

NINETIETH SESSION

In re Durand-Smet (No. 4)

Judgment No. 2040

The Administrative Tribunal,

Considering the fourth complaint filed by Mr Jérôme Durand-Smet against the European Patent Organisation (EPO) on 28 February 2000 and corrected on 9 March, the Organisation's reply of 20 June, the complainant's rejoinder of 5 July, the observations submitted by Mr V. on 11 July at the Tribunal's request, Mr E.'s e-mail message of 25 July stating that he had nothing to add to the Organisation's reply, Mr P. not wishing to make any observations, the EPO's letter of 26 July informing the registrar that it would not file a surrejoinder, the complainant's additional comments of 8 August and the Organisation's final submission of 24 August 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case are to be found in Judgments 1559 (*in re Durand-Smet*), 1832 (*in re Durand-Smet No. 2*) and 1891 (*in re Durand-Smet No. 3*).

Pursuant to Judgment 1832 the Administrative Council considered a first internal appeal filed on 11 July 1996 by the complainant claiming appointment instead of Mr V. to a post as a member of a technical board of appeal, with effect from 1 May 1991. In Judgment 1891 the Tribunal dismissed for failure to exhaust internal remedies part of his third complaint concerning two further appeals. The complainant had lodged a second internal appeal on 17 November 1997 asking for the deletion of a comment casting doubt on his competence and conduct from the minutes of a meeting of the Selection Board of Directorate-General 3 (DG3), dated 2 May 1996, or else disclosure of the minutes in full. In a third appeal filed on 6 February 1997 he had sought the quashing of the appointments of the members of technical boards of appeal as well as their reappointments in 1989 and 1996, particularly that of Mr P.; and had challenged the EPO's refusal to appoint and promote him in 1991 and 1993. By a letter of 28 April 1999 the Chairman of the Administrative Council informed him that the Council had rejected the three appeals and referred them to its Appeals Committee. On 3 November 1999 the Committee issued opinions Nos. 1/99, 2/99 and 3/99 on his first, second and third appeals respectively and recommended that the Administrative Council reject them.

On 4 March 1999 the complainant had filed a fourth appeal against the appointment of Mr E. as a member of a technical board of appeal on the grounds that he had been promoted straight from grade A3 to A5 in breach of the Service Regulations of the European Patent Office, the EPO's secretariat. In a letter of 18 June 1999 the Chairman of the Administrative Council told the complainant that the Council had rejected his appeal and referred it to its Appeals Committee. The Committee issued opinion No. 4/99 on 3 November 1999 recommending rejection.

By a letter of 10 December 1999, the impugned decision, the President of the Council informed the complainant that his four appeals had been rejected.

B. The complainant contends that the rejection of his internal appeals is unfounded. For the appointment of a member of a board of appeal to be lawful, the criteria for promotion set in Article 49 of the Service Regulations must be met. Mr P.'s appointment was therefore unlawful from the start.

Furthermore, Judgment 1559 concerned only the appointment of Mr P. - which was for a period of five years - and his reappointment in 1996 should be quashed.

The comment on him in the minutes of the DG3 Selection Board is subjective and unfounded given his experience, his "high level of competence", his "outstanding performance reports" and in particular the fact that all his reports since 1990 have declared him "fit for membership of a board of appeal".

Lastly, the complainant considers that he fell foul of "illicit manoeuvring" and discrimination. He suspects the Chairman of the DG3 Selection Board, an Italian, of trying to get fellow Italians, including Mr P. and Mr V., appointed to A5 posts before he retired.

He asks the Tribunal to find that the appointing authority committed an abuse of authority; to appoint him to grade A5 with retroactive effect as from 1 May 1991 instead of Mr V., and from grade A6 as from 1 May 1993; to delete the comment in the minutes of the DG3 Selection Board, dated 2 May 1996; and to quash Mr P.'s appointment and reappointment and order Mr P.'s relegation to A3 with retroactive effect as from December 1991. He also seeks the quashing of "all the unlawful appointments and promotions of other officials", the prohibition of their future reappointment and their relegation to their former grades with retroactive effect. He claims costs.

C. The EPO replies that the complaint is partly irreceivable. The complainant's claim to the quashing of Mr V.'s appointment is receivable, but the claim to his own appointment at grade A5 is not because the Tribunal is not competent to order such a measure. Besides, any objection to his not being appointed to grade A5 in May 1991 should have been made within the statutory time-limit. In the EPO's view, the comment on his performance in the Selection Board's minutes is not an actionable decision. His claim to the quashing of Mr P.'s reappointment is also irreceivable because that decision simply confirmed the earlier one to appoint him. As to his claim to the quashing of all "unlawful appointments and reappointments" it is an *actio popularis* and therefore irreceivable; it is also irreceivable because all but one of the appointments he impugns were in fact reappointments.

On the merits, the Organisation asserts that a member of a board of appeal holds a special position for which there are specific conditions of eligibility. Even though appointment to such posts involves promotion to grade A5, it is not an ordinary promotion within the meaning of Article 49 of the Service Regulations. Furthermore, however good, his reports are not sufficient proof that he was the best candidate for appointment to a board of appeal, nor can they take precedence over the conclusions of a selection board whose members know by experience what such a post requires. The Organisation adds that the accusation of favouritism towards Italian candidates is unfounded: a Frenchman was appointed to a board of appeal in 1993. Consequently, the President of the Office did not exceed his discretionary authority by not proposing the complainant's nomination to the Administrative Council, and the latter was not wrong to reject his appeals.

Turning to Mr P.'s reappointment, the EPO submits that the complainant's pleas are no more relevant than the ones he put forward in challenging Mr P.'s appointment, which Judgment 1559 has made "unchallengeable". The complainant has failed to prove that the appointments he challenges are unlawful: his arguments are pure conjecture based on an "overestimation" of his own worth and alleged persecution.

D. In his rejoinder the complainant contends that the EPO's vain attempts to rebut his appeals show that it was "cornered". In his view, his performance reports take precedence over the Selection Board's conclusions. He maintains that he was a victim of "systematic and prolonged discrimination".

E. In his observations Mr V. says that he is "quite satisfied" that his appointment fully complied with the rules of procedure.

F. In his additional comments the complainant states that he infers from the stance taken by Mr P., Mr V. and Mr E. that they are convinced that their appointments are unlawful.

G. In its final brief the EPO accuses the complainant of being "systematically disparaging" in his comments, an attitude hardly compatible with the "composure" required of a member of a board of appeal.

CONSIDERATIONS

1. The facts which prompted this complaint are set out in Judgments 1559, 1832 and 1891 in which the Tribunal ruled on Mr Durand-Smet's first, second and third complaints.

The gist of the case is as follows. The complainant joined the EPO in 1980 as an examiner and was promoted to grade A4 in 1989. In 1991 he applied for a post as member of a technical board of appeal at grade A5. He was unsuccessful and the post was given to another candidate, Mr P., who held grade A3. In 1993 the complainant again applied unsuccessfully. In 1994 he asked the President of the Office to promote him to grade A5 as from 1 May 1991 and to grade A6 as from 1 May 1993. Having received no reply he filed an internal appeal against the implied rejection. That appeal failed and he came to the Tribunal which ruled in Judgment 1559 that his claims were time-barred and so irreceivable, and dismissed the complaint.

Having applied yet again for membership of a board of appeal, the complainant was informed on 8 July 1996 that the post had been given to another candidate, Mr V., an A4 examiner.

He lodged an internal appeal against that decision on 11 July 1996, but was informed by a letter of 11 November 1997 that the President of the Office had rejected it. He returned to the Tribunal, which, in Judgment 1832, quashed the impugned decision insofar as it related to his claims challenging the appointment of Mr V. and the rejection of his own application, sent the case back for decision to the Administrative Council of the EPO, which is alone competent to make appointments to boards of appeal, and dismissed his other claims.

In the course of his first internal appeal the complainant learned of a comment concerning him in the minutes of the Selection Board. On 17 November 1997 he lodged a second internal appeal, this time with the President of the Administrative Council, seeking either the deletion of the comment or disclosure of the minutes in full.

On 6 February 1997 he filed a third appeal objecting to the reappointment in December 1996 of a member of a board of appeal, Mr P. He asked the Organisation:

- (a) to quash Mr P.'s appointment and reappointment and regrade Mr P. at A3 with retroactive effect as from December 1991;
- (b) to quash the unlawful appointment and promotion of other officials and ban their future reappointment, and to relegate the staff members concerned to their former grades with retroactive effect;
- (c) to promote him to grade A5 as from 1 May 1991 and to grade A6 as from 1 May 1993.

On 4 March 1999 he lodged a fourth internal appeal against the appointment of Mr E. to a board of appeal and his promotion straight from A3 to A5 on the grounds that it was in breach of the Service Regulations.

On the recommendation of the Appeals Committee, the Council decided unanimously at its 78th Session held in Munich on 8 and 9 December 1999 to reject the complainant's four appeals. The complainant was so informed on 10 December 1999 by a letter from the Chairman of the Administrative Council.

That is the decision he is challenging in this complaint.

The persons named by the complainant in the course of the proceedings were invited to submit comments. In response, Mr E. endorsed the defendant's reply and Mr V. deemed his appointment to be fully in conformity with the rules of procedure. Mr P. did not respond.

2. The complainant asks the Tribunal:

- (a) to find his complaint receivable and well-founded;
- (b) to rule that there was abuse of authority on the part of the appointing authority;
- (c) to appoint him to grade A5 instead of Mr V. with retroactive effect from 1 May 1991;
- (d) to delete the comment contained in the minutes of the Selection Board of DG3, dated 2 May 1996;
- (e) to quash Mr P.'s appointment and reappointment and to regrade him at A3 with retroactive effect as from

December 1991;

(f) to quash all the unlawful appointments and promotions of other officials and ban their future reappointment, regrading them appropriately with retroactive effect;

(g) to appoint him to grade A6 with retroactive effect as from 1 May 1993; and

(h) to order the EPO to bear the costs.

Receivability

3. The EPO submits that the complaint is partly irreceivable insofar as it seeks the complainant's appointment to grade A5, the deletion of the comment in the Selection Board's minutes, the quashing of Mr P.'s reappointment and the quashing of "all unlawful appointments and reappointments".

4. The EPO's objections to the receivability of certain claims are sound:

(a) The appointment of the complainant at grade A5 and subsequently at grade A6

The Tribunal may not make appointments itself. The complainant should have challenged within the statutory time limits the EPO's failure to appoint him to A5 in May 1991. Having failed to do so, he was not entitled to claim such appointment as from 1 May 1991 by challenging Mr V.'s appointment in September 1996 or Mr P.'s reappointment in December 1996 (see Judgment 1559).

The Tribunal is neither competent to order the complainant's appointment at grade A5, nor is it competent to order his promotion to A6.

(b) The deletion of the comment in the Selection Board's minutes

Contrary to what the complainant thinks, the Selection Board's minutes are neither a decision by the EPO nor an item from the complainant's personal file. What the Board gives is an opinion to guide the President of the Office in his proposals to the Administrative Council, and this is not open to challenge.

(c) The quashing of all the unlawful appointments and promotions of other officials and the prohibition of their future reappointment

As the EPO rightly observes, the claim cannot be allowed in that form: the complainant should have identified the decisions he deemed unlawful and, if they affected him adversely, challenged them within the prescribed time limits if he thought he qualified for a post to which some other official had been appointed.

Concerning more particularly the appointment of Mr E., the complainant fails to show any actual and present injury arising from that appointment: Mr E. specialises in electricity and physics and the complainant, whose speciality is mechanics, does not claim appointment in his stead.

The merits

5. As the Tribunal has held in many judgments, a decision by an international organisation to make an appointment is a discretionary one and as such is subject to only limited review. It may be quashed only if it was taken without authority, or in breach of a rule of form or of procedure, or if it rested on an error of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence. Moreover, the Tribunal will exercise its power of review with special caution in such cases and will not replace the organisation's assessment of the candidates with its own (see Judgment 1497, *in re Flores*).

6. The complainant takes the Organisation to task for turning down his application of 19 March 1996 for membership of a board of appeal at grade A5 and for appointing Mr V. to the post with effect from 1 January 1994. He also objects to the reappointment of Mr P.

Those decisions, he says, are in breach of the Service Regulations, particularly Article 4(1) and 49(7), and of the principle of equal treatment.

7. The Tribunal observes that appointment to a board of appeal is subject to a special procedure, different from the one established in Annex II to the Service Regulations. As the EPO points out, the members of boards of appeal hold a special position in the Office because they are called upon to take decisions as the last instance in the procedure for the grant of European patents. Appointment to a board of appeal confers grade A5 on the incumbent. But it is not an ordinary promotion within the meaning of Article 49(1)(d) of the Service Regulations, since such appointments are governed by different rules.

Article 11(3) of the European Patent Convention says:

"The members ... of the Boards of Appeal ... shall be appointed by decision of the Administrative Council, taken on a proposal from the President of the European Patent Office ..."

Article 49(1) of the Service Regulations states that:

"A permanent employee may obtain a higher grade by a decision of the appointing authority:

(a) following appointment to a post under the provisions of Article 11 of the [European Patent] Convention;

...

(d) by promotion to a post in the next higher grade in the same category;

..."

It is in the light of the above rules and of the case law that the lawfulness of the decisions under challenge must be determined.

8. The complainant submits that, although the authority to appoint staff members to boards of appeal is vested in the Administrative Council, the President of the Office remains competent as to their promotion "under the conditions laid down in Article 49" of the Service Regulations. Furthermore, he says, an A4 examiner may not be appointed to a board of appeal at grade A5 unless the requirements for promotion from A4 to A5 are met.

That assertion is contradicted by the provisions of the second paragraph of Article 7(1) of the Service Regulations, which says:

"A procedure other than that of competition may be adopted by the appointing authority for the recruitment of the senior employees referred to in Article 11 of the European Patent Convention ..."

and by Article 11 of the Convention.

Those provisions are quite clear: the appointment of the employees covered by Article 11 of the Convention and hence that of members of boards of appeal is governed by special rules.

Article 7 of the Service Regulations provides for a different procedure for appointments to boards of appeal from the one set forth in Annex II to the Regulations and Article 49(1)a). Consequently, there is no need to keep to the criteria set by the President of the Office under Article 49(7) of the Service Regulations or any other criteria - seniority for instance - ordinarily applied in promoting staff members. Recruitment to boards of appeal calls for more general criteria, such as those set in Article 5 of the Regulations, which focus on the highest standards of ability, efficiency and integrity. And in assessing ability, the special duties that members of boards of appeal have to perform must be borne in mind.

It is clear from the material rules that there is no right to promotion under Article 49(1)d) any more than there is any right to nomination by the President of the Office under Article 11 of the Convention or to appointment by the Administrative Council. Both the President of the Office and the Council enjoy broad discretion in these matters.

9. In view of the foregoing, the Tribunal cannot accept the complainant's reasoning that, because he had held grade A4 for more than two years and had a good performance record and broad professional experience, he was entitled under Article 49(1)d) of the Service Regulations to promotion with retroactive effect from 1 May 1991.

As reaffirmed in Judgment 1827 (*in re* Ochani), the case law has it that a good performance record does not in itself justify promotion to a higher grade. Consequently, it did not justify the promotion of the complainant to grade A5 to perform the duties of a member of a board of appeal, which are different from those of an examiner. The recommendations of his reporting officer, which the complainant relies on, are no substitute for the conclusions of a selection board composed of officials of DG3 and chairmen of boards of appeal who know by experience what the post demands. The Selection Board noted in the complainant's case that he was too inflexible and narrow-minded in his opinions, that he paid too much attention to detail, was ill-prepared and showed little interest in the work of boards of appeal.

10. The conclusion is that there was no breach of the rules governing the appointment of members of boards of appeal and their promotion to grade A5. Nor were there any other irregularities warranting the quashing of the Administrative Council's decision. Furthermore, the complainant produces not a shred of evidence in support of his allegation of abuse of authority. Consequently, the complaint cannot succeed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet