

FIFTIETH ORDINARY SESSION

In re SPANGENBERG

Judgment No. 551

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Reinhard Kurt Spangenberg on 3 June 1982 and brought into conformity with the Rules of Court on 16 June, the EPO's reply of 15 September, the complainant's rejoinder of 29 October and the EPO's surrejoinder of 3 January 1983;

Considering Article 11, paragraph 5, of the Statute of the Tribunal and Articles 5(2) and (3), 49(5), (7) and (10), 108 and 109(3) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. From 1 July 1971 the complainant, a citizen of the Federal Republic of Germany born in 1938, served in the patent office of that country as an examiner. On 1 October 1979 he joined the staff of the EPO in Munich as an examiner at grade A3. On 2 November 1980 he applied for a grade A4 post as a principal examiner. According to Article 49(10) of the Service Regulations the President of the Office shall forward to a promotion board set up under Article 49(5) the names of employees who possess the qualifications for promotion, and the board shall return to the President, for decision, a list in order of merit of those eligible for promotion. As the President explained in a note to the chairman of the competent promotion board on 15 September 1981, examiners whose performance was "very good" might be promoted to A4 if they had between 12 and 13 years' seniority; citizens of the Federal Republic were an exception, however: one whose performance was "very good" would need between 15 and 18 years' seniority to qualify. The complainant's staff report dated 28 July 1981 described his "over-all performance" as "very good", but by 1 January 1982 his seniority was reckoned at only 13 years and 9 months. In mid-November 1981 the director of his division informed him that he had not been promoted. On 30 November he sent an inquiry to the Principal Director of Personnel, who, on 16 December, explained that as a citizen of the Federal Republic he had not the seniority required by the exceptional rule. On 12 January 1982 he appealed to the President of the Office under Article 108 of the Service Regulations. The President neither referred his case to an appeals committee nor gave a decision. On 26 May 1982 the Principal Director of Personnel informed him that he might regard the internal means of redress as exhausted and appeal to the Tribunal in accordance with Article 109(3).

B. The complainant observes that only because of his nationality was he refused promotion. The EPO was, he contends, in breach of Articles 5(2) and (3) and 49(7) of the Service Regulations. Article 5(2) reads: "Permanent employees shall be selected without reference to race, creed or sex", and (3): "No particular post shall be reserved for nationals of any specific Contracting State". If 5(2) did not apply also to promotion 5(3) would be meaningless, since rules might always be drafted to prevent nationals of some countries from attaining particular posts. Article 49(7) says that promotion shall be "by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them": there is no mention of nationality. The complainant invites the Tribunal to declare the EPO in breach of Articles 5(2) and (3) and 49(7) and to order his promotion to grade A4 under the same conditions as staff of other nationalities and with effect from the date on which he qualified or as soon as an A4 post becomes vacant.

C. In its reply the EPO explains that entry and promotion to grades depend on seniority - as reckoned according to specific criteria of experience - as well as performance. In its early days there was agreement that governments of member States would recommend for transfer examiners employed in national patent offices. The salaries being attractive, the patent office of the Federal Republic of Germany, which is also in Munich, proposed from among the most deserving, i.e. the most senior, examiners for transfer. To prevent a preponderance of West Germans in the higher grades, especially A4, and distortions in the age structure of the staff, the EPO decided that until the end

of 1980 examiners recruited from countries other than the Federal Republic would qualify for A4 with less seniority. The Administrative Council of the EPO embodied this practice in a set of norms. The decision not to promote the complainant complied with them, and in fact he is challenging their lawfulness. Even if Article 5 of the Service Regulations related to promotion - which is moot - access to A4 would not be barred to West German examiners or reserved for citizens of other countries. West Germans would, but for the exception, have filled half of the A4 posts and the purpose is precisely to prevent such distortion and safeguard the principles reflected in Article 5. There is no breach of Article 49(7), which does not prevent the President from taking nationality into account if that serves the EPO's interests, nor of the principle of equal treatment.

D. In his rejoinder the complainant observes that he joined the EPO in 1979, before the Administrative Council approved the discriminatory rules, and by virtue of a general principle of law they should therefore not be applied to him. Moreover, the EPO's interpretation of the Service Regulations constitutes a mistake of law: Article 49(7) may not be so construed as to make nationality more important than merit in qualifying for promotion.

E. In its surrejoinder the EPO points out that the complainant is relying on the principle of acquired rights when he says that the rules adopted in 1980 should not apply to him. But the Tribunal has held that provisions setting the conditions of promotion do not confer any acquired right. Recruitment notices state that the office "cannot accept any special conditions such as ... promotion within a certain period of time". The EPO denies, not the difference in treatment, but breach of the principle of equal treatment. The principle requires the same treatment only where the facts are the same. It must also be applied within the limits set by efficient administration, and there are sound and objective reasons for EPO policy. Lastly, the complainant was promoted to A4 by a decision of 2 December 1982 with effect from 1 April 1982, i.e. only six months after the date when he says he qualified, in recognition of his merits and on the strength of 14 years' seniority.

CONSIDERATIONS:

1. When the Organisation was created on 1 November 1977 a policy had to be devised of a transitional character to cope with the unusually large intake of recruits. These were expected to come from the patent offices of the nations which had set up the organisation and so to be experienced persons. There were four grades in DG2, the department of the new office with which this case is concerned, A1, 2, 3 and 4, and the top grades, especially A4, could not be filled in the ordinary way by promotion from below. Prospective recruits would want to know the grade in which they were likely to be placed and the prospects of promotion. It was decided that the basic criterion should be years of "reckonable experience". For each grade there would be fixed a minimum number of years as a qualifying factor. This was a general figure which was continually being changed. Moreover, allowance would be made for the personal record of the applicant by raising or lowering the general factor. For example, at a time when the general factor for A4 was 19-23 years, it was reduced to 15-18 for those whose performance had been "very good" and to 12-15 for those whose performance had been "outstanding".

2. The office of the new Organisation was in Munich only 200 metres from the German Patent Office. The pay in the new office was higher than in the German Office and there were taxation advantages. The Organisation expected a much larger flow of applications from Germany than from other countries from which the new recruit would have to face all the problems of domestic upheaval. This tendency, unless corrected, would mean that the new organisation would start off with a staff that was not nationally well-balanced, having an undesirable preponderance of Germans. It was decided to counter the tendency by an offer for a transitional and limited period to non-Germans of a reduction in the qualifying factor, thus giving a special attraction to non-German recruitment. The attraction might be considerably diminished if it applied only to recruitment and not to subsequent promotion, for then it might entail a long period in a lower grade: so it was extended to promotion as well as to recruitment. The concession was offered to recruits during an initial period of about three years; it was withdrawn for persons recruited after 31 December 1980. As it stood when it was withdrawn, it reduced the qualifying factor for A4 from 13-23 years of experience to 12-16 - 13-16 for normal applicants, 12 for outstanding applicants and between 12 and 13 for very good. In the result the concession does not appear to have unduly disadvantaged the Germans since the intake from Germany during the initial period was about a third of the whole.

3. The complainant was recruited from the German Patent Office to a post in grade A3 in October 1979. On 2 November 1980 he applied for a post at grade A4. In November 1981 he was told that he had failed to qualify. With a record of "very good" the factor for him as a German was 15-18 years while his reckonable experience was only 13 ³/₄. But among his competitors there were non-Germans recruited before 31 December 1980 and for them the corresponding factor would be between 12 and 13 years.

4. The complainant alleges that the concession was a breach of the principle of equality of treatment. This principle requires similar treatment for persons in the same or similar categories. To the argument that Germans and non-Germans are not in similar categories, the complainant could reply that the only difference between them is a difference of nationality and that a second or subsidiary principle, one that is followed by all international organisations, forbids the drawing of distinction between nationalities. As to the second principle, the Organisation argues that it is not slighting but applying it. Its object was to obtain a staff which was a fair mix of nationalities. The nationals of what may be called the home country of an organisation enjoy because of their nationality advantages denied to the nationals of other countries. The concession offered to non-Germans was designed to balance these advantages. It has generally been accepted that an organisation may offer special benefits to staff recruited abroad, since without some compensation such staff would be in a worse position financially than staff recruited in the home country. The complainant accepts this but argues that it should not be applied to conditions for promotion.

5. A system which discriminates in the matter of promotion between officials according to their nationality seriously offends against the principle of equal treatment and should as a general rule be forbidden. Although international organisations may determine quotas for recruitment for the purpose of preserving or developing the international character of the staff, officials are normally entitled to objective treatment after they have taken up duty. This is a general rule. If in any particular case it can be shown that a scheme for determining quotas on recruitment would not work satisfactorily unless it was extended in a limited way to subsequent promotion, an exception may be justified.

In the unusual circumstances of this case, in which it proved necessary to recruit many officials of the same nationality to establish a new secretariat, the Tribunal holds that the Administrative Council was free to lay down for a strictly limited period conditions for promotion which differed according to nationality. When as here the object is to secure a balanced staff and there is no evidence to suggest any abuse of authority by the Administration designed to show favour or cause detriment to particular staff members, the Tribunal holds that its action was not unlawful.

6. The complainant alleges that the policy of accelerated promotion for non-Germans was not introduced until after the date of his contract of employment and so ought not to be allowed to prejudice him. Whether or not he is right about the introduction, the argument fails. Promotion is a matter within the discretion of the President and Administrative Council and the staff member has no right or expectation that the rules or policy applicable at the date of his contract will remain unchanged.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 30 March 1983.

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner