

NINETY-THIRD SESSION

(Application for execution)

Judgment No. 2128

The Administrative Tribunal,

Considering the second application for execution of Judgment 1910 filed by Mr P. G. M. C. on 29 June 2001, the reply submitted by the European Patent Organisation (EPO) on 17 September, the complainant's rejoinder of 26 December 2001, the EPO's surrejoinder of 14 January 2002 and the letter of 29 January 2002 by which the Organisation submitted to the Registrar a supplement to its surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. The facts relevant to the present dispute are set out in Judgments 1910 and 2065.

Pursuant to Judgment 1910 delivered on 3 February 2000, the President of the European Patent Office - the EPO's secretariat - asked the Promotion Board to re-examine the complainant's case. As stated under E in Judgment 2065, the Organisation informed the complainant by a letter of 11 April 2001 that the President had decided to endorse the Board's recommendation and to refuse him promotion to grade A4 in 1997. That is the impugned decision.

B. The complainant submits that in making the decision of 11 April 2001 on his request for promotion, the EPO had no doubt intended to execute Judgment 1910, but that it had not actually complied with the terms of that judgment. He claims that his mission to Portugal as a liaison officer was not sufficiently taken into account. He considers that his current professional situation is the same as it would have been had he not undertaken the mission.

He asks the Tribunal to set aside the impugned decision, to send the case back to the Organisation for a further decision on his promotion in accordance with Judgment 1910, and to award him 500 euros in costs.

C. In its reply the EPO submits that it did execute the judgment in question, as the complainant himself acknowledges: it referred the complainant's case a second time to the Promotion Board, which considered that he did not merit the promotion he sought. Consequently, his application no longer shows any cause of action. Furthermore, the complainant's interpretation of Judgment 1910 is erroneous: he cannot infer from that judgment that the re-examination of his case would necessarily culminate in his promotion, or that the refusal to promote him was due to an incorrect assessment of his merits. Indeed, the Tribunal itself pointed out in Judgment 1667 that "no direct promise" had been made to the complainant on this matter.

The President of the Office, and likewise the Promotion Board, examined whether the fact that he had exercised the functions of a liaison officer enabled the complainant to be considered as a "special case" within the meaning of the "Note from the President to the Chairmen of the Promotion Boards", but they reached the conclusion that there were no grounds for accelerating his promotion by departing from the normal promotion criteria.

Lastly, the EPO submits that the complainant's criticism concerning the progress of his career is unjustified.

D. In his rejoinder the complainant emphasises that the present application should be interpreted as a request for the success of his mission to be taken into account as an additional "point in his favour" - in line with the assurance

given to him - and in accordance with the terms of Judgment 1910. Indeed, his duties as a liaison officer, which were of a "level far higher than average", required a great deal of work and rigour on his part. However, his commitment had been greatly underestimated in the letter of 11 April 2001. Furthermore, the "exceptional" duration of the mission in question - four years - should be considered as a further additional point in his favour. In claiming that it cannot depart from the normal promotion criteria, the EPO is disregarding the guarantee it gave to the complainant, which was recognised by the Tribunal in Judgment 1667. Lastly, the complainant claims that he suffered unequal treatment.

E. In its surrejoinder the EPO explains that the complainant's observations concerning the level of his duties and the commitment required to carry out his mission are not relevant. The complainant has suffered neither injustice nor unequal treatment.

In its supplement to the surrejoinder, the Organisation submits an extract from the Promotion Board's report for 2001 in which the Board stated that the special consideration and assessment of the duties performed by the complainant in Portugal did not justify his promotion during the period "up to and including 2001".

CONSIDERATIONS

1. The complainant's career at the European Patent Office is set out in Judgments 890, 1667, 1910, 2064 and 2065, to which reference should be made.

Having joined the EPO in 1985 as an assistant examiner at grade A1, he was promoted to grade A2 with effect from 1 November 1986 and then to grade A3 with effect from 1 November 1991. From 1 May 1992 until 31 December 1995 he was seconded to the Portuguese National Industrial Property Institute in Lisbon as a liaison officer. He had been selected on the basis of an announcement published in the *Gazette* which contained, in particular, the following statement:

"5. The experience gained by the liaison officer during his or her mission is considered to be highly valuable both for the selected staff member and for the EPO; for the advancement of his or her career, special consideration shall be given to this experience, in the light of the liaison officer's contribution to the success of [the] mission."

When this mission ended, the complainant resumed his duties as an examiner at grade A3 in Directorate-General 1 (DG1) in The Hague. Alleging that promises had been made to him, he asked to be promoted.

In Judgment 1667, the Tribunal established that the Organisation had made no promise of immediate advancement, but that it had given the staff member a limited assurance that a successful secondment as a liaison officer would be taken into account as a point in his favour whenever a decision was to be taken on promotion or appointment.

On 27 June 1997 the list of staff members of DG1 who were to be promoted was published. The complainant asked in vain to be included in this list and, having exhausted the means of internal appeal, submitted a complaint to the Tribunal. In Judgment 1910 the Tribunal held that the EPO had reached its decision on the complainant's promotion on the basis of the promotion criteria applicable to all staff members without taking into consideration the above-mentioned limited assurance; consequently, the Tribunal set aside the impugned decision and sent the case back to the EPO for a new decision.

The President of the Office then asked the Promotion Board to make a new decision on the basis of that judgment. However, the Board decided, with the President's consent, to await the outcome of the internal appeals concerning the complainant's performance reports for the periods 1992-93, 1994-95 and 1996-97. Dissatisfied with that decision, the complainant filed an application for execution of Judgment 1910. In Judgment 2065 his application was dismissed by the Tribunal, which nevertheless pointed out that since a new decision had been made by the President in the meantime, his application showed no cause of action. Indeed, on 11 April 2001 the President had decided to reject the complainant's request for promotion in 1997, as recommended by the Promotion Board.

In Judgment 2064 the Tribunal dismissed a complaint filed against a decision to reject the complainant's appeals concerning his performance reports.

2. In the present case, the complainant is challenging the decision of 11 April 2001, which was made prior to the

delivery of Judgments 2064 and 2065 on 12 July 2001.

The EPO points out that the promotions in 1997 were granted on the basis of the "Note from the President to the Chairmen of the Promotion Boards" for 1996, which remained in force in 1997. The complainant did not satisfy the requirements set out in that note. The above-mentioned note did provide for a departure from the normal rules in special cases. However, the EPO considers that an accelerated promotion of the complainant is not justified. Indeed, although the impugned decision referred to Judgment 1910 and indicated that the final staff reports for the period up to 31 December 1997 had been resubmitted to the Board, it also stated that, in accordance with the Board's recommendation, the President had "decided that a promotion to grade A4 in 1997 [was] not justified", since he considered "that the exercise of the duties of a liaison officer for approximately four years does not justify so rapid a promotion" as that which the complainant sought.

3. The complainant asks the Tribunal to set aside the impugned decision and to send the case back to the Organisation for a new decision on the grant of his promotion in accordance with Judgment 1910. He makes the following observation:

"Had I not undertaken the mission in question, my current grade and duties more than 5 years after the end of the mission and 10 years after my recruitment for the post of liaison officer in Portugal would be, if not higher, no lower than at present."

The EPO asks the Tribunal to dismiss the application. It argues that his application no longer shows a cause of action since Judgment 1910 has been executed, the complainant's case having been resubmitted to the Promotion Board.

4. On 29 January 2002 the EPO submitted to the Tribunal a supplement to its surrejoinder, consisting of an extract from the Promotion Board's report for the year 2001 indicating that the Board had reached the conclusion that a promotion for the complainant was not justified for the period "up to and including 2001".

It should be noted, however, that the present dispute concerns only the possibility of a promotion in 1997, since no decision as to subsequent promotions has been challenged in the context of the present proceedings. As far as the 1997 promotion is concerned, the submitted document adds no new information.

5. In the proceedings which culminated in Judgment 2065, the complainant criticised the EPO for having unduly delayed its decision regarding his promotion. In the present case, he criticises the EPO for having disregarded the terms of Judgment 1910 in its decision not to promote him, which in some respects involves the execution - *lato sensu* - of that judgment. In view of the binding nature of Judgment 1910, the EPO's purely formal argument that that judgment was executed in full because the case was resubmitted to the Promotion Board is wrong.

6. On the merits, the Tribunal can only refer to the judgments cited above.

The EPO had given the complainant a limited assurance: a successful outcome of the mission in Portugal would be an additional point in his favour to be taken into consideration when decisions were to be made on matters of promotion or appointment; and in view of the substantial additional effort required of the staff member, the weight to be attributed to a successful outcome of the mission was not to be underestimated and was to be taken into account as part of the overall evaluation, which in principle is a discretionary matter for the Organisation over which the Tribunal has only a limited power of review.

It should be noted that it was after the delivery of Judgment 1910 that the Tribunal was able to deduce from statements made by the EPO that the mission carried out by the complainant in Portugal had produced positive results (see Judgment 2064, under 12(b)). Judgment 1910 contained no finding on this issue and the complainant has not established that the impugned decision is flawed in this respect by any error of fact or law to be remedied by the Tribunal.

In addition, the following observations can be made regarding certain arguments put forward by the parties.

(a) The complainant appears to consider that the time that has elapsed since his return to The Hague ought to have been taken into account. In so doing, he appears to overlook the fact that the dispute concerns only the possibility of a promotion in 1997 and that it is the situation at that time alone that is relevant.

(b) According to the EPO, the Promotion Board considered that it was not possible to depart from the normal promotion criteria solely on the basis of the mission carried out in Portugal. Expressed in those terms, this statement is not compatible with the above-mentioned judgments, which specifically envisage the possibility of departing from the normal criteria in view of the limited assurance given to the complainant.

(c) The EPO also argues that as a liaison officer in Portugal the complainant would have been required to perform duties of a higher level than those of an examiner and that the assessment of his work had to be more demanding.

However, the EPO rightly does not infer from this that the limited assurance given to the complainant was illusory. That assurance must be honoured insofar as it was given.

(d) Contrary to the view which the EPO appears to take, the Tribunal did not consider that the complainant would obtain promotion solely on the basis of his performance reports (leaving aside the limited assurance given to him). However, this does not mean that the quality of his work should not be taken into account in the context of an overall assessment (see in particular Judgment 2064, under 11 and 12, and Judgment 2065, under 5).

7. It is reasonable to believe that in making the impugned decision the EPO intended to base its position on Judgment 1910 and on the complainant's performance reports for the periods 1992-93, 1994-95 and 1996-97, which were good though not excellent; it concluded that to grant a promotion in 1997 was, at the very least, premature.

This overall assessment does not go beyond the broad discretion of the President of the Office. It does not mean, however, that the limited assurance given to the complainant now ceases to be of relevance. If need be, it will have to be taken into account again in the event of a future decision regarding the promotion or appointment of the complainant.

On this issue, the Tribunal also draws attention to its previous considerations, particularly under 3 in Judgment 1910, and under 12 in Judgment 2064.

8. The application is devoid of merit.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 15 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

(Signed)

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet

