

EIGHTY-EIGHTH SESSION

In re Durand-Smet (No. 3)

(Application for execution)

Judgment 1891

The Administrative Tribunal,

Considering the application for the execution of Judgment 1832 filed by Mr Jérôme Durand-Smet on 28 May 1999, the reply of 19 August from the European Patent Organisation (EPO), the complainant's rejoinder of 14 September and the Organisation's surrejoinder of 28 October 1999;

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

Having examined the written submissions;

CONSIDERATIONS

1. The facts at the origin of this dispute are set out in Judgments 1559 and 1832 on Mr Durand-Smet's first and second complaints. The complainant joined the EPO as an examiner at Directorate-General 1 (DG1) of the European Patent Office, the EPO's secretariat, at The Hague. He was transferred to DG2 in Munich, where his last promotion was to grade A4, and in April 1991 he applied for an A5 post as a member of a technical board of appeal at DG3. His application was unsuccessful as the Administrative Council, the competent authority for such appointments, had selected an A3 official for the post. His first complaint, in which he asked to be appointed retroactively instead of the successful candidate, was dismissed as obviously out of time.

In 1996 he applied for a similar vacancy, but was again unsuccessful, the President of the Office having refused to put his name to the Administrative Council. His appeal against that decision was rejected by the President of the Office on the recommendation of the Appeals Committee. In Judgment 1832 the Tribunal quashed the President's decision on the grounds that he took it without authority, the competent body for appointments and appeals being the Administrative Council. The complainant had also submitted a claim for damages, which the President was competent to entertain, but the Tribunal disallowed it on the same grounds as it gave in Judgment 1559, insofar as it was *res judicata*. As a consequence the case was sent back to the Administrative Council.

On 17 November 1997 the complainant filed a second internal appeal with the Chairman of the Administrative Council asking him to "either delete a comment from the minutes of the meeting of the Selection Board of DG3, dated 3 May 1996, or failing that to disclose the minutes to him".

In another internal appeal filed on 6 February 1997 to the President of the Office, the complainant sought the quashing of the appointments of members of technical boards of appeal and of their renewal in 1989 and 1996, and challenged the refusals 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, at its 75th session, the Council had decided to reject the three appeals. Pursuant to Judgment 1832, the Council had recognised that it was competent.

The Council referred the three appeals to its Appeals Committee.

Without awaiting a new decision resulting from that procedure, the complainant has filed a complaint with the Tribunal asking it to quash the decision of 28 April 1999 and to allow the claims in his internal appeals. He refers to his complaint as an application for execution and appeal against the Council's rejection of his

three internal appeals.

The EPO submits that the complaint is devoid of merit - as an application for execution - and otherwise irreceivable because the internal remedies were not exhausted.

2. According to precedent an application for execution does not require the internal remedies to have been exhausted (see Judgments 1887 (*in re* Argos No. 3 and others), under 5, 1771 (*in re* De Riemaeker No. 4), under 2(b), and the precedents cited therein). Insofar as it seeks the execution of Judgment 1832 the complaint is therefore receivable.

(a) Judgment 1832 upheld the President's decision insofar as it rejected the claim to damages (consideration 2, and point 4 of the Tribunal's decision), but otherwise set it aside because the competent body was not the President but the Administrative Council (considerations 3 to 6, and point 1 of the Tribunal's decision). It also stated expressly that a ruling on the merits was premature (consideration 7).

Since the Administrative Council recognised that it was competent and ruled on the claims in question, it fully executed Judgment 1832. To that extent, the complainant has no cause of action.

(b) He also contends, however, that Judgment 1832 set aside the decision appointing another candidate to the post he wanted. But he has misread the text and the meaning of the judgment; his plea is all the more unsustainable because the impugned decision came from the President of the Office and not from the appointing authority.

To that extent, the application for execution is clearly unfounded.

3. In all other respects the impugned decision concerns the merits. It was referred to the Council's Appeals Committee for a recommendation following which the appointing authority would give a final ruling on the internal appeals. When this complaint was filed, the internal remedies had therefore not been exhausted (Article VII(1) of the Statute of the Tribunal).

The Tribunal sent the case back to the Organisation not out of any desire to be excessively formal or because of a lack of good faith, but so that a proper procedure could be conducted before the Administrative Council. The Organisation, for its part, does not object to this requirement. The (new) Appeals Committee of the Council has not yet had an opportunity to give an opinion on the merits of the dispute, the solution of which may to some extent be discretionary. In these circumstances, it is clearly not asking too much of the complainant that he observe the rules of procedure for appeals set out in the Service Regulations.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 12 November 1999, Mr Michel Gentot, President of the Tribunal, Mr Julio Barberis, Judge, and Mr Jean-François Egli, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2000.

(Signed)

Michel Gentot
Julio Barberis
Jean-François Egli

Catherine Comtet

