

FORTIETH ORDINARY SESSION

***In re* DAUKSCH (No. 2)**

Judgment No. 348

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Patent Institute by Mr. Helmuth Johannes Dauksch on 17 March 1977, the Institute's reply of 5 April and the complainant's rejoinder of 29 June 1977;

Considering Article II, paragraph 5, of the Statute of the Tribunal and the Institute Staff Regulations, particularly Article 25;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

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

A. On 1 September 1972 the complainant joined the staff of the Institute as an examiner at grade A7, step 1, with zero months' seniority. His appointment was confirmed on 1 September 1973. In May 1974 the Director-General endorsed his performance mark for 1973, which was 15 ½. On 27 November 1975, on the recommendation of the reports board the Director-General endorsed his performance report, but on 11 December the complainant protested and on 2 February 1976 the Director-General changed the assessment of the complainant's productivity and the general assessment to "very good". His performance mark was changed too late for the careers committees which met in 1975 to take it into account. On 15 March 1976 the Director-General therefore allowed his application for review of his case and referred it to the Careers Committee. On 24 December 1976 a further list of promotions was published. The complainant was not on it and he is now impugning the decision of 24 December.

B. The complainant observes that according to Article 25 of the Staff Regulations the only method of promotion is to make a choice from among staff members with minimum seniority in their grade after comparison of their merits and performance reports. The staff members promoted for 1975 included several who had three years' seniority in grade A7 and a "good" assessment in their report for 1974. The complainant, too, had acquired three years' seniority in grade A7 by 1975 and been given the assessment "very good" in his performance report for 1974. The decision not to promote him was therefore a breach of the Staff Regulations. In his rejoinder he points out that in failing to take account of his "very good" assessment the Director-General overlooked an essential fact and the Tribunal may therefore interfere. He asks the Tribunal to order that he be promoted for 1975.

C. The Institute says that in deciding on promotions from A7 to A6 for 1975 the Careers Committee and the Director-General were guided by the "general principles" governing promotion approved by the Administrative Council. Those principles stipulated, among other things, four years' actual service in the Institute. By 1975, however, the complainant had completed only three years' actual service, and it was therefore for the Careers Committee and the Director-General to determine whether his merits were "so far above average as to warrant promoting him one year earlier than other examiners who had completed the normal period of four years' actual service and qualified for promotion". The Committee and the Director-General took the view that his merits were not so exceptional. In general the comparison of merits stipulated in Article 25 of the Staff Regulations should amount to more than a mere comparison of general assessments made in anyone year and should be based on many other criteria such as seniority and quality of performance as evidenced by all the assessments entered in performance reports throughout the official's career and by general assessments and marks. It is by such criteria that the Careers Committee and in the last resort the Director-General form their opinion. The Tribunal cannot interfere with the Director-General's decision without departing from its own rule and making its own comparison of the merits of the complainant and the promoted staff members. The Institute therefore asks the Tribunal to dismiss the complaint.

CONSIDERATIONS:

As to the defendant:

1. On 17 March the complainant filed the complaint against the International Patent Institute, which had appointed him to its staff on 1 September 1972. By an agreement signed on 19 October 1977 the Institute was integrated into the European Patent Office, the secretariat of the European Patent Organisation (EPO). Having recognised the jurisdiction of the Administrative Tribunal, with the agreement of the ILO Governing Body, from 1 January 1978 the EPO replaced the Institute in disputes with its staff members still pending at that date before the Tribunal. Thus in this case the EPO has become the defendant.

As to the Tribunal's power of review:

2. The impugned decision not to promote the complainant from A7 to A6 is a discretionary one. Hence the Tribunal may quash it only if it was taken without authority, or violated a rule of form or of procedure, or was based on a mistake of fact or of law, or if essential facts were not taken into account, or if the decision is tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts.

As to the complainant's pleas:

3. The draft report on the complainant for 1974 assessed both his "productivity" and his general performance as "good". On 27 November 1975 the Director-General endorsed the report on the recommendation of the reports board, although the board had found a difference of opinion between the author of the report and the chief of division. In accordance with a table drawn up by the Careers Committee the complainant was not promoted from A7 to A6.

On 2 February 1976, however on behalf of the Director-General the Technical Director allowed the complainant's application for a change in the assessment of his productivity and general performance to "very good". On 15 March, again at the complainant's request, the Director-General asked the Careers Committee to review his case. On 1 December the Committee refused to recommend granting him the promotion he had been denied. By a decision of 24 December, which is the one impugned, the Director-General endorsed the Committee's opinion.

4. The complainant says that he has been less fairly treated than other officials who, like himself, had acquired three years' seniority in grade A7 by 1975 but were not so well qualified as he. In view of the general principles laid down by the Administrative Advisory Committee that contention is unfounded.

According to those principles there are two groups of officials who qualify for promotion from A7 to A6: first, those who have completed at least four years' actual service, have pursued a normal career and, to judge from the most recent and earlier performance reports, appear qualified; and, secondly, those who, though they have not completed four years' actual service, have shown merit "far enough above the average to warrant faster promotion".

The officials who the complainant says were better treated than himself were pursuing normal careers and belonged to the first group. Although they had been in grade A7 for only three years, they had completed four years' actual service. Moreover, the complainant does not deny that they deserved promotion. Their promotion was warranted according to the general principles laid down by the Administrative Advisory Committee.

Since he had not completed four years' actual service, the complainant belonged to the second, or exceptional, group. To obtain promotion he had to show, not just sufficient merit, but merit so far above average as to warrant faster promotion. To judge from the performance reports in the dossier it does not appear that he had shown such merit.

Thus the complainant's case was different enough from that of the officials he treats as comparable to warrant different treatment. He has therefore failed to establish inequality of treatment.

5. Again, the complainant cannot properly contend that the Director-General overlooked essential facts. On the contrary, after changing the original assessments of the complainant's performance, the Director-General again consulted the Careers Committee and took proper account of its confirmation of its original opinion.

6. Lastly, it appears from the foregoing that the impugned decision did not draw clearly mistaken conclusions from the facts.

DECISION:

For the above reasons,

The complaint is dismissed.

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

Delivered in public sitting in Geneva on 8 May 1978.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet