NINETY-SEVENTH SESSION

Judgment No. 2338

The Administrative Tribunal,

Considering the complaint filed by Mrs D. M. against the European Patent Organisation (EPO) on 8 August 2003, the Organisation's reply of 14 November, the complainant's rejoinder of 10 December 2003 and the EPO's surrejoinder of 18 March 2004;

Considering Articles II, paragraph 5, and VII 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 complainant, an Italian national born in 1958, joined the European Patent Office – the EPO's secretariat – in October 1997 as a temporary employee based in The Hague. With effect from 1 September 1998 the Office granted her a fixed-term contract as a clerk in one of its Search Assistance Service (SAS) teams. She was appointed at grade B2, step 4, the EPO having established a provisional calculation of her previous experience – which the complainant saw only later – based on the information set out in her application form.

On 5 March 1999 the Office sent the complainant what it deemed to be a definitive calculation of her reckonable experience, which it evaluated at 10 years and 6 months; the calculation confirmed that her grade and step as of 1 September 1998 was B2, step 4. When she signed and returned the calculation on 12 March, the complainant added a handwritten note stating that she agreed with the calculation "for the time being" but invited the Personnel Department to take into account two additional periods of employment "when and if necessary".

On 20 July 1999 the Office offered the complainant an appointment as a permanent employee at the same grade and step with effect from 1 September 1999, as a continuation of her existing employment. The complainant accepted this offer on 23 July.

By a letter of 1 March 2000 the complainant asked the Head of Recruitment to amend the calculation of her previous work experience so as to include two further periods of employment. She also pointed out that, since at the end of February she had acquired 12 years' experience, she would be eligible for promotion to grade B3 by September 2000. On 8 January 2002 the Head of Recruitment wrote to inform her that her reckonable experience had been recalculated and was now evaluated at 11 years and 8 months at the time of recruitment. The new calculation, a copy of which was attached to his letter, showed that the complainant's grade and step remained unchanged at grade B2, step 4. The complainant signed and returned the new calculation as requested, indicating by means of handwritten notes that she agreed with the new calculation of her experience but not with the grade assigned to her.

On 4 March 2002 she lodged an internal appeal with the President of the Office, contesting her grade at the time of recruitment. Arguing that the Office had breached the terms of her appointment by failing to rectify her grade further to its recalculation of her previous experience, she asked to be assigned to grade B3 with retroactive effect from 1 September 1998. The President concluded, after an initial examination of her case, that her grading was correct. He therefore referred the case to the Appeals Committee, which issued its opinion on 16 May 2003. The Committee unanimously recommended that the appeal be dismissed as unfounded, emphasising that although a minimum of 10 years' experience is required for assignment to grade B3, the Office is under no obligation to assign that grade on recruitment simply because an employee possesses such experience. The Committee held that the Office was entitled, at its discretion, to recruit external candidates at lower grades and that it had committed no error in the exercise of its discretion in this case.

The President decided to reject the complainant's appeal in accordance with the opinion of the Committee. That decision, which the complainant impugns, was conveyed to her by a letter of 2 June 2003.

B. In support of her case, the complainant relies on Circular No. 144 of 2 September 1985, which sets out guidelines for calculating the reckonable experience of category B and C staff for recruitment and promotion purposes. According to Circular No. 144, the minimum reckonable experience for assignment to the first step in grade B3 was 10 years. The complainant argues that since the Office evaluates her reckonable experience at the time of appointment at 11 years and 8 months, she ought to have been placed in grade B3 from the outset. In her view, the provisions of Circular No. 144 are binding and should prevail over the B1/B2 grading shown in the vacancy notice, which was merely indicative.

She contends that her acceptance of a contract at grade B2 was only conditional, being based on the good faith assumption that the Office had correctly evaluated her reckonable experience and awarded her the correct grade. When it transpired that the Office's calculation had been incorrect, she immediately asked for it to be amended.

The complainant also denounces what she describes as an asymmetry in rights between the Office and its employees. She submits that whereas the Office apparently reserves the right to downgrade an employee who, having been appointed at a given grade, subsequently proves to have insufficient experience to satisfy the requirements of Circular No. 144, no such right of rectification is recognised for the employee.

For the above three reasons, she considers that she is entitled to have her appointment regraded as B3 *ab initio*. As a subsidiary plea, she argues that the tasks she has been asked to perform are not commensurate with the B1/B2 grading of her post, and that the Office should therefore have offered her at least a B3 grade, for which she qualified in terms of experience.

The complainant asks the Tribunal to set aside the impugned decision and to order the defendant to assign her to grade B3 with retroactive effect from 1 September 1998 or, subsidiarily, from the time when it first became clear that she assumed responsibilities corresponding to a grade higher than B2. She also claims moral damages and costs.

C. The Organisation considers the complaint to be partially irreceivable. It submits that once the complainant had been informed, on 5 March 1999, of the Office's initial calculation of her reckonable experience and of the corresponding grade, she failed to contest her grade within the three-month period provided for in the Service Regulations for Permanent Employees of the EPO. Consequently, her claim to regrading as from 1 September 1998 is irreceivable. The defendant concedes that her claim to regrading is receivable with regard to the three-month period immediately prior to the filing of her internal appeal, insofar as monthly salary payments are deemed to be challengeable recurrent decisions showing the grade and step of the employee. The EPO also considers that the complainant's claim to moral damages is irreceivable, on the grounds that it was not raised during the internal appeal proceedings.

Addressing the complainant's arguments on the merits, the Organisation submits that potential employees have no automatic right to be assigned to a particular grade and step. The President of the Office may, at his discretion, determine the grade of a post before it is advertised. Provided that they are recruited to perform duties commensurate with the grade advertised, employees will not necessarily be entitled to a higher grade simply because they meet the conditions for assignment to a higher grade.

With regard to the recalculation of her reckonable experience, the Organisation submits that this did not affect the validity of the decision to appoint her at grade B2. Even on the basis of the Office's first calculation she satisfied the requirements for assignment to grade B3. However, not only did she have no automatic right to be appointed at grade B3, but she was offered a post at grade B1/B2 which she could only accept as such or reject. Moreover, she did not expressly challenge the grade of her post either on receiving the Office's first calculation of her experience or on accepting her appointment as a permanent employee at grade B2.

The EPO rejects the argument that the complainant's acceptance of her appointment was conditional upon the validity of her good faith assumption that her grade was correct. It replies that when she signed her fixed-term contract, and indeed the subsequent offer of a permanent position, she accepted her grade despite the fact that she was aware of the requirements of Circular No. 144 and that her previous experience totalled more than 10 years. Consequently, the Organisation maintains that it did not act in breach of the principle of good faith.

Regarding the duties performed by the complainant, the defendant submits that they are entirely consistent with the terms of the vacancy notice, and that the complainant has produced no evidence to support her assertion that they warrant a higher grade.

D. In her rejoinder the complainant maintains her position on all issues.

E. In its surrejoinder the EPO likewise maintains its arguments in full, noting that the complainant's rejoinder introduces no new element liable to alter its position.

CONSIDERATIONS

1. The complainant asks that the President's decision of 2 June 2003 be set aside and that she be granted grade B3 retroactively from 1 September 1998, in accordance with Circular No. 144. She also claims damages and costs.

2. In its reply the Organisation submits that, at the time of recruitment, all recruitment to the career group B1-B4 was made in the grades B1 and B2, as was indicated in the vacancy notice. The complainant was never led to believe that she would be appointed at grade B3. In other words, her assignment to grade B2 corresponded to the post for which she was recruited. The Organisation admits that it failed to provide the complainant with a copy of the provisional calculation at the time of recruitment and that the subsequent calculation was based on a miscalculation of her experience which was later rectified. However, she did accept that her grade was B2 both when signing the fixed term contract and her appointment as a permanent employee, even though she was aware that she had more than 10 years' experience.

3. According to the Organisation, even if she had known at the time of her recruitment that her reckonable experience amounted to 11 years and 8 months, she still would not have been entitled to a higher grade. She would only have been able either to accept the post in grade B1/B2 or to turn down the offer. The minimum requirements for assignment to B3 laid down in Circular No. 144 were already met from the outset. However, although she was promptly informed of her reckonable experience totalling more than 10 years, she failed to challenge her grade expressly, whether on 12 March l999 when she signed and returned the first calculation of 10 years and 6 months which turned out to be incorrect, or on 8 January 2002 when, following her request for rectification, her reckonable experience was set at 11 years and 8 months retroactively to 1 September 1998, but the assignment to grade B2, step 4, remained unchanged. She gave her agreement to this new calculation but contested the grade assigned to her.

4. The Tribunal finds for a fact, without discussing the issue of receivability, that the complainant applied for, and was appointed to, a Bl/B2 post, a grading corresponding to the post for which she had been recruited. No error of discretion on the part of the appointing authority was committed since account was taken, not only of the Service Regulations and the job description, but also of the qualifications required for the post and the degree of responsibility involved. Although she already met the minimum requirements for a B3 post at the time of recruitment, including 10 years' reckonable experience, she had no automatic right to grade B3. Change in her reckonable experience did not affect in any way her right, which continued to be to an appointment at grade B2.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.