

G. G.

v.

EPO

122nd Session

Judgment No. 3696

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs S. G. G. against the European Patent Organisation (EPO) on 17 December 2011, the EPO's reply of 4 April 2012, the complainant's rejoinder of 28 April and the EPO's surrejoinder of 3 August 2012;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant contests the calculation of her reckonable previous experience upon recruitment.

Shortly after the complainant joined the European Patent Office, the secretariat of the EPO, in September 2005, she requested to have her grading upon recruitment reviewed. In December 2006, she was informed of the definitive calculation of her reckonable experience, in accordance with Circular No. 271 of June 2002. She was placed in grade A2, step 6, with 5 months in step.

On 8 January 2007 she wrote to the President of the Office contesting the calculation of her reckonable experience. She explained that from 9 September 1998 to 31 July 2000 she had worked as a postdoctoral researcher in a French scientific research institute (the

Centre national de la recherche scientifique or CNRS) and that the EPO had taken into account only part of that period – i.e. December 1998 to 15 December 1999 during which she had an employment contract – as reckonable professional experience, which was credited at 75 per cent of the time worked. It had considered the two periods 9 September 1998 to 4 December 1998 and 16 December 1999 to 31 July 2000 as periods of training, because although she performed the same work at the same place, she was paid on the basis of a scholarship and not an employment contract. The complainant asked that these two periods be acknowledged as relevant professional experience credited at 75 per cent of the time worked, that her grade and step upon recruitment be adjusted accordingly and that she be paid the resulting difference in salary since the date of her recruitment. She also claimed moral damages and costs. Her request for review was rejected and the matter was referred to the Internal Appeals Committee (IAC) for an opinion.

Having held oral hearings, the IAC issued its opinion on 16 August 2011. The majority of the IAC's members recommended dismissing the appeal as unfounded but awarding the complainant 500 euros for undue delay. It concluded that she had failed to establish that the two contested periods should be considered as periods of professional activity, particularly as she had not given details of her working hours and level of responsibility. The minority recommended that the contested periods be credited at 75 per cent and that her reckonable experience be calculated anew on that basis, her grade upon recruitment re-determined and her date of promotion to grade A3 recalculated. It also recommended that she be paid 8 per cent interest on any amount due to her with respect to arrears in salary, together with 1,500 euros in moral damages and 500 euros in costs.

By a letter of 19 October 2011, the complainant was informed that the Vice-President of Directorate-General 4 acting with delegation of authority from the President had decided to reject her appeal as unfounded but to award her 500 euros for undue delay. The rejection was based on the EPO's "well-established and uniform policy" on post-doctorates according to which, in the absence of a "normal employment contract", activities covered by a fellowship or a scholarship were considered

different from professional activities, in particular as regards the nature and level of duties and the working conditions (remuneration, working hours, social security etc.) and were thus credited at 50 per cent. The Vice-President agreed with the majority of the IAC and considered that the activities described in the certificate she had provided demonstrated that these activities were of a training nature and did not fulfil the requirements of a professional activity. The rejection of her appeal is the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to quash the impugned decision, to acknowledge the two periods from 9 September 1998 to 4 December 1998 and 16 December 1999 to 31 July 2000 as relevant professional activity credited at 75 per cent of the time worked, to order the EPO to establish a corrected definitive calculation of her reckonable experience and to determine a new assignment (as from the date of her recruitment) into a grade and step that correctly reflects her reckonable experience. She also asks the Tribunal to order the EPO to pay any resulting difference in salary, together with interest. She further seeks an award of at least 2,500 euros in moral damages (in addition to the 500 euros already paid to her) and 500 euros in costs.

The EPO asks the Tribunal to dismiss the complaint as unfounded, submitting that it acted lawfully and that the complainant has not demonstrated an “especially grave moral prejudice” that would warrant the award of moral damages.

CONSIDERATIONS

1. The central question that the present complaint raises is whether the EPO should have considered two periods of post-doctoral research: 9 September 1998 to 4 December 1998 and 16 December 1999 to 31 July 2000, as periods of professional activity and taken them into consideration at a weight of 75 per cent in calculating the complainant’s reckonable previous experience, under Section I(3) of Circular No. 271 of June 2002 (“the Circular”). The Circular contains the Guidelines for applying Articles 3(1), 11(1) and 49(7) of the Service Regulations. The applicable provisions are relevantly reproduced.

2. Article 11 of the Service Regulations is under the rubric “Grade and seniority”. Paragraph 1 of the Article states as follows:

“The appointing authority shall assign to each employee the grade corresponding to the post for which he has been recruited. Employees recruited to posts classified in a group of grades shall be assigned the grade corresponding to their reckonable previous experience, in accordance with the criteria laid down by the President of the Office.”

3. The President laid down the relevant criteria that define periods of training and periods of professional activity in Sections I(1) and I(3) of the Circular, for implementing the career system for category A as follows:

“I. Reckonable previous experience

Activity prior to recruitment to an EPO permanent post is credited for step-in-grade assignment and career development purposes in accordance with the rules below.

(1) Periods of training

- (a) Such periods must occur after acquisition of the diploma required under the minimum qualifications of the job description for the post in question.
- (b) The training must be relevant for duties which can be performed at the Office, and must have given rise to a diploma or certificate awarded no later than the date on which appointment is confirmed.
- (c) Subject to sub-paragraph (d) below, these training periods are normally credited at 50%, up to a maximum of 18 months.
- (d) If however these periods led to the award of a doctorate (eg PhD) in a field relevant to duties which may be performed at the Office, they are credited at 75%, up to a maximum of 36 months’ total experience credited for training.
- (e) Any professional activity performed during a credited training period is not taken into account under paragraph (3) below.

(2) Periods of military service

[...]

(3) Periods of professional activity

- (a) Such activity must occur after acquisition of the level of education required under the minimum qualifications of the job description for the post in question.
- (b) It must occur after the age of 21.

- (c) It must correspond to that of an EPO category A post as regards type of work and level of responsibility.
- (d) Periods of employment of less than three months with any one employer are not taken into account, unless the type of work (eg freelance) justifies frequent changes of employer.
- (e) Periods of professional activity are normally credited at 75%. The President may, in exceptional cases, credit at 100% periods considered particularly relevant and useful to the Office (eg work at a national patent office of a member state, or as a patent attorney or in a patent department in industry in an EPO member state).

Each of the periods credited is expressed in days, and the total reckonable period rounded off to the nearest full month.

The total period thus credited is the 'reckonable previous experience'; added to 'seniority', i.e. the period of EPO service (in category A), it gives the staff member's 'total experience'."

4. Inasmuch as the determination of the central issue will be a function of interpretation, it would be helpful at this juncture to recall the basic principles of interpretation as stated by the Tribunal. Those principles state that the words of a provision are to be interpreted in good faith giving them their ordinary and natural meaning in their context. Where the language of the text is clear and unambiguous, the words must be given effect without looking outside of the text to determine the meaning. Texts which are ambiguous are to be construed in favour of the staff member. Thus it was stated as follows in Judgment 2276, consideration 4:

"When it comes to interpretation, the primary rule is that words are to be given their obvious and ordinary meaning (see Judgment 1222, under 4) and any ambiguity in a provision should be construed in favour of staff and not of the Organization (see Judgment 1755, under 12)."

The following was stated in Judgment 691, consideration 9:

"The text being unambiguous, the EPO and the Tribunal have no choice but to apply it without reference to the preparatory work or the supposed intent of the lawmaker. Strict textual interpretation is an essential safeguard of the stability of the position in law and so of the Organisation's efficiency.

Only when the text is ambiguous need more subtle methods of construction be applied. Difficulty may occur in international organisations precisely because language versions disagree, and it was just such a difficulty that the Tribunal had to resolve in Judgment 537, for example. But it need not do so

here. Since the text is clear in the three official languages of the EPO, the Tribunal concludes that there was an error of law and it allows the complainant's plea."

The following was stated in Judgment 2641, consideration 4:

"Staff Rules are to be construed in context and according to the natural and ordinary meaning of the words used."

5. The words of Sections I(1) and I(3) of the Circular are clear, unambiguous and not obscure. They are to be construed according to the natural and ordinary meaning, in order to determine, on the evidence, whether the activities which the complainant undertook during the contested periods were "professional activities" as the complainant asserts.

6. The calculation, which the complainant challenges, was done in order to set her initial salary and grade on recruitment, an exercise that was carried out, as is usual, on documents which she provided. It was on a review of the initial decision that a definitive calculation was issued in December 2006, under which the complainant was appointed at grade A2, step 6, with 5 months in step. By that re-calculation, the EPO determined that of six relevant periods, four were periods of professional service weighted at 75 per cent for which the complainant was credited with the requisite number of days under the Circular. The other two periods are those that are referred to in consideration 1. The EPO decided to disregard these periods on the ground that the certificates which the complainant had provided for them stated that they were periods of traineeship. The EPO determined that they were periods of training, under Section I(1) of the Circular, for which the calculations did not permit any further days to be credited to the complainant. The complainant specifically challenged this latter decision.

7. In its opinion, the majority of the IAC agreed with the EPO's decision and recommended that the internal appeal be dismissed, but held that the complainant should be awarded 500 euros for undue delay. The Vice-President of Directorate-General accepted these recommendations, in the impugned decision, rather than the minority's recommendations

that the appeal be allowed and the complainant be awarded 1,500 euros moral damages for undue delay and 500 euros costs.

8. If the complainant succeeds on this complaint an order would be issued to the EPO to re-calculate her reckonable previous experience under the Circular. The order may result in an upgraded assignment into a new grade and step on her recruitment.

9. The outcome of this case will turn on the interpretation of the relevant aspects of Article 11 of the Service Regulations, as well as of Sections I(1) and I(3) of the Circular, in light of the principles and analyses set out in considerations 4 and 5 of this judgment, and their application to the relevant facts presented in evidence. In particular, it will be necessary to distinguish between “periods of training” and “periods of professional activity”.

10. It is noted that the parties seem to suggest that a difficulty is created because the Circular does not specifically categorize post-doctorate and internship periods as it has categorized “periods of training”, “periods of military service” and “periods of professional activity” in Section I. This does not mean that there is thus a gap in the Circular that has to be filled by interpretation or by discretion. Post-doctorate and internship periods are periods of activity which may fall into either the first or the third categories provided in Section I of the Circular so long as they fit the criteria set for the category.

11. The reasons which the EPO gives for its determination that the two contested periods were periods of training may be summarized as follows: inasmuch as the Circular does not specifically categorize periods of post-doctorate and internship the EPO, in the exercise of its discretionary power, has determined that such periods are to be taken as periods of training and has so applied it as a long-standing and uniform practice. According to the practice, in the absence of a normal employment contract or certificate of employment, activities that are funded by fellowships, scholarships or by a fund are essentially different from professional activities, inter alia, as regards the nature and level of

duties and the working conditions, including the payment of remuneration, the working hours, and social security benefits. They are periods of training and fall to be weighted and calculated under Section I(1) of the Circular because a person who is funded by an internship, scholarship or under similar programmes receives money as a pupil or a student to conduct studies in an educational body. The complainant did not provide a contract of employment and was not paid a salary for the two contested periods. She provided a contract and was paid a salary for the other four uncontested periods. Additionally, the certificates which she provided for the two contested periods state that she was completing periods of internship or “traineeships”, which were funded by a scholarship.

12. The question whether activities are “training activities” or “professional activities” is not a function of the exercise of discretion. Neither is it a function of long-standing and uniform practice. Rather, it is a function of analysis that must be based on the criteria set out in Section I(1) of the Circular, for the former, and in Section I(3) for the latter, in light of the factual circumstances of the given activities. The staff member, who bears the burden of proof, must provide the evidence of those circumstances.

13. It is determined that the evidence which the complainant provided satisfies Section I(3)(a) of the Circular. This is because the subject activities occurred after she acquired the level of education that was required under the minimum qualifications of the job description for the post in question. She has also satisfied Section I(3)(b) as the subject activities occurred after she had attained the age of 21. Section I(3)(d) does not come into consideration as her claim relates to periods of more than three months. She further needs to show that her activities were professional activities and that they correspond to that of an EPO category A post as regards type of work and level of responsibility in order to satisfy Section I(3)(c) of the Circular.

14. It is observed that the two contested periods fell within the full period during which the complainant was engaged as a post-doctoral

researcher at the Laboratory for Coordinated Chemistry of the CNRS in Toulouse, France from 9 September 1998 to 31 July 2000. It is uncontroverted that she had performed the same work throughout the period. The EPO accepted that her activities for the period, other than for the contested periods, were professional activities. The EPO also accepted for the periods, other than the contested periods, that her activities corresponded to those of an EPO category A post as regards type of work and level of responsibility. Inasmuch as the complainant performed the same type of work with the same level of responsibility during the entire period, the funding of her engagement by scholarship during the contested periods does not take her activities during the subject periods out of the criteria set out in Section I(3) of the Circular, as the EPO suggests. The activities were the same, and, accordingly, the entire period from 9 September 1998 to 31 July 2000, without exception, should have been taken into consideration as “periods of professional activities”. The fact that the complainant had employment contracts for the four other periods while her engagements during the contested periods were funded by scholarships and they were described as periods of internships in the certificates which she provided does not provide a relevant distinction for the purpose of Sections I(1) and I(3) of the Circular.

15. In the foregoing premises, the complaint is well founded and the impugned decision will be set aside. The EPO will be ordered, on the basis of the foregoing finding, to re-calculate the complainant’s reckonable previous experience, under Section I(3) of the Circular, and, accordingly, re-adjust her initial salary and grade if the re-calculation of her reckonable previous experience requires. The EPO will be ordered to pay the complainant interest on the outstanding sum by which the complainant’s salary may be re-adjusted at the rate of 5 per cent per annum from due dates until the date of final payment.

The EPO has accepted that there was undue delay in the internal appeal proceedings and has agreed to pay the complainant 500 euros in moral damages therefor. This was inadequate, given that the length of the delay was approximately four and a half years. The Tribunal will award the complainant an additional 1,000 euros in moral damages for

the undue delay. The EPO will further be ordered to pay the complainant 750 euros costs.

DECISION

For the above reasons,

1. The impugned decision of 19 October 2011 is set aside, as is the earlier decision of 29 December 2006.
2. The EPO shall re-calculate the complainant's reckonable previous experience, under Section I(3) of the Circular, from 1 September 2005, the date on which she joined the EPO, with all consequential salary adjustments.
3. The EPO shall pay interest on any outstanding sum by which the complainant's salary may be re-adjusted, under point 2 above, at the rate of 5 per cent per annum from due dates until the date of final payment.
4. The EPO shall also pay the complainant 1,000 euros in moral damages, in addition to the 500 euros that it has already agreed to pay her.
5. The EPO shall also pay to the complainant costs in the amount of 750 euros.
6. All other claims are dismissed.

In witness of this judgment, adopted on 13 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

ANDREW BUTLER