FIFTY-FIRST ORDINARY SESSION

In re BRUENDL

Judgment No. 571

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Gerhard Leopold Brundl on 1 March 1983, the EPO's reply of 13 May, the complainant's rejoinder of 15 June and the EPO's surrejoinder of 19 August 1983;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 11, 49(8) and 116 and Title VIII of the Service Regulations for permanent employees of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant, a citizen of the Federal Republic of Germany, held several jobs, including one in the Federal Patent Office, before he joined the European Patent Office in Munich, on 14 April 1980, as a "substantive examiner" at grade A3. A year later the President of the Office determined his seniority in the light of his "reckonable experience" and put him at step 8 in A3. The Principal Director of Personnel explained to him in a minute of 1 February 1982 how the calculation had been made. On this depended his qualifying for promotion under Article 49 of the Service Regulations. Three periods of employment in 1966, 1969 and 1970 in pharmacy and pharmacology were omitted on the grounds that periods under a year did not count; so was a three-month period of military service; and other periods of employment, in 1966-69 and 1971-73, were rated at only 50 per cent. On 28 April 1982 he made objections to the calculation, the President rejected them on 11 May, and his case was put to the Appeals Committee under Title VIII of the Service Regulations. On 29 November the Committee recommended dismissing the appeal and in a letter of 7 December, the impugned decision, the President informed the complainant that he did so.

B. The complainant cites a paper, CA/16/80, which the President submitted to the Administrative Council of the EPO on 16 April 1980 and which sets out the rules for reckoning experience of examiners in Munich: while experience of patent work counts in full, other kinds, which are listed, are reckoned at 50 per cent. There is an exception in paragraph 4: "if experience in a particular capacity was outside the EPO and lasted less than one year, it is not counted at all". But in his view the text is unclear. His pharmaceutical experience -- including the three months' military service, during which he says he worked exclusively in pharmaceuticals -- should count because it totals over a year, even though acquired with different employers. Article 116 of the Service Regulations requires the President to have "regard to the guidelines laid down by the Administrative Council". Guidelines in CI/Final 20/77 relate to examiners, like the complainant, coming from national patent offices, and say that experience in industry "in a relevant technical field should count in full up to a maximum of five years". Nothing in the guidelines allows deduction of shorter periods of experience and to discount them is arbitrary. The complainant asks that all the periods mentioned in A above should count in full as reckonable experience in calculating his seniority and that the President review his seniority and make any decision thereon retroactive.

C. In its reply the EPO observes that the complainant's internal appeal related only to three periods of employment in pharmaceuticals in 1966, 1969 and 1970, not to the periods, reckoned at 50 per cent, in 1966-69 and 1971-73, nor to the three months' military service: his claims for the crediting of these are therefore irreceivable. As to the merits, the EPO says that the three periods in 1966, 1969 and 1970 were discounted because each fell short of a year. This was in keeping with a valid practice, applied to all recruits from national patent offices, based on CI/Final 20/77 and embodied in CA/16/80. The words "if experience in a particular capacity ... lasted less than one year" in CA/16/80 may be ambiguous, but the practice is not to aggregate such periods if there were changes of employer. The President has discretion in determining seniority and exercised it properly. It is right to discount short periods since experience will be more useful if the examiner stayed long enough with each employer to

become familiar with working conditions. This is why periods of employment with one employer may be aggregated, but periods with several may not. There is no inequality of treatment. As for the other periods, the claims are, besides being irreceivable, devoid of merit. The practice, reflected in CA/16/80, is to discount military service. As to the periods reckoned at 50 per cent, CI/Final 20/77 says that experience in industry will only be "taken into account" in determining an examiner's grade, and in proper exercise of his discretion the President has decided that that should mean 50 per cent.

D. In his rejoinder the complainant observes that not until he drew up his complaint did he realise that the periods reckoned at 50 per cent and the military service ought to have counted in full as well. In any event the issues he raises do not go beyond those raised in the internal proceedings. Article 116 requires the President to have regard to the Council's guidelines and it is clear from the Council's minutes that the President was to take account of special cases like his own. The practice is inconsistent since the EPO does aggregate periods with the same employer. He was already familiar with "working conditions" when he took up employment with each employer. As for the periods reckoned at 50 per cent, CI/Final 20/77 says in paragraph 9 that industrial experience "should count in full, with an upper limit of five years".

E. In its surrejoinder the EPO refers to and enlarges on the arguments in its reply. Contending that the rules and guidelines were respected and that there was no reason to treat the complainant as a special case, it invites the Tribunal to dismiss the claims as in part irreceivable and in any event of no merit.

CONSIDERATIONS:

1. The Organisation was created on 1 November 1977. The circumstances in which the large initial recruitment was conducted during the transitional period have been described in Judgment No. 551. The grade in which the recruit was placed depended upon his previous professional experience, which experience also counted when subsequent promotion was

considered. Article 116(3) of the Service Regulations of the Office states:

"Periods of professional experience prior to recruitment ... shall be determined by the President of the Office having regard to the guidelines laid down on this matter by the Administrative Council."

2. The complainant entered the service of the Organisation on 14 April 1980 when he was credited for the purpose of calculating his seniority with service of six years and four months with the German Patent Office, which service immediately preceded his entry into the Organisation.

3. Guidelines were given to the President concerning the recognition of certain types of experience other than in a patent office. On 1 February 1982, the Director of Personnel, having reviewed the whole of the complainant's previous service, disallowed in whole or in part several periods which can be put into two items. The first concerned three separate periods of service as a pharmacist of three months, nine months and seven months respectively, observing that "experience of less than one year is not taken into account". The second item is a complaint that certain periods, e.g. military service, where, as the Organisation puts it, the complainant "was working as a pharmacist within a military framework", were reckoned at only 50 per cent of the time.

4. As to the first item the complainant quotes the relevant guideline, which says that "if experience in a particular capacity ... lasted less than one year" it is not counted at all. He contends that in all three periods his experience was in the same capacity in the pharmaceutical field. The President's view is that an employment of short duration adds little to experience and that, having regard to the fact that in each employment time is taken up by familiarisation with and adaptation to the special conditions of the employment, it is proper to disregard employments which last less than one year. It is not for the Tribunal to interpret the text of the guideline. The regulation leaves it to the discretion of the President to determine the number of years so long as he has regard to the guideline. The interpretation which he puts upon it, whether right or wrong, is a reasonable one; it cannot be said that he has disregarded the guideline. Likewise, he is entitled to have regard to the fact that the interpretation, whether right or wrong, has been applied consistently since the first staff were recruited and it cannot now be changed without causing injustice.

5. As to the second item, it cannot be disputed that experience in an office which is not a patent office must be of only limited value and that it is for the President to put a percentage figure upon its value as experience. Here again

his judgment, subject to the principle of equality, must be discretionary and no grounds have been given for interfering with it.

DECISION:

For the above reasons, and without finding it necessary to consider the question of receivability.

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 20 December l983.

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.