FIFTY-FIRST ORDINARY SESSION

In re WENZEL

Judgment No. 572

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Alfred Wenzel on 23 February 1983, as supplemented on 3 March, the EPO's reply of 20 May, the complainant's rejoinder of 20 July, the EPO's surrejoinder of 27 September 1983, and the further observations supplied, at the Tribunal's invitation, by the EPO on 30 September and by the complainant on 26 October 1983;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 11, 49, 109(1), 115 and 116(3) 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, was employed as an engineer in industry from 1 January 1978 until 1 July 1980, when he joined the EPO in The Hague as an examiner at grade A1, step 2. On 1 July 1981 he was promoted to A2, step 1, with four months' seniority. The reckoning of the seniority of all EPO examiners recruited since 1978 was reviewed and some, including the complainant, were credited with 50 per cent of their industrial experience. Thus in November 1981 he was credited with one year and three months, his seniority at A2, step 1, being increased to seven months. At the same time examiners who, unlike the complainant, had been recruited from national patent offices had their industrial experience credited in full, and retroactively from the date of recruitment. On 15 December 1981 the complainant wrote to the Personnel Department claiming the full crediting of his industrial experience. The President of the Office replied on 11 May 1982 rejecting his claim, which was referred to an Appeals Committee under Article 109(1) of the Service Regulations. In its report of 25 November the Committee unanimously recommended rejecting the appeal, and by a letter of 29 November, the challenged decision, the President informed the complainant that se accepted the recommendation.

B. The complainant alleges that denying him the full crediting of his industrial experience, which is granted to examiners recruited from national patent offices, is in breach of the principle of equal treatment. He submits that he ss in the same position as such examiners because, like them, he was recruited while the EPO was being set up, ho does the same work in the same branch, and his industrial experience, as against his experience of patent work, is equally relevant to his present work. Moreover, all examiners should be subject, on an equal footing, to the Service Regulations He invites the Tribunal to order the EPO to promote him to A2, step 2, with six months' seniority, with effect from 1 July 1981.

C. The EPO invites the Tribunal to dismiss the complaint as unfounded. It sees no breach of the principle of equal treatment ln reckoning the complainant's industrial experience at only 50 per cent. There are no detailed rules in the Service Regulations for reckoning experience, and tho President assesses it at his discretion. In the early days of the EPO when the complainant was recruited, Articles 115 and 116(3) empowered tho President to make rules "having regard to the guidelines Said down" by the Administrative Council Guidelines in CI/Final 20/77 relate to examiners coming from national patent offices and say that experience in industry counts in full in determining the step, with an upper limit of five years. For other examiners, like the complainant, the President has decided that industrial experience shall be credited at 50 per cent for determining the step, with an upper limit of ten years, i.e. a maximum credit of five years. This from rule was applied from the outset to all examiners not coming from patent offices, whatever their duty station, and it constitutes the established practice. The difference in treatment between the two groups of examiners is justified. On appointment examiners from national patent offices are not in the same factual position as examiners from industry. In its early days the EPO wanted to attract examiners with experience of patent work since others generally needed two years to come up to standard, and it therefore offered better terms to examiners from patent offices. It also helped such offices to reduce their staff. These are the reasons why

different treatment is, quite correctly in the EPO's view, prescribed in CI/Final 20/77.

D. In his rejoinder the complainant presses his claims and his contention that the EPO is in breach of the principle of equal treatment. His first year's service on probation with the EPO should be counted, together with his prior industrial experience of two years and six months, so as to entitle him to grade A2, step 2, with six months' seniority, on 1 July 1981.

E. In its surrejoinder the EPO explains why in its view the difference in calculating experience between examiners with and examiners without experience in a national patent office is justified. It invites the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS:

1. The complainant is employed by the Organisation as an examiner of patent applications. In the Organisation promotion is governed by seniority and seniority is calculated according to years of experience and these include previous experience outside the Organisation. The latter is calculated in accordance with rules made by the President. While this gives the President a discretionary power, it is not disputed that the rules themselves and the decisions made thereunder must conform with the principle of equality of treatment.

2. Under the rules previous experience in a patent office is counted in full, while experience in industry is given a lesser weighting. The Tribunal has already decided that this difference in treatment does not necessarily infringe the principle, since up to a point experience in a patent office is more serviceable to an examiner of patents than general industrial experience. The complainant, when he was appointed on 1 July 1980 had no patent office experience but he had two-and-a-half years' industrial experience. Under the rule then in force his industrial experience was weighted at one year. When on 1 July 1981 his promotion was being considered the rules were altered so as to allow industrial experience at 50 per cent, thus giving the complainant an additional three months. At the same time officers with patent office experience had their additional industrial experience allowed at 50 per cent, the same as the others, when it was a question of promotion to a higher grade; but at 100 per cent for within-grade advancement to a higher step. The complainant submits that this latter distinction is unreal and arbitrary and is not founded on any true difference in the value of the experience.

3. He argues in the first place that industrial experience is not in itself rendered more valuable by the fact that its possessor has also patent office experience. Second, that, if it is, by June 1981 he had already had one year of patent office experience in the Organisation and so was the equal, if not the superior, of anyone with patent office experience outside the Organisation. Third, that the value of industrial experience, however it is weighted, must be the same for advancement within the grade as for promotion to a higher grade.

4. The Tribunal accepts these arguments and concludes that the distinction is not truly designed to divide officers into more experienced and less experienced categories. The true object of the distinction appears in the alternative argument advanced by the Organisation in which it concedes that policy considerations also partly account for the difference. It was necessary, the Organisation says, to help national patent offices to reduce their staff and the Organisation was therefore bound to offer certain advantageous conditions to examiners from national patent offices. The Tribunal is not here concerned with advantages offered to attract recruitment and which take effect once and for all on recruitment. It is concerned with discrimination between candidates for promotion. There is not in the dossier to be found any justification for discrimination on promotion.

DECISION:

For the above reasons,

The complaint is allowed and it is ordered that:

1. The complainant be promoted to grade A2-2-6 with retroactive effect to 1 July 1981; and

2. The Organisation pay to the complainant 1,000 United States dollars as costs.

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 1983.

André Grisel

Jacques Ducoux

Devlin

A. B. Gardner

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