Registry's translation, the French text alone being authoritative.

FIFTY-SECOND ORDINARY SESSION

In re TISSOT

Judgment No. 598

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Louis Marie Victor Tissot on 7 March 1983, the EPO's reply of 23 May, the complainant's rejoinder of 28 July and the EPO's surrejoinder of 3 October 1983;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 44(1), 107, 115 and 116 of the Service Regulations 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 French citizen, joined the EPO on 10 September 1980 as a grade A3 examiner. There was a review of the seniority of examiners, which matters in determining grade and step on appointment and fitness for promotion. On 28 January 1982 the Personnel Department sent him the new reckoning of his seniority. It discounted a period of national service from September 1969 to July 1971 -- the first 15 months compulsory, the remaining 6 ½ voluntary -- when he had performed civilian duties at a teachers' training college in Zaire. Moreover, of a period from 1974 to 1980, during which he had done patent work in the industrial property section of the Battelle Institute in Geneva, only 4 years were counted at 100 per cent, the remaining 2 years and 5 months at 50 per cent, rounded up to one year and 3 months. On 27 April 1981 he stated his objections and lodged an appeal with the Appeals Committee in accordance with Article 107 of the Service Regulations. In its report of 29 November 1982 the Committee reasoned that military service was excluded, not because it was military but because it was compulsory, and that if someone continued to perform voluntarily the alternative civilian duties "for a substantial period" that period should count. It recommended rejecting all his claims but the one in respect of his 6 ½ months' voluntary teaching service in Zaire. In a letter of 7 December 1982, which is the impugned decision, the President of the Office informed him that he endorsed the Committee's recommendation.

B. The complainant submits that the only relevant articles of the Service Regulations are 115 and 116, which relate to the appointment of staff in a "transitional period" during which he himself was appointed. Article 116(3) provides for the reckoning of prior experience by the President "having regard to" guidelines approved by the Administrative Council, and such guidelines appear in CI/Final 20/77. They are not just recommendations, but set definite limits on the exercise of the President's discretion. The complainant contends, first, that the whole period of his employment from 1974 to 1980 with the Battelle Institute, including the 2 years and 5 months in excess of 4 years, should count in full. He has three main arguments. (1) Points 5 and 13 of CI/Final 20/77 provide, in determining fitness for promotion, for counting in full work on the presentation of patent applications. (2) At its second session in February 1978 the Council decided (paragraph 33 of CA/PV.2) that experience as a self-employed adviser on patents should be recognised and an amendment to that effect was made in CI/Final 20/77. The complainant believes he gained the equivalent of such experience with Battelle. (3) To discount it would be in breach of the principle of equality by giving an unfair advantage to those who have worked, not with private bodies, but in national patent offices, employment in such offices being reckoned in full. Secondly, he submits that his compulsory national service in zaire should be reckoned. He cites the guidelines in CA/16/80, as well as CI/Final 20/77, which he says require the reckoning at 50 per cent of teaching in science at the university level. Although CA/16/80 says military service does not count, it should when military are replaced with civilian duties. The President may exercise his discretion to that effect. It would again be a breach of equality to discount his teaching experience simply because he gained it on national service. He invites the Tribunal to set aside the decision of 7 December 1982 in so far as it rejected his claims and to order that full account be taken of (1) his

employment with Battelle and (2) his teaching experience in Zaire from September 1969 to December 1970.

C. The EPO replies that the claim as to period (2) (the teaching in Zaire) is devoid of merit. Point 5(d) of CA/16/80 reflects its practice of discounting "military service". Although for the sake of brevity the guidelines do not say so, this covers all forms of compulsory national service. The President has so decided in the correct exercise of the discretion the Council left him in the matter. According to the law of France, the complainant's country, duties of the kind he performed count as national service. To include them in the reckoning would be unfair to officials who have performed military duties. Moreover, Article 44(1) of the Service Regulations assimilates all forms of compulsory military or "comparable" service. The claim as to period (1) (employment with Battelle) should also fail. Clearly the complainant was not a self-employed adviser on patents since he worked under supervision. Nor may he rely on CI/Final 20/77, which leaves discretion to the President, as its wording and that of Article 116(3) of the Regulations make clear. In the EPO's interests the President has preferred not to act on point 13 of the guidelines. Fuller recognition of prior experience for the purpose of promotion than for that of determining grade and step has been found to make the grading structure top-heavy, and the President prefers that the reckoning of seniority be the same for both purposes.

D. In his rejoinder the complainant submits, as to his employment with Battelle, that point 13 is binding: the President does not have discretion and is not safeguarding the EPO's interests in ignoring it since it would apply to only very few examiners and could never distort the grading structure. As to the period of teaching in Zaire, what CA/16/80 discounts is "military" service, not civilian duties, especially university teaching, which in fact the guidelines say should count. To discount his national service is to give an unfair advantage to officials from countries with no conscription.

E. In its surrejoinder the EPO maintains that Article 116 does leave the President discretion and he is not abusing it in refraining from applying point 13. The point would apply to far more examiners and therefore be of greater effect than the complainant allows. As to national service, it is compulsory, whether the duties are military or civilian, and it is only right to put on a par everyone who has done it.

CONSIDERATIONS:

1. The European Patent Organisation was founded on 1 November 1977. The Tribunal has discussed in several judgments, such as No. 551, the way in which many of its staff came to be recruited. During a "transitional period" the appointing authority was empowered under Articles 115 and 116 of the Service Regulations to derogate, "in the interests of the service", from some of the provisions of the regulations on recruitment and promotion. But Article 116 put a limit on the discretion of the President of the Office: for both recruitment and promotion he was to have "regard to the guide lines laid down on this matter by the Administrative Council". The guidelines drawn up by the President prompted lengthy debate in the Council on several occasions, and in interpreting them the Tribunal will refer to the Council records as well as the actual text.

Where the guidelines properly modify the requirements of the Service Regulations they confer on the President authority of his own which he exercises in the general interest and as befits the particular circumstances. But his discretion is not without bounds. The wording of the guidelines is such that they cannot be treated as nothing more than standards or goals and as leaving the President a free hand in building the initial structure of the staff. In fact they set objective and binding criteria for deciding on individual staff cases, and, while not ignoring the President's discretionary authority, the Tribunal will review the application of the rules the Council has laid down.

2. The EPO recruited the complainant as an examiner during the transitional period, on 10 September 1980. His initial grade and step depended on, among other things, his prior professional experience, and this was also to be taken into account in considering later promotion. The basic text is Article 116(3) of the Regulations: "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."

By a decision of 28 January 1982 the complainant was granted 10 years and 3 months' seniority on account of his professional experience prior to recruitment. Believing that the reckoning was at odds with the Council's guidelines, he lodged an internal appeal. The Appeals Committee made its recommendation on 29 November 1982 and the President fully endorsed it: he allowed the claims on only one point. The complainant has duly filed a complaint asking the Tribunal to quash the decision of 7 December 1982 in so far as it rejected his claims.

The claims cover two periods: one from September 1969 to the end of December 1970, and the other from April 1974 to the end of August 1980. Each period raises different issues, and the Tribunal will take them separately.

From September 1969 to the end of December 1970

3. From 3 September 1969 to 23 December 1970 the complainant performed national service in Zaire under his country's technical co-operation programme as a lecturer in science at the National Educational Institute of Kinshasa.

The EPO's argument is that such service does not count as professional experience because it was compulsory.

It is clear from the guidelines and from the Council's records that the conclusion of the Council's lengthy debate on the subject was that military service should not count. Here the President has no discretion and has to apply the guidelines.

But the complainant was not performing military service: he was serving under a technical co-operation programme. The EPO submits, first, that such service is a substitute for military or defence duties and that young people who prefer that form of national service should fare no better than those who do military service.

Secondly, it contends that to rule otherwise would be unfair when the form of service chosen by the staff member may be performed in both military and civilian life.

Thirdly, it observes, by way of comparison, that Article 44 of the Staff Regulations expressly assimilates all forms of national service.

4. The third plea may be rejected at once since it relates to what happens when someone already on the staff performs military or comparable service. Indeed the argument might even be turned against the EPO since it shows the Council was quite aware of the question of technical co-operation service when it discussed military service. Apparently it was not silent by oversight.

5. Military and technical co-operation service cannot be assimilated. They are both a form of national service, it is true, but that is all they have in common. Their duration, purpose and nature differ. One has to volunteer for co-operation work. The principle of equality cannot therefore apply when one young man makes use of his university or other academic qualifications, for example to serve in some developing country or area, and another serves in the defence of his own country. When the Council decided to discount military service in reckoning professional experience it meant and indeed could only mean military service as such. The President therefore erred in law in founding his decision on an assimilation of military and technical co-operation service.

6. Of course not every form of co-operation service necessarily has to count. Here the President has discretion under the Council's guidelines, particularly paragraphs 5(i) and (ii) of CI/Final 20/77.

The error of law would normally mean setting aside the impugned decision and referring the complainant to the EPO for review of his position. But there is a particular element in this case which enables the Tribunal to rule otherwise.

On completing his co-operation service the complainant continued until July 1971, as a private citizen, to perform the same duties. What the President's decision of 7 December 1982 said was that that further period might count towards prior experience if the complainant could show that the National Educational Institute of Kinshasa was on a par with a university. Since it is agreed his duties did not alter, the decision on the period subsequent to co-operation service holds good, and on the same terms, for the period of such service.

From April 1974 to the end of August 1980

7. During this period the complainant was a salaried employee of the Battelle Institute in Geneva and worked in its industrial property section. His duties were those of an engineer and included the presentation and investigation of patent applications.

The impugned decision gives him full credit for the first four years in reckoning his professional experience, but reckons the remainder of the period at only 50 per cent, to give a total of 5 years and 3 months for his employment

with Battelle.

The complainant is seeking full credit also for the remainder, and he relies on paragraph 33 of the minutes of the Council's second session (document CA/PV.2) and paragraph 13 of the guidelines in CI/Final 20/77.

8. The plea based on CA/PV.2 fails. As the EPO says, the Council decided that full credit should be given only for experience as a "self-employed adviser on patents". The complainant was an employee of Battelle during the period in question. His answer to this is that paragraph 33 means professionally, and not administratively, "self-employed" but the Tribunal rejects the distinction because inquiries to determine whether someone was "self-employed" could never be objective. The EPO's interpretation of paragraph 33 is the only reasonable one.

9. As for paragraph 13 of CI/Final 20/77, it says that "the period of experience referred to under paragraphs 5(i) and (ii)(b) should be taken fully into account in determining promotion in the EPO".

There is no doubt, and the EPO does not deny, that the complainant fulfils the conditions in those provisions.

But the EPO has a different line of argument. It says that CI/Final 20/77 is only a set of guidelines and is not binding; the President has discretion, as is clear from the use of the conditional as against the indicative mood.

The EPO also cites the President's view that it was not sound policy to follow the method of calculation proposed for determining seniority in paragraph 13 since he found that that would make for an excess of senior posts and so distort the structure of the Office.

One of the President's duties is to ensure sound administration, and it is indeed the essential purpose of the guidelines. But, as was said in 1 above, the guidelines set objective criteria to cover certain circumstances and the criteria have to be applied to particular cases.

In this case there is a criterion which the Council set, and it even gave examples of how to put the principle into effect. The use of the conditional mood does not suffice to turn the rule into a mere recommendation, and paragraph 13 is binding on the President. If he thought the result undesirable he should have asked the Administrative Council to amend the guidelines: he could not decide on his own not to apply them. He therefore committed an abuse of authority and the impugned decision must be set aside also in so far as it rejects the claim.

10. The EPO is required to pay the complainant 2,500 Deutschmarks as costs.

DECISION:

For the above reasons,

1. The impugned decision is quashed as set out above. The complainant is referred back to the President of the Office for review of the reckoning of his professional experience for the purposes of seniority and promotion.

2. The EPO shall pay him DM 2,500 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 12 April 1984.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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