

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

## FIFTY-SIXTH ORDINARY SESSION

In re WACKERLIN

Judgment No. 674

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Erich Oscar Wäckerlin on 21 May 1984, the EPO's reply of 13 August, the complainant's rejoinder of 8 November 1984 and the EPO's surrejoinder of 4 February 1985;

Considering the applications to intervene filed by Mr. F. Andres, Mr. C. Bonvin and Mrs. A. Kronester-Frei, and the EPO's comments of 7 January 1985 on Mrs. Kronester-Frei's application;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 49, 106, 107, 108, 115 and 116(1) and (3) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a patent examiner of Swiss nationality, was appointed to the EPO on 14 April 1980 during the transitional period of recruitment provided for in Article 116 of the Service Regulations. On the strength of his previous experience he was granted step 5 in grade A2. He and others noticed that their experience had been taken into account at a less favourable rate than that of staff recruited at grade A3 and they would therefore take longer to reach any given step in that grade. On 7 May he and 30 other examiners pointed this out to the Principal Director of Personnel. The Director answered in a letter of 11 May 1982 that no special measures could be taken. On 30 July the complainant wrote to the President of the Office asking him, under Article 106(2) of the Service Regulations, to take specific decisions about his promotion to A3 and possible later promotion to A4. By a letter of 6 October 1982 the Principal Director of Personnel refused his claims. He was promoted to A3 as from 1 November 1982 and was granted step 1, with five months' seniority. On 23 December 1982 he lodged an appeal with the Appeals Committee, which reported on 19 December 1983. On its recommendation the President of the Office informed the complainant by a letter of 21 February 1984, which is the final decision impugned, that his appeal was rejected.

B. The complainant submits that it was not the letter of 11 May but that of 6 October 1982 in answer to his claims of 30 July that constituted the decision subject to appeal under Article 107 of the Service Regulations: his appeal of 23 December was therefore lodged within the time limit of three months set in Article 108(2). As to the merits, he observes that by April 1981 his reckonable experience for the purpose of determining his grade amounted to five years and he should therefore have had his promotion then. Five years is the period of experience which, according to the guidelines in EPO Council document CI/Final 20/77, is taken into account in determining the starting step in A3 on recruitment at that grade, not the eight years required under the guidelines in CA/16/80 adopted by the Council in June 1980, after his appointment. The conditions for promotion form part of his contract with the EPO and were determined once and for all on his appointment. When appointed he was given to understand, in particular by the Swiss patent office, his former employer, that he would be promoted to A3 when he had five years' experience. The complainant likewise believes he should be promoted to A4 once he has 13 years of experience. He asks that he be promoted to A3 as from April 1981; that the acquisition of 13 years of reckonable experience should qualify him for promotion to A4; and that his step in A3 be determined, as from the date of his promotion, according to paragraph 10 of CI/Final 20/77, i.e. as for those recruited at A3.

C. In its reply the EPO contends that the complaint is irreceivable because the complainant failed to follow the internal appeals procedure correctly and so to exhaust the internal means of redress. The decision of 6 October 1982, which he challenged on 23 December, merely confirmed the letter of 11 May 1982. The latter was a challengeable decision within the meaning of Article 106(1) of the Service Regulations, and the complainant failed to challenge it in time. Besides, the complaint is devoid of merit. The conditions for promotion cannot create

acquired rights. The President was free to alter them at his discretion and increase to eight years the minimum period normally required for promotion to A3 -- a practice endorsed by the Council in CA/16/80 and CA/20/80. Besides, an official may still be promoted to A3 sooner if his record is especially good, and indeed the complainant himself had only seven years' experience by November 1982. He was never told that promotion would be automatic or the conditions for promotion immutable. In any event, as Article 49 makes clear, promotion is not a right. As to the claim relating to promotion to A4, he has no present interest since his experience does not yet nearly qualify him for that grade; besides, he has no acquired right in the matter. Lastly, the EPO objects to the claim relating to the step granted on promotion to A3 for reasons similar to those put forward in similar cases and summed up in Judgment 657, under C.

D. In his rejoinder the complainant submits, as to receivability, that he did follow the internal appeals procedure correctly since the decision of 6 October did not just confirm that of 11 May 1982 but rejected his own specific claims. He develops in great detail his submissions on the merits, again alleging breach of contract and of acquired rights. As to the claim relating to his later promotion to A4, he affirms a present interest in securing a clear definition of his career prospects. He answers at length the EPO's arguments about his step in A3, which in his view rest on the odd notion that service outside the EPO should count for more than service within it. The inequality of treatment suffered by A2 examiners promoted to A3 continues throughout their careers.

E. In its surrejoinder the EPO answers at some length the points raised in the rejoinder. It quotes the Council's minutes to show that the Council approved the guidelines in CA/16/80 and CA/20/80, maintains that there is nothing arbitrary or improper about the impugned decision, and again invites the Tribunal to dismiss the complainant's claims as irreceivable or, subsidiarily, as unfounded.

## CONSIDERATIONS:

### Applications to intervene

1. Any person to whom the Tribunal is open under Article II of its Statute may apply to intervene in a case on the conditions stated in Article 17(2) of the Rules of Court. Applications to intervene may be made at any stage and the Tribunal decides whether they shall be allowed (Article 17(4)).

The three applications submitted in this case are receivable. As regards that of Mrs. Kronester-Frei, in keeping with precedent the Tribunal will not consider her pleas insofar as they differ from the complainant's nor entertain claims other than those in the complaint. Its decision on the complaint will hold good for this and the other applications as well.

### Merits

2. The complainant is challenging a decision of 21 February 1984 to dismiss his internal appeal and asks --

(1) that the date of his promotion to grade A3 take effect from April 1981;

(2) that the acquisition of 13 years' reckonable experience qualify him for promotion to A4;

(3) that his step in A3 be determined, as from the date of his promotion, according to paragraph 10 of the guidelines in CI/Final 20/77.

The complainant was promoted to grade A3, step 1, on 2 December 1982 with effect from 1 November 1982. The Tribunal's decision on his first claim depends on whether, in the light of the facts on which he relies and his various pleas, his promotion to A3 complied with the rules.

Article 49 of the EPO Service Regulations, which governs promotion, states in paragraph (7):

"Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and reports of them.

The employees must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and have at least two years service in their grade in the Office."

From this it is plain that the acquisition of a particular period of experience confers no right to promotion under the Service Regulations.

On 6 June 1980 the EPO Administrative Council approved the guidelines in document CA/16/80. It thereby altered the minimum period of experience which officials recruited at A2 needed to qualify for promotion to A3 and which had till then been determined by the guidelines in CI/Final 70/77.

The complainant's promotion to A3 complied with Article 49 and CA/16/80. His objections to applying these guidelines are unsound. A staff member has no right to demand that the rules on promotion in force at the date of his joining the Organisation should never be amended: the material rules are those that obtain at the time of his promotion. Being applied only subsequently to their coming into force, they are not retroactive. Rules on promotion do not confer any acquired right on the staff member, who cannot tell at the outset how he will fare in his career. The rules may be amended, and he must expect that they will be.

The complainant contends that, for the reasons he gives, the EPO ought to have made an exemption from Article 49 in his favour. This plea too fails. Such exemption may be made only on fulfilment of the conditions defined in the second clause of Article 115 and in Article 116(1), which has nothing to do with the minimum professional experience required by the post description for obtaining the corresponding grade (Article 49(7), second clause). The Tribunal holds that the rules were correctly applied in promoting the complainant to A3 and it rejects his first claim.

For similar reasons it also disallows the second one, for his promotion to A4 on acquiring 13 years' experience. His claim fails because it is premature: only when he may be eligible for promotion will the EPO be required to determine under the second clause of Article 49(7) the minimum experience required.

The complainant's third claim is that his step on promotion to A3 be determined according to paragraph 10 of CI/Final 20/77. His step was fixed by the general rules on appointment and promotion to A3 which had been established under the system provided for in Article 49(11). Different treatment is prescribed for those recruited at A3 and those who, like the complainant, were recruited at A2 and later promoted to A3. The complainant's case is that the distinction is discriminatory and in breach of the principle of equal treatment. The EPO argues that, the two groups not being in the same position in fact, the difference in treatment is not in breach of that principle; that what it requires is that those in like position be given like treatment; but that where the factual position is not the same difference in treatment is in accordance with the principle. The Appeals Committee's unanimous report of 19 December 1983 on the complainant's internal appeal (paragraphs 19-24) and the EPO's reply to this complaint reveal factual justification for having different rules on determining step according as the official has been recruited at A3 or promoted to A3. The Tribunal concludes that the difference is not in breach of the principles of equality and non-discrimination.

Receivability

3. The complaint being dismissed on the merits, there is no need to determine whether it is receivable.

DECISION:

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, the Right Honourable the Lord Devlin, Judge, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 19 June 1985.

(Signed)

André Grisel

Devlin

H. Gros Espiell

A.B. Gardner

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