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

FIFTY-EIGHTH ORDINARY SESSION

In re HUNT

Judgment No. 739

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Anthony Edward Hunt on 20 December 1984, the EPO's reply of 21 March 1985, the complainant's rejoinder of 4 June and the EPO's surrejoinder of 21 August 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 11, 108, 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 facts of the case and the pleadings may be summed up as follows:

A. The complainant, an Englishman, held private employment in patents in his own country from 1974 to 1982. On 1 June 1982 and by virtue of a decision of 3 June he joined the EPO in Munich as a patent examiner and was appointed to grade A2, step 4, with ten months' seniority at that step. Early in 1984 the Office decided to alter its practice in the matter. By a letter of 15 May 1984 the Principal Director of Personnel informed the complainant that in accordance with the new practice of the Office the reckoning of his seniority for the purpose of determining his grade and step had been revised; he was appointed to A2, step 7, with 15 months' seniority, as from 1 January 1984. In a letter of 20 June 1984 the Director wrote again explaining the new rules for reckoning experience. One change from which the complainant benefited was that experience gained in the drafting and processing of patent applications elsewhere than in a national patent office would henceforth count in full and not just at the half rate. On 1 August he wrote to the President asking that the new and more favourable reckoning of his seniority should take effect, not as from 1 January 1984, but as from the date of his appointment 1 June 1982. Not having received satisfaction, he has filed this complaint.

B. The complainant submits that according to the Service Regulations he was not entitled at the time to challenge the step originally granted to him. Not until 15 May 1984 was he informed of his new step in the grade, recalculated in accordance with the new practice, and not until then did he have the opportunity of challenging that decision. The date from which the EPO has decided that the new step should take effect -- 1 January 1984 -- is arbitrary. The EPO benefited from his experience from the date on which he joined the Office. Since other staff members had their seniority correctly reckoned from the outset, there is discrimination and breach of the principle of equal treatment in respect of the period from 1 June 1982 to 31 December 1983. The complainant asks that the amended reckoning of his seniority made in accordance with Article 116(1) of the Service Regulations, the guidelines in CI/Final 20/77 and the principle of equal treatment, take effect as from 1 June 1982, the date on which he took up duty, and that he be awarded the sums due on that account plus interest.

C. In its reply the EPO observes that the complaint is in fact challenging a decision of 3 June 1982, the terms of the original appointment, and is irreceivable: whether the decision was lawful or not the appeal is time-barred. The complainant failed to challenge the decision in time, although he had the right to do so under Article 108(2) and (3) of the Service Regulations. The decision of 15 May 1984 set off no new time limit; it altered the original decision only to the extent determined by the appointing authority.

As to the merits the EPO points out that the date from which the new rules on the reckoning of seniority took effect was set at 1 January 1984 for everyone. In fixing the date the President made a proper exercise of his discretion. The challenge to the decision of 15 May 1984 is therefore also devoid of merit.

D. In his rejoinder the complainant cites the case of several staff members whose experience has been correctly reckoned for the purpose of determining their step. The only difference between their position and his own is that

they were put forward for appointment by national patent offices, and that is no reason for treating them differently. He submits that the EPO was in bad faith in failing to give him the text of the relevant rules when he was appointed. His supervisors assured him his grade had been correctly determined. He was unaware of the position of the officials mentioned above. He presses his claims and seeks costs.

E. In its surrejoinder the EPO observes that the guidelines in CI/Final 20/77 on the determination of step relate only to examiners from national patent offices and therefore not to the complainant. The material rule in his case is different and is in Article 11 of the Service Regulations.

The EPO maintains that in laying down the new rules the President acted within the limits of his discretion. It rejects the allegation that the Organisation acted in bad faith towards the complainant. It explains again why, in its view, the complaint is devoid of merit and it invites the Tribunal to dismiss it.

CONSIDERATIONS

The method of reckoning seniority

1. Article 115 of the EPO Service Regulations, which is headed "Initial recruitment", empowers the appointing authority to derogate from the requirements of several articles during a transitional period to be fixed by the Administrative Council of the Organisation.

Article 116(1) stipulates that during the transitional period the "recruitment procedure and conditions applicable to Category A staff in the field of substantive examination shall be determined by the President of the Office having regard to the guidelines laid down" by the Administrative Council.

The Council's "guidelines", inasmuch as they set objective and binding criteria and do not offer mere guidance, are binding on the President insofar as they do not allow him discretionary authority. That is the construction to be put on the phrase "having regard to the guidelines" in 116(1).

2. The Council has issued "guidelines" within the meaning indicated above, and they are to be found in particular in the document known as CI/Final 20/77. Paragraph 9 of this text says that any "experience obtained in the field of industrial property" shall count in full in determining the examiner's starting step in his grade.

As the "appointing authority" the President of the Office made rules, within the limits set in the Council's guidelines, on the recruitment of examiners. The rules distinguished between those who had formerly been employed in a national patent office and those who had not. They provided that the guidelines in CI/Final 20/77 should apply to those who had spent at least a year in a national patent office but that the experience of other candidates should be credited in full for up to four years and at 50 per cent beyond four years.

3. The Tribunal has already heard several complaints relating to recruitment. In Judgment 572 of 20 December 1983 (in re Wenzel) the Tribunal held discrimination between candidates for promotion to a higher step to be in breach of the principle of equality, and in Judgment 598 of 12 April 1984 (in re Tissot) it ruled that paragraph 13 of CI/Final 20/77 must be applied in particular cases.

Again acting as the appointing authority, and within the scope of the guidelines, the President changed the rules in the light of those judgments, and on 20 June 1984 the Office informed the staff concerned that for the purpose of determining their step and for promotion their patent experience would in future count in full, whether or not they had served in a national patent office. The new method of reckoning took effect on 1 January 1984.

The lawfulness of the impugned decision

4. The complainant joined the Office on 1 June 1982. He had several years' previous experience of patent work out side a national patent office, and, in accordance with the rules the President had applied until they were changed, hist experience counted in full for the first four years and at the half-rate for the remainder. He was granted grade A2, step 4, with ten months' seniority.

After the amendment of the rules by the President the complainant was granted step 7, with 15 months' seniority, still grade A2, and that is the decision he now impugns.

He is asking that the reckoning take effect not as from 1 January 1984, as the new rules prescribe, but as from 1 June l982, the date when he joined the Office. He alleges breach of the principle of equal treatment on the grounds that other examiners have enjoyed the advantage of the new rules since the date of their appointment. While conceding that, unlike him, they came from national patent offices, he believes that that difference in fact warrants no difference in treatment.

5. The President was right to review EPO practice in the light of Judgments 572 and 598. Had he not done so his decisions would, at least in some cases, have been successfully challenged. Yet he was under no duty in 1aw to review the position of officials who were not parties to the earlier complaints, and to allow them the benefit of the revised criteria was an exercise of his discretion. There was no abuse of his authority «n having the new rules come into force on 1 January 1984, and the complainant's contention that they should apply to him as from 1 June l982 is unsound.

The impugned decision could not of course be upheld if it were in breach of the principle of equal treatment. But it is not. The President put on a par those who came from national patent offices and those who did not, and in doing so he actually corrected an existing element of inequality. He may not have done away with it altogether, inasmuch as the new rules came into force only as from 1 January 1984; but insofar as there is still inequality it is due, not to the impugned decision, but to the terms of the original appointment, and the Tribunal will therefore consider whether that appointment is lawful.

The lawfulness of the original appointment

6. The complainant was appointed on 3 June 1982 as from 1 June. Having failed to challenge that decision within the prescribed time limits, he may not challenge it now, and the present complaint is irreceivable insofar as he does so.

It is immaterial that he was told as early as 26 March 1981 what method would be applied to determine his seniority if he was appointed: that did not prevent him from challenging the terms of his appointment in due course.

7. The complainant submits that the EPO showed bad faith in failing, on his appointment, to communicate to him the relevant guidelines and to draw his attention to the difference between the treatment of himself and the treatment of other staff members. In his view that is a reason for holding that the present complaint is receivable insofar as it challenges his original appointment. But this plea is obviously unsound.

When he was appointed the EPO took the view that the Council's guidelines, including CI/Final 20/77, applied to those who had been employed in national patent offices and not to anyone else. That view was mistaken, but there is no reason to suppose it was in bad faith. The EPO was therefore under no duty to inform the complainant of the guidelines or to explain to him how his own position differed from that of staff members to whom the guidelines applied. The omission affords no evidence of bad faith.

DECISION:

For the above reasons,

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 the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 17 March 1986.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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