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

FIFTY-EIGHTH ORDINARY SESSION

In re KUHN

Judgment No. 740

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Eduard Friedrich Emil Kuhn on 21 January 1985 and corrected on 5 February, the EPO's reply of 23 April, the complainant's rejoinder of 5 June and the EPO's surrejoinder of 23 August 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 11, 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 joined the EPO on 1 January 1983 as an examiner at grade A3, step 6, with five months' seniority. On 4 July 1985 he informed the Personnel Department that he had gained his professional experience almost wholly in the field of industrial property rights and that in accordance with the guidelines in CI/Final 20/77 it should be reckoned in full in determining his step. By a letter of 23 January 1984 he asked that a decision be taken. Early in 1984 the Office decided to alter its practice in the matter. By a minute of 24 May 1984 he was told that after recalculation of his experience he was granted step 10, with 11 months' seniority, as from 1 January 1984. On 25 August he filed an internal appeal against the decision, asking that it take effect as from 1 January 1983. Not having received satisfaction, he has filed this complaint.

B. The complainant's main plea is that since he asked on 4 July 1983 and 23 January 1984 that his professional experience should be reviewed the corrected reckoning should take effect as from 1 January 1983. He further submits that his experience as a patent attorney is equivalent to that of a national patent examiner and should count in full. He asks that the new reckoning of his professional experience take effect as from 1 January 1983, not 1984, and that his experience as a patent attorney should count in full, his total experience as reckoned for the purpose of determining his grade to be 15 years and 18 months.

C. In its reply the EPO observes that the complainant's position was reviewed against the new rules on reckoning of experience which came into effect on 1 January 1984. The new rules relate only to the reckoning of experience for the purposes of promotion and of determining the step in the starting grade. The rules on reckoning experience for the purpose of determining the starting grade have not been altered. The whole system was summed up and explained to the staff in a circular of 20 June 1984.

In asking that the decision of 24 May 1984 take effect as from 1 January 1983 the complainant is challenging the determination of his starting grade and step. The claim is irreceivable because he failed to challenge the terms of his appointment in time. The fact that on 4 July 1983 he applied for review of his position does not set a new time limit, nor indeed did that application constitute an internal appeal, In any event the decision of 24 May 1984 corrects the earlier one only to the extent determined by the competent authority; the President decided that the new rules should take effect as from 1 January 1984; and he was entitled to do so.

The letter of 24 May 1984 makes it plain that the complainant's experience as a patent attorney counted in full for the purpose of determining his step in his starting grade and for that of promotion. In that respect the decision is no more than confirmation of an earlier one. If what the complainant objects to is the terms of his original appointment his complaint is irreceivable for the reasons already stated. The original reckoning counted the first four years of his experience in full and the remainder, acquired as a patent attorney, at 50 per cent. In accordance with paragraph 33 of the minutes of the Administrative Council's second session (CA/PV.2) the remainder ought to have counted in full as well and so the EP0 made the correction by a decision of 17 April 1985. The result is that

the complainant's seniority is five years and two months and that makes no difference to his grade. His claim in that respect serves no further purpose. The EPO asks the Tribunal to dismiss as irreceivable and, besides, devoid of merit both the claim to the determination of a new step as from 1 January 1983 and the claim to the reckoning of experience as a patent attorney.

D. In his rejoinder the complainant argues that from paragraph 33 of CA/PV.2 it is plain that the original reckoning of his experience disregarded the criteria in CI/Final 20/77. The EPO therefore committed an error in disregarding both the criteria and the information he supplied on 22 February 1982, and certified on 7 June 1982 and 28 February 1983, about the nature of his independent work as a patent attorney from July 1972, After he wrote his letter of 4 July 1983 his position should have been corrected as from 1 January 1983.

E. The EPO presses its arguments in its surrejoinder. It explains that the new reckoning of the complainant's experience as a patent attorney is not based directly on CI/Final 20/77 but was made in keeping with the rules applicable to examiners who do not come from national patent offices, which the President issued by virtue of Article 11 of the Service Regulations. The EPO observes, as to the complainant's starting grade, that even greater seniority for the purposes of grade would not have made him eligible for promotion to A4.

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. Eat is the construction to be put on the phrase "having regard to the guidelines"in 116 (1).

2. The Council has issued the "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. De new method of reckoning took effect on 1 January 1984.

The reckoning of the complainant's seniority for step and for promotion

4. The complainant joined the Office on 1 January 1983 as an examiner at grade A3, step 6, with five months' seniority.

On 4 July 1983 he asked the Personnel Department to review his step. On 23 January 1984 he asked for a decision.

By a minute of 24 May 1984 he was informed that as from 1 January 1984 his patent experience would count in full in determining his step and for the purposes of promotion: as from that date he was granted step 10 in grade A3, with eleven months' seniority, and that is the decision he now impugns.

The complainant is asking that the reckoning take effect not as from 1 January 1984, as the new rules prescribe, but as from 1 January 1983, the date when he joined the Office.

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 law 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 in 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 January 1983 is unsound.

6. The Tribunal would take a different view only if the complainant were still free to challenge his original appointment. But he is not. For one thing, he did not challenge that decision in time: his application of 4 July 1983 for review of his position cannot be treated as an internal appeal. For another, he does not allege any flaw which the Tribunal will customarily admit as fatal to an organisation's decision.

The reckoning of the complainant's seniority

for the purpose of grade

7. The complainant argues that, as regards his grade, his patent experience is equivalent to that of staff who have served in a national patent office. In other words, he is alleging breach of the principle of equality. For the following reasons the Tribunal rejects this plea.

8. The minute of 24 May 1984 is explicit: it applies only to the step in the grade and to promotion; it does not cover determination of the grade. As regards grade, therefore, it constituted implied confirmation of the terms of the complainant's original appointment and as such set off no new time limit for challenging that decision in respect of his grade. Since he failed to challenge the terms of his appointment in time the question of his grade is no longer subject to review.

9. Actually the EPO says that of its own accord it did review the determination of the complainant's grade, although as it happened it confirmed its original decision, and that this is clear from the letter it wrote him on 17 April 1985 and the appendix thereto. In other words, it says it has done what the complainant wanted and reviewed his grade. The point is immaterial, however, since the question of the grade is closed anyway. Besides, in his rejoinder the complainant appears to waive his objections to the reckoning of his grade.

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

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