

FIFTY-NINTH ORDINARY SESSION

In re VAN DER PEET (No. 6)

Judgment No. 768

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hendricus van der Peet against the European Patent Organisation (EPO) on 18 July 1985 and corrected on 12 August, the EPO's reply of 22 October 1985, the complainant's rejoinder of 26 December 1985 and further communication of 7 January 1986 and the EPO's surrejoinder of 22 March 1986 and observations of 28 March on the complainant's further communication:

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 7 and 49(7) of the Service Regulations of the European Patent Office, the secretariat of the EPO:

Having examined the written evidence:

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Facts relevant to this case appear in Judgment 568 under A. The complainant's initial grading, as at 1 November 1981, was A2, step 3, with eight months' seniority. In his first complaint he said that the EPO had not taken full account of his prior employment in industry for six years and seven months. In Judgment 568 the Tribunal rejected that complaint. He was transferred to Munich and took up duty there on 1 January 1984 as a substantive examiner. On 10 February he lodged a new appeal against his grading and sought promotion to A3 on the grounds that by 1 July 1983 he had gained eight years' reckonable experience. According to the guidelines approved by the Administrative Council of the EPO on 3 April 1980 and set out in CA/20/80 an examiner qualified for A3 with at least eight years' experience provided the quality of his work was "normal". In a letter of 13 March 1984 the Principal Director of Personnel rejected his claim on the grounds that at 1 July 1983 his experience had been only six years and four months. On 20 March he wrote to say that in the light of Judgment 572 (in re Wenzel) his experience should be increased to eight years. He withdrew his appeal of 10 February and on 2 April filed a new one seeking promotion to A3 as from 1 July 1983 or, failing that, 1 January 1984. Meanwhile, in the light of Judgment 572 and with effect from 1 January 1984, the EPO amended the rules. Under point I.2 of the new rules prior industrial experience was to count in full for up to a maximum of five years and at half rate thereafter for the purpose of determining an examiner's step in his grade. On 15 May 1984 the complainant was given a reckoning under the new rules: it increased the total of his experience and he was accordingly granted step 7 in A2, with six months' seniority as from 1 January 1984. In its report of 27 March 1985 the Appeals Committee recommended rejecting his appeal on the merits and the President of the Office did so by a letter of 29 April 1985, the decision he is impugning.

B. The complainant submits that it is a breach of good faith for the new reckoning to take effect only as from 1 January 1984. His reckonable experience amounted to at least eight

years by 1 July 1983, and since his performance reports were good he ought to have been promoted to A3, in accordance with CA/20/80, as from that date. There is breach of the principle of equal treatment since other examiners whose performance was good and who had eight years' experience did get promotion to A3 in 1983. The refusal of promotion runs counter to Judgment 572, in which the Tribunal accepted the contention 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". He seeks promotion to A3 as from 1 July 1983 or, failing that, 1 January 1984, and payment of interest on the sums due.

C. The EPO replies that the complaint is devoid of merit. It rests on several misconceptions. (1) Judgment 572 is irrelevant since it did not relate to the reckoning of industrial experience for the purpose of determining the starting grade or eligibility for promotion, it related to the step within the grade. The rules are different for the two purposes, step being covered by I.2 of CA/20/80 grade and promotion by I.1 and III. (2) Besides, the Tribunal did not hold that its ruling on step applied to the reckoning of experience for promotion. The case was about step not grade and the Tribunal's intention was to prevent discrimination between examiners recruited from national patent offices and others, particularly as to the step granted on promotion from A1 to A2. The President has correctly

exercised his discretion in deciding that industrial experience should count at half rate for the purposes of starting grade and promotion. (3) The new reckoning of 15 May 1984 applied only for the purpose of step, not for that of grade: it leaves the reckoning for the purpose of grade unchanged at three years and four months. With the addition of the complainant's experience in the EPO the total did not come to eight years either at 1 July 1983 or at 1 January 1984.

D. In a lengthy rejoinder the complainant recounts in detail his career both outside and in the EPO. He submits that the rules on the reckoning of experience are obscure, defective, not properly communicated to the staff and applied incorrectly, inconsistently, in disregard of equal treatment and in ignorance of essential facts. The President has failed to take proper account of his university experience again in breach of the principle of equal treatment. He challenges Judgment 568 on the grounds that it is at variance with Judgment 572, in which the Tribunal allowed a claim similar to one of his which it had rejected, and that new facts have since come to light namely the existence of document CI/342/77 of 6 June 1977. He maintains that under CI/342/77 his experience should be reckoned at seven years and four months as at 1 July 1980, when he joined the EPO; that the Appeals Committee was in breach of due process; and that the Tribunal's ruling in Judgment 572 does apply to eligibility for promotion. He seeks disclosure of his personal file and applies for oral proceedings to hear witnesses. He submits that only a selection board set up under the recruitment procedure may properly assess his degrees and prior experience.

He amends his claims. He seeks promotion to A4, step 5, with eight months' seniority, as from 1 July 1980 plus arrears of pay with interest, or else appointment to A2, step 5, with four months' seniority, as from 1 July 1980 and promotion to A3, step 4, with four months' seniority, as from 1 July 1982, plus arrears of pay with interest. He seeks 7,500 Deutschmarks in costs.

E. In a detailed surrejoinder the EPO submits that the complainant's challenge to Judgment 568 is irreceivable because the subject matter is not the same as that of the instant complaint. The new claims in his rejoinder are irreceivable. The EPO enlarges on its arguments on the merits and seeks to refute the pleas put forward in the rejoinder, maintaining that the rules were correctly applied and that there was no breach of equal treatment. It observes that CI/342/77 has no force in law and is, besides, immaterial. It submits that no purpose would be served by the disclosure of the complainant's personal file or by the hearing of witnesses.

CONSIDERATIONS:

1. The complainant joined the staff of the EPO on 1 July 1980 as an assistant examiner at grade A1, step 2. On 1 July 1981 his appointment was confirmed and he was promoted to the post of examiner at grade A2, step 3. With effect from 1 November 1981, as a result of a change in the rules for calculating experience, his grading was fixed at A2, step 3 with eight months' seniority. He appealed to the Tribunal against this grading on the ground that his previous experience in industry should have been taken at 100 per cent and on the ground of inequality of treatment. The Tribunal rejected his complaint in Judgment 568.

In consequence of a further change in the EPO's practice in the calculation of previous experience for the purpose of determining grade and incremental steps, the complainant's grading was revised on 15 May 1984 to grade A2, step 7, with six months' seniority with effect from 1 January 1984.

In these proceedings he seeks an order that (i) the EPO promote him to grade A3 with effect from 1 July 1983 or from 1 January 1984; and (ii) the EPO pay interest on the arrears of salary due.

Preliminary

2. In his rejoinder the complainant requests that the matter of the recognition of his degree should be referred to the Court of Justice of the European Communities for a preliminary ruling. The Tribunal has no authority to order such reference.

The complainant seeks the production of certain documents. In the opinion of the Tribunal the documents sought are immaterial to the issues before it.

The complainant seeks oral proceedings. The Tribunal declines to order oral proceedings because the material issues are fully dealt with in the written proceedings and oral proceedings would serve no useful purpose.

The claim to promotion

3. Article 49(7) of the Service Regulations provides:

"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 of reports on 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."

In guidelines applicable to the complainant (CA/20/80) the minimum experience stipulated for promotion to grade A3 is eight years for employees such as the complainant whose performance is normal. As regards the calculation of experience for the purpose of grade, the guidelines provide that periods spent in research or development work in scientific or technical fields in industry, government agencies or institutions should count to the extent of 50 per cent. This is reflected in the calculation notified to the complainant on 15 May 1984.

The complainant contends, among other things, that only the selection board appointed in accordance with Article 7 of the Service Regulations is competent to assess his diplomas and previous experience. He is clearly mistaken. A selection board is appointed when recruitment is by competition and its competence is limited to drawing up a list of suitable candidates. It is not responsible for the calculation of previous experience.

The complainant has not sought review of Judgment 568 but in his rejoinder seeks to put forward a claim that certain "new facts" vitiate its validity. The claim is clearly irreceivable.

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 Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 June 1986.

André Grisel

Jacques Ducoux

William Douglas

A.B. Gardner