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

**SIXTY-SECOND ORDINARY SESSION**

## *In re* MARIE

**Judgment 818**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Alain Louis Léon Marie against the European Patent Organisation (EPO) on 3 October 1986 and corrected on 6 November, the EPO's reply of 23 January 1987 and the complainant's letter of 16 March 1987 to the Registrar of the Tribunal stating the he did not wish to file a rejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 11(2), 49, ll5 and ll6(3) 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. One factor of an EPO examiner's grade and of his step within his grade is the reckoning of his seniority. The reckoning is based on, among other things, the professional experience he gained before joining the staff. Guidelines which the Administrative Council of the EPO approved on the subject in 1977 in accordance with Article 116(3) of the Service Regulations were embodied in the text known as CI/Final 20/77. They were to apply during the "transitional period" provided for in Article 115 of the Regulations and one thing they said was that the prior general experience of an examiner who did not come from a national patent office should count only at half rate. Not more than ten years were to count, giving a maximum of five years' seniority under that head. After the Tribunal delivered Judgments 568 and 572 the President of the Office made new rules, and a staff circular of 20 June 1984 gave an account of them. One change was that as from 1 January 1984 general industrial experience was to count in full, not at half rate, whether the examiner came from a national patent office or not. Since the five-year limit held good no more than five years' such experience was thenceforth taken into account. That is "the 1984 method". According to a decision of the Administrative Council - CA/D 12/84 - the transitional period ended on 31 December 1984 and Article 116(3) of the Regulations ceased to apply as from 1 January 1985. The President thereupon acted under Articles 11(2) and 49 of the Regulations, which relate to grade, seniority and eligibility for promotion. He declared a new method - "the 1985 method" - to apply to all examiners: as from 1 January 1985 prior industrial experience was to count at the rate of 75 per cent and be worth up to 12 years' seniority. The 1985 method was embodied in guidelines and made known in a staff circular of 2 September 1985.

The complainant, a Frenchman, did postgraduate industrial research from 1969 to 1975 and worked in biochemistry until 1981. On 1 November 1981 he joined the EPO as an examiner at grade A1. His prior industrial experience being worth five years' seniority, the maximum set in CI/Final 20/77, he was promoted on 2 November 1982 to A2. On 15 May 1984 the Principal Director of Personnel sent him a second reckoning of his seniority as from 1 January 1984, made by the 1984 method: again the figure was cut to five years, the maximum, and he was put at step 4 of grade A2. In July 1984 he was promoted to A3, step 1, as from 1 November 1984. On 10 September he wrote to the President objecting to the 1984 method on the grounds that examiners with over five years' prior industrial experience fared less well than before and those with over ten even worse. The Director answered on 7 November 1984 that his seniority had been properly reckoned. The next day his case was referred to the Appeals Committee. After the 1985 method had been announced he was given a third reckoning of seniority and was accordingly put at step 5 in A3. In its report of 23 June 1986 the Committee held the appeal to be receivable but devoid of merit and recommended rejecting it. By a letter of 7 August 1986, the impugned decision, the Director informed the complainant that the President did so.

B. The complainant's case is that the 1984 method, which reckons prior industrial experience in full up to five years discriminates against those like himself who have over ten years. He believes that the period of actual experience taken into account should have been unlimited. Even though the 1985 method did away with the maximum, he and

other examiners suffered the consequences of the 1984 method for one year. He asks the Tribunal to order that the 1985 method come into effect as from the same date as the 1984 one.

C. The EPO replies that the complaint is irreceivable. What the complainant sought in his internal appeal of 10 September 1984 was that no maximum should be set to the reckoning of his experience or, failing that, that for the purpose of determining his step his seniority should be increased by two years and six months as from l January 1984. What he now asks is that the 1985 method should come into effect as from 1 January 1984. Since that matches neither of his internal claims he has failed to exhaust the internal means of redress.

Besides, his complaint is devoid of merit. The President of the Office made a proper exercise of his discretion as to the method of reckoning the seniority of examiners and the date on which the new rules should come into effect. As the Tribunal has held, to alter such rules does not infringe the staff member's acquired rights. A balance must be struck between attracting competent staff by properly recognising their prior experience and putting too many staff at the higher steps in their grades, and that was the President's legitimate purpose in adopting the new rules. There is no reason to treat the complainant differently from other examiners. Nor was there any breach of equal treatment, a principle which applies only when staff members are in like case in fact and in law: the complainant demands comparison with examiners who, having less prior experience than he, are not in the same position in fact.

CONSIDERATIONS:

1. The complainant joined the European Patent Office in 1981 after being employed in postgraduate research and in industry, and the Service Regulations say that such prior employment shall count in reckoning seniority.

It was not in dispute that in the complainant's case the total period came to 12 years and 4 months, but the rules in force in 1981 said that not more than ten years might be taken into account and that industrial experience counted only at half rate, or up to five years, for the purpose of determining the official's starting step in his grade. On 2 November 1982 the EPO accordingly granted the complainant the five years, and the decision is not under challenge.

On 20 June 1984 the President of the Office announced new rules that took effect as from 1 January 1984: industrial experience was to count in full, but still only up to five years. The complainant's position did not alter by the new method of reckoning, but other staff with similar prior experience might in some cases have been granted the same seniority as he: for example, someone who had only five years' experience of industry and who held the same grade as the complainant would be granted the same step as he.

The complainant stated his objections in a letter of 10 September 1984. His main claim was that the five years' limit should be lifted and his subsidiary claim that, to restore parity with others, 2 years should be added to his seniority as reckoned for the purpose of determining his step. The EPO rejected his claims in a final decision of 7 August 1986 on completion of the internal appeal procedure and on the Appeals Committee's recommendation.

2. Not all the claims he made in his internal appeal are before the Tribunal because the EPO has since amended the rules yet again. By a circular of 2 September 1985 it decided that as from 1 January 1985 and for the purpose of determining step within grade industrial experience should count at the rate of 75 per cent and the maximum to be added to seniority should be 12 years.

The 1985 method meets the complainant's wishes and all he is objecting to now is his position in 1984. He asks the Tribunal to order that the 1985 method come into effect as from the same date as the 1984 one.

3. The EPO contends that the complaint is irreceivable on the grounds that the claims for redress are not the same as those that made up the internal appeal.

The Tribunal rejects the plea. As the EPO acknowledges, the claims that are before the Tribunal are covered by the ones that were before the Appeals Committee. What the complainant sought in his internal appeal was that his experience should count at 100 per cent and without limit. What he seeks from the Tribunal is in effect an order that it be reckoned at 75 per cent to give additional seniority of up to 12 years. Though he may not enlarge his claims before the Tribunal he is free to reduce them.

4. As was said above the 1984 method of reckoning seniority left the complainant's own position as it was. He may nevertheless impugn the decision because it was based on a new method of reckoning. The change is of such a kind

as to warrant challenging a method that has the effect of revising the system of steps within grade.

That is indeed how he presents his case, and his plea, and only plea, is breach of equal treatment.

What the principle requires is that everyone in like case should be governed by the same rules and get the same treatment. The Tribunal holds that it was respected in this instance. The 1984 rules applied to everyone alike, and so everyone was in the same position in law. The five-year limit applied to everyone, and the complainant, who was already subject to it, may not rely on the breach of any acquired right.

The Tribunal will of course consider also whether the purpose or even the mere effect of the rule is to put some members of the staff at a severe disadvantage. If the new method of reckoning seniority did have that effect the Tribunal would have to see whether it was warranted by broader considerations, the Organisation being allowed a large degree of discretion in the matter.

But the Tribunal need not take up the point in this case. The complainant merely asserts breach of equality and does not even contend that in fact it caused him injury. Although in the internal appeal proceedings he submitted a paper drawing a comparison between his own position and that of two others, his examples were notional and there is no evidence before the Tribunal to suggest that they are real.

The 1984 method ceased to apply from 1 January 1985. The Appeals Committee observed that under the 1985 rules the complainant had got another three years' seniority as from 1 January 1985 because his industrial experience had been reckoned at 75 instead of 50 per cent.

Accordingly the Tribunal will not entertain the plea of breach of equality.

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 Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1987.

(Signed)

André Grisel
Jacques Ducoux
E. Razafindralambo
A.B. Gardner

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