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

SIXTY-FOURTH SESSION

In re GLENDINNING

Judgment 886

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. David Glendinning against the European Patent Organisation (EPO) on 6 July 1987, the EPO's reply of 25 September, the complainant's rejoinder of 29 October 1987 and the EPO's surrejoinder of 15 February 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 38 and 116 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Considering the application to intervene filed by Mr. Sven-Erik Bergdahl on 24 February 1988 and the EPO's observations thereon of 30 March 1988;

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 was employed for seventeen years and nine months as an examiner of patents in the United Kingdom Patent Office. On 15 April 1985 he took up duty as a substantive examiner at grade A3 with the EPO in Munich. In accordance with a reckoning of his experience dated 9 March 1985 he started at step 8, with 21 months' seniority. In a letter of 7 June 1985 to the President of the Office he said that only five years, not eight, ought to have been docked from the tally of his experience in determining his starting step, which should be 10, with 9 months' seniority. The President rejected his claim and the case went to the Appeals Committee. In its report of 24 March 1987 the Committee recommended by a majority allowing the appeal and changing his starting step. But a letter to him of 4 May 1987 from the Principal Director of Personnel, the decision now under challenge, said that the President had rejected the appeal for the same reasons as he had an earlier one, Mr. Bergdahl's.

B. Though to some extent differently argued, the complainant's case is in substance the same as Mr. Bergdahl's, which was summed up in Judgment 855, under A.

He cites circular 144, which isued new guidelines by the President on the reckoning as from 1 January 1985 of the experience of A staff for the purposes of recruitment and seniority for promotion. Section II.2 of the guidelines requires eight years' experience for appointment at A3 and what is left determines the starting step. It is true, says the complainant, that if docked by the eight years his experience, which on appointment came to seventeen years and nine months, would entitle him only to step 8. But Section V says that for examiners recruited from national patent offices "the rules in force before the present rule comes into effect are applicable until 31 December 1986". The complainant observes that the earlier rules were in CI/Final 20/77 and were more favourable to him because they provide for docking only five years and so warrant a higher step. On 2/3 August 1983 the President decided to change the policy and to dock eight years on appointment to A3: the decision appears in a paper cited as 005.0L/103 Rev. 1 of 15 September 1983. In the complainant's submission not only should the President have consulted the General Advisory Committee beforehand as required by Article 38 of the Service Regulations and notifed the change to the staff, but the guidelines in CI/Final 20/77 were binding on him under Article 116 of the Service Regulations: only with the Administrative Council's consent was he free to depart from them and dock eight years instead of five.

Besides, the President was acting for the purpose of correcting what he wrongly believed to be a discrepancy between the period of seniority required for promotion to A3 - eight years - and the period that used to be deducted on appointment to A3 - five years. As the Tribunal has ruled, different criteria may be applied in reckoning experience for the different purposes.

The complainant observes that the Council approved the guidelines in circular 144 only on the strength of a promise from the President - he cites document SUEPO 19/34/85 - that examiners recruited in 1985-86 would not fare worse than former employees of national patent offices already on the staff. The President has not kept that promise: the complainant is the only examiner from the British Patent Office to have had eight years docked on recruitment, and his pay is some 500 Deutschmarks a month less than it should be.He claims starting step 10 with nine months' seniority, the corresponding increase in salary and allowances, simple or compound interest, and 3,000 Deutschmarks or one week's leave with pay in costs.

C. The EPO replies that the rule that was in force before the President issued circular 144 was his decision of 2/3 August 1983 that examiners recruited at A3 should have eight years docked before their starting step was reckoned. The procedural and substantive objections to that decision are mistaken. It was with the Council's consent and in the exercise of his discretion that the President decided to require eight years for recruitment to A3, an increase the Tribunal upheld in Judgment 657. Point 8 of CI/Final 20/77 made a link between the period docked on determining the starting grade and the period that counted towards the starting step, and that was why the President was free to demand eight years. There was no need for him to consult the General Advisory Committee, whose members might have asked that they be consulted had they so wished.

The ruling on the deduction of eight years has been consistently applied to everyone recruited since August 1983: the other recruits from the British Patent Office were offered examiners' posts prior to that date and therefore had only five years docked.

Since the decision of August 1983 affected only a few recruits at A3 who were, after all, not yet permanent employees, failure to announce it to all the serving staff did not make it unlawful.

The President has not broken any promise he made to the Council in the discussions on the new guidelines: the decision of August 1983 lawfully laid down the rules before the guidelines came into force.

D. In his rejoinder the complainant develops his pleas and doubles his claim to costs. He contends that the transitional period in which the guidelines in CI/Final 20/77 were to apply did not end, by the Council's own decision, until 31 December 1986 and that during that period the President was bound by those guidelines. Although circular 144 did bring in changes they could not, by reason of section V, adversely affect anyone from a national patent office. It is immaterial that the Council endorsed the increase in the period required for recruitment at A3 since the Council did not say that the period to be docked for the purpose of determining the step had to change too: had its intent been to confer discretion on the President for that purpose, it would have amended CI/Final 20/77. The President was under a duty to make his decision of August 1983 properly known and not leave it to employees to find out about it for themselves, especially when it made a big difference to pay. The complainant enlarges on his procedural and substantive objections to it. He accuses the Organisation of bad faith in answering the plea about consultation of the General Advisory Committee and in support he cites minutes of one of the Committee's meetings.

E. In its surrejoinder the EPO observes that the complainant has failed to suggest why the Tribunal should not follow Judgment 855 in his case. The EPO develops its earlier submissions and addresses several points in the rejoinder, submitting in particular that the minutes of the General Advisory Committee are immaterial.

CONSIDERATIONS:

1. The complainant used to work in the British Patent Office and is now an examiner at grade A3 with the European Patent Office. He is seeking review of the step he was granted on recruitment in 1985 on the strength of his reckonable experience.

2. The offer of appointment he was given on 12 March 1985 said that by the rules in force he would be graded A3, step 8, with 21 months' seniority. The appended reckoning of his experience showed that the step had been determined after docking eight years from the total.

3. Having accepted the offer, he took up duty on 15 April 1985, but on 7 June wrote to the President of the Office to ask whether the step was not wrong. Since recruitment he had learned that the transitional provisions of Article 116 of the Service Regulations held good; that his starting step should therefore have been governed by para-

graph 10 of CI/Final 20/77; and that it should have been determined, after docking only five years not eight, at step 10 with nine months' seniority. In case his claim was refused he appended an internal appeal.

4. On 8 July 1985 the President passed on his appeal to the Appeals Committee. With his consent the Committee suspended proceedings pending its report on the similar case of Mr. Sven-Erik Bergdahl (see Judgment 855 of 10 December 1987). In its report of 24 March 1987 the Committee recommended by a majority that the President allow the appeal. It observed that, whereas on Mr. Bergdahl's case opinion had split evenly and the President had had to make his own ruling, the complainant's case had proved more telling and there was now a minority of only one member.

5. By a letter of 4 May 1987 the Principal Director of Personnel informed the complainant that, after careful study of the report, the President held to the reasoning in the EPO's submissions and the position which he had taken in Mr. Bergdahl's case, and which he saw no reason to change. He rejected the appeal.

6. The complainant contends that at the date of his recruitment the transitional provisions in CI/Final 20/77 were still in force and the Administrative Council, the only body competent to amend them, had not done so. The only valid amendment of the rules, he argues, was the guidelines in circular 144; but they came after his recruitment and in any event, because of the transitional provision in point V, did not apply to a former employee of the British Patent Office. All other former employees of the British Office who are now with the EPO have had only five years docked.

7. He seeks the retroactive correction of his grading and payment of arrears of salary plus interest at 7 per cent a year. In his complaint he seeks 3,000 Deutschmarks or one week's leave with pay to make up for the free time he has spent in drafting it. In his rejoinder he says that that amount is too low and increases it to 6,000 DM.

8. In its surrejoinder the EPO cites Judgment 855, arguing that since the complainant is in the same position as Mr. Bergdahl his complaint should fail for the same reasons.

9. As for the other former employees of the British Office, says the EPO, they were recruited before the change in policy and therefore came under the old rules. Besides, the complainant was not treated unfairly since he was told the terms of his appointment beforehand and consented to them.

10. The complainant was recruited from the British Office before the guidelines in circular 144 came in but in the course of a period in which the guidelines had retroactive effect. For the reasons stated in Judgment 855 under 12 and 13 the Tribunal holds that he was governed by the rules in force before circular 144 and at the time of his recruitment.

11. Also in that judgment, under 16, the Tribunal upheld its earlier ruling in Judgment 657 of 18 March 1985 (in re Metten and others): there was nothing improper about applying the eight-year rule, which was indeed in keeping with the Administrative Council's guidelines. Though the complainant has to some extent enlarged on earlier pleas on the material issue, nothing he adds affords any reason for changing what the Tribunal has already ruled. He had no right to fare better on the strength of a method of reckoning that had been superseded by the time he took up duty, the less so since he had been told of the terms of appointment in force at the time and had consented to them.

12. Since his complaint fails so do his claims to financial compensation and costs.

The application to intervene

13. On 24 February 1988 Mr. Bergdahl, also a substantive examiner at the EPO, applied to intervene in this case. He asks the Tribunal not to follow the judgment which it gave on his own complaint - No. 855 of 10 December 1987 - and which he believes to be mistaken. He states the reasons why he submits the Tribunal should review its ruling on the matter.

14. The Organisation replies that the application is irreceivable because its purpose is to get the Tribunal to reconsider an issue on which it gave a final ruling with regard to the applicant in Judgment 855. The application is, in its submission, precluded by the res judicata rule.

15. Article 17(2) of the Rules of Court says that anyone to whom the Tribunal is open may apply to intervene in a case "on the ground that he has a right which may be affected by the judgment to be given". Since the rights Mr.

Bergdahl is relying on in his application were ruled on once and for all in Judgment 855, the res judicata rule bars him from raising the same issues again by other means and his application is therefore irreceivable.

DECISION:

For the above reasons,

The complaint and the application to intervene are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner

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