

## SIXTY-FIFTH SESSION

### *In re* BESLIER (No. 2)

#### Judgment 943

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Louis Maurice Beslier against the European Patent Organisation on 19 April 1988, the EPO's reply of 8 July, the complainant's rejoinder of 23 August and the EPO's surrejoinder of 10 October 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 48, 49(11), 49(12), 49(13), 107 and 121 of the Service Regulations of the European Patent Office, the secretariat of the EPO and Chapter III, particularly Articles 4, 5, 9.1, 9.2 and 9.3 of the Agreement on the integration of the International Patent Institute into the European Patent Office;

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 rules on determining the step and seniority of EPO officials on promotion are in Article 49(11) to (13) of the Service Regulations, which read:

"(11) Subject to the provisions of paragraph 8, a permanent employee who obtains a higher grade shall be appointed to the lowest step in the new grade which carries a higher basic salary than that received in his former grade and step increased by the equivalent of one 12-monthly incremental step in his former grade in the case of Categories A, B and C and one 18-month incremental step in the case of Category L.

(12) Advancement of the next step in the higher grade shall be granted

a) after the period of time set out in Article 48 for advancement in incremental step, reckoned from the date of appointment in the higher grade, or

b) after the period of time at the end of which the permanent employee concerned would have reached the next step in his former grade if this period of time is shorter and if the difference between the salaries before and after appointment in the higher grade is less than twice the value of the step he occupied in his former grade.

(13) In no case may the obtaining of a higher grade by a permanent employee result in a reduction in his total net remuneration."

The former International Patent Institute was brought into the European Patent Office as at 1 January 1978 in accordance with the Agreement on integration. The terms of transfer of former staff of the Institute to the EPO appear in Chapter III of the Agreement. Articles 9.1 and 9.2 in Chapter III provide that the transferred official shall receive a "compensatory allowance" equal to "the difference between the basic salary corresponding to the step which [he] would have reached in the grade on the Institute scale occupied at the time of transfer and the basic salary corresponding to the step reached" in his grade at the EPO. Article 9.3 says that payment of the allowance shall cease on promotion, but in his new grade the official shall get the step "carrying the basic salary which is equal to or immediately above" his former pay. Article 121 of the EPO Service Regulations provides that in case of conflict it is Chapter III of the Agreement that shall prevail.

The complainant, who is a French citizen, joined the Institute in 1972. He was transferred to the EPO on 1 January 1978 and put at grade A2. He was later promoted to A3 as from the same date. On 16 December 1986 he was informed that he was to be promoted as at 1 January 1987 from the last step - step 11 - in A3, where he had twelve months' seniority, to step 8 in A4, with no seniority.

By a letter of 29 January 1987 he lodged an internal appeal against that decision under Article 107 of the EPO

Service Regulations, asking that at step 8 in A4 his seniority be twelve months. In its report of 23 November 1987 the Appeals Committee recommended rejecting his appeal. At the date of filing this complaint, 19 April 1988, he had not yet received the President's decision.

B. The complainant submits that as a former official of the Institute and in accordance with Article 9 of the Agreement he would, had he remained in A3, have got the compensation allowance after spending 24 months at step 11 in that grade and the grant of the allowance is tantamount to the creation of another step, "11 bis". He should therefore have been granted twelve months' seniority at his step in the new grade and has been denied one year's seniority because of failure to comply with Article 121 of the Service Regulations.

He asks the Tribunal to order that he be granted twelve months' seniority at step 8 of A4 as from 1 January 1987 and that he be awarded interest on the sums due to him since that date and his costs.

C. In its reply the EPO submits that since the complainant was at the last step in A3 at the time of promotion 49(12)(b) did not apply. The grading system makes no special provision for taking account of a fictitious step.

Nor does the complainant's status as a former Institute staff member help his case. Since the Agreement on integration does not cover the contingency it is the EPO Service Regulations that apply.

Those regulations having been properly applied, the complaint is devoid of merit.

D. In his rejoinder the complainant observes that the Organisation's case glosses over a problem facing several former employees of the Institute who, at the EPO, even if their performance is above average, cannot help being kept at the top step of A3. Such discriminatory treatment is largely due to failure to adapt their grading according to the Agreement to the criteria for promotion at the EPO. The solution lies in treating the compensation allowance as an additional step and it is not at odds with Article 49(12)(a).

E. In its surrejoinder the EPO enlarges on the pleas in its reply. It submits that there is no discrimination between former Institute employees and directly recruited EPO staff. The same rules on the reckoning of seniority apply to everyone, and because many were taken on at a high grade officials in both groups may spend a long time at the last step in A3.

#### CONSIDERATIONS:

1. On 1 January 1987 the complainant was promoted from grade A3, step 11, with twelve months' seniority, to grade A4, step 8, with no seniority. He is appealing against the decision to give him no seniority at step 8 in his new grade and seeks to have his twelve months' seniority carried forward.

2. Article 49(12) of the Service Regulations reads:

"(12) Advancement of the next step in the higher grade shall be granted

a) after the period of time set out in Article 48 for advancement in incremental step, reckoned from the date of appointment in the higher grade, or

b) after the period of time at the end of which the permanent employee concerned would have reached the next step in his former grade if this period of time is shorter and if the difference between the salaries before and after appointment in the higher grade is less than twice the value of the step he occupied in his former grade."

3. Article 48 provides that incremental steps in A2, A3, A4 and A5 shall be granted every year from 1 until the employee reaches 7 and every two years thereafter. Since there are only eleven steps in A3, the complainant on reaching step 11 was unable to advance further unless promoted to the next grade, promotion being not automatic but by selection.

4. The complainant argues that as a former official of the Institute he would, after serving for twenty-four months at step 11 in A3, have been paid a residual compensation allowance under Article 9 of the Agreement. He says that that amounts in effect to a step "11 bis" which was ignored on his promotion to A4. He further says that when he was promoted from A2 to A3 he did not benefit from the "jump" in step provided for by Article 49(12) of the Service Regulations.

5. Article 4 of the Agreement states that former officials of the Institute are subject to the rules and regulations of the EPO except insofar as the Agreement otherwise provides. Article 5 deals with the allocation of grade and seniority to Institute officials on transfer to the EPO and says nothing of promotion. Promotion and the calculation of seniority and step on promotion are therefore governed by the EPO Service Regulations. Article 9 of the Agreement deals with remuneration and provides for the payment of a compensation allowance to Institute officials, to be added to their basic salary. Paragraph 3 of the article provides that in the case of promotion the allowance ceases to be paid, and the step allocated in the new grade is the one that corresponds to the total of basic salary and allowance paid before promotion. The step may not be lower than the one prescribed under 49(11) for an official who does not get the allowance. If the total of basic salary and allowance before promotion is greater than the remuneration at the top step in the new grade the official is put at that step. The difference between the total of the former basic salary and allowance and the new basic salary is paid in the form of a residual compensation allowance.

6. On 1 January 1978 the complainant was transferred from the Institute to the EPO at grade A2, step 5. In accordance with the guidelines in document CA/25/79 he was later promoted to A3 with effect from the same date and the allowance as such thereupon ceased to be paid to him. If there was any error - which the EPO denies - in calculating his step on promotion to A3, it is too late for him to object to it since the claim is long since time-barred.

7. It is not clear on what grounds he is claiming that a residual compensation allowance would have become payable to him after two years at step 11 in grade A3. But even if it would, that does not help his case. Article 49(12) refers to "the next step in his former grade". The reference is to the grades and steps provided for in the EPO Service Regulations. Even if additional remuneration is payable to a former Institute official after reaching the last step in his grade that does not create a new step in the grade for the purpose of the EPO Regulations.

8. The complainant was promoted in accordance with 49(11) to the lowest step in A4 which carried a higher basic salary than what he had received at his step in A3 increased by one twelve-monthly incremental step in that grade. His seniority in his new grade is therefore governed by Article 49(12)(a) and he must wait two years for his next incremental step. Article 49(12)(b) cannot apply because there was no further step in his former grade.

9. No breach of the principle of equal treatment may be derived from the fact that grade A3 has only 11 steps. DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

(Signed)

Jacques Ducoux  
Mohamed Suffian  
Mella Carroll  
A.B. Gardner