

SIXTY-SIXTH SESSION

In re HUNTER (No. 3)

Judgment 966

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Miss Eileen Elsie Hunter against the European Patent Organisation (EPO) on 12 September 1988, the EPO's reply of 22 December 1988, the complainant's rejoinder of 2 March 1989 and the EPO's surrejoinder of 7 March 1989;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 49(11) and (12) 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. Article 49(11) of the EPO Service Regulations provides that on promotion a permanent employee in category A shall be appointed to the lowest step in his new grade which carries a higher basic salary than what he received before plus the equivalent of one 12-monthly incremental step in his former grade.

As Judgment 672 states, under A, the complainant left the United Kingdom Patent Office to take up duty with the EPO in Munich on 11 January 1982 as a grade A3 examiner of patents. She was promoted to grade A4 as from 1 May 1987. By that date she had reached step 11 - the last step - in A3 and gained 55 months' seniority at that step. By a decision dated 22 July 1987 she was granted step 8 in A4, with no seniority, at the date of promotion. On 1 September 1987 she filed an appeal asking the EPO to count the 55 months she had served at the last step of A3 and claiming step 10 in A4 with seven months' seniority: i.e. two further biennial steps accounting for 24 months each, and the seven months left over. Her appeal was referred to the Appeals Committee, which in a report of 27 April 1988 unanimously recommended rejecting it. By a letter of 14 July 1988, the decision impugned, the Principal Director of Personnel informed her that the President of the Office had rejected her appeal.

B. The complainant points out that Article 49(11) does not say that seniority gained at the step in the former grade shall be discounted in determining the step due in the higher grade on promotion. Since she would have got another two steps in A3 had they existed - each step being equivalent to 24 months at that level - she should have got another two steps in A4 and, since seven months are left over, she should have got a third step after only another seventeen.

Her first plea is that her position is covered by 49(12), which reads:

"Advancement of [sic] the next step in the higher grade shall be granted

...

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."

In her submission that provision applies because the difference between her salary before and her salary after promotion was only 385 Deutschmarks, or less than twice the value of the step she had held in A3.

Secondly, she contends that the reckoning of her step is in breach of the principle of equal treatment since someone promoted A4 before reaching the top of A3 or recruited at A4 would not lose the 55 months' seniority as she has.

Thirdly, she cites the guidelines approved by the Administrative Council of the EPO in June 1980 and set out in CA/20/80 and CA/PV.8 on career policy for staff in categories A and L. According to paragraph 16 of CA/20/80,

although experience gained before the age of 25 does not count towards seniority for promotion from A3 to A4, it does count in determining the step due on such promotion. The implication is that the 55 months must count towards the complainant's step in A4. The rule in paragraph 16, which was in force at the date of her recruitment and has since been upheld in Judgment 908, on her second complaint, induced her to accept appointment. She therefore alleges breach of an acquired right to have the 55 months count in full.

She claims appointment to step 10 with seven months' seniority as at 1 May 1987, consequent arrears of pay and an award of 2,000 Deutschmarks in costs.

C. The EPO replies that the decision is correct in law. It submits, first, that 49(12)(b) does not apply because there was no "next step" in the complainant's former grade: as the Tribunal held in Judgment 943 (in re Beslier No. 2), the reference is to the steps provided for in the Service Regulations, not to fictitious ones.

Secondly, there was no breach of equal treatment since, again according to Judgment 943, no such breach may derive from there being only 11 steps in A3.

Thirdly, there was no breach of paragraph 16 of CA/20/80, which she misconstrues. All it means is that promotion to A4 of staff recruited before the age of 25 is delayed by the period of their service before that age, but once they have enough seniority over that age to qualify for A4 their step in that grade will be governed by 49(11) and their service before 25 will count in full. Paragraph 16 was correctly applied in the complainant's case: her step in A4 was determined according to the experience she had by then acquired, whether before or after the age of 25.

D. In her rejoinder the complainant says that before she accepted the EPO's offer of appointment an officer in the British patent office explained that because of a recent change in the rules she would no longer qualify for A4 and would have to spend some years at A3 before reaching A4, but that the disadvantage would vanish on promotion, when she would reach the position she would have had had she been recruited, at A4, under the old rules. She took that to mean that her step on promotion to A4 would take account of her experience in full, including reckonable service before the age of 25, and that was what induced her to accept the offer of appointment at A3.

Although in the light of Judgment 943 she may not be entitled to have the 55 months counted, she is still entitled to the 43 months which she served in the British office before the age of 25, and which did not count in determining her starting grade. Besides, she was not aware of 49(12) until she took up duty. She should have been granted on promotion at least step 9 with 19 months' seniority.

As to the guidelines in CA/20/80, she points out that according to paragraph I.3 "years served below the age of 25 are then [viz. on promotion from A3 to A4] fully taken into account and provide an advantage of one or more steps ...". Though the EPO says that her service in the British office before the age of 25 counted towards her step in A4, the "calculation of incremental step on promotion" dated 22 July 1987 shows that that is not so.

Besides having severe financial effects, the loss of the 55 months precludes further promotion.

She presses her claim to the counting of 55, or at least of 43, months in reckoning her step in A4.

E. In its surrejoinder the Organisation observes that staff of national offices have no authority to commit the EPO as to terms of appointment.

Paragraph 16 of CA/20/80 was properly applied in the complainant's case, in which the "former grade and step" mentioned in 49(11) means A3, step 11. In determining step on promotion to A4 the EPO does not work out the fictional step a staff member would have reached in A3 if the reckoning of his starting step had discounted his experience before the age of 25, and the staff member promoted to A4 does not lose any prior experience for the purpose of reckoning his step.

The complainant's allegation that she will get no further promotion is mere surmise.

Her claim to the counting of the 55 months fails under 49(12)(a), and so does her subsidiary claim to the counting of the 43 months under paragraph 16 of CA/20/80: both provisions were correctly applied.

CONSIDERATIONS:

1. The complainant joined the EPO on 11 January 1982 at grade A3. With effect from 1 May 1987 she was promoted from A3, step 11, with 55 months' seniority, to A4, step 8, with no seniority. She submits that she should have been promoted to grade A4, step 10, with 7 months' seniority.

2. Promotion is governed by Article 49 of the EPO Service Regulations, which provides in paragraph 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 ..."

Paragraph 8, which deals with promotion from grade A1 to A2, does not apply to the complainant's case, and paragraph 11 mentions grade and step, but not seniority.

3. The complainant's first argument is that since she had 55 months' seniority at step 11 of her original grade, which is equivalent to over two 24-monthly steps, and since she would have already gained another two steps in that grade had they existed, she should have been granted the two further steps on promotion to A4, or step 10, and seven months' seniority at that step.

The short answer is that the Service Regulations do not provide for the computation of notional steps in dealing with promotion. The reality is that the complainant was promoted from the last step of grade A3 - step 11 - to grade A4. Article 49(12)(b), under which she is claiming twice the value of the step in her former grade, cannot apply because it deals solely with "the period of time at the end of which the permanent employee concerned would have reached the next step in his former grade". In the complainant's case there was no "next step".

4. She further contends that the refusal to award her the additional steps or additional seniority at step 8 of her new grade is in breach of the principle of equality because she has been given credit for four years and seven months' seniority less than someone who is promoted to grade A4 before reaching the last step of A3.

In support of this plea the complainant appends to her rejoinder an affidavit stating that an official of the British patent office concerned with recruitment for the EPO had informed her that because of a change in the rules she would be in grade A3 instead of A4 but that that initial disadvantage would disappear on her promotion to A4, when she would regain the position she would have had if she had been recruited under the old rules.

The complainant is mistaken as to the legal effect of any assurance she alleges she got about how the Organisation would apply its rules on promotion: if not authorised by the Organisation, such an assurance cannot be binding.

She is also mistaken as to the meaning of the term "the lost years" in the guidelines in CA/20/80 on career policy for category A staff: the term relates to experience prior to the age of 25 years, not to time spent at the top of A3.

5. The complainant's claim to appointment on promotion to A4 at step 10, with seven months' seniority therefore fails, as do her subsidiary claims to outstanding salary and other emoluments and to costs.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, 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 27 June 1989.

(Signed)

Jacques Ducoux
Mella Carroll

William Douglas
A.B. Gardner

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