

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

## FIFTY-SIXTH ORDINARY SESSION

In re MAUGAIN (No. 4)

Judgment No. 668

### THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint brought against the European Patent Organisation (EPO) by Mr. Christian Paul André Maugain on 15 October 1984 and corrected on 30 November, the EPO's reply of 20 February 1985, the complainant's rejoinder of 29 March and the EPO's surrejoinder of 15 May 1985;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant joined the staff of the International Patent Institute in 1970 and on 1 September 1971 was promoted to grade A7. A reckoning of his professional experience was made on 17 February 1972. He was transferred to the EPO on 1 January 1978 at grade A2 and has since been promoted to A3. On 22 February 1984 he submitted an appeal in the form of a letter to the President of the Office asking for review, in the light of what the Tribunal had said in Judgment 572, of the reckoning of his experience for the purpose of determining his grade, step and eligibility for promotion; he claimed arrears of pay in consequence. In Judgment 597 of 12 April 1984, on the complainant's second complaint, the Tribunal held that the President of the Office had erred in law in assimilating military service and technical co-operation service of the kind the complainant had done in 1969-70 in the French Embassy in Bonn, and his case was sent back to the President for review. On 19 June 1984 the President informed him that the period of his service in Bonn was not deemed useful to the exercise of his EPO duties and would be discounted. He wrote to the President on 2 July urging his claims. The Principal Director of Personnel replied on 24 July that the period would be counted after all at half rate in determining his grade and eligibility for promotion, but not his step; a new reckoning would be sent to him shortly; his claims of 22 February 1984 were deemed to be satisfied; and the matter was closed. The new reckoning, dated 20 August, made no change in the determination of step and is the decision said to be impugned.

B. The complainant observes that other former officials of the International Patent Institute have had technical co-operation service counted in the reckoning of experience and so have fared better than himself. There is therefore breach of the principle of equal treatment and wrongful damage to his career and career prospects. He invites the Tribunal to set aside the decision taken by the Director-General of the International Patent Institute on 17 February 1972 determining his professional experience and to order the President of the EPO to award him Institute grade A7, step 3, with 22 months' seniority, as from 1 September 1971, and financial compensation; failing that, to quash the President's decision of 7 December 1982 and order the President to award him grade A7, step 10, with six months' seniority, as at 1 January 1978 and financial compensation, and to review his career status, including the effect of the new reckoning resulting from the decision of 24 July 1984 on the possibility of promoting him to A4 as from some date in 1978-81.

C. The EPO replies that the complaint is irreceivable. The claims which go beyond those set forth in the complainant's internal appeal of 22 February 1984 are irreceivable under Article VII of the Statute of the Tribunal for failure to exhaust the internal means of redress. Insofar as his claims do form part of his internal appeal they are irreceivable under the rule of *res judicata* because they were put forward in his second complaint and dealt with in Judgment 597. Judgment 572, on which he relies, can have no effect on the receivability of any claim. His claim as to his period of technical co-operation service is irreceivable, being premature his internal appeal was made on 22 February 1984 before the decision of 24 July 1984 to count the period at the rate of 50 per cent was taken, and he failed to file an internal appeal against that decision. The EPO reserves the right to argue the merits should the Tribunal declare any of the claims receivable.

D. In his rejoinder the complainant admits that his appeal of 22 February 1984 goes beyond the matter of counting his technical co-operation service but submits that the EPO's procedural objections to receivability are a quibble: the claims in his second complaint make plain his good faith, and the procedural flaw is, he submits, one the Tribunal may excuse in the circumstances in the interests of a fair solution to the whole question.

E. In its surrejoinder the EPO points out that the rejoinder contains no satisfactory answer to the arguments on receivability in its reply, and it accordingly again invites the Tribunal to dismiss the complaint.

## CONSIDERATIONS

1. The complainant joined the International Patent Institute in 1970 and was transferred to the European Patent Office on 1 January 1978 when the two organisations were amalgamated. The EPO took a long time to reckon his professional experience, and not until 1 February 1982 did it determine his seniority in his grade. Being dissatisfied with the decision and having had his internal appeal rejected, he filed a complaint with the Tribunal.

On 12 April 1984 the Tribunal delivered judgment on two sets of claims by the complainant.

It dismissed as irreceivable his claims relating to a period of employment before the age of 25 on the grounds that he had failed to file an internal appeal against the decision of 1 February 1982 under Article 106 of the Service Regulations.

But it quashed the decision of 1 February 1982 on the grounds of a mistake of law insofar as that decision had discounted in reckoning the complainant's experience a period of

national service discharged in the form of technical co-operation. It referred the complainant to the President of the EPO for review of his administrative status.

2. Before the Tribunal had delivered judgment, however, the complainant had again submitted his claim to the EPO. On 20 December 1983 the Tribunal had allowed a complaint by another EPO official who had claimed that his technical co-operation service should be taken into account in reckoning his professional experience. As soon as he learnt of that judgment the complainant wrote to the EPO, on 22 February 1984, asking that he be granted the same treatment as the other official. He further states that that claim was followed by another dated 28 February, and although he does not produce the text, the EPO does not deny its existence. In any event the EPO refused the complainant the benefit of the Tribunal's ruling in favour of the other official. The complainant is challenging that decision.

3. His claim fails. What he is seeking was refused by the decision of 1 February 1982 on the reckoning of his experience. As was stated above, the judgment of 12 April 1984 dismissed the claim because he had failed to exhaust the internal means of redress provided under the Service Regulations.

The claim is now time-barred. The decision of 1 February 1982 was notified to the complainant not later than 5 April. Indeed an internal appeal would have been time-barred long before he actually submitted one in February 1984. That another official, who observed the time limits, was successful does not remove the purely procedural obstacle.

4. But the complainant is also challenging the decision which the EPO took following the judgment of 12 April 1984 as to the reckoning of his national service.

The EPO answers that the claim is irreceivable because it does not come within the scope of the claim he made in February 1984.

The complainant was of course not demanding in February 1984 the application in his favour of a ruling which the Tribunal had not yet made. But he did not remain idle after the judgment of 12 April 1984 came to his knowledge. Although he does not produce the text of his claim, the EPO wrote to him on 24 July 1984 to say it had decided to take account of the period of his national service at the rate of 50 per cent. Its decision, which is in the dossier, begins: "Further to our correspondence regarding the reckoning of your professional experience and in particular your letter of 2 July 1984..." Thus an internal appeal was indeed submitted, even though the Tribunal does not know exactly how it was framed. And it was in response to that appeal that the EPO gave the complainant partial satisfaction. The appeal was not time-barred in the circumstances of the case.

5. The EPO has not replied on the merits. It has stated that it wishes to be allowed to argue the merits should the Tribunal hold the complaint receivable. Since in part it is, the Tribunal authorises the EPO to reply on the merits. It orders that the written proceedings resume with regard to the claim relating to the reckoning of the period of the complainant's technical co-operation service. Since the EPO no longer challenges the taking into account of such a period, the further briefs shall relate to the number of months of further experience to be allowed and the consequences for the complainant's status.

DECISION:

For the above reasons,

1. The Tribunal orders that the written proceedings resume with regard to the claim relating to the reckoning of the complainant's technical co-operation service.
2. The other claims are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 19 June 1985.

(Signed)

Andre Grisel

Jacques Ducoux

Devlin

A.B. Gardner