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

SIXTY-THIRD SESSION

In re BERGDAHL

Judgment 855

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Sven-Erik Bergdahl against the European Patent Organisation (EPO) on 4 March 1987, the EPO's reply of 22 May, the complainant's rejoinder of 22 June and the EPO's surrejoinder of 9 September 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 38(3) and 116 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. The complainant, who used to work in the Swedish Patent Office, applied in mid-1984 for employment with the EPO. In a letter of 21 December 1984 the Principal Director of Personnel offered him a post in Munich as a substantive examiner from 1 April 1985. He was to start at grade A3, step 7, with nineteen months' seniority at that step. In his reply of 15 January 1985 he accepted the offer of appointment and agreed to the starting date and grade but said he thought he should be at step 8, not 7. Personnel wrote back on 4 February confirming step 7. In a letter of 12 February the complainant again objected, but on 20 February Personnel upheld its decision. He duly took up duty on 1 April and submitted an appeal to the President of the Office on 20 May 1985 against his starting step. On 5 June he was given a new reckoning of his professional experience which corresponded to A3, step 7, with 23 months' seniority at that step. In the Appeals Committee's report of 25 September 1986 the majority recommended allowing the appeal and altering the complainant's starting step. By a letter of 15 December 1986, the impugned decision, the Principal Director of Personnel informed him that the President had rejected the recommendation and his appeal.

B. The complainant cites circular 144 which announced new guidelines, issued by the President of the Office on 1 August 1985 as from 1 January 1985, for reckoning the experience of A staff for the purposes of recruitment and promotion. Section II.2 requires eight years' experience for appointment at A3 and what is left over counts in determining the step. The complainant concedes that by that rule his experience, which at recruitment came to 17 years and 7 months, would, with the eight years docked, warrant only step 7 in A3. But a transitional provision, section V, provides that for substantive examiners recruited from national patent offices "the rules in force before the present rule comes into effect are applicable until 31 December 1986". In the complainant's submission the earlier rules were in the guidelines in CI/Final 20/77. Paragraph 10, which provides for docking only five years, is more favourable to him because it entitles him to a higher step. On 2/3 August 1983 the President decided as a matter of policy that thenceforth eight years should be docked from experience on recruitment to A3, and the decision appears in an internal paper, 005.02/103 Rev. 1 of 15 September 1983. Yet the guidelines in CI/Final 20/77 were binding on the President under Article 116 of the Service Regulations; he had no right to depart from them save with the Administrative Council's consent; and he should have docked only five years, not eight, from the complainant's experience.

Moreover, he took his decision for the mistaken purpose of removing what he thought was an unwarranted discrepancy between the number of years - eight - required for promotion to A3 and the number of years - five - that used to be docked for recruitment at A3: the Tribunal has upheld the application of different criteria in reckoning experience for recruitment and promotion.

The complainant observes that he was the only examiner from the Swedish national patent office to have eight years docked and that the President ought to have told the staff of his decision of August 1983 to change the rule.

He seeks to refute the arguments in the Organisation's reply to his internal appeal.

He asks for the determination of his starting step in A3 in accordance with paragraph 10 of CI/Final 20/77 and payment of the corresponding increase in his salary and allowances as from 1 April 1985, plus compound interest, and an award of 1,000 Deutschmarks in costs.C. In its reply the EPO contends that the rule that was in force before circular 144 went out was the President's ruling of 2/3 August 1983 that A3 recruits would have eight years docked, not five, before their starting step was determined. As the dissenting member of the Appeals Committee observed, the complainant's substantive and procedural objections to the ruling of 1983 are unfounded. It was with the Council's consent and in the exercise of his discretion that the President increased to eight the number of years required for recruitment at A3, and indeed the Tribunal upheld that increase in Judgment 657. Because of the connection point 8 of CI/Final 20/77 made between the experience docked on determining the grade and the period that counted in determining the step the President was also free to increase the period from five to eight years, and that is just what he did in August 1983. The complainant is mistaken to allege unequal treatment: the ruling on the deduction of eight years has been consistently applied to everyone recruited since August 1983: five years were docked only where someone had been offered an examiner's post before that date.

The ruling affected, not A staff in general, but only a few recruits at A3, who were, after all, not yet permanent employees, and it was enough to tell them in the individual letter of appointment. Failure to publish the ruling did not make it unlawful.

D. In his rejoinder the complainant enlarges on his original arguments and seeks to refute the Organisation's. In his submission it is immaterial that the Council endorsed the President's increasing from five to eight years the period of experience required for recruitment at A3 since the Council did not say that the number of years to be docked for the purpose of determining the step had to change too. The President ought to have invited the Council to amend the guidelines. In referring to the earlier rules the transitional clause in the guidelines in circular 144 must mean rules that were lawfully in force: the ruling of August 1983 was unlawful from the outset and so the only rule that matters is paragraph 10 of CI/Final 20/77.

E. In its surrejoinder the EPO develops its case and answers the arguments in the rejoinder, which it believes to be mistaken. It again invites the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS

1. The complainant, who used to work in the Swedish Patent Office, has since 1985 been a search examiner at grade A3 at the EPO. He is seeking review of the step he was granted on recruitment on the strength of his prior professional experience. He was appointed at about the same time as the EPO brought in new rules on the matter: circular 144 informed the staff of new guidelines, issued by the President of the Office on 1 August 1985 as from 1 January 1985, for the reckoning of prior experience on appointment and for the purpose of promotion. It will therefore be useful to begin with a chronological account of the dispute.

The facts

2. The complainant applied to the EPO for employment on 20 July 1984 and by a letter of 21 December the Principal Director of Personnel offered him a post as an examiner at grade A3, his starting step to be 7, with 19 months' seniority, "in accordance with the rules currently in application". In a letter of 15 January 1985 he accepted but stated reservations about his step, which he said ought to be 8, with 19 months' seniority, because of his time in the Swedish Patent Office. In its reply of 4 February 1985 the EPO confirmed what it had said before: his total reckonable experience would be 15 years and 7 months by the proposed date of his appointment, the 8 years' experience required for admittance to A3 had to be subtracted, and 7 years and 7 months were left for the purpose of determining his starting step in A3. The Administration held to its position in further correspondence, but at no time did it tell the complainant the legal basis of the decision.

3. The complainant took up duty on 1 April 1985 and lodged an internal appeal with the President of the Office on 20 May. In his appeal he relied on Article 116 of the Service Regulations, which says that the recruitment procedure and conditions applicable to examiners in category A shall be determined by the President "having regard to guidelines laid down on this matter by the Administrative Council". The complainant contends that the relevant guidelines are in CI/Final 20/77; that according to paragraph 10 the starting step in A3 must ordinarily be reckoned by docking 5 years from reckonable experience and taking the balance to determine the step; and that on

account of his prior experience his starting step should have been 10.

4. The President referred his internal appeal to the Appeals Committee. In a report dated 25 September 1986 the Committee recommended by a majority allowing it and changing his starting step according to the five-year rule in CI/Final 20/77. The Committee held that by the time that the complainant had taken up duty the EPO had indeed been applying the eight-year rule for the purpose of determining the starting step of A3 officials, but that the new rule, which had come in after a meeting on 2 and 3 August 1983 of a body known as the "presidential committee", had never been properly introduced by the President: the new practice had never been committed to writing nor communicated to the staff and the General Advisory Committee whose remit is set forth in Article 38(3) of the Service Regulations had not given its opinion. The Appeals Committee observed that the decision had been revealed for the first time at its hearing of the case on 28 May 1986. The Committee concluded that the complainant's step should be determined by the guidelines in CI/Final 20/77, though it added that his own reckoning was mistaken.

5. Appended to the report was a dissenting opinion by two members of the Committee. They believed that, though the outcome of the discussion in the presidential committee had never been notified to the staff, the introduction of an instruction passed on to the competent official "may be regarded as tantamount to publication and therefore makes publication unnecessary". As to the merits, the two dissenting members thought the eight-year rule was warranted by the need to remove the disparity between the terms of appointment at A3 and the conditions for the promotion to A3 of staff recruited at A2. In their view there had been no need to consult the General Advisory Committee since no provision of the Service Regulations had been amended.

6. Having had the Committee's report, the President of the Office informed the complainant by a letter of 15 December 1986 - now impugned - that he saw no reason to reverse his decision and was therefore rejecting the appeal.

7. Circular 144 issued guidelines that had been adopted with retroactive effect from 1 January 1985 and they afford the main foundation of the complaint. Although section II.2 of the guidelines embodies the eight-year rule for determining the starting step in A3, a transitional provision in V says that for any examiner who has come from a national patent office of a member State the rules in force before shall continue to apply should he fare better by the old reckoning. That is the provision the complainant cites in support of his claim to benefit from the method of reckoning prescribed in paragraph 10 of CI/Final 20/77.

8. In its reply the Organisation relies in the main on the minority opinion expressed in the Appeals Committee on this and on a similar case. It further contends that the text of CI/Final 20/77 taken as a whole shows that paragraph 10 was merely illustrative and that in any event the figures given were the minimum; that the President was therefore free to amend them after 1980, when the Administrative Council brought in the eight-year rule (CA/16/80 and CA/20/80, approved, according to CA/PV 8f, on 6 June 1980); that the Tribunal so held in Judgment 657 of 18 March 1985 (in re Metten and others); and that the extension of the rule to the reckoning of step was therefore quite lawful.

9. The EPO argues, in answer to the plea that the change was not published, that it was enough to inform recruits one by one, as indeed it informed the complainant.

10. The Organisation cites a text it produced in proceedings on another case. In his rejoinder the complainant demurs and seeks disclosure of the full records of those proceedings so that he may comment.

The application for disclosure11. The EPO's citing a text material to a case to which the complainant was not party does impair his rights. But since the Tribunal has before it all the material evidence it will merely disregard that text, and the complainant need not be given access to the records of the other case.

The merits

12. Circular 144 was issued after the complainant's appointment. Whether the rules in the circular might validly govern the terms of his appointment is immaterial since in any event the transitional provision in section V refers to the "rules in force before" for the recruitment of category A examiners from national patent offices, such as the complainant.

13. The only issue is, as the parties acknowledge, what those earlier rules were, and it is immaterial whether they

apply ratione temporis or because of the reference to them in the circular.

14. The complainant is mistaken in contending that the guidelines in the circular require the automatic application of paragraph 10 of CI/Final 20/77. Read as a whole, that text is seen to have been provisional, intended to cover the period following the reorganisation of the EPO and so amendable in the light of experience.

15. Judgment 657, which the EPO cites, declared in 6 that the eight-year rule, which the Administrative Council had approved both for appointment and for promotion to A3, was not at variance with the texts in force at the time and that the Administrative Council had "bestowed discretion on the President to determine the number of years he thought necessary in the interests of the efficiency of the Office". The President therefore acted properly in applying the rule more broadly to cover both grade on recruitment and starting step.

16. The practice the Organisation was following when the complainant was appointed was on objective grounds lawful and in line with the rules discussed in Judgment 657. The complainant may not therefore properly claim to benefit by a method of reckoning that there was no longer any reason to apply by the time he took up duty. That would indeed have been plain to him from reading Judgment 657.

17. On the foregoing grounds the complaint must fail.

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 Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

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

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