

109th Session

Judgment No. 2951

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs T. K. against the European Patent Organisation (EPO) on 3 September 2008 and corrected on 18 October 2008, the EPO's reply of 30 January 2009, the complainant's rejoinder of 12 March and the Organisation's surrejoinder of 24 June 2009;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Circular No. 271 on the implementation of the career system for category A relevantly provides that periods of professional activity prior to recruitment to an EPO permanent post shall be credited for step-in-grade assignment and career development purposes if they correspond to that of an EPO category A post as regards type of work and level of responsibility. It also provides that such periods shall normally be credited at 75 per cent but that, in exceptional cases, the

President of the Office may credit at 100 per cent periods considered particularly relevant and useful to the Office (e.g. work at a national patent office of a Member State, or as a patent attorney or in a patent department in industry in an EPO Member State).

The complainant is a German national born in 1967. She joined the European Patent Office, the EPO's secretariat, at its branch in The Hague on 1 October 2003 as an examiner. Prior to that, from 2 September 2002 to 30 September 2003, she had worked at the Office as an external examiner assistant.

Under cover of a letter dated 9 September 2003 the Office sent the complainant an offer of appointment, in which it was stated that she would be assigned grade A1, step 1. A copy of her step-in-grade calculation was purportedly enclosed with the letter, but the complainant received no such document. On 8 December 2004 she wrote to the Personnel Department requesting that she be provided with a copy of her step-in-grade calculation on recruitment. She reiterated her request on 2 February 2005, adding that a copy of such calculation should be available for information and consultation given that previous experience may be taken into consideration for grade and step assignment purposes. The Personnel Department replied on 18 February 2005 that, although a copy of her step-in-grade calculation had not been sent to her with the letter of 9 September 2003, her grade and step had been correctly calculated under Article 11(2) of the Service Regulations for Permanent Employees of the European Patent Office. In an e-mail of 26 September 2005 the complainant's line manager explained to the Director of Personnel that he considered the complainant's experience prior to recruitment – as a publishing-house editor and as an external examiner assistant in the EPO – relevant to her work as an examiner and invited him to credit her with one year and eight months of reckonable previous experience. The Director of Personnel replied on 18 November that the Office did not consider the duties performed by the complainant prior to recruitment to be at the same level as those performed in an EPO category A post.

By a letter of 16 December 2005 to the Director of Personnel, the complainant contested the refusal to consider her work prior to recruitment as being at the category A level. She requested that it be recognised as reckonable previous experience and, in the event that her request was not granted, that her letter be treated as an internal appeal. In a letter of the same day to the Director of Personnel, the complainant's line manager reiterated his support for the complainant's request. The Director of Personnel replied to the complainant on 24 January 2006, confirming that the Office's rules concerning recognition of experience prior to appointment had been correctly interpreted and applied, and that, accordingly, the complainant's step-in-grade would remain unchanged. On 9 March 2006 the complainant wrote to the President supplementing her statement of appeal. By a letter of 30 March 2006 from the Director of the Employment Law Directorate, she was informed that the President had decided to reject her request and to refer her case to the Internal Appeals Committee. In the course of the internal appeal proceedings, the complainant extended the scope of her appeal, requesting that her earlier work as an editor-in-chief of a newspaper also be taken into account in the calculation of her reckonable previous experience.

The Committee issued its opinion on 8 April 2008. It recommended unanimously that her request concerning her work as a newspaper editor-in-chief be rejected as an inadmissible extension of the original cause of action. It also recommended, by a majority, that her request concerning her work as a publishing-house editor be rejected on the ground that it did not correspond to category A level work. However, with regard to her work in the Office as an external examiner assistant, the Committee unanimously recommended that it be recognised as relevant previous experience. A majority of its members held that it should be credited at 75 per cent – a minority took the view that it should be credited at 100 per cent. By a letter of 6 June 2008, which is the impugned decision, the complainant was informed that the President had decided to endorse the Committee's majority opinion. Under cover of a letter dated 21 July

2008, she received the definitive calculation of her reckonable previous experience, in accordance with the President's decision.

B. The complainant argues that the EPO's calculation of her reckonable previous experience was not made in accordance with the applicable guidelines contained in Circular No. 271. She contends, in particular, that the calculation is incomplete as it does not take account of her earlier work as a newspaper editor-in-chief and a publishing-house editor. With regard to her work as a publishing-house editor, she asserts that it should be recognised as reckonable experience and credited at 75 per cent. In support of her plea, she points to other EPO staff members, whose prior work as editors at the same publishing house has been recognised by the Office as relevant experience and credited at 75 per cent. She submits that, notwithstanding the President's discretionary power, decisions concerning the calculation of reckonable previous experience must conform to the principle of equal treatment.

The complainant contests the view that her request for the recognition of her work as a newspaper editor-in-chief constituted an inadmissible extension of the original cause of action of her internal appeal. She asserts that the said experience was relevant and useful to the work of an examiner and that it should therefore be credited at 50 per cent. Relying on Circular No. 271, she also asserts that her work at the Office as an external examiner assistant included core examiner tasks and that it should thus have been credited at 100 per cent.

She requests that the EPO be ordered to calculate her reckonable previous experience on the basis of the information she submitted with her job application and to make that calculation effective as from 1 October 2003. She asks, in particular, that the personal files of staff members with similar prior professional experience be consulted and that her work as a newspaper editor-in-chief and as a publishing-house editor be credited at 50 and 75 per cent respectively, and her work at the Office as an external examiner assistant at 100 per cent.

C. In its reply the EPO submits that, if the administrative decision challenged by the complainant before the Internal Appeals Committee dates back to 9 September 2003, the internal appeal was time-barred and hence the complaint must be dismissed as irreceivable in accordance with Article VII, paragraph 1, of the Tribunal's Statute. It further argues that the complainant's claims for consultation of other staff members' personal files and for recognition of her work as a newspaper editor-in-chief must also be dismissed as irreceivable under the aforementioned provision, for failure to exhaust the internal means of redress.

On the merits, the Organisation argues that the complaint is unfounded. It explains that Article 11 of the Service Regulations affords the appointing authority considerable latitude with regard to the recognition of reckonable previous experience, and that decisions on such matters are discretionary and therefore subject to limited review by the Tribunal. It considers that it was appropriate for the complainant's work as an external examiner assistant to be credited at 75 per cent and that there were no exceptional circumstances which would have justified recognition at 100 per cent. It notes, in particular, that the work did not comprise the full range of an examiner's core duties, but only part of it, and was thus not deemed particularly relevant or useful to the Office within the meaning of Circular No. 271.

The EPO also considers that the complainant's claim for the recognition of her work as a publishing-house editor must be dismissed. It points out that the duties performed by her in the course of that work did not correspond to those of an EPO category A post but rather to those carried out in the B6/B4 grade group. With regard to the complainant's allegation that similar duties performed at the same publishing house have been credited to other staff members at 75 per cent, the defendant observes that it is for the appointing authority to assess whether the duties performed were indeed comparable. It adds that the performance of different duties may justify different treatment. The Organisation further considers that the

complainant has not provided any evidence in support of her claim for recognition of her work for a newspaper as reckonable previous experience.

D. In her rejoinder the complainant asserts that, as the EPO failed to provide her with a calculation of her reckonable previous experience at the time she joined the Office, the time limit for filing her internal appeal did not begin to run at that point. Thus, her appeal was filed in good time and her complaint is receivable. She supplements her initial claim for relief and requests that she be paid the salary arrears as from 1 September 2004. She also requests that the EPO's failure to take account of her work as a newspaper editor-in-chief be considered a procedural error, in the event that her initial claim regarding that period of work is not granted.

E. In its surrejoinder the EPO maintains its position concerning both the receivability and the merits of the complaint.

CONSIDERATIONS

1. The European Patent Office informed the complainant, by a letter of 9 September 2003, that she was offered a job as an examiner and that she would be assigned grade A1, step 1. It was indicated in the letter that “[a] copy of the step calculation [was] enclosed”. She began work on 1 October 2003. More than a year later, on 8 December 2004, she requested a copy of her step-in-grade calculation on recruitment. During a telephone conversation on 5 January 2005 she was told that the letter of 9 September 2003 mistakenly indicated that a step calculation was enclosed. She repeated her request by an e-mail of 2 February 2005, noting that a copy of such calculation should be provided for information and consultation since previous professional experience is considered for grade and step assignment purposes. The Organisation replied by an e-mail of 18 February that she had been assigned to the correct grade and step given that there was no evidence of reckonable previous

experience at the time of her recruitment; it added that she could produce any documents concerning her relevant professional experience. On 26 September the complainant's line manager wrote to the Director of Personnel indicating that the complainant's experience before joining the EPO, as a publishing-house editor and as an external examiner assistant, was relevant to her work as an examiner and that she should be credited with one year and eight months of reckonable previous experience. The Director replied on 18 November 2005 that the Office did not consider the duties performed by the complainant prior to recruitment to be at the same level as those performed in an EPO category A post.

The complainant initiated her internal appeal with a letter dated 16 December 2005 in which she requested review of the decision of 18 November 2005 not to recognise her previous professional experience for the purposes of her step-in-grade assignment on recruitment.

2. In its opinion dated 8 April 2008 the Internal Appeals Committee unanimously recommended that the complainant's previous work at the EPO as an external examiner assistant "be recognised as relevant previous experience" and the majority of its members recommended that it be credited at 75 per cent. The majority also held that her previous experience as a publishing-house editor "need not be recognised as reckonable experience". With regard to her request for the recognition of her work as editor-in-chief of a newspaper, the Committee noted that it had only been raised in the complainant's written pleadings in the course of the internal appeals proceedings and therefore unanimously recommended that it be rejected as an inadmissible extension of the original cause of action. The Committee also noted: "as far as the salary effects of an actual decision on reckonable experience are concerned, it must be found, in accordance with the Tribunal's case law cited by the Office, that salary arrears can only be claimed retrospectively for a three-month period prior to the date of request (2 February 2005), i.e. in this case, from 1 November 2004. Any salary decisions taking effect before that

date, however, have become unappealable.” The complainant was informed by a letter dated 6 June 2008 that the President of the Office had decided to follow the Committee’s recommendations and to allow her appeal in part in accordance with the majority opinion.

3. The complaint raises three issues: (a) receivability; (b) recognition of the complainant’s previous professional experience as external examiner assistant at the EPO at 100 per cent, as a publishing-house editor at 75 per cent, and as a newspaper editor-in-chief at 50 per cent; and (c) the effective retroactive starting date for payment of salary arrears.

4. The complaint is receivable insofar as it concerns the complainant’s reckonable experience and salary arrears to be paid from 1 November 2004. An appeal against a decision which has recurring effects cannot be time-barred: each month in which the complainant receives her payslip, in accordance with her step-in-grade assignment, must be considered a source of a new cause of action (see Judgment 978, under 8). However, in accordance with Article 108 of the Service Regulations she may not claim salary arrears for the period prior to the three months from the date she made her request. The Internal Appeals Committee was correct in its unanimous recognition of 2 February 2005 as the date when the complainant requested her step-in-grade calculation and thus the date from which the three-month period for claiming salary arrears begins. The complainant’s proposal that her e-mail of 8 December 2004 be considered as the starting date for the calculation of salary arrears is unacceptable as it was a mere request for information. Indeed, in that e-mail she asked to be provided with a copy of her step-in-grade calculation, whereas in her e-mail of 2 February 2005 she contested the fact that her professional experience was not calculated for the purpose of her step-in-grade assignment.

5. The complainant’s claim regarding her previous experience as an editor-in-chief of a newspaper is inadmissible as it was raised

only after the initiation of her appeal, which is contrary to Article VII, paragraph 1, of the Statute of the Tribunal as well as to Article 109 of the Service Regulations.

6. The complainant's claims to have her experience as an external examiner assistant credited at 100 per cent and her experience as a publishing-house editor credited at 75 per cent are unfounded. According to Circular No. 271, section I(3)(c), periods of professional activity prior to recruitment are credited for step-in-grade assignment purposes provided, *inter alia*, that they "correspond to that of an EPO category A post as regards type of work and level of responsibility". Regarding the complainant's previous work as an external examiner assistant, the President of the Office endorsed the majority opinion of the Internal Appeals Committee, in which it was stated that, although she performed to a significant extent work which corresponded to core examiner duties, it could not be suggested that her work as an examiner assistant comprised all of the duties of an examiner. The majority of the Committee's members also stated that there was "insufficient evidence that the work as an examiner assistant must be regarded as 'particularly relevant and useful for the Office', or even that it would be appropriate to class it as such". The Tribunal is of the opinion that there is no reviewable error in the assessment of the complainant's previous professional experience. As the complainant's previous experience as an examiner assistant did not comprise all the duties of an EPO category A post, it was reasonable for the Office to credit that experience at the normal rate of 75 per cent.

7. Regarding the complainant's experience as a publishing-house editor, the Tribunal is of the view that there was no error in the decision to endorse the Internal Appeals Committee's opinion that "there [could] be no legal objection to [the] view that those activities and the type of work carried out by a project manager responsible for editorial work on an environmental encyclopaedia do not correspond to the duties assigned to a patent examiner and are not at the same level as other duties normally performed by A-grade Office staff" and

that “neither the type of work nor the level of responsibility assigned to the [complainant as a publishing-house editor] must necessarily be regarded as corresponding to a post in category A” and, thus, “need not be recognised as reckonable experience”. The Tribunal notes that in this case there is no evidence that the complainant had performed duties equivalent to those of a category A post as listed in the job descriptions of the Service Regulations for grade group A4/A1 and which could be counted towards her reckonable experience in accordance with the latter.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet