

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

FIFTY-FIFTH ORDINARY SESSION

In re ZEISLER

Judgment No. 653

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Franz Zeisler on 11 May 1984 and corrected on 21 May, the EPO's reply of 13 August, the complainant's rejoinder of 15 October 1984 and the EPO's surrejoinder of 7 January 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 4 of the integration agreement and Article 12(4) 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 material facts of the case are as follows:

A. The complainant, who is an Austrian citizen and was born on 12 December 1920, was employed at the International Patent Institute as an examiner of patents from 1956 and as head of a group at grade A4 from 1969. When the Institute was merged with the EPO, on 1 January 1978, he was transferred. In the EPO there were larger groups, each headed by a director at grade A5, but since there were fewer of them not all of those who had been head of a group at the Institute could be promoted, and in fact the complainant was one who kept his old grade, A4. He has contributed not only to the Institute and EPO pension funds, but also to the Austrian national pension scheme, and his pension is to be made up of sums from the EPO and sums from the Austrian scheme. The Administrative Council of the EPO adopted measures in 1978 and 1979 (CA/80/78 and CA/14/79) to encourage A4 heads of group to retire early: provided that they undertook to retire at the age of 60 they could choose between promotion *ad personam* to A5, the pension being calculated at the rate of 2 per cent of basic salary for each year of service, and a bonus of six months' basic salary at A4, the pension being calculated at only 1.75 per cent for each year of service. The complainant did not accept either offer, and he retired on 1 July 1983, when he was over 62. On 21 April 1983 he had written to the President asking him to invite the Administrative Council to treat him as a special case. The President refused, and on 21 March he lodged an internal appeal. In its report of 19 December 1983 the Appeals Committee recommended rejecting his appeal, and in a letter of 21 February 1984, the impugned decision, the President informed the complainant that he did so.

B. The complainant calculates that had he retired at 60 and chosen the option of promotion to A5 his pension would have been 44.37 per cent of his A5 basic salary; had he chosen the

second option -- the lump-sum indemnity -- it would have been 38.82 per cent of his A4 salary. Neither was acceptable: the Austrian part of his pension was not payable until he reached 65; and in the five intervening years he would be unable, on the partial pension, to contribute to the Austrian scheme, pay for health insurance, finance his children's education and provide a proper standard of living for his family. He submits that the President was in breach of a commitment he entered into towards him in declaring to the Council that cases like his called for special treatment. What he was offered was not to his advantage, and the President, by offering nothing better, was in breach of good faith. There is breach of the principle of equality, too, inasmuch as former A3 Institute staff promoted to A4 on transfer to the EPO have had their pension calculated at the rate of 2 per cent for each year of service without having to retire by the age of 60. There is breach of Article 12(4) of the Service Regulations, which says that an official required to perform the duties of a higher grade shall get a duty allowance. Though kept at his old grade, A4, he was in fact serving as head of a group, and his duties merited A5. He should have been promoted to A5 one year after transfer. He invites the Tribunal to order his promotion to A5, step 11, as from 1 July 1982.

C. In its reply the EPO contends that the complaint is devoid of merit. The complainant is not entitled to promotion to A5: he did not qualify since he did not retire at 60. The EPO could not afford to promote all the heads of groups transferred from the Institute, since many of them went on performing duties carrying no higher grade than A4.

Instead it offered them incentives to leave early. In approving those incentives the Council was aware of the special position of those, like the complainant, who were also contributing to a national pension scheme. To refuse him promotion to A5 was not in breach of any principle of law. Although the President had discretion to submit the whole question to the Council in the first place, the Council's decisions left him no discretion in actual cases. The EPO is not liable for the complainant's financial difficulties. There was no breach of the principle of equality since he was not in the same position as former A3 Institute staff promoted to A4 in the EPO. Nor was he entitled to benefit under Article 12(4) of the Service Regulations: the duties he was performing were correctly graded A4 at the EPO, where only the duties of a director of several groups warrant A5.

D. The complainant's rejoinder develops his original submissions and answers in detail the arguments in the reply. He explains why his case deserves special treatment, as, he contends, was recognised in a footnote on the first page of CA/14/79, which relates to the position of those entitled to pensions in part from national schemes at a higher age. He compares his duties at the Institute and at the EPO, and maintains that what he did at the latter merited A5. He enlarges on his allegations of discrimination.

E. In its surrejoinder the EPO observes that there is little new argument in the rejoinder. It seeks to correct what it regards as further mis-statements of fact. It points out that the author of CA/14/79 was not the Council, but the Administration of the EPO. It explains why the complainant's duties were more limited than those pertaining to grade A5.

CONSIDERATIONS:

1. The complainant, an Austrian citizen, joined the International Patent Institute on 1 February 1956. Under an agreement concluded on 19 October 1977 the Institute was integrated into the European Patent Organisation on 1 January 1978. The complainant had held grade A4 since 1 September 1969 and was head of a group of examiners in the search department of the Institute.

Article 4 of the integration agreement reads: "officials of the Institute shall become permanent employees of the European Patent Office ... they shall be subject to the Service Regulations, the Pension Scheme Regulations and all other provisions applicable to the staff of the Office unless this Chapter provides otherwise". In accordance with that article and a "table of equivalents" in Annex II to the agreement, the complainant was allotted the same grade at the EPO as he had held at the Institute, and he was to get the same total pay or, if the basic salary was lower, a compensatory allowance to make up the difference.

2. After the merger the EPO altered the structure of its search department, which became a "principal directorate" consisting of "directorates" each corresponding to some technical branch. It then became evident that there would not be as many directorates as there had been groups of examiners at the Institute and that the heads of group could not all be appointed directors and given the corresponding grade, A5.

Several heads of group did not become directors. In the hope of dealing with the problem the EPO introduced incentives for early retirement. Whereas the normal retirement age was 65 the Administrative Council decided to offer, in return for an undertaking to retire at 60, a choice between a higher pension rate and the immediate payment, in addition to a pension calculated at the ordinary rate, of a lump sum equivalent to several months' salary.

3. The complainant, who was one of those not promoted to director, felt he could not afford to retire at 60. He therefore declined both offers and continued to work. Only on reaching the age of 62 ½ did he apply for and receive an early pension, and by a decision of 18 March 1983 the President of the Office refused him the benefits granted to staff who retired at 60. He lodged an internal appeal, but on the recommendation of the Appeals Committee the President rejected it, on 21 February 1984.

4. To calculate his pension the EPO strictly applied the provisions of the integration agreement, the pension regulations and the Administrative Council's decisions on benefits payable to staff retiring at 60. Nor indeed does the complainant allege the breach of any of those texts.

5. The complainant's Austrian citizenship put him in an odd position. The Council has agreed that a staff member with pension rights in his own country may transfer them to the EPO. Thus EPO officials, on qualifying for a pension, may be paid a single pension which will be governed by the EPO pension rules, and by those rules alone.

But this arrangement will of course work only when there is agreement between the national authorities and the EPO. There is no such agreement applicable to Austrian citizens because Austrian law does not provide for the transfer of pension rights.

There are financial consequences where the official retires early. Austrian law provides for payment of the pension only from the age of 65, and up to that age one must continue to contribute to the Austrian pension scheme.

Over and above such difficulties there were others, as the complainant explains, and it is understandable enough that he preferred not to retire at 60, despite the worth-while benefits the EPO promised in return. In an official paper the EPO actually acknowledged the difficulties for an Austrian staff member, even though it did nothing to remove or even mitigate them.

6. The complainant's case is that by failing to suggest some way of sorting things out for Austrian officials the President disregarded the Council's instructions.

The plea fails. The President did submit a paper to the Council on 20 March 1979, but it was only for the Council's information, it made only a brief reference to the position of Austrian citizens, and it made no commitment nor any proposal for a decision by the Council. At a session it held from 14 to 19 May 1979 the Council approved a proposal made by the Budget and Finance Committee along the lines suggested by the President in document CA/14/79. But it made no provision for any special arrangements for Austrian citizens, and the President was therefore not bound to take any action whatever.

7. The complainant further submits that the President acted in breach of good faith by knowingly imposing on him an unacceptable choice.

The rules did not require the complainant to retire at 60: he could have carried on up to the age limit of 65. Of course he could not then have had the benefits due to those who left at 60, but his career would have continued as expected up to the normal age of retirement. It was his own choice that he did not leave at 60 and that he retired later, at the age of 62 ½.

The Tribunal concludes that in fact it was Austrian law that induced him not to retire at 60 and the EPO cannot be held liable on that account.

8. The complainant alleges breach of the principle of equal treatment, and in two ways.

First, he explains that some staff members were promoted without having to retire at 60. "Personal" promotion was offered to other examiners of average or even below-average performance, whereas the President refused to give the complainant personal promotion to A5 because he was unable to leave at 60.

The evidence does show the complainant's performance to have been satisfactory. But, however highly his supervisors thought of him, he was not entitled to promotion. The EPO was free to reform the department in which he was employed, and the creation of posts for directors was the normal consequence of the reform. When the President filled the posts up to the number determined by the Council, he was exercising his discretion and the Tribunal will not review his decisions unless they suffered from some flaw which warrants setting them aside, such as a clearly mistaken conclusion from the evidence.

Secondly, the complainant alleges, in support of his plea of breach of equality, that he fared less well than certain other staff members. But again the plea fails, because those staff members were not in the same position as he. He was financially better off than staff appointed to A4 after the integration of the Institute into the EPO because he was paid the compensatory allowance.

9. Lastly, the complainant pleads that the President failed to comply with Article 12(4) of the Service Regulations: "A permanent employee may be called upon to perform temporarily the duties of a permanent employee in a higher grade. From the beginning of the third month of such temporary duties he shall receive an acting allowance equal to twice the difference in basic salary between the first and second steps in his grade."

All examiners at the EPO, he contends, have access to grade A4 even if they do not have other examiners as subordinates. He himself was head of a group and, as a result of the reform of the department, duties such as his pertain to grade A5 posts for directors.

The Tribunal takes note of the duties of grade A5 directors, as set out in document 1112, and the duties which are assigned, according to the new organisation chart, to A4 officials in charge of a group, as set out in document 1113.

There are appreciable differences between the two. Although both grades are for senior examiners and the differences are more commonly of degree than of substance, it was not possible to put the complainant on a par with a director. It is hardly to be expected that reforms as far-reaching as those the EPO undertook should take effect at once. The Tribunal accordingly concludes that, though some directorates may provisionally have consisted of much the same number of examiners as the group the complainant had headed at the Institute, that fact lends no substance to his case.

The plea accordingly fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 18 March 1985.

(Signed)

André Grisel

Jacques Ducoux

E. Razafindralambo

A.B. Gardner