

FIFTY-SIXTH ORDINARY SESSION

In re HUNTER

Judgment No. 672

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Miss Eileen Elsie Hunter on 21 September 1984 and corrected on 29 October, the EPO's reply of 14 January 1985, the complainant's rejoinder of 4 February and the EPO's surrejoinder of 24 April 1985;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal and Article 108(2) 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. Having on 12 September 1981, accepted an offer of 15 July, the complainant, a British subject, became an examiner of the EPO in Munich under a permanent appointment on 11 January 1982. She was granted grade A3, step 10, with 15 months' seniority. On 2 February 1984 she lodged an internal appeal claiming grade A4 as from the start of her appointment. She alleged breach of the principle of equal treatment on the grounds that until 31 December 1980 the seniority of examiners was determined without setting any minimum age for the reckoning of experience, whereas after that date only relevant experience after the age of 25 was reckonable. Her case was referred to the EPO Appeals Committee. In its report of 10 May 1984 the Committee observed that an internal appeal must be submitted within three months of the challenged decision; in this case the appeal was time-barred. By a letter of 17 July 1984, the decision now impugned, the President of the Office informed the complainant that he endorsed the Committee's view and therefore rejected her appeal.

B. The complainant argues that her classification was in breach of the principle of equal treatment since, to her knowledge, at least one other examiner recruited after 31 December 1980 had his seniority reckoned according to the criteria which had been in force before that date, although the distinction found no justification under the Service Regulations. She invites the Tribunal to order that she be granted grade A4, as under the rules in force up to 31 December 1980 and as from 11 January 1982, and that she be paid in full the corresponding additional emoluments from that date.

C. The EPO replies that the complaint is clearly irreceivable because the complainant failed to follow correctly the internal appeals procedure and therefore to exhaust the internal means of redress. According to Article 108(2) of the Service Regulations an "internal appeal shall be lodged within a period of three months" of the decision appealed against. The decision challenged was that of 11 January 1982 appointing the complainant to the EPO at grade A3, step 10; yet she did not lodge her internal appeal until over two years later, or 21 months late. As the Tribunal has held, observance of the time limit for appeal does not depend on the date at which the complainant says he discovered the alleged breach of the law: the material date is that on which he was informed of the decision challenged. The EPO asks that it be allowed to argue the merits later should the Tribunal declare the complaint receivable.

D. In her rejoinder the complainant submits that the material date for defining the three-month time limit in Article 108(2) of the Service Regulations is that on which she became aware that she had been less fairly treated than another staff member who had also been recruited after 11 January 1982. She presses her claims.

E. In its surrejoinder the EPO contends that there is no argument in the rejoinder which in any way invalidates its contention that the complaint is irreceivable.

CONSIDERATIONS:

1. Article VII of the Tribunal's Statute provides that a complaint shall not be receivable unless the person

concerned has exhausted such other means of resisting the decision impugned as are open to him under the applicable Staff Regulations. Article 108 of the Service Regulations of the Office makes provision for an internal appeal to be lodged within a period of three months from the notification of the act appealed. A complainant who fails to appeal within this period likewise fails to exhaust the means of resistance that are open to him with the result that the appeal to the Tribunal, although it may be brought within the Tribunal's own time limit, is irreceivable under Article VII.

2. The facts in the case are that on 15 July 1981 the President of the Office offered the complainant a post as an examiner in the Office. The letter stated that the post was in grade A3 and that she would be expected to take up her duties on 11 January 1982. By letter dated 12 September 1981 the complainant accepted the offer. On 11 January the President issued and signed a formal document appointing the complainant as an examiner in grade A3 and the complainant commenced her duties accordingly.

3. On 20 December 1983 this Tribunal delivered Judgment 572 in re Wenzel in which it quashed a decision by the President concerning the promotion to a higher grade of the complainant in that case on the ground that it did not conform to the principle of equality of treatment. Also on 20 December 1983 the Tribunal delivered Judgment 575 in re Schulz in which it rejected as irreceivable under Article VII a complaint against the European Patent Office in which the complainant asserted that she had been wrongly graded. The Tribunal said:

"No doubt the complainant did not notice until March 1982 the inequality of treatment which she pleads. But according to Article 108(3) of the Service Regulations the time limit for filing the appeal in this case began at the date on which the impugned decision was notified to her, not at the later date on which she became aware of the alleged inequality."

4. On 2 February 1984 the complainant in this case transmitted a written appeal to the President against her grading of A3, contending that it violated the principle of equal treatment. On 10 May 1984 the internal Appeals Committee of the Office, relying upon Judgment 575, recommended that the appeal should be rejected as out of time. On 17 July

the President accepted this recommendation and rejected the appeal accordingly.

5. On 21 September 1984 the complainant appealed to the Tribunal against the President's decision of 17 July. The Office in their reply objected to the complaint as irreceivable under Article VII. The complainant had not argued in her complaint that the period of three months allowed under Article 108(2) of the Service Regulations had not elapsed between the date of her appointment and the date of her complaint that by it she had been wrongly graded. She anticipated the objection to receivability by arguing that the period should begin to run not from the date of notification of the decision but from the date on which she became aware that that decision did not conform with the principle of equal treatment. The Organisation in its reply pointed out that this argument had been rejected by the Tribunal in Judgment 575 cited above. In her rejoinder the complainant contended in the alternative that the notification of 11 January 1982 was not a decision but a mere confirmation of the decision to appoint made in July 1981. She contends that her letter to the President of 2 February 1984 should be treated as a request for a reconsideration of her grade after the discovery of the unequal treatment and that the President's rejection of it constitutes the decision against which she is appealing.

6. There are several answers to this contention, the first and simplest being that it is not admissible in these proceedings. When instituting any proceedings, whether in an internal appeal or before the Tribunal, the complainant identifies a decision which he or she is challenging. It is only when the decision is identified and the date of its notification ascertained that it can be seen whether or not the time limit for impugnement has been respected. A complainant before the Tribunal is not necessarily restricted to the arguments she has advanced in earlier proceedings, but she cannot change the decision she is challenging. It is not open to the complainant in this case to substitute for a decision that is time-barred another one that allegedly falls within the prescribed limits.

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 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)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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