

## FIFTY-SEVENTH ORDINARY SESSION

In re KOLBE

Judgment No. 689

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Werner Hans Kolbe on 19 February 1985 and corrected on 21 March, the EPO's reply of 7 June, the complainant's rejoinder of 4 August and the EPO's surrejoinder of 27 September 1985;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 3, of the Statute of the Tribunal and Articles 108 and 109 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 joined the staff of the EPO on 1 April 1982 as an examiner at grade A1, step 2. One year later he was promoted to grade A2, step 5, with no seniority. The reckoning of the seniority of examiners recruited after 1978 was revised in June 1984. On 26 September 1984 the complainant applied for retroactive promotion as from 1 January 1983 to grade A2, step 4, with 8 months' seniority. He is challenging an implied decision to reject that claim.

B. The complainant observes that paragraph 6 of the guidelines in Council document CA/16/80 serves as a basis for determining the grade and step of all examiners. He submits that it is unwarranted to discriminate between experience acquired exclusively in industry and experience acquired in the EPO itself. He believes that he has not been put on a par with examiners who have the same professional experience. His present claim is to "promotion to grade A2, step 4, 8 months' seniority, with retroactive effect to 1 December 1982".

C. The EPO confines the arguments in its reply to the question of receivability. The complainant filed an internal appeal on 26 September 1984, the case was referred to the Appeals Committee on 21 January 1985, and it was on 19 February 1985 that the complainant filed the present complaint. At that time the Appeals Committee had not yet reported, the case being set down for June 1985. The complainant has therefore failed to exhaust the internal means of redress prescribed in Articles 108 and 109 of the Service Regulations. Before referring the internal appeal to the Appeals Committee the President of the Office took a provisional decision on 8 November 1984 to reject the appeal; there is therefore no question of impugning any implied decision. The complaint is irreceivable.

D. In his rejoinder the complainant submits that it was another appeal, one dated 17 September 1984, which was provisionally rejected. That rejection also applied to the appeals of two other staff members who had challenged the method of reckoning professional experience. The decision did not apply to his appeal of 26 September 1984 alleging unequal treatment in the reassessment of the grade of examiners with the same experience. He presses his contention that there was an implied decision to dismiss his internal appeal.

E. The EPO maintains that the complainant is mistaken. In its surrejoinder it explains that it joined the internal appeals of two other officials with the complainant's two appeals of 17 and 26 September 1984, which all related to the reckoning of experience. The provisional decision of 8 November 1984 also rejected the complainant's appeal of 26 September. The EPO repeats that there is no question of there being any implied decision and that the internal means of redress have not yet been exhausted. The Appeals Committee is not to complete examination of the cases mentioned above until 26 September 1985, and the complaint should be dismissed as irreceivable.

### CONSIDERATIONS:

#### Receivability

1. Under the provisions of Article VII(1) of the Statute of the Tribunal a complaint is receivable only if the means of redress available under the Service Regulations have been exhausted. In accordance with its jurisprudence the

Tribunal will not apply Article VII(3) of the Statute to impose a time limit of 60 days on the resolution of an internal appeal where the Service Regulations provide for such an appeal and in so providing lay down no time limits.

2. On 1 April 1982 the complainant joined the EPO as an examiner at grade A1, step 2, and was promoted to grade A2, step 5, on 1 April 1983.

3. On 26 September 1984 the complainant wrote to the President of the EPO pointing out that, under the new method of calculating previous experience for determining grade and step, examiners with industrial experience of 12 years or more had been promoted retroactively to grade A2, step 4. He claimed that he had met this criterion on 1 January 1983, 8 months after his recruitment and demanded promotion to grade A2, step 4, with 8 months' seniority with effect from 1 January 1983. He emphasised that he was being treated unequally with respect to grade, step and promotion in comparison with examiners having the same reckonable experience.

4. On 8 November 1984 the EPO wrote to the complainant and two other officers stating that "by letter of 17-26/9/84" they had lodged an internal appeal (RI 114/84) and that it had been decided to reject the claim provisionally and refer it to the Appeals Committee.

5. The complainant filed his complaint to the Tribunal on 19 February 1985. The EPO contends that the internal appeal No. 112/84 submitted by the complainant reached the Appeals Committee on 21 January 1985, and that, no decision having been rendered by the Committee by 19 February 1985, the Tribunal should dismiss the complaint as irreceivable.

6. In his rejoinder the complainant denies that the EPO's provisional rejection relates to his internal appeal dated 26 September 1984 and asserts that the provisional rejection was in connection with a different internal appeal lodged on 17 September 1984.

7. Both internal appeals relate to the calculation of the complainant's grade and step, one with effect from 1 January 1984, the other with effect from 1 January 1983. Both are based on his previous industrial experience and both allege inequality of treatment. In its provisional rejection the EPO referred both internal appeals to the Appeals Committee as a single appeal No. 112/84. The EPO was justified in so doing because the subject-matter in each is the same and the relief sought in each is interrelated. In the event, since the means of redress available under the Service Regulations have not been exhausted in respect of the complainant's internal appeal dated 26 September 1984, the present complaint is irreceivable.

#### 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 14 November 1985.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

