

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

FIFTY-SEVENTH ORDINARY SESSION

In re HUBEAU (No. 2)

Judgment No. 690

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed against the European Patent Organisation (EPO) by Mr. Michel Ghislain Hubeau on 15 January 1985, the EPO's reply of 3 April, the complainant's rejoinder of 5 June and the EPO's surrejoinder of 23 August 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 9.3 and .5 and 20 of the Agreement on the integration of the International Patent Institute into the EPO, and Article 106(1) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant's career in the EPO is described in Judgment 574, under A. In that judgment the Tribunal referred the complainant to the President of the EPO for a new decision. The complainant is objecting to the President's new decision of 15 October 1984 to refuse him an additional step on promotion to grade A3.

B. The complainant observes that no reasons are given for the decision of 15 October 1984, and he contends that that is a breach of general principles of law, Article 106(1) of the Service Regulations and the obligation arising under Judgment 574. Alternatively, he submits that the reasons, as stated in the Appeals Committee's report, were contradictory. He repeats his former submissions about inequality of treatment, which are summed up in Judgment 574, under D. He also pleads breach of the principles of equity and good faith and of the EPO's duty of care.

He seeks the quashing of the President's decision of 15 October 1984 confirming the decision of 29 January 1982 already set aside by the Tribunal insofar as it promoted him to grade A3 with no additional step.

Subsidiarily, if the decision is not set aside, he asks for an award of damages equivalent to the value of one step throughout his career and corresponding pension rights, interest at 10 per cent a year on the sums due and 5,000 guilders as costs.

C. In its reply the EPO observes that the impugned decision of 15 October 1984 was taken in execution of Judgment 574 on completion of the internal procedure. The decision expressly

refers to the reasons given by the Appeals Committee in support of its opinion, and the Committee took up the complainant's various pleas and explained why in its view they were unsound.

Article 9.3 of the Agreement on the integration of the International Patent Institute into the EPO applies to former Institute examiners such as the complainant, and the lawfulness of the system it introduced was accepted by the Tribunal in Judgment 365. There was no inequality of treatment. The complainant did not satisfy the criteria for promotion which apply to former Institute officials. There can be no acquired right in respect of the rules on promotion. Lastly, the total remuneration of staff members like the complainant who were graded A2 after their transfer from the Institute was such that, on their later promotion to A3, they were in any event granted a higher step than examiners with equal seniority recruited directly at grade A2 by the EPO.

The impugned decision is not tainted with any of the flaws the complainant alleges, and the complaint should therefore be dismissed as devoid of merit.

D. In his rejoinder the complainant submits, as to the reasons for the decision, that each of the items of evidence to which the EPO refers itself cites some earlier text, and that the earlier texts do not actually state the reasons for the decision, barring the general question of the lawfulness of Article 9.3 of the integration agreement. The

complainant believes that his pleas were not properly considered. How, he asks, can there be equality of treatment when examiners who held grade A7 at the Institute were the only ones not to get two additional steps? He enlarges on his other pleas and presses his claims.

E. The EPO reaffirms in its surrejoinder that the Appeals Committee did deal with the merits and that the pleas it examined do relate to the complainant's particular circumstances. Although the impugned decision is the same in substance as that of 29 January 1982, it does not merely assert the authority of *res judicata*. Officials transferred from the Institute to the EPO were granted a compensatory allowance which under special arrangements was absorbed into the basic salary instead of the additional step. Like other staff transferred from the Institute the complainant enjoys the guarantees prescribed in the integration agreement (Articles 9.3 and .5 and 20). The purpose of Article 9.3 of the agreement was to remove differences in remuneration, where grade and step were the same, between officials transferred from the Institute and officials recruited directly by the EPO.

CONSIDERATIONS:

1. The complainant was employed at the International Patent Institute as an examiner at grade A7. On the merger of the Institute with the EPO he, like other examiners in the same grade, was transferred to the EPO as an examiner at grade A2 and given the salary step just above the one he had had at the Institute.

On 29 January 1982 the President of the EPO promoted him to grade A3, step 2. Realising that at the Institute he would have been granted an additional step on his first promotion, he asked for an additional step in A3. The President refused on the grounds that, the Tribunal having already ruled on the matter, the claim was *res judicata*.

After exhausting the internal means of redress the complainant came before the Tribunal. By Judgment 574 of 20 December 1983 it quashed the President's decision on the grounds that the plea of *res judicata* was mistaken and there had been an error of law. The Tribunal referred the case to the President of the EPO for a new decision. After further internal proceedings the President decided on 15 October 1984 not to alter his original position, and that is the decision now impugned.

2. The complainant's first plea is that the decision is not a reasoned one or at least that the reasons are contradictory.

Although the President has not stated the reasons, he does refer to the Appeals Committee's report of 12 September 1984, and that is admissible provided that the Committee itself gave reasons for its opinion. But the complainant submits that the Committee's opinion rests, not expressly but by unmistakable implication, on the plea of *res judicata* the Tribunal has already rejected.

To the complainant's argument that Article 9 of the Agreement on the integration of the Institute and the EPO was unlawful the Committee answered that the Tribunal had decided in Judgment 365 that the article was not. But the Committee went further than that and took up the complainant's pleas. It reasoned, first, that although he had not been given an additional step, the effect of paying him a compensatory allowance was that he was "at a higher salary step than an official recruited at A2 and later promoted to A3", i.e. someone recruited directly by the EPO. Secondly, the Committee held that "the principle of equal treatment means that those in a similar position should receive similar treatment and those in a different position different treatment": a transferred official who had held grade A7 at the Institute was not in the same position as one who had held A6. Thirdly, the Committee said it was sorry to see that nothing had come of an inquiry the EPO had made into ways of improving the career prospects of staff in the same position as the complainant, and that the Organisation was therefore under no obligation towards him on that account.

3. To read the Committee's report is to realise that the Committee did not repeat the error the Tribunal had identified in Judgment 574. The Committee's reference to Judgment 365 is a mere citation from which the Committee drew no conclusion as to the receivability of the appeal before it. In fact its reasoning is to be found in its answers to the complainant's arguments, and the first of his present pleas therefore fails.

4. The complainant's second plea is a formal flaw: the reasons for the decision were contradictory. The Committee's report concludes: "The Committee finds no evidence to suggest that the President's decision was unlawful. Indeed the complainant does not allege that it was." The complainant takes exception to the latter sentence and says it betrays a contradiction. The wording is certainly awkward, but that cannot make any difference to the lawfulness of

the President's decision: what the Committee probably meant was that it found no other evidence of unlawfulness and that the complainant had not submitted any other plea to that effect.

5. Before turning to the merits the Tribunal will define the scope of the dispute. First, the complainant has never objected and is not now objecting to the decision to give him grade A2 on transfer, a decision which is final and beyond challenge. Secondly, he is not pleading breach of acquired rights, and the principle is not at issue.

6. What he does allege is breach of the principle of equal treatment. He observes that category A officials who held A7 in the Institute and were regraded A2 on transfer to the EPO get only one additional step in the course of their career whereas all other category A staff, whether taken over from the Institute or recruited directly by the EPO, get two the Personnel Office and the Administrative Council were aware of the anomaly, he says, but nothing came of the inquiry that was supposed to be made.

7. An international official may allege breach of the principle of equality only where his position is similar both in fact and in law; if it is different he may be treated differently.

Of the complainant's two allegations of breach of equality the first is that he fared less well than others transferred from the Institute.

The Institute Staff Regulations provided for three grades for examiners, which were, in ascending order, A7, A6 and A5. Promotion was from one grade to the next, on each promotion to a higher grade an additional step was granted, and so in the course of his career the examiner obtained two additional steps. When the Institute was merged into the EPO examiners were again put in one of three grades which, in ascending order, were A2, A3 and A4. A7 and A6 examiners from the Institute were granted A2 at the EPO. Both also got a compensatory allowance, but it was higher for the A6 examiners, who had been higher up the Institute salary scale than the A7 examiners.

Like the Institute's Regulations, the EPO Service Regulations too prescribe the grant of an additional step on promotion, except, on their first promotion after transfer, to examiners transferred from the Institute to the EPO at A2. The purpose of that exception, which was provided for in the integration agreement, was to ensure that A6 examiners, who had already been given one additional step at the Institute, should not get another two in the EPO, a second on promotion to A3 and a third on promotion to A4. Although that did not hold good for A7 examiners from the Institute, they may indeed obtain only one additional step in the course of their EPO career.

8. This system is a complicated one, and the complainant picks on just one feature of it in support of his case. There is some risk in allowing such a plea that an attempt to make up for one form of unlawful treatment may give rise to some other form.

As was said above, A7 examiners from the Institute were given the same grade at the EPO as the more senior examiners holding grade A6. That prompted some of the latter to appeal to the Tribunal. The Tribunal rejected their complaints on the grounds that they had not fared less well because of the decision they were impugning than the A7 examiners. In fact the A7 examiners have lost the prospect of obtaining an additional step on their promotion to A6, but the loss does not constitute breach of any acquired right since the rules on promotion may be altered at any time. Moreover, the compensatory allowance they are paid protects them against any cut in salary, and although their allowance is less than that paid to the former A6 examiners, the main purpose is to help to preserve the difference in status which formerly existed between the two grades. If the complainant's plea were allowed, former A6 examiners might validly contend that A7 examiners had got better treatment.

This way of awarding compensation is certainly not ideal. But once the principle is allowed the complainant must show some injury, and what he has to say on the point does not convince the Tribunal that he has.

The Tribunal concludes that there is no breach of the principle of equal treatment as between groups of former Institute staff.

9. The complainant's second allegation of breach of the principle of equality is of breach as between himself and officials directly recruited to the EPO at A2. The latter may get two additional steps and on that account, argues the complainant, they have better career prospects than he and other former A7 Institute examiners.

The EPO replies that the total remuneration of an examiner graded A2 on transfer from the Institute is such that on promotion to A3 he will in any event obtain a higher step than an examiner with equal seniority recruited at A2.

This, says the Organisation, is because of the compensatory allowance paid to former Institute staff. The amount of the allowance is equivalent to the difference between the basic salary pertaining to the step the transferred examiner would have got in his Institute grade at the time of transfer and the basic salary at his actual step in his EPO grade. Under Article 9.3 of the integration agreement the compensatory allowance ceases on the first promotion or, in some cases, on the second. In the EPO's submission this system is a substitute for the additional step.

But all this overlooks one important feature. An examiner who is directly recruited by the EPO cannot have seniority equivalent to that of an examiner transferred from the Institute. The EPO grants the former an additional step on promotion to A3, whereas on such promotion the latter loses all or part of his compensatory allowance, and so the two groups do not get the same treatment. Things which have so little in common are not comparable. The items of evidence produced by the complainant, which the EPO does not challenge, show that the treatment of former A7 Institute examiners is unsatisfactory and that no solution has yet been found. The Tribunal has already declared acceptable the difference in treatment between different groups of former Institute staff. But it finds no argument in the submissions before it which justifies the difference in treatment prescribed by the rules on promotion between former Institute staff and staff recruited directly by the EPO. For this reason it will set the impugned decision aside.

The EPO must carry out a further review of the matter, taking care not to upset the present balance in the position of former Institute staff belonging to two different grades. The Tribunal observes that for several years the EPO has been concerned about the position of former Institute staff, but has failed to work out a solution. Indeed the Appeals Committee regretted it had to make a finding to that effect. It is therefore possible that further review of the matter may fail. If so, a lump-sum award of damages would have to be made to the complainant, and the Tribunal sets the amount now at 10,000 guilders. This sum would bear interest at 10 per cent a year from the date on which he was promoted to A3.

10. The complainant pleads breach of three other general principles: equity, the principle of good faith and the duty of care.

The Tribunal need not rule on these pleas. Since the decision is set aside the complainant's position must be reviewed anyway. Being set aside, the impugned decision is deemed not to have been taken. The Tribunal having gone thoroughly into the complainant's case in considering his first plea, the EPO has at its disposal all the elements it requires for the review, and even if there were breach of other general principles, as he alleges, that would make no difference.

11. In his claims for relief the complainant indicates that his claim for damages is subsidiary, failing the quashing of the impugned decision, and the Tribunal need not therefore rule on that claim.

But the Tribunal will allow his claim to payment of interest on the sums due at the rate of 10 per cent a year as from the date on which they fell due.

12. The Tribunal awards the complainant 3,000 guilders as costs.

DECISION:

For the above reasons,

1. The President's decision of 15 October 1984 is set aside.
2. The complainant is referred to the President of the EPO for review of his position. The sums due shall bear interest at the rate of 10 per cent a year as from the date on which they fell due.
3. Should the review of his position prove difficult, the EPO shall pay him 10,000 guilders, plus interest at 10 per cent a year as from the date on which he was promoted to A3.
4. He is awarded 3,000 guilders as costs.

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

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