

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

FIFTY-EIGHTH ORDINARY SESSION

In re MAUGAIN (No. 4)

(Merits)

Judgment No. 721

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed against the European Patent Organisation (EPO) by Mr. Christian Paul André Maugain on 15 October 1984 and corrected on 30 November;

Considering Judgment 597 dated 12 April 1984 on the complainant's second complaint against the EPO and Judgment 668 dated 19 June 1985 on the receivability of his fourth complaint;

Considering the EPO's reply of 9 September 1985 on the merits of the fourth complaint, the complainant's rejoinder thereto of 10 October and the EPO's surrejoinder of 30 December 1985;

Considering Articles 4 and 5 of the Agreement on the integration of the International Patent Institute into the EPO and Articles 48 and 49 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. In Judgment 597, on the complainant's second complaint, the Tribunal held that the President of the Office had erred in law in assimilating military and technical co-operation service and in deciding to discount the latter in the reckoning of the complainant's professional experience. The facts of the present complaint and the parties' pleadings are summed up in Judgment 668, under A to E. In that judgment the Tribunal ordered that the written proceedings resume with regard to the complainant's claim relating to the reckoning, in the determination of his professional experience, of the 18-month period of national service he had discharged in the form of technical co-operation. Since, as indicated in Judgment 668, under A, the EPO no longer challenged the counting of such a period, the written briefs were to relate to the number of months of further experience to be allowed and the consequences for the complainant's status.

B. In its reply on the merits the EPO submits that insofar as the complaint has been declared receivable it is devoid of merit. In accordance with Judgment 597 and in the exercise of his discretion the President of the Office decided to count at 50 per cent the period of the complainant's technical co-operation service. He took the view that the complainant's

work during that period at the French Embassy in Bonn did not fall within the scope of point 5 i) of the guidelines in CI/Final/20/77, which lists various kinds of experience that may count in full in the determination of seniority, but did come under point 5 ii), which allows due account of "relevant experience in e.g. industry or university", and, in accordance with point 3 of the guidelines in CA/16/80, was counted at half rate. The complainant was accordingly given another nine months' seniority.

As regards the complainant's step in his grade, A3, the rule applicable is Article 49(11) of the Service Regulations: "a permanent employee who obtains a higher grade shall be appointed to the lowest step in the new grade which carries a higher basic salary than that received in his former grade and step increased by the equivalent of one ... step in his former grade". The complainant's step on promotion to A3 in the EPO was determined by that rule, and the reckoning of his prior experience had nothing to do with it; whatever the reckoning is, it cannot affect his step in A3.

As to the reckoning of his experience for the purpose of promotion, the rules are in the two sets of guidelines mentioned above. The nine months' seniority corresponding to the period of technical co-operation service will

count when, added to his other experience, it brings the total up to the minimum required to make him eligible for promotion to A4.

C. In his rejoinder on the merits the complainant submits that the EPO fails to discuss the effect on his pay of the change in the reckoning of his experience and he invites the Tribunal to rule on the point. He observes that his main duties in Bonn did not consist, as is suggested in Judgment 597, under A, in giving science lectures, but in providing information on scientific and technical matters in general.

As to the consequences of the new reckoning of seniority, he believes he has fared less well than most other non-German examiners and has been unfairly treated.

D. In its surrejoinder the EPO contends that the complainant's rejoinder is irrelevant and casts no doubt on the validity of its submissions on the merits, which he has not even sought to answer. It accordingly again invites the Tribunal to dismiss his claims.

CONSIDERATIONS:

1. In Judgment 668 of 19 June 1985 the Tribunal held that Mr. Maugain's complaint was in part receivable and it allowed the EPO to make further submissions on the claim relating to the reckoning of the complainant's technical co-operation service. It observed that since the EPO no longer challenged the taking into account of such a period the only two questions pending were the number of months of further experience to be allowed and the consequences for the complainant's status.

Number of months to be reckoned for technical co-operation service

2. The complainant served from 1 March 1969 to 30 August 1970 at the French Embassy in Bonn. The President of the EPO originally refused to count that period in reckoning the complainant's seniority. But by the two decisions which are now impugned, one of 24 July and the other of 20 August 1984, he agreed to reckon the period at 50 per cent. In its brief of 9 September 1985 the EPO observes that the complainant's duties during the period consisted in giving science lectures in the Cultural Section of the Embassy.

The complainant maintains that he had many other duties, which he set out in a letter of 2 July 1984 to the Office and which are described in his submissions to the Tribunal. The EPO does not address the point. It merely refers to paragraph A of Judgment 597 of 12 April 1984, which merely sums up the parties' submissions and does not have the authority of *res judicata*.

3. The defendant has the duty to enable the court to give a full ruling on the case before it. The Tribunal has already shown indulgence in admitting further submissions in this case and the EPO was bound to address properly the issues of fact and of law raised by the complainant. Since it has not the Tribunal will accept the complainant's allegations of fact and it holds that his duties from 1 March 1969 to 30 August 1970 should count at 100 per cent.

Consequences for the complainant's status

4. The complainant maintains that he is entitled to review of his status as from 1 September 1971, when he was promoted to A7 at the International Patent Institute. The EPO believes that it has applied the rules correctly and that on this point the complaint should be dismissed.

The Tribunal draws a distinction between two periods.

5. The Institute, of which the complainant was once an official, was incorporated into the EPO by an Agreement which was concluded on 19 October 1977 and came into force on 1 January 1978.

Article 4 of the 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". Article 5(4) of the Agreement provides that only years of service completed at the Institute by the transferred officials shall be treated as years of service at the Office. The Agreement does not say that experience before joining the Institute counts in reckoning service. It is therefore Article 4 that applies.

Accordingly, the complainant is mistaken in believing that his experience before joining the Institute should have been taken into account on his transfer to the EPO. Nor will the Tribunal entertain the claim that such experience ought to have been taken into account in reckoning his seniority at the Institute since the rules on the integration of the Institute into the EPO are no longer open to challenge.

6. To keep efficiency up to standard the EPO had to recruit staff from national patent offices and, so as to attract good candidates, it decided to take account of experience acquired outside national offices. For the sake of equality it resolved to apply the same rule to staff taken over from the Institute. The general review of seniority which was carried out in 1982 prompted many complaints, of which this is but one.

The EPO's first argument is that the complainant's Embassy experience has no effect on his step in his grade since the step depends on Articles 48 and 49 of the Service Regulations and on those provisions alone. The basic step is the one which the staff member was given on transfer and he then advances automatically, the only relevant factor being the period of his service from the starting date.

The EPO's second argument is that on transfer the complainant had his experience taken into account, including nine months corresponding to his eighteen months' service at the Embassy.

This is plainly untrue since not until 1985 was he given the further nine months, which the Tribunal is raising to eighteen. When the question arose of promoting him to a higher grade before that date, the competent bodies were precluded from counting the period the EPO refused to allow. The complainant is therefore right in saying that there has been a mistake in the matter of his promotion in grade.

As regards determination of step, the Tribunal merely observes that the President has recently issued instructions which are more favourable to the staff but the EPO is refusing to apply them to former Institute officials. The Tribunal sees no reason of law or equity for such discrimination and for such unfair treatment of staff members who have had to file suits to get their rights respected. The complaint succeeds on this point as well.

7. The Tribunal will not for the time being award the damages the complainant is claiming for the injury caused by the unlawful treatment of him over the past few years. His case is referred back once again to the EPO for review of his administrative position as to both promotion and step as from 1982.

8. The Tribunal will also make him an award of costs.

DECISION:

For the above reasons,

1. The complainant is referred back to the EPO for further review of his administrative position as to both promotion and step as from 1982.
2. The Organisation shall pay him 3,000 guilders in costs.

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 signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 17 March 1986.

(Signed)

André Grisel

Jacques Ducoux

E. Razafindralambo

A.B. Gardner

