

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

FIFTY-NINTH ORDINARY SESSION

In re BENZE (No. 3)

Judgment No. 759

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr. Wolfgang Eberhard Benze against the European Patent Organisation (EPO) on 30 January 1985 and corrected on 11 March, the EPO's reply of 23 May, the complainant's rejoinder of 4 July, the EPO's surrejoinder of 20 September, its further briefs of 11 November and 2 December in reply to the Tribunal's questionnaire of 29 October, the complainant's further brief of 29 November 1985 on the questionnaire, his comments of 4 January 1986 on the EPO's further briefs, and the EPO's comments of 7 January 1986 on the complainant's further brief;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 10(2)(g) of the European Patent Convention and Articles 11(2), 49(7) and (8), 108, 115 and 116(3) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Considering 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, a citizen of the Federal Republic of Germany, was employed as a mining engineer for a total of 14 years and 5 months from May 1965, and from 1 February to 31 October 1980 as an examiner in the Patent Office of the Federal Republic. He joined the EPO in The Hague on 1 November 1980 as a search examiner at grade A2, step 7. The reckoning of his seniority was reviewed in mid-1981 and by a notice of 30 July he was informed that his experience in the German Patent Office counted in full and his mining experience at half rate. He was consequently regraded as from 1 November 1980 at A3, step 1, with nine months' seniority, by a decision of 15 September 1981. His request of 20 October 1981 for review of that decision was rejected on 17 March 1982. A second request, of 13 April 1982, was refused on 17 June and a third of 22 June on 1 July. On 4 February 1984 he wrote to the head of personnel at The Hague office asking that his experience be reckoned for the purpose of promotion at 18 years and 8 months at 31 December 1983. On 10 February the head of personnel replied that at 1 December 1983 his experience was reckoned for that purpose at only ten years. On 20 February he filed an internal appeal. In Judgment 697 the Tribunal dismissed as premature his first complaint against what he alleged to be an implied decision to reject his appeal. The President of the Office agreed to add six months to the reckoning but rejected his appeal provisionally and referred it to the Appeals Committee. In its report of 31 October 1984 the Committee recommended rejecting the appeal as devoid of merit and the President did so in a letter of 8 January 1985, the final decision impugned.

B. The complainant submits that the EPO is wrong not to count his mining experience in full and observes that if it did so his seniority would qualify him for promotion to A4. His mining experience is of practical use to him in performing his duties as an EPO examiner. National patent offices do not and the former International Patent Institute did not count industrial experience at any arbitrarily reduced rate in reckoning seniority. The material rule in this case is Article 49(7), which requires the President to take account of "professional experience" in determining fitness for promotion, and the President is therefore bound to take full account of his experience. Article 116(3) does allow discretion in counting experience at a reduced rate, but it applies only to the initial recruitment of substantive examiners during a transitional period. The President has acted without authority in extending to search examiners like himself the exception to the reckoning of experience for the purpose of promotion. He invites the Tribunal to order the President of the Office, in accordance with 49(7), to count his mining experience in full and determine his seniority at 18 years and 8 months as at 31 December 1983.

C. The EPO submits in its reply that the complaint is irreceivable. In his internal appeal of 20 February 1984 the complainant was seeking review of the reckoning of his prior experience, a matter determined on 30 July 1981 and by 1984 beyond challenge because he had failed to respect the three-month time limit in Article 108 of the Service

Regulations. There is only one set of rules on reckoning experience and it is the same whether the purpose is to determine the starting grade or fitness for promotion. The only exception relates to patent experience in industry, and the complainant has only general industrial experience.

Subsidiarily, the EPO argues that the complaint is devoid of merit. It rejects the view that under 49(7) the only qualification for promotion is having the minimum number of years required under the job description. The article does not relate to the reckoning of experience for the purpose of promotion but presupposes a reckoning made by the President in accordance with rules laid down by him with due regard to guidelines of the Administrative Council. There are no special rules on the subject in the Regulations. The legal basis for the exercise of the President's discretion in reckoning experience for promotion is the rules on recruitment. The President made a correct exercise of his discretion, and one based on legitimate reasons of policy, in deciding to apply the same rules to search examiners as to substantive examiners in determining experience for the purpose of promotion.

D. In his rejoinder the complainant contends that his complaint is receivable, the question of the reckoning of experience for the purpose of promotion being quite distinct from that of the reckoning for determining the starting grade and step.

He enlarges on his pleas on the merits and answers in detail the case made out in the reply. He objects to the introduction of the term "general industrial experience", which does not appear in the Regulations, and to drawing a distinction between that and patent experience. He submits that there are no sound reasons of law or policy for the treatment of search examiners like himself. He presses his claim.

E. In its surrejoinder the EPO develops its submissions in answer to the pleas reaffirmed in the rejoinder. It again submits that the complaint is irreceivable.

As to the merits, it argues that there is nothing arbitrary about distinguishing between patent experience and general industrial experience. The distinction is provided for in the case of substantive examiners in the guidelines approved by the Council and referred to in Article 116, and the President's power to apply the same rules to search examiners rests on 11(2) and 49(7) and (8). He decided at his discretion to do so because search examiners usually move on to substantive examination after gaining experience in search work.

CONSIDERATIONS:

Receivability

1. On 15 December 1980 the President of the Office appointed the complainant as an examiner on probation as from 1 November 1980. He was granted step 7 in grade 2. Grading depends on professional experience, the complainant's experience was recalculated, and on 30 July 1981 he was promoted to A3, step 1, with 9 months' seniority, as from 1 November 1980. On 20 October 1981, 13 April 1982 and 22 June 1982 he sought review but he did not actually make any internal appeal.

Finding that he was not on the list of promotions to A4, he wrote on 4 February 1984 to ask that his experience as reckoned for the purpose of determining his eligibility for promotion should be 18 years and 8 months as at 31 December 1983. On 10 February a representative of the head of personnel answered that as at 1 December 1983 his reckonable experience had come to only 10 years.

He filed an internal appeal on 20 February 1984 and the President rejected it on the Appeals Committee's recommendation by a decision of 8 January 1985, which is now impugned.

2. The EPO's main plea is that the complaint is irreceivable on the grounds that prior experience is reckoned according to the same criteria for the purpose of promotion and on appointment and that since the complainant failed to appeal in time against the terms of his appointment he may not now challenge the reckoning of his experience as it relates to his fitness for promotion.

The plea fails. With one exception any decision by the EPO may be challenged before the Tribunal as is prescribed in its Statute. The exception is a decision that merely confirms or reproduces the original one and is not based on any further inquiry or any new grounds. But there will be confirmation only if the later decision is identical in substance to the original one. Being related to the complainant's promotion, the decision of 8 January 1985 is to be distinguished from that of 30 July 1981, which related to his appointment.

It is immaterial that underlying the two decisions is a reckoning of experience which was made according to the same criteria. All that that means is that the grounds for the decisions were identical: the substance of them was not.

Merits

3. The complainant is asking that his experience as a mining engineer and patent examiner, namely 18 years and 8 months as at 31 December 1983, should count in full for the purpose of his promotion. The material rule is Article 49(7) of the Service Regulations:

"Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them.

The employees must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and have at least two years service in their grade in the Office."

The parties disagree on the meaning of "professional experience". The complainant argues that the reckoning should include the full number of years when he was working as a mining engineer before joining the Office. On the strength of CA 16/80, which is based on the guidelines in CI/Final 20/77, the EPO credits his mining experience only at half rate.

Article 49(7) does not resolve the issue. The President may therefore make good the omission by an exercise of his discretion as the "appointing authority" under Article 10(2)(9) of the European Patent Convention. He is subject to three restrictions however. One is that he must comply with the Service Regulations; another that he must respect the Administrative Council's guidelines insofar as they are binding; and the third that he must not abuse his authority or exceed the limits of it: in particular he may neither act arbitrarily nor infringe the principle of equal treatment.

4. In this case the EPO did not infringe the provisions of the Service Regulations which directly or indirectly relate to promotion: Articles 11(2) and 116(3).

Under 11(2) "Unless the appointing authority decides otherwise, for duly substantiated reasons relating to the training and special professional experience of the candidate, appointment shall be to the first step in the grade". Since the clause does not explain the term "special professional experience" there can have been no breach of it in reckoning the complainant's.

The other provision, 116(3), reads:

"The minimum period of service in the grade at the Office provided for in Article 49, paragraph 7, shall be reduced to one year for the first promotion for permanent employees recruited in accordance with paragraph 1. Periods of professional experience prior to recruitment to be reckoned towards the minimum number of years of professional experience required under the job descriptions for the award of a higher grade shall be determined by the President of the Office having regard to the guidelines laid down on this matter by the Administrative Council."

The provision does relate to fitness for promotion. But it expressly applies only to officials "recruited in accordance with paragraph 1", viz. "Category A staff in the field of substantive examination" and not to the complainant, who is a search examiner, not a substantive one. There was therefore no possibility of breach of 116(3) by the impugned decision.

5. Nor did the EPO infringe the guidelines the parties cite, CI/Final 20/77. Like 116(3) those guidelines apply only to substantive examiners and therefore not to the complainant.

CA 16/80, on which the EPO relies, does no more than elaborate on CI/Final 20/77, and so there can be no question of breach of these guidelines by CA 16/80 and the impugned decision based thereon.

6. Lastly, the President did not exceed or abuse his authority.

In support of his claim to the full crediting of his mining experience the complainant says how useful it is in

performing his duties as a search examiner. That may be so, but one may still take another view. Since search examiners have to comment on eligibility for grant of a patent there was nothing arbitrary about taking full account only of experience that was directly related to patents. The President committed no abuse of his authority in counting the complainant's mining experience at only the half rate.

The complainant is also mistaken in pleading inequality of treatment between search examiners and substantive examiners. Insofar as the treatment of the two groups does differ the competent authorities authorised the difference in approving Article 116(3). Besides, there are objective reasons for it. In the transitional period provided for in Article 115, which is to end on 31 December 1986, the EPO may recruit search examiners from the old International Patent Institute, whereas posts for substantive examiners have to be filled from national civil services.

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 Sir Williams Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 June 1986.

(Signed)

André Grisel

Jacques Ducoux

William Douglas

A.B. Gardner