

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

FIFTY-NINTH ORDINARY SESSION

In re FELGEL-FARNHOLZ, HENRIKSON,

KITZMANTEL, RATH and VAN DE PANNE (No. 2)

Judgment No. 763

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Wolf-Dieter Felgel-Farnholz against the European Patent Organisation (EPO) on 9 May 1985, corrected on 27 June and amended on 30 August, the EPO's reply of 26 September, the complainant's rejoinder of 26 November 1985 and the EPO's surrejoinder of 14 February 1986;

Considering the second complaint filed by Mr. Olof Per Sven Henrikson against the EPO on 10 May 1985, corrected on 27 June and amended on 2 September, the EPO's reply of 26 September, the complainant's rejoinder of 2 December 1985 and the EPO's surrejoinder of 14 February 1986;

Considering the second complaint filed by Mr. Peter Kitzmantel against the EPO on 9 May 1985, corrected on 27 June and amended on 30 August, the EPO's reply of 26 September, the complainant's rejoinder of 26 November 1985 and the EPO's surrejoinder of 14 February 1986;

Considering the second complaint filed by Mr. Robert Rath against the EPO on 9 May 1985, corrected on 27 June and amended on 30 August, the EPO's reply of 26 September, the complainant's rejoinder of 11 December 1985 and the EPO's surrejoinder of 14 February 1986;

Considering the second complaint filed by Mr. Vitus Nicolaas van de Panne against the EPO on 10 May 1985, corrected on 28 June and amended on 30 August, the EPO's reply of 26 September, the complainant's rejoinder of 28 November 1985 and the EPO's surrejoinder of 14 February 1986;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 11, 32(2) and 106(1) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed the application for the hearing of a witness by Mr. Felgel-Farnholz, Mr. Henrikson, Mr. Kitzmantel and Mr. Rath;

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

A. These cases are the sequel to those on which the Tribunal has ruled in Judgment 762, and relevant facts appear in that judgment, under A. On 20 July 1984 the complainants and one

other staff member lodged a joint appeal against decisions of 15 May 1984 whereby the reckoning of their prior experience for the purpose of determining their grade and step had been revised and the new reckonings were to take effect as from 1 January 1984; they asked that the reckonings take effect as from 4 April 1983, the date of their appointment. In its report of 27 March 1985 the Appeals Committee, to which their appeal had been referred, recommended rejecting it, and by letters of 29 April 1985, the decisions impugned, the Vice-President of the Office informed them that the President did so.

B. The complainants concede that their internal appeal was not lodged within three months of the notification of the terms of their appointment. They maintain, however, that under Article 32(2) of the EPO Service Regulations the reckoning of their seniority, on which their starting grade and step were based, was not communicated with their letters of appointment even though it was put in their personnel files; that the letters do not qualify as challengeable decisions; that the earliest decisions that do are those of 15 May 1984; and that they did challenge those decisions in time. It appears from Judgment 656 that the notification of the reckoning to the staff member is essential to the receivability of the internal appeal: in that case, as in the present, the staff members had lodged internal appeals against the determination of their starting grade and step long after the expiry of the period of three months from the date of their appointment; yet the Tribunal held their complaints to be receivable.

Moreover, time limits should be extended where the Organisation shows bad faith. In this case the EPO was in bad faith in concealing from them the fact that it was bound to apply the rules set out in guidelines approved by the Administrative Council of the EPO and embodied in CI/Final 20/77 and CI 342/77. It also concealed from them the arbitrary and improper distinction it drew between those who applied directly for employment and those whose names were put forward by member States.

As to the merits they contend that had the guidelines been properly applied their prior experience in the field of industrial property would have counted in full and the determination of their starting grade and step would have been more favourable, not just as from 1 January 1984, but as from 4 April 1983. They invite the Tribunal to order that their starting grade and step be determined as from 4 April 1983 in accordance with CI/Final 20/77 and award them the additional sums due upon their consequent advancement in step, plus interest. They claim 1,000 Deutschmarks each in costs.

C. The EPO contends that insofar as the complaints are challenging the decisions of 15 May 1984 they are, though receivable, devoid of merit. As in previous cases on which the Tribunal has ruled, in Judgments 572 and 598, the President exercised his discretion in setting 1 January 1984 as the date from which the new reckonings should take effect, and there was no flaw in the exercise of that discretion.

Insofar as the complainants are by implication challenging the terms of their appointment the complaints are, in the EPO's submission, irreceivable. Even a decision for which no statement of reasons is given is, though flawed, still a decision, and must therefore be challenged within the time limits. The charge that the EPO misled the complainants is also unfounded, being based on the false premiss that the guidelines in CI/Final 20/77 apply to all examiners: in fact the experience of examiners, like the complainants, who are not recruited from national patent offices is not governed by those guidelines. Nor is there any evidence to suggest concealment from them of the rules for determining their starting grade and step. The legal issues on which the Tribunal ruled in Judgment 656 were different.

In any event, insofar as the complainants challenge the terms of their appointment, their complaints are devoid of merit. Their starting grade and step were correctly reckoned, not by the criteria in CI/Final 20/77, but by a different set of rules laid down by the President under Article 11 of the Service Regulations.

D. In their rejoinders the complainants press their claims. They develop their original pleas and seek to answer the EPO's objections to receivability and to the merits. All but Mr. van de Panne apply for the hearing of oral evidence from a personnel officer on the rules that applied for the purpose of reckoning their prior experience at the time of their appointment.

E. In its surrejoinders the Organisation submits that there is nothing in the further pleadings in the rejoinders which impairs the force of the pleas in its replies. It develops those pleas and reaffirms its views that the complaints are irreceivable and in any event, insofar as they are held to be receivable, devoid of merit.

CONSIDERATIONS:

Joinder

1. Before the Tribunal will join two or more complaints two conditions must be fulfilled. The first is that the substance of the claims must be the same, whatever their wording. The second is that the material facts, viz. those on which the claims rest, should be the same.

The complaints the five complainants lodged with the Tribunal on 9 and 10 May 1985 satisfy both conditions. They all claim the application as from 4 April 1983 of the EPO's new rules on grade and step and the payment of the additional sums due, plus interest. The material facts, too, are the same. The Tribunal therefore joins the five complaints.

It is immaterial that the complainants advance more or less different pleas since the content of pleas lays no constraint on the Tribunal's ruling.

The complainants' pleas

2. In December 1982 the Office offered each of the complainants a post as a class A examiner. It informed them of the grade and step they would be given, but not of the method of reckoning their prior professional experience. They accepted the offers and took up duty on 4 April 1983.

On 15 May 1984 the Principal Director of Personnel informed them that because of a change in practice the determination of their grade and step had been altered as from 1 January 1984. He appended a detailed reckoning of their experience. On 20 June 1984 he explained to them the reasons for the review of the reckoning, informed them of the new rules in force, and warned that if they appealed to have the decisions made retroactive from an earlier date their appeals would be rejected as out of time.

By a letter of 2 July 1984 the complainants observed that no figures had been given in support of the reckoning of their experience made at the time of their appointment and they asked that the steps granted to them on 15 May 1984 should take effect as from 4 April 1983.

On 20 July 1984 they lodged an internal appeal. The appeal was provisionally rejected on 2 August 1984 but referred to the Appeals Committee. The Committee recommended rejecting the appeal and in a final decision of 29 April 1985 the Vice-President of the Office did so on the President's behalf.

The complainants are impugning that decision. Their case is that for the reasons set out below they were entitled from 15 May 1984 to object to the terms of their appointment and the EPO was wrong to refuse them the benefit of the new steps as from 4 April 1983.

3. Their first plea is that, in accordance with Articles 32(2) and 106(1) of the Service Regulations, the terms of their appointment may not be cited against them because no reckoning of their professional experience and no statement of the reasons were appended to the letters of appointment, and the decision is therefore not a challengeable one.

The plea is quite mistaken. The purpose of an appeals procedure is to enable a dissatisfied staff member to have a decision reviewed and possibly set aside or altered by a higher authority. It confers on him the right to challenge a flawed decision. It follows that even if the decisions appointing the complainants were tainted with a formal flaw in that neither a reckoning of their experience nor any explanation was appended the decisions were challengeable under the internal appeals procedure and before the Tribunal. The formal flaws the complainants allege did not suspend the time limits, they failed to observe the time limits, and they may no longer challenge the terms of their appointment on the formal grounds they are now putting forward.

4. Their second plea is that the terms of their appointment were unlawful because they were at odds with the guidelines in CI/Final 20/77 and CI 342/77 and because they made for inequality of treatment.

This plea also fails. Whether the flaws in the decisions appointing them were substantive or formal, they ought to have challenged the decisions within the time limits in the Service Regulations and in the Statute of the Tribunal. They failed to do so and may not challenge the decisions now.

5. Thirdly, they contend that the EPO showed bad faith in failing to communicate to them the guidelines to be taken into account in reckoning their experience and that the time limits should therefore be extended.

There is no proof of bad faith. The EPO takes the view that the guidelines they rely on do not apply to them, but only to candidates for employment proposed by member States. The Tribunal need not rule on the point. In any event the EPO's view is arguable, and indeed paragraph 2 of CI/Final 20/77 does suggest that the recruitment procedure prescribed in those guidelines applies to candidates proposed by national civil services. The charge of bad faith fails.

6. Lastly, the complainants argue that in Judgment 656 the Tribunal implied that appeal may lie against a decision to appoint a staff member from the date on which he is duly informed of the reckoning of his seniority.

The case the Tribunal ruled on in Judgment 656 is different from the present ones. In that case the EPO considered the merits of an appeal against a reckoning of seniority, and the Tribunal did not need to determine whether the reckoning was challengeable before it since the internal means of redress had been exhausted. In these cases the EPO declined to reconsider the terms of the complainants' appointment because the time limits had expired, and, that being the decision under challenge, the Tribunal holds it to be sound.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Sir William 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