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

SIXTY-FOURTH SESSION

In re ANDRES (No. 10)

Judgment 879

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr. Florian Andres against the European Patent Organisation (EPO) on 19 March 1987 and corrected on 29 April, the EPO's reply of 22 July, the complainant's rejoinder of 23 October, the EPO's surrejoinder of 8 January 1988, the EPO's application of 25 January for the withholding of several items of evidence from the complainant and the complainant's observations of 3 February 1988 on that application;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 49(11) 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, a Swiss citizen, joined the staff of the EPO on 1 October 1979 as an examiner at grade A2. On 3 February 1984 he was promoted to grade A3, step 1, as from 1 December 1983. On 26 April 1984 he lodged an internal appeal asking that he be granted step 4 in A3 as at the date of his promotion in accordance with the guidelines in CI/Final 20/77. The President of the Office rejected his appeal on 6 June 1984 and referred it to the Appeals Committee. In its report of 27 October 1986 the Committee recommended allowing his appeal but in a letter of 15 December 1986, the decision he impugns, the Principal Director of Personnel told him the President had rejected both recommendation and appeal.

In Judgments 657 and 674 the Tribunal dismissed complaints by other EPO officials seeking review of their grade and step and the present complainant was an intervener in those cases.

B. The complainant contends that the cases the Tribunal dismissed in Judgments 657 (in re Metten, Spiekermann and Stern) and 674 (in re Wäckerlin) were different from his own. Judgment 657 was about the position of those who, unlike him, had been recruited after the Administrative Council had decided to make a change in EPO career policy. Moreover, new facts have come to light since those judgments were pubished, namely the ruling by the Court of Justice of the European Communities in re Williams and Judgment 690 (in re Hubeau), which said that Article 49(11) of the Service Regulations was not invariably binding on the EPO in determining step.

To his mind the decision of 3 February 1984 to give him only step 1 was in breach of the principle of equal treatment because someone with no greater experience recruited on the same date would have got step 4. There was breach of his good faith because the Swiss Federal Patent Office, from which he was recruited, gave him assurances on that score. It is wrong that two examiners should after the date of his promotion to A3 have been recruited at that grade on terms more favourable than those that had been applied to him.

He asks the Tribunal to order that he be given step 4 in A3 as at the date of his promotion. He claims an award of 2,000 Swiss francs in costs.

C. In its reply the EPO argues that the complaint is irreceivable under the res judicata rule. The complainant was an intervener in the cases the Tribunal dismissed in Judgments 657 and 674: there is therefore identity of the parties. There is, moreover, identity in the purpose and in the cause of action since in all three cases the objections are to the step granted under Article 49(11) of the Service Regulations and to the requirements for access to A3, which differ according as there is appointment or promotion.

The Organisation has subsidiary arguments on the merits. The rules peculiar to the European Communities that afforded the basis for the Court's ruling in re Williams are immaterial, and Judgment 690 was about the status of

someone in a situation quite different both in fact and in law from the complainant's. As for the principles of equality and good faith, there is ample precedent to bear out the view that an official has no right to continuance of the conditions of promotion as they stood at the time of his own recruitment. The new rules on reckoning step were brought in in August 1983 and have been applied consistently ever since, the exceptions being only apparent because they relate to cases in which an offer of appointment was made before August 1983 by the rules in force at the time.

D. The complainant rejoins that as a mere intervener in the earlier complaints he had no opportunity to put his own case. Besides, at the time he had not yet been promoted and had suffered no injury.

He submits as another new fact a statement made by Mr. Vincenzo Scordamaglia, a former secretary to the Interim Committee which drew up EPO policy on recruitment and promotion, that the Committee's intent was to apply the principle of equality of treatment between all examiners.

Though not binding on the Tribunal, the ruling in the Williams case shows that in a comparable case the European Communities took action different from the EPO's decision in this one.

Some officials who were recruited after the date on which he was promoted fared better, he maintains, than he and that constitutes breach of the EPO's obligations towards him.

After reading Judgment 860 of 10 December 1987 (in re Aspeby) he wrote to the Tribunal expressing surprise at its refusal to allow Mr. Scordamaglia's statement and asking that it hear evidence from Mr. Scordamaglia in oral proceedings.

E. The EPO enlarges on its pleas in its surrejoinder. It argues that by applying to intervene in another case an official waives his right to state his own arguments and is barred by the res judicata rule from seeking to reopen the case by bringing a new complaint of his own. None of the alleged new facts relied on affords admissible grounds for an application for review. The statement by the former secretary to the Interim Committee is immaterial because he is not competent to interpret a text just because he took part in drafting it.

F. In an application to the President of the Tribunal the EPO asks that papers it has supplied about the cases of the officials mentioned by the complainant should because of their personal nature be treated as confidential and withheld from the complainant.

G. Invited to comment on that application, the complainant says there is no reason not to disclose the papers to him.

CONSIDERATIONS:

1. The complainant was an employee of the Swiss federal patent office and is now a search examiner with the EPO. He wants review of the step he got on promotion to grade A3. This being the fourth time he has put the issue to the Tribunal, either as complainant or as intervener, a recapitulation is called for.

The facts

2. The complainant joined the EPO on 1 October 1979 as an examiner at grade A2. He says he was induced to do so by assurances from the Swiss patent office about his career prospects at the EPO and he relies on a statement of 3 October 1984 which Mr. Comte, deputy director of the Swiss office, gave Mr. Wäckerlin: see Judgment 674 of 19 June 1985, under B.

3. On 15 October 1981, before he was in line for promotion, the complainant and others challenged the rules on access to A3 on the grounds that the manner of reckoning experience made for disparity of treatment between someone appointed at that grade and someone promoted to it. On 18 May 1984 he filed his first complaint with the Tribunal and in Judgment 647 of 18 March 1985 the Tribunal dismissed it as irreceivable because he had not observed the time limit for an internal appeal. The Tribunal did not then go into the merits of his case.

4. On 3 February 1984, while his first internal appeal was pending, he was promoted to A3 and granted step 1 in that grade, with no seniority.

5. That decision prompted him to take several steps. First, on 26 April 1984 he submitted another internal appeal to

the President of the Office claiming step 4 in A3 under the guidelines approved by the Administrative Council at its meeting of 19/21 October 1977 and set out in CI/Final 20/77. He also cited a comparative scale of pay drawn up by the Swiss office which he said the office had given him when putting his name forward for the EPO.

6. Then, in May 1984, he lodged his first complaint, which the Tribunal dismissed in Judgment 647; an application to intervene in the complaints of Mr. Metten, Mr. Spiekermann and Mr. Stern, on which the Tribunal ruled in Judgment 657 of 18 March 1985; and an application to intervene in Mr. Wäckerlin's case, which led, as was said above, to Judgment 674.

7. On 6 June 1984 the President rejected his internal appeal of 26 April 1984 and referred it to the Appeals Committee. The Committee did not report until 27 October 1986 and by then the Tribunal had handed down Judgments 657 and 674. The majority of the Committee held that the case was not res judicata because the complainant had been just an intervener in those cases and that there were at any rate reasons of equity for allowing his appeal: see Judgment 860 of 10 December 1987 (in re Aspeby, 3 to 7), which cites that view. The complainant had, in the majority's opinion, been doubly misled in the breach both of the assurances he had got from the Swiss office and of the career expectations he had had on appointment.

8. A letter of 15 December 1986 informed him that the President had decided against the majority's recommendation and rejected his appeal. That is the decision he is impugning in this complaint, which he filed on 19 March 1987.

The parties' pleas

9. The complainant is relying mainly on the views of the majority of the Committee. He submits that his case is not prejudged by Judgment 657, which was about officials who had been recruited after a change in EPO career policy. He therefore abides fully by his plea about the legitimate career expectations he was given on recruitment and the assurances he got from the Swiss office. He cites the case of two officials who after he himself was promoted were recruited on better terms than the rules then prescribed. And he alleges "new facts": the decision of 6 October 1982 by the Court of Justice of the European Communities in re Williams, and a statement by Mr. Vincenzo Scordamaglia, former secretary to the Interim Committee of the EPO (see Judgment 860 under 12).

10. After he had put in his rejoinder he learnt of Judgment 860 and wrote to the Tribunal expressing astonishment at its refusal to take note of that statement and asking it to hear evidence from Mr. Scordamaglia.

11. The EPO's main defence is res judicata: all the issues the complaint raises were disposed of in Judgments 657 and 674 dismissing cases in which the complainant was an intervener. It has subsidiary pleas on the merits and submits papers about the particular cases he mentions, though it asks that they be treated as confidential and not passed on to him.

Receivability

12. It is plain from the foregoing that the Tribunal answered all his pleas in the cases he was an intervener in: it addressed in Judgment 657 the issues of principle and in Judgment 674 the case of a Swiss official who, like him, had been recruited before the change in career policy.

13. As the Tribunal ruled in Judgment 860, in 14 to 16, the res judicata rule applies to an intervener because by the very act of intervening he espouses the complainant's case.

14. It is true that there are some arguments which he puts forward again and which those judgments did not address. But that does not mean that the conditions, stated in Judgment 785 (in re Andres No. 8) of 12 December 1986 and restated in Judgment 860, for applying the res judicata rule are not met: between this case and the earlier ones there is identity in the parties, in the purpose of the suit and in the cause of action. The new facts the complainant alleges are really just variants of issues that were fully discussed the first time the Tribunal ruled on the matter, when he was an intervener. Neither irrelevant statements by a former secretary of the Interim Committee, which the Tribunal has already disallowed, nor arguments about the status of other staff members who are not parties to the case can cast the slightest doubt on the reasoning by which the Tribunal has dismissed all these cases.

15. There is therefore no substance to the complainant's attempt to have the case reconsidered, and his complaint,

including his claim to costs, fails because it is irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner

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