

SIXTY-SIXTH SESSION

***In re* PINEAU**

Judgment 955

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Alain Christian Raoul Pineau against the European Patent Organisation (EPO) on 3 August 1988, the EPO's reply of 7 December 1988, the complainant's rejoinder of 7 January 1989 and the EPO's surrejoinder of 10 February 1989;

Considering Articles II, paragraph 5, and VII, para-

graph 1, of the Statute of the Tribunal and Article 108 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 accordance with the terms of an offer of appointment dated 30 October 1979 the complainant, a Frenchman, took up duty at the EPO's office at The Hague on 18 February 1980 as an examiner of patents. He had already had experience of patent work in industry and served in the French national patent office, which is known as the INPI. His experience being reckoned at the time at seven years and two, later four, months, he was put at grade A2, step 6, with four months' seniority at that step, as at 1 September 1980.

In a letter of 26 August 1983 he asked the EPO to count two three-month periods of training he had undergone with the French National Electricity Corporation (EDF); the Organisation agreed and accordingly increased his experience as at 1 September 1980 to seven years and ten months.

As was stated in earlier judgments - for example in No. 851, under A - circular 144 of 1 August 1985 announced new guidelines, which came into effect as from 1 January 1985, on the reckoning of experience for the purpose of determining an examiner's starting grade and step and seniority for promotion. The complainant had his experience recalculated according to the new guidelines and, as he was informed on 22 November 1985, was credited with thirteen years and four months as at 1 January 1985.

On 7 October 1986 he wrote asking the Organisation to count four months' training with a company known as Elektro- Stief in the Federal Republic of Germany and a year of postgraduate study in industrial property in 1969-70. Having received no answer he lodged an internal appeal on 4 February 1987. The upshot was that he got another reckoning on 10 April 1987 which allowed him three months for the training course and six for the year of study, making a new tally of fourteen years and one month as at 1 January 1985 and increasing his step in A2 accordingly.

On 22 May 1987 he wrote to the President of the Office pointing out that by the rules that had been in force in February 1980 he ought to have been credited at recruitment with over eight years' prior experience, the minimum period that qualified an examiner for access to A3; the INPI had misinformed him about the sort of experience that counted, and he claimed retroactive appointment at A3, step 4. For want of a reply he lodged an internal appeal on 7 August 1987 repeating his claim and his case went to the Appeals Committee. In its report of 11 March 1988 the Committee declared his appeal irreceivable, but cited the case of a British examiner who, though recruited at the same time as the complainant and no more experienced, had been granted A3, step 4; the difference in treatment being unexplained, the President of the Office might care to correct the anomaly. But by a letter of 11 May 1988, the decision challenged, the Principal Director of Personnel informed the complainant that the President had rejected his appeal.

B. The complainant observes that he did not get the final and correct reckoning of his prior experience until 10 April 1987, his internal appeal of 22 May 1987 to the President was therefore in time, and his complaint is therefore receivable. Because of his ignorance of the rules and the INPI's failure to advise him properly the tally made on recruitment fell short. When at last he found out what the rules said he sought certificates of service from his former employers, but one company had gone out of business and not until 1986 could he produce what the EPO needed. Had the final reckoning been made at the date of recruitment he would have been given A3. It is no fault of his that it took so long: the EPO's rules were hard to come by, and so were the certificates of service.

A British examiner who, like him, had at least eight years' prior experience at recruitment did get A3, in breach of the principle of equal treatment.

He claims the grant of A3, step 4, as from 18 February 1980.

C. In its reply the Organisation submits that the complaint is irreceivable. The complainant was graded in accordance with the offer of appointment the President of the Office had made him in the letter of 30 October 1979. If he wanted to challenge that grading he should have found out at the time by what rules it had been arrived at and could then have provided any other information about his record he thought relevant. He may not plead his own ignorance of the rules, nor blame the INPI, which was not competent to commit the EPO as to the terms of his appointment.

He knew by 26 August 1983, when he first raised the matter, that periods of training might count, and whatever his difficulties in getting certificates of service he might at the same time have claimed - subject to the later production of proof - the reckoning of the other experience he spoke of in his letter of 7 October 1986. Since he did not his internal appeal was time-barred under Article 108 of the Service Regulations and he has failed to exhaust the internal means of redress. The EPO agreed only *ex gratia* to correct the reckoning retroactively.

In any event the complaint is unfounded. The reckoning made at recruitment took full and correct account of the information the complainant had given. Besides, even if the three training courses and the postgraduate study had been considered at the time, his experience as reckoned under the rules then in force would still have come to only seven years and ten months. The year of study would have counted only at half rate, and the training periods of less than one year did not count at all for the purpose of determining the starting grade. So in any case he would have fallen two months short of the minimum required for admission to A3.

Though apparently his experience had not yet been reckoned, the British examiner was offered A3, he accepted the offer and the EPO could not go back on it. The complainant may not benefit from a wrong decision taken in someone else's case.

D. In his rejoinder the complainant observes that had he known the material rules at recruitment he would have done his utmost to get the grading he was entitled to. Had the evidence supporting his claims been missing the EPO would not have allowed them; so he waited until he had it before claiming. The EPO has given him credit for the training periods only as from 1 January 1985, not, as it should, as from the date of his appointment.

The three training periods and the period of further study, if added together, come to one year and eleven months, and even if the year of study counted only at half rate the total of his reckonable experience would go up from seven years and four months to over eight years.

He submits that the EPO cannot have erred in reckoning the British examiner's prior experience.

E. In its surrejoinder the Organisation develops its earlier pleas. It observes that the complainant has only himself to blame for not making prompt enquiries about how his grading on recruitment had been worked out. It points out that his own reckoning is wrong because training periods of less than one year did not count and the period of further study counted only at half rate. Even had he made the claim in time only another six months would have been added to the reckoning as at the date of recruitment, 18 February 1980. According to the rules then in force he would not have had the total of prior experience - eight years - that would have qualified him for A3.

CONSIDERATIONS:

1. The complainant joined the EPO on 18 February 1980, having accepted an offer it had made him in a letter of 30

October 1979 to appoint him as an examiner of patents at grade A2, step 6. He was given a reckoning of his experience for the purpose of determining his grade and the total came to 7 years and 2 months. The number of months was later corrected to 4. He asked to have account taken of two three-month training courses he had followed with the French National Electricity Corporation (EDF) and the EPO accordingly agreed to increase to 10 the number of months of his seniority at step 6 as at 1 September 1980.

On 1 August 1985 he was promoted to grade A3, in which he was put at step 6, with 4 months' seniority.

On 7 October 1986 he asked the Organisation to count four months' training he had undergone at Electro-Stief and one year's postgraduate study. After he had lodged an internal appeal the EPO agreed, on 10 April 1987, to increase his professional experience to 14 years and 1 month as at 1 January 1985.

On 22 May 1987 he lodged an appeal claiming the grant of grade A3, step 4, as at the date of his appointment in 1980 on the grounds that by the rules then in force he had had over eight years' experience, the minimum required for appointment at A3. In its report of 11 March 1988 the Appeals Committee recommended rejecting his appeal as irreceivable or, subsidiarily, as devoid of merit. The President of the Office endorsed the recommendation and by a decision of 11 May 1988 rejected his appeal.

2. In support of that decision the EPO points out that grade A2, step 6, was what the complainant was offered in the letter of 30 October 1979. Neither then nor on taking up duty, on 18 February 1980, did he object to that grading, nor did he ask how it had been made, nor what rules governed the reckoning of experience it was based on. Even on 26 August 1983, by which date he knew that training courses might count, all he asked for was a new reckoning. So the time limit for appeal ran out long before 22 May 1987, when he first claimed grade A3, step 4, as from the date of his appointment.

3. To account for the delay he says that the French national patent office (INPI) which in 1979 put in his application for employment with the EPO was guilty of mistakes and omissions, that not until 1983 did he find out for himself that training courses counted, and that even then he did not claim regrading at A3 because he did not yet have all the papers he needed to get a new reckoning of his experience made.

4. His argument fails.

Under Article 108(2) of the Service Regulations he had three months from the date of notification to challenge the decision on his grading. The three months expired long before 22 May 1987, when he put his claim to the President of the Office, even though, as the EPO concedes, it was not until 1983 that he heard about the rule he might have relied on. Article VII(1) of the Tribunal's Statute provides that a complaint will not be receivable unless the official has exhausted the internal means of redress. To satisfy that requirement it is not enough for the official to submit an internal appeal: he must submit it in time. The complainant failed to do so since not until 22 May 1987 - long after the three months were over - did he challenge the decision of 1980 on his starting grade and step. His internal appeal having been out of time, his complaint is irreceivable.

His argument that he was late in discovering that the decision had been unlawful is irrelevant: a time limit is a matter of objective fact and starts when the decision is notified. If that were not so - whatever considerations of equity there might be - there could be no certainty in legal relations between the parties, and such certainty is the whole point and purpose of time limits. An exception might be allowed only if the Organisation had acted in bad faith and misled the official. But in this case the Organisation did not.

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. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 27 June 1989.

(Signed)

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner

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