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

FIFTY-SECOND ORDINARY SESSION

In re MAUGAIN (No. 2)

Judgment No. 597

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Christian Paul André Maugain on 4 March 1983 and corrected on 24 March, the EPO's reply of 13 June, the complainant's rejoinder of 15 July and the EPO's surrejoinder of 14 September 1983;

Considering Articles II, paragraph 5, and VII, paragraph l, of the Statute of the Tribunal and Articles 44(1), 106, 107, 115 and 116 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 material facts of the case are as follows:

A. The complainant, a Frenchman born in 1943, was employed from 1970 by the International Paterlt Institute and on I January 1973 joined the EPO as a grade A2 examiner on the integration of the Institute into the EPO. He was promoted to A3. The EPO reviewed the seniority of examiners and on 1 February 1982 informed him that his was reckoned at thirteen years, consisting of eleven years and four months' service in the Institute and the EPO and one year and eight months corresponding to a period of postgraduate study and research from 1965 to 1963 reckoned at 50 per cent. In accordance with EPO guidelines set out in CA/16/80 and approved by the Administrative Council, the reckoning discounted a period in 1963-69 when he had been employed as an engineer in Strasbourg because it came to less than one year, and a period of national service from 1 March 1969 to 30 August 1970 -- the first fifteen months compulsory, the remaining three voluntary -- during which he had served as a lecturer in science in the Cultural Section of the French Embassy in Bonn. Experience gained before the age of 25 did not count either. He stated his objections on 23 February 1982 but the Principal Director of Personnel rejected them in his reply of 31 March, citing the Council's decisions. On 5 April he wrote to the President of the Office asking him to decide in accordance with Article 106 of the Service Regulations, that his national service be taken into account. Having got no reply within the prescribed two months, he lodged an appeal under Article 107(1) on 28 June. In its report of 29 November 1982 the Appeals Committee recommended rejecting the appeal and the President informed him by a letter of 7 December, the challenged decision, that he accepted the recommendation.

B. The complainant observes that his duties during his national service in Bonn were civilian and not military. To discount them is to give an unfair advantage to EPO officials from countries with no conscription. The record of the Council's debates on CA/16/80 shows that it did not intend that periods of civilian duty by conscripts should be discounted. He invites the Tribunal to order that the periods of (1) compulsory and (2) voluntary national service count at the rate of 50 per cent and (3) that the experience he gained before the age of 25 be added, and (4) to award him costs. He further claims (5) amendment of the reckoning to take account of his employment in Strasbourg, and the correction of (6) his step in grade A3 and (7) his pension rights.

C. The EPO replies that claims (2) to (7) are irreceivable under Article VII(1) of the Statute of the Tribunal because the complainant failed to exhaust the internal means of redress: his internal appeal related only to the matter of his compulsory national service. Claim (1), though receivable, is devoid of merit. There is nothing in the Regulations about the criteria for reckoning experience, and EPO practice is summed up in CA/16/80, which the Council approved in 1980. Point 5(d) states that "military service" does not count and, although for the sake of brevity the guidelines do not say so, the practice is to define it as covering all forms of compulsory national service, whatever the nature of the duties performed. According to the law of France the complainant's country, duties of the kind he performed count as national service. Not to discount them would be unfair to officials who have performed military duties. Moreover, Article 44(1) of the Service Regulations assimilates all forms of compulsory military or

"comparable service".

D. In his rejoinder the complainant maintains that his claims did form part of his internal appeal, and he cites passages in a brief he submitted to the Appeals Committee on 28 September 1982 which in his view cover all his claims. He asks the EPO to produce material which will shed light on the civilian nature of his duties in Bonn, which he believes gave him experience of use to the EPO. His voluntary extension of national service (claim (2)) should count even if it lasted less than one year. As to claims (3) to (7), he reaffirms the arguments in his letter of 23 February 1982 to the Principal Director of Personnel.

E. In its surrejoinder the EPO observes that what matters is the terms in which the complainant framed his appeal in his letter of 5 April 1982 to the President. The only point it covered and the only one the Appeals Committee dealt with was the period of his compulsory national service; that is why claims (2) to (7) are irreceivable. The EPO sees no point in submitting material on the nature of his duties in Bonn since national service does not count anyway.

CONSIDERATIONS:

1. The European Patent Organisation was founded on 1 November 1977. The Tribunal has discussed in several judgments, such as No. 551, the way in which many of its staff came to be recruited. During a "transitional period" the appointing authority was empowered under Articles 115 and 116 of the Service Regulations to derogate, "in the interests of the service", from some of the provisions of the regulations on recruitment and promotion. But Article 116 put a limit on the discretion of the President of the Office: for both recruitment and promotion he was to have "regard to the guidelines laid down on this matter by the Administrative Council". The guidelines drawn up by the President prompted lengthy debate in the Council on several occasions, and in interpreting them the Tribunal will refer to the Council records as well as the actual text.

Where the guidelines properly modify the requirements of the Service Regulations they confer on the President an authority of his own which he exercises in the general interest and as befits the particular circumstances. But his discretion is not without bounds. The wording of the guidelines is such that they cannot be treated as nothing more than

A standards or goals and as leaving the President a free hand in building the initial structure of the staff. In fact they set objective and binding criteria for deciding on individual staff cases, and, while not ignoring the President's discretionary authority, the Tribunal will review the application of the rules the Council has laid down.

2. The International Patent Institute recruited the complainant as a trainee examiner in 1970. He became an examiner in 1971 and an EPO official in accordance with the Agreement on the integration of the Institute into the EPO.

In 1982 the EPO decided to carry out a review of the seniority of all examiners who had joined the EPO during the transitional period, taking account of the professional experience they had gained before joining the Organisation. The relevant text is Article 116(3) of the Service Regulations, which reads: "Periods of professional experience prior to recruitment ... shall be determined by the President of the Office having regard to the guidelines laid down on this matter by the Administrative Council".

By a decision of 1 February 1982 the complainant was granted a total of 13 years' seniority in consideration of his professional experience. He believed that the reckoning was at odds with the Council's guidelines, and he lodged an internal appeal. The Appeals Committee gave him a hearing and reported on 29 November 1982. The President fully endorsed its recommendation to reject the internal appeal and did so by a decision of 7 December 1982. The complainant has filed a complaint seeking the quashing of the decision and the correction of the reckoning of his professional experience.

3. The complainant has two sets of claims.

The first relate to the period during which he performed national service, and they are without doubt receivable.

The others relate to his employment up to the age of 25.

The EPO submits that they are not receivable on the grounds that they did not form the subject of the original

request which, according to Article 106 of the Service Regulations, must be made before the appeal to the Appeals Committee.

On receiving the decision of 1 February 1982 on the reckoning of his experience the complainant first wrote to the competent director setting out the points with which he disagreed and briefly mentioning the experience he had gained by the age of 25. The letter was in fact a request for information, and the director answered it on 31 March 1982.

Not until 5 April 1982 did the complainant lodge his internal appeal, describing it as such. But the appeal does not mention experience acquired by the age of 25, and the Appeals Committee did not rule on the point, which was not before it. The plea of irreceivability succeeds under Article VII(1) of the Statute of the Tribunal, which says that "a complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations".

4. Thus the only question before the Tribunal is the period during which the complainant, a French citizen, did his national service in West Germany under technical co-operation. From 1 March 1969 to 1 July 1970 he served in West Germany as a lecturer in science in the Cultural Section of the French Embassy in Bonn. For that purpose his services were made available to the Foreign Ministry by the Ministry of the Armed Forces.

The EPO's argument is that such service does not count as professional experience because it was compulsory.

It is clear from the guidelines and from the Council's records that the conclusion of the Council's lengthy debate on the subject was that military service should not count. Here the President has no discretion and has to apply the guidelines.

But the complainant was not performing military service: he was serving under a technical co-operation programme. The EPO submits, first, that such service is a substitute for military or defence duties and that young people who prefer that form of national service should fare no better than those who do military service.

Secondly, it contends that to rule otherwise would be unfair when the form of service chosen by the staff member may be performed in both military and civilian life.

Thirdly, it observes, by way of comparison, that Article 44 of the Service Regulations expressly assimilates all forms of national service.

5. The third plea may be rejected at once since it relates to what happens when someone already on the staff performs military or comparable service. Indeed the argument might even be turned against the EP0 since it shows the Council was quite aware of the question of technical co-operation service when it discussed military service.

Apparently it was not silent by oversight.

6. Military and technical co-operation service cannot be assimilated. They are both a form of national service, it is true, but that is all they have in common. Their duration purpose and nature differ. One has to volunteer for co-operation work. The principle of equality cannot therefore apply when one young man makes use of his university or other academic qualifications, for example in the foreign service of his country, and another serves in the defence of his country. When the Council decided to discount military service in reckoning professional experience it meant and indeed could only mean military service as such. The President therefore erred in law in founding his decision on an assimilation of military and technical co-operation service.

7. The error of law does not mean that the Tribunal gives the complainant full satisfaction. Not every form of co-operation service necessarily has to count. Subject to review by the Tribunal, the President is free to exercise his discretion, having regard to the Council's guidelines.

In the circumstances the Tribunal will set aside the impugned decision and refer the complainant to the EPO for review of his position in the light of this decision.

8. The EPO is required to pay him 2,500 Deutschmarks in costs.

DECISION:

For the above reasons,

1. The impugned decision is quashed as set out above, and the complainant is referred to the President of the Office for review of his administrative status.

2. The remainder of his claims is dismissed.

3. The EPO shall pay him DM 2,500 in costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 April 1984.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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