

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

## FIFTY-NINTH ORDINARY SESSION

In re GOLDSCHMIDT

Judgment No. 752

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gerhardt Goldschmidt against the European Patent Organisation (EPO) on 6 September 1985, the EPO's reply of 27 November 1985, the complainant's rejoinder of 15 January 1986 and the EPO's surrejoinder of 3 April 1986;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, Articles 6, 7 and 8 of the Berlin Agreement concluded between the EPO and the Government of the Federal Republic of Germany, and Articles 32, 107, 108(2) and 109 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. The complainant, who was born in 1927 and is a citizen of the Federal Republic of Germany, served as a patent examiner in the Berlin annex of the Federal Patent Office from 1970 to 1978. On 18 May 1978 he was offered a post in the EPO's new sub-office in West Berlin as a search examiner at grade A2, step 9. In a letter of 30 May to the President of the Office he accepted the post but protested against the grade, maintaining that someone like himself with eight years of patent experience should start at grade A3. He took up duty on 1 June. On 22 August the Principal Director of Personnel confirmed his grading at A2. He pressed his objections in a letter of 29 August 1978.

This was treated at first as an internal appeal but just over a year later the appeal was allowed to lapse. On 13 December 1979 he was promoted to A3 as from 1 June 1979 and on 1 February 1983 to A4 as from 1 January 1982. Some time early in 1984 he learned that a younger and junior examiner had been recruited from the Federal Patent Office, in Munich, at A3. On 12 March 1984 he wrote to the President of the Office saying that, though he had hitherto acquiesced, he must now protest against the unequal treatment and seek an "adjustment" of his grade. A reply of 12 June from the Principal Director of Personnel rejected his claim and on 19 June he lodged an internal appeal under Article 107 of the Service Regulations. In its report of 8 May 1985 the Appeals Committee held that the appeal was time-barred and in any event devoid of merit. It recommended rejection, and in a letter of 21 June 1985, the impugned decision, the President informed him that he accepted the recommendation.

B. The complainant explains that the reason why he did not press his claims in 1979 was that he could not get hold of evidence to establish the unfairness of his initial grading. Not until early 1984 did he obtain it and he thereupon raised the matter promptly. In doing so he pursued his original claim, and his appeal of 19 June 1984 was therefore not time-barred.

As to the merits, he alleges unequal treatment on the grounds that the other examiner recruited from the Federal Patent Office, who had no greater professional experience, fared better than he. He asks the Tribunal to quash the impugned decision and order the President to "correct [his] unjustified grading".

C. The EPO replies that the complaint is irreceivable. The complainant failed to exhaust the internal means of redress as required by Article VII(1) of the Statute of the Tribunal because his appeal of 19 June 1984 was time-barred under Article 108(2) of the EPO Service Regulations: he ought to have appealed within three months of the decision of 1978 on his starting grade. He let the matter lapse, as he said himself in his letter of 12 March 1984, and the delay is fatal. In any event he failed to challenge the implied decision to reject his internal appeal of 29 August 1978 within the time limit set in Article VII(3) of the Statute. Lastly, as the Tribunal held in Judgment 602, the later discovery that the original decision may have been unlawful does not set off a new time limit.

The complaint is also unfounded. There was no breach of equal treatment because the other examiner was in a different position both in fact and in law. The complainant came from the Berlin annex of the Federal Patent Office and was appointed under the special provisions -- Articles 6, 7 and 8 -- of the Berlin Agreement between the EPO and the Federal Government; the other examiner was in Munich and covered by the ordinary provisions of the Service Regulations on recruitment. The EPO submits that the special provisions of the Agreement were correctly applied in determining the complainant's starting grade. But they applied only to recruitment: as to promotion the complainant is covered by the Service Regulations, was promoted to A3 as soon as he qualified, and in that respect has been put on a par with all other EPO staff.

D. The complainant rejoins that what he wants is not a change in his starting grade -- he did not ask for that in his internal appeal of 12 March 1984 -- but compensation for the "unjustifiable difference" in pay between his own grade and the other examiner's, which he puts at some 600 Deutschmarks a month. Since what he is challenging now is the inequality of treatment and that inequality is continuing there was no time bar to his appeal and his complaint is receivable.

Repeating his submissions on the merits, he demands a "satisfactory adjustment" to remove the inequality as from 1 January 1980. He claims an "acceptable equal grade with the other employee" as from that date, interest at 10 per cent a year on the sums due and 3,000 Deutschmarks as costs.

E. In its surrejoinder the EPO observes that the complainant has failed to address its pleas either on receivability or on the merits. It enlarges on those pleas, maintaining that what the complainant is really asking for is a change in his grade in the early years of his employment in the EPO. The matter has been closed for years since he failed to pursue his claims in time.

## CONSIDERATIONS:

### Receivability

1. The impugned decision of 21 June 1985 rejected the complainant's internal appeal of 19 June 1984 "as time-barred and, subsidiarily, as devoid of merit", on the unanimous recommendation made by the Appeals Committee in its report of 8 May 1985.

The Tribunal will first rule on the EPO's plea that the complaint is irreceivable because the internal appeal was out of time. Under Article VII(1) of the Statute of the Tribunal a complaint shall not be receivable unless the internal means of redress have been exhausted. In this instance the Service Regulations provide, in Article 108(2), that the internal appeal shall be lodged within three months, the time limit to be reckoned as prescribed in 108(3).

2. On 30 May 1978 the complainant accepted an offer of a post in the EPO's Berlin sub-office but he objected to his grading, A2, step 9, on the grounds that it should be A3. On 22 August the Principal Director of Personnel informed him that his claim was rejected. In a letter of 29 August the complainant said he could not accept the reasons for the rejection. The Administration had to decide whether to treat that letter as an internal appeal, and it did so decide on 9 November 1979, or over a year later. But by a minute of 22 November 1979 the Personnel Department in Munich informed it that the complainant had stated orally he did not wish to pursue the matter.

The minute plainly fails to meet the requirements set in Article 32(1) and (3) of the Service Regulations for the filing of a document in the staff member's file and may therefore not be cited against him. But quite apart from the complainant's oral statement it appears that, though there was no express decision on the internal appeal within the meaning of Article 109(1), there was an implied one to reject it under 109(2). The complainant was therefore free to file a complaint with the Tribunal, in accordance with 109(3), within the time limit set in Article VII(3) of the Statute of the Tribunal.

3. On 13 December 1979 he was promoted to A3 as from 1 June 1979 and on 1 February 1983 to A4 as from 1 January 1982.

By a letter of 12 March 1984 he repeated his objections to his original grading, having discovered that another staff member he alleged to be in the same position as himself had fared better. On 12 June 1984 the Principal Director of Personnel rejected his objections, he filed an internal appeal on 19 June 1984, and the EPO rejected the appeal in a final decision of 21 June 1985, the one he now impugns.

4. His first internal appeal, that of 29 August 1978, instituted administrative proceedings, but he failed to go to the Tribunal within the time limits in Article VII of its Statute.

The reaffirmation of his claims on 12 March 1984 was based on the same facts as his original appeal, but this time he relied on the discovery that another staff member he alleged to have been in the same position as himself had nevertheless been granted a higher initial grading.

His second internal appeal, that of 19 June 1984, was lodged after expiry of the time limit in Article 108(2) of the Service Regulations. Though he did rely on facts of which he had been unaware at the outset, there was no new time limit on that account, the time limit in the Service Regulations being objectively determined and unqualified. Any other conclusion, even if founded on considerations of equity, would impair the stability of the parties' position in law, which is the purpose and indeed the whole point of a time limit. The only exception is where the organisation has misled the complainant or concealed some paper from him so as to do him harm, in breach of the good faith which should govern administration. But the condition is not fulfilled here.

Since the complainant's internal appeal was out of time he failed to exhaust the internal means of redress as required by Article VII(1) of the Statute of the Tribunal and his complaint is therefore irreceivable.

5. The complaint being irreceivable, the Tribunal need not rule on the merits.

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 Mr. Héctor Gros Espiell, 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

H. Gros Espiell

A.B. Gardner