

## SIXTY-FOURTH SESSION

### *In re* THEUNS

#### Judgment 882

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hubertus Gerardus Theuns against the European Patent Organisation (EPO) on 29 April 1987, the EPO's reply of 24 July, the complainant's rejoinder of 29 October 1987 and the EPO's surrejoinder of 15 January 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 49(7) and 108(2) 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, a Dutchman, joined the staff of the EPO at The Hague on 1 March 1985 as an examiner of patents at grade A2. As has been recounted in earlier judgments - for example in No. 851, under A - the President of the Office brought in new guidelines as from 1 January 1985 on the reckoning of the professional experience of examiners and others for the purpose of determining their starting grade and step and their seniority for promotion. The guidelines were announced in circular 144 of 1 August 1985. The complainant's experience at appointment was recalculated according to the guidelines at seven years and seven months and he was so informed in a note he got on 6 November 1985. By a minute of 22 November the Head of the Personnel Department informed him that as from 1 March 1985 he had been put at A2, step 6, with seven months' seniority. In an appeal of 18 April 1986 to the President he said that in that case he had had eight years' experience by 1 August 1985, five months after appointment; that according to the new guidelines that warranted his appointment at grade A3; that whereas at 1 August 1985 he was only at step 7 in A2 someone with no greater experience recruited at that date got step 1 in A3; and that the discrepancy would last until he left the EPO and cost him dearly. The President referred his appeal to the Appeals Committee on 12 June 1986. In its report of 27 November 1986 the Committee held that the appeal was timebarred because he had got the new reckoning on 6 November 1985 and had failed to appeal within the three months' time limit in the Service Regulations. Though it held that in any event the rules had been correctly applied, it observed an anomaly, aggravated by the requirement in Article 49(7) that the staff member serve for two years in the EPO before qualifying for promotion, and recommended retroactive amendment of the rules to remove it. Having received no decision from the President on the Committee's recommendations, the complainant is challenging the implied rejection of his claims. B. The complainant contends that he has exhausted the internal means of redress because his internal appeal was not, as the Appeals Committee held, time-barred. The challengeable decision was not the new reckoning he got on 6 November 1985. The earliest decision that showed the effects of the reckoning was his pay-slip for January 1986, which he got at the end of the month, so that his internal appeal of 18 April 1986 was in time.

Turning to the merits, he alleges breach of the principle of equality. As the Committee acknowledged, he fares worse than anyone with the same experience who was recruited at 1 August 1985, the more so because he may not be promoted to A3 for at least two years. It is absurd to rate EPO service less highly than outside experience. There is further breach of equality in that several examiners recruited at A2 advanced to A3 on the strength of the reckoning of their experience by the new guidelines. The effects of the anomaly will not be removed by the complainant's promotion to A3 since he will still lag behind those recruited at A3 in August 1985 and his seniority in A3 will count less towards promotion to A4. If now appointed to his own post he would be paid more. He asks for the grant of grade A3, step 1, as from 1 August 1985 and consequent arrears of pay with interest; failing that, an award of compensation to make good his pay and pension rights; and costs.

C. The EPO replies that the complaint is irreceivable because he lodged his internal appeal out of time and failed to

exhaust the internal remedies. By 6 November 1985, when he got the new reckoning, he had all the information he needed to realise that because of the two-year waiting period stipulated in 49(7) he could not be promoted to A3. His failure to appeal within three months of that date is fatal.

Besides, his complaint is devoid of merit. The decision not to grant him A3 as from 1 August 1985 was lawful. The rule in 49(7) takes precedence over any guidelines the President may issue, and the President has no discretion to derogate from it. Nor was there any breach of equality. The permanent employees given A3 after recalculation of their experience by the new guidelines were regraded as from the date of recruitment: the new reckoning entitled them to retroactive recruitment at A3 whereas the complainant did not have the 8 years' seniority until he had been in the EPO for several months, so that he could get A3 only by promotion that 49(7) precluded. The EPO discusses the case law.

D. The complainant rejoins that his internal appeal was in time. He rejects the EPO's interpretation of the case law, particularly on equal treatment in the reckoning of experience and grant of grade. He fares worse than others who have no greater experience, and indeed less in the EPO itself. Equality of treatment is a general principle embodied in many international instruments and the EPO has the duty to depart from its rules to comply with the principle.

E. In its surrejoinder the EPO enlarges upon its earlier submissions and seeks to refute the rejoinder, which it contends weakens its case neither on receivability nor on the merits. It submits that the complainant is mistaken in arguing that EPO service counts less than prior experience: the reason why he is not promoted to A3 is the rule in 49(7), not the evaluation of his EPO experience for the purpose of promotion.

#### CONSIDERATIONS:

1. The complainant, a grade A2 official of the European Patent Office, is seeking regrading at A3 as from 1 August 1985, the consequent arrears of pay with interest, and costs.
2. He joined the EPO on 1 March 1985. Circular 144 having brought in new guidelines on the reckoning of experience as from 1 January 1985, he was given on 6 November 1985 a reckoning of experience made according to those guidelines. A minute of 22 November from the Head of the Personnel Department told him that because of the new reckoning he had been put as from 1 March 1985 at A2, step 6, with 7 months' seniority.
3. In an appeal of 18 April 1986 to the President of the Office he explained that it was not until 27 January 1986, when he got his pay-slip dated 1 January, that he realised his grading was wrong. By 1 August 1985 he had, he said, gained eight years' experience and acquired entitlement to A3, as indeed had those with the same tally of experience who had actually been recruited at that grade. He said that if the President refused his claim it should be treated as an internal appeal.
4. On 12 June 1986 the President told him that his appeal was provisionally rejected and was referred to the Appeals Committee.
5. In its report of 27 November 1986 the Appeals Committee unanimously recommended rejecting the appeal: for one thing, it was time-barred and therefore irreceivable; for another, it was devoid of merit. Everyone, said the Committee, who had started at A2 with over six but under eight years' experience came off worse because Article 49(7) of the Service Regulations required for promotion not just a minimum period of experience but also at least two years' service in the present grade.
6. The President having taken no decision on the Committee's report, the complainant lodged his complaint on 29 April 1987.
7. The EPO's main plea is that the complaint is irreceivable because the internal appeal was not in time. In its submission he was aware of a challengeable decision by 6 November 1985, when he got the new reckoning. Not having lodged his appeal for five months, on 18 April 1986, he was time-barred under Article 108(2) of the Service Regulations, which says an appeal must be lodged within three months of the date of notification of the decision challenged.
8. The complainant's answer to that is that the time limit began when he got the first pay-slip showing his new grading, the one for January 1986, and in support of that view he cites Judgment 753 of 12 June 1986 (in re Germano).

9. The Tribunal holds that the time limit for filing his internal appeal ran from the date of the earliest notification to him of his new grading. It is immaterial whether that was 6 November 1985, when he got the new reckoning, or 22 November, when the Head of Personnel wrote to him: whichever it was, his appeal was too late.

10. He misreads Judgment 753: what the Tribunal held was that payment of salary might be treated as a challengeable decision only when there was no other.

11. Since the complainant failed to file his internal appeal in time his complaint is irreceivable. According to Article VII of the Statute a complaint is receivable only if the internal means of redress have been exhausted. Filing a complaint is not a remedy for failing to make an internal appeal in time and the certainty in law that is a condition of sound administration requires treating time limits as compulsory.

12. Since the complaint fails because it is irreceivable, so do the claims to damages and costs.

#### 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