

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

## FIFTY-THIRD ORDINARY SESSION

In re MEYER

Judgment No. 612

### THE ADMINISTRATIVE TRIBUNAL

Considering the complaint filed against the European Patent Organisation (EPO) by Miss Christiane Meyer on 6 May 1983 and corrected on 1 July, the EPO's reply of 22 September, the complainant's rejoinder of 28 November and supplement thereto of 16 December 1983 and the EPO's surrejoinder of 1 February 1984;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 8, 11(1), 13, 49, 64(1) and 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 material facts of the case are as follows:

A. In August 1979 the complainant, a citizen of Luxembourg, accepted an offer from the EPO of appointment to a grade B2 post with effect from 1 November 1979. On 16 September she applied for a B4 vacancy as an assistant accountant. According to a minute of 5 March 1980 signed by the Principal Director of Personnel it had been explained to her orally that since she did not have the minimum experience required for grade B4 she was offered the vacancy at B3 for one year; she might then be promoted to B4. She accepted the post "at provisional grade B3" with effect from 1 April 1980. On 4 June 1981 she applied for immediate promotion to B4. On 19 June the Principal Director of Personnel replied that there had never been any question of her automatic promotion to B4 at the end of the year. On 26 October she wrote to the President of the Office seeking promotion to B4 with effect from 1 April 1980 and observing that she had been told at the time that a rule against "leapfrogging" barred her immediate promotion from B2 to B4. On 30 July 1981, she said, she had learnt from the office newsletter that a C4 official had got a B3 post, thus "leapfrogging" several grades. On 8 December she was informed of her promotion to grade B4, but with effect only from 1 April 1981. Her case went to the Appeals Committee, which reported on 15 December 1982. The majority recommended backdating her promotion to 1 May 1980, but by a decision of 28 December 1982, the one impugned, the President rejected her appeal as time-barred.

B. The complainant contends that what prevented her getting B4 when she took up the post was the ban on leapfrogging, which one was told was a hard-and-fast rule. Only on reading the newsletter of 30 July 1981 did she realise it was not. The effect was to vitiate her consent and open a new time limit for appeal. As to the merits, she submits that it was wrong to put her on a temporary or unapproved post and give her a grade which did not match the post she actually held. On the strength of various items of evidence she submits that her duties warranted grade B4. There is a rule in the Service Regulations which says that the grade must match the post description. There is no ban on leapfrogging in the Regulations. She seeks the quashing of the decision of 28 December 1982 and her appointment to B4 with effect from 1 April 1980, payment of interest at 10 per cent on the arrears of pay due to her from 26 October 1981, the date on which she submitted her internal appeal, and 1,100 Deutschmarks as costs.

C. The EPO observes that the complainant applied to intervene in the Decroix case (Judgment No. 602) and that the essence of her own complaint is the same. It should fail because the internal appeal was irreceivable. She was aware at the latest by the date on which she received the letter of 19 June 1981 of the reasons for not promoting her immediately to B4, and she ought to have appealed in the three-month time limit set in Article 108(2) of the Service Regulations. There was no new fact which removed the time bar. In any event the complaint is devoid of merit. She did not have the minimum professional experience required. There was no question of letting her leapfrog grades. The case of the staff member promoted from C4 to B3 was truly exceptional. Article 64 of the Service Regulations is irrelevant: it entitles an official only to the remuneration for the grade he has, not the one he thinks he should have. The complainant wittingly and expressly consented to the grant of grade B3 for a year.

D. The complainant argues in her rejoinder that she consented to the grade for two reasons, the ban on leapfrogging and the requirement of minimum experience. Her consent is vitiated if either of them proves false. On studying the evidence on Miss Decroix's case she realised that the objection based on experience was mistaken. Although at the time she herself needed another nineteen months' experience to qualify for B4 Miss Decroix's experience did not qualify her even for B3. The complainant appends the text of a decision taken by the Administrative Council on 9 December 1983 which in her view supports her case.

E. In its surrejoinder the EPO answers the rejoinder and enlarges on its arguments. It observes that neither the complainant nor Miss Decroix had experience which qualified them even when they were actually promoted to B4. The complainant too, was given preferential treatment and there was no inequality of treatment, as she implies. When she consented to the offer she was aware of the reasons for not appointing her to B4. Her appointment to the post and her promotion to B4 only one year later were entirely to her advantage. The President exercised his discretion correctly. The Council's decision of 9 December 1983 is subsequent to the impugned decision and therefore not material.

#### CONSIDERATIONS:

1. After winning a competition in February 1980 for a vacancy the complainant, who was already on the staff of the EPO, was appointed as an assistant accountant with effect from 1 April 1980.

Although the Selection Board was unanimous that she should be appointed at grade B4, the Personnel Department took the view that she could not have that grade straightaway and it therefore offered her B3. She accepted the provisional grant of that grade in a letter of 28 March 1980. By a decision of 8 December 1981 she was promoted to B4 with effect from 1 April 1981, one year after she took up duty.

She discovered that another staff member had been directly appointed to B4, thereby "leapfrogging" several grades, and on 30 October 1981 she asked that she be given B4 from the date of her taking up the new post in the Accounts Section, 1 April 1980. This was turned down on 14 December 1981, and at her request her case went to the Appeals Committee.

The EPO's main contention before the Committee was that her appeal was time-barred and irreceivable, but the Committee disagreed and recommended appointing her to B4 with effect from 1 May 1980.

The President refused and on 28 December 1982 rejected the appeal as time-barred.

2. The EPO submits that the decision she is challenging is the one on her grade taken on 28 March 1980. According to Article 108(2) of the Service Regulations she had three months from the notification of the decision in which to appeal to the Administration. Since she did not lodge her appeal with the President until 30 October 1981 it was time-barred, even though the Appeals Committee took a different view. Her complaint is irreceivable under Article VII(1) of the Statute of the Tribunal because she did not follow the internal procedure properly.

The complainant's answer to that -- and the Appeals Committee's -- is that although it had been unlawful to appoint her to B3 in the first place she did not realise it until July 1981, when she learned that someone else had been promoted despite the rule the EPO had relied on to reject her own claim.

3. The plea fails. Article VII(1) says that a complaint shall not be receivable unless the means of redress provided under the Staff Regulations have been exhausted. It is not enough just to make an internal appeal; it must be submitted in time. And there the complainant failed because not until 30 October 1981 did she submit to the President her appeal against the decision of March 1980 on her grade and step. She had notice of that decision not later than 28 March, and therefore failed to abide by the three-month time limit. Since she did not follow the internal procedure correctly her complaint is irreceivable.

Her later discovery that the Administration's decision might have been unlawful does not affect the time limit, which is an objective matter of fact and starts on the date on which the impugned decision was notified. 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 and is therefore in breach of good faith. In this instance the EPO was not in breach of good faith since the complainant's position was not analogous to that of the other official she refers to.

4. The complainant refers in her rejoinder to a decision taken on 9 December 1983 by the Administrative Council of the EPO. Article 2 of the decision states that it shall come into force on 9 December 1983, and obviously the decision has no bearing on the present dispute.

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 hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1984.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner