

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

FIFTY-FIFTH ORDINARY SESSION

In re METTEN, SPIEKERMANN and STERN

Judgment No. 657

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. André Metten on 16 May 1984, the EPO's reply of 17 August, the complainant's rejoinder of 20 September and the EPO's surrejoinder of 14 December 1984;

Considering the applications to intervene in Mr. Metten's complaint filed by:

A. Blondeau,

C. Bournot,

R. Cecchini,

V. Chaki,

Y. Cleuziou,

M.J. Conlon,

U. Hild,

S. Kalling,

E. Kirschbaum,

F.J. Koer,

P. Kyriakides,

P.R. Lockett,

J.B. Manton,

P. O'Reilly,

U. Peters,

R.P. Spiegel,

P. Spiekermann,

E. Stern,

J. Straker,

A. Wells; and the EPO's comments of 14 December 1984 on those applications;

Considering the complaint filed by Mr. Peter Hermann Wilhelm Spiekermann on 8 May 1984 and corrected on 15 May, the EPO's reply of 3 August, the complainant's rejoinder of 3 October and the EPO's surrejoinder of 21 December 1984;

Considering the applications to intervene in Mr. Spiekermann's complaint filed by:

P.R. Alting von Geusau,

F. Andres,

M. Aspeby,

A. Blondeau,

C. Bonvin,

C. Bournot,

G.D. Carruthers,

Y. Cleuziou,

B. Gellie,

I. Harris,

U. Hild,

K.P. Hiltner,

B. Hjelm,

E. Kirschbaum,

F.J. Koer,

P. Kyriakides,

P.R. Lockett,

J.B. Manton,

V. Markowski,

A. Metten,

U. Peters,

P. O'Reilly,

F.J. de Ruiter,

E. Stern,

L. Stone,

J. Straker,

R. van Voorst tot Voorst; Considering the EPO's comments of 1 March 1985 on Mr. Blondeau's application;

Considering the complaint filed by Mr. Eric Stern on 5 June 1984 and corrected on 14 June, the EPO's reply of 3 September, the complainant's rejoinder of 4 October and the EPO's surrejoinder of 21 December 1984;

Considering the applications to intervene in Mr. Stern's complaint filed by Mr. Blondeau, Mr. Bournot, Mr. Chaki, Mr. Manton and Mr. Metten and the EPO's comments of 25 October and 27 November 1984 on those applications;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 49(1), (7) and (11), Title VIII, Article 116(1) and (3) and Annex I of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed Mr. Metten's application for oral proceedings;

Considering that the material facts of the case are as follows:

A. All three complainants are patent examiners and were appointed to the staff of the EPO at grade A2. Mr. Metten, who was appointed on 11 January 1982, was granted step 5 on the grounds of his previous professional experience. Mr. Spiekermann joined the staff on 2 September 1981 and was granted step 7; on his promotion to A3 on 1 October 1982 he was granted step 1. On 11 January 1982, when he was appointed, Mr. Stern's professional experience was reckoned at 4 years and 4 months. The complainants and others noticed that their experience had been taken into account at a less favourable rate than that of staff recruited at grade A3 and that they would therefore take longer to reach any given step in that grade. Mr. Metten, Mr. Spiekermann and others accordingly submitted appeals to the Appeals Committee, and the Committee reported on 19 December 1983. By a letter of 21 February 1984 the President of the Office informed them that on the Committee's recommendation he rejected their appeals, and that is the final decision they are impugning. As for Mr. Stern, on discovering that he was not on the list of examiners promoted to A3 he submitted an appeal on 22 March 1984 against the decision not to promote him. He received no reply to his appeal and is impugning the implied decision to reject it.

B. The complainants are all objecting to the reckoning of their professional experience which served in determining their starting grade, A2, and their starting step in that grade, as well as to the conditions for access to A3, which differ according as the grade is granted on recruitment or on promotion. They allege breach of the principle of equal treatment. Mr. Metten contends that the period of five years' experience which, according to the guidelines in EPO Council document CI/Final 20/77, is taken into account in determining the starting step in A3 on recruitment at that grade should suffice for himself to qualify for A3, not the eight years actually required under the guidelines in CA/16/80. Mr. Spiekermann calculates that he will need 11 years and 7 months' experience, as reckoned for the purpose of determining grade, and 12 years and one month as reckoned for the purpose of determining starting step, to reach the step in A3 which others were granted on recruitment at A3 on the strength of only five years' experience. Mr. Stern is asking the Tribunal to rule that an A2 examiner should ordinarily be promoted to A3 as soon as reckonable seniority amounts -- as his own now does -- to five years. Mr. Metten claims appointment to A3 as from the date of his recruitment. Mr. Spiekermann asks that he be granted the step which he would have had had he been originally recruited at A3, on 1 October 1982. Mr. Stern seeks promotion to A3 as from January 1983. Mr. Metten and Mr. Stern also claim the corresponding arrears of pay and their costs.

C. The EPO observes in its replies to the complaints that no-one has any right to promotion. The Council approved guidelines on promotion which are set out in CA/20/80 and which provide that for promotion to A3 the staff member must have from five to eight years' experience, depending on the quality of his performance. Only in exceptional cases will promotion be granted on the strength of only five years' experience. To qualify for recruitment at A3 the candidate for a post as an examiner must have at least eight years' experience according to other guidelines in document CA/16/80. Examiners who are recruited at A2 and later promoted to A3 enjoy the benefits of their legal status as EPO officials from the date on which they join the staff; the examiner recruited at A2 and promoted to A3 is therefore not in the same position in law and in fact as the examiner recruited at A3.

D. In their rejoinders the complainants enlarge on their submissions. In particular they observe that in increasing to eight years the period of experience required for promotion to A3 the President acted without authority: he was not empowered under the guidelines in CI/Final 20/77 to make any such requirement. The inequality of treatment suffered by A2 examiners promoted to A3 continues right through their careers: they will never catch up with examiners recruited at A3. Mr. Metten and Mr. Stern submit that the Council has never offered the practice, set out in CA/16/80 and CA/20/80, of laying down a maximum requirement of eight years' professional experience for access to A3.

E. In its surrejoinders the EPO develops the arguments in its replies. It answers in detail several points raised in the rejoinders. It quotes the Council's minutes to show that the Council did approve the guidelines in CA/16/80 and CA/20/80. It maintains that there is nothing arbitrary or improper about the impugned decisions and it again urges the Tribunal to dismiss the complainants' claims.

CONSIDERATIONS:

Joinder

1. Before the Tribunal will join two or more complaints and deal with them in a single judgment two conditions must be fulfilled.

The first is that the substance of the claims must be the same. Whether they are stated differently is of no account: what matters is that the Tribunal should be able to rule on them in a single decision.

The second condition is that the material facts, viz. those on which the claims rest and which are relevant thereto, should be the same.

The complainants need not all have the same arguments. The Tribunal rules as it sees fit and is not constrained by the parties' submissions, variations between them being immaterial.

2. Both conditions are fulfilled for joining the complaints filed by Mr. Metten, Mr. Spiekermann and Mr. Stern.

Though not stated in exactly the same terms, their claims are the same in substance: they are all asking that there should be a standard requirement of five years' professional experience for access to grade A3 and that in having their step determined examiners recruited at A2 and later promoted to A3 should, on promotion, be put on a par with examiners recruited at A3.

Again, though not in quite the same position, they are pleading similar facts: a refusal to apply to them a standard requirement of five years' experience for access to A3, and the failure to put on a par examiners recruited at A2 and examiners recruited at A3.

The EPO's application for joinder is allowed.

The allegations of unequal treatment and discrimination

3. All three complainants are examiners who were recruited at A2. The nub of their case is that in the determination of the starting step in A3 examiners recruited at A3 fare better than examiners recruited at A2 and later promoted to A3.

In their view the President's refusal to put the two groups on a par amounts to breach of the principle of equality and discriminates against examiners recruited at A2.

The relief they seek is that the minimum requirement of experience for access of examiners to A3 should apply also to themselves.

The EPO does not deny that examiners recruited at A3 are granted a higher step than are examiners promoted from A2 to A3. But it submits that there need be like treatment only when officials are in like position in fact and in law; those -- like the present complainants -- who are in a different position may be treated differently.

The EPO further contends that there is no merit in their claim to have the standard requirement of experience for access to grade A3 applied also to themselves.

The material issues in this case are the position of A2 and A3 examiners, and what the texts have to say about the terms of their recruitment and promotion.

4. The EPO Service Regulations prescribe a transitional period, and Article 116, headed "Initial recruitment of category A staff in the field of substantive examination", circumscribes the authority to be exercised in the matter by the President of the Office and by the Administrative Council during that period. Under 116(1) the President is authorised to derogate "from the provisions of Title I and Title III, Chapter 2" concerning "the recruitment procedure and conditions". In doing so, however, he must have "regard to the guidelines laid down on this matter by the Administrative Council".

The guidelines are in CI/Final 20/77. Their wording is such that they cannot be treated as a mere statement of

policy: they set objective criteria for dealing with individual cases.

5. What, then, does CI/Final 20/77 say, and what does it require? As to recruitment it allows derogation from the regulations under three heads: "Determination of starting grade", "Determination of starting step within a grade", and "Promotion of those recruited under the simplified procedure".

To determine the starting grade paragraph 4 says that examiners qualify for recruitment by satisfying the minimum requirements of the grade -- which are determined according to the criteria in paragraph 5 -- but that someone who satisfies them will not be "entitled to a post in that grade as of right".

To determine the starting step in a grade, paragraph 10 prescribes a formula which consists in deducting from the total period of reckonable experience 2 years if the starting grade is A2, 5 if it is A3 and 9 if it is A4.

The complainants were recruited, during the transitional period, in 1981 and 1982 and in accordance with the guidelines were granted grade A2 at steps determined by the formula in paragraph 10.

None objected to the decision on his starting grade and step, let alone duly filed an internal appeal under Title VIII of the Service Regulations.

Accordingly the decisions appointing them to A2 are beyond challenge and any claim which entails review of their grade and step on appointment is time-barred and irreceivable.

6. The President has refused to base their promotion to A3 on the five years' minimum experience required by the job descriptions, and their main plea is that that constitutes breach of the principles of equal treatment and non-discrimination.

Insofar as they are not seeking to challenge a posteriori their appointment at A2 the Tribunal will go into the merits.

Although the job descriptions require five years' experience for access to A3, it is clear from paragraph 4 of the guidelines that that is a minimum requirement and that recruitment at A3 is not a right even if the requirement is satisfied.

The same rules govern promotion. Article 49(7) of the Service Regulations says that promotion to the next grade in a category shall be by selection from among employees who have the minimum experience required in the job descriptions.

The President therefore acted correctly, when he came to apply the provisions on the minimum requirements, in adopting a requirement of eight years' experience for both recruitment and promotion to A3. The practice, as set out in CA/16/80 and CA/20/80, was endorsed by the Council on 6 June 1980 (see CA/PV 8 f).

It thus appears that a requirement of eight years' experience is compatible with the rules. In originally making five years the minimum requirement for access to A3 the Council bestowed discretion on the President to determine the number of years he thought necessary in the interests of the efficiency of the Office.

Nor may the complainants contend that their career prospects have suffered since the practice endorsed by the Council was being followed before the complainants were recruited and continued to be applied to all examiners directly recruited at A3. There is therefore no merit in the plea that there was breach of their good faith.

There is no need to dwell on the complainants' plea that paragraph 8 of CI/Final 20/77 links the conditions for promotion to A3 and the conditions for determining the starting step in A3 on direct recruitment at that grade and that the link warrants applying the minimum requirement of five years' experience for promotion to A3.

The Tribunal need only observe that paragraph 8, which is concerned with the starting step on appointment, is a rule about recruitment, not about promotion. It comes under the heading "Determination of starting step within a grade" and, referring to what goes before, states in fine: "these figures could be employed in determining the step within a grade".

For these reasons the Tribunal rejects the plea.

7. The Tribunal now takes up the complainants' contention that their step on promotion to A3 should be determined as if they had been recruited at A3. This means that someone who is in A2 should on promotion benefit from the rules in paragraph 10 of CI/Final 20/77 about determining the starting step on recruitment at A3.

For the reasons given below the claim is disallowed.

There is no text which for the purpose of determining the step on promotion refers to the guidelines in CI/Final 20/77, which in fact relate to initial recruitment.

During the transitional period Article 116(1) of the Service Regulations derogates from Title I and Title III, Chapter 2. But that does not mean that the whole of Chapter 2, including Article 49 about promotion, ceases to apply during the period.

The derogation expressly applies only to the provisions relating to the recruitment procedure and conditions applicable to Category A staff in the field of substantive examination. Not only does it not apply to staff in other categories; more particularly, it does not cover provisions relating to the procedure and conditions for promotion.

In matters of promotion it is Article 49(11), which comes under Chapter 2, that determines the step in the higher grade.

It is therefore quite in keeping with the Regulations to apply 49(11) to examiners promoted to A3, and the EPO cannot be held liable for breach of the principles of equality and non-discrimination in the treatment of A2 examiners promoted to A3, who are not in the same position as examiners directly recruited at A3.

The Tribunal must dismiss the complaints and need not take up every single argument or rule on every single contention: the arguments will fail either because they are superfluous or because the main pleas fail.

8. In the nature of things the interveners cannot have any greater rights than the complainants themselves. Since the complaints are dismissed, so must be the applications to intervene.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 18 March 1985.

(Signed)

André Grisel

Jacques Ducoux

E. Razafindralambo

A.B. Gardner