

SIXTY-FOURTH SESSION

In re HUNTER (No. 2)

Judgment 908

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Miss Eileen Elsie Hunter against the European Patent Organisation (EPO) on 3 September 1987, the EPO's reply of 20 November, the complainant's rejoinder of 21 December 1987 and the EPO's surrejoinder of 16 March 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 11 and 49(7) 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. As is recounted in Judgment 672, under A, the complainant joined the EPO in Munich as an examiner at grade A3 on 11 January 1982. Her performance is rated "good". She was born on 6 May 1942. From her seniority for promotion as reckoned at 1 January 1986 there was docked three years and seven months' experience she had gained before the age of 25 at the United Kingdom Patent Office.

In a note of 12 May 1986 to the competent promotion board the President of the Office said that "subject to the general career system for A and L category staff ... the following arrangements will apply for promotion to A4: examiners ... who are 'good': in the range of 19-23 years. Accession to each of these ranges of experience will depend on the attainment of certain minimum ages. These minimum ages lie within the range of ... 44-48 for 'Good'".

Having heard that the board had not recommended promoting her to grade A4 in 1986, the complainant lodged an appeal on 18 July 1986. In her submission it was wrong to dock any of her experience under the so-called "25-year rule" and she therefore had the required seniority. In its report of 18 May 1987 the Appeals Committee recommended rejecting her appeal and by a letter of 9 July, the final decision she impugns, the Principal Director of Personnel told her the President had done so. She was promoted to A4 as from 1 May 1987.

B. The complainant submits that it is contrary to Article 11 of the Service Regulations to reckon her experience differently for the purpose of determining her step in her grade and her seniority for promotion, which should have been 22 years and 3 months as at 1 January 1986. The three years and seven months have been docked from her seniority under the 25-year rule. Yet the rule never came into force and was in breach of equal treatment anyway because it applied only to seniority for promotion to A4, not to other grades. Besides, staff communiqué No. 4 of 3 July 1985 said: "As regards the new guidelines for the calculation of reckonable experience for A/L grade staff, the Presidential Committee agreed to the General Advisory Committee's recommendation that the '25-year rule' in respect of promotion to A4 be replaced by minimum age requirements". So the rule has been repealed.

Paragraph 259 of CA/PV 8, which the Administrative Council of the EPO approved in 1980, requires "approximately 20 years" of seniority for access to grade A4 by someone whose work is "good". Although in CA/20/80 the President proposed a range of 19 to 23 years the Council never approved the proposal. Since the complainant's seniority was well over 20 years as at 1 January 1986 she qualified under CA/PV 8.

It is discriminatory to lay down a minimum age that varies with performance: there should be one age for everyone and in any event for everyone with the same rating, not a range of ages.

The complainant has a subsidiary plea that since she reached the minimum age of 44 on 6 May 1986 she is entitled to promotion as from that date. Even if the 25-year rule is upheld, there was still breach of equal treatment. Two examiners who were promoted to A4 in 1986 had the same rating as the complainant and only 19 years' experience after the age of 25. Even with her seniority docked under the rule she had 19 years' experience after the age of 25

by 6 May 1986, when she was 44.

She claims promotion to A4 as from 1 January 1986 or, failing that, as from 6 May 1986, arrears of pay and 2,000 Deutschmarks in costs.

C. In its reply the EPO contends that the complaint is devoid of merit. The main claim is unsound because on 1 January 1986 the complainant did not qualify for promotion to A4. According to the guidelines approved by the Council and set out in CA/20/80 and CA/PV 8, a staff member rated "good" must have from 19 to 23 years' seniority to qualify and according to point 16 of CA/20/80 experience gained before the age of 25 does not count. With the 3 years and 7 months deducted the complainant's seniority came to only 18 years and 8 months by 1 January 1986. Besides, according to the guidelines in circular 144 of 2 September 1985 she ought also to have attained the minimum age for someone with her rating: at 1 January 1986 she was not yet 44.

Her objections to the 25-year rule are unsound. Not only is seniority for promotion not the same as seniority for the purpose of determining step in grade, but she misreads Article 11 of the Service Regulations, which relates solely to the latter. In CA/PV 8 the Council approved the career system as a whole, including the rule. Communiqué No. 4 did not repeal it. Neither the General Advisory Committee nor the Presidential Committee may do so; only the President may. The rule is at odds neither with the establishment of minimum ages nor, since different rules apply to different grades, with the principle of equal treatment. The minimum age requirements in CA/20/80 are not in breach of the principle either. There are sound reasons of policy both for stipulating different ages for staff rated differently and for a range of ages: a balance must be struck between overcrowding in A4 and refusing many their promotion.

The subsidiary claim is also devoid of merit. By 6 May 1986 the complainant did not meet the minimum requirements. The rules do not require the President to promote anyone who qualifies, and he takes the decision at his discretion in accordance with Article 49(7) of the Service Regulations. The complainant's sole objection to his decision in her case is that it was in breach of equal treatment. Her plea is unsound because the two examiners promoted to A4 were more deserving in that, though given the same formal rating, they had actually performed better.

D. In her rejoinder the complainant enlarges on her pleas and seeks to refute the EPO's reply. In particular she maintains that the Organisation is applying rules the Council did not approve; that the 25-year rule, besides being unlawful, never came into force and even if it did has since been repealed by the communiqué; that the minimum age requirements are arbitrary and discriminatory; and that the reasons of policy offered in the reply are mistaken.

E. In its surrejoinder the EPO contends that the rejoinder is either repetitive or irrelevant and in no way weakens the arguments in its reply, which it develops.

CONSIDERATIONS:

1. The complainant was recruited to the Organisation on 11 January 1982 at grade A3. At the time the career policy for staff in categories A and L was stated in the guidelines submitted by the President of the Office to the Administrative Council of the EPO on 3 April 1980 and set out in CA/20/80.

2. The calculation of reckonable experience for promotion from A3 to A4 is dealt with in paragraph 16 of CA/20/80:

"... Experience within the office has already shown that the ages at which graduates begin their professional life may extend from 21 to 28. In order, therefore, to establish a common starting point from which experience can be measured for promotion to A4 (and so avoid perpetuating national differences within a single organisation), it is suggested that the age of 25 be accepted as that starting point. As with every compromise solution some individuals do less well out of it than others, either because at 25 their education is still in progress or because several years of professional life may already lie behind them. The latter case is the more serious but its impact is reduced because all reckonable experience, irrespective of age, will have been taken into consideration for promotion to A3. The result is that young graduates will continue to advance to A3 (with the attendant financial advantages) at a relatively early age, even if some years are subsequently 'lost' for promotion to A4. Even here the 'lost' years will be taken into account when determining the entry step inside the A4 grade."

This is referred to as the "25-year rule".

3. A summary contains a table setting out the "kind of career envisaged in this paper for category A staff":

"Minimum experience (years) Age on reaching grade

Performance:

normal very good and above

(about 15%)

A1 - - 25

A2 2/1 27/26

A3 8 5-7 33/30-32

A4 19-23 12-18 44-48/37-43(Entry age to the EPO is assumed to be 25 years, the age from which experience will always be counted for promotion to A4)."

4. At a meeting in June 1980, as recorded in CA/PV.8, the Administrative Council approved the introduction of the career policy proposed by the President for A and L staff. "With a view to giving him the necessary directives applicable from 1 January 1981, it stated its position on the various points submitted to it." Having rejected proposals from the President for the promotion to A4 of examiners whose performance was normal, it adopted the following norms:

"Years' experience Performance

12 to 18 very good (about 15%)

approx. 20 normal"

5. The complainant's argument is that that decision did away with the 25-year rule and in support she cites the following passage of the President's communiqué No. 4 of 3 July 1985:

"As regards the new guidelines for the calculation of reckonable experience for A/L grade staff, the Presidential Committee agreed to the General Advisory Committee's recommendation that the '25-year rule' in respect of promotion to A4 be replaced by minimum age requirements."

6. The complainant contends that her reckonable experience for promotion at 1 January 1986 was 22 years and 3 months because no minimum age should apply and her experience under the age of 25 should count.⁷ Contrary to the complainant's submission the Council did approve in June 1980 the 25-year rule, which formed part of the arrangements for promotion from A3 to A4. The only item in the table mentioned in 3 above which the Council changed was the proposal that someone with "normal" performance should have 19 to 23 years' maximum experience: the Council altered the figure to "approximately 20 years". It is clear from the minutes of the Council's discussion that the 25-year rule was not disputed. Since the rule holds good it must be present in some form or another, either as such or else in the form of a minimum age requirement.

8. Paragraph 2 of the President's note of 12 May 1986 to the Chairman of the Examiner Promotion Board (A4) reads:

"All examiners except those to whom the special system described in paragraph 3 applies, are subject to the normal arrangements laid down in the general career system for A and L category staff. Subject to this general system, the following arrangements will apply for promotion to A4: examiners with a record of outstanding merit ('excellent') between 12 and 15 years, those who are 'very good' normally between 15 and 18 years and those who are 'good' in the range of 19-23 years. Accession to each of these ranges of experience will depend on the attainment of certain minimum ages. These minimum ages lie within the range of 37-40 for those with a record of 'Excellent', 40-44 for 'Very Good' and 44-48 for 'Good'."

9. The minimum age requirement is in effect the same as the 25-year rule. A candidate for promotion with an "excellent" record must be at least 37 years old: if reckonable experience starts at the age of 22 he will have 15 years' experience and, if at the age of 25, 12 years' experience. This accords with the norm "12 to 15 years' experience, minimum ages 37-40". If the norm had been "12-15 years' experience from the age of 25" the result would have been exactly the same.

The same is true of those with a "very good" record. Someone with experience reckoned from the age of 22 will have 18 years' experience by the age of 40. Someone whose experience starts at the age of 25 will have 15 years' experience by the age of 40. There is no difference in effect between "15-18 years' experience, minimum age 40-44" and "15-18 years' experience from the age of 25".

As for those whose performance is rated "good", someone with experience reckoned from the age of 22 will have 22 years' experience at the age of 44 and someone with experience reckoned from the age of 25 will have 19 years' experience at the age of 44. Again there is no real distinction between "19-23 years' experience, minimum ages 44-48" and "19-23 years' experience from the age of 25".

The conclusion is that the age limit has exactly the same effect as the 25-year rule.

10. The complainant argues that the words "vor der Erreichung des 25 Lebensjahres" in the reckoning of seniority made on 11 January 1982 for determining her grade and step should be interpreted literally to mean "before reaching the 25th year of life". But such construction is contrary to the clear intent of the 25-year rule, which is to disallow for the purpose of determining eligibility for promotion to A4 any experience acquired before the age of 25.

11. The complainant further contends that seniority for promotion is determined by Article 11 of the Service Regulations, which is headed "Grade and seniority" and reads:

"(1) The appointing authority shall assign to each employee the grade corresponding to the post for which he has been recruited.

(2) Unless the appointing authority decides otherwise, for duly substantiated reasons relating to the training and special professional experience of the candidate, appointment shall be to the first step in the grade."

But the article deals only with the determination of grade and of step in the grade, not with seniority for the purpose of promotion from A3 to A4, a matter covered by the guidelines the Council approved in June 1980. It follows that the reckoning of the complainant's experience for the purpose of determining her step in grade is not the right calculation to apply for the purpose of determining her seniority for promotion to A4.

12. The complainant was not eligible under the rules in force for promotion on 1 January 1986, when she had acquired over 22 years' actual experience, since she had not then reached the age of 44. By the time she did reach that age she had 19 years' experience after the age of 25 and was eligible for promotion. But she had no right to it: promotion is on merit, not on seniority alone, a principle the Council endorsed in June 1980 (CA/PV.8, paragraph 226).

As the Tribunal held in Judgment 787 (in re Biggio (No. 4)), it is not contrary to the principle of equal treatment to have a range of age and experience to determine eligibility for promotion to A4. The number of places available for promotion to A4 depends on the number of vacancies arising in A4, and, again in June 1980, the Council limited the number of A4 posts in proportion to that of A1, A2 and A3 posts (CA/PV.8, paragraph 250).

13. Lastly, the complainant has failed to show any breach of the principle of equal treatment. She cites the case of two other examiners rated "good" who were promoted with experience after the age of 25 similar to hers. But the performance of those examiners was not identical to the complainant's; it was better, so that promoting them ahead of her was justified.

14. The Tribunal rejects the complainant's claim to appointment to A4 as from 1 January 1986, when she had over 22 years' actual experience, or as from 6 May 1986, when she had 19 years' experience after the age of 25.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, 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
Mohamed Suffian
Mella Carroll
A.B. Gardner