

SIXTY-SIXTH SESSION

In re CUPIDO

Judgment 957

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Marinus Cupido against the European Patent Organisation (EPO) on 7 July 1988, the EPO's reply of 23 September, the complainant's rejoinder of 26 October 1988 and the EPO's surrejoinder of 11 January 1989;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 48, 49 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 Dutch citizen born in 1951, joined the EPO's office at The Hague on 1 March 1985 as a patent examiner at grade A2. His experience as at 1 March 1985 was reckoned by the rules in circular 144 of 2 September 1985 and, according to a statement dated 31 May 1986, came to six years and ten months at 1 March 1985, or eight years by 1 May 1986. He was graded step 5 in A2, with ten months' seniority at that step, as at 1 March 1985.

In a letter of 29 July 1986 to the President of the Office he appealed against the reckoning on the grounds that someone who was recruited as an examiner and who also had eight years' experience would get grade A3, step 1 as at 1 May 1986. In its report of 6 May 1987 the Appeals Committee recommended rejecting the appeal as devoid of merit. The President did not act.

Article 49(7) of the Service Regulations says that to qualify for promotion employees "must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and have at least two years' service in their grade in the Office". Point II.2 of circular 144 requires eight years' experience for access to A3, and the complainant was promoted to that grade, two years after recruitment, as from 1 March 1987. According to a statement dated 3 August 1987, which he got on 10 August, he was put at step 1 in A3, with no seniority. On 3 November 1987 he lodged a second appeal contending that he should have been granted ten months' seniority at that step as at 1 March 1987. On 17 November he filed a third appeal asking that his promotion take effect, not from 1 March 1987, but from 1 May 1986, the date by which his reckonable experience had come to eight years. The second and third appeals were put together to the Appeals Committee. In its report of 11 March 1988 the Committee recommended rejecting them though it also suggested changing EPO practice and correcting the English version of the circular. By a letter of 11 May 1988, the decision impugned, the Principal Director of Personnel told the complainant that the President had rejected his appeals.

B. The complainant alleges breach of the principle of equal treatment and of the spirit of Article 49 of the Service Regulations in that he has lower seniority than would have been granted to someone with the same professional experience recruited as an A3 examiner. In his submission it would be in keeping with Article 49(11), which governs seniority on promotion, for the President to allow his claim, which is that he be granted ten months' seniority at step 1 of A3 as at 1 March 1987.

C. In its reply the Organisation cites its pleas to the Appeals Committee and the Committee's own reasoning.

Insofar as the complainant is challenging the date on which his promotion took effect his complaint is irreceivable: since he did not file his internal appeal of 17 November 1987 against the statement of 3 August 1987 within the three months' time limit in Article 108(2) of the Service Regulations, he failed to exhaust the internal means of redress. Besides, that statement merely confirmed the one of 31 May 1986 which he unsuccessfully challenged in his first internal appeal.

Insofar as he is seeking revision of his seniority at step 1 in A3 his complaint is devoid of merit. He is not challenging the application of Article 49(11), which relates to the determination of the step in the new grade on promotion. He was correctly put at step 1 in A3. There was also correct application of 49(12)(a), the material rule on the reckoning of his seniority at step 1 on promotion. The conditions for applying 49(12)(b) were not met. There was no breach of 49(13), which says that promotion in grade may not bring about a reduction in total net remuneration. The article leaves the President no discretion in the matter of seniority.

His allegations of breach of equality are unfounded. The principle comes into play only when the complainant's position is the same as that of other staff members both in fact and in law. The complainant, who was promoted to A3, is not in the same position as someone directly recruited at that grade. It is therefore lawful to apply to him different criteria in determining seniority.

D. In his rejoinder the complainant enlarges on his contention that he is faring less well than someone who has been appointed to A3 and has no greater experience, such discriminatory treatment being blatantly wrong.

He submits that Article 49 does not bar granting him the greater seniority and that the President has discretion to remove an anomaly of the kind that has occurred in his case: for example, in a communiqué dated 29 September 1988 the President announced the grant of twelve months' additional seniority as an incentive to staff.

E. In its surrejoinder the Organisation submits that there is nothing in the rejoinder to weaken the pleas in its reply, which it maintains. As for the President's communiqué of 29 September 1988, it did no more than moot the possibility of granting additional seniority, something that in any event would form part of a broader review of the Service Regulations.

CONSIDERATIONS:

1. The complainant joined the EPO on 1 March 1985 and was placed in grade A2, step 5, with ten months' seniority. On 29 July 1986 he filed an internal appeal asking that he should be assigned grade A3, step 1, with no seniority. His appeal was rejected. On 10 August 1987 he received notification of the decision dated 3 August promoting him to grade A3, step 1, with no seniority, with effect from 1 March 1987. He again filed an internal appeal dated 3 November 1987 claiming entitlement to grade A3, step 1, with ten months' seniority. In a third internal appeal dated 17 November 1987 he sought retroactive effect for his promotion to the date by which he had acquired eight years' reckonable experience under the Service Regulations. It is against the rejection by the President of the Office of his two internal appeals entered in November 1987 and jointly submitted to the Appeals Committee that he is appealing to the Tribunal.

2. Promotion is governed by Article 49 of the Service Regulations. Paragraph 7 reads:

"Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them.

The employees must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and have at least two years' service in their grade in the Office."

Paragraph 11 provides:

"... a permanent employee who obtains a higher grade shall be appointed to the lowest step in the new grade which carries a higher basic salary than that received in his former grade and step increased by the equivalent of one 12-monthly incremental step in his former grade in the case of Categories A ..."

And paragraph 12 states:

"Advancement of the next step in the higher grade shall be granted

(a) after the period of time set out in Article 48 for advancement in incremental step, reckoned from the date of appointment in the higher grade, or

(b) after the period of time at the end of which the permanent employee concerned would have reached the next

step in his former grade if this period of time is shorter and if the difference between the salaries before and after appointment in the higher grade is less than twice the value of the step he occupied in his former grade."

For the purpose of paragraph 12 the time which according to Article 48 employees at grade A2 must spend at each step is one year at steps 1 to 6 and two years at each higher incremental step.

3. The applicability of Article 49 is not disputed, the complainant's case being that his reckonable experience entitles him to be placed at grade A3, step 1, with ten months' seniority. He alleges inequality of treatment in that EPO employees with the same experience are granted different grades and therefore receive different emoluments.

Receivability

4. As was said in 1 above, the complainant was informed by the statement of 3 August 1987, which he received on 10 August, of his promotion to grade A3 with effect from 1 March 1987. Since his appeal dated 17 November 1987 was lodged outside the period of three months specified in Article 108(2) of the Service Regulations it was irreceivable and the complainant has therefore failed to exhaust the internal means of redress, as Article VII(1) of the Tribunal's Statute requires. But his appeal dated 3 November 1987 was filed in conformity with 108(2) and was therefore receivable, and he has satisfied the requirement of Article VII(1).

The merits

5. Article 49, paragraph 7, requires that an employee must have the minimum number of years of professional experience specified in the job description to obtain the grade of the post and must also have two years' service in the grade from which he is being promoted. The complainant completed the eight years' professional experience before he had served two years in grade A2. Paragraph 11 merely determines the step in the new grade of an employee who has been promoted from one grade to another: it does not take into account any period between the attainment of the requisite professional experience for the higher grade and the completion of the required two-year period of service in the lower grade. Paragraph 12(b), which deals with advancement to the next step in the higher grade, applies only if the complainant would have reached the next step in his former grade in less than 12 months and if his new salary did not exceed his old salary by at least 288 guilders. The complainant cannot claim the application of paragraph 12(b) on either of those grounds. He needed another fourteen months at grade A2, step 7, to reach A2, step 8, and his salary increase was greater than 288 guilders. Thus paragraph 12(b) does not apply and he is caught by paragraph 12(a), which required him to serve in the new grade for twelve months before advancing to the next step. It follows that the reckoning of his seniority on promotion is in compliance with Article 49 of the Service Regulations.

His plea that there was breach of the principle of equal treatment fails because the material provisions of the Service Regulations deal with promotion within the Organisation as distinct from the attributions of grade and step on appointment: the comparison he is drawing is between staff members who are not in the same position in law.

His claim to assignment as at 1 March 1987 at grade A3, step 1, with ten months' seniority, therefore fails.

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 the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 27 June 1989.

(Signed)

Jacques Ducoux
Mella Carroll
William Douglas

