

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

FIFTIETH ORDINARY SESSION

In re BEELEN

Judgment No. 545

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Ivo Constant Beelen on 4 August 1982 and brought into conformity with the Rules of Court on 17 August, the EPO's reply of 5 November, the complainant's rejoinder of 6 December and the EPO's surrejoinder of 14 January 1983;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal and Articles 1(2), 3(1), 11(1), 64(1), 106(2), 108 and 109(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 material facts of the case are as follows:

A. The complainant, a citizen of Belgium born on 5 April 1953, applied for an advertised grade B5 post as a "senior programmer" with the EPO at Rijswijk, in the Netherlands. He was invited for an interview. On 27 April 1981 the head of the Personnel Department wrote offering him a post as senior programmer: "You will be appointed to step 5 in grade B4. Advancement to grade B5, Senior Programmer, will depend on merit and may be considered after two years; that advancement cannot take effect before you have reached the age of 30 years." The complainant accepted the offer and, in accordance with a decision of 29 June by the President of the Office embodying the terms of the offer, took up duty on 1 July. On 12 December he wrote to the Principal Director of Personnel seeking review of his grade on the grounds that he qualified for grade B5. The Director refused the request on 7 January 1982 and on 24 March the complainant appealed under Article 108 of the Service Regulations. The President of the EPO having taken no decision within two months, the complainant is challenging the refusal implied under Article 109(2).

B. The complainant observes that, according to the grading standards, the text of which he supplies, there is only one grade, B5, for senior programmer posts. He meets the educational and language requirements for B5 in that text, which sets no minimum age. Moreover, Article 11(1) of the Regulations states: "The appointing authority shall assign to each employee the grade corresponding to the post for which he has been recruited"; in October 1977 the Administrative Council, in accordance with Article 3(1), approved the grades of various posts, and that of a senior programmer is B5. It was improper to interview him for a B5 post and then offer him only grade B4. He invites the Tribunal to quash the implied refusal to regrade him at B5 and he seeks an award of 500 guilders in costs.

C. The EPO replies that the complaint is irreceivable because the internal means of redress have not been exhausted. The complainant failed to challenge, within the three months prescribed in Article 108 of the Regulations, the decision of 29 June 1981 to appoint him to B4, which was notified to him when he took up duty on 1 July. He did not question his grade until 12 December, and the EPO's reply of 7 January 1982 merely confirmed the original decision. His internal appeal of 24 March is time-barred. Subsidiarily, the EPO contends that the complaint is devoid of merit. To ensure a balanced career structure minimum ages for each grade were approved by the Interim Committee of the Organisation in June 1977 and have been consistently applied ever since. The offer of appointment said that the complainant would not get promotion before he was 30; he agreed to that in accepting the offer and may not withdraw his consent.

D. In his rejoinder the complainant contends, as to receivability, that by paying him a B4 salary each month the EPO is in repeated breach of its obligations, and he may validly challenge any such breach. As to the merits, he

observes that the age limits have never been endorsed by the Administrative Council of the EPO and have no legal effect. To the plea that he cannot withdraw consent to the grant of B4 he retorts that Article 1(2) of the Regulations implies that an appointment is a unilateral act. There is no such thing as a B4 post for a senior programmer, and he is performing duties which are graded B5.

E. In its surrejoinder the EPO observes that the complainant has not rebutted its arguments against receivability. If what he challenges is the monthly decision on the amount of his salary then the substance of his complaint is altered and does not match his claims. That decision is taken under Article 64(1) of the Service Regulations, which entitles the official to the remuneration corresponding to his grade, and it implies no decision on grade, a matter determined by the act of appointment. Subsidiarily, the EPO contends that subject to the policy set by the Administrative Council the President has discretion in determining recruiting arrangements, of which the stipulation of a minimum age for grade B5 forms part. The actual appointment may be a unilateral act but the candidate must first consent, as indeed the complainant did.

CONSIDERATIONS:

Receivability

1. The Tribunal holds that the complaint should be dismissed for the reasons set forth below. There is therefore no need to determine whether it is receivable or to consider the parties' differing views on the question.

The merits

2. The parties disagree on the merits.

The complainant rests his case on two items of evidence. One, bearing the code number 3412, declares that senior programmer posts are graded B5. It describes the duties of such posts and the required qualifications. The other item is a summary of decisions which the Administrative Council of the EPO took at a session it held from 19 to 21 October 1977, and which include one approving the grades indicated in the draft post descriptions in "CI/Final 18/77". The complainant believes that Article 11(1) of the Service Regulations entitles him to B5, the grade corresponding to the description of his post set out in CI/Final 18/77.

The EPO is relying on two other items. One is a report dated 6 June 1977 by the secretariat of the Interim Committee of the EPO recommending 30 as the minimum age for access to grade B5. The other is a text recording approval by the members of the Committee at their session of 10 and 11 June 1977. The EPO concludes that the complainant may not claim grade B5 until he is 30.

It may appear desirable to set age restrictions for various grades so that a staff member will not be paid the maximum salary long before reaching the age of retirement. But it is doubtful whether the Interim Committee's decisions, however reasonable they may be, constitute valid derogations from decisions of the Administrative Council, which is empowered under Article 3(1) of the Service Regulations to determine the grades justified by job descriptions. In any event it is curious that the Administrative Council has not been invited to endorse the Interim Committee's decisions. These are matters which the Tribunal may pass over, however, since in any event the complaint is devoid of merit.

3. On taking up duty the complainant knew that he would be granted step 5 in grade B4 and would hold B4 until he reached the age of 30, even though his post was normally graded B5. He was therefore fully aware of his position. By accepting the appointment on 6 May 1981 and by unconditionally starting work on 1 July 1981 he gave the EPO clearly to understand that he was accepting the terms of appointment as offered. To apply, just a few months later, on 12 December 1981, for review of the terms of appointment was to go against what was the EPO's reasonable expectation and to act in breach of the principle of good faith, and his application was correctly rejected for that reason.

A staff member is not bound for ever more by the terms of his appointment. But if he does challenge them he must respect the limitations of good faith. That is what the complainant failed to do.

In any event he will be 30 on 5 April 1983 and will soon be free to seek promotion.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President, Mr. Jacques Ducoux, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 30 March 1983.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner