

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

FIFTY-SECOND ORDINARY SESSION

In re DECROIX

Judgment No. 602

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Miss Annie Sonia Decroix on 24 March 1983, the EPO's reply of 10 June, the complainant's rejoinder of 15 July and the EPO's surrejoinder of 16 September 1983;

Considering the application to intervene filed by Miss Christiane Meyer on 28 March 1983;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 3, 8, 11(1), 12(4), 13(1), 64(1) and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a French citizen, joined the EPO in July 1979 as a grade B2 typist. In September she applied for a B4 vacancy as an accounting clerk. The Selection Board set up to choose the successful candidate recommended appointing her. A minute of 5 March 1980 signed by the Principal Director of Personnel says that it was explained to her orally that, since she did not have the minimum experience required for a B4 post, she could not be offered the post immediately. She was offered the vacancy at B3 for one year; only then might she be promoted to B4. On 28 March she accepted the B3 appointment with effect from 1 April 1980. On 4 June 1981 she asked that she be promoted to B4 immediately. On 19 June the Principal Director of Personnel answered that she had never been promised automatic promotion to B4 after one year; she did not have the required minimum experience, and at the time of her appointment to B3 she had been told that the "rules against grade-jumping" prevented her direct advancement to B4. On 30 July she learned from the Office newsletter that a C4 official had got a B3 post, thus "jumping" several grades. On 30 October 1981 she wrote to the President of the Office saying that she had been misled and asking that she be promoted to B4 with effect from 1 April 1980 or that her letter be treated as an appeal. On 8 December 1981 the President promoted her to 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 the impugned decision of 28 December 1982, notified to her on 8 February 1983, the President rejected her appeal as time-barred.

B. The complainant submits that she filed her internal appeal within the three-month time limit set in Article 108(2) of the Regulations. First, the only objection to her promotion to B4

which was officially notified to her in 1980 was the alleged ban on "leapfrogging". Since she did not learn until 30 July 1981 that the EPO had misled her, the appeal was timely. Secondly, continuous breach of the Regulations such as she alleges may be challenged at any time. As to the merits, she contends that, as the majority of the Appeals Committee held, it was wrong to put her on one year's probation for the B4 post: Article 13(1) of the Regulations limits probation to six months for B category posts. Nor could she be put on a temporary or other unapproved post, since according to Article 3 a permanent official must be put on an established post with a specific job description and the corresponding grade. There was also breach of Articles 11(1) (each employee must have the grade corresponding to the post for which he is recruited), 12(4) (a permanent employee may be called upon to perform the duties of one in a higher grade for up to one year), and 64(1) of the Service Regulations (a permanent employee shall be "entitled to the remuneration appropriate to his category, grade and step"). The argument that she did not have the experience for B4 appears only in the Principal Director of Personnel's minute of 5 March 1980 and since the minute is not in her personal file it may not be held against her. Besides, she did not have such experience in 1981 either. She seeks the quashing of the decision of 28 December 1982 and her appointment to B4 with effect

from 1 April 1980, compensation amounting to a tenth of the difference between her actual salary and a B4 one from 1 May 1980 to 30 April 1981, interest thereon at 10 per cent a year from 24 March 1983, and 2,000 Deutschmarks as costs.

C. The EPO submits that, the complainant's appeal of 30 October 1981 being time-barred, she failed to exhaust the internal means of redress, and her complaint is irreceivable. She knew as early as 1 April 1980 and in any event no later than the date on which she got the Principal Director of Personnel's letter of 19 June 1981 that the two reasons for not promoting her at once to B4 had been, first, that at least eight years' experience were required, and at the time she had less than three; secondly, that there was a ban on leapfrogging of grades. She should therefore have filed her internal appeal at the very latest within three months of receiving that letter. There was no continuous breach of the Regulations, and no new fact which removed the time bar. In any event, the complaint is devoid of merit. Article 13(1) applies only to officials on probation, and the complainant was not. She could not be appointed to B4, both because she did not have the experience required and because of the rule against "leapfrogging". The President exercised his discretion correctly in not allowing an exception to that rule in her favour. The case of the official promoted from C4 to B3 was truly exceptional. He had 18 years' more experience than B3 required; as she knew, the complainant's did not qualify her even for B3, let alone B4. The complainant may not in good faith go back on her acceptance of B3. Article 64(1) is irrelevant: it entitles an official only to the remuneration of his actual grade, not that of the one he thinks he should have.

D. In her rejoinder the complainant develops her arguments. She submits that the Principal Director of Personnel's letter of 19 June 1981 suggests that the ban on leapfrogging was the sole objection to promoting her to B4 and that the time limit for filing an internal appeal therefore began only on 30 July 1981, when she learned that no such ban was being uniformly applied. As to the merits, she contends that the requirement of experience for grade B4 is not a rule, but merely a guideline, and the President has discretion to apply it flexibly. Besides, Article 8 says that a candidate for appointment must have "the diploma and qualifications or equivalent professional experience": she therefore qualified for B4 on the strength of her educational attainments. There was no breach of good faith since the EPO misled her in the first place.

E. In its surrejoinder the EPO answers the rejoinder and enlarges on its arguments. The letter of 19 June 1981 made it quite plain that the complainant did not have the experience for B4, whether she was promoted from B2 or from B3. The EPO repeats that the promotion of the other official was not a new fact giving rise to a new time limit for an internal appeal.

She was not misled since she was never told that there was an absolute ban on leapfrogging or that no exception was allowed. The President exercised his discretion correctly in not making her an exception, and any other solution would have discriminated against other staff. The complainant has suffered no prejudice; indeed she has fared unusually well since the President could have rejected her application for the B4 post altogether.

F. In a letter of 15 December 1983 the complainant seeks from the President of the Tribunal authorisation to file further material.

CONSIDERATIONS:

1. After winning a competition for a vacancy the complainant was appointed to a new post in the Accounts Section of the European Patent Office 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. In the event the Tribunal need not consider the application which the complainant made after the written proceedings had closed for the filing of further evidence. The items relate to the merits and not to the question of receivability.

DECISION:

For the above reasons,

The complaint and so also the application to intervene are dismissed.

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

Delivered in public sitting in Geneva on 12 April 1984.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner