

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

FIFTY-SECOND ORDINARY SESSION

In re GRANT

Judgment No. 603

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mrs. Barbara Grant on 28 March 1983, the EPO's reply of 16 June, the complainant's rejoinder of 25 July and the EPO's surrejoinder of 28 September 1983;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 8, 11(1), 13, 49, 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 citizen of the Federal Republic of Germany, joined the EPO on 1 January 1979 on a grade B2 post. In November 1979 she applied for a B4 vacancy as a "formalities officer". The Selection Board set up to choose the successful candidate recommended appointing her, but by a letter of 28 May 1980 the Principal Director of Personnel offered her a provisional B3 post which she would hold for a year; she might then, but no sooner, be appointed to the B4 post. She objected, and on 10 June he answered that the policy was to promote by only one grade at a time and that her case was no exception; if she declined, another candidate would get the offer. She accepted on 18 June and on 25 August was appointed to B3 with effect from 1 May 1980. On 30 July 1981 she learned from the office newsletter that a C4 official had got a B3 post, thus "leapfrogging" several grades, and on 27 October she wrote to the President of the Office asking that her promotion to B4 take effect from 1 May 1980 or that her letter be treated as an appeal. On 8 December 1981 the President promoted her with effect only from 1 May 1981. Her case was referred to the Appeals Committee. The Committee reported on 15 December 1982. The majority recommended backdating her promotion to 1 May 1980. But by a decision of 28 December 1982, notified to her on 8 February 1983 and now impugned, the President rejected her appeal as time-barred.

B. The complainant contends that she lodged her internal appeal within the three-month time limit set in Article 108(2) of the Service Regulations. Where, as here, the breach of the regulations is continuous, it may be challenged at any time. Since she did not discover until 30 July 1981 that the EPO had misrepresented its promotion policy, her appeal of 27 October was not time-barred. There is nothing in the rules on promotion (Article 49 of the Regulations) or anywhere else to forbid "leapfrogging". To keep her at B3 might have been

right had her duties really been B3 ones; but in fact her duties from 1 May 1980 to 30 April 1981 were graded B4. There was therefore breach of Article 11(1) of the Regulations, which says each employee must have the grade corresponding to the post for which he is recruited. There was breach, too, of Article 64(1): an employee "... shall be entitled to the remuneration appropriate to his category grade and step". The EPO has failed to show that the qualifications of the official promoted from C4 to B3 are any more exceptional than her own. The criterion is arbitrary, but in any event she was fully qualified for the B4 post. It was unlawful to put her on probation. The EPO misled her into accepting B3 and put her under duress by threatening to give the post to someone else. She seeks the quashing of the decision of 28 December 1982 and her appointment to B4 with effect from 1 May 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 29 March 1983, and 2,000 Deutschmarks as costs.

C. The EPO submits that the complainant should have challenged within the three-month time limit the decision of 25 August 1980 to promote her to B3. Her appeal of 27 October 1981 being time-barred, she failed to exhaust the internal means of redress, and her complaint is irreceivable. There was no continuous breach of the Regulations, and no new fact which removed the time bar. She could have challenged in time either the ban on leapfrogging or

else, on the grounds that she warranted exceptional treatment, its application to herself. Her complaint is also devoid of merit. The case of the other official was truly exceptional. He had the minimum academic qualifications for B3 but her school diploma was, not of the standard required for B4. Whatever her experience was and despite the Selection Board's recommending her, the President had discretion to refuse her B4. The policy against leapfrogging is justified by Article 49(7), which speaks of "promotion to a post in the next higher grade". The President is entitled to ensure that officials do not reach their final grade too soon before retirement, and there was nothing improper about his refusing to exercise his discretion to allow an exception in this case. She was not required to serve a probationary period for B4 within the meaning of Article 13. She 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 for the grade he has, not the one he thinks he should have.

D. The complainant develops her case in her rejoinder. She enlarges on her contention that her internal appeal was not time-barred: the EPO may not, in her view, rely on its own misrepresentations to plead irreceivability. As to the merits, she observes that if her diploma was not good enough she ought not to have been promoted to B4 at all. In fact the President has discretion in the matter. Besides, Article 8 says that a candidate for appointment must have "the diploma and qualifications or equivalent professional experience": she therefore qualified in any case for B4.

E. In its surrejoinder the EPO answers the rejoinder and enlarges on its arguments. It repeats that the promotion of the other official was not a new fact giving rise to a new time limit for an internal appeal. The President exercised his discretion correctly, 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 simply have rejected her application for the B4 post.

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

CONSIDERATIONS:

1. The complainant, a grade B2 official of the EPO, won a competition held early in 1980 to fill a post as a formalities officer.

Although the Selection Board suggested she be given grade B4, the Principal Director of Personnel thought she could not, at least straightaway, and he offered her B3. At first she refused on the grounds that there was no basis for the Administration's position in the Service Regulations, but in a letter of 10 June 1980 the Director confirmed his offer and on 18 June she consented. The President of the Office decided on 25 August to promote her to B3 with effect from 1 May 1980. By a decision of 8 December 1981 she was promoted to B4 with effect from 1 May 1981, one year after she took up duty.

Discovering that another official had, on promotion to B4, been allowed to "leapfrog" several grades, she applied on 17 October 1981 for promotion to B4 with effect from 1 May 1980, the date of her appointment to the new job. This was turned down, and 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 of 25 August 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 27 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 27 October 1981 did she submit to the President her appeal against the decision of 25 August 1980 on her grade and step. That the decision came to her notice over three months before 27 October 1981 is not at issue. Since she failed to respect the time limit in Article 108(2) of the Service Regulations and to 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 setting 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 is 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