

SIXTY-THIRD SESSION

In re WEST (No. 8)

Judgment 847

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr. Julian Michael West against the European Patent Organisation (EPO) on 28 March 1987, the EPO's reply of 12 June, the complainant's rejoinder of 15 July and the EPO's surrejoinder of 30 September 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 11, 49, 108, 109 and 116 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;

Having disallowed the application for joinder with his ninth complaint which the complainant made in a letter of 16 October 1987 to the Registrar of the Tribunal;

Considering that the facts of the case and the pleadings may be summed up as follows: A. The EPO has employed the complainant as a substantive examiner of patents in its Munich office since January 1982, and he is still at his starting grade, A3.

On 2 September 1985 the Principal Director of Personnel put out a circular, No. 144, containing new guidelines by the President on the reckoning of experience. The Administrative Council's earlier guidelines, in CI/Final 20/77, had set different criteria for reckoning experience for the purposes of starting grade, step and promotion, but the new guidelines applied the same to all three. To anyone, like the complainant, who had joined before they came in they applied only if the tally was more favourable; otherwise the old rules applied.

This case is about the reckoning of the complainant's experience for the purpose of determining his seniority for promotion. On 15 September 1985 a new reckoning was made of his experience as at 1 January 1985: it counted 3 years and 10 months for postgraduate research, 9 years and 4 months for service in the British Patent Office, and 3 years for service in the EPO. Experience gained before the age of 25 was docked and, the total coming to 15 years, he was put in step 7, with 12 months' seniority at that step. An internal appeal he lodged on 5 December 1985 went to the Appeals Committee. On 9 March 1987 the Principal Director of Personnel wrote him a letter, the impugned decision, saying that on the Committee's recommendation the President had rejected his appeal.

B. The complainant submits that according to Article 11(2) of the Service Regulations and CI/Final 20/77 the experience that counted in determining the step in the starting grade used to serve also in determining "seniority for promotion". The original reckoning of 1 February 1982 gave his "seniority step" as at 11 January 1982, the date of his appointment, as 8 in A3, with 16 months' seniority. That step corresponded to a reckoning of 14 years and 4 months, or 17 years and 4 months by 1 January 1985. Point IV.2 of the guidelines in circular 144 says that "Under no circumstances will experience credited to date be reduced". Besides, says the complainant, he has an acquired right to the application of the criteria in CI/Final 20/77. His experience should match his actual step in A3 and should therefore be 17 years and 4 months as at 1 January 1985.

The new reckoning is in several respects inaccurate and unexplained.

Some points of the new guidelines - in particular I.6, I.10, III and V - make for unequal treatment. They work unfairly to the complainant's detriment and in favour of some examiners with less experience. One, whom the complainant names, was recruited on the same date and at the same grade as he, and though younger and less experienced, has been granted greater seniority for the purpose of promotion.

He asks (1) that his seniority for promotion correspond to his actual position on 1 January 1985: step 10 with 4 months' seniority. Failing that, he asks (2) that circular 144 be withdrawn, or I.6, I.10, III and V deleted, or (3) that he be awarded 50,000 Deutschmarks as damages for delay in his promotion to A4 and impairment of his further

career prospects. He claims 2,000 DM in costs.

C. The EPO replies that it applied the guidelines in circular 144 in reckoning the complainant's seniority for promotion because as at 1 January 1985 his seniority was higher according to the guidelines than in the original reckoning. As reckoned by the new guidelines his experience came to 12 years at recruitment, the maximum set in point I.10, so that by 1 January 1985, three years later, it came to 15 years. That exceeds by two months, and therefore prevails over, the total obtained by adding the figure he got for the purpose of promotion on recruitment, which was 11 years and 10 months, to his 3 years in the EPO. In any event there is no acquired right to the application of rules on promotion.

Claim (1) is irreceivable. He may not now challenge his seniority for promotion as determined in the original reckoning; yet that is what he is doing, and he has failed to go through the internal appeal procedure correctly. The claim is in any event devoid of merit because the prior experience that counted in determining his starting step was not the same for the purpose of promotion: he misreads Article 11 of the Service Regulations and CI/Final 20/77. Starting step and promotion are not the same thing, there is no reason why the same criteria should apply to both, and in fact CI/Final 20/77 did set different criteria. The complainant's experience as reckoned for the purpose of step in grade was 14 years and 4 months less the five years - the period required for recruitment at A3 - that had to be subtracted, to give a total of only 9 years and 4 months. His seniority for promotion, as reckoned according to the different criteria in CI/Final 20/77, came to 11 years and 10 months.

Claim (2), too, is irreceivable for failure to exhaust the internal means of redress: the complainant is not challenging an individual decision but objecting to the general rules in circular 144.

In any event the claim is devoid of merit: there is no breach of the principle of equality. The Organisation explains why in its view I.6, I.10, III and V are unobjectionable and indeed fair.

Lastly, claim (3) is unsound: impairment of promotion prospects is not unlawful if it is the unavoidable outcome of a lawful change in the rules. Besides, the claim is just an alternative to claim (2), which is itself both irreceivable and unfounded.

D. In his rejoinder the complainant maintains that he is not challenging the original reckoning but the construction put on it for the purpose of determining his seniority for promotion. There has never, in his view, been any requirement that such seniority be reduced by the period subtracted from experience in determining the starting step. He enlarges on his contention that the new guidelines offend against the principle of equality and submits that there is a secret "seniority list". There should be a single minimum age for entry to a grade, whereas the instructions the President of the Office issued to the A4 promotion board on 12 May 1986 were arbitrary: he set different minimum ages according to different ratings of performance. The complainant develops his submission that his seniority for promotion was 17 years and 4 months as at 1 January 1985, corresponding to his actual step in A3 - 10 with four months' seniority - under both the old and the new rules.

E. In its surrejoinder the EPO further explains the pleas in its reply and seeks to rebut those put forward in the rejoinder. In particular it maintains that the complainant is disputing the lawfulness of the original reckoning and that in any event his plea is misconceived. The new guidelines do not offend against the principle of equality. The President had sound reasons, which the EPO explains in detail, for setting different minimum ages for promotion to A4 and exercised his discretion correctly in giving instructions to the promotion board, the flexibility of the arrangements being intended to secure the staff's interests as well as the EPO's.

CONSIDERATIONS:

1. The reckoning of their seniority matters to officials of the EPO in determining their starting grade on recruitment, starting step within that grade and eligibility for promotion.

Seniority at the EPO is a tally not only of the period of service with the EPO itself but also of earlier experience of various kinds. Such experience is valued according to its usefulness to the EPO: for example, experience of patent work may count in full, whereas experience in industry may count at lesser rates. Some sorts of experience - e.g. experience gained under the age of 25 or before graduation - do not count at all. The methods of reckoning depend, too, on the nature of the official's duties in the EPO; on whether or not he was recruited from a national patent office; and on which of the three purposes - starting grade, starting step, or eligibility for promotion - the reckoning

is meant to serve.

This complaint is about the reckoning of seniority for the purpose of promotion and so the Tribunal is not concerned with the reckoning for the other two purposes.

2. Every patent examiner is each year awarded marks for his performance and is given a general rating - "outstanding", "good", or whatever it may be. He will not be in line for promotion until he has at least so many years of seniority as reckoned for that purpose, and the number of years depends on the quality of his performance. Thus an "outstanding" examiner will not need as many years as one who is only "good": he makes up by ability what he lacks in experience. The list of all who are eligible for promotion under the rules is drawn up each year and put to a promotion board, which makes recommendations for actual promotion to the President of the Office.

The main issue

3. The main issue is how to reckon the complainant's experience as at 1 January 1985 for the purpose of determining his seniority for promotion. By his way of reckoning it should be 17 years and 4 months. By the EPO's it is only 15 years.

The first claim

4. The complainant's first and main claim is that his seniority for promotion correspond to his actual position on 1 January 1985, step 10 with 4 months' seniority, i.e. be set at 17 years and 4 months.

5. The complainant did postgraduate research from August 1967 until September 1972; from then until January 1982 he worked in the British Patent Office. On 11 January 1982 he was appointed to the EPO in Munich as a substantive examiner of patents.

The EPO had to determine in the light of his experience his starting grade, his starting step in that grade and his seniority for promotion. It appointed him to grade A3, and there is no dispute on that score. As to his starting step, he was given credit as follows according to the criteria in points 6 to 9 of the guidelines then in force, which were set out in CI/Final 20/77:

- postgraduate research at the full rate: 5 years.
- service in the British Patent Office at the full rate: 9 years and 4 months.

Total: 14 years and 4 months.

That reckoning was dated 1 February 1982 and communicated to him by the Principal Director of Personnel. In accordance with point 8 of CI/Final 20/77 the five years' experience which was required for recruitment to grade A3 was deducted to give a total of 9 years and 4 months, and that was his reckonable experience for the purpose of determining his starting step.

His reckonable experience for the purpose of determining seniority for promotion was also governed by CI/Final 20/77. His postgraduate research was recognised at 50 per cent under points 5(ii)(a) and 13 of CI/Final 20/77 as read together with point 3 of CA/20/80 and his patent experience was recognised in full under points 5(i)(a) and 13 of CI/Final 20/77:

- postgraduate research at the half rate: 2 years and 6 months.
- service in the British Patent Office at the full rate: 9 years and 4 months.

Total: 11 years and 10 months.

The reckoning of 1 February 1982 shows the two different calculations, one for determining the starting step and the other for determining seniority for promotion, and the different periods of experience credited to the complainant.

In September 1985 new guidelines were issued in circular 144 and they came into force as from 1 January 1985. On

15 September 1985 a new reckoning was made, in accordance with the guidelines, of the complainant's prior experience as at 1 January 1985 for the purpose of promotion:

- postgraduate research at the rate of 75 per cent: 3 years and 10 months.

- service in the British Patent Office at the full rate: 9 years and 4 months.

Total: 13 years and 2 months.

Since an upper limit of 12 years was set by the circular on reckonable experience outside the EPO and since the complainant had by 1 January 1985 served 3 years in the EPO, the total came to 15 years.

6. The complainant is dissatisfied. His first claim is that after three years' service in the EPO his seniority should correspond to his actual step in A3 at 1 January 1985 and be 17 years and 4 months. His case is that according to Article 11(2) of the Service Regulations and CI/Final 20/77 the experience that counted in determining the starting step in his grade should serve also in determining his seniority for promotion; that the original reckoning gave his "seniority step" on 11 January 1982, the date of his appointment, as 8 in A3, with 19 months' seniority; that that step corresponded to a reckoning of 14 years and 4 months or, by 1 January 1985, 17 years and 4 months; that point IV.2 of the guidelines in circular 144 says that "Under no circumstances will experience credited to date be reduced"; and that, besides, he has an acquired right to benefit from the criteria in CI/Final 20/77.

7. The complainant's first claim is irreceivable.

His contention that his actual step on 1 January 1985, after three years with the EPO, came to 17 years and 4 months rests on the assumption that his starting step corresponded to a tally of 14 years and 4 months, not 11 years and 10 months. He has reached the figure of 14 years and 4 months by adding five years for his postgraduate research to 9 years and 4 months for his service with the British Patent Office, but without deducting, as required by point 8 of CI/Final 20/77, the five years' prior experience which he needed for recruitment to grade A3.

So what he is really challenging is the reckoning of his seniority for promotion as originally determined. He could of course at one time have challenged it but as the determination was made on 1 February 1982 he should have done so within the three-month time limit set in Article 108(2) of the Service Regulations, i.e. by May 1982. He did not and it is now too late. His claim fails because he has not exhausted the internal means of redress within the meaning of Article 109(3) of the Service Regulations.

The second claim

8. The second claim is that, if the first fails, circular 144 should be withdrawn or at least points I.6, I.10, III and V deleted.

9. This claim, too, is irreceivable. The complainant is not challenging an individual decision but objecting to certain general rules in the circular. As the Tribunal has held before - for example in Judgment 625 (in re Desmont and Gagliardi) - a complaint impugning a general decision against which no direct internal appeal will lie is irreceivable until individual decisions are taken on the strength of the general decision.

The third claim

10. The complainant asks the Tribunal, should his second claim fail, to award him 50,000 Deutschmarks as damages for the delay in his promotion to grade A4 and for the impairment of his further career prospects.

Since his first two claims fail there are no grounds for allowing the third, which is therefore also dismissed.

Costs

11. As all claims have failed, the Tribunal makes no award of costs.

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 10 December 1987.

(Signed)

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner