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

SIXTY-THIRD SESSION

In re ASPEBY

Judgment 860

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Magnus Aspeby against the European Patent Organisation (EPO) on 10 April 1987, the EPO's reply of 2 July, the complainant's rejoinder of 21 September and the EPO's surrejoinder of 22 October 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 49(11) 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 Swedish citizen, joined the EPO on 1 April 1979 as an examiner. On 3 February 1984 he was promoted to grade A3, step 1, as from 1 October 1983. On 27 April 1984 he lodged an internal appeal seeking the grant of step 4 in A3 as at the date of his promotion. In a report of 13 October 1986 the Appeals Committee recommended allowing a similar appeal, which it had taken up as representative of a group of which the complainant's was one. But by a letter of 8 January 1987, the impugned decision, the Principal Director of Personnel told him that the President had rejected the Committee's recommendation and so also his appeal.

In Judgment 657 of 18 March 1985 the Tribunal had dismissed complaints by several EPO officials which sought review of their grades and steps and in one of which the present complainant was an intervener.

B. The complainant submits that his complaint is receivable, citing the reasoning to that effect in the Appeals Committee's report.

He contends that his own case does not have the same foundation in law or rest on the same issues of fact as those the Tribunal dismissed in Judgment 657. The facts are different in that, unlike those who brought the earlier complaints, he was appointed before the rules on recruitment and promotion were amended. Moreover, new facts have come to light since Judgment 657 was published: a decision by the Court of Justice of the European Communities on the Williams case, and Judgment 690, which showed that the EPO was not bound in all circumstances to comply with Article 49(11) of the Service Regulations in determining the starting step.

He submits that according to the principles of good faith and equity the rules that govern his promotion should be those that were in force at the date of his appointment.

He invites the Tribunal to award him step 4 as from the date of his promotion to A3 and 2,000 Deutschmarks in costs.

C. The EPO replies that the complaint is irreceivable under the res judicata rule because the complainant was an intervener in one of the complaints the Tribunal ruled on in Judgment 657. The parties are therefore the same. Moreover, the earlier complaints, like this one, challenged the step awarded under Article 49(11) of the Service Regulations and objected to the conditions for promotion to A3 on the grounds that they differed according as that grade was granted on promotion or on appointment.

The EPO's subsidiary argument is that the complaint is devoid of merit. The law of the European Communities which served as the basis for the decision on the Williams case affords no standard of comparison, and Judgment 690 related to the case of a staff member whose position differed both in fact and in law from the present

complainant's. As to the principles of good faith and equity, the precedents consistently show that a staff member has no right to the continuance of the conditions of promotion that were in force at the date of his promotion.

D. In his rejoinder the complainant submits that the res judicata rule does not apply because he was a mere intervener in the cases dismissed in Judgment 657 and he had no opportunity to make his own submissions.

He alleges a further new fact warranting review in the form of a statement made by Mr. Vincenzo Scordamaglia, former secretary to the Interim Committee of the Organisation, which was in charge of drafting EPO policy on recruitment and promotion, that the Committee's abiding intention was to apply the principle of equal treatment for all examiners.

E. The EPO's surrejoinder enlarges on its submissions. It contends in particular that in lodging an application to intervene a staff member waives his right to plead his own case and may not therefore have his case reconsidered by filing a complaint of his own: the res judicata rule precludes that. In any event the complainant has failed to cite any "new fact" within the meaning given to the term by the case law. Nor may he rely on Judgment 690, which turned on different issues of fact.

CONSIDERATIONS:

1. The complainant, an examiner at the European Patent Office, is seeking review of the step he was granted on promotion from grade A2 to grade A3 on the strength of his professional experience.

The facts

2. He took up duty on 1 April 1979 as a search examiner at grade A2. On 3 February 1984 he was promoted to A3, step 1, as from 1 October 1983. On 27 April 1984 he lodged an internal appeal with the President of the Office seeking promotion to step 4 in A3 in accordance with the guidelines in CI/Final 20/77. He said he thought it unfair that in the tally of professional experience those who were taken on at A3 should fare better than those who started at A2 and were later promoted to A3.

3. The President rejected the appeal and referred it with other like cases to the Appeals Committee.

4. Shortly after the filing of those appeals three EPO officials, Mr. Metten, Mr. Spiekermann and Mr. Stern, lodged complaints with the Tribunal, in May and June 1984, that raised the same matter. There were interveners in all three complaints, and the present complainant was an intervener in that of Mr. Spiekermann, who was in much the same position as himself. The purpose of the three suits being the same, the Tribunal joined them and in Judgment 657 of 18 March 1985 it dismissed them together with the applications to intervene.

5. Meanwhile the Appeals Committee had suspended proceedings in the complainant's internal appeal and the others until the Tribunal had heard the three complaints. The Tribunal having delivered Judgment 657, the Committee took the cases up again in 1986, picking that of Mr. Andres as typical and deciding to deal with it first. It so informed the other appellants and asked them to attend the hearings on 8 and 9 September 1986. The present complainant consented and attended.

6. The EPO argued that Mr. Andres's internal appeal was irreceivable on the grounds that he had been an intervener in the complaints dismissed by Judgment 657; that by the res judicata rule no appeal should be entertained if the appellant had been party to the Tribunal proceedings; and that the new appeals were the same in substance as the complaints the Tribunal had already ruled on.

7. In its report of 13 October 1986 the majority of the Appeals Committee rejected the plea on the grounds that, though the parties and the purpose of the suit might be the same, the cause of action was not and res judicata therefore did not apply. Going into the merits, the majority held that it would be hard to find "convincing reasons other than strictly legal" ones to warrant the practice of treating staff on duty less well than newcomers, of taking over five years to restore parity and of stoutly refusing retroactive correction. The recommendation was for allowing the appeal.

8. The President accordingly rejected Mr. Andres' appeal, whereupon the chairman of the Appeals Committee wrote to the President on 5 January 1987 suggesting that he reject the other appeals too so as to relieve the Committee of further unnecessary hearings. The Principal Director of Personnel told the complainant by a letter of

8 January 1987, which he received on 12 January, that his appeal was rejected, and that is the decision he impugns in this complaint, which he filed on 10 April 1987.

The purpose of the suit

9. The complainant's main purpose is to get step 4 in A3 as from 1 October 1983, the date of his promotion. Whatever else he may want is unclear because, as has been explained, the various proceedings overlapped.

10. As to receivability the complainant merely cites the Appeals Committee's comments on Mr. Andres' appeal. As to the merits he seeks first and foremost to distinguish his own case from those the Tribunal ruled on in Judgment 657, pointing out that, for one thing, he was recruited in 1979, before the rules on recruitment and promotion were amended, which they were between 1980 and 1983. He submits that fairness and good faith demand that the EPO apply the rules that were in force when he took up duty.

11. The EPO's main plea in reply is that the complaint is irreceivable under the res judicata rule because the parties, the purpose of the suit and the cause of action are the same as in the cases dismissed in Judgment 657. In subsidiary arguments on the merits it cites Judgment 674 (in re Wäckerlin) in reply to the plea that the complainant took up duty before the change in practice he objects to: that judgment was about the case of someone who was also recruited before the change was made. As for fairness and good faith, it observes that an official has no right to continuance of the prospects of promotion he had on taking up duty.

12. It is in his rejoinder that the complainant first addresses the issue of receivability and the res judicata rule. He points out that he was not a party but merely an intervener in one of the earlier complaints and as such could not argue his own case. He enlarges on the plea, foreshadowed in his original brief, that new facts demand review, and he cites three: (1) a statement by Mr. Vincenzo Scordamaglia, former secretary to the Interim Committee of the EPO, which in his view suggests that the Committee's intent was that there should be equal treatment for all examiners, whatever their starting grade; (2) a decision of 6 October 1982 to the same effect by the Court of Justice of the European Communities (in re Williams); and (3) a judgment by the Tribunal, No. 690 of 14 November 1985 (in re Hubeau), which made it plain that Article 49(11) of the Service Regulations need not be applied in all cases.

13. Thus the preliminary issue is whether res judicata applies, although the complaint may subsidiarily be treated as an application for review of Judgment 657 against new facts.

Res judicata

14. The complainant has misunderstood the consequences of his applying to intervene, after lodging his internal appeal, in one of the earlier complaints. Had he not done so his internal appeal would have gone ahead and been dealt with on its own merits. Had he not got satisfaction he could have filed a complaint and put to the Tribunal any plea he thought material.

15. That is not what he did. Intervening in a complaint that was already pending, he threw in his lot with Mr. Spiekermann's and espoused the case as it stood at the date of his application. He did become a party to that case and so for him Judgment 657 does carry the authority of res judicata.

16. The res judicata rule was set forth in Judgment 785 of 12 December 1986 (in re Andres No. 8). The identity of the parties and identity in the purpose of the suit are not issues the parties address. The only one discussed - both by the complainant and the Appeals Committee - is identity in the cause of action or, to quote Judgment 785, "the foundation of the claim in law". As against the complaints ruled on in Judgment 657 this one discloses no new cause of action but really just seeks review of that judgment.

17. The only new plea by the complainant is that the rules on career development were amended after he joined the staff in 1979. He observes that Judgment 657, in the seventh paragraph of 6, rejected the complainants' plea of breach of good faith because they had taken up duty after the new practice had come in. The complainant is therefore entitled to ask whether his own position may be different because he took up duty before the change.

18. The conclusion is that res judicata does not apply to that particular issue since the Tribunal did not rule on it in Judgment 657. It did rule in Judgment 674 (in re Wäckerlin) on a case where, like the complainant, a staff member had been appointed before the rules changed, but again res judicata does not apply because the complainant was not a party to that case. The Tribunal will therefore take up the issue on the merits.

19. A staff member who, like the complainant, was recruited when the EPO was being set up may not plead any hopes of advancement he may have been encouraged in by what was really temporary practice and something of an experiment. To quote Judgment 674, "A staff member has no right to demand that the rules on promotion in force at the date of his joining the Organisation should never be amended". And so the complainant may not argue on the strength of Judgment 657, which, as to the material issue, hinged on factual positions different from his own.

20. The conclusion is that the complaint is irreceivable under the res judicata rule, save as to the plea of breach of good faith, which is rejected as unsound.

Review of Judgment 657

21. The complainant alleges several new facts which he submits call for review of the rulings in Judgment 657.

22. He produces a statement by Mr. Vincenzo Scordamaglia, who is now head of the General Secretariat of the Council of the European Communities and was once secretary to the Interim Committee of the EPO. The statement purports to construe the guidelines in CI/Final 20/77, and Mr. Scordamaglia says he took part in the preparatory work on the text.23. The former secretary to the Interim Committee has no authority to comment on the meaning of a text he took part in drafting. The statement affords no reason for review of a final ruling.

24. The decision by the Court of Justice of the European Communities on the Williams case was delivered on 6 October 1982 and was therefore a matter of public knowledge by the date of Judgment 657. Desirable though it may be that the various bodies that hear disputes in the international civil service take account of each other's rulings, each of them has a legal context of its own and will rule by its own lights on any case before it.

25. Lastly, all that need be said about Judgment 690 (in re Hubeau) is that it relates to a situation quite different from the present one and is therefore immaterial

26. For the foregoing reasons the Tribunal will dismiss the complaint, including the claim to costs.

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 Mr. Pierre Pescatore, Deputy 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
Mella Carroll
P. Pescatore
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.