

SIXTY-SIXTH SESSION

In re THEUNS (No. 2)

Judgment 953

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Hubertus Gerardus Theuns against the European Patent Organisation (EPO) on 13 August 1988, the EPO's reply of 7 December, the complainant's rejoinder of 13 March 1989 and the EPO's surrejoinder of 25 April 1989;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 49 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. EPO circular 144 of 2 September 1985 announced the issue of new rules by the President of the Office to be applied as from 1 January 1985 to the reckoning of the prior experience of EPO staff at their recruitment and for the purpose of determining their seniority for promotion. Point II.2 requires experience of at least eight years for access to grade A3 and Article 49(7) of the Service Regulations says that to qualify for promotion employees must "have at least two years' service in their grade in the Office".

The complainant, a Dutchman born in 1946, joined the EPO's office at The Hague on 1 March 1985 as a patent examiner. His experience, as reckoned according to circular 144, came to seven years and seven months at that date and so he was put at step 6 in A2, with seven months' seniority. A minute of 3 August 1987 informed him that he was promoted to A3, step 1, with seven months' seniority as from 1 March 1987, the date by which he had met the requirement in 49(7). On 13 November 1987 he lodged an internal appeal pointing out that an examiner who, as he did, had experience that came to nine years and seven months would be recruited at A3, step 2, with seven months' seniority. He therefore asked that his promotion take effect as from 1 August 1985, the date by which his experience had come to eight years or, subsidiarily, that his prior experience as at 1 March 1987 be revised in accordance with the circular.

In its report of 10 March 1988 the Appeals Committee recommended rejecting his appeal though it also proposed amending Office practice to remove the anomaly shown by this and other cases. By a letter of 11 May 1988, the decision impugned, the Principal Director of Personnel told the complainant that the President had rejected his appeal.

B. The complainant repeats the arguments he put to the Appeals Committee, alleging breach of the principle of equal treatment, as embodied in many international instruments, and misinterpretation and misapplication of Article 49 of the Service Regulations. In his submission he has been less fairly treated than new recruits and those whose reckonable experience after two years on the staff comes to eight years. The discrepancy holds up his advancement and will cost him loss of salary over the full period of his career. Though the Appeals Committee recommended a change in practice the President paid no attention and did not even explain why.

He asks that he be promoted to A3 as from 1 August 1985, the date by which he had gained eight years' reckonable experience, or, failing that, that his experience as at 1 March 1987 be recalculated, "with matching upgrading". He further claims interest on the arrears of pay due to him and an award of costs. He adds that, should review of his position "prove difficult", he should be paid each month as from 1 August 1985 the difference between his actual pay and the pay which an EPO official with equal experience acquired outside the EPO would receive, as well as compensation for loss of pension rights.

C. In its reply the Organisation submits that the provisions of the Service Regulations take precedence over any instruction of the President's and that the decision it took, in accordance with Article 49(7), not to promote the complainant as from 1 August 1985 is therefore lawful.

It further contends that it was right to refuse to change his grading as at 1 March 1987. What he is asking is that his step be determined on his promotion to A3 in keeping with the rules that would have applied had he been recruited at that grade at that date. But according to Article 49(11) the step to be granted to an official on promotion depends, not on the reckoning of his seniority, but on the step he held in the lower grade.

In the Organisation's submission there was no breach of equal treatment. Different rules may apply in determining the step due on appointment and the step due on promotion since the two situations are different in fact and in law. The reason why some employees were granted A3 after recalculation of their experience by the rules in circular 144 was that their experience was found to have come to eight years or more at the date of appointment. The complainant's experience at the date of his appointment came to only seven years and seven months.

As for the President's implied decision not to accept the Appeals Committee's suggestion, such a matter is entirely at his discretion.

D. In his rejoinder the complainant seeks to refute the Organisation's pleas, enlarges on his arguments about breach of equal treatment and the lasting and serious consequences of the discriminatory treatment of him, and presses his claims.

E. In its surrejoinder the EPO observes that the complainant's rejoinder puts forward no argument that weakens its case. It therefore presses all the pleas in its reply and adds several observations in support of its contention that there was no breach of the principle of equal treatment.

CONSIDERATIONS:

1. The main issue in this case is whether the complainant's promotion from grade A2 to A3 should have been backdated to 1 August 1985.

By a minute of 3 August 1987 he was informed that he was promoted as from 1 March 1987. The Organisation submits that that was lawful because it was the date by which he had served two years at grade A2, but the complainant contends that his promotion should have been backdated to 1 August 1985, the date by which his credited experience had come to eight years.

2. The complainant is mistaken.

He could have been promoted only in accordance with Article 49(7) of Service Regulations, and that provision lays down two prior requirements for promotion. One is that the official "must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned", and point II.2 of circular 144 requires "total credited experience of eight years" for appointment to grade A3. The second requirement is that the official must "have at least two years' service" in his grade.

Thus the complainant was required, first, to have eight years' professional experience to qualify for promotion to A3, and he did; secondly, he was required to have served for at least two years at his old grade, A2. But by 1 August 1985 he had not yet served for two years at that grade - actually he was then still on probation - and not until 1 March 1987 had he done so. So the President's decision to date his promotion from 1 March 1987 was correct; indeed the President had no authority under Article 49(7) to promote him from any earlier date.

3. The complainant has a subsidiary claim: if his main one fails he asks in effect that on promotion his experience be recalculated in keeping with the guidelines in circular 144 and that the step granted to him on promotion to A3 be determined by the rules that would have applied had he been recruited at that grade.

4. His subsidiary claim, too, is mistaken.

What was reassessed in accordance with the circular was his prior experience at the date of recruitment. Grading on recruitment is to be distinguished from grading on promotion. The complainant's prior experience and hence his grading were determined correctly on recruitment and his experience in the Office was correctly taken into account at 100 per cent. His grading on promotion was correctly determined, in accordance with Article 49(11) of the Service Regulations, by reference to his "former grade and step". That provision states that an employee who obtains a higher grade shall be appointed to the lowest step in the new grade which carries a higher basic salary

than what he got at his former grade and step. Grading on promotion, as 49(11) makes clear, depends not on seniority, but on the step held in the lower grade.

5. The Organisation has not discriminated against the complainant. Appointment is different from promotion and different rules may apply in determining the step due on appointment and the step due on promotion. It is true that some employees were granted A3 after recalculation of their experience in accordance with circular 144. But that was because their experience was found to have come to eight years or more at the date of their appointment, whereas the complainant's experience at the date of appointment came to only seven years and seven months.

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 Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 27 June 1989.

Jacques Ducoux
Mohamed Suffian
E. Razafindralambo
A.B. Gardner