

Registry's translation the French text alone being authoritative.

FIFTY-SECOND ORDINARY SESSION

In re CHOMENTOWSKI

Judgment No. 596

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Maurice Chomentowski on 4 March 1983, the EPO's reply of 20 May, the complainant's rejoinder of 24 June and the EPO's surrejoinder of 19 August 1983;

Considering Article II, paragraph 5 of the Statute of the Tribunal, Articles 4 and 5(3) and (4) of the Agreement on the Integration of the International Patent Institute into the European Patent Office, the secretariat of the EPO, and Articles 11(2), 32, 49, 106 to 108 and 116 of the Service Regulations of the Office;

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 Frenchman, was employed from 1968 by the International Patent Institute in The Hague and was transferred to Munich as an examiner on 1 January 1978 on the integration of the Institute into the EPO. The Personnel Department of the Office carried out a review of the seniority of examiners and early in 1982 informed the complainant that several periods did not count in reckoning his seniority: a period of military service from 1965 to 1966, a training period from April to October 1967 and two periods of employment as a programmer from October 1967 to July 1968. The complainant demurred in letters of 17 February and 24 March 1982, saying that the Institute had credited him with those periods; but the President of the Office replied on 30 April that the EPO excluded military service and periods of experience of less than one year, and Institute practice was immaterial. His case went to the Appeals Committee which, in its report of 29 November 1982, recommended rejecting the appeal. The President informed him by a letter of 7 December, the challenged decision, that he accepted the recommendation.

B. The complainant submits that no text affords any basis for the review of his seniority. It is not justified by the guidelines on the recruitment of examiners (CI/Final 20/77, adopted by the Administrative Council in 1977), by Article 11(2) (determination of grade and seniority on recruitment) or 49(9)(b) (minimum professional experience required for the grade of the post) of the Service Regulations, or by Article 5(3) of the Agreement on integration, which says that for Institute staff transferred to the EPO "Seniority in the new grade shall be equal to the seniority attained in the former grade". The inclusion in his personal file of the new reckoning of his seniority is at odds with the earlier one and harms his career prospects. He alleges breach of an acquired right to certain conditions governing promotion, in particular the method of reckoning the experience required for access to a higher grade. The EPO has failed to abide by the Institute's commitments towards him. There is discrimination in that different rules apply to him from those applied to former Institute staff who stayed on in The Hague. He seeks the quashing of the decision of 7 December 1982 and the recognition by the EPO, for the reckoning of his seniority, of three years' experience prior to his joining the Institute. He also claims costs.

C. The EPO replies that it has reckoned the complainant's experience before joining the Institute, for the purpose of promotion, according to the practice and rules applied for that purpose to any official. According to Article 4 of the Integration Agreement former Institute officials are subject to EPO rules and fare as other EPO staff. Article 5(3) is no exception: all it deals with is the determination of the step of Institute staff on transfer, and only on transfer, as the context makes clear. The Agreement was respected in the complainant's case, in particular Article 5(4), which says that "years of service completed at the Institute by the transferred officials ... shall be treated as years of service completed at the Office...". The Agreement says nothing of prior experience. The President takes account of such experience at discretion and ensures equal opportunity for promotion to everyone, the experience of former Institute officials being reckoned by the same criteria. As the Tribunal has held, the conditions governing

promotion do not confer any acquired right. The EPO's obligations towards former Institute staff are confined to what is set out in the Agreement and to respect for general principles of law, and it has not infringed them. The allegation that those who stayed on in The Hague have fared better is groundless. The table showing the calculation of the complainant's seniority was communicated to him and put in his file, and there has been no tampering with its contents. The EPO invites the Tribunal to dismiss the complaint as devoid of merit.

D. The complainant develops his arguments in his rejoinder. He reaffirms there was no authority for review of his seniority, his grade and step in the EPO having been determined by the Agreement, and that the contents of his file have been improperly altered, in breach of the rules about such files in Article 32 of the Service Regulations. He submits that the method of reckoning experience was a matter of decisive importance to him in accepting employment with the Institute and transfer to the EPO and is therefore the subject of an acquired right.

E. In its surrejoinder the EPO again denies any tampering with the complainant's file, which was merely reviewed to ensure that it correctly showed his "administrative position" One item, giving the calculation of his seniority, was added, and communicated to him too. The calculation was made correctly in accordance with rules which are perfectly lawful.

CONSIDERATIONS:

1. The complainant was an official of the International Patent Institute. After negotiation the Institute was integrated into the European Patent Organisation under an Agreement which was signed on 19 October 1977 and came into force on 1 January 1978.

Article 4 of the Agreement on integration says that "officials of the Institute shall become permanent employees of the European Patent Office ... they shall be subject to the Service Regulations, the Pension Scheme Regulations and all other provisions applicable to the staff of the Office unless this Chapter provides otherwise". The complainant accordingly became an employee of the EPO on 1 January 1978 and, as an examiner, was paid the same remuneration as at the Institute. In 1982 the EPO decided to carry out a general review of the steps which the Institute had granted on account of prior professional experience, and the new reckoning of seniority, which was later corrected in several respects, was notified to the complainant. He lodged an internal appeal with the Appeals Committee, the Committee reported on 29 November 1982, and by a decision of 7 December 1982 the President of the Office, on the Committee's recommendation, dismissed the appeal.

The complainant duly filed the present complaint.

2. According to Article 4 of the Agreement former Institute officials are subject to the EPO Service Regulations unless otherwise provided.

Of the specific provisions in the Agreement the material rule is Article 5, and the Tribunal will cite two paragraphs of that article. Paragraph 3, on which the complainant is relying, reads: "Seniority in the new grade shall be equal to the seniority attained in the former grade" (at the Institute).

This rule was respected when the complainant joined the EPO. He kept the steps he had been granted at the Institute and was given the same seniority in his new grade as that which he had attained at the Institute. But the EPO argues that that decision served only for the purpose of determining his grading on transfer, and it relies on paragraph 4 of Article 5:

"For the purposes of the Service Regulations for Permanent Employees of the Office, years of service completed at the Institute by the transferred officials referred to in paragraph 1 shall be treated as years of service completed at the Office in a grade which, according to the table referred to in paragraph 1, corresponds to the grade occupied at the Institute. If, according to this table, two grades on the scale of the Staff Regulations of the Institute correspond to a single grade on the scale of the Service Regulations for Permanent Employees of the Office, years of service completed in both grades on the scale of the Staff Regulations of the Institute shall be taken into account."

The clear meaning of this is that the only prior experience to be treated as EPO service is service completed by the transferred official at the Institute.

For the purpose of reckoning seniority the Agreement says nothing of experience prior to joining the Institute, and the material rule is therefore Article 4. As regards seniority benefits former Institute officials are fully subject to the

EPO Service Regulations.

3. In taking his decision in accordance with the Agreement the President of the Office did not infringe any acquired right. As the Tribunal said in Judgment No. 365 of 13 November 1978 on complaints by former Institute officials transferred to the EPO, "A right is acquired when he who has it may require that it be respected notwithstanding any amendment to the rules. In particular, it may be either a right which arises under an official's contract of appointment and which both parties intend should be inviolate, or a right which is laid down in a provision of the Staff Regulations or Staff Rules and which is of decisive importance to a candidate for appointment".

Neither condition is fulfilled in this case. The rules on reckoning seniority are not among those intended to be inviolate. They do not have any far-reaching effect on the complainant's advancement, and the purpose is to guarantee equality of opportunity for promotion for former Institute examiners and examiners recruited by the EPO. More broadly, the Tribunal's reasoning in Judgment No. 365 holds good: provisions on the conditions of promotion do not create acquired rights for an official, they are subject to amendment, and the staff member may expect them to be amended.

The decision is also in accordance with Articles 115 and 116 of the EPO Service Regulations, which confer wide discretion on the President of the Office, having regard to the guidelines approved by the Administrative Council.

In reviewing the impugned decision the Tribunal observes that what was needed was uniformity in the position of staff members, whether recruited by the Institute or by the EPO.

4. The complainant further alleges abuse of authority. There is no evidence of this in the dossier. The EPO says that officials are treated alike whatever the place of their residence or origin, and there is nothing whatever to support the complainant's allegations.

5. Lastly, he contends that the EPO infringed Article 32 of the Service Regulations, which relates to the keeping of personal files.

The plea fails. The EPO merely put in the complainant's file the form used in recalculating his seniority. The form was notified to him before being filed, and nothing was removed from his file. There was no irregularity.

6. The questions raised in the complaint may be resolved on the written evidence, and there are no grounds for granting the complainant's application for oral proceedings.

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

