

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

## FIFTY-NINTH ORDINARY SESSION

In re METTEN (No. 4)

Judgment No. 754

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. André Metten against the European Patent Organisation (EPO) on 20 May 1985, the EPO's reply of 5 August, the complainant's rejoinder of 17 December 1985 and the EPO's surrejoinder of 5 March 1986;

Considering Articles II, paragraph 5, VI, paragraph 1, and VII of the Statute of the Tribunal and Articles 49, 108 and 116(1) and (3) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Frenchman, was appointed to the EPO in Munich on 11 January 1982 as an examiner. He was granted grade A2, step 5, with eight months' seniority, on the strength of a reckoning of his professional experience, notified to him on 1 February 1982, of six years and eight months. In his first complaint he objected to the reckoning on the grounds of breach of equal treatment and he claimed A3 as from the date of his appointment. In Judgment 657 the Tribunal dismissed his claim on the merits. There came to his notice on 21 February 1984 a list of examiners to be promoted from A2 to A3, and he was not on the list. On 13 May he lodged an internal appeal objecting to his absence from the list and claiming promotion in 1983. In its report of 18 December 1984 the Appeals Committee held that the President of the Office had correctly exercised his discretion in deciding not to promote the complainant and it recommended rejecting the appeal. By a letter of 20 February 1985, notified to him on 22 February, the President informed him that he accepted the recommendation, and that is the decision now impugned.

B. The complainant's main plea is that under the guidelines approved by the Administrative Council of the EPO and embodied in CI/Final 20/77 a period of five years' reckonable experience should suffice for himself to qualify for promotion to grade A3, not the eight years required under the guidelines in CA/16/80. That is borne out by the fact that the President subtracts only five years' reckonable experience from the total accredited to the examiner recruited at A3 for the purpose of determining his starting step in that grade. He contends that the application to different groups of examiners of different criteria for promotion to A3 is in breach of the principle of equality and that since by 1983 he had gained over five years' experience he ought to have been promoted to A3 in that year. He has a subsidiary plea that, even if the minimum required were the full eight years' experience, he ought to have been promoted since by 1983 he had reached A2, step 7, and to do so an examiner needs eight years' experience: 2 years in A1 and 6 in A2. But the President follows the incorrect practice of applying different criteria for determining eligibility for promotion and for determining the step in the grade. The complainant seeks promotion to A3 as from 1983 and damages.

C. In its reply the EPO argues that the main plea is irreceivable because it is *res judicata*, being put forward after the Tribunal delivered Judgment 657, on 18 March 1985. The Tribunal dealt with the plea in 3 to 6 of that judgment.

The subsidiary plea -- that experience should be the same both for reckoning the starting step and for the purposes of promotion -- has arisen in the context of the complainant's fifth complaint, and the EPO refers to the arguments in its reply to that complaint, which are summed up in Judgment 755, under C.

D. In his rejoinder the complainant submits, as to receivability, that the *res judicata* rules does not apply because his present claim -- promotion to A3 in 1983 -- is not the same as what he was seeking in his first complaint. One of the complainants whose complaint the Tribunal joined to his in Judgment 657 did claim promotion to A3 in 1983, but he himself did not.

In any event he believes there are grounds for reviewing Judgment 657, namely errors of law and failure to rule on pleas.

As to the merits of his subsidiary plea he refers to the arguments he advances in the context of his fifth complaint and which are summed up in Judgment 755, under B and D, and maintains that those arguments show the EPO's reply to the plea to be irrelevant.

E. In its surrejoinder the EPO maintains, as to the receivability of the complainant's main plea, that the issues of law on which the Tribunal ruled in Judgment 657 were the same as those the plea raises. The fact that what the complainant now asks for is promotion to A3 in 1983 cannot conceal the substantive identity of his two complaints. Indeed the Tribunal joined to his first complaint the one by Mr. Stern, who did claim such promotion, on the grounds that the claims were, though stated differently, the same in substance. And the complainant was actually an intervener in Mr. Stern's complaint.

His application for review of Judgment 657 is irreceivable because it falls outside the scope of his complaint. If he wants the Tribunal to review the judgment he should file a separate application. Besides, the grounds for review which he alleges are not admissible.

As to the merits of the subsidiary plea the EPO refers to its submissions in the context of the fifth complaint.

#### CONSIDERATIONS:

##### Receivability

1. On 10 June 1984 the complainant filed an internal appeal against a decision not to promote him to A3 in 1983. In its report of 18 December 1984 the Appeals Committee unanimously recommended rejecting the appeal and the President of the Office did so by a decision of 20 February 1985, which is the one now under challenge.

That decision is a final one, the complainant having exhausted the internal means of redress as required by Article 108 of the Service Regulations and Article VII(1) of the Statute of the Tribunal. He also filed within the time limit in Article VII(2). His complaint is therefore receivable.

##### Objections to Judgment 657

2. In his rejoinder the complainant objects to Judgment 657, which the Tribunal delivered on 18 March 1985 on his first complaint and on Mr. Spiekerman's and Mr. Stern's, on the grounds of "fundamental flaws", the nature of which he describes at length.

The EPO submits in its surrejoinder that an application for review is irreceivable.

Though he objects to the judgment, the complainant does not ask for its review in any formal statement of claims. The Tribunal therefore holds that the complainant has failed to file a valid application for review.

##### Application for oral proceedings

3. In the application for oral proceedings which he submits with his rejoinder the complainant contends that such proceedings would supplement the written pleadings, banish any misunderstanding and provide further useful information.

The material issues raised by the complainant have been fully discussed in the briefs, oral proceedings would serve no purpose, and the application is therefore rejected.

##### Res judicata

4. In its reply the EPO maintains that the complaint is in breach of res judicata because the Tribunal ruled on the material issues in Judgment 657. The complainant rejoins that the rule does not apply because the conditions for applying it are not met.

As Article VI(1) of its Statute says, the Tribunal's judgments are final and without appeal: though subject to

review, they carry the authority of *res judicata*.

For the plea to succeed the substance of the claims, the cause of action and the parties must be the same in the new case.

It is beyond dispute that the material issues were the same in the case the Tribunal ruled on in Judgment 657 as in the present one and there is no doubt about the identity of the cause of action and the parties. Indeed the complainant has himself avowed the connection by founding his rejoinder on objections to the judgment.

But the Tribunal finds no real identity in the substance of the claims. In his first complaint the complainant was not seeking promotion to A3 in 1983, the chief claim in the present one. Although the reasoning in Judgment 657 has a direct bearing on the material issues in the present complaint, there is no identity in the claims. The Tribunal therefore rejects the plea.

#### Merits

5. The complainant contends that it was in breach of the EPO Administrative Council's guidelines in CI/Final 20/77 for the President of the Office to require eight years' professional experience for promotion to A3, a total he had not acquired by 1983.

The guidelines were drawn up in accordance with Article 116(1) and (3) of the Service Regulations, which provide for the drawing up of such guidelines to apply during a transitional period.

The complainant is mistaken in maintaining, and the Appeals Committee was right to hold, that paragraph 8 of the guidelines does not prevent the President from requiring eight years' experience for promotion to A3 during the period in which the guidelines apply. The Service Regulations empower the President to act in the matter provided that he does not depart from the guidelines. There is nothing in the requirement at odds with any express provision of the guidelines and it does not call for Council approval to be valid.

The Tribunal concludes that the President neither exceeded his authority as defined in the Service Regulations nor acted in breach of any provision of the guidelines.

In point of fact the Tribunal has ruled on the issue in earlier cases. In all of them its ruling has been at variance with what the complainant is arguing. There is no need to repeat at length the Tribunal's reasoning in the earlier judgments: what is said above affords adequate grounds for the present ruling.

6. Nor does the Tribunal accept the complainant's plea that he was discriminated against on the grounds that examiners recruited at grade A2 fare less well under the President's policy than those appointed at A3.

For the plea to succeed there must be different treatment of staff members who are in the same administrative position. Where the circumstances differ, so may the treatment provided that it is a fair, reasonable and logical outcome of the difference.

In this case the circumstances do differ. Moreover, the introduction of the distinction between examiners recruited at A2 and examiners recruited at A3 was fully warranted by the EPO's position at the time.

#### DECISION:

For the above reasons,

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 June 1986.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner

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