

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

## SIXTIETH ORDINARY SESSION

In re BIGGIO (No. 4)

Judgment No. 787

### THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Carlo Giuseppe Federico Biggio against the European Patent Organisation (EPO) on 17 December 1985 and corrected on 7 January 1986, the EPO's reply of 26 March, the complainant's rejoinder of 16 June and the EPO's surrejoinder of 11 September 1986;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Article 49(4) and (7) 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. At its 10th Session, in December 1980, the Administrative Council of the EPO approved, in CA/PV 10, rules for the rapid promotion of examiners to grade A4:

"For non-German examiners recruited at grade A3 ... before 1 January 1981 ... the promotion norm applicable at the time of their recruitment, enabling them to attain grade A4 after thirteen years' experience, will continue to apply ... the President of the Office will take into account all available assessment data on the merit of the employees concerned."

The complainant, an Italian, joined the International Patent Institute as an examiner in 1972. He was transferred to the EPO on 1 January 1978, promoted to A3 on 1 September 1978 and assigned in 1980 to General Directorate 2 in Munich. On 1 February 1982 his seniority was reckoned at 11 years and 3 months as at 1 January 1982, and from 1979 to 1982 his work was "good". The President laid down guidelines on 21 September 1983 in a note to the competent promotion board: examiners whose work was good" were to be promoted to A4 "when their experience lies between 13 and 16 years". Finding he was not on the list of promotions to A4 in 1983 the complainant lodged an internal appeal on 18 May 1984. He was promoted to A4 as from 1 October 1984. He asked that the date be 1 October 1983 or at the latest 1 January 1984 on the grounds that for the purposes of determining his fitness for promotion the period of his post-graduate studies should have counted in full and not just at half rate and that his experience had therefore warranted promotion earlier. The EPO refused on 14 August 1984. On 27 September he lodged an appeal, his second, against that decision. In reports dated 16 August 1985 the Appeals Committee, to which the President had referred the two appeals, recommended rejecting them on the merits, and by a letter of 24 September 1985, the decision impugned, the President informed the complainant that he did so.

B. The complainant observes that since by 1 October 1983 he had a total of 13 years' experience and his work had been "good" he qualified for the promotion. For no valid reason the President failed to respect the rules in CA/PV 10. The decision not to promote him was arbitrary, contrary to the criteria in the note of 21 September 1983, and in breach of the President's discretionary authority. The President was wrong to assume that he had only 13 years' experience by 1 October 1983: had his prior studies counted in full he would by then have had 14 years. It is unfair to value different sorts of prior experience at different rates for the purpose of promotion. He cites Judgment 572 in support of that view. He invites the Tribunal to quash the decision and order his promotion to A4 as from 1 January 1983 or, failing that, as from 1 January 1984, correct the reckoning of his experience as from 1 January 1984 for the purpose of future promotion by counting in full his prior industrial experience, and award him 2,000 Deutschmarks in costs.

C. In its reply the EPO observes that Article 49(7) of the Service Regulations makes it plain that promotion depends on a choice between qualified candidates. Though the guidelines approved by the Council and set out in CA/16/80 and CA/20/80 require from 19 to 23 years' experience for A4 examiner posts, under the rapid career pattern, which

applies to the complainant, 13 years might have sufficed. But CA/PV 10 is not imperative and the Council left the President freedom to take account of each examiner's merits. He quite properly said in his minute of 21 September 1983 to the promotion board that he would consider promoting an examiner whose work was "good" and who had from 13 to 16 years' experience. He was therefore not bound to promote the complainant, who had only the minimum experience. Nor was there any discrimination against him: no one whose work was "good" was promoted to A4 in 1983 unless he had at least 14 years' experience: indeed the complainant himself was promoted when he had 14 years.

The decision to promote him as from 1 October 1984 is also sound. What he is challenging is the reckoning of his experience for the purposes of promotion. Since he was told of it on 1 February 1982 any challenge to it is now time-barred. In any event his objections are unsound. Judgment 572 is irrelevant because it relates to a distinction between examiners recruited from national patent offices and others: the rules on the reckoning of postgraduate experience apply to all examiners indiscriminately. Besides, as the Tribunal said in Judgment 568, it is reasonable to give less weight to such studies than to patent experience. Lastly, the complainant's claim to the correction of the reckoning for the purpose of future promotion is irreceivable because it did not form part of either of his internal appeals and he has failed to exhaust the internal means of redress. Besides, for the reasons given above, it is unfounded.

D. In his rejoinder the complainant seeks to answer the EPO's case. He submits that his claims are receivable, observing in particular that the Organisation said so in its replies to his two internal appeals and that the reckoning notified to him in February 1982 was not challengeable at the time because it did not cause him injury. He develops at length his main pleas alleging that the reckoning drew clearly mistaken conclusions from the facts, that there was disregard of Judgment 572 as read with Judgment 568, and that there was discrimination against him first in refusing him promotion in 1983 and later in promoting him only as from 1 October 1984. He observes that under new rules the President introduced on 1 August 1985 he was given a new reckoning of experience, but only as from 1 January 1985. He argues in support of his claims that it ought to have been retroactive from an earlier date. He restates his claims in full.

E. In its surrejoinder the EPO maintains that the complainant has failed to answer satisfactorily the arguments in its reply which it discusses further, and that much of the rejoinder is beside the point. It again invites the Tribunal to declare each of the claims irreceivable and, subsidiarily, to dismiss them as devoid of merit.

## CONSIDERATIONS:

### Conditions for promotion

1. Article 49(7) of the EPO Service Regulations reads:

"Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them.

The employees 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 have at least two years' service in their grade in the Office."

2. The job description of a grade A4 official in General Directorate 2 requires at least nine years' experience. The figure was at first increased to 13 years and then, for someone of average performance, to a period ranging from 19 to 23. The Administrative Council of the Organisation has adopted norms which are based on the number of years of experience and on performance and it has introduced a scheme of what is known as "rapid promotion" (CA/PV 10): "For non-German examiners recruited at grade A3 at General Directorate 2 before 1 January 1981 and for them alone, the promotion norm applicable at the time of their recruitment enabling them to attain grade A4 after thirteen years' experience will continue to apply. It is understood that in applying this norm and the one for permanent employees recruited after 1 January 1981, the President of the Office will take into account all available assessment data on the merit of the employees concerned."

The President of the Office addressed a note dated 21 September 1983 to the competent promotion board saying that to qualify for promotion to A4 under the rapid promotion scheme an examiner whose performance was "good" would have to have from 13 to 16 years' professional experience.

3. On 1 August 1985 the President issued instructions setting out new rules on the reckoning of experience. The rules count industrial experience at 75 per cent in some cases, and they apply as from 1 January 1985.

The decision not to promote the complainant to A4 in 1983

4. The complainant, an Italian citizen, joined General Directorate 2 at grade A3 before 1 January 1981. His performance was reported to be "good". His professional experience was reckoned at 13 years as at 1 October 1983.

Believing that he met the requirements for promotion to A4, he objected to his omission from the list of examiners promoted to A4 in 1983. He filed an internal appeal, No. 43/84, which, on a unanimous recommendation by the Appeals Committee, the President rejected in a decision of 24 September 1985 that is now impugned.

5. The complainant maintains that the President failed to abide by the norms approved by the Council for non-German examiners holding a grade A3 post at General Directorate 2 before 1 January 1981.

What the norms say is that 13 years' experience is the norm "enabling" the examiner to get promotion to A4. The word "enabling" may be variously construed. Either it denotes mere possibility or it confers a right with a corresponding duty. Here it bears the former sense. First, that squares better with the word "peuvent" in the French version of CA/PV 10. Secondly, it reflects the intent stated by several Council members to preclude automatic advancement by seniority. Thirdly, the Council asked the President to "take into account all available assessment data on the merit of the employees concerned", i.e. to exercise discretion. Lastly, it is only right for the promoting authority to bear in mind the need for the Organisation to keep a proper balance between staff belonging to the various grades.

The Tribunal concludes that the norms did not require the promotion to A4 of any examiner who qualified, but instead set the minimum requirements for promotion. They conferred on the President discretion over whom to promote and so, in ruling on the complainant's claim to promotion to A4 in 1983, the Tribunal will determine whether the President exercised that discretion correctly.

6. Rejecting the complainant's pleas, the Tribunal holds that he did.

In saying that the period of experience required depended on the quality of performance the President took due account of "merit" as the Council had wished. No doubt he could have prescribed the same period for everyone. But it was no abuse or misuse of his authority to require from 13 to 16 years' experience of an examiner whose work was "good". By adopting the scale he was able to ensure a proper spread between the grades and so safeguard the interests of administration and staff alike.

7. The complainant argues that the President should not have promoted in 1983 only those who had 14 years' experience. He is mistaken. The promotions for 1983 would be objectionable only if they revealed inequality of treatment. But they do not. As the Appeals Committee observed and as the EPO's pleadings confirm -- and the complainant does not deny it -- everyone promoted to A4 in 1983 had 14 years' experience, and so everyone was in the same position.

Besides, even if an official who had only 13 years' experience by 1982 had been promoted in that year to A4 there would be no breach of equal treatment: the President was not bound to apply the same criteria in 1983 as he had applied earlier.

8. It is immaterial that the promotion board proposed promoting the complainant to A4 in 1983. Under Article 49(4) of the Service Regulations its function is purely advisory.

The decision not to make the complainant's promotion retroactive

9. By a minute of 24 July 1984 the complainant was informed of his promotion to A4 as from 1 October 1984, when his total experience was reckoned at 14 years. The complainant asked that his promotion date back to 1 January 1983 or at least 1 January 1984. That was refused and he filed an internal appeal, No. 116/84. Again on the Appeals Committee's unanimous recommendation, the President confirmed his decision on 24 September 1985. The complainant is seeking the retroactive promotion. In support of his claim he submits that, properly reckoned, his experience would have totalled 14 years by 1983.

10. The EPO retorts that the claim is time-barred: the complainant failed to challenge in time the reckoning notified to him on 1 February 1982 and he may not do so now.

The point need not be decided, the claim being devoid of merit for the reasons given below.

11. The complainant's case is that in accordance with Judgment 572, which the Tribunal delivered on 20 December 1983, his industrial experience, which the EPO counted at only half rate, ought to have counted in full. He betrays a misunderstanding of the judgment.

The Tribunal did hold that it was contrary to the principle of equality to count at the full rate, for the purpose of determining step within grade, industrial experience gained by officials who had come from some national patent office and to count it at only half rate for the same purpose in the case of other staff members. But the breach of equality which the Tribunal found in Judgment 572 is not established here. The Organisation says in its reply, and the complainant does not deny, that the professional experience of all candidates for promotion in 1983 and 1984 was reckoned at half rate whether or not they had been employed in a national patent office. The plea of breach of equality is therefore unsound.

12. The guidelines the President adopted on 1 August 1985 on the reckoning of professional experience took effect only as from 1 January 1985 and are immaterial to a complaint that relates to promotion in 1983 and 1984.

The decision not to alter the reckoning of experience

13. The complainant seeks alteration of the reckoning of his professional experience for the purpose of future promotion. The claim was not put to the Appeals Committee and, the internal means of redress not being exhausted is irreceivable under Article VII(1) of the Statute of the Tribunal.

Costs

14. Since his claims fail the complainant is not awarded costs.

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 Tun Mohamed Suffian, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 12 December 1986.

(Signed)

André Grisel

Jacques Ducoux

Mohamed Suffian

A.B. Gardner