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

**SIXTY-SIXTH SESSION**

# *In re* DIALLO

**Judgment 962**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Ingrid Diallo against the European Patent Organisation (EPO) on 4 August 1988 and corrected on 5 September, the EPO's reply of 23 December 1988, the rejoinder filed by the complainant on 3 February 1989 and the EPO's surrejoinder of 9 March 1989;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 38(3) and 56 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. Article 56 of the EPO Service Regulations provides that the President of the Office may authorise a permanent employee to work part time. The complainant, a citizen of the Federal Republic of Germany, joined the EPO in Munich as a permanent employee on 1 April 1979 and was granted grade B2. She worked full time until 31 July 1981, half time until 31 March 1985, three-quarters time until 10 November 1985 and again full time. She was promoted to B3 on 1 January 1982.

Circular 144 of 2 September 1985 announced the application as from 1 January 1985 of new guidelines for reckoning the professional experience of staff. On 3 December 1985 the complainant received a reckoning by the new rules: it stated that, besides prior experience totalling 6 years and 7 months, her EPO experience had come to 5 years and 9 months as at 1 January 1985. The Organisation confirmed the reckoning of the period of her EPO service on 16 September 1986.

On 1 June 1987 she asked the Personnel Department what experience she was credited with for the purpose of promotion to a B4 post she had applied for. The head of Personnel replied on 3 June that her prior experience was as stated before and that her EPO experience at 1 June 1987 came to 6 years and 3 months, including 3 years and 9 months at B3, her part-time work being counted not in full, but only pro rata. On 23 July she wrote to the President appealing against the partial reckoning of the periods of half- and three- quarters-time work (from 1 August 1981 to 10 November 1985); she wanted them to count in full, as indeed they had in the reckoning of December 1985, not pro rata according to the number of hours she had worked. In its report of 23 December 1987 the Appeals Committee held that that reckoning had been misleading; it recommended "clarifying and publishing the Office practice concerning the recognition for promotion purposes of part-time work in the EPO" and taking a final decision "in the light of the published practice".

After correspondence with the Chairman of the Appeals Committee the President of the Office wrote to the complainant on 11 May 1988 to say that for the reasons the Administration had given in its submissions to the Committee he rejected her appeal. That is the decision she is impugning.

B. The complainant points out that the tally of EPO experience she was given on 3 June 1987 did not agree with the figure she had got in 1985 - confirmed in 1986 and never corrected since - in that the periods of part-time employment were no longer credited in full.

(1) She submits that since the refusal to count them in full is at odds with the earlier reckoning there is breach of her legitimate expectations. (2) The President issued guidelines on part-time work in circular 34 of 15 May 1979. Paragraph 4 says that for the purpose of reckoning step in grade such work counts as full-time work. That paragraph should apply by analogy to seniority for promotion. (3) The Organisation is in breach of Article 38(3) of

the Service Regulations because it has never consulted the General Advisory Committee on the matter. (4) The staff have never been officially informed.

Since, as the Appeals Committee observed, the Regulations do not say how to reckon part-time employment the President has discretion to allow her claim.

She seeks the quashing of the decision of 11 May 1988, confirmation of the reckoning notified on 3 December 1985 and an award of 1,000 Deutschmarks in costs.

C. In its reply the EPO submits (1) that the complainant is mistaken in founding her case on the reckonings of 1985 and 1986. The relevant guidelines in circular 144, which apply to the reckoning of the experience of B and C category staff on recruitment and for the purpose of promotion, are about prior experience only. The reckoning of 1985 was based on those guidelines, gave the total as 6 years and 7 months and plainly related only to the complainant's prior experience. That was borne out by the reckoning of 1986, which cited point IV.2 of the guidelines. Appended to the reckoning of 1985 was a note from the Principal Director of Personnel which made it clear that the purpose of the reckoning was to determine step within grade. For that purpose all periods of the complainant's EPO experience counted in full in keeping with paragraph 4 of circular 34. If she did not understand she had only to inquire, as indeed the note suggested.

(2) Since the meaning of the reckoning was plain there is no breach of any legitimate expectation.

(3) In any event she misconstrues paragraph 4. If her interpretation of it were right there would have been no need to have the paragraph at all. In fact the paragraph changed the rule that would otherwise have applied in the reckoning of step, namely that part-time work must be reckoned only in part. Since the paragraph expressly applies only to step, by implication it does not cover promotion.

(4) The practice of partial reckoning constitutes lawful exercise by the President of his wide discretion in the matter. Part-time employment is a concession made at the employee's request and in his interests, and there is no reason why, just because he fares well in the reckoning of step, he should have the other benefits of full-time work.

(5) There has been no breach of Article 38 of the Service Regulations. As the minutes show, the General Advisory Committee met on 19 September 1978 to discuss part-time work and the guidelines that later appeared in circular 34: it might have discussed seniority for promotion too had it wished, either then or in 1985, when it discussed part-time work again.

(6) There was no need to announce the practice to the staff. The principle is that benefits are granted pro rata according to services rendered: the Organisation need announce only the exceptions, as indeed does paragraph 4 of circular 34.

D. In her rejoinder the complainant contends that the employee has the right to have information clearly presented. The reckoning of 1985 appeared clear and she saw no need to ask what it meant. The practice of reducing the seniority for promotion of part-time employees is warranted neither by the Service Regulations, which say nothing on the subject, nor by any circular. There is nothing in paragraph 4 to preclude applying it to seniority for promotion as well. The matter was never referred to the Advisory Committee nor discussed by it.

E. In its surrejoinder the Organisation submits that the reckoning of 1985 plainly related only to prior experience and to the effect which the new calculation might have on the complainant's step as at 1 January 1985 in accordance with point IV.2 of circular 144. When she asked for information about seniority for promotion in her letter of 1 June 1987, the reply of 3 June explained that part-time work would affect the reckoning. She neither challenges the general principle that the benefits the employer provides are in proportion to the services the employee renders, nor explains why the principle should not apply to seniority for promotion. In the exercise of his discretion the President of the Office has declined to make an exception to the principle.

Though the records of the Advisory Committee's discussions do not mention the particular issue of seniority for promotion, it was consulted on the matter of part-time work, and it is up to the Committee itself to decide what to discuss.

CONSIDERATIONS:

1. The complainant joined the staff of the EPO on 1 April 1979 at grade B2, step 5. On 1 January 1982 she was promoted to B3. From 1 August 1981 until 10 November 1985 she was allowed to work part time. On 3 December 1985 she was told that her professional experience prior to appointment had been reckoned according to guidelines in circular 144 and came to 6 years and 7 months, and also that her EPO service counted in full. There was an explanatory appendix. The same reckoning was notified to her on 16 September 1986. On 5 December the EPO again gave her a reckoning of prior experience made in accordance with the circular and confirmed that the total was 6 years and 7 months.

Having applied for a B4 post, she wrote on 1 June 1987 asking what period of experience had been given to the promotion committee. On 3 June the head of Personnel answered that her period of part-time work at the EPO counted only pro rata according to the actual duration of work. She lodged an internal appeal asking that her part-time work count in full for the purpose of determining her eligibility for promotion. Her appeal went to the Appeals Committee which, in a report of 23 December 1987, recommended referring her case to the President of the Office for review. But by a decision of 11 May 1988, the one she now impugns, the President rejected her appeal.

2. The gist of her case is that she is entitled to the full counting of her part-time work because the reckoning of 3 December 1985, as confirmed on 16 September 1986, not only gave the tally of her prior professional experience but counted in full her period of EPO service. The notice dated 5 December 1986 also confirmed the reckoning of her prior experience.

3. Her plea fails.

The notice of 3 December 1985 and the one of 16 September 1986 - which is just a photocopy of the earlier one - show that the reckoning was made, in compliance with the guidelines in circular 144, for the purpose of determining the complainant's experience prior to appointment. That, too, was the purpose of the notice of 5 December 1986, which, like the one of 3 December 1985, put the total of prior experience at 6 years and 7 months.

The notice of 3 December 1985 did mention the period of her EPO service and said that it had been counted in full, including the periods in which she had worked only part time, and the appendix gave no satisfactory explanation of the reference to her EPO service. But, as the Organisation points out, the purpose of that notice was to give her step as at 1 January 1985 and it was not wrong to add a mention of her EPO service since it had counted in full towards her step in keeping with paragraph 4 of the guidelines on part-time work in circular 34 of 15 May 1979.

4. The Organisation explains that when it comes to determining grade the practice is to count periods of part-time work only pro rata.

The Tribunal is satisfied that that is indeed the practice. The complainant does not deny it, but merely contends that it is warranted neither by the Service Regulations nor by the guidelines on the reckoning of part-time work.

She is mistaken.

The only article of the Service Regulations that mentions part-time employment is 56, and it does not say how to reckon such employment for the purpose of determining either step or seniority for promotion. So the President had a wide discretion in making implementing rules, being required only to comply with the general principles of law that govern the international civil service. The EPO says that in the exercise of his discretion the President took two decisions: one was that experience should count only pro rata towards seniority for promotion on the principle that promotion is a reward for service rendered; his other decision was to make an exception by counting part-time work in full towards step.

The complainant is quite wrong in saying that the practice is at odds with circular 34. What paragraph 4 says is that "For the purpose of calculating seniority for advancement in the prescribed steps within the relevant grade, the period of part-time work will be taken into account in the same way as in the case of normal full-time work". The wording of the guidelines, which set objective criteria, is so clear and precise as to leave no room for different interpretations. Circular 34 made it compulsory to count part-time employment in full towards step and a contrario made the practice in the matter of reckoning seniority for promotion compulsory as well. There is therefore no question of any breach of the material rules and the complainant's plea fails.

5. She further contends that the EPO's practice was unlawful because it had not been notified to the staff.

She is again mistaken.

As the Organisation retorts, the practice of counting part-time work pro rata towards seniority for promotion is just a corollary of the rule - reflected in the Service Regulations - that benefits from the employer are in proportion to services from the employee. Only exceptions to that rule need to be announced to the staff, like the one in Article 56. Another exception is the one relating to step in paragraph 4 of circular 34. Besides, the adoption of circular 34 made an announcement to the staff unnecessary because, as was said above, it confirmed a contrario the practice in the matter of reckoning seniority for promotion.

6. No more successful is the complainant's argument that the Organisation acted in breach of Article 38 of the Service Regulations, which requires that the General Advisory Committee first give an opinion on "any proposal which concerns the whole or part of the staff".

According to the Appeals Committee's report of 23 December 1987 the complainant herself pointed out that the matter had already been referred to the General Advisory Committee, though it had not been debated. The text of its minutes shows that at a meeting on 19 September 1978 the General Advisory Committee did discuss the subject of part-time work. Moreover, as the EPO observes, the Committee had a proposal referred to it in 1985 for enlarging the scope of part-time employment. In any event the complainant may not properly contend that the Committee was not duly consulted, and again her plea fails.

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. 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.

(Signed)

Jacques Ducoux
Mella Carroll
E. Razafindralambo
A.B. Gardner

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