

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

## FIFTY-NINTH ORDINARY SESSION

In re METTEN (No. 5)

Judgment No. 755

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth 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 16 December 1985 and the EPO's surrejoinder of 5 March 1986;

Considering Articles II, paragraph 5, and VII, paragraph 1, of the Statute of the Tribunal and Articles 49(1), 106(2), 107(1) 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. Facts relevant to this complaint appear in Judgments 657 and 754, under A. There came to the complainant's notice a "seniority list", the purpose of which was to determine the fitness of EPO examiners, including the complainant, for promotion and which listed them according to their reckonable professional experience. He wrote to the President of the Office on 30 January 1984 objecting to the reckoning of his experience -- four years and eight months as at 11 January 1982, the date of his appointment -- on the grounds that it did not match the reckoning made for the purpose of determining his starting step in A2 -- six years and eight months, as at the same date. His industrial experience counted at only half rate for the purpose of promotion but in full in determining his starting step. Having got no answer within the time limit of two months set in Article 106(2) of the Service Regulations, he lodged an appeal under 107(1) against the implied decision to reject his claim. In its report of 5 August 1985 the Appeals Committee held that the President had correctly applied the guidelines the Administrative Council of the EPO had approved on the subject. On the Committee's recommendation the President rejected the appeal and so informed the complainant by a letter of 20 February 1985, which reached him on 22 February and which is the decision challenged.

B. The complainant contends that there is no text requiring the President to reckon experience differently for determining fitness for promotion and starting step. The distinction makes for inequality between examiners of equal merit. Indeed an examiner who is acknowledged, in the fixing of his starting step, to have lesser experience may sometimes qualify earlier for promotion. It was never explained to the complainant on appointment that there would be a different reckoning of his experience for the purpose of promotion. In Judgment 572 the Tribunal endorsed the contention that the value of industrial experience must be the same for advancement within grade as for promotion. He asks that his experience be reckoned for

the purpose of promotion at six years and eight months at 11 January 1982, and that he come higher in the seniority list. He seeks compensation for the adverse consequences of any other reckoning, and 3,500 Deutschmarks in costs.

C. The EPO replies that the complaint is irreceivable because, his internal appeal being time-barred, the complainant failed to exhaust the internal means of redress. The reckoning of his experience was notified to him on 1 February 1982, and although in his letter of 30 January 1984 he said he had only just learned that it was different for promotion and for starting step, an appendix to his letter of 22 December 1982 introducing the appeal which culminated in Judgment 657 shows he knew of the difference then, his own reckoning being based on the method of calculating experience for the purpose of promotion.

In any event the complaint is devoid of merit. In adopting different methods of reckoning for the two purposes the President exercised his discretion correctly. Article 116(3) provides for the adoption of guidelines on the matter by the Council, and the guidelines in Cl/Final 20/77 afford the basis for the decision. Point 9 says that in determining the starting step industrial experience counts in full, but point 5(ii)(c) says that in determining the grade it shall be given due account, and the President decided at his discretion that that should mean half rate only. The Council

endorsed the practice in June 1980 in approving the further guidelines in CA/16/80. The difference is justified because advancement by step is automatic whereas promotion is not. Judgment 572 is irrelevant because it is concerned with a difference in reckoning industrial experience for step between examiners recruited from national patent offices and other examiners.

The claim to compensation is unsound: the starting grade and step were correct, and besides, no-one has a right to promotion, which depends not just on experience but on performance as well.

D. The complainant rejoins that his internal appeal was not time-barred. The reckoning notified on 1 February 1982 was concerned only with starting grade and step, and not until much later was he told that the period used to determine his grade would serve for promotion too. The first challengeable decision on the reckoning of his experience for promotion was the implied rejection of his claim of 30 January 1984.

He develops his pleas on the merits. To reckon industrial experience at only half rate for promotion is illogical, does not answer the Council's wishes, makes for unequal career opportunities and determines seniority independently of merit. The Council has made new rules (CA/15/85) to restore equality of treatment. CA/16/80, which the EPO cites, is irrelevant because it relates to starting grade, not to promotion. Though not wholly relevant, Judgment 572 does accept a thesis that is material to this case.

E. In its surrejoinder the EPO develops its pleas on receivability and on the merits and submits that the rejoinder in no way diminishes the cogency of its case. It denies breach of equality: examiners put in the same starting grade are treated alike in determining whether they have the experience -- prior and in the EPO -- required for promotion to a higher grade. The new guidelines to which the complainant refers -- and under which he was promoted to A3 on 1 January 1985 -- have no bearing on the lawfulness of the earlier rules.

## CONSIDERATIONS:

### Receivability

1. The EPO submits that the internal appeal the complainant lodged on 6 April 1984 was irreceivable. If it was, the present complaint would be as well since the internal means of redress would not have been exhausted as required by Article VII(1) of the Statute of the Tribunal.

The Organisation observes that the complainant knew as early as 22 December 1982 that there was one method of reckoning experience for the purpose of promotion and another for the purpose of determining the starting step: on that date he wrote a letter lodging an appeal in his first case -- the one the Tribunal ruled on in Judgment 657 -- and a paper he appended to that letter shows he knew of the difference in method. He did not lodge an internal appeal in 1982 and was no longer free to do so in 1984.

The complainant rejoins that his internal appeal was receivable. Though notified to him on 1 February 1982, the reckoning of his experience related to the determination of his starting grade and there was no indication that it would serve in determining his fitness for promotion as well.

In its report of 18 December 1984 the Appeals Committee held the appeal of 6 April 1984 to be receivable.

The subject of the EPO's letter of 1 February 1982 to the complainant was the reckoning of his experience for determining his starting step and grade. The reckoning for the purpose of promotion is a different matter, and so the letter does not make the appeal of 6 April 1984 time-barred.

The EPO further submits that the complainant knew before December 1982 that the reckoning for step held good for promotion as well: in another appeal he said: "I shall normally be promoted to A3 when I have eight years' experience, viz. A3-1-1, in May 1985".

The plea fails. What the complainant may have said in the context of a different case did not render irreceivable the internal appeal which preceded the present complaint. Since he was not officially informed of the criteria for reckoning experience for promotion he was unable to file an appeal on the matter. There are no grounds for inferring from the complainant's arguments in the paper appended to his internal appeal of 22 December 1982 that the internal appeal that preceded this complaint was irreceivable.

The seniority list mentioned in the rejoinder was just an internal working paper of the Office with no legal purport.

In the absence of any formal decision on the reckoning of experience for the purpose of promotion -- the purpose of the communication of 1 February 1982 was different -- the complainant had reason to ask the EPO to give a ruling. He did so on 30 January 1984, after getting the seniority list. Having received no reply, he lodged his internal appeal on 6 April 1984 in accordance with Articles 106 and 107 of the Service Regulations.

The internal appeal being receivable, so is the present complaint.

The application for oral proceedings

2. The complainant filed an application for oral proceedings on 16 December 1985, together with his rejoinder.

He submits that oral proceedings would serve to supplement the written pleadings, banish any misunderstanding and provide further useful information.

In fact they would shed no further light on the material issues, which have been amply discussed in the written pleadings, and the application is therefore disallowed.

Merits

3. In its report of 18 December 1984 the Appeals Committee unanimously recommended rejecting the complainant's appeal, and it is the President's decision of 20 February 1985 to do so that he is now impugning.

The Tribunal holds that the complainant has failed to show that the procedure followed by the Organisation was unlawful.

The point is whether the President's decision to reckon experience according to different criteria for determining step and for promotion was in breach of the Service Regulations or the Council guidelines, or the principle of equal treatment, or was arbitrary or taken without authority.

The Tribunal observes that, whereas Article 116(1) of the Service Regulations relates to the conditions of recruitment of examiners, the subject of 116(3) is the periods of experience to be taken into account for access to a higher grade, i.e. the promotion provided for in Article 49(1). Thus the distinction between the reckoning for starting step and the reckoning for promotion is plain from the actual wording of the rules. The distinction warrants different treatment, and there is no breach of the principle of equality where the treatment is a fair, reasonable and logical outcome of circumstantial differences.

The guidelines in CI/Final 20/77, which the Council adopted in keeping with the Service Regulations, do not and cannot, on any proper reading of Article 116, require the President to follow the same criteria in reckoning experience for the purpose of recruitment as for promotion.

There was no discrimination, merely a distinction between two different situations, recruitment and promotion. The staff members in the two situations are treated differently and there is no breach of equality nor anything arbitrary in that.

The Tribunal concludes that the President made a correct and reasonable exercise of his discretion, committed no breach of the Service Regulations, the relevant guidelines, or the principle of equality, and did not act arbitrarily.

Since the Tribunal dismisses the complaint for the reasons aforesaid it need not take up the parties' other pleas.

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 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.