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

FIFTY-FIRST ORDINARY SESSION

In re HUBEAU

Judgment No. 574

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Michel Gislain Hubeau on 15 October 1982 and brought into conformity with the Rules of Court on 27 October, the EPO's reply of 19 January 1983, the complainant's rejoinder of 20 March as corrected on 5 April and the EPO's surrejoinder of 25 May 1983.

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 9.1, 9.3 and 23 of the Agreement on the Integration of the International Patent Institute into the European Patent Office, the secretariat of the EPO, Article 30 of the Institute Staff Regulations and Article 109(1) of the EPO Service Regulations;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The integration of the former International Patent Institute into the European Patent Office is described in Judgment No. 365, under A. The complainant, a Belgian, was employed at the Institute as a grade A7 examiner. He was transferred to the EPO at grade A2 at the time of the merger. Under Article 30 of the Institute Staff Regulations an official was entitled on promotion to a salary increment corresponding to one biennial step in his new grade. Under Article 9.3 of the integration agreement, however, a former Institute official is not so entitled but gets the step "carrying the basic salary which is equal to or immediately above" his former pay. On 29 January 1982 the President of the Office promoted the complainant with effect from 1 March 1981 to grade A3, step 2. On 25 March 1982 he appealed to the President against the refusal of the additional step he would have got under the Institute rules. In his reply of 26 May, notified to the complainant on 26 July, the President observed that in Judgment No. 365, delivered on a case in which the complainant had himself been an intervener the Tribunal had dismissed claims based on objections to Article 9.3 of the integration agreement; his decision, now challenged, was to reject the appeal or the grounds that the matter was res judicata.

B. The complainant observes that, but for Article 9.3, A7 examiners at the Institute like himself could look forward, during their career in the EPO, to two additional steps on promotion, just as they could under the Institute rules. Because of Article 9.3 they get only one, and that constitutes breach of the principle of equal treatment. The complainant invites the Tribunal to quash the President's decision of 26 May 1982 and order the EPO to apply for his benefit Article 23 of the integration agreement, whereby the Administrative Council shall adopt "any additional provisions which may prove necessary to deal with situations for which the provisions of this Chapter fail to provide an equitable solution". He claims 1,500 guilders in costs.

C. In its reply the EPO submits that the complaint is irreceivable on the grounds that it is res judicata: in Judgment No. 365 the Tribunal, holding Article 9.3 to be lawful, dismissed the complaints and the applications to intervene, including the present complainant's. Besides, the complaint is devoid of merit: as the Tribunal has held, Article 9.3 is lawful because the conditions governing promotion do not confer any acquired rights and are subject to amendment.

D. In his rejoinder the complainant contends that the principle of res judicata does not apply: in the former case he was only an intervener; in Judgment No. 365 the Tribunal dit not hold Article 9.3 of the integration agreement to be immune to any challenge; and the present cause of action is different. In fact it did not arise until he was promoted and was refused an increment. There was a fatal defect in the internal proceedings in that according to Article 109(l) of the Service Regulations his appeal ought to have been referred to an Appeals Committee. He enlarges on his allegations of breach of the principles of equal treatment and equity. The refusal of the increment,

to which almost all other staff are entitled, will affect his salary until the end of his career and the amount of his pension. There is further discrimination in that former A6 Institute officials have their former seniority restored on their first promotion whereas former A7 Institute officials do not. The EPO is in breach of good faith in that it gave the latter to understand that it would put the matter right. Lastly, it is in breach of a "duty of care" to ensure equality and equity of treatment. He alters his claims, inviting the Tribunal to quash the decision and declare the refusal of an increment unlawful, or to award him damages equivalent to the amount of the increment for the rest of his career and a corresponding increase in his pension rights, and costs.

E. In its surrejoinder the EPO maintains that the case does come under res judicata since in Judgment No. 365 the Tribunal dismissed the applications to intervene, including the complainant's, and ruled on "the financial consequences of promotion as defined in ... Article 9.3", the same question as arises in this case. To his argument that no cause of action arose until he was actually refused the increment, the EPO replies that the decision of 26 May 1982 affords no grounds for seeking a new decision on a matter settled in Judgment No. 365. As to the allegations of breaches of good faith and equity, it is in the President's discretion whether to propose amending Article 9.3 or submit the matter to the Administrative Council under Article 23 of the integration agreement. Article 9.3 being lawful, there can be no fault in continuing to apply it. There was no defect in the actual proceedings since the President was right to rule out an abuse of the appeals procedure. The EPO invites the Tribunal to dismiss the complaint as irreceivable and unfounded, and to dismiss all the claims for relief.

CONSIDERATIONS:

1. By a decision of 29 January 1982 the complainant, a grade A2 official of the European Patent Office, was put on a category II examiner's post and promoted to grade A3, step 2. What he is challenging is the decision to give him only step 2.

2. The EPO's main plea is that the complaint fails by the doctrine of res judicata: on 13 November 1978 the Tribunal delivered Judgment No. 365 (Lamadie and Kraanen) on complaints in which the present complainant was an intervener.

Where such a plea is upheld the effect is to preclude a further ruling on claims identical in substance to claims on which the Tribunal has already passed judgment.

Where the earlier complaint was dismissed the doctrine of res judicata will apply if three conditions are fulfilled.

The first is that the parties must be the same. This condition is met here. Although Mr. Hubeau was not a complainant in the case in which the Tribunal gave judgment on 13 November 1978, he was an intervener, the Tribunal declared the intervention receivable, and it dismissed the applications to intervene together with the complaints. Mr. Hubeau was therefore party to those proceedings.

The second condition is that the substance of the claim should be the same. It is not fulfilled.

The complaint which the Tribunal heard on 13 December 1978 dismissed pleas protesting against the Agreement on the Integration of the International Patent Institute into the European Patent Office. The Tribunal held that the agreement had the force of staff regulations, and so the measure that was challenged had the force of a rule.

In this case the complainant seeks the quashing of a decision clearly of an individual nature and affecting his personal career.

A claim for the quashing for misuse of authority of a measure which has the force of a rule is not the same in substance as one for the quashing on the same grounds of a decision taken in accordance with that measure. Even supposing that the complainant made the same pleas -- though he does not -- as those the Tribunal dismissed on 13 December 1978, the EPO was mistaken in relying on res judicata in the internal and in the present proceedings.

There is no need to consider whether the third condition -- namely that the cause of action should be the same -- is fulfilled. As the complainant contends, his complaint is neither time-barred nor irreceivable.

3. After receiving notice of the decision of 29 January 1982 the complainant submitted an internal appeal to the President of the Office on 25 March. The President replied on 26 May 1982 that "in accordance with the general 1egal principle of res judicata" ne could not "reopen the case, which had closed once and for all on 13 November

1978". There was therefore no discussion in the internal proceedings. The case was not even referred to the Appeals Committee since in the Administration's view there was no point at issue.

The EPO's reliance on res judicata was mistaken: it was in fact under an obligation to take up the case and consider the complainant's arguments. It therefore committed an error of law.

The EPO argues the merits only subsidiarily and very briefly, and it fails to answer most of the complainant's pleas.

The Tribunal observes that the defendant is under a duty to enable the court to render a complete decision on the dispute. If the party who is the defendant takes the view that the complaint should be rejected because it is clearly vexatious, he may apply to the Tribunal, before filing the reply, for permission to confine his arguments to that point. Otherwise he will incur the danger that the Tribunal declare the allegations of fact in the complaint to be established.

In this instance, however, the Tribunal will not do so. It will merely set the decision aside and refer the case back to the EPO for review of the merits.

4. The Tribunal awards 1,000 guilders as costs.

DECISION:

For the above reasons,

1. The President's decision of 29 January 1982 is quashed.

2. The case is referred back to the President of the EPO for a new decision.

3. The complainant is awarded 1,000 guilders as costs.

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 20 December 1983.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

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