

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

FIFTY-FIFTH ORDINARY SESSION

In re BENUSSI, BERNECKER, PARUP, TESCHEMACHER and VAN LINGE

Judgment No. 656

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Patent Organisation (EPO) by Mr. Franco Benussi, Mr. Dietrich Bernecker, Mr. Rudolf Teschemacher and Mr. Hans van Linge on 18 May 1984 and corrected on 22 June, the EPO's replies of 10 September, the complainants' rejoinders filed in October and the EPO's surrejoinders of 12 December in Mr. Teschemacher's case, 21 December in Mr. Benussi's case, and 11 January 1985 in Mr. Bernecker's case and Mr. van Linge's case;

Considering also the complaint filed against the EPO by Mr. Mats Pårup on 15 May 1984 and corrected on 28 May, the EPO's reply of 20 August, Mr. Pårup's rejoinder of 29 August and further communication of 19 September and the EPO's surrejoinder of 15 October and further observations of the same date;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 11(2) 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 material facts of the case are as follows:

A. The complainants are employed at the European Patent Office in Munich as lawyers. They are in category A and each of them is at some step in grade 2. By letters of 8 July 1982 the Principal Director of Personnel sent them tables showing how their seniority had been calculated. Seniority took account of certain kinds of experience the official had gained before joining the EPO, but it was explained to them that any period of such experience which fell short of twelve months had been discounted by rounding down to the nearest full year in calculating their step within their grade. For Mr. Benussi and Mr. van Linge the period disregarded was three months, for Mr. Bernecker four months, for Mr. Pårup two months and for Mr. Teschemacher six months. By letters of 6 October 1982 they asked the President of the Office to reconsider, but on 18 January 1983 he refused. On 23 September 1983 they jointly appealed to the Appeals Committee. The Committee recommended rejecting their appeals, and by decisions of 21 February 1984, which they are challenging, the President informed them that he accepted the Committee's recommendation.

B. The complainants see no sound reason to discount periods of reckonable prior experience short of one year. The seniority tables are misleading in that they show the periods in dispute yet discount them. The main objection is to the breach of the principle of equal treatment to the detriment of lawyers: for patent examiners in category A at The Hague and Munich branches of the EPO and for translators in Munich in category L periods of reckonable experience short of a year do count for the purposes of calculating the step. Mr. Benussi, Mr. Bernecker, Mr. Teschemacher and Mr. van Linge contend that there is unfair discrimination also between lawyers and that the decisions are at odds with Judgment No. 572 (in re Wenzel), and they give examples to illustrate this. Mr. Pårup submits that there was a flaw in the Appeals Committee's report in that it failed to rule on one of his pleas. He observes, too, that although the Appeals Committee stated that for lawyers all prior experience counted in full, he himself had a period of twelve months' research he did in Canada credited at only 50 per cent in determining his seniority. Mr. Benussi says he has lost 8,545 Deutschmarks in earnings up to 1 June 1984; Mr. Bernecker DM 2,883 up to 1 November 1984; Mr. Teschemacher DM 2,799 up to February 1984; and Mr. van Linge DM 1,312 up to 1 September 1984. These four complainants invite the Tribunal to set aside the impugned decisions and order that they be granted the following periods of seniority for all purposes of the Service Regulations: for Mr. Benussi 13 years and 8 months as from 15 June 1978; for Mr. Bernecker 17 years and 4 months as from 1 November 1977; for Mr. Teschemacher 11 years and 6 months as from 1 March 1984; and for Mr. van Linge 3 years and 3 months as from 1 September 1981. Mr. Pårup invites the Tribunal to order that he be credited with another two months at grade A2, step 2, as from 27 April 1981, or, if it does not wish to rule on the merits, to remit his case to the

Appeals Committee on the grounds of its failure to rule on his claims. All the complainants also seek costs.

C. In its replies the EPO submits that failure to explain in the seniority tables that experience has been "rounded down" to full years is a merely formal objection which cannot invalidate the determination of the step. The legal basis for recognising prior experience in determining the step is Article 11(2) of the Service Regulations: "Unless the appointing authority otherwise decides, for duly substantiated reasons relating to the training and special professional experience of the candidate, appointment shall be to the first step in the grade". Because their duties differ the reckoning is not the same for lawyers as for examiners. Those recruited as lawyers become familiar with patent law much sooner than newly recruited examiners gain the highly specialised knowledge required of them. 50 for examiners reckonable prior experience counts only at half rate and up to a maximum, whereas for lawyers it counts in full, except for academic experience -- which answers Mr. Pårup's objection to counting only at 50 per cent his period of experience in Canada -- and there is no maximum. These differences are warranted and fair in the circumstances, and so too is the rounding down to full years for lawyers. Nor is there discrimination between lawyers; the same rules apply to all of them. Judgment No. 572 is irrelevant because it relates only to determining the relevance of prior experience for examiners. The EPO submits that the complaints should be dismissed as devoid of merit and the applications for costs, too should be refused. It asks that Mr. Pårup's case be joined with the others.

D. The complainants rejoin that their objections to the tables are not purely formal, because the President's decisions are based on the facts stated therein. The EPO has given no justification for rounding down in calculating the step and seniority in step for lawyers: it just implies that lawyers must fare worse in this respect because they fare better than examiners in others. Rounding down does also make for arbitrary discrimination between lawyers. To retort that lawyers are all subject to the same rules is tantamount to arguing that measures which affect everybody in a group can never be held discriminatory. The EPO may have the right to treat groups of staff differently in determining experience, but not to treat acknowledged experience differently in working out the step. Mr. Benussi, Mr. Bernecker, Mr. Teschemacher and Mr. van Linge give further examples. Mr. Pårup observes that the EPO does not seek to rebut his contention that the Appeals Committee omitted to rule on one of his pleas. All five complainants press their claims. Mr. Pårup objects to the joinder of his case with the others.

E. In its surrejoinders the EPO enlarges on the arguments in its replies and adds a few remarks prompted by some of the submissions in the complainants' surrejoinders, maintaining its chief contention that there is no breach of the principle of equality either between lawyers and other staff or between lawyers. It presses its application for the joinder of Mr. Pårup's complaint.

CONSIDERATIONS:

Joinder

1. Before the Tribunal will join two or more complaints and deal with them in a single judgment two conditions must be fulfilled.

The first is that the substance of the claims must be the same. Whether they are stated differently is of no account: what matters is that the Tribunal should be able to rule on them in a single decision.

The second condition is that the material facts, viz. those on which the claims rest and which are relevant thereto, should be the same.

The complainants need not all have the same arguments. The Tribunal rules as it sees fit and is not constrained by the parties' submissions, variations between them being immaterial.

2. Both conditions are fulfilled for joining the complaints filed by Mr. Benussi, Mr. Bernecker, Mr. Pårup, Mr. Teschemacher and Mr. van Linge.

Although their claims are not stated in exactly the same terms, in substance they are the same, since they are all asking that account be taken of a number of months of experience which falls short of a full year in determining their grade and step.

Furthermore, though they are not all in quite the same position, they are relying on similar facts: the refusal to take account of months of experience short of one year, and the taking account of such months in the case of examiners

and translators who belong to the same categories as they do. The facts are therefore identical.

The Tribunal accordingly allows the EPO's application for joinder.

Allegation of a discrepancy

3. On 8 July 1982 the Principal Director of Personnel sent the complainants notice of the reckoning of their seniority, grade and step. Whereas their seniority was stated in years and months, their grade and step discounted months short of a full year. The complainants submit that according to the notice their grade and step ought to have matched their seniority by taking account of the full number of months and that the discrepancy is a fatal flaw in the impugned decision.

In fact what the notices reveal is not a discrepancy but inadequate explanation. The notices reckoned seniority in years and months and then rounded the months down to a full year in determining the grade and step. The implication was that months of experience short of twelve were not to count in the complainants' favour. It would certainly have been more satisfactory to say so, but there was really no mistaking the EPO's intent, and the allegation of a discrepancy is unfounded.

Allegation of breach of equal treatment

4. All five complainants maintain that insofar as their grading discounts months short of one year they fare worse than examiners and translators, for whom all months of experience count even if they fall short of one year. Four of the complainants further allege inequality of treatment as between lawyers. As appears below, only the first of these arguments is sound.

5. The EPO admits that in the counting of months lawyers such as the complainants are not on a par with examiners and translators. Its explanation is that for different groups of staff the advantages and disadvantages more or less cancel each other out, whatever the actual differences may be. For many examiners and translators some experience counts only in part, but all the months count; for lawyers all kinds of experience count in full, but months short of one year are dropped. In other words the EPO sees rough compensation between an advantage granted to lawyers in taking account of forms of previous experience and the disadvantage of having a few months discounted.

This argument is fundamentally unsound. Although the experience of examiners and translators counts only in part the reason is that it is of limited use to them in performing their duties at the EPO. But the reason why the experience of lawyers counts in full is that, as the EPO actually admits, they are able to adapt quickly to their new duties whatever their prior training may have been. In other words, the difference in the calculation of seniority is due to a difference of fact and there is no tipping of the balance that needs to be offset. What the EPO describes as a kind of compensation in the counting of months is in fact a breach of the principle of equality.

The EPO suggests that the purpose of the preferential treatment of examiners is to encourage the recruitment of staff from national patent offices. But that is not a sound reason for treating examiners better than lawyers.

6. There is also inequality as between lawyers. Those whose seniority is more than one year but less than two are treated as if it were only one. Thus the difference in fact between them is not reflected in any difference of treatment.

The EPO submits that in putting all lawyers on a par in its discounting of months it has observed the principle of equality. It is right. The EPO may determine questions of seniority according to more or less formal criteria. Thus it may, for example, discount months altogether in reckoning seniority. What it must not do is apply different rules to different groups of staff. Accordingly, the practice of discounting months short of one year in reckoning the seniority of all who are lawyers is not in itself a breach of the principle of equality. The breach of the principle lies in treating examiners and translators more favourably than lawyers.

DECISION:

For the above reasons,

1. The EPO shall take account of months falling short of one year in determining the complainants' grade and step

for as long as officials in other categories have such months counted as in present circumstances.

2. The EPO shall pay each of the complainants 1,000 Deutschmarks in costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 18 March 1985.

(Signed)

André Grisel

Jacques Ducoux

E. Razafindralambo

A B. Gardner