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

SIXTY-SECOND ORDINARY SESSION

In re FRANKS

Judgment 819

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Barry Gerard Franks against the European Patent Organisation (EPO) on 20 October 1986, the EPO's reply of 8 January 1987, the complainant's rejoinder of 12 March and the EPO's surrejoinder of 24 April 1987;

Considering Article II, paragraph 5, of the Statute of

the Tribunal, Article 116 of the Service Regulations of the European Patent Office, the secretariat of the EPO, and Circular No. 144 issued by the President of the Office on 2 September 1985;

Considering the applications to intervene filed by Mr. Andrew Evans and Mr. Nigel Franks;

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. While an undergraduate in mechanical engineering at the University of Bath the complainant, a British subject, took what is known as a "thin sandwich course". It entailed his working for Westland Helicopters, in England, for several months in 1979, 1980 and 1981 and for Valeo, in Paris, for a few more in 1982. The total number of months was 18. He joined the EPO as an examiner at The Hague on 1 September 1983 at grade Al. On 27 May 1985 he and two others, who had also taken sandwich courses while at Bath, wrote to the head of the Personnel Department asking that the 18 months' industrial experience they had gained from the sandwich courses should count in reckoning seniority for the purpose of determining their step within their grade at the EPO. On 3 June the head of Personnel refused on the grounds that the practice was to count only postgraduate experience of industry. The three lodged internal appeals on 4 July 1985. In its report of 22 May 1986 the Appeals Committee said it saw nothing wrong with the practice and recommended rejecting the appeals. By a letter of 16 July 1986, which is the decision impugned, the Principal Director of Personnel informed the complainant that the President of the Office had rejected his appeal.

B. The complainant is challenging, not the application of the rule that only postgraduate experience counts, but the rule itself, which he sees as arbitrary and unfair. In counting military service the EPO does not care whether it was done before or after the obtaining of a university degree, the reason being that that would discriminate between citizens of different countries and between citizens of the same country. The reason holds good for industrial experience. Why should the EPO put less value on the complainant's experience at Westland and Valeo than on, say, service as a private in the West German army? It is common in Great Britain to count undergraduate experience in determining starting pay. The complainant asks the Tribunal to set the decision aside and order the EPO to count his industrial experience towards seniority.

C. The EPO replies that the complaint is devoid of merit. There is nothing arbitrary about its practice of counting only postgraduate experience of industry. It has applied that rule consistently since 1977 and the rule appears in all its guidelines on the reckoning of seniority. The rule takes account of the fact that employees in category A must ordinarily have a university degree, and professional experience is worthwhile to the EPO only if obtained in some position that itself requires a university degree. Undergraduate experience clearly fails on that ground to qualify. The rule does not discriminate against the complainant. As the Tribunal has held, there can be breach of equal treatment only where the position is similar both in fact and in law. The complainant, who has undergraduate experience only, is not in the same factual position as an examiner who has served in industry after acquiring the academic knowledge a degree demands. Practice in Great Britain is irrelevant in an international organisation. The

rules on military service do not discriminate against the complainant. The President of the Office has correctly exercised his discretion in laying down different rules about military service and industrial experience, and the EPO explains the political and other reasons why the former is the sole exception it allows to the rule that only postgraduate experience counts.

D. In his rejoinder the complainant points out that the EPO has never denied that his industrial experience is useful to his work as an examiner. That should be the criterion, not when he gained it. In any event the application of the rule that allows only postgraduate experience has not been as consistent as the EPO makes out. On its own admission one exception is military service, and its reasons for allowing it are unsound. It observes in support of its own practice that the civil service in some member States takes account of military service. Yet it says that British practice with regard to industrial experience is irrelevant. It cannot make the argument cut both ways. Moreover, it does not consider whether military service is useful to it; yet that is the criterion it applies to industrial experience.

There are at least two other exceptions. One is recruitment to the A category of those who have no university degree, and another is the practice of promotion of a B6 grade official who has no such degree to grade A2.

E. In its surrejoinder the EPO enlarges on its own arguments and submits that the rejoinder puts forward no pleas that cast any doubt on the soundness of its reply. It again invites the Tribunal to dismiss the complaint as devoid of merit.

CONSIDERATIONS:

1. The complainant joined the staff of the EPO on 1 September 1983 as an examiner at grade A1, step 1, and was promoted on 1 September 1985 to A2, step 1. On 28 May 1985 he had asked for review of the reckoning of his experience. As an undergraduate he had been employed for eighteen months in industry under what is known in English universities as a "thin sandwich" course. On 22 May 1986 the Appeals Committee recommended rejecting his claim and the President of the Office did so on 16 July.

2. The EPO's main reason is that it counts professional experience only if gained after graduation, a rule it has been applying "consistently and across the board" since 1977.

As applied to the complainant's case is the rule arbitrary and discriminatory, as he maintains?

3. At a meeting it held from 10 to 14 June 1985 the Administrative Council of the EPO adopted a text, CA/15/85, which precludes the application of Article 116(1) and (3) of the Service Regulations in reckoning prior professional experience for the purpose of determining the staff member's starting grade and step and his eligibility for promotion.

The purpose of CA/15/85 was to empower the President of the Office to make his own arrangements for reckoning the experience of examiners which would be "uniform, legally unimpeachable and more favourable to the staff concerned". For that purpose the President issued instructions in a circular, No. 144 of 2 September 1985. As the Appeals Committee observed, the circular embodies earlier practice, although, being issued by the President, it does not have the same binding character as the earlier Council guidelines.

4. The rule the EPO relied on to refuse the claim is section I ("Reckonable experience"), point 8: "Periods of professional experience after completion of studies may be credited only from the documented date on which university studies were successfully completed".

Military or "comparable" service counts as reckonable professional experience", says point 3, drawing no distinction between periods before and after graduation. The EPO therefore counts periods of such service not just after graduation but before as well.

Yet the impugned decision was no breach of the principle of equality: the principle holds good only as between those who are in the same position in fact and in law and therefore does not apply to this case.

Military service, or comparable service, whatever form it may take, is compulsory, whereas the training course the complainant took as an undergraduate was not. As the EPO points out, even countries which have military service do not make it compulsory for everyone, some categories being exempt, and someone who belongs to such a category and who is employed at the EPO may not properly allege he is discriminated against.

In keeping with former practice the EPO states military or comparable service as a specific exception to the general rule, and so it is not something the complainant may rely on.

He cites the case of those who have been appointed to staff category A even though they have no university degree, and that of a B6 official also with no degree who was promoted to A2. The plea is immaterial because the staff members are not in the same position as he in law or in fact. Being a university graduate, different procedures for recruitment and later for promotion apply to him.

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. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1987.

(Signed)

André Grisel
Jacques Ducoux
E. Razafindralambo
A.B. Gardner

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