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

SEVENTY-NINTH SESSION

In re KOCK, N'DIAYE and SILBERREISS

Judgment 1450

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed against the European Patent Organisation (EPO) by Mr. Thierry Silberreiss on 25 February 1994 and by Mrs. Bérénice N'Diaye on 10 March and corrected on 27 April, the EPO's replies of 20 July, the complainants' rejoinders of 31 October 1994 and the Organisation's surrejoinders of 20 January 1995;

Considering the complaint filed against the EPO by Mrs. Marion Kock on 9 June 1994 and corrected on 29 July, the Organisation's reply of 21 October 1994, the complainant's rejoinder of 11 January 1995 and the EPO's surrejoinder of 17 February 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Considering that the complainants have applied for joinder, that the Organisation does not object and that the three complaints may therefore be formally joined for the purposes of this judgment;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

Considering that the case arises out of the rejection of the complainants' claims to the grant of permanent appointments with the Organisation upon expiry of their fixed-term contracts and that the parties' claims are as follows:

The complainants:

1. The grant of permanent appointments with retroactive effect from the date of expiry of their fixed-term contracts;

2. failing that, awards of material and moral damages equivalent to two years' salary;

3. costs.

The defendant:

Dismissal of the complaints.

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainants joined the staff of the EPO in 1991 and 1992 as auxiliary staff under fixed-term appointments for two years. Appended to their contracts was the text of a decision which the Administrative Council of the EPO had taken on 17 January 1986, and which read in part:

"Conditions of employment shall otherwise be governed by the employment and social welfare legislation in force at the place of employment; this shall also apply to matters of recourse to the national courts."

On 12 November 1993 and 6 April 1994 the complainants appealed to the President of the European Patent Office, the secretariat of the EPO, against decisions not to renew their appointments and asked for permanent appointments.

The EPO refused in letters of 26 November 1993 and 27 April 1994.

In the meantime the complainants filed suit with the German courts. As the court of first instance the employment tribunal of Berlin made a ruling on 22 February 1994 on the case of Mr. Silberreiss, the only one of the three to complete the procedure. The ruling was that the German courts lacked competence and would not entertain his case. On 12 September 1994 the appellate court, the employment tribunal of the State of Berlin, upheld the ruling.

B. The complainants submit that the clause in their contracts limiting their appointments to two years offends against German law. They deny that their duties were temporary. They allege a judicial void and say that the EPO has acted in breach of good faith by pleading immunity in the German courts.

C. The EPO replies that sound personnel management called for the introduction of a category of temporary staff; that on recruitment the complainants consented to the clause limiting the period of their appointment; and that Judgment 1311 (in re Guerra Ardiles) acknowledged that the law of the international civil service prevailed over municipal law.

D. In their rejoinders the complainants challenge the EPO's account of the facts and argue that the German version of the clause is ambiguous.

E. In its surrejoinders the Organisation presses all its pleas.

CONSIDERATIONS:

1. The EPO recruited the complainants as auxiliary staff under contracts of service that were limited to two years. Mr. Silberreiss and Mrs. N'Diaye took up duty in 1991 and Mrs. Kock in 1992. All three are objecting to the Organisation's refusal to convert their appointments on expiry into permanent ones.

2. Until a short while ago the Service Regulations of the European Patent Office provided solely for appointment of staff "for life", so to speak, under contracts without limit of time. The Organisation used to obtain any temporary staff it needed from employment agencies. Such arrangements having proved unsatisfactory, its Administrative Council decided in 1985 to consider making legal provision for recruiting staff directly under fixed-term contracts.

3. The outcome was a decision that the Administrative Council took on 17 January 1986 - No. CA/D 14/85 - to determine conditions of service for auxiliary staff. The preamble states that temporary contracts should be used only "to solve temporary problems". The first of the ensuing five paragraphs says that the total period of employment under such a contract may not exceed two years; the second, that auxiliary staff shall be paid according to the nature of their duties; and the third, that pay shall be subject to national income tax. The fourth is about leave. And the fifth, which has given rise to this case, says:

"Conditions of employment shall otherwise be governed by the employment and social welfare legislation in force at the place of employment; this shall also apply to matters of recourse to the national courts."

4. Since there is dispute over the construction to be put on the fifth paragraph and since the three complainants' contracts, which are in German, refer to it, it is worth reproducing the text of it in the EPO's other two official languages:

"Das Dienstverhältnis bestimmt sich im übrigen nach den am Dienstort geltenden nationalen arbeits- und sozialrechtlichen Bestimmungen; dies gilt auch für den Rechtsweg zu den nationalen Gerichten."

"Les autres conditions d'emploi sont assujetties au droit national du travail et de la sécurité sociale en vigueur au lieu d'affectation; cela vaut également en cas de saisine des tribunaux nationaux."

5. The contracts of service that the President of the Office and the complainants signed draw on the standard terms of decision 14/85. They provide that the complainants are to serve at the EPO's sub-office in Berlin. Clause 9 matches the first part of the fifth paragraph of the Council's decision, the part about the applicable law, but not the second, which is about the right of appeal, though the second part does appear in the full text of the decision appended to each contract.

6. When the complainants' appointments expired the Organisation took the view that its contractual relations with

them were at an end. They thereupon filed internal appeals which were in like terms and had the same gist. Under German law - they argued - their contracts of service might not be limited to two years, the clause to that effect was invalid and they were entitled to permanent appointments. So they claimed the grant of indefinite appointments as permanent employees of the Organisation with retroactive effect from the date of expiry of their contracts. And if - they concluded - the Organisation refused their claims, they wanted the President of the Office to treat them as internal appeals under Articles 106 and 108 of the Service Regulations.

7. The EPO did not answer Mr. Silberreiss and Mrs. N'Diaye, whose cases arose together, in the same way as it answered Mrs. Kock, whose case came up one year later. Its final position may be summed up as follows. In each contract there was entered the date at which the appointment was to end, and the Organisation had neither any reason to renew the contract nor any need to grant a permanent appointment. The time clause was valid: municipal law was irrelevant by virtue of the express exclusion of it in the contract. Since as auxiliary staff the complainants were not free to file internal appeals and the internal means of redress were therefore exhausted, direct appeal lies to the Tribunal.

8. While their internal appeals were going ahead the complainants filed suit against the EPO with the employment tribunal of first instance (Arbeitsgericht) of Berlin. Only the case of Mr. Silberreiss, which he filed on 30 November 1993, went through the German courts, whereas pending the outcome of it there was a stay of proceedings in the cases brought by Mrs. Kock and Mrs. N'Diaye.

9. On 4 February 1994 the Organisation filed a reply with the employment tribunal. As the Tribunal understands it, the EPO's position in that reply was as follows: it claimed immunity as to the conditions of service that the complainants' contracts expressly exempted from national law, including the time clause, this Tribunal being recognised as competent in that respect.

10. In a ruling of 22 February 1994 the employment tribunal accepted that contention and declined to entertain the suit filed by Mr. Silberreiss. He then appealed to the appellate employment tribunal (Landesarbeitsgericht) of the State of Berlin. That tribunal upheld the ruling on 12 September 1994 on the grounds that - as paragraph 5 of decision 14/85, which it cited, made plain - "the relevant national law will be applicable and the national courts competent only insofar as the Administrative Council's decision contains no express provision" ("dass sowohl das materielle nationale Recht nur gelten als auch der Rechtsweg zu den nationalen Gerichten nur gegeben sein soll, soweit der Verwaltungsratsbeschluss nicht bereits eine Regelung enthält"); that municipal law on the matter of fixed-term contracts varied greatly from country to country; that the Administrative Council's decision did contain an express provision on that subject, which was the one at issue; and that the German courts therefore had no jurisdiction.

11. There were two sequels: on 29 December 1994 Mr. Silberreiss withdrew an appeal he had filed with the federal employment tribunal (Bundesarbeitsgericht), the court of last instance in matters of employment; and the two other complainants thereupon withdrew their applications from the tribunal of first instance.

12. Without waiting for the outcome of the German litigation Mr. Silberreiss filed his complaint on 25 February 1994, i.e. just after the tribunal of first instance had made its ruling; Mrs. N'Diaye filed on 10 March and Mrs. Kock on 9 June 1994. The receivability of the complaints as a whole is not at issue.

13. In their original and later submissions the complainants put forward many pleas which rest on German labour law and on the Organisation's own rules. The gist of their case is as follows:

(a) The jobs they were assigned under their contracts of service were to vary according to need and consisted in a whole range of auxiliary duties: messenger service, reception, storekeeping, distribution of equipment and putting through telephone calls. In their submission an administration will always need staff to perform such duties precisely because of their variety. So the wording of their contracts was inconsistent with the Organisation's need, cited in the preamble to decision 14/85, "to solve temporary problems". The time clause being unlawful, they are to be treated as permanent employees.

(b) The Organisation was deceitful. Before the employment tribunal of first instance of Berlin it advocated a broad interpretation of its own immunity so as to narrow the competence of the municipal courts. Yet when the complainants made their claims it refused them access to the internal appeal procedure. It showed the same bad faith in the preparatory work on decision 14/85: the text was tampered with in translation and for that reason its

validity is dubious.

14. The Organisation submits that the complaints are irreceivable insofar as they claim damages failing reinstatement under permanent appointments. That, it says, was not one of their original claims. It has the following pleas on the merits:

(a) Since its Regulations provide only for "life" appointments it had to find some way of resorting to temporary recruitment, which would make for flexibility. The main purpose was to achieve greater efficiency and escape the constant risk of having a host of permanent employees who could not be got rid of. That was the whole point of decision 14/85.

(b) Each of the complainants wittingly consented to the conditions of service. Never could any of them have doubted but that the contract was limited in time and not to be extended. Once they had the benefit of temporary contracts they were not free to rely on the terms thereof to get round the requirements for access to permanent appointment with the Organisation.

(c) The litigation in Germany raised conflicts of law and of jurisdiction which the German courts resolved in the Tribunal's favour. Referring to Judgment 1311 (in re Guerra Ardiles) and the precedents cited therein, the Organisation submits that the Tribunal holds to the view that the law of the international civil service shall apply in the event of conflict with municipal law and in particular with the law of the host country.

The Tribunal's jurisdiction

15. The Tribunal will first take up the issue of jurisdiction that the parties raise. Its ruling hinges on the construction to be put on paragraph 5 of decision 14/85, which affords the basis for clause 9 of the contract of service. The decision is authoritative in the three official versions - English, French and German - that appear above. The EPO says that the German was the original in the preparatory work. But neither that nor the drafting of the complainants' contracts in German confers any greater authority on that version. In law there is but one decision, and the interpretation of it, which must be objective, must match its terms and purpose.

16. The parties and the German courts put stock in the words "im übrigen". In the English text the term is "otherwise" and it was "par ailleurs" in an early draft of the French but became "Les autres conditions d'emploi" in the final text. But what raises the difficulty is not so much those words as the different shades of meaning there may be between "Dienstverhältnis", "conditions of employment" and "conditions d'emploi": the German denotes the whole relationship of employment from start to finish whereas the terms in English and French may be taken to mean only access to employment.

17. It is the German term, the most pregnant and the only unambiguous one, that best conveys the purpose of the provision. The purpose is that the EPO's auxiliary staff shall be subject to municipal law in three matters - employment, social security and tax - and that the Organisation's own rules shall apply only to the extent that the decision actually states they shall, viz. as to grading, pay, leave and the limit of duration. All other components of the employment relationship are therefore subject to municipal law.

18. The renvoi to municipal law also resolves the issue of jurisdiction. Indeed decision 14/85 states that in any dispute over a term of employment that is governed by municipal law the municipal courts shall have jurisdiction. The issue is the lawfulness of the complainants' fixed-term appointments; it is one that the decision and their contracts of service expressly cover; and so the German courts correctly resolved the conflict of jurisdiction by declining to entertain the issue. Insofar as the Organisation may have been arguing otherwise in its somewhat obscure submissions to the German courts it was wrong in law.

19. The EPO is also mistaken about Judgment 1311: the Tribunal has never ruled out municipal law a priori. Although it is ordinarily and essentially competent in a context of international law, it may well have to heed some provisions of municipal law where, as indeed in this case, there is renvoi to such law in a contract of service or in an organisation's rules. Precedent further has it that there may be reference to municipal law for the sake of comparison and so as to educe certain general principles of law that apply to the international civil service.

The receivability of the claim to damages

20. For two reasons the EPO fails in its preliminary objection to the complainants' claim to damages. For one thing,

it may not refuse the complainants access to the appeal procedure on the grounds that they are "auxiliary" staff, yet say that they ought, in what, for all intents and purposes, amounted to preliminary appeal, to have demarcated the full ambit of any future litigation. The other reason is that, as the Organisation must realise, it is precisely in cases like this, about termination of employment, that the Tribunal may in any event itself award damages if it deems reinstatement impossible.

21. So the objection to receivability cannot be sustained whatever the ruling on the merits may be.

The merits

22. The complaints fail on the merits on both objective and subjective grounds.

23. However municipal law on the grant of fixed-term contracts may vary from country to country, the fact is that in the international civil service such contracts are common and the policy is seen as a proper and even necessary method of administration. So the EPO acted unimpeachably in resorting to fixed-term contracts to get auxiliary work done and so ease the undue rigidity of its staff structure. True, especially when there is not full employment, the decision not to renew a contract on expiry may cause hardship. But that is why, in keeping with precedent, the Tribunal will in each case look to the circumstances in which the decision not to renew or not to convert to permanent appointment may have come about.

24. One further point is worth stressing. The Organisation is free to make whatever use it wishes of the possibility of granting fixed-term contracts. The Tribunal will not interfere in the exercise of such discretion. So there is another issue that it will not entertain, namely whether, on account of the way the work was organised, the complainants' duties were permanent or temporary. Whether duties are permanent or not will depend not just on the sort of work to be done but also on the organisation's own shifting requirements.

25. As for the subjective grounds, the complainants quite wittingly consented, as the EPO points out, to the contracts of service they were offered and were aware that, being for a fixed term, the contracts could not run beyond the period of two years they set. Nor may the complainants object a posteriori to an essential term of the contract, viz. its duration, in an attempt to have it converted to a permanent appointment. They have adduced not a jot of evidence to suggest that the Organisation acted in any but its own legitimate interests either when the contracts were made out or when they came to an end.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas
E. Razafindralambo
P. Pescatore
A.B. Gardner

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