NINETY-SECOND SESSION

***In re* Kern (No. 11)** **Judgment No. 2101**

The Administrative Tribunal,

Considering the eleventh complaint filed by Mr Gerbert Christoph August Kern against the European Patent Organisation (EPO) on 27 February 2001 and corrected on 19 March, the EPO's reply of 7 June, the complainant's rejoinder of 10 September, and the Organisation's surrejoinder of 19 October 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions;

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

A. The complainant was born on 12 October 1933 and holds both Swiss and German nationality. He joined the European Patent Office, the EPO's secretariat, on 27 April 1981 and retired (at grade A4(2)) on 31 October 1998.

Article 12(1) of the Office's Pension Scheme Regulations, which concerns the inward transfer of pension rights, states that:

"An employee who enters the service of the Office after leaving the service of a government department, a national organisation, an international organisation not listed in Article 1 or a firm, may arrange for payment to the Organisation in accordance with the Implementing Rules hereto, of any amounts corresponding to the retirement pension rights accrued under his previous pension scheme, provided that that scheme allows such transfers to be made.

In such cases the Office shall determine, by reference to his grade on confirmation of appointment and to the Implementing Rules hereto, the number of years of reckonable service with which he shall be credited under its own pension scheme."

From 1 April 1971 to 26 April 1981 the complainant was working at the Swiss Federal Institute of Intellectual Property and was paying on a compulsory basis into the Swiss federal pension scheme (the *Eidgenössische Versicherungskasse* (EVK)). Upon taking up employment with the EPO his pension entitlements accrued under that scheme were transferred to the EPO pension scheme - the transfer was completed in early 1983.

For several years prior to 1971 the complainant had been paying compulsory or sometimes voluntary contributions into the German social security pension insurance scheme, administered by the *Bundesversicherungsanstalt für Angestellte*[(1)] (BfA). It is not in dispute that the complainant's pension rights in the BfA scheme were never transferred to the EVK scheme.

On 8 December 1995 the EPO and the Federal Republic of Germany entered into an "Agreement ... on the implementation of Article 12 of the Pension Scheme Regulations of the European Patent Office" (hereinafter the Agreement), which came into force on 21 September 1996. Pursuant to that Agreement the complainant applied on 17 September 1996 to have the overall value of his contributions to the BfA scheme transferred into the EPO pension scheme.

By a letter dated 12 December 1997 the BfA confirmed, at the Office's request, that the complainant had paid no contributions between 1 January 1978 and 27 April 1981. The complainant contested the absence of contributions during that period and instituted legal proceedings in the Social Security Tribunal in Munich challenging the BfA's communication of 12 December 1997.

By a letter of 15 May 1998 the Vice-President of Directorate-General 4 (DG4) told the complainant that his request for the transfer could not be granted. He said that years of reckonable service - for the period in which an employee belonged to a pension scheme before joining the Office - could be credited under certain conditions. The conditions were defined in Article 12(1) of the Pension Scheme Regulations in conjunction with Implementing Rule 12.1/1 i) a). Pension rights relating to periods of service outside the EPO could be credited only if the aggregate of such rights was taken into account by the pension scheme of the official's last employer before joining the Office. That had not happened in the complainant's case. For the complainant to meet the conditions of the transfer, the EVK would have had to take over his rights accrued under the BfA scheme and then transfer the aggregate amount into the EPO scheme. The Vice-President explained that a direct transfer of rights accrued in the BfA was not possible.

The complainant filed an internal appeal against that decision on 19 May, alleging that it was contrary to the terms of the Agreement. On 8 July 1998 he lodged another appeal in which he challenged several procedural measures taken by the Office in connection with his request for the transfer.

In a report dated 20 November 2000 the Appeals Committee reported on both appeals. It unanimously recommended dismissing them as unfounded. By a letter of 30 November 2000, the impugned decision, the Director of Personnel Development informed the complainant that the President of the Office had rejected the two appeals.

B. The complainant submits that when he applied for the transfer in 1996 he met all the requirements, so the transfer should have been allowed. He contends that the legal basis for the inward transfer is set out in Article 12 and the "Agreement ... on the implementation of Article 12 ..." which came into force on 21 September 1996. He notes that the Organisation does not share his opinion, since it takes the view that the scope of the Agreement is restricted by Rule 12.1/1 of the Implementing Rules that entered into force on 4 June 1981. The complainant interprets that view as a belated "intention" on the part of the Organisation "to restrict the scope of the Agreement". That intention came about only after he had applied for the transfer and can therefore have no retroactive effect on his application. Besides which, the form he filled out to request the transfer mentioned the Agreement but not the Implementing Rules that the Organisation gives weight to.

Furthermore, he states that the EPO offended against data protection regulations by wrongly using data concerning him obtained from the BfA. It misled the BfA and engaged in "illegal activities" in order to thwart his interests and thus offended against the rules of loyalty and good faith. He assumes that his legal relations with the BfA and his affiliation to the German pension scheme come under German law, and that consequently the German national courts have jurisdiction in the matter; he adds that the law suit he lodged with the Tribunal in Munich is still pending.

The complainant takes issue with the internal appeals proceedings, claiming that the Appeals Committee did not offer impartial justice and there was no satisfactory result. No oral proceedings took place. He learned of the Organisation's arguments for the first time during the appeal process and did not have the opportunity to comment on them before the impugned decision was taken. He interprets the impugned decision as being a "bundle of a large number of decisions" on requests that he put to the Organisation between May 1998 and December 2000 and which have not been duly answered by the EPO - in breach of "the requirements of procedural care".

In addition he finds it unfair that a former colleague at the EPO was allowed the transfer while he was refused it. In his opinion they were in similar situations. He contests the view that only the pension rights accrued in the scheme of the last employer can be transferred. He describes that view as "erroneous" and says it is not evident from the relevant texts.

The complainant wants the impugned decision to be set aside and the requested transfer to take place. In addition he claims damages because of what he qualifies the "useless" and "capricious" internal appeal proceedings and asks for costs for "regular proceedings". In two "conditional" claims, he seeks damages because of "illicit intrusion" into his personal concerns and abuse of personal data and wants his case referred back to the EPO for clarification of various facts and submissions.

C. In its reply the Organisation contends that the complaint is devoid of merit. It emphasises that Article 12(1) combined with Rule 12.1/1 i) a) are the texts that govern the conditions for the transfer of pension rights. From these texts it is clear that the only rights that an official can have transferred are those that accrued in the pension

scheme of his last employer before joining the EPO. It takes "last employer" to mean the one a staff member worked for "immediately prior" to joining the EPO. That view is borne out by the Rules and Implementing Instructions governing the pension scheme of the Coordinated Organizations. It produces the text of a footnote to Instruction 12.1/1 of that document (on the inward transfer of previously accrued rights) which corroborates its viewpoint.

It adds that the complainant cannot base his request on the Agreement. The Agreement was concluded to implement Article 12; so it cannot be at variance either with the provisions of that article, or with Rule 12.1/1. Moreover, it is for the Office alone to decide whether according to its own rules the overall transfer value of the contributions made to the BfA can be transferred.

Turning to the accusations made by the complainant against the Office, the EPO rejects them as being devoid of all foundation. The Office has merely applied Article 12 and Rule 12.1/1 in accordance with their wording. By signing the application form for the transfer the complainant gave his agreement to data being exchanged between the EPO and the BfA. There was a clause to that effect on the application form. His objections to the exchange of data are therefore misguided.

So too the Organisation refutes the complainant's objections to the internal appeals proceedings and points out that the complainant himself chose not to attend the Appeals Committee hearing.

D. In his rejoinder the complainant finds it odd that the letter from the Vice-President of DG4 made not the slightest mention of the Agreement even though it purportedly forms the basis of the Organisation's refusal to grant him the transfer. He finds it all the more surprising since the application form for the transfer mentions the Agreement in a prominent place. He points out that the extract from the Rules and Implementing Instructions relating to the Pension Scheme of the Coordinated Organizations is undated and unverifiable. He names a senior official who would be able to explain the original "intention" of the Agreement as he had headed the EPO delegation involved in negotiating it and wants the Tribunal to hear him as a witness.

The Appeals Committee in his view failed to notice that there was no objective basis for the Organisation's interpretation of the pertinent texts and failed to show independence from instructions of the appointing authority.

The complainant thinks that the EPO has not produced "conclusive and objective evidence" of good legal grounds for the impugned decision. He further develops his claim to damages.

E. In its surrejoinder the Organisation rejects the complainant's various requests for financial compensation. It points out that the Agreement did not form the basis of the Organisation's refusal of his request for a transfer. The purpose of the Agreement is to make it technically possible to apply Article 12(1) and Rule 12.1/1 i) a) and allow the transfer of pension rights, within the limits of the conditions they stipulate. The application form mentions the Agreement because no transfer was technically possible before it was concluded. The official that the complainant wants the Tribunal to hear as a witness, was not involved in negotiating the Agreement.

The EPO confirms that the document that it annexed to its reply, relating to the pension scheme of the Coordinated Organizations, dates from 1992. The footnote itself dates at least from 1979. It points out that the document cited is of relevance because the EPO Pension Scheme Regulations and their implementing rules are based on the provisions in force in the Coordinated Organizations.

It states that the complainant "loses all sense of proportion" in his accusations against the Appeals Committee and qualifies his criticisms as "frivolous".

CONSIDERATIONS

1. The complainant, who has Swiss and German nationality, retired from his employment with the EPO on 31 October 1998. Prior to that, he had made a formal application to have his pension rights that had accrued in the BfA scheme transferred to the Organisation's own pension scheme. Following the refusal of his request, he filed two internal appeals and now seeks the quashing of the final decision rejecting his claims.

2. The Organisation argues that only rights accrued in the pension scheme of the last employer before entry into

service of the EPO can be transferred. Immediately before joining the EPO, the complainant was, from 1971 to 1981, in the employ of the Swiss Federal Institute of Intellectual Property and contributed on a compulsory basis to the Swiss federal pension scheme - the EVK - the pension scheme of that employer. Prior to joining the Institute he had for a number of years made both compulsory and voluntary contributions to the BfA scheme. While he continued to make some voluntary contributions to the BfA during his time with the Institute, his contributions to the BfA, both accumulated and ongoing, could not be transferred into the EVK. When he joined the EPO, his rights accumulated with the EVK were transferred into the EPO's pension scheme. His rights in the BfA could only have been credited if they had formerly been transferred into the EVK, which they were not. In fact, up until its amendment in 1995, applicable German legislation prevented the outward transfer of BfA contributions into another pension scheme.

3. Although the complainant makes a large number of allegations about the Organisation's conduct in relation to the manner in which it dealt with his claim to the transfer as well as his internal appeals, it is not necessary for the Tribunal to study them in any detail. The complainant's claim differs in only immaterial respects from the facts and the applicable legal provisions studied by the Tribunal in its recent Judgment 2012 *(in re* Goettgens No. 5) and that case establishes beyond argument that his claim is unfounded on the merits and that he had and has no right to obtain the requested transfer. That being so, it is of no consequence that he alleges defects and injustices in the internal appeal process; even if everything had been done perfectly, he could still not have succeeded.

4. In Judgment 2012 the Tribunal had to deal with a complainant who, like the present complainant, had made contributions to the BfA and had later been compulsorily affiliated to the pension scheme of the German civil service, and when he joined the EPO existing German legislation prevented him - like the present complainant - from transferring his BfA entitlements directly into the EPO pension scheme. Following the 1995 change in the German legislation, he too sought to transfer his BfA entitlements invoking the terms of Article 1(1) of the Agreement signed between Germany and the EPO in December 1995. The Tribunal held that he could not do so because Article 12 of the EPO Pension Scheme Regulations prohibited such transfer and the Agreement could not have the effect of varying the pension scheme to which it was ancillary.

5. Since that judgment, it is now settled law, first, that the EPO pension scheme allows an employee to make an inward transfer of his contributions from only one previous pension scheme, namely from the scheme of his immediately preceding employer, and, second, that the Agreement between Germany and the EPO concluded as a result of the 1995 change to German national legislation does not have the effect of changing the applicable rules of the EPO pension scheme. Since the complainant's rights in the EVK, which did not include his accumulated rights in the BfA, were transferred into the EPO pension scheme shortly after he joined the Organisation, it follows that he cannot now obtain the transfer of the rights accrued under the BfA and his complaint must be dismissed.

6. Two final matters call for brief comment. In the first place, it is in vain that the complainant seeks to introduce evidence and even to call witnesses, to explain the meaning of the Agreement entered into between Germany and the EPO or to show that the meaning and scope given to that agreement by the Tribunal in Judgment 2012 was mistaken. The interpretation of contracts is not normally a matter of evidence but a question of law, which is fully within the Tribunal's competence. There is nothing in the circumstances of the present case which would justify the Tribunal in making an exception to that general rule and obtaining such evidence.

7. Secondly, the Tribunal does not comment on the complainant's assertion that the German national courts have jurisdiction in this matter. It limits itself to stating that it does not pretend to have any competence to apply German domestic law. The present decision is based on the Tribunal's construction of the applicable pension scheme rules and the Agreement between Germany and the EPO.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 November 2001, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 30 January 2002.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet

1. Federal Insurance Office for Salaried Employees

Updated by PFR. Approved by CC. Last update: 15 February 2002.