

NINETY-FIFTH SESSION

Judgment No. 2235

The Administrative Tribunal,

Considering the second complaint filed by Mr D.R. B. against the European Patent Organisation (EPO) on 11 July 2002, the EPO's reply of 25 October, the complainant's rejoinder of 2 December 2002, and the Organisation's surrejoinder of 12 March 2003;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a British national born in 1933, is a former permanent employee of the European Patent Office, the EPO's secretariat; he retired in 1993. Prior to entering the service of the EPO in 1982 he worked for the United Kingdom Patent Office, during which time (18 years) he contributed to the Principal Civil Service Pension Scheme (hereinafter referred to as PCSPS). Before he was recruited by the EPO he had been told that he would be able to transfer his pension entitlements from the PCSPS to the EPO's Pension Scheme. However, throughout the time he worked at the EPO, the Organisation maintained that such a transfer was not possible. He receives a pension from the PCSPS as well as an EPO pension with an enhancement of benefits.

On 11 October 1999 the Office published the following communication in the Gazette, its in-house magazine:

"Note for the attention of staff members holding pension entitlements with the Principal Civil Service Pension Scheme

On the conditions laid down in Article 12(1) of the Pension Scheme Regulations, and Rule 12.1/1 of the Implementing Rules, the EPO allows for inward transfer of pension rights.

Following several requests for transfer of pension entitlements by **former British civil servants**, it has appeared that the Office, notably following failed negotiations on a transfer agreement as early as in 1982, mistakenly presumed that transfer of pension entitlements from the Principal Civil Service Pension Scheme (PCSPS) to the EPO was not possible, and has acted accordingly. In view of these exceptional circumstances, the President of the Office has decided that the six-month time limit for application for transfer of pension entitlements laid down in Rule 12.1/1 v) of the Pension Scheme Regulations will be applied as from the publication of this announcement."

On 1 November 1999 the complainant wrote to the Director of Personnel Development, stating that it was his intention to transfer his PCSPS entitlements and asking to be advised on the procedure. By a letter of 8 November the Pensions Department informed him that, since he had already begun to draw his UK pension, a transfer of pension entitlements would not be possible. On 5 April 2000 the complainant wrote to the President of the Office, requesting compensation for the loss of income he suffered due to the EPO's mistaken belief that he could not transfer his PCSPS pension entitlements. On 23 May the Principal Director of Personnel denied his request.

On 14 July 2000 the complainant filed an internal appeal against the refusal to grant him compensation. The EPO objected to the receivability of the appeal. In its opinion of 20 March 2002 the Appeals Committee found the appeal to be receivable. Nevertheless, finding that the Office had not acted incorrectly, but rather under mistaken belief, the Committee unanimously recommended rejecting the appeal as unfounded. In a letter of 22 April 2002

the Principal Director of Personnel informed the complainant on the President's behalf that his appeal had been rejected. That is the impugned decision.

B. The complainant submits that not transferring pension entitlements results in a considerable financial loss: not only is the pension payment lower, but taxation rules are more favourable to an EPO pension. Between the time he started at the EPO in 1982 and his retirement in 1993 he had made several enquiries about transferring his PCSPS entitlements, but each time he received a response that such a transfer was not possible. But it now appears that "transfers were available since 1986". He estimates that he suffers an annual loss of about 3,900 pounds sterling because his pension entitlements were not transferred.

He questions the findings of the Appeals Committee in its opinion dated 20 March 2002, stating that the Committee has based itself on assumption rather than fact. He also questions the effort put forth by the EPO to negotiate an agreement on the transfer issue. He says that the letters the Organisation has provided as proof of its efforts in the matter are nothing more than general enquiries. He contends that the efforts of the Office came after two British staff members made enquiries to the British authorities on their own behalf and learned in February 1999 that a transfer of pension entitlements to the EPO was possible. Their actions were discussed at length during the Appeals Committee hearings, but the Committee has omitted this information from its opinion.

He contrasts the effort put forth concerning an agreement for the transfer of German pension entitlements with that put forth on behalf of UK nationals, stating that there is no evidence that the EPO made a concerted effort to negotiate with the UK authorities.

He requests the Tribunal to set aside the President's decision of 22 April 2002 and he asks for compensation for the financial losses he has incurred and will continue to incur. He also claims 150 pounds in costs.

C. The EPO replies first that the complaint is not receivable. The complainant had requested how to proceed with a transfer of his pension entitlements on 1 November 1999 and had received a negative reply on 8 November. The time limit for filing an appeal ran out on 8 February 2000, but according to the EPO he did not challenge the decision until 10 April 2000. It submits that the Appeals Committee should not have found his appeal to be receivable.

Subsidiarily, the Organisation contends that the complaint is unfounded. It notes that the complainant is not challenging the fact that he cannot transfer his pension entitlements but rather he is seeking compensation for an alleged mistake on the part of the Organisation. It points out that since 1993 he has been drawing a pension plus an enhancement of benefits provided for under Article 46 of the Pension Scheme Regulations. Thus "due account" has been taken of the fact that he was not able to transfer his pension entitlements to the EPO. Granting him compensation would lead to a double payment.

It explains why it believed, until it published the notice in the Gazette in October 1999, that the British authorities did not allow transfer of pension entitlements from the PCSPS to the EPO's Pension Scheme; agreement by the British authorities is a prerequisite under Article 12 of the Regulations. When it became aware that transfers were permissible, it extended the time-limit under Rule 12.1/1(v) of the Implementing Rules for serving staff members to apply for a transfer. But for retired staff such a transfer was no longer possible due to British regulations.

Lastly, it denies that staff members holding pension entitlements in the UK were treated less favourably than those holding the same in Germany. Negotiations will vary among Contracting States, and in that respect, the complainant's remark "is of little help" to him.

D. The complainant rejoins that his appeal was receivable. The letter of 8 November 1999 was merely "a statement of factual information"; it was not an appealable decision of the President.

He has never requested the same treatment as under the agreement between the EPO and the German authorities. He used this example to highlight the difference in effort made by the EPO and to show what could and should have been achieved by the Organisation for British nationals on this matter. He says "there can be no disputing" that negotiations between the EPO and the German authorities continued for more than a decade.

The EPO does not face up to its admitted mistake. Instead, it attempts to blame the British authorities. He alleges that the EPO decided to do nothing more about the situation for British staff members until the UK did, thus the matter remained as it was until the two staff members acted in 1999.

As for the enhancement of benefits he receives under Article 46 of the Regulations, this amounts to only 79 pounds per month, whereas he would have received an additional 325 pounds per month if his pension entitlements had been transferred. Granting him compensation would not lead to a double payment because the amount to be granted would take this figure into account.

He notes that one of the letters annexed to the EPO's reply, which he states the Appeals Committee relied upon as evidence, was not made available to him until he received the reply to his complaint. The letter, which was written in 1999 about events that had occurred many years earlier, "should be treated with circumspection". It was written by an interested party who wanted to present matters in a good light; furthermore, this individual cannot place the blame on the EPO, because he himself was involved in the failed efforts.

E. On the issue of receivability the EPO contends that the letter of 8 November 1999 constitutes a final decision within the meaning of the Service Regulations and that the complainant's appeal was therefore filed out of time.

On the merits, the Organisation asserts that, in his letter received by the EPO on 17 July 2000 the complainant did indeed ask for the same treatment as German nationals. The Organisation maintains that it did not make a mistake in believing for nearly 20 years that the transfer of entitlements from British pension schemes was not possible and it asserts that it reassessed the situation at "regular intervals". It refutes the complainant's arguments and allegations and presses the pleas it put forth in its reply.

CONSIDERATIONS

1. The complainant, a former employee of the United Kingdom Patent Office, joined the EPO in 1982 and retired in 1993. He receives a pension from the PCSPS as well as an EPO pension, with an enhancement of benefits provided under Article 46 of the EPO's Pension Scheme Regulations for employees whose previous pension scheme does not permit the transfer of entitlements to the EPO's Pension Scheme. After seeing a note in the Gazette of 11 October 1999 which said that the Organisation had mistakenly presumed that such a transfer was not possible, the complainant wrote on 1 November 1999 to the Director of Personnel Development, stating that it was his intention to request the transfer of his PCSPS entitlements and asking to be advised on the procedure. On 8 November 1999 the Pensions Department replied that since he was already drawing his pension from the PCSPS, a transfer would not be possible. The complainant did not directly challenge that decision but on 5 April 2000 wrote to the President of the Office saying that, having been denied the opportunity to transfer his entitlements due to a mistake by the EPO, he claimed compensation for the loss he had incurred, based on the fact that his pension would have been much higher and taxed more leniently if the transfer of his entitlements had taken place. On 23 May 2000 the Principal Director of Personnel denied his request and said that, since no request for a transfer of pension entitlements had ever been received by the Office or any negative decision been issued in that respect, he saw no reason why any such compensation would be appropriate.

2. The complainant filed an internal appeal against that decision before the Appeals Committee, which found, in its opinion of 20 March 2002, that the appeal was receivable, but recommended rejecting it as unfounded. In a letter of 22 April 2002, which constitutes the impugned decision, the Principal Director of Personnel informed the complainant that the President had decided to reject his appeal.

3. As in the case leading to Judgment 2234 delivered this same day, the defendant submits that the complainant's appeal against the decision of 8 November 1999 rejecting his request for a transfer of his pension entitlements was irreceivable because it was lodged on 5 April 2000, that is, after the time limit of three months allowed under Article 108(2) of the Service Regulations.

In fact, the complainant's challenge was directed not against the decision rejecting his request for a transfer of pension entitlements, but against the decision of 23 May 2000 denying his request for compensation of 5 April 2000, whose purpose and cause of action were different from those of the request put forward in his letter of 1 November 1999.

The appeal was therefore receivable.

4. On the merits, the case is similar to that giving rise to Judgment 2234 and calls for similar replies. The

arguments put forward by the parties are almost the same: the complainant points out that after several years of fruitless and in his view half-hearted negotiations, the Organisation had been unable to obtain the necessary information concerning the applicable UK legislation, whereas letters from two staff members to the British authorities had rapidly enabled the matter to be cleared up. The defendant contends, on the other hand, that it was for the complainant himself to enquire of his country's authorities under what conditions the transfer was possible, bearing in mind that the Office cannot be expected to monitor the legal systems of 24 countries and to keep enquiring whether a transfer is possible or not.

5. These last arguments are unacceptable. The Organisation has recognised that it had "mistakenly presumed" that transfer of the pension entitlements of former British civil servants was not possible; it was therefore for the EPO to ascertain the extent of the rights of the persons concerned at the time when these were settled. Consequently, although entitlements are transferable only at the request of the persons concerned, the defendant cannot argue that it was up to them to find out what rights they had. The efforts which the Organisation allegedly made to discuss the matter with the UK authorities shows at any rate that it fortunately had not intended to abandon the matter.

6. In view of all the circumstances of the case, the Tribunal considers, as in the case leading to Judgment 2234, that the complainant cannot claim compensation for all his alleged loss. It is not possible to determine with any accuracy all the elements required to arrive at an assessment of the complainant's theoretical loss, such as the sums that would actually have been transferred by the PCSPS, changes affecting the UK pension scheme, the effects of taxation systems that differ according to whether pension benefits are paid internationally or not, or the complainant's life expectancy.

In view of these uncertainties and the fact that the two pensions received by the complainant have already been settled once and for all and cannot be changed, the Tribunal can only award a lump-sum compensation, which will take account of all the circumstances of the case and in particular of the fact that the defendant is not entirely to blame. It considers that in fair compensation the Organisation should pay the complainant a sum equivalent to five years' lost income arising from the difference between the gross amount of pension benefits he receives from the two schemes and the gross amount of the single benefit he would have received on retirement if his entitlements had been transferred at that date in accordance with Article 12 of the EPO's Pension Scheme Regulations. The basis of this calculation should be the same as that used on the date that the complainant's pension entitlements under the EPO's Pension Scheme were determined.

7. As the complainant is partially successful, he is entitled to 2,000 euros in costs.

DECISION

For the above reasons,

1. The Organisation shall pay the complainant compensation calculated as explained under 6, above.
2. It shall pay him 2,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 16 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 23 July 2003.