

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

## **106th Session**

## **Judgment No. 2768**

### THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mrs J. S. against the European Patent Organisation (EPO) on 19 June 2007 and corrected on 2 August, the Organisation's reply of 19 November 2007, the complainant's rejoinder dated 9 January 2008 and the letter of 31 January 2008 by which the EPO informed the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

Considering Article II, paragraph 5, 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, an Irish national born in 1948, joined the European Patent Office, the EPO's secretariat, in 1986. In a letter of 5 December 2003 to the Personnel Department she stated that she had just learnt that it might be possible to transfer the pension rights she had acquired under a British pension scheme – the *Universities Superannuation Scheme*, hereinafter referred to as the “USS” – to the Office's pension scheme, and she applied for such a transfer. On 22 March 2004 she filed an appeal against what she regarded as an implicit decision rejecting her application. On 18 May the Pension

Administration Department informed her that she should have submitted her transfer application within six months of being notified that her appointment had been confirmed and pointed out that it had been possible since 1985 to transfer pension rights acquired under the USS. On 20 July 2004 the complainant advised the EPO that she maintained her appeal, which was then forwarded to the Internal Appeals Committee. In her submissions before the Committee, she asserted that, at the time when she had joined the EPO, she had been told that it was impossible to transfer her pension rights. The Committee issued its opinion on 24 January 2007 after hearing both parties. The majority of its members recommended that the appeal be dismissed as time-barred and unfounded, noting in particular that there was insufficient evidence that the complainant had been misinformed when she had joined the Office. The complainant was notified by letter of 23 March 2007 that the President of the Office had decided to reject her appeal. That is the impugned decision.

B. The complainant submits that as soon as she found out that she was entitled to transfer her pension rights to the Office's scheme, she submitted an application to that effect.

She taxes the Internal Appeals Committee with showing indulgence towards the Office by ignoring the latter's duty to act in the interests of staff members. She contends that the Office seems to be unaware of the difference between the right to transfer pension rights and the duty to take the specific administrative steps needed in order to make such transfers possible. She considers that the Office was negligent in that respect. She further alleges that the Office neglected its duty to inform by not advising staff members that the situation regarding the possibility of a transfer had evolved. She points out that in 1999 the Office had notified British staff members who had previously been affiliated to a civil service pension scheme that it had mistakenly assumed that it was not possible for them to transfer their pension rights and that it had given them an extra six months to apply for a transfer. But the Office had not extended this offer to staff members who had been affiliated to other pension schemes.

The complainant also claims that the Committee made an error of law by disregarding her arguments and the evidence she had produced and that it required of her a standard of proof normally associated with criminal proceedings, which is much more onerous than that demanded in civil proceedings. She complains that it based its decision solely on the finding that one person had successfully transferred the pension rights acquired from the USS to the Office's scheme in 1993. Moreover, in support of her assertion that in 1986 new recruits were informed that such a transfer was impossible, the complainant produces the statement of a colleague recruited at the same time as she was, and she argues that, had the new recruits not been given that information, there would have been numerous applications for transfers from the USS. She acknowledges that the date on which these transfers became possible is unclear, but considers that there is ample evidence that the steps needed to enable these transfers to occur were not taken until well after 1986.

The complainant adds that the Office caused lengthy delays in order to render transfer impossible in practice owing to her retirement. She points out that she filed her application in December 2003 but was not made aware of the Office's position until May 2006 and she did not receive a final answer until March 2007. She considers that it is unacceptable that the Committee should have condoned such a delay.

She claims the transfer of her pension rights to the Office's pension scheme or, failing that, payment of compensation. In addition, she claims moral damages in the amount of 10,000 euros, punitive damages of 5,000 euros and costs.

C. In its reply the EPO states that the complainant has produced not one shred of evidence in support of the allegation that she was misinformed. The Office, on the contrary, has shown that the USS has allowed transfers of pension rights since 1975 and that such a transfer to the Office's pension scheme took place in 1993. The defendant underlines that the complainant had only to express the wish to have her pension rights transferred and the necessary steps and checks would have been carried out in line with the applicable texts, a copy of which she received on joining the Office. The EPO states that the

colleague's statement produced by the complainant cannot be reconciled with subsequent developments concerning the transfer of pension rights from British pension schemes.

Regarding the length of the proceedings, the Organisation submits that the complainant's case was dealt with "in a normal manner" and that, as the Internal Appeals Committee unanimously found, there was no intention to be obstructive on the part of the Office.

D. In her rejoinder the complainant maintains her arguments and contends that the Organisation does not seem to understand them, or does not wish to understand them. She does not dispute the fact that, in principle, the USS could make outward transfers to other pension funds as from 1975, but emphasises that the issue is whether the USS had considered that the Office's scheme fulfilled the requirements for the purpose of such transfers and approved that scheme; if so, whether the staff members concerned had been informed. She acknowledges that a transfer from the USS to the Office's scheme might have occurred in 1993, but holds that the EPO has produced no evidence that its scheme was approved at that date by the USS and that the transfer had not been made as a result of an administrative error. Indeed, applications for transfers after 1993 had prompted the USS to request information about the Office's pension scheme so that it could be approved.

## CONSIDERATIONS

1. The complainant joined the European Patent Office on 1 September 1986 as an examiner. Prior to that she had been affiliated to the USS, a British pension scheme, and on 5 December 2003 she applied to the Personnel Department to have the pension rights she had acquired under that scheme transferred to the Office's pension scheme. She produced a statement dated 1 December 2003 which she had received from the USS certifying that the total transfer value of these rights was 60,694.07 pounds sterling, and she asked the Personnel Department to provide the USS with the information it required.

Having received no answer, on 22 March 2004 she filed an appeal with the President of the Office against what she believed was an implicit decision rejecting her application. She maintained this appeal after the Pension Administration Department had informed her that her application was too late, because she had not submitted it within the time limit laid down in Rule 12.1/1(v) of the EPO's Pension Scheme Regulations, entitled "Inward transfer of previously acquired rights" which at the time was worded as follows:

"v) Time limit for application

Application for the amounts referred to in paragraph (ii) [...] to be credited to the Office must be made in writing

a) within six months from the date of entry into the service in the case of employees exempted from the probationary period or from the date of notification of confirmation of appointment after the probationary period;

b) as a transitional measure, within a period of six months either from the date of notification of these Rules to permanent employees whose appointment was finalised before that date or from the date on which the possibility of such a transfer was made available to permanent employees by their previous employer.

[...]"

2. On 9 May 2006 the Office submitted its position to the Internal Appeals Committee. In response, the complainant alleged *inter alia* that, on taking up her post, she had been informed that it was impossible to transfer her USS pension rights to the Office's pension scheme. She produced evidence that a similar statement had been made to one of her colleagues in 1991.

3. On 24 January 2007 the majority of the members of the Internal Appeals Committee recommended that the appeal be dismissed, since the complainant had missed the time limit for applying for the transfer and she could not rely on the exception allowed under Rule 12.1/1(v)(b) of the Pension Scheme Regulations. It considered that the complainant had not proved that she had been misinformed when she joined the Office. The Committee also dismissed the complainant's criticism of the delay in handling her case.

Two members of the Committee issued a dissenting opinion in which they indicated that the Office should have informed the complainant as soon as it became aware of the possibility of transferring pension rights from the USS and that it should have given her the opportunity to apply for such a transfer.

The complainant was informed in a letter of 23 March 2007 that the President of the Office had rejected her appeal in accordance with the majority opinion of the Committee. She challenges that decision before the Tribunal.

4. The principle of good faith and the concomitant duty of care demand that international organisations treat their staff with due consideration in order to avoid causing them undue injury; an employer must consequently inform employees in advance of any action that may imperil their rights or harm their rightful interests (see Judgment 2116, under 5). This duty of care is greater in a rather opaque or particularly complex legal situation. This is often the case when it is necessary to determine staff rights in technical fields, such as the determination of pension rights or the transfer of rights acquired by the staff member under a public or private pension scheme prior to being recruited by an organisation.

5. It has been established that the complainant did not apply for a transfer of pension rights within the normal time limit prescribed in Rule 12.1/1(v)(a) of the Pension Scheme Regulations. The Tribunal must also conclude from the evidence on file that she did not submit her application within the time limit laid down in paragraph (v)(b) of that rule either. The application of 5 December 2003 was therefore, in principle, time-barred.

This conclusion would, however, be inappropriate in view of the circumstances of the case. When the complainant took up employment with the Office it had been possible, for at least a year, to obtain the transfer of pension rights from the USS to the Office's pension scheme. But it is clear from the file that the applicable rules were so complex that a mere perusal of the documentation would not enable employees to understand them fully. Furthermore, the Administration

and staff members were still largely unfamiliar with the possibility of transferring pension rights. In the light of these particular circumstances, the Office's duty to inform could not be confined to merely handing the applicable texts to the staff members concerned by a possible transfer. This duty demanded that the Office, having obtained such information as was necessary, should draw to the attention of the staff members concerned the possibility of obtaining a transfer of pension rights and should inform them of the procedure to be followed.

The complaint must therefore succeed in this respect without there being any need to ascertain whether, as the complainant claims, she was dissuaded from action by inaccurate information given to her by representatives of the Office when she took up her appointment.

6. The complaint must also succeed insofar as the complainant criticises the delay in settling her case.

(a) An organisation may not justify its delay in handling a file by pleading reasons linked to the difficulties facing its Administration. It is up to the organisation to overcome a shortage of human or financial resources, so that no staff member who is waiting for a decision suffers undue delay, which constitutes a denial of a staff member's right to have his or her requests handled with due diligence (see Judgment 2196, under 9, and also Judgment 2522, under 7).

(b) In view of all the circumstances of the case, it was incumbent upon the Administration to reply to the complainant's application within a reasonable period of time. Yet, by 22 March 2004, she had received no news regarding the processing of the application she had submitted nearly four months earlier, a situation which led her to file an appeal against an implicit rejection. It was not until two months later, on 18 May 2004, that the Office informed her that it considered her application to be time-barred. She then had to wait until 9 May 2006 for the Employment Law Directorate to submit the Office's position on this appeal. The decision to dismiss the appeal was not reached until three years after it had been filed, although there was no justification for such a delay and, in particular, the

complainant's imminent retirement meant that she should not have been left in uncertainty for long.

It must therefore be found that the case and especially the internal appeal proceedings were not handled with the diligence required by the circumstances and with the care which international organisations owe to their staff.

7. It follows that the impugned decision must be set aside.

8. The complainant requests the transfer of her USS pension rights to the Office's pension scheme. In the circumstances the Tribunal is not in a position to allow this claim, since the complainant apparently retired in May 2008. The Office must therefore ascertain whether this transfer is still possible and, if it is not, it must ensure that she is compensated for any financial injury she might have suffered.

9. The complainant is also entitled to damages which the Tribunal sets *ex aequo et bono* at 8,000 euros.

She is likewise entitled to costs in the amount of 3,500 euros.

#### DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The case is referred back to the EPO in order that it may proceed as indicated under 8 above.
3. The EPO shall pay the complainant 8,000 euros in damages.
4. It shall also pay her 3,500 euros in costs.
5. All remaining claims are dismissed.



In witness of this judgment, adopted on 13 November 2008, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba  
Claude Rouiller  
Patrick Frydman  
Catherine Comtet