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

FORTY-SECOND ORDINARY SESSION

In re ELSEN and ELSEN-DROUOT

Judgment No. 368

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints brought against the European Patent Organisation (EPO) by Mrs. Marie-Christine Elsen-Drouot on 23 January 1978 and by Mr. Daniel Berthe Alphonse Elsen on 30 January, the EPO's single reply of 5 March, the complainants' rejoinders of 31 May and the EPO's statement of 3 August 1978 that it did not wish to file a surrejoinder;

Considering that the two complaints relate to the same matters and should be joined to form the subject of a single decision;

Considering Article II, paragraph 5, of the Statute of the Tribunal, the Agreement on the integration of the International Patent Institute into the European Patent Office, the secretariat>of the EPO, particularly articles 4, 9.2, 10 and 11.2, the Staff Regulations of the former Institute, particularly articles 40, 41, 42, 51 and 52, and former articles 53 and 54, since repealed, and the Staff Regulations of the European Patent Office, particularly articles 72.1, 72.4, 72.7 and 82.1;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the cases are as follows:

A. Mrs. Elsen-Drouot joined the staff of the International Patent Institute on 1 August 1971. On 12 July 1973 she married Mr. Elsen, also an Institute official, and from that date received a "household allowance" equivalent to 6 per cent of her basic salary in accordance with article 41 of the Institute Staff Regulations. With the birth of her children she was paid the dependent child allowances in accordance with article 42 of the Institute Staff Regulations. With the latest amendment of the scale, those allowances amounted to 2,788 guilders a year for each child. Despite her marriage she still qualified for expatriation allowance under articles 51 and 52 of the Institute Staff Regulations, and she therefore continued to be paid that allowance, amounting to 18 per cent of total basic salary plus the household and dependent child allowances. Mr. Elsen joined the staff of the Institute on 1 January 1973. Despite his marriage he too still qualified for expatriation allowance under articles 51 and 52 of the Regulations, and continued to be paid that allowance, amounting to 18 per cent of total basic salary.

B. By a "personal letter" dated 2 November 1977 and circulated on 5 November the Director-General of the Institute informed the complainants that on 19 October the Chairman of the Administrative Council and the Director-General of the Institute had concluded with the President of the European Patent Organisation the Agreement on the integration of the Institute into the European Patent Office and that the Agreement would come into force on 1 January 1978. Article 4 of the Agreement provides that on the date of entry into force Institute officials shall become EPO employees and subject to the staff regulations, pension scheme regulations and all other provisions applicable to EPO staff.

C. In their statement of the facts the complainants state: "As regards the expatriation allowance, although neither the part of the agreement on transfer (article 10) nor the EPO Staff Regulations (article 72.1) amend the terms of qualification, article 72.7 of the EPO Staff Regulations sets the rate of payment, where both spouses are EPO officials, at 16 per cent of basic salary for each of them." Mrs. Elsen-Drouot also points out that according to article 72.4 the rate of the expatriation allowance for officials entitled to household allowance is 20 per cent of basic salary.

D. By letters of 2 December 1977 to the Chairman of the Administrative Council of the Institute the complainants filed internal appeals against the Council's decision to accept the Agreement on integration. They asked that they

should continue to benefit under "the provisions of the present Staff Regulations and Staff Rules which are more favourable than and intended to replace those laid down in texts adopted by the Administrative Council of the Institute, particularly as to the qualifications for and amount of expatriation allowance". By letters of 14 December 1977 the Director-General of the Institute informed the complainants that the referral of their appeals to the Appeals Committee would serve no purpose and that their appeals had been dismissed by the Administrative Council by decision of 9 December 1977. The complainants thereupon filed their complaints.

E. The complainants point out that the Council's acceptance of the integration agreement had the following consequences for them: a reduction from 18 to 16 per cent of the rate of expatriation allowance to which they are entitled; a reduction from 18 to 16 per cent of the rate of expatriation allowance paid to the husband; and, for Mrs. Elsen-Drouot, the leaving out of account of the household and child allowances in calculating the rate of expatriation allowance. The complainants further point out that the acceptance of the agreement introduced an element of discrimination against married staff members working in the same organisation "since the EPO Staff Regulations set at 20 per cent of basic salary the amount of the allowance paid to staff members entitled to household allowance (article 72.4)". Such discrimination was removed from the Institute Staff Regulations by the repeal of articles 53 and 54.

F. The complainants therefore ask the Tribunal: (a) to quash the EPO's decision of 9 December 1977 in so far as it makes applicable to the complainants the provisions of the EPO Staff Regulations relating to the determination of the expatriation allowance; (b) to quash that decision in so far as it constitutes refusal to continue to apply to the complainants the provisions of the Institute Staff Regulations relating to the determination of the expatriation allowance.

G. Referring to Article II, paragraph 5, of the Statute of the Tribunal, the EPO points out that the complainants do not allege non-observance of the terms of their appointment or of the provisions of the Staff Regulations. In their claims for relief they ask for the quashing, albeit partial, of the decision of the supreme body of an international organisation to authorise the signing of an international agreement on the merger of two organisations. The provisions of the agreement which the complainants challenge are not in law tantamount to any amendment which may be made in the staff regulations of an international organisation during its existence. Hence if the Tribunal allowed the complainants' claim and quashed the decision to approve the agreement or declared its main provisions null and void it would be interfering in matters falling within the political competence of member States and of the international organisations set up by them and outside the limits of its own competence. In the present case there is no question of an amendment to the Staff Regulations: the purpose of the agreement is to determine the rights of staff members under the staff regulations of a new organisation. It is unthinkable that the Tribunal should supplant the EPO and require it to apply staff regulations or grant terms of appointment which its executive bodies have never approved. The EPO therefore asks the Tribunal to declare that it is not competent to hear the claims. Furthermore the decision taken on 9 December 1977 by the Administrative Council of the Institute, and impugned by the complainants, was merely to dismiss their internal appeals against the Council's decision of 29 September authorising the conclusion of the integration agreement. Such a decision cannot be assimilated to a collective or individual decision taken under the Staff Regulations, and that is "the only kind of decision which may be impugned before the Tribunal". The complaints are therefore irreceivable. As to the merits, and subsidiarily, the EPO contends that applying to the complainants a new method of calculating expatriation allowance cannot be regarded as much altering the terms of their appointment. It is merely a way of adapting their position to the new context provided by the EPO Staff Regulations, which their transfer to the European Patent Office makes binding on them. Lastly, as to their contention that the conclusion of the integration agreement introduced an element of discrimination against married officials, the EPO observes that the principle of equality requires merely that officials in like case should be treated alike. The complainants, a married couple, both work in the same organisation and are therefore in a special position. They have no grounds for complaint if they are treated differently from other officials who are in a different position and therefore subject to different rules.

H. The EPO asks the Tribunal: (a) to declare that it is not competent to hear the complaints on the merits; (b) to declare them irreceivable; (c) subsidiarily, to declare them unfounded, and accordingly to dismiss them.

CONSIDERATIONS:

As to the procedure:

1. Mrs. Elsen-Drouot joined the staff of the International Patent Institute on 1 August 1971 and Mr. Elsen on 1

January 1973. They are nevertheless right to file their complaints, which are dated 23 and 30 January 1978, against the European Patent Organisation (EPO).

By an agreement signed on 19 October 1977 the Institute was integrated into the European Patent Office, the secretariat of the EPO, with effect from 1 January 1978. From that date the EPO took over the assets and liabilities of the Institute and, in particular, replaced the Institute in disputes with its staff members. Hence the EPO, and not the Institute, is the defendant organisation, its recognition of the Tribunal's competence having been accepted by the Governing Body of the International Labour Office.

2. The Organisation contends that since the Tribunal may not hear applications for the quashing of legislative acts, a fortiori it may not hear the complaints, which relate to the conclusion of an international agreement. In the Organisation's view the complaints differ in two respects from cases in which the Tribunal declares itself competent by assimilating to a breach of a contractual clause an amendment of staff regulations of decisive importance to a candidate for appointment. First, the provisions of the integration agreement to which the complainants object are not comparable to provisions of the staff regulations. They were approved by the representatives of States acting within the area of their sovereignty, that is to say an area in which the Tribunal has no power of review. Moreover, if the Tribunal declared such provisions null and void, it could not apply the Institute Staff Regulations instead, since they no longer exist.

The Organisation further argues that the complaints are irreceivable in so far as they relate to a decision of the Administrative Council of the Institute to approve the integration agreement.

As is explained below, those objections are groundless.

3. Whether the provisions governing the staff of an organisation are embodied in internal rules or in an international agreement, they have been adopted by the representatives of the States Members of that organisation and their purpose is to govern conditions in the international civil service. Hence, by analogy, just as the Tribunal may decide not to apply a provision of the staff regulations in a particular case, so it may decide not to apply a clause of an international agreement. Moreover, there is no question of asking the Organisation to bring the provisions which used to govern the Institute staff back into force. If a complaint is justified in principle, what the Tribunal will do is to treat those provisions as part of the contract of appointment and apply them as such.

4. What the complainants are really seeking is not the revocation of an international agreement but payment of financial benefits by the EPO. They have acted correctly in filing their complaints against the EPO itself, not against any one State. Hence the plea that the complaints are irreceivable because the EPO is not the true defendant must fail.

As to the alleged violation of acquired rights:

5. Article 51 of the Institute Staff Regulations prescribed payment of an expatriation allowance equivalent to 18 per cent of the total basic salary plus household and dependent child allowance. Under article 72.4 of the EPO Staff Regulations, however, staff members are entitled to an expatriation allowance amounting to 20 per cent of basic salary if they are entitled to household allowance, 16 per cent if they are not. Under article 72.7, when both spouses are employed in the same country, each of them receives an allowance amounting to only 16 per cent of the basic salary, even if also in receipt of household allowance.

The effect of the change is to reduce the amount of the allowances payable to the complainants. Whereas Mrs. Elsen-Drouot was receiving 18 per cent of the total of basic salary and household and dependent child allowances, she now gets only 16 per cent of her basic salary, and Mr. Elsen's allowance has fallen from 18 to 16 per cent of his basic salary. They are therefore both alleging infringement of their acquired rights.

6. A right is acquired when he who has it may require that it be respected notwithstanding any amendment to the rules. It may be either a right which is laid down in a provision of the Staff Regulations or Staff Rules and which is of decisive importance to a candidate for appointment, or a right which arises under an express or implied provision in an official's contract of appointment and which the parties intend should be inviolate. The conditions for the acquisition of a right are not met in this case.

7. It is quite clear that expatriation, education and leave expense allowances are matters of importance to someone who joins the staff of an international organisation. The question therefore arises whether the outright abolition of

such allowances would in principle violate an acquired right. There is, however, no acquired right to the amount and the conditions of payment of such allowances. Indeed the staff member should expect amendments to be prompted by changes in circumstances if, for example, the cost of living rises or falls, or the organisation reforms its structure, or even finds itself in financial difficulty. Hence the reduction in the expatriation allowance paid to the complainants does not infringe any right which was of decisive importance to them in accepting appointment and which may be regarded as acquired. Moreover, there is no clause in their contract which even tacitly guaranteed them any such right. The plea that acquired rights were infringed therefore fails.

A further reason for dismissing that plea is that, according to article 11.2 of the integration agreement, the application of the new provisions "may not under any circumstances result in the payment of a total net salary lower than that which, containing the same elements, was received by the official in respect of the last full month prior to the entry into force of this Agreement". In other words, in any event the complainants suffer no actual cut in remuneration.

As to the alleged violation of the principle of equality:

8. Being entitled to expatriation allowance amounting to 16 per cent of their basic salary, the complainants contend that they fare less well than spouses of whom only one is on the EPO staff since, under article 72.4 of the EPO Staff Regulations, that spouse will be paid 20 per cent of the basic salary as expatriation allowance.

The principle of equality means that where the facts are the same the treatment is the same. Spouses who are both on the EPO staff are not in the same position as spouses of whom only one is on the EPO staff, and a difference in treatment is therefore warranted. It is clear that two allowances amounting to 16 per cent of the basic salary make up for the disadvantages of expatriation just as well as a single allowance amounting to 20 per cent. The plea based on unequal treatment therefore fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vic1e-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 June 1979.

(Signed)

M. Letourneur
André Grisel
Devlin

Bernard Spy

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