

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

T. (No. 2)

v.

EPO

123rd Session

Judgment No. 3795

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr B. T. against the European Patent Organisation (EPO) on 8 February 2012, the EPO's reply of 4 June, the complainant's rejoinder of 11 September and the EPO's surrejoinder of 12 November 2012;

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 may be summed up as follows:

The complainant challenges the decision not to confirm his entitlement to transfer to the EPO Pension Scheme the pension rights he had acquired with the pension scheme to which he belonged directly before joining the EPO.

Between July 1978 and April 1982 the complainant worked for the European Centre for Medium-Range Weather Forecasts (ECMWF). He received a severance grant upon separation from that organization. ECMWF is a member of the "Co-ordinated Organisations", an expression that refers to several international organisations which have

a common system of remuneration and pensions, and which are members of the Co-ordination System.*

On 3 February 1982, prior to joining the European Patent Office – the EPO’s secretariat – the complainant wrote to the EPO Administration to enquire about the conditions for transferring his ECMWF severance grant to the EPO Pension Scheme. In particular, he asked about whether his transfer would be re-evaluated if the EPO became a member of the Co-ordinated Organisation System. By a letter of 24 February the Administration replied that under the arrangements in place at that time the “safest solution” would be for the complainant to effect a transfer of his acquired pension rights under Article 12 of the Pension Scheme Regulations of the European Patent Office (hereinafter “the Pension Scheme Regulations”) concerning inward and outward transfer of pension rights, which allows for “the payment to the Organisation in accordance with the Implementing Rules hereto, of any amounts corresponding to the retirement pension rights accrued under [the staff member’s] previous pension scheme, provided that the scheme allows such transfers to be made”.

The complainant joined the EPO in April 1982. At the time he took up service, he did not apply to transfer the pension rights acquired from the ECMWF to the EPO Pension Scheme.

On 30 June 2004, the EPO issued Circular No. 282 entitled “Revision to Article 12 of the Pension Scheme Regulations concerning the transfer of pension rights”. The Circular recalled that under the previous version of Article 12 staff members could only transfer pension rights acquired with the pension scheme to which they belonged directly before joining the EPO. Under Circular No. 282, as from 1 July 2004, Article 12 of the Pension Scheme Regulations would be read so that all pension rights acquired prior to entry into the service of the EPO could be transferred

* They include the Council of Europe (CoE), the European Centre for Medium-Range Weather Forecasts (ECMWF), the European Space Agency (ESA), the European Organisation for the Exploitation of Meteorological Satellites (EUMETSAT), the North Atlantic Treaty Organization (NATO), the Organization for Economic Cooperation and Development (OECD) and the Western European Union (WEU) (formerly a member of the Co-ordinated Organisations – now defunct).

to its Pension Scheme, regardless of whether or not they were acquired under the last pension scheme prior to joining the EPO.

In September 2004 the complainant submitted an application to transfer the pension rights he had acquired from the ECMWF to the EPO Pension Scheme. The Administration confirmed receipt and stated that the processing of his application would be likely to take some time.

On 29 November 2004 the Administration issued a reminder to all staff regarding the inward transfer of pension rights. Referring to Circular No. 282, it recalled that “the time limit for applying to transfer rights from a previous pension scheme that was not the last pension scheme prior to entry into the service of the [EPO] will expire on 31 December 2004”.

In March 2006 the complainant asked the Administration whether he had to re-submit his application for transfer of pension rights and was informed that this was not necessary.

By an e-mail of 3 June 2009 the complainant requested the President of the EPO to confirm that he was entitled to transfer his pension rights from the ECMWF to the Pension Scheme and to provide him with the calculations of “what was due and the precise effects” on his pension with the EPO. Should his request be rejected, his e-mail was to be treated as an internal appeal.

The complainant was informed on 25 June 2009 that an inward transfer of his pension rights from the ECMWF pension scheme could not be granted, because the request had not been made within the time limit set in Rule 12.1/1 of the Implementing Rules to the Pension Scheme Regulations (hereinafter “the Implementing Rules”). Rule 12.1/1 relevantly provides that applications for transfer of pension rights must be submitted within six months from the date of notification of confirmation of appointment. In the complainant’s case the time limit had expired on 25 April 1983.

The complainant retired from service on 1 July 2009.

On 29 July 2009 the complainant was informed that, as the President considered that the relevant rules had been applied correctly, the matter had been referred to the Internal Appeals Committee (IAC) for an opinion.

The IAC convened a hearing on 5 April 2011 and issued its opinion on 12 September 2011. It unanimously found the appeal to be receivable. A majority recommended dismissing the appeal as entirely unfounded, on the grounds that the complainant's request to transfer his pension rights acquired from ECMWF was time-barred and that the EPO had not acted in bad faith nor violated its duty of care. A minority recommended allowing the appeal in part and awarding the complainant 3,000 euros in moral damages, as well as costs.

On 16 November 2011 the complainant was informed of the decision of the Vice-President in charge of Administration, acting by delegation of power from the President, to reject his appeal as unfounded, in accordance with the IAC's majority opinion. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision. He seeks damages for loss of opportunity to transfer his ECMWF pension rights and 10,000 euros in moral and punitive damages for the excessive delay in handling his internal enquiries and appeal, as well as costs, with interest.

The EPO submits that the complaint is entirely unfounded.

CONSIDERATIONS

1. By a letter dated 3 February 1982, the complainant requested clarification of some points regarding the possible transfer of his severance grant from the ECMWF Pension Scheme to the EPO's Pension Scheme. Specifically, he asked if Articles 4 and 5 of the Pension Scheme Regulations would apply to him; if Article 12 of the Pension Scheme Regulations would be applicable to him; and if transfers made under Article 12 would be re-evaluated if the EPO were to become a Co-ordinated Organisation and whether it would be necessary for his previous employer to also be a Co-ordinated Organisation at the same time as the EPO. In a letter of reply dated 24 February 1982 from the Principal Director of Personnel, the complainant was notified that Articles 4 and 5 of the Pension Scheme Regulations would not apply to him; that Article 12 of the Pension Scheme Regulations would apply to him; and that while it was "impossible to predict what [the] Administrative Council might decide" if the EPO

joined the Co-ordinated Organisations, he believed that “a ‘re-evaluation’ would be accepted for staff members who had already transferred their rights under art. 12 by way of payment to the EPO of the Severance Grant received from their former Organisation”. He noted that “[w]hat is certain is that a prior condition for any further development is that both the EPO and ECMWF become co-ordinated”. He stated that “[f]or the time being I venture to think that the safest solution for you would be to effect a transfer in accordance with art. 12. That, however, remains a matter for you alone to decide and I hope that the information above will be of assistance to you.”

The complainant joined the EPO on 26 April 1982 but did not apply to transfer the pension rights he had acquired with the pension scheme to which he belonged directly prior to joining the EPO (i.e. ECMWF) to the EPO’s Pension Scheme by the 25 April 1983 deadline (i.e. within the six-month deadline following his probationary period) in accordance with the provisions of Rule 12.1/1(v)(a) of the Implementing Rules.

2. Circular No. 282, concerning revisions to Article 12 of the Pension Scheme Regulations, was published on 30 June 2004. According to that Circular, as from 1 July 2004 Article 12 would be read so that all pension rights acquired prior to entry into the service of the EPO could be transferred to the EPO’s Pension Scheme. On 29 September 2004, the complainant applied for an inward transfer of the pension rights acquired with the pension scheme to which he belonged directly before joining the EPO to the EPO’s Pension Scheme. By an e-mail of 3 June 2009 the complainant requested the President to confirm that he was entitled to transfer his pension rights from the ECMWF to the Pension Scheme. By a letter dated 25 June 2009 the Administration informed the complainant that his request could not be granted as it had not been submitted within the time limit set by Rule 12.1/1 of the Implementing Rules (i.e. 25 April 1983) and, therefore, that it was time-barred. By a letter dated 29 July 2009 the Administration informed the complainant that the President had reviewed his case and decided that the relevant rules had been applied correctly. Therefore, his request was referred to the IAC for an opinion. The majority of the IAC, in its opinion dated 12 September 2011, recommended that the complainant’s appeal be

rejected as unfounded. The minority opinion recommended that the complainant's request be allowed in part and that he be awarded moral damages in the amount of 3,000 euros "for the unexplainable and very substantial delay in providing the [complainant] with a reply to his request of 29.09.2004" and costs upon presentation of the corresponding invoices.

3. In the present complaint the complainant impugns the decision of the Vice-President in charge of Administration, acting by delegation of power from the President, notified to him by a letter dated 16 November 2011, to endorse the majority opinion of the IAC and to reject his appeal as unfounded.

4. The Tribunal is of the opinion that the letter dated 24 February 1982 from the Principal Director, Personnel, was clear and complete in answering the complainant's questions raised in his 3 February 1982 letter. The complainant asserts that there was confusion and ambiguity regarding inward transfers between previous employers and the EPO, particularly with regard to being a Co-ordinated or not Co-ordinated Organisation. The Tribunal notes that as the EPO was not a Co-ordinated Organisation at the relevant time, the complainant had a clear choice between applying for an inward transfer of his pension rights under the applicable rules and the choice not to apply for the transfer. Perhaps the complainant had the hope of a future application for inward transfer if the EPO became a Co-ordinated Organisation at a future date and allowed for transfers outside of the set time limits, but that was a mere speculation. The Principal Director recommended that the complainant apply for the inward transfer under Article 12 of the Pension Scheme Regulations and noted that there was a possibility that if the EPO became a Co-ordinated Organisation, transfers made under Article 12 might be re-evaluated in future. The complainant's assertion that the time limit for application of inward transfers "was merely one of administrative convenience and measures could have been taken to introduce flexibility on this once the question of co-ordination had been resolved" is unfounded. Time limits exist in order to ensure the proper functioning of an organisation and to guarantee the principle of legal certainty. While time limits can on occasion be extended under special circumstances, one must receive an

express decision in that regard. It is unreasonable to expect that time limits can simply be disregarded.

5. The complainant bases his complaint on the assertion that Circular No. 282, and the associated note of 29 November 2004, changed his position with respect to his ability to apply for inward transfers in that the Circular set a new time limit for such applications. This assertion is mistaken. Circular No. 282 did not affect the complainant's position, namely that he could transfer the pension rights acquired with the pension scheme to which he belonged directly before joining the EPO to the EPO's Pension Scheme until the 25 April 1983 deadline. Circular No. 282 provides in relevant part that "*all* pension rights acquired prior to entry into the service of the Office may henceforth be transferred into the EPO's pension scheme, regardless of whether or not they were acquired under the last pension scheme prior to joining the Office, provided that the schemes under which they were acquired permit such transfers and that the amounts concerned are actually transferred to the Office". The Circular also provides that "[a]pplications to transfer pension rights from the last pension scheme prior to entry into the service of the Office, submitted by staff recruited before 1 July 2004, will be processed in accordance with the previous regulations". In the complainant's case, he was recruited before 1 July 2004 and the applicable previous regulations provided for a 6-month deadline following the end of his probationary period to apply for a transfer of his pension rights.

6. The wording of Circular No. 282 is clear. As the complainant was recruited prior to 1 July 2004, the previous regulations (that is those in place when he started working with the EPO) regarding inward transfers of pension rights from the most recent previous employer apply. Therefore, his situation had not changed in any way in this regard as the applicable regulation in his case (Rule 12.1/1(v)(a)) provided that application for the transfer of pension rights must be made "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". Thus, the

EPO was correct in treating the complainant's request of 29 September 2004 as being time-barred in accordance with the applicable regulations.

7. The complainant requests an award of damages for the EPO's undue delay in providing a response to his 29 September 2004 request. The Tribunal notes that the complainant could have initiated an internal appeal on the implied rejection of his request in accordance with Articles 106, 107 and 108 of the Service Regulations for permanent employees of the European Patent Office, applicable at the relevant time, regarding internal appeals. During those five years there was no change which adversely affected the complainant's position, with regard to the inward transfer of his pension rights from his most recent previous employer, which would have required that the EPO notify him that he was not entitled in accordance with the principle of duty of care (see Judgments 3357, under 15, 2519, under 10, and 2345, under 1(c)). Considering this, the Tribunal finds that an award of damages for the delayed response is not appropriate in this case.

However, the time which elapsed between the filing of the complainant's internal appeal, the IAC hearing, the issuance of the IAC's opinion and the notification of the impugned decision to the complainant was excessive and he is entitled to an award of moral damages on that account. The Tribunal sets the amount at 1,500 euros. As the complaint succeeds in part, the complainant is entitled to an award of costs, which the Tribunal sets at of 1,000 euros. In light of the above considerations, the remaining claims must be dismissed.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 1,500 euros in moral damages.
2. It shall pay him 1,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 21 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ