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

SEVENTY-FIFTH SESSION

In re SABININE

Judgment 1276

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Nelly Monique Sabinine against the European Patent Organisation (EPO) on 27 August 1992, the EPO's reply of 2 October, the complainant's rejoinder of 28 December 1992 and the Organisation's surrejoinder of 11 February 1993;

Considering Articles II, paragraph 5, and VII, paragraphs 1 and 3, of the Statute of the Tribunal, Articles 54(2) and 107 of the Service Regulations of the European Patent Office, the secretariat of the EPO, and Articles 14 and 17(1) of the Office's Pension Scheme Regulations;

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

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

A. The complainant, a French citizen who was born in 1932, joined the EPO on 1 May 1978. Before getting an invalidity pension on 1 June 1992 she held a post as reviser in the Language Service and had reached step 7 in grade A4(2).

The Invalidity Committee having found her unfit for work in May 1992, the President of the Office decided on 18 May 1992 to grant her an invalidity pension under Article 54(2) of the Service Regulations as from 1 June 1992.

In a letter of 9 June 1992 to the Director of Personnel she objected to a statement of 4 June setting out her benefits. She wanted the reckoning of her pension to reflect, not the grade and step she held on separation, but those she would have reached by the normal retirement age of 65. She relied on Articles 14(1) and (3) of the Pension Scheme Regulations, which read:

"(1) ... the invalidity pension shall be equal to the retirement pension to which the employee would have been entitled at the age limit laid down in the Service Regulations if he had remained in the service until that age ...

(3)The salary used as a basis for the calculation of the invalidity pension ... shall be the salary for the grade and step held by the employee in accordance with the scales in force on the date laid down in Article 17, paragraph 1."

Article 17(1) says:

"Entitlement to invalidity pension shall commence on the first day of the month following that in which the employee is recognised to be permanently incapable of performing his duties."

In a letter of 11 June the Director of Personnel confirmed the reckoning and referred her to Articles 14(3) and 17(1). In a letter of 3 July her counsel asked the Director to review the reckoning to bring it into line with the salary she would have had by the age of 65, when she would have reached step 10 in grade A4(2). In its reply of 16 July the Administration held to its position without offering further explanation.

The decision she impugns is the statement of 4 June 1992.

B. The complainant points out that she has come straight to the Tribunal because no appeal lies under Article 107(2) of the Service Regulations against decisions taken after consultation of the Invalidity Committee.

She observes that the amount of the invalidity pension depends on an official's reckonable years of service, his grade and step and the relevant salary scale. Since, in keeping with Article 14(1) of the Pension Scheme Regulations, the invalidity pension must be equal to the retirement pension he would have had by 65 - assuming

that he had not left earlier - his seniority counts, i.e. the number of years of service he would have completed by 65 and the step he would have reached by within-grade advancement.

The complainant got step increases every two years. Article 14(3) prescribes the relevant scale - the one in force at the starting date of entitlement - and has no bearing on what the relevant grade and step are. That is borne out by the provision in 14(4) that the invalidity pension "may not be more than the last salary": were the reference in 14(3) to the same salary there would be no point in capping pensions in 14(4) since no pension could ever have been so big. If the invalidity pension depended only on the number of reckonable years of service at the age of 65, not on the notional step, it would be impossible for the rate of pension to go over 100 per cent or even come close.

C. The EPO's main plea in its reply is that the complaint is irreceivable. Though the Invalidity Committee - whose members are all doctors - ruled on her permanent disablement it did not reckon her pension, and it is that reckoning, not the medical decision, that she is challenging. Since Article 107(2) of the Service Regulations does not apply she failed to exhaust the available remedies and her complaint is irreceivable under Article VII(1) of the Tribunal's Statute.

The Organisation submits subsidiarily that the complaint is devoid of merit. Its consistent practice is to apply Article 14(1) of the Pension Scheme Regulations only to determine the number of reckonable years of service and to determine salary, in keeping with 14(3), according to the grade and step actually held upon separation. There is no foretelling how an official's career will fare: it will depend on such variables as ratings of performance, promotion, step increases or even disciplinary action. So actual earnings are the only reliable factors of reckoning. The whole point of making the official a lump-sum payment equal to 2.75 times yearly basic salary is to offset the loss of career prospects.

D. In her rejoinder the complainant maintains that the reckoning of her pension was a decision taken "after consultation of the Invalidity Committee" and therefore not subject to internal appeal under 107(2). Besides, the EPO's failure to answer her claims was tantamount to final rejection under Article VII(3) of the Tribunal's Statute.

The reckoning of the invalidity pension rests on two postulates: (1) it must be equal to the retirement pension the official would have had if he had stayed on until 65; and (2) it must take account of notional seniority including notional years of service - which the EPO does not challenge in this case - and the notional step the official would have reached by 65 - which it does. If, as the Organisation assumes, an official will ordinarily go on serving and accumulating reckonable years of service up to 65, why should it be any less likely that he would advance from step to step within his grade?

What the lump-sum payment does in the main is lighten the impact of sudden loss of income: the payment the complainant got came to a mere 38 per cent of her former earnings.

Article 14(4) of the Pension Scheme Regulations sets the maximum rate of invalidity pension, a limit that would be pointless if only reckonable years of service at the age of 65 were counted without regard for potential step; otherwise the rate could never come close to 100 per cent of final salary.

E. In its surrejoinder the EPO denies failing to answer the complainant's claims. It gave explanations in writing and to her counsel over the telephone. In any event she did not lodge an internal appeal and her complaint is irreceivable.

The sort of reckoning she wants would be arbitrary since the Organisation can be sure of the grade and step only of serving officials. Her comments on Article 14(4) of the Pension Scheme Regulations are a red herring: all that 14(4) does is ensure that the official's pension will not be below 120 per cent of the salary for the lowest grade and step on the scale nor more than what he was getting before he left.

CONSIDERATIONS:

1. The complainant used to be on the staff of the European Patent Organisation and it pays her an invalidity pension. She is objecting to its reckoning of the rate of her pension at the date of retirement.

2. The material provisions are Articles 14(1) and (3) and 17(1) of the EPO's Pension Scheme Regulations and are reproduced in A above.

3. On the Invalidity Committee's recommendation the complainant was declared permanently disabled as from 1 June 1992. The Organisation having made a technically correct calculation of the rate of her pension, the sole matter at issue is whether it was right to base its reckoning on her actual pay when she left, i.e. the figure corresponding to step 7 in grade A4(2). In her submission the proper figure would have been the notional pay she would have been entitled to had she reached the age limit of 65 years set in the Service Regulations, i.e. the figure corresponding to step 10 in the same grade.

4. A statement of her invalidity pension was made at 4 June 1992. She got it on 6 June and at once, on 9 June, wrote the EPO a letter saying that in her view it failed to comply with Article 14 of the Pension Scheme Regulations. In his reply of 11 June the Director of Personnel simply drew her attention, without further explanation, to paragraph 3 of that article and to Article 17(1) of the Regulations.

5. On 3 July 1992 her counsel sent the Organisation a fully argued letter pointing out that according to 14(1) a staff member who was disabled was entitled to a pension equivalent to the retirement pension he would have been entitled to at the age limit set in the Service Regulations had he remained in the service until that age; that meant that the complainant ought to be paid a pension corresponding to step 10 in A4(2), the step she would have reached had she stayed on until the age limit; and 14(3), which the EPO had relied on, meant no more than that the reckoning was to be based on the salary scales in force at the date of recognition of disablement: it did not derogate from the rule of equivalence in 14(1). Counsel therefore asked the Organisation to correct the figure of his client's pension and pay her the amount due.

6. In its reply of 16 July Personnel merely referred the complainant to the Director's letter of 11 June.

7. She thereupon filed this complaint on 27 August 1992, and she is impugning the statement of 4 June 1992 which she got on 6 June.

8. The EPO raises the preliminary objection that her complaint is clearly irreceivable. In its view she has failed to exhaust the internal means of redress provided in Article 107(1) of the Service Regulations. Her answer is that according to 107(2) "The provisions of paragraph 1 shall not apply to decisions taken after consultation of the Invalidity Committee". And the Organisation retorts that the exception applies only to matters decided on the Invalidity Committee's recommendation since the Committee is competent only in medical and not in administrative matters. The complainant demurs on the grounds that the distinction is not apparent from the text of 107, which, she says, is about all decisions taken after referral to the Committee.

9. The Organisation's pleas on the merits are subsidiary. It contends that its consistent practice is to apply the rule in 14(1) only for the purpose of determining the number of years of service that count towards the pension. In its submission the figure of pay to serve as the basis for the reckoning should, according to 14(3), correspond to the grade and step actually reached by the time the staff member retires. Any other method would yield fortuitous results since it would be subject to the unforeseeable features of a notional career: many factors might affect that career besides automatic advancement in step.

10. One initial comment on the case is that it is important to the complainant because the decision she is challenging determines once and for all her final entitlements from the Organisation; and to the EPO because it questions, apparently for the first time, the construction hitherto put on a provision of the Pension Scheme Regulations that appears obscure. Though twice alerted to the obscurity the Personnel Department twice thought it explanation enough just to refer the complainant to the text of the Regulations.

11. Because of the Tribunal's ruling below on the merits of the complaint there is no need to rule on the issue of receivability.

12. As to the merits, the first point is that Article 14 of the Pension Scheme Regulations is indeed ambiguous. According to 14(1) the staff member's invalidity pension shall be "equal to the retirement pension" which would have been due at the age limit set in the Service Regulations. Relying on that provision, the complainant claims the pension she would be entitled to on the strength of a notional extrapolation of her career up to the date of its normal term.

13. But the answer is that 14(1) confers such entitlement only subject to 14(3), the purpose of which is to determine the figure of salary to serve as the basis for reckoning the rate of pension. According to 14(3) the reckoning is to be

made by reference to the salary scale in force at the date of the finding of disablement. That leaves open the issue as to whether the relevant figure in the scale is that of actual pay at the date of disablement or the notional one to be worked out by the extrapolation contemplated in 14(1).

14. The French text of 14(3) does not resolve the issue. But the English seems to favour taking the figure of actual pay: "the salary for the grade and step held by the employee in accordance with the scales in force on the date laid down in Article 17, paragraph 1". And the same inference may be drawn from the grammatical structure of the German version and the tense of the verb therein: "das Gehalt ... das der ... Dienstaltersstufe des Bediensteten in den Besoldungstabellen entspricht".

15. All things considered, the relevant figure must be that of actual pay at the date of retirement. It may be easy to reckon the number of years of service that count in working out the notional career prescribed in 14(1). But any attempt at positing the figure of pay at the end of an "extrapolated" career is hazardous. Since she was near the normal age of retirement the complainant is an untypical case. It is also proper to take consistent EPO practice as a guideline: it would be quite unreasonable to put on a poorly drafted text a construction that disrupted such administrative practice. Everyone concerned has till now seen it as striking a fair balance between the security enjoyed by staff who carry on working in the usual way up to the prescribed age limit and the effort of mutual aid to be made in exceptional circumstances for the benefit of someone who has to retire early on account of strokes of fortune beyond management's control.

16. The conclusion is that the complaint is devoid of merit.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner.

Delivered in public in Geneva on 14 July 1993.

(Signed)

José Maria Ruda
William Douglas
P. Pescatore
A.B. Gardner

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