In re Belser (No.2), Bossung (No.2) and Lederer (No.2)

Judgment 1825

The Administrative Tribunal,

Considering the second complaints filed by Mr. Paulus Belser, Mr. Otto Bossung and Mr. Kurt Lederer against the European Patent Organisation (EPO) on 23 July 1997 and corrected on 20 November 1997, the EPO's reply of 23 February 1998, the complainants rejoinder of 18 June and the Organisation's surrejoinder of 24 August 1998;

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

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. Some facts of relevance to this case are set out in Judgment 1456 (*in re* Belser and others) under A. Since that Judgment was delivered the complainants have been constantly claiming the amendment of the method of reckoning the enhancement of their pension benefits. By a letter of 9 April 1997 they asked the President of the European Patent Office, the secretariat of the EPO, to stop using for that purpose a "retrospective insurance value" (*Nachversicherungswert*) supplied by the German Government. The complainants were alluding to a ruling by the German Federal Administrative Court of 12 December 1996 rejecting Mr. Belser's claim to an order to the Federal Administration to give the EPO the actuarial equivalent of his pension. By a letter of 28 April 1997, which is the impugned decision, the President of the Office rejected the complainants' claim.

B. The complainants charge the German Government with "attempting systematically ... to reduce the salaries and pensions of German civil servants working in international organisations". They maintain that, although Judgment 1456 drew mistaken conclusions from the evidence, the Tribunal ordered a new calculation of the enhancement. They say that the EPO let them have mistaken information and showed bad faith. In their submission that precludes its pleading of the irreceivability of the complaints for failure to respect the time limits. They find it regrettable that no court has yet given a ruling on the merits.

The complainants refer to an agreement concluded on 8 December 1995 between the EPO and the German Government on the transfer of pension rights. The agreement came into force in September 1996 and in their view confirms that it is unlawful to use a retrospective insurance value. Moreover, the ruling of the Federal Administrative Court points out that the Organisation is free to assess the value provided by the German authority.

The complainants ask the Tribunal to set aside the impugned decision, order recalculation of their pension enhancement and declare that the EPO has full discretion in the matter. They further claim the retroactive application of the new enhancement at the date of their retirement, payment of interest on the sums due and an award of costs.

C. In its reply the defendant maintains that the complaints are clearly irreceivable. For one thing, the impugned decision, which merely confirmed earlier ones, has not formed the subject of an internal appeal; for another, the complaints are in breach of the *res judicata* rule.

In subsidiary argument the Organisation pleads that the complaints are devoid of merit. The agreement that the complainants cite applies only to officials whose former pension scheme allows the actual transfer of pension rights. That is not the complainants' case.

D. In their rejoinder the complainants contend that the decision by the Federal Administrative Court was a new fact warranting the claim of 9 April 1997. They point out that the impugned decision was obviously final, especially since the President of the Office had already rejected internal appeals on the same issue. As for *res judicata*, the objections cannot be upheld since the amount of their pension may be recalculated at any time in the event of error

or omission.

On the merits they contend that the entry into force of the transfer agreement does warrant recalculation of the enhancement of their pensions.

E. In its surrejoinder the EPO says that it does not press its objections to the receivability and it invites the Tribunal to rule once and for all on the merits. It contends that it is bound by the information certified by the German authorities "as being a fixed value representing retirement pension rights acquired under the previous pension scheme". It presses its arguments relating to the agreement.

CONSIDERATIONS

1. This is the latest skirmish in a seven-year battle between a number of retired German employees of the European Patent Organisation (EPO) and their former employer. At issue is the calculation of their enhancement of their pension benefits.

2. The matter has already been considered twice by the Tribunal in Judgments 1456 (*in re* Belser and others) and 1517 (*in re* Goettgens No. 2) and by the German Federal Administrative Court. All three decisions have been adverse to the positions advocated by the complainants.

3. Yet the complainants again wrote to the President of the European Patent Office requesting him to revise the method of calculating the enhancement of their pension benefits. That request was refused on 28 April 1997, and that is the decision which the complainants impugn before the Tribunal. They submit that the method of calculation based upon the "retrospective insurance value (*Nachversicherungswert*) does not adequately reflect their entitlement under their previous pension scheme as German civil servants prior to their joining the EPO. The clear implication of the submission is that the Tribunal either misunderstood the facts or improperly applied the law in its previous judgments.

4. The first issue raised by the defendant Organisation is that of irreceivability: the complainants are attempting to appeal against the President's decision directly to the Tribunal without first having resorted to the Appeals Committee; in consequence they have not exhausted their internal means of redress. Since their complaints cannot succeed on the merits and since the Organisation has in any event abandoned the plea in its surrejoinder it is not necessary to rule on receivability.

5. The true issue raised by these complaints is the authority of the Tribunal's judgments, or *res judicata*. There can be no doubt that the classic three identities - of person, cause and object - are here present: the complainants were party to the previous decision; and the cause, or legal foundation for the complaints, and the object, the purpose of the complaints and the remedy sought are identical.

6. The Tribunal's judgments are final and binding. They are not subject to appeal. The Tribunal will not entertain applications for revision or review except in the most unusual circumstances such as fraud or the discovery of conclusive new evidence which could not have been brought forward before. The stability of judicial procedures and the need to bring an end to litigation require that parties must accept the result they obtain even when they are unsatisfied with it. Where both parties have had a full opportunity to present their case and where no new and previously undiscoverable factual element is brought forward the principle of *res judicata* prevents the reopening and rearguing of cases already decided.

7. There is nothing in the circumstances of the present case - including the ruling of the Federal Administrative Court and the transfer agreement of 8 December 1995 - which would allow the Tribunal to revisit its findings in Judgment 1456. There is no allegation of fraud on the EPO's part and no suggestion of new and determinative facts.

8. Lastly, there is nothing to the complainants' argument that in 21 to 26 Judgment 1456 mandated any recalculation of the enhancement. Those passages merely indicate that the Organisation is free to discard any formulations offered by the national administration which offend against the EPO's regulations. That is of no assistance to the complainants.

9. In consequence the application of the *res judicata* rule operates as an absolute bar to the complainants' obtaining any part of the relief sought.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

Michel Gentot

Mella carroll

James K. Hugessen

A.B. Gardner

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