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

EIGHTY-NINTH SESSION

***In re* Rauter (No. 2)** **Judgment No. 1963**

The Administrative Tribunal,

Considering the second complaint filed by Mr Anton Rauter against the European Patent Organisation (EPO) on 1 March 1999 and corrected on 29 March, the EPO's reply of 4 June, the complainant's rejoinder of 10 September, and the Organisation's surrejoinder of 12 October 1999;

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 neither party has applied for;

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

A. Some facts relevant to this case are set out in Judgment 1864 (*in re* Andrews and others). Mr Rauter was also a complainant in the case which led to that judgment. He has Austrian nationality and was born in 1948. He joined the European Patent Office, the secretariat of the EPO, in 1983 as an examiner, and was stationed in Munich, Germany. As indicated in Judgment 1864, when the complainant joined the EPO he had already been resident in that country for more than three years and was not, therefore, eligible to receive an expatriation allowance. The expatriation allowance is awarded to permanent employees who meet the conditions set out in Article 72(1) of the Service Regulations for Permanent Employees of the European Patent Office. It is payable to permanent employees if, at the time of taking up their duties, they "hold the nationality of a country other than the country in which they will be serving" and "were not permanently resident in the latter country for at least three years".

At its 39th Session, held in December 1990, the EPO's Administrative Council adopted an amendment to Article 72 of the Service Regulations lifting restrictions based on staff category. However, the amendment made no changes to the three-year disqualifying period of prior residence in the host country. Nevertheless, the Council "noted", in point 106 of the minutes of its meeting, that the Office would submit to the Council a revised proposal regarding an extension of the period of prior residence.

The complainant repeatedly asked the then President of the Office when he would submit the proposal referred to in point 106 of the minutes. The President always insisted that for the time being he would not be taking concrete action on the issue. In a letter of 5 February 1996 the complainant and forty other employees addressed the same request to the new President of the Office. The President replied in a letter of 14 March reiterating the view of his predecessor that for the time being no action would be taken. By a letter of 9 July the complainant again took up the issue with the President. On 23 July the President replied, referring back to his letter of 14 March.

In mid-October 1996 the complainant filed an internal appeal contesting the President's refusal to act and requesting that the President be ordered to submit a proposal revising Article 72(1) b). In its report of 5 November 1998 the Appeals Committee unanimously recommended rejecting the complainant's appeal. On 8 December 1998 the Director of Personnel Development informed the complainant that the President was upholding the opinion of the Appeals Committee that the complainant had no legal basis to request the President to act. That is the impugned decision.

B. The complainant contends that he has been adversely affected by the President's delay in submitting a proposal and by the Administrative Council's acceptance of his failure to act. He argues that in 1990 the Council "had evidently wished to give expression to the urgent need for an early amendment" to Article 72 and that "it can be assumed that the only obstacles in the way of an amendment were primarily formal in nature and that no further

fundamental consideration was necessary".

He argues that the three-year disqualifying period under Article 72(1) of the Service Regulations "results in unequal treatment" and that the only way to ensure equal treatment based on the Universal Declaration of Human Rights is to extend entitlement to the expatriation allowance to all non-nationals.

The complainant requests that the President's decision rejecting his appeal be quashed and that the President "be required to submit a proposal to the Administrative Council as set down in point 106 of the minutes ... of the Council's 39th meeting". He also requests that he be paid the expatriation allowance retroactively from 1 July 1990.

C. The Organisation challenges the receivability of the complaint. The claim to order the President to submit a proposal for amending Article 72 of the Service Regulations does not come within the scope of the Tribunal's competence as defined in Article II, paragraph 5, of the Tribunal's Statute. In addition, neither the European Patent Convention nor the EPO Service Regulations vest in a civil servant the right to make such a request. It says that it is for the Council alone to decide what amendments it adopts and what actions it thinks fit. Furthermore, even if his claim regarding the proposal were found to be receivable under Article II(5) of the Tribunal's Statute, it is nevertheless time-barred and consequently irreceivable.

As for his claim to the expatriation allowance, the Organisation cites Judgment 725, *in re* Hakin No. 7 under 4, in which the Tribunal has held that identical claims may not be twice submitted to the same instance and, therefore, submits that the complainant's claim for the allowance is irreceivable since it has already been put before the Tribunal in Judgment 1864.

Subsidiarily on the merits, the EPO explains that since the substance of the complainant's pleas have been argued at length in *in re* Andrews and others, it has only summarised the arguments it put forward in the context of that case. First, the President is under no obligation to act since, according to the minutes of the Council's 39th meeting, the Council merely "noted" that a proposal would be submitted by the Office. Secondly, the three-year disqualifying period found in Article 72(1) b) does not violate the principle of equality of treatment because it is consistent with criteria applied by the Tribunal in Judgment 754, *in re* Metten No. 4. According to those criteria, "where the circumstances differ, so may the treatment provided that it is a fair, reasonable and logical outcome of the difference". Finally, the Tribunal's well-established case law defines discrimination as "different treatment of staff members who are in the same administrative position". In this respect the complainant is not being treated differently than other permanent employees that have lived in the host country for more than three years before commencing employment with the Organisation. The EPO adds that there was no breach of the Universal Declaration of Human Rights.

D. In his rejoinder the complainant clarifies the difference between the present complaint and that which was examined in Judgment 1864. He points out that it was the wording of Article 72 of the Service Regulations which was at issue in *in re* Andrews and others, whereas in this present case he is requesting that the President of the Office submit a proposal regarding the extension of the period of prior residence. He rebuts the Organisation's view that his complaint is irreceivable because this complaint has arisen from a decision taken on his individual appeal, which constituted an impugnable decision that he challenged in a timely manner. The impugnable decision of *in re* Andrews and others arose out of a joint appeal. He argues that the complaint is well-founded and that at its 39th meeting the Administrative Council wished to improve the system, particularly as in his opinion "no fair, reasonable and logical difference between expatriates exists". Any action in that sense requires the President to submit a proposal.

E. In its surrejoinder the Organisation points out that the complainant introduced no new arguments in his rejoinder. Nevertheless, it presses its argument regarding the similarities between the "substance of the claim" and the "material facts" in the present complaint and those in the complaints which led to Judgment 1864, and reiterates that his complaint is irreceivable. In addition, since the complainant is asking for the same relief under this complaint, it offends against the *res judicata* rule. By merely "noting" that the Office would be submitting a proposal, the Council did not create any legal basis for the complainant's claim.

CONSIDERATIONS

1. The complainant is one of the forty-one employees of the European Patent Office who unsuccessfully complained to the Tribunal concerning the application in their case of Article 72(1) of the Service Regulations for

employees of the Office relating to the conditions required for the payment of the so-called expatriation allowance. In Judgment 1864 (*in re* Andrews and others), delivered on 8 July 1999, the Tribunal found that the rules governing the granting and retention of the right to be paid the expatriation allowance were no doubt debatable and had been challenged on several occasions; however, even so, it held that the fixing of a length of residence of three years in the host country, prior to employment, for employees of foreign nationality, beyond which period an employee may not be considered as an "expatriate", was neither unreasonable nor a breach of the principle of equality.

2. On the basis that the Administrative Council had "noted", at its meeting in December 1990, that a proposal to amend the rules governing the length of the period of prior residence would be submitted by the Office "as soon as possible", the complainant on several occasions requested the President of the Office to submit a proposal to the Council on the matter. On 23 July 1996, in response to a recent inquiry by the complainant, the President referred to an earlier letter, of 14 March 1996, in which he had refused to submit a proposal to the Council to amend Article 72(1) of the Service Regulations. The complainant then referred the matter successively to the Appeals Committee and the Administrative Council which, in line with the opinion of the Appeals Committee, refused to give him satisfaction. The complainant is now asking the Tribunal to set aside the President's decision of 8 December 1998 rejecting his internal appeal and to require the President to submit a proposal to the Administrative Council to amend the rules governing the expatriation allowance. He is also seeking the payment of the above allowance as from 1 July 1990.

3. Once Judgment 1864 had been delivered, the EPO informed the complainant that it would appear appropriate "both in his interests and those of the EPO" that he should envisage withdrawing suit. However, the complainant, who also believes that he is in a position to criticise the above judgment, decided that he should press his complaint, on which the Tribunal will therefore rule.

4. The Tribunal partially upholds the Organisation's plea of *res judicata* raised in its surrejoinder. The complainant's claims for the retroactive payment of the expatriation allowance have already been dismissed in Judgment 1864 and he has no valid reason to challenge the Tribunal's final decision, even though he criticises the fact that there is no possibility open to him for revision of that judgment.

5. On the other hand, the claims asking that the President of the Office should submit a proposal to the Administrative Council to amend Article 72(1) of the Service Regulations were not contained in the complaints which gave rise to Judgment 1864. *Res judicata* cannot, therefore, apply here.

6. The claims must, in any event, fail. The complainant does not plead any breach of his contractual or statutory conditions of employment. He wants the President to be ordered to intervene so that the Administrative Council amends the Service Regulations. However, firm precedent has it that the Tribunal may not order such action (with reference to the EPO, see Judgments 1456, *in re* Belser and others, and 1591, *in re* Popineau No. 13). Only in the event that the Office were under an obligation to change its rules in order to ensure respect for the fundamental conditions of service of staff members would the latter, faced with the silence or inaction of the administration, be entitled to challenge the unlawfulness of their situation. In the present case, however, it is fully within the competence of the President and the Administrative Council to amend or not the impugned provisions of the Service Regulations. Admittedly, the Council "noted" at its 39th Session in December 1990 that the Office would submit a proposal to this effect "as soon as possible". Yet this implied no obligation for the President who, for reasons which he alone can appropriately judge, has not considered it possible to submit such a proposal. It follows that the complainant cannot plead any breach of his fundamental rights or guarantees as a result of the maintenance of rules which, as ruled in Judgment 1864, are not unlawful.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 25 July 2000.