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

FORTY-SECOND ORDINARY SESSION

In re NUSS

Judgment No. 369

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Patent Organisation (EPO) by Mr. Albert Jean Nuss on 22 February 1978, the EPO's reply of 31 March, the complainant's rejoinder of 25 May and the EPO's statement of 3 August 1978 that it did not wish to file a surrejoinder;

Considering the applications to intervene filed by

J.G. Beernaert,
H. Berghmans,
C.G.F. Biggio,
M.L.M. Bogaerts,
C. Burgaud,
A.O.M. Coucke,
O. De Herdt,
H. Dauksch,
P.A. Desmont,
M. Ginestet,
R.H. Guyon,
Y. Hamers,
W.J.R. Hellemans,
D.I.J. Iverus,
R.C. Labeeuw,
P. Lapeyronnie,
R.M.L. Laugel,
C.P.B. Leroy,
A.E.S. Mertens,
R.A.M.G.G. Meulemans,
A. Miller,
J.C.J.J. Peeters,
L.J. Peeters,
R. Schmal,
N.F.G. Schuermans,
F. Thibo,
H.P. Van Breemen,
A.M.J. Van Moer,
H.P. Weber,
B. Zaegel,
R.E.M. Hakin;

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, the Staff Regulations of the former Institute, particularly articles 11, 15, 37, 63 and 84 and the Staff Regulations of the European Patent Office, particularly article 14;

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 case are as follows:

A. Formerly an official of the International Patent Institute in The Hague, the complainant became an official of the European Patent Office on 1 January 1978 in accordance with the integration agreement concluded on 19 October 1977 between the Institute and the EPO.

B. On 2 December 1977 he lodged an internal appeal against the decision of the Administrative Council of the Institute to approve the integration agreement, on the grounds that some of its provisions constituted a grave breach of the essential terms of his appointment. The Council dismissed his appeal by a decision of 9 December. That decision was notified to the complainant on 14 December and it is the one he impugns.

C. The complainant maintains that by concluding the integration agreement the Institute consented to the replacement of its own Staff Regulations with basically different ones. In particular, it did away with article 11 of the Institute Staff Regulations, which conferred on Institute staff the status of international officials who enjoyed the benefits of immunities and privileges granted by the host State to the organisation. It is clear "that the defendant organisation was at fault because it failed to do its utmost, particularly in negotiations with the Dutch authorities, to safeguard the interests of its expatriate staff". The Institute made a praetiee of referring to the benefits in its publicity material and offers of employment. It therefore knew full well that by consenting to the withdrawal of those benefits it was authorising a change in one of the basic terms of appointment. The complainant accordingly maintains that he is suffering a serious prejudice as regards the terms of his appointment attributable, first, to the change which the Institute "authorised in the Institute Staff Regulations in disregard of the effects of article 11 thereof", and, secondly, to the Institute's failure to fulfil its duty to do its utmost to protect the interests of its staff.

D. In his claims for relief, the complainant asks the Tribunal:

(a) to quash the decision of 9 December 1977 in so far as it fails to preserve article 11 of the Institute Staff Regulations;

(b) subsidiarily, to quash the decision in so far as it constitutes a refusal to award the complainant at least financial compensation for the wrong he is suffering owing to the loss of the special benefits enjoyed by international officials;

(c) to appoint an expert to assess the actual damage suffered by the complainant by reason of the loss of the benefits of article 11 of the Institute Staff Regulations;

(d) to order the Institute or its successor to pay the complainant a monthly allowance to be determined by the expert;

(e) to order the Institute or its successor to pay damages amounting to not less than 2,000 guilders for the moral prejudice suffered by the complainant;

(f) to award costs against the defendant, the amount to be determined by the Tribunal.

E. Referring to Article II, paragraph 5, of the Statute of the Tribunal, the EPO points out that the complainant is not alleging non-observance of the terms of his appointment or of the provisions of the Staff Regulations. He asks 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 complainant challenges 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 complainant's 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. Hence the claims based on the provisions of the integration agreement do not fall within the Tribunal's competence. Moreover, in so far as they relate to the privileges enjoyed by the complainant as an Institute official, they again have no bearing on the observance of the terms of his appointment or of the staff regulations. The relevant texts (the headquarters agreement between the Institute and the Netherlands and the Protocol on the privileges and immunities of the EPO) make it clear that the privileges are granted for the benefit of the organisation alone and

not for the personal advantage of its staff. Those texts, which refer to the privileges and immunities of Institute and EPO officials, do not make the international agreements part of the contact of employment between the organisation and its officials. Hence the Tribunal is not competent to hear the complainant's claim to the retention of certain privileges which he enjoyed as an Institute official. Nor may the Tribunal hear the complainant's contention that the EPO is liable in that regard; if it did, the Tribunal, in reviewing the EPO's attitude as to the continuation of the privileges, would be interfering in relations between an organisation and one of its member States and such relations are a matter which in essence falls outside the limits of the Tribunal's competence.

E. The EPO points out that the decision taken on 9 December 1977 by the Administrative Council of the Institute, and impugned by the complainant, was merely to dismiss his internal appeal against the Council's decision of 29 September to authorise 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 complaint is therefore irreceivable.

G. As to the merits, and subsidiarily, the EPO contends that the removal of article 11 of the Institute Staff Regulations is no wrong to the complainant. An EPO staff member has the status of an international official whether or not the Staff Regulations expressly recognise it. In any event the enjoyment of certain privileges, particularly tax privileges, is not necessarily a corollary of the status of an international official. In reply to the complainant's contention that the Organisation is liable to him for the loss of certain financial benefits, the EPO puts forward the following arguments. Institute officials enjoyed certain privileges by virtue of the headquarters agreement between the Institute and the Netherlands Government. Under that agreement Institute officials enjoyed "the immunities and privileges granted to officials of comparable rank in diplomatic missions at The Hague". That agreement was denounced by the Netherlands Government with effect from 1 January 1978 because on that date the Institute was to be dissolved and the headquarters agreement to come into force concerning The Hague section of the European Patent Office. On 1 January 1978 the officials of the Institute became officials of the Office. They had no personal right to continue to enjoy privileges which, although it was they who benefited, had been granted by the Netherlands Government to the defunct organisation and for the benefit of that organisation alone. The Tribunal therefore cannot but dismiss a claim which relates to a matter falling outside the relationship of employment between the EPO and the complainant, which the EPO cannot meet, and which is not founded on any right the complainant may validly invoke. In conclusion, and in reply to the complainant's argument that the organisation misled applicants by alluding in offers of employment to the privileges and immunities later withdrawn, the EPO points out that the mention of those advantages constituted no guarantee that they would continue, "far less in the event that the organisation was integrated into a new international organisation".

H. The EPO therefore asks the Tribunal to declare that it is not competent; to declare the complaint in any event irreceivable; and, subsidiarily, to dismiss the complaint in its entirety as unfounded.

CONSIDERATIONS:

As to the defendant:

1. The complaint was filed on 22 February 1978 against both the International Patent Institute and the European Patent Office. By an agreement signed on 19 October 1977 the Institute>was integrated into the European Patent Office, the secretariat of the European Patent Organisation, 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 in the present case, its recognition of the Tribunal's competence having been accepted by the Governing Body of the International Labour Office.

As to the privileges and immunities granted to staff of the International Patent Institute and the European Patent Office:

2. When the International Patent Institute was established in the Netherlands the Government of that country concluded a headquarters agreement with it conferring on its staff the privileges and immunities granted to diplomatic staff of comparable rank. Thus the first paragraph of article 11 of the Institute Staff Regulations conferred on the staff the "status of international officials". A notice of vacancy in the Institute set out the benefits and they were also mentioned in various offers of appointment in the following terms[(1)] :

"The Government of the Netherlands grants to all Institute staff members other than Dutch citizens privileges and immunities similar to those enjoyed by diplomatic staff accredited to The Hague, namely:

(a) immunity from jurisdiction in respect of any act committed in the performance of duties;

(b) exemption from all direct taxes on remuneration paid by the Institute;

(c) exemption from import duties on goods and effects intended for personal use such as cigarettes, alcohol motor cars, photographic equipment, etc.;

(d) refund of taxes on motor fuel;

(e) grant of a special identity card similar to that granted to diplomatic staff accredited to The Hague, which also constitutes the residence and work permit."

As has been said, by an agreement signed on 19 October 1977 the Institute was integrated into the European Patent Office with effect from 1 January 1978 and, although it is now a branch of that Office, the Institute still has its headquarters in the Netherlands. The Netherlands Government thereupon denounced the headquarters agreement with the Institute and concluded another with the EPO. The new text provides for the continuance of the immunities properly so called and of exemption from tax on remuneration paid by the EPO, but not of the other tax benefits enjoyed by non-Dutch staff members of the Institute.

As to the procedure:

3. According to Article II, paragraph 1, of its Statute, the Tribunal hears complaints alleging non-observance of an official's terms of appointment and of such provisions of the Staff Regulations as are applicable to the case. It appears from that article that the Tribunal's competence is limited to review of individual cases but covers all such cases in question.

Hence the Tribunal may not hear an application for the repeal or amendment of a provision of the Staff Regulations or Staff Rules. If it heard such a complaint it would be passing judgment on matters which fall outside the context of an individual case and would therefore be exceeding the competence conferred on it by its Statute.

The Tribunal is, however, competent to consider whether a provision of the Staff Regulations or Staff Rules applies to an individual case. It is true that it will then be determining the meaning and scope of a general and abstract provision; in doing so, however, it is merely passing preliminary judgment so that it may decide an individual case which does come within the scope of its competence.

4. The complainant's first claim is for the quashing of the impugned decision "in so far as it fails to preserve article 11 of the Institute Staff Regulations". It is true that the object of that claim, taken separately from the others, is to preserve a general and abstract provision; in other words, it goes beyond the scope of an individual case. But when that claim is seen in the context of the other claims for relief and the purpose of the complaint, it becomes clear that it is for his own benefit that the complainant wishes to have article 11 preserved. Hence, seen in that context, the first claim does form part of an individual case in respect of which the Tribunal is competent. As for the other claims, it is obvious that they do so.

5. The EPO contends that in the present case the Tribunal cannot refuse to apply the international agreement on the integration of the Institute without disregarding the sovereignty of the States parties. It further contends that the case law relating to the provisions of Staff Regulations cannot apply to the clauses of an international agreement which provides for the absorption of one organisation by another since the Tribunal cannot compel the latter to respect rules applied by the former, which no longer exists.

Those objections are irrelevant. Wether 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 EPO to bring the provisions which used to govern the Institute staff back into force. If a complaint is justified in principal,

what the Tribunal will do is to treat those provisions as part of the contract of appointment and apply them as such, and award damages of appointment and apply them as such, and award damages for any breach of them.

6. The EPO challenges the Tribunal's competence on the grounds that the privileges and immunities enjoyed by Institute and EPO staff under the headquarters agreements are not granted for their personal advantage. Although they do benefit the staff, they have been granted in the interests of the organisations, and so the organisations alone may demand that they continue. That is expressly provided by article 15 of the Institute Staff Regulations, article XI of the first headquarters agreement and article 19 of the Protocol on the privileges and immunities of the EPO. Hence, if the Tribunal were to pass judgment on the survival of those benefits it would be interfering in the relationship between an international organisation and a State in which it has its headquarters, and that is a matter which falls outside its competence.

In fact the question is not one of competence. What has to be decided is whether or not the complainant is entitled to continue to enjoy certain privileges. That is a matter of substance and should be treated as such.

7. Lastly, the EPO contends that because the impugned decision authorises the signature of an international agreement it may not be impugned before the Tribunal. It points out that the complaint's dispute is not with the Institute or the EPO but with the country which granted the benefits. Hence the complaint is, in its view, irreceivable.

It is true that the purpose of the complaint is not to have an international agreement revoked but to secure privileges and, subsidiarily, the payment of financial advantages. It is quite clearly brought against the EPO itself, and not any particular State. It cannot therefore be treated as irreceivable on the grounds that the EPO is not the true defendant.

As to the alleged violation of acquired rights:

8. The complainant bases his argument on the privileges granted under the first headquarters agreement and the Institute Staff Regulations, which referred to those privileges in recruiting staff members. He also takes the Institute to task for having failed to defend the interests of its staff as far as possible. In short, without saying so in so many words, he is alleging violation of rights which he considers he has acquired.

9. 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.

10. The privileges which the complainant says that he has lost derive, first, from the headquarters agreement between the Netherlands Government and the Institute and, secondly, from the Institute Staff Regulations. Article XI of the agreement provided, however, that "the privileges, immunities and facilities are granted to the Institute and its officials solely in the interests of the Institute and not for their personal advantage". Similarly, the first paragraph of article 15 of the Institute Staff Regulations confirmed that "the privileges and immunities of the staff are granted in the interests of the Institute". Hence, according to the terms of the agreement and the Staff Regulations the privileges granted thereunder and now claimed by the complainant were not a personal right, and so could not have been of decisive importance to him when he accepted appointment.

11. An acquired right might be established in the present case only if, either expressly or by implication, for example in the light of conclusive evidence, the complainant's contract of appointment had guaranteed the benefits he is claiming. But it did not. First, he cannot rely on any clause in his contract: there is no express guarantee. Secondly, although the Institute did mention the privileges in more or less explicit terms in its publicity material and in notices to future staff members, it explained that the benefits were granted by the Netherlands Government and made no firm promise on which the complainant may rely. New staff members should indeed have realised that the benefits depended on the continuance of an agreement with a State which could at any time ask to have it amended, or even just amend it.

12. Besides, it is doubtful whether in general all the privileges granted by the host State to international officials are of such decisive importance to them when they accept appointment. Since it is clear from the foregoing that no rights were acquired, that question need not be decided here. Moreover, it is not contested that, notwithstanding the

integration agreement, the complainant did continue to enjoy the main tax advantage, namely exemption from income tax.

13. The allegation of negligence against the Institute is not proved. Indeed it appears from the documents supplied by the Organisation that the Institute made efforts to preserve the benefits enjoyed by its staff.

DECISION:

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-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

1. Registry translation.

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