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

FORTY-SECOND ORDINARY SESSION

In re MERTENS (No. 2)

Judgment No. 371

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Patent Organisation (EPO) by Mr. André Eugène Sydney Octave Joseph Mertens on 10 March 1978 and brought into conformity with the Rules of Court on 20 April, the EPO's reply of 23 May, the complainant's rejoinder of 26 June and the EPO's statement of 25 August 1978 that it did not wish to file a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal, the provisions of the Agreement on the integration of the International Patent Institute into the European Patent Office and articles 15 and 90 of the Staff Regulations of the defunct International Patent Institute;

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. On 1 July 1973 the complainant was appointed to the staff of the International Patent Institute, which had its headquarters in The Hague. On 23 September 1977 the administrative Council of the Institute approved an agreement on the integration of the International Patent Institute into the European Patent Office, and that agreement was notified to the Institute staff on 7 November. With effect from 1 January 1978, when the agreement came into force, Institute officials became officials of the European Patent Office, the secretariat of the European Patent Organisation, and they are now subject to the Staff Regulations, pension rules and other texts which apply to officials of the European Patent Office.

B. On 2 December 1977 the complainant appealed against the decision of 23 September on the grounds that some provisions of the agreement were detrimental to him and that the joint consultations prescribed in article 90 of the Institute Staff Regulations had not been held before the decision had been taken. That appeal was dismissed by a decision of 9 December 1977, which is the one now impugned.

C. The complainant contends that the decision of 23 September 1977 was taken in breach of article 90 of the Staff Regulations, which relates to joint consultations; that he fares less well in the new organisation in that he holds a lower grade; that the salary scale is less favourable; that there is now a discriminatory system of remuneration in that there are two different categories; that pension benefits are calculated at the rate of 2 per cent of salary for each year of service for EPO officials but at the rate of 1.75 per cent for former Institute officials; that career opportunities are not so good; 1hat an additional increment is no longer granted in the event of promotion; and that because of the merger of the two organisations the complainant has forfeited almost all his diplomatic privileges, to which the Institute referred in publicity material at the time of his recruitment and which were of decisive importance to him in accepting appointment. He asks the Tribunal to "declare that the decisions of 9 December 1977 and of 23 September 1977 were improper and failing the quashing of those decisions, that they do not affect him; and to award him fair compensation for present and future material prejudice and for the moral prejudice he has suffered, and costs".

D. In its reply the EPO contends that, since the Tribunal may not hear applications for the quashing of legislative acts, a fortiori it may not hear complaints relating to the provisions of an international agreement. Similarly it considers that the Tribunal is not competent to hear claims relating to diplomatic privileges since article XI of the headquarters agreement between the Institute and the Netherlands Government provided 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". There is therefore no question of any obligation towards the complainant of which he may ask the Tribunal to order the performance. Moreover, in so far as the complaint impugns a decision to approve

an international agreement it is irreceivable since such a decision is not analogous to a collective or individual decision based on Staff Regulations, the only kind of decision which may be impugned before the Tribunal. Besides, quashing that decision would inevitably be devoid of effect. The EPO also rejects all the complainant's arguments as to the merits. It contends that the staff representatives were fully consulted on the papers submitted to the working party which reviewed the arrangements for merging the staffs of the two organisations, and that the impugned decision is not analogous in law to an amendment of the Institute Staff Regulations, to which article 90 of those Regulations refers. The EPO points out that the utmost care was taken to safeguard the interests of the Institute staff. A table of corresponding grades in the two organisations was drawn up, and the grading structure is a matter which falls within the sovereign authority of organisations. As for remuneration, article 9 of the integration agreement provides for payment of a "compensatory allowance" equal to the difference between the salary for the new grade and the salary for the former grade. The complainant has no acquired right to the continuance of the career patterns and grading structure which existed in the Institute. It is true that there had to be one method for adjusting the salaries of "B" and "C" category officials and another for adjusting those of "A" category officials, but the difference in method was rather to the advantage of "B" category officials, like the complainant, and "C" category officials. The EPO contends that the complainant has suffered no prejudice in regard to pension benefits since according to article 20(2) of the agreement the more favourable of the two methods of calculating benefits shall apply to the transferred officials. As regards promotion, it points out that the mere possibility of promotion is not a transferable personal right, and so the complainant has no valid grounds for complaint; besides, the arrangements for payment of the compensatory allowance are designed to mitigate any losses in that area as well. The complaint is therefore unfounded.

E. In his rejoinder the complainant points out that he is not asking the Tribunal to revoke an international agreement but to secure the observance of his rights under his contract of appointment and the Staff Regulations. As the successor to the Institute the EPO is bound to observe those rights, such as the material benefits which he derived from his diplomatic privileges and to which, whatever may be the legal nature of those privileges, he gave considerable importance in accepting the contract of appointment. The decision which he is impugning has had direct effects on the Institute's obligations under the contract of appointment and the Staff Regulations, and the complaint is therefore receivable. For the same reasons the complainant contends that the agreement, which has had an effect on those obligations, ought to have been submitted to the joint body, the Administrative Advisory Committee. He objects to the agreement on the grounds that it has created disparities between different categories of staff. Moreover, the regrading of the transferred officials ought to have ensured that those who performed the same duties held the same grade or at least were paid the same remuneration. But it did not, and the relevant decisions were purely arbitrary. Of the three categories of staff, "A", "B" and "C", his own category fares less well, for example as regards the indexing of salaries. Again, the former Institute officials will undoubtedly be paying much higher pension contributions than new EPO officials, although in most cases the benefits will be much the same. The complainant repeats his objections concerning career prospects and benefits in the event of promotion, which are less favourable than before. Lastly, he points out that the loss of his diplomatic privileges has caused him "enormous prejudice" since he is now subject to the many forms of tax levied in the Netherlands and will no longer be exempt from payment of tax, or pay lower tax, on any purchases unless the EPO makes transitional arrangements to reduce the "enormous" cut thereby brought about in the income of its staff.

CONSIDERATIONS:

As to the procedure:

1. The Organisation contends that, since the Tribunal does not hear applications for the quashing of legislative acts, a fortiori it may not review a decision by the supreme body of an international organisation authorising the conclusion of an international agreement. True, the Organisation is not contesting the Tribunal's competence to determine whether or not the amendment of staff regulations constitutes a breach of an official's terms of appointment. It argues, however, that for two reasons the Tribunal may not do so in the present case. First, there is no question of any amendment to staff regulations: the complainant is contesting the application of an international agreement and is therefore proposing to the Tribunal improper interference in matters falling within the competence of the States and organisations which are parties to that agreement. Secondly, it is a case in which staff regulations have been, not just amended, but replaced altogether; hence the Tribunal may not apply the former text, which is no longer in force, instead of the new one. The Organisation maintains on similar grounds that the complaint is irreceivable. It further contends that the Tribunal is not competent to award compensation for prejudice due to the loss of diplomatic privileges and immunities.

2. Those arguments are irrelevant. The Tribunal may pass judgment on the consequences of an amendment to staff regulations in a particular case. It is likewise competent to pass judgment on the effects of the agreement on the integration of the Institute into the EPO. Whether the provisions on the staff member's employment relationship are embodied in staff regulations or in that agreement, they have been adopted by the representatives of the member States of the organisation and their purpose is to govern conditions in the international civil service. In both cases, therefore, their nature is the same. Moreover, if it allows the complainant's claims, the Tribunal will not bring the Institute Staff Regulations back into force: it will assimilate them to the terms of a contract of appointment and will award damages for any breach of them. The question of the loss of diplomatic privileges and immunities is one of substance, and it will be considered as such.

3. The complainant contends that the failure to consult the Administrative Advisory Committee in accordance with article 90 of the Institute Staff Regulations constituted a breach of that article and vitiates the integration agreement.

That plea fails. As appears from the draft minutes appended to the Organisation's reply, the Administrative Advisory Committee discussed the question of the integration at four meetings at least. It was therefore in fact consulted. It is immaterial that it expressed no view on the matters in question. It appears from the eighth paragraph of article 90 of the Institute Staff Regulations that the expression of such a view was optional.

As to the merits:

4. The substance of the complainant's arguments on the merits is that he suffered prejudice because of his transfer from the Institute to the EPO. Those arguments will succeed only if there has been a breach of his acquired rights.

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 of an official's contact of appointment and which the parties intend should be inviolate. For the reasons given below the conditions for the acquisition of a right are not met in this case.

5. The complainant held grade B3 in the Institute. He objects to being given in the EPO a grade which is normally less well paid and which, in his view, does not match his responsibilities.

Neither the Institute Staff Regulations nor the complainant's terms of appointment give him an acquired right to any particular grade. What matters to a staff member is not so much his actual grade as the consequences of obtaining it.

There is no need to consider whether a staff member has an acquired right to continue to receive the agreed remuneration. In any event the complainant has not been deprived of that right, which he is guaranteed by means of payment of a compensatory allowance.

Moreover, even if the complainant now held a grade inferior to his qualifications, he is performing in the EPO the same duties that he performed in the Institute. He has therefore not been deprived of any acquired right by the transfer from his former employment.

As to the method of salary adjustment, the complainant has no acquired right to application of the methods practised in the Institute. There is therefore no need to consider whether the EPO Staff Regulations prescribe the same incremental curves as did the Institute rules.

6. The complainant contends that, because his retirement pension is calculated at the rate of 1.75 per cent of salary, he fares less well than other members of the EPO staff who pay the same contribution but have their pension calculated at the rate of 2 per cent. This argument is based on only one factor of comparison between the position of former Institute officials and that of other EPO officials, namely the relationship between contributions and pension benefits. It leaves other factors out of account, such as the payment of a compensatory allowance to the former Institute officials to make good the reduction in salary which they would have suffered had the scale applying to other EPO officials been applied to them. Hence, while former Institute officials fare less well in one respect than other EPO officials, they fare better in another, which appears just as important. Hence, in so far as it exists, the discriminatory treatment which the complainant alleges should be regarded as compensated.

7. It is not a fact of decisive importance that as a result of the integration agreement the complainant will not derive from any promotion the benefits he would have enjoyed as an Institute official. The provisions which lay down the conditions governing promotion do not confer any acquired rights on a staff member because, when he takes up his appointment, he cannot foresee how he will fare in his career. On the contrary, those provisions are subject to amendment and the staff member must expect such amendment.

8. The complainant is mistaken in objecting to the reduction in the expatriation allowance paid to him. Such an allowance is of course a matter of importance to an employee of an organisation. It must even be admitted that its abolition would in principle constitute a breach of an acquired right. There is, however, no acquired right to the amount and conditions of payment of such an allowance. Indeed the staff member should expect amendments to be prompted by changes in circumstances if, for example, the cost of living rises or falls, or the organisation reforms its structure, or even finds itself in financial difficulty.

The complainant is mistaken in attributing any permanent character to the diplomatic privileges and immunities which he enjoyed in the Institute, which have been partly curtailed.

Not only did the first paragraph of article 15 of the Institute Staff Regulations lay down that those privileges and immunities were granted in the interest of the Institute, but the complainant's contract of appointment does not mention them. Moreover, the offers of appointment which refer to them are too vaguely worded to constitute promises on which staff members can base any acquired right.

DECISION:

For the above reasons,

The complaint is 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

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