SIXTY-THIRD SESSION

In re WEIHS (No. 2)

Judgment 854

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Joachim Alfred Weihs against the European Patent Organisation (EPO) on 22 December 1986, the EPO's reply of 23 March 1987, the complainant's rejoinder of 16 April and the EPO's surrejoinder of 9 June 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 4 and 10 of the Agreement on the integration of the International Patent Institute into the EPO (the "transfer agreement"), Article 51 of the Staff Regulations of the Institute and Articles 72 and 108(1) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. Article 72(1) of the EPO Service Regulations provides that an expatriation allowance shall be payable to permanent employees in staff categories A, L and B who at the time of appointment are "not nationals of the country in which they are serving". Article 72(2) says that the allowance shall cease if the employee "is transferred to the country of which he is a national". But 72(3) stipulates that it shall be paid to employees "who, although nationals of the country in which they are serving, have been continuously resident for at least ten years in another State at the time of their appointment, no account being taken of previous service in their home country's administration or with other international organisations".

As was said in Judgment 786, under A, the complainant, a citizen of the Federal Republic of Germany, joined the International Patent Institute at The Hague in 1971. In accordance with the Agreement on the integration of the Institute into the EPO - the "transfer agreement" - he became a category A official of the EPO on 1 January 1978. Article 4 of the transfer agreement said that Institute officials were to be subject to the EPO Service Regulations unless the agreement provided otherwise, and Article 10(1) that anyone who had got the allowance at the Institute would get the similar allowance at the EPO if he would have continued to qualify under the Institute's rules. The complainant stayed on at The Hague and qualified for the EPO expatriation allowance.

He was transferred on 1 July 1985 to the EPO office in West Berlin. The allowance then stopped, and he appealed on 30 July under Article 108(1) of the Service Regulations. On 8 October the President of the Office referred his case to the Appeals Committee. He lodged his first complaint on 9 December 1985 challenging what he believed to be an implied decision to reject his internal appeal, but in Judgment 786 the Tribunal dismissed it as premature. In a report dated 30 May 1986 and notified to the President on l9 June the Committee found that the term "time of their appointment" had been construed to mean the date of recruitment in 72(3) but also the date of transfer to another duty station in 72(1). It held that, though the complainant's claim would succeed under 72(3) on the latter construction, the text would hardly bear it. It recommended that before taking his final decision the President consider a uniform interpretation of the rules. By a letter of 5 August 1986 the Principal Director of Personnel informed the complainant that the President was considering the matter, but by a letter of 20 November, the decision impugned, told him that the President had rejected his appeal.

B. The complainant submits that he qualifies for the allowance under 72(3). The reference to the time of appointment in that provision means the time of transfer to another EPO duty station. He qualifies because, though a citizen of the Federal Republic, he had been "continuously resident" in another country for well over ten years before 1 July 1985, the date of his transfer to the West Berlin office. He supports his interpretation of 72(3) by citing the EPO's practice - which it acknowledged in the internal appeal proceedings - of granting the allowance under 72(1) to someone who took up duty in his own country as from the date on which he is transferred elsewhere. To refuse him the benefit of that construction is a breach of the principle of equality. He cites as evidence of breach of the principle the case of another West German official in Berlin who is getting the allowance.

He seeks payment of the expatriation allowance as from 1 July 1985.

C. In its reply the EPO discusses in detail the construction to be put on Article 72. It points out that if "time of their appointment" in 72(3) means the date of joining the EPO - 1978 in the complainant's case - the complaint fails because he cannot make up the required ten years abroad. Although he was abroad from 1964 until 1978, the period of seven years from 1971 does not count under 72(3) because he was with the Institute ("... no account being taken of previous service ... with other international organisations"), and that leaves only six years. So he is trying to get round the obvious meaning of 72(3) by saying that the time of appointment means the time of transfer as well: the period he spent with the EPO at The Hague before his transfer to Berlin would then count. In fact he would still fail to qualify because that period comes to only just over seven years and the time he spent abroad before joining the Institute does not count because the ten years must be continuous.

The EPO distinguishes the case of the other West German official.

It asks the Tribunal to dismiss the complaint as devoid of merit.

D. In his rejoinder the complainant enlarges on his submissions about EPO practice, the interpretation of Article 72 and breach of the principle of equality, and he seeks to rebut the EPO's reply. He submits that the case of the other official is on a par with his own. He qualifies under 72(3) because his service with the Institute should count: the Institute was not an international organisation within the meaning of the article but really just the same organisation. He was therefore continuously resident in another country for over ten years before the time of appointment, viz. the date of his transfer to Berlin.

E. In its surrejoinder the EPO develops in detail its arguments on the issues of law, contending that the complainant does not satisfy 72(3) and that he misconstrues it. The Organisation explains that since the Institute was a different organisation service with it cannot count.

CONSIDERATIONS:

1. The complainant, who is a citizen of the Federal Republic of Germany, joined the service of the International Patent Institute at The Hague on 4 January 1971. On the integration of the Institute with the European Patent Organisation on 1 January 1978 he was transferred to the EPO in accordance with the transfer agreement. In 1984 he requested a transfer from The Hague to Berlin and on 1 July 1985 was so transferred. From that date the expatriation allowance which he had been paid in accordance with Article 4 and Article 10(1) of the transfer agreement and Article 51 of the Staff Regulations of the Institute ceased to be paid. He had been informed by a letter dated 20 November 1984 that on transfer he would no longer qualify for such allowance.

2. The complainant claims the expatriation allowance under Article 72(3) of the EPO Service Regulations.

3. Paragraphs (1) to (3) of Article 72 read:

"(1) An expatriation allowance shall be payable to permanent employees in Categories A, L and B who, at the time of their appointment or - if such appointment follows immediately upon employment in one of the Co-ordinated Organisations - at the time of their appointment by that Organisation:

a) were not nationals of the country in which they are serving and

b) were not continuously resident in that country for at least three years, no account being taken of previous service in their home country's administration or with other international organisations.

(2) This allowance shall cease to be payable if a permanent employee is transferred to the country of which he is a national.

(3) The expatriation allowance shall also be paid to permanent employees in the above-mentioned categories who, although nationals of the country in which they are serving, have been continuously resident for at least ten years in another State at the time of their appointment, no account being taken of previous service in their home country's administration or with other international organisations."

4. The argument turns on whether the term "time of their appointment" in Article 72(3) means only the date of

joining the Organisation or includes the date of transfer. The complainant contends that the phrase "time of their appointment" in 72(1) has been interpreted to mean date of transfer for the benefit of those permanent employees who were recruited in their home country and worked there for a while before being transferred abroad. In its report of 30 May 1986 the Appeals Committee observed that in such cases EPO practice accepted that "time of their appointment" meant also the date of transfer. Therefore he claims that in 72(3) the phrase should be given the same meaning.

5. The EPO argues that "time of their appointment" in both paragraphs means the time when the employee entered the service of the Organisation or of a co-ordinated organisation.

6. Article 72(1) and (2) contain the general rule, and 72(3) an exception to 72(2).

7. Article 72(1) imposes an obligation on the EPO to pay an expatriation allowance to permanent employees in certain categories who are (present tense) serving in a country of which they were not (past tense) nationals at the time of their appointment.

There is a further condition that at the time of their appointment they were not continuously resident in the country of assignment for a period of three years.

There is a proviso that in calculating the period of three years no account is to be taken of previous service in their home country's administration or with other international organisations, but it is immaterial in this case.

8. Article 72(2) provides that the expatriation allowance ceases if a permanent employee is transferred to his home country.

9. Article 72(1) cannot be interpreted as giving "time of their appointment" the meaning preferred by the complainant, i.e. as including the time of transfer. To give the phrase its ordinary meaning of date of entry into the service, a citizen of the Federal Republic of Germany living and recruited in the Federal Republic who is later transferred to The Hague is entitled to be paid the expatriation allowance while he is working there because he was neither a citizen nor a resident of the Netherlands at the time of his recruitment. If he returns home, the allowance ceases. The complainant may not therefore plead breach of equal treatment.

10. Article 72(3) introduces an exception to the general rule expressed in 72(1) and (2). It provides for the case of a permanent employee who at the time of his recruitment had in effect lost his bond of affinity with his home country and had formed one with another country.

11. In order to qualify for payment of an expatriation allowance in his home country notwithstanding 72(2), an employee in categories A, L or B must at the time of his appointment have been continuously resident for at least ten years in a country other than his home country, with the proviso that in calculating the ten years no account is to be taken of service in his home country's administration or with other international organisations.

Therefore someone who at the time of appointment had established residence in another country for over ten years, otherwise than in the context of service for the administration of his home country or other international organisations would be entitled to the expatriation allowance if at any stage during his service he returned to work in his home country. But such person would not be entitled under 72(1) to the allowance if at any time he was appointed to serve in the country in which he had been resident for three years prior to recruitment: in such case condition (b) in 72(1) would be relevant.

12. The complainant's argument depends on satisfying the Tribunal that the interpretation he puts on the phrase "time of their appointment" in 72(1) is correct and therefore the same interpretation applies to 72(3). Since he has failed to do so, there is no basis on which the phrase "time of their appointment" in 72(3) could mean time of transfer, and there is therefore no basis on which the complainant could be entitled under 72(3) to an expatriation allowance.

13. The complainant contends that a fellow employee and citizen of the Federal Republic, Mr. Dockhorn, who had also been with the Institute, was transferred from The Hague to Berlin and was paid the expatriation allowance under 72(3), the period he had spent at The Hague being taken into account in calculating the ten-year period. The EPO deny that such is the case and say that Mr. Dockhorn had more than ten years' residence abroad before joining the Institute and therefore qualifies under 72(3). The complainant does not deny this fact. The plea of unequal

treatment is therefore again not proved.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

Jacques Ducoux
Mella Carroll
P. Pescatore
A.B. Gardner

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