

NINETIETH SESSION

In re Goettgens (No. 5)

Judgment No. 2012

The Administrative Tribunal,

Considering the fifth complaint filed by Mr Johannes Karl Wilhelm Goettgens against the European Patent Organisation (EPO) on 8 March 2000, the EPO's reply of 26 May, the complainant's rejoinder of 30 June, and the Organisation's letter of 11 July 2000 to the Registrar of the Tribunal waiving its right to submit a surrejoinder;

Considering Article II, paragraph 5, 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. Facts relevant to this case are set out under A in Judgments 1517 and 1518 on the complainant's second and third complaints.

In 1979 the complainant was seconded to the EPO from the German Patent Office where he had worked first as a salaried employee and then as a civil servant. While at the German Patent Office he contributed to two pension schemes: the German social security pension insurance scheme, administered by the Federal Insurance Office for Salaried Employees (*Bundesversicherungsanstalt für Angestellte* (BfA)) and the civil service pension scheme.

On 8 December 1995 the EPO and the Federal Republic of Germany entered into an "Agreement ... on the implementation of Article 12 of the Pension Scheme Regulations of the European Patent Office" which came into force on 21 September 1996. In the February 1997 issue of the EPO *Gazette*, the Office published its interpretation of "previous pension scheme" as used in Article 12. This phrase was defined to mean "the last pension scheme to which the staff member made contributions before joining the Office". In addition, it was pointed out that it was "not possible to transfer in isolation rights accrued with the social security pension scheme".

On 10 March 1997 the complainant requested the transfer to the Office's Pension Fund of his pension rights under the German social security pension insurance scheme (hereinafter referred to as the BfA scheme). He expressed doubts that the rights accrued under the civil service pension scheme could also be transferred. On 18 April he lodged an internal appeal with the President of the Office against the "decision" published in the February 1997 issue of the *Gazette*.

In March 1998 the EPO informed the staff, by an article published in the *Gazette*, that the Federal Ministry of Justice had concluded that the above-mentioned Agreement did not apply to civil servants who had already retired from the national civil service, because their status ended upon retirement. The complainant was affected since he had retired from the national civil service in 1993.

On 26 May 1998 the Head of the Remuneration Department informed the complainant that his request of 10 March 1997 was refused because the BfA scheme was not the last pension scheme to which he was affiliated immediately before joining the EPO. The complainant replied that it was only the transfer of his BfA scheme entitlements that he was requesting. On 23 July 1998 the Remuneration Department confirmed its previous decision.

On 28 July 1998 the complainant filed an internal appeal against the decision of 23 July. In this appeal he requested joinder of the appeal he had lodged on 18 April 1997, but had not yet been heard. Having met on 27 October 1999, the Appeals Committee in its opinion dated 6 December unanimously recommended, in so far as they were receivable, dismissing his appeals as unfounded. On 13 December 1999 the Director of Personnel Development informed the complainant that the President of the Office had rejected his appeals. That is the impugned decision.

B. The complainant argues that the decision of the President was based on a misinterpretation of facts and evidence. He belonged simultaneously to two previous pension schemes: the civil service and the BfA schemes. Article 12 clearly addresses the "previous pension scheme" whereas Rule 12.1/1 i) a) of the Implementing Rules to the Pension Scheme Regulations refers to "pension schemes preceding entry into the service of the Office". While recognising that his civil service pension rights cannot be transferred, he claims that the Office has no legal basis for rejecting his request to transfer his BfA pension rights.

He requests the Tribunal to: (1) quash the President's decision of 13 December 1999; (2) order the EPO to request information from the BfA about the amount of his pension, including interest; to recalculate his EPO pension; and then to give him the choice of transferring his BfA pension rights; (3) order the EPO to pay him the newly calculated pension and the difference between the old and new pensions "from the beginning", plus interest, if he opts to transfer his BfA pension rights; and (4) award costs for telephone, postage, photocopies and travel to Munich.

C. In its reply the EPO submits that the complaint is unfounded. It is clear from the wording of Article 12 that the intention of the lawmakers was to allow the possibility of transferring only the pension rights accrued under the scheme applicable immediately before joining the EPO. Furthermore, the complainant is asking for an "isolated transfer right", which has been specifically excluded by that article. The Organisation notes that the complainant has been benefiting from the BfA scheme; he has therefore not suffered any injury by the EPO's denial of his request.

D. In his rejoinder the complainant states that as an employee of the German Patent Office he contributed to the BfA scheme and as a civil servant with the same employer he contributed to the civil servants' pension. There is no reason to consider him as having been employed by two different employers simply because of a change in status.

CONSIDERATIONS

1. The complainant impugns the decision of the President of the European Patent Office denying him the possibility of transferring to the EPO pension scheme his rights accrued under the German social security pension insurance scheme (the BfA scheme).

2. The complainant is a German national, born in 1928. He was employed by the German Patent Office, first as a salaried employee and then, from 1 August 1966 to 1 April 1979, as a civil servant. As a salaried employee, he paid contributions to the BfA scheme but as a civil servant, he was compulsorily affiliated to the civil servants' pension scheme. However, he continued to contribute to the BfA scheme, concurrently and on a voluntary basis, until 31 December 1977. On 1 April 1979 the complainant joined the staff of the EPO. On 1 March 1992 he retired from the EPO and on 1 January 1993 he also retired from the German civil service.

3. On 8 December 1995 the EPO and the Federal Republic of Germany entered into an "Agreement ... on the implementation of Article 12 of the Pension Scheme Regulations of the European Patent Office". The Agreement came into force on 21 September 1996.

4. On 10 March 1997 the complainant requested, pursuant to this Agreement, that the entitlements he had accrued with the BfA scheme up to the end of 1977 in parallel with those acquired under the pension scheme for civil servants up to March 1979, be transferred to the Office.

5. On 18 April 1997 the complainant lodged an internal appeal against the interpretation which had been published by the EPO Administration in the *Gazette* of the terms "previous pension scheme" used in Article 12 of the Office's Pension Scheme Regulations.

6. On 26 May 1998 the Head of the Remuneration Department informed the complainant that his request for the transfer of his BfA pension

rights could not be allowed, because, according to Article 12(1) of the Office's Pension Scheme Regulations and Rule 12.1/1 of the Implementing Rules, only those rights which were accrued under the pension scheme to which the staff member was affiliated immediately prior to joining the EPO could be transferred. Since the complainant was a German civil servant before entering the service of the EPO, the BfA scheme was not the last pension

scheme to which he was affiliated.

7. In a letter dated 10 June 1998, the complainant replied that he was only requesting the transfer of his BfA scheme entitlements. On 23 July 1998, the Remuneration Department confirmed its decision dated 26 May 1998.

8. On 28 July 1998 the complainant filed an internal appeal against the decision of 23 July.

9. On 27 October 1999 the Appeals Committee unanimously recommended rejecting the internal appeals on the grounds of irreceivability as regards the publication in the *Gazette* and of lack of foundation as regards the 23 July decision. On 13 December 1999 the complainant was informed of the President's endorsement of the Committee's recommendation. That is the impugned decision.

10. The rejection of the complainant's first internal appeal on the grounds of irreceivability is clearly well-founded: the interpretation published in the *Gazette* is not a "decision" affecting the complainant's rights; it is only an expression of opinion which has no obligatory force.

11. The rejection of the complainant's claim asserted in his second internal appeal flows inevitably from the provisions of the applicable rules themselves. They are quite clear. Article 12(1) of the Office's Pension Scheme Regulations states that:

"An employee who enters the service of the Office after leaving the service of a government department, a national organisation, an international organisation not listed in Article 1 or a firm, may arrange for payment to the Organisation in accordance with the Implementing Rules hereto, of any amounts corresponding to the retirement pension rights accrued under his previous pension scheme, provided that that scheme allows such transfers to be made.

In such cases the Office shall determine, by reference to his grade on confirmation of appointment and to the Implementing Rules hereto, the number of years of reckonable service with which he shall be credited under its own pension scheme."

12. The Tribunal notes that the use of the singular in the reference to a "previous pension scheme" is not accidental.

13. Rule 12.1/1 of the Implementing Rules to the Pension Scheme Regulations deals with the manner in which the years of service are calculated:

"i) Periods of membership of previous pension schemes

a) Pursuant to Article 12, paragraph 1, of the Regulations, years of reckonable service shall be credited in accordance with these Rules in respect of periods of membership of pension schemes preceding entry into the service of the Office.

Such periods of membership may include periods served in one or more government departments, organisations or firms, provided that the aggregate of such rights had been taken into account under the pension scheme of the last government department, organisation or firm in whose service the person concerned was employed before entering the service of the Office. [emphasis added.]

b) An amount shall be credited under this Article only if it is certified by the previous pension scheme as being the actuarial equivalent of retirement pension rights or as representing a capital payment in respect of rights to a pension or of social security entitlements (excluding compensation for dismissal or a severance grant) and must be equivalent to the whole of the amounts paid to the person concerned by the afore-mentioned pension scheme."

14. As stated above, the EPO and the Federal Republic of Germany entered into an Agreement on the implementation of Article 12 of the Office's Pension Scheme Regulations. Article 1(1) of this Agreement reads as follows:

"A permanent employee or member of the contract staff of the European Patent Office who has been compulsorily or voluntarily insured with the German social security pension insurance scheme shall be entitled to have transferred to the pension scheme of the European Patent Office the total compulsory and voluntary contributions paid in respect of him to an authority responsible for the social security pension insurance scheme in the Federal

Republic of Germany up until the time of his entry into the service of the European Patent Office, taking into account where appropriate any pension adjustment, together with 3.5 per cent interest for each complete year following the contribution payment until the time of the transfer. The transfer shall be effected on application by the person entitled; it may also be applied for by his survivors. Such application is to be made to the European Patent Office within six months from the appointment of the employee on a permanent basis or, in the case of a member of the contract staff, within six months from the date on which he acquires a right to a retirement pension. That period shall not expire earlier than six months after the entry into force of this Agreement. The European Patent Office shall notify the Federal Insurance Office for Salaried Employees, which shall, where appropriate, pass the application on to the competent authority responsible for the pension scheme. An application may not be withdrawn once the applicant has accepted in writing the proposal made by the European Patent Office regarding the extent of the period of service to be credited."

15. In the present case, it is agreed that prior to his transfer to the EPO, the complainant was compulsorily affiliated to the civil servants' pension scheme. He had ceased to contribute to the BfA scheme for approximately fifteen months. Article 12 of the Office's Pension Scheme Regulations makes it quite clear that the only rights that can be transferred are the ones acquired under the previous pension scheme, provided it does not prevent the transfer. The complainant's previous pension scheme at the time of his secondment was the civil servants' pension scheme. It is established that German law prevents the transfer of the rights acquired under that pension scheme. The above provisions make it quite clear that the complainant's rights under the BfA scheme cannot be transferred.

16. The complainant can draw no comfort from any apparent ambiguity in the terms of the quoted passage of the Agreement: even if it could bear the meaning which the complainant contends for it, which it does not, it could not override the clear terms of the statutory provisions to which it is ancillary.

17. The impugned decision is accordingly well-founded and the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2000, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

Michel Gentot

James K. Hugessen

Flerida Romero

Catherine Comtet