

NINETY-FIFTH SESSION

In re Holliday

Judgment No. 2234

The Administrative Tribunal,

Considering the complaint filed by Mr I.A. H. against the European Patent Organisation (EPO) on 12 July 2002 and corrected on 5 August, the EPO's reply of 8 November, the complainant's rejoinder of 8 December 2002, and the Organisation's surrejoinder of 18 March 2003;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a British national born in 1933, is a former permanent employee of the European Patent Office, the EPO's secretariat; he retired in 1995. Prior to entering the service of the EPO in 1981 he worked for the United Kingdom Patent Office, during which time (over 16 years) he contributed to the Principal Civil Service Pension Scheme (hereinafter referred to as PCSPS). Before he was recruited for the EPO he had been told that he would be able to transfer his pension entitlements from the PCSPS to the EPO's Pension Scheme. However, throughout the time he worked at the EPO, the Organisation maintained that such a transfer was not possible. He began drawing his pension from the PCSPS in 1993 and from the EPO in 1995.

On 11 October 1999 the Office published the following communication in the Gazette, the EPO's in-house magazine:

"Note for the attention of staff members holding pension entitlements with the Principal Civil Service Pension Scheme

On the conditions laid down in Article 12(1) of the Pension Scheme Regulations, and Rule 12.1/1 of the Implementing Rules, the EPO allows for inward transfer of pension rights.

Following several requests for transfer of pension entitlements by **former British civil servants**, it has appeared that the Office, notably following failed negotiations on a transfer agreement as early as in 1982, mistakenly presumed that transfer of pension entitlements from the Principal Civil Service Pension Scheme (PCSPS) to the EPO was not possible, and has acted accordingly. In view of these exceptional circumstances, the President of the Office has decided that the six-month time limit for application for transfer of pension entitlements laid down in Rule 12.1/1 v) of the Pension Scheme Regulations will be applied as from the publication of this announcement."

On 21 October 1999 the complainant wrote to the Director of Personnel Development, informing the latter that, had it been possible when he had joined the EPO in 1981, he would have transferred his pension entitlements. He wanted to know what the Office intended to do as far as former staff members were concerned. By a letter of 8 November the Pensions Department informed him that, since he had already begun to draw his UK pension, a transfer of pension entitlements would not be possible. Not satisfied with this reply, the complainant wrote again to the Director of Personnel Development on 19 November. He informed the Director that, having drawn a PCSPS pension for more than six years, he accepted the fact that the PCSPS was no longer willing to consider a transfer of his entitlements. He pointed out, however, that former British civil servants, who had been unjustly denied transfer of their pension entitlements due to the Office's mistake, should be entitled to financial compensation greater than

that already awarded under the provisions of Article 46 of the Pension Scheme Regulations on the enhancement of benefits; he wished to know what the Office planned to do. Having received no reply, he resent his letter on 17 January 2000. Replying on 9 February, the Director of Personnel Development said that he could only confirm what had already been told to the complainant in the letter of 8 November 1999.

Considering this as a refusal to grant "equivalent treatment" in respect of transferability of pension entitlements, on 15 February 2000 the complainant filed an internal appeal against this decision. In his appeal he stressed that he was not challenging a refusal to transfer his pension entitlements. Instead, he claimed compensation for the losses he suffered due to the EPO's mistaken belief that he had not been able to transfer these entitlements. The EPO objected to the receivability of the appeal. In its opinion of 20 March 2002 the Appeals Committee found the appeal to be receivable. Nevertheless, finding that the Office had not acted incorrectly, but rather under mistaken belief, the Committee unanimously recommended rejecting the appeal as unfounded. In a letter of 22 April 2002 the Principal Director of Personnel informed the complainant on the President's behalf that his appeal had been rejected. That is the impugned decision.

B. The complainant submits that the fact that he could not transfer his pension entitlements resulted in a financial disadvantage. According to him, the EPO has publicly admitted that this loss is directly attributable to a mistake on its part. Between the time he started at the EPO and his retirement he had made several enquiries to the Personnel Department about transferring his PCSPS entitlements; each time he was told that such a transfer was not possible. He estimates that he suffers a monthly loss of more than 500 pounds sterling because he was not able to transfer his pension entitlements.

He questions the findings of the Appeals Committee, stating that the Committee has based itself on assumption rather than fact. He also questions the effort put forth by the EPO to negotiate an agreement on the transfer issue. Nowhere has the EPO explained how it came to be aware in 1999 that pensions could be transferred, but not before that date. Nor has it supplied any grounds to support its assertion that "all efforts failed until early in 1999". He contends that the efforts of the Office came after two British staff members made enquiries to the PCSPS on their own behalf and learned in February 1999 that it was possible to transfer their pension entitlements to the EPO. Their actions were discussed at length during the Appeals Committee hearings, but the Committee has omitted this information from its opinion. He argues that the Office has failed in its duty of care by not apprising itself of the existing right of transfer.

He contrasts the effort put forth concerning an agreement for the transfer of German pension entitlements with that put forth on behalf of UK nationals, stating that there is no evidence that the EPO made a concerted effort to negotiate with the UK authorities.

He requests the Tribunal to set aside the President's decision of 22 April 2002 and he seeks an enhancement of his pension benefits, or, in the alternative, an "appropriate" lump sum to compensate him for the financial losses he has incurred and will continue to incur. He also claims costs.

C. The EPO replies first that the complaint is not receivable. According to the Organisation, the fact that the complainant had formulated a request for compensation in his letter of 19 November 1999 "is directly connected to the initial request for a transfer to be effected" on 26 October; therefore, it does not have the effect of reopening the time limits for filing an appeal, which had expired on 8 February 2000.

Subsidiarily, the Organisation contends that the complaint is unfounded. It notes that the complainant is not challenging the fact that he cannot transfer his pension entitlements but rather he is seeking compensation for an alleged mistake on the part of the Organisation. Since 1995 he has been drawing a pension plus an "enhancement of benefits" provided for under Article 46 of the Pension Scheme Regulations. Thus "due account" has been taken of the fact that he was not able to transfer his pension entitlements to the EPO. Granting him compensation would lead to a double payment. In the "absence of a fault" by the Organisation there is no other remedy available to him.

It explains why it believed, until it published the notice in the Gazette in October 1999, that a transfer was not possible "because of the British authorities' procrastination". An agreement with the authorities is a prerequisite under Article 12 of the Regulations. When it became aware that transfers were permissible it extended the time limit under Rule 12.1/1(v) of the Implementing Rules for serving staff members to apply for a transfer. But for retired staff such a transfer was no longer possible due to British regulations. The complainant does not substantiate his allegation that promises were made to him at the time of joining the EPO that he would be allowed to transfer

his pension entitlements.

Lastly, it denies that staff members holding pension entitlements in the UK were treated less favourably than those holding the same in Germany. Negotiations will vary among Contracting States, and in that respect, the complainant's remark "is of little help" to him.

D. The complainant rejoins that his appeal was receivable and that the Appeals Committee had found this to be the case. He submits that it is clear that his letter of 19 November, which the Office did not even answer until after he had sent a reminder, led to the appeal; but his appeal was against the Office's decision of 9 February 2000.

Concerning the enhancement of benefits he receives under Article 46 of the Regulations, he states that the amount he currently receives is inadequate to cover the financial loss involved.

He has provided a document, dated January 1979, which he refers to as the "UK Briefing for the European Patent Organisation" and which, he says, was given to UK Patent Office employees before they transferred to the EPO. The document underlines that, despite some difficulties, the "intention is [...] to enable UK pension rights to be transferred to the EPO scheme and discussions are continuing". Thus, he accepted that transfer was not possible in 1981, but that this briefing gave hope that it would become possible at a later date. Although the EPO has made references to correspondence with the British authorities in 1992, it does not explain why the Office did not follow up on this matter.

He maintains his position that the Organisation made far greater efforts to obtain an agreement on the transfer of pension entitlements for those staff members having "pensions of German origin" than it made on behalf of former British civil servants.

E. In its surrejoinder the EPO contends that, the decision in the letter of 9 February 2000 being merely confirmatory, it is the letter of 8 November 1999 which constitutes a final decision. The complainant's appeal was therefore filed out of time.

On the merits, the Organisation asserts that the complainant has failed to demonstrate that the amount provided as an enhancement of benefits is insufficient to make up for the alleged loss sustained as a result of not being able to transfer his pension entitlements. The Organisation maintains that "at no point" before the beginning of 1999 was it aware that a transfer of pension entitlements from the UK was possible. Despite the fact that the Office extended the time limit for permanent employees to apply for a transfer of pension entitlements, this option could not be made available to retired employees. The EPO rejects the document provided in the complainant's rejoinder as "irrelevant".

CONSIDERATIONS

1. The complainant, a British national, joined the EPO in 1981 after serving as examiner at the United Kingdom Patent Office from 1964. Having reached the age of 60 on 20 April 1993, he began drawing his pension from the PCSPS. He retired from the EPO on 1 October 1995 and received a pension calculated according to his years of service with the Organisation, plus an enhancement of benefits provided for under Article 46 of the EPO's Pension Scheme Regulations, which may be granted to an employee "whose previous pension scheme does not permit transfers under Article 12, paragraph 1, or who has not availed himself of the option to make such a transfer". At the time he left the Organisation, there was no question that former British civil servants could obtain the inward transfer of pension entitlements that were available, under certain conditions, to employees entering the service of the Office after leaving the service of a government department, a national organisation or an international organisation.

2. On 11 October 1999 a note by the Director of Personnel Development for the attention of staff members holding pension entitlements with the PCSPS was published in the Organisation's Gazette. After referring to the relevant provisions of the Pension Scheme Regulations and the Implementing Rules, the note went on to say that following several requests for transfer of pension entitlements by former British civil servants, it had emerged that the Office, notably following failed negotiations on a transfer agreement as early as in 1982, had mistakenly presumed that such transfer would not be possible, whereas in fact it was, as shown in a letter from the Pensions Department of the UK Department of Trade and Industry (DTI) dated 17 May 1999, according to which there had always been a

statutory right to transfer benefits out of the PCSPS. In view of these exceptional circumstances, the President of the Office had decided that the six-month time limit for applications to transfer pension entitlements under Rule 12.1/1(v) of the Implementing Rules, would be applied from the date of publication of the note.

3. Since that note of 11 October gave no indication regarding the possible application of those provisions to officials who had already retired, the complainant wrote to the Organisation on 21 October 1999, on his own behalf and as a member of the Board of the EPO's Pensioners' Association, asking what the Office intended to do with regard to former British civil servants who had already retired and who would undoubtedly have transferred their pension rights if they had known that transfer was possible.

4. In a letter dated 8 November 1999, the EPO's Pensions Department replied that it had been informed by the PCSPS that a transfer of pension rights was not possible for staff members who had already started to draw the pension to which they were entitled as former British civil servants. While regretting that the agreement of the British authorities could not be applied in the complainant's case, the author of the letter asked for his "understanding", adding that the Office was powerless to intervene.

5. Not satisfied with this reply, the complainant wrote again on 19 November 1999 saying that, having drawn a PCSPS pension for more than six years, he accepted the fact that the PCSPS was no longer willing to consider a transfer of his entitlements. He added that he had nevertheless incurred a substantial loss on account of the EPO's mistake, and former British civil servants who had been unjustly denied the transfer of their pension rights should be entitled to a financial compensation greater than that currently provided under Article 46 of the Regulations.

6. In a letter dated 9 February 2000, the Director of Personnel Development reiterated that the purpose of the note published in the Gazette had not been to open retroactively the possibility of a transfer of pension entitlements for British officials already in receipt of a PCSPS pension. On 15 February 2000 the complainant filed an internal appeal against the decision, which he alleged refused to grant him "equivalent treatment" to that of former British civil servants serving with the EPO but not yet retired.

7. In its opinion of 20 March 2002, the Appeals Committee considered that the appeal was admissible, but that it should be dismissed as unfounded. In a letter of 22 April 2002 the Principal Director of Personnel informed the complainant of the decision taken by the President of the Office to reject his appeal, in accordance with the Appeals Committee's recommendation. That decision is now challenged by the complainant.

8. The defendant argues before the Tribunal, as it did unsuccessfully before the Appeals Committee, that the appeal was irreceivable because the complainant had been informed on 8 November 1999 that the transfer of his pension entitlements was not possible, so that the time limit for an appeal expired on 8 February 2000. The appeal lodged on 15 February 2000 was thus outside the time limit, bearing in mind that the decision of 9 February 2000 merely confirmed that of 8 November 1999.

9. The Tribunal agrees with the Appeals Committee that the appeal was receivable: by a letter of 8 November 1999 the complainant was informed, in reply to his enquiry, that retired former British civil servants could not have their entitlements transferred, but although the complainant appeared to accept that reply in his letter of 19 November, he also asked for compensation for his alleged loss. It is this request for compensation which must be regarded as having been rejected by the Director of Personnel Development in his letter of 9 February 2000, and it is against this decision that the complainant appealed on 15 February, that is to say, within the prescribed time limit.

10. In support of his request, the complainant puts forward the same arguments as before the Appeals Committee. He submits that the Administration has not shown that it made sufficient efforts to negotiate an agreement with the British authorities similar to that negotiated with Germany, or even to enquire about the rights of officials in his situation. He asserts that if he had known in good time that his pension rights with the PCSPS could be transferred to the EPO's Pension Scheme, his monthly income would have been higher by some 500 pounds. Having made a mistake, the defendant owes him compensation.

11. The EPO replies to these pleas that the complainant has been receiving an enhancement of benefits, as provided for in Article 46 of the Regulations, and that granting his request would lead to double compensation. It also contends that it was legitimately under the impression, until 1999, that the British authorities would not agree to the transfer. Yet their agreement was necessary, under the terms of Article 12, for the transfer to take place. No promise had been made to the complainant or to other officials in the same situation. Moreover, any comparison

with the situation of staff members benefiting from the agreement with the German authorities should be excluded.

12. It appears from the file that the Organisation legitimately believed that an agreement with the UK authorities was required for a transfer of the pension entitlements of British officials of the EPO to take place, in accordance with Article 12(1), and that negotiations with the British authorities were at a standstill owing to the position adopted by the DTI and the British Treasury. Moreover, an exchange of correspondence in April 1992 between the President of the EPO, the British Minister for Foreign Affairs and the Comptroller-General of the UK Patent Office shows that the issue was considered to be still pending and unresolved, despite the EPO's manifest wish to see that the British nationals were treated fairly.

13. Nevertheless, it was only when two EPO staff members, who had previously been employed by the UK Patent Office and who were approaching the age of 60, enquired with the DTI in January 1999 about their right to transfer entitlements and obtained a positive reply, that the situation became clear. The EPO's Pensions Department then wrote on two occasions, on 14 January and 17 May 1999, to the Superannuation Section of the DTI to make sure that the officials concerned were in fact entitled to request the transfer of their pension entitlements accrued with the PCSPS. It was in reply to those enquiries that the DTI's Superannuation Section replied, in a letter dated 17 May 1999, that the right to transfer benefits out of the PCSPS had existed since 1 January 1986 under the Social Security Act 1985 and that officials who had left the British pension scheme after 1 January 1986 were entitled to transfer at any time before their benefits became due. Officials who had left the scheme earlier were in fact also entitled to request transfer under PCSPS rules.

14. In the circumstances, the defendant's share of responsibility is reduced in view of the attitude of the British authorities, who appear for years to have failed to take account of the provisions of their domestic legislation, even though the EPO tried on several occasions to negotiate a satisfactory solution. Nevertheless, while the Organisation was under no obligation to sign an agreement similar to that concluded with Germany, the EPO did acknowledge that it was as a result of a mistake that the officials concerned had been denied the possibility of transferring their pension entitlements.

15. The mistake made by the defendant, which it acknowledged in its note of 11 October 1999, constituted a fault for which the complainant may legitimately claim compensation. But it is also true that it is not possible retroactively to rectify the situation of an official who, as the Organisation indicates, has been drawing a pension for several years from the PCSPS (which is unwilling to authorise a transfer whereas such authorisation would in any case be necessary) and who is also receiving an EPO pension, plus the enhancement of benefits allowed under Article 46. The complainant's entitlements with respect to these two pension schemes should be regarded as definitively settled and any compensation to which he is entitled should not aim retroactively to restore the situation which might have existed had the PCSPS transferred the actuarial equivalent of his pension entitlements in due time.

16. Since it is not possible retroactively to restore the rights the complainant would have enjoyed if, at his request, the PCSPS had paid over to the EPO's Pension Scheme the sums equivalent to his pension entitlements as a British civil servant, any rights to compensation he may claim need to be examined in the light of several factors. Firstly, the defendant cannot be accused of deliberately neglecting the interests of its staff members. It has proved that it tried in good faith, though on the basis of erroneous information, to negotiate with the British authorities and that it cannot be held responsible for the failure of those negotiations, which in the event proved unnecessary. Secondly, it does not appear from the file that the complainant, when claiming his pension entitlements from the PCSPS, ever requested a transfer, which would probably have been agreed to since the British authorities recognise that such a transfer had always been in order. Lastly, as the case stands, it is impossible to calculate the loss which the complainant really incurred. While it appears established, in the EPO's note of 20 May 1996, that the years of reckonable service which could have been transferred would have amounted to 8.75 years - the figure used to determine the enhancement payable to the complainant under Article 46 of the Pension Scheme Regulations - it is not possible to determine with any accuracy the elements needed to arrive at an assessment of the complainant's theoretical loss, such as the sums which would actually have been transferred by the PCSPS, changes affecting the UK pension scheme, the effects of taxation systems that differ according to whether pension benefits are paid internationally or not, or the complainant's life expectancy.

In view of these uncertainties and the fact that the two pensions received by the complainant have already been settled once and for all and cannot be changed, the Tribunal can only award a lump-sum compensation, which will take account of all the circumstances of the case and in particular of the fact that the defendant is not entirely to

blame. It considers that in fair compensation the Organisation should pay the complainant a sum equivalent to five years' lost income arising from the difference between the gross amount of pension benefits he receives from the two schemes and the gross amount of the single benefit he would have received on retirement if his entitlements had been transferred at that date in accordance with Article 12 of the EPO's Pension Scheme Regulations. The basis of this calculation should be the same as that used on the date that the complainant's pension entitlements under the EPO's Pension Scheme were determined.

17. As the complainant is partially successful, he is entitled to 2,000 euros in costs.

DECISION

For the above reasons,

1. The Organisation shall pay the complainant compensation calculated as explained under 16, above.
2. It shall pay him 2,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 16 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet