

## **FORTY-FIFTH ORDINARY SESSION**

### ***In re* PHERAI**

#### **Judgment No. 441**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Patent Organisation (EPO) by Mr. Shantisaroop Pherai on 26 November 1979, the EPO's reply of 4 February 1980, the complainant's rejoinder of 29 February and the EPO's surrejoinder of 6 June 1980;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 8 and 23 of Annex III to the Staff Regulations of the International Patent Institute, Articles 60 and 72 of the EPO Service Regulations and Articles 4, 10 and 23 of the Agreement on the Integration of the Institute into 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 material facts of the case are as follows:

A. The complainant who was born in Surinam in 1947, joined the staff of the International Patent Institute on 1 October 1970. At the time he was a Dutch citizen and had been living in the Netherland since 15 July 1968. After the accession of Surinam to independence on 25 November 1975, the complainant took Surinamese nationality. On 1 January 1978 the Institute was integrated into the EPO and so he thus became a member of the EPO staff. In the Institute he had not been entitled to expatriation allowance, amounting to 18 per cent of total basic salary, since under Article 51 of the Institute Staff Regulations only staff members who had never held Dutch citizenship were so entitled. Article 27 of Annex III to the Regulations did, however, entitle him to repayment of the cost of travel on home leave to Surinam.

B. On 20 December 1977 the complainant asked the EPO to pay him from 1 January 1978 the expatriation allowance provided for in Article 72 of the EPO Service Regulations. EPO staff were entitled to the allowance provided that at the time of appointment they were not citizens of the country in which they were serving and had not been continuously resident in that country for at least three years, "no account being taken of previous service with other international organisations". In his reply of 30 August 1978 the Chief of Personnel said that Article 72 did not apply to staff members transferred from the Institute. On 12 September 1978 and again on 29 March 1979 the complainant filed an appeal. He cited Article 60 of the EPO Service Regulations, which states that only staff members entitled to expatriation allowance may be granted home leave, and asked that he should continue to be granted home leave. On 26 April 1979 the Appeals Committee recommended the President of the EPO to dismiss the claim for expatriation allowance but "to propose to the Administrative Council, that, in accordance with Article 23 of the Agreement on integration, it make additional arrangements to deal with the complainant's situation by providing for the grant of home leave and repayment of the costs of travel on home leave". On 24 October 1979 the President dismissed the appeal outright on the grounds that the complainant was entitled neither to expatriation allowance nor, on that account, to home leave. The complainant is impugning that decision.

C. The complainant contends that, contrary to the Appeals Committee's view, in the event of dissolution of an international organisation and succession by another, the staff cease to be employed by the former and are forthwith employed by the latter. The date of appointment to the Institute may not therefore be treated as the date of appointment to the EPO. Nor can it be said that the complainant was transferred from the Institute to the EPO since Article 8 of the Institute Staff Regulations, which related to assignments and transfers of staff, afforded no legal basis for such transfer. He therefore became automatically entitled under Articles 72(1) and 60(1) and (2) EPO Service Regulations to the expatriation allowance and to home leave in Surinam from the date of his appointment, i.e. from the date on which he joined the staff of the EPO. That is borne out by the German version of Article 72(1) of the EPO Service Regulations, in which "Dienstantritt" (entry into service) corresponds to "engagement" in the French version. It is also the tenor of Dutch law on company succession, under which the staff

of the former employer are deemed to be engaged by the new one. An EPO personnel circular dated 12 July 1978 dealt with the question of the place of origin of former Institute staff. The circular gives effect to Article 60(2)(1) of the EPO Service Regulations, which states that the place of origin is determined at the time of appointment. Subsidiarily, the complainant argues that, assuming that there was no break between his employment at the Institute and his employment at the EPO, the right to home leave expenses which he enjoyed at the Institute and which was worth a large sum - 8,000 guilders every two years - is an acquired right.

D. In his claim for relief the complainant asks the Tribunal: (a) to quash the decision of the President of the EPO dated 24 October 1979 and declare that the complainant is entitled to expatriation allowance and consequently to the benefit of the provisions of the Staff Regulations on home leave with effect from 1 January 1978, or, subsidiarily, 1 January 1979; (b) to order the EPO to pay interest on the sums due at the rate of 10 per cent a year; (c) subsidiarily, to declare that he is entitled to payment of the cost of travel to Surinam for himself and his family; and (d) to award him 1,500 guilders in costs.

E. In its reply the EPO contends that the complainant is entitled neither to expatriation allowance nor to home leave in Surinam with his family. As regards expatriation allowance, it cites Article 10 of the Agreement on integration, which states that transferred officials who received allowances at the Institute shall receive the corresponding allowances at the EPO "provided that they continue to satisfy the conditions laid down in the Staff Regulations of the Institute granting entitlement thereto". It points out that, as the complainant admits, he was not entitled to the expatriation allowance at the Institute. As regards the transferred officials, Article 72 of the EPO Service Regulations, which the complainant cites, is subject to Article 10 of the Agreement on integration. His contention that he was reappointed by the EPO is mistaken: under Article 4 of the Agreement, all officials of the Institute automatically became employees of the EPO on integration. Besides, the provisions of the EPO Service Regulations on the appointment of new officials cannot apply to officials transferred from the Institute. The adoption of the Agreement makes immaterial any argument based on theories of succession of organisations or on the Dutch law of company succession, the more so since national laws differ widely on the subject. The purpose of the Agreement was to safeguard the employment of Institute staff. As for the personnel circular dated 12 July 1978, it refers not to Article 60(2)(1) but to Article 60(2)(2), which relates to arrangements for changing the place of origin of serving officials, and so it merely confirms that the integration of Institute officials was not by appointment but by transfer. Contrary to what the complainant contends, the EPO staff in Berlin were not taken over in the same way as the Institute staff since for the Berlin staff there was no integration agreement which provided for succession. Lastly, the EPO observes that in earlier judgments the Tribunal has held the Agreement to be lawful. Under Article 60 of the EPO Service Regulations, to which according to Article 4 of the Agreement the complainant is subject, the right to home leave depends on the right to expatriation allowance. Since the complainant does not get the allowance, he has no right to home leave. Nor has he any acquired right to payment of the home leave expenses he used to get in the Institute, since Articles 4 and 10 of the Agreement on integration, which mention the allowances to which there is an acquired right, does not mention the expatriation allowance. True, the principle of acquired rights does afford protection against total and general abolition of an important allowance, but it does not preclude changes in the terms on which the allowance is paid. The conditions for repayment of home leave travel expenses are not the same in the EPO, where the right to home leave depends on the right to expatriation allowance. The EPO therefore asks the Tribunal to dismiss the complaint in its entirety.

F. In his rejoinder the complainant observes that the Agreement on integration takes precedence over the EPO Service Regulations. Consequently, the failure to apply the arrangements for recruitment prescribed in those Regulations to former Institute officials does not mean that they were transferred and not reappointed by the EPO. As regards the relevance of national law on succession, it is an exception rather than a general principle of civil law for a new employer to assume the rights and duties of the former employer under a contract of employment. National law therefore bears out the view that the EPO actually appointed the former Institute officials. It is not true to say that the personnel circular of 12 July 1978 was intended just to revise the method of determining the place of origin. Had that been so, it would not have been retroactive to 1 January 1978. The complainant notes the EPO's argument that officials of the German Patent Office in Berlin were individually reappointed, whereas the Institute officials were all transferred together. He believes that in fact the German Office, which the EPO took over as its Berlin agency, was treated in the same way as the Institute: in the case of Institute staff too the Director-General of the Institute took an individual decision for each official. Thus the complainant received a letter from the Director-General, No. 551 dated 12 December 1977, informing him that on 1 January 1978 he would become an EPO staff member. He also denies that the integration was equivalent to "universal succession". In fact there was universal transfer only of the Institute's assets and liabilities and universal succession only to contractual rights and obligations. In other words, such succession did not cover the staff who were governed by staff regulations.

Moreover, the former Institute staff are subject to the EPO pension regulations; so are other staff members appointed by the EPO who have come from other organisations; and that again shows that there was no transfer of the institute officials. Lastly, the complainant challenges the interpretation which the EPO puts on the Tribunal's case law on acquired rights. By that interpretation only utter abolition affecting the whole staff would constitute a breach of the principle of acquired rights. In fact, an acquired right is one which derives from the relationship between the staff member and the organisation and is therefore subjective. The complainant presses all his claims for relief.

G. In its surrejoinder the defendant stresses the fact that recruiting an official implies a legal action and an actual entry into service. As far as the complainant is concerned he automatically became an official of EPO and was not recruited. He cannot therefore claim the benefit of such provisions as are applicable to newly-recruited staff. As a consequence the country which was recognised as his place of origin under the Staff Regulations of the Institute became his home under Article 60 of EPO's Staff Regulations. The defendant claims that the analogy drawn by complainant with the officials of the Berlin Office is immaterial since in that case there was no universal succession and that his arguments, based on the civil law of the Federal Republic of Germany, are unfounded, German law being inapplicable in this instance. It also rejects as foreign to the dispute the comparison - purely hypothetical - which he makes between the Agreement on integration and similar agreements which the EPO might be called upon to enter into with the "organisations coordonnées". As regards pension rights they were transferred to the EPO pensions scheme by virtue of Article 13 of the integration Agreement, which proves once again that the officials from the Institute did not "enter into service" with the EPO. Lastly, the defendant recalls the Tribunal's previous decision on acquired rights. According to these decisions existing allowances are guaranteed; in other words, they cannot be wholly or partially cancelled, but they may be reasonably modified.

#### CONSIDERATIONS:

1. On 1 October 1970, when he joined the staff of the International Patent Institute, the complainant was a citizen of the Netherlands. When Surinam, where he was born, became independent on 25 November 1975, he took Surinamese nationality. On 1 January 1978 the Institute was integrated into the European Patent Organisation (EPO) under an international agreement.
2. In his complaint - which, being dated 26 November 1979, was filed within the time limit and in accordance with the requirements set in Article VII, paragraphs 1 and 2, of the Statute of the Tribunal - the complainant asks the Tribunal:
  - (a) to quash the President's decision of 24 October 1978 and declare that the complainant is entitled to expatriation allowance and consequently to the benefit of the provisions of the Staff Regulations on home leave with effect from 1 January 1978, or, subsidiarily, 1 January 1979;
  - (b) to order the EPO to pay interest on the sums due at the rate of 10 per cent a year;
  - (c) subsidiarily, to declare that he is entitled to payment of the cost of travel to Surinam for himself and his family; and
  - (d) to award him 1,500 guilders in costs.

The claim regarding the expatriation allowance

3. By a letter dated 20 December 1977 the complainant, relying upon Article 72.1 of the EPO Staff Regulations, applied to the EPO for payment of an expatriation allowance with effect from 1 January 1978.

In his reply of 30 August 1978 the Chief of Personnel said that Article 72 did not apply to staff members transferred from the Institute. On 12 September 1978 and again on 29 March 1979 the complainant applied to the President of the EPO, asking him to treat the application if need be as an internal appeal. On 24 October 1979 the President dismissed the appeal on the grounds that the complainant was not entitled to expatriation allowance.

4. This claim, whether it relies on Article 10 of the integration Agreement or Article 72 of the EPO Staff Regulations, cannot succeed.
5. Article 10 of the Agreement is not applicable: it expressly provides that staff members who were entitled to

expatriation allowance will continue to receive the allowance, and the complainant, who was not entitled to it when employed by the Institute, may not claim it from the EPO.

6. As regards Section 72 of the Staff Regulations, the words "at the time of their appointment" require interpretation. Within the meaning of Article 4 of the integration Agreement the complainant, like all other former International Patent Institute officials, was not appointed at the time of his transfer to EPO, but on the day he joined the Institute. The provisions of the said Article indicate that these officials of the Institute were transferred to EPO and became staff members of that Organisation in their capacity of officials engaged by the Institute. In other words, inasmuch as an official is transferred to an organisation he is not deemed "appointed" by it. This claim therefore fails.

The claim regarding repayment of the cost of travel on home leave

7. The complainant is not entitled to this repayment under Article 10 of the integration Agreement, which refers to certain allowances but not the payment in question. There remains to consider whether the refusal of the allowance is contrary to an acquired right of the complainant. There is a breach of an acquired right when an allowance which may have prompted a staff member to join the organisation is done away with. In the present case the discontinuance of the repayment of his travelling expenses, which represented a considerable advantage for the complainant and which may have prompted him to accept his appointment, is a breach of an acquired right.

#### DECISION:

For the above reasons,

1. The claim regarding the expatriation allowance is dismissed.
2. The claim regarding repayment of the cost of travel on home leave succeeds.
3. The complainant is awarded 300 guilders towards his costs.

In witness of this judgment by Mr. André Grisel, Vice-President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy 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 11 December 1980.

(Signed)

André Grisel  
Devlin  
H. Armbruster

Bernard Spy