

SIXTY-NINTH SESSION

In re SENFTL

Judgment 1032

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hannes Senftl against the European Patent Organisation (EPO) on 4 October 1989, the EPO's reply of 21 December 1989, the complainant's rejoinder of 6 February 1990 and the Organisation's surrejoinder of 18 April 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 12(1) of the EPO Pension Scheme Regulations and Rule 12.1/1(i)(b) of the Implementing Rules;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The complainant, an Austrian born in 1944, used to work for a West German company, Bayer A.G., and was a member of its employees' pension scheme. He took up duty with the EPO in Munich on 1 April 1986. By a letter of 17 October 1986 Bayer told him that pension entitlements had accrued to him under their scheme but he might have his contributions refunded and would then have his future entitlements reduced pro rata.

By a letter of 30 July 1987 he applied to the EPO for transfer to its Pension Scheme of his own contributions to Bayer's scheme.

In a letter of 30 November 1987 Bayer said that the amount due would come to 28,279 Deutschmarks and it excluded their own contributions to his pension, which could not be paid out.

The Personnel Department answered his letter of 30 July 1987 in a letter of 22 August 1988, which said that the Scheme did not accept inward transfer of only part of pension entitlements acquired elsewhere.

The complainant lodged an appeal on 17 November 1988 and the President of the Office referred it to the Appeals Committee. In its report of 23 May 1989 the Committee construed in his favour Article 12(1) of the EPO Pension Scheme Regulations and Rule 12.1/1(i)(b) of the Implementing Rules* and recommended allowing his appeal. (*Article 12(1) reads: "An employee who enters the service of the Office after leaving the service of ... 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." Rule 12.1/1(i)(b) states: "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 aforementioned pension scheme.") But by a letter of 8 August 1989, the decision impugned, the President rejected it on the grounds that what he wanted to transfer did not come within 12.1/1(i)(b): it was neither the "actuarial equivalent" of his pension entitlements with Bayer nor "a capital payment in respect of rights to a pension", but just the sum of his contributions plus interest, and he would be keeping some of his entitlements with Bayer.

In a letter to him of 11 August 1989 Bayer confirmed that they would not make over the actuarial equivalent of their own contributions.

B. The complainant expresses surprise that the grounds for the impugned decision are new, never having been suggested in the appeal proceedings. They are, besides, mistaken. Since the payment of the lump sum will lower his entitlements with Bayer the amount presumably constitutes the actuarial equivalent of part of his pension rights. In any event the term "any amounts" in Article 12(1) does not require actuarial or any other particular method of reckoning: the condition set in the impugned decision is not in the rules, and is unreasonable anyway.

It is mistaken to contend that the actuarial equivalent of full pension entitlements under the earlier scheme must be transferred. The English and German versions of 12(1) do not require that construction, and the French - which says that rights are transferred "dans la mesure où ce régime permet pareil transfert" - is actually against it, as are all three language versions of 12.1/1(i)(b). The words "the whole" in (i)(b) in fine refer to the amounts payable, not, as the EPO makes out, to the entitlements.

The complainant submits that his own reading fits the purposes of transfer, which are to concentrate the employee's pension rights in the EPO's Scheme and preserve his earlier rights insofar as he wants to transfer them on moving to the EPO. The EPO's construction would thwart those purposes since transfer would usually be precluded. Private industrial firms commonly make over only part of the employee's rights when he leaves, and compulsory state schemes hardly ever allow pay-outs.

The complainant asks the Tribunal to rescind the impugned decision, order the EPO to allow transfer of the 28,279 DM to its Pension Scheme and award him 1,000 DM in costs.

C. In its reply the EPO explains that it allows transfer only from schemes compatible with its own. One condition it sets for transfer is that the amount the employee makes over must correspond to all his accrued rights. Bayer's letters of 30 November 1987 and 11 August 1989 make it plain, and indeed the complainant does not deny, that the amount he wants to transfer corresponds to only part of his rights.

The grounds for the impugned decision are not new but reflect those stated in the letter of 22 August 1988 from the EPO's Personnel Department.

Article 12(1) and Rule 12.1/1(i)(b) afford the legal basis for disallowing transfer of just part of pension rights. The complainant's misreading of 12(1) hinges on the French version, which he says provides for transfer "insofar as", and not just "provided that", the other pension scheme allows it. As he concedes, the English and German versions do not fit that construction; besides, "dans la mesure où" sometimes means "provided that" and should be so construed here so as to bring the French into line with the other languages.

The EPO's construction is in keeping with the guiding principle of contributors' solidarity. Even an EPO official who has served long enough to have the maximum pension must go on contributing, albeit with no further advantage to himself. If allowed to transfer part of his rights from another scheme he might, over and above the maximum EPO pension, still enjoy the remainder of his rights under that scheme. Solidarity requires transfer of his rights in full, and of the whole amount, as Rule 12.1/1(i)(b) stipulates, the only exception being rights under a compulsory state scheme.

It would also be in breach of solidarity to let someone spread pension rights over several schemes. That is why, when an official leaves, he may transfer his full EPO rights to another scheme.

D. The complainant rejoins that it is unclear from the EPO's reply whether it is still contending that because of its nature the amount does not qualify under (i)(b).

The EPO's interpretation disregards the purposes of its Scheme. How far accrued rights may be transferred turns on the rules of the earlier scheme, and only part, if any, of the rights may commonly be transferred. But their value will still be reckoned according to the amount paid over and in line with the EPO's own rules so as to avoid overburdening its Scheme. Had the intent been to exclude part transfer the wording would have differed.

There is no threat to solidarity in allowing part transfer: the increase in entitlements under the EPO's Scheme is the direct and intended consequence of transfer, and it is irrelevant to solidarity whether the amount made over corresponds to all or some of the rights acquired elsewhere. True, the official should not be free to alter his EPO rights by making over only part of the sums paid out of the earlier scheme or by adding payments made for other purposes, but 12.1/1(i)(b) precludes that, and it is not what the complainant wants anyway.

E. In its surrejoinder the EPO submits that the rejoinder raises no new point that in any way weakens its case. It observes that the issue is not what to call the sum the complainant wants to transfer but whether it corresponds to the whole of his earlier pension rights. An official's previous employers are free under the rules of their pension schemes to allow or refuse transfer, and the EPO is claiming the same freedom for its own scheme, particularly respect for the principle of solidarity, which precludes transferring only part of the official's entitlements under the

earlier scheme. Its reading of the material rules not only turns on their wording but takes account of their purpose as well.

CONSIDERATIONS:

1. On joining the staff of the EPO on 1 April 1986 the complainant became a participant in its Pension Scheme. He had earlier been employed by Bayer, a West German company, and by a letter of 30 July 1987 he formally applied for the transfer to the EPO's Pension Scheme of a sum of money to which he was entitled under the Bayer pension fund.

In a letter dated 17 October 1986 Bayer had informed him that having left the company's employment, he had, with effect from 1 April 1986, been registered as an associate member of its pension fund so that, though he would continue to be affiliated, he would not have to pay contributions. Bayer gave him the option of having his own contributions refunded but leaving its contributions to his credit in its pension fund. By a letter of 30 November 1987 it refunded his contributions to him in the amount of 28,279 Deutschmarks. On 11 August 1989 the company confirmed that he still had a vested right which was based on its own contributions but said that it was not willing to transfer their actuarial equivalent to the EPO's Pension Scheme.

The EPO having refused the transfer of the sum of his refunded contributions to its Pension Scheme, he filed an internal appeal. The Appeals Committee recommended allowing it and letting him transfer the sum to the Pension Scheme, but the President of the Office rejected the appeal. That is the decision impugned.

2. The material provisions are Article 12(1) of the EPO Pension Scheme Regulations and Rule 12.1/1(i)(b) of the Implementing Rules.

Article 12(1) reads:

"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."

And Rule 12.1/1(i)(b) provides:

"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 aforementioned pension scheme."

The complainant points out inconsistencies between the English, French and German texts of those provisions.

The three language versions, being equally authentic, shall be deemed to bear the same meaning. Where there are inconsistencies the Tribunal will apply the construction which, having regard to the purpose of the provisions, best reconciles the various versions.

The Tribunal's ruling in this case turns on four points.

The first is that the use of the terms "may arrange for payment" in Article 12(1) and "certified by the previous pension scheme" in Rule 12.1/1(i)(b) envisage a transaction between two pensions schemes, not between a pension scheme and a staff member.

Secondly, the words "any amounts corresponding to the retirement pension rights accrued under his previous pension scheme" in Article 12(1) must refer to the entirety of those rights.

Thirdly, the privilege of having pension rights transferred is subject to the proviso that the previous scheme allows such transfer. The evidence here is that the previous scheme does not.

And fourthly, the Implementing Rules require certification by the previous scheme that the amount to be credited

represents the actuarial equivalent of the staff member's pension rights. Bayer can give no such certification to the complainant because the amount of his refunded contributions is not the actuarial equivalent of his pension rights under its scheme.

The conclusion is that under the material provisions the EPO Pension Scheme was not empowered to accede to the complainant's request and that the President's decision of 8 August 1989 is well founded in law.

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 the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 26 June 1990.

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner