Registry's translation, the French text alone being authoritative.

EIGHTY-SEVENTH SESSION

In re Andrews (Christopher) and others

Judgment 1864

The Administrative Tribunal,

Considering the complaints filed against the European Patent Organisation (EPO) on 5 June 1998 and corrected on 3 July by:

Mr C. Andrews
Mrs J. Barthl-Wagner (No. 2)
Mrs A.I. Berglund-Werner
Mr P.S. Bruzzese
Mrs B. Burke
Mrs M. Cappadonia
Mr G. Castriciano
Mr C. Cavestri
Mr G. Chebance
Mr G. Chistè
Mr T. Christodoulou
Mr E. Colonnella
Mrs A. Counillon
Mrs J. Diel
Mr S. Faggiano
Mr M. Gagliardi (No. 2)
Mrs R. Galloway-Przybilla
Mr J. Hamer
Mr W.B. Hauschild
Mr O. Hötzer
Mrs F. Ide
Mrs S. Jacobus-Prues
Mrs A.M. Kohlstadt
Mr P. Krasa
Mr J. Kröll
Mr A. Lovrecich (No. 2)
Mr G. Ludwig
Mrs M. MacFarland
Mrs S. Marchesi
Mr P. Martorana
Mr E. Mondi (No. 4)
Mrs P. Niggemann
Mrs B.-I. Nordmark
Mrs E. Pachta
Mrs I. Pether-Trost
Mr A. Rauter
Mr F. Scaglia
Mrs M.G. Sotgia
Mrs F. Townend
Mr C. Vullo
Mrs N. Werner

Considering the EPO's reply of 21 October 1998, the complainants' rejoinder of 25 January 1999 and the Organisation's surrejoinder of 15 March 1999;

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

Considering the applications to intervene filed by Mrs Jeanine Draszcz and Mrs Franscesca Telari on 19 March 1999;

Having examined the written submissions and disallowed the complainants' application for hearings;

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

A. The complainants hold permanent appointments at the European Patent Office, the secretariat of the EPO. Except for Mrs I. Pether-Trost, who is German and serves in The Hague, they are non-Germans and their duty station is Munich. None of them receives the expatriation allowance as they do not fulfil the second requirement prescribed in Article 72(1) of the Service Regulations which reads:

"An expatriation allowance shall be payable to permanent employees who, at the time they take up their duties or are transferred:

a) hold the nationality of a country other than the country in which they will be serving, and

b) were not permanently resident in the latter country for at least three years, no account being taken of previous service in the administration of the country conferring the said nationality or with international organisations."

At its 39th Session, held from 4 to 7 December 1990, the EPO's Administrative Council decided to grant the expatriation allowance and home leave entitlement to all staff of a nationality other than that of the country of their duty station. However, the Office was to submit a proposal for the revision of Article 72(1) b). Article 72 was thus partly amended with effect from 1 July 1990.

Two of the complainants told the President of the Office in a letter that they intended to contact a number of Administrative Council delegations with a view to further amendment of Article 72(1) b). By a letter of 23 September 1993, the President advised them against such a move, as it would have a "negative impact" on the Council's discussions.

In the absence of any further amendment, some thirty complainants asked the President, in letters of 29 April 1996, to grant them the expatriation allowance. The Administration rejected their request. Between 24 June and 19 November, the same complainants lodged internal appeals. They were referred to the Appeals Committee and the Administration so informed them in a letter of 25 July 1996. In its report of 7 January 1998 the Committee recommended rejecting them. The President endorsed that recommendation in a letter of 10 March 1998 - the impugned decision.

B. Citing the Tribunal's Statute and in response to arguments put forward by the Organisation in the internal appeal, the complainants submit that their complaints meet all receivability requirements.

They allege that by withholding the expatriation allowance the EPO discriminated against them. It arbitrarily created two categories of expatriate staff for no objective reason, since Article 72(1) b) is not a valid criterion for granting or withholding the allowance. It was thus in breach of equal treatment, a principle recognised in the case law, and a number of international texts including the Universal Declaration of Human Rights.

The system established in Article 72 is inconsistent and open to abuse: for example, someone who was granted the allowance on recruitment may keep it even after the "disqualifying period" has been completed. The rule is therefore "superficial and arbitrary".

They ask the Tribunal to quash the President's decision of 10 March 1998 and to order the EPO to pay them the allowance retroactively to their respective dates of appointment or, failing that, to 1 July 1990 or to 23 September 1992 or to the date of their complaints.

C. In its reply, the Organisation submits that both the main and subsidiary claims in the complaints are irreceivable. Apart from Mrs J. Barthl-Wagner and Mrs M. Cappadonia, none of the complainants challenged their pay slips in time. Contrary to the complainants' assertion, the Tribunal's earlier rulings that each non-payment decision may be challenged does not mean that the time limit for appeal need no longer be observed. Mrs Barthl-Wagner's second complaint must fail on grounds of *res judicata* (Judgment 664), and Mrs Cappadonia's complaint is irreceivable

because she failed to challenge the President's decision of 15 May 1991 to dismiss her appeal against non-payment of the expatriation allowance.

In subsidiary pleas on the merits, the EPO cites Judgment 754 (*in re* Metten No. 4) under 6 in which the Tribunal ruled that for there to be breach of equal treatment, "there must be different treatment of staff members who are in the same administrative position. Where the circumstances differ, so may the treatment provided that it is a fair, reasonable and logical outcome of the difference". The issue is, therefore, whether the requirements set in Article 72(1) are reasonable and fair. The Tribunal has already heard complaints about this article and has indirectly confirmed that it is consistent with the principle of equal treatment. In the EPO's view, someone who has been living for at least three years in the country of his future place of employment with the EPO may be regarded as sufficiently integrated not to need an expatriation allowance.

There is nothing exceptional about the requirements in Article 72(1) b). Other organisations have similar rules because the simple fact of not being a national of the country of one's employment is not enough to warrant the grant of an expatriation allowance.

The complainants' examples of inconsistencies and abuses of the system as established under Article 72(1) b) are only hypothetical and are not sufficient to invalidate it. A rule's lawfulness depends not on whether it can be circumvented but on whether the goal it pursues is appropriate.

The adoption of certain amendments in 1990 is not proof that Article 72 is "superficial and arbitrary", since the Administrative Council has wide discretion in such matters. The amendments improved the situation for expatriate EPO staff and were the maximum the Administrative Council could allow without incurring criticism about its financial management from politicians in the EPO's member States.

Article 72 is not inconsistent with the international instruments cited by the complainants. Indeed, the Service Regulations are preceded by a statement adopted by the Administrative Council at its 55th Session to the effect that it has "noted with approval the President's declaration that the Office adheres to the said legal provisions and principles".

It points out that the complainants have no qualms about seeking to show that the rule is unlawful *ab initio*, while at the same time asking to have it applied to them.

D. In their rejoinder the complainants submit that every pay slip is an impugnable decision and rebut the Organisation's objections to receivability.

The EPO was wrong to infer from the case law that the Tribunal has implicitly found Article 72 to be consistent with the principle of equal treatment.

The Administrative Council's discretionary authority is restricted by higher law.

The argument that there are underlying political problems is unsound: payment of the allowance would have only a minimal impact on EPO expenditure.

They refute the Organisation's other pleas.

E. In its surrejoinder the Organisation submits that in their rejoinder the complainants put forward no arguments liable to modify the EPO's position, but that the absence of comment in no way implies acceptance on its part.

CONSIDERATIONS

1. The forty-one complainants are all employees of the European Patent Office. One of them is of German nationality and works in The Hague; the forty others are non-Germans and work in Munich. All claim the expatriation allowance provided for in Article 72(1) of the Service Regulations for employees of the Office. They request the Tribunal, in complaints which must be joined, to quash the decisions of 10 March 1998 whereby the President of the Office, in accordance with the unanimous recommendation of the Appeals Committee, confirmed his refusal to pay the allowance in question.

2. Article 72(1), quoted under A above, the provisions of which are applied cumulatively, rules that employees who

are nationals of a country other than the one they work in have no right to an expatriation allowance if, when taking up their duties, they had already been permanently resident there for more than three years. This is the case here.

3. The complainants seek the quashing of the contested decision, as well as the payment of the expatriation allowance from the date of their appointment or, subsidiarily, from 1 July 1990, or, failing that, either from 23 September 1992 or even from the date of filing their complaints. They claim that Article 72(1) b) establishes, without valid reason, two categories of expatriate staff, and that this distinction constitutes unjustified discrimination. They therefore refer to the principle of equal treatment recognised in the Tribunal case law, and also to such international instruments as the Convention No. 111 of the International Labour Organization, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

4. The defendant contends that the complaints are irreceivable, both the main and subsidiary claims, since the complainants did not challenge their pay slips in time. Furthermore, whereas two complainants have previously challenged the refusal to pay them the expatriation allowance, one of them submitted a complaint to the Tribunal which was dismissed (see Judgment 664, *in re* Barthl) and her present one is therefore *res judicata*; and the other, whose internal appeal was rejected, did not come before the Tribunal. In fact, the complainants may indeed challenge their last pay slips within the time limits of the complaint and argue, in support of their complaints, that Article 72(1) b) of the Service Regulations is unlawful, as appears from much supporting case law (see the cases cited in Judgment 1786, *in re* Skulikaris). Thus the Organisation's objection to receivability can only be upheld in part and the Tribunal will still examine the lawfulness of Article 72(1) b) of the Service Regulations, which is the legal basis for the decisions arising from the monthly pay slips showing salaries which did not include the expatriation allowance.

5. However, although the complaints are partially receivable, in the Tribunal's opinion they fail on the merits. No doubt the rules governing the granting and retention of the right to be paid the expatriation allowance are debatable and this is what has led the Organisation to re-examine the situation of expatriate employees on several occasions. But while the system could certainly be improved, it is in line with legal requirements that the applicable rules should precisely define the notion of "expatriation", and fix a length of residence in the country prior to employment beyond which an employee may not be considered as expatriate. As is stated in Judgment 754 (*in re* Metten No. 4), for there to be breach of the principle of equality "there must be different treatment of staff members who are in the same administrative position. Where the circumstances differ, so may the treatment, provided that it is a fair, reasonable and logical outcome of the difference".

6. It is clear that the expatriation allowance is intended to take account of certain disadvantages arising from being a foreigner newly installed in a country. Employees who have resided in the host country for a long time are not subject to the same constraints as those recently installed. But fair and reasonable distinctions between the two must be based on objective criteria and, in this connection, length of residence prior to employment is just such a criterion. Naturally, the length of residence to be taken into account in order to make the distinction may be challenged, but in this matter the Tribunal recognises the Organisation's discretion, provided that the exercise of such power has no adverse consequences. In this case, a period of three years' residence beyond which the complainants may not be considered as "expatriates" would appear reasonable. Although some members of the Administrative Council are far from considering the system satisfactory and point to several inconsistencies as well as the abuses it may engender, and while a rule rigidly establishing length of residence may create "qualification threshold" problems, nevertheless breach of the principle of equality of treatment has not been proved. Even if retaining the allowance beyond a certain time is debatable, this does not mean that the defendant may not establish residence conditions governing the right to expatriation allowance from the outset, as indeed other international organisations have done.

7. Since the argument of breach of the principles of equality of treatment has no substance, there is therefore no need to examine the defendant's arguments that the Tribunal has on several occasions already accepted, at least implicitly, the validity of paying the expatriation allowance to those of its employees who are not nationals of their country of posting and have not been residents for at least three years before taking up their duties.

8. Both the main and subsidiary claims presented by the complainants must fail.

DECISION

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment, adopted on 20 May 1999, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

(Signed)

Michel Gentot
Jean-François Egli
Seydou Ba

Catherine Comtet

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