

NINETY-SEVENTH SESSION

Judgment No. 2367

The Administrative Tribunal,

Considering the thirteenth complaint filed by Mr G. C. A. K. against the European Patent Organisation (EPO) on 30 June 2003, the EPO's reply of 2 October, the complainant's rejoinder of 11 December 2003 supplemented by a letter of 2 March 2004 to the Registrar of the Tribunal, and the Organisation's surrejoinder of 16 March 2004;

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

Having examined the written submissions;

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

A. The complainant, who was born in 1933 and has Swiss and German nationality, retired from the European Patent Office – the EPO's secretariat – on 31 October 1998. He subsequently settled in Switzerland, and opted under Article 33(2)(i) of the Office's Pension Scheme Regulations to have his pension calculated according to the scale applicable to Switzerland, a choice that is irrevocable.

The complainant sent an internal appeal to the President of the Office on 4 March 2003, saying he had heard rumours that EPO pensions paid in Switzerland were to be reduced by 10.7 per cent, and that in order to attain that objective, pension adjustments due under Article 36 of the Pension Scheme Regulations would be withheld. He assumed that the decision had been taken by the Administrative Council at its session of 10-12 December 2002, and that it was contained in document CA/141/02, which as yet he had not seen. He said his appeal was directed against the "mysterious individual decisions" applying the general decision contained in that document. Alleging lack of "procedural care", he claimed material damages. He put forward several other claims, among which he requested legal assistance "compensating for insufficiencies of procedural care".

By a letter of 3 April 2003 the Administration acknowledged receipt of his internal appeal relating to the alleged "insufficiency" of procedural care, and informed him that it had been referred to the Appeals Committee. The complainant wrote on 10 April and 27 May 2003 reminding the Administration of the full scope of his appeal of 4 March. On 27 May he also filed an internal appeal against the implied rejection of his request for legal assistance. The following day, he lodged an internal appeal against the implied rejection of the other claims put forward on 4 March. The Head of Employment Law acknowledged receipt of those letters on 12 June 2003, informing him that as his additional appeals were directly connected to the one of 4 March they would be dealt with in the same proceedings. The complainant challenges the implied rejection of his claims of 4 March 2003.

B. The complainant submits that in mid-2002 the EPO had adjusted salaries and pensions, increasing them to bring them in line with a cost-of-living increase, but his own pension payments were not so adjusted. From hearsay only, he learned that the relevant decisions were taken by the Administrative Council at its December 2002 session, and were recorded in document CA/141/02, which he still had not seen. He refers to them as "partially secret decisions". He understands that they "came into retroactive effect from July 2002", that they concern the adjustment of salaries and pensions in general, that EPO pensions paid in Switzerland are to be reduced by 10.7 per cent, and that the full reduction will be attained by a step by step retention of adjustments that would otherwise be due to him in relation to the cost of living.

His main pleas are that he has been disadvantaged by the denial of pension adjustments; he has also been unlawfully discriminated against, either because he is a Swiss national or because he has opted under Article 33(2)(i) of the Pension Scheme Regulations to have his pension calculated according to the scale applicable to Switzerland. The discrimination has resulted from at least one individual decision that affected him adversely and,

pursuant to Article 106(1) of the Service Regulations, any decision affecting him adversely should have been communicated to him in writing with a statement of the grounds on which it was based - be it in the form of said document CA/141/02.

The complainant seeks the disclosure of “all relevant data, grounds and reasons of official decisions affecting [his] pension in comparison with the pensions of active and retired colleagues”; acknowledgement that he was unlawfully discriminated against; and acknowledgement that he was illegally ‘expropriated’ of rights acquired under Article 33(2) of the Pension Scheme Regulations. He wants “a pension according to acquired rights” and “without illicit discrimination” and claims compensation for the lack of “due procedural care”. He also seeks acknowledgment that there was “at least one individual decision” affecting him adversely. He seeks the quashing of that decision; written notification of all data relevant to the “individual decision modifying the basis of calculation [...] of [his] pension”; a written statement of the grounds on which said decision was based; and notification of the relevant Administrative Council decisions and particularly document CA/141/02. He asks for the hearing of witnesses and wants the Tribunal to rule on his procedural grievances and award him due redress.

C. In its reply the Organisation maintains that the complaint is manifestly irreceivable and unfounded. It deems it to be irreceivable under Article VII(1) of the Tribunal’s Statute as the complainant has not exhausted the internal means of redress. His appeal was registered on 3 April 2003 well within the two-month time limit provided for in Article 109(2) of the Service Regulations, but the complainant gave the Organisation no chance to submit arguments in its defence to the Appeals Committee. He has also done nothing to enquire about the status of the internal appeal proceedings. Furthermore, the complaint is irreceivable in view of the discrepancy between the claims he puts to the Tribunal and the subject matter of his appeal of 4 March 2003.

Replying subsidiarily on the merits, the EPO denies that any procedural error was made and rejects the complainant’s claim to compensation. It submits that the procedure for adjusting remuneration, and hence pensions, is enshrined in the Service Regulations, that the procedure is “transparent and equitable” and is based on objective statistical facts. Moreover, such adjustments do not occur as a result of “partially secret decisions”, as implied by the complainant. Under the applicable rules the basic salary and allowances are adjusted each year with effect from 1 July. The EPO produces document CA/141/02, referred to by the complainant, which constitutes the proposal for adjustment of remuneration with effect from 1 July 2002; that proposal was drawn up by the President of the Office after consultation with the General Advisory Committee. As that document indicates, during the calculation of the adjustment it became clear that a retroactive adjustment from 1 July 2001 was warranted.

The EPO points out that the adjustment procedure may give rise to a negative result, in which case the Organisation’s practice is to maintain remuneration at the previous year’s level until future adjustments set off the negative one. It explains why a negative adjustment was applied to Switzerland. As is clear from the pension slips the complainant received, his pension was in fact adjusted from July 2001. He cannot claim that there was discrimination against him, because the adjustment at issue was correctly applied to all staff.

D. In his rejoinder the complainant develops his pleas. He puts forward several other claims, mainly seeking the disclosure of any other essential information related to decisions that may affect him adversely. He also wants the EPO to “continue the litigation proceedings” either before the Tribunal or within the EPO, and claims compensation for obstruction of justice. In his “additional rejoinder”, contained in the letter of 2 March 2004 addressed to the Registrar of the Tribunal, he presses his application for oral proceedings.

E. In its surrejoinder the Organisation observes that the claims listed in the complainant’s rejoinder exceed the scope of those initially submitted and are irreceivable. From comments the complainant made in his letter of 2 March 2004, it notes that some of his new claims in the rejoinder, including the request for compensation, concerned the subject matter of his fourteenth complaint. Given that he has now withdrawn that complaint, any claims linking thereto would be irreceivable.

It reiterates that there are no grounds for any award of damages. The negative adjustment for Switzerland was the result of a lawfully applied procedure, and was not prompted by any malice on the part of the defendant.

CONSIDERATIONS

1. The complainant is a former staff member of the European Patent Office, having retired at grade A4(2) on

31 October 1998. He is a national of both Germany and Switzerland, and, on his retirement he settled in Switzerland and made an irrevocable election to receive his pension at the scale applicable in that country.

2. In late February 2003, the complainant learned that the pension scale applicable to Switzerland had been reduced by 10.7 per cent. This had not been obvious from his pension slips as the Organisation's practice is to maintain the previous level of pension, if a reduction occurs in the relevant scale, until the reduction is cancelled by subsequent increases.

3. On 4 March the complainant wrote to the President of the Office lodging an internal appeal against "the mysterious individual decisions to apply" the 10.7 per cent reduction to his pension. He made several consequential claims, including seeking compensation for his efforts in ascertaining the situation affecting pensions paid in Switzerland, material damages and "legal assistance compensating for insufficiencies of procedural care in further official actions".

4. The EPO replied to the complainant's letter on 3 April 2003, noting that he had "filed an internal appeal related to an alleged 'insufficiency of officially applied procedural care'" and informing him that the President considered that his appeal was not founded. The letter further informed him that the matter had been referred to the Appeals Committee for an opinion. The complainant wrote to the Administration on 10 April, and again on 27 May, stating that he could not "recognize [in his letter of 4 March] an internal appeal of the kind defined" in the letter of 3 April and that he would not participate in any "aimless action". He reiterated that his internal appeal involved three aspects, namely, an appeal against "individual decisions affecting [...] the payment of adjusted benefits to [his] pension", a claim for compensation and a request for legal assistance.

5. Also on 27 May, the complainant filed an internal appeal with the President treating the failure to respond expressly to his request for legal assistance as an implied rejection. He filed a similar appeal on 28 May against the implied rejection of claims submitted on 4 March, and claimed compensation. The EPO replied to these letters on 12 June stating that the matters raised in those appeals were directly related to the internal appeal which arose from his letter of 4 March and would be dealt with in the same proceedings.

6. It seems that the Appeals Committee has not yet dealt with the appeal referred to it following the complainant's letter of 4 March 2003. In any event, it had not dealt with it when, on 30 June 2003, the complainant lodged his thirteenth complaint with the Tribunal.

7. The complainant brings these proceedings on the basis that the President of the Office failed to take a decision on the matters raised in his letter of 4 March 2003 within sixty days. In this respect, the complainant relies on Article VII(3) of the Tribunal's Statute which allows that, if there is a failure to take a decision on a claim within sixty days, "the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision". In such a case, the period of ninety days required by Article VII(2) runs "from the expiration of the sixty days allowed for the taking of the decision by the Administration".

8. By his complaint to the Tribunal, the complainant seeks information regarding decisions affecting his pension and requests that his pension be calculated without the 10.7 per cent reduction which, he contends, amounts to discrimination and the illegal "expropriation" of his acquired rights. Additionally, he claims compensation "for the lack of due procedural care". He also seeks to call various witnesses and, by his "additional rejoinder", asks "to be personally heard by the Tribunal in oral proceedings".

9. In its reply and surrejoinder, the EPO contends that the complaint is not receivable as the complainant has not exhausted the internal means of redress. Additionally, it argues that the decisions affecting the complainant's pension were lawfully and properly taken.

10. As the documentary evidence clearly demonstrates that the complaint is not receivable, there is no occasion for the calling of witnesses or the holding of an oral hearing. Accordingly, both applications are refused.

11. Article VII(1) of the Tribunal's Statute clearly provides that a complaint is not receivable unless the complainant "has exhausted such other means of resisting [the decision in question] as are open to him under the applicable Staff Regulations". Judgment 2039 makes clear that that provision does not prevent a complainant from proceeding directly to this Tribunal where an internal appeal body cannot decide an issue within a reasonable time

or, for some other reason, the internal mechanisms will have the effect of paralysing the exercise of a complainant's rights. However, that is not the case here.

12. It is unfortunate that the EPO's letter of 3 April 2003, informing the complainant that the President considered his appeal to be unfounded and had referred the matter to the Appeals Committee, described the appeal as "related to an alleged 'insufficiency of officially applied procedural care'". However, that letter made it clear that the complainant's claims had been rejected and it is not credible that the complainant did not understand that the whole of his appeal had thus been referred to the Committee. In addition, the complainant's subsequent letters of 10 April and 27 May made it abundantly clear that his primary concern was with the adjustment that had been made to his pension entitlements and that he sought consequential relief because of the decisions that had been made in that regard. It is not to be supposed that the Appeals Committee would have mistaken the nature of his appeal. Further, should he choose to participate in the proceedings before the Appeals Committee, the complainant will have ample opportunity to make it clear that he is appealing with respect to the decisions implementing an adjustment to his pension entitlements and is seeking consequential relief because of those decisions.

13. The complaint is irreceivable because the complainant has not exhausted internal procedures. Whether he pursues his claims before the Appeals Committee is entirely a matter for the complainant to decide but, unless and until he does so, he cannot bring proceedings in this Tribunal.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet