

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

FIFTY-SIXTH ORDINARY SESSION

In re CHOMENTOWSKI (No. 2) MAUGAIN (No. 3) and NIVEAU DE VILLEDARY (No. 3)

Judgment No. 666

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed against the European Patent Organisation (EPO) by Mr. Maurice Chomentowski on 21 May 1984, the EPO's reply of 13 August, the complainant's rejoinder of 4 October and the EPO's surrejoinder of 21 December 1984;

Considering the third complaint filed against the EPO by Mr. Christian Paul André Maugain on 15 May 1984 and corrected on 24 July, the EPO's reply of 5 October, the complainant's rejoinder of 27 October and the EPO's surrejoinder of 14 January 1985;

Considering the third complaint filed against the EPO by Mr. Hubert Etienne Marie Niveau de Villedary on 18 May 1984 and corrected on 23 July, the EPO's reply of 5 October, the complainant's rejoinder of 11 December as corrected on 12 December 1984, and the EPO's surrejoinder of 27 February 1985;

Considering the applications to intervene in Mr. Niveau de Villedary's complaint filed by:

C. Andries,

G. Boersma,

M. Brisson,

F.H. Chavonand,

E. Crab,

G. Giroud,

F. Heinlein,

P. Lancon,

P.A. Lorenz,

M. Marandon,

G. Natus,

A.J. Nuss,

F. Roubert,

W. Seifridsberger,

K.M.E. van Reeth;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 10(3) of the Agreement on the integration of the International Patent Institute into the EPO, Articles 47 and 48 of the former Institute Staff Regulations and Articles 67.1(a), 71, 72(6) and 121 of the Service Regulations of the European Patent Office, the secretariat of 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 cases are as follows:

A. The three complainants, former employees of the International Patent Institute at The Hague, were transferred to the EPO on 1 January 1978 in keeping with the agreement⁽¹⁾ on the integration of the two organisations, known below as "the transfer agreement". Under Article 10(3) of the agreement they were paid education allowances for their children as prescribed in Article 47 of the Institute Staff Regulations and the implementing rules. At various dates they moved to Munich and enrolled their children at the European School there. Mr. Chomentowski, Mr. Niveau de Villedary and others, but not Mr. Maugain, continued to receive the Institute education allowances. But the Principal Director of Personnel wrote to them on 19 July to say there had been a mistake: the third paragraph of Article 10(3) meant that the Institute allowances were due only to the extent that the Organisation did not offset the actual costs borne, and not covered by the EPO education allowance, by means of subsidies to the schools attended. Since the EPO wholly financed the European School, the allowances would cease in July 1982; but the sums wrongly paid would not be refundable, and supplements to the expatriation allowance would be due under Article 72(6) of the EPO Service Regulations.⁽²⁾ The letter went to Mr. Maugain too even though he had not actually been getting the education allowance. Mr. Chomentowski lodged an appeal on 12 October against the decision of 19 July. In letters of 9 September 1982 Mr. Niveau de Villedary challenged the decision and asked for review of the amount paid for his first child since 1 January 1982 and for payment for his third child as from 1 September 1982. The Director rejected his claims in a letter of 13 September, and he appealed on 18 October. On 11 October 1982 Mr. Maugain asked the Director why he had been denied the allowance paid to the others and claimed payment from 24 April 1981, the date of his move to Munich, and in future as well. On 18 November the Director replied that he had had no right to the allowance, any more than the others, and the EPO refused to enlarge its mistake retroactively. Mr. Maugain appealed on 22 November. The Appeals Committee joined the complainants' appeals and 13 others. Though it upheld discontinuance of the Institute allowance, the Committee recommended granting the allowance due under Article 71 of the EPO Service Regulations and reviewing the complainants' position -- in Mr. Maugain's case since his move to Munich, in the others' since the discontinuance of the Institute allowance -- but taking into account the supplements to the expatriation allowance. By a letter of 21 February 1984, the decision impugned, the President of the Office informed the complainants that payment of the Institute allowances was discontinued but that they might claim reimbursement of such actual expenses as they believed to be due to them under Article 71 of the EPO Regulations; the supplements to the expatriation allowance would then stop.

B. The complainants submit different briefs in support of their claims. The longest, Mr. Niveau de Villedary's, puts forward detailed arguments in support of his contention that the second paragraph of Article 10(3) of the transfer agreement preserves his acquired right to payment of the lump-sum education allowance he was paid at the Institute. In his view the EPO has misread the third paragraph of 10(3). Some expenses which are not covered by the EPO allowance can never be "offset" by EPO financing of the European School. So long as such expenses are not repaid by the EPO the acquired right subsists, and the expenses must continue to be repaid by means of the Institute allowance in accordance with 10(3). The supplement to the EPO expatriation allowance is smaller than the Institute education allowance, the right to which has in any event a sounder legal basis. Mr. Chomentowski and Mr. Maugain put forward similar arguments, though more briefly. Mr. Maugain further alleges that he has again been discriminated against and questions the EPO's good faith. All three complainants seek the quashing of the decision and costs. Mr. Chomentowski seeks reinstatement of the Institute allowance as from July 1982; Mr. Maugain reinstatement as from the date of his transfer to Munich; and Mr. Niveau de Villedary reinstatement of the allowance for his first two children as from July 1982 at the rates payable at the Institute, an increase in the amount paid for his first child in the first half of 1982, payment of the allowance for his third child as from 1 September 1982, and payment of interest at 10 per cent a year on the sums due.

C. In its replies the EPO observes that the education allowance is payable to transferred officials in accordance with the first paragraph of 10(3) and, as for other EPO staff, with the rules in Article 71 of the EPO Service Regulations. Although transferred officials also enjoy the safeguard laid down as to the amount of their allowances in the second paragraph of 10(3), the safeguard is conditional and applies only to the extent that actual expenses are offset neither by the EPO allowance nor by EPO subsidies to the school attended. When the safeguard lapses the transferred official's rights are covered exclusively by the EPO Service Regulations, the intention being not to give him financial advantages over other EPO staff but merely to put him on a par. High fees had to be paid for enrolment in schools at The Hague, but the European School in Munich is wholly financed by the EPO. Thus in practice there are not normally any actual expenses to be borne by EPO officials in Munich. The complainants must produce

evidence to show that they still incur expenses which they would have been repaid under Institute rules and which are covered neither by the EPO subsidies to the School nor by the education allowance provided for in Article 71 of the EPO Service Regulations. They incur no such expenses. Besides, to cover any further small expenses they might incur the complainants are entitled to supplements to the expatriation allowance under Article 72(6). The EPO submits subsidiarily that Mr. Maugain has no right to retroactive payment of an allowance he was never entitled to anyway: there was no breach of the principle of equality since the payment to the others had no basis in law. The EPO invites the Tribunal to reject all three complaints on the merits.

D. In their rejoinders the complainants seek to refute the EPO's pleas and enlarge on the arguments in their original briefs. They say they do incur expenses which are covered neither by the subsidies, nor by the EPO education allowance, nor by the supplement to the expatriation allowance, but which would have been met under Institute rules. By misreading the transfer agreement the EPO has put them on a par with other EPO staff without even considering whether their actual expenses are covered.

E. In its surrejoinders the EPO answers the rejoinders on several points of detail and develops its replies. It maintains that the complainants may always claim the safeguard in the second paragraph of 10(3) should their actual expenses alter to the point that the conditions for applying the third paragraph are no longer met. There is no question of their losing the benefit of the safeguard for good.

CONSIDERATIONS:

Joinder

1. The EPO applies for joinder of the three complaints, and so does Mr. Maugain to some extent in his rejoinder.

Before the Tribunal will join complaints and deal with them in a single judgment two conditions must be fulfilled.

The first is that the substance of the claims must be the same. Whether they are stated differently is of no account: what matters is that the Tribunal should be able to rule on them in a single decision.

The second condition is that the material facts, viz. those on which the claims rest and which are relevant thereto, should be the same.

The complainants need not all have the same arguments. The Tribunal rules as it sees fit and is not constrained by references to particular provisions or texts or by the nature of the parties' submissions.

2. Both conditions are fulfilled for joining the present complaints.

They impugn the President's decisions of 21 February 1984, asking that these be set aside and that they be paid the education allowance and other benefits.

The complainants' pleas and claims are not stated in identical terms, but in substance their case is the same.

First, all three complainants are in the same factual position. They were serving on the staff of the International Patent Institute when the Institute was merged into the EPO. A further fact that is material, in view of the nature of their claims, is that all three are married and have children. The material facts are therefore identical.

Secondly, the material issue in the three cases is in essence the same and the Tribunal will rule on the single legal issue which the three complaints raise.

The complaints may therefore be joined.

The applications to intervene

3. Any person to whom the Tribunal is open under Article II of its Statute may apply to intervene in a case on the conditions stated in Article 17(2) of the Rules of Court. Applications to intervene may be made at any stage, and the Tribunal decides whether they shall be allowed.

The applications to intervene in the present case are receivable and the Tribunal's ruling on the merits of the

complaints will hold good for the applications as well.

Merits

4. The material issue is the construction to be put on Article 10 of the transfer agreement, which sets the conditions for payment of the education allowance prescribed under the relevant provisions of the EPO Service Regulations -- Articles 67.1(a), 71 and 72 -- in respect of the children of officials transferred from the Institute.

Article 10 reads:

"1. Transferred officials who, on 31 December 1977, receive the household allowance, the dependent child allowance or the expatriation allowance provided for in the Staff Regulations of the Institute shall receive the corresponding allowances laid down in the Service Regulations for Permanent Employees of the Office provided that they continue to satisfy the conditions laid down in the Staff Regulations of the Institute granting entitlement thereto.

2. For the purposes of calculating the amounts of allowances and any deductions fixed with reference to the basic salary, the compensatory allowance or, as the case may be, the residual compensatory allowance shall be considered part of the basic salary specified in the Service Regulations for Permanent Employees of the Office.

3. Transferred officials shall receive the education allowance provided for in the Service Regulations for Permanent Employees of the office in respect of dependent children provided that they continue to satisfy the conditions laid down in the Staff Regulations of the Institute granting entitlement thereto.

The application of this provision may not result in transferred officials receiving as an education allowance an amount less than that to which they would have been entitled under the Staff Regulations of the Institute.

However the preceding sub-paragraph shall only apply to the extent that the Organisation does not offset the actual costs borne and not covered by the education allowance provided for in the Service Regulations for Permanent Employees of the Office by means of subsidies to the schools attended by the children of transferred officials.

4. The fixed allowance provided for in Article 54a of the Staff Regulations of the Institute shall continue to apply to the transferred officials who receive such allowance on 31 December 1977, provided they continue to meet the conditions laid down in that Article. However, this allowance, which shall remain fixed at the amount applicable on that date, may not be received at the same time as the language allowance provided for in the Service Regulations for Permanent Employees of the Office. A transferred official may at any time renounce his right to the fixed allowance."

Article 10 is to be treated as part of the EPO Service Regulations by virtue of Article 121: "The provisions of Chapter III of the Agreement on the integration of the International Patent Institute into the European Patent Office shall be considered as forming an integral part of these Regulations. In cases of conflict they shall prevail over any provision of these Regulations."

The complainants challenged the decisions communicated to them in the EPO's letters of 19 July 1982, and their internal appeals culminated in the impugned decisions of 21 February 1984. The complainants contend, and the EPO denies, that its ruling was in breach of the first and second paragraphs of Article 10(3).

Article 10 must be construed in context, all its provisions being read together, not singly and separately. In so construing the article the Tribunal will also take account of Articles 47 and 48 of the Institute Staff Regulations and Article 71 and other material provisions of the EPO Service Regulations, bearing in mind that according to Article 4 of the transfer agreement and Article 121 of the EPO Service Regulations it is the agreement that shall prevail over the Regulations in case of conflict.

The broad purpose of the transfer agreement in respect of the rights of transferred officials was explained in comments on the draft text of the agreement by the Interim Committee in CI/Final 23/77 (third section, point 29): [\(3\)](#)

"the transferred officials shall be guaranteed education allowances corresponding to those to which they would have been entitled had the Institute Staff Regulations continued to be applied to them. The safeguard shall cease on the date on which the EPO, by direct subsidies to the

schools attended by the children of the transferred officials, removes the difference in treatment between staff in Munich and staff at The Hague which consists in the former having access to a European school wholly subsidised by the EPO whereas the latter have to send their children to international schools at the Hague, where the cost to them far surpasses the amount of the education allowance."

In the light of the foregoing the Tribunal holds that the EPO made a correct application of the rules to the complainants.

What is said in the second and third paragraphs of Article 10(3) has to be read together with the qualification in the third paragraph. The purport of this is that if the Organisation does offset "the actual costs borne and not covered by the education allowance provided for in the [EPO] Service Regulations by means of subsidies to the schools attended by the children of transferred officials", then the second paragraph will not apply. In other words, the safeguard in that paragraph obtains only insofar as the "actual costs" are not offset.

The children of Munich staff like the complainants may go to the European School subsidised by the EPO. This is precisely the case expressly covered by the third paragraph, the intention is to cover school fees, and the result is that attendance at the School is free for the children of EPO staff.

The Tribunal accordingly holds that the complainants would be entitled to payment of the education allowance under the first and second paragraphs of 10(3) only if the EPO's subsidising of the School failed to offset "the actual costs borne and not covered by the education allowance provided for in the [EPO] Service Regulations by means of subsidies to the schools attended by the children of transferred officials".

It is a material fact -- and one acknowledged by the EPO in all three replies and in its surrejoinder in Mr. Niveau de Villedary's case -- that the complainants have a subsidiary right under Article 72(6) of the Service Regulations to the education allowance prescribed in Article 71.

The point at issue is therefore whether under present arrangements "the actual costs borne" by the complainants are offset or not. The EPO submits that ordinarily there would be no amount to be offset because the complainants would not have borne any actual costs. But it does concede that there may be some actual costs to be refunded. If that were so, then under the safeguard in 10(3) transferred officials would undoubtedly be entitled to refund.

That is an issue of fact, and one on which the Tribunal cannot rule. It is up to the complainants to ask the EPO to apply Article 71 and possibly Article 72 of the Service Regulations and refund their actual costs not otherwise covered. The Tribunal holds that on the correct construction of the transfer agreement and the Regulations they would be entitled to have any such sums repaid.

If the complainants do apply for refund and the EPO ensures full and general application of the rules in the light of the foregoing there will be no breach of their rights.

5. The EPO's application of Article 10 and of the Service Regulations does not constitute breach of any acquired right of the complainants. As the Tribunal has consistently held, an allowance may form an essential part of the official's contract in that he considered it to be of decisive importance when he accepted employment, and its abolition would therefore constitute breach of his acquired right; but he has no acquired right to the actual amount of the allowance or to continuance of any particular method of reckoning it. Indeed he must expect these to change as circumstances change.

As the Tribunal has said above, the second paragraph of 10(3) affords transferred officials a safeguard of continuance of the education allowance they were paid at the Institute. But the rule must be read subject to the third paragraph.

In accordance with the concept of acquired rights as set forth in earlier cases and the correct application of the agreement and the Service Regulations the Tribunal concludes that there has been no breach of acquired rights.

6. No one may plead breach of the principle of equality on the grounds that he has not received a benefit unlawfully conferred on others. Mr. Maugain is therefore mistaken in alleging that such breach entitles him to payment of an allowance which was wrongly paid to others.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 19 June 1985.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner

1. "Transferred officials shall receive the education allowance provided for in the Service Regulations for Permanent Employees of the Office in respect of dependent children provided that they continue to satisfy the conditions laid down in the Staff Regulations of the Institute granting entitlement thereto.

The application of this provision may not result in transferred officials receiving as an education allowance an amount less than that to which they would have been entitled under the Staff Regulations of the Institute.

However the preceding sub-paragraph shall only apply to the extent that the Organisation does not offset the actual costs borne and not covered by the education allowance provided for in the Service Regulations for Permanent Employees of the Office by means of subsidies to the schools attended by the children of transferred officials."

2. "Permanent employees entitled to the expatriation allowance who are not in receipt of an education allowance shall receive a supplement to their expatriation allowance for each dependent child..."

3. Registry translation.

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