

**NINETY-FIFTH SESSION**

**Judgment No. 2238**

The Administrative Tribunal,

Considering the complaint filed by Mr H. S. against the European Patent Organisation (EPO) on 11 June 2002 and corrected on 12 July, the Organisation's reply of 21 October 2002, the complainant's rejoinder of 21 January 2003 and the EPO's surrejoinder of 11 April 2003;

Considering the applications to intervene filed by Messrs R. F., G. H., H.T. O., S. S. and P.M. S. on 11 June 2002, and the letter of 24 July 2002 in which the Organisation indicated that it had no comments to make on those applications;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, who was born in 1936 and has German nationality, joined the European Patent Office - the EPO's secretariat - on 1 July 1979 on secondment from the German civil service. At that time he had already accumulated pension rights under the German civil service pension scheme. The possibility for former civil servants to transfer pension rights accrued under a previous pension scheme to the EPO's scheme is provided for in Article 12(1) of the Office's Pension Scheme Regulations, which reads as follows:

"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.

In such cases the Office shall determine, by reference to his grade on confirmation of appointment and to the Implementing Rules hereto, the number of years of reckonable service with which he shall be credited under its own pension scheme."

This option became available to German civil servants in 1996, when an agreement between the Federal Republic of Germany and the EPO on the implementation of Article 12 of the Office's Pension Scheme Regulations (hereinafter "the Agreement") took effect.

The amounts to be transferred and the method by which the EPO calculates the number of reckonable years of service to be credited to the employee in respect of a transfer are defined in the Implementing Rules to the Pension Scheme Regulations. The fourth paragraph of Rule 12.1/1(ii) provides as follows:

"Where [the transferred amounts] are paid by the previous pension scheme after the date of entry into the service, the increases arising between this date and the date of payment are not taken into account for purposes of calculating the years of reckonable service, although they shall accrue to the Office [...]."

The German civil service pension scheme is a budgetary scheme based on retrospective insurance. When a German civil servant leaves the civil service, his or her pension rights are evaluated retrospectively and transferred by the

employer as a lump sum (the *pauschaler Rückkaufwert*, or "lump sum surrender value") to the German social security pension insurance scheme administered by the Federal Insurance Office for Salaried Employees (*Bundesversicherungsanstalt für Angestellte*, hereinafter "the BfA"). To that end, the civil service retrospectively pays contributions on the contributory income from employment during the period of retrospective insurance. In accordance with Article 1 of the Agreement, the BfA adds 3.5 per cent interest to the amounts transferred to the EPO "for each complete year following the contribution payment until the time of the transfer".

As mentioned earlier, the complainant was initially seconded to the EPO from the German civil service. He resigned from the civil service in 1983, but remained in the employ of the EPO. On leaving the civil service he became retrospectively insured as described above and his civil service pension rights were transferred to the BfA on 4 January 1984 in the form of a retroactive insurance sum.

On 17 September 1996 the complainant applied to have those rights transferred to the EPO. By a letter of 13 June 1997 the BfA informed the Office of the lump sum surrender value of his pension rights on the date of his entry into the service of the EPO. On 27 June 1997 the Office provided the complainant with a provisional assessment of the resulting reckonable years of service. In this assessment, the Office had deducted 3.5 per cent per annum from the lump sum surrender value for the period from 4 January 1984 until the estimated date of the transfer to the EPO's pension scheme, before converting the remaining amount into reckonable years of service. It had made no deduction for the period between his entry into service (1 July 1979) and the date of the transfer of his pension rights to the BfA (4 January 1984).

The complainant accepted this proposal on 15 July 1997. However, he was informed by the Office in September 1997 that a new assessment proposal was to be issued, because doubts had arisen as to whether the BfA had correctly indicated the interest that had accrued on the lump sum surrender value communicated to the Office. The BfA then informed the Office, in a letter of 7 November 1997, that it considered itself under no obligation to provide an evaluation of the lump sum surrender value as at the date of the employee's entry into service, but only as at the date of the transfer to the EPO's scheme.

In its second assessment proposal, dated 29 December 1997, the Office also deducted interest for the period between the complainant's entry into the service of the Office and the transfer of his rights to the BfA. On 8 January 1998 the BfA provided the Office with the lump sum surrender value on the estimated date of the transfer to the EPO. The complainant accepted the Office's second proposal on 29 January 1998 with express reservations as to the additional deduction it contained. His pension rights were transferred to the EPO on 25 February, and on 3 March he received the Office's final assessment of the reckonable years of service to be credited to him. This final assessment, dated 3 March 1998, still contained the contested deduction.

The complainant filed an internal appeal against the Office's final assessment on 14 April 1998. In an Opinion dated 21 January 2002, the Appeals Committee considered that the appeal should be allowed and that the reckonable years of service resulting from the complainant's transfer should be reassessed without any deduction for the period between his entry into the service of the Office and the transfer of his rights to the BfA. However, the President of the Office did not endorse the recommendations of the Appeals Committee and rejected his appeal. The complainant was notified of this in a letter of 22 March 2002 from the Principal Director of Personnel. That is the impugned decision.

B. The complainant submits that the deduction made by the Office is in breach of Rule 12.1/1(ii). He accepts that it is entitled under that provision to deduct from the lump sum surrender value any increases arising between the date of his entry into the service of the Office and the date of the transfer of his rights to the EPO's pension scheme. Thus, he acknowledges that the Office rightly deducted interest for the period between the date of the transfer to the BfA, in 1984, and the date of the transfer to the EPO, since the BfA disclosed and transferred to the EPO the interest which had accrued on the lump sum during that period. However, with regard to the period between his entry into the service of the EPO and the transfer of his rights to the BfA, the complainant considers that the Office was not entitled to make a deduction, because the BfA neither disclosed nor transferred any interest for that period. Its calculation resulted in a reduction of the number of years of reckonable service, and was detrimental to him.

The complainant asks the Tribunal to set aside the impugned decision; to order the EPO to reassess the number of reckonable years of service to be credited to him in respect of his transfer, without effecting a deduction for the period between his entry into the service of the EPO and the date of receipt of the retrospective insurance sum at the BfA; and to award him 2,000 euros in costs.

C. The EPO replies that the contested deduction complied with Rule 12.1/1(ii). The BfA only provided the lump sum surrender value at the time of the transfer to the EPO; it was unwilling to certify the lump sum surrender value at the date of the complainant's entry into service, which is the date taken into account by the Office for the purpose of calculating the additional reckonable years of service. It did, however, provide a method for determining the surrender value at that date. The defendant applied the BfA's method, and the complainant has not proved it to be incorrect.

The Organisation points out that its practice is to accept transfers only where compound interest of at least 3.5 per cent is paid by the previous pension scheme into the EPO's scheme for the period between the date of entry into service and the date of the transfer. It has applied the same method of deduction for all employees who were initially seconded from the German civil service, regardless of the date on which they resigned from the civil service. In the present case, it considers that all the sums transferred contained interest which it was entitled to deduct under Rule 12.1/1. Furthermore, the complainant has not shown that the amount held by the civil service between 1979 and 1984 in respect of his pension rights was not subject to any increase.

It also argues that if it did not effect such deductions, its pension scheme would suffer and the loss would have to be borne by the entire staff. This, it asserts, would be "contrary to the principles of sound management".

D. In his rejoinder the complainant points out that it is up to the EPO to prove that capital accretion took place on the sum in question between 1979 and 1984, since the interest is collected by the Office. The EPO has made no attempt to prove that interest actually accrued that period, but has merely assumed that it did. He adds that although the Office claims to be bound by the figures communicated to it by the BfA, it has departed from those figures in its calculation of his reckonable years of service. He also submits further evidence to show that the amount transferred to the BfA in 1984 was a purely nominal amount containing no capital accretion.

E. In its surrejoinder the Organisation maintains its position on all issues.

## CONSIDERATIONS

1. The complainant is a German former staff member of the EPO who retired on 1 March 1998 and who now challenges the evaluation of the pension rights transferred on his behalf pursuant to the Agreement of 8 December 1995 between the Organisation and the Federal Republic of Germany and to Article 12 of the Pension Scheme Regulations of the European Patent Office. The complainant entered the service of the Office on 1 July 1979 on secondment from the German civil service. He resigned from the civil service in 1983 and the pension rights he had acquired under the civil service pension scheme were transferred on 4 January 1984 to the German social security pension insurance scheme administered by the BfA. When in September 1996 he asked to benefit from the provisions of the above-mentioned Agreement, the BfA informed the Office of the "lump sum surrender value" of his rights, evaluated as at the estimated date of the transfer. The Office sent him an initial proposal on 27 June 1997. It had deducted 3.5 per cent annual interest for the period from 1984 to the estimated date of the transfer and set the number of reckonable years of service to be credited to him in respect of the transferred amount at seven years, one month and three days. The Office then changed its mind and on 29 December 1997 sent the complainant a new provisional assessment, in which the deduction of 3.5 per cent annual interest was effected from the date of his entry into the service of the EPO, in 1979, and his reckonable years of service were set at 5 years, 11 months and 21 days. The BfA transferred the lump sum surrender value on 25 February 1998 and, despite the complainant's protests, on 3 March 1998 the Office determined his reckonable years of service maintaining a deduction for the entire period since his entry into the service of the EPO.

2. The complainant's internal appeal against that decision was examined by the Appeals Committee, which issued its report on 21 January 2002. The Committee unanimously recommended that his appeal should be allowed, but the President of the Office did not follow its recommendation and dismissed the appeal by a decision of 22 March 2002, which the complainant has duly challenged before the Tribunal.

3. Unlike the staff members or former staff members whose complaints have been dismissed by Judgment 2239 also delivered this day, the complainant does not challenge the principle of a deduction of 3.5 per cent annual interest from the sums transferred as the lump sum surrender value, but he contests the application of that deduction to the period between the date of the evaluation and transfer to the BfA of his "retrospective" insurance

sum (4 January 1984) and the date of his entry into the service of the EPO (1 July 1979). According to the complainant, this deduction contravenes Rule 12.1/1(ii) of the Implementing Rules to the Pension Scheme Regulations, and particularly the provision specifying that where the amounts representing the rights of the person concerned are transferred by the previous pension scheme after the date of entry into the service of the EPO, "the increases arising between this date and the date of [the transfer] are not taken into account for purposes of calculating the years of reckonable service, although they shall accrue to the Office". Indeed, prior to the transfer by the German civil service of his pension rights as evaluated in January 1984, there was no "increase" arising from retrospective insurance, in the capital sum representing those rights.

4. That view, which was shared by the Appeals Committee, is contested by the EPO on several grounds. Firstly, the Office considers that it complied with the applicable rules: it was obliged to accept the value fixed by the BfA and had to deduct annual interest of 3.5 per cent calculated from the date of the complainant's entry into the service of the EPO. Secondly, the deductions it effected were in keeping with the requirements of sound management. Lastly, the complainant has not proved that the amounts held by the German civil service in respect of his rights prior to the transfer to the BfA bore no interest.

5. The relevant statutory provisions are cited under A above and also in Judgment 2239 delivered this day. What emerges from those provisions is that whilst the Office is entitled to apply a flat-rate deduction of 3.5 per cent to the amounts evaluated at the time of the transfer by the BfA, taking as the starting point of that deduction the date on which the staff members concerned entered the service of the EPO, it may do so only on condition that such amounts can be considered to have been subject to an "increase" in capital or interest. It seems clear that the amount transferred to the BfA at the time when the complainant resigned from the German civil service, in 1983, had not been subject to any "increase" within the meaning of the above-mentioned Rule 12.1/1(ii). In any case, contrary to the defendant's view, the burden of proving otherwise, by consulting the BfA or the competent authority within the German civil service, would be on the Office, and not on the complainant, who rightly relies on the Appeals Committee's finding that "the Office has not specified in detail what actually constituted the capital accretion for [the] period [in question]". The Committee added, in paragraphs 47 to 49:

"47. [...] The retrospective insurance sum disclosed by the BfA in the assessment of the lump sum surrender value is in line with the retrospective insurance contributions paid by the former employer. The BfA has not effected any accumulation for the period as of the date of entry into the service.

48. Nor has the former employer updated these contributions in any way. The retrospective insurance contributions were calculated on the basis of the previous earnings. Interest was not paid on them, nor were they revalued upward in any way. There was no dynamisation [index-linking] of the bases for assessment. As the appellant correctly argued, these were contributions on nominal sums that were merely transferred at a later date.

49. The retrospective insurance value transferred to the BfA in the present case can therefore, in the opinion of the majority of the Committee, under no circumstances have been higher than the value of the contributions on the date of entry into the service. There was therefore neither due cause nor justification for an adjustment of the lump sum surrender value to the detriment of the appellant in the form of a [deduction] up to the date of entry into service."

Thus, in the absence of evidence of an "increase" in the value of the complainant's pension rights prior to 4 January 1984, when they were transferred by the German civil service to the BfA, the defendant wrongly considered itself entitled to deduct annual interest of 3.5 per cent for the period prior to that date.

6. Even if the calculation method requested by the complainant were contrary to the requirements of sound management and liable to have adverse or, in some cases, absurd effects for the pension scheme, the defendant would nevertheless be obliged to apply the rules it has established, and likewise those resulting from the Agreement with the Federal Republic of Germany.

7. Lastly, as mentioned earlier, it was not up to the complainant to prove that the sums transferred to the BfA in 1983 had not been subject to any "increase"; the administration responsible for liquidating his pension rights should have provided the complainant, and then the judge, with all the information required to substantiate its position, but there is no evidence of this in the file.

8. The complaint must therefore be allowed, and likewise the applications to intervene, to the extent that the applicants are in the same legal and factual situation as the complainant.

9. Since his claims succeed, the complainant is entitled to costs, which the Tribunal sets at 2,000 euros.

## DECISION

For the above reasons,

1. The decision of 22 March 2002 by the President of the Office is set aside.
2. The matter is sent back to the EPO for a new determination of the complainant's pension rights in accordance with consideration 5 of the present judgment.
3. The applications to intervene are allowed to the extent that the applicants are in the same situation in fact and law as the complainant.
4. The EPO shall pay the complainant 2,000 euros in costs.

In witness of this judgment, adopted on 16 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

*(Signed)*

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet