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

**NINETY-EIGHTH SESSION**

**Judgment No. 2413**

The Administrative Tribunal,

Considering the complaint filed by Mr E. L. against the European Patent Organisation (EPO) on 28 April 2003 and corrected on 19 May, the EPO's reply of 14 August 2003, the complainant's rejoinder of 20 April 2004, the Organisation's surrejoinder of 28 July, the complainant's further submissions of 12 October, and the Organisation's comments thereon of 26 October 2004;

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. This case concerns the enhancement of pension benefits calculated by the European Patent Office, the secretariat of the EPO, where an employee eligible for an inward transfer of pension rights under Article 12 of the Office's Pension Scheme Regulations has chosen not to avail himself of that option or has been unable to do so. The enhancement of benefits is explained in Judgment 2311 and other judgments cited therein.

At the material time Article 12(1) of the Pension Scheme Regulations read 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 […] 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."

Article 46 of the Pension Scheme Regulations deals with the enhancement of benefits and relevantly provides:

"(1) An employee […] whose previous pension scheme does not permit transfers under Article 12, paragraph 1, or who has not availed himself of the option to make such a transfer shall be entitled to an addition based on:

i) the difference between the rate of salary applicable for the grade and step reached at the date of departure or death and the rate of salary current for his starting grade and step in the Office at that date, and

ii) the number of years of service that would have been credited under Article 12, paragraph 1, if a transfer payment had been made."

Rule 46.1/1 of the Implementing Rules to the Pension Scheme Regulations, concerning the computation of the number of years of service mentioned in Article 46(1)(ii), provides:

"i) The number of years of service in question shall be calculated on the basis of the amount of a theoretical transfer calculated in accordance with the conditions laid down in Article 12, paragraph 1. The afore-mentioned amount shall be that which the department or institution responsible for administering the previous pension scheme is able to certify as being the actuarial equivalent or any other fixed value representing retirement pension rights acquired under that scheme before departure. Pension rights acquired by means of voluntary contributions shall be disregarded.

ii) Where the institution responsible for administering the previous pension scheme is unable to provide such a certified statement, the Office shall determine in each case the number of years of service which it will take into

account."

The complainant is a German national and was born in 1938. He joined the EPO on 1 March 1979 as an examiner on secondment from the German civil service, where between November 1973 and February 1979 he had accumulated pension rights in the non-contributory scheme of the German civil service. Prior to that – between April 1966 and October 1973 – he had been employed at the Technical University of Munich and during that period had accumulated pension rights in the contributory pension scheme administered by the Federal Insurance Office for Salaried Employees (hereinafter the "BfA*").

The option to transfer pension rights only became available to German civil servants in September 1996, when an agreement signed on 8 December 1995 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. Under the applicable national rules, German civil servants must resign from the civil service before such transfers can take place. 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 surrender value to the BfA.

On 12 December 1996 the complainant applied to have his previously acquired pension rights transferred to the EPO's pension scheme. By a letter of 23 June 1998 the EPO's Remuneration Department sent him a "proposal" dated 16 June 1998 setting out the additional reckonable service to be credited if he decided to proceed with the transfer. On the basis of the lump sum surrender value, which was supplied to the EPO by the BfA, he would have been credited with an additional five years, eight months and ten days of reckonable service.

By a letter dated 15 February 1999 the complainant asked the Office to calculate what pension enhancement he might expect under Article 46, taking due account "of the time [he] spent working as a research assistant in the civil service". The Remuneration Department sent him the calculation on 16 February. It was based on additional reckonable service of three years, eight months and four days. In a declaration dated 18 February 1999 he decided against the transfer of his pension rights under Article 12.

The complainant retired on 1 November 2001. Since he had decided against the transfer of his pension rights, he was eligible for an enhancement of benefits (also referred to as the "addition") under Article 46(1). By a letter of 7 November 2001 he was informed of the calculation of his pension enhancement. The calculation was based on the amount of reckonable service notified to him on 16 February 1999 – i.e. three years, eight months and four days. By a letter of 15 December 2001 he lodged an internal appeal against it, contending that under Article 46(1) the pension enhancement should be based "on the length of reckonable service under Article 12(1)". This, he argued, had not been respected since the EPO had only taken account of rights accrued in the German civil service pension scheme. The complainant requested that the pension rights accrued with the BfA during his previous periods of employment as a research assistant with the Technical University of Munich should also be taken into account for the calculation of the pension enhancement.

An official of the Employment Law Department wrote to the complainant on 5 February 2002 stating that Article 46 had been correctly applied and that the matter had been referred to the Appeals Committee. In its opinion dated 12 December 2002 the Appeals Committee unanimously recommended that the appeal be allowed. By a letter of 7 February 2003 the acting Head of the Conditions of Employment and Statutory Bodies Directorate informed the complainant that the President of the Office had rejected his appeal. He specified that the reason for rejecting it was that the BfA was not the pension scheme to which he belonged immediately prior to joining the Office. That is the impugned decision.

B. Referring to the findings of the Appeals Committee, the complainant argues that the Office should review its practice of calculating pension enhancements for seconded civil servants solely on the basis of the retrospective insurance value indicated by their sponsoring administration – in his case the German Ministry of Justice. He submits that the amount of reckonable service to be taken into account under Article 46 should be the same as that which would have been credited under Article 12(1) had a transfer payment been made. The Appeals Committee held the view that the Agreement signed in 1995 should be applied *mutatis mutandis* to the calculation of pension enhancement. Hence the basis of calculation for the enhancement would be the amount that could be transferred under the terms of the Agreement, namely the lump sum surrender value. It also considered that for the purposes of Article 46(1) the calculation of reckonable service should take into account at least contributions "actually made to the BfA".

The complainant seeks the quashing of the impugned decision. He wants the EPO to base his pension enhancement under Article 46 on the years of reckonable service that would have been credited to him under Article 12(1) had he agreed to the transfer of his pension rights under the latter article. He also seeks compensation to cover "retroactive cumulation of the addition", with compound interest as from 1 November 2001; compensation for moral damages; and costs.

C. In its reply the EPO contends that none of the Committee's arguments endorsed by the complainant is valid. It submits that in determining the basis for calculating the enhancement it is obliged to adhere to the applicable provisions, namely Article 12 of the Pension Scheme Regulations to which Article 46(1) refers, as well as the relevant implementing rules. In relation to Article 46(1) it points out that the phrase "if a transfer payment had been made" introduces a legal fiction, because the addition, or enhancement, is in fact payable to employees who could not or did not wish to avail themselves of the transfer of pension rights under Article 12(1). The Organisation considers itself to be bound by the official determination of the value of pension entitlements provided by the previous pension scheme. Consequently, in the case of a German civil servant who decides against the transfer of his pension entitlements, the only amount to be taken into consideration in calculating the enhancement is that indicated by the former employer – which in the complainant's case was the German Ministry of Justice.

Contrary to the view expressed by the complainant, similar criteria do not have to be applied to employees who have transferred their pension rights and to those who either have not, or have not been able to do so. They belong to different legal categories.

The EPO submits that immediately prior to joining the Office, the complainant belonged to a non-contributory pension scheme. It recalls that in December 1996 he applied for what it terms a "simulation" transfer of his pension rights, so that he could weigh up the consequences of such a transfer. The BfA was necessarily involved since the complainant, as a seconded civil servant, would have had to resign from the civil service before the retrospective insurance value of his pension entitlements could be transferred. He had contributed to the BfA in earlier years while employed at the Technical University of Munich; consequently, those contributions were included in the calculation of the retrospective insurance value made by the BfA in respect of his period of employment with the German Ministry of Justice. As the complainant did not agree to the transfer, the Office rightly based its calculations of the enhancement on the retrospective insurance value communicated to the EPO in 1992 by the German Ministry of Justice.

D. In his rejoinder the complainant enlarges on his pleas. He states that he has become aware of Judgment 2311, delivered on 4 February 2004, and makes comments on the Tribunal's analysis.

He contends that for employees in his situation, following the entry into force of the Agreement, the BfA has to be considered as the "previous pension scheme". This is because, in order to be able to transfer their pension rights, civil servants who are affiliated to the non-contributory pension scheme have to leave that scheme and join the contributory BfA scheme. Theoretically, it could therefore be assumed that he had resigned from the German civil service.

The complainant submits that it would be illegal in calculating the pension enhancement to reduce the number of years of service below the number that would have been taken into consideration under Article 12. Employees are, he asserts, at liberty not to opt for the transfer of pension rights, but the purpose of Article 46 is not to penalise them for their choice. He produces a document dated April 1977 from the preparatory work of Article 46 to explain the rationale behind that article.

He maintains his claims, with the exception of his claim for damages for moral injury.

E. In its surrejoinder the EPO states that Judgment 2311 is quite relevant to the present dispute and it asks the Tribunal to dismiss the present complaint on the basis of that judgment. It notes that the complainant has withdrawn his claim for moral damages.

It considers that the taking into account of the "notional" amount communicated by the BfA would result in an undue advantage being granted to the complainant. It rejects his assertion that his previous pension scheme was the BfA. It points out that if a civil servant does not agree to the transfer proposal made to him by the EPO, then he cannot be considered to have been insured by the BfA prior to his joining the service of the EPO. He remains a participant in the civil service pension scheme. That was the case for the complainant.

The Organisation recalls that in Judgment 1456 the Tribunal cited reasons for not taking the preparatory work for the material rules into account.

F. In further submissions the complainant draws attention to what he terms a “new fact”. He produces a copy of Administrative Council document CA/38/04 of 23 April 2004, which contained a draft proposal for the amendment of Article 2 of the Pension Scheme Regulations as well as its implementing rules. He notes that on the basis of that document a new version of Article 12 came into force on 1 July 2004. The new version provides for the transfer of pension rights accrued under previous pension “schemes”, whereas previously the word “scheme” was in the singular. He believes that this removes all foundation from the Organisation’s assertion that his previous pension scheme was not the BfA. He assumes that the amendment of Article 12(1) would have implications for the calculation of the enhancement under Article 46.

G. In its further comments the EPO argues that the new wording of Article 12 does not change the conclusion that, for the complainant, the BfA was not his last pension scheme prior to joining the EPO. The applicable provision at the time he filed his application for the transfer was Article 12 in its previous version; he refused the transfer, as a result of which he became entitled upon retirement to the enhancement provided for in Article 46. The value of his entitlements is therefore that communicated by the German Ministry of Justice in 1992.

The effect of the new wording of Article 12 is that, in application of a transitional phase, the complainant is entitled to apply for a transfer of his pension entitlements accrued with the BfA for the period 1 October 1959 to 31 October 1973, as provided for in the Protocol to Article 7 of the Agreement. It also points out that an application for transfer under the new rules must be made before 31 December 2004.

CONSIDERATIONS

1. The complainant is a German national who joined the European Patent Office on 1 March 1979, on secondment from the German Ministry of Justice, and retired on 1 November 2001 having reached grade A4(2).

He applied on 12 December 1996 for a transfer of his pension rights under the Agreement of 8 December 1995 between the Federal Republic of Germany and the EPO on the implementation of Article 12 of the Office’s Pension Scheme Regulations (hereinafter referred to as “the Agreement”). On 23 June 1998, in consideration of all his previous periods of employment, he was offered the possibility of transferring pension rights equivalent to five years, eight months and ten days of reckonable service. This evaluation was based on a calculation made by the BfA, that is, the Federal Insurance Office for Salaried Employees, which is responsible for administering the German social security pension insurance scheme. Having examined this proposal, the complainant – who had not resigned from the German civil service – refused the transfer and thus became entitled to an enhancement of benefits in accordance with Article 46(1) of the Pension Scheme Regulations. In a handwritten note dated 16 February 1999 the complainant was informed that his pension enhancement would amount to 442.36 German marks monthly, corresponding to three years, eight months and four days of reckonable service. On the basis of the same amount of reckonable service, his pension enhancement was calculated on 7 November 2001, at the time when the complainant began to draw his pension, as amounting to a monthly sum of 426.15 marks. On 15 December 2001 he lodged an internal appeal, contesting the length of reckonable service as calculated. The matter was referred to the Appeals Committee, which on 12 December 2002 recommended that the appeal be allowed. By a letter of 7 February 2003 the acting Head of the Conditions of Employment and Statutory Bodies Directorate informed the complainant that the President of the Office had decided to reject his appeal.

The complainant asks the Tribunal to set aside that decision, reiterating the arguments he put forward successfully before the Appeals Committee. He also refers to the amendments introduced in the applicable regulations as from 1 July 2004.

2. As in the case leading to Judgment 2311, to which the present judgment refers, the dispute hinges on whether the number of years of service to be taken into account when calculating the amount of the enhancement under Article 46(1) of the Office’s Pension Scheme Regulations should be based on the lump sum surrender value indicated by the BfA – which covers all the complainant’s periods of employment – or on the retrospective insurance value, as communicated to the Organisation by the German Ministry of Justice, relating to the previous pension scheme to which the complainant was affiliated before joining the EPO. The complainant puts forward no element which might cause the Tribunal to depart from the interpretation given in Judgment 2311 of the combined

provisions of Articles 12(1) and 46 of the Pension Scheme Regulations and Rules 12.1/1 and 46.1/1 of the Implementing Rules to those regulations. The amounts to be taken into account for determining the pension enhancement for employees who have opted not to transfer their rights are those calculated "under the previous pension scheme […] on the date on which the person concerned entered the service". In the complainant's case, that scheme was the non-contributory pension scheme of the German civil service and it is the figures officially communicated to the EPO in 1992 by the German Ministry of Justice which were rightly taken into account by the defendant. The reference to what appears to be incomplete and fragmentary preparatory work which is supposed to invalidate this solution must be disregarded, as already held by the Tribunal in its Judgment 1456.

3. After the defendant submitted its surrejoinder, the complainant was authorised by the Tribunal to enter further submissions reporting a new fact, namely the amendment of the provisions of Article 12 of the Pension Scheme Regulations and Rule 12.1/1 of the Implementing Rules as from 1 July 2004. In his view, the effect of this amendment is to allow consideration to be given not only to the previous pension scheme to which employees were affiliated but to all schemes to which they were affiliated throughout their years of employment prior to joining the Office. As the defendant comments, the new text cannot affect the legality of the decision it took earlier in accordance with the provisions then in force, taking into account the complainant's pension rights under his previous scheme, as communicated in 1992 by the German Ministry of Justice. The Tribunal, for its part, can only acknowledge this state of affairs and abide by its case law based on the wording of the specific texts whose interpretation gave rise to the dispute. It is true that the amendment of the provisions in question appears to confer new rights on employees of the Office. In this respect, it is worth quoting from the further comments submitted by the Organisation on 26 October 2004, a copy of which was sent to the complainant on 1 November 2004:

"The effect of the new wording of Article 12 [of the Pension Scheme Regulations] in force since 1 July 2004 is that, in application of the transitional phase, the complainant is entitled to apply for a transfer of the pension entitlements accrued under the BfA for the period 1 October 1959 to 31 October 1973 […] as provided for in the Protocol to Article 7 of the Agreement […] Chapter II, point 1, fifth paragraph. Application for transfer under the new rules must be made within six months from the entry into force of the new version of Article 2 […], ie 31 December 2004.

If he does not wish to transfer, the addition provided for in Article 46 […] shall be paid to him on the basis of the amounts communicated by the BfA (see Rule 46.1/1 […] 'Computation of the number of years of service referred to in sub-paragraph (ii)': 'i) The number of years of service in question shall be calculated on the basis of the amount of a theoretical transfer calculated in accordance with the conditions laid down in Article 12, paragraph 1.')"

4. Regardless of the extent of the new rights which may be conferred on former employees in the same situation as the complainant, the latter's complaint can only be assessed by the Tribunal in the light of applicable provisions and must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2004, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

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* *Bundesversicherungsanstalt für Angestellte*.

Updated by PFR. Approved by CC. Last update: 17 February 2005.