The Administrative Tribunal,

Considering the fifteenth complaint filed by Mr G.C.A. K. against the European Patent Organisation (EPO) on 18 October 2006 and corrected on 25 October 2006, the EPO's reply of 12 February 2007, the complainant's rejoinder of 23 March and the Organisation's surrejoinder of 28 June 2007;

Considering Articles II, paragraph 5, and VII 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. Facts relevant to this case are to be found in Judgment 2367, delivered on 14 July 2004, in which the Tribunal ruled on the complainant's thirteenth complaint, finding it irreceivable for failure to exhaust internal remedies.

Suffice it to recall that the complainant, who was born in 1933 and holds dual Swiss and German nationality, retired from the European Patent Office – the EPO's secretariat – on 31 October 1998 and subsequently settled in Switzerland. Under Article 33(2)(i) of the EPO's Pension Scheme Regulations he opted to have his pension calculated according to the scale applicable to Switzerland, a choice that is irrevocable. At the time of his retirement he was credited, for pension purposes, with just under 22 years of reckonable service.

Pursuant to the relevant provisions of the Service Regulations for Permanent Employees of the European Patent Office, the EPO regularly reviews salary levels, which form the basis for the calculation of pensions. Under the Implementing Rule for Article 64 of the Service Regulations, as amended by the Administrative Council in decision CA/D 8/02, there is an annual salary adjustment with effect from 1 July. In document CA/141/02, the President of the Office submitted a proposal for the adjustment of the remuneration of permanent employees and of pensions paid by the Office. This document showed that there was a new purchasing power parity coefficient for Switzerland as of 1 July 2002, which resulted in a downward adjustment of the salary scale applied to that country. In decision CA/D 13/02 the Administrative Council adopted the President's proposal. As a consequence of the adjustment, the complainant's pension was calculated as of 1 July 2002 according to a coefficient for Switzerland that was 10.7 per cent lower than on 1 July 2001.

On 4 March 2003 the complainant lodged an internal appeal with the President disputing the "mysterious individual decisions" applying a 10.7 per cent reduction to pensions to be paid in Switzerland. He made several consequential claims as well. He filed further internal appeals with the President on 27 May against the implied rejection of his request for legal assistance and on 28 May against the implied rejection of his remaining claims put forward on 4 March. On 30 June 2003 he lodged his thirteenth complaint with the Tribunal, which subsequently found it to be irreceivable. By letter dated 23 July 2004 the complainant requested that the Internal Appeals Committee take up his case again.

In its opinion dated 12 June 2006 the Internal Appeals Committee recommended by a majority that the appeal be dismissed as unfounded. By a letter dated 27 July 2006, which constitutes the impugned decision, the complainant was informed that the President of the Office had decided to follow the Committee's recommendation.

B. The complainant states that he is appealing and seeking relief with respect to "individual decisions" implementing an adjustment to his pension entitlements. He contends that upon retirement he entered into a contractual relationship with the Organisation which provided for the application of a "primary type of national Swiss salary scale", and that his pension entitlements flow from this contract. In his opinion, he was guaranteed a standard of living upon retirement. If the EPO cannot honour the terms of that contract, he wants it "revised or substituted" by an equivalent "substitutive" contractual relationship. He considers that the decision to apply a negative adjustment to the salary scale on the basis of which his pension is calculated constitutes a breach of his acquired rights.

The complainant asserts that the President's proposal in document CA/141/02 does not deal with the legal interests of pensioners. Moreover, the decision of the Administrative Council CA/D 13/02 relates to the remuneration of permanent employees and, in his opinion, does not "imply any legal justification of any administrative attack on [his] legal interests in the maintenance of [his] legally acquired and granted standard of living". He contests the calculation of the purchasing power parity coefficient for Switzerland, asserting that it should have risen as it did in other countries. He argues that because the EPO has abolished the salary scale which constituted an essential element of the contract that he entered into with the EPO upon his retirement, he should be awarded "substitute pension entitlements", and he provides a mathematical formula to achieve this.

The complainant argues that Article 36 of the Pension Scheme Regulations distinguishes between an adjustment of pensions in relation to the cost of living and an adjustment of pensions in relation to the standard of living.He relies on Article 36 as the legal foundation of his claim to have his standard of living maintained at the level at which it stood at the time of his retirement. He further argues that the European Patent Convention defines the competencies of the President of the Office and the Administrative Council and consequently they do not have authority adversely to affect pensioners by any "discretionary disposal of pension entitlements".

He asserts that his claim could be satisfied by a reassessment of his reckonable years of service and that Articles 6 and 12 of the Pension Scheme Regulations provide authority for this. He supplies a mathematical formula to determine a "substitutive contractual relation" that would provide "substitutive pension entitlements" equal to those he enjoyed upon his retirement.

The complainant seeks a revision of his "primary contractual relation" with the EPO regarding his pension entitlements, in order to maintain his "primary standard of living". He requests that 24.6694 years of reckonable service for pension purposes be credited to him. He further asks the Tribunal to award him "substitutive pension entitlements equal to [his] primary pension entitlements".

C. In its reply the Organisation asserts that the complaint is manifestly irreceivable and unfounded. In his internal appeal the complainant put forward various claims for relief, three of which he subsequently waived upon the withdrawal of his fourteenth complaint to the Tribunal. The EPO deems the complaint to be irreceivable under Article VII of the Tribunal's Statute because the three claims put forward by the complainant in this case were not included in his internal appeal and consequently he has not exhausted the internal means of redress.

The EPO further argues that the determination of the complainant's reckonable years of service was made when he retired in 1998 and that his request for a recalculation is thus time- barred.

Replying subsidiarily on the merits, the EPO asserts that civil servants are not the holders of a contract. They are in a "statutory situation", pursuant to an individual act of appointment. The individual act retiring them, on whatever grounds, is not a contract either. Relying on Judgment 986, the EPO contends that a pension scheme forms part of the administrative arrangements retirees may look forward to and that, like pay, pensions are governed by basic rules that are binding on the Organisation. It rejects the complainant's argument, based on Article 36 of the Pension Scheme Regulations, that he has a right to maintain his standard of living as defined on the day of his retirement in 1998. Referring to a decision of the Administrative Council of 30 November 1979 (CA/D 16/79), it states that, as of the date of entry into force of that decision, the distinction in Article 36 of the Pension Scheme Regulations between the adjustment of salaries in relation to the cost of living and that made in relation to the standard of living has no relevance to the adjustment of pension benefits.

The EPO says that it has correctly calculated the complainant's reckonable years of service and that, on the grounds of legal certainty, the calculation is no longer open to challenge. The complainant's calculations are based on concepts which have no legal basis.It rejects the complainant's claim for an award of "substitutive pension entitlements".

D. In his rejoinder the complainant develops his pleas. He asserts that in the past four years he has never been effectively heard by the EPO. He does not accept that his claims in this case are new. He states that the Internal Appeals Committee's opinion and the Organisation's reply both rely on decision CA/D 4/96 as amended by decision CA/D 8/02 and that because he does not have these documents the impugned decision should be set aside. He argues that the abolition of the previous salary scales for Switzerland, including the methods used by the EPO to assess these scales, is an "omission" as defined by Article 34 of the Pension Scheme Regulations and, consequently, Article 34 provides authority for the requested "revision" of his pension. He also suggests that

Article 49 of the Service Regulations may provide authority for the grant of a “promotion” to a higher step and grade than the one he held upon retirement.

E. In its surrejoinder the Organisation maintains that the complaint is irreceivable. It submits that Article 36 of the Pension Scheme Regulations needs to be read in conjunction with decision CA/D 16/79 mentioned in the footnote to that provision. The EPO explains that the decision of the Administrative Council CA/D 4/96 is found under Article 64 of the Service Regulations and that decision CA/D 8/02 forms the Implementing Rule for Article 64 of the Service Regulations. Both texts are to be found in the Codex, the compendium of rules applicable to staff, which is available to the complainant.

The EPO states that the basis for calculating the complainant’s pension was fixed on the day he left service as the grade and step he had attained at that date. Contrary to the complainant’s claims, Article 49 of the Service Regulations does not provide authority for the grant of a higher grade and step.

CONSIDERATIONS

1. The complainant challenges the letter of 27 July 2006 by which he was informed of the final decision of the President of the Office, endorsing the Internal Appeals Committee’s recommendation to reject his appeal against the application to his pension of the downward adjustment of the salary scale for Switzerland.

2. In essence, he claims the right to maintain his standard of living as determined on the day of his retirement in 1998, which he considers as an acquired right, and denies that the EPO has the authority to take measures affecting pensioners adversely. To that end he proposes that his “reckonable service” be “re-assessed” to a higher number of years or, alternatively, “to have the downgrade of the salary scales compensated by the upgrade of the terms of the last step and grade held”.

3. The Organisation raises an objection to the receivability of the complaint on the grounds that the complainant’s claims were not included in his internal appeal and that, hence, he has failed to exhaust the internal means of redress. It also argues that the complainant is time-barred in claiming a new determination of the number of years of his reckonable service because this determination was made when he retired in 1998.

4. Since the complaint must be dismissed on the merits, there is no need for the Tribunal to address the issue of receivability.

5. The Tribunal finds that the complainant is now merely seeking alternative ways of remedying his alleged injury, in lieu of other forms of monetary relief. However, there are no grounds here for remedies of any kind, as will be explained, and the question of alternative remedies is therefore moot.

6. The complainant’s claim that his “once legally acquired and granted primary standard of living be maintained” finds no support in the Pension Scheme Regulations. Article 36 of the Pension Scheme Regulations provides:

“Should the Council of the Organisation responsible for the payment of benefits decide on an adjustment of salaries in relation to the cost of living, it shall at the same time grant an identical adjustment of pensions currently being paid and of pensions whose payment is deferred.

Should salary adjustments be made in relation to the standard of living, the Council shall consider whether an appropriate adjustment of pensions should be made.”

Although Article 36 requires an adjustment of pensions for cost of living adjustments, it allows for the possibility that either upward or downward adjustments for the standard of living will be passed on to pension payments. More to the point, the reduction of pension payments as a result of the downward adjustment to salary scales became automatic as a result of the decision of the Administrative Council of 30 November 1979 (CA/D 16/79). This decision, which took effect on 4 April 1978, provides in part that:

“Article 36 of the Pension Scheme Regulations relating to the arrangements for the adjustment of benefits shall be interpreted in all circumstances, and whatever the current salary adjustment procedure, as follows:

‘Whenever the salaries of staff serving in the Co-ordinated Organisations are adjusted – whatever the basis for adjustment – an identical proportional adjustment will, as of the same date, be applied to both current and deferred pensions, by reference to the grades and steps and salary scales taken into consideration in the calculation of these pensions.’”

As a result, the EPO can reduce pension payments if there is a downward adjustment to salary scales.

7. The Pension Scheme Regulations have at all material times allowed for the possibility that pension payments would be reduced or, as in this case, frozen until later increases were absorbed. The complainant bases his argument on his “primary contractual relation as a pensioner with the EPO” and claims that, by virtue of that relationship he is entitled to have his pension maintained on the same basis as that which he obtained when he retired in 1998. That argument must be rejected. No contract came about on the complainant’s retirement. All that happened was that he then became entitled to such rights as had accrued to him pursuant to the terms of his appointment and the relevant Service Regulations and Pension Scheme Regulations.

8. Although the complainant bases his argument on the alleged contract he had with the Organisation, he claims in essence breach of an acquired right. However, the case law of the Tribunal concerning salaries and pensions recognises that these are adjusted on a regular basis, for various objective reasons, including the variable factors in the country of residence, and establishes that “there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency” (see in particular Judgment 832, under 14 and 15).

Insofar as the complainant bases his argument on the new adjustment of the salary scale applicable to Switzerland in 2002, it is relevant to note that that modification meets objective criteria and does not contravene the complainant’s acquired rights, inasmuch as it purports to offset salary scales in Switzerland that were subsequently deemed to be too high, without in effect reducing the net amount of pensions. Even if the complainant may, in his opinion, be financially worse off as a result of these modifications, he does not argue that they were established with specific bias against him but rather that they breached his right to have his standard of living maintained at the level at which it stood at the time of his retirement. As explained above, that claim is not supported by Article 36 of the Pension Scheme Regulations and it cannot prevail over the objective criteria by which salaries and pensions scales are established and updated (see Judgment 2089, under 15).

Even more, as has been put in Judgment 832, under 15, “[i]nternational civil servants quite understandably put stock in their retirement benefits and quite rightly want an income that, even if it will not sustain the same standard of living, will at least be comfortable. The decisions impugned do mar the outlook, in some cases seriously. But that is not enough to establish breach of an acquired right”.

9. Since the modifications in question were made by reference to objective criteria, the complainant’s argument that these modifications were arbitrary and discriminatory must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 November 2007, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

Updated by SD. Approved by CC. Last update: 27 February 2008.