Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

113th Session **Judgment No. 3117**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr B.L. P. against the European Patent Organisation (EPO) on 14 December 2009 and corrected on 11 January and 2 February 2010, the Organisation's reply of 17 May and the letter of 22 June 2010 by which the complainant informed the Registrar of the Tribunal that he did not wish to enter a rejoinder;

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. Article 12(1) of the Pension Scheme Regulations of the European Patent Office, the EPO's secretariat, relevantly provides:

> "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 schemes, provided that those schemes allow such transfers to be made."

Rule 12.1/1, paragraph (i)(c), of the Implementing Rules to the Pension Scheme Regulations (hereinafter the "Implementing Rules") reads:

> "An amount shall be credited under […] Article [12 of the Pension Scheme Regulations] only if it is certified by the pension scheme concerned as being the actuarial equivalent of retirement pension rights or as representing a capital payment in respect of rights to a pension or of social security entitlements (excluding compensation for dismissal or a severance grant) and must be equivalent to the whole of the amounts paid to the person concerned by that pension scheme."

The complainant, a French national born in 1942, joined the Office in Munich (Germany) in 1981 as an examiner at grade A3, after having worked for the previous seven years in Italy for a firm based in that country. When he retired on 1 August 2007 he had reached grade A4(2).

On 19 May 2004, in preparation for his retirement, he wrote to the Head of the Compensation and Benefit Systems Department in order to request an enhancement of benefits under Article 46 of the Pension Scheme Regulations. He pointed out inter alia that, on taking up his duties at the Office, he had requested the transfer of the pension rights which he had acquired under the Italian pension scheme of which he had been a member between 1974 and 1981, but that this request had been denied on the grounds that there was no transfer agreement between the EPO and Italy. In his opinion, that decision was incorrect because, under Article 12 of the Pension Scheme Regulations and Implementing Rule 12.1/1, the lump sum known as a "*liquidazione*" which he had received on leaving the Italian firm in 1981 ought to have been transferred to the Office's pension scheme. He therefore asked the Head of the above-mentioned Department to confirm that the transfer of the *liquidazione* was possible and could still be effected.

As he received no reply, he repeated his request on 8 February and 15 April 2005 and supplied some additional information on 5 July. On 13 December 2005 a member of the Compensation and Benefit Systems Department informed him that he would receive a

"provisional calculation" of his pension rights before the end of January 2006. In an e-mail of 10 March addressed to that department, the complainant referred to a telephone conversation on the previous day, during which he had been told that the processing of his transfer request was in abeyance pending the receipt of further information regarding the nature of the *liquidazione*. In his view, the *liquidazione* represented a capital payment in respect of rights to a pension – within the meaning of Implementing Rule 12.1/1 – which could be transferred. He asked for an immediate decision. On 15 March he was asked "to be patient for a little while longer", since the Pension Administration Department was trying to ascertain to what extent the *liquidazione* comprised pension rights. The Compensation and Benefit Systems Department informed the complainant in a letter of 22 June that his transfer request had been rejected. The letter referred to paragraph (i)(c) of the above-mentioned rule and enclosed a copy of an e-mail of 26 April 2006 from his former Italian employer, stating that the *liquidazione* did not correspond to pension rights.

On 4 September 2006 the complainant wrote to the President of the Office in order to challenge this decision to deny his request. He contended that the Administration had not proved that the *liquidazione* was not a capital payment in respect of social security entitlements. He therefore asked the President to cancel the decision of 22 June 2006 and to allow the transfer of the *liquidazione* as from the date of his first request, i.e. 19 May 2004. He was informed by letter of 4 October 2006 that the matter had been referred to the Internal Appeals Committee for an opinion, since the President of the Office considered that it had not been established that the *liquidazione* corresponded to retirement pension rights accrued under his previous pension scheme before he entered the Office's service, within the meaning of Article 12(1) of the Pension Scheme Regulations. In his appeal before the Committee, the complainant asked for the transfer of the *liquidazione* in accordance with Article 12 or, if that were not possible, an enhancement of benefits under Article 46 of the Pension Scheme Regulations.

The Committee issued its opinion on 10 August 2009, after a hearing held on 16 June. The majority of its members recommended that the appeal should be dismissed as unfounded. The Committee took the view that the *liquidazione*, which the complainant's former employer had been required by law to pay him on separation, did not constitute pension rights acquired with a pension scheme. It added that the complainant had not supplied certification from his previous pension scheme that the *liquidazione* corresponded to "rights to a pension or […] social security entitlements" as required by Implementing Rule 12.1/1, or that it was the actuarial equivalent or any other fixed value representing retirement pension rights acquired under that scheme within the meaning of Implementing Rule 46.1/1, paragraph (i). By a letter of 5 October 2009, which constitutes the impugned decision, the President of the Office notified the complainant that she had decided to follow that recommendation and to reject his appeal as unfounded.

B. The complainant submits that inadequate reasons were given for the decision of 22 June 2006 and that the Office breached the principle of due process because, prior to the adoption of that decision, the Office failed to provide him with the information on which it was based. He asserts that at the end of the hearing on 16 June 2009 the Chairman of the Internal Appeals Committee raised a new issue – that of certification by the former pension scheme – which was likewise contrary to the above-mentioned principle.

Furthermore, the complainant considers that the impugned decision is unfounded, as the conditions laid down in Article 12 of the Pension Scheme Regulations and Implementing Rule 12.1/1 were met, since it may be inferred from Article 2120 of the Italian Civil Code in force in 1981 that the *liquidazione* was a capital payment in respect of social security entitlements which corresponded to the whole of the amounts paid to him by his previous employer. The only two capital payments in respect of social security entitlements which are excluded from the scope of Rule 12.1/1 are compensation for dismissal and severance grants. In his opinion, this means that the *liquidazione* can be transferred to the Office's pension scheme. The complainant

further submits that the Committee added two conditions which do not exist in Article 12 or Rule 12.1/1: first, that the *liquidazione* has to be paid by a pension scheme and, secondly, that the latter must certify the amount thereof. He emphasises that his former employer did supply a declaration in writing, but that the Committee ignored it. Lastly, he states that he suffered injury, particularly on account of "misinformation", the sluggishness of the proceedings and procedural errors and flaws.

He asks the Tribunal to quash the impugned decision and to confirm that he is entitled to transfer the *liquidazione* under Article 12 of the Pension Scheme Regulations with effect from the date of his initial request, i.e. 19 May 2004, or with effect from 4 September 2006 at the latest. Failing that, he asks for an enhancement of benefits under Article 46 of those Regulations. He claims damages in an amount which he hopes will be "exemplary".

C. In its reply the EPO submits that adequate reasons were given for the decision of 22 June 2006, in that it explicitly referred to Implementing Rule 12.1/1. It considers that the principle that the rights of the defence must be respected does not require that the complainant should be kept informed of the stages leading up to the decision in question. It also argues that the Committee is not bound by the scope of the parties' arguments and was therefore entitled *ex officio* to examine any issue during the hearing on 16 June 2009.

The Organisation explains that the transfer of the *liquidazione* was impossible because two conditions stipulated by Article 12(1) of the Pension Scheme Regulations and Implementing Rule 12.1/1, paragraph (i)(c), were not met. First, as the Italian Civil Code in force in 1981 confirms, the *liquidazione* is a sum which every Italian firm is required by law to pay to any employee on separation. It is therefore comparable to a severance grant which is excluded from the scope of Rule 12.1/1. In addition, there is no evidence in the file to show that this sum came from the pension fund of the Italian firm for which the complainant worked between 1974 and 1981. The Organisation infers from this that the *liquidazione* does not correspond to the

complainant's pension rights accrued under a pension scheme, as required by the above-mentioned Article 12(1). Secondly, for this reason, no pension scheme could certify that the *liquidazione* was the actuarial equivalent of retirement pension rights, or that it represented a capital payment in respect of rights to a pension or of social security entitlements. It adds that, for the same reason, the complainant cannot request an enhancement of benefits under Article 46 of the Pension Scheme Regulations. It considers that he has furnished no evidence of the injury which he has allegedly suffered and that his claim to damages must therefore be dismissed.

CONSIDERATIONS

1. The complainant, a French national, was recruited by the European Patent Office in April 1981 as an examiner at grade A3, after having worked in an Italian firm for the previous seven years. He retired from the Office on 1 August 2007 at grade A4(2).

2. On 19 May 2004, in anticipation of his retirement, he sent the Head of the Compensation and Benefit Systems Department a letter in which he requested, inter alia, a transfer of pension rights under Article 12 of the Office's Pension Scheme Regulations, or an enhancement of benefits under Article 46 of the Regulations, in order to take account of his period of employment in Italy. This letter referred to a first application to that effect, which he had submitted on joining the Office in 1981. Subject to certain conditions, Article 12 of the above-mentioned Regulations allows staff members who have previously worked for a firm to arrange for the transfer to the Office of pension rights accrued under their previous pension schemes, provided that these schemes allow such transfers. Article 46, which is a transitional provision applicable to the complainant, allows an enhancement of benefits for employees whose previous pension scheme does not permit transfers under Article 12, or who have not availed themselves of the option to make such a transfer.

3. It must be stressed that, in the instant case, the central issue raised by the complainant did not concern the crediting of his pension rights acquired under the Italian state social security scheme administered by the *Istituto Nazionale della Previdenza Sociale* (INPS), since it is well established that the INPS has not yet agreed to the transfer of pension rights to the Office under Article 12. Such a transfer therefore currently remains impossible, as the Tribunal found in Judgment 2527, where it emphasised that the Office could not be blamed for this regrettable situation. In the present case, the complainant is seeking the crediting of a lump sum known as "*liquidazione*", which is provided for under Italian law and which an employer must pay to any employee when their employment relationship ceases. The complainant, who received this lump sum on leaving the firm where he had previously been working, considers that it should be regarded as a capital payment in respect of rights to a pension or of social security entitlements which can be transferred or, failing that, give rise to an enhancement of benefits.

4. Since the Office initially did not reply to the above-mentioned letter of 19 May 2004, the complainant repeated his request in a letter of 8 February 2005 and then tried twice in 2005 to obtain the further examination of his case.

5. By letter of 21 December 2005 the Office, which wished to ascertain whether the *liquidazione* could be deemed to correspond, in whole or in part, to pension rights, asked the complainant's former employer to enquire as to the exact nature of this lump sum. On 11 April 2006 the firm first confirmed the amount of the *liquidazione* paid to the complainant and explained how it had been calculated. In an e-mail of 26 April 2006 it then made it clear that this lump sum did not comprise any pension rights whatsoever.

6. In the meantime the complainant had been advised by e-mail on 13 December 2005 that he "w[ould] receive a provisional calculation [of his pension rights] between the middle and end of

January 2006". After he had complained that this promise had not been kept, he was invited in an e-mail of 15 March 2006 to "be patient for a little while longer". However, taking into account the position expressed by the complainant's former employer, inter alia, the Compensation and Benefit Systems Department finally decided on 22 June 2006 to reject his request for a transfer of pension rights.

7. On 4 September 2006 the complainant challenged this decision in accordance with the procedure laid down in Articles 107 and 108 of the Service Regulations for Permanent Employees of the European Patent Office. It must be noted that, mainly because the Office did not submit its first position paper to the Internal Appeals Committee until 14 July 2008, this body did not issue its opinion until 10 August 2009, in other words almost three years after the matter was referred to it. In that opinion the majority of Committee members recommended the dismissal of the complainant's claims. The President of the Office followed this recommendation and rejected the complainant's appeal by a decision of 5 October 2009.

8. The complainant impugns that decision before the Tribunal and asks that it be set aside. He also seeks an award of damages for the injury which he considers he has suffered, not only as a result of this decision but also because of the manner in which his case was handled.

9. In support of his claims, the complainant first submits that insufficient reasons were given for the above-mentioned decision of 22 June 2006. However, the decision stated, with reference to Rule 12.1/1 of the Implementing Rules to the Pension Scheme Regulations, that the complainant's request did not meet the condition laid down in paragraph (i)(c), of that Rule, of which more will be said later in this judgment. In addition, the decision referred to the e-mail of 26 April 2006 from the complainant's former employer, a copy of which was enclosed with it. In the instant case, these reasons were sufficient to inform the complainant of the grounds for the decision and, in particular, to enable him to appeal against it. The requirements

of the Tribunal's case law on the matter were therefore satisfied (see Judgments 1817, under 6, 2391, under 7, or 2850, under 8).

10. The complainant further submits that the decision of 22 June 2006 breached the principle of due process in that it was taken on the basis of information which had not previously been brought to his attention. In this connection the Tribunal notes that, when an international organisation examines a request submitted by a staff member, it is not bound to inform that person of all the steps which it is taking in that respect. On the other hand, in that or any other situation, it does have a duty to provide the person concerned with any items of information which might have a bearing on the outcome of his/her claims (see Judgments 1815, under 5, or 2315, under 27). In this case, it might be considered that one of the items of information in question, namely the e-mail of 26 April 2006 from the complainant's former employer expressing an opinion on the nature of the *liquidazione*, should have been brought to his attention. Indeed, since the decision adopted by the Office was clearly based, to a large extent, on that information, it might seem legitimate that the complainant should be given an opportunity to challenge its validity before the decision was taken.

11. However, according to the Tribunal's case law, failure to disclose an item of information will in any case not render a decision unlawful where this flaw has been remedied in the course of an internal appeal procedure or of proceedings before the Tribunal (see, for example, Judgments 301, under 2, 1815, under 4 and 5, or 2558, under 5(a)), and that is precisely what occurred in this case since, as stated earlier, a copy of the e-mail in question was forwarded to the complainant at the same time as the disputed decision, with the result that he was duly enabled to challenge its contents during the internal appeal proceedings.

12. The complainant also calls into question the lawfulness of the proceedings before the Internal Appeals Committee. He takes the Committee Chairman to task for having suggested, at the end of the

hearing of 16 June 2009, that the outcome of the dispute might be determined by the fact that the pension scheme concerned had not certified that the *liquidazione* was the equivalent of pension rights. But, in doing so, the Chairman, who merely mentioned a condition established by the applicable provisions to which the decision of 22 June 2006 expressly referred, did not raise a new issue which should have been discussed by the parties. Furthermore, the complainant's argument that the Chairman's attitude conflicted with the Office's decision to consult his former employer, rather than a pension scheme, in order to obtain that certification has no bearing on the lawfulness of the proceedings, since the Chairman of the Internal Appeals Committee is clearly under no obligation to adopt the same legal analyses as the Office.

13. On the merits, the dispute turns on the question of whether the indemnity known in Italy as "*liquidazione*", which is now referred to as a "*trattamento di fine rapporto*" (or TFR) pursuant to an Act of 29 May 1982, may be transferred to the Office's pension scheme.

14. Article 12 of the Office's Pension Scheme Regulations, entitled "Inward and outward transfer of pension rights", relevantly provides, in paragraph 1, that: "An employee who enters the service of the Office after leaving the service of 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 schemes, provided that those schemes allow such transfers to be made."

15. Rule 12.1/1 of the Implementing Rules to the Pension Scheme Regulations, entitled "Inward transfer of previously acquired rights", whose purpose is to define the terms and conditions for implementing the above-mentioned Article 12, states in paragraph (i) that: "(a) Pursuant to Article 12, paragraph 1, of the Regulations, years of reckonable service shall be credited in accordance with these Rules in respect of periods of membership of one or more pension schemes preceding entry into the service of the Office. […] (c) An amount

shall be credited under this Article only if it is certified by the pension scheme concerned as being the actuarial equivalent of retirement pension rights or as representing a capital payment in respect of rights to a pension or of social security entitlements (excluding compensation for dismissal or a severance grant) and must be equivalent to the whole of the amounts paid to the person concerned by that pension scheme."

16. The *liquidazione*, which was formerly governed by Article 2120 of the Italian Civil Code, was, like the current TFR, an indemnity which the employer was obliged to pay to an employee when the latter left the firm, irrespective of the reasons for the end of the employment relationship, and which was calculated according to the length of service of the person concerned. This indemnity, being based solely on that legal obligation, was completely unrelated to any contributions to a pension scheme.

17. This brief description of the *liquidazione* shows that it clearly cannot be deemed to constitute "retirement pension rights" within the meaning of Article 12 of the Pension Scheme Regulations. It is true that, following a major reform of the TFR, which was adopted on 24 November 2005 and entered into force on 1 January 2007, all or part of the amounts which employers have to pay in respect of this indemnity may now be paid into pension funds in order to add to the funding of a supplementary retirement pension. But it is doubtful whether, because of this, the TFR can be equated with pension rights, given that the new legislation appears to have merely introduced the possibility of converting amounts paid in respect of this indemnity into pension rights. More importantly, this change in the law, which occurred after the complainant had received the *liquidazione* in 1981, cannot in any event retroactively alter the nature of the sum at issue in the instant case.

18. The complainant points out that the above-mentioned Rule 12.1/1 of the Implementing Rules to the Pension Scheme Regulations gives a broad interpretation of the amounts which may be

transferred, since in this connection it refers to "a capital payment in respect of rights to a pension or of social security entitlements". He submits that, as the *liquidazione* did not correspond to pension rights, it should be regarded as a "capital payment in respect of social security entitlements" within the meaning of that provision.

19. There is no doubt that the *liquidazione* does serve as social security; the main reason behind it is to ensure that an employee who has to leave his/her job has sufficient resources to bridge a possible temporary loss of earnings. However, two considerations lead the Tribunal to find that this indemnity cannot be transferred to the Office's pension scheme.

20. First, although the notion of "social security entitlements" is not defined in the above-mentioned texts, it is clear that it can only refer to amounts which, on account of their economic nature and the legal regime governing them, may be regarded as equivalent to pension rights. Indeed, Rule 12.1/1 would otherwise be inconsistent with Article 12 of the Pension Scheme Regulations, which restricts the possibility of making a transfer to "retirement pension rights", since it would extend this possibility to capital sums of a different nature. In view of the hierarchy of norms within the Office, the Implementing Rules to the Pension Scheme Regulations obviously may not conflict with the said Regulations. Moreover, it is to be noted that Rule 12.1/1, paragraph (i), states that the rights which may be transferred are those acquired with "pension schemes", according to the wording of subparagraph (a), or with "a pension scheme", according to the wording of subparagraph (c), which confirms that the Rule refers only to pension rights or to sums that are equivalent to such rights.

21. Secondly, since many social benefits or allowances stem, by definition, from a concern to provide social security, the authors of Rule 12.1/1 carefully limited the notion of "social security entitlements" by expressly excluding any "compensation for dismissal" or "severance grant". While the *liquidazione*, which, as explained earlier, is an amount paid by an employer to any employee

upon separation, certainly may not be regarded as compensation for dismissal, it precisely matches the concept of a "severance grant" within the meaning of these provisions, on account of its nature and purpose. In this regard, the fact that the *liquidazione* is not expressly mentioned among the allowances excluded from the scope of the text is immaterial, since the regulations of an international organisation can obviously refer only generically to such notions, without quoting the exact title of the various legal devices provided for in each national law.

22. As there was a substantive obstacle to the complainant's transfer request in that the *liquidazione* could not be treated as equivalent to pension rights, nor could it, by definition, satisfy the formal requirement also laid down in Rule 12.1/1, paragraph (i)(c), that the pension scheme concerned had to certify that it could be deemed equivalent. In fact, no pension scheme had the authority to examine a request for such certification, and that is why the Office had no other option in this case than to put the question to the complainant's former employer.

23. The Tribunal finds that, for the same reasons, the complainant could not claim an enhancement of benefits on the grounds that it was impossible to transfer the *liquidazione*, since Article 46 of the Pension Scheme Regulations makes it clear that an enhancement can be granted only where the amounts that have not been transferred are of a kind which could, in theory, have been the subject of a transfer, which is certainly not the case here.

24. In view of the foregoing, the Tribunal will dismiss the complainant's various claims for damages to the extent that they are based on the allegedly unlawful nature of the impugned decision.

25. The Tribunal will also dismiss the allegation of improper conduct based on the fact that the Office allegedly "misinformed" the complainant by suggesting in the above-mentioned e-mails of 13 December 2005 and 15 March 2006 that his transfer request would

be accepted. Indeed, an examination of these e-mails shows that they cannot be regarded as containing any formal undertaking to that effect, particularly since the statement that the complainant would receive a provisional calculation of his pension rights also related to the request for an enhancement of benefits in respect of the rights which he had accrued with the INPS.

26. On the other hand, there is merit in the complainant's claim for compensation for the injury which he suffered on account of the unacceptably slow processing of his file. As the above-mentioned sequence of events shows, more than two years elapsed between his submission of a transfer request on 19 May 2004 and the decision on that request – a situation for which he was not to blame – and well over three years then passed before the President of the Office took a final decision after the internal appeal procedure. As a result, the dispute will not have been finally settled by this judgment until more than eight years after the complainant submitted his initial request and some five years after his retirement. This is all the more deplorable because, in view of the subject matter of the request, the Office ought to have endeavoured to process it before the complainant started to draw his pension. As the Tribunal has repeatedly stated, it is incumbent upon international organisations to take all the requisite steps to ensure that requests presented by their officials are examined with acceptable promptness and that internal appeals procedures move forward with reasonable speed (see, for example, Judgments 2197, under 33, 2904, under 15, or 3016, under 9). In the circumstances of this case, and having regard to the serious failure to comply with these requirements, the Tribunal will thus order the EPO to pay the complainant the amount of 4,000 euros in damages for this delay.

DECISION

For the above reasons,

1. The EPO shall pay the complainant damages in the amount of 4,000 euros for the delay in processing his request and in the internal appeal procedure.

2. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 27 April 2012, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet