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

NINETY-FIFTH SESSION

Judgment No. 2239

The Administrative Tribunal,

Considering the complaint filed by Mr Y. B. against the European Patent Organisation (EPO) on 6 May 2002 and corrected on 18 June, the Organisation's reply of 6 September, the complainant's rejoinder of 9 December 2002 and the EPO's surrejoinder of 21 March 2003;

Considering the complaint filed by Ms B.M. G. against the EPO on 6 May 2002 and corrected on 24 June, the Organisation's reply of 11 September, the complainant's rejoinder of 14 November 2002 and the EPO's surrejoinder of 21 February 2003;

Considering the complaint filed by Mr L.J. K. against the EPO on 6 May 2002 and corrected on 22 May, the Organisation's reply of 20 September, the complainant's rejoinder of 28 November 2002, the EPO's surrejoinder of 6 March 2003, the complainant's further submissions of 9 April and the Organisation's comments thereon of 2 May 2003;

Considering the complaint filed by Mr I.M. K. against the EPO on 7 May 2002 and corrected on 23 May, the Organisation's reply of 20 September, the complainant's rejoinder of 28 November 2002, the EPO's surrejoinder of 6 March 2003, the complainant's further submissions of 9 April and the Organisation's comments thereon of 2 May 2003;

Considering the complaint filed by Mr R.E. T. - his second - against the EPO on 24 May 2002 and corrected on 1 July, the Organisation's reply of 23 September, the complainant's rejoinder of 2 December 2002, the EPO's surrejoinder of 10 March 2003, the complainant's further submissions of 14 April and the Organisation's comments thereon of 2 May 2003;

Considering the application to intervene filed by Mr D. L. on 10 June 2002 and the EPO's letter of 27 June 2002 in which it raised no objection to that application;

Considering the application to intervene filed by Mr P. K. on 10 July 2002, and the Organisation's letter of 26 July 2002 in which it raised no objection to that application;

Considering the application to intervene filed by Mr G. U. on 10 July 2002 and the Organisation's observations thereon of 29 August 2002;

Considering the application to intervene filed by Mr J. B. on 1 August 2002 and the Organisation's observations thereon of 30 August 2002;

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. The complainants are German nationals whom the defendant recruited from the German civil service at various dates between 1977 and 1991. At the time when they joined the European Patent Office, the secretariat of the EPO,

the complainants 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."

German civil servants were prevented from effecting such transfers by their national legislation until 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 complainants all applied to transfer their pension rights to the EPO's pension scheme pursuant to that Agreement.

The amounts to be transferred and the method by which the Office 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. Of particular relevance to the present case is the fact that where a transfer occurs after the date of the employee's entry into service, in calculating the corresponding reckonable years of service the EPO disregards any "increases" in the amount transferred arising between the date of entry into service and the date of the transfer to its pension scheme. The basis for this approach is the fourth paragraph of Rule 12.1/1(ii), which 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 the 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 to the German social security pension insurance scheme administered by the Federal Insurance Office for Salaried Employees (*Bundesversicherungsanstalt für Angestellte*, hereinafter "the BfA"). In practice, this means that the civil service retrospectively pays contributions on the contributory income from employment during the period of retrospective insurance. Since 1992, the annual income figures on which the retrospective evaluation is based have been index-linked, as a mandatory requirement of German law. 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 a result of the legal framework outlined above, a number of different transfer scenarios may arise, depending in particular on the date of the evaluation of the pension rights (pre- or post-1992), the dates of the transfers to and from the BfA and the information provided by the BfA as to the components of the lump sum transferred to the EPO's pension scheme. In this connection it is worth noting that the BfA considers itself under no obligation to communicate the retrospective insurance value at the date of the employee's entry into the service of the EPO, but only at the date of the actual transfer to the EPO's scheme.

In giving effect to the complainants' transfer applications, in each case the Office deducted, for each full year which had elapsed between the date when the employee joined the EPO and the date of the transfer to the EPO, 3.5 per cent per annum from all retrospective contributions transferred to it by the BfA, before converting the remaining sum into reckonable years of service. The complainants objected to the deduction of 3.5 per cent from their retrospective insurance contributions where the BfA had not declared any interest or other capital accretion on the lump sums it had transferred to the EPO. They asked the Office to recalculate the number of reckonable years of service to be credited to them without making that deduction. The Office did not accede to their requests and they therefore filed internal appeals individually with the Appeals Committee.

The Committee, which joined the complainants' appeals, considered that in the absence of a binding calculation by

the BfA of the retrospective insurance value on the date of entry into service, the Office was entitled to calculate the amount to be taken into account in determining the additional reckonable years of service, based on the values indicated by the BfA. It concluded that the 3.5 per cent deduction from retrospective insurance contributions transferred by the BfA to the EPO's pension scheme was justified under Rule 12.1/1(ii) in the case of index-linked contributions, because indexation resulted in an increase in the value of such contributions which the Office was entitled to ignore in calculating the corresponding reckonable years of service. The President of the Office accepted the Committee's findings and decided to dismiss all of the internal appeals. That is the impugned decision.

B. The complainants submit that there is no legal basis for the disputed deduction. There could not have been any capital accretion justifying a deduction under Rule 12.1/1(ii) on retrospective insurance contributions which, by their very nature, did not exist during the period for which such accretion is alleged. The defendant has not proved any actual accretion in the value of the complainants' pension rights between the time when they joined the EPO and the time when their pension rights were transferred to the EPO scheme.

The complainants do not accept that the index-linking of the bases used to assess retrospective insurance contributions results in capital accretion. They assert that the retrospective insurance mechanism is inherently disadvantageous for civil servants in financial terms. Index-linking is one of several factors on which it is based, but other factors arbitrarily ignored by the defendant, such as the capping of contributions by means of an income ceiling, result in an overall reduction in capital, despite the index-linking.

The figure of 3.5 per cent is arbitrary in that it disregards the actual amount and evolution of the index-linking factors and of the contribution rates on which they should be based. The deduction leads to disproportionately high reductions in the reckonable years of service, in violation of employees' acquired rights. Moreover, the deduction was in breach of the principle of equal treatment, because the same percentage was deducted in different situations.

The complainants point out that any delays in the retrospective insurance calculation and in the transfer of the pension rights, which are beyond the control of the employees concerned, necessarily cause them to incur further losses, since the 3.5 per cent deduction then covers a correspondingly greater period of time.

Furthermore, the defendant breached its duty to inform employees of the deduction, since the information documents provided by the EPO did not indicate that a deduction would be made for retrospective insurance contributions.

According to the complainants, the legal fiction set out in Article 3 of the Agreement, whereby an employee who has applied to transfer his pension rights is deemed to have been insured with the BfA prior to joining the EPO even if he has been insured retrospectively in respect of prior periods, does not permit a more extensive fiction enabling retrospective insurance payments made only years later to be treated as if they had been subject to capital accretion which never actually occurred.

In defining the amounts to be taken into account for the calculation of reckonable years of service, Rule 12.1/1(ii) refers to "the amounts [...] as calculated under the previous pension scheme, in terms of both capital and interest, if any [...]". Had the intention been to include other types of return on capital, a word other than "interest" would have been used. Given that the retrospective insurance of German civil servants was a case that was necessarily envisaged by those who drafted the Implementing Rules, it must be assumed that they did not intend that particular case to be covered by Rule 12.1/1(ii). Purely financial considerations cannot justify the deduction, and the EPO cannot make up for weaknesses in the Agreement by adopting legally unfounded measures that are detrimental to the staff concerned.

The complainants ask the Tribunal to set aside the decisions of the President of the Office rejecting their respective claims for a recalculation of reckonable years of service. They ask for a new calculation to be carried out without any deduction from retrospective insurance contributions. Four of the complainants also claim costs.

Subsidiarily, three of the complainants seek a recalculation without the disputed deduction for the period 1997-98 or, in one case, 1997-99, on the grounds that they would have avoided the deduction for those periods by ensuring that their transfers occurred sooner had the EPO informed them of the deduction in due time; and a fourth complainant seeks a recalculation of the number of years of reckonable service, with any deduction being based only on the actual increases generated by the specific index-linking factors applied in his case, rather than a 3.5 per cent flat rate.

C. The EPO replies that the legal basis for the deduction is Rule 12.1/1(ii), which was considered by the Appeals Committee to refer to increases in the broadest sense. It submits that index-linking is an adjustment amounting to an increase in retrospective insurance contributions. The deduction effected by the Office was therefore warranted. It denies that there has been any breach of equal treatment, since the rate of 3.5 per cent was applied to all amounts transferred, and the complainants have not proved that the overall increase in the retrospective insurance contributions transferred to the BfA was not equal to 3.5 per cent. Furthermore, that rate was indicated in the Agreement.

The EPO's information brochure concerning these transfers was correct at the time when it was published, and the complainants were kept properly informed throughout the procedure.

The purpose of the legal fiction in Article 3 of the Agreement is simply to ensure that the previous pension scheme of the employee concerned is the BfA; the complainants' suggestion that the fiction is being used more extensively is therefore irrelevant.

The inherent disadvantages of the retrospective insurance mechanism are the result of German legislation, and the complainants' assumption that the EPO must have envisaged the case of retrospective insurance contributions when drafting the Implementing Rules is unfounded, as noted by the Appeals Committee.

D. In their respective rejoinders, the complainants reiterate that there is no legal basis for the disputed deduction and that the defendant has failed to prove any actual capital accretion on the sums to which it applied the deduction.

E. In its surrejoinders the defendant maintains its position on all issues.

F. In further submissions, three of the complainants object to comments made by the EPO in its surrejoinders, to the effect that their comparison of the specimen calculations obtained from their previous employers and from the BfA was misleading.

G. In its comments on these further submissions, the EPO points out that the specimen calculation provided by the BfA cannot have the effect of casting doubt on the Office's method of calculating the number of reckonable years from the actual amount transferred by the BfA.

CONSIDERATIONS

1. The complainants are German staff members of the EPO who are challenging the way in which pension rights acquired by virtue of their employment in Germany prior to their recruitment by the Office were transferred 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. Although their respective factual situations and, in some cases, their claims are not strictly identical, the complainants rely on the same legal arguments and the Tribunal considers that their complaints should be joined.

2. Mr [I.M.] K., who entered the service of the EPO on 1 September 1989 as a lawyer at grade A4 on secondment from the German civil service, applied for a transfer of his rights and resigned from the German civil service in December 1998 to enable his "retrospective insurance rights" to be liquidated in accordance with German legislation.

On 10 September 1999, having determined his rights in consultation with him, the BfA paid the EPO an amount corresponding to the lump sum surrender value of his pension rights. The EPO deducted 3.5 per cent per annum from that amount to determine the value of his rights as at the date on which he had entered the service of the EPO, before calculating the number of reckonable years of service to be credited to him, which it set at ten years, two months and four days. Mr K. appealed against that decision, of which he was notified on 24 August 1999; but his appeal was rejected by the President of the Office in a decision of 6 February 2002, endorsing a recommendation issued by the Appeals Committee on 21 January 2002. It is that decision which the complainant now impugns, asking the Tribunal, primarily, to order that his reckonable years of service be calculated without any deduction being made in respect of his retrospective insurance contributions from the amount transferred by the BfA. Subsidiarily, he requests that there be no deduction at least for the years 1997 and 1998.

3. Mr [Y.] B. is in a similar situation. Having been employed since 1 June 1990 as a principal administrator seconded from the German civil service, which he had joined in 1970, he applied for a transfer of his pension rights. On 25 February 1999 the BfA transferred the lump sum surrender value of his pension rights to the EPO, which, after deduction of the above-mentioned annual interest of 3.5 per cent, evaluated the number of reckonable years of service at ten years, ten months and eighteen days. Mr B. appealed, and he now challenges the decision of the President of the Office of 6 February 2002, as well as another decision, dated 25 March 2002, rejecting claims which he had submitted in the context of a joint appeal processed separately.

4. Ms G. entered the service of the EPO on 1 August 1988 on secondment from the German civil service, which she had joined on 3 January 1972. Following the same procedure as the other complainants, she obtained an agreement in principle to a transfer of her pension rights, and following the transfer of the lump sum surrender value of those rights her reckonable years of service were set at nine years and twenty-five days. Having appealed unsuccessfully, she now asks the Tribunal to set aside the decision of 6 February 2002 by which the President of the Office rejected her appeal. She submits the same subsidiary claims as Mr [I.M.] K.

5. Mr [L.J.] K. joined the EPO on 19 August 1991, having worked for the German civil service almost continuously since 2 May 1979. He applied for a transfer of his pension rights and challenges the President's decision of 6 February 2002 rejecting his appeal against the decision of 4 May 1999 by which his reckonable years of service were set at 7 years, 11 months and 16 days. Subsidiarily, he asks the Tribunal to order the Office to recalculate his reckonable years of service taking into account only the actual increases which occurred in the value of his retroactive insurance.

6. Mr T. was recruited by the EPO on 1 March 1980 as a lawyer seconded from the German civil service, where he had worked from 1 October 1968 until 20 March 1972, and from 20 May 1973 until 29 February 1980. The pension rights which he asked to transfer were evaluated at five years, seven months and twenty-one days. He asks the Tribunal to set aside the decision of 22 March 2002 by which the President of the Office refused to alter the bases of the calculation which produced that result, and subsidiarily requests that no deduction be effected for the years 1997, 1998 and 1999.

7. Before examining the complainants' arguments, it is worth recalling the texts applied by the defendant in determining their respective situations as regards the pension rights acquired by virtue of their employment prior to joining the EPO.

8. Article 12 of the Office's Pension Scheme Regulations, concerning the inward and outward transfer of pension rights, provides in paragraph 1 that:

"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."

9. Rule 12.1/1 of the Implementing Rules to the Pension Scheme Regulations defines the conditions for crediting reckonable years of service to staff members who have contributed to an external pension scheme prior to joining the EPO. In particular, it provides, in paragraph (i)(b), that the amounts to be taken into account in determining the number of years of reckonable service must be certified by the previous pension scheme 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", and in paragraph (ii), that in calculating the said years of reckonable service, such amounts "shall be taken into account as calculated under the previous pension scheme, in terms of both capital and interest, if any, on the date on which the person concerned entered the service". Paragraph (ii) also indicates that where such amounts are paid by the previous pension scheme after the date of entry into service, as in the complainants' case, "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". Lastly,

paragraph (iii) of that same Rule stipulated in its 1997 version that:

"The number of reckonable years of service to be taken into account under Article 12, paragraph 1, of the Regulations shall be calculated by dividing the amounts credited under paragraph (ii) by an amount equal to 12 × 24% of the first monthly salary paid to the staff member as a permanent employee of the Office."

10. Until 1996, staff members of the Office who had worked as German civil servants and been affiliated, in that capacity, to a pension scheme, were unable to transfer their rights to the EPO's scheme because no agreement authorising such transfers had been reached. On 8 December 1995 the Federal Republic of Germany and the EPO signed an Agreement, which entered into force on 21 September 1996, extending the benefit of Article 12 of the Office's Pension Scheme Regulations to permanent employees and contract staff of the Office who had been compulsorily or voluntarily insured with the German social security pension insurance scheme. The Agreement provided that a staff member covered by its terms was entitled to "have transferred to the pension scheme of the European Patent Office the total compulsory and voluntary contributions paid in respect of him to an authority responsible for the social security pension insurance scheme in the Federal Republic of Germany up until the time of his entry into the service of the European Patent Office, taking into account where appropriate any pension adjustment, together with 3.5 per cent interest for each complete year following the contribution payment until the time of the transfer". The transfer is effected on application by the staff member to the EPO, which notifies the BfA, which in turn forwards the application, where appropriate, to the competent authority responsible for the pension scheme. Article 3 of the Agreement expressly stipulates that:

"A person shall also be deemed to have been insured prior to his entry into the service of the European Patent Office where that person has been, or is, retrospectively insured with the German social security pension insurance scheme in respect of periods prior to such entry."

The Protocol signed by the parties to the Agreement of 8 December 1995 and referred to in Article 7 thereof provides, in chapter II, paragraph 1, that:

"An employee of the European Patent Office who was appointed as a permanent employee prior to the entry into force of the Agreement or who has acquired a pension or severance grant right as a member of the contract staff shall be entitled, in the circumstances laid down by Article 1, to apply for the transfer of the lump sum surrender value of the contributions paid by him to the German social security pension insurance scheme."

11. According to the complainants, who for the most part reiterate the arguments on which they relied without success during the internal appeal proceedings, the Office's deduction of 3.5 per cent per annum from the amounts transferred by the BfA has no legal basis and is entirely arbitrary, since the pension rights they held on joining the EPO had not been liquidated and could not have been subject to any "increase" within the meaning of Rule 12.1/1 of the Implementing Rules. They assert that the Office decided to effect this deduction for purely financial reasons, which did not entitle it to violate the applicable texts and the rights of its employees, particularly in view of the fact that it had not informed them, before they chose to apply for a transfer, of the way in which the transfer would be carried out. Moreover, the actual time taken to effect the transfer, which was beyond their control, had added to the loss they had suffered. The complainants contend that by acting in that way, the Organisation disregarded the principle of equal treatment.

12. The EPO replies, as it did before the Appeals Committee, that it merely applied the combined provisions of the Agreement of 8 December 1995 and Rule 12.1/1(ii) of the Implementing Rules in effecting a deduction which enabled it to determine the value of the complainants' pension rights at the date of their entry into the service of the EPO. It submits that this deduction is necessary because of the fact that the rights transferred by the BfA were evaluated as at the date of the transfer, and that prior to that date the complainants had benefited from "increases" resulting in particular from the index-linking (*Dynamisierung*) required by German legislation. It also asserts that it provided the complainants with all the information they required to make their decision and that it violated neither their rights nor the principle of equal treatment.

13. The Tribunal feels bound to observe that the system adopted is far from satisfactory and will inevitably lead to disappointments. As pointed out in a note from a Vice-President of the Office, the provisions of Article 12 of the Pension Scheme Regulations do not guarantee that the transfer of pension rights will be effected on the basis of total "actuarial neutrality", whether to the detriment of staff members or, in some cases, the Organisation itself. Indeed, the system is based on a fiction, or rather a double-fiction, since it involves first calculating the rights

theoretically transferred to the BfA on the basis of "retrospective" insurance, then retrospectively calculating the value of the staff members' rights crystallised at the often distant date of their entry into the service of the EPO. Moreover, the retrospective calculation system is not based on an evaluation of the actual increases in the value of the pension rights which occurred in each year, but involves a flat-rate deduction mechanism which may create an impression of unfair treatment amongst staff, or at least some of them. On this issue, the defendant invokes the dictates of "sound management", but it may not have been sufficiently mindful of the fact that this "sound management" implies a particularly thorough examination of the individual situations of its staff members in dealing with transfers of the rights they hold as a result of contributions paid by and on behalf of them prior to their entry into the service of the EPO.

14. Nevertheless, despite the flaws of the system, it complied with the Pension Scheme Regulations, the Implementing Rules thereto and the Agreement entered into with the Federal Republic of Germany, as was clearly demonstrated in the analysis by the Appeals Committee. The problem stems from the fact that the BfA considered that it was neither obliged nor able to provide the EPO with an evaluation of the rights of the staff members concerned as at the date of their entry into the service of the Office. However, it is quite clear that, contrary to the view put forward by the complainants, it is the value of their rights at the time when they left the German civil service that must be taken into account to determine the extent of the transfer. Although the Office is in principle bound to rely on the amounts certified by the pension scheme transferring the rights, it remains responsible for converting the transferred amounts into reckonable years of service. To that end it must take into account the employee's "grade on confirmation of appointment", in accordance with Article 12 of the Pension Scheme Regulations, which means that it must place itself retroactively at the date of the employee's entry into the service of the Office and calculate his or her rights retrospectively to that date, regardless of the amounts transferred by the pension scheme. As stated in Rule 12.1/1 of the above-mentioned Implementing Rules, the "increases" arising between the date of entry into service 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". It is true that the "increases" to which the complainants' pension rights were subject remained virtual, since those rights had not been liquidated before the complainants left the German civil service. Nevertheless, the only rational way for the Office to convert their rights into years of reckonable service was to place itself fictitiously, with regard not only to the grade and salary of the staff members concerned but also to the pension rights to which they were entitled, at the date of their entry into the service of the EPO. The application of a flat-rate deduction of 3.5 per cent per annum to the amounts calculated at the time of the transfer from the BfA is by no means unreasonable, since that rate is not only indicated by the Implementing Rules and by the Agreement with Germany, but is also used, according to the evidence on file, by the European Communities.

15. In view of the foregoing considerations the complainants' main plea fails. Their other pleas must also be rejected: the Organisation did not breach the principle of equal treatment, given that all staff members in identical situations were treated in the same manner. It is unfortunate that a clearer explanation of the system was not given in due time, but in the circumstances the defendant cannot be considered to have breached its obligations to its staff, or to have provided them with inaccurate information, or to have excessively delayed what was in fact a complex procedure, involving collaboration with a third party, the BfA, and in most cases requiring the staff members concerned to resign from the German civil service.

16. The complainants' subsidiary claims must likewise be rejected. The flat-rate deduction of 3.5 per cent per annum was lawfully applied, up to the date of the transfer, to the value of the rights actually transferred. A calculation method not involving a flat rate would have been conceivable, but the Organisation was under no obligation to resort to such a method.

17. Since the complaints fail, so must the applications to intervene, it being noted that certain claims they contain which differ from those submitted in the complaints are in any case irreceivable.

DECISION

For the above reasons,

The complaints are dismissed.

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

Updated by PFR. Approved by CC. Last update: 23 July 2003.