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

NINETY-SIXTH SESSION

Judgment No. 2311

The Administrative Tribunal,

Considering the complaints filed by Mr H. F. - his second - and Mr G. K. against the European Patent Organisation (EPO) on 31 October 2002, the Organisation's single reply of 11 February 2003, the complainants' rejoinder of 15 April and the EPO's surrejoinder of 26 May 2003;

Considering the applications to intervene filed by Messrs O. B., H. S., P. B., K. S. and W. S. on 10 December 2002, their letters of 4 April and 26 June 2003 concerning those applications, and the Organisation's comments of 31 January 2003;

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. This case concerns the enhancement of pension benefits provided 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. In that respect it is closely related to the disputes ruled on by the Tribunal in Judgments 1456, 1517, 1825 and 1826. The transfer mechanism provided for in Article 12 is explained in Judgment 2239, under A.

Under Article 46(1) of the EPO's Pension Scheme Regulations, the enhancement of benefits is calculated by determining the number of years of service that would have been credited under Article 12(1) if a transfer had been made, and then multiplying that number by a figure equal to 2 per cent of the difference between the employee's final salary and the salary applicable at the time of his departure to his starting grade.

The complainants were recruited from the German civil service in 1980 and 1979, respectively. Both retired in 2001 having reached grade A5. In 1997 each complainant applied for a transfer of his previously acquired pension rights under Article 12(1) of the Pension Scheme Regulations. The proposals issued by the Office, based on the "lump sum surrender value" provided in each case by the BfA [(1)], showed that the years of service to be credited to the complainants in respect of their previously acquired pension rights would be seven years, one month and three days for Mr F., and six years and six months for Mr K..

The complainants chose not to accept these proposals. Thus, the transfer did not take place and they became entitled to an enhancement of their EPO pension benefits under Article 46 of the Pension Scheme Regulations. The amount of the resulting addition to their benefits communicated to them at the time they retired was calculated by the Office on the basis of the "retrospective insurance value" provided in 1992 by the complainants' previous employer, the German Ministry of Justice. In terms of years of service, the results were considerably lower than those indicated in their earlier transfer proposals.

The complainants challenged the calculation of their enhancement of benefits, arguing that it ought to have been based on the lump sum surrender value indicated by the BfA at the time when they applied for a transfer of their pension rights, and not on the retrospective insurance value communicated by the German Ministry of Justice. The

Appeals Committee, which issued its opinions on 19 June 2002, unanimously recommended that their appeals be allowed. By a letter of 6 August 2002, which constitutes the impugned decision, the President of the Office informed the complainants that he did not endorse the opinions of the Appeals Committee and that he had decided to reject their appeals.

B. The complainants explain that the lump sum surrender value comprises three components: social security pension insurance contributions made during periods of employment in the private sector; retrospective insurance contributions for periods of employment as a civil servant affiliated to the civil service's non-contributory (budgetary) pension scheme; and the statutory index-linking of retrospective insurance contributions (*Dynamisierung*). The number of years of service credited to them in the transfer proposals on the basis of the lump sum surrender value was seven years, one month and three days for Mr F., and six years and six months for Mr K.. The Office, however, based its calculation of their enhancement of benefits on only one component of the lump sum surrender value, namely the retrospective insurance value, and thus obtained three years, ten months and fourteen days for Mr F., and three years, ten months and three days for Mr K. Its approach was therefore clearly in breach of Article 46, which requires the Office to take into account "the number of years of service that would have been credited under Article 12, paragraph 1, if a transfer payment had been made".

The complainants describe retrospective insurance contributions as "a purely German affair" occurring only where a civil servant moves, within the German system, from the non-contributory pension scheme for civil servants to the contributory scheme administered by the BfA. The retrospective insurance contribution *per se* is not a "finished element" of a pension entitlement, because under German law it has to be index-linked and must therefore be adjusted accordingly.

According to the complainants, the purpose of the enhancement of benefits under Article 46 is not to compensate for disruption to a civil service career, but to confer on former civil servants the same advantages as those gained by employees who transfer their pension rights under Article 12. Referring to the preparatory papers for the text of Article 46, they submit that one of the main concerns was to avoid inequality between the large number of staff recruited from the International Patent Institute, whose pension entitlements had been transferred in full to the EPO's pension scheme, and staff recruited from other sources, particularly those who, like the former German civil servants, were then unable to transfer their pension rights. In their view, the application of Article 46 should produce the same pension as an actual transfer under Article 12.

Citing Judgment 1456 and a ruling of the German Federal Administrative Court, the complainants emphasise that the Organisation cannot blame the German authorities for the fact that it relies on the retrospective insurance value in calculating the enhancement of benefits. They contend that the Tribunal's dismissal of the complaints ruled on in Judgment 1456 was largely due to misrepresentations made by the EPO.

They ask the Tribunal to set aside the impugned decision; to order that the addition paid to them under Article 46 be based on the number of years of service that would have been credited under Article 12(1) if a transfer had been made in accordance with the Agreement of 8 December 1995 between the Federal Republic of Germany and the EPO; to order the defendant to apply the resulting addition retroactively, with interest, as from the date of their retirement; and to award them costs.

C. The Organisation replies that of the two available values it chose the figure provided in 1992 by the complainants' previous employer and corresponding to their career in the German civil service. There was no reason for it to take into account the higher figure communicated by the BfA because they had not resigned from the civil service and were therefore still covered by the civil service pension scheme rather than the scheme administered by the BfA.

The lump sum surrender value represents pension rights acquired not only during the transferor's civil service career but also during earlier periods of employment in the private sector. Since the purpose of the enhancement of benefits under Article 46 is to compensate for any loss of entitlements arising out of leaving the German civil service, it is inappropriate to take into account periods of employment other than the time spent in the civil service immediately prior to joining the EPO. In any case, the provisions governing enhancement of benefits stipulate that it is the value communicated by the previous pension scheme which is to be taken into account. In the complainants' case, this meant the German civil service scheme, and not the BfA, which is deemed to be the previous pension scheme only where an employee actually resigns from the German civil service to enable a transfer of pension rights to take place.

The Organisation emphasises that Judgment 1456 should be read in the light of Judgment 1825, which it considers as having definitively settled the issues raised by the complainants.

D. In their rejoinder the complainants submit that in view of the clear wording of Article 46(1), the Organisation's approach cannot be justified, particularly now that transfers are actually occurring pursuant to the Agreement between the Federal Republic of Germany and the EPO. They assert that all German social security pension contributions, whether retrospective or not, have to be index-linked. Consequently, even a theoretical transfer must be based on the total amount of contributions plus indexation. Moreover, German civil service pensions always take into account contributions in respect of previous periods of employment, and it therefore cannot be acceptable to base the calculation for a theoretical transfer only on "a curtailed entitlement".

The complainants point out that it is inherently contradictory to argue that the BfA is not their previous pension scheme whilst relying on a value which is only of use to the BfA, since retrospective insurance contributions are "values which, legally and substantively, are intended solely to be paid into the BfA".

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

CONSIDERATIONS

1. The complainants are German citizens who, after serving with the German Ministry of Justice, joined the EPO at the proposal of that administration and retired in 2001 at grade A5. They had initially applied for a transfer of their pension rights on the basis of the Agreement of 8 December 1995 between the Federal Republic of Germany (FRG) and the Organisation on the implementation of Article 12 of the EPO's Pension Scheme Regulations. They subsequently rejected the proposals made to them, however, and thus became entitled to the pension "enhancement" available under Article 46(1) of those Regulations. Their pensions were then recalculated on the basis of amounts which were different from those which would have been used in the event of a transfer. The complainants challenged the results of the new calculation and brought their case before the Appeals Committee, which, on 19 June 2002, recommended that the appeals be allowed. In view of the President's decision not to endorse the Committee's recommendation and to reject their appeals, the complainants, relying on the reasoning accepted by the Appeals Committee, ask the Tribunal to set aside that decision, which was taken on 6 August 2002.

2. The fact that the complainants are entitled to an enhancement of their pension benefits in accordance with Article 46 of the Pension Scheme Regulations is not in dispute. There is disagreement, however, regarding the number of years of service to be taken into account when calculating the amount of the enhancement. In order to determine whether the complainants' reasoning is valid, it is worth considering the relevant rules.

3. Article 46 of the Pension Scheme Regulations, entitled "Enhancement of benefits", is worded as follows:

"(1) An employee referred to in Article 43 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.

[...]

(2) The increase in pension shall be 2% of the difference in salaries established under paragraph 1 multiplied by the number of years so determined.

[...]"

4. According to Article 12(1), which is referred to in Article 46:

"An employee who enters the service of the Office after leaving the service of a government department [...] 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."

5. Rule 12.1/1 of the Implementing Rules to the Pension Scheme Regulations sets out the following provisions concerning the application of Article 12(1), under the heading "Inward transfer of previously acquired rights":

"i) Periods of membership of previous pension schemes

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 pension schemes preceding entry into the service of the Office.

Such periods of membership may include periods served in one or more government departments, organisations or firms, provided that the aggregate of such rights had been taken into account under the pension scheme of the last government department, organisation or firm in whose service the person concerned was employed before entering the service of the Office.

b) An amount shall be credited under this Article only if it is 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 must be equivalent to the whole of the amounts paid to the person concerned by the afore-mentioned pension scheme.

ii) Amounts credited

For purposes of calculating the years of reckonable service to be credited pursuant to Article 12, paragraph 1, of the Regulations the amounts specified in paragraph (i) b) above 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.

[...]"

6. Lastly, according to Rule 46.1/1 of the Implementing Rules, which defines in greater detail the number of years of service to be taken into account for the purposes of Article 46 of the Pension Scheme Regulations concerning enhancement:

"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."

7. When in March 1997 the complainants applied for a transfer of their pension rights on the basis of the Agreement between the FRG and the EPO, the Office sent them a proposal indicating the amounts which would be taken into account assuming that the transfer would be made by the BfA, which presupposed that they would resign from the German civil service. According to the proposed amounts, Mr F. would have been credited, in respect of his previously accrued pension rights, with seven years, one month and three days, and Mr K. with six years and six months. As the complainants rejected this proposal, their rights were not transferred but they became entitled on retirement to the enhancement of their benefits. This enhancement was calculated on the basis of the "hypothetical retrospective insurance values" which had been notified to the Organisation by the German Ministry of Justice in August 1992. The amount of the enhancement worked out at 437.40 German marks for Mr F. and 405.66 marks for Mr K., corresponding in each case to three years and ten months of reckonable service, well below the figure produced by the previous calculation.

8. The justification given by the Organisation for excluding the first method of calculation is clearly set out in the impugned decision of 6 August 2002. After admitting that the amount the BfA would have paid to the EPO had the pension rights actually been transferred was known, the President of the Office added:

"In the event of a transfer, the person resigning from the German civil service must have the period during which he subscribed to the pension scheme of the civil service validated by the BfA ("Nachversicherung"), which is then considered as the last pension scheme prior to joining the EPO. The amount which is then transferred by the BfA to the EPO represents the entitlements accrued not only during the career with the German civil service, but also during any previous periods of employment in the private sector.

[...] The two complainants did not resign from the German civil service. The pension benefits accrued during their career in the civil service were therefore not validated by the BfA, so that their last pension scheme is that of the German civil service and not the BfA.

[...] In accordance with the provisions governing the calculation of the theoretical transfer, it is the information supplied by the last (actual) pension scheme to which the persons concerned subscribed which should be taken into account for the purpose of calculating the pension enhancement."

9. In rebutting this line of argument, the complainants, referring to the opinion of the Appeals Committee, rely on the wording of Article 46 of the Pension Scheme Regulations, which states, in paragraph 1(ii), that the addition must be based on "the number of years of service that would have been credited under Article 12, paragraph 1, if a transfer payment had been made". Since the number of years of service that would have been credited as a result of a transfer by the BfA is known, this is the amount which, according to the complainants, should serve to calculate the enhancement. The only element taken into account by the Organisation includes neither the contributions paid before they joined the German civil service, nor the index-linking factor (*Dynamisierung*) applied according to German legislation, and thus cannot correspond to the lump sum surrender value (*pauschaler Rückkaufswert*) as defined in the Agreement between the FRG and the EPO. Furthermore, the complainants assert that the Tribunal expressed a view on this issue in Judgment 1456, in which it held that the fixed value "representing retirement pension rights" which, under Rule 46.1/1, is to be used subsidiarily as the basis for calculating the enhancement, corresponds to "another theoretical value, one to be reckoned on the strength of the employee's full record of social security coverage".

10. The arguments derived from these texts by the complainants, which the Appeals Committee accepted, show how difficult it is to interpret these rules. The Tribunal described them as "obscure" in Judgment 1456, emphasising that "the theoretical figures used in reckoning the enhancement are exceedingly unreliable". Taken out of context, the reference in Article 46(1)(ii), to the number of years of service that would have been credited under Article 12(1), "if a transfer payment had been made" arguably supports the interpretation put forward by the complainants. But Article 12(1) cannot be interpreted in isolation from the provisions of the Implementing Rules to which it refers expressly, that is, Rule 12.1/1 quoted above: the amounts to be taken into account are those calculated "under the previous pension scheme [...] on the date on which the person concerned entered the service". As the Organisation asserts, however, the "previous pension scheme" is not the BfA, since the complainants had not resigned from the German civil service, and the amounts of the first evaluation could have been taken into account only on condition that their entitlements had been validated by the BfA. The last pension scheme to which they show they belonged was indeed that of the German civil service and the figures which were quite rightly used were those officially communicated in 1992 by the German Ministry of Justice. The reference made by the Tribunal in Judgment 1456 to the "full record of social security coverage" which should be taken into account to calculate the enhancement must be understood as applying to the pension scheme which actually provided the Organisation with data concerning the career of the individuals concerned. This cannot mean the data communicated by the BfA, considering that the latter was not the complainants' "previous pension scheme". The figures communicated by the German Ministry of Justice could certainly have been challenged by the defendant, had it deemed them to be inadequate, incomplete or insufficient. However, there is no evidence that casts any doubt on them, or that supports the complainant's arguments regarding the difference - according to whether or not the indexation of retrospective insurance contributions and the contributions paid in some cases prior to joining the German civil service are taken into account - between the calculations applicable, respectively, to transfers of entitlements under Article 12(1) and to the enhancement of benefits received under Article 46 by those who have chosen not to avail themselves of the transfer (a choice which necessarily entailed certain consequences), given that these two categories of retirees are obviously in very different situations.

11. The complaints must therefore be dismissed. Consequently, the applications to intervene filed by interveners whose claims are the same as the complainants' must likewise be dismissed. Insofar as some of the applications to intervene include other claims, they are irreceivable, as are those submitted by unidentified claimants.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 13 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

James K. Hugessen

Seydou Ba

Catherine Comtet

1. *Bundesversicherungsanstalt für Angestellte*, or Federal Insurance Office for Salaried Employees, which administers the German social security pension scheme.

Updated by PFR. Approved by CC. Last update: 20 February 2004.