The Administrative Tribunal,

Considering the complaint filed by Mr M. K. against the European Patent Organisation (EPO) on 10 July 2006 and corrected on 11 August, the EPO's reply of 16 November 2006, the complainant's rejoinder of 28 February 2007 and the Organisation's surrejoinder of 6 June 2007;

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. The complainant is a German national born in 1964. He joined the European Patent Office, the EPO's secretariat, in 2001. On 6 May 2002 he applied for the calculation of the pension entitlements he had acquired under the German social security pension insurance scheme, administered by the *Bundesversicherungsanstalt für Angestellte* (hereinafter "BfA")*, for the purpose of transferring them into the EPO pension scheme. Appended to his application for transfer, he submitted his pension insurance history and the standard European Form on social security contributions, E104. According to these documents, between January 1999 and December 2000 the complainant had not contributed to the BfA scheme but to a Portuguese social security scheme. In October 2002 the BfA confirmed that the complainant's last contribution to the German social security pension insurance scheme was made in 1998.

By a letter dated 8 May 2003 the Pension Administration Department rejected the complainant's application for transfer of the pension rights accrued to him under the BfA on the ground that Article 12 of the Pension Scheme Regulations of the EPO and Rule 12.1/1 of the Implementing Rules to the Pension Scheme Regulations (hereinafter "Implementing Rules") provided that pension entitlements were transferable only from the pension scheme to which an employee was affiliated prior to joining the Office. On 7 August the complainant lodged an appeal against that decision, requesting that the BfA be recognised as his previous pension scheme and that the transfer of his pension entitlements be approved. In a letter of 22 September 2003 the Head of the Employment Law Directorate told the complainant that, since an initial review had not permitted a favourable reply, the matter had been referred to the Internal Appeals Committee. In its opinion dated 30 January 2006 the Committee recommended by a majority that the appeal be dismissed as unfounded. In a dissenting opinion, one member of the Committee held that the appeal should be allowed. The Director of Personnel Management and Systems informed the complainant by a letter of 5 April 2006 that the President of the Office had decided to reject his appeal. By a letter of 2 May 2006, which is the impugned decision, he informed the complainant that, contrary to what he had indicated in his previous letter, the President's decision was based on the majority opinion of the Internal Appeals Committee and not on its unanimous opinion.

In the meantime, pursuant to a decision of the Organisation's Administrative Council, an amended version of Article 12 of the Pension Scheme Regulations and Implementing Rule 12.1/1 entered into force on 1 July 2004. The amendment provided for the transfer of pension rights acquired not only in the last pension scheme but in one or more pension schemes to which a staff member was affiliated prior to entering the service of the Office.

B. The complainant submits that all his pension entitlements prior to joining the EPO were acquired under the German social security pension insurance scheme, through compulsory contributions made in the context of a conventional employment relationship, and that his last employment- related pension scheme before taking up his duties with the EPO was the BfA on account of his employment at Kassel University from 1993 to 1998. He contends that his voluntary contributions to the Portuguese social security scheme in 1999 and 2000, during which time he was on a post-doctoral research scholarship at Coimbra University in Portugal, were made solely for the purpose of showing continuity of coverage abroad, which was necessary to ensure that he would obtain health insurance coverage upon his return to Germany in the event of invalidity. Thus, through his participation in the Portuguese social security scheme, which did not allow separate contributions for health insurance and pension, the complainant sought to guarantee his readmission to the German public insurance scheme and not to establish

pension entitlements in the Portuguese scheme.

Furthermore, he argues that neither the letter nor the spirit of Article 12 of the Pension Scheme Regulations and Implementing Rule 12.1/1 suggests that, by reason of his "marginal" contributions to the Portuguese social security scheme in 1999 and 2000, that scheme is to be considered as the one to which he was affiliated immediately prior to joining the Office, thus preventing the transfer of his BfA pension rights into the EPO scheme. He asserts that these provisions only allow for the transfer of pension rights acquired in the context of a conventional employment relationship; they do not provide a legal basis for the transfer of contributions made outside an employment relationship. The complainant's contributions to the Portuguese social security system were made in the context of a post-doctoral research scholarship, the legal status of which is completely different from that of gainful employment. As the holder of a scholarship, he was not considered to be an employee, neither was the authority funding his scholarship considered as an employer. The funding was not equivalent to a salary but was merely a maintenance subsidy intended to provide support for a limited period of time. Moreover, there was no pension scheme associated with the scholarship and the complainant was exempted from the payment of compulsory social security contributions and income taxes in Portugal.

For these reasons, he considers that his period of participation in the Portuguese social security scheme does not fall within the scope of the provisions of Article 12 of the Pension Scheme Regulations and Implementing Rule 12.1/1 and that, as a result, the BfA must be considered as his last pension scheme for the purposes of those provisions. The complainant asks the Tribunal to set aside the decision of 2 May 2006 and to order the Organisation to allow the transfer of his BfA pension entitlements into the EPO pension scheme under the Pension Scheme Regulations and the Implementing Rules thereto in the version applicable until 30 June 2004. He also seeks 4,000 euros in costs.

C. In its reply the EPO contends that the decision not to grant the complainant's application for transfer of his BfA entitlements into the EPO pension scheme was based on a correct interpretation of Article 12 of the Pension Scheme Regulations and Implementing Rule 12.1/1 applicable at the time. It maintains that these provisions unequivocally provide, in all the Organisation's three official languages, that only pension rights acquired in the scheme to which an employee was affiliated immediately prior to joining the Office can be transferred into the EPO pension scheme and it relies on the Tribunal's case law, in particular Judgments 2012 and 2101, in support of its argument. It also asserts that, as confirmed by the Internal Appeals Committee, the legal status of the complainant's relationship with the University of Coimbra is immaterial for the question under consideration.

Immediately prior to his entering the service of the EPO, the complainant contributed for almost two years to a Portuguese pension scheme. According to the Organisation, that alone is material for determining whether his request can be granted. The reasons which led him to join that pension scheme and the nature of his employment at CoimbraUniversity have no bearing on the matter. This interpretation, it holds, is in line not only with the wording of the applicable provisions but also with the lawmaker's intention. In addition, the EPO notes that the complainant's employment at Coimbra University was taken into account for the purpose of determining his reckonable previous experience and hence his grade and step, as provided under Circular No. 271. Accordingly, it considers the complainant's claim to be devoid of merit.

D. In his rejoinder the complainant reiterates his arguments. He asserts that Implementing Rule 12.1/1 establishes an inextricable link between the pension scheme from which pension rights can be transferred into the EPO scheme and an employment relationship or employer linked to that scheme, in that it defines the latter as "the pension scheme of the last government department, organisation or firm in whose service the person concerned was employed". This link, he argues, is necessary for determining which contributions are transferable when a person is affiliated to more than one pension scheme immediately prior to his or her employment with the EPO, and thus preventing fraud. He submits that in his case, the pension scheme of the University of Kassel, in whose service he was last employed before joining the EPO, was the BfA.

In response to the EPO's contention that the time he spent in Portugal was taken into account in calculating his reckonable experience, he submits that the recognition of professional experience according to Circular No. 271 is a completely different issue from the recognition of transferable rights and as such has no bearing on the question under consideration.

The complainant indicates that he also applied for a transfer of his BfA pension rights under the new provisions – in force since 1 July 2004 – in order not to lose the right to have his pension entitlements transferred. Nevertheless,

he emphasises that under the new provisions his transferable rights would be reduced by almost one third, amounting to a loss of more than one year of reckonable service.

E. In its surrejoinder the EPO maintains its position. It dismisses the view that the Pension Scheme Regulations provide only for the transfer of pension entitlements acquired in the context of an employment relationship and that this allows for the determination of the transferable rights in case of coexisting entitlements. It recalls that, at the time the Pension Scheme Regulations were drafted, employee mobility was not common and employees were either young recruits or civil servants seconded from their national agencies, who were unlikely to have contributed to more than one pension scheme prior to joining the EPO. Moreover, the Office has the means to verify that the pension rights in respect of which an application for transfer is made accurately correspond to the rights accrued to the applicant under a national scheme. The EPO points out that the complainant was engaged in professional activity at CoimbraUniversity, given that his duties were not confined to post-doctoral studies. What is material, according to the Organisation, is that his activity gave rise to contributions to a Portuguese pension scheme, irrespective of the fact that the amount was small or that the contribution period was too short for the complainant to accumulate pension rights.

Concerning the new provisions governing the transfer of pension entitlements, the EPO emphasises that their application does not involve a reduction of the transferable rights. The capital transferred remains the same; the difference lies in the calculation of the corresponding reckonable years of service, which has changed due to the application of age coefficients. It also draws attention to the fact that, even though a transfer under the new provisions may be less advantageous for the complainant, the new regime does allow him to transfer his BfA pension rights into the EPO pension scheme. In fact, following his application for a transfer under the new provisions in December 2004, the complainant received in November 2006 a proposal concerning the reckonable years of service that would be credited to him. The amount indicated in that proposal has now been transferred from the *Deutsche Rente Versicherung*, the BfA's successor, into the EPO scheme.

CONSIDERATIONS

1. The complainant challenges the decision of the President of the Office to dismiss his appeal against the Organisation's refusal to allow the transfer into the EPO pension scheme of the pension rights he acquired in the BfA. He contends that Article 12 of the Pension Scheme Regulations and Implementing Rule 12.1/1 in force prior to 1 July 2004 contemplate the conventional employee and employer relationship. Since he was on a research scholarship at CoimbraUniversity, he argues that he was not an employee within the meaning of the Pension Scheme Regulations.

2. The Organisation submits that the only pension entitlements that can be transferred are those held in the scheme the employee was a part of immediately before entering into the service of the Office. It states that this position is supported by the decisions of the Tribunal in Judgments 2012 and 2101. It also relies on an earlier case, in which the Internal Appeals Committee took the view that the EPO Pension Scheme Regulations were identical to the Pension Scheme Rules of the Co- ordinated Organisations* and should thus be interpreted in a similar fashion. The Pension Scheme Rules of the Co-ordinated Organisations include wording specifically indicating that the pension scheme being considered is the previous pension scheme and not the pension scheme of the previous employer.

3. Article 12 of the EPO Pension Scheme Regulations, as applicable prior to its amendment in 2004, refers to an employee's "previous pension scheme". It does not specify what is meant by "previous pension scheme". Implementing Rule 12.1/1 is used to calculate the years of reckonable service to be attributed to a transferring employee. It provides, in the version prior to July 2004, that periods of membership of pension schemes preceding entry into the service of the Office shall be credited, provided that they have 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". It is clear that the pension scheme referred to in this provision is the pension scheme of the last employer in whose service the employee was before joining the Office. However, no temporal words are used to indicate that the Office's employee must have been a member of that pension scheme immediately prior to entering the EPO's service. It is only concerned with the preceding employer. Therefore, Implementing Rule 12.1/1 read together with Article 12 of the Pension Scheme Regulations allows for the conclusion that the "previous pension scheme" from which pension entitlements may be transferred is the last pension scheme the employee contributed to during the period of his last employment.

4. As to the Organisation's reliance on its decision in Judgment 2101, the Tribunal observes that in that decision it specifically held that "it is now settled law, first, that the EPO pension scheme allows an employee to make an inward transfer of his contributions from only one previous pension scheme, namely from the scheme of his immediately preceding employer". In view of this statement, the reliance by the Organisation on Judgments 2012 and 2101 is misplaced.

5. The EPO's reliance on the findings of the Internal Appeals Committee in an earlier case to support the view that the EPO Pension Scheme Regulations are identical to the Pension Scheme Rules of the Co-ordinated Organisations and should thus be interpreted in the same way, is also misplaced. First, the language of the EPO Pension Scheme Regulations differs from that of the Co-ordinated Organisations' Pension Scheme Rules. Second, although the Tribunal is not bound by the Internal Appeals Committee's interpretation, the Committee in that case found that the relevant pension scheme was that of "the last place of employment".

6. The complainant takes the position that a scholarship holder is not an employee as contemplated by the Pension Scheme Regulations. In contrast, the Organisation submits that the Regulations are only concerned with the last pension scheme an employee was in prior to joining the EPO and not the legal nature of the relationship between the employee and the organisation with which the employee was affiliated. The Organisation also submits that, irrespectively of the amount the complainant received as remuneration for his services at the University of Coimbra, his relationship with that institution was a professional relationship.

7. The Tribunal finds that the complainant was not in an employment relationship during the time he was at CoimbraUniversity on scholarship. Nor was the Portuguese pension scheme connected to the complainant's activities at CoimbraUniversity.

8. First, the complainant's scholarship was not the basis of an employment relationship. Its legal status was such that it did not qualify as taxable income, nor as income that would require contributions to the Portuguese social security system.

9. Second, the complainant's participation in the Portuguese pension scheme was fundamentally different from participation in an employer's compulsory or voluntary pension scheme as contemplated in the Pension Scheme Regulations. Additionally, as the complainant notes, the voluntary monthly contributions paid by him were neither dependent upon nor defined as a percentage value of the complainant's scholarship. Nor did the entity funding the scholarship or the University contribute to the pension fund in association with the complainant's payments.

10. There was no linkage between the Portuguese pension scheme and the complainant's activities at the University such that it could be characterised as the pension scheme of the last government department, organisation or firm in whose service the complainant was employed.

11. The Organisation has attempted to claim that the complainant was employed by the University of Coimbra by pointing to its recognition of his time there as professional experience for the purpose of determining his grade and step. The fact that the Organisation took these into account for hiring purposes has no bearing on the legal relationship the complainant had with the University of Coimbra.

12. The Tribunal concludes that the Portuguese pension scheme was not the "previous pension scheme" in the meaning of Article 12 of the Pension Scheme Regulations and Implementing Rule 12.1/1 as applicable prior to 1 July 2004.

13. The question remains whether the BfA was a "previous pension scheme" under those provisions as they stood at the relevant time.

14. First, the BfA pension scheme was, at the material time, a compulsory pension scheme linked to the complainant's employment at KasselUniversity. The respective pension contributions had to be paid as a percentage value of the salary by the University and the complainant. It therefore follows that the BfA was the pension scheme of the employer, KasselUniversity, in whose service the complainant was employed prior to entering the service of the EPO.

15. Second, the wording of the Pension Scheme Regulations and the Implementing Rules thereto do not require

that the employee must have been part of the “previous pension scheme” immediately before entering the service of the EPO.

16. Accordingly, the Tribunal concludes that the President of the Office erred in determining that the complainant’s pension entitlements in the BfA were not transferable pursuant to the EPO Pension Scheme Regulations and the Implementing Rules thereto.

DECISION

For the above reasons,

1. The decision of 2 May 2006 is set aside.

2. The President of the Office shall take a new decision in accordance with the present judgment.

3. The EPO shall pay the complainant 3,000 euros in costs.

4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 2 November 2007, Mr Seydou Ba, Vice-President of the Tribunal, Ms Mary G. Gaudron, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet

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* Federal Insurance Office for Salaried Employees

*They include the North Atlantic Treaty Organization (NATO), the Organisation for Economic Co-operation and Development (OECD), the Council of Europe (COE), the European Space Agency (ESA), the Western European Union (WEU) and the European Centre for Medium-Range Weather Forecasts (ECMWF).

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