The Administrative Tribunal,

Considering the complaint filed by Mr R. M. against the European Patent Organisation (EPO) on 19 March 2007 and corrected on 8 May, and the EPO's reply of 3 August 2007;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, a German national born in 1958, joined the European Patent Office, the secretariat of the EPO, on 1 September 1998. At that time he had already accumulated pension rights under the German statutory pension scheme. According to Article 12, paragraph 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."

Article 1, paragraph 1, of the 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") provides, in pertinent part, that:

"A permanent employee or member of the contract staff of the European Patent Office who has been compulsorily or voluntarily insured with the German social security pension insurance scheme shall be 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, <u>together with 3.5 per cent interest for each complete year following the contribution payment until the time of the transfer</u>." (emphasis added)

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 of pension rights are defined in the Implementing Rules to the Pension Scheme Regulations. At the material time, Rule 12.1/1(ii) relevantly provided that:

"[w]here [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 payment are not taken into account for purposes of calculating the years of reckonable service, although they shall accrue to the Office".

On 10 December 1999 the complainant applied to have his previously accrued pension rights transferred to the EPO's pension scheme. In August 2001 the Federal Insurance Office for Salaried Employees (*Bundesversicherungsanstalt für Angestellte,* hereinafter "the BfA") informed the EPO that the lump sum surrender value (the *pauschaler Rückkaufwert) of the complainant's pension rights* on 1 September 1998 – the date of his entry into the service of the EPO – was 99,835.30 euros. Details of the complainant's pension contributions during each previous period of employment and of the interest that had accrued on them were also provided.

At two different times prior to joining the EPO, the complainant had been employed as a German civil servant. During these periods of employment he had not paid pension contributions as such, because the pension scheme to which German civil servants are affiliated is a budgetary scheme operating on the basis of retrospective insurance. Instead, when he had left the civil service at the end of each of the periods concerned, his employer had retrospectively evaluated his pension rights and had transferred them to the BfA as lump sums (retrospective insurance values) on 6 August 1987 and 17 February 2000, respectively. Thus, the breakdown of contributions provided by the BfA showed that the lump sum surrender value of the complainant's pension rights comprised, on the one hand, conventional pension contributions and the interest that had accrued on them since the date on which they had been paid and, on the other hand, retrospective contributions which, having materialised only upon being transferred from the civil service pension scheme to the BfA, had accrued interest only from the date of that transfer onwards. Since the second of these transfers had occurred on 17 February 2000, the lump sum surrender value as at 1 September 1998 did not include any interest on the retrospective insurance value concerned.

In October 2001 the Office provided the complainant with a provisional assessment of the reckonable years of service which would be credited to him if the lump sum surrender value communicated by the BfA (99,835.30 euros) were transferred to the EPO's pension scheme. To that end, it deducted interest at an annual rate of 3.5 per cent from the retrospective insurance value received by the BfA on 17 February 2000, on the basis that this amount had necessarily been subject to "increases", within the meaning of Rule 12.1/1(ii), since the date of the complainant's entry into service. Having updated the lump sum surrender value accordingly, it proposed to take into account the sum of 96,631.84 euros and, assuming a transfer date of 1 October 2001, to credit the complainant with 5 years, 11 months and 20 days of reckonable service.

The complainant accepted this proposal on 21 November 2001. In August 2002 the BfA recalculated the lump sum surrender value to take into account the interest that had accrued since its previous evaluation and informed the Office that on 1 September 2002 it would transfer to its pension scheme the sum of 110,887.46 euros. Again, it provided a breakdown of the contributions and interest on which its evaluation was based. The amount was transferred into the Office's account on 2 September 2002.

By a letter of 19 March 2003 the Office notified the complainant of the definitive calculation of the reckonable years of service credited to him in respect of his previously accrued pension rights. This calculation was identical to the provisional assessment it had sent him in October 2001, insofar as the Office had taken into account the sum of 96,631.84 euros and had credited him with 5 years, 11 months and 20 days of reckonable service.

On 16 June the complainant requested that the calculation of his reckonable years of service be reassessed on the ground that the EPO's decision to deduct 3.5 per cent per annum from the retrospective insurance value as from the date of his entry into the service of the Office had no legal basis. He was informed in November 2003 that his request could not be granted and that the matter had been referred to the Internal Appeals Committee.

In its opinion of 26 October 2006 the Committee concluded that the appeal should be allowed in part. Referring to Judgment 2239 it found that the flat-rate deduction of 3.5 per cent per annum applied by the Office to the retrospective insurance value for the period from 1 September 1998 to 16 February 2002 was "legally admissible" and in conformity with the Tribunal's case law; it therefore recommended rejecting the complainant's claim in that respect. However, it considered that the Office had wrongly treated as a single entity the period between the date of the complainant's entry into the service of the Office (1 September 1998) and the date of the transfer of the lump sum surrender value to the EPO (1 September 2002). It noted that whereas the BfA had credited only two years' interest for the period from 17 February 2000 to 1 September 2002, the Office had deducted 3.5 per cent interest per annum for the entire period, i.e. two years and six and a half months. Indeed, the BfA credited 3.5 per cent interest only for each complete year following payment of contributions. The Committee pointed out that, in accordance with Judgment 2238, capital growth that has not occurred cannot be retained by the Office, and that in this case the interest period was easy to determine. It concluded that the interest deducted by the Office with respect to the period for which no interest had been paid by the previous pension scheme was an arbitrary and therefore unlawful measure adversely affecting the complainant. It therefore recommended that the complainant's reckonable years of service be recalculated.

By a letter of 21 December 2006 the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided to reject his appeal as unfounded. The President considered that the Office had correctly applied Rule 12.1/1 as well as the above-mentioned Agreement. Indeed, the Office had correctly deducted 3.5 per cent flat-rate interest per annum to determine the value of the complainant's entitlements

on the date of entry into service. In his view, the retrospective insurance value had undoubtedly been subject to an increase as a result of index-linking (*Dynamisierung*);* in such a case the application of a flat-rate deduction of 3.5 per cent per annum up to the date of transfer is lawful. He added that the period to which a deduction should apply was 1 September 1998 to 31 August 2002 and that the Office had deducted three annuities of 3.5 per cent each for that period. He explained that, in accordance with the Office's practice, the anniversary date coinciding with the date of transfer was not considered as giving rise to a further deduction. That is the impugned decision.

B. The complainant argues that the Office mistakenly deducted 3.5 per cent per annum from the lump sum surrender value for the entire period between 1 September 1998 and 1 September 2002. With regard to the period from 1 September 1998 to 16 February 2000, he contends that no effective increase in capital warranting a deduction of 3.5 per cent interest per annum occurred. Based on the documents provided by the Office during the internal appeal proceedings, a deduction of no more than 1.5 per cent per annum was justifiable. He stresses that the period under consideration is less than a year and a half, and not two years. Concerning the period from 17 February 2000 to 1 September 2002 the complainant acknowledges that an increase in capital occurred that warranted a deduction of interest, but in his view this deduction should have been limited to two years on the grounds that the BfA paid him interest for each complete year only. According to Article 1, paragraph 1, of the Agreement, the BfA has the duty to pay interest only for completed years between the payment of contributions and the time of transfer to the EPO pension scheme. He contests the statement made in the impugned decision that the Office deducted only three annuities of 3.5 per cent each for the period from 1 September 1998 to 31 August 2002.

Lastly, he points out that the internal appeal proceedings took a considerable time, i.e. more than three years, and resulted in a detailed and "carefully drafted" opinion that the Office decided to ignore. In his view, it is pointless to have lengthy internal proceedings if the outcome is not endorsed by the Office and he considers that he should be awarded damages in that respect.

The complainant seeks the setting aside of the decision of 21 December 2006 and of "the calculation" of his reckonable years of service. He asks the Tribunal to order the EPO to recalculate his reckonable years of service taking into account a 3.5 per cent deduction per annum for two years only. In addition, he claims moral and "punitive" damages and "reasonable compensation" for his time and effort.

C. In its reply the EPO contends that the claims for moral and punitive damages and the claim for compensation for time and effort are irreceivable for failure to exhaust internal remedies. It also argues that it is doubtful whether the internal means of redress have been exhausted with respect to the complainant's request for recalculation of the years of reckonable service.

On the merits it submits that the rules governing transfers of pension entitlements have been correctly applied and that the complainant's claims for the quashing of the impugned decision and of the "calculation" of his reckonable years of service as well as the claim to order the EPO to recalculate his reckonable years of service are therefore unfounded. It explains that it did not take into account the date on which the lump sum surrender value was to be transferred by the BfA but the date on which it was actually paid, that is to say 2 September 2002. In its view, such practice is in conformity with Rule 12.1/1(ii) of the Implementing Rules to the Pension Scheme Regulations.

With regard to the amount deducted for the period from 1 September 1998 to 16 February 2000, the Organisation submits that, in accordance with the Tribunal's case law, whenever the capital transferred has increased the Office must apply Rule 12.1/1(ii) in conjunction with the Agreement and deduct 3.5 per cent per full year between the date of entry into service and the date of transfer of his pension rights. It is not disputed that the retrospective insurance value paid on 17 February 2000 has been subject to an index-linked capital accretion.

Concerning the period from 17 February 2000 to 1 September 2002, the defendant argues that, based on the rules applicable at the material time, only the date of entry into service and the date of transfer of the complainant's pension rights to the EPO's pension scheme were relevant. The Internal Appeals Committee therefore mistakenly referred to an interest period commencing on 17 February 2000, since the complainant joined the Office on 1 September 1998. It adds that only three annuities were deducted, i.e. on 1 September 1999, 1 September 2000 and 1 September 2001.

CONSIDERATIONS

1. The complainant, a German national born in 1958, joined the European Patent Office on 1 September 1998. He challenges in his complaint the calculation made by the EPO regarding the transfer of his accrued pension rights under the German statutory pension scheme to the EPO's pension scheme on the basis of Article 12 of the Pension Scheme Regulations and of the Agreement between the Federal Republic of Germany and the EPO on the implementation of Article 12 of the Pension Scheme Regulations (hereinafter "the Agreement"). The question raised is to what extent the EPO is entitled to effect a deduction in respect of the retrospective insurance value transferred by the former employer to the BfA, leading to a corresponding reduction in the additional reckonable years of service for pension purposes.

On 10 December 1999 the complainant requested a calculation of his transferable entitlements under the Agreement. All the retrospective insurance contributions were transferred to the account of the BfA on 17 February 2000. The lump sum surrender value was credited to the Office's account in early September 2002. In its calculations of the reckonable years of service to be credited for pension purposes, the EPO deducted 3.5 per cent per annum in respect of the period between 1 September 1998 and 1 September 2002. In a letter dated 16 June 2003 the complainant requested a review of the decision to deduct a flat rate of 3.5 per cent per annum from the retrospective insurance value for the above-mentioned time period and requested that the number of reckonable years of service be recalculated without deduction of interest from the retrospective insurance value.

In its opinion of 26 October 2006 the Internal Appeals Committee recommended that the appeal be allowed in part as it held that the deduction of interest was not justified for a period of six and a half months during which the BfA did not pay any interest to the EPO. By letter dated 21 December 2006 the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided to reject the appeal. The complainant impugns this decision before the Tribunal.

2. He seeks mainly the setting aside of the decision of 21 December 2006 and the recalculation of his years of reckonable service, considering that with respect to the retrospective insurance contributions, a deduction of 3.5 per cent per annum is justified only for a period of two years. He also seeks moral and punitive damages.

3. The complainant argues that a distinction has to be made between "period A" – the period between 1 September 1998 (when he entered the service of the EPO) and 16 February 2000 (the date before his pension rights were transferred to the BfA) – and "period B" – the period between 17 February 2000 and 1 September 2002 (when the lump sum surrender value was credited to the EPO's account). According to him it is indeed incorrect to combine both periods and to apply a general deduction of 3.5 per cent per annum for the whole period as no effective capital accretion justifying such a deduction has occurred. He contends that the time of the accretion for "period A" does not cover two full years, but less than a year and a half and that an index-linking factor of only 1.03 should have been applied, thus only a deduction of not more than 1.5 per cent per annum was warranted. He also submits that "period B" should only be counted in completed years as the BfA paid interest only for completed years; thus the time of accretion amounts to two years and not to two years and six months. Lastly, he indicates that the internal appeal proceedings took more than three years which is, in his view, too long.

4. The Internal Appeals Committee unanimously recommended that the complainant's appeal be allowed in part insofar as the contested calculation of reckonable years of service should have been set aside and the reckonable years of service recalculated as the deduction of interest was not justified for a period of six and a half months during which the BfA did not pay interest. The Committee stated that the "flat-rate discount of 3.5% applied to the index-linked retrospective insurance payment by the Office for the period 1 September 1998 to 16 February 2002 is legally admissible in accordance with [Judgment] 2239". In that respect, it recommended that the appeal be dismissed. It was of the view that "the Office wrongly treated as a single entity the whole period from when the [complainant] joined the Office (1 September 1998) to when the Office was paid the lump sum surrender value (1 September 2002). Under Article 1(1) of the Agreement, the BfA credited just two years' interest for the period from 17 February 2000 to 1 September 2002 (i.e. two years and six-and-a-half months), meaning that the Office also deducted 3.5% interest for six-and-a-half months for which there is evidence to show that the BfA paid no interest. Since the interest period is easy to determine, the interest deducted in respect of this period for which no interest was earned is an arbitrary and therefore unlawful measure adversely affecting the [complainant]." In that respect, it recommended that the appeal be allowed and the complainant's years of reckonable service recalculated.

5. The Organisation considers that the complaint is irreceivable on the grounds that in his internal appeal the complainant requested that no deduction of interest from the value of the retrospective insurance be made when calculating his reckonable years of service, whereas in his complaint he seeks a recalculation of the years of

reckonable service deducting only two annuities instead of three; as a result, it doubts that the internal means of redress have been exhausted. In addition, it considers the complaint irreceivable to the extent that the complainant's claim for moral and punitive damages and costs is formulated for the first time before the Tribunal and was not mentioned in his internal appeal.

6. The complaint is receivable. The complainant is now presenting part of the claims he brought before the Internal Appeals Committee and not a new claim; consequently, he has exhausted the internal means of redress. The Tribunal considers that the claims for moral damages and costs are rightfully formulated for the first time before the Tribunal as they concern the excessive length of the appeal proceedings and, therefore, could not have been raised before the Committee.

7. On the merits the EPO states that it applied Rule 12.1/1(ii) of the Implementing Rules to the Pension Scheme Regulations correctly since a 3.5 per cent per annum uniform deduction was applied to determine the value of entitlements and that the retrospective insurance value had undoubtedly increased because of index- linking. The EPO relies on Judgment 2239 to assert that the Office was allowed to deduct 3.5 per cent per annum on the amount transferred even if index-linking had not produced a similar rate. The Organisation interprets the Tribunal's ruling in the above case to mean "that whenever the capital transferred increases, the [Office] must apply Rule 12.1/1(ii) combined with the Agreement, and deduct 3.5% per full year between the date of entry into the service and the date of transfer". As regards the claims for moral and punitive damages, the Organisation states that "[m]oral and punitive damages would be due only if a wilful act on the part of the defendant could be identified which led to the protracted procedure". It denies that that was the case.

8. The present case is governed by the Agreement, by Rule 12.1/1 of the Implementing Rules to the Pension Scheme Regulations which define the conditions for crediting reckonable years of service for persons who have contributed to an external pension scheme prior to joining the EPO, and by the Tribunal's case law as set out in Judgment 2239.

According to the case law, in cases where the value of pension rights is index-linked, a flat-rate deduction of 3.5 per cent per annum is allowed for the period between the date of entry into service and the date of transfer into the organisation's account, whereas in cases where the value of pension rights is not index-linked, the organisation must show evidence of an increase in the value of the employee's pension rights during that same period in order for the 3.5 per cent flat-rate deduction to be allowed (see Judgments 2238 and 2239). In the present case neither party disputes that the value of pension rights was index-linked. Therefore, in accordance with the above-mentioned precedents, a 3.5 per cent flat-rate deduction is allowable for each complete year in the period between the date of entry into service and the date of transfer of the said pension rights to the EPO's account. For this reason, the claim for recalculation of reckonable years of service is dismissed.

9. The Tribunal states that the claim for moral damages for the lengthy appeal process is founded. "Since compliance with internal appeal procedures is a condition precedent to access to the Tribunal, an organisation has a positive obligation to see to it that such procedures move forward with reasonable speed. Here, while the [Internal Appeals Committee], once the meetings had started, came to its conclusion fairly quickly, there can be no valid excuse to justify the delay of over twenty months between the filing of the internal appeal and the start of the hearings" (see Judgment 2197, under 33). In the present case, over three years have elapsed between the filing of the complainant's appeal and the issuing of the Internal Appeals Committee's opinion. Moreover, two and a half years have elapsed between the filing of the appeal and the submission of the EPO's position paper before the Committee, which constitutes an excessive delay in the proceedings. Therefore, the complainant is entitled to 1,000 euros in moral damages. Having succeeded in part, the complainant is entitled to 400 euros in costs.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 1,000 euros in moral damages.

2. It shall pay the complainant 400 euros in costs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 9 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet

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* Retrospective insurance contributions have been index-linked since 1992, as a mandatory requirement of German Law.

Updated by SD. Approved by CC. Last update: 14 July 2008.