

**SEVENTY-NINTH SESSION**

***In re* BELSER,  
BOSSUNG, LEDERER,  
RIEWALD, SARRE,  
STREBEL and ZIMMER**

**Judgment 1456**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Paulus Belser against the European Patent Organisation (EPO) on 11 August 1994 and corrected on 12 September, the EPO's reply of 5 December 1994, the complainant's rejoinder of 10 March 1995 and the Organisation's surrejoinder of 21 April 1995;

Considering the complaint filed by Mr. Klaus Sarre against the same Organisation on 14 September 1994, the EPO's reply of 6 December 1994, the complainant's rejoinder of 10 March 1995 and the Organisation's surrejoinder of 28 April 1995;

Considering the complaint filed by Mr. Wolfgang Riewald against the Organisation on 12 August 1994, the EPO's reply of 6 December 1994, the complainant's rejoinder of 11 March 1995 and the Organisation's surrejoinder of 26 April 1995;

Considering the complaint filed by Mr. Kurt Lederer against the Organisation on 21 September 1994, the EPO's reply of 22 December 1994, the complainant's rejoinder of 20 January 1995 and the Organisation's surrejoinder of 17 March 1995;

Considering the complaint filed by Mr. Otto Bossung against the Organisation on 27 September 1994 and corrected on 12 October, the EPO's reply of 22 December 1994, the complainant's rejoinder of 22 March 1995 and the Organisation's surrejoinder of 21 April 1995;

Considering the complaint filed by Mr. Johann Strebel against the Organisation on 28 September 1994, the EPO's reply of 15 December 1994, the complainant's rejoinder of 21 January 1995 and the Organisation's surrejoinder of 17 March 1995;

Considering the complaint filed by Mr. Steffen Zimmer against the Organisation on 4 October 1994, the EPO's reply of 20 December 1994, the complainant's rejoinder of 15 March 1995 and the Organisation's surrejoinder of 25 April 1995;

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

Considering that the complaints raise the same issues and should therefore be joined to form the subject of a single ruling;

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

Considering that the case turns on whether to count the complainants' prior employment in the civil service of the Federal Republic of Germany towards the years of service reckonable for the purpose of determining pension and that the parties' claims are that the Tribunal:

The complainants:

1. Quash decisions by the President of the European Patent Office, the secretariat of the EPO, apply the

"retrospective insurance value" (Nachversicherungswert) established by the German national administration for the purpose of "enhancement of benefit" under Article 46 of the EPO Pension Scheme Regulations.

2. order the President of the Office to apply, in reckoning the enhancement of their benefits, values corresponding to the full entitlements that the complainants acquired under the pension scheme to which they previously belonged;

3. order the Organisation to pay the difference between the enhanced benefits actually paid to the complainants since retirement and the recalculated amounts, plus interest at the rate of 10 per cent a year;

4. award costs.

The defendant:

1. Dismiss as irreceivable the complaints of Mr. Belser, Mr. Bossung, Mr. Lederer, Mr. Riewald and Mr. Strebel on the grounds that their internal appeals were out of time;

2. dismiss the other complainants' claims on the merits.

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

A. The complainants, who are German citizens, all joined the European Patent Office with sponsorship from the German national administration for which they had worked for several years. They retired at various dates from July 1991 until November 1993.

Under Article 12 of the EPO Pension Scheme Regulations an employee who enters the EPO's service may arrange for transfer to the Organisation of sums corresponding to the liquidation of entitlements accrued under any pension scheme to which the employee previously belonged. Article 46 of the Regulations says that where the previous pension scheme does not allow such transfer the employee is entitled to "enhancement" of benefit. According to Rule 46.1/1 of the Implementing Rules the enhancement depends on the sum supplied by the institution responsible for the previous scheme.

At dates ranging from July 1991 until October 1993 the EPO told each of the complainants the amount of the enhancement he was entitled to. It explained that the amount depended on the "retrospective insurance value" provided by the German administration.

At dates from August 1992 until November 1993 the complainants each filed an internal appeal against the EPO's method of reckoning the enhancement. In a single report of 31 May 1994 the Appeals Committee recommended rejecting the appeals. By decisions of 6 and 7 July 1994 the Director of Staff Policy informed the complainants that the President of the Office had endorsed the recommendation. Those are the decisions under challenge.

B. The complainants submit that the values supplied by the German administration are wrong because they fail to take full account of their entitlements under the previous pension scheme. They ask the EPO to take other values in reckoning the enhancement of their benefits under Article 46 of the Pension Scheme Regulations.

C. In its replies the Organisation submits that the complaints of Mr. Belser, Mr. Bossung, Mr. Lederer, Mr. Riewald and Mr. Strebel are irreceivable because they lodged their internal appeals out of time. It pleads that all the complaints are devoid of merit on the grounds that it cannot but apply the values provided by the board of the previous scheme.

D. In their rejoinders the complainants maintain that their complaints are receivable and that the Organisation has misapplied the rules.

E. In its surrejoinders the Organisation presses its pleas.

CONSIDERATIONS:

1. For those who have joined the staff of the EPO under sponsorship by a national administration and whose previous pension scheme does not allow transfer of pension entitlements Article 46 of the EPO Pension Scheme

Regulations allows "enhancement" of benefit. The complainants used to be employees of the EPO. In internal appeals they challenged the Organisation's reckoning of the enhancement of their benefits under Article 46. They want the Tribunal to quash decisions the President of the Office took, on 6 and 7 July 1994, to reject those appeals. They object to his applying what is known as the "retrospective insurance value" (Nachversicherungswert) in reckoning enhancement. That is the value certified by the German administration and accepted by the EPO in accordance with rule 46.1/1 i) of the Rules Implementing the Pension Scheme Regulations. The complainants are each asking that it be replaced by a value which more accurately reflects the pension rights they acquired under the German pension scheme before joining the EPO.

2. The complainants all used to be civil servants or judges of the German patent administration. At the time when it was set up the EPO recruited them under sponsorship by that administration to carry out like duties. The pension scheme of the German civil service being wholly funded from its budget, they were unable to have their pension entitlements transferred on taking up duty with the EPO. But they did keep those entitlements, which depended on length of service at the date of leaving for the EPO. The upshot was that their pensions could not be worked out before the dates at which they actually retired and which ranged from July 1991 to November 1993. Since they were not with the EPO for as long as with the German administration there arose dispute between them and the EPO as to whether the figures the administration had supplied for the purpose of reckoning the enhancement of benefit under Article 46 of the Pension Regulations and the implementing rules truly represented their prior entitlements.

3. They lodged internal appeals. The Appeals Committee heard the complainants and went carefully into their individual claims and the common issues. In its report of 31 May 1994 it unanimously recommended treating all the appeals as receivable, despite the EPO's objections to some, but rejecting them on the merits.

4. In view of the Appeals Committee's report on those appeals the Tribunal need take up only the substantive issues in the light of the material rules set out below and the parties' pleas.

The material rules and the parties' pleas

5. Article 12(1) of the Pension Scheme Regulations, which is headed "Inward and outward transfer of pension rights", reads:

"An employee who enters the service of the Office after leaving the service of a government department, a national organisation, an international organisation ... or a firm, may arrange for payment to the Organisation in accordance with the Implementing Rules hereto, of any amounts corresponding to the retirement pension rights accrued under his previous pension 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."

6. Article 43, which comes under "Transitional Provisions", provides:

"Articles 44, 45 and 46 shall apply to employees who enter the service of the Office at the proposal of a national administration and who have completed at least five years' service with a government department, a national organisation, an international organisation ... or a firm."

7. Article 46, on "Enhancement of benefits", stipulates:

"(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. ..."

8. Lastly, Rule 46.1/1 of the Implementing Rules has the following to say about reckoning the "number of years of service" referred to in 46(1)ii):

"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.

ii) Where the institution responsible for administering the previous pension scheme is unable to provide such a certified statement, the Office shall determine in each case the number of years of service which it will take into account."

9. The evidence is that for former employees of the German administration, who belonged to a pension scheme wholly funded from its budget, it proved impossible to work out any actuarial equivalent of entitlements. At all events the German administration maintained that for want of provision for such equivalents under German law it could not work out the figures that the EPO Pension Regulations demanded. The only value it was willing to give the Organisation was not the actuarial equivalent but another "fixed value representing retirement pension rights" within the meaning of Rule 46.1/1. That was the "Nachversicherungswert", or "retrospective insurance value". It is a lump sum that the German administration makes over to any employee who leaves for some reason or other and who moves to the statutory scheme of staff pension insurance. Both sides accept that it is much lower than the actuarial equivalent of the civil servant's pension entitlements. So it was that figure, as certified by the German administration, that the EPO used to work out the amount of the "theoretical transfer" under Rule 46.1/1 and the enhancement of benefit under Article 46 of the Regulations.

10. In the complainants' submission that method of reckoning rests on a mistaken analogy and the resulting figures do not truly represent "pension rights acquired" under the German pension scheme. To their mind the Organisation failed in its duty of care by unreservedly endorsing the figures certified by the German administration. Since those figures bear no relation to the true value of their accrued rights the Organisation should have discarded them and should itself have reckoned the "fixed value representing" their pension rights in accordance with 46.1/1 i). By applying the certified figures the EPO was unfair to them and adopted a policy that discriminates between officials according to the social security scheme they belonged to before joining the Organisation. As a first step towards obtaining accurate figures they ask the Tribunal to quash the impugned decisions on the grounds that they rest on unreserved endorsement of the German administration's figures. But apart from Mr. Belser none of them says what a more accurate figure might be.

11. Since the figure came from the German administration Mr. Belser filed suit against the competent authority, the Federal Ministry of Justice, with the administrative tribunal of Bavaria (Bayerisches Verwaltungsgericht) in Munich. That tribunal having on 14 December 1993 declared the case irreceivable, he appealed to the appellate administrative tribunal of Bavaria (Bayerischer Verwaltungsgerichtshof), which on 21 December 1994 declared the case receivable but devoid of merit. Although the ruling gave leave for appeal there is no evidence to show whether Mr. Belser has taken the case to the federal administrative tribunal (Bundesverwaltungsgericht). He has been at pains to submit with his complaint the reckoning of an actuarial equivalent which he had an insurance company carry out.

12. The Organisation submits that according to Rule 46.1/1 the "department or institution responsible for administering the previous pension scheme" works out the value of pension rights and the figure of the "theoretical transfer". So the Organisation believes it has no choice but to endorse the figures that the German administration supplied at its sovereign discretion.

13. On the merits it contends that the "retrospective insurance value" affords a fair basis of reckoning since it is the amount that someone who previously belonged to the general security scheme in Germany might actually have had transferred to the EPO. It is only right to take the same figure in working out the amount of the merely theoretical transfer for the purpose of enhancement of benefit. There is, too, a problem of fairness that such enhancement

raises in the sharing out of benefits. Whereas enhancement is denied to the rest of the EPO staff - the great majority - who may have transferred their prior entitlements to the Organisation and, on top, are helping to finance its social security scheme by contributing to the pension fund, the complainants are keeping their German pensions intact but still getting the enhancement, at no charge to themselves, and having the cost borne in full by the Organisation in accordance with its Pension Scheme Regulations.

The receivability of the complaints and of certain evidence

14. The first issue is the receivability of the complaints. The Appeals Committee duly entertained the EPO's objections on that score. It held that since some of the internal appeals were undoubtedly receivable, and since they were all connected, there was no point in drawing a distinction on account of the internal time bar. In view of what follows there is now no point in taking up the issue.

15. In their pleadings the parties cite two judgments of the Court of Justice of the European Communities. One is a judgment of 18 March 1982, *Caisse de pensions des Employés privés v. Léon Bodson*, ECR p. 1019; the other is one of 17 December 1987, *Commission v. the Grand-Duchy of Luxembourg*, ECR p. 5391. They further rely on the text of an agreement on social security concluded between Germany and the European Communities on 9 October 1992. But neither the agreement nor the judgments are material to the Tribunal's ruling on this case. The agreement is not binding on the EPO. And the judgments are about the distinction that the rules of the Communities draw between "actuarial equivalent" and "sums repaid" and are irrelevant because this case is about the undefined notion in the Organisation's rules of "any other fixed value" representing retirement pension rights. That notion is not at all akin to that of "sums repaid", which refers to the total of paid-up contributions. This case turns solely on the Organisation's own rules.

16. The Tribunal will also disregard the documents produced by the parties on the preparatory work for the material rules. The documents are fragmentary, and indeed the Appeals Committee even remarked that it had been refused access to the ones that really mattered, namely those which related to preparatory work on Rule 46.1/1. The Organisation makes no bones about the deep disagreement between national delegations over the drafting of the rules that have prompted this case. So the scant information in the preparatory papers is unlikely to prove helpful. In construing the rules the Tribunal is bound to take an objective view and pay heed, in line with the method approved in international law, to their wording, context, purport and purpose.

The merits

17. The material rules being obscure, the first issue is to determine their true purpose. That means, to be precise, construing the term "enhancement" in Article 46 of the Pension Scheme Regulations, which corresponds to no recognised notion of social security law. In this context the purpose of enhancement is to bestow a special pension benefit on employees whom the EPO has recruited under sponsorship by a national administration. According to Article 43 that benefit accrues to anyone so recruited who completed at least five years' service with a "government department", a "national organisation", an "international organisation" or a "firm". What enhancement really means is that the EPO retroactively increases the pension entitlements that accrued to its employee before recruitment.

18. One point worth noting is that Article 46(1)i) does not apply the enhancement to the pension as a whole but only to the difference between two rates of salary: the rate corresponding to the grade and step reached by virtue of promotion and seniority by the date of the employee's departure from the EPO and the current rate corresponding to the starting grade and step at the same date. According to Rule 46.1/1 of the Implementing Rules the enhancement is reckoned on the basis of "theoretical transfer" to the Organisation of an "actuarial equivalent" or, failing that, of "any other fixed value". In either contingency the employee is certain to be paid the national pension in full and to get the enhancement on top. The enhancement depends on the number of years of employment in the national administration but is financially linked by means of a fictitious calculation to the international pension, the cost of it being borne by the Organisation. In sum, the prior career in the national administration is reconstituted, but at the Organisation's expense.

19. Rule 46.1/1 lays down the method of determining reckonable years of service. It says under i) that the basis for reckoning the number of years of service to be taken into account for the purposes of Article 46(1)ii) of the Pension Scheme Regulations is the "amount of a theoretical transfer" calculated as prescribed in Article 12(1). In other words, according to the first sentence of 12(1), the basis for determining reckonable years of service to establish the amount of the enhancement is the notional equivalent, for each beneficiary, of the "amounts corresponding to

the retirement pension rights accrued under his previous pension scheme". According to the second sentence of 46.1/1 i) the amount of the theoretical transfer "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".

20. On that score there are two points at issue between the parties. What exactly is meant by "any other fixed value" as against the actuarial equivalent? And is the figure certified by the national administration binding on the Organisation?

21. As to the first point, the second sentence of 46.1/1 i) confers no discretion on the EPO. The wording establishes a logical sequence between "actuarial equivalent" and "any other fixed value" in that the Organisation may resort to the latter, undefined, notion only if the determination of an actuarial equivalent proves impossible.

22. The evidence shows that ever since the first case arose in 1983 the German administration has declined to certify any actuarial value on the grounds that there is no provision for it in German law. The Organisation does not demur. It has since 1984 been accepting as another "fixed value" within the meaning of 46.1/1 i) the "retrospective insurance value", which German law defines as the figure taken into account when a civil servant moves to the general pension insurance scheme. All the correspondence submitted to the Tribunal shows that that has been the notion governing EPO practice since the outset.

23. The practice is not compatible with the premisses underlying the EPO's rules, which are no less binding on its member States and their administrations than on the EPO's own institutions. The point is that the first sentence of Rule 46.1/1 i) refers not to any actual transfer of money, which would indeed offend against the cardinal principle of a wholly budgetary scheme, but to "theoretical transfer", i.e. a merely notional calculation. The Organisation needs to have such calculation made for its own purposes, and there are no financial consequences whatever for the body that makes the calculation by reference to the data at its disposal. That interpretation is borne out by the wording of the alternative in Rule 46.1/1, a fixed value "representing retirement pension rights acquired". The term denotes another theoretical value, one to be reckoned on the strength of the employee's full record of social security coverage.

24. As to the decision-making process - on which turn the means of redress - the Organisation postulates that 46.1/1 i) left it with no choice but to take the figures certified by the German administration. Consequently it declines liability for those figures and even urges the complainants to see whether the German authorities will change their mind. The complainants retort that the EPO is free to discard the figures supplied by a national administration if they are not to its liking and that where agreement proves impossible it has a duty to determine the number of reckonable years of service at its own discretion in accordance with 46.1/1 ii).

25. Here the complainants' argument does have some merit. No doubt national institutions that run pension schemes are better able to evaluate entitlements that may have accrued to the employee under one or more national schemes before recruitment by the EPO. No doubt, too, the phrase "the afore-mentioned amount shall be that which" the national institution is able to certify, means that the institution has the last word on the figure to be used. But despite the authority thus conferred on the national institution the Organisation remains free by virtue of its administrative and financial autonomy to discard any figure that the institution has worked out on some basis that offends against the prescriptions of the international regulations. It is free, too, to ask the institution to work out a new figure in the event of disagreement. And if the institution cannot certify a figure that meets the requirements of the EPO's rules the Organisation still has Rule 46.1/1 ii) to fall back on.

26. The conclusion is that by taking the German administration's figures the Organisation endorsed them and subsumed them in its own decision. The figures thus become inseparable from the decision for the purpose of any litigation in the municipal courts; the EPO may not properly refer the complainants to the national administration; and that administration may not properly intervene in the Organisation's decision.

27. As to the purpose of the enhancement and their plea that it is discriminatory, the complainants argue that they are entitled to the full value of their pension entitlements and that the Organisation may not reduce the figure to a purely nominal amount on the strength of an immaterial provision of municipal law. The Organisation replies that the purpose of enhancement was to attract experienced staff from national patent offices when it was being set up.

28. That is the only explanation the Organisation gives, and the Tribunal does not find it plausible. The proper way

of achieving the Organisation's purpose was to offer applicants conditions of service that took account of their prior experience, for example a higher starting grade. The terms on which the enhancement is granted do not square with the Organisation's professed aim. Under Article 43 the enhancement is granted on the completion of at least five years' service, a stint obviously too short to afford the experience the EPO was looking for. Enhancement is due only to someone who cannot, or who has chosen not to, have pension entitlements transferred to the Organisation, i.e. someone who has kept national pension entitlements in their entirety and who may not therefore claim the increase in the name of social justice.

29. Lastly, the enhancement does make for inadmissible discrimination, though not of the kind the complainants have in mind. Article 43 says that enhancement is due only to someone who has sponsorship by a national administration, and it cites arbitrarily defined categories, not the criterion of professional experience that the EPO is relying on. Such method of granting the enhancement constitutes an inadmissible form of encroachment by national administrations in the area of the EPO's autonomy and works to the detriment of employees whom it did not recruit under sponsorship from any such administration.

30. What the complainants want is that by quashing the impugned decisions the Tribunal express disapproval of the use of the "retrospective insurance value" in reckoning the enhancement and so get the Organisation to negotiate with the German authorities theoretical figures that more truly represent all their accrued rights. But they offer no specific suggestions as to how to achieve that end.

31. The Tribunal disallows their claims for two reasons. First, it may not order the Organisation to negotiate with a member State or set the objectives of any such negotiation. Secondly, the foregoing shows that the theoretical figures used in reckoning the enhancement are exceedingly unreliable, and they are a source of difficulty in achieving a distribution of benefits that is fair to the other members of the staff. The Tribunal cannot therefore contemplate any possibility of enlargement of a benefit which is inherently so unsound.

32. In the circumstances the complaints must fail, there being no need to rule on the Organisation's plea that some of them are irreceivable.

#### DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas  
Michel Gentot  
P. Pescatore  
A.B. Gardner