

NINETY-FIFTH SESSION

Judgment No. 2236

The Administrative Tribunal,

Considering the fourth complaint filed by Miss E.E. H. against the European Patent Organisation (EPO) on 19 July 2002, the EPO's reply of 18 October, and the complainant's letter of 15 November 2002 informing the Registrar of the Tribunal that she did not wish to enter a rejoinder;

Considering the application to intervene filed by Mr J.M. W. on 15 April 2003 and the Organisation's observations thereon of 30 April 2003;

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 is a British citizen born in 1942. She joined the staff of the European Patent Office, the EPO's secretariat, on 11 January 1982. From October 1963 to January 1982 she had been employed at the United Kingdom Patent Office and had contributed to the Principal Civil Service Pension Scheme (hereinafter referred to as the PCSPS). Subject to certain conditions not at issue here, Article 10(2) of the EPO Pension Scheme Regulations sets the maximum amount of a retirement pension at 70 per cent of the last salary. The complainant retired from the Office on 1 September 2002.

By a letter of 22 March 1999 she applied for an inward transfer of pension rights from the PCSPS to the EPO's Pension Scheme. In order to calculate her transferable reckonable years of service, the EPO's Remuneration Department asked the UK Department of Trade and Industry (DTI) to notify it of the actuarial equivalent of her pension rights at the time she joined the EPO. The DTI informed the EPO in writing that the complainant had a transfer value of 42,593.00 pounds sterling at the date of leaving the PCSPS; it calculated the value of her pension rights on 25 August 1999 (which it referred to as the guarantee date) as 49,840.18 pounds plus interest at 2.25 per cent per quarter for the period from 11 January 1982. The amount transferable to the Office was 236,597.86 pounds.

By a letter of 10 November the Remuneration Department sent the complainant a proposal offering a provisional calculation of 9.7587 reckonable years of service (that is nine years, nine months, and three days) that would be credited on transfer of her pension rights. The Office had based its calculation on the value of 42,593.00 pounds indicated by the DTI for 10 January 1982, and on that basis computed a total of 183,618.42 German marks at an exchange rate of 4.311. The complainant accepted the proposal and on 6 December 1999 requested the PCSPS to transfer her pension rights.

In two internal appeals filed on 6 December 1999 she challenged the provisional calculation of her reckonable years of service. In the first appeal she requested that the calculation be carried out on the same terms as for former employees of the German Patent Office, thus giving her 21.2717 reckonable years of service. In the second appeal she requested that the calculation be based on the value of her pension rights at 25 August 1999, thus giving her 11.4191 reckonable years of service.

On 6 September 2000 the PCSPS transferred 236,597.86 pounds to the Office in respect of the complainant's

pension rights. In a letter of 9 April 2001 the Pensions Department sent the complainant a definitive calculation of her reckonable years of service, amounting to 9.7589 years. On 18 June 2001 the complainant challenged this calculation in two additional internal appeals. In the first of these two appeals she asked for a calculation of the capital sum on the same terms as for German employees, but at a different exchange rate than that used in her very first appeal, resulting in 21.9919 reckonable years of service. In the second of these appeals she requested the calculation be based on the capital sum's value on 25 August 1999, resulting in 11.4191 reckonable years of service.

In its opinion of 20 March 2002 on all four appeals, the Appeals Committee considered that the appeals failed on the merits, as the Office had demonstrated that the relevant legal provisions were correctly applied and that it was correct to reject the application of the transfer arrangements between the EPO and Germany in the complainant's case. Consequently, the Committee unanimously recommended dismissing the appeals. By a letter of 22 April 2002 the Principal Director of Personnel informed the complainant on the President of the Office's behalf that her appeals had been rejected. That is the impugned decision.

B. In her complaint the complainant appeals against what she considers to be the incorrect determination of the number of years to be credited for pension purposes under Article 12(1) of the Pension Scheme Regulations when her PCSPS pension rights were transferred to the EPO Pension Scheme. Since the DTI had imposed a strict time limit, after which a transfer would not be possible, she had to agree to the transfer and then subsequently appeal against it. Therefore, she had filed internal appeals against both the provisional and final calculations in order to be certain that at least one set of appeals would be receivable, and she notes that the Appeals Committee had found all her appeals to be receivable.

She asserts that when determining the number of years to be credited for staff members transferring pension rights from the German Patent Office, the EPO used the actual transfer value received and then reduced this "at a rate of 3.5% compound per complete year" to determine a notional transfer value at the date of joining the EPO; it did not use the same method of calculation in her case. The transfer of pension rights by German staff members is governed by an agreement entered into between the EPO and the Federal Republic of Germany, but this agreement does not say how the EPO should apply Article 12(1) after the monetary transfer of pension rights. Therefore, the failure to apply the same actuarial method of calculation for determining pension rights under Article 12(1) to both Germans and non-Germans results in an illegal discrimination based on nationality and breaches the principle of equal treatment. She submits that she should have been entitled to the benefit of subsequent capital increases and interest payments in the calculation of her equivalent transfer value. She provides an example of how the calculation of her reckonable years of service differed from that of a German colleague.

While acknowledging that there is no case law directly related to this particular issue, she makes reference to other cases by analogy, stating that nothing in the case law prevents the Office from applying the same method of calculation to both Germans and non-Germans alike. Furthermore, making reference to a recent judgment of the European Court of Human Rights, she states that pension benefits are property rights that belong to the person entitled to those rights and are therefore protected by the European Convention on Human Rights.

The complainant submits that where there is a conflict between equity and law, equity takes precedence over law. When there is a choice between actuarial methods, the EPO has an obligation to choose the method which gives the most equitable outcome to staff members. She says that the "strict application" of Article 12(1) and Rule 12.1/1 of the Implementing Rules of the Pension Scheme Regulations is "unacceptably oppressive". The delay between the complainant's actual transfer to the EPO and the transfer of her previous pension rights to the EPO pension scheme has led to an "unacceptably massive windfall" for the EPO's pension reserve fund. She contends that this situation can only be rectified by using an actuarial method that is based on the actual amount received by the Organisation. This would result in her being credited 20.7011 years for pension purposes.

Lastly, she argues that the EPO should have calculated her reckonable years of service for pension purposes on the basis of the amount of 49,840.18 pounds rather than of 42,593.75 pounds, as the transfer value received by the EPO was based on the higher value. Using that figure, the number of years credited for pension purposes would be 11.4192 years.

She asks the Tribunal to order that her retirement pension be based on 70 per cent of her last salary, or in the alternative that the reckonable years of service be determined by the later DTI actuarial calculation, resulting in at least 11.4192 reckonable years. She claims payment of any pension and tax adjustment arrears with interest at 8 per

cent per annum compounded daily, an award of 56,325 pounds for moral damages, and 1,000 euros in costs.

C. In its reply the EPO points out that in all her internal appeals the complainant claimed only a higher number of reckonable years of service. Consequently, her claims before the Tribunal for payment of arrears, moral damages and costs are new claims and are, therefore, not receivable.

On the merits, the Organisation submits that its calculation of the reckonable years of service for pension purposes conformed to the Pension Scheme Regulations as well as the applicable implementing rules. The calculation was based upon the transfer value at the date the complainant left the British civil service (42,593.75 pounds). Following the method laid down in Rule 12.1/1(iii) the EPO credited her with nine years, nine months and three days. The final calculation was made using the correct figure, pursuant to the applicable rules and without material errors.

It denies that there has been any breach of the principles of equal treatment and non-discrimination. The agreement between the EPO and the German authorities is not applicable to the complainant, as she was not a holder of pension rights in a German pension scheme. Furthermore, it points out that the agreement applies to staff members holding pension rights in a German pension scheme, regardless of the staff member's nationality. As to the complainant's allegations that German nationals have received favourable treatment, it notes that many German nationals have also filed complaints challenging the method used to determine the reckonable years of service. In addition, the EPO points out that the complainant's situation differs from that of an individual holding pension rights in a German pension scheme, because the PCSPS clearly indicated the value of the complainant's entitlements as of the date she entered into the service of the EPO. The Organisation is bound by the calculation made by the national authority responsible for executing the transfer.

Furthermore, the EPO asserts that the wording of Article 12 of the Regulations is clear: the value to be taken into account is the value on the date on which the staff member joined the EPO. It therefore had no choice but to proceed in the manner prescribed by the rules. The purpose of Article 12 is to ensure that, irrespective of the date of transfer, the same number of reckonable years of service is reached. This is done by reference to the salary at the date of entry into service. None of the methods suggested by the complainant achieve this result.

It rejects the complainant's arguments resting on the European Convention on Human Rights. The EPO is not bound by the Convention or any protocol thereto.

CONSIDERATIONS

1. The complainant, a British national, was employed at the United Kingdom Patent Office from October 1963 to January 1982, before joining the staff of the EPO on 11 January 1982 as an examiner at grade A3. She retired at the age of 60, with grade A4, on 1 September 2002. She had applied beforehand, in March 1999, for an inward transfer to the EPO's Pension Scheme of her pension rights accrued in the United Kingdom with the PCSPS. In order to calculate her pension entitlements, the EPO asked the UK Department of Trade and Industry to notify it of the actuarial equivalent of her pension rights at the time she joined the EPO. After an exchange of correspondence, the competent UK authority transferred the sum of 236,597.86 pounds to the Office, corresponding to the value of the complainant's pension rights at the date of leaving the PCSPS, as on 25 August 1999, which was the date at which the transferred amount was calculated. The EPO for its part notified the complainant that, on the basis of the evaluation of her rights as at 10 January 1982, when she left the UK Patent Office, that is 42,593.75 pounds, the reckonable years of service to be credited to her pension in respect of her employment prior to joining the Organisation came to nine years, nine months and three days.

2. While her application for transfer was being processed, the complainant filed four appeals, in December 1999 and in June 2001, challenging the method of calculation used by the Organisation and asking to be credited with 21.2717 reckonable years of service in respect of the time she had spent at the UK Patent Office, or according to other methods of calculation, 21.9919 years, or alternatively 11.4191 years. She does, however, acknowledge that since she has completed 18 years of employment with the EPO and since her total pension cannot exceed 70 per cent of her last salary according to Article 10(2) of the Pension Scheme Regulations, any reckonable years of service in excess of 17 years granted in respect of her employment prior to joining the EPO would have no effect on her pension.

3. The Appeals Committee examined all four appeals and in its opinion of 20 March 2002 recommended dismissing them. By a letter of 22 April 2002 the Principal Director of Personnel informed the complainant that the President of the Office had decided to follow the Committee's recommendation and to dismiss her appeals. That is the decision regularly challenged before the Tribunal.

4. The complainant asks the Tribunal to order that her retirement pension be valued at 70 per cent of her last salary or alternatively that the reckonable years of service arising from the transfer of her UK pension rights be determined according to the calculation method resulting in at least 11.4192 years. She also claims the payment of interest, compensation for moral injury and costs. She argues that the method of calculation used by the defendant is wrong and that it is in any case contrary to the principle of equal treatment, since German staff members are allowed much more favourable conditions for the transfer of their pension rights, and contrary to the principle of equity and the principles enshrined in the European Convention on Human Rights.

5. The defendant submits that some of the complainant's claims are irreceivable, but the Tribunal, in the light of what follows, will not rule on the objections to receivability, noting that, irrespective of her claims, the complainant in all her appeals invariably challenged the figure of nine years, nine months and three days calculated for her reckonable years of service.

6. The first issue to be determined is whether the method of calculation used by the Organisation complies with the relevant provisions of the Pension Scheme Regulations.

7. Article 12(1) of those Regulations states:

"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."

8. Rule 12.1/1 of the Implementing Rules to the Pension Scheme Regulations, entitled "Inward transfer of previously acquired rights", specifies in paragraph (i)(b) that the amount taken into account for periods of service performed in government departments, organisations or firms preceding entry into the service of the EPO is credited "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 [...] and must be equivalent to the whole of the amounts paid to the person concerned by the afore-mentioned pension scheme". Paragraph (ii) adds that "[f]or 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. Any necessary conversion into the currency of the salary paid by the Office on the date of entry into the service shall be effected at the exchange rate in force on that date". According to the third sub-paragraph of paragraph (ii), where the said 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". Lastly, paragraph (iii) states that "[t]he number of reckonable years of service to be taken into account under Article 12, paragraph 1, of the Regulations shall be calculated by dividing the amounts credited under paragraph (ii) by an amount equal to 12 x 24% of the first monthly salary paid to the staff member as a permanent employee of the Office".

9. Contrary to the complainant's contention, the above rules have been correctly applied by the defendant: the amount transferred by the competent UK authority of 236,597.86 pounds should be considered as the amount "certified by the previous pension scheme as being the actuarial equivalent of retirement pension rights" of the person concerned, in the meaning of Rule 12.1/1 (i)(b), quoted above. Nevertheless, in calculating the pension rights transferred on behalf of the complainant, the amount to be taken into account was that calculated on the date of her entry into the service of the EPO (11 January 1982), which was 42,593.75 pounds (and not

13,199.83 pounds as the Organisation maintains in paragraph 16 of its reply, owing to an error which is puzzling but which did not affect the actual calculations). Firstly, the defendant rightly based its calculation of the transferred amounts on the value certified by the competent UK authority and there was no reason for it to ask that authority to reconsider its evaluation, as it might have done if views had differed, in accordance with the Tribunal's Judgment 1456. Secondly, in calculating the complainant's pension rights, it was entitled to take into account the value of those rights on the date she joined the EPO rather than the value of the actuarial equivalent that was actually transferred. That was in strict application of the above-mentioned provisions of the Implementing Rules, and there is nothing in the file to suggest that the Organisation made any mistake in estimating that value as at 11 January 1982, or in determining the applicable exchange rates, or in the mathematical method of conversion which led it to determine the number of reckonable years of service as nine years, nine months and three days.

10. The complainant considers that even if the calculations are correct the results show that the Organisation disregarded the principle of equal treatment for all staff members, since the method applied in the case of German staff members is, in her view, much more favourable than the method used for staff members of other nationalities. There is no doubt that the conditions applying to German staff members appear much more favourable than those applied to British nationals and in particular to the complainant. But this is due to the fact that the Office concluded an agreement with the German authorities, taking into account the characteristics of the German pension scheme, and that it could not apply the same system to all its staff members, since every foreign pension scheme is at liberty to authorise the transfer of pension rights, in accordance with Article 12 of the Regulations, which necessarily implies that the results will tend to vary according to the scheme to which the persons concerned belonged prior to joining the Organisation.

As the Tribunal has often pointed out, the principle of equal treatment should be applied only to staff members in identical circumstances. Officials who, like the complainant, subscribed prior to joining the EPO to schemes giving them specific rights could not expect the Office to grant them the same rights as those of German staff members. The principle of equal treatment has therefore not been breached.

11. Regardless of whether or not the complainant's arguments regarding the inequitable nature of the treatment she received are valid, they cannot prevail over the application of rules which bind the Organisation and which it applied correctly. Neither the plea based on disregard for the principle of equity nor that based on the breach of principles enshrined in the European Convention on Human Rights, to which international organisations such as the EPO are not party, can in any event be admitted.

12. Since the defendant committed no error of law in this case, the complainant cannot be awarded compensation for her alleged moral injury.

On the application for intervention

13. The right to intervene in a complaint filed before the Tribunal is available to persons who wish to claim the benefit of the judgment rendered on that complaint, without having themselves exhausted the remedies available to them. Since the intervener has availed himself of the internal remedies and filed a complaint before the Tribunal on which judgment is delivered this day, his application to intervene is, therefore, irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 16 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

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