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

NINETY-FIFTH SESSION

Judgment No. 2237

The Administrative Tribunal,

Considering the thirteenth complaint filed by Mr J.M. W. against the European Patent Organisation (EPO) on 19 July 2002, the EPO's reply of 18 October, the complainant's rejoinder of 21 November 2002, and the Organisation's surrejoinder of 24 February 2003;

Considering the application to intervene filed by Mr K. V. on 7 April 2003 and the Organisation's observations thereon of 17 April 2003;

Considering the application to intervene filed by Mr N. R. on 28 April 2003 and the Organisation's observations thereon of 9 May 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 1945. He joined the staff of the European Patent Office, the EPO's secretariat, on 11 January 1982. From September 1972 to January 1982 he had been employed at the United Kingdom Patent Office and had contributed to the Principal Civil Service Pension Scheme (hereinafter referred to as 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 was retired from the Office with an invalidity pension, with effect from 1 June 2001.

By a letter of 2 February 1999 he applied for an inward transfer of pension rights from the PCSPS to the EPO's Pension Scheme. In order to calculate his 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 his pension rights at the time he joined the EPO. The DTI informed the EPO in writing that the complainant had a transfer value of 13,199.83 pounds sterling at the date of leaving the PCSPS; it calculated the value of his pension rights on 12 August 1999 (which it referred to as the guarantee date) as 14,053.98 pounds plus interest at 2.25 per cent per quarter for the period from 11 January 1982. The amount transferable to the Office was 62,185.09 pounds.

By a letter of 10 November the Remuneration Department sent the complainant a proposal offering a provisional calculation of 3.2326 reckonable years of service (three years, two months, and twenty-four days) that would be credited on transfer of his pension rights. The Office had based its calculation on the value of 13,199.83 pounds indicated by the DTI for 10 January 1982, and on that basis computed a total of 56,904.47 German marks at an exchange rate of 4.311. The complainant accepted the proposal and on 6 December 1999 requested the PCSPS to transfer his pension rights.

In two internal appeals filed on 6 December 1999, and subsequently registered under the references RI/116/99 and RI/117/99, he challenged the provisional calculation of his reckonable years of service. In the first appeal he requested that the calculation be carried out on the same terms as for former employees of the German Patent Office, thus giving him 5.9895 reckonable years of service. In the second appeal he requested that the calculation be based on the value of his pension rights on 12 August 1999, thus giving him 3.4418 reckonable years of service.

On 14 September 2000 the PCSPS transferred 62,185.09 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 his reckonable years of service, amounting to 3.2326 years. On 5 June 2001 the complainant challenged that calculation in two additional internal appeals; these were subsequently registered under the references RI/40/01 and RI/41/01. In the first of these two appeals he asked for a calculation of the capital sum on the same terms as for German employees, but using a different exchange rate than that used in appeal RI/116/99, resulting in 6.2043 reckonable years of service. In the second of these appeals he requested that the calculation be based on the capital sum's value on 12 August 1999, resulting in 3.4418 reckonable years of service. In a final set of two appeals, which he filed on 23 July 2001 and which were subsequently registered under the references RI/57/01 and RI/58/01, he challenged the application of the calculation of his reckonable years of service.

In its opinion of 20 March 2002 on all six 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 his appeals had been rejected. That is the impugned decision.

B. In his complaint the complainant appeals against what he considers to be the incorrect determination of the number of years to be credited for invalidity pension purposes under Article 12(1) of the Pension Scheme Regulations when his PCSPS pension rights were transferred to the EPO Pension Scheme. He says that he had filed three different sets of internal appeals in order to be certain that at least one set was admissible; he points out that the Appeals Committee found all of the appeals admissible. He states that his complaint is based only on internal appeals RI/57/01 and RI/58/01, which he asserts were filed against the determination of his invalidity pension, whereas the four other appeals concerned his retirement pension and therefore are no longer relevant.

He submits that he took up his duties with the EPO after having completed more than five years of pensionable service with the UK Patent Office and therefore satisfies the conditions laid out in the EPO Pension Scheme Regulations for an enhanced invalidity pension under Article 45, paragraphs 1 and 3. He says he should be credited with an additional nine years, four months and seven days of reckonable service, giving him a total of 38 years, 3 months and 27 days for invalidity pension purposes. In the absence of any implementing rules to the contrary, there is no ceiling on the total amount of the invalidity pension when a transfer of pension rights is made. He provides as an example the case of another staff member receiving an invalidity pension which he claims exceeds the 70 per cent ceiling.

Making reference to a recent judgment of the European Court on Human Rights, he submits 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. He considers that the ceiling mentioned in Article 10(2) of the Regulations cannot be applied without breaching the Convention, and thus he calculates that he is entitled to an invalidity pension based on 76.6667 per cent of his last salary.

He considers that he is entitled to moral damages because the EPO was aware of his entitlements under Article 45(1).

He asks the Tribunal to order that his invalidity pension be based on 76.6667 per cent of his last salary, or in the alternative on 70 per cent of his last salary. He claims payment of any pension and tax adjustment arrears with interest at 8 per cent per annum compounded daily, an award of 50,000 euros for moral damages, and 2,000 euros in costs.

C. In its reply the EPO notes that the complaint is based only on internal appeals RI/57/01 and RI/58/01: neither of those appeals referred to Article 45 of the Regulations nor did they mention the complainant's invalidity pension. In addition, the claims in the appeals are altogether different from those of the complaint. It submits that, consequently, the complaint is 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 (13,199.83 pounds). The only sum relevant is that as of the date of the complainant's entry into service with the EPO, since the calculation of

reckonable years of service for pension purposes relies in part on the salary scale in force at that time. Following the method laid down in Rule 12.1/1(iii) of the Implementing Rules of the Pension Scheme Regulations the EPO credited him with three years, two months and twenty-four days. The final calculation was made using the correct figure, pursuant to the applicable rules and without material errors.

The method of calculation suggested by the complainant offends against the applicable rules. The fact that he has only recently discovered the existence of Article 45 does not change the result; the Office has properly calculated his reckonable years of service for pension purposes, in accordance with the applicable statutory provisions. The complainant has clearly misread the applicable provisions, as there is nothing in Article 45 that introduces an exception to the general rule that a pension should not exceed 70 per cent of the last salary. It points out that the example he has provided of another staff member is not relevant in his case, as that particular staff member chose not to transfer his PCSPS pension rights to the EPO.

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.

Pointing out that the complainant has filed numerous internal appeals on the issue and has already filed and withdrawn a complaint on the same issue, it considers this complaint to be "a clear abuse of the right to appeal" and it makes a counterclaim that the complainant be ordered to pay its own costs.

D. In his rejoinder the complainant admits that his claim for an invalidity pension based on 76.6667 per cent of his last salary is a new claim, but he asserts this is because it results from the discovery that he is entitled to an enhanced invalidity pension under Article 45. In any event, if the Tribunal cannot allow this claim, he would prefer that it be declared irreceivable rather than unfounded.

He maintains that it is not Rule 12 that applies in his case, but Article 45. In any event each of these provisions prescribes a different method of calculation, so the EPO is wrong to say there is only one method. He disagrees that the provisions of the Pension Scheme Regulations limiting pensions to 70 per cent of the last salary can be considered as a general rule. He argues that the EPO is a "public authority" and therefore the European Convention on Human Rights is applicable in this case.

Citing the example of other retired British colleagues whose costs were paid even though their internal appeals were unsuccessful, he now argues that he has been subjected to unequal treatment concerning his claim for costs; he now increases this claim to 2,500 euros. He maintains that he is entitled to moral damages and he presses his other pleas.

E. In its surrejoinder the Organisation submits that the complainant is trying to make "more complex" the simple issue of calculating the amount of an invalidity pension when a transfer of pension rights from a previous scheme has been made into the EPO's scheme. It maintains that no mistake has been made in calculating the number of years of service for pension purposes following the formula laid out in Rule 12.1/1(ii). The complainant's interpretation of Article 45 is frivolous: it does not provide for all of his service with the UK Patent Office to be taken into account. If it were to do so, then the rate of pension would exceed the 70 per cent ceiling. The Organisation denies that he is entitled to moral damages; it has not acted wrongly.

It submits that there was no inequality of treatment concerning costs. It did not pay the costs of the unsuccessful appellants to whom he refers; it agreed to reimburse their travel expenses for the Appeals Committee's hearings but they still had to pay their own legal costs.

It questions the complainant's motives in preferring to have his claims declared irreceivable rather than unfounded, and says that this is yet another indication of his misunderstanding of the law.

CONSIDERATIONS

1. The complainant, a British national, joined the staff of the EPO on 11 January 1982 as an examiner after being employed at the United Kingdom Patent Office from September 1972 to January 1982. In 1999 he asked for the inward transfer to the EPO's Pension Scheme of the pension rights he had accumulated with the PCSPS. The UK Department of Trade and Industry evaluated his transferable rights at 62,185.09 pounds, and duly transferred that

amount on 14 September 2000. The complainant was informed that, considering the value of his rights on leaving the PCSPS, calculated at 13,199.83 pounds, the reckonable years of service resulting from his employment with the UK Patent Office would be three years, two months and twenty-four days. The complainant retired on 1 June 2001 and was paid an invalidity pension which took account of the reckonable years of service thus validated.

2. The complainant filed six appeals against the various decisions taken while his entitlements were being determined. In its opinion dated 20 March 2002, the Appeals Committee recommended dismissing the appeals. By a letter of 22 April 2002, the Principal Director of Personnel informed the complainant that the President of the Office had decided to reject his appeals. That is the impugned decision.

3. The complainant states that his complaint is based only on internal appeals RI/57/01 and RI/58/01 filed on 23 July 2001. In one of those appeals the complainant asked that his transferred pension rights be calculated under a method which would result in an additional 3.4418 reckonable years of service, while in the other, using a different method of calculation, he claimed 6.2043 reckonable years of service. The claims submitted in the other four appeals therefore do not need to be considered. In his claims before the Tribunal, based on the fact that he is entitled to an invalidity pension and not a retirement pension, the complainant requests that his pension be reckoned as 76.6667 per cent of his last salary, instead of the 64.3334 per cent calculated by the Organisation, or at least 70 per cent of his last salary if the Tribunal considers that the rules establishing that ceiling apply to his case. He contends that in the light of the combined provisions of Articles 43, 45 and 49 of the Pension Scheme Regulations he can be credited with the whole time he spent in the service of the UK Patent Office, that is nine years, four months and seven days. He argues that if those years are added to those spent with the EPO, he is entitled to a pension based on a total of 38 years, 3 months and 27 days, which should be equivalent to 76.6667 per cent of his last salary.

4. The complainant has abandoned the argument put forward in some of his internal appeals and reiterated in a complaint before the Tribunal which he subsequently withdrew, whereby the defendant's method of calculation under Article 12 of the Regulations and Rule 12.1/1 of the Implementing Rules was incorrect. On that point the Tribunal could only give the same reply as that given in Judgment 2236 delivered this same day. But the complainant argues now that these provisions do not apply to him since he benefits from an invalidity pension and not from a retirement pension, and is therefore entitled to the measures allowed under the "Transitional Provisions" of Chapter XI of the Pension Scheme Regulations for 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 that administration.

5. The defendant submits that the complainant's claims are irreceivable since they were not put forward in his many internal appeals. To this the complainant replies that in his last two appeals - the only ones still at issue - he did challenge the way his invalidity pension had been calculated, though he admits that it was only when he prepared his complaint for submission to the Tribunal that he realised he could rely on Article 45(1) of the "Transitional Provisions". He concedes that these are new claims but, rather oddly, states in his rejoinder that he would prefer the Tribunal to find that his request for an invalidity pension based on 76.6667 per cent of his last salary is irreceivable rather than unfounded.

6. Despite this puzzling last comment, the Tribunal, to which the entire dispute has been validly submitted by the complainant, shall not decline to rule on the merits of the case, as the complainant's new claims are in any event unfounded.

7. The complainant submits that the "Transitional Provisions" of Chapter XI of the Pension Scheme Regulations apply to him, which is neither disputable nor disputed. However, he interprets Article 45(1) concerning invalidity pensions, as entitling him to have all the years spent in the service of the UK Patent Office taken into account. Yet it is clear from the paragraph concerned that this interpretation is not admissible. Article 45(1) reads as follows:

"For the purposes of Chapter III of these Regulations the number of years of reckonable service for an employee referred to in Article 43 shall be increased, in accordance with the method of calculation laid down in Article 12, paragraph 1, by the period of previous service completed during which he was covered by a pension scheme."

Article 12(1) is precisely the provision that was applied to the complainant, on the basis of which the Office was able to 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". The reference to "the Implementing Rules hereto" obviously means Rule 12.1/1 concerning the inward transfer of

previously accrued pension rights, which establishes the method to be used when calculating transferable pension rights. Thus, the complainant cannot argue that Article 45(1) of the Regulations excludes Article 12 of those Regulations and Rule 12.1/1 since it refers directly to the former provision and indirectly to the latter.

8. It follows that the Organisation committed no error of law in calculating the complainant's pension rights according to the method laid down in the relevant regulations, which do not offend any principle, nor in considering that the complainant's total number of years of service with the UK Patent Office could not simply be added to his years of service with the EPO. The issue of whether the maximum rate of retirement pension, namely 70 per cent of the last salary, should apply to the complainant's invalidity pension need not be settled, since the pension rate legally established by the Organisation at 64.3334 per cent of his last salary is below that ceiling.

9. Since the claims for quashing the decision are rejected, there are no grounds, in the circumstances of this case, for allowing the claims either for moral damages or for an award of costs.

On the applications for intervention

10. Since the complaint is dismissed, the application for intervention by Mr R. must also be dismissed.

The application for intervention by Mr V., a German national, whose pension rights were not transferred when he retired in 1991 - and in fact could not be at the time - and who argues that he should benefit from the agreement signed between the EPO and the Federal Republic of Germany in 1995 on the implementation of Article 12 of the EPO's Pension Scheme Regulations, must also be dismissed since he is not in the same situation in fact and in law to that of the complainant.

11. The Organisation makes a counterclaim that the complainant be ordered to pay its own costs as his complaint is a clear abuse of the right to appeal. There are no grounds, in the circumstances of the case, to allow such a counterclaim.

DECISION

For the above reasons,

1. The complaint is dismissed.

2. The EPO's counterclaim 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.