

**109th Session**

**Judgment No. 2911**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. K. against the European Patent Organisation (EPO) on 28 November 2008, the Organisation's reply of 9 March 2009, the complainant's rejoinder of 3 May and the EPO's surrejoinder of 24 August 2009;

Considering the application to intervene filed by Mr K.G. S. on 22 May 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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

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

A. The complainant, a German national born in 1938, joined the European Patent Office, the secretariat of the EPO, in 1981, and retired on 1 October 2003. He pays half of his pension to his wife, from whom he has been separated since March 1992. He currently resides in Germany.

The complainant's EPO pension is supplemented by a tax adjustment which is intended to compensate to some degree for the fact that it is taxed in his home country, since the income tax

exemption enjoyed by staff members ceases upon retirement. The adjustment is calculated by reference to tables of equivalence established for each tax year and for each Member State – in this case Germany – on behalf of the EPO by the Inter-Organisations Study Section on Salaries and Prices (hereinafter “the IOS”). The tables specify, for each amount of pension, the amount of the adjustment to be added thereto. At the material time, pursuant to Article 42(3) of the Pension Scheme Regulations of the European Patent Office, for the purpose of calculating the adjustment, pensioners without a spouse or dependants were deemed to be in the position of a pensioner without entitlement to any tax reliefs or allowances for family responsibilities. All other recipients were deemed to be pensioners enjoying the tax reliefs and allowances of a person who is married without children. No account was taken of individual factors relating to the personal circumstances of a particular pensioner, but circumstances arising in the course of the year as a result of a change in civil status were taken into account.

From October 2003 to March 2005 the tax adjustment paid to the complainant was calculated on the basis of tables of equivalence applicable to married pensioners. In April 2005 the complainant was informed that he would be subject to the table of equivalence applicable to pensioners without a spouse or dependants, with retroactive effect from the date of his retirement, as he had requested. As a consequence, the amount of his tax adjustment was increased.

By a letter of 30 September 2005 the Head of the Pension Administration Department informed the complainant that the guidelines provided by the IOS with the 2005 tables of equivalence stipulated that separated pensioners in receipt of a household allowance were to be subject to the table applicable to married pensioners. As the complainant was married, he was still receiving a household allowance in addition to his pension. Consequently, with effect from 1 January 2005, the tax adjustment to which he was entitled would again be calculated using the table applicable to married pensioners.

By a letter dated 18 December 2005 the complainant requested that the calculation of his tax adjustment be based, as before, on the table of equivalence applicable to pensioners without a spouse or dependants. He asked that, in the event that his request was rejected, his letter be treated as an internal appeal. On 14 February 2006 the Director of the Employment Law Directorate replied that the President of the Office considered that the tax adjustment had been calculated correctly. Consequently, the matter had been referred to the Internal Appeals Committee for an opinion.

In its opinion of 13 August 2008 the Committee unanimously recommended that the complainant be awarded 1,000 euros in moral damages for the excessive duration of the internal appeal procedure, but that the appeal otherwise be dismissed as unfounded. In a letter dated 10 October 2008 the complainant was informed that the President had decided to endorse that recommendation. That is the impugned decision.

B. The complainant submits that the EPO was correct when it calculated his tax adjustment based on the table of equivalence applicable to pensioners without a spouse or dependants. He states that he is “legally separated” from his wife and that under German law he is considered unmarried for income tax purposes. In his view, Article 42 of the Pension Scheme Regulations does not explicitly stipulate whether pensioners in his situation should be treated as married or unmarried but, in light of Article 42(2) of the Pension Scheme Regulations and Rule 42/1 of the Implementing Rules thereto, the EPO has to take into account the way he is treated under German law in calculating his tax adjustment. Furthermore, Article 42(3) of the Pension Scheme Regulations must be applied bearing in mind the purpose of the tax adjustment system, which, according to the complainant, is to provide a 50 per cent tax relief to pensioners based on the income tax system of the Member State where they reside. The EPO must therefore consider the fact that under German law he does not enjoy the tax relief granted to married taxpayers.

The complainant contends that the EPO’s decision to recalculate the tax adjustment to which he was entitled using the table applicable

to married pensioners is unlawful. He argues that the IOS is not competent to provide rules of interpretation for the application of the tables of equivalence. The competence to interpret and apply the Pension Scheme Regulations rests solely with the Office.

He asks the Tribunal to quash the impugned decision with respect to the tax adjustment and to order the EPO to calculate the adjustment by treating him as he would be treated under German law, that is, as a pensioner without a spouse or dependants. He seeks further damages for what he deems to be the excessive delay in the internal appeal procedure, and he also claims costs.

C. In its reply the EPO states that it correctly applied the relevant provisions of the Pension Scheme Regulations. It points out that under Article 42(3) an unambiguous distinction is made between two categories of pensioners based on whether or not they have a spouse or dependants. Consequently, taking into account national law, only two tables of equivalence are drawn up by the IOS. Article 42(3) stipulates that only changes in a pensioner's civil status are taken into account when determining the category to which he or she belongs. Furthermore, paragraphs 2 and 3 of Article 42, which are to be read together, provide that the tax adjustment system is theoretical and that national law is applicable only to a certain extent. Therefore, it is a pensioner's civil status and not how he or she is treated under national tax law that is determinative. The Organisation argues that the complainant's separation from his wife is factual, not legal; his civil status has not changed and his status under German tax law is irrelevant. It also points out that it is not disputed that the complainant is entitled to and receives a household allowance because he is married. Irrespective of his separation from his wife, he cannot be treated as a pensioner without a spouse or dependants for the purpose of calculating his tax adjustment.

The EPO acknowledges that the letter to the complainant of 30 September 2005 relied inter alia on the IOS guidelines as a basis for the decision to revert to using the table of equivalence for married pensioners. However, it notes in this respect that during the internal appeal procedure it justified its decision on different grounds, namely

the correct application of the relevant provisions of the Pension Scheme Regulations and the Implementing Rules thereto. It submits that it lawfully changed its interpretation of those provisions. The complainant had no right to be considered as a pensioner without a spouse or dependants.

The Organisation disputes the complainant's claim for additional moral damages. It asserts that the amount of damages he has already received for the delay in the internal appeal procedure corresponds to previous awards made by the Tribunal in similar cases.

D. In his rejoinder the complainant presses his pleas. He submits that the theoretical nature of the tax adjustment system does not mean that national tax law is not applicable or applicable only to a certain extent. The word "theoretical" in Article 42 of the Pension Scheme Regulations refers to the method of calculating the tax adjustment. In addition, he argues that the EPO has demonstrated uncertainty by twice changing its interpretation of the relevant provisions, and that any ambiguity in those provisions should be construed *contra proferentum* and in his favour.

E. In its surrejoinder the EPO maintains its position. It contends that the applicable provisions are clear, leave no room for interpretation and that they were applied correctly to the complainant.

## CONSIDERATIONS

1. The complainant, a former staff member of the European Patent Office, retired on 1 October 2003 and lives in Germany. He is married but he has been separated from his wife since March 1992. Pursuant to the Pension Scheme Regulations, he has been in receipt of a tax adjustment in addition to his pension.

2. From October 2003 to March 2005 the tax adjustment due to him was calculated on the basis of tables of equivalence applicable to married pensioners. In April 2005 the EPO informed the complainant that, with retroactive effect to the date of his retirement, his tax

adjustment would be calculated on the basis of a table of equivalence applicable to pensioners without a spouse or dependants. In September the EPO advised him that, with effect from 1 January 2005, the tax adjustment would revert back to the adjustment applicable to married pensioners. The complainant lodged an internal appeal against this decision.

3. The Internal Appeals Committee recommended that the complainant be awarded moral damages in the amount of 1,000 euros for the delay in the internal appeal procedure but that the appeal be dismissed in all other respects as unfounded. The President accepted this recommendation and on 10 October 2008 dismissed the internal appeal. The complainant impugns this decision before the Tribunal.

4. The complainant's position is premised on the fact that, under German tax law, a legally separated person is treated the same as an unmarried taxpayer. In his view, reference should be had to German tax law for the purpose of determining the appropriate tax adjustment due to him.

5. At the material time, Article 42 of the Pension Scheme Regulations which provided for the adjustment of pensions read as follows:

**“Pensions which are subject to national tax legislation**

- (1) The recipient of a pension under these Regulations shall be entitled to the adjustment applying to the Member State of the Organisation in which the pension and adjustment relating thereto are chargeable to income tax under the tax legislation in force in that State.
- (2) The adjustment shall equal 50% of the amount by which the recipient's pension would theoretically need to be increased, [in order for] the balance remaining after deduction of the amount of national income tax or taxes on the total to correspond to the amount of the pension calculated in accordance with these Regulations.

For such purpose, there shall be drawn up, for each Member State, in accordance with the implementing provisions referred to in paragraph 6, tables of equivalence specifying, for each amount of pension, the amount of the adjustment to be added thereto. The said tables shall determine the rights of the recipients.

- (3) In calculating the theoretical amount of income tax or taxes referred to in paragraph 2 of this Article, account shall be taken only of the provisions of tax legislation and regulations affecting the basis of liability and the amount of income tax or taxes for all pensioner-taxpayers in the country concerned.

Pensioners without spouse or dependants shall be deemed to be in the position of a pensioner without entitlement to any tax reliefs or allowances for family responsibilities, all other recipients being deemed to be pensioners enjoying the tax reliefs and allowances of a person who is married without children.

No account shall be taken:

- of individual factors related to the personal circumstances or private means of a particular pensioner,
- of income other than that arising under these Regulations,
- of the income of the spouse or dependants of the pensioner.

On the other hand, account shall, in particular, be taken of circumstances arising in the course of the year as a result of:

- a change in civil status or settlement in another place of residence with a different taxation system,
- commencement or cessation of payment of the pension.

[...]"

6. Contrary to the complainant's assertion, the Pension Scheme Regulations do not contemplate that the civil status of a pensioner for the purpose of the application of the tax adjustment should be determined by reference to the income tax law of the relevant Member State of the Organisation. Rather, regardless of any status under the relevant tax law, under Article 42(3) a pensioner is deemed to be in one of two categories for the purpose of determining the appropriate tax adjustment.

7. Those pensioners without a spouse or dependants are deemed to be in the position of a pensioner without entitlement to any tax reliefs or allowances for family responsibilities. All other pensioners are deemed to be pensioners enjoying the tax reliefs and allowances of a person who is married without children. Accordingly, it can be seen that, under the Pension Scheme Regulations, the status of

a pensioner under German tax law is irrelevant for the purpose of determining the tax adjustment.

8. Further, although the complainant maintains that he is regarded as unmarried under German tax law, in the absence of any persuasive authority to the contrary, his civil status remains that of a married person.

9. Based on the above interpretation of Article 42(3), the Tribunal concludes that the EPO correctly interpreted and applied the Pension Scheme Regulations. It is unnecessary to consider the complainant's additional arguments as they are subsumed by this conclusion. Accordingly, the complaint will be dismissed.

10. As the Tribunal concludes that the moral damages in the amount of 1,000 euros already paid to the complainant for the delay in the internal appeal procedure is appropriate in the circumstances, no further order in this regard will be made.

## DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2010, Ms Mary G. Gaudron, 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 8 July 2010.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet