

The Administrative Tribunal,

Considering the complaint filed by Mr H.J. A. against the European Patent Organisation (EPO) on 12 September 2005 and corrected on 2 November 2005, the Organisation's reply of 10 February 2006, the complainant's rejoinder of 16 March and the EPO's surrejoinder of 23 June 2006;

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 Dutch national born in 1938, was an official of the European Patent Office – the secretariat of the EPO – from 1 July 1988 until his retirement on 1 August 2001. Prior to joining the Office he had accrued pension rights in the private pension scheme of the Netherlands-based firm which he owned and directed. He asked to transfer those rights into the EPO's pension scheme in accordance with Article 12(1) of the Office's Pension Scheme Regulations. The Office initially refused to accept the transfer, but after having received confirmation from the Dutch authorities that the capital sum which the complainant wished to transfer did in fact correspond to his accumulated pension rights, it agreed to reconsider his request.

The complainant engaged a Dutch tax consultant to evaluate his pension rights for the purpose of a transfer. By a letter of 6 April 2001, a copy of which was faxed to the Office, the consultant informed the complainant that he had obtained the approval of the Dutch tax authorities for a transfer of 160,134 Dutch guilders (72,666 euros), representing the value of the complainant's pension rights as at 31 December 2000. He had also calculated the amount corresponding to the complainant's rights as at 1 July 1988, the date on which the latter entered the service of the EPO, which he evaluated at 153,418 guilders (69,618 euros). In reply to a request from the complainant for clarification of these figures, the tax consultant indicated in a letter of 23 May 2001 that the value of the pension rights as at 31 December 2000 had been calculated according to the "approximate market value" method, which was applied by insurance companies in the Netherlands to transfers of the kind envisaged. Their value as at 1 July 1988, on the other hand, had been calculated according to a linear accrual method, which in 1988 was accepted by the tax authorities as being applicable to pension schemes such as the complainant's, at least for calculations concerning the rights of one employee or a small number of employees.

The Office considered that the figures provided by the complainant suggested a surprisingly weak performance by his pension fund over the 12-year period from 1988 to 2000. It therefore engaged an actuary to verify that his pension rights had been evaluated in accordance with the Pension Scheme Regulations. By letter of 14 September 2001 the actuary confirmed that the capital sum representing the complainant's pension rights as at 31 December 2000 had been properly calculated and recommended that the Office accept a transfer of 160,134 guilders. However, he pointed out that the use of the linear accrual method to evaluate the complainant's rights as at 1 July 1988 was not correct, because that method had been prohibited by law since 1 January 1995. At the Office's request, the actuary then provided his own calculation of the actuarial value of the complainant's pension rights as at 1 July 1988, which he evaluated at either 95,740 guilders or 105,156 guilders, depending on the rate of interest applied (4 or 3.5 per cent, respectively). By a letter of 4 March 2002 the Office informed the complainant that it proposed to take into account the latter figure and, on that basis, to credit him with four years, eight months and seven days of reckonable service.

Before accepting that proposal, the complainant asked the Office, by letter of 25 March, to explain why it had not accepted the figure provided by his tax consultant. The Office replied on 23 May that his consultant's figure had not been calculated in accordance with the Pension Scheme Regulations and the Implementing Rules thereto. The actuary had indicated that, on the basis of the said Regulations and Rules as well as Dutch law, the amount to be taken into account was 105,156 guilders, and the Office shared that view. It therefore reiterated the transfer

proposal made in its letter of 4 March.

On 11 June 2002 the complainant accepted the proposal. However, by a letter of 12 August addressed to the President of the Office, he initiated an appeal contending that in its letter of 23 May 2002 the Office had failed to explain in detail why his tax consultant's calculations had been rejected.

The transfer proposal was based on the actuarial value of the complainant's pension rights as at 31 December 2000 (160,134 guilders). Since the transfer would in fact occur at a later date, the Office wrote to him on 12 December 2002 asking him to adjust that figure to the effective date of transfer. On 10 February 2003 the complainant submitted a calculation showing a transfer value of 171,161 guilders (77,669 euros) as at 31 March 2003. He stated that this figure had been obtained by applying an interest rate of 3 per cent. He notified the Office on 19 March 2003 that he would instruct his bank to transfer that amount to the Office's Pension Scheme, adding that the amount could be adjusted at a later date if necessary. The transfer was effected on 20 March 2003.

The Office asked the actuary to verify the calculation of the adjusted transfer value. In an e-mail of 2 June 2003, assuming that no transfer had yet occurred, the actuary indicated that the transfer value as at 31 March 2003 was 77,674 euros, a figure based on the three-month Euribor rate. On 10 June, at the Office's request, he provided a second calculation of the adjusted transfer value, this time using an actuarial adjustment method, which yielded a figure of 79,663 euros as at 30 June 2003.

By a letter of 17 June 2003 the Office informed the complainant that it considered this second figure to represent the correct transfer value and invited him to transfer to the Pension Scheme the difference between that amount and the amount already transferred by him (1,994 euros). Having transferred that sum, the complainant asked the Office in a letter dated 24 June 2003 to indicate why it had calculated a different transfer value to that which his tax consultant had put forward. By a letter of 3 July the Office explained that the transfer value had been calculated "according to Dutch actuarial standards".

On 4 September 2003 the complainant lodged a second appeal, asking the President of the Office to provide "a meaningful answer" to the query raised in his letter of 24 June, and contending that the Pension Scheme Regulations appeared to indicate that the calculation of the transfer value ought to be performed by the previous pension scheme, and not by the EPO or its "outside consultant". The Office informed him on 30 October 2003 that, since the President considered that the position of the Office was justified, his two appeals had been referred to the Appeals Committee.

Having joined the two appeals, the Appeals Committee issued its opinion on 19 April 2005. It considered that the Office's decision to reject the complainant's calculation of the value of his pension rights as at 1 July 1988 on the grounds that it was based on the linear accrual method could not be faulted. The Committee noted in this regard that the complainant's calculation was inconsistent with that used to determine the transfer value of 160,134 guilders, and that under Rule 12.1/1 of the Implementing Rules to the Pension Scheme Regulations the Office may only credit amounts which are the actuarial equivalent of pension rights. However, the Committee considered that there was no reason for the Office to depart from the complainant's calculation of the adjusted transfer value. Accordingly, it recommended that the Office reimburse the additional 1,994 euros that he had transferred to the Pension Scheme. It also recommended that he be awarded 1,000 euros in compensation for material loss on the grounds that the transfer had been delayed as a result of the Office's refusal to accept his calculation. On the other hand, the Committee considered that there was insufficient evidence to justify the compensation for non-pecuniary loss claimed by the complainant.

By a letter of 14 June 2005 the Director of Personnel Management and Systems informed the complainant that the President had decided to follow the recommendation of the Appeals Committee and to allow his appeal in part. The overpayment of 1,994 euros would therefore be reimbursed, and he would receive 1,000 euros to compensate for any material damage. That is the impugned decision.

B. The complainant considers that the EPO has credited him with an insufficient number of reckonable years of service in respect of the transfer of his previously acquired pension rights because it has relied on an incorrect evaluation of his rights as at 1 July 1988. He contends, firstly, that the Organisation contravened Rule 12.1/1(ii) of the Implementing Rules to the Pension Scheme Regulations, according to which it is the previous pension scheme which must calculate the value of the pension rights as at the date of entry into service. The EPO, he says, relied on its own calculations, without providing an adequate explanation as to why it considered his calculations to be

incorrect.

Secondly, he submits that the Organisation provided no feedback regarding the “verification” of his figures by an external actuary. He states that he had asked to be told exactly on what point or points his calculation was incorrect, but that he received no feedback other than the letter of 23 May 2002.

Thirdly, the complainant argues that the verification by the actuary in fact produced a positive result, confirming his calculation, but that the EPO misinterpreted it. Moreover, by failing to indicate why his calculation had not been accepted, the Organisation precluded any chance of correcting its erroneous conclusion.

Fourthly, he contends that the Office’s calculation, apart from being contrary to the Implementing Rules, is incorrect. In his view, the figures put forward by the actuary show that the Office ought to have applied an interest rate of 3 per cent, rather than 3.5 per cent.

The complainant’s fifth plea is that in handling the dispute the EPO did not display the open and cooperative attitude he was entitled to expect. He points out in this regard that the Organisation consistently refused to give straight answers to his legitimate questions, thereby preventing any dialogue between the parties.

Lastly, he submits that the EPO’s handling of the dispute was “inept and careless”. He asserts that the Organisation made many mistakes, not all of which were minor. In view of its failure to treat his case with due care and concern, he considers that he should be awarded moral damages.

The complainant requests that the EPO be ordered to recalculate the reckonable years of service resulting from the transfer of his previously acquired pension rights on the basis of a value of 153,418 guilders as at 1 July 1988 instead of 105,156 guilders, and to adjust his past and future pension payments accordingly, adding interest to the past payments. He also claims 4,854 euros in costs and an award of moral damages.

C. In its reply the EPO points out that in a case such as this, where a staff member wishes to transfer pension rights from a pension scheme of which he or she is the founder and sole beneficiary, national authorities must be involved in the evaluation of the rights in order to avoid possible abuse. The Dutch tax authorities had certified the value of the complainant’s pension rights as at 31 December 2000, and as far as the Organisation was concerned, that was the only valid figure. Indeed, the complainant submitted an evaluation of his rights as at 1 July 1988 which had been prepared not by a national authority, but by a consultant hired by himself. Moreover, there was a discrepancy between that figure and the figure approved by the tax authorities. Consequently, a closer examination was justified.

Regarding the allegation that it failed to indicate why it rejected the complainant’s calculation, the defendant refers to Judgment 1590 and recalls that the reasons for a decision need not necessarily be stated “in the actual text notified to the staff member”, but may be conveyed by other means. It points out that in this case the reasons for its decision were explained in its submissions before the Appeals Committee.

The Organisation denies any misinterpretation of the result of the verification by the actuary, who explained that the figure put forward by the complainant was not valid because it had been obtained by a method that was no longer in force. It also denies that its attitude in dealing with the complainant’s application was uncooperative. It emphasises that the particular circumstances of his case warranted a thorough review of his calculations. It considers that his claim for moral damages is unfounded, since it had no intention to cause him unnecessary hardship, and asks the Tribunal to order that the complainant bear his own costs.

D. In his rejoinder the complainant presses his pleas.

E. In its surrejoinder the Organisation states that the complainant’s rejoinder does not introduce any argument liable to modify the position set out in its reply, which it maintains.

## CONSIDERATIONS

1. The complainant, a Dutch national and former permanent employee of the European Patent Office, retired on 1 August 2001. Before entering the Office’s service on 1 July 1988, he managed a firm in the Netherlands. Some of the firm’s profits were assigned to the financing of a private pension scheme. As his retirement was

approaching he requested the transfer of his pension rights into the EPO's pension scheme on the basis of Article 12 of the Pension Scheme Regulations. The Office initially refused to accede to this request, but then reconsidered its position after it had received confirmation from the Dutch authorities that the capital sum the complainant wished to transfer did in fact represent his pension rights. The complainant's tax consultant informed the Office that he had obtained the authorisation of the Dutch tax authorities for a transfer of 160,134 Dutch guilders, i.e. the equivalent of 72,666 euros, corresponding to the "pension reserve built up by the [above-mentioned firm] under its pension liabilities" to the complainant. This evaluation was carried out as at 31 December 2000. The tax consultant considered that the value of the complainant's pension rights on the date on which he had entered the Office's service, i.e. 1 July 1988, calculated according to a "linear" method, was 153,418 guilders. As the difference in the value of these rights in 1988 and in 2000 presupposed growth of no more than 4.4 per cent over a 12-year period, which appeared unrealistic, the Office called on the services of an actuary who, applying a different method, estimated that the value as at 1 July 1988 amounted to 105,156 guilders based on an interest rate of 3.5 per cent, and to 95,740 guilders based on a rate of 4 per cent. The Office accepted the first of these values and on that basis proposed, by a letter of 4 March 2002 confirmed on 23 May 2002, to credit the complainant with four years, eight months and seven days of reckonable service under the EPO's Pension Scheme, in accordance with Rule 12.1/1 of the Implementing Rules to the Pension Scheme Rules.

2. The complainant contested this calculation and, after several exchanges of correspondence to which reference is made in A, he appealed on the one hand against the decision setting the value of his pension rights on the date of his entry into service at 105,156 guilders, and on the other hand against the decision setting the transfer amount, adjusted to 30 June 2003, at 79,663 euros.

3. The complainant's second appeal was allowed: endorsing the conclusions of the Appeals Committee of 19 April 2005, the President of the Office agreed that the sum of 77,669 euros paid by the complainant on 20 March 2003 was correct, being based on a normal interest rate, and that the complainant should be reimbursed the additional 1,994 euros he had subsequently transferred and awarded 1,000 euros in compensation. There is therefore no longer any dispute on this issue.

4. However, the complainant continues to argue, as he has done from the outset, that his pension rights as at 1 July 1988 were wrongly evaluated at 105,156 guilders, or 47,718 euros, and not 153,418 guilders, or 69,618 euros. Indeed, as indicated in the impugned decision of 14 June 2005, the President followed the Appeals Committee's recommendation that the calculation by which the complainant's pension rights on entering the Office's service had been evaluated at 105,156 guilders should be deemed to comply with the applicable rules and regulations. This issue has therefore been referred to the Tribunal, it being noted that both parties agree that the value of the complainant's pension rights as at 31 December 2000 amounted to 160,134 guilders.

5. In order to weigh up the parties' submissions, it is worth recalling the statutory provisions governing the transfer of pension rights accrued by the Office's permanent employees before they enter its service. At the material time, Article 12, paragraph 1, of the Pension Scheme Regulations provided 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."

Rule 12.1/1, paragraph (i)(b) of the Implementing Rules to the Pension Scheme Regulations stated that:

"An amount shall be credited under [Article 12] 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 aforementioned pension scheme."

6. The complainant contends that the Organisation breached these provisions by evaluating the capital sum

representing his pension rights on the date of his entry into service at 105,156 guilders. He considers, firstly, that it was up to the scheme of which he was previously a member to calculate and certify the capital and interest to be taken into account and that, in the event of a disagreement, the Office ought to have asked his previous scheme to work out a new figure. The wording of Rule 12.1/1, paragraph (i)(b), lends some substance to the complainant's plea, for in this case it was not the "previous pension scheme" which had the last word as regards the disputed calculation. But clearly this provision concerns national institutions running pension schemes and not situations such as that of the complainant's one-member pension fund. The fact is that, even in cases where the calculations are certified by such an institution, the Tribunal made it clear in Judgment 1456 that, despite the authority conferred on this 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 a disagreement." In the instant case, the only figure certified by an official authority concerned the value of the complainant's pension rights as at 31 December 2000. However, the Office plainly could not make do with the evaluation submitted by the complainant's tax consultant when calculating, as required by the texts, an "actuarial equivalent" of his pension rights at the date of his entry into service, on the basis of the transfer value of 160,134 guilders certified by the Dutch tax authorities and indeed accepted by the complainant.

7. Secondly, the complainant accuses the Office of accepting a figure different to that which he proposed without stating its reasons for refusing his method of calculation. It is true that the Administration's letter to the complainant of 23 May 2002, in which the figure of 153,418 guilders, supplied by a "private consultant", was rejected and the figure of 105,156 guilders, taken from a study by a "confirmed actuarial advisor", was proposed, was somewhat vague as to the method of calculation used, but that method was fully explained later during the appeal proceedings, and in the event the Office cannot be accused of failing to set out the reasons for the impugned decision or of breaching the principle of due process.

8. The complainant mainly challenges the method employed and the results obtained by the actuary whose conclusions were accepted by the Office. Contrary to what is alleged, the actuary never expressed his agreement with the figures proposed by the complainant, although he did indicate that the figure of 153,418 guilders had been obtained by applying a linear method "then accepted by the tax authorities for determining the reserves that large shareholders were allowed to allocate to their pension", but that this method was "no longer valid". The method advocated by the complainant's tax consultant could not therefore be used, firstly because it applied only to the building up of reserves in accordance with tax regulations and secondly because in any case it was no longer valid.

9. It was decided that the actuarial value of the complainant's pension rights as at 1 July 1988 should be assessed not by a linear method, but by a method involving a deduction of 3.5 per cent per annum from the value of the rights as at 31 December 2000, which was consistent with the computation which had set this latter value at 160,134 guilders. While the complainant challenges the fact that a rate of 3.5 per cent was chosen, he does not put forward any justification for taking a different rate into account.

10. There is no reason to doubt the validity of the method used to establish the value of the complainant's pension rights on the date of his entry into service and hence the number of reckonable years of service credited to him under the Office's pension scheme. The Tribunal notes that, as the defendant rightly points out, Rule 46.1/1(ii) of the Implementing Rules to the Pension Scheme Regulations does not in any case apply to the complainant, who did not enter the Office's service at the proposal of a national administration.

11. The complainant accuses the Office of failing to examine his requests with due care and to show a cooperative attitude, and of having caused him moral injury through its "inept" handling of this case, but the Tribunal considers that, although the process of determining the complainant's rights was excessively long, no fault can be found with the Organisation's handling of this intricate file. It therefore dismisses the claim for compensation for the moral injury alleged by the complainant.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2006, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.