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

SEVENTY-EIGHTH SESSION

In re COOK (No. 2)

Judgment 1393

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Steven Derek Cook against the European Patent Organisation (EPO) on 15 December 1993, the EPO's reply of 14 March 1994, the complainant's rejoinder of 12 June and the Organisation's surrejoinder of 23 September 1994;

Considering the applications to intervene filed by:

Abram, R.

Absalom, R.

Adam, XX

Agnès, J.

Ainscow, J.

Alconchel Ungria, J.

Aldridge, S.

Alexatos, G.

Allard, M.

Alvarez Alvarez, C.

Anderson, A.

Andres, S.

Angius, P.

Angrabeit F.

Aran, D.

Aras, C.

Areal Calama, A.

Argentini, A.

Attalla, G.

Bacon, A.

Bahr, G.

Baillet, B.

Balbinot, H.

Baron, H.

Bartels, M.

Barton, S.

Battistig, M.

Becker, R.

Behringer, L.

Belibel, C.

Benker, G.

Bentein, M.

Berends, R.

Berrington, N.

Berte, M.

Berwitz, P.

Beslier, L.

Beugeling, G.

Beyer, F.

Béquet, T.

Bieber, XX

Bischof, J.

Blaak, A.

Blaas, J.-L.

Blas, V.

Blasband, I.

Blommaert, S.

Blondel, F.

Blurton, M.

Bodart, P.

Boero, R.

Boersma, R.

Bogaerts, M.

Bohnert, K.

Bolder, XX

Bollen, J.

Bonde, A.

Bonnevalle, E.

Boon, J.

Bosch, F.

Bosma, A.

Bosma, P.

Boulois D.

Bourseau, A.

Bousquet, K.

Boutelegier, C.

Brandt, J.

Brebion, J.

Brennan, J.

Brévier, F.

Bridault, A.

Brison, O.

Brisson, M.

Brothier, J.

Brunet, XX

Buchmann, O.

Budtz-Olsen, A.

Buglass, R.

Bulthuis, J.

Burgaud, XX

Bussieres, G.

Buter, J.

Butler, N.

Cadeddu, A.

Caillet, A.

Canosa Aresté, C.

Cantarelli, R.

Cardus, A.

Ceder, O.

Cervantes, XX

Chambonnet, XX

Chen, A.

Chiarizia, XX

Chouly, J.

Claessen, L.

Clarkson, P.

Clasing, XX

Claudepierre, M.

Cohen, B.

Constant, J.

Copini, A.

Coppieters, C.

Cordenier, XX

Corneglio, B.

Coucke, A.

Couckuyt, P.

Courrier, XX

Cousins-Vansteen, G.

Criqui, J.

Cubas Alcaraz, J.

Cummings, A.

Cuny, J.-M.

Cupido, M.

D'Sylva, C.

Daalmans, F.

Daeleman, P.

Danielidis, S.

Daskalakis, T.

Datta, S.

Dauksch, H.

David, J.

De Herdt, O.

De Jong, C.

De Lameillieure, D.

De Mas, A.

De Rijck, F.

De Roy, P.

De Weghe, I.

Declat, M.

Decocker, L.

Deconinck, E.

Decorte, D.

Degraeve, L.

Depijper, XX

Depoorter, F.

Deraedt, G.

Derz, T.

Desmet, F.

Desmet, W.

Desmont, P.

Deutsch, J.-P.

Devergranne, C.

Devine, J.

Devisme, F.

Dhondt, I.

Diaz-Maroto, V.

Dietrich, A.

Dijkstra, G.

Diot, XX

Dippel, U.

Dissen, H.

Dockhorn, H.

Doesburg, F.

Domann, A.

Doolan, G.

Dölker, H.

Döpfer, K.

Drentje, J.

Drouot, M.

Dubois, XX

Duchatellier, XX

Dudley, C.

Duif, J.

Durand, J.

de Bock, R.

de Can, J.-P.

de Coene, P.

de Jager, R.

de Jong, B.

de Jong, F.

de Jong, R.

de Jong, R.C.

de Jonge, S.

de Kok, A.

de Los Arcos, E.

de Sena y Hernandorena, A.

del Frate, A.

den Otter, A.

Eccetto, M.

Economou, A.

Eijkenboom, A.

Ekhult, U.

Elmeros, C.

Engelsman, J.

Espen, J.

Evans, A.

Exelmans, U.

Fairbanks, S.

Farricella, L.

Fernandez y Branas, XX

Ferrigno, A.

Feuer, F.

Fiedler, R.

Fischer, J.

Fischer, W.

Fisher, N.

Fletcher, A.

Flink, E.

Foglia, P.

Fonderson, A.

Fontenay, XX

Forlen, G.

Fournier, C.

François, XX

Franks, XX

Friden, C.

Fritz, S.

Fuchs, R.

Fuchs, XX

Fuhn, C.

Fux, XX

Gallegos, P.

Ganci, P.

Garnier, F.

Gastaldi, G.

Geoghogan, C.

Gerber, J.

Gerli, P.

Gerling, XX

Gélébart, J.

Gélébart, Y.

Giannotti, P.

Giese, W.

Gijsen, L.

Gino, XX

Ginoux, XX

Girard, Y.

Godin, XX

Godot, T.

Goepfert, XX

Goni, N.

Gonzalez Arias, M.

Gonzalez Ordoñez, O.

Goodall, C.

Goossens, A.

Goossens, A.J.

Goudelis, M.

Gourier, P.

Gourier-Locatelli, A.

Govaerts, T.

Götte, H.

Graham, M.

Granger, B.

Gregg, N.

Grentzius, W.

Greve, M.

Gries, T.

Griffith, G.

Grittern, A.

Groenendijk, M.

Guastavino, L.

Guillaume, XX

Guingale, XX

Guivol, O.

Guivol, Y.

Guyon, R.

Haenisch, U.

Hagberg, A.

Hageman, L.

Hakhverdi, M.

Hamm, C.

Hansen, P.

Hauck, N.

Hauglustaine, H.

Hauser, XX

Hazel, J.

Häusler, F.

Hebel, G.

Heijna, R.

Hendriks, L.

Henningren, XX

Henry, J.

Herbelet, XX

Herijgers, J.

Hermans, XX

Herreman, G.

Heryet, C.

Hey, S.

Hickey, J.

Hijzelendoorn, J.

Hillebrecht, D.

Hix, R.

Hocquet, A.

Hodson, C.

Hoepfner, W.

Hoff, P.

Hoffmann, H.

Hoffmann, M.

Holper, G.

Hoofdman, L.

Hoorens van der Berg, R.

Hoorn, F.

Hoornaert, P.

Hoornaert, W.

Hoppe, H.

Höll, H.

Hulster, D.

Hunt, A.

Hunt, B.

Hunt, J.

Hylla, W.

Iasevoli, R.

Ibarrola, O.

Iverstam, M.

Iwansson, XX

Jagusiak, A.

Jansen, A.

Jansen, R.

Janyszek, J.

Jaworski, A.

Jensen, K.

Jepsen, J.

Jettkowski, D.

Johnson, K.

Jonathans, B.

Jones, C.

Joosting, T.

Jordan, R.

Joris, XX

Juhl, A.

Juyn R.

de Koster, M.

Kagermeier, I.

Kanal, P.

Kanbier, D.

Kapteyn, H.

Katerbau, R.

Keereweer, W.

Keller, F.

Kempen, P.

Kirsten, K.

Klaver, T.

Klawitter, A.

Klág, M.

Kleikamp, B.

Klein, C.

Klinger, T.

Klocke, L.

Klocke, S.

Klopfenstein, P.

Knijff, S.

Knoester, D.

Koestel-Ertzscheid, XX

Korth, C.-F.

Korving, J.

Kosicki, T.

Krametz, E.

Kraski, M.

Krieger, P.

Kriekoukis, S.

Kruydenberg, G.

Kühne, C.

Kyriakakou, G.

Labeeuw, R.

Lamers, W.

Lammineur, P.

Lanaspèze, J.-P.

Lange, J.

Lapeyronnie, P.

Lasson, XX

Lecornec, N.

Lefebvre, XX

Leherte, XX

Lemercier, XX

Lensen, XX

Lentz, C.

Leong, C.

Lepretre, F.

Léouffre, M.

Libberecht, L.

Libberecht-Verbeeck, XX

Lieske, U.

Lina, XX

Lindner, T.

Linger, L.

Lloyd, P.

Lo Conte, C.

Loiselet-Taisne, S.

Loncke, J.

Luck, W.

Ludi, M.

Lund, M.

Lut, K.

Lüthe, H.

Maddox, A.

Madsen, P.

Magrizos, S.

Mailliard, A.

Mair, J.

Malic K.

Manntz, W.

Markham, R.

Martin, A.

Martin, C.

Martinez Navarro, A.

Martín Vicente, M.

Masche, C.

Massaar, P.

Masturzo, P.

Mathey, X.

Mauke, M.

McConnell, C.

Meertens, J.

Meijs, P.

Meiklejohn, G.

Merckx, A.

Mergoni, M.

Mes, L.

Meulemans, J.-P.

Meulemans, R.

Meyl, D.

Michels, XX

Michiels, P.

Mietzsch, H.

Mikkelsen, C.

Mimoun, XX

Mitchell, N.

Moens, R.

Molina Galan, E.

Mollet, G.

Monier, G.

Montalbano, F.

Montanari, M.

Moruzzi, A.

Moualed, R.

Mouton, J.

Moyle, J.

Munnix, S.

Munzer, E.

Muss, C.

Müllners, W.

Nagglas, XX

Nanos, A.

Nardzinski, H.

Nauche, S.

Nehrdich, H.

Nepven, XX

Nesciobelli, C.

Nessmann, XX

Neumann, E.

Neville, D.

Nicholls, J.

Noesen, R.

Nooij, F.

O'Reilly, D.

O'Reilly, P.

Ockers, XX

Orviz Diaz, P.

Osborne, H.

Oudot, XX

Ousset, J.-B.

Paalman, R.

Paauwe v/d Zwaan, J.

Paetzel, H.-J.

Paiteris, E.

Papone, F.

Pauwels, G.

Peeters, M.

Pelsers, L.

Peltre, C.

Perez Molina, E.

Perney, XX

Pernice, C.

Pether R.

Pettersson, H.

Pflugfelder, A.

Phoa, Y.

Pico, E.

Pieper, T.

Pierfederici, A.

Pigniez, XX

Pineau, A.

Pipping, L.

Piriou, J.-C.

Plomp, J.

Poirier, J.-M.

Ponthöfer, C.

Porwoll, H.

Postma, H.

Powell, D.

Pütz, C.

Rabasa, I.

Rattai, H.

Raven, P.

Raybould, B.

Rebiere, XX

Reedijk, A.

Rempp, G.

Ressenaar, J.

Rieb, K.

Riegel, XX

Righetti, R.

Rigondaud, B.

Rivero, C.

Roberts, P.

Roine, F.

Rosé, A.

Ross, K.

Roussel, A.

Röske, H.-J.

Ruppert, W.

Ryckebosch, A.

Sanchez, J.

Sanchez Garcia, J.

Sarasua, L.

Sarneel, G.

Scheu, M.

Schlabbach, M.

Schmidt, H.

Schmitt, J.

Schmitt, L.

Schölvinck, T.

Schubert, P.

Schueler, D.

Schuermans, N.

Schulze, C.

Scott, J.

Segaert, XX.

Senelle, G.

Serbetsoglou, A.

Serrano Galarraga, J.

Serravalle, M.

Seufert, G.

Sewalt, R.

Siem, T.

Sigwalt, XX

Silvis, H.

Sinemus, M.

Six, G.

Skelly, J.

Sleesen, P.

Slob, D.

Smith, C.

Smolders, R.

Sogno, M.

Sogno-Pabis, E.

Sonius, M.

Sozzi, R.

Söderberg, J.

Spettel, J.

Staessen, B.

Standring, M.

Stecchina, A.

Steenbakker, J.

Stienon, P.

Stierman, B.

Stierman, E.

Stimson, R.

Stolk, M.

Stroud, J.

Surie, A.

Sündermann, R.

Swartjes, H.

Taccoen, J.-F.

Tamme, H.

Tazelaar, H.

Tealdi, B.

Tellefsen, XX

Thanos, I.

Theodoropoulos, I.

Theuns, H.

Thibaut, E.

Thomas, C.

Tiel, B.

Tiete, O.

Torrezlas, I.

Tyberghien, G.

Urack, W.

Uzman, K.

Van den Bossche, W.

Van Geyt, J.

Vandevondele, J.

Vanmol, M.

Veen, G.

Vennik, A.

Ventura, A.

Verdonck, J.

Verhoek, J.

Verhulst, W.

Verleye, J.

Vermander, R.

Verveer, D.

Villeneuve, J.-M.

Vingerhoets, XX.

Vistisen, L.

Vollering, J.

Volmer, W.

Von Arx, V.

Vorropoulos, G.

Voutsadopoulos, K.

van Amsterdam, L.

van Belleghem, XX

van Breda, A

van Broeckhuijsen, A.

van Doremalen, J.

van den Hoek, P.

van den Meerschaut, G.

van Dorst-Abbink, XX

van Gelder, P.

van Gestel, H.

van der Heijden, G.

van der Kooy, H.

van der Krogt, G.

van der Meer, S.

van der Poel, W.

van der Schaal, C.

van der Veen, F.

van der Woude-Zoller, M.

van der Zwalm, A.

van der Zwan, S.

van Kalsbeek, P.

van Moer, A.

van Puymbroeck, M.

van Rijn, XX

van Roost, L.

van Rosmalen, W.

van Velzen-Péron, L.

van Wallene, A.

Wacker, K.

Walvoort, B.

Wareman, E.

Wareman F.

Wassenaar, G.

Weiand, T.

Weinachter, R.

Weiss, P.

Weist, J.-L.

Wells, A.

Wendling, J.-P.

Wenger, R.

Wentzal, J.

White, D.

Willekens, G.

Williams, M.

Wilson, P.

Wind, C.

Wisboreit, M.

Wittblad, U.

Wolf, C.

Wongel, XX

Yvonnet, J.

Zacca, F.

Zanghi, A.

Zeisler, P.

Zeri, A.

Zervas, XX

Zikking, J.

Zinngrebe, U.

Zoukas, E.

Zucka, G.

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

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

The present dispute being about an increase of 1 per cent in staff members' contributions to the Organisation's pension scheme, the parties' claims are as follows:

The complainant:

1. To quash the impugned decision;

2. to refund sums wrongfully withheld to cover the increase as from 1 January 1992 plus interest at 10 per cent;

3. to award the complainant 8,000 guilders in costs.

The defendant:

1. Principally, to dismiss the complaint as irreceivable on the ground that the internal appeal was premature;

2. subsidiarily, to dismiss the complaint as devoid of merit.

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

A. Following several actuarial studies on the total rate of contribution to the EPO's pension scheme the

Organisation's Administrative Council decided on 12 September 1991 to bring in, as from 1 January 1992, a special contribution from the staff in the amount of 1 per cent of basic salary. This staff contribution was to be added to the contributions set in Article 41(1) of the Pension Scheme Regulations of the European Patent Office, the secretariat of the Organisation. The staff got notice of the Council's decision from communiqué No. 188, which the President of the Office issued on 17 September 1991. On 4 December 1991 the complainant lodged an internal appeal against the communiqué. On 15 October 1993 the Director of Staff Policy told him that the President had rejected his appeal.

B. The complainant pleads breach of his acquired right to contribute at the rate of 7 per cent set in Article 41.1 of the Pension Regulations. In his submission the Organisation owed the staff an explanation for a change it had chosen to make unilaterally, but it gave none. He challenges the methods and parameters of the actuarial studies and says that the studies failed to show that the rate of contribution in 41(1) was too low. So the impugned decision is tainted with misuse of authority. It is also unlawful and arbitrary inasmuch as neither the Service Regulations nor the Pension Scheme Regulations provide for the imposition of a special contribution. What is more, the Organisation put up the rate without making the changes the increase entailed, thereby disrupting the terms of the complainant's contract. Lastly, the EPO was in gross breach of the duty of care it owed him by favouring a measure that is to his detriment and was unnecessary.

C. In its reply the EPO contests the receivability of his internal appeal against communiqué 188 of 17 September 1991. The individual decision, the only challengeable one, did not come until late in January 1992. On the merits the Organisation contends that the actuarial studies do afford proof that the total rate of contribution was too low and that the instruments it used to set the new rate were sensibly chosen. No staff member has an acquired right to any particular rate of contribution. There was neither misuse of authority nor breach of the Organisation's duty of care.

D. The complainant maintains in his rejoinder that communiqué 188 was a decision that affected him adversely and that he was obliged to challenge it within the relevant time limit. What is more, the President of the Office did not say in his final decision that his internal appeal was irreceivable. So the Organisation is acting in bad faith by challenging receivability now. The complainant presses his pleas on the merits.

E. In its surrejoinder the EPO restates its position.

CONSIDERATIONS:

1. The complainant, an EPO official, seeks the quashing of a decision of 15 October 1993 notifying final rejection of his challenge to communiqué 188 of 17 September 1991. The President of the Office thereby announced that as from 1 January 1992 the EPO would withhold from staff pay a special contribution of 1 per cent to supplement the pension Reserve Fund in pursuance of a decision the Administrative Council had taken on 12 September 1991 (document CA/D 11/91).

2. This complaint is in substance the same as the one from Mr. Gaston Raths which the Tribunal rules on in Judgment 1392 also delivered this day. The difference is that Mr. Raths has challenged, not communiqué 188, but the first of his pay slips for 1992 to be reckoned in line with the Administrative Council's general decision.

3. Having received internal appeals lodged in December 1991 and January 1992 by the complainant and other members of the staff, the Administration informed them by a note of 6 March 1992 that after initial study the President was not inclined to allow the appeals and had therefore forwarded them as a "collective internal appeal" to the Appeals Committee. He took a similar decision on the appeal Mr. Raths filed on 30 March 1992, which was later joined to the collective appeal.

4. In the brief it submitted to the Appeals Committee the Administration contended that the appeals were irreceivable insofar as they challenged communiqué 188 of 17 September 1991. Citing Judgment 764 (in re Berte No. 2), the EPO observed that the purpose of the communiqué was to inform staff of the Administrative Council's decision. As such it did not amount to an "act adversely affecting" them within the meaning of Article 107(1) of the Service Regulations. The appellants should have waited for the pay slips they got on 26 January 1992 before lodging their appeals; so the only receivable appeal was the one Mr. Raths had filed against his pay slip; the others were all premature.

5. The Appeals Committee demurred and took the view that communiqué 188 was more than just a declaration of intent: it informed the staff of a decision by the Administrative Council, the decision had obvious financial and legal effects, and there was an "act adversely affecting" the staff as from the date of the Council's decision, even though the pay slips had not come until 26 January 1992. The Committee therefore declared all the appeals receivable, as indeed it did the appeal of Mr. Raths. The Committee joined the cases for the purposes of internal appeal and the procedure was the same for all.

6. In his submissions to the Tribunal the complainant rebuts the EPO's objections to receivability. He contends that communiqué 188 made it plain exactly how the Council's decision affected his pay; that in his internal appeal he made clear his intention of exercising his right of appeal under Articles 107 and 108 of the Service Regulations; and that the Administration had entertained the appeals and looked into them before referral to the Appeals Committee, as was attested by the letters of 6 March 1992 sent to all the appellants. The complainant contrasts the EPO's position in this case with the Tribunal's ruling in Judgment 607 (in re Verron) - recently confirmed in Judgment 1247 (in re Kurukulanatha) - that the rules on internal appeals "are not supposed to be a trap or a means of catching out a staff member who acts in good faith" (see Judgment 607 under 8 in fine).

7. The receivability of internal appeals is a matter which the Tribunal has taken up on many occasions. It may be crucial to the receivability of a complaint owing to the requirement in Article VII(1) of the Tribunal's Statute that the internal means of redress be first exhausted. The case law reveals some variations on the issue which are attributable to wide differences in the rules on internal appeals from one organisation to another. In Judgment 1279 (in re Almazán- Aguirre and others) the Tribunal referred, under 9, to the importance of the administrative formalities that precede the filing of internal appeals because it is they that set off the time limit; it said that for reasons of stability in law time limits must be treated as binding; and it observed that the staff member needs to know, especially when administrative action is taken at successive stages, from the general to the particular, just when he may act without fear of having his appeal rejected as premature or time-barred.

8. Consistent rulings by the Tribunal make it plain that the act which is challengeable and so sets off the time limit will ordinarily be some individual decision notified to the staff member. Only that decision affords him unquestionable and final notice that the time limit is set off and that he will have to act if he wants to assert his rights. (See Judgments 323 (in re Connolly-Battisti No. 5), under 22 in fine; 398 (in re Mager No. 2), under 3; 624 (in re Giroud No. 2 and Lovrecich), under 2; 625 (in re Desmont and Gagliardi), under 2; and 626 (in re Giroud No. 3 and Caspari), under 2; 902 (in re Aelvoet and others), under 25, 26 and 27; 963 (in re Niesing, Peeters and Roussot), under 2; 1081 (in re Albertini and others), under 4; 1101 (in re Cassaignau and Karran No. 3), under 9; 1134 (in re Ngoma), under 4; 1148 (in re Scheu Nos. 1 and 2), under 13.)

9. The conclusion is that the internal appeals at issue in this case are to be deemed premature. Yet there is no reason of public policy why an organisation should not entertain a claim, even when it is premature, pending the notification of an individual decision. That is the approach that the EPO took when, instead of warning the complainant forthwith that his appeal was premature, it entertained his claims - just as it entertained all the others - and forwarded them, after what it described as preliminary study, to the Appeals Committee. So it was in breach of good faith in objecting to receivability before the Committee at a time when the time limits set off by its individual decisions had already run out. The Tribunal accordingly holds that under the circumstances the complainant is right to plead that he was caught in a procedural trap.

10. The conclusion is that the complaint is indeed receivable, but it is devoid of merit for the reasons set out in Judgment 1392 also delivered this day on the complaint filed by Mr. Gaston Raths.

11. Since the complaint fails, the applications to intervene too must be dismissed.

DECISION:

For the above reasons,

The complaint and the applications to intervene 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 1 February 1995.

(Signed)

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

Updated by PFR. Approved by CC. Last update: 7 July 2000.