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

EIGHTY-NINTH SESSION

***In re* Bousquet (No. 4) and others** **Judgment No. 1979**

The Administrative Tribunal,

Considering the fourth complaint filed by Mr Karl Christian Bousquet, the fifth complaint filed by Mr Jean-Pierre Cervantes, the third complaints filed by Mr Jean-Jacques Criqui and Mr Philippe André Gourier, the second complaint filed by Mr Paul Richard Luckett, the sixth complaint filed by Mr Gaston Raths and the third complaints filed by Mr Alain René Pierre Rosé and Mrs Barbara Schorsack against the European Patent Organisation (EPO) on 4 March 1999 and corrected on 16 June, the EPO's reply of 29 September, the complainants' rejoinder of 13 December 1999 and the Organisation's surrejoinder of 25 February 2000, the complainants further submission of 11 April and the EPO's further observations of 27 April 2000;

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

Considering the applications to intervene filed by 2,266 EPO employees;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. Facts relevant to this case are to be found in Judgment 1663 (*in re* Bousquet No. 2 and others) delivered on 10 July 1997 and Judgments 1931 (*in re* Baillet No. 3), 1932 (*in re* Vollering No. 17) and 1933 (*in re* Ousset) delivered on 3 February 2000.

In order to settle once and for all a dispute about the adjustment of the remuneration of staff at the European Patent Office, the EPO's secretariat, on 8 March 1996 the Administrative Council adopted decision CA/D 4/96. Among other things, that decision provided for the amendment of the salary adjustment procedure applicable from 1 July 1988 (decision CA/D 20/88) through the introduction of a single lump-sum payment for the period from 1 July 1992 to 31 December 1995, and the amendment of the basic salary scales with effect from 1 January 1996. The dispute nevertheless came before the Tribunal. It gave rise to Judgment 1663, in which the Tribunal concluded that there were no proper grounds for departing from the 1988 procedure.

After further consultations the President of the Office submitted the Office's analysis of Judgment 1663 to the Council in document CA/117/97 of 7 October 1997, with details of how the judgment would be implemented. Concerning the period after 31 December 1995 the President noted:

"The new element introduced by [Judgment 1663] is that the level of remuneration which would have been reached at the end of 1995 had the 1992 and 1993 adjustments been made in accordance with the Tribunal's interpretation of the procedure would in some cases be higher than the one introduced on 1 January 1996."

Consequently, the Office considered that, for the period from 1 January 1996 to 30 June 1996, a "guarantee clause" should be applied to all staff whose pay would, as a result of the new scales introduced on 1 January 1996, be lower than that they would have received under the procedure previously in force. While not changing the scales officially introduced on 1 January 1996, the clause would provide for payment of compensation and would affect only staff serving in Germany.

By a decision, CA/D 10/97, of 5 December 1997 the Council amended decision CA/D 4/96 with effect from 1 January 1996. The amendment provided that for the above-mentioned staff the difference in the net monthly

remuneration or pension in respect of the period from 1 January to 30 June 1996 would "be made up in the form of a compensation allowance". By decision CA/D 6/97 of 5 December 1997 the Council established that as from 1 July 1997 the basic salary scales would be drawn up in accordance with the adjustment procedure (decision CA/D 20/88) as amended by decision CA/D 4/96.

Consequently, on 19 December 1997 the complainants received two additional pay slips for November 1997, one for the period from January 1996 to June 1996 and the other for the period from July 1997 to November 1997. By letters of 17 March 1998 they each lodged two appeals with the President, subsequently registered under numbers 20/98 and 21/98, against each of the two additional pay slips. In their first appeals they argued that the compensation allowance was intended to offset the loss in salary resulting from the EPO's "failure to correct the salary scales adopted on 1 January 1996" and denied them "the benefit of regular scales and higher remuneration in the future". In their second appeals they asserted that the scales used to establish the amount of the pay adjustment for the period from 1 July 1996 to 30 June 1997 were "inaccurate". Therefore, the salary scales adopted as from 1 July were also "wrong". In both appeals they asked the President to grant them the fair remuneration they considered they were entitled to. By letters of 6 April 1998 the Director of Personnel Development informed them that the President could not allow their appeals and had referred the matter to the Appeals Committee for an opinion.

The Committee reported on 23 September 1998 on the two appeals. It found the adjustment procedure to be flawed and that the Administration had "omitted" the compensation allowance from the salary scales adopted at 1 January 1996. It recommended unanimously that the appeals should be allowed, that the complainants' remuneration should be recalculated as from 1 July 1996 in the light of its conclusions and that any resulting arrears of salary should be paid. By a letter of 10 December 1998, the impugned decision, the Director of Personnel Development informed the complainants that the President had decided to dismiss their appeals.

B. Citing the Committee's report, the complainants submit that the rejection of their two internal appeals is unlawful. Referring to appeals 20/98 - challenging the application to them of decision CA/D 10/97 - they observe that although the compensation allowance made their remuneration for the period from 1 January 1996 to 30 June 1996 equal to "the amount yielded by the adjustment method in force", the EPO failed to set scales at 1 January 1996 in accordance with the procedure laid down in decision CA/D 20/88. It set them arbitrarily and for considerations of pay policy, in breach of that procedure. They add that, by decision CA/D 10/97, the Office excluded the compensation allowance in adjusting basic salaries at 1 July 1996. That adjustment was based on the scales appended to decision CA/D 4/96 - which were wrong - and was therefore unlawful. There must be continuity in adjustments, each new one being based on the regular adjustment of the previous year.

Referring to appeals 21/98, challenging the application to them of decision CA/D 6/97, they submit that the unlawfulness of the adjustment of the salary scales applied as from 1 July 1996 automatically affected the adjustment of the scales of 1 July 1997 "by repercussion".

They ask the Tribunal to quash the President's decision of 10 December 1998 and to award them costs.

C. In its reply the EPO contends that the complaints are irreceivable *ratione temporis* in that they seek a review of the pay scales applied as from 1 January 1996 and 1 July 1996. Having been introduced in 1996 the scales could not be challenged in March 1998, the date on which the appeals at the origin of these complaints were filed. Neither the delivery of Judgment 1663 nor the payment of the compensation allowance can set off a new time limit for appeals against them. The complainants' claim to a review of the scale applied as from 1 July 1997 is irreceivable "by repercussion" since it is based on the allegedly unlawful scale of 1 July 1996 and does not challenge the adjustment percentage applied as from 1 July 1997. Citing Judgment 1713 (*in re* Carretta and others), the EPO contends that the complainants may not seek the establishment of new pay scales.

Furthermore, the complaints filed by Mr Cervantes, Mr Luckett, Mr Raths and Mrs Schorsack are also irreceivable because these complainants signed the individual declaration thereby undertaking not to file any new appeals other than those seeking proper application of the new procedure. But what they are challenging here is not the application of the new procedure but the procedure itself.

Lastly, the EPO points out that, in practice, the compensation payment concerned only staff serving in Germany. Consequently, the complaints of Mr Cervantes, Mr Gourier and Mr Rosé, who were serving at The Hague in the first half of 1996, are irreceivable on this score too.

In subsidiary pleas it submits that the compensation allowance payment and the establishment of scales at 1 January 1996 were lawful. It was at the staff's request that the scales provided in CA/D 4/96 were applied as from 1 January 1996. Since those new scales were "restructured and realigned" on those of the Coordinated Organizations and the European Union, it would have been more relevant to introduce them as from 1 July 1996. Moreover, the procedure in force at 1 January 1996 allowed the scales to be adjusted as from 1 July 1996 at the earliest. The level of the realigned scales was only 0.2 per cent short of what the staff claimed. The EPO was not bound to establish new scales in executing Judgment 1663, and by opting for the compensation allowance and maintaining the scales introduced at 1 January 1996 it respected the complainants' rights and at the same time chose the solution which was the most easily implemented from an administrative standpoint. By challenging the introduction of the compensation allowance the complainants are in fact seeking "by repercussion" an increase in pay as from 1 July 1996 and for the future, though no such increase is due to them.

The EPO contends that the salary scales for the period from 1 July 1996 to 30 June 1997 were lawful. The procedure introduced by document CA/D 20/88 allowed for periodic review and revision. In carrying out such revisions, the Council was free to set a new level of remuneration, for example by comparison with that of the Coordinated Organizations, which is precisely what it did when it adopted the new scales. What the complainants aim to achieve from the so-called "principle of continuity" in pay adjustment would amount to denying the Council's competence to modify the scales.

Deeming that it has demonstrated the lawfulness of the scales applied as from 1 July 1996, the EPO considers that the scales at 1 July 1997 are also lawful.

D. In their rejoinder the complainants maintain that their complaints are receivable and citing the case law assert that they may "at any time" ask that the level of their remuneration be "in keeping with the principles they rely on". Although they signed the individual declaration they did not relinquish the benefit of the legally applicable procedure.

They press their pleas on the merits. Referring to appeals 20/98 they note that, in its reply, the Organisation failed to mention a "fundamental document" dated 7 November 1995, in which the President acknowledged that, should the Tribunal find in favour of the staff (in future Judgment 1663), the Office would have to correct retroactively the pay scales. Furthermore, when the comprise was reached, the President undertook to respect the adjustment procedure for five years. But he broke that commitment by deciding to introduce the compensation allowance. They concede that the Council is free to amend the adjustment procedure, but on condition that it observes the principles set by the Tribunal in Judgment 1663. Furthermore, the EPO cannot lawfully rely either on the "realignment" of staff pay in that it is not based on any decision by the Council nor on the 0.2 per cent difference in that it does not derive from proper application of the procedure in force.

Referring to appeals 21/98 the complainants challenge the level of the pay scales as from 1 July 1997 in that they were set on the basis of scales applying as from 1 July 1996 which were 1.2 per cent lower than the lawful level.

E. In its surrejoinder the Organisation submits a document from the Inter-Organisations Study Section on Salaries and Prices (IOS), which, it says, bears out the statistical data and the conclusions it drew from them. It contends that by assessing the difference between the scales applied at 1 July 1996 and those claimed as being 1.2 per cent and not 0.2 per cent, the complainants are attempting to consolidate for the future the benefit of the adjustments made in 1994 and 1995, whereas according to the Tribunal's interpretation in Judgment 1663, those adjustments were in breach of the applicable procedure. Besides, if the President had still been bound by the commitment entered into by his predecessor on 7 November 1995 *vis-à-vis* the whole staff, any compromise on pay - such as the one provided by decision CA/D 4/96 - would have been "superfluous".

It adds that, in Judgments 1931 and 1933 the Tribunal did not object to the principle of a compensation allowance and found that it was not necessary to set new general scales for the first six months of 1996. Furthermore, again in Judgment 1933, the Tribunal acknowledged that the Organisation was entitled to apply, as from 1 July 1996, "a new method, with new scales", for the reckoning and adjustment of salaries.

F. The complainants' further submission addresses the extent of the injury they allege. They submit that the IOS document said nothing of the EPO's technical explanations or the validity of the salary adjustment procedure selected by the Office as a basis for concluding that there was a 0.2 per cent difference. That being so, they consider that the EPO's interpretation of the statistical data and technical conclusions was not endorsed by the IOS.

G. In its observations, the EPO maintains that the IOS did bear out its conclusions and that the complainants' pleas are therefore "purely contrived".

CONSIDERATIONS

1. The facts that prompted this complaint are set out in Judgment 1663 (*in re* Bousquet No. 2 and others), delivered on 10 July 1997, to which reference is made.

In 1988 the European Patent Office adopted a method for working out pay adjustments taking account of the cost of living and the level of pay of international civil servants and using the rates applied by the "Coordinated Organizations" as a reference. However, for pay due as from 1 July 1992 the Administrative Council used other criteria though it did not amend the method. As a result, salaries were lower than they would have been had the method been applied. This created discontent and resentment among the staff of the Office. To put an end to the dispute, representatives of the staff and the Administration agreed on a compromise settlement - which meant concessions on both sides. The Administrative Council endorsed the proposed settlement on 8 March 1996 by adopting decision CA/D 4/96. In order to benefit under the compromise, those receiving a salary or pension had to sign individual declarations, which the vast majority of them did. However, Mr Bousquet, Mr Gourier and Mr Vollering - joined by twenty interveners - challenged the amount of the adjustment for the period from 1 July 1992 to 30 June 1994. In its judgment (No. 1663) on that case, the Tribunal largely found in their favour, deeming that so long as the method had not been changed, it was binding on its author and should be applied.

The decisions taken by the Office following that judgment were again contested.

In the present case the complainants, joined by many interveners (2,266), are challenging the salary scales (which serve as the basis for determining later adjustments) applied from 1 July 1996 and, consequently, from 1 July 1997. They submit that the amount of a "compensation allowance" granted to them for the period from 1 January to 30 June 1996 should be included in the scales introduced on 1 July 1996 and hence, indirectly, in subsequent scales.

It should be noted that, on the President's proposal the pay agreement concluded in early 1996 was reflected in a decision of the Administrative Council (CA/D 4/96), dated 8 March 1996, which amended the Implementing Rule to Article 64 of the Service Regulations, adopted in 1988 (CA/D 20/88), and endorsed a salary and pension adjustment in line with the agreement reached with the staff representatives that was to benefit officials who signed the individual declarations. The new implementing rule, entitled "Procedure for adjusting the remuneration of permanent employees of the European Patent Office, applicable with effect from 1 July 1988 (CA/D 20/88) and amended with effect from 1 July 1996 (CA/D 4/96)", provides that as a rule adjustments take effect from 1 July each year. Chapter VIII of the Rule, entitled "Special measures as of 1 January 1996", provides in Article 12 for the adjustment of basic salary scales. Article 13 of Chapter IX, entitled "Date of entry into force" says:

"(1) The present procedure will enter into force on the date on which it is approved by the Administrative Council.

(2) The provisions of Chapter VIII will take effect on 1 January 1996.

(3) The provisions of Chapters I to VII will apply for the first time when the annual adjustment is made on 1 July 1996.

(4) Notwithstanding Article 2, paragraph 2, of the present procedure, the adjustment as of 1 July 1996 will apply to the scales resulting from the special measures referred to in Article 12."

These provisions were widely publicised. They are referred to explicitly in the individual declaration, which the vast majority of the staff (99 per cent) signed, thus undertaking "neither to pursue any existing appeals, nor file any new ones relating hereto, given that his/her other rights, notably to correct application of the adjustment procedure in the future, are not thereby affected".

Following Judgment 1663, the President of the Office noted that some staff not covered by the judgment ran the risk of receiving less, for the period from 1 January to 30 June 1996, than the amounts that would have resulted from the application of the judgment. At the request of staff representatives he therefore proposed to the Administrative Council that they be paid an additional amount from 1 January 1996.

Since the adjustment agreed on in the pay agreement for 1996 was to take effect from 1 January 1996 - rather than 1 July as was the rule - the President proposed to the Council that the additional amounts granted for the first half of 1996 be termed "compensation allowance".

The Council therefore adopted a decision (CA/D 10/97) on 5 December 1997, which reads as follows:

" Article 1

The following addition shall be made to Article 12 of Annex 1 to decision CA/D 4/96:

'(7) In the event that the net monthly remuneration or pension resulting from the scales determined in paragraphs 1 to 5 above should, for persons who, during the period from 1 January 1996 to the date of entry into force of the present decision, were entitled to a remuneration or pension from the Office, prove to be less than that which would have resulted from the application of judgment No. 1663 of the Administrative Tribunal of the International Labour Organisation, the difference will be made up in the form of a compensatory payment in respect of the period from 1 January to 30 June 1996 calculated on the basis of the tables shown in Annex IV.

(8) The amounts of the compensatory payment corresponding to the different components making up the remuneration will, for the calculation of the monthly compensation due and of the contributions to the social security and pension schemes, be treated in the same way as that element of the remuneration to which they relate.'

Article 2

Article 13, paragraph (4), of Annex I to decision CA/D 4/96 shall be amended to read as follows:

'Notwithstanding Article 2, paragraph 2, of the present procedure, the adjustment as of 1 July 1996 will apply to the scales resulting from the special measures referred to in Article 12, paragraphs 1 to 6.'

Article 3

This decision shall enter into force on 5 December 1997. It shall take effect as of 1 January 1996."

On the same day the Council adopted a decision (CA/D 6/97) on the adjustment of remuneration as of 1 July 1997.

The Organisation takes the view that the compensation allowance should not be added to the amounts in the scale used as a basis for the adjustments taking effect at 1 July 1996.

The complainants demur. They ask to have the compensation allowance included in the scale for July 1996 and, consequently, in the one for July 1997.

2. They ask the Tribunal to quash "the decision of the President of the Office, as notified by the letter of 10 December 1998 from the Director of Personnel Development, and to award full redress". They want a judgment which can be applied to "the whole of the staff". In their view, the compensation allowance should be included in the scale applying at 1 July 1996, to serve as a basis for subsequent adjustments.

3. The Organisation submits that the complaints are irreceivable, though it concedes that the internal appeals against the first individual decisions (additional pay slips concerning the adjustment for the periods from January 1996 to June 1996 and July 1997 to November 1997) were lodged in time. It contends that the complainants could and should have challenged in time the decisions fixing the scales, but they did not. Furthermore, for staff who did adhere to the compromise, the present complaint is contrary to the pay agreement that set the new scale introduced at 1 July 1996.

The complainants deny that their complaints are irreceivable. In order to appeal they had to await the first individual decisions. The pay agreement allowed them to challenge the application of the amended procedure; in their opinion, the latter should have taken account of the ruling of Judgment 1663, which they could invoke.

According to the case law, the complainants could properly challenge the first decision applying to them individually a general decision on pay (reflected in their pay slips). Whether they could, exceptionally, have attacked the general decision is immaterial. The complaints are not out of time.

The question of whether the complainants' arguments coincide with the terms of pay agreement - as it should now be understood - will be examined to the extent necessary in the discussion on the merits.

4. Consistent precedent holds that, since judgments carry the authority of *res judicata* only for the parties to a dispute (see Judgment 1935, *in re* Fabiani No. 4), complainants may not put forward claims for the whole staff, but only for themselves. The complaints are irreceivable insofar as they address the position of persons who are not parties to this suit.

5. Since the present case largely concerns the effects of Judgment 1663, it is worthwhile recalling the latter's salient points. For the period in question - from 1 July 1992 to 30 June 1994 - the Office took individual decisions applying a general decision on pay adjustment, which were inconsistent with the adjustment procedure it adopted in 1988 and which it was bound to apply for as long as it remained in force. Judgment 1663 (under 12) refers expressly to - and confirms - earlier precedents including Judgments 1419 (*in re* Meylan and others) and 1420 (*in re* Dekker and von der Lühe). According to those precedents, an organisation may change its methodology provided that it abides by general principles of law (see also Judgments 1912, *in re* Berthet No. 2 and others, under 13, 1913, *in re* Dauvergne and others, under 11, and the others cited therein).

It is therefore necessary to determine whether the Office properly amended its rules of "procedure", to use its own terminology, and whether it complied with general principles of law.

(a) It is common ground that, formally, the amendment to the procedure was decided by the competent body - the Administrative Council (Article 33(2)(b) of the European Patent Convention and Article 64 of the Service Regulations) and was applied from 1 July 1996, a date consistent with the previous procedure adopted in 1988.

(b) An organisation's decisions about pay are within its discretionary authority. The Tribunal will review them only if they show an error of fact or of law, overlook essential facts, show abuse of authority or draw clearly mistaken conclusions from the evidence.

The complainants put forward a number of arguments in support of their contention that the decision not to include the compensation payment was unlawful.

(c) In their submission, the procedure has not changed, so the 1988 procedure, which provides for continuity of adjustment on the basis of a scale that includes the previous remuneration, still applies.

That reasoning overlooks the amendments made to the procedure in 1996 and 1997, which provided for new basic scales and not an adjustment vis-à-vis the former situation. This is borne out by both the text of these decisions and their stated aim - "realignment" by comparison with remuneration in the European Union and Coordinated Organizations.

The plea fails.

(d) The complainants assert a right to continuity of adjustment.

The plea has no basis in law as the rules do not bar a change of method. Besides, staff have no perpetual right to a pay rise proportional to cost of living increases or the evolution of pay levels in a comparable sector (see Judgment 1912, under 19).

Of course, the Organisation may not impair acquired rights of its employees or take arbitrary decisions to their detriment. But it did neither: the amended scales were the subject of an agreement between the Office and its staff, to which the vast majority of officials subscribed; and the Administrative Council can not be taxed with abuse of authority for taking a policy decision to bring EPO remuneration into line with that of the European Union and the Coordinated Organizations.

(e) Here, as in the case in which staff who signed the individual declaration seek to benefit fully from the effects of Judgment 1663, the complainants cite the letter of 7 November 1995 whereby the former President told a staff representative, through the intermediary of the Director of Staff Development, that if the Tribunal found for the officials in question, the benefits of the judgment would be extended to all staff. However, for the reasons stated in Judgment 1980 (*in re* Cervantes No. 6 and others) also delivered this day, that promise was made in a different

context; its conditions are no longer met, at least as concerns officials who signed individual declarations following the 1996 compromise settlement and the Council's subsequent decisions. Furthermore, Judgment 1663 concerns only the pay adjustment for the period from 1 July 1992 to 30 June 1994 and does not rule out a change of method provided that it is consistent with general principles of law. The complainants may not therefore infer a right to continuity of adjustment either as a general rule or in the context of 1996.

(f) The complainants refer to a statement in a document dated 15 February 1996 written at the time of the negotiations for the proposed pay settlement in which the President of the Office undertook "to maintain for the next five years the position thus reached regarding pay". They submit, in essence, that this commitment was misleading and not respected by the Office.

But they fail to prove their assertion. The commitments made under the pay agreement, to take effect at 1 January 1996, were met. The pay increase resulting from the agreement was also taken into consideration for the adjustment at 1 July 1996. The only change after Judgment 1663 was the increase granted by the Office - in the form of a compensation allowance for the period from 1 January to 30 June 1996. Even if that payment was not included in the scale used for subsequent adjustments, overall it undoubtedly benefited the staff concerned.

(g) According to the complainants, the new procedure should be applied with their own stipulations.

Their reasoning is unsound, particularly as the text, as amended, indicates clearly that the adjustment of July 1996 is to be based on the increases established in the pay agreement, excluding the compensation allowances granted for the first half of 1996.

(h) The rule against retroactivity prevents an organisation from applying retroactively to staff a rule which is unfavourable to them. In order to determine whether a measure is unfavourable its overall effects must be assessed. For the reasons given above, the compensation allowance was, overall, favourable to the officials concerned even if it was not to serve as a basis for subsequent adjustments.

There was no breach of the rule against retroactivity.

6. Since none of the pleas succeed, the complaints must be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 25 July 2000.