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

***In re* PHILLIPS (No. 2), DE LAET, VAN MAREN, BARE, BRACKE, DUREN and VUILLEMIN**

Judgment No. 308

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints against the International Patent Institute drawn up by Mr. Gwilim John Phillips, Mr. Fernand Renaat Cesanine De Laet, Miss Elsa Van Maren, Mr. Robert Joseph François Baré, Mr. Petrus Paul Bracke, Mr. Léon Duren and Mr. Louis Vuillemin on 13 May 1976, the Institute's single reply of 2 June 1976 to the seven complaints, the complainants' rejoinder of 18 June 1976, the Institute's surrejoinder of 23 August 1976 and the complainants' further memorandum of 10 September 1976;

Considering that the seven complaints relate to the same matters and should be joined to form the subject of a single decision;

Considering the applications to intervene made by

Mr. Gaëtan Marie René Antoine Ghislain Baetens,
Mr Ignace Blasband,
Mr. Constant Braems,
Mr. Victor André Cattoire,
Mr. Jean Raymond Cruchten,
Mr. Herman A. De Muyt,
Miss Anna W. E. de Vries,
Mr. Rodolphe A. E. Fischer,
Mr. Nicolas Friden,
Mr. Jean-Marie Ganeff,
Mr. Raymond Henri Albert Gautier,
Mr. Michel Ginestet,
Mr. Pierre Goller,
Mr. Willy Jean Rosa Hellemans,
Mr. Henri Hemes,
Miss Louisa Hoofdman,
Mr. Pierre Marie René Keppens,
Mr. Paul Mathieu Georges Kerres,
Mr. Gérard Kohler,
Mr. Zeger Kroon,
Mr. Hugo Werner Labie,
Mr. André Florimond Leherte,
Mrs. Wilhelmine Mostard-Van Leeuwen,
Mr. J. J. François J. Nepper,
Mr. Frans Pieter Peeters,
Mr. Winfried Peschel,
Mr. Mladen Marko Rajic,
Mr. Jah. J. Roomer,
Mr. Robert Antonius Rosmolen,
Mr. Jean F. M. Schimberg,
Miss Maria Antonia Elisabeth Snel,
Mrs. Helene Staber-Selzer,
Mrs. Pauline Huguette Van Breemen,
Mr. Felix Willy Van Humbeeck,
Mr. Arthur J. L. C. Van Reeth,
Mr. Marcel L. P. Van Schoor,

Mr. Siegfried Van Walle,
Mr. Alfred Nestor Georges Vangheluwe,
Mr. Joe Petrus Maria Verhoest,
Mr. Friedrich Zemek;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Appendix III to the former Institute Staff Rules and the Pension and Welfare Scheme Rules of 1966, particularly Articles 4, 39, 41, 47, 50 and 51, and Article 5 of the Staff Regulations;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The Institute has two pension schemes concurrently in force. The first, known as the "old scheme", is governed by Appendix III to the former Staff Rules. The other, known as the "new scheme", came into force on 1 January 1965 but is governed by Staff Rules which were not adopted until 27 June 1966. The structure and operation of both schemes are independent. The complainants are all members of the old scheme.

B. While the new pension scheme was being drawn up, in December 1964 some 90 per cent of the staff refused to join it on the ground that "in the absence of any rules they could not be regarded as reasonably well qualified to decide whether to do so". On 8 January 1965 the Administration decided to bring the new scheme into force with effect from 1 January. In view of the Staff's misgivings the Administrative Council said that they would be given another opportunity to join when a final text of the rules had been drafted. The text was adopted on 27 June 1966 and on 20 July the Administration told the staff members who had not yet joined the new scheme that the "deadline for joining" had been postponed to 16 September. Ninety of the then 150 staff members decided not to join. When the complaints were filed there were only about 60 and most staff members now belong to the new scheme. The staff has trebled since 1969 and all staff members recruited after 1 January 1965 had to join the new scheme except - or so say the complainants - those required by the law of their nationality to remain members of a social security scheme in their own country.

C. The complainants say that any differences which might have existed between the two schemes in 1965-66 mattered little and that since the contributions were much the same "former staff and new staff felt that they were on a par". But at the end of 1966 the Administrative Council decided to establish a reserve fund to supplement the contributions and reserves so as to meet the requirements arising under Article 39 of the Pension and Welfare Scheme Rules. The fund originally amounted to 1 million guilders. After that sum had run out the Administrative Council decided, in 1974 and again in 1975, to preserve the purchasing power of pensions by paying into the fund a special contribution equivalent to 1.25 per cent of the amount of salaries of scheme members paid wholly by the Institute. In December 1975 "the Administrative Council decided to charge to the Institute the full deficit incurred in operating the new scheme for 1975 - or 3.4 per cent of the total amount of pensionable remuneration - and to charge the Institute a special contribution in 1976 equivalent to 1 per cent of the total amount of salaries, over and above its three fifths share of the total pension contribution, which was set at l9 per cent of salaries for 1976".

D. The complainants observe that the Administrative Council made no similar provision for members of the old scheme, who therefore had to bear the combined effects of devaluations of the French franc - the main insurer being the French Deposit and Consignment Office (Caisse des dépôts et consignations) - and the fall in the purchasing power of the currency. The outcome was that members of the old and new schemes fared quite differently: members of the old scheme were much worse off, whereas members of the new scheme fared as well as or even better than before. These trends did not emerge until the deadline for choosing between the two schemes (September 1966) had passed and on 13 May 1975 the members of the old scheme asked for another opportunity to join the new one, offering to pay the difference between the contributions they had already paid and those which would have become due under the new scheme so as to put all staff members on an equal footing as to the distribution of costs. Their request was refused.

E. The complainants came to hear of a decision taken by the Administrative Council on 19 December 1975 that the Institute should pay extra contributions for 1975 and 1976 for the benefit of members of the new scheme, but for them alone. They regarded that as unfair and in January 1976 appealed against the decision. Their appeal was dismissed by a decision of 5 February 1976 which they now impugn.

F. The complainants argue that the Institute committed a breach of the rule of equal treatment by paying special grants and contributions over and above the share it is required to pay under Article 41 of the rules governing the new scheme. The purpose was to compensate members of the new scheme for devaluations of the French franc and the fall in the purchasing power of the currency. Similar contributions were not paid for the benefit of members of the old scheme. The Institute's breach taints the Administrative Council's decision of 5 February 1976 with an essential flaw and warrants quashing it.

G. In their claims for relief the complainants ask the Tribunal: (a) to quash the Administrative Council's decision of 5 February 1976, notified to them on 20 February, on the ground that it constitutes a breach of the basic rule of equal treatment; (b) to order the Institute to put members of the old and new schemes on a par and ensure that equal contributions afford equal protection; and (c) should the Institute fail to restore equality of treatment within six months from the date of judgment, to give leave to the complainants to claim damages in further proceedings. In their rejoinder the complainants explain points (b) and (c): in their view they would be properly compensated in the following way. The Institute should calculate the total amount of contributions paid by each of them in guilders since the date on which it began to protect members of the new scheme against changes in exchange rates. It should then pay the insurer, in the currency used by that insurer, an amount equivalent by present-day exchange rates to the total amount of contributions originally made in guilders on the complainants' account. Should the Institute fail to do so, the complainants ask the Tribunal to give them leave to come before it again when benefits under the old scheme fall due and seek determination of the amount of their entitlements and in order that those entitlements be respected. Lastly, each of the complainants claims 4,000 Swiss francs towards costs.

H. The Institute argues that the impugned decision concerns solely the financing of the new scheme and therefore cannot in any way affect the rights and duties of the complainants, who are all members of the old scheme. The first claim for relief is for the quashing of a decision on the manner of applying rules which do not affect the complainants. Hence the decision cannot cause prejudice to the complainants, who, in any case, do not contend that it was a breach of the rules in force. Their second claim for relief, "which no doubt reflects the only true purpose of the complaints", is for an order that the Institute put the members of both schemes on a par. In the Institute's view that claim has no bearing on any individual decision which may cause prejudice - the only kind that may be impugned - and can be met only if the Institute changes the rules. The exercise by the Institute of its rule-making authority is not subject to review by the Tribunal. Hence the complaints are irreceivable.

I. The Institute also replies on the merits. It notes the complainants' contention that the Administrative Council's impugned decision of 19 December 1975 (see E above) constitutes a breach of the principle of equal treatment for all staff members in an organisation. The Institute points out that that principle means merely that the same measures should be applied to all staff members in the same situation. Since it was only the new scheme which showed a deficit for 1975 and 1976, and not the old scheme, of which the complainants are members, "the Council's decision to order extra contributions can apply only to the new scheme, and rightly so". The complainants want their own pension rights to be put on a par with those of members of the new scheme. "Hence the nub of the complaint is this: they are not so much objecting to inequal treatment by the Institute as venting regret that they did not take up the offer, made to all staff members, to join the new scheme." The Institute is not obliged to set a new deadline simply because it took measures after the last deadline expired to ensure the efficiency of the new scheme, such as the establishment of a reserve fund and the impugned decision of 19 December 1975. "If any pension scheme, particularly a funded one, is to be properly financed and managed, both internal and external conditions must be met. It is precisely because of uncertainty about whether the conditions will be met that staff members are usually offered a right of option when such a scheme comes into force." The Institute therefore argues that the complainants, who are not in the same legal and factual position as members of the new scheme, cannot plead measures affecting the latter in seeking improvements in their entitlements under the old scheme, of which they freely chose to remain members.

J. The Institute therefore asks the Tribunal: (a) to declare that it is not competent to decide on the merits; (b) to declare the complaints and claims for relief in all respects irreceivable;

(c) subsidiarily, to declare the complaints unfounded in their entirety; and accordingly to dismiss all the claims for relief.

CONSIDERATIONS:

As to the first claim for relief:

1. On 19 December 1975 the Administrative Council of the Institute decided[(1)] (1) "to charge to the Institute the full amount of the deficit incurred by 31 December 1975 in operating the pension scheme"; (2) "so as to finance the scheme in 1976, to require the Institute to pay a special contribution amounting to 1 per cent of the total basic salary of staff members belonging to the scheme and to exact contributions at a rate of 19 per cent, the burden to be shared between the staff and the Institute in the manner laid down in Article 41 of the Pension and Welfare Scheme Rules". On 15 January 1976 the complainants asked the Administrative Council to "correct that decision so that the Institute's special contribution should apply to all staff members of the Institute without discrimination". That request was dismissed by a further decision taken on 5 February 1976 and notified on 20 February. In so far as that decision constitutes a refusal to grant the complainants the benefit of the decision of 19 December 1975, it does form the basis of a grievance. Their first claim for relief, which impugns that decision, is therefore receivable.

2. To support that claim the complainants allege merely a breach of the principle of equality.

According to Article 5 of the Staff Regulations "staff members belonging to the same category are subject to the same conditions of recruitment and career patterns". That article cites one application of the general principle of equality which governs all aspects of the Institute's relations with its staff members. The complainants may therefore rely upon that principle in, for example, claiming pension rights.

But the general principle of equality does not mean that all Institute staff members should be subject to identical rules. Rather is it reflected in the rule that like circumstances call for like treatment, different ones for different treatment. The Administrative Council's decision of 19 December 1975 applied solely to staff members belonging to the new pension scheme, and its purpose was to make good the deficit incurred in running that scheme. The complainants all belong to the old scheme and cannot therefore properly ask to have applied to them a decision which affects staff members in a different position. They have not shown that the remedial measures applied by the Administrative Council to the new scheme, such as setting the contribution rate at 19 per cent, are suited to the old scheme. In other words, they are mistaken in alleging discriminatory treatment and their first claim therefore fails.

As to the second claim for relief:

3. Secondly, the complainants allege that they have been discriminated against and wish to be put on the same footing as members of the new scheme. If they wish that claim to be met by individual or specific measures or by decisions, then this claim is irreceivable because it was not previously referred to the Administrative Council. Moreover, it is not couched in clear enough terms. If, on the other hand, the complainants want general and non-specific measures in the form of new rules, the claim is still irreceivable, since the Tribunal is competent to correct breaches of terms of appointment or provisions of the Staff Regulations, not to order the adoption of new rules.

As to the other claims for relief:

4. These claims are corollaries of the first two and are also unfounded. They should therefore be dismissed.

As to the applications to intervene:

5. Since the complaints are dismissed, so too are the applications to intervene.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 6 June 1977.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet

1. Registry translation.

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