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

SEVENTY-EIGHTH SESSION

In re RATHS (No. 2)

Judgment 1392

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Gaston Raths against the European Patent Organisation (EPO) on 3 January 1994, the EPO's reply of 14 March, the complainant's rejoinder of 15 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 4 per cent;

3. to award the complainant 4,000 German marks in costs.

The defendant:

1. To disregard on grounds of breach of Article 111 of the Service Regulations the "reasoned opinion" in the internal Appeals Committee's report of 11 August 1993, including the references therein to the collective appeal filed by Mr. Steven Derek Cook;

2. to examine the Organisation's objections to receivability;

3. 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 in the amount of 1 per cent of basic salary. This contribution from the staff 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 30 March 1992 the complainant lodged an appeal against his pay slip for January 1992. On 15 October 1993 the Director of Staff Policy told him that the President had rejected his appeal.

B. The complainant submits that the imposition of the special contribution entails double payment. He alleges breach of his acquired right to the rate of contribution, 7 per cent, set in Article 41.1 of the Pension Scheme Regulations. The Organisation was required to explain to the staff the reasons for a change it chose to make unilaterally, but it gave no explanation. 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 contends that the actuarial studies show that the total rate of contribution to the pension scheme was too low. It maintains that the method followed and the instruments used in setting 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. In his rejoinder the complainant presses his pleas about misuse of authority and the unlawfulness of the impugned decision.

E. In its surrejoinder the EPO restates its position.

CONSIDERATIONS:

1. The complainant, a grade A3 employee of the European Patent Office, seeks the quashing of a final decision of 15 October 1993 rejecting his appeal against the withholding from his pay as from 1 January 1992 of a special contribution of 1 per cent to supplement the pension Reserve Fund in pursuance of a decision the Administrative Council took on 12 September 1991 (document CA/D 11/91).

The background of the dispute

2. According to the evidence on file the EPO set up an independent pension scheme under the Pension Scheme Regulations, to be funded from the Organisation's budget. Pensions were linked to the amount of the last salary payment and subject to automatic adjustment. Each year of service gives rise to a pension entitlement equivalent to 2 per cent of the final salary payment, up to a maximum of 70 per cent. The budget is financed in the first instance out of the Organisation's own resources, which come from fees levied for the grant of patents and include amounts transferred to it from the fees levied by member States. But the Organisation's solvency is covered in all circumstances by the guarantee which member States provide for the pension scheme under Article 40 of the Pension Regulations.

3. Though the scheme was originally fully funded from the EPO's budget, the Organisation's Administrative Council decided in 1983 to set up a Reserve Fund to guarantee the funding of pensions in the long term by means of joint provident contributions both from the Organisation and from its staff. A basic agreement which was with the staff, and which is reflected in the regulations, provides that the financial burden is to be shared, the staff contributing one third and the Organisation two thirds. One point worth recalling in this context is that before the decision at issue in this case contributions were set at 21 per cent of base salary, of which the Organisation paid 14 per cent in the form of a budget allocation and the staff the remaining 7 in the form of monthly deductions from pay.

4. The establishment and management of the Fund have given rise in the past to studies drawing comparison with national pension schemes and schemes in other representative international organisations, and it is not in dispute that the establishment and management of the Fund are by and large in line with general practice. Each of the studies that was carried out over the years, first by Heubeck Consultants and later by Watson and Sons, incorporated expert actuarial forecasts. The findings of the studies did vary according to method, but the variations fell within a fairly narrow range when compared to the standards applied in the other schemes that were considered.

5. To gain a clearer picture of the outlook for the pension scheme, and following a warning from Watson and Sons, the Administrative Council approved in 1990 a proposal from the President of the Office for commissioning a working party made up of experts from inside and outside the EPO and of staff representatives to carry out a broad review of the scheme. The findings are summed up in document CA/43/91 of 19 July 1991. After a thorough inquiry into the situation the working party reported that apart from an accumulated and undischarged deficit the financial health of the pension scheme was basically sound; but the reappraisal of actuarial figures and the Fund's rate of return argued in favour of a rise in the total contribution from 21 to 24 per cent and a consequent rise in the staff's contribution from 7 to 8 per cent. The working party's report also contained draft regulations intended to confer greater autonomy on the Fund, which had till then been treated as a distinct category of EPO assets, but the draft did not go through.

6. The report stated that the staff representatives were against raising the employees' contribution. The working party expressed its conclusions in terms that betray some misgivings as to whether a rise in the staff's contribution was automatic if the rise in the total contribution to the Fund went through. Although a rise in the Organisation's own contribution seemed unavoidable the working party suggested treating the rise in the staff's contribution as "additional and exceptional".

7. The views of the Central Staff Committee on the report of the working party were set out in document CA/65/91 of 23 August 1991. The document makes two criticisms of the actuarial methods followed by the working party. One is that the "projected unit credit" method it adopted takes into account a forecast of future trends in pay levels, whereas the method previously applied took into account existing levels. The other criticism is that in taking the figure of 2.5 per cent the working party underestimated the Reserve Fund's rate of return, i.e. the investment yield corrected for inflation and pay rises. According to the document - and the point seems to be at the centre of the Staff Committee's thinking - the EPO's purpose in following those methods was to make its own position more secure and so counter the "budgetary" nature of the scheme by means of a corresponding reduction in the extent of the guarantee that member States were liable for. So in the Staff Committee's view there was no need for the staff, by accepting a rise in their own contribution, to help in funding any such exercise of budget consolidation.

8. In conclusion the staff offered the gradual introduction of an "additional and exceptional contribution of up to 0.5% of base salary until 1996" provided that the EPO raised its own contribution to at least 2.5 per cent of base salary and that a further 2 per cent of the yearly fees paid back to the Organisation by its member States were allotted to the Fund.

9. After preparatory discussion in the Budget and Finance Committee on 9 and 10 September 1991 (document CA/F PV 43) the Administrative Council examined the report of the working party at its session of 11 and 12 September (document CA/PV 41). The President of the Office then put forward the two points of view. One was that a rise of total contributions to 24 per cent would suffice to guarantee pension benefits, even in the long term. The other was that the cost of the increase should be shared in a proportion of two to one, the Organisation to pay two thirds and the staff one third. The minutes show that the decision on the matter was complicated by the view of several delegations that a further rise in the total contribution, to 27 per cent, would soon prove necessary and that the Organisation would have to bear the full burden on its own. In the end the decision to raise the total contribution to 24 per cent and to levy a further 1 per cent on pay was approved unanimously. It was issued on 12 September 1991 in document CA/D 11/91. By a majority vote the Council also decided to raise the endowment of the Fund to 27 per cent as from 1 January 1994 and consequently to raise the Organisation's contribution from 16 to 19 per cent. That decision bears the reference CA/D 12/91.

10. On 17 September 1991 the President of the Office issued a communiqué, No. 188, to inform the staff of the decisions. The communiqué is highly critical of the Council. It announces increases in the total contribution to 24 per cent and in the staff's share from 7 to 8 per cent, both as from 1 January 1992. It announces the decision,

subject to confirmation late in 1993, to raise the total contribution to 27 per cent as from 1 January 1994, on the understanding that, should that go through, the increase would be financed entirely out of the Organisation's budget, its share to rise from 16 to 19 per cent. The President said that in this he had managed for the time being to remove the "sword of Damocles" hanging over the staff's heads.

11. After taking the measure that is at issue in this case the President of the Office consulted an Actuarial Advisory Group made up of three independent actuaries. Their terms of reference were to see how the pension scheme should balance the books. The EPO explains that the group's report, first submitted in July 1993 and issued in final form in October of that year, was based on the position at the end of 1992. In the Organisation's submission it confirmed the working assumptions that underlay the measure the complainant is objecting to. In answer to a question the Tribunal put to it the EPO stated that in the light of the group's report the Council had replaced decision CA/D 12/91 with a new one, CA/D 17/93 of 9 December 1993; it thereby extended the disputed arrangements by three years as from 1 January 1994, and kept the total contribution at 24 per cent, the Organisation paying 16 per cent and the staff 8.

The internal appeals

12. The publication of communiqué No. 188 prompted the filing of a host of appeals with the Administration in December 1991 and January 1992. By a note of 6 March 1992 the appellants learned that their appeals would be treated as a collective one and were being referred to the internal Appeals Committee for an opinion. The appeal led to a parallel complaint on which the Tribunal also rules on this day in Judgment 1393 (in re Cook No. 2).

13. The present complainant, Mr. Raths, appealed on 30 March 1992 against the first of his pay slips - the one forJanuary 1992 - to show the increase in his pension contribution from 7 to 8 per cent. In reply the President said that after the initial study he was not inclined to allow the appeal and had therefore forwarded it to the Appeals Committee to be joined to the collective appeal.

14. The Appeals Committee reported on 11 August 1993. It held all the appeals, including the complainant's, to be sound and recommended that the President should refund the contributions wrongfully levied and put new proposals to the Administrative Council. The Committee's reasoning was (1) that analysis of the preparatory work on the measure at issue would have made plain the EPO's failure to show the need for any rise in the Fund's financing in view of the safety margins afforded both by the contributions and by the rate of return on the Reserve Fund; (2) that the Organisation was therefore guilty of "misuse of authority" insofar as it used its prerogatives for purposes unrelated to the aims of the Pension Scheme Regulations (see paragraphs 27, 28 and 29 and, on burden of proof, 31 of the Committee's report). The Committee levelled criticism mainly at the Administrative Council's decision on the second increase in contributions, namely the one from 24 to 27 per cent as from 1 January 1994. The Committee held that there was no explanation of the reasons for that decision and that there was no forecast in the working party's report (paragraph 29(c) and (d)).

15. On 15 October 1993 the Director of Staff Policy informed the complainant of the final rejection of his appeal. That communication dealt only with the first increase in contributions and it concluded:

"Although, as was the case during the internal appeal, certain parameters on which the actuarial experts relied may prove controversial, it should be stated that there was no obvious mistake in the experts' study".

The complaint and the pleas put to the Tribunal

16. The complainant has submitted to the Tribunal a set of pleas which he has developed in the course of the internal appeal proceedings, and in his submissions on his present case. At this, the latest stage in the proceedings, he has adopted most of the Appeal Committee's reasoning and his arguments come under two heads:

(a) Formal flaws. The EPO failed to comply with the requirements of Article 41 of the Pension Scheme Regulations because it introduced an "exceptional" deduction which is not provided for by 41(1). It altered the arrangements for financing the Fund as a result of political compromise in the Council and without first making an actuarial study as required by 41(3).

(b) Substantive flaws. The EPO acted ultra vires and committed misuse of authority because of the Council's choice of method for the purpose of reckoning foreseeable costs to the scheme. It made a needless increase in the employees' contribution. It reformed essential features of the scheme to the detriment of the staff's acquired rights

by altering the relationship between its own payments, the staff contributions and the member States' guarantee by increasing the staff's contribution. Lastly, it was in breach of the "duty of care" it owed its staff and of the "rule of optimisation" that that duty implied.

17. The EPO raises two preliminary objections. The first concerns the report of the Appeals Committee, which it says is fundamentally flawed in that all its members, as being themselves EPO employees, shared the staff's interests and therefore could not be "completely independent in the execution of their task", as Article 111 of the Service Regulations requires. What is more, says the EPO, one member of the Committee served as an expert on the working party whose report led to the disputed changes. The EPO therefore asks the Tribunal to strike out the Committee's report and disregard it in ruling on the case.

18. The Organisation's second objection to receivability is that when the complainant filed his internal appeal he was acting as chairman of the staff union. The Organisation does not question receivability insofar as Mr. Raths was acting as an employee but asks the Tribunal to record its reservations so as to remove any doubt there may be about the true nature of his suit.

19. As for the merits the EPO relates at length the background to the impugned decision. It points out that at every stage, particularly in the discussions of the working party, the actuarial studies were the main determinant and that that was in line with what Article 41(3) of the Pension Regulations required. As for the "projected unit credit" method, which the experts adopted, it was especially well suited to the EPO because its employees get permanent appointments, there are prescribed career patterns, the turnover of staff is low, and the last salary is the figure that counts for the purpose of reckoning the pension.

20. The EPO rejects the complainant's pleas about breach of the staff's acquired rights and of its duty of care. On the issue of acquired rights it submits that the figure of the staff contribution is bound to be variable since it depends on unforeseeable trends in such factors as the economic climate, salary scales and the actual rate of return on the Reserve Fund. As to its duty of care the EPO submits that the prime service it has rendered and continues to render its staff is that in everyone's interest it keeps the pension scheme running properly; that indeed was the whole point of the measure the complainant is challenging.

The Organisation's preliminary objections

21. The EPO's plea that the internal Appeals Committee was not independent cannot be sustained. Because of the function the Service Regulations confer on it the Committee is bound to take a stand on many an issue that affects or may later affect its own members as EPO employees. That is true of any court of administrative law, which may have to make rulings that affect its own members as individual citizens. The universal experience of the judiciary is that the duty of independence may be fully respected even in such circumstances. Article 111 of the Service Regulations is therefore to be construed as applying to circumstances that are particularly likely to threaten the independence of a member of the Appeals Committee: the article does not apply to its status as an institution.

22. There is another point worth making. The EPO does not lack means of safeguarding and defending the Committee's independence. After all, the Committee is a joint body and the Organisation therefore has under Article 110 of the Service Regulations the right and the freedom to appoint its chairman and two of its members with regard to the duty of independence. There is a further safeguard in the President's right to reject any recommendation by the Committee that he feels its members made in breach of that duty. In that event it would be for the Tribunal, which is outside the Organisation, to review the case.

23. One of the Committee's members contributed as an expert to the report that prompted the decision under challenge. The Tribunal agrees with the defendant that such accumulation of functions is at odds with the duty of independence laid down in Article 111. The point is one that the Organisation should have made in internal appeals proceedings, or the Committee itself or its chairman might have raised the objection proprio motu. But since the procedural defect had no appreciable influence on the Committee's views, the Tribunal holds that there are no grounds for treating the report as invalid.

24. Lastly, the Tribunal upholds the EPO's objection as to the capacity in which Mr. Raths said he was filing his internal appeal. The appeal procedure set forth in the Service Regulations is, to quote Article 106, an individual appeals system. Such too is the basic feature of the system of appeal embodied in Article II of the Statute of the Tribunal, though it is subject to the provision in Article VII(2) setting a special time limit for appeal against any

decision affecting a "class of officials", which runs from the date of issue. So it is only by virtue of an individual contract of employment with the Organisation that someone may lodge a complaint and the complainant may not alter the nature of the suit by declaring when he files the complaint that he is doing so as a staff union representative.

The merits

General considerations

25. The provisions of the Pension Scheme Regulations that are material to this case were drafted at a time when the Organisation was an applicant for membership of the "Co-ordinated Organisations" referred to in Article 1 of those Regulations. The provisions have not since been amended and they read as follows:

Article 40

"(1) Benefits paid under this pension scheme shall be charged to the budgets of the Organisation responsible for the assessment of these benefits ...

(2) The Member States of the Organisation jointly guarantee the payment of these benefits.

...

Article 41

(1) The employees' contribution to this pension scheme shall be 7% of their salary and shall be deducted monthly.

...

(3) Should the Councils of the Co-ordinated Organisations ... deem it necessary to have an evaluation of the cost of the pension scheme made by one or more actuaries and should this show the employees' contributions to be insufficient to cover one third of the financing of the benefits payable under these Regulations, the said Councils shall decide what changes, if any, are to be made in the rates of contribution."

26. It is the Administrative Council's decision No. CA/D 11/91 of 12 September 1991 that has given rise to this dispute. It came into effect on 1 January 1992 and reads as follows:

"1. In addition to the contributions of employees laid down in Article 41, paragraph 1 of the Pension Scheme Regulations of the European Patent Office in order to finance the pension scheme of the European Patent Organisation, a further amount of 1% of basic salary (Article 1401 of the budget) shall be retained each month by way of special contribution.

2. This special contribution shall be regarded as a contribution within the meaning of Article 41, paragraph 1 of the Pension Scheme Regulations of the European Patent Office."

27. Also on 12 September 1991 the Council took another decision, CA/D 12/91. It too, in the absence of any indication to the contrary, came into force on 1 January 1992 and it reads:

"1. There shall be allocated to the Pension Reserve Fund payments under the budget of the European Patent Organisation equivalent to 16% from 1 January 1992 and 19% from 1 January 1994 of the amount allowed for in the budget for basic salaries (Article 3000 of the budget), plus employees' ordinary and special contributions to the pension scheme at the overall rate of 8% of basic salaries (Article 1401 of the budget), after deduction of pensions actually paid (Article 3010 of the budget).

2. Two years after this decision enters into force, the payments referred to in paragraph 1 shall be reviewed having regard to the balance of the pension scheme."

28. Those provisions are not only poorly drafted but also poorly coordinated. They are to be construed as follows. Since they were all approved by the Administrative Council they are to be treated as having the same force in law as the provisions of the Pension Scheme Regulations the Council adopted in 1977. The "special" contribution

which was introduced in 1991 has, on account of the reference to Article 41 of the Regulations, the same force in law as the ordinary contribution and combines therewith to raise the contribution to 8 per cent.

29. The question of the proportion of the employees' contribution to the Organisation's remains unclear. Comparison of the figures mentioned in the two decisions suggests that the proportion is not to vary, the ratio at the material time being 8 to 16 per cent, making a total equivalent to 24 per cent of the staff's salary earnings. Yet Article 41(3) states that the purpose of the employees' contribution is to fund one third "of the benefits payable under these Regulations". That is a criterion distinct from the splitting of the total rate of contribution in set proportions between Organisation and staff. The Tribunal will base its ruling on the latter criterion, which in practice the Organisation has been applying for many years and which the President of the Office expressly commended to the Council.

The formal objections

30. As was said above, the complainant objects to the EPO's describing the disputed contribution as "special" on the grounds that the Regulations make no mention of any such category: Article 41 refers only to the regular contribution, which is subject to revision according to the procedure laid down in paragraph 3 of that article. But the plea is unsound. Regrettable though it may be that the method followed to achieve the purpose of decision CA/D 11/91 threatened the consistency of the Regulations, the fact remains that the second paragraph of the decision expressly assimilates the so-called "special" contribution to the regular contribution defined in the first.

31. Secondly, the complainant charges the EPO with failing to meet the requirement in 41(3) of carrying out an actuarial study before altering the rate of contribution. Like the Appeals Committee, the complainant takes the view that despite the report from the working party the Council let itself be swayed in the end by political expediency.

32. The parties' submissions show, however, that the complainant has come to acknowledge that the working party's report includes actuarial calculations that are at the centre of its comprehensive review and that fully satisfy the requirements in 41(3). That too is the view of the Tribunal, should there still be any disagreement on the issue.

33. The Tribunal observes that, unlike the first increase, from 21 to 24 per cent, which the working party recommended despite certain misgivings, the second one, from 24 to 27 per cent, scheduled for 1 January 1994 was not considered by the working party. The question therefore arises whether the second increase complies with 41(3). But there is no need to rule on that issue in the context of the present dispute, which is only about the increase in the employees' contribution from 7 to 8 per cent due to the rise in the total rate of contribution from 21 to 24 per cent. Besides, according to decision CA/D 12/91 the EPO itself is to finance the second increase entirely so that it will not affect the staff. The Tribunal further observes that in the light of the measures the Council adopted towards the end of 1993, decision CA/D 12/91 is no longer material.

The substantive objections

34. The Tribunal rejects the complainant's plea that the EPO acted in breach of an "acquired right" by raising his contribution from 7 to 8 per cent on the grounds that the rise meant a corresponding drop in his take-home pay. The amount at issue is small: a mere 93.61 German marks a month in the complainant's case. But, quite apart from that, all that need be said is that whereas his right to a pension is no doubt inviolable, a pension contribution is by its very nature subject to variation as the Organisation rightly points out. Far from infringing any acquired right a rise in contribution that is warranted for sound actuarial reasons - an issue the Tribunal reverts to below - actually affords the best safeguard against the threat that lack of foresight may pose to the future value of pension benefits.

35. The Tribunal also dismisses the plea about "misuse of authority" that the complainant has taken from the Appeals Committee's report. There will be misuse of authority where the Administration exercises it for some purpose other than those prescribed by law or, to put it more broadly, those that the general interest requires. A staff member who pleads misuse of authority, and the tribunal that allows the plea, must be able to identify the improper purposes for which the authority - in this case it is the authority to set the rate of contribution - has been exercised. Neither the complainant nor the Appeals Committee has shown what purpose such misuse of authority would have served. Even supposing the result of the rise in the rate of contribution had been overcapitalisation, the money was bound to go to the Fund anyway and the benefit to go to the staff, albeit after some lapse of time.

36. The complainant's main plea is about the choice of actuarial method. On that score there is a misconception in

the reasoning of the Appeals Committee - and so of the complainant too - in that it lay on the Administration the burden of proving the soundness of the method used. Like any public authority, the EPO enjoys a presumption in its favour - especially when it is taking technical measures and it has done thorough preparatory work - that its choice of actuarial method is the most suitable and the fairest. The EPO has stated the reasons that prompted its choice of method, and they were the sort of appointments its staff have, the peculiar features of its pension scheme, and its financial structure. It is of course open to a staff member under a system of administrative law to challenge the Organisation's choice, but he must be able to adduce evidence to show why the chosen method, when compared with others, may suffer from technical flaws that should have disqualified it. A ruling to that effect might conceivably require advice from experts in the matter.

37. The complainant's passing comments do not suffice to cast any doubt on the correctness of the EPO's choice of actuarial method. He has merely alleged, but without offering evidence in support, that other methods would have yielded results more in keeping with the view of some members of the staff who prefer present consumption to higher contributions towards future pensions and would rather let the EPO's future budgets assume any residual risks. That impression is strengthened by the parties' lack of enthusiasm for dealing with a deficit that no one denied and that was due to the former manner of managing the Fund. So it may be asked whether the "healthy" position of the pension scheme, which everyone treats as axiomatic, does not call for a further corrective dose of caution.

38. The conclusion from the foregoing is that the complainant's arguments fail to bear out his view that by the choice of the actuarial method on which the Council based the decision under challenge the EPO went beyond the bounds of the discretion it lawfully enjoys. There are certainly no grounds for supposing that by applying the standards of prudence that are inherent to the method it chose the Organisation failed in its duty of "care" towards its staff: it was actually discharging that duty. Lastly, as to the rule about the "optimisation" of benefits which the complainant pleads, the Tribunal observes that his whole complaint reflects an attempt to restrict the staff's contributions and cast the resulting additional burden of funding the pension scheme on the Organisation's budget, to the detriment of the users of the public service that the EPO provides and of its member States.

39. The various pleas the complainant puts forward in opposition to the increase in the employees' contribution from 7 to 8 per cent thus appear unfounded, and his complaint must fail.

40. Since the complaint fails, so too do the applications to intervene.

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.