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

EIGHTY-NINTH SESSION

***In re* Cervantes (No. 6), Luckett (No. 3), Raths (No. 7), Rosé (No. 4) and Schorsack (No. 4)** **Judgment No. 1980**

The Administrative Tribunal,

Considering the sixth complaint filed by Mr Jean-Pierre Cervantes, the third complaint filed by Mr Paul Richard Luckett, the seventh complaint filed by Mr Gaston Raths and the fourth 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 dated 11 April and the EPO's 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 2,057 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 set out 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 in respect of the period from 1 July 1992 to 31 December 1995, and by providing that Brussels would again become the "reference city" for reckoning parities in purchasing power, as from 1 July 1996. By the terms of Article 4 of decision CA/D 4/96, the payment of the lump sum was made "subject to the beneficiary's signing an individual declaration". The complainants in the present case all signed the declaration. 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. By communiqué No. 17 of 17 September 1997 the President of the Office informed all staff that Judgment 1663 would not apply to officials who had signed the declaration.

In a communiqué of 2 October 1997 the Staff Committee advised all members of the staff to fill up an appended letter appealing to the President to execute Judgment 1663 or else to treat the letter as a notice of internal appeal. In the *Gazette* of 10 November 1997 the Director of Personnel Development informed staff that the President had rejected the appeals and referred the matter to the Appeals Committee. The appeals were registered under No. 85/97.

In a document, CA/117/97, of 7 October 1997 on the implementation of Judgment 1663, the President sent the Office's analysis of the judgment to the Council. Referring to the period from July 1992 to December 1995, the Office said:

"... as far as the complainants and intervening parties [in the case that led to Judgment 1663] are concerned, the Office will have to correct the salary adjustments made with effect from 1 July 1992 and 1 July 1993, and ... this correction will have to comprise keeping Brussels, not Munich as the reference city. Correcting the adjustments for 1992 and 1993 will also 'automatically' mean that, for the persons involved, the remuneration due for the period July 1994 - December 1995 will have to be recalculated, since, even though they were not challenged, the adjustments made with effect from 1 July 1994 and 1 July 1995 will have to be made on the basis of the correction for 1992/93."

The Office concluded that Judgment 1663 should be applied to all persons who did not sign the declaration. At its 68th Session on 7 and 8 October 1997 the Council approved the measures envisaged for the period in question.

On 4 November 1997 the Administration explained to staff who were to benefit from Judgment 1663 the procedure for the calculations needed to implement it. Having signed the individual declaration and obtained the lump sum, the complainants received no additional payment. By letters of 4 February 1998 they each filed two appeals with the President challenging their pay slips for November 1997 as the first application to them individually of the President's decision of 17 September. In their first appeals, subsequently registered as No. 9/98, they objected to the exclusion from the benefit of Judgment 1663 of staff who had signed the declaration. In their second appeals, subsequently registered as No. 10/98, they alleged "improper execution" of the judgment. In both appeals they asked the President to quash the impugned decision and adjust their remuneration in line with the adjustments due at 1 July 1992, 1 July 1993, 1 July 1994 and 1 July 1995 in accordance with the principles set in Judgment 1663. In their second appeals they also sought rectification of the EPO's contribution to their pension and rectification of the amounts of their sickness insurance contributions in respect of the same adjustments. On lodging the two appeals, those of them who were parties to it withdrew from appeal 85/97. By individual letters of 18 March 1998 the Director of Personnel Development informed the complainants that the President could not allow their appeals and had referred the matter to the Appeals Committee.

In its report of 23 September 1998 on appeals 9/98 and 10/98, the Committee found that, in the light of Judgment 1663, different treatment of staff who had signed the declaration was unwarranted. It unanimously recommended that for the period from 1 July 1992 to 31 December 1995 the complainants' remuneration should be recalculated and that any resulting arrears should be paid to them. However, it rejected as irreceivable their claim to a recalculation of the basic salaries at 1 July 1994 and 1 July 1995. By a letter of 8 December 1998, the impugned decision, the Director of Personnel Development informed them that the President had decided to reject their appeals.

B. The complainants note that, for the period from 1 January 1992 to 31 December 1995, staff members who did not sign the declaration received salary increases of 4.1 per cent in 1992 and 6.3 per cent for 1993 to 1995. Those who did sign it got only the lump sum, in other words two to three times less than the amount received by their colleagues.

Citing the Appeals Committee's report they submit that the rejection of their two appeals is unlawful. Referring to appeals 9/98 they observe that the President failed to fulfil the commitment taken by his predecessor, which was notified to a member of the Staff Committee by the Director of Staff Development in a letter of 7 December 1995, to follow the "well-established practice" of extending to all staff any decisions taken as a result of a judgment of the Tribunal on an issue of general interest. Moreover, the Office's execution of Judgment 1663 was not strictly *inter partes* in that it extended the benefit of the judgment to staff who had not signed the declaration. The complainants also note that the Administration adjusted the pay of some fifty staff members for the period from 1 July 1992 to 31 December 1995 whereas Judgment 1663 covers only the period from 1 July 1992 to 30 June 1994.

Referring to appeals 10/98, they submit that the EPO broke the material rules. In their submission, for the period from 1 July 1992 to 31 December 1995 they are entitled to new scales established according to the rules and adopted by the competent authority following a proper procedure, insofar as they affect the establishment of regular scales as from 1 January 1996. Citing the case law, they explain that when the Tribunal sends a case back to it an organisation must take a new decision which complies not only with the wording and reasons of the judgment but also with the rules and procedures which it has itself set. Here, the EPO offended against Article 64 of the Service Regulations and the rules implementing it, which establish that authority in matters of remuneration is vested in the Council. Yet for the period from 1 July 1992 to 31 December 1995 the President failed to consult the Council. Consequently, the Office did not correct the old scales as Judgment 1663 required by implication and the

complainants were denied the possibility of benefiting in the future from new adjustments based on salary scales adapted by the competent authority.

The complainants further submit that the calculation of amounts outstanding under the adjustment for the above-mentioned period was wrong. The rates applied to calculate their sickness insurance contributions deducted for that period were higher than they should have been, with the result that their pay was lower than that which Judgment 1663 entitled them to.

They ask the Tribunal to quash the President's decision of 8 December 1998 and to award them costs.

C. In its reply the Organisation submits that the complaints are irreceivable. By signing the individual declaration, the complainants undertook not to file any new appeals concerning the application of the adjustment procedure established in document CA/D 20/88. Besides, the Tribunal ordered the EPO to execute Judgment 1663 "in the complainants' and interveners' favour", but the present complainants were not parties to that case (*in re* Bousquet No. 2 and others). The EPO notes that some of their claims are new. They may not rely on Judgment 1663 to seek a review of the decisions that affected them in 1992, 1993, 1994 and 1995, since they must assume the consequences of opting for the compromise. Furthermore, appeals 9/98 and 10/98 are but a "prolongation" of appeals 85/97. Having withdrawn from the latter and reintroduced the same claim on 4 February 1998 the complainants are now out of time. Citing Judgment 1713 (*in re* Carretta and others), it submits that the complaints are irreceivable insofar as they claim the establishment of new pay scales.

In subsidiary arguments the EPO maintains that the rejection of the internal appeals was lawful. Referring to appeals 9/98 it asserts that Judgment 1663 does not invalidate the substance of the compromise accepted by the complainants. Furthermore, according to the principle that a judgment affects only the parties, Judgment 1663 did not apply to them. There was therefore no breach of equal treatment. When the former President undertook in November 1995 to apply future Judgment 1663 to the entire staff, circumstances were such that recourse to the Tribunal was the only way of settling the pay dispute. When the new President took office in January 1996, he started discussions with staff representatives in an attempt to settle it by compromise. And he succeeded in March 1996, thereby devoiding his predecessor's undertaking of substance. To argue that the staff who signed the compromise might have misunderstood the implications of so doing and retained the right to benefit from the judgment is sheer "bad faith". The Office extended the benefit of the judgment to officials who had not signed it because it considered they could rightly claim that the compromise should not affect their pay. Lastly, the execution of Judgment 1663 implied increasing the adjustments granted for the period from 1 July 1992 to 30 June 1994. The same applied, by "chain reaction" to the adjustments granted between 1 July 1994 and 31 December 1995.

Referring to appeals 10/98, the EPO points out that the measures envisaged for the execution of Judgment 1663 (contained in document CA/117/97) were submitted to and approved by the Council at its 68th Session. However, it concedes that it did not submit any adjusted salary scales to the Council, because it considered that the Tribunal's wording in Judgment 1663 allowed it to increase only the remuneration or pension received by the complainants and interveners, by applying rates from 1992 and over the other years at issue that would be appropriate according to the method upheld by the Tribunal in that judgment. It notes that the judgment establishes no new rights for the staff as a whole. As to the amounts deducted from remuneration in respect of sickness insurance, a "rectification" was made in March 1998 and reflected in an additional pay slip for the same month. It adds that the accumulated adjustment applied to the period from July 1992 to July 1996 was 0.2 per cent lower than the adjustment that would have resulted if the procedure of the Coordinated Organizations had been applied with Brussels as the reference city.

D. The complainants rejoin that their complaints are receivable and citing the case law assert that they may "at any time" ask that the level of their pay be "in keeping with the principles they rely on". In their submission, the provision in the individual declaration under which they undertook not to appeal included a reservation allowing them to appeal should their right to correct application of the adjustment procedure in the future be affected, as it is in the present case.

They press their pleas on the merits. Referring to appeals 9/98, they submit that Judgment 1663 "did invalidate the consequences of the compromise" in that it meant that the salary scales then at issue were unlawful and, according to them, implied the adoption of new scales which were lawful. They add that in the hierarchy of legal texts a judgment of the Tribunal ranks higher than an agreement and must take precedence in the event of any

contradiction between the two. Furthermore, staff had every right to expect the EPO to keep its promise - namely the undertaking contained in the letter of 7 November 1995 - insofar as it took no express decision revoking it.

Referring to appeals 10/98, the complainants observe that the additional pay slip for March 1998 refers only to 1996, a year not at issue here, and proves that "nothing was done" for the years 1992 to 1995. The amount of the sickness insurance contributions paid by staff for those years, as well as pay adjustments they have received, were calculated on a wrong basis. As to the accumulated adjustment, they retort that it is meaningless if the scales taken as a basis were wrong, which was the case.

E. In its surrejoinder the EPO says that it inferred from Judgment 1931 that the Tribunal found the compromise to be valid. It observes that had the President still been bound by his predecessor's undertaking of 7 November 1995, any compromise would have been "superfluous". Nothing in Judgment 1663 indicated that all pay scales were to be recalculated. Besides, in Judgment 1933 the Tribunal recognised that the EPO had acted properly and ruled that the execution of Judgment 1663 could not affect pay scales applying from 1 July 1996. Lastly, the Organisation maintains that the pay adjustments it made during the period in question were only 0.2 per cent short of the level that would have been obtained taking Brussels as the reference city.

F. In their further submission the complainants contend that the injury they sustained is bound to be more than 0.2 per cent. They allege that in adjusting pay in 1994 and 1995 the EPO took decisions out of expediency and opportunism in order to reduce staff pay, in breach of a decision taken by Council in 1994.

G. In its observations the EPO rejects the arguments put forward in the complainants' further submission.

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 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 compromise agreement on 8 March 1996 by adopting decision CA/D 4/96. In order to benefit from the compromise, staff had to sign individual declarations, and the vast majority did so. 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. The President of the Office held that Judgment 1663 should apply only to the parties to the suit, including the interveners. He extended the benefit of the judgment to staff other than the parties provided that they had not signed the individual declaration whereby the compromise became binding.

The complainants - and the 2,057 interveners in the present complaint - accepted the compromise. They nonetheless asked to benefit retroactively from Judgment 1663 and claimed the adjustment of their remuneration under the adjustments due at 1 July 1992, 1 July 1993, 1 July 1994 and 1 July 1995. To that end, they challenged the decision setting their salary (pay slips of November 1997) when their colleagues who benefited from Judgment 1663 obtained a compensation allowance. They claimed that they too were entitled to the compensation allowance at the time. Their claim was dismissed and their internal appeals were declared to be devoid of merit, despite a favourable recommendation from the Appeals Committee.

2. The complainants assert that they are entitled to the same treatment as staff who benefited from Judgment 1663. They contend that they have a right to the same compensatory payment and to repayment of the amounts they paid in excess in respect of contributions to the pension fund and sickness insurance scheme.

In support of their claims they put forward the following arguments. The Office was bound to treat staff equally

since equal treatment is a right. Judgment 1663, which clarified the position in law, takes precedence over the compromise. Inequality in remuneration is unacceptable. In this connection they cite a letter of 7 November 1995, which was to have been communicated to staff, in which the Director of Staff Development, on behalf of the former President had assured all EPO officials that they would be allowed the benefit of a favourable judgment by the Tribunal even if they had not been parties to the procedure. Since that promise had never been revoked, it must also apply to the effects of Judgment 1663; at any rate they could so interpret it in all good faith. It had always been the Office's practice to extend the effects of a judgment of the Tribunal to all staff. Indeed, the Administration itself extended the effects of Judgment 1663: for one thing, it applied the judgment to the period after 30 June 1994 - up to 31 December 1995 - and for another, it allowed staff who had not been parties to the process, i.e. who had not agreed to the compromise, to benefit from it. So it would be only fair to extend it to all the staff.

The complainants further submit that the Office failed to execute Judgment 1663 properly, because it failed to set new scales which included the adjustments and which would serve as a basis for subsequent adjustments. That was contrary to a number of judgments in which the Tribunal has sent the case back to the organisation ordering it to take new decisions by recalculating pay scales in accordance with its rules. The complainants also allege formal flaws in the execution of Judgment 1663.

3. The Organisation asks the Tribunal to dismiss the complaints as irreceivable and, subsidiarily, devoid of merit. On receivability, it argues that the compromise was binding. Staff who agreed to it undertook to withdraw any appeals pending and not to file any new ones relating to it. Furthermore, the complainants may not ask to benefit from Judgment 1663 since they were not parties to that suit and the judgment does not state that it is to be extended to all staff. Besides those claims were not submitted at the time, so in the context of an application for execution they are new and therefore irreceivable. The complaints are also time-barred because the internal appeals were not filed within the time limit that started to run from the decision setting the pay adjustment for the period in question, namely the first pay slip applying the decision to the complainants. The complaints are also irreceivable insofar as some complainants previously withdrew an appeal on the same issue when they agreed to the compromise.

On the merits, the Organisation asserts that the complainants' pleas are irrelevant. Judgment 1663 conferred no right on them. The compromise remains valid and the Office never undertook to extend the effects of Judgment 1663 to all staff. The letter of 7 November 1995, which was written before the compromise, addressed another situation and the text of the declarations of adherence to the compromise excludes any subsequent appeal against it. The EPO did observe the staff's right to equal treatment: those who signed the compromise were not in the same position of fact and law as those who appealed. The disparity in pay ended on 1 January 1996 since when all staff have been remunerated on the same basis. Furthermore, the extension of the effects of Judgment 1663 to staff who had not agreed to the compromise yet did not intervene in the appeal procedure, can be explained by the fact that they were not bound by the compromise and that, not having signed the individual declaration they may have thought that the letter of 7 November 1995 applied to them; consequently, they did not benefit from any advantage that the complainants could claim. As to the effects of Judgment 1663, which were favourable to the complainants in that procedure, until the end of 1995 they stemmed simply from the "repercussion" effect of the increases granted for the previous period and until the new pay scales came into force.

The Organisation denies formal flaws in the execution of Judgment 1663.

4. The issues of receivability will be taken up as necessary in the discussion of the merits.

5. The complainants contend that Judgment 1663 was not properly executed.

According to a general principle, a judgment ordinarily affects only the parties to the suit and applies only to the issues raised in it. The Tribunal has applied that principle in judgments concerning monetary claims by staff members of organisations (see Judgment 1935, *in re* Fabiani (No. 4), under 4 to 6).

The complainants were not parties to the proceedings that led to Judgment 1663 and so are not entitled to benefit from it unless they can invoke some special ground.

6. The complainants cite the letter of 7 November 1995, from which they infer that the Office undertook to extend its effects to all those entitled to benefit from the judgment.

That argument is at odds with the evidence. The letter of 7 November 1995 and the undertaking it contains go back

to a period when most of the staff were in dispute with the Organisation about the calculation of the pay adjustment. Negotiations were under way and the purpose of the letter was to avoid staff having to initiate appeal proceedings. The situation changed with the arrival of the new President of the Office, on 1 January 1996. At the time the Appeals Committee suggested a collective arrangement. Negotiations between the Administration and staff representatives resulted in a compromise agreement which was to be approved by the Administrative Council and to which staff were to adhere individually. The modalities of the agreement were approved by the Council in its decision of 8 March 1996 (CA/D 4/96), Article 4 of which says:

"Payment of the lump sums ... shall be subject to the beneficiary's signing an individual declaration conforming with the specimen attached as Annex III. This declaration shall be presented to the beneficiary within 15 days from the date of [this] decision. Except in the case of *force majeure,* signing must occur within three months of the date of the present decision."

The text of the individual declaration says that:

"signatory (1) below undertakes to pay ... the lump sum provided for in Article 3 of said decision, which signatory (2) accepts unreservedly and in final settlement.

As a consequence of this transaction:

- all litigation and claims arising from application of the adjustment procedure under CA/D 20/88 - with the exception of any concerning the specific indicator - are regarded as settled and mutually agreed upon;

- signatory (2) undertakes neither to pursue any existing appeals, nor to 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."

This arrangement has all the characteristics of an extra-judicial transaction, that is to say a contract whereby the parties end a dispute about a right or its scope by making concessions with the aim of ending or avoiding litigation. Since it is intended as a substitute for a judgment, a transaction may not ordinarily be contested on grounds of a mistake made by one or other of the parties regarding the scope of the right in question.

Nearly 99 per cent of the staff adhered to the compromise, which, for the parties concerned, put an end to litigation pending and precluded any future litigation on the adjustment of pay for the period in question.

Clearly, the letter of 7 November 1995 did not envisage the eventuality of a settlement by transaction between the staff concerned and the Office.

7. The compromise and its effects call for the following remarks.

(a) It is clear from the text of the Council's decision and of the individual declaration that the compromise did not require the agreement of all staff in order to be valid, since it took effect only when the declaration was signed by individual staff members.

(b) The text of the compromise sets no reservations for the eventuality of one or more staff members declining to sign it and obtaining a more favourable decision from the Tribunal. Since such an eventuality could not be excluded at the time when the compromise was concluded, it must be inferred that the parties wanted no reservations placed on the definitive nature of the compromise. This is clearly borne out by the categorical terms of the individual declaration ("in final settlement", withdrawal of existing appeals and undertaking not to file any new ones on the same issue).

(c) Nor does the principle that an administration must comply with its own rules affect the validity of the compromise. Although Article 64(1) of the Service Regulations states that a permanent employee may not "waive his entitlement" to remuneration, the text was amended by decision CA/D 4/96 which states that "this provision shall not invalidate the individual declaration concerning decision CA/D 4/96".

Furthermore, the complainants accepted the compromise so their position in law is different from that of their colleagues. They have no grounds for pleading breach of equal treatment.

8. It cannot be alleged that the Organisation undertook by implication to extend to all staff the effects of a more favourable judgment by the Tribunal. If there was such an extension in the past, the nature of the compromise allowed the Office to refuse extension without exceeding its discretionary authority.

9. They say that they were mistaken as to their position in law at the time of signing the compromise, but that their mistake was clarified by Judgment 1663 (see 6 above). But those are not receivable grounds for seeking rescission or review of the compromise.

10. Having no *locus standi* to apply for the execution of Judgment 1663, the complainants cannot plead that the execution of the judgment was formally flawed.

11. The conclusion is that the complaints are devoid of merit.

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.