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

NINETY-SECOND SESSION

***In re* De Lucia (No. 4) and Rosé (No. 5)** **Judgment No. 2110**

The Administrative Tribunal,

Considering the fourth complaint filed by Mr Gennaro De Lucia against the European Patent Organisation (EPO) on 12 December 2000 and corrected on 22 January 2001, the fifth complaint filed by Mr Alain René Pierre Rosé against the EPO on 11 December 2000 and corrected on 2 February 2001, the EPO's single reply of 4 May, the complainants' rejoinder of 25 July and the Organisation's surrejoinder of 1 October 2001;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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. Mr Rosé, a Frenchman who was born in 1960, joined the European Patent Office, the EPO's secretariat, on 1 November 1984. He serves at Directorate-General 1 in The Hague as a search examiner at grade A3.
Mr De Lucia, an Italian who was born in 1961, joined the staff of the Office on 1 November 1986. He is a formalities officer at grade B3 at Directorate-General 2 in Munich.

By decision CA/D 7/83 the EPO's Administrative Council amended as from 10 June 1983 Article 84 of the Service Regulations headed "Death or permanent invalidity". It was decided in 1989 that the old version of Article 84 would apply to staff recruited prior to 10 June 1983. For staff members who joined the Organisation from that date - the only ones concerned by this dispute - the article as amended prescribes that:

"(2) ...

b) if the Invalidity Committee establishes that the permanent invalidity has occurred on or after the date at which the permanent employee attained the age of 56, the lump sum [payable] shall be reduced by:

20% at the age of 56

40% at the age of 57

60% at the age of 58

80% at the age of 59

100% at the age of 60.

...

(4) One third of the contribution, calculated by reference to the basic salary of the permanent employee, which is required to meet the insurance of the risks [of death and permanent invalidity] shall be charged to the employee, but so that the amount charged to him shall not exceed 0.6% of his basic salary."

When the Office was set up in 1977, the Organisation concluded a collective insurance contract with a European

group of insurance companies to cover sickness, death and permanent invalidity; it is administered by the broker Van Breda. By decision CA/D 9/97 of 5 December 1997 the Council approved a draft of an endorsement, No. 26, to the collective insurance contract under which the fixed term of the contract would be reduced from five to three years as from 1 January 1998.

On 19 September 1997 Van Breda informed the Organisation that the insurers wanted to review premiums. They wanted to review those for permanent invalidity insurance because the number of invalidity cases had increased significantly between 1993 and 1996. The matter was put to the General Advisory Committee at its 122nd meeting, on 10 November 1997. By a note of 21 January 1998 the latter's Chairman told the President of the Office that the Committee members he had appointed had been in favour of increasing premiums but that those appointed by the Staff Committee had not been in a position to give an opinion. Circular No. 247 of 23 January 1998 set out the new rates of the contribution payable by staff for permanent invalidity insurance. For staff recruited prior to 10 June 1983 the rate was maintained at 0.457 per cent of basic salary - any increase would have meant exceeding the 0.6 per cent ceiling established by Article 84(4) of the Service Regulations. For the others, however, it was raised by 290 per cent to 0.1936 per cent of basic salary for permanent employees.

On 17 and 21 April 1999 several officials, including the complainants, challenged the decision constituted by their pay slips for January 1998 applying Circular No. 247 to them individually. They asked the President to quash the increase in the rate of contribution for permanent invalidity insurance, to adjust their pay with retroactive effect from 1 January 1998 on the basis of the rate in force at 31 December 1997 and to repay the amounts wrongfully withheld from their salary. The *Gazette* of 15 June 1998 informed staff that the President had decided not to allow their appeals and had referred them to the Appeals Committee, which registered them under the reference RI/37/98. The Committee reported on 6 July 2000. Its recommendation was to allow the appeals and quash the increase in contribution rates set in Circular No. 247, and to reimburse the overpayments plus interest at the rate of 10 per cent a year. By letters of 7 September 2000 the President informed the appellants individually that their appeals had been dismissed. Those are the impugned decisions.

B. The complainants' first plea is breach of Article 84(4) of the Service Regulations. The EPO denied them information enabling them to ascertain that an increase of 290 per cent in the rate of contribution for permanent invalidity insurance was warranted. That, they say, amounts to an "admission" that the rate was abnormally high, and by imposing it on staff who had already been penalised by the lower coverage introduced by the amendment to Article 84, the Organisation failed in its duty of care.

They further plead breach of Article 38(3) of the Service Regulations which lists the subjects on which the General Advisory Committee is to be consulted. They include "any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff". The complainants observe that the draft of endorsement 26 was not put to the Committee even though there was no obvious urgency warranting a waiver of consultation. Consequently, Circular No. 247 is unlawful because it was adopted in the context of applying a contract when at least one of the endorsements had not been seen by the Committee. And although the latter was consulted about the increase in the rate of contribution, the procedure was tainted by bad faith because the Administration did not of its own accord forward all the information the Committee needed to ascertain whether the increase was necessary.

Lastly, they plead breach of Article 106(1) of the Service Regulations which lays on the Organisation the duty to account for its decisions. Since the Administration gave no plausible reason for it, the increase is arbitrary and shows abuse of authority besides. In their view an increase of 50 to 60 per cent would have been reasonable.

They seek the quashing of the impugned decisions and all consequent redress. They also claim costs.

C. In its reply the EPO observes that the only material issue is the rise in the rate of contribution to permanent invalidity insurance. The complainants plead breach of Article 38 on the ground that the General Advisory Committee was not advised of other changes in the collective contract such as the term of the insurance. But, says the EPO, that is immaterial because those changes bear no relation to rate-fixing, dealt with in endorsement 27.

According to the Organisation, the Committee was consulted in accordance with the rules and in good faith: the Administration forwarded to it all the information available so it was able to reach its conclusions advisedly, as the Appeals Committee noted. There is therefore no substance to the plea that the EPO failed in its duty to account for its decisions.

There were objective reasons for increasing the rate of contribution for permanent invalidity insurance: between 1994 and 1996 Van Breda registered a deficit in death and permanent invalidity insurance. The complainants have not proved their assertion that a 60 per cent rise would have been reasonable: the figure is hypothetical and unverifiable. That being so they are hardly in a position to accuse the EPO of arbitrariness, abuse of authority and failure in its duty of care towards staff. The President has shown care: the death and permanent invalidity insurance scheme is to be reformed and an internal insurance scheme is to be introduced as from 1 January 2002, and his intention is to have the EPO bear the administrative costs, to make risk sharing more equitable and to lower contributions in general.

D. The complainants maintain that the term of the contract is material to the issue of contributions: had it been consulted the General Advisory Committee could have expressed its approval of a shorter term, since the contribution rate had been challenged and it applies for the duration of the contract.

They point out that between 1993 and 1997 Van Breda recorded a deficit in permanent invalidity insurance only. It was largely attributable to the group of officials recruited prior to 10 June 1983, and so it was the premiums paid by the latter group that should have been increased. The deficit caused by staff recruited from that date was only "slight". Their premiums should therefore have been increased by just a reasonable amount. By imposing a large increase the EPO was able to maintain its own contribution at the previous level. Had it imposed a similar increase on staff recruited before 10 June 1983, it would have had to bear the cost in full: the statutory limit of 0.6 per cent having been attained, the staff contribution rate could not have been raised any higher. The EPO thus passed on costs it should have borne itself to staff recruited after 10 June 1983, although the risk they constituted as a group had not so increased as to warrant such a decision.

In the complainants' submission, the hypothetical 60 per cent increase they proposed was unverifiable only as to detail. As an estimate it is perfectly reliable and relevant. It was for the EPO to work out the exact figures.

E. In its surrejoinder the EPO asserts that the complainants' approach of separating staff into two quite distinct groups is not valid because it overlooks the fact that both groups have exactly the same cover for permanent invalidity until the age of fifty-five. A system that bases the contribution rate on a core - common to both groups - supplemented by provisions that take account of their differences is in keeping with solidarity, a principle the complainants overlook and which by definition cannot affect anyone adversely. Lastly, contrary to the complainants' assertion, the increase in the rate of contribution is due to a rise in the number of cases of invalidity affecting staff members of under fifty-five recruited after 10 June 1983.

CONSIDERATIONS

1. Staff of the European Patent Office are covered by insurance against permanent invalidity involving total incapacity for work. To protect its staff against the risk of sickness, death and permanent invalidity in 1977 the EPO concluded a collective insurance contract with a European group of insurers for a renewable term of five years. Management of the policy was entrusted to the insurance brokers Van Breda. At the end of the period from 1993 to 1997, it was decided that the term of the contract would be reduced to three years and that the rate of contributions of some members of staff would be adjusted.

2. For permanent invalidity premiums and coverage the EPO has drawn a distinction since 1989 between staff recruited from 10 June 1983 and those recruited before that date. The former have had the lump sum due to them in the event of permanent invalidity reduced by 20 per cent a year between the age of fifty-six and sixty - at which time the coverage ends. Before changes came in on 1 January 1998, their contribution was equal to 0.0495 per cent of their basic salary until the age of fifty-five and thereafter diminished progressively until the age of sixty. For staff recruited prior to10 June 1983, however, the conditions that applied before the reform were maintained: there was no reduction in the lump sum as their age increased, and it remained payable until the age of sixty-five. The contribution paid by this group is accordingly much higher than that of staff recruited from 10 June 1983: from 0.2112 per cent of basic salary in 1989, it has risen to 0.457 per cent since 1993.

3. Van Breda having informed the Office that the number of invalidity cases had increased sharply between 1993 and 1996 and exceeded the estimates used as the basis for setting premiums, it was decided to review rates. An endorsement, No. 27, stipulated that the overall premium paid by staff appointed as from 10 June 1983 would be

increased from 0.0045 per cent to 0.0176 per cent of the total of the capital guaranteed by the permanent invalidity insurance. By Circular No. 247 of 23 January 1998, the Vice-President in charge of Directorate-General 4 informed all staff of the implications of the review: the contributions to be paid by staff recruited from 10 June 1983 - set by the rules at one third of the total amount due to the insurer - would be increased from 0.0495 per cent to 0.1936 per cent of basic salary. That was equal to an increase of 290 per cent. The contribution rate for staff recruited prior to 10 June 1983 remained unchanged.

4. Having received at the end of January 1998 pay slips constituting the first decisions applying to them individually Circular No. 247 on the new contribution rates, some members of staff sent notices of appeal to the President of the Office seeking the quashing of those decisions. They cited the fact that the deductions from their pay offended against the provisions of Article 84 of the Service Regulations and the duty of loyalty and care an international organisation owes to its staff. They added that the decisions they were challenging had been taken without consulting the General Advisory Committee as the rules require.

5. Deeming that he was unable to allow their appeals, the President of the Office referred them to the Appeals Committee.

6. In its report of 6 July 2000 the Committee found that only the appeals of staff appointed as from 10 June 1983 were receivable: those appointed before then were not affected by the increase in contributions, which neither party denied. The Committee found by a majority that, contrary to the appellants' assertion, there had been nothing improper about the consultation of the General Advisory Committee, as the Office had given it sufficient information in view of the time available and the fact that the staff had been represented by an observer at the negotiations with Van Breda before the contract was reviewed. On the merits, however, the Committee unanimously recommended allowing the appeal and quashing the increase in the contributions of staff recruited as from 10 June 1983. It found that, although a comparison of the death and permanent invalidity benefits paid out and the amount of the premiums paid in under the same heads showed a clear deficit for the period from 1993 to 1996, it was not possible to determine from the documents produced by the Administration the type and group of insured persons responsible for the deficit. Before the contract was amended the Organisation had provided no information about the premiums paid by staff recruited from 10 June 1983. It also failed to show that the benefits paid out had shifted from staff appointed before 10 June 1983 to those recruited as from that date. Consequently the Committee considered that the EPO had not objectively justified in any way which could be verified the 290 per cent increase in the rate of contribution.

7. In letters of 7 September 2000 the President announced his decision not to follow the Committee's recommendation, and rejected the appeals. Two staff members recruited after 10 June 1983 are asking the Tribunal to quash those decisions and award them all consequent redress. Since the complaints raise the same issues, they will be joined to form the subject of a single ruling.

8. For the most part the complainants adduce the same arguments as before the Appeals Committee. They submit that the procedure whereby the General Advisory Committee was consulted fell short of the requirements of Article 38 of the Service Regulations and the case law, and offended against the principle of good faith. On the merits they contend that the increase in the rate of contributions of staff recruited as from 10 June 1983 was not based on objective considerations. They further plead misuse of authority and breach of Article 84(4) of the Service Regulations which says that "One third of the contribution ... which is required to meet the insurance of the risks [of death and permanent invalidity] shall be charged to the employee".

9. They add, in their complaints to the Tribunal, that the General Advisory Committee was not consulted before other amendments to the collective insurance contract were agreed on, particularly the reduction from five to three years of its term. Those changes - introduced by endorsement 26 - are, as the Organisation says, immaterial to this case, which is about the rate of contribution as set in endorsement 27.

10. Before the decision was taken to sign endorsement 27 (it was apparently not taken until January 1998 - though there is no evidence as to the exact date - and was in any event notified to staff by Circular No. 247 of 23 January 1998) the General Advisory Committee was consulted and did discuss both the proposal to increase premiums and a draft of Circular 247 at its 123rd meeting held on 17 and 18 December 1997. It had some data on which to base an opinion, including the number of cases of invalidity for the period from 1987 to 1996, the amount of the premiums paid by the Office from 1988 to 1996, and the permanent invalidity benefits paid out by Van Breda between 1993 and 1997 broken down as between staff recruited as from 10 June 1983 or prior to that date. But it

had no data on the premiums paid by the group of staff recruited after 10 June 1983, which meant that the staff representatives had no way of knowing whether, and if so to what extent, there was a deficit in the invalidity insurance covering this group. It was because they lacked this information that the members of the General Advisory Committee appointed by the Staff Committee "were not in a position to give an opinion", according to a note from the Chairperson of the Committee dated 21 January 1998, whereas the members appointed by the President had voted in favour.

11. Article 38(3) of the Service Regulations confers on the General Advisory Committee the duty to give a "reasoned opinion" on "any proposal which concerns the whole or part of the staff", except in cases of obvious urgency. According to the case law (see Judgments 1062, *in re* Hofmann, No. 2, and 1291, *in re* Hofmann, No. 3), consultation under Article 38 means giving the General Advisory Committee enough information for it to come to a reasoned opinion. In both those cases the impugned decision was quashed for lack of such information. But the case at bar is different in that relevant available information was sent to the Committee and the latter was in a position to give an opinion even if it found the documents prepared by the Administration to be wanting. It would undoubtedly have preferred the data on the premiums paid by the Office to be broken down according to date of recruitment. But such information had not been prepared and so was not available when the Committee was consulted. If the Administration did not include such data, it was in all likelihood because it considered that in setting premiums it was more appropriate to take the staff as a whole regardless of the date of their recruitment. However, the consultation cannot be regarded as formally flawed and the Tribunal cannot allow the plea that the Administration acted in bad faith by choosing deliberately not to give the Committee the necessary information or by transmitting it belatedly.

12. As the Appeals Committee rightly noted, the issue to be settled is whether the 290 per cent increase in the premiums to be paid by staff recruited after 10 June 1983 towards the cost of invalidity insurance is objectively justified by considerations which are able to be verified.

13. The complainants submit that the rate set for them was set far too high: in order to deal with the deficit in the scheme run by Van Breda the Organisation should have worked out, on the basis of the number of contingencies that occurred in each group, how far it was attributable to staff recruited before 10 June 1983 and how far to staff recruited after that date. But it declined to do so and made staff recruited after 10 June 1983 bear the brunt of redressing the balance of the scheme. According to their reckoning, which the EPO rebuts as being based on a wrong assumption, the amount of the deficit attributable to the group recruited before 10 June 1983 is approximately 2.7 million German marks, whereas that attributable to staff recruited after that date is only 750,000 marks. Indeed the second group shows no deficit at all if death insurance is included. In their submission the EPO chose not to change the contribution rate of staff recruited before 10 June 1983 because in total their contributions already amounted to 0.6 per cent of their basic salary, the maximum allowed by Article 84(4) of the Service Regulations. Consequently, the EPO itself would have had to bear the cost of any increase.

14. In rebuttal the Organisation cites the notion of solidarity whereby everyone gets the same benefits until the age of fifty-five regardless of when they were recruited. That idea underlies the reform, accepted by staff, that will come in on 1 January 2002 and which will no longer involve an external insurer. Staff recruited as from 10 June 1983 paid a very low contribution, yet the onset of invalidity in the group is occurring at an earlier age, so more of them are receiving full invalidity benefits than previously estimated. To increase their contribution is therefore neither arbitrary nor unreasonable, bearing in mind that the competent authority has a measure of discretion in the matter.

15. The Tribunal acknowledges that some discretion must be allowed, since contribution rates are set on the basis of estimates which are not infallible. Calculation of risks for the purpose of determining premiums must nevertheless be based on groups of staff with the same characteristics. Yet, as the complainants rightly noted, staff recruited before 10 June 1983 are in a different position from those recruited thereafter. Among other things they enjoyed much broader coverage, as stated under 2 above. Under the scheme that applied when the insurance contract was renewed, in terms of guarantees offered that difference warranted a difference in contribution rates. In setting new rates in order to remedy the overall deficit, the EPO should have ascertained how far it was attributable to each of the two groups in terms of benefits paid out, and made the necessary adjustments taking into account the amount of the contributions paid by each group. But it failed to do so. Instead it treated all staff as a single homogeneous group for the only reason that their entitlements are the same up to the age of fifty-five. Without any objective reasons the EPO thus placed on staff recruited after 10 June 1983 the entire burden of redressing the balance by imposing a large increase on their contribution rate.

16. In these circumstances, the Tribunal is bound to set aside the impugned decisions, there being no need to rule on the complainants' other pleas. The case must be sent back for the Organisation to repay to the complainants the excess withheld plus interest at 8 per cent a year from the date at which the amounts were withheld from their monthly salary. The Organisation is free to set new contribution rates with retroactive effect on the basis of considerations which are objective and known to staff.

17. Since they succeed, the complainants are entitled to an overall award of costs which the Tribunal sets at 4,000 euros.

DECISION

For the above reasons,

1. The decisions taken on 7 September 2000 by the President of the Office are set aside.

2. The case is sent back so that the EPO may follow the procedure set out under 16.

3. The EPO shall pay the complainants an overall amount of 4,000 euros in costs.

In witness of this judgment, adopted on 2 November 2001, 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 30 January 2002.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2002.