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

FIFTY-EIGHTH ORDINARY SESSION

In re ANDRES (No. 2), BENZE (No. 2), CHAKI, IVERUS (No. 3) and McGINLEY

Judgment No. 726

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Victor Chaki on 10 December 1984 and corrected on 19 December, the EPO's reply of 22 March 1985, the complainant's rejoinder of 10 October and the EPO's surrejoinder of 30 December 1985;

Considering the second complaint filed against the EPO by Mr. Florian Andres on 21 December 1984 and corrected on 1 February 1985, the EPO's reply of 19 April, the complainant's rejoinder of 20 September, the EPO's surrejoinder of 9 December, the complainant's application of 19 December 1985 for oral proceedings and the EPO's observations of 17 January 1986 on that application;

Considering the second complaint filed against the EPO by Mr. Wolfgang Eberhard Benze on 28 December 1984 and corrected on 11 January 1985, the EPO's reply of 29 March, the complainant's rejoinder of 22 April and the EPO's surrejoinder of 8 July 1985;

Considering the third complaint filed against the EPO by Mr. Dan Iverus and the complaint filed against the EPO by Mr. Caran John McGinley on 2 February 1985, the EPO's replies of 22 April, the complainants' rejoinders of 29 July and the EPO's surrejoinders of 14 October 1985;

Considering the application to intervene in Mr. Andres's complaint filed by Mr. Julian West and the EPO's comments thereon of 9 December 1985;

Considering the applications to intervene in Mr. Iverus's and Mr. McGinley's complaints filed by:

Mr. I. Alfaro

Mr. M. Allard

Mr. E. Allen

Mr. J. Amand

Mr. A. Anderson

Mr. P. Angius

Mr. R. Anthony

Mr. D. Aran

Mr. G. Ashley

Mr. J. Atkins

Mr. R. Attasio

Mr. I. Ayiter

Mr. J. Ayiter

Mr. H. Balbinot

Mr. K. Becker

Miss C. Beguin

Mr. H. Berghmans

Mr. L. Beslier

Mr. F. Beyer

Mr. C. Bindon

Mr. I. Blasband

Mr. M. Blurton

Mr. A. Boets

Mr. F. Bogaert

Mr. M. Bogaerts

Mr. J. Bollen

Mrs. E. Bonnevalle

Miss A. Boulon

Miss A. Bourseau

Mr. C. Boutelegier

Mr. J. Boutruche

Mr. P. Bracke

Mr. C. Braems

Miss C. Brinkmann

Mr. T. Brock

Mr. C. Brown

Mr. H. Brulez

Mr. A. Brumer

Mr. J. Cannard

Mr. R. Cantarelli

Mr. A. Cardon

Mr. V. Cattoire

Mr. C. Chaix de Lavarene

Mr. E. Comel

Mr. C. Coppieters

Mr. J. Cordenier

Mr. O. Cornillie

Mr. A. Coucke

Mr. J. Cousins

Mr. J. Criqui

Mr. Y. Cristol

Mr. D. Curzi

Mr. F. Daalmans

Mr. C. Dailloux

Mr. S. Datta

Mr. H. Dauksch

Mr. J. David

Mr. H. De Buyzer

Mr. D. Decorte

Mr. O. De Herdt

Miss B. de la Morinerie

Mr. D. De Lameillieure

Mr. H. De Muyt

Mr. P. De Paepe

Mr. R. De Raeve

Mr. F. De Rijck

Mr. R. De Roeck

Mr. P. De Roy

Mr. F. De Smet

Mr. P. De Winter

Mr. M. Declat

Mr. E. Deconinck

Mr. M. Dekeirel

Mr. F. Depoorter

Mr. M. Deprun

Mr. G. Desmedt

Mr. J. Devine

Mr. F. Devisme

Mr. I. Dhondt

Mr. D. Dickinson

Mr. G. Dijkstra

Mr. H. Dissen

Mr. M. Donner

Mrs. M. Drouot

Mr. N. Drysdale

Mr. B. Dubois

Mr. M. Duchatellier

Mr. D. Elsen

Mr. C. Errani

Mr. D. Eschbach

Mr. G. Farnese

Mr. F. Feuer

Mr. G. Filtri

Mr. A. Fletcher

Mr. G. Forlen

Mr. J. Francois

Mr. N. Franks

Mr. L. Fransen

Mr. N. Friden

Mr. J. Fux

Mr. M. Galanti

Miss F. Garnier

Mr. R. Gautier

Mr. J. Geisler

Mr. J. Gerling

Mr. A. Germano

Mr. G. Gianni

Mr. M. Ginestet

Mr. C. Godin

Mr. P. Goller

Mr. R. Goovaerts

Mr. G. Griffith

Mr. H. Grondijs

Mr. P. Groseiller

Mr. Y. Guivol

Mr. H. Guldner

Mr. R. Guyon

Mr. L. Gysen

Mr. J. Haasbroek

Mr. M. Hakhverdi

Mr. R. Hakin

Mr. H. Hauglustaine

Mr. J. Hazel

Mr. R. Heijna

Mr. W. Hellemans

Mr. H. Helot

Mr. X. Hendrickx

Mr. J. Henry

Mr. J. Herbelet

Mr. J. Herygers

Mr. G. Holper

Mr. P. Hoornaert

Mr. W. Hoornaert

Mr. G. Horak

Mr. R. Horvath

Mr. J. Houillon

Mr. R. Irvine

Mr. J. Jacobs

Mr. P. Janssens De Vroom

Mr. L. Jaworski

Mr. Y. Jest

Mr. J. Joris

Mr. T. Kapoulas

Mr. J. Kauffmann

Mr. P. Keppens

Mr. P. Kerres

Mr. M. Klag

Mr. F. Knauer

Mr. J. Knops

Mr. W. Kolbe

Mr. M. Krier

Mr. D. Kuschbert

Mr. R. Labeeuw

Mr. P. Lammineur

Mr. P. Lapeyronnie

Mr. R. Laugel

Mr. L. Lefebvre

Mr. M. Leger

Mr. C. Lehnberg

Mr. D. Lemercier

Mr. W. Lepee

Mr. A. Leroy

Mr. C. Leroy

Mr. B. Leverd

Mrs. E. Libberecht-Verbeeck

Mr. C. Lintz

Mr. P. Lloyd

Mr. C. Lo Conte

Mr. H. Lokere

Mr. J. Loncke

Mr. B. Louvion

Mr. D. Lowe

Mr. A. Luberichs

Mr. H. Luyten

Mr. J. Maisonneuve

Mr. Y. Malherbe

Mr. K. Malic

Mr. M. Marchau

Mr. J. Meertens

Mr. H. Menager

Mr. H. Mende

Mr. J. Meulemans

Mr. H. Meylaerts

Mr. P. Michiels

Mr. C. Mikkelsen

Mr. G. Minnoye

Mr. H. Moet

Mr. G. Mollet

Mr. J. Moreau

Mss D. Morrell

Mr. A. Morris

Mr. R. Moualed

Mr. H. Muenkel

Mr. E. Munzer

Mr. H. Nehrdich

Mr. K. Nestby

Mr. B. Neys

Mr. H. Nicolas

Mr. E. Nuijten

Miss A. Nuyts

Mr. M. Odgers

Mr. P. Offmann

Mr. D. Oldroyd

Mr. H. Osborne

Mr. J. Osborne

Mr. H. Pauwels

Mr. L. Peeters

Mr. L. Pelsers

Mr. W. Permentier

Mr. J. Petit

Mr. R. Pfahler

Mr. Y. Phoa

Mr. A. Pineau

Mr. M. Rajic

Mr. P. Ramboer

Mr. A. Rasschaert

Mr. W. Rechler

Mr. G. Rempp

Mr. J. Ressenaar

Mr. K. Rieb

Mr. R. Riegel

Mr. M. Ris

Mr. L. Rotsaert

Mr. L. Ruymbeke

Mr. A. Ryckebosch

Mr. P. Sala

Mr. A. Sarneel

Mr. K. Sarre

Mr. C. Schaeffler

Mr. J. Schartz

Mr. G. Schaub

Mr. R. Schmid

Mr. L. Schmitt

Mr. B. Schmitter

Mr. J. Schmitter

Mr. W. Schols

Mr. H. Schrijvers

Mr. H. Schruers

Mrs. N. Schuermans

Mr. R. Schuman

Mr. J. Schweitzer

Mr. H. Seifert

Mr. J. Sepers

Mr. S. Sgura

Mr. T. Siem

Mr. C. Sigwalt

Mr. H. Silvis

Mr. J. Simonnot

Mr. G. Sogno

Mr. M. Sonius

Mr. R. Steegman

Mr. M. Suter

Mr. J. Teply

Mr. F. Thibo

Mr. H. Tielemans

Mr. F. Torfs

Mr. F. Toussaint

Mr. J. Trevetin

Mr. R Turbinsky

Mr. H. Van Akoleyen

Mr. P. Van Assche

Mr. W. Van Belleghem

Mr. W. Van den Bossche

Mr. G. Van den Meerschaut

Mr. G. Van der Kuip

Mr. W. Van der Wal

Mr. P. Van Gelder

Mr. H. Van Gestel

Mr. J. Van Gheel

Mr. G. Van Goethem

Mr. R. Van Leeuwen

Mr. A. Van Moer

Mr. F. Van Rolleghem

Mr. J. Van Thielen

Mr. E. Van Weel

Mr. F. Vancraeynest

Mr. J. Vandevenne

Mr. J. Vandevondele

Mr. R. Vanhulle

Mr. M. Vanneste

Mr. J. Verdonck

Mr. S. Verdoodt

Mr. A. Vereecke

Mr. J. Verleye

Mr. R. Vermander

Mr. J. Verschelden

Mr. J. Verslype

Mr. W. Vijverman

Mr. K. Vilbig

Mr. G. Vogt-Schilb

Mr. J. Vollering

Mr. H. Von Arx

Mr. L. Vuillemin

Mr. R. Wanzeele

Mr. G. Wassenaar

Mr. J. Weihs

Mr. J. Wendling

Mr. M. Wright

Mr. J. Yvonnet

Mr. B. Zaegel

Mr. A. Zeri

Mr. J. Zilliox; Considering declaration No. 8 of 1 October 1985 by the President of the European Patent Office, the secretariat of the EPO;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Article 33(2) of the European Patent Convention, Article 16 of the Protocol on the Privileges and Immunities of the EPO and Articles 38, 49(13), 64(6), 66, 108(1) and 109(2) of the Service Regulations of the Office;

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

A. The EPO and several other organisations, known as the "co-ordinated organisations", introduced in 1979 a new system of adjusting staff pay. A summary of the measures they took appears in Judgment 624 (in re Giroud (No. 2) and Lovrecich), under A. By 1982 several governments thought salaries had risen too high and wanted to cut them by at least a fifth. The Co-ordinating Committee of Government Budget Experts of the organisations made a report on the subject, No. 191, on 18 February 1983. On 17 March, by decision CA/D 1/83, the Administrative Council of the EPO approved the report. Among other things it decided in article 5, as the Committee had proposed in paragraph 34 of the report, that it would impose a levy on the basic salary of staff in the categories known as A and L at the rate of lo 5 per cent from 1 July 1983 to 30 June 1984, 3 per cent from 1 July 1984 to 30 June 1985 and 4.5 per cent from 1 July 1985 to 30 June 1986. Mr. Giroud and Mr. Lovrecich filed complaints against decision CA/D 1/83 on 2 March 1984, At the time there were difficulties over putting the decision into effect; the then salary scales were those that had come into force in July 1982 and the levy had not yet been imposed. In Judgment 624, which it delivered on 5 December 1984, the Tribunal held that the complainants might not yet challenge the validity of the general decision but must await individual decisions and appeal against them within the Organisation before coming, if they so wished, before the Tribunal.

On 8 June 1984, by decision CA/D 1/84, the Council decided to put article 5 of CA/D 1/83 into effect and impose the levy as from 1 July 1983. Article 3 of CA/D 1/84 provided that nominal basic salaries of A and L staff should be individually guaranteed. The salary to be guaranteed as at 30 June 1983 would be that laid down in the scales in force at the time and as at 30 June 1984 and 30 June 1985 that laid down in the scales in force at each of those dates "less the actual amount then being paid by way of levy". The amount levied would be the prescribed percentage of the staff member's basic salary as at 1 July in 1983, 1984 and 1985 and would hold good for twelve months. By another decision of 8 June 1984, CA/D 2/84, also to take effect as from 1 July 1983, the Council introduced new salary scales. By circulars 131 of 16 June and 134 of 22 July 1984 the Principal Director of Personnel told the staff in Munich about the levy and the new scales. By a notice of 23 July 1984 the head of the Personnel Department informed staff in the EPO's office at Rijswijk. The Administration explained that although

the maximum amount deductible in the first year was 1,5 per cent of the basic salary the amount actually levied would be less since for all staff the increase in their basic salary under the new scales fell short of the 105 per cent and the guarantee came into play. The complainants belong to the staff categories concerned. Mr. Andres and Mr. Chaki are stationed in Munich; Mr. Benze, Mr. Iverus and Mr. McGinley in RijswiJk. They submitted appeals against the levy to the President of the Office under Article 108(1) of the Service Regulations: Mr. Andres on 6 August 1984; Mr. McGinley on 20 August; Mr. Iverus on 28 August; Mr. Benze on 29 August; and Mr. Chaki on 6 September. Having received no replies, they are each challenging the rejection of their appeal which is implied under Article 109(2) of the Service Regulations. The levy was first deducted from the monthly salaries for November 1984. By decision CA/D 17/84 of 7 December 1984 the Council decided that the rate of levy should remain at 1.5 per cent from 1 July 1984 to 30 June 1986.

B. The complainants' pleas, though differently stated, are similar in substance. (1) Neither the Service Regulations nor any other text makes any provision for imposing a levy, and an authority is bound by the rules it has itself laid down until it repeals or alters them. The levy has no legal basis. (2) It was in breach of the rule against retroactive measures. Though the decision to apply the levy was taken on 8 June 1984, the levy was imposed as from 1 July 1983. (3) There was breach of Article 38(3) of the Service Regulations: the General Advisory Committee was not allowed an opportunity to give a reasoned opinion of the levy before it was introduced. (4) Although the Service Regulations do not state that net remuneration is an acquired right, it has always been treated as such; for example, Article 49(13) says that "in no case may the obtaining of a higher grade by a permanent employee result in a reduction in his total net remuneration". (5) The levy is in any event unnecessary because the salary scales take account of salary trends in member States and so there is no risk that EPO salaries will forge too far ahead of national salaries. The proceeds of the levy unjustly enrich the EPO. (6) It is a form of tax -- "parafiscal" is the term used -- for which neither the Service Regulations nor the provisions of the Protocol on Privileges and Immunities on the relationship between permanent employees of the EPO and the member States of the Organisation make any provision. (7) Mr. Iverus and Mr. McGinley further submit that in the Netherlands the levy is discriminatory and causes distortion. For example, an official who got advancement in step or in grade after 1 July 1984 earned less than someone in the same step or grade who had not had such advancement since 1 July 1984, because the basic salary of the latter at that step or grade is preserved by the guarantee, whereas the former's is not. Thus two officials in the same step and grade had different rates of pay.

All five complainants ask the Tribunal to declare the levy null and void and to order repayment of the sums wrongfully withheld. Mr. Andres seeks payment of interest at 10 per cent a year on those sums, Mr. Chaki interest at 7 per cent. Mr. Iverus and Mr. McGinley apply for a provisional order suspending the levy until the Tribunal has given its ruling. Mr. Andres claims 2,000 Swiss francs and Mr. Chaki 3,500 Deutschmarks as costs.

C. The EPO replies that the complaints are devoid of merit. It observes that the guarantee of nominal basic salary has preserved all salaries paid at 30 June 1983 from cuts the levy might have made. The levy merely reduces increases in salary over a short period by 195 per cent of basic salary as calculated at each yearly review under the approved method. By virtue of article 4 of CA/D 1/84 the rules on the levy are incorporated into Annex III to the Service Regulations, so that it is mistaken to allege the levy has no legal foundation. EPO staff have no acquired right to the application of any particular method of adjusting their salaries. They could plead breach of such a right only if the levy seriously disrupted or compromised the steady rise of their salaries. It does not, because the rate is low, the period is short, and basic salary is guaranteed. The existence of the guarantee belies the charge that the levy is a form of tax. The taxes payable on the EPO's behalf are listed exhaustively in Article 16 of the Protocol on the Privileges and Immunities of the EPO. Advancement in step or grade increases basic salary, and the levy is made on the higher amount, but because of the guarantee the staff member cannot earn less in basic salary than what he did before the advancement. The kind of "distortions" Mr. Iverus and Mr. McGinley point to are so tiny as not to matter. The application for a provisional order would be justified only if there were a threat of irreparable injury, but there is none.

D. In their rejoinders the complainants enlarge on their submissions and dispute in some respects the EPO's account of the facts. They maintain that the levy is an arbitrary measure which is in breach of their acquired rights and for which no prior provision was made in the Regulations. If the rules on the levy were incorporated into the Service Regulations then the General Advisory Committee ought to have been consulted as required by Article 38. Since it was not the rules are invalid. Mr. Iverus's and Mr. McGinley's main objection is that, as the EPO actually admits, the levy makes for different rates of pay for staff at the same duty station, at the same grade and step, and it is no answer to say that it is temporary it may be extended after the three years. Mr. Iverus and Mr. McGinley put in further claims to an award of 15,000 guilders each in costs.

E. In its surrejoinders the EPO submits that there is nothing in the rejoinders to rebut the arguments in its replies. It seeks to correct what it regards as errors of fact or misreading of the facts by the complainants, In particular it observes that the General Advisory Committee discussed at length the proposals in the 191st Report of the Co-ordinating Committee, including the levy. For example, its chairman submitted a detailed record on 10 February 1983 to the President of the Office. The EPO observes again that the levy is only temporary and merely slows down the rate of increase of salaries until 1 July 1986 when another decision will have to be taken either to prolong it or to abolish it. The staff have no acquired right to constant increases in salary, and the levy does not seriously disrupt the steady rise in pay.

CONSIDERATIONS:

Joinder

1. The EPO invites the Tribunal to join the five complaints.

Before the Tribunal will join two or more complaints and deal with them in a single judgment two conditions must be fulfilled.

The first is that the substance of the claims must be the same. Whether they are stated differently is of no account: what matters is that the Tribunal should be able to rule on them in a single decision.

The second condition is that the material facts, viz, those on which the claims rest and which are relevant thereto, should be the same.

The complainants need not all have the same arguments. The Tribunal rules as it sees fit and is not constrained by the parties' submissions, variations between them being immaterial.

2. Both conditions are fulfilled for joining the five complaints.

First, although their claims are not stated in exactly the same terms, in substance they are the same, since they are all asking for the quashing of the decision to impose a levy on their basic salary as from 1 July 1983 up to 30 June 1986 and for the repayment of the sums they allege have been wrongfully withheld.

Secondly, though not all in exactly the same position, they are relying on similar facts: the levy of sums equivalent to 1.5 per cent of their nominal basic salary under the scales in force on 30 June 1983, 30 June 1984 and 30 June 1985.

The Tribunal accordingly allows the Organisation's application for joinder.

The applications to intervene

3. Many members of the EPO staff have applied to intervene in the complaints filed by Mr. Andres, Mr. Iverus and Mr. McGinley. Under Article 17 of the Rules of Court they may intervene insofar as they are in the same position as the complainants in fact and in law, or at least in a similar one. But since they have not filed complaints of their own in time they may not advance pleas other than the complainants' or put forward different claims. The Tribunal need rule only on the complaints, and its decision will be applicable to the interveners as well.

Declaration by the President of the Office

4. The President of the Office has submitted a declaration that all staff members subject to the temporary levy shall be treated as interveners for the purpose of executing the Tribunal's decision, and so they need not file formal applications to intervene.

The Tribunal takes note of that declaration.

The application for oral proceedings

5. Mr. Andres has applied for oral proceedings. The Tribunal takes the view that it can examine the complaints on the strength of the pleadings and the evidence before it and that such proceedings are unnecessary.

The lawfulness of the levy

6. The complainants are impugning the decision by the Administrative Council of the EPO to impose a temporary levy of 1.5 per cent on the salaries of staff in categories A and L.

Their first plea is that the decision is in breach of the principle that the law-maker is bound by the rules he makes until they are repealed or amended.

In the complainants' submission no provision is made for a levy on salaries either in the EPO Service Regulations or, for that matter, in the Staff Regulations of the defunct International Patent Institute, now merged into the EPO, or in the Agreement on the integration of the two organisations. They conclude that the Council was not authorised to make special rules about a levy unless it had amended the Service Regulations beforehand, as indeed it is empowered to do under Article 33(2)(b) of the European Patent Convention.

The plea fails for the following reasons.

7. The Tribunal can readily dispose of the argument that the old Institute rules made no provision for a levy. All it need observe is that those rules said nothing of authority to amend the EPO Service Regulations and to set salary scales in the EPO.

The only material rules are in the European Patent Convention and the EPO Service Regulations.

8. Article 64(6) of the Regulations reads: "The remuneration of the permanent employees shall be subject to periodic review and shall be adjusted by the Administrative Council taking account of the recommendations of the Co-ordinating Committee of Government budget experts of the Co-ordinated Organisations."

In accordance with that article, and in its 159th Report, dated 16 February 1979, the Committee proposed a new procedure for the regular review and adjustment of pay.

As to categories A and L, the new procedure provides for review of basic salary, every year and every three years, by objective criteria. There are arrangements for adjusting pay at 1 January which consist mainly in raising salaries in the event of at least a 2, later raised to 3, per cent increase in the cost of living.

The EPO Council approved the new rules and they were applied from 1 July 1978.

The first three-yearly review was carried out in 1979.

At the time of the second one the Co-ordinating Committee proposed, in its 191st Report dated 16 March 1983, keeping the rules in force until 30 June 1986 but making a few amendments and additions. In particular paragraph 34 of the report, which was headed "Levy on basic salaries of category A and L staff", proposed:

"Wage restraint would be applied in the form of a cumulative 1.5 per cent levy from 1 July 1983 to 30 June 1986 ... on basic salaries as adjusted each year in accordance with the results of the procedure set out in the 159th Report. The Committee may, at the end of this period, consider the advisability of proposing to councils that the levy be incorporated in the salary scales..."

9. From this it is plain that the levy was based on the criteria in article 5 of the "New rules", appended to the 159th Report, on the three-yearly salary reviews, particularly the level and trend of "net remuneration in the national civil services taken as reference". The reduction in salary was not a departure from the rule but actually a manner of applying it by sole reference to the outcome of the 159th Report procedure.

10. Nor does the Tribunal accept that the levy is in breach of Article 66 of the Service Regulations and that it was inadmissible, save after amendment of that article, to embody the paragraph 34 proposal in Annex III, which sets out the basic salary scales.

Article 33(2) of the European Patent Convention authorises the Administrative Council to adopt and amend the Service Regulations and the salary scales. In the ordinary exercise of that authority the Council had to choose between alternatives. One was to take account of the levy in the scales, the basic salary figures being given after

deduction of the levy; the other to leave the levy out of account but to decide that the figures in the scales be reduced by the amount of the levy proposed in paragraph 34.

The alternative recommended by the Co-ordinating Committee was the second one, the Council approved it by decision CA/D 1/84 of 8 June 1984 and in doing so it exercised its discretion. It is immaterial that the paragraph 34 proposal was embodied in Annex III and not in Article 66 since by virtue of 66(1) the Annex forms part of the article.

The Tribunal concludes that the decision to embody the paragraph 34 proposal in Annex III could not have any effect on the actual wording of 66 and that 66 therefore needed no amending.

11. The complainants' second plea is breach of Article 38 of the Service Regulations, which relates to "Joint committees", on the grounds that there was no joint action with the staff representatives.

Article 38(3) provides that the General Advisory Committee, on which the staff are represented, shall "be responsible for giving a reasoned opinion on any proposal to amend these Service Regulations ... any proposal to make implementing rules and, in general, ... any proposal which concerns the whole or part of the staff...".

If put to the Council for approval, proposals by the Co-ordinating Committee for regular review of salary and for a levy do of course fall within the scope of 38(3).

But 38(3) requires only a "reasoned opinion" and confers on the General Advisory Committee, as its very title makes plain, only an advisory function and not, as the complainants suggest, authority to make decisions. To plead absence of joint action is to postulate an obligation to negotiate an agreement or, if need be, reach a compromise with the Committee.

What 38(3) requires is mere consultation. It is indeed quite in keeping both with Article 33(2) of the European Patent Convention, which confers on the Administrative Council alone the authority to adopt and amend the Regulations and salary scales, and with Article 64(6) of the Regulations, which gives the Council discretion to carry out periodic review and adjustment of pay.

The plea is therefore unsound in law. It is also unsound in fact.

12. The evidence before the Tribunal shows that, contrary to what the complainants say, the Council did consult the Advisory Committee.

The decisions on the levy -- CA/D 1/83, CA/D 1/84 and CA/D 2/84 -- were stated to be taken by the Council "having consulted the General Advisory Committee". The evidence includes the minutes of the Committee's 29th Session, held on 1 February 1983 (GAC/PV XXIX/83). There was a long discussion of the l91st Report recommending the levy, and on 10 February 1983 the Committee submitted a "reasoned opinion" to the Council (GAC/AV 1 A/83).

The second plea accordingly also fails.

13. Another argument, based on paragraph 46(c) of the 191st Report, is that the levy is a form of tax and therefore unlawful since it is not provided for in any provision of the Service Regulations.

All that 46(c) says is that one reason for «the absence of a clause guaranteeing the maintenance of the nominal amounts of salaries» is the "parafiscal nature of the levy". The argument fails because such a clause was recommended in the 195th Report and the Council approved it by decision CA/D 1/84 of 8 June 1984.

The main purpose of Article 16 of the Protocol on Privileges and Immunities of the EPO is to govern relations between EPO staff members and the inland revenue in their home country, whereas the levy is a way of adjusting pay in the ordinary context of their service relations with the EPO.

14. The complainants further allege breach of their acquired rights: even if the Council had discretion to amend the Service Regulations and salary scales unilaterally on a recommendation from the General Advisory Committee, it was not free, without the staff members' consent, to introduce a measure that was not expressly covered by the Service Regulations and that reduced pay by means of the review and adjustment procedure.

15. A right is acquired when he who has it may require that it be respected notwithstanding any amendment to the rules.

It may arise in two ways. First, it may be a right which is laid down in a provision of the Staff Regulations or Staff Rules and which is of decisive importance to a candidate for appointment with the organisation. Any encroachment on such right without the staff member's consent will amount to disruption of the conditions of service he is entitled to rely on. Where the Staff Regulations or Staff Rules confer such a right they are broadly analogous to terms of the contract. It is true that the organisation's efficiency and the interests of the international community require that such terms should not remain what they were at the date on which the contract was concluded and for its entire duration. But they may not be altered without the staff member's consent if there is disruption of the structure of his contract or breach of the basic terms of service in reliance on which he accepted the appointment.

Secondly, a right may be acquired under a provision of the contract of appointment which the parties intend should be inviolate. Not all rights which arise under the contract will be acquired: there must be an express clause or else an implied term that the right shall not be impaired. Though the staff member may have an acquired right to an allowance, he will not necessarily have an acquired right to the method of reckoning it or to the actual amount.

16. The Tribunal comes to the complainants' plea that the levy infringed the basic terms of service that induced them to accept appointment and disrupted the structure of their contract.

The levy was imposed under the procedure for three-yearly review of salary and therefore at the Council's discretion. It is arguable that the employer's duty to review and adjust salary from time to time was one term of the contract that was of decisive importance to the staff on accepting appointment. But it is also arguable that when they joined the EPO they must have expected that pay might be changed as required by any new circumstances serious enough to warrant unilateral alteration of the salary review procedure.

17. As the EPO points out, the levy is temporary, being imposed for only three years; it is very small, being no more than 1.5 per cent of basic salary; it is not cumulative, as was originally intended; and there is a guarantee of nominal basic salary.

The reduction in pay is tiny and short-lived and it affects only periodic increases in salary, not nominal basic salary.

Secondly, the reason for the impugned decision is a wish to comply with the EPO's commitments towards the co-ordinated organisations -- of which it hopes to become one -- the better to fulfil its purposes and objectives, and that can scarcely be at odds with the interests of its own staff. Being a feature of broad EPO policy, it cannot be branded as arbitrary or in breach of the staff's rightful expectations.

Thirdly, the levy has been applied to all staff members according to the objective criteria prescribed under the 159th Report procedure. Although there may be different results in different cases, that is because the facts are different, and there is no substance in the charge by some complainants that EPO policy is discriminatory.

The Tribunal concludes that the impugned decision was the outcome of the normal procedure for three-yearly review; there being no disruption of the structure of the contract, it was not in breach of acquired rights; nor did it infringe any general principle of law.

18. The Tribunal would have held otherwise had it upheld the complainants' plea of breach of the rule against retroactivity. They observe that though the decision to incorporate paragraph 34 of the 191st Report in Annex III to the Service Regulations was not taken until 8 June 1984 it was applied as from 1 July 1983.

The plea fails.

The levy was recommended in the 191st Report on 16 February 1983, the proposal was that it should be imposed as from 1 July 1983, and the Administrative Council approved it in CA/D 1/83 on 17 March 1983. All that was decided on 8 June 1984, by CA/D 1/84, was the arrangements for carrying out the earlier decision.

The decision was therefore not retroactive.

19. It is because of the terms on which the levy is at present being imposed that the Tribunal deems it not to disrupt the structure of the contract and amount to breach of an acquired right.

But should any feature of the levy -- particularly its duration -- be so altered as to make the arrangements substantially different, that would be a new fact and the Tribunal would wish to reconsider if the matter came before it again.

Application for a provisional order

20. The application serves no purpose since the purpose of it was that the impugned decision should be suspended until the Tribunal passed judgment.

DECISION:

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Cardner, Registrar.

Delivered in public sitting in Geneva on 17 March 1986.

(Signed)

André Grisel

Jacques Ducoux

E. Razafindralambo

A.B. Gardner

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