

**108th Session**

**Judgment No. 2877**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. C. D. against the European Patent Organisation (EPO) on 18 December 2007 and corrected on 21 January 2008, the EPO's reply of 26 May, the complainant's rejoinder of 21 July and the Organisation's surrejoinder of 3 November 2008;

Considering the third complaint filed by Mrs E. H. against the EPO on 18 December 2007 and corrected on 22 January 2008, the EPO's reply of 26 May, the complainant's rejoinder of 21 July and the Organisation's surrejoinder of 3 November 2008;

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

Having examined the written submissions;

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

A. The complainants are permanent employees of the European Patent Office – the EPO's secretariat. At the material time, Mr D. was Chairman of the Central Staff Committee and held grade A3. Mrs H. was Chairperson of the local Staff Committee in Munich and held grade A4.

By decision CA/D 2/06 of 26 October 2006 the Administrative Council adopted a new specimen contract concerning the appointment

and terms of employment of Vice-Presidents of the European Patent Office. On 19 December 2006 the complainants, acting in their capacity as staff representatives, lodged an appeal with the Chairman of the Administrative Council. They contended that decision CA/D 2/06 was incompatible with Article 10(3) of the European Patent Convention, that it jeopardised the independence of the Vice-Presidents in general, that it was incompatible with the independence of the Vice-President of Directorate-General 3 (DG3) in particular, and that it was procedurally flawed in that the General Advisory Committee (GAC) had not been consulted prior to its adoption, in breach of Article 38(3) of the Service Regulations for Permanent Employees of the European Patent Office. Article 38(3) relevantly provides that the GAC shall give a reasoned opinion on “any proposal which concerns the whole or part of the staff to whom [the] Service Regulations apply or the recipients of pensions”. The complainants sought the quashing of decision CA/D 2/06, moral damages in the amount of one euro per staff member represented and costs. A few days earlier, an identical appeal had been filed by the local Staff Committee in The Hague (see Judgment 2876, also delivered this day).

By a letter of 15 March 2007 the Secretary of the Appeals Committee of the Administrative Council informed the complainants that their appeal could not be given a favourable reply and that it had therefore been referred to the Appeals Committee. In its opinion of 27 September 2007 the Appeals Committee observed *inter alia* that decision CA/D 2/06 did affect part of the staff and that, in accordance with Article 38(3) of the Service Regulations, the GAC should have been consulted. It therefore recommended that the necessary steps be taken in order to submit the new specimen contract for Vice-Presidents to the GAC for revision or clarification. It also recommended that the complainants be reimbursed their costs insofar as these were reasonable but that their request for moral damages be rejected.

By a letter of 31 October 2007 the Chairman of the Administrative Council informed the complainants that the Council had decided to dismiss their appeal in its entirety. He explained that

the latter had endorsed the Office's oral legal advice, which would be set out in detail in the minutes of its 111th meeting to be published in due course. That is the decision impugned.

The draft minutes of the Council's 111th meeting were communicated to staff on 23 November 2007. By a letter of 17 December 2007 the relevant extract of the minutes was provided to the complainants. It was stated therein that the Office had explained that the procedure before the Appeals Committee was flawed since there had been no hearings in the presence of both parties, and that it was confident that it was under no obligation to consult the GAC with regard to a decision relating to the appointment of Vice-Presidents. The Office had also referred to Judgment 2036, in which the Tribunal held that it would appear unusual to impose consultation of an internal joint body, such as the GAC, before the adoption of guidelines on such appointments.

B. The complainants contend that the impugned decision is flawed as the Chairman of the Administrative Council gave no reasons in the letter of 31 October 2007 justifying the Council's decision to depart from the Appeals Committee's recommendation. They argue that Judgment 2036, to which the Administrative Council referred in the minutes of its 111th meeting in order to justify the rejection of their appeal, is not relevant to the present case, because the new specimen contract has far wider implications for the staff as a whole than the Guidelines for the recruitment procedure for Vice-Presidents of the European Patent Office, at issue in that judgment.

According to the complainants, the Administrative Council acted beyond its authority in adopting decision CA/D 2/06, as it extended its prerogatives beyond the scope determined in the European Patent Convention. They contend that decision CA/D 2/06 alters the balance of power between the Council and the President of the Office. The Convention seeks to prevent conflicts of interest by limiting the influence of the Administrative Council. Thus, in Article 10(3) it provides *inter alia* that Vice-Presidents shall assist the President of the Office. It follows that Vice-Presidents are primarily accountable to the President. However, pursuant to decision CA/D 2/06, the Council

shall conduct an annual appraisal of the Vice-Presidents' performance on the basis of which it may decide to offer them considerable rewards or to dismiss them. Consequently, contrary to what is stipulated in the Convention, Vice-Presidents will no longer be accountable to the President of the Office.

The complainants also allege that decision CA/D 2/06 is procedurally flawed insofar as it was not adopted following the established consultation procedure. Article 38(3) of the Service Regulations provides that the GAC shall give a reasoned opinion on any proposal which concerns the whole or part of the staff to whom the Service Regulations apply, or the recipients of pensions. Since decision CA/D 2/06 modified the relations between the Administrative Council and the Vice-Presidents and, consequently, between the Vice-Presidents and the staff members, the GAC should have been consulted. They further submit that the introduction of the new specimen contract adversely affects the career prospects of Principal Directors: whereas they were previously allowed to accept a position as Vice-President whilst keeping their permanent position in the Office, pursuant to decision CA/D 2/06 they will have to resign before accepting a position as Vice-President.

According to the complainants, decision CA/D 2/06 has introduced a high level of job insecurity for Vice-Presidents. The latter used to be permanent employees; whereas before they were given five-year renewable contracts, now they are only entitled to five-year non-renewable contracts. At the end of their appointment they will have to participate in an open competition for a vacancy in order to remain in employment. Furthermore, since the Administrative Council shall be involved in the appraisal of their performance, they might be tempted "to accept unrealistic objectives, promise lucrative cooperation projects and/or certain posts to certain nationalities in exchange for a favourable [appraisal] report" since a negative appraisal could lead to their dismissal. Thus, they will be highly dependent on the Administrative Council, which is not in the interest of the Organisation.

The complainants ask the Tribunal to annul decision CA/D 2/06 *ab initio*. They claim moral damages in the amount of one euro per staff member represented and costs.

C. In its replies the EPO expresses the view that the Tribunal is not competent to annul legislative acts or general rules, such as decision CA/D 2/06, though it may be led to examine such acts when an individual decision is challenged.

The Organisation denies that the impugned decision was flawed. It contends that the internal appeal proceedings were flawed because no adversarial hearings were held in violation of the principle of due process and natural justice and that therefore the Appeals Committee's recommendation had to be rejected. It asserts that the complainants were given reasons for the Administrative Council's decision not to endorse the Committee's recommendation. Indeed, in the impugned decision of 31 October 2007 the Chairman of the Council indicated that the minutes of the Council's 111th meeting would contain full details of its decision and, under cover of the letter dated 17 December 2007, he provided the complainants with the relevant extract of the minutes, which included details of the discussions that had led to the impugned decision.

According to the EPO, the modification introduced by decision CA/D 2/06 concerning the performance appraisal of Vice-Presidents and their remuneration did not alter the balance of power between the Administrative Council and the President of the Office. The complainants' argument that the GAC should have been consulted on the grounds that decision CA/D 2/06 modified the established balance of power must therefore be rejected. The Organisation states that the introduction of a performance appraisal of Vice-Presidents is not an entirely new feature that changes the situation of staff. It explains that the President is responsible for preparing a draft appraisal report, which shall be examined by the Performance Committee nominated by the Council; on that basis the Performance Committee will make its recommendation to the Council. Consequently, there is no undue shift in powers affecting all of the staff following the entry into force of decision CA/D 2/06.

The defendant asserts that the Administrative Council was under no obligation to consult the GAC before adopting decision CA/D 2/06. In its view, Article 38(3) of the Service Regulations is not applicable given that decision CA/D 2/06 does not concern the whole or part of the staff but only a very limited number of staff members, i.e. five staff members out of the 6,500 currently employed by the Organisation. Moreover, the Service Regulations are applicable to Vice-Presidents only to the extent stipulated in their contracts of employment, and these contracts contain no reference to Article 38(3). The Organisation adds that the Tribunal ruled, in Judgment 2036, that the Administrative Council enjoys a wide measure of latitude with regard to the appointment of Vice-Presidents given the relatively “political” nature of these appointments and that, consequently, it was not necessary to satisfy the requirements of Article 38(3). It considers that Judgment 2036 is relevant to the present case as decision CA/D 2/06 likewise concerns the terms of appointment of Vice-Presidents.

The EPO denies that the introduction of the new specimen contract may jeopardise the independence of Vice-Presidents or create job insecurity. In its view, the fact that a staff member, such as a Principal Director, has to resign before being appointed Vice-President is not prejudicial to his or her career development given that such a function will usually be his or her last employment. Most international organisations have introduced similar limitations for their most senior positions. Moreover, the new specimen contract refers to Article 14 of the Service Regulations, which provides that a staff member shall carry out his duties and conduct himself solely with the interests of the Organisation in mind.

Concerning the requests for relief, the EPO contends that the complainants have produced no evidence of any injury justifying an

award of moral damages. It points out that, according to the case law, the mere fact that a decision is flawed does not suffice to warrant an award of compensation. It adds that the complainants are entitled to time off for their work as staff representatives and that they should therefore not be awarded costs.

D. In their rejoinders the complainants assert that the fact that the internal appeal proceedings were flawed for lack of adversarial hearings has no bearing on the present case, which concerns the conformity of the impugned decision with the European Patent Convention and the EPO rules and regulations.

Contrary to the defendant's view, they consider that neither the minutes of the Administrative Council's 111th meeting nor the letter of 31 October 2007 contained sufficient reasons for rejecting their arguments, in particular those concerning the lack of competence of the Administrative Council and the shift in balance of power. They contend that Article 38(3) of the Service Regulations does not refer to a substantial number of staff when providing that the GAC must be consulted on any proposal concerning the whole or part of the staff. In their opinion, the introduction of the new specimen contract will have a substantial impact on relations between staff and management, and the GAC should therefore have been consulted prior to its introduction. They submit that the Tribunal is competent to annul a decision such as decision CA/D 2/06, which affects the interests of staff members, if it is incompatible with the provisions of the European Patent Convention and the Organisations' rules and regulations.

E. In its surrejoinders the EPO maintains its position. It adds that the Administrative Council was only under the obligation to give reasons for not endorsing the Appeals Committee's recommendation that the new specimen contract be submitted to the GAC. According to the defendant, the number of staff affected by a proposal is a criterion for determining whether or not the GAC should be consulted. It asks the Tribunal to order that the complainants bear their costs.

## CONSIDERATIONS

1. These two complaints before the Tribunal raise the same issues of fact and of law, and seek the same redress. The Tribunal notes that the Organisation has requested that they be joined and that the complainants have expressed their consent. The complaints are therefore joined to form the subject of a single ruling.

2. By decision CA/D 2/06 of 26 October 2006 the Administrative Council adopted a new specimen contract concerning the appointment and terms of employment of Vice-Presidents of the European Patent Office.

3. On 19 December 2006 the complainants, in their respective capacities as Chairman of the Central Staff Committee and Chairperson of the local Staff Committee in Munich, lodged an internal appeal against decision CA/D 2/06. They contended that the new specimen contract was incompatible with Article 10(3) of the European Patent Convention, with the independence of high-level civil servants as well as of the Vice-President of DG3, and that the decision had been taken without the required statutory consultation.

4. On 16 February 2007, pursuant to Article 18(1) of the Rules of Procedure of the Administrative Council, the President of the Office submitted an opinion to the Council in which he recommended that the complainants' appeal be dismissed.

5. By a letter of 15 March 2007 the Secretary of the Appeals Committee of the Administrative Council informed the complainants that their appeal had been referred to the Appeals Committee for an opinion.

6. On 21 May 2007 the Appeals Committee advised the complainants that it would continue its deliberation of their appeal at its meeting on 16 and 17 July 2007 and that, subject to their consent, the appeal would be, for procedural purposes, consolidated with that



filed by the local Staff Committee in The Hague also against decision CA/D 2/06.

7. On 17 July 2007 the Appeals Committee held a hearing at which the complainants were assisted by Professor K. H., whose legal opinion had been submitted to the Appeals Committee shortly before the hearing. The complainants claimed costs in this regard.

8. On 19 July 2007 the President of the Office submitted a document to the Appeals Committee containing clarifications that the Committee had requested pursuant to Article 113(2) of the Service Regulations on five issues raised by the appeal.

9. On 27 September 2007 the Appeals Committee issued its opinion in which it recommended that the specimen contract be submitted to the GAC for revision or clarification. It also recommended that the complainants be compensated for their costs in relation to the assistance provided by Professor K. H., but that their request for moral damages be rejected as unfounded.

10. At its 111th meeting held from 23 to 25 October 2007, the Administrative Council dismissed the appeal in its entirety. In the letter of 31 October 2007, by which he informed the complainants that the appeal had been dismissed, the Chairman of the Council explained that the Council had endorsed the Office's oral legal advice and that this would be set out in detail in the minutes of its 111th meeting to be published in due course.

11. The minutes of the Administrative Council's 111th meeting indicate that the Office had explained that general legal principles had been violated in the procedure before the Appeals Committee. In particular, there had been no hearings in the presence of both sides. Further, the Office had cited Judgment 2036, in which the Tribunal had observed that, not only in relation to the appointment of the President, but also in relation to the appointment of Vice-Presidents, and having regard to the relatively "political" nature of such decisions, the

imposition of consultation of an internal joint body, such as the GAC, before the adoption of guidelines on such appointments would appear to be unusual. According to the Office, it was up to the President to consult the GAC.

12. The minutes also set out the observation by the Chairman of the Administrative Council that this was the first time the Office had recommended not to follow the recommendation of its Appeals Committee “based on clear [Tribunal] jurisprudence”. He also observed that “the Office was sure that the risk of losing the appeals before the [Tribunal] was very low”. Following the observations made by three delegations, the Chairman “summarized that the Council had decided not to go back on its previous decision on the Vice-Presidents’ contracts and had decided to follow the Office’s position”. Staff representatives at the meeting commented on Judgment 2036 and warned that a rejection of the Appeals Committee’s recommendation would add to the uncertainty as the GAC would have resolved the problems more quickly than proceedings before the Tribunal. The minutes conclude thus:

“Following oral legal advice given by the Office, the Council, contrary to the recommendation of its Appeals Committee, unanimously decided to reject [the complainants’ appeal and that filed by members of the local Staff Committee in The Hague against decision CA/D 2/06] in their entirety [...]”

13. The complainants advance two main arguments. The first concerns the adequacy of the Administrative Council’s reasons for rejecting the appeal.

14. They submit that neither the letter from the Chairman of the Council nor the minutes of the Council’s 111th meeting fulfil the requirement to provide reasons for rejecting the favourable recommendation of an appeal body, set forth in Judgment 2339, under 5. They contend that the stated reasons do not address the main issues they raised in the appeal nor do they identify any flaw in the Appeals Committee’s reasoning. They also point out that the

Administrative Council failed to deal with the Appeals Committee's recommendation on costs.

15. The complainants also submit that the failure to provide reasons at the time of the delivery of the impugned decision constitutes a procedural error due to which they were forced to choose between filing a complaint with the Tribunal, without knowing the reasons for the decision, or being left a significantly shorter period of time within which to lodge a complaint. They ask the Tribunal to take this into account in an award of moral damages.

16. The complainants' second argument concerns the reasons for rejecting the appeal. They argue that the first reason put forward by the Administrative Council, namely, the existence of a procedural error, could have been remedied by remitting the matter to the Appeals Committee and not by rejecting the appeal. In terms of the second reason put forward by the Council, namely, reliance on the Tribunal's conclusion in Judgment 2036, they contend that the Tribunal's decision in that case is distinguishable on its facts and is not relevant to the present dispute.

17. The Organisation submits that the complainants received an explanation for the decision in accordance with the requirements set out in Judgment 2339, under 5. The impugned decision endorsed the oral legal advice given by the Office; that is, the Administrative Council considered that the Appeals Committee's opinion was the result of a flawed procedure due to the lack of adversarial proceedings and that the Committee had misinterpreted Article 38(3) of the Service Regulations and did not have regard to Judgment 2036.

18. It is trite law that "where a final decision refuses, to a staff member's detriment, to follow a favourable recommendation of the internal appeal body such decision must be fully and adequately motivated" (see Judgment 2339, under 5). It is equally well established that if reasons are required, the reasons must be sufficiently clear, precise and intelligible so that a complainant knows why the appeal

has been rejected and he is in a position to assess whether a complaint should be filed with the Tribunal.

19. In the present case it is clear that the appeal was rejected on the grounds that the appeal process was procedurally flawed and that, having regard to the Tribunal's case law, it was not necessary to refer the matter to the GAC. On the substantive issues raised before the Appeals Committee, as the Administrative Council rejected the only recommendation favourable to the complainants, it was only obliged to give reasons on this point. However, on the question of costs, the Appeals Committee recommended the payment of compensation for the assistance provided by Professor K. H. The Council did not deal with this recommendation. The Organisation argues that rejecting the appeal on the substance meant also rejecting the recommendation as to costs. This argument is dismissed. The Organisation's position is premised on an award of costs to the successful party always following the event. While this is the usual outcome, it is not always the case. In the appropriate circumstances, there is no legal principle that automatically precludes an award of costs to an unsuccessful party. Accordingly, the Council also had to give reasons for not accepting the Appeals Committee's recommendation on this point.

20. It is not necessary to consider the claims relating to irregularity in the proceedings before the Appeals Committee. So far as concerns the argument of the EPO, it would not lead to a different result. As far as the complainants are concerned, their claims are effectively subsumed in the procedural irregularities before the Administrative Council.

21. Before turning to the Administrative Council's substantive reason for rejecting the appeal, it is necessary to consider the manner in which the Council arrived at its decision. There is no dispute that in reaching its decision the Council accepted the President's opinion. In Judgment 2876, also delivered this day, the Tribunal found that the internal appeal process set forth in the Service Regulations does not allow for the receipt of a legal opinion on the merits of the Appeals

Committee's opinion from the President prior to the Council taking its decision.

22. The Council also grounded its decision on the Tribunal's conclusion in Judgment 2036 concerning Article 38(3) of the Service Regulations. Article 38(3) relevantly provides that the GAC shall be responsible "for giving a reasoned opinion on [...] any proposal to amend [...] the Pension Scheme Regulations" or "any proposal which concerns the whole or part of the staff to whom [the] Service Regulations apply or the recipients of pensions". In Judgment 2036 the Tribunal held that that provision did not apply to the Guidelines for the recruitment procedure for Vice-Presidents adopted by the Administrative Council.

23. In Judgment 2875, also delivered this day, and which raises the same issue in substance as the present case, the Tribunal held that, to the extent that the specimen contract introduced provisions with respect to the pensions of Vice-Presidents who previously served in the European Patent Office, it should have been referred to the GAC. Although the complainants in this case have not based their arguments on the Pension Scheme Regulations, the rulings in considerations 6 to 10 of that judgment are equally applicable to their complaints.

24. The complainants also argue that the specimen contract is incompatible with the provisions of Article 10(3) of the European Patent Convention, with the independence of high-level civil servants and of the Vice-President of DG3. These arguments are rejected for the reasons given in Judgment 2876 in which it is stated:

"28. [...] These arguments are based on the provisions of the specimen contract which subject the Vice-Presidents to an annual performance appraisal by the Administrative Council and open competition for their posts after five years. So far as concerns the first argument, Article 10(3) provides that the Vice-Presidents shall assist the President. According to the argument, Article 10(3) implies that Vice-Presidents are primarily accountable to the President. Neither the contractual provision with respect to annual performance appraisals, nor that with respect to their term of office alters that position. It may be accepted that these provisions will alter the powers previously exercised, respectively, by the President and the

Administrative Council, but there is nothing in the Convention that either expressly or impliedly directs that those powers must remain unchanged. Accordingly, there is no incompatibility between the specimen contracts and the European Patent Convention.

29. The argument with respect to the independence of the Vice-Presidents is founded on the proposition that 'the high level of job insecurity' that results from the specimen contract 'could tempt the [Vice-Presidents] to accept unrealistic objectives, promise lucrative co-operation projects and/or certain posts to certain nationalities.' This is pure speculation and provides no basis for a finding that the independence of the Vice-Presidents will be compromised.

30. The argument with respect to the independence of the Vice-President of DG3 is based on the fact that he is also the Chairman of the Enlarged Board of Appeal. The complainants point out that the Chairman of the Enlarged Board of Appeal is nominated for a period of five years and can only be removed by a proposal from the Board and on limited grounds. They contend that problems could arise if the Vice-President's contract was terminated before the expiry of his five-year term. Clearly that is so, but that does not establish that the specimen contract compromises the independence of the Vice-President of DG3 either in relation to his management of DG3 or in the discharge of his duties as Chairman of the Enlarged Board of Appeal."

25. As the materials submitted by the parties are sufficient for the Tribunal to reach an informed decision, the application for an oral hearing is denied.

26. Although the complainants succeed in part, they do so on an issue not raised by them. Accordingly, there will be no order for costs or for moral damages.

## DECISION

For the above reasons,

1. The impugned decision and the earlier decision CA/D 2/06 of 26 October 2006 are set aside to the extent that the new specimen contract provides with respect to the pensions of Vice-Presidents who previously served in the EPO.
2. All other claims are dismissed.

In witness of this judgment, adopted on 5 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet