**109th Session** **Judgment No. 2939**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Messrs L. R. M. (his fourth), G. D. (his second), L. P. (his fourth), J. A. S. (his sixth), L. G. (his fourth) and B. H. (his second) against the European Patent Organisation (EPO) on 25 June 2008, the EPO's reply of 3 November, the complainants' rejoinder of 2 December 2008 and the Organisation's surrejoinder of 11 March 2009;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the cases 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 R. M. was Chairman of the local Staff Committee

in The Hague, Mr D. was Vice-Chairman and the other complainants were members of that Committee.

By a note of 10 January 2008 staff members were informed that Mr L., who had hitherto served as Principal Director of Personnel, had assumed the function of Special Adviser to the Vice-President of Directorate-General 4 (DG4). The note indicated that Mr L.'s new assignment was to take effect immediately and that, following the expiry of his appointment as Principal Director of Personnel on 31 March 2008, he would exercise his new function on an A5-grade contractual basis. On 31 January 2008 a contract was concluded between the Office and Mr L., whereby the latter was appointed Special Adviser to the Vice-President of DG4 with effect from 1 April 2008. The appointment was for a 15-month fixed-term period with the possibility of renewal and Mr L. was assigned grade A5, step 12.

On 20 February 2008 the complainants, acting in their capacity as staff representatives, lodged an internal appeal against the decision to nominate Mr L. to the post of Special Adviser to the Vice-President of DG4. They expressed the view that the nomination was tainted with procedural flaws and abuse of power and requested that it be revoked *ab initio* and that the vacant post be advertised in accordance with Article 4(2) of the Service Regulations for Permanent Employees of the European Patent Office. They also requested moral damages in the amount of one euro per staff member represented, punitive damages and costs. They added that, in the event that the President of the Office decided not to grant their requests but to refer the appeal to the Internal Appeals Committee, they would expect the Office to submit its position at the latest by 20 May 2008. Failing this, they would consider that all internal means of redress had been exhausted and they would have direct recourse to the Tribunal.

By a letter of 14 March 2008 the Director of the Employment Law Directorate informed the complainants that the President had decided to refer their appeal to the Internal Appeals Committee for an opinion. He stated that Mr L. had been offered a "Euro-contract" for the purpose of providing temporary assistance to the Vice-President of DG4 in connection with the Office's Strategic Renewal Process and

that, as the contract was for a period of less than three years, a formal recruitment procedure was not compulsory. That is the decision impugned.

B. The complainants contend that the complaints are fully receivable. They were filed by them in their capacity as staff representatives with a view to ensuring, pursuant to Article 34 of the Service Regulations, that the interests of staff are safeguarded and that the procedures laid down in the statutory texts are respected. They argue that for any remedy to be meaningful and effective, in light of the nature of the contested decision, their internal appeal would have had to be dealt with speedily. Therefore, in order to prevent the Administration from frustrating its purpose through inaction or negligence, they requested that the Office submit its position to the Internal Appeals Committee by 20 May 2008. However, as the Office failed to do so – notwithstanding the fact that the time allowed was more than reasonable – they consider that they have exhausted all internal means of redress.

On the merits, the complainants submit that the decision to appoint Mr L. to the post of Special Adviser to the Vice-President of DG4 is tainted with procedural flaws, given that the post was not advertised in accordance with Article 4(2) of the Service Regulations and that no provision for it was made in the budget. Relying on the case law, they also submit that the decision is tainted with lack of transparency, improper motivation and abuse of authority. They point out that Article 7(1) of the Service Regulations provides for the possibility of recruitment through a procedure other than that of a competition only for the recruitment of the senior employees referred to in Article 11 of the European Patent Convention, for the recruitment of Principal Directors and, in exceptional cases, for recruitment to posts which require special qualifications. In light of the fact that Mr. L.'s nomination does not fall under any of these exceptions and that the defendant has failed to prove that it constitutes a *bona fide* exceptional case, it must be concluded that the formal recruitment procedure was bypassed. In addition, Mr L.'s nomination did not meet any of the criteria for the conclusion of

fixed-term contracts, as laid down in Article 1(2) of the Conditions of Employment for Contract Staff at the European Patent Office. In particular, it was not made in response to a temporary staff shortage at the Office or for the purpose of carrying out occasional tasks and neither is there any evidence that it was made for other legitimate reasons.

The complainants request that Mr L.'s nomination to the post of Special Adviser to the Vice-President of DG4 and all financial consequences thereof be revoked *ab initio* and that the vacant post be advertised in accordance with Article 4(2) of the Service Regulations. They claim moral damages in the amount of one euro per staff member represented, punitive damages, costs, and other relief as the Tribunal may deem appropriate.

C. In its reply the EPO argues that the complaints must be dismissed as irreceivable for failure to exhaust the internal means of redress. It points out that the case law allows for direct recourse to the Tribunal where the internal appeal process is unjustifiably and unreasonably delayed. In the present case, however, there was no unreasonable delay in the internal appeal process and neither was there an indication that it was not likely to be completed within a reasonable time.

On the merits, the Organisation explains that the projects implemented by the Office under the Strategic Renewal Process greatly increased the workload of DG4 at the material time, and that Mr L.'s nomination as Special Adviser to the Vice-President of DG4 was made in the proper exercise of the President's discretionary power for the purpose of responding to that increase and ensuring an effective management of the workload.

Furthermore, Mr L.'s nomination was fully in line with the requirements of Article 1(2) of the Conditions of Employment for Contract Staff, given that his contract had been concluded in response to the temporary staff shortage caused by the Strategic Renewal Process – which called for immediate action – and for the purpose of carrying out tasks which by their nature were not permanent. Thus, he

was engaged to provide temporary assistance and was awarded a contract limited to 15 months. It was also fully consistent with the provision of Article 3(2) of the Conditions of Employment for Contract Staff, which affords the President of the Office the right to opt for a recruitment procedure other than a competition for contracts of less than three years' duration. Hence, there was no obligation for the Office to follow the formal recruitment procedure or to advertise the post, especially in view of the fact that the Conditions of Employment for Contract Staff contain no reference to Article 4(2) of the Service Regulations which embodies the requirement to advertise a vacant post. Accordingly, there was no procedural flaw in the decision to nominate Mr L. The EPO also points to Article 7(1) of the Service Regulations, which inter alia affords the appointing authority the right to adopt a recruitment procedure other than that of a competition "in exceptional cases, for recruitment to posts which require special qualifications". It considers that this provision applies to the instant case because the post of Special Adviser to the Vice-President of DG4 required specialised knowledge and skills which Mr L. possessed due to his prior service with the Office. It thus rejects the allegations of lack of transparency and improper motivation.

D. In their rejoinder the complainants invite the Tribunal to find that the internal means of redress have been exhausted and that their complaints are receivable. They state that if there was indeed a vacant post in DG4, it should have been filled by way of competition in line with the general criteria and conditions laid down in Articles 3 and 4 of the Service Regulations. They add that, as the Strategic Renewal Process was initiated in 2006, the defendant had plenty of time to advertise the post properly. They contest the applicability of Article 7(1) of the Service Regulations in the instant case and argue that the Organisation has failed to specify the "special qualifications" that Mr L. alone possessed.

E. In its surrejoinder the EPO maintains its position in full and rejects the assertions made by the complainants in their rejoinder.

## CONSIDERATIONS

1. As receivability is the determinative issue in this case, only the facts relevant to this issue are summarised below.

2. The complainants, in their capacity as staff representatives, lodged an internal appeal against the appointment of Mr L. to the position of Special Adviser to the Vice-President of DG4. They allege in particular that by failing to advertise the position the President of the Office violated Article 4(2) of the Service Regulations.

3. In their internal appeal the complainants stated:

> "Should you nevertheless refer this appeal to the Internal Appeals Committee, **we will expect a position of the Office by close of business on 20 May 2008.** Should this deadline be ignored, we will consider that we have exhausted all internal means of redress and will proceed with lodging a complaint before the [Tribunal]."

4. On 14 March 2008 the Director of the Employment Law Directorate informed the complainants that the President was of the view that in the circumstances a formal recruitment procedure was not compulsory. He also informed the complainants that their appeal had been registered and referred to the Internal Appeals Committee for an opinion.

5. The complainants did not receive the Office's position by the date stated in their internal appeal and filed their complaints on 25 June 2008.

6. In their submissions to the Tribunal the complainants point out that the Office was clearly informed that they would consider that the internal means of redress had been exhausted if the Office's position on their internal appeal was not received by 20 May 2008. They state that the time given to the Office equals the ninety days accorded for a reply to a complaint filed with the Tribunal.

7. The complainants maintain that, given that the appointment at issue would expire by mid-2009 and that on average the first response from the Office takes approximately a year and a half, the time given to the Office for the submission of its position on their internal appeal was more than reasonable in the circumstances. Therefore, they consider that they have exhausted the internal means of redress and that their complaints are receivable.

8. They also maintain that the Tribunal has equitable jurisdiction to grant an exception to the requirement that the internal means of redress be exhausted in cases, such as the present, where there is *prima facie* evidence that a serious miscarriage of justice would occur or that the complainants would be deprived of any meaningful relief if the exception was not granted.

9. Article VII, paragraph 1, of the Statute of the Tribunal provides that a complaint is not receivable unless the internal means of redress have been exhausted. Although the Statute does not expressly allow for any exception to this requirement, the Tribunal's case law is clear that "where the pursuit of the internal remedies is unreasonably delayed the requirement of Article VII, paragraph 1, will have been met if, though doing everything that can be expected to get the matter concluded, the complainant can show that the internal appeal proceedings are unlikely to end within a reasonable time" (see Judgment 1829, under 6, and the cases cited therein, and Judgment 2039, under 6).

10. The case law is also clear that the relevant date for the purpose of receivability is the date on which the complaint is filed with the Tribunal (see Judgment 1968, under 5).

11. The complainants' argument is flawed for a number of reasons. Under the exception provided for in the case law, the complainants ought to have established that their internal appeal

had, in fact, been unduly delayed. Instead of so doing, however, the complainants unilaterally ascertained what in their view would constitute unreasonable delay at the time they filed their appeal. Furthermore, prior to filing their complaints with the Tribunal, they did not communicate with the Internal Appeals Committee for the purpose of having the appeal expedited and neither did they make any enquiries to ascertain when the Office's first response would be filed.

12. Given the period of time that had elapsed between the lodging of the internal appeal and the filing of their complaints, it cannot be said that on the date the complaints were filed the internal appeal proceedings were unlikely to reach a conclusion within a reasonable time.

13. To endorse the approach adopted by the complainants in this case would render Article VII, paragraph 1, meaningless. As the internal means of redress were not exhausted, the complaints are irreceivable.

## DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 14 May 2010, 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 8 July 2010.

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