

**108th Session**

**Judgment No. 2874**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. J.-J. d. D. against the European Patent Organisation (EPO) on 30 April 2008, the EPO's reply of 29 August and the complainant's e-mail of 6 October 2008 informing the Registrar of the Tribunal that he did not wish to enter a rejoinder;

Considering Article II, paragraph 5, 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 case and the pleadings may be summed up as follows:

A. Amongst other activities, the EPO processes international applications under the European Patent Convention and the Patent Cooperation Treaty. One of the purposes of filing an international application is to ascertain whether a claimed invention is likely to be patentable before incurring the expense of applying, perhaps unsuccessfully, for patents at national or regional level. Under the procedure that was in place when the European Patent Office – the EPO's secretariat – was set up each application was first submitted to

a search examiner, who carried out a search in order to identify similar technology already known as a result of a written public disclosure. The inventor could then choose to obtain a more detailed opinion provided by a substantive examiner. In 1989 the formerly separate roles of search examiner and substantive examiner were combined through a pilot project known as “BEST” (Bringing Search and Examination Together). Examiners were to be trained to perform both search and examination duties so that applications could be dealt with by the same examiner (a “BEST examiner”). The BEST project was implemented at the Office, first in Directorate-General 1 in The Hague (Netherlands) and later in Directorate-General 2 in Munich (Germany). In June 1997 the Administrative Council approved in principle the Office-wide extension of BEST and instructed the Committee on Patent Law, whose mandate is to advise the Council *inter alia* on any legal matters concerning a revision of the European Patent Convention, to study the project in the context of the Convention and to submit its conclusions and recommendations. A majority of the Committee on Patent Law recommended that a diplomatic conference be held with a view to amending Articles 16 and 17 of the Convention as well as provisions of the Protocol on the Centralisation of the European Patent System and on its Introduction (hereinafter “Protocol on Centralisation”). This recommendation was endorsed by the Administrative Council and the proposed amendments were adopted in 2000 by the Conference of the Contracting States.

The complainant, who was born in 1966 and has dual French and Swedish nationality, joined the Office in 1991 as a search examiner and subsequently worked as a substantive examiner. By e-mail of 6 October 2004 his director informed him that his name had been put on the waiting list for transfer to BEST. In a further e-mail of 25 October she provided clarifications on this matter, stating *inter alia* that transfer to BEST was no longer done on a voluntary basis only. On 13 December 2004 the complainant was invited to take part in BEST training as from 6 April 2005.

On 18 January 2005 he lodged an appeal with the Internal Appeals Committee, requesting that the order to transfer him to BEST be

cancelled and that the lawfulness of BEST be examined by the Committee. In its opinion delivered on 19 December 2007 the Committee found that the Office had failed to consult the General Advisory Committee (GAC) prior to deciding the compulsory Office-wide implementation of BEST, in breach of Article 38(3) of the Service Regulations for Permanent Employees of the Office and it recommended that the implementation of BEST be submitted to the GAC for its opinion. The Committee also recommended by a majority that a “symbolic” amount of 500 euros be awarded to the complainant in moral damages. By letter of 14 February 2008 the complainant was notified that the President of the Office had decided not to endorse the Committee’s recommendations and that his appeal had accordingly been rejected. That is the impugned decision.

B. The complainant submits that the Office-wide implementation of BEST breached Article 38(3) of the Service Regulations because the President of the Office failed to consult the GAC. Referring to the case law, he contends that in a similar case where the GAC was not consulted, the Tribunal set aside the impugned decision. He acknowledges that, in the present instance, setting aside the decision to implement BEST Office-wide might cause major disruptions but he points out that removing him from BEST would not occasion such disruptions and that, in any event, every examiner should be given the choice whether or not to work as a BEST examiner.

He also submits that since 1996 he has been the subject of repeated attacks from his line managers who sought to have him transferred to BEST. This, he says, had a negative impact on his self-esteem and health, thus entitling him to compensation in excess of the symbolic amount recommended by the Internal Appeals Committee.

The complainant asks the Tribunal to order that the GAC be consulted on the Office-wide implementation of BEST. He also asks the Tribunal to quash the decision to transfer him to BEST, at least until the outcome of the GAC’s consultation. He claims 10,000 euros in moral damages and 5,000 euros in costs.

C. In its reply the EPO objects to the receivability of the complaint insofar as it relates to the lawfulness of BEST. It submits that the GAC and the Internal Appeals Committee are both advisory bodies and that neither they nor the Tribunal are competent to rule on the lawfulness of the amendments adopted by the Conference of the Contracting States. It considers that the claim that every examiner should be given the choice to work or not as a BEST examiner is also irreceivable, because the complainant cannot challenge “an injustice purportedly suffered by his colleagues”.

On the merits the EPO contends that the complaint is unfounded. Article 38(3) of the Service Regulations did not require consultation of the GAC as the decisions to implement BEST Office-wide and to amend Articles 16 and 17 of the Convention and provisions of the Protocol on Centralisation were taken by the Conference of the Contracting States. They were thus binding on the Organisation and the President could not ignore them. Furthermore, the Office-wide implementation of BEST was an organisational matter which fell within the President’s power, under Article 10(2) of the Convention, to take all necessary steps to ensure the functioning of the Office. Referring to a Note concerning the Office’s Policy and Criteria for Migration to BEST, the EPO points out that all examiners had to be transferred to BEST and that the only possible exceptions were on the grounds of age or health reasons. It adds that an employee’s duties cannot be considered as acquired rights.

The Organisation argues that the complainant has failed to provide evidence that he was the victim of harassment. It points out that if, as he asserts, his health has been impaired, he can turn to the relevant medical authorities.

## CONSIDERATIONS

1. In 1989 the EPO launched the “BEST” pilot project, which brought search and examination together in order to process more patent applications without increasing the number of staff members.

In June 1997 the Administrative Council approved in principle the implementation of BEST Office-wide and instructed the Committee on Patent Law to study the project in the context of the European Patent Convention and to submit its conclusions and recommendations. The Committee recommended by a majority that a diplomatic conference be convened for the purpose of amending Articles 16 and 17 of the Convention as well as the Protocol on Centralisation. The proposed amendments were adopted in 2000 by the Conference of the Contracting States. In essence, they removed mention of specific branch offices (The Hague, Munich and Berlin) and replaced them with a general reference to the Organisation to reflect the merging of search and examination duties Office-wide.

2. The complainant joined the Office at its branch in The Hague in 1991 as a search examiner. He was transferred to Munich in 1996 and worked as a substantive examiner. By an e-mail of 6 October 2004 his director informed him as well as all other non-BEST examiners, that they had been put on the official waiting list for transfer to BEST in the course of 2005, subject to the condition that training should not start before March 2005. In an e-mail of 25 October 2004 she pointed out that transfer to BEST was no longer voluntary.

3. The complainant lodged an appeal against the decision to transfer him to BEST and asked the Internal Appeals Committee to rescind it and to examine the lawfulness of BEST under the Convention as the decision to make BEST compulsory for all examiners had not been submitted to the GAC as required by Article 38(3) of the Service Regulations. In its opinion dated 19 December 2007 the Committee unanimously recommended:

“1. that the compulsory Office-wide implementation of BEST be submitted to the GAC for opinion as soon as possible [...] and that a decision be taken on that basis on whether [...] BEST [...] is to be maintained in its present form;

[...]

3. that in all other respects the appeal be dismissed as unfounded.”

It recommended by a majority that the complainant be paid the symbolic sum of 500 euros in damages. The minority opinion found that no personal injury was identifiable as a result of failure to consult the GAC and that therefore the complainant had no claim to damages.

4. The complainant was notified by a letter dated 14 February 2008 of the President's decision to reject his appeal as irreceivable in part and unfounded in its entirety. The letter stated inter alia that the President was of the opinion that the introduction of BEST was not in the competency of the GAC as defined in Article 38(3) of the Service Regulations. Both that Committee and the Internal Appeals Committee acted as consulting bodies to the President and had no competency concerning the decisions taken by the Contracting States. The complainant's request to examine the lawfulness of BEST was therefore considered irreceivable.

5. The complainant bases his complaint on Article 38(3) of the Service Regulations, which states:

"The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:

- any proposal to amend these Service Regulations or the Pension Scheme Regulations, 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 to whom these Service Regulations apply or the recipients of pensions;
- any question of a general nature submitted to it by the President of the Office;
- any question which the Staff Committee has asked to have examined and which is submitted to it by the President of the Office in accordance with the provisions of Article 36."

6. The Organisation submits that the Office-wide implementation of BEST did not require consultation of the GAC under Article 38(3) and that the President was entitled under Article 10(2) of the European Patent Convention to reorganise the duties assigned to examiners.

It notes that the complainant may only challenge the order that he himself work as a BEST examiner and not the lawfulness of BEST in general. The Organisation is of the opinion that, according to “Article 2 in conjunction with Article 4(3)” of the Convention, the President’s role in implementing the decision of the Conference of the Contracting States to apply BEST Office-wide was very limited: he “had no discretion to accept or ignore it, he simply had to implement it”. The Organisation further notes that the Tribunal’s case law has determined that the head of an international organisation “is empowered to change the duties assigned to his subordinates” and has the “executive authority to assign staff to different posts” (see Judgments 265 and 534, under 1).

7. The Tribunal held that “Article 38(3) does of course [...] apply to cases where the Service Regulations and Pension Scheme Regulations are to be amended or ‘implementing rules’ are to be made, and the legal status of staff is thereby to be affected. But it goes further: it applies to cases where ‘any proposal’ is made ‘which concerns the whole or part of the staff’. So it casts a wide net that goes beyond mere changes in legal provisions.” The Tribunal has also held that “Article 38(3) does not interfere with the President’s exercise of his decision-making authority, but seeks to ensure that the proposal shall go through a formal process in which the staff have a right to be consulted through the General Advisory Committee” (see Judgment 1488, under 9 and 10). Furthermore, in accordance with the provision of Article 10(2) of the European Patent Convention, the President “shall take all necessary steps to ensure the functioning of the European Patent Office, including the adoption of internal administrative instructions and information to the public”, and unless otherwise stipulated in the Convention “he shall prescribe which acts are to be performed at the European Patent Office in Munich and its branch at The Hague respectively”. The exercise of these powers is, thus, subject to Article 38(3) of the Service Regulations and the GAC must be consulted on “any proposal which concerns the whole or part of the staff”.

8. The Organisation is correct in asserting that the Tribunal is not competent to rule on the lawfulness of the amendments to the Convention. However, that does not mean that the President could choose the method for implementing the amendments without consulting the GAC. He could have dispensed with that consultation only if the amendments themselves foreclosed any choice as to the method of implementation. This was not the case; there were several factors not mentioned in the amendments in question which could be relevant in choosing a method of implementation. Therefore, there should have been a consultation of the GAC.

9. As the GAC was not consulted, the decision to place the complainant on the BEST list is flawed and must be set aside. The underlying question as to the method for implementing the amendments to the European Patent Convention is remitted to the President to be determined following consultation with the GAC. The complainant must return to his previous non-BEST duties until that has been done.

10. The Tribunal agrees with the Organisation that the complainant has failed to prove any harassment or to follow proper procedure to assess alleged health problems and therefore disregards them in the calculation of damages. Considering the failure to consult the GAC and the time spent by the complainant acting as a BEST examiner, the Tribunal awards him 3,000 euros in moral damages. As the complaint succeeds, the Tribunal awards him 800 euros in costs.

DECISION

For the above reasons,

1. The President's decision dated 14 February 2008 concerning the complainant's internal appeal is set aside as is the earlier decision to place the complainant on the BEST list.
2. The question as to the method for implementing the amendments to the European Patent Convention is remitted to the President to be determined following consultation with the General Advisory Committee.
3. The Organisation shall pay the complainant 3,000 euros as compensation for the moral injury he suffered.
4. It shall also pay him 800 euros in costs.
5. All remaining 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