112th Session **Judgment No. 3053**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. d. l. T. against the European Patent Organisation (EPO) on 19 August 2009, the EPO's reply of 14 December 2009, the complainant's rejoinder of 1 February 2010, the Organisation's surrejoinder of 21 May, the complainant's further submissions of 15 July and the EPO's final comments thereon dated 25 October 2010;

Considering Articles II, paragraph 5, and VII 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 complainant, a Spanish national born in 1973, joined the European Patent Office, the EPO's secretariat, in 2002 as an examiner. At the material time he was a member of the General Advisory Committee (GAC) and the Local Staff Committee in Berlin (Germany).

Article 38(3) of the Service Regulations for Permanent Employees of the European Patent Office 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. In early 2009, without prior consultation with the GAC, the President of the Office submitted proposals to the Administrative Council to amend the Implementing Regulations to the European Patent Convention (hereinafter "the Implementing Regulations"). As a result of these proposals, on 25 March 2009 the Council adopted decisions CA/D 2/09 and CA/D 3/09, which amended numerous Implementing Regulations. By a letter of 24 April addressed to both the President of the Office and the Chairman of the Administrative Council, the complainant, in his capacity as a member of the Local Staff Committee and the GAC, requested that the aforementioned decisions be withdrawn pending consultation with the GAC in accordance with Article 38(3). In the event that his request was rejected, he asked that his letter be treated as an internal appeal and that the appeal be considered by both the Internal Appeals Committee and the Appeals Committee of the Administrative Council until such time as it was clear which body had jurisdiction over the matter under Article 108 of the Service Regulations.

By a decision of 12 June 2009, which is the impugned decision, the Administrative Council declined jurisdiction and forwarded the appeal to the President of the Office. That same month the complainant was informed that the President had referred the appeal to the Internal Appeals Committee for an opinion. By a letter of 6 July the Director of the Employment Law Directorate informed the complainant that the Administrative Council had referred the appeal to the President and reiterated that the latter had forwarded the appeal to the Internal Appeals Committee.

B. The complainant submits that the Administrative Council's decision of 12 June 2009 declining jurisdiction must be understood as a final decision taken by that body not to quash decisions CA/D 2/09 and CA/D 3/09.

He alleges that these two decisions affect part of the staff, within the meaning of Article 38(3) of the Service Regulations, because the amended Implementing Regulations will have to be applied by

examiners. In addition, they limit and shift the responsibilities of the search and examining divisions that are stipulated by the European Patent Convention. In his view, the President of the Office acted *ultra vires* by failing to consult with the GAC prior to submitting her proposals. By considering those proposals, the Administrative Council acted *ultra vires* as well. He contends that, as a consequence, these decisions are unlawful.

The complainant asks the Tribunal to quash Administrative Council decisions CA/D 2/09 and CA/D 3/09 and he claims moral damages and costs.

C. In its reply the Organisation submits that, as the complainant filed his complaint with the Tribunal before the Internal Appeals Committee had delivered an opinion, the complaint is irreceivable under Article VII of the Statute of the Tribunal for failure to exhaust the internal means of redress. Also, the Convention and its Implementing Regulations do not directly concern the terms of appointment of the EPO's employees and therefore ruling on their validity is beyond the Tribunal's competence. In addition, although under the doctrine of *forum non conveniens* the Administrative Council was entitled to consider which body had the closest nexus with the case and to decline jurisdiction, this cannot be considered a final decision as it could be revised following a recommendation of the President.

On the merits, the EPO argues that the President's proposals to amend the Implementing Regulations were not measures which concerned the whole or part of the staff to whom the Service Regulations apply. Consequently, the President was not obliged to consult the GAC prior to submitting the proposals to the Administrative Council.

D. In his rejoinder the complainant states that, in accordance with Article 108(1) of the Service Regulations, he lodged his appeal with the Administrative Council because it was the appointing authority which took the decision he was appealing against. If the Council could not give a favourable opinion, its Appeals Committee should have been convened to consider the matter. In his view, given that the

decision of the Administrative Council to decline jurisdiction was a final decision, all internal means of redress have been exhausted and his complaint is receivable. He contends that both the Appeals Committee and the Tribunal are competent to consider any failure to comply with the European Patent Convention, which forms the basis for all terms of appointment and the Service Regulations.

The complainant argues that decisions CA/D 2/09 and CA/D 3/09 are *ultra vires* because they conflict with several articles of the European Patent Convention. He submits that responsibilities are directly conferred on the search and examining divisions by numerous articles of the Convention and the aforementioned decisions alter these responsibilities. Consequently, the decisions directly concern the terms of appointment of staff members. Furthermore, the amendments have affected the procedures applicable to patent applications which were previously agreed upon by the Convention's Contracting States. In his view, any such amendments must first be ratified by the Contracting States.

In the event that the Tribunal is unable to quash decisions CA/D 2/09 and CA/D 3/09, the complainant asks it to refer the appeal to the Appeals Committee of the Administrative Council. Subsidiarily, he asks the Tribunal to refer the appeal to the Internal Appeals Committee for an opinion, in particular with respect to the Administrative Council's decision to decline jurisdiction. He claims that any award of moral damages should include compensation for the Council's "denial of justice".

E. In its surrejoinder the EPO stresses that the President's right – prescribed by the European Patent Convention – to submit proposals to the Administrative Council is not subject to consultation with the GAC under Article 38 of the Service Regulations. It points out that the Implementing Regulations stipulate how the European Patent

Convention is to be applied in granting a patent and that the Tribunal is not competent to rule on the lawfulness of amendments to the Implementing Regulations. It disputes the complainant's contention that decisions CA/D 2/09 and CA/D 3/09 alter the responsibilities conferred on the search and examining divisions by the European Patent Convention and states that the relevant articles of the Convention merely list the departments involved in the patent grant procedure without referring to their competences. Furthermore, the amendments are consistent with the Convention in substance.

F. In his further submissions the complainant asserts that a number of articles of the European Patent Convention do refer to the competences of different departments, and he appends to his submissions several documents to support this assertion.

G. In its comments on the complainant's further submissions, the Organisation maintains its position in full and contends that the complainant is not adversely affected by decisions CA/D 2/09 and CA/D 3/09.

CONSIDERATIONS

1. The complainant, a staff member of the EPO, is a member of the GAC and a member of the Local Staff Committee in Berlin. On 24 April 2009 he wrote to the President of the Office and, also, to the Chairman of the Administrative Council asking that two decisions of the Council, namely CA/D 2/09 and CA/D 3/09, be withdrawn pending consultation with the GAC. He asked that, if his request was not granted, his letter be treated as an internal appeal. He explained his request saying:

> "I am sending this letter to both my appointing authority – the President of the Office – and to the appointing authority that took the decision – the Administrative Council –, since it is unclear which is the correct place for th[e] appeal to be lodged according to Article 108 of the [Service Regulations]."

2. On 12 June 2009 the Administrative Council decided that the appeal addressed to it should be forwarded to the President for further action on the basis that it could only be concerned with the implementation of the decisions in question. The complainant was informed of this decision by a letter dated 6 July 2009 and was also then informed that the appeal had been referred to the Internal Appeals Committee for its opinion. In his complaint he asks for an oral hearing. However, the matter turns entirely on questions of law and, thus, the application is refused.

3. The complainant contends that the decision of the Administrative Council of 12 June 2009 is a decision refusing to exercise its jurisdiction and, as such, is a final decision not to quash decisions CA/D 2/09 and CA/D 3/09. The EPO replies that the complaint is irreceivable on the ground that, as the President referred the complainant's appeal to the Internal Appeals Committee, he has not exhausted internal remedies. Additionally, it submits that the decision of 12 June 2009 is not a final decision as the Administrative Council might revise decisions CA/D 2/09 and CA/D 3/09 including, for example, upon recommendation of the President following the proceedings before the Internal Appeals Committee. Further, the EPO refers to the doctrine of *forum non conveniens* and argues that the Council was entitled to decline jurisdiction on the basis that the Internal Appeals Committee has the closest connection with the issue.

4. So far as is presently relevant, Article 107 of the Service Regulations allows for internal appeals. Article 108(1) provides:

> "An internal appeal shall be lodged with the appointing authority which gave the decision appealed against. […]"

Article 106 identifies the appointing authorities as the President and the Administrative Council, respectively. Article 109 provides that, if the President of the Office or the Administrative Council cannot give a favourable reply, an Appeals Committee shall be convened to deliver an opinion on the matter which, by Article 112, is to be transmitted to the relevant appointing authority for decision.

5. It is not disputed that the Administrative Council took the decisions that were the subject of the appeal that the complainant submitted to it. Accordingly, his appeal had to be lodged with the Council. The Service Regulations do not permit of appeals to the President with respect to decisions of the Council. Two consequences follow. The first is that the doctrine of *forum non conveniens* has no application. That doctrine only applies where more than one court or tribunal has jurisdiction. The second consequence is that, as the President of the Office has no jurisdiction to entertain an appeal against a decision of the Administrative Council, her action in referring the appeal addressed to the Council to the Appeals Committee has no legal effect. It follows that the argument that the present complaint is irreceivable on the basis that internal remedies have not been exhausted because proceedings are pending before the Internal Appeals Committee must be rejected.

6. Where the only body competent to hear an appeal declines jurisdiction, a decision to that effect is a final decision that may properly be the subject of a complaint to the Tribunal. It is not to the point to argue, as the EPO does, that the Administrative Council might revisit its decisions CA/D 2/09 and CA/D 3/09. They are the decisions that gave rise to the appeal. It is the decision by the Council not to entertain that appeal that is the subject of the complaint. Accordingly, the argument that there has not been a final decision must also be rejected.

7. It follows that the present complaint is receivable. Ordinarily, if an internal appeals body wrongly declines jurisdiction, the decision to that effect will be set aside and remitted for further consideration in accordance with the relevant internal appeal procedures. However, the present matter involves only two substantive issues, one of which has been fully argued and the other being closely related to the first. It is, thus, convenient that those issues now be dealt with.

8. The first argument made by the complainant is based on Article 38(3) of the Service Regulations which relevantly provides that the GAC is responsible for giving a reasoned opinion on:

> "– any proposal to amend [the] 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 [the] Service Regulations apply or the recipients of pensions".

It is not in dispute that the President proposed to the Administrative Council that the Implementing Regulations of the European Patent Convention be amended with respect to divisional applications and applications containing a plurality of independent claims, and that those proposals eventually led to decisions CA/D 2/09 and CA/D 3/09, respectively. Similarly, it is not disputed that the proposals were not submitted to the GAC for its opinion. The question whether they should have been depends on the meaning of the phrase "which concerns the whole or part of the staff to whom [the] Service Regulations apply". The complainant contends that the decisions concern part of the staff because the changes to the Regulations "will have to be applied by Examiners constituting Search and Examining Divisions, and they limit and/or shift the responsibilities directly vested in the Examiners constituting Search and Examination Divisions".

9. In Judgment 1488, under 9, the Tribunal noted that Article 38(3) does not apply only to proposals that would affect the legal status of staff and that "it casts a wide net that goes beyond mere changes in legal provisions". In that case, the Tribunal held that it applied to what were described as "streamlining measures" that introduced "a new system of granting points to examiners" who processed certain specified patent applications. Similarly, in Judgment 2196, the Tribunal held that Article 38(4), which makes similar provision with respect to proposals concerning "solely the whole or part of the staff at the place of employment concerned", required that the Local Advisory Committee be consulted with respect

to a "productivity norm" to be used in calculating the productivity rating of certain staff members. And in Judgment 2874 the Tribunal held that Article 38(3) required the GAC to give an opinion on the method for implementing amendments to the European Patent Convention which had the effect of combining search and examination duties in the same examiners. In the course of that judgment, under 8, the Tribunal noted that the EPO was "correct in asserting that the Tribunal [was] not competent to rule on the lawfulness of the amendments to the Convention" but that did "not mean that the President could choose the method for implementing the amendments without consulting the GAC".

10. In a context quite different from the present case, the Tribunal stated in Judgment 2875, under 9, that "the expression 'concerns [...] staff to whom [the] Service Regulations apply' in Article 38(3) imports the notion that it concerns them in their capacity as staff to whom the Service Regulations apply". The same is true in the present context. What the expression directs is that the proposal or decision in question should in some way affect the relationship of staff members with the Organisation, whether in terms of the work to be performed, the way in which it is to be performed, the method by which it is to be evaluated or the like. Proposals and/or decisions relating to the law and/or procedures applicable to patent applications do not directly affect that relationship although, as recognised in Judgment 2874, decisions or proposals as to the implementation of changes to the law and/or procedures may well do so. Accordingly, Article 38(3) of the Service Regulations was not engaged by the proposals that led to decisions CA/D 2/09 and CA/D 3/09.

11. The complainant also contends that these decisions are *ultra vires* and not authorised by the European Patent Convention. He asks that this aspect of his appeal be remitted to the Administrative Council for consideration in accordance with the Council's appeal procedures. The EPO argues that the Tribunal is not competent to determine this issue. However, the question is whether that issue may properly be the

subject of an appeal to the Administrative Council. Article 107 of the Service Regulations relevantly allows for appeals "against an act adversely affecting" staff members. As already indicated, decisions with respect to the law and/or procedures applicable to patent applications do not affect a staff member's relationship with the Organisation. Similarly, decisions of that kind do not "adversely affect" staff members and, thus, cannot be the subject of an internal appeal. Although the complaint is receivable, it must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 November 2011, Ms Mary G. Gaudron, Vice-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 February 2012.

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