

118th Session

Judgment No. 3342

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr E. D. (his fifth), Mrs E. H. (her thirteenth) and Mrs D. H. against the European Patent Organisation (EPO) on 10 May 2010 and corrected on 14 June, the EPO's reply of 20 September, the complainants' rejoinder of 22 November 2010 and the EPO's surrejoinder of 21 February 2011;

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

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

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

A. In February 2008 the Administrative Council of the EPO was informed that the President of the Office had decided to open competition procedures for the recruitment of new Vice-Presidents for Directorate-General 4 (DG4) and Directorate-General 5 (DG5) respectively. While those competitions were under way, the post of Vice-President DG4 became vacant, and in June 2008 the Administrative Council was notified that the President had decided to

appoint Mr McG., who was then a Principal Director in DG4, to the vacant position on an ad interim basis, pending the appointment of the successful candidate.

At its 116th meeting in December 2008 the Administrative Council decided to close the selection procedures for the posts of Vice-President DG4 and Vice-President DG5 without making appointments and to begin new selection procedures in March 2009. The Council was also informed that the President had decided to extend the appointment of Mr McG. as acting Vice-President DG4 and to appoint Mr v.d.E., who was then a Principal Director in DG5, as acting Vice-President DG5 for a maximum period of one year.

By a letter dated 17 December 2008 to the President, the complainants, in their capacity as members of the Staff Committee, challenged the decisions to appoint Mr v.d.E. as Vice-President DG5 ad interim and to extend Mr McG.'s appointment as Vice-President DG4 ad interim and they requested that those decisions be withdrawn. In the event that their request could not be granted, they asked to have their letter treated as an internal appeal and they reserved their right to claim moral damages and costs.

By letters of 17 February 2009 the complainants were each informed that the President had decided to reject their appeal and to refer the case to the Internal Appeals Committee (IAC) for an opinion.

In its opinion of 7 January 2010 the IAC unanimously recommended that the appeal be dismissed. By letters of 4 March 2010 the complainants were notified that it had been decided to reject their appeal as unfounded. Those are the impugned decisions.

B. Referring to the Tribunal's case law, the complainants submit that individual members of the Staff Committee of an organisation have *locus standi* to file a complaint on behalf of the Staff Committee in order to preserve the common rights and interests of staff which would otherwise not be protected by way of complaints brought by other staff. In their view, the President acted *ultra vires* by appointing two Vice-Presidents on an ad interim basis, and as all staff members have a common legal interest in ensuring that the appointments of

their highest level officials are not flawed, they have *locus standi* to bring the present complaints.

On the merits, the complainants argue that pursuant to Article 11 of the European Patent Convention (EPC), only the Administrative Council has the competence to appoint Vice-Presidents, regardless of the length of appointment. Indeed, the aim and purpose of Article 11, which is to safeguard the separation of powers within the EPO, precludes that Article from being construed in such a way as to permit the President to act as appointing authority for Vice-Presidents.

The complainants challenge the EPO's contention that Article 10 of the EPC, which sets out the functions and powers of the President to manage the Office, gives the President the authority to appoint Vice-Presidents on an ad interim basis. They assert that this authority must be viewed in the context of the separation of powers between the Administrative Council and the President and that there was no justifiable reason for the President to take the contested decisions.

Lastly, the complainants argue that Article 12(4) of the Service Regulations for Permanent Employees of the European Patent Office, relating to assignment and temporary duties, does not provide the President with the competence to appoint Vice-Presidents on an ad interim basis. The operation of Article 12 is restricted to the transfer of duties attributed to the post of a permanent employee to the post of another permanent employee, and it is not possible to apply Article 12(4) by analogy.

The complainants ask the Tribunal to quash the impugned decisions and to declare the extension of the ad interim appointment of Mr McG. as Vice-President of DG4 and the appointment of Mr v.d.E. as Vice-President DG5 ad interim null and void. They seek a reasonable award of moral damages, the amount of which is to be determined by the Tribunal. They also claim costs.

C. In its reply the EPO points out that the complainants did not challenge, either during the internal appeal or in the present case, the earlier decision to appoint Mr McG. as Vice-President DG4 ad interim. Consequently, any such challenge would be time-barred

and thus, irreceivable. Furthermore, the complaints are irreceivable under Article II, paragraph 5, of the Tribunal's Statute. Referring to the case law, the EPO submits that the complainants cannot simply assert that the complaints relate to the protection of "the general interest of staff". They must allege a breach of guarantees which the EPO is legally bound to provide to its staff, and they must provide evidence which will allow the Tribunal to examine its competence to consider the merits of the case. In the EPO's view, they have failed to do so. First, the President's decisions did not relate to the appointment or the extension of an appointment of permanent employees of the Office, and the Service Regulations are therefore not applicable. Likewise, the EPO did not violate any provisions relating to the publication of vacancies or the requirement to conduct open competitions. Second, the complainants' contention that the President acted *ultra vires* raises a constitutional issue of the "separation of powers" between the Administrative Council and the President of the Office. It is not the role of the Staff Committee to defend the "institutional balance" in the relations between the President and the Administrative Council. This is a matter of the EPO's internal structure which is not open to judicial review. Third, the complainants have failed to demonstrate how the President's decisions had any adverse effect on the individual interests of the EPO's permanent staff.

On the merits, the EPO asserts that the President's exclusive power to manage the Office under Article 10 of the EPC implicitly grants the President the power to appoint a Principal Director to act as a Vice-President ad interim when, and as long as, the Administrative Council is unable to take such a decision and provided that the President deems it necessary to be assisted by a Vice-President to ensure the effective functioning of the Office. The President is responsible to the Administrative Council for his or her actions in this regard under the aforementioned Article and the Administrative Council raised no objections upon being notified of the challenged decisions.

The EPO submits that the Tribunal has previously held that it does not need to consult the General Advisory Committee regarding the definite appointment of a Vice-President and it contends that this doctrine applies *a fortiori* to the ad interim appointment of a Vice-President, be it by the President or by the Administrative Council.

Lastly, the EPO argues that the President's authority to take the decisions at issue in this case was not restricted by Article 12(4) of the Service Regulations. Also, the President's decisions conform to Article 12(4) *a maiore ad minus*: if a permanent employee may be called upon to temporarily perform the duties of a permanent employee of a higher grade, clearly she or he may equally be called upon to temporarily perform the duties of a higher ranking official employed on a contractual basis, as occurred in the present case.

D. In their rejoinder the complainants develop their pleas. With respect to the receivability of the complaints, they argue that staff members have a common right and interest in ensuring that the two appointing authorities in the EPO, namely the President and the Administrative Council, make appointments in line with their respective authority to do so and with the applicable procedures. They point out that, in the event the Tribunal annuls the contested decisions, such relief would be of "an academic nature" unless it is supported by an award of punitive damages.

E. In its surrejoinder the EPO maintains its position in full. It points out that new Vice-Presidents of DG4 and DG5 have been appointed and thus, the challenged decisions have become moot.

CONSIDERATIONS

1. The complainants, Mr D., Mrs H. and Mrs H., filed their complaints in their respective capacities as Chairman, Vice-Chairman and member of the Munich Staff Committee. No challenge was made to this description of the complainants, but the Tribunal notes what was said in Judgment 1392, under 24: "it is only by virtue of an

individual contract of employment with the Organisation that someone may lodge a complaint and the complainant may not alter the nature of the suit by declaring when he files the complaint that he is doing so as a staff union representative". They challenge a decision of the President of the EPO appointing Mr v.d.E. as acting Vice-President DG5 and a decision extending the appointment of Mr McG. as acting Vice-President DG4.

2. As the complainants rely on the same arguments and seek the same redress, their complaints are joined and will be the subject of this single judgment.

3. In its reply the EPO challenges the receivability of the complaints, arguing that they did not concern a matter within the jurisdiction of the Tribunal having regard to Article II, paragraph 5, of the Tribunal's Statute. In its surrejoinder the EPO also argues that the complainants do not have a cause of action. It is desirable to consider these issues at the outset.

4. The circumstances leading to the complaints in this Tribunal can be summarised briefly. It appears that in May 2008 the position of Vice-President DG4 became vacant when the holder of the office reached the age limit. Mr McG., who then held the position of Principal Director in DG4, was appointed by the President as acting Vice-President DG4. This was reported to the Administrative Council at its meeting in June 2008. In December 2008 the Administrative Council decided to close a selection procedure then in train (and commenced on or about 1 April 2008) and to reopen the procedure in March 2009. The President thereupon extended the appointment of Mr McG. The position of Vice-President DG5 became vacant on 31 December 2008. Similarly the Administrative Council made a decision in December 2008 to close a selection procedure then in train and to reopen the procedure in March 2009. Thereupon the President appointed Mr v.d.E., who then held the position of Principal Director in DG5 (though on a fixed-term contract), as acting Vice-President DG5 for a maximum period of one year. The extension

of Mr McG.'s appointment and the appointment of Mr v.d.E. were reported to the Administrative Council at its meeting in December 2008.

5. The complainants wrote to the President on 17 December 2008. They set out several bases on which they believed this appointment and this extension were "illegal". They impliedly requested the President to "withdraw" her decision and if that was not to occur they requested that the letter be treated as an internal appeal. The complainants reserved the right to request moral damages and costs. The complainants were advised by letters dated 17 February 2009 that the President had decided to reject their appeal and to refer the case to the IAC. This occurred and in an opinion dated 7 January 2010, the IAC recommended that the appeal be dismissed. By letters dated 4 March 2010, the complainants were informed that their internal appeal was rejected as unfounded. Those are the impugned decisions.

6. In order to understand the competing contentions about the Tribunal's jurisdiction, it is necessary to identify what issues the complainants seek to raise in their complaints. Having regard to the contentions of the parties in the internal appeal and the opinion of the IAC together with the contentions of the complainants in their brief, they seek to challenge the power of the President to make the acting appointments on two bases. The first is that Article 12(4) of the Service Regulations was not a source of power to make the appointments, which the EPO argued in the internal appeal authorised the President to take the steps she did. Article 12(4) provides:

"A permanent employee may be called upon to perform temporarily the duties of a post, including the duties of a newly created post, in a higher grade on a full-time basis.

From the beginning of the third month of such temporary duties he shall receive an acting allowance equal to twice the difference in basic salary between the first and second steps in his grade.

The duration of such temporary duties shall not exceed one year, except where, directly or indirectly, the posting is to replace a permanent

employee who is seconded to another post in the interest of the service or absent on protracted sick leave [...].”

7. The second basis is that Article 11 of the EPC confers on the Administrative Council the power to appoint Vice-Presidents. The complainants challenge the proposition that the power conferred on the President by Article 10 of the EPC to manage the EPO empowered, as the EPO argued, the President to make the acting appointments. Thus the ultimate legal issue the complainants seek to raise is whether the President had power to make the appointments.

8. It should be noted that the EPO does not, in its reply or surrejoinder, seek to argue that the source of power to make the appointments was Article 12 of the Service Regulations. Indeed the EPO submits that as the President’s decisions did not relate to the appointment or the extension of appointment of permanent employees of the EPO, the Service Regulations did not apply.

9. On the question of jurisdiction, the EPO notes that it has accepted the Tribunal’s jurisdiction to hear individual complaints alleging the non-observance, in substance or in form, of the terms of appointment of its officials and of its Service Regulations. The EPO acknowledges that under the Tribunal’s established jurisprudence this competence extends to complaints raised by individual staff members as representatives of the Staff Committee with the aim to preserve individual rights and interests of the staff. In their brief and in more detail in their rejoinder, the complainants argue the judgments of the Tribunal establishing or expanding on this jurisprudence demonstrate that the present complaints can be brought by the complainants. It is desirable to describe, more specifically, the rights or interests identified by the complainants as those they are seeking to protect or preserve in these proceedings. They contend in their rejoinder that “[s]taff has therefore also a common right and interest that Vice-Presidents, even ad interim, are selected and appointed after a proper legal process in conformity with the relevant EPO Service Regulations [...] and other binding service law provisions” and later

that “[s]taff members have a common right and interest that the two appointing authorities [the President and the Administrative Council] obey their respective authorisations and procedures to appoint EPO staff members”.

10. Earlier judgments decide that members of a Staff Committee can invoke the Tribunal’s jurisdiction to enforce rights conferred on them by their terms of appointment or by the Service Regulations. So much is clear from Judgment 1147, consideration 4. This has been recognised in a number of judgments since which have accepted that individual officials can act as representatives to preserve what have been described as “common rights and interests” (see Judgment 2562, consideration 10). However the expression “common rights and interests” is a reference to enforceable legal rights and interests derived from terms of appointment or under the Service Regulations. As the Tribunal said in Judgment 2649, consideration 8, “in order for a complaint submitted to the Tribunal on behalf of a Staff Committee to be receivable, it must allege a breach of guarantees which the Organisation is legally bound to provide to staff who are connected with the Office by an employment contract or who have permanent employment status, this being a *sine qua non* for the Tribunal’s jurisdiction”. A similar statement of the principle is found in Judgment 3115, consideration 3.

11. That approach was comparatively recently followed by the Tribunal in determining one of a number of issues about receivability raised in the context of the employment by the EPO of external contractors (see Judgment 2919, consideration 8). Of particular relevance in that judgment for present purposes was the Tribunal’s consideration of a challenge sought to be made to the engagement of external contractors. The complainants, who were permanent employees of the EPO and members of the Munich Staff Committee, sought to raise the question of whether permanent posts should be established in order to carry out the tasks otherwise undertaken by external contractors. The Tribunal said at consideration 6:

“As the creation of permanent posts rests exclusively within the President’s discretion under Article 10(2)(d) of the European Patent Convention, this case is not a complaint alleging the non-observance, in substance or in form, of terms of appointment or the Staff Regulations and is, therefore, irreceivable.”

12. Equally, in the present case, the power to appoint acting Vice-Presidents is vested in either the Administrative Council or the President or conceivably both. Plainly that is a significant aspect of the legal controversy the complainants seek to agitate in the Tribunal. However what is important, for present purposes, is that the complaints do not raise, having regard to the pleas, any alleged non-observance of the Service Regulations or terms of appointments. The EPO points out that the Service Regulations have no application to the decisions under challenge. The common rights and interests identified by the complainants may arguably be legitimate interests in a broad political or organisational sense. However they are not rights or interests of a character that are justiciable in the Tribunal. Accordingly the complaints should be dismissed as irreceivable.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 7 May 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller, Vice-President, Mr Seydou Ba, Judge, Ms Dolores M. Hansen, Judge, Mr Patrick Frydman, Judge, Mr Michael F. Moore, Judge and Mr Hugh A. Rawlins, Judge sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

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CLAUDE ROUILLER
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