

The Administrative Tribunal,

Considering the two complaints filed by Mr J:A.S. against the European Patent Organisation (EPO) on 26 January 2005, the Organisation's reply of 11 May, the complainant's rejoinder of 7 June and the EPO's surrejoinder of 13 September 2005;

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 case and the pleadings may be summed up as follows:

A. The complainant, a Spanish national born in 1961, is a grade A3 employee of the European Patent Office – the EPO's secretariat – based in The Hague. He is also Chairman of the Central Staff Committee.

On taking up his functions on 1 July 2004, the new President of the European Patent Office promptly reorganised the unit known as the President's Office. In anticipation of that reorganisation, the draft budget for 2005, which was drawn up in May 2004 by his predecessor, made provision *inter alia* for a new grade A6 post of Head of the President's Office. However, that budget was not due to be approved by the Administrative Council until December 2004, and would not take effect until January 2005. In the meantime, therefore, the President asked Mr M., who held the grade A6 post of Head of the Controlling Office, to act as the new Head of the President's Office as from 1 July 2004 whilst retaining his existing budget post. In order to replace Mr M. in the Controlling Office, the President asked Mr F., a Principal Director at grade A6, temporarily to assume the functions of Head of the Controlling Office whilst likewise retaining his existing budget post. A communiqué of 2 July 2004 issued by the President's Office informed staff of these changes.

On 21 September 2004 the complainant contested these measures by submitting two similar appeals to the President, one in a personal capacity “[a]s a member of the Staff Committee”, the other as Chairman of the Central Staff Committee. He contended that the recent appointments to the President's Office, and likewise that of Mr F. as Controller, contravened the Service Regulations for Permanent Employees of the EPO, particularly because the corresponding vacancies had been neither published nor opened to competition. As a result, the Staff Committee, which is represented on selection boards, had been unable to perform its function of representing the interests of staff in the selection process. He asked the President to cancel the appointments and to follow a “proper selection procedure” in each case, after having published a vacancy notice. He also claimed moral damages and costs.

By letters of 17 December 2004 the Director *ad interim* of the Employment Law Directorate informed the complainant that, following an initial review, the President had decided not to allow his appeals, which had therefore been referred to the Appeals Committee. He added that the President considered that the relevant statutory provisions had been complied with, and that further details of the reasons for his decision would follow.

In a letter to the President dated 10 January 2005, the complainant acknowledged receipt of the letters of 17 December. However, referring to Article 109(2) of the Service Regulations, he pointed out that the President's preliminary decision on an appeal must be conveyed to the appellant within two months from the lodging of the appeal, failing which the appeal is deemed to be definitively rejected. In this case, his decision had come more than one month too late. Consequently, the complainant informed the President that he was filing a complaint with the Tribunal in accordance with Article VII, paragraph 3, of its Statute.

On 26 January 2005 the complainant filed two complaints – one in a personal capacity “as a member of the Staff Representation”, the other as Chairman of the Central Staff Committee “representing the Staff Representation *in corpore*” – impugning the implied definitive rejection of his appeals by the President. He submitted a single brief in support of these complaints.

B. The complainant contends that the disputed posts in the President's Office are not provided for in the Service Regulations and were not foreseen in the budget. He asserts that changes to the Service Regulations and to the terms and conditions of employment may only be undertaken following consultation of the General Advisory Committee (GAC), the primary function of which is "to ensure that proper consultation takes place on matters affecting staff". He emphasises that the Staff Committee appoints members of the GAC for that purpose.

He denounces the fact that the appointment of Mr M. as Head of the President's Office, that of Mr F. as Head of the Controlling Office, and the appointments of the other members of the President's Office were made without first informing staff of each vacancy, as required by Article 4(2) of the Service Regulations. Furthermore, these vacancies were not opened to competition in accordance with Article 4(3). Noting that Article 37 of the Service Regulations provides for staff representation within selection and promotion boards, he argues that since the disputed appointments were made without establishing the necessary boards, the Staff Committee members were prevented from fulfilling their function of representing the interests of staff in the selection process.

The complainant also draws attention to the fact that the President's Office appears to have been "entrusted with wide powers", bringing into question the established formal and informal means of consultation between the senior management and the Staff Committee. He contends that, in breach of the relevant provisions of the Service Regulations, Mr M. "acts *de facto* as the deputy to the President", notably in negotiations with the Staff Representation, and that in a widely-publicised letter of 5 August 2004, the President defamed the Staff Representation by insinuating that it was working against the interests of the Office.

The complainant concludes that the President's decision has caused harm not only to the Staff Representation, by affecting its reputation and its ability to fulfil its functions, but also to many staff members, who have been deprived of the right to compete fairly for several posts. He adds that if the posts in question were subsequently opened to competition, the staff members who currently occupy them on an interim basis would have an unfair advantage over other candidates.

In his individual capacity, the complainant seeks the following relief: cancellation of the appointments of Mr M. and his subordinates in the President's Office; cancellation of the appointment of Mr F. "and any other irregular 'ad interim/on loan' nominations that his own nomination may have engendered"; "proper publication of posts and proper selection procedure, in which an elected Staff Representative should be sitting as an observer"; 6,000 euros in moral damages; and costs. In his capacity as Chairman of the Central Staff Committee, he claims the same relief on behalf of the Staff Representation, but additionally requests that "proper procedures", including consultation of the GAC, be followed "if the establishment of a [President's Office] is still desired" and possible in the light of the Service Regulations, and the withdrawal of the "defamatory statement" contained in the President's letter of 5 August 2004.

C. In its reply the EPO submits that the complaints are irreceivable. Citing Judgment 533, it argues that as of 17 December 2004, when the President took an express decision, the complainant could no longer challenge an implied definitive rejection of his appeals, and Article VII(3) of the Tribunal's Statute no longer applied. When on 26 January 2005 he filed his complaints, internal appeal proceedings were pending and he had therefore not exhausted the internal means of redress. Consequently, the complaints are irreceivable pursuant to Article VII(1) of the Statute.

The Organisation also expresses doubt as to whether the complainant has *locus standi*. He has given no indication of how, in his personal capacity, his rights could be affected by the impugned decision. Indeed, in view of his grade, he could not aspire to be appointed to the posts at issue, and he has therefore suffered no prejudice. Moreover, the complaint lodged by him in his capacity as Chairman of the Staff Committee is also irreceivable on account of the absence of an act adversely affecting the rights of the Staff Committee.

Subsidiarily, the EPO argues that the complaints are devoid of merit. The President did not create a new structure, but merely reorganised the President's Office in accordance with Article 10(2)(a) of the European Patent Convention, which provides that the President shall take all necessary steps to ensure the functioning of the European Patent Office. Contrary to the view put forward by the complainant, this was not a measure requiring consultation of the GAC under Article 38 of the Service Regulations. No new posts were created as from 1 July 2004. Consequently, there was no vacancy to be filled, within the meaning of Article 4(1) of the Service Regulations, nor any need for publication under Article 4(2). As regards the post of Head of the President's Office, since there was no vacant A6 post in the President's Office prior to the approval of the budget for 2005, Mr M. was

asked to perform the duties in question whilst retaining his budget post in the Controlling Office. Following the approval of the budget, including the creation of a new A6 post of Head of the President's Office, staff were informed on 4 January 2005 that the President had decided to fill that post by transfer within the Office, i.e. by transferring Mr M. to the post with effect from 1 January 2005. This decision complied with Article 4(1), which provides that vacant posts shall be filled by transfer within the Office, by promotion or appointment under the conditions laid down in Article 49, or by recruitment or appointment as a result of a general competition open both to employees of the Office and to external candidates. Similarly, the decision to ask Mr F. temporarily to perform the duties of Head of the Controlling Office did not create a vacancy: he retained his existing budget post. The subsequent decision to transfer Mr M. to the post of Head of the President's Office did, however, render the post of Head of the Controlling Office vacant, and that vacancy was duly advertised.

The Organisation emphasises that, according to the Service Regulations, the President can fill vacant posts by means of a general competition, but he is not obliged to do so; internal transfer is also considered to be an acceptable and equally valid means of filling a vacant post. It asks the Tribunal to order that the complainant bear his costs.

D. In his rejoinder the complainant argues that the fact that the President took an express decision on his appeal after the expiry of the time limit set by Article 109(2) of the Service Regulations does not prevent him from exercising his right under Article VII(3) of the Statute of the Tribunal to challenge the implied rejection of his appeal. He considers that Judgment 533, on which the EPO relies, should be distinguished because in that case, although the complainant was entitled to consider his appeal as being impliedly rejected, he asked the Organisation to confirm that this was indeed its intention, and having received such confirmation, he could not in good faith have challenged the implied rejection of his appeal. As for his *locus standi*, the complainant submits that in a case such as this, the most appropriate person to lodge a complaint is an elected staff representative, whose function according to Article 34 of the Service Regulations is to "represent the interests of the staff".

Developing his arguments on the merits, the complainant contends that although Article 4(1) provides for the possibility of filling a post by transfer rather than by promotion or recruitment, Articles 4(2) and 4(3) indicate that there is nevertheless an obligation to open the vacancy to competition. He queries whether the announcement of Mr M.'s transfer to the post of Head of the President's Office can be construed as a vacancy announcement.

E. In its surrejoinder the EPO observes that the rejoinder contains no argument liable to modify its position, which it maintains in full.

CONSIDERATIONS

1. On 1 July 2004 a new President took office at the EPO. His reorganisation of the President's Office was announced to a meeting of the Staff Committee and then to the staff at large in a communiqué of 2 July 2004, the relevant part of which reads:

"Changes in the Presidential area

The President informed the Central Staff Representation about the changes in the Presidential area. He had decided to introduce the concept of a Head of Office based on the practice current in the European Commission. This concept allowed for a better screening and preparation of dossiers to be treated by the President and the [Management Advisory Committee (MAC)]. [...]

To support his presidency therefore, [the new President] had decided to detach Mr [M.] from his current function as Head of Controlling to the President's Office where he would be in charge of the President's Office and a member of the MAC. There was no transfer involved. To fill the gap left in Controlling, Mr [F.] was detached for one year from his current function as Principal Director, Joint Cluster in DG1/2 to be Head of Controlling and he too would be a member of the MAC."

2. Following an exchange of correspondence, appeals were filed on 21 September 2004 by the complainant in a personal capacity and as Chairman of the Central Staff Committee.

3. No reply to these appeals was received within the two following months and the appeals were accordingly deemed to be rejected pursuant to Article 109(2) of the Service Regulations. On 17 December 2004 the

complainant was informed that his internal appeals had been rejected by the President and were being referred to the Appeals Committee. His two complaints were filed with the Tribunal on 26 January 2005. Both the complainant and the EPO have treated them jointly and the Tribunal, without further commenting on that aspect of the procedure, will do likewise.

4. The EPO takes two preliminary points: first that the complaints are irreceivable and second that the complainant lacks standing.

Receivability

5. The Organisation says that the complaints are irreceivable because the internal appeals, although timely filed with the President of the Office, had not yet been considered by the Appeals Committee at the time when the complaints were filed. Thus, it is said, the complainant has not exhausted the internal means of redress. It cites and relies on Judgment 533 where the Tribunal found to be irreceivable a complaint filed following a letter from the President confirming his rejection of an appeal which had already been deemed rejected under the provisions of Article 109(2) of the Service Regulations. Noting that the provisions of Article VII of its Statute must prevail over the Service Regulations, the Tribunal said:

“4. On 27 July 1981 the complainant filed an appeal with the President of the Office seeking the quashing of a decision and the repayment of sums deducted from his salary. The sixty-day time limit set in Article VII(3) thus expired on 25 September 1981. Accordingly from 26 September it was open to the complainant duly to appeal to the Tribunal against an implied decision to dismiss his claim.

He did not do so. All that he did, on 28 October 1981, was to ask the President of the Office to confirm the rejection of his appeal. In his reply of 30 October the President said that he could not allow the complaint and that it was therefore being passed on to the Appeals Committee for its opinion. On 18 December the complainant lodged this complaint with the Tribunal.

5. The President’s letter of 30 October had two legal consequences: it made provisional rejection of the internal appeal, and referred it to an advisory body. The letter therefore constitutes a ‘decision’ within Article VII(3). From 30 October 1981 the complainant could no longer properly challenge any implied decision, since there was an express one. Accordingly Article VII(3) does not apply, and under Article VII(1) the complaint is irreceivable, the internal means of redress not being exhausted.

It is immaterial that until the President sent his letter of 30 October 1981 the complainant could have filed a complaint by virtue of Article VII(3). He has only himself to blame for approaching the President on 28 October 1981 instead of going straight to the Tribunal. In any event, since an express decision was taken on 30 October, there has been no question since then of challenging any implied decision.

[...]”

6. Those circumstances were entirely different from those of the present case: nothing in the complainant’s actions here can be interpreted as an invitation to the President to decide the appeals out of time, nor can the President by a unilateral action in breach of the Service Regulations frustrate the acquired right of the complainant under Article VII(3) of the Statute of the Tribunal to bring his complaints. The EPO cannot be heard to argue that the complainant has failed to exhaust internal means of redress when the sole reason for his failing to do so was the EPO’s own failure to abide by its own Service Regulations and to follow the timelines under Article 109(2). The decision in Judgment 533 must be restricted to the very particular facts of that case.

7. The complaints are receivable.

Standing

8. By his complaints the complainant seeks relief against the President’s implied decision to reject his appeals challenging the measures announced in the communiqué of 2 July 2004 regarding the reorganisation of the President’s Office. He does so in two separate capacities, personally and as Chairman and member of the Staff Committee.

9. In his personal capacity the complainant claims he has standing. He argues that since Mr M.’s nomination

took place without informing staff beforehand, individuals were unable to apply for the post of Head of the Office of the President, and so it would be difficult if not impossible to find an individual staff member who would have had clear standing to lodge an appeal in this case. The complainant claims that someone must be given standing else the appointment could never be contested. The point is without merit and contradicts the complainant's own arguments regarding his standing as a representative of the Staff Committee. The internal appeal procedure is generally an individual appeals system, as is the complaint procedure before the Tribunal (see Judgment 1392, under 24). The complainant was at the relevant time an employee at grade A3. He could not have been considered for appointment or transfer to any A6 position. He therefore does not have standing in his personal capacity.

10. On the other hand, the Tribunal has consistently held that individual members of the Staff Committee must have the power to file suit as representatives of that body (Judgments 1147, 1269, 1315, 2036). The rationale is that if the Staff Committee is not able to file suit, the only way to preserve common rights and interests of staff is to allow individual officials to act as representatives (see Judgment 1315, under 8, referring to Judgment 1269, under 13). These rulings are also consistent with Article 34 of the Service Regulations, which states that elected staff representatives have a duty to "represent the interests of the staff". It follows that the complainant should have *locus standi* to bring a complaint on behalf of the Central Staff Committee.

The merits

11. The complainant argues that the reorganisation of the President's Office in July 2004 amounted to the creation of new posts and the filling of those posts by the appointment or transfer of employees without proper advertisement, competition and selection.

12. In the Tribunal's view, the changes to the President's Office in July 2004 did not amount to the creation of a new structure or of any new posts. The only change was to the organisation of work within the President's Office, a matter well within the President's authority to organise his own Office to be as efficient as possible, as required by the European Patent Convention. The President has the power to take "all the necessary steps [...] to ensure the functioning of the European Patent Office" and has the power to "exercise supervisory authority over the personnel" (Article 10(2) of the Convention). The Tribunal's case law has determined that the head of an international organisation has the "executive authority to assign staff to different posts" (Judgment 534), and "is empowered to change the duties assigned to his subordinates" (Judgment 265). There is no evidence to support the veiled suggestion that the reorganisation was in some way an attempt to evade or avoid the provisions of the Staff Regulations concerning the appointment and promotion of staff.

13. The complainant also argues that the EPO is in breach of its duty to consult the General Advisory Committee (GAC). In the Tribunal's view it has not been shown that consultation was necessary. The argument is based on Article 38(3) of the Service Regulations, which defines when, in addition to the specific tasks given to it by the Service Regulations, the GAC shall be responsible for giving a reasoned opinion. It states that the GAC provides reasoned opinions for:

"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 [...]"

14. Article 38(3) is designed to foster discussion and proper consultation between the parties regarding various proposals. Previous decisions have considered whether there was a duty to consult on guidelines for the recruitment procedure for Vice-Presidents (Judgment 2036 holding that there was not), on changes to the Service Regulations to allow the employment of contract staff (Judgment 1618), on plans to raise standards of productivity (Judgment 1488), and on a proposal to raise employee contributions to the costs of death and invalidity insurance (Judgment 1062). In each of the last three cited cases there was found to be such a duty.

15. While the Tribunal has held that Article 38(3) "casts a wide net that goes beyond mere changes in legal provisions" (see Judgment 1488, under 9), the case law does not extend the net so far as to capture the decisions at issue in the present case. The President's actions do not amount to a "proposal" in the meaning of Article 38(3). He has undertaken temporary measures to use "on loan" staff to facilitate the smooth operation of his Office. The complainant appears to be concerned that the use of "on loan" staff may become a regular practice within the EPO. But there is no evidence that this practice has become widespread, nor is there any evidence that the President or the EPO developed any policy to make the use of "on loan" staff more prevalent. Simply put, the President's

staffing decisions did not amount to policies, and it follows that the President was not required to engage in consultations.

16. Nor has the President's decision granted his Office new, wide-ranging powers as alleged by the complainant. The challenged decisions therefore do not amount to a proposal to amend the Service Regulations, and do not require consultations on this basis either.

Appointment to new posts

17. No new posts were created as of 1 July 2004. The EPO is correct to argue that all that happened was the reassignment of duties of existing staff who occupied existing posts. Once it was decided that the new post of Head of the President's Office should appear in the draft budget for 2005 as an A6 position, it was only logical that in the meantime an A6 employee would be placed "on loan" to fulfil the position's duties, even though his post remained in the Controlling Office. By the same token, another A6 employee was "loaned" to the Controlling Office to ensure the continuation of that work. In short, there were no new posts created or filled on 2 July 2004, when staff were informed of the reorganisation of the President's Office, but simply the reassignment of duties for persons already occupying existing posts. Subsequent appointment and transfer decisions, although argued at some length by the complainant, are not properly at issue in the present case.

18. No vacancies were created by the President's decision to reorganise his own Office and to reassign existing staff to it. Accordingly, staff did not need to be informed about vacancies. There was no need to hold a competition to fill vacancies, so selection and promotion boards were not required to be established. Staff Committee members were not prevented from carrying out their duties; there were simply no such duties to be performed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 12 May 2006, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet