

**106th Session**

**Judgment No. 2792**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr H. S. against the European Patent Organisation (EPO) on 9 February 2007, the EPO's reply of 29 May and the letter of 7 August 2007 by which the complainant informed the Registrar of the Tribunal that he did not wish to enter a rejoinder;

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 is an Austrian national born in 1944. He joined the European Patent Office – the EPO's secretariat – in 1986 as an examiner. At the material time he held grade A4 and was the Chairman of the Staff Committee in Munich.

By a Note of 28 July 2004 the staff in Directorates-General 1 and 2 were informed that the President of the Office had decided that Ms S. would “take over” as Director of Patent Administration in Munich. By a letter of 29 July 2004 the complainant, in his capacity as

Chairman of the Staff Committee in Munich, asked the Vice-President in charge of Directorate-General 2 to cancel the appointment of Ms S. on the grounds that it was unlawful. In his view, it contravened Articles 4(2) and 7(1) of the Service Regulations for Permanent Employees of the European Patent Office, which provide respectively that “[t]he staff shall be informed of each vacant post’ when the appointing authority decides that the post is to be filled” and that “[r]ecruitment shall generally be by way of competition”. He consequently asked that the post be filled by way of a “regular statutory procedure” or, in the alternative, that his letter be treated as an internal appeal. On 30 July the Principal Director of Personnel informed Ms S. that she would be transferred to the post of Director of Patent Administration as from 1 August 2004.

On 18 August 2004 the Principal Director of Personnel wrote again to Ms S. Referring to his letter of 30 July, he informed her that the President had decided that she was “available on loan” to Directorate 2.1.4 (Patent Administration) as from 1 August 2004 and that the post of director would be filled as quickly as possible, probably by internal transfer under Article 4(1) of the Service Regulations. He added that she would still be assigned to her post in Directorate 2.1.23 during the loan period. Ms S. expressed interest in the post on 24 August 2004 and was notified on 21 September that she would be transferred to it with effect from 1 October.

The complainant was informed by a letter of 21 October 2004 that the President had not acceded to his request of 29 July 2004 and that the matter had therefore been referred to the Internal Appeals Committee. On 5 December 2005 the complainant informed the Committee of his intention to file a complaint with the Tribunal if the EPO’s position was not submitted by the end of January 2006. The EPO submitted its position to the Committee on 16 January 2006. In an opinion of 6 September 2006 a majority of the Committee’s members considered that his appeal was irreceivable insofar as he claimed to have been personally affected by the transfer decision. Not only had he failed to make such a claim in his appeal as filed, but the contested decision could not have affected him as an individual, since it concerned a post in a grade higher than his, to which he could

not have been transferred. The majority nevertheless found that the appeal was receivable insofar as the complainant had filed it in his capacity as a staff representative. It held that the rights of staff representatives had been infringed because the Office had failed to inform staff of the vacant post, in breach of Article 4(2) of the Service Regulations. It therefore concluded that the principle of equality, which also applies to transfers, had not been observed since staff had not been informed of a vacancy and consequently had not been given the chance to apply. It recommended by a majority that the decision of 21 September 2004 be revoked and that the complainant's costs be reimbursed.

By a letter of 15 November 2006, which is the impugned decision, the complainant was informed that the President considered that his appeal was now "without subject", given that Ms S. had been appointed to the post of Principal Director as from 1 November 2006 and was consequently no longer Director of Patent Administration. The President had nevertheless decided to reimburse the reasonable costs incurred by the complainant in relation to his internal appeal, in accordance with the recommendation of the majority of the Appeals Committee.

B. The complainant contends that the Office violated Article 4(2) of the Service Regulations and Article 3(1) of the Conditions of Employment for Contract Staff at the European Patent Office by transferring Ms S. to the post of Director of Patent Administration without proper prior advertisement of the vacancy. He explains that the Administration announced in the Note of 28 July 2004 that Ms S. would be appointed as Director of Patent Administration and two days later she was notified that she would be transferred with effect from 1 August. He stresses that according to Article 4(3) of the Service Regulations vacant posts must be filled having regard to the need to offer career opportunities to permanent employees; the right to be informed is consequently crucial as it guarantees transparency and enables all interested staff members to apply for a vacant post. He adds that the letter of 18 August 2004 indicating that Ms S. was "on loan" was an attempt to conceal the original illegal transfer decision by

organising a mock procedure. According to him, that decision did not cancel the original transfer decision.

Further to the letter of 18 August 2004, Ms S. expressed interest in the post and was informed by a letter of 21 September that she was being transferred to that post with effect from 1 October 2004. In the complainant's view, the fact that that "second appointment decision" bore a receipt date of 28 August 2004 shows that the recruitment procedure was artificial. In this respect, he draws attention to the finding of the Internal Appeals Committee that the evidence on file did not show that there had been any publication of the vacancy prior to the transfer of Ms S.

The complainant contends that the transfer decision was flawed because in the absence of a formal selection procedure or competition, staff representatives were not involved in the recruitment process. Articles 7(1) and 49(5) of the Service Regulations and Article 1(1) of Annex II to the Service Regulations provide that the Staff Committee has the right and duty to appoint members of the Selection Board and of the Promotion Board. According to the complainant, the absence of specific provisions concerning staff representation in a transfer process should not be interpreted as indicating that no procedures had to be observed. He argues that a "purposive interpretation" of Articles 4(2) and (4), 7(1) and 49(5) of the Service Regulations suggests that a transfer may not take place without minimum procedural safeguards, which include the appointment of a Selection or Promotion Board with the participation of at least one staff representative.

The complainant submits that an unlawful decision must be set aside retroactively irrespective of any subsequent development. He argues that the decision to appoint Ms S. as Principal Director as from 1 November 2006 did not regularise the unlawful decision to transfer her to the post of Director of Patent Administration.

He asks the Tribunal to set aside the impugned decision of 15 November 2006 and retroactively to set aside the decision to appoint Ms S. as Director of Patent Administration. He claims moral

and punitive damages, and reasonable compensation for his time and effort.

C. In its reply the EPO submits that the complaint is receivable only insofar as it is filed by the complainant in his capacity as a staff representative. It is irreceivable to the extent that he alleges that he was personally affected by the transfer decision. This allegation is time-barred under the Service Regulations. In addition, at the material time he held grade A4; consequently, he was not entitled to be transferred to a grade A5 post. Article 12(2) of the Service Regulations provides that in order to be eligible for a transfer, a staff member must hold a grade corresponding to that of the post to be filled.

The Organisation contends that the decision to fill the post of Director of Patent Administration by way of a transfer was made in accordance with Article 4(1) of the Service Regulations. Indeed, a competition is not a prerequisite for a transfer decision. It adds that such a decision falls within the President's discretionary authority. It rejects the complainant's interpretation of Articles 4(2), 7(1) and 49(5) of the Service Regulations and explains that a transfer is governed by different rules to those applicable to a promotion or an appointment.

The EPO asserts that it had informed the staff that the post of Director of Patent Administration was vacant by displaying a notice of transfer on the notice boards. It argues that even though the notice was not signed, it can be assumed that it was displayed since the employee responsible for that task was very familiar with recruitment procedures.

With regard to the remedies sought by the complainant, the defendant indicates that since Ms S. had been appointed to another position after the Internal Appeals Committee had rendered its opinion, it would not have made sense to set aside the transfer decision. It adds that the complainant was awarded 500 euros for the costs incurred in the internal appeal proceedings and that he has not produced evidence showing that that amount was not sufficient.

At the Tribunal's request, the Organisation invited Ms S. to comment on the complaint. It attaches to its reply an e-mail from Ms S. indicating that she does not wish to comment.

## CONSIDERATIONS

1. The complainant brings this second complaint against the EPO both in his representative capacity as Chairman of the Staff Committee in Munich and personally.

2. Although the EPO recognises the complainant's right to bring his complaint in his representative capacity, it disputes his right to bring this complaint in his personal capacity. It submits that Article 12(2) of the Service Regulations provides for the transfer of a permanent employee on the initiative of the appointing authority or at the employee's request to a vacant post of equivalent grade. As the complainant held a grade A4 post at the material time and the vacant post was grade A5, it cannot be said that the complainant was personally affected by the decision to appoint Ms S. as Director of Patent Administration in Munich. The Tribunal accepts this submission and finds that the complaint brought in the complainant's personal capacity is irreceivable.

3. In summary, the complainant submits that the EPO's actions violated the staff's right to be informed about any vacant post the Administration intends to fill as required by Article 4(2) of the Service Regulations and Article 3(1) of the Conditions of Employment for Contract Staff at the EPO; violated the participatory rights of the Staff Committee in the selection process; and violated the rights of interested and qualified staff members to be considered as potential candidates for vacant posts as contemplated by Article 4(3) of the Service Regulations.

4. Article 4(2) of the Service Regulations requires that the staff "be informed of each vacant post when the appointing authority decides that the post is to be filled". The EPO asserts that it informed

the staff by displaying a notice of transfer on the notice boards at the various places of employment and in support of this assertion, points to the document at Annex 9 of the complaint that purports to be a vacancy notice. It submits that even though this document does not bear a signature it can be assumed that it was displayed since the employee in charge at the time was very familiar with the procedures for doing so.

5. The Tribunal finds that this document has little probative value. In contrast with the vacancy notice for the same position included with the EPO's reply as Annex 8, not only does it not have a signature, it does not contain a description of the main duties, aptitudes required and minimum qualifications.

6. Further, although the EPO points out that the individual responsible for posting vacancy notices is no longer with the Office, it has not submitted any declarations from individuals with knowledge of the circumstances surrounding the posting of the vacancy notice, such as the Principal Director of Personnel or Ms S., to corroborate that the vacancy notice had been published.

7. In these circumstances, the Tribunal finds that the EPO has failed to discharge its burden of proving the publication of the vacancy notice. Consequently, the procedure followed by the EPO to fill the vacant post at issue violated Article 4(2) of the Service Regulations. Having reached this conclusion, the Tribunal finds that a consideration of the complainant's additional arguments on the issue of the violation of Article 4(2) is unnecessary.

8. The complainant also submits that the transfer process was flawed due to the non-participation of a staff representative in the selection process. He acknowledges that the Service Regulations do not explicitly deal with staff representation in the transfer process. He argues, however, that a "purposive interpretation" of the relevant provisions of the Service Regulations, namely, Articles 4(2) and (4), 7(1) and 49(5), points to the requirement of at least minimum

safeguards in the transfer procedure including a Selection or Promotion Board with the participation of at least one staff representative. The Tribunal rejects this argument. The absence of explicit requirements in the Service Regulations for staff representation in the internal transfer process in contrast with the specific requirements in relation to other competitions is at odds with the “purposive interpretation” advanced by the complainant. As the Internal Appeals Committee observed in its majority opinion, it is indicative of a deliberate intention on the part of the EPO not to include staff representative involvement in the transfer selection process, a decision with which the Tribunal will not interfere.

9. As to the violation of the rights of staff members to be considered as candidates for vacant posts, the complainant asserts that every staff member has a right to a fair opportunity to submit a candidature for a vacant post and to be considered in an impartial appointment procedure that has at least minimum procedural safeguards including the participation of at least one staff representative.

10. In the Tribunal’s view, this argument is simply a reformulation and conflation of the two previous arguments and is rejected for the above reasons.

11. In terms of relief, the complainant asks the Tribunal to set aside the President’s 15 November 2006 decision; to set aside retroactively the decision to appoint Ms S. as Director of Patent Administration; and to award moral and punitive damages and reasonable compensation for his time and effort. He also asked that the EPO be ordered to initiate an open competition procedure for the contested post but withdrew this claim at a later stage in the procedure.

12. The EPO submits that the President’s decision should not be disturbed. Although the President did not follow the recommendation of the Internal Appeals Committee to revoke the transfer decision, he substantiated his decision on the basis that since Ms S. had been

appointed to another position after the Committee had rendered its opinion, quashing the transfer decision would not have made sense. Further, since a vacancy notice for the post left vacant by Ms S. was published on 24 November 2006, the goal of the appeal to safeguard fair opportunities for staff members to apply for a vacant post had been met.

13. In the Tribunal's view, the EPO's submission fails to recognise the distinction between the grounds of an appeal and the relief sought. Having launched an internal appeal, a staff member is entitled to know whether the appeal is allowed or dismissed. The fact that certain aspects of the relief sought may have become moot does not absolve the head of an organisation from making a determination on the merits of the appeal. As the failure to make a determination on the merits of the appeal has been overtaken by this proceeding, the matter will not be remitted to the President for determination. Additionally, as the effect of the decision to transfer Ms S. is now spent, there will be no order setting aside the transfer decision or the impugned decision.

14. The complainant claims that the EPO's "lack of respect" and "contempt" for established procedures in the highly sensitive area of filling important managerial posts warrants awards of moral and punitive damages. While there are troubling circumstances surrounding the transfer decision including the fact that Ms S. endorsed her receipt of the letter of 21 September 2004 on 28 August 2004, there is insufficient evidence to conclude that the EPO's conduct was a deliberate attempt to circumvent the Service Regulations rather than administrative ineptitude in attempting to rectify a mistake brought to their attention by the appeal. These circumstances fall short of giving rise to an order of punitive damages.

15. In his representative capacity, the complainant has not suffered any actual pecuniary damage. He is entitled, however, to moral damages for the violation of the Service Regulations. As well, the unexplained and inordinate delay in the processing of the

internal appeal that has effectively denied the complainant of one aspect of the relief to which he would have otherwise been entitled, namely, the quashing of the transfer decision, warrants an award for moral damages on that head. The Tribunal assesses the moral damages at a sum of 1,000 euros.

16. The Tribunal also awards the complainant costs for this proceeding in the amount of 1,000 euros.

### DECISION

For the above reasons,

1. The complaint is allowed.
2. The EPO shall pay moral damages to the complainant as a representative of the Munich Staff Committee in an amount of 1,000 euros.
3. It shall also pay him 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 30 October 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba  
Mary G. Gaudron  
Dolores M. Hansen  
Catherine Comtet