

**109th Session**

**Judgment No. 2921**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr H. S. against the European Patent Organisation (EPO) on 21 January 2008, the EPO's reply of 21 May, the complainant's rejoinder of 27 June and the Organisation's surrejoinder of 30 September 2008;

Considering the fifth complaint filed by Mrs E. H. against the EPO on 21 January 2008, the EPO's reply of 21 May, the complainant's rejoinder of 27 June and the Organisation's surrejoinder of 30 September 2008;

Considering that in her letters transmitting the complaints to the EPO, the Registrar conveyed the Tribunal's request that the person who might be affected by its ruling be invited to see the complaints and comment thereon;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, 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. The complainants are permanent employees of the European Patent Office, the EPO's secretariat. At the material time, Mr S. was

Chairman of the Staff Committee in Munich and Mrs H. was Vice-Chairperson of that Committee.

On 15 April 2005 a vacancy notice was published for the post of Director of the Practice and Procedure Directorate in Munich. It indicated that the vacant post would be filled by transfer within the Office, in accordance with Article 4(1) of the Service Regulations for Permanent Employees of the European Patent Office. No closing date for applications was mentioned. In a note of 29 April to staff members in Directorates-General 1 and 2, it was announced that Mr W. would be appointed to the vacant post by transfer from another directorate. The transfer was to take effect on 1 May 2005.

On 9 June 2005, in their capacity as staff representatives, the complainants wrote to the President of the Office contesting the appointment through transfer of Mr W. They expressed the view that recruitment should generally be by way of competition and that direct appointments to key managerial posts were not in the interest of the Office. They requested that the appointment be cancelled and that the vacant post be filled by way of a broad competition. They also requested, in the event that the President decided not to grant their requests, that their letter be considered as an internal appeal within the meaning of Article 108 of the Service Regulations. By a letter of 27 July 2005 the Director of the Employment Law Directorate informed the complainants that after an initial review the President had considered that the relevant statutory provisions had been properly applied and had thus decided not to grant their requests. Accordingly, their case had been referred to the Internal Appeals Committee.

The Committee issued its opinion on 24 August 2007, recommending unanimously that the appeal be dismissed as unfounded. By a letter of 23 October 2007 each complainant was informed that the President had decided to reject the appeal in accordance with the Committee's opinion. That is the decision impugned in each complaint.

B. The complainants contend that the appointment through transfer of Mr W. as Director of the Practice and Procedure Directorate

is unlawful and is one of a recent series of direct appointments without a formal selection procedure. While acknowledging the Administration's discretion in deciding what procedure to follow for filling a vacant post, they point out that such discretion must not be exercised arbitrarily.

They also contend that the said appointment contravenes Article 4(2) of the Service Regulations, which requires that "staff [...] be informed of each vacant post when the appointing authority decides that the post is to be filled". In their view, the requirement to advertise a vacant post is of the utmost importance in any recruitment procedure, not only because it allows the Office to select the best suited candidate, but also because it guarantees a fair and transparent selection process and prevents favouritism. They consider that this requirement was violated, in particular because the vacancy notice did not indicate a closing date for the submission of applications and because the appointment decision was announced less than 15 days after its publication. Pointing to Article 4(3) of the Service Regulations, which requires *inter alia* that vacant posts be filled "in the interests of the proper functioning of the Office and having regard to the need to offer career opportunities to permanent employees", the complainants also argue that, by virtue of the principle of equal treatment, all staff must be afforded equal career advancement opportunities. This, in their view, is all the more necessary when, as in the present case, the post to be filled is of particular importance for the acquisition of managerial skills and conducive to professional development.

The complainants argue that, in order for a recruitment procedure to be fair and impartial, it must satisfy a minimum of procedural safeguards. They refer, in particular, to Article 7(1) of the Service Regulations, which stipulates that "[r]ecruitment shall generally be by way of competition", and also to Article 49(5) of the Service Regulations and Article 1(1) of Annex II thereto, which respectively

provide for the right of the Staff Committee to appoint members of the promotion and selection boards. They emphasise the Administration's obligation to ensure staff representation in recruitment and promotion procedures and to apply all of the above procedural safeguards also in cases where a vacant post is filled through transfer. In their view, whereas a transfer without a formal recruitment procedure between posts with identical job descriptions may be justified, the same does not apply to a transfer between posts which have different job descriptions and require different skills.

The complainants request that the impugned decision be set aside and that the decision to appoint Mr W. as Director of the Practice and Procedure Directorate be quashed *ex tunc*. They seek "reasonable compensation" for their time and effort.

C. In its replies the EPO submits that the complaints are irreceivable to the extent that the complainants contend that they were personally affected by the appointment of Mr W., given that they could not have been transferred to the post in question in view of the grades that they held. It also submits that their claim that the post be filled by way of competition is irreceivable, as such redress is not provided for in the Tribunal's Statute and in any event decisions on how to fill vacant posts are at the discretion of the President of the Office.

On the merits, the Organisation states that the decision to fill the said post by transfer is beyond reproach. It explains that Article 4(1) of the Service Regulations affords it that right and that transfer decisions are made in the interests of the service and of the proper functioning of the Office, pursuant to Articles 12(1) and 4(3) of the Service Regulations. In addition, it is not in its interest to fill a post through transfer without regard for a person's ability to perform the duties involved. It contends that, as transfer decisions are subject to different rules than promotion or appointment decisions, they do not require a general competition and neither do they require the participation of staff representatives.

Furthermore, the EPO considers that staff were duly informed of the aforementioned vacant post and that all interested candidates were given sufficient time to apply, given that the vacancy notice was published on 15 April 2005 and that the appointment decision was not made until 29 April 2005. According to the defendant, the fact that the appointment decision was announced on the last day the vacancy notice was displayed does not constitute a reason to invalidate the appointment of Mr W. It explains that the post had to be filled urgently, as it had been vacant for more than two months, and that Mr W. had the right profile as well as in-depth knowledge of the substantive issues.

D. In their rejoinders the complainants explain that they filed their complaints in their capacity as staff representatives. They state that the Administration's practice of non-transparent direct appointments has resulted in a situation where the staff's confidence in higher management is "dramatically low". They insist on the importance of ensuring minimum procedural safeguards for any recruitment procedure, such as the dissemination of complete and correct information about a vacant post, an appropriate deadline for the submission of applications, the absence of judgemental comments by higher management, and staff representation.

E. In its surrejoinders the EPO maintains its position in full and rejects the assertions made by the complainants in their rejoinders.

## CONSIDERATIONS

1. The complainants bring these complaints in their respective capacities as Chairman and Vice-Chairperson of the Munich Staff Committee. They dispute the appointment of Mr W. to the position of Director of the Practice and Procedure Directorate by transfer within the Office. They submit that a competition should have been held for the position that included staff representation in the process. The

complainants also submit that the appointment of Mr W. was made in violation of Article 4(2) and (3) of the Service Regulations.

2. At the conclusion of the internal appeal process, the President of the Office rejected the complainants' requests for a cancellation of the appointment and the holding of a formal competition. The complainants now challenge the President's decision to reject their appeal.

3. Contrary to the EPO's submission, the complainants did not bring their complaints in their personal capacities. Therefore, there is no need to deal with the defendant's argument on the question of receivability on this point.

4. These complaints raise two main issues. The first, as the complainants acknowledge, is the same issue as that raised in an earlier complaint but had not been decided at the time their complaints were filed. In Judgment 2792, concerning Mr H. S.'s second complaint, under 3, the Tribunal summarised the complainant's position as follows:

"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."

5. In that judgment, under 8, 9, and 10, the Tribunal concluded the following:

"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.”

6. As the same reasoning applies to these complaints, the complainants’ argument that the appointment of Mr W. is legally flawed because it contravened the Service Regulations concerning staff representation in the decision-making process regarding selection procedures must be rejected.

7. The second issue concerns the fact that, according to the complainants, there were deficiencies in the vacancy notice. In addition to the absence of a closing date, the vacancy notice contained no information regarding the main duties of the position, the required qualifications, or an invitation to interested applicants to apply. This is the same issue that arose in Judgment 2920, also delivered this day. In that judgment, the Tribunal observed:

“The underlying rationale for the publication of the vacancy notice is to permit qualified staff members to make an informed decision as to whether they should submit an application to be considered for the vacant post and to foster a policy consistent with Article 4(3) of the Service Regulations. Although there are no set content requirements for a vacancy notice, it cannot be said that the notice for the post of Director of the Learning and Development Directorate in the present case provided even the minimum

information that a staff member would require to reach an informed decision. In the absence of any cogent explanation for the derogation from the usual practice, the Tribunal finds that the action of the EPO constitutes a violation of Article 4(2) of the Service Regulations.”

8. The same reasoning applies in the present case. Accordingly, the President’s decision of 23 October 2007 to reject the internal appeal will be set aside to the extent that it rejected the request for revocation of Mr W.’s appointment. The decision to appoint Mr W. as Director of the Practice and Procedure Directorate with effect from 1 May 2005 will also be set aside. The EPO is to protect Mr W. from any injury that he might suffer due to the setting aside of an appointment he accepted in good faith. It will pay to the complainants jointly costs in an amount of 1,000 euros.

## DECISION

For the above reasons,

1. The President’s decision of 23 October 2007 to reject the internal appeal is set aside to the extent that it rejected the request for revocation of Mr W.’s appointment.
2. The decision to appoint Mr W. as Director of the Practice and Procedure Directorate with effect from 1 May 2005 is set aside. The EPO is to protect Mr W. from any injury that he might suffer due to the setting aside of an appointment he accepted in good faith.
3. The EPO shall pay to the complainants jointly costs in the total amount of 1,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 2010, 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 8 July 2010.

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