

NINETIETH SESSION

***In re* Cervantes (No. 7), De Lucia (No. 2), Kagermeier (No. 6), Lockett (No. 4)
and Munnix (No. 3)**

Judgment No. 2036

The Administrative Tribunal,

Considering the seventh complaint filed by Mr Jean-Pierre Cervantes, the second complaint by Mr Gennaro De Lucia, the sixth complaint by Mrs Ingrid Kagermeier, the fourth complaint by Mr Paul Lockett and the third complaint by Mr Serge Munnix against the European Patent Organisation (EPO) on 14 March 1999, the EPO's reply of 27 May, the complainants' rejoinder of 30 July and the Organisation's surrejoinder of 30 September 1999;

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

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. Article 38(3) of the Service Regulations for Permanent Employees of the European Patent Office, secretariat of the EPO, reads as follows:

"The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:

- 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;
- any question of a general nature submitted to it by the President of the Office;
- any question which the Staff Committee has asked to have examined and which is submitted to it by the President of the Office in accordance with the provisions of Article 36."

Paragraph 1 of Article 7, concerning recruitment procedure, provides in particular that:

"Recruitment shall generally be by way of competition ...

A procedure other than that of competition may be adopted by the appointing authority for the recruitment of the senior employees [that is, employees appointed by the Administrative Council] referred to in Article 11 of the European Patent Convention ..."

The complainants are all permanent employees of the Office. At the time of the impugned decision, they were members of the Staff Committee and of the General Advisory Committee.

From 1977 to 1995 recruitment of the Vice-Presidents of the Office was carried out informally: the heads of the national delegations constituting the Administrative Council made recommendations, and the appointments were subsequently formalised by the Council. Vice-Presidents used also to be permanent employees of the Office.

However, as the number of Contracting States to the European Patent Convention grew and Vice-Presidents acquired more political functions, the EPO decided to recruit them on a contractual basis. Thus the Administrative Council, at its 62nd Session held from 12 to 14 June 1996, approved a "Specimen contract concerning the appointment and terms of employment of Vice-Presidents", and amended Article 1(5) of the Service Regulations, which now reads:

"These Service Regulations shall apply to the President and Vice-Presidents of the Office only in so far as there is express provision to that effect in their contract of employment."

On 5 December 1996 at its 65th Session, the Administrative Council adopted the "Guidelines for the recruitment procedure for Vice-Presidents of the European Patent Office" by decision CA/D 14/96.

On 27 February 1997 the complainants each submitted an appeal to the Chairman of the Administrative Council contesting the procedure whereby that decision was adopted. They objected to the fact that the General Advisory Committee had not been consulted. In a letter of 4 April 1997 the Chairman informed the complainants that their appeals had failed and that the matter had been referred to the Appeals Committee of the Administrative Council. In its report of 10 November 1998 the Committee declared the appeals irreceivable because they were directed against a "legislative act", and recommended dismissal. At its 73rd Session, from 8 to 10 December, the Administrative Council unanimously decided to dismiss the appeals. Its Chairman so informed the complainants in a letter of 11 December 1998. That is the impugned decision.

B. The complainants contend that their complaints are receivable, in particular since they impugn within the time limits a decision adversely affecting them.

On the merits they submit that the only issue to be resolved is whether the Council was bound to consult the General Advisory Committee in accordance with Article 38(3) of the Service Regulations. They allege that the general provisions of the Service Regulations apply even if the contract for Vice-Presidents makes no reference to them. Since the preamble to decision CA/D 14/96 refers to Article 7 of the Service Regulations, the Administrative Council obviously considers that this general provision applies to the recruitment procedure for Vice Presidents even if the contract does not mention it. Accordingly, say the complainants, so too does Article 38 of the Service Regulations. Furthermore, decision CA/D 14/96 is a general one applying to a category of personnel, Vice-Presidents, whose terms of employment are at least partly governed by the Service Regulations. The Council was therefore bound to consult the General Advisory Committee. Its failure to do so constituted a serious procedural flaw.

The complainants claim the quashing of Administrative Council decision CA/D 14/96 concerning the recruitment procedure for Vice-Presidents, and 1,000 German marks in moral damages for every month the Council refuses to withdraw its decision. They claim 5,000 marks in costs.

C. In its reply the EPO contends that the complaints are irreceivable. It asserts that Article 38(3) of the Service Regulations is immaterial. Article 11(2) of the Convention, which takes precedence over the Service Regulations, gives the Administrative Council "sole competence" for the appointment of Vice-Presidents, the President of the Office being merely consulted. The latter therefore holds no right to make proposals, which implies that he will not consult the General Advisory Committee "in the absence of matters to place before it or for which it is directly competent".

Article 7(1) of the Service Regulations allows the Administrative Council "full freedom" in setting the procedure for the recruitment of senior employees. Moreover, under Article 33(2)(e) of the Convention, the Council may set and amend its own Rules of Procedure; and it did just that when it adopted the Guidelines for the recruitment of Vice-Presidents. It would therefore be "extraordinary" to allow staff representatives a say in the organisation of the Council's work. Furthermore, the offending adoption procedure coming under Article 33 of the Convention, its review is outside the competence *ratione materiae* of the Tribunal, which may rule on non-observance only of the Service Regulations.

The specimen contract excludes application of Article 38 of the Service Regulations by implication, in that it does not expressly include it. That is a consequence of the "highly political" nature of the duties of a Vice-President. There is no substance to the argument that there are general provisions which apply even if no mention is made of them in the contract. The EPO points out that it amended Article 1(5) of the Service Regulations and adopted the

specimen contract in June 1996, and that the complainants did not object at the time, not even to the fact that the contract excluded application of Article 38. The non-application of that article was thus confirmed before the Guidelines for the recruitment of Vice-Presidents were adopted in December 1996.

In subsidiary argument the EPO points out that to claim the quashing of the decision to adopt the Guidelines on grounds of serious procedural flaws is excessive given that the complainants have no quarrel with their substance.

D. The complainants rejoin that Article 11(2) of the Convention does not release the Council from the obligation to consult the General Advisory Committee. When appointing senior employees, the Council is free to choose the person and the procedure it likes. However, once it has decided on a recruitment procedure, the latter comes within the ambit of Article 38(3) of the Service Regulations.

E. In its surrejoinder the Organisation argues that, even supposing that Article 38 did apply, none of the instances in which consultation of the General Advisory Committee is mandatory would be relevant in this case.

CONSIDERATIONS

1. Under Article 11(2) of the European Patent Convention (hereinafter referred to as "the Convention"): "The Vice-Presidents shall be appointed by decision of the Administrative Council after the President has been consulted." No consultation is required for the appointment of the President, which is also the responsibility of the Administrative Council (Article 11(1) of the Convention), as is the appointment of the members of the Boards of Appeal and of the Enlarged Board of Appeal - made on a proposal from the President (Article 11(3) of the Convention). The President is the appointing authority for other employees.

The Service Regulations for Permanent Employees, adopted by the Administrative Council, includes the following provisions:

"Article 1

Field of application

...

(5) These Service Regulations shall apply to the President and Vice-Presidents of the Office only in so far as there is express provision to that effect in their contract of employment.

[Version adopted by decision of the Administrative Council CA/D 6/96 with effect from 14 June 1996.]

...

Article 7

Recruitment procedure

[see text under A above]

...

Article 38

Joint Committees

(1) The joint committees shall consist of:

- a General Advisory Committee,

- Local Advisory Committees.

(2) [composition of joint committees]

(3) [see text under A above]"

Furthermore, by the terms of Article 33(2)(e) of the Convention the Administrative Council establishes its own Rules of Procedure.

At its 65th Session, held from 3 to 5 December 1996, the Administrative Council adopted Guidelines for the recruitment procedure for Vice-Presidents of the Office. It did not consult the General Advisory Committee before doing so.

Until then, there had been no written rules governing the procedure to be followed in appointing a Vice-President.

2. The complainants, who at the material time were members of the Staff Committee and of the General Advisory Committee, filed an unsuccessful appeal claiming that before the adoption of such a rule, the General Advisory Committee should be consulted on what was a "proposal which concerns ... part of the staff to whom these Service Regulations apply", in accordance with Article 38(3) of the Service Regulations.

On the proposal of its Appeals Committee, the Council rejected their internal appeal by a decision which they are now challenging before the Tribunal.

3. The complainants contend that the absence of consultation with the General Advisory Committee constitutes a procedural flaw which taints the Council's initial decision. They argue that Vice-Presidents are members of staff and as such are subject in part to the Service Regulations and in any event to Article 7, which governs recruitment and is referred to in the Council's decision to adopt the offending Guidelines. In their view, consultation of the General Advisory Committee in no way impairs the Council's power of decision, and the procedure for adopting the Guidelines therefore fell within the ambit of Article 38(3) of the Service Regulations.

The Organisation submits that the complaints are irreceivable and, subsidiarily, devoid of merit. It bases its objection to receivability on the Council's exclusive competence. This, it argues, is established by Article 11 of the Convention, which regulates the consultation procedure exhaustively, providing for consultation only of the President. Since the latter makes no proposals but is merely "consulted", it is inconceivable that an advisory body would be required to submit opinions to him. Being a higher-ranking norm, the Convention would take precedence over any rule to the contrary in the Service Regulations. Besides, Article 7(1) of the Service Regulations also gives the Council sole competence to set rules for the procedure for recruiting senior employees. The Council's exclusive competence for all aspects of the procedure is also established by Article 33(2)(e) of the Convention which empowers it to set its own Rules of Procedure, of which the Guidelines are but an instance. They were not adopted under the Service Regulations, so the case is not within the Tribunal's competence as defined in Article II(5) of its Statute. The EPO further submits that under Article 1(5) of the Service Regulations the latter apply to Vice-Presidents only insofar as there is express provision to that effect in their contract of employment; but the specimen contract for the appointment of Vice-Presidents makes no reference to Articles 33 to 38 of the Service Regulations.

On the merits, the Organisation advances similar arguments in support of its plea that the complaints lack substance.

4. As members of the Staff Committee and of the General Advisory Committee, the complainants are entitled to challenge a measure on the grounds that prior consultation with the General Advisory Committee did not take place. Given the nature of the impugned decision, they may appeal against it directly (see for instance Judgment 1147, *in re* Rath).

The objections to receivability on the grounds that Article 38 of the Service Regulations does not apply will be examined with the merits.

5. All that the Tribunal need determine is whether Article 38(3) of the Service Regulations, providing for consultation with the General Advisory Committee, applies to the adoption of the Guidelines concerning the appointment of Vice-Presidents. Taken alone, the Guidelines could fall within the cases mentioned in

Article 38(3) requiring submission to the General Advisory Committee since they constituted a measure which concerns part of the staff. Moreover, being a relatively important measure, on the basis of Article 38 alone the Guidelines might warrant consultation of the General Advisory Committee (on Article 38 see Judgments 1398, *in re* Vollering No. 5; 1488, *in re* Schorsack; 1618, *in re* Baillet No. 2 and others; and 1978, *in re* Bousquet No. 3 and others).

But do the Guidelines fall within the scope of Article 38 and are they consistent with the Convention, the more authoritative text?

Both parties produce arguments of weight in support of their cases. The argument based on the Administrative Council's competence to appoint (Article 11 of the Convention) is not on its own decisive, since that competence excludes neither prior consultation nor the right to challenge such a decision or a related directive, in accordance with the Service Regulations.

More pertinent is the argument concerning the President's role under Article 11 of the Convention with regard to appointments made by the Administrative Council: although the President must "propose" candidates for membership of Boards of Appeal, he is merely "consulted" before the appointment of Vice-Presidents, and he is not required to give an opinion before the appointment of his successor. This distinction was drawn deliberately by the Convention's authors and no doubt relates to the procedure for appointing Vice-Presidents, and not the procedure for adopting guidelines on their appointment. It nonetheless reflects the authors' wish to endow the Administrative Council with a wide measure of latitude particularly in the appointment of the President, but also in the appointment of the Vice-Presidents, owing to the relatively "political" nature of such decisions; consequently, to impose consultation of an internal joint body - the General Advisory Committee - before the adoption of guidelines on such appointments would appear unusual.

The scope of the Service Regulations is formally defined in Article 1(5), which states that: "These Service Regulations shall apply to the President and Vice-Presidents ... only in so far as there is express provision to that effect in their contract of employment." But the specimen contract adopted by the Office for the appointment of Vice-Presidents contains no reference to Article 38, a fact that is not in dispute. A literal interpretation of Article 1(5) would mean that Article 38 does not apply to all measures concerning Vice-Presidents, including the adoption of guidelines on their appointment. While it is understandable that a contract of employment should specify which contractual provisions of the Service Regulations apply to it, there is no reason why it should set out rules applying to Vice-Presidents as a category. Be that as it may, Article 1(5) of the Service Regulations creates the presumption that the Regulations do not apply to the President and Vice-Presidents. And that presumption implies that Vice-Presidents come under other rules and are subject to the Service Regulations only exceptionally (where they are in like situations to other staff). In view of the partly "political" nature of the appointment of senior employees, it is understandable that such appointments and any rules governing them should not be subject to an opinion from a joint body.

The preamble to decision CA/D 14/96 cites Article 7 of the Service Regulations. Does this mean that Article 7 is to apply to the appointment of Vice-Presidents, thus bringing such appointments within the scope of Article 38? In formal terms this would appear to be the case. However, it is plain from the operative articles of the Guidelines that the Administrative Council chose not to apply the regulations pertaining to the staff as a whole and to establish different ones (because senior employees are appointed by the Council). What it actually applied, therefore, was not the Service Regulations but a procedure specific to Vice-Presidents. So the presumption created by Article 1(5) was not reversed.

Since Article 38 of the Service Regulations does not apply, the complainants' main and subsidiary claims must be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 3 November 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 31 January 2001.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 February 2001.