

**117th Session**

**Judgment No. 3308**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr L. R. against the European Patent Organisation (EPO) on 3 August 2010, the EPO's reply of 14 February 2011, the complainant's rejoinder of 18 March and the EPO's surrejoinder of 28 June 2011;

Considering the applications to intervene filed by Mr W. H. and Mr D. S. on 27 and 30 August 2010 respectively;

Considering the applications to intervene filed by Mr A. K. and Mr P. T. on 29 July 2011, the application to intervene filed by Mr I. T. on 2 August and the EPO's comments of 26 September 2011 on those applications;

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

Having examined the written submissions and decided not to hold oral proceedings, 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 joined the European Patent Office, the EPO's secretariat, in March 1990. At the material time he was a member of both the local Staff Committee in The Hague and the General Advisory Committee (GAC). In June 2007, following consultations

with the GAC pursuant to Article 38 of the Service Regulations for Permanent Employees of the European Patent Office, the President of the Office submitted document CA/115/07 to the Administrative Council in which he asked the Council to approve an amendment to Article 7 of the Service Regulations that would grant the President the authority to adopt a new recruitment procedure for Principal Directors. On 29 June 2007 the Administrative Council adopted decision CA/D 20/07, which amended Article 7(1); the amended Article provided that a procedure other than that of competition established in Annex II to the Service Regulations could be adopted by the appointing authority, i.e., the President, for the recruitment of Principal Directors.

By a letter of 19 September 2007 the complainant, acting in his capacity as a member of the local Staff Committee in The Hague, lodged an internal appeal challenging decision CA/D 20/07. On 16 November he was informed that the President had referred the matter to the Internal Appeals Committee (IAC) for an opinion.

In its opinion of 17 March 2010 the IAC unanimously recommended that the appeal be rejected as unfounded on the merits. By a letter of 11 May 2010 the complainant was informed that, in accordance with the opinion of the IAC and for the reasons set out by the Administration during the internal appeal proceedings, it had been decided to reject his appeal as unfounded. That is the impugned decision.

B. The complainant asserts that the consultation procedure with the GAC was fatally flawed. He points out that in 2007, prior to the President's submission of document CA/115/07 to the Advisory Council, document CA/114/06 was provided to the GAC so that it could give its opinion on the proposals therein. That document comprised, inter alia, a draft decision to amend Article 7(1) of the Service Regulations and an Annex thereto which set out a draft text of the recruitment procedure for Principal Directors. However, document CA/115/07 did not include the Annex to document CA/114/06 and thus, decision CA/D 20/07 was taken by the

Administrative Council on the basis of incomplete and potentially misleading information.

The complainant submits that, with the exception of the procedure set out in the amended version of Article 7(1), the Administrative Council is involved, directly or indirectly, in all recruitment procedures at the EPO, either as the appointing authority for the post in question or as the authority responsible for regulating the recruitment procedure set out in Annex II to the Service Regulations. In his view, the contested amendment creates an “imbalance of powers” between the Administrative Council and the President, as the latter now has the authority to determine the recruitment procedure for Principal Directors and to take decisions on their appointment, without any involvement by the Administrative Council. Indeed, prior to the contested amendment, the President did not have the power to establish the recruitment procedure for any post for which she or he was the appointing authority.

Referring to the Tribunal’s case law, the complainant states that, when an organisation attempts to set up different recruitment procedures for a particular category of staff, it is imperative that special procedures be put in place to ensure the integrity and transparency of the process. He asserts that Annex II to the Service Regulations offers some guarantees with respect to the fairness and transparency of the EPO’s recruitment and selection procedures because it provides that, for each competition, the Selection Board must include members designated by the Staff Committee. However, as the President may now follow a procedure other than that of a competition established in Annex II for the recruitment of Principal Directors, the President may potentially exercise that authority in the absence of any Staff Committee involvement and thus, without the required transparency.

The complainant asks the Tribunal to quash decision CA/D 20/07 and the impugned decision. He seeks moral damages and costs in the amount of at least 500 euros as compensation for his own time and effort.

C. In its reply the EPO contends that, as the President is the appointing authority for Principal Directors and the latter require special qualifications in view of their responsibilities, under both the previous and the amended version of Article 7(1) the President had and continues to have the power to adopt a special recruitment procedure for Principal Directors. Indeed, the adoption of decision CA/D 20/07 by the Administrative Council was an express acknowledgement by the Council of the President's power in this respect. In addition, pursuant to Article 7(1), the President has the discretion to adopt a procedure other than that of a competition established in Annex II, but she or he is not required to do so.

The EPO asserts that the decision to introduce a special recruitment procedure was taken for valid reasons and that those reasons were explained to the GAC during the consultation process. Moreover, document CA/115/07 also set out the reasons for the decision.

It denies that the consultation procedure with the GAC was flawed and that the Administrative Council consequently based its decision on incomplete information. The EPO points out that pursuant to Article 38(3) of the Service Regulations the President must consult the GAC on any proposal to amend the Service Regulations, any proposal to make implementing rules, and in general, any proposal which concerns the whole or part of the staff to whom the Service Regulations apply. Article 33(2) of the European Patent Convention (hereinafter "the EPC") gives the Administrative Council the authority to amend the Service Regulations. The EPO asserts that issues related to the special recruitment procedure and the contents of document CA/115/07 were discussed with the GAC. Furthermore, document CA/115/07, submitted to the Administrative Council by the President, incorporates the portions of document CA/114/06 that were relevant to decision CA/D 20/07. Thus, the President fulfilled the statutory obligation to submit the draft text of the recruitment procedure for Principal Directors to the GAC, but there was no corresponding obligation to submit that draft to the Administrative Council.

The EPO points out that, since the adoption of decision CA/D 20/07, the President has not exercised her discretion to establish special recruitment procedures. Should the President wish to do so in the future, she or he will first have to request an opinion from the GAC pursuant to Article 38(3) of the Service Regulations. Furthermore, referring to the Tribunal's case law, the EPO argues that the Tribunal is not the proper forum in which the complainant can address issues pertaining to the design of recruitment guidelines for Principal Directors.

It asserts that as the President has not yet applied the amended version of Article 7(1) to appoint a Principal Director under a procedure other than that established by Annex II to the Service Regulations, the presumptions of regularity and bona fides with respect to the recruitment procedures continue to apply. There is no evidence of improper motive or bad faith in this case, and the complainant's allegation that the principles of integrity and transparency in the selection procedures for Principal Directors have been violated cannot be maintained.

Lastly, the EPO submits that the amendment to Article 7(1) does not increase the President's authority regarding recruitment procedures for Principal Directors. Furthermore, the Tribunal is not competent to take a decision regarding the balance of power between the President and the Administrative Council.

D. In his rejoinder the complainant presses his pleas. In his view, the fact that the President continues to recruit Principal Directors according to the rules set out in Annex II to the Service Regulations is evidence that they do not form a category of staff with "special qualifications" for which special recruitment procedures are required, and he challenges the reasons put forward by the EPO to justify the amendment to Article 7(1).

E. In its surrejoinder the EPO maintains its position in full.

F. The EPO objects to the applications to intervene filed by Mr A. K. and Mr P. T. on the grounds that they are not in situations similar in fact and law to that of the complainant. Specifically, they have each filed an application in a personal capacity and not, as is the case for the complainant, as a member of the Staff Committee. Furthermore, they do not have an individual interest in the challenged decision, which is of general application. Referring to the case law, the EPO states that if staff members who are not staff representatives intend to pursue a common interest by filing suit, they may only do so while defending their own case. The EPO does not object to the application to intervene filed by Mr I. T. to the extent that he has filed that application in his capacity as a member of the local Staff Committee in Munich. To the extent that he has filed it in his personal capacity, the EPO objects to his application on the grounds mentioned above.

#### CONSIDERATIONS

1. The complainant joined the EPO on 1 March 1990. He filed his complaint in his capacity as a member of the local Staff Committee in The Hague. At the material time he was also a member of the GAC. Five other employees have filed applications to intervene in this complaint.

2. In the present complaint, the complainant impugns the President's decision of which he was notified on 11 May 2010, endorsing the unanimous recommendation of the IAC to dismiss his appeal as unfounded. The complainant had lodged an internal appeal challenging Administrative Council decision CA/D 20/07 which amended Article 7(1) of the Service Regulations. At the material time, Article 7(1) as amended, read as follows:

**“Article 7**

**Recruitment or appointment procedure**

- (1) Recruitment shall generally be by way of competition in accordance with the procedure laid down in Annex II. A competition may be held for the purpose of constituting a reserve for future recruitment.

A procedure other than that of competition established in Annex II may be adopted by the appointing authority for the recruitment of the senior employees referred to in Article 11 of the European Patent Convention (hereinafter referred to as ‘the Convention’), for Principal Directors and also, in exceptional cases, for recruitment to posts which require special qualifications.”

The amendment concerned the introduction of the words “for Principal Directors”.

3. The complainant’s claims for relief are set out under B, above. His grounds for complaint are as follows:

- (a) the procedure followed to adopt Administrative Council decision CA/D 20/07 was flawed as the final document presented to the Council for decision, CA/115/07, did not contain the Annex to CA/114/06 which specified the procedure the President would follow to appoint Principal Directors. The Annex had, however, been examined by the GAC;
- (b) decision CA/D 20/07 does not set out the procedure to be followed when recruiting Principal Directors, which gives the President absolute freedom to decide on those appointments;
- (c) the principles of integrity and transparency have been violated; and
- (d) Article 7(1) as amended introduces an imbalance of power between the President and the Administrative Council.

4. The EPO submits, inter alia, that “since the adoption of CA/D 20/07, (i) the President has chosen not to exercise his or her discretionary powers to establish the relevant special recruitment procedures [...], and (ii) the recruitment of principal directors has been based on the general rules governing recruitment procedures and appointment [...] provided for by the [Service Regulations]. The fact that the general rules comprised by the [Service Regulations] continue to be applied to the recruitment of principal directors shows that the Office is aware of the consequences of applying the amended Article 7(1) in the absence of specific guidelines.”

5. The Tribunal finds the complaint unfounded on the merits and therefore shall not consider any other issues, particularly that of cause of action. The Tribunal is of the opinion that as the Administrative Council, acting within its competence in accordance with Article 33 of the EPC, approved only the simple amendment to Article 7(1) and did not take a decision with respect to the implementation of the amendment, it was not necessary for the Council to consider the Annex to CA/114/06. In document CA/115/07 the President pointed out that “[t]he current selection procedure [...] does not take into account the relevant policy considerations for posts at this level and the amendments effected in CA/D 10/01 which introduced the contractual appointments of [Principal Directors] at the EPO”. He also set out the main reasons for the special procedure for the selection of grade A6 Principal Directors (a greater involvement of the President in the selection, a more extensive evaluation of the candidates on sensitive policy and strategic matters, a shortening of the present procedure) and concluded that the new procedure should ensure “a balance between the requirements of competition and fairness and the interests of the Office”. Considering that, the Tribunal agrees with the IAC’s unanimous conclusions set out below.

6. The IAC concluded that neither the complainant’s allegation that the GAC was not properly consulted before the Administrative Council took decision CA/D 20/07, nor the assertion that the decision created a legal imbalance between the President and the Council with regard to the recruitment and appointment of Principal Directors, were founded. It also noted that the complainant’s concerns that the President might recruit or appoint Principal Directors in an unfair and/or non-transparent manner, were merely speculative. It specified that “it remains to be seen in which way the President intends to make use of this empowerment in practice. If the President wants to [have] recourse to the exception in Article 7(1) [of the Service Regulations] for the recruitment of Principal Directors, he will have to ensure the integrity and transparency of the special selection process. In this regard, the Appeals Committee strongly advises to have implementing rules in force which are applicable in the recruitment procedure for

Principal Directors in all such cases where the standard procedure provided for under Article 7 and Annex II [of the Service Regulations] is not applied, before the first different selection procedure is started, unless the exemption can be based on real special qualifications (see [...] judgment no. 2791, consideration 8 on this point).” The Tribunal finds this reasoning to be persuasive.

7. The Tribunal considers that by endorsing the IAC’s opinion, the President agreed to continue to apply the general recruitment procedures to the recruitment and appointment of Principal Directors until implementing rules are established applying the amendment to Article 7(1). At such time as that implementation takes place, the normal appeal procedures shall apply if an employee feels the need to contest an appointment or the recruitment process leading to that appointment. Until that time, complaints shall be considered premature.

8. Based on the foregoing, the Tribunal considers that the Administrative Council acted within its competence to decide on the amendment to Article 7(1); the IAC’s conclusions were sound; and the President’s final decision was properly motivated. As such, the Tribunal finds the complaint to be unfounded on the merits.

#### DECISION

For the above reasons,

The complaint is dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 20 February 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 April 2014.

GIUSEPPE BARBAGALLO  
MICHAEL F. MOORE  
HUGH A. RAWLINS  
DRAŽEN PETROVIĆ