Registry's translation, the French text alone being authoritative.

NINETIETH SESSION

***In re* Cervantes (No. 8), De Lucia (No. 3), Kagermeier (No. 7), Luckett (No. 5) and Munnix (No. 4)** **Judgment No. 2037**

The Administrative Tribunal,

Considering the eighth complaint filed by Mr Jean-Pierre Cervantes, the third complaint filed by Mr Gennaro De Lucia, the seventh complaint filed by Mrs Ingrid Kagermeier, the fifth complaint filed by Mr Paul Luckett and the fourth complaint filed 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, the Organisation's surrejoinder of 23 September and Mr M.'s letter of 8 December 1999 stating that he has no observations to make regarding the present case;

Considering Articles II, paragraph 5, and VII 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. Facts relevant to this case are set out in Judgment 2036 delivered this day (*in re* Cervantes No. 7 and others).

The complainants are employees of the European Patent Office, the secretariat of the EPO. At the date of the impugned decision, they were all members of the Staff Committee and of the General Advisory Committee.

At its 62nd Session, held from 12 to 14 June 1996, the Administrative Council adopted a "Specimen contract concerning the appointment and terms of employment of Vice-Presidents". Under Article 4 of this contract, the provisions of the Service Regulations concerning social security are applicable. Article 5 of the contract reads in part:

"The provisions of the Pension Scheme Regulations shall apply, subject to the following:

(a) The minimum period of service required by Article 7 of the Pension Scheme Regulations for entitlement to a retirement pension shall be reduced from ten to five years."

The Council also decided to amend 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."

The Council appointed Mr M. as Vice-President in charge of Directorate-General 3 (DG3) and mandated its Chairman to negotiate with him the terms and starting date of his contract. At its 63rd Session, held on 10 and 11 October, the Council appointed Mr M. to the post for a five-year term as from 1 December 1996, and authorised its Chairman to sign the contract of employment.

On 27 February 1997, each of the complainants appealed to the Chairman of the Council against the appointment of Mr M., pleading that the latter's contract, which was based on the specimen contract, derogated from the Service Regulations and other rules applying to employees. In a letter of 4 April 1997, the Chairman informed the

complainants that he could not allow their appeals and that the matter had been referred to the Council's Appeals Committee. The Committee reported on 10 November 1998. It found the appeals time-barred and hence irreceivable, and recommended rejection. At its 73rd Session, held from 8 to 10 December, the Council unanimously decided to reject 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. The Appeals Committee regarded the decision of October 1996 to appoint Mr M. as the one adversely affecting them. But they disagree: that decision was not final and could not become so for as long as the Vice-President had not signed his contract and had not undergone the medical examination prescribed by Article 9 of the Service Regulations. The complainants assert that they did not become aware that Mr M. had actually taken up his duties until December 1996. Some learned at the 65th Session of the Council, held from 3 to 5 December - when he made his first public appearance as Vice-President - and others found out by reading *Gazette* No. 24/96 of 9 December. So those dates set off the time limits for appeal.

On the merits, they state that the decision to appoint Mr M. as Vice-President in charge of DG3 causes them injury. The terms of the specimen contract allow Vice-Presidents to draw a retirement pension and to benefit from the Organisation's health insurance scheme after a "considerably shorter" qualifying period than that required for other employees. The rates of contribution to the retirement pension and health insurance schemes have so far remained reasonable because the great majority of staff contribute for far longer than the minimum of ten years. By allowing more staff members to join the ranks of those not reaching or only just reaching the ten-year threshold, the Council is in fact making the whole staff bear the cost of a "special benefit" granted to only a few. The Organisation's next actuarial study will take account of the special benefits in reassessing contribution rates. The additional cost generated is "far from negligible" and the fact that each individual will bear only a small part of it does not make the Council's decision lawful. Indeed, the decision could constitute a "dangerous precedent" since more derogations could result in even higher contributions.

Moreover, the Administrative Council's decision is unlawful because it contravenes the principle of equality of treatment in that its sole purpose is to allow Mr M. to benefit from a retirement pension, to which he would not otherwise be entitled. His position does not warrant different treatment of that kind. The Pension Scheme Regulations in fact authorise an employee who has not fulfilled the prescribed qualifying period to draw a pension only in cases of what the complainants call "*force majeure*", for example invalidity. Lastly, they point out that the specimen contract should have been sent to the General Advisory Committee for an opinion in accordance with Article 38(3) of the Service Regulations.

The complainants ask the Tribunal to quash the Administrative Council's decision to appoint Mr M. to the post of Vice-President in charge of DG3 or, failing that, to rule that the additional cost the decision incurs for the retirement pension and health insurance schemes must be borne entirely by the Organisation's budget and not jointly financed by employees' contributions. They also claim moral injury in an amount of 1,000 German marks for every month that the Council refuses to withdraw its decision, and 5,000 marks in costs.

C. In its reply the EPO contends that the complaints are irreceivable. Insofar as they are impugning the establishment of individual employment conditions for Mr M., the complainants are challenging not the latter's contract but the adoption of the specimen contract. The internal appeals filed on 27 February 1997 were time-barred since all staff were informed of the adoption of the specimen contract on 17 June 1996 by Communiqué No. 8 issued by the President of the Office. Furthermore, the complainants should have challenged the specimen contract even though it was a general decision, because they knew it would never be applied to them individually.

Even supposing the complainants are impugning only the decision to appoint Mr M., their appeals are still time-barred. That decision was taken in October 1996 at the Council's 63rd Session, which some of the complainants attended as staff representatives, and was announced to the entire staff in the President's Communiqué No. 9 of 18 October 1996. The statutory three-month time limit was therefore exceeded.

The appointment of Mr M. was not conditional. The President of the Office had already come to an agreement with the chosen candidate and the Council had authorised its Chairman to sign the contract with him. So there was no doubt as to the finalisation of the contract.

The EPO states that the injury alleged by the complainants is "purely hypothetical", so the complaints are irreceivable on that score too.

In subsidiary pleas, the Organisation contends that the decision to set a minimum qualifying period of five years for entitlement to a retirement pension is not in breach of equal treatment because the complainants and Vice-Presidents are in different positions in fact and in law. In view of the relatively short length of Vice-Presidents' contracts, it is logical to reduce the qualifying period. By contesting the distribution among all staff members of the cost of the benefits granted to Vice-Presidents, the complainants are seeking to call into question the principle of solidarity which underpins pension and health insurance schemes. The qualifying period has been shortened only for Vice-Presidents, of whom there are five. So the effect on contributions can only be infinitesimal, particularly as Mr M. is the only Vice-President who is not a permanent employee. The Organisation adds that it is presently recruiting a significant number of young examiners, which is bound to have a positive effect on the financial balance of the above schemes.

The EPO explains that Article 38 of the Service Regulations is immaterial here. Under the terms of the European Patent Convention, the Administrative Council is competent to decide on all matters relating to the conditions of employment of staff. It also has sole competence for the appointment of Vice-Presidents, the President being merely consulted. Consequently, not having the authority to initiate, the President may not refer matters to the General Advisory Committee. Furthermore, in deciding not to apply Article 38 to the specimen contract, the Council was simply implementing the amendment it made to Article 1(5) of the Staff Regulations. Besides, even supposing Article 38 did apply, none of the instances listed in its paragraph 3 would be pertinent in this case.

D. In their rejoinder the complainants point out that the existence and extent of the injury are issues of substance and not of receivability. They argue that they could not have impugned the specimen contract since it was a regulatory measure taken by the Council. Precedent has it that such decisions may be challenged only by way of exception, that is by appealing against an individual decision which causes them injury. Such is the case here.

The principle of solidarity may warrant different treatment, for example, where the difference arises from a staff member's social or family situation, but not where it is based on political considerations. Moreover, the recruitment of more young examiners does not justify causing injury to each individual employee.

E. In its surrejoinder the Organisation asserts that the existence of injury is a prerequisite for receivability. Citing the case law it contends that the complainants have failed to demonstrate that the decision under challenge impaired the rights and safeguards which they consider their status confers on them. It adds that payment of a retirement pension to Vice-Presidents at the end of their five-year contract is no more than a possibility "depending on the choice of those concerned", and that continued membership of the health insurance scheme is contingent on that choice. Thus, the alleged negative consequences for the retirement pension and health insurance schemes will not materialise unless Mr M. leaves his post before completing ten years of service.

CONSIDERATIONS

1. Until 1996 the Vice-Presidents of the European Patent Office were appointed informally by the Administrative Council after consultation of the President of the Office (Article 11 of the European Patent Convention). They used also to be permanent employees. But as the Organisation grew and the duties of Vice-Presidents became "highly political" the EPO decided to recruit them on a contractual basis. Accordingly, at its 62nd Session, held in June 1996, the Council adopted a "specimen contract" for their appointment. It also amended Article 1(5) of the Service Regulations by introducing a new rule whereby the Service Regulations would apply to the Vice-Presidents only insofar as their contract expressly said so. At that session, the Council also appointed Mr M. as Vice-President in charge of DG3 and mandated its Chairman to negotiate the terms of his contract with him.

In October 1996 at its 63rd Session, the Council noted that Mr M. had agreed the terms of his contract with the President of the Office and the Council Chairman, and appointed him for five years as from of 1 December 1996, authorising the Chairman to sign the contract. The appointment was notified to the staff by the President's Communiqué No. 9 of 18 October 1996, and by a Staff Committee information document of 17 October 1996.

Although the written contract has not been produced, it is not disputed that it contains a clause - taken from the specimen contract - allowing Mr M. to acquire the right to a retirement pension after only five years of service, whereas Article 7 of the Pension Scheme Regulations requires a minimum of ten years of service for permanent employees.

At its 65th Session, held in December 1996, the Council adopted "Guidelines" on the recruitment of Vice-Presidents. The staff representatives who attended the session were able to observe that Mr M. was present and had therefore taken up his post.

2. The gist of the complaints is that the clause in the specimen contract entitling new Vice-Presidents to a retirement pension after only five years of service gives them an advantage which the permanent employees will ultimately pay for since they co-finance the pension scheme. The Organisation doubts the likelihood of such additional costs.

There is no need to determine whether the decision to appoint Mr M. has already caused the complainants injury or whether they should, if necessary, claim at some later date that they have suffered material injury.

That issue may remain unresolved since the complaints are in any case irreceivable.

3. For a complaint to be receivable all means of internal appeal must have been exhausted (Article VII(1) of the Statute of the Tribunal). That requirement presupposes that such appeals were timely.

The Appeals Committee of the Council considered that the appeals of 27 February 1997 against the appointment of Mr M. were not introduced within the time limit of three months prescribed by Article 108(2) of the Service Regulations, which starts to run "on the date of publication, display or notification of the act appealed" (Article 108(3) of the Service Regulations). The Committee found that the complainants had been informed of the appointment at the 63rd Session of Council, on 10 and 11 October 1996, or at the latest on 18 October 1996 by the President's Communiqué No. 9. The complainants maintain that they did not become aware that Mr M. had actually taken up office until the 65th Session of the Council, held from 3 to 5 December 1996, which he attended, or until they read the *Gazette* of 9 December 1996. Before then, they say, the appointment of Mr M. was not final, since he had yet to sign the EPO's proposed contract and satisfy the conditions for appointment set in Articles 8 and 9 of the Service Regulations.

When what is challenged is a contract between an organisation and a future employee, the act which may be impugned is the contract as communicated by the organisation, irrespective of the possibilities open to the contracting parties to appeal internally - such as a medical examination still to be undergone (see Judgment 1964, *in re* Liaci in this connection). Legal certainty requires communications from an organisation to be reliable so that all concerned know when the time limit for an appeal starts to run. This is all the more important when the organisation is not bound to reveal the exact content of the contract.

In this instance, after the Council's 62nd Session, the President of the Office issued Communiqué No. 8, which says:

"The Administrative Council has ... designated [Mr M.] ... as the next Vice-President in charge of DG3. I have been mandated to negotiate the terms of his contract with him to allow its approval at the Council session next October ..."

Having reached an agreement on the terms with the President of the Office and Mr M., at the 63rd Session the Chairman of the Council proposed that the Council appoint Mr M. and he sought its permission to sign the contract of employment.

The appointment was notified to all staff by the President's Communiqué No. 9 of 18 October 1996. The Staff Committee's information document of 17 October 1996 confirmed it:

"The Council confirmed the appointment of [Mr M.] ... as Vice-President of DG3, an appointment which it had been proposed, at the June Session, to finalise after he had agreed on the details of his contract (unpublished) with the Chairman of the Council."

The Organisation thus gave official notification that it had reached an agreement with Mr M. on the terms of his contract. Besides, the staff already knew of the specimen contract for the appointment of Vice-Presidents, particularly the clause setting a five-year qualifying period for a retirement pension. They were therefore in a position to act within the time limit.

A third party wishing to file an appeal against this decision of appointment had sufficient basis to do so in full possession of the facts. Since the Organisation had already notified its decision and its agreement with the future Vice-President on his terms of appointment, the signing of the contract and the prior medical examination appeared to be mere formalities. It would have been sheer pedantry to insist that they be completed and the staff so informed before the appointment of the Vice-President was announced. As for the complainants, they could have ascertained that the time limit for appeal had started to run as soon as the staff were informed of the appointment of the new Vice-President.

Since the internal appeals were out of time, the complaints are irreceivable.

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.