

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

R. (No. 9) and H. (No. 6)

v.

EPO

120th Session

Judgment No. 3534

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr L. R. (his ninth) and Mr W. H. H. (his sixth) against the European Patent Organisation (EPO) on 30 July 2011 and corrected on 17 September, the EPO's reply dated 7 December 2011 and the complainants' letter of 25 January 2012 informing the Registrar that they did not wish to file a rejoinder;

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 none of the parties has applied;

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

The two complainants, both of whom were, at the material time, members of the General Advisory Committee (GAC) within the European Patent Office – the EPO's secretariat –, contest the nomination of the Chairman of the GAC for year 2010.

On 10 December 2009 the Administrative Council adopted decision CA/D 22/09, which modified inter alia Article 2 of the Service Regulations for Permanent Employees of the Office by introducing with immediate effect a second paragraph, which read as follows: “[p]ermanent employees and employees on contract referred to in Article 1 may act under the same conditions as members or chairmen

of the bodies defined in paragraph 1 [which include the GAC]. They may also act as experts in these bodies.” Article 1, paragraph 1, of the Implementing Rule for Article 38 of the Service Regulations, which was in force when decision CA/D 22/09 was taken, provided that “[b]efore 15 December each year the President of the Office shall appoint for the following year from among the permanent employees in active service the Chairman of the General Advisory Committee”.

On 14 December 2009 the President of the Office appointed Mr F., a principal director employed on contract, as Chairman of the GAC for 2010. At the same time, the complainants, who were permanent employees, were appointed by the Central Staff Committee as members of the GAC. On 29 January 2010 the complainants, acting in their capacity as members of the GAC, wrote to the President of the Office contesting the nomination of Mr F. They alleged that his nomination was in breach of Article 1 of the Implementing Rule to Article 38 of the Service Regulations. They requested that she “withdr[e]w” Mr F.’s nomination *ab initio* and that she quash all the decisions that were taken in 2010 pursuant to the consultation of the GAC, if Mr F. had participated in the said consultation. They added that, if their requests could not be met, their letters should be considered as internal appeals, in which case they were also claiming moral damages and costs. Mr H. further asked the President to appoint a permanent staff member as Chairman of the GAC. The requests were rejected and the matter referred to the Internal Appeals Committee (IAC).

After hearing the complainants, the IAC issued its opinion on 28 February 2011. The majority of its members recommended that the appeals be rejected as unfounded. It stressed that the Administrative Council had approved the amendment of Article 2 of the Service Regulations to allow contract staff to be appointed as members or chairman of the GAC, and that it was not necessary, in view of the principle of the hierarchy of norms, to amend the Implementing Rule for Article 38 of the Service Regulations too. According to the majority, Articles 1 and 2 of the Implementing Rule for Article 38 of the Service Regulations had to be interpreted in light of the amended version of Article 2(2) of the Service Regulations, which allowed employees on

contract to be nominated as members or Chairman of the GAC. The minority was of the opposite opinion, considering that the Administrative Council did not intend to allow employees on contract to be appointed Chairman of the GAC, given that decision CA/D 22/09, which modified Article 2 of the Service Regulations, explicitly referred to the Implementing Rule for Article 38, according to which the President of the Office appoints the Chairman of the GAC from amongst permanent employees. The minority therefore recommended that the President declare null any consultation of the GAC held when Mr F. was Chairman and set aside any decision taken pursuant to such consultation. It also recommended awarding moral damages to the complainants and costs.

By letters of 6 May 2011 each complainant was informed that the Vice-President of Directorate-General 4, acting by delegation of authority from the President, had decided to endorse the recommendation of the majority of the members of the IAC and consequently to dismiss their appeals as unfounded. That is the decision the complainants impugn before the Tribunal.

They ask the Tribunal to set aside the President's decision of 14 December 2009 to appoint Mr F. as Chairman of the GAC for 2010. They also ask the President to set aside all the decisions taken following consultation of the GAC in a meeting chaired by Mr F. and to submit again the proposals adopted during these meetings to a properly constituted GAC. They further claim moral damages and costs.

The EPO asks the Tribunal to dismiss the complaints as unfounded and to order the complainants to bear their own costs.

CONSIDERATIONS

1. On 14 December 2009 the President of the Office appointed an individual, Mr F., as Chairman of the GAC for the year 2010. At the same time, the complainants were appointed members of the GAC. The complainants challenged the decision appointing the Chairman culminating in an internal appeal to the IAC which, by a majority, recommended that the appeal be dismissed as unfounded. A Vice-President acting on behalf of the President accepted the

recommendation and dismissed the appeal by letters of 6 May 2011. These are the impugned decisions.

As the complaints raise the same issues of fact and law and seek the same redress, it is convenient that they be joined to form the subject of a single judgment.

2. The issue is a confined one. The individual appointed as Chairman was a principal director employed on contract. The complainants argue and the EPO disputes, that the applicable regulatory provisions precluded an employee on contract being appointed to this position.

3. The GAC is constituted under Articles 2 and 38 of the Service Regulations that provided, at the relevant time:

“Article 2

Bodies under the Service Regulations

- (1) There shall be set up within the Office:
[...]
b) joint committees
[...]
which shall perform the functions assigned to them under these Service Regulations.
- (2) Permanent employees and employees on contract referred to in Article 1 may act under the same conditions as members or chairmen of the bodies defined in paragraph 1. They may also act as experts in these bodies.
[...]

and

“Article 38

Joint Committees

- (1) The joint committees shall consist of:
 - a General Advisory Committee,
 - Local Advisory Committees.
- (2) They shall comprise:

- a Chairman who shall be appointed each year by the President of the Office and who shall not vote save on procedural questions;
- members and alternates appointed at the same time in equal numbers by the President of the Office and by the Staff Committee.

These members, the number of whom shall be laid down in the Implementing Rules, shall be selected in such a way as to ensure appropriate representation of the various places of employment and the various departments of the Office.

Only permanent employees at the place of employment concerned may be selected as members of the relevant Local Advisory Committee. The alternate members shall participate only when they replace full members.

[...]"

4. Central to the issue in dispute is Article 1 of the Implementing Rule for Article 38 of the Service Regulations. It provided:

“Article 1

Appointment of Chairmen

- (1) Before 15 December each year the President of the Office shall appoint for the following year from among the permanent employees in active service the Chairman of the General Advisory Committee. In the same way the President shall appoint from among the permanent employees in active service at each place of employment the Chairman of the Local Advisory Committee.

In each alternate year, these appointments shall be made on the recommendation of the Staff Committee.

- (2) If any of the persons so appointed gives up his appointment the President of the Office may appoint a successor for the remaining period. The President of the Office may also appoint a substitute if any of the persons so appointed is unable to perform these duties.”

It can be seen that the aforementioned Article 1 empowered the President to appoint the Chairman of the GAC “from among the permanent employees”. If this provision confined the class from whom the Chairman can be appointed, then the appointment of Mr F. was not authorised by the Implementing Rule as he was a contract employee.

5. However, Article 38(2) of the Service Regulations empowered the President to appoint the Chairman and the power was unconfined as to who might be appointed. While Article 2(2) of the

Service Regulations is not a model of clear drafting, it is tolerably clear that under the Service Regulations both permanent employees and employees on contract referred to in Article 1 could have been either members of, amongst other bodies, the GAC or chairmen of those bodies. Article 1 made clear that the Service Regulations apply to both permanent employees and “principal directors of the Office employed on contract”. Thus the Service Regulations established that a principal director on contract could be a member of the GAC or appointed as Chairman of the GAC.

6. The Implementing Rules were subordinate to the Service Regulations. The relevant provisions of the Service Regulations came into force with effect from 10 December 2009. Insofar as they deal with the same subject-matter, they must be taken to have been intended to supplant the then existing provisions of the Implementing Rules.

7. The appointment of Mr F. as Chairman was lawful. Accordingly the complaints should be dismissed.

DECISION

For the above reasons,
The complaints are dismissed.

In witness of this judgment, adopted on 15 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ