

**R. (No. 18), d. l. T. (No. 24), H. (No. 27),  
P. (No. 11) and S. (No. 11)**

**v.**

**EPO**

**130th Session**

**Judgment No. 4322**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr L. R. (his eighteenth), Mr D. d. l. T. (his twenty-fourth), Mr W. H. H. (his twenty-seventh), Mr R. P. (his eleventh) and Mr D. M. S. (his eleventh) against the European Patent Organisation (EPO) on 29 October 2018, the EPO's reply of 4 March 2019, the complainants' rejoinder of 11 April and the EPO's surrejoinder of 23 July 2019;

Considering Articles II, paragraph 5, and VII 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 complainants contest the appointments of members of the General Advisory Committee (GAC) for 2014.

The complainants are permanent employees of the European Patent Office – the EPO's secretariat. In June 2007 the Administrative Council adopted decision CA/D 24/07, which modified the rules relating to the terms of employment for principal directors recruited on contract. In December 2009 it adopted decision CA/D 22/09 which amended Articles 2, 35 and 38a of the Service Regulations for permanent employees of the Office and the Implementing Rules for Articles 38 and 38a of the Service Regulations to provide in particular that employees on contract, including vice-presidents, may act as members of the

GAC. These two decisions made it possible for principal directors, vice-presidents and other employees on contract to be appointed as members of the GAC.

In December 2013, the President of the Office announced his decision concerning the appointment of GAC members for 2014. The President appointed vice-presidents and members of the Management Committee (MAC) as chairman and members of the GAC. The complainants, acting in their capacity as GAC members appointed by the Staff Committee, requested a review of that decision stating that the appointments of these members were in violation of the applicable rules as these persons were either staff members on contract or members of the MAC, or both. Their requests were rejected and the matter was referred to the Appeals Committee. The complainants asked that the composition of the GAC for 2014 be declared null and void *ab initio*, that they be awarded moral damages for all staff in place at the time and that their costs be reimbursed. They also asked to receive the opinion of the Appeals Committee at the same time as the President.

After having heard the complainants, the Appeals Committee issued its opinion on 27 June 2018. It unanimously recommended that they be awarded moral damages in respect of the violation of their right to legal certainty and the unreasonable length of the appeal proceedings. It recommended rejecting their claim to receive its opinion at the same time as the President. The majority of the members of the Appeals Committee found that the appointment of vice-presidents to the GAC had a sufficient legal basis in the Service Regulations, namely Articles 1(5) and 2(2). It nevertheless held that the changes implemented by decision CA/D 22/09, on their face, did not make it sufficiently clear that vice-presidents could be appointed to the GAC. However, the Administrative Council had unanimously adopted decision CA/D 2/12 on the basis of the changes proposed in the preparatory document which aimed at allowing the appointment of vice-presidents to the GAC. The majority also considered that the complainants had not established that a member of the MAC would not be able to enter into *bona fide* discussions on topics submitted to the GAC. Hence, the argument regarding the alleged incompatibility between the membership of the MAC and the membership of the GAC was unfounded. The majority recommended rejecting the claim that the composition of the GAC be declared null and void *ab initio*, the claim for moral damages and the claim for costs, except for those

who could establish that costs had been incurred. To the contrary, the minority recommended that the complainants' claims concerning the composition of the GAC, moral damages and costs should be granted. In particular, it held that vice-presidents were not independent to give an opinion in the context of consultation within the GAC.

By a letter of 22 August 2018 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 opinion of the majority of the members of the Appeals Committee that the GAC was lawfully composed in 2014. He referred to the reasons given in the opinion. He also endorsed the recommendation to reject the claim for costs. However, he decided to award moral damages for the violation of the right to legal certainty and for undue delay in the internal appeal proceedings, explaining that the excessive length of the proceedings had deprived staff of the possibility to receive a clear interpretation of the rules within an adequate period of time. He added that the amount would be credited to the staff representation as, in accordance with the Tribunal's case law, the complainants were not entitled individually to moral damages insofar as they were acting in their capacity as staff representatives. The complainants impugn that decision before the Tribunal.

The complainants ask the Tribunal to quash *ab initio* the appointments of Messrs M., C., V., T., L, D. and F. and of Ms W., who were chairman, members or alternate members of the GAC in 2014, and to declare that any decisions taken after having consulted the GAC in its irregular composition of 2014 are quashed *ab initio*. They also claim moral damages (not less than 10 euros per staff member of the Office as of 1 January 2014) and costs.

The EPO asks the Tribunal to dismiss the complaints as unfounded. It adds that the complainants were awarded 24,400 euros in compensation for moral damages.

#### CONSIDERATIONS

1. On 13 December 2013, the President of the Office appointed the GAC members for 2014, including staff members who were either employed on contract (mostly vice-presidents) or members of the MAC, or both.

2. The complainants filed individual internal appeals as full or alternate members, appointed by the Staff Committee, of the GAC for the year 2014. They challenged the 2014 composition of the GAC on the basis that vice-presidents and MAC members could not be appointed to the GAC according to the rules in force at the pertinent time.

3. In its opinion dated 27 June 2018, the Appeals Committee unanimously recommended that:

- Each complainant be awarded 2,000 euros in moral damages in respect of the violation of their right to legal certainty;
- Each complainant challenging the appointments to the GAC be awarded 300 euros in moral damages for the unreasonable length of the appeal proceedings; and
- The requests to receive its opinion at the same time as the President be rejected.

The majority of the Appeals Committee recommended:

- That the claims that the composition of the GAC be declared null and void *ab initio*, with all the consequences that the GAC never met in 2014, be rejected as unfounded;
- Reimbursement of reduced costs to the complainants who could establish that costs had been actually incurred by them; and
- Rejecting the appeals for the remainder also as regards the claims for moral damages and costs.

The Appeals Committee's minority opinion recommended that the requests made by the complainants, as set out in points 25(2) to (4) and points 26(1) to (4) of the majority's opinion, be granted. The requests were the following: that the composition of the 2014 GAC be declared null and void *ab initio*, with all the consequences flowing from the accompanying conclusion that the GAC had never met in 2014 – the result of this being that none of the decisions made on the basis of consultation of the 2014 GAC were legitimate; an award of moral damages for all staff in place at the time; and reimbursement of costs.

4. By letters dated 22 August 2018, the Vice-President of Directorate-General 4, acting by delegation of authority from the President, endorsed the majority opinion of the Appeals Committee that the 2014 GAC was lawfully composed, for the reasons contained

in the opinion dated 27 June 2018. He thus rejected the appeals as unfounded insofar as they addressed the composition of the GAC and the claim for costs. However, he endorsed the majority recommendation to reimburse reduced costs for the complainants who would provide proof of the costs actually incurred, and the unanimous recommendation to reject the request to receive the Appeals Committee's opinion at the same time as the President. He also endorsed the unanimous recommendation to award moral damages in the total amount of 24,400 euros for the excessive length of the procedure and the lack of legal certainty. He specified that, as the Tribunal's case law states, individual staff representatives acting in that capacity are not entitled to moral damages; hence, the 24,400 euros would be credited to the staff representation as a whole, that is to say to "the specific budgetary line of the staff committees related to training/duty travel". He rejected the request for moral damages, in line with the majority opinion. That is the impugned decision.

5. The complainants ground their complaints on the following:

- Flaws in the composition of the Appeals Committee;
- Unlawful participation of vice-presidents and/or members of the MAC in the GAC in violation of the relevant Staff Regulations;
- Delivering the Appeals Committee's opinion to the President before forwarding a copy of it to the complainants allows for the possibility that the President could exert pressure on the Committee to change its opinion; and
- The award of moral damages to be paid to the Staff Committee and not to them is unacceptable, illogical, abusive, and contrary to the principle of legal certainty.

6. As the five 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.

7. The Tribunal considers that the present case raises a threshold issue that needs to be resolved: whether the complainants' status as members of the GAC gives them a cause of action to challenge the appointment of other GAC members.

The Tribunal notes that this issue was raised and comprehensively debated before the Appeals Committee. While the Appeals Committee accepted the complainants' arguments, the Tribunal is not satisfied that the Appeals Committee's conclusion was correct.

8. Although the parties did not raise the question before the Tribunal, the Tribunal must, in this case, address the preliminary issue of the complainants' cause of action of its own motion. Indeed, the existence of a cause of action is a necessary precondition for the Tribunal's competence. If a complainant does not allege a violation of rights which the Tribunal is called upon to protect under the terms of its Statute, the Tribunal cannot adjudicate on the complaint. The Tribunal's case law connects this issue to the issue of receivability (see, for example, Judgments 3426, under 16, 3428, under 11, and 3642, under 11).

9. Article II, paragraph 5, of the Tribunal's Statute provides that the Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the staff regulations applicable to them. In accordance with this provision, a member of an advisory body within an international organization, acting in that capacity, may only raise before the Tribunal defects which have affected her/his prerogatives as a member of the body as defined by the internal provisions (see, for example, Judgment 3921, under 6 and 9). The composition of an advisory body does not, except in cases involving manifest perversity, affect the prerogatives of that body. In the present case, the complainants do not specifically allege any non-observance of their terms of appointment or the rules applicable to the GAC. Moreover, the appointment of the Administration's representatives as members of the GAC does not show any manifest perversity. The impugned decision does not have any legal effect on the complainants' status (see Judgments 2952, under 3, and 3198, under 13).

10. In light of the above, the complaints are irreceivable in their entirety and must be dismissed.

DECISION

For the above reasons,  
The complaints are dismissed.

In witness of this judgment, adopted on 16 July 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ