108th Session **Judgment No. 2875**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr W. H. H. against the European Patent Organisation (EPO) on 25 January 2008, the EPO's reply of 21 May, the complainant's rejoinder of 31 July and the Organisation's surrejoinder of 17 November 2008;

Considering the complaint filed by Mr D.M. S. against the EPO on 24 January 2008, the EPO's reply of 27 May, the complainant's rejoinder of 8 August and the Organisation's surrejoinder of 17 November 2008;

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

Having examined the written submissions;

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

A. The complainants are permanent employees of the European Patent Office – the EPO's secretariat.

By decision CA/D 2/06 of 26 October 2006 the Administrative Council adopted a new specimen contract concerning the appointment and terms of employment of Vice-Presidents of the European Patent Office. On 8 and 14 December 2006 Mr H. and Mr S. respectively, acting in their capacity as members of the General Advisory

Committee (GAC), each wrote to the President of the Office and to the Chairman of the Administrative Council requesting the quashing of decision CA/D 2/06 and moral damages for every staff member who worked under a Vice-President holding a contract similar to that adopted through the decision. They indicated that if their requests could not be granted they should be treated as internal appeals.

By a letter of 15 March 2007 the Secretary of the Appeals Committee of the Administrative Council informed Mr S. that, as his appeal could not be given a favourable reply, it had been referred to the Appeals Committee. The same was done for Mr H.' appeal. In its opinion of 27 September 2007 the Committee noted inter alia that decision CA/D 2/06 did affect part of the staff and that, in accordance with Article 38(3) of the Service Regulations for Permanent Employees of the European Patent Office, the GAC should have been consulted. It therefore recommended that the necessary steps be taken in order to submit the new specimen contract for Vice-Presidents to the GAC for revision or clarification but that the request for moral damages be rejected.

By letters of 31 October 2007 the Chairman of the Administrative Council informed the complainants that the Council had decided to dismiss their appeals in their entirety. He explained that the latter had endorsed the Office's oral legal advice, which would be set out in detail in the minutes of its 111th meeting to be published in due course. These are the impugned decisions.

The draft minutes of the Council's 111th meeting were communicated to staff on 23 November 2007. By letters of 17 December 2007 the relevant extract of the minutes was provided to the complainants. It was stated therein that the Office had explained that the procedure before the Appeals Committee was flawed since there had been no hearings in the presence of both parties, and that it was confident that it was under no obligation to consult the GAC with regard to a decision relating to the appointment of Vice-Presidents. The Office had also referred to Judgment 2036, in which the Tribunal held that it would appear unusual to impose consultation

of an internal joint body, such as the GAC, before the adoption of guidelines on such appointments.

B. The complainants contend that the impugned decisions are flawed as the Chairman of the Administrative Council gave no reasons in the letters of 31 October 2007 justifying the Council's decision to depart from the Appeals Committee's recommendation. They argue that Judgment 2036, to which the Administrative Council referred in the minutes of its 111th meeting in order to justify the rejection of their appeals, is not relevant to the present case, because the new specimen contract has far wider implications for the staff as a whole than the Guidelines for the recruitment procedure for Vice-Presidents of the European Patent Office, at issue in that judgment.

The complainants also contend that decision CA/D 2/06 is procedurally flawed insofar as it was not adopted following the established consultation procedure. Article 38(3) of the Service Regulations provides that the GAC shall give a reasoned opinion on any proposal which concerns the whole or part of the staff to whom the Service Regulations apply or the recipients of pensions. Since decision CA/D 2/06 modified the relations between the Administrative Council and the Vice-Presidents and, consequently, between the Vice-Presidents and their staff members, the GAC should have been consulted. They submit that all staff members are affected by decision CA/D 2/06 because the maximum rate of the pension of Vice-Presidents is thereby raised to 80 per cent. That increase being charged to the pension scheme budget, the remaining staff members who contribute to the pension scheme will bear the extra costs. They further submit that the introduction of the new specimen contract adversely affects the career prospects of Principal Directors: whereas they were previously allowed to accept a position as Vice-President whilst keeping their permanent position in the Office, pursuant to decision CA/D 2/06 they will have to resign before accepting a position as Vice-President. They add that, following the introduction of decision CA/D 2/06, the Vice-Presidents' rights will be reduced given that the Administrative Council is authorised to negotiate with any serving

Vice-President the modification of his or her permanent contract into a new specimen contract of a limited duration.

The complainants request that the Tribunal set aside the impugned decisions and the "Vice-Presidents' contract". They also seek moral damages in the amount of ten euros "per working day per affected member of staff" as well as costs in the amount of 1,000 euros each.

C. In its replies the EPO denies that the impugned decisions were flawed. It contends that since the appeal proceedings were flawed the Appeals Committee's recommendation had to be rejected. It explains that, in violation of the principle of due process and natural justice, the hearings were not adversarial. It asserts that the complainants were given reasons for the Administrative Council's decision not to endorse the Committee's recommendation. Indeed, in the impugned decisions of 31 October 2007 the Chairman of the Council indicated that the minutes of the Council's 111th meeting would contain full details of its decision and, under cover of the letters dated 17 December 2007, he provided the complainants with the relevant extract of the minutes, which included details of the discussions that had led to the impugned decisions.

The defendant submits that the Administrative Council was under no obligation to consult the GAC before adopting decision CA/D 2/06. In its view, Article 38(3) of the Service Regulations is not applicable, given that decision CA/D 2/06 does not concern the whole or part of the staff to whom the Service Regulations apply. It explains that the introduction of the new specimen contract for Vice-Presidents concerns only a very limited number of staff members, i.e. five staff members out of the 6,500 currently employed by the Organisation. It also rejects the argument that the modifications brought to the Vice-Presidents' pension entitlements following decision CA/D 2/06 will have consequences for the entire staff. It asserts that the increase in the maximum rate of pension of Vice-Presidents does not constitute an amendment to the Pension Scheme Regulations of the European

Patent Office warranting the consultation of the GAC. In fact, it is an exceptional measure and cannot therefore be considered as overburdening all the members of the pension scheme. It adds that the Tribunal ruled, in Judgment 2036, that the Administrative Council enjoys a wide measure of latitude with regard to the appointment of Vice-Presidents given the relatively "political" nature of these appointments and that, consequently, it was not necessary to satisfy the requirements of Article 38(3). The Organisation considers that Judgment 2036 is relevant to the present case as decision CA/D 2/06 likewise concerns the terms of appointment of Vice-Presidents. It observes that the decision did not alter the balance of power between the Administrative Council and the President of the Office.

Concerning the requests for relief, the EPO contends that the complainants have produced no evidence of any injury justifying an award of moral damages. It points out that, according to the case law, the mere fact that a decision is flawed does not suffice to warrant an award of compensation. It adds that the complainants are entitled to time off for their work as staff representatives and considers that they should therefore bear their costs.

D. In their rejoinders the complainants argue that the fact that the internal appeal proceedings were flawed for lack of adversarial hearings did not deprive the Appeals Committee of essential information. In any event, according to the Rules of Procedure of the Appeals Committee of the Administrative Council in force as from 1 January 2007, there is no requirement for adversarial hearings. Contrary to the defendant's view, they consider that the minutes of the 111th meeting of the Administrative Council did not contain sufficient reasons for rejecting their appeals.

E. In its surrejoinders the EPO maintains its position concerning the requirement for adversarial hearings. It points out that the Office did not have the opportunity to provide its comments on a written opinion submitted by the complainants at the hearings as it was not present.

CONSIDERATIONS

1. The complainants impugn the Administrative Council's decisions of 31 October 2007 to dismiss their appeals. Since the two complaints are directed against decisions which are identical in terms of content and they seek the same redress, they are joined to form the subject of a single ruling.

2. After reviewing the complainants' appeals, the Appeals Committee recommended in its opinion of 27 September 2007 that the specimen contract concerning the appointment and terms of employment of Vice-Presidents be submitted to the GAC for revision or clarification, but rejected the request for moral damages as unfounded. The Chairman of the Administrative Council notified the complainants by letters of 31 October 2007 that the Council had decided to reject the recommendations of the Appeals Committee and to dismiss the appeals in their entirety.

3. Having examined the written submissions, the Tribunal disallows the complainants' application for hearings as their complaints raise only questions of law.

4. The two main questions to be addressed are, first, whether the impugned decisions were sufficiently motivated, and, second, whether the decision to adopt a new specimen contract without prior consultation with the GAC was correct.

5. The Tribunal is of the opinion that the impugned decisions are sufficiently motivated by the express references to the minutes of the Council's 111th meeting. These minutes state, inter alia, that contrary to the opinion of the Appeals Committee, the principle affirmed in Judgment 2036 also applies in the present case. In that judgment the Tribunal held that the Guidelines for the recruitment procedure for Vice-Presidents should be adopted without prior consultation with the GAC. It also held that Article 11 of the European Patent Convention reflected its 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".

In the minutes of the Council's 111th meeting it is reported:

> "The chairman stated that it was the first time that the Office recommended not to follow the recommendations of its Appeals Committee, based on clear [Tribunal case law]."

It is also reported:

> "Following oral legal advice given by the Office, the Council, contrary to the recommendation of its Appeals Committee, unanimously decided to reject [the complainants'] appeals […] in their entirety […]."

6. So far as concerns the second question, Article 38(3) of the Service Regulations relevantly provides that the GAC shall be responsible "for giving a reasoned opinion on […] any proposal to amend […] the Pension Scheme Regulations" or "any proposal which concerns the whole or part of the staff to whom [the] Service Regulations apply or the recipients of pensions". In Judgment 2036 the Tribunal held that that provision did not apply to the Guidelines for the recruitment procedure for Vice-Presidents adopted by the Administrative Council.

7. In reaching its decision, the Tribunal referred to Article 1(5) of the Service Regulations, entitled "Field of Application", which relevantly provides:

> "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 Tribunal also noted in Judgment 2036 that 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." (Emphasis added.) However, it proceeded on the basis that Article 1(5) operated to create a

"presumption that the Regulations do not apply to the President and Vice-Presidents" but allowed that a reference in the Guidelines to a specific provision of the Service Regulations pertaining to the staff as a whole could bring the appointment of Vice-Presidents "within the scope of Article 38". In the result, it held that because it was plain from the operative articles of the Guidelines that the Administrative Council had chosen to apply a "procedure specific to Vice-Presidents" the presumption created by Article 1(5) of the Service Regulations was not reversed.

8. The present case is concerned with the adoption of a specimen contract that is specific to Vice-Presidents. The specimen contract identifies the particular Staff Regulations that shall apply to Vice-Presidents and, clearly, to the extent of those provisions, a future proposal for an amendment in their application to Vice-Presidents would, in the terms of Article 38(3), be "any proposal which concerns […] part of the staff to whom [the] Service Regulations apply". However, the identification of Service Regulations applicable specifically to Vice-Presidents is merely part of the exercise of drawing up contracts specific to Vice-Presidents and is, thus, no different from the formulation of a recruitment procedure specific to them.

9. The complainants argue that the terms of the specimen contract "concern" Principal Directors and other staff members in that, if elected Vice-Presidents, they have to accept that their previous functions have ended definitively and that there is "no entitlement to compensation or reinstatement at any time". The practical effect of this may well be to curtail the career opportunities of Principal Directors and other permanent staff. To some extent the Guidelines considered in Judgment 2036 similarly "concerned" Principal Directors and other permanent staff who might become Vice-Presidents in that they directed consideration of age and geographic spread. However, that was not enough to engage Article 38(3) of the Service Regulations. Nor, in this case, is the provision requiring definitive termination of previous functions. The expression "concerns

[…] staff to whom [the] Service Regulations apply" in Article 38(3) imports the notion that it concerns them in their capacity as staff to whom the Service Regulations apply. For so long as they remain Principal Directors or staff to whom the Service Regulations apply, the Regulations continue to apply in exactly the same way as before. The impact of the specimen contract only occurs if and when they become Vice-Presidents and, at that point, by virtue of Article 1(5) they cease to be staff to whom the Service Regulations apply save to the extent that that is expressly provided in their contracts.

10. It follows that the provision in the specimen contract relating to definitive termination of previous functions within the European Patent Organisation is not one that engages Article 38(3). The same is true of the provisions defining the relationship between Vice-Presidents and the Administrative Council. However, different considerations apply with respect to the provision relating to the pension payable to a Vice-President who previously performed functions within the Office. That provision relevantly provides:

> "If [the new Vice-President] is performing or has performed other functions within the European Patent Office at the time or prior to the present appointment, the provisions of the Pension Scheme Regulations shall apply. The maximum rate of the pension provided for under Article 10(2) of the Pension Scheme Regulations shall be raised to 80%."

An annex to the specimen contract provides:

> "The cost of providing pension cover for the Vice-President shall be borne in full by the Organisation […] except in the case of staff belonging to the Office's pension scheme […]."

Article 10(2) of the Pension Scheme Regulations provides, subject to an exception that is not presently relevant, that the maximum pension shall be 70 per cent of the salary paid in the last grade and step held for at least one year before retirement. Contrary to the Organisation's argument, the raising of the maximum rate to 80 per cent for a Vice-President effectively amends or proposes an amendment to the Pension Scheme Regulations. There is nothing in Article 1(5) of the Service Regulations which refers only to the Service Regulations and which would exclude the operation of Article 38(3) in relation to the Pension Scheme Regulations. Article 38(3) applies according to its express

terms. Its operation cannot be curtailed by a provision in the specimen contract stating that it does not apply. Nor is it relevant, as the Organisation contends, that the impact of this amendment is minimal. It follows that, to the extent that the specimen contract introduced provisions with respect to the pensions of Vice-Presidents who previously served in the European Patent Office, it should have been referred to the GAC. To the same extent, the Administrative Council erred in dismissing the complainants' appeals.

11. The Tribunal will not consider the claims relating to irregularities in the proceedings before the Appeals Committee. So far as concerns the arguments of the EPO, they would not lead to a different result. So far as concerns the complainants, their claims are effectively subsumed in the more serious procedural irregularities that occurred before the Administrative Council and that are dealt with in Judgment 2876, also delivered this day. The complainants are entitled to moral damages in respect of those irregularities.

12. The impugned decisions of 31 October 2007 to reject the recommendations of the Appeals Committee and to dismiss the appeals in their entirety, and the Council's earlier decision of 26 October 2006 to adopt a new specimen contract concerning the appointment and terms of employment of Vice-Presidents of the European Patent Office without prior consultation of the GAC will be set aside to the extent that the specimen contract introduced provisions with respect to the pensions of Vice-Presidents who previously served in the Office.

13. The Tribunal takes into account the irregularities in the proceedings before the Administrative Council, as set out in Judgment 2876, in the award of moral damages, which it sets collectively at 1,000 euros.

14. As they succeed in part, the complainants are entitled to costs, which the Tribunal sets at 400 euros each.

DECISION

For the above reasons,

1. The impugned decisions and the earlier decision CA/D 2/06 of 26 October 2006 to adopt a new specimen contract concerning the appointment and terms of employment of Vice-Presidents of the European Patent Office without prior consultation of the General Advisory Committee are set aside to the extent that the specimen contract introduced provisions with respect to the pensions of Vice-Presidents who previously served in the Office.

2. The EPO shall pay the complainants collectively 1,000 euros in moral damages.

3. It shall pay them costs in the amount of 400 euros each.

4. All other claims are dismissed.

In witness of this judgment, adopted on 5 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet