108th Session **Judgment No. 2876**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Messrs L. G. (his third), J. A. S. (his fifth), G. D., B. H., M. K., L. P. (his third) and L. R. (his second) against the European Patent Organisation (EPO) on 19 January 2008 and corrected on 18 February, the EPO's reply of 6 June, the complainants' rejoinder of 24 June and the Organisation's surrejoinder of 20 October 2008;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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. At the material time, Mr G. was Chairman of the local Staff Committee in The Hague, Mr A. S. was Vice-Chairman, and the other complainants were members of that Committee.

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 13 December 2006 the complainants, acting in their capacity as staff representatives, lodged an appeal with the Chairman of the Administrative Council. They contended that decision CA/D 2/06 was incompatible with Article 10(3) of the European Patent Convention, that it jeopardised the independence of the Vice-Presidents in general, that it was incompatible with the independence of the Vice-President of Directorate-General 3 (DG3) in particular, and that it was procedurally flawed in that the General Advisory Committee (GAC) had not been consulted prior to its adoption, in breach of Article 38(3) of the Service Regulations for Permanent Employees of the European Patent Office. Article 38(3) relevantly 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". The complainants sought the quashing of decision CA/D 2/06, moral damages in the amount of one euro per staff member represented and costs. A few days later, an identical appeal was filed by the Central Staff Committee (see Judgment 2877, also delivered this day). On 16 February 2007 the President of the Office submitted an opinion to the Council, under Article 18(1) of the Administrative Council's Rules of Procedure, recommending that the appeals be dismissed.

By a letter of 15 March 2007 the Secretary of the Appeals Committee of the Administrative Council informed the complainants that their appeal could not be given a favourable reply and that it had therefore been referred to the Appeals Committee. On 19 July 2007 the President of the Office submitted a document to the Appeals Committee containing clarifications that the Committee had requested pursuant to Article 113(2) of the Service Regulations on five issues raised by the appeal. In that document the President again recommended that the complainants' appeal as well as that filed by the Central Staff Committee against decision CA/D 2/06 be dismissed. In its opinion of 27 September 2007 the Appeals Committee observed 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, 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. It also recommended that the complainants be reimbursed their costs insofar as these were reasonable but that their request for moral damages be rejected.

By a letter of 31 October 2007 the Chairman of the Administrative Council informed the complainants that the Council had decided to dismiss their appeal in its 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. That is the decision impugned.

The draft minutes of the Council's 111th meeting were communicated to staff on 23 November 2007. By a letter 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 decision is flawed on the grounds that the Administrative Council has not provided adequate reasons for rejecting the unanimous recommendation of the Appeals Committee. In their view, Judgment 2036, to which the Administrative Council referred in the minutes of its 111th meeting in order to justify the rejection of their appeal, concerned a case that was different to the present case. Indeed, in Judgment 2036 the Tribunal ruled that statutory consultation was not compulsory but this concerned the process of appointment of Vice-Presidents and the appointment itself. In the present case, the Tribunal is asked to decide whether the Administrative Council should be afforded the same

degree of latitude in determining the Vice-Presidents' working conditions and in appraising their performance.

The complainants also contend that the impugned decision was taken in breach of due process. The President of the Office advised the Administrative Council not to endorse the recommendation of the Appeals Committee although neither the European Patent Convention nor the Rules of Procedure of the Appeals Committee provide for such possibility. Moreover, they were not given the opportunity to comment on the President's advice. They argue that the Administrative Council committed a mistake of law since one of the grounds on which it relied in dismissing their appeal was that the internal appeal proceedings were flawed. Given that they were not responsible for the Appeals Committee's failure to conduct adversarial hearings, this was not a valid basis on which to dismiss their appeal.

According to the complainants, the Administrative Council acted beyond its authority in adopting decision CA/D 2/06, as it extended its prerogatives beyond the scope determined in the European Patent Convention. According to Article 10(3) of the Convention, Vice-Presidents are primarily accountable to the President but, following decision CA/D 2/06, Vice-Presidents will be highly dependent on the Administrative Council, which is not in the interest of the Organisation. In the complainants' view, decision CA/D 2/06 has introduced a high level of job insecurity for Vice-Presidents. Whereas previously they were given five-year renewable contracts, now they are only entitled to five-year non-renewable contracts. At the end of their appointment they will have to participate in an open competition for a vacancy in order to remain in employment. Furthermore, since the Council shall be involved in the appraisal of their performance, they might be tempted to "accept unrealistic objectives, promise lucrative co-operation projects and/or certain posts to certain nationalities in exchange for a favourable [appraisal] report" since a negative appraisal could lead to their dismissal.

They also allege that decision CA/D 2/06 is procedurally flawed insofar as it was not adopted following the established consultation procedure provided for in Article 38(3) of the Service Regulations. In

their view, since decision CA/D 2/06 substantially modifies certain provisions of the Service Regulations, the GAC should have been consulted.

The complainants request that the Tribunal quash "the decision" of the Administrative Council *ab initio* and that it order the full and unconditional implementation of the unanimous recommendation of the Appeals Committee. They claim interest at 8 per cent per annum on the amount to be granted in damages on the basis of that recommendation. They also seek moral damages in the amount of one euro per staff member represented, as well as punitive damages and costs.

C. In its reply the EPO expresses the view that the Tribunal is not competent to annul legislative acts or general rules, such as decision CA/D 2/06, though it may be led to examine such acts when an individual decision is challenged. It adds that the complainants' claim for punitive damages is irreceivable for failure to exhaust internal remedies.

The Organisation denies that the impugned decision was flawed. 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 decision 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 a letter 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 decision. The EPO adds that, since the internal 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.

The defendant rejects the allegation of breach of due process explaining that, in accordance with Article 18(1) of the Rules of Procedure of the Administrative Council, the President of the Office shall draft an opinion for the Council when an appeal is filed against a

decision taken by that body. On that basis the President recommended that the Council reject the complainants' appeal as well as that filed by the Central Staff Committee against decision CA/D 2/06 and that it refer them to the Appeals Committee for an opinion.

According to the EPO, the modification introduced by decision CA/D 2/06 concerning the performance appraisal of Vice-Presidents and their remuneration did not alter the balance of power between the Administrative Council and the President of the Office. The complainants' argument that the GAC should have been consulted on the grounds that decision CA/D 2/06 modified the established balance of power must therefore be rejected.

The defendant also takes the view that 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. Moreover, the Service Regulations are applicable to Vice-Presidents only to the extent stipulated in their contracts of employment, and these contracts contain no reference to Article 38(3). The Organisation 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). It 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.

The EPO denies that the introduction of the new specimen contract may jeopardise the independence of Vice-Presidents or create job insecurity. In its view, the fact that a staff member, such as a Principal Director, has to resign before being appointed Vice-President is not prejudicial to his or her career development given that such function will usually be his or her last employment. Most international organisations have introduced similar limitations for their most senior

positions. Moreover, the new specimen contract refers to Article 14 of the Service Regulations, which provides that a staff member shall carry out his duties and conduct himself solely with the interests of the Organisation in mind.

Concerning the requests for relief, the EPO contends that the complainants have produced no evidence of any injury justifying an award of moral or punitive 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. With regard to the claim put forward for implementation of the Appeals Committee's recommendation, it stresses that the recommendation to refer the matter to the GAC was vague and contrary to Article 38(3) of the Service Regulations. Concerning the claim for costs, it indicates that the complainants are entitled to time off for their work as staff representatives and that they should therefore not be awarded costs.

D. In their rejoinder the complainants assert that the fact that the internal appeal proceedings were flawed for lack of adversarial hearings has no bearing on the present case, which concerns the conformity of the impugned decision with the European Patent Convention and the EPO rules and regulations. They indicate that they could not have asked for punitive damages in their internal appeal because the prejudice for which they claim these damages occurred during the internal appeal proceedings. They deny that the Appeals Committee's recommendation was vague. Regarding their claim for costs, they submit that, according to the Tribunal's case law, they are entitled to compensation for their time and trouble.

E. In its surrejoinder the EPO maintains its position. It acknowledges that the complainants put forward a claim for moral damages in their internal appeal "for the gross abuse of authority displayed by the Council", and therefore agrees that the claim for punitive damages in compensation for the alleged abuse of authority before the Tribunal is receivable. It reiterates that the President of the Office was entitled to comment on the opinion issued by the Appeals Committee. Indeed, Article 10(2)(c) of the European Patent

Convention provides that the President shall have the power to submit to the Administrative Council any proposal for decisions which come within the competence of the Council. It asks the Tribunal to order that the complainants bear their costs.

CONSIDERATIONS

1. 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.

2. On 13 December 2006 the complainants, in their respective capacities as staff representatives, lodged an internal appeal against decision CA/D 2/06. They contended that the new specimen contract was incompatible with Article 10(3) of the European Patent Convention, with the independence of high-level civil servants as well as of the Vice-President of DG3, and that the decision had been taken without the required statutory consultation.

3. On 16 February 2007, pursuant to Article 18(1) of the Rules of Procedure of the Administrative Council, the President of the Office submitted an opinion to the Council in which he recommended that the complainants' appeal be dismissed.

4. By a letter of 15 March 2007 the Secretary of the Appeals Committee of the Administrative Council informed the complainants that their appeal had been referred to the Appeals Committee for an opinion.

5. On 21 May 2007 the Appeals Committee advised the complainants that it would continue its deliberation of their appeal at its meeting on 16 and 17 July 2007 and that, subject to their consent, the appeal would be, for procedural purposes, consolidated with that filed by members of the Central Staff Committee also against decision CA/D 2/06. It held a hearing on 17 July 2007.

6. On 19 July 2007 the President of the Office submitted a document to the Appeals Committee containing clarifications that the Committee had requested pursuant to Article 113(2) of the Service Regulations on five issues raised by the appeal. In that document, the President again recommended that the complainants' appeal be dismissed.

7. On 27 September 2007 the Appeals Committee issued its opinion, in which it recommended that the specimen contract be submitted to the GAC for revision or clarification. It also recommended that the complainants be reimbursed their costs insofar as these were reasonable but that their request for moral damages be rejected as unfounded.

8. At its 111th meeting held from 23 to 25 October 2007, the Administrative Council dismissed the appeal in its entirety. In the letter of 31 October 2007, by which he informed the complainants that the appeal had been dismissed, the Chairman of the Council explained that the Council had endorsed the Office's oral legal advice and that this would be set out in detail in the minutes of its 111th meeting to be published in due course. The complainants impugn that decision before the Tribunal by filing separate complaints but submitting a common brief. These complaints raising the same issues of fact and law and seeking the same redress are therefore joined.

9. The minutes of the Administrative Council's 111th meeting indicate that the Office had explained that general legal principles had been violated in the procedure before the Appeals Committee. In particular, there had been no hearings in the presence of both sides. Further, the Office had cited Judgment 2036, in which the Tribunal had observed that, not only in relation to the appointment of the President, but also in relation to the appointment of Vice-Presidents, and having regard to the relatively "political" nature of such decisions, the imposition of consultation of an internal joint body, such as the GAC, before the adoption of guidelines on such appointments would appear

to be unusual. According to the Office, it was up to the President to consult the GAC.

10. The minutes also set out the observation by the Chairman of the Administrative Council that this was the first time the Office had recommended not to follow the recommendation of the Appeals Committee "based on clear [Tribunal] jurisprudence". He also observed that the "Office was sure that the risk of losing the appeals before the [Tribunal] was very low". Following the observations made by three delegations, the Chairman "summarized that the Council had decided not to go back on its previous decision on the Vice-Presidents' contracts and had decided to follow the Office's position". Staff representatives at the meeting commented on Judgment 2036 and warned that a rejection of the Appeals Committee's recommendation would add to the uncertainty as the GAC would have resolved the problems more quickly than proceedings before the Tribunal. The minutes conclude thus:

> "Following oral legal advice given by the Office, the Council, contrary to the recommendation of its Appeals Committee, unanimously decided to reject [the complainants' appeal and that filed by the Central Staff Committee against decision CA/D 2/06] in their entirety […]."

11. The complainants contend that the Administrative Council's decision is tainted by procedural and substantive errors. First, there is no provision in the European Patent Convention or the Rules of Procedure of the Appeals Committee permitting an opinion from the President or a submission in response to the Appeals Committee's opinion. Even if such a possibility were to be implied, natural justice dictates that they should have been afforded an opportunity to reply. In the complainants' opinion the Administrative Council's decision was taken in breach of due process.

12. Second, they contend that the Council erred in law in rejecting their appeal on account of a procedural error on the part of the Appeals Committee and that it also erred in concluding that Judgment 2036 was determinative of the outcome of the appeal.

13. The complainants also argue that the specimen contract for Vice-Presidents introduced by decision CA/D 2/06 is incompatible with the provision of Article 10(3) of the European Patent Convention, with the independence of high-level civil servants and of the Vice-President of DG3.

14. The Organisation relies on Article 18(1) of the Rules of Procedure of the Administrative Council. It notes that it was on the basis of this provision that the President submitted the initial opinion to the Council. Moreover, Article 10(2)(c) of the European Patent Convention provides that the President shall have in particular the power to "place before the Administrative Council any proposal for […] decisions which come within the competence of the Administrative Council". Therefore, the President was also entitled to state her views on the opinion issued by the Appeals Committee. The Organisation points out that the Administrative Council was under no obligation to accept the President's suggestion. As well, the minutes of the Council's 111th meeting show that a staff representative attended the meeting and commented on Judgment 2036, but did not comment on the Organisation's observations concerning the absence of adversarial hearings.

15. Before considering the positions advanced by the parties, it is useful to set out a general overview of the appeal process applicable to appeals against decisions of the Administrative Council.

16. Article 108(1) of the Service Regulations provides for the lodging of an internal appeal with the appointing authority which gave the decision appealed against, in the present case the Administrative Council. Under Article 109(1) of the Service Regulations, if the Council is unable to give a favourable reply to the internal appeal, an Appeals Committee is convened to deliver an opinion on the matter, and the appointing authority "shall take a decision having regard to this opinion".

17. The Rules of Procedure of the Administrative Council contain specific provisions concerning internal appeals against Council

decisions. In particular, under Article 18(1) and (2) of the Rules, the President is required to draft for the Council an opinion regarding the appeal. As well, the Council must decide whether and by whom it is to be represented before the Appeals Committee.

18. In addition, Article 113(1) to (4) of the Service Regulations provides that the papers submitted to the Appeals Committee must include all the material necessary to investigate the case and that this material must be submitted to the appellant. If required, the Committee is authorised to carry out an additional investigation and in doing so may receive oral or written evidence. The appellant has the right to be heard and may be assisted or represented by another person. He or she must also be informed of any document or new factor produced during the investigation and, if it is provided subsequent to being heard, the appellant may ask to be heard again or to give a written reply.

19. As noted above, the Organisation relies on Article 18(1) of the Administrative Council's Rules of Procedure and Article 10(2)(c) of the European Patent Convention in support of the assertion that the President was entitled to express her views on the opinion issued by the Committee. The Tribunal rejects these submissions. Article 18(1) concerns and is limited to an opinion on the merits of the appeal that is provided to the Council at the first stage of the internal appeal process. It does not necessarily follow nor can it be inferred from Article 18(1) that the President is entitled to offer a legal opinion on the merits of the Committee's opinion.

20. The Service Regulations establish a specific procedure for internal appeals. Once the Appeals Committee has delivered its reasoned opinion and that opinion has been transmitted to the Administrative Council, as provided for in Article 112, the procedure requires the Council to take a decision having regard to the Appeals Committee's opinion. The procedure set out in the Service Regulations does not include the receipt of a further opinion from the President prior to a decision being taken. Allowing the President to offer an

opinion at this point in the appeal process is procedurally unfair. This procedural unfairness is not remedied by the fact that in the instant case a staff representative did express a cautionary note regarding the potential result of accepting the President's advice. This cannot be equated with a meaningful opportunity to be heard. The staff representative who attended the Council's 111th meeting did so as an observer and could not have anticipated being given an opportunity to comment on the merits of the Appeals Committee's opinion or to address the President's assertion that the Appeals Committee's process was procedurally flawed.

21. To accept the Organisation's argument would also lead to an absurd result. Throughout the internal appeal process the Office took a position on the substance of the appeal adverse to that advanced by the complainants. In effect, it would permit the President to opine on the merits of an opinion prepared by a body, whose task was to consider the merits of the position advanced by the Office. If, as the Organisation contends, the complainants had an opportunity to reply, it would mean that the President and the complainants would reargue the merits of their respective positions before the Administrative Council.

22. The Tribunal also finds that Article 10(2)(c) of the European Patent Convention does not support the Organisation's argument. This provision permits the President of the Office to submit proposals to the Administrative Council. As a proposal and a legal opinion are substantively different it has no application in the present circumstances.

23. In addition to the procedural unfairness arising from having permitted the President to intervene, by accepting the advice of the President, the Administrative Council failed to have regard to the Committee's opinion in reaching its decision, as required by Article 109(1) of the Service Regulations.

24. Turning now to the substance of the decision, the Administrative Council rejected the appeal on two grounds. First,

the opinion of the Committee was based on a procedurally flawed process. Second, the Council grounded its decision on the Tribunal's conclusion in Judgment 2036 that consultation with the GAC was not required.

25. On the first ground, it is not necessary to consider the claims relating to the irregularity of the proceedings before the Appeals Committee. So far as concerns the argument of the EPO, it would not lead to a different result. As far as the complainants are concerned, their claims are effectively subsumed in the procedural irregularities before the Administrative Council.

26. On the second ground, 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.

27. In Judgment 2875, also delivered this day, and which raises the same issue in substance as the present case, the Tribunal held 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. Although the complainants in this case have not based their arguments on the Pension Scheme Regulations, the rulings in considerations 6 to 10 of that judgment are equally applicable to their complaints.

28. The complainants also argue that the specimen contract is incompatible with the provisions of Article 10(3) of the European Patent Convention, with the independence of high-level civil servants and of the Vice-President of DG3. These arguments are based on the provisions of the specimen contract which subject the Vice-Presidents

to an annual performance appraisal by the Administrative Council and open competition for their posts after five years. So far as concerns the first argument, Article 10(3) provides that the Vice-Presidents shall assist the President. According to the argument, Article 10(3) implies that Vice-Presidents are primarily accountable to the President. Neither the contractual provision with respect to annual performance appraisals, nor that with respect to their term of office alters that position. It may be accepted that these provisions will alter the powers previously exercised, respectively, by the President and the Administrative Council, but there is nothing in the Convention that either expressly or impliedly directs that those powers must remain unchanged. Accordingly, there is no incompatibility between the specimen contracts and the European Patent Convention.

29. The argument with respect to the independence of the Vice-Presidents is founded on the proposition that "the high level of job insecurity" that results from the specimen contract "could tempt the [Vice-Presidents] to accept unrealistic objectives, promise lucrative co-operation projects and/or certain posts to certain nationalities". This is pure speculation and provides no basis for a finding that the independence of the Vice-Presidents will be compromised.

30. The argument with respect to the independence of the Vice-President of DG3 is based on the fact that he is also the Chairman of the Enlarged Board of Appeal. The complainants point out that the Chairman of the Enlarged Board of Appeal is nominated for a period of five years and can only be removed by a proposal from the Board and on limited grounds. They contend that problems could arise if the Vice-President's contract was terminated before the expiry of his five-year term. Clearly that is so, but that does not establish that the specimen contract compromises the independence of the Vice-President of DG3 either in relation to his management of DG3 or in the discharge of his duties as Chairman of the Enlarged Board of Appeal.

31. The complainants also submit that the Administrative Council did not provide reasoned grounds for deviating from the

recommendations of the Appeals Committee; however, as they did not elaborate further, the plea will not be considered.

32. The complainants are entitled collectively to an award of moral damages in the amount of 1,000 euros.

33. The Organisation has disputed the complainants' claim for the costs of these proceedings on the basis that their representative before the Tribunal is a full-time EPO staff member. However, as the complainants have succeeded in respect of the procedural issues but not otherwise, it is appropriate to award them 100 euros each to cover their out-of-pocket expenses, time and trouble. All other claims are rejected.

DECISION

For the above reasons,

1. The impugned decision and the earlier decision CA/D 2/06 of 26 October 2006 are set aside to the extent that the new specimen contract provides with respect to the pensions of Vice-Presidents who previously served in the EPO.

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

3. It shall also pay the complainants 100 euros each in costs.

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