

The Administrative Tribunal,

Considering the complaint filed by Mr W.H.M. against the European Patent Organisation (EPO) on 1 August 2003 and corrected on 18 August 2003, the stay of proceedings ordered by the President of the Tribunal until 30 June 2004 at the request of the EPO pending a final decision on the case, the EPO's reply of 27 July, the complainant's rejoinder of 31 August and the Organisation's surrejoinder of 10 December 2004;

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. At its 44th meeting in June 1992, the Administrative Council of the European Patent Office – the secretariat of the EPO – appointed the complainant, a German national born in 1940, as Vice-President with effect from 1 January 1993 in Directorate-General 4. In that capacity, he was a permanent employee, at grade A7, and a member of the Management Advisory Committee. At its 55th meeting in December 1994, the Administrative Council elected another German national as President of the Office with effect from 1 January 1996. In order to avoid the situation whereby two nationals of a single contracting State held upper management level positions, the Council decided that the complainant should be relieved of his duties and that an amicable solution should be found.

On 28 June 1996 the President of the Office, the Chairman of the Administrative Council and the complainant signed an Agreement (“the Agreement”) which stipulated that the complainant would take over the function of Head of the Controlling Office, a Principal Directorate directly reporting to the President, instead of continuing in his position as Vice-President, with effect from 1 July 1996. The complainant would retain *ad personam* the grade and remuneration corresponding to a grade A7 post, although his new assignment as Controller was in fact to an A6 post. The Agreement provided that the complainant's consent was required in the following cases: termination of his direct subordination to the President; his transfer to another post within six years; the transfer of his post to another Office location; or any change in the “core area” of his duties. It also provided that in such cases his acquired rights shall remain unaffected.

By a letter of 23 September 2002, citing the Agreement, the President relieved the complainant of his duties as Controller with effect from 1 November and assigned him to a new post in which the latter would carry out a study and comparative analysis of costs for European and community patents and related economic costs. The complainant would continue to report directly to the President and retain his A7 salary. The new function, together with a new organisational unit, was approved by the Council at its 91st meeting in December 2002.

By a letter of 4 October 2002, the complainant appealed against the President's decision to the Chairman of the Administrative Council, contending that only the Council was competent to decide his transfer to another post. He also considered that the new post did not involve adequate duties and responsibilities. By a letter of 29 October, the President informed the complainant that his membership of the Management Advisory Committee was ended. The complainant appealed against this decision in a letter of 20 November claiming that it infringed his acquired rights. In letters of 24 and 29 November to the Administrative Council, he questioned whether the Council was his appointing authority, whether correct procedures had been followed in the transfer and queried the nature of his new post.

By a letter of 19 December 2002, the Chairman of the Administrative Council informed the complainant that the Council took the view that his appeals could not be allowed and that it had decided to refer the question to its Appeals Committee for an opinion. The latter delivered its opinion to the Administrative Council on 28 August 2003. However, following the delivery of Judgment 2244 in which the Tribunal held that discrimination existed in the amended provisions of the Service Regulations for Permanent Employees of the EPO, concerning the composition of the Appeals Committee, the Council decided to refer the appeal to the Committee in its new

composition. In its opinion of 25 March 2004, the Council's Appeals Committee unanimously recommended rejecting the appeal as irreceivable. The Council accordingly rejected the appeal at its 97th meeting in June 2004. At the time he filed his complaint, the complainant had received no answer to his appeal dated 4 October 2002; he impugns implicit rejection thereof.

B. The complainant submits that, although internal means of redress have not been exhausted, his complaint is receivable because the Council's Appeals Committee has failed to move forward with reasonable speed. He says he has been left idle since 1 November 2002 and that he should not have to bear the consequences of slow decision-making and procedural shortcomings.

On the merits, he contends that the decision to relieve him of his duties as Controller does not state the grounds on which it is based. In his view, his appointing authority was the Administrative Council and only the Council could decide to transfer him from his post to another post. Furthermore, as he never stepped down and was not dismissed, he still is Vice-President. The complainant considers that his consent was required under the Agreement for any change to take place in the core area of his duties. He claims that he was not given duties and responsibilities commensurate with his grade, that the number of staff allocated to the new organisational unit was not consistent with the number that should be allocated to an official at the A6 level, and that the functions and location of the new unit were inappropriate. He also claims that he was forcibly removed from his post. His title is still Controller, but he is addressed by his family name only.

The complainant seeks the quashing of the decision of 23 September 2002 and his reinstatement or transfer to a post with adequate duties and responsibilities. He also asks for 10,000 euros in moral damages.

C. In its reply the EPO contends that the complaint is irreceivable. It submits that, even if the Agreement does not explicitly say so, it is clear that the complainant was relieved of his duties as Vice-President. He was placed in direct subordination to the President in a Principal Director post. The EPO concludes that the President was his appointing authority and that, in accordance with Article 108 of the Service Regulations, the appeal of 4 October 2002 should have been lodged with him.

On the merits, the EPO pleads that the complaint is unfounded. It considers that the decision to transfer the complainant respected the applicable provisions. Relying on the case law, it recalls that decisions to transfer are discretionary and may be made *ex officio* by the appointing authority in the interest of the service. The decision to transfer the complainant was properly taken by the competent authority. Moreover, the complainant's consent was no longer required under the 1996 Agreement as six years had elapsed since.

According to the EPO, the study for which the complainant is responsible being of undeniable importance, the level and status of his new duties are consistent with an A6 job description. It points out that the number of staff as such is not proportional to the importance of an organisational unit.

It is standard practice that only the President, the Vice-Presidents and the Controller are addressed by their title; staff exercising functions at grade A6 (the complainant holds *ad personam* grade A7), are usually addressed by name. Lastly, there is no longer adequate office space for new organisational units. Consequently, the complainant's unit was not located beside other units reporting directly to the President.

D. In his rejoinder the complainant reiterates that he has been underemployed since 1 November 2002. He presses his argument that his appointing authority was the Administrative Council and not the President. In his view, he never lost his status as Vice-President and therefore his acquired rights have been affected.

The complainant submits that, as the Council never took a formal decision to transfer him, the President's decision was *ultra vires*, particularly since the complainant was not consulted and was left idle. This constituted a procedural flaw and an error of law. He claims that the "level and status" of his duties do not correspond with the grade A6.

E. In its surrejoinder the EPO believes that the complainant's interpretation of the Agreement is mistaken and that he was no longer Vice-President after it came into effect. He cannot therefore claim that his acquired rights were affected. It considers that the complainant's objection to the lack of consultation is misplaced, and that his tasks are commensurate with his grade. The EPO takes the view that his acceptance of the new assignment signified that he was willing to perform it and that the transfer decision was not tainted by any flaw.

The EPO submits that it processed the complainant's appeal of 4 October 2002 within a reasonable period of time, given the consequences of Judgment 2244, and that the complainant could have taken the precaution of filing his appeal with the competent authority. The change in the complainant's position was in the interest of the Organisation and the decision to transfer him took his interests into account.

## CONSIDERATIONS

1. In June 1992, the Administrative Council of the EPO appointed the complainant, a German national, as Vice-President in DG4 (an A7 post). In December 1994, the Council elected another German national as President of the Office with effect from 1 January 1996. In order to avoid one nationality being represented twice at top management level, an Agreement was reached in June 1996 and the complainant took over the function of Controller retaining his existing grade and salary but not the title of Vice-President.

2. The relevant provisions of the 1996 Agreement are as follows:

“– Desirous of not prejudicing [the complainant's] legal position in this situation any more than necessary;

[...]

### Article 1

[The complainant] shall be [...] Head of the Controlling Office – grade 7 *ad personam* (grade A7, step 6) with effect from 1 July 1996 instead of his present position as Vice-President DG 4. He shall have the title of ‘Controller’.

He shall remain directly subordinate to the President. His agreement shall be required

- for the termination of this direct subordination,
- for his transfer to another post within six years,
- for the transfer of his post to another Office location and
- for any change in the core area of the duties assigned to him.”

3. By a written decision of 23 September 2002, the President relieved the complainant of his duties as Controller with effect from 1 November 2002 and assigned him to a new project where he was to conduct a comparative analysis of costs.

4. The complainant appealed to the Chairman of the Administrative Council on 4 October 2002, arguing that the President had no power to take that decision. The Chairman did not allow the appeal and referred it to the Appeals Committee. That Committee, both as originally constituted and as reconstituted following Judgment 2244, recommended rejecting the appeal as irreceivable and as devoid of merit. In June 2004, the Administrative Council accepted that recommendation and rejected the appeal. That is the impugned decision.

5. The complainant argues that the President had no power to take the decision to transfer him as he considers that his appointing authority was not the President but the Administrative Council. He contends that this decision was not substantiated, that the new post did not involve adequate duties and responsibilities and that he was left idle. He submits that his consent was required if a transfer was accompanied by a change in the core area of his duties. He seeks the quashing of the contested decision and that he be reinstated or reassigned. He also asks for moral damages.

6. The EPO considers that the complaint is irreceivable as the complainant lodged an appeal with the Chairman of the Council which is not his appointing authority anymore. On the merits, the decision to transfer the complainant respected the applicable provisions and the Tribunal's case law. It was properly taken by the competent authority and in the interest of the Organisation. According to the EPO, the task assigned to him in 2002 was of undeniable importance. In any case, his consent was no longer required as six years had passed since the 1996 Agreement.

7. It is clear from the Agreement that the complainant is no longer Vice-President. The exact wording is he “shall be Head of the Controlling Office [...] instead of his present position as Vice-President DG 4”. The use of the word “instead” clearly shows that he was removed from the Vice-President’s position although he was to retain the salary and other benefits which had theretofore been attached to it, consistent with the quoted words of the preamble that he should not be prejudiced “any more than necessary”.

8. In addition, according to Article 11 of the European Patent Convention, the Administrative Council is the appointing authority for senior employees, namely the President, the Vice-Presidents and members of the Boards of Appeal; the complainant’s position of Controller is not included in that list. Accordingly, the President, and not the Administrative Council, was his appointing authority.

9. The appeal of the decision was made to the Chairman of the Administrative Council instead of being made to the President. Pursuant to the terms of Article 108 of the Service Regulations, an appeal shall be lodged with the appointing authority.

10. The Tribunal’s Statute and case law are clear: a complainant must exhaust internal remedies before filing a complaint. The complainant’s internal appeal was taken to the wrong body and was properly rejected as irreceivable. Accordingly, his complaint is likewise irreceivable.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2005, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet