

The Administrative Tribunal,

Considering the complaints filed by Mr A.W., Mr J.A.S. (his third), Mr P.C., Mr P.d.H., Mrs N.G., Mr L.G., Miss M.M., Mr L.P. and Mr L.R. against the European Patent Organisation (EPO) on 2 February 2005, the EPO's single reply of 12 May, the complainants' rejoinder of 7 June, the Organisation's surrejoinder of 26 August, corrected on 5 September 2005, the additional submissions of 20 February 2006 provided by the EPO at the Tribunal's request, and the complainants' facsimile of 8 March 2006 indicating that they did not wish to comment thereon;

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. The complainants are employees of the European Patent Office – the EPO's secretariat – based in The Hague. Relying on the same pleadings, they have filed their complaints in their capacity as staff representatives.

When the new President of the Office took up his duties in July 2004, in order to avoid double representation of one member State at the top of the Office's management structure, the functions of the then Vice-President of Directorate-General 1 (DG1) were terminated in accordance with Article 53(1) of the Service Regulations for Permanent Employees of the Office, both men being of French nationality. Pending the appointment of a new Vice-President, an ad interim Head of DG1 was nominated by the outgoing President, who informed staff accordingly in a communiqué of 18 June 2004.

The arrival of the new President coincided with a restructuring of Directorates-General 1 and 2 involving the creation of 14 "joint clusters", each of which was to be headed by a Principal Director at grade A6. Since there were at that time only ten Principal Directors, four new ones were required. In addition, one of the ten existing Principal Directors having temporarily been assigned duties in another unit, it was necessary to nominate a fifth person to replace him for the duration of his temporary assignment. A communiqué of 6 August 2004 issued by the ad interim Head of DG1 and the Vice-President of DG2 informed staff that, pending the appointment of "permanent replacements", the President of the Office had decided to nominate five Directors (grade A5) as ad interim Principal Directors (grade A6) with effect from 1 September 2004, in accordance with Article 12(4) of the Service Regulations. Article 12(4) relevantly provides that "[a] permanent employee may be called upon to perform temporarily the duties of a permanent employee in a higher grade".

On 27 September 2004 the complainants submitted a joint appeal to the President in their capacity as members of the Staff Committee, challenging the recent ad interim nominations, which they considered to be contrary to the Service Regulations. They asked the President to cancel the nominations and to award moral damages of one euro per staff member as well as costs. Having received no reply, they lodged their complaints with the Tribunal on 2 February 2005, impugning the implied decision to reject their appeal.

B. The complainants contend that the 2004 budget made no provision for the new Principal Director posts. Thus, the President created several posts "*ex nihilo*", thereby abusing his power. Furthermore, insofar as they were based on Article 12(4) of the Service Regulations, his nomination decisions were tainted with an error of law, because a permanent employee cannot be called upon, pursuant to that article, to perform temporarily the duties of another employee in a higher grade unless a post exists to which those duties are attached.

The complainants allege that the procedures for establishing new posts, which are set out in the Service Regulations, were not followed. In particular, they point out that posts must be budgeted, and that changes to the Service Regulations and to the terms and conditions of employment may only be undertaken following consultation of the General Advisory Committee (GAC). They also contend that the Office ought to have informed staff of each

vacancy, as required by Article 4(2) of the Service Regulations. As a result of its failure to do so, the contested nominations are tainted with a fundamental procedural flaw.

Lastly, the complainants submit that the President “is not at liberty to appoint his favourites to new posts without proper selection procedure”. Noting that Article 37 of the Service Regulations provides for staff representation on selection and promotion boards, they observe that since the appointments were made without establishing the necessary boards, the Staff Committee members were prevented from fulfilling their function of representing the interests of staff in the selection process.

According to the complainants, the President’s decision caused harm to many staff members, by depriving them of their right to compete fairly for several posts. Moreover, as far as any future competition for the posts is concerned, those who have already held the posts on an ad interim basis have an unfair advantage over other candidates. By way of relief, they seek the cancellation of all the ad interim appointments and “respect for proper procedure”, as well as moral damages of one euro per staff member and costs.

C. In its reply the Organisation submits that Article 12(4) of the Service Regulations was correctly applied. It explains that an employee appointed ad interim under Article 12(4) temporarily performs the duties assigned to a post other than his own while remaining, from a budgetary point of view, assigned to his own post of a lower grade. At the material time, four grade A6 Principal Director posts were vacant in DG1 and DG2. A fifth Principal Director’s post, though not vacant, needed to be filled temporarily owing to the temporary assignment of its incumbent to another unit.

The EPO considers that the decision to assign a staff member on the basis of Article 12(4) is a discretionary decision and that, as such, it is subject to only limited review by the Tribunal. Moreover, Article 10(2)(a) of the European Patent Convention requires the President to take “all the necessary steps [...] to ensure the functioning of the Office”. Thus, the President had the authority to call upon five staff members in grade A5 to perform ad interim the grade A6 duties of Principal Director. The requirement stipulated in Article 4(2) of the Service Regulations, namely that staff be informed of each vacant post to be filled, was not relevant because the President did not fill posts in the budgetary sense. Nor did the ad interim nominations require the constitution of selection boards.

The Organisation dismisses as wholly unfounded the allegation that “favourites” were appointed by the President. The ad interim appointments were motivated by the Office’s interest in ensuring the proper functioning of the joint cluster structure. Regarding the unfair advantage allegedly acquired by the ad interim nominees for subsequent selection procedures, it points out, firstly, that an ad interim nomination is not necessarily followed by a selection procedure and, secondly, that the outcome of such a procedure is not a foregone conclusion, given that in performing the higher grade duties to which he has been assigned the ad interim nominee may, on the contrary, have demonstrated that he is not the best candidate for the post.

The EPO asks the Tribunal to order that the complainants bear their costs.

D. In their rejoinder the complainants maintain that the interim nominations in 2004 took place before the corresponding budget posts had been created. They point out that four of the officials concerned were appointed in March and September 2005 to the Principal Director posts which they held on an ad interim basis. They note that a vacancy notice for several Principal Director posts was published on 1 October 2004, but state that it is not clear whether the appointments were made pursuant to that notice, and that in any case the results seem pre-determined.

E. In its surrejoinder the EPO asserts that, contrary to the complainants’ contentions, four of the five Principal Director posts did exist in the 2004 budget. It states that “[t]he fifth A6 post is the only one that had to be created”, but maintains that the conditions for applying Article 12(4) of the Service Regulations were met, because “there was no incumbent to perform the duties attached to a fifth A6 post”. It also draws attention to the fact that the selection board for the competition which resulted in the subsequent appointment of the Principal Directors included two members appointed by the Central Staff Committee.

F. At the Tribunal’s request, the Organisation entered additional submissions showing in particular that the fifth Principal Director post was not vacant at the time of the announcement of the ad interim appointments. This post became vacant on 1 March 2005. The official who had held the post on an ad interim basis was appointed to it on a permanent basis with effect from 1 October 2005.

CONSIDERATIONS

1. These complaints stem from restructuring efforts undertaken by the EPO in 2004.
2. The President of the Office reorganised ten principal directorates into 14 “joint clusters”, with each joint cluster being managed by a Principal Director. Five Directors were nominated by the President to perform the additional duties of Principal Directors at grade A6 purportedly pursuant to Article 12(4) of the Service Regulations. In addition, when the new President took office, the functions of the Vice-President of Directorate-General 1 (DG1) were terminated under Article 53(1)(c) effective 1 July 2004. An ad interim Head of DG1 was appointed until a new Vice-President was selected, who assumed his post on 1 January 2005.
3. The complainants are all Local Staff Committee members at The Hague. They allege that the appointments of several Principal Directors were in breach of the Service Regulations of the EPO. They seek the cancellation of all “interim” appointments, in addition to moral damages of one euro per staff member and legal costs.
4. The complainants allege that the 2004 budget did not provide for new Principal Directors’ posts, so the President created these posts “*ex nihilo*”. The posts, they say, were only created in the 2005 budget. They argue that the President does not have the authority to create these new posts, and therefore abused his power. They also submit that the President erred in law by appointing five Directors to Principal Directors’ posts by invoking Article 12(4) of the Service Regulations, that allows employees “to perform temporarily the duties of a permanent employee in a higher grade”.
5. They take the view that Article 12(4) applies to allow for the temporary replacement of incapacitated workers, but does not permit the Office to appoint employees to new posts of a higher grade. They allege that the Service Regulations procedures to establish new posts were not followed, since there was no consultation with the General Advisory Committee and the posts were not properly budgeted. In their view, the Office’s actions are procedurally flawed since the Office failed to inform the staff of the vacancies or hold a fair competition. Lastly, the complainants say that since there was no urgency in appointing persons to the posts, the President ought to have followed the proper selection procedures. This final argument goes on to allege that the President used this opportunity to fill the posts with “a group of men from the inner chamber of favourites”.
6. The EPO does not take issue with the complainants’ standing to bring these complaints. Such standing has been confirmed by the Tribunal in Judgment 2562, delivered concurrently herewith, holding that individual members of a Staff Committee must have the power to file suit as representatives of the staff and citing abundant case law to that effect.
7. The principal question arising on these complaints flows from the EPO’s use of Article 12(4) of the Service Regulations to nominate five ad interim Principal Directors. The relevant text reads:

“A permanent employee may be called upon to perform temporarily the duties of a permanent employee in a higher grade.”
8. In the surrejoinder the EPO admits that, of the five new ad interim Principal Directors appointed to head the joint clusters, one was named to a post that did not yet exist at the time of the appointment. With regard to the other four new Principal Director posts, the surrejoinder states:

“four out of the five principal director posts at grade A6 already existed in the 2004 budget but were vacant on 31 October 2004.”
9. It seems obvious to the Tribunal that the underlying purpose of Article 12(4) is to allow the duties of a person occupying an existing post to be carried out temporarily when a permanent employee in the post is unable to do the job. The text speaks specifically of one permanent employee being called upon to carry out the duties of another.
10. Article 12(4) explains that the temporary duties shall not exceed one year, except where the posting is to replace a permanent employee who is seconded to another post, or when an employee is absent on protracted sick leave. Both of these examples involve situations in which a permanent employee has been properly appointed to and occupies a post and subsequently becomes temporarily unable to perform his or her duties and is then replaced

by an employee of lower grade on an interim basis. In contrast, in this case, the EPO attempts to rely on Article 12(4) to assign employees to temporarily perform the duties of newly created posts that did not have incumbents and in one case did not even yet exist. Were the EPO permitted to create new posts and assign staff to perform temporarily their duties, then the EPO could effectively avoid the normal consultative processes by which posts are created and filled.

11. An essential prerequisite to the exercise of the power conferred by Article 12(4) is that the post exists and has an incumbent permanent employee at the time that the temporary assignment is made. One cannot be called upon to do the duties of another person if that person does not occupy any post to which those duties are attached.

12. It appears as though Article 12(4) was properly invoked to temporarily assign someone to replace the departing Vice-President as Head of DG1; the same cannot be said, however, of the “temporary” appointments to the five new Principal Directors’ positions.

13. While the EPO asserts that four of the five new Principal Director posts already existed in the 2004 budget, it admits that they had not yet been filled and were vacant at the time of the appointments. It also admits that the ad interim nomination to the fifth post took place when the budgetary post had not yet even been created.

14. The EPO’s reliance upon Article 12(4) is misplaced: in four of the five cases there was simply no permanent employee whose duties the new Principal Directors were called upon to perform; in the fifth case, unless and until there was a post properly created there could be no duties attached to it and no temporary assignment to perform those duties.

15. All five of the ad interim appointments of Principal Directors must be set aside. While there is no direct evidence to support the complainants’ submissions alleging that the later permanent appointments to those posts were predetermined, it would be unrealistic to suppose that the temporary postings, being themselves improper, could not operate to give an unfair advantage to the interim nominees, especially since they were all subsequently appointed on a permanent basis. The selection process for the filling of the permanent positions is not formally in issue on these complaints and the Tribunal will not comment further on whether or not those appointments were fatally flawed.

16. In their representative capacity the complainants have not suffered any actual pecuniary damage. They are entitled to moral damages, however, for the EPO’s highhanded and arbitrary actions, which the Tribunal assesses at the sum of one euro per staff member, as requested by the complainants themselves. The Tribunal also awards the complainants nominal costs in the amount of 1,000 euros. All sums awarded shall be paid to the complainants in their capacity as representatives of the Staff Committee.

DECISION

For the above reasons,

1. The impugned decision is set aside as are the ad interim appointments to the five principal directorships.
2. The EPO shall pay the complainants, as representatives of the Staff Committee, moral damages of one euro per staff member.
3. It shall also pay costs of 1,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 12 May 2006, 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 12 July 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 21 July 2006.