Registry's translation, the French text alone being authoritative.

NINETY-FIFTH SESSION

Judgment No. 2244

The Administrative Tribunal,

Considering the third complaint filed by Mr B.S. C. against the European Patent Organisation (EPO) on 21 March 2002, the EPO's reply of 19 June, the complainant's rejoinder of 2 September and the Organisation's surrejoinder of 18 November 2002;

Considering the applications to intervene in that case filed by:

E. A.

J. A.

F. B.

K. B.

E. H.

P. d. H.

W. H.

D. K.

D. M.

D. R.

C. R. F.

H. S.

M. T.

A. W.

Considering the complaints filed by Mrs U.M. K. and Mr A.G. K. against the EPO on 22 March 2002 and corrected on 17 April, the Organisation's replies of 25 July, the complainants' rejoinders of 2 September and the Organisation's surrejoinders of 11 December 2002;

Considering the applications to intervene in those two cases filed by:

P. A.

G. A.

M. A.

R. B.

P.-P. B.

F. B.

A. B.

J.-M. C.

S. C.

A. C.

S. C.

B. C.

A. D.

G. D.

F. D.-B.

G. D.-H.

F. E.

G. E.

V. F.

R. F.

R. G.

M. H.

C. I.

J. J.

G. K.

P. K.

J. K.

P. K.

U. K.

T. K.

B. t. L.

E. L.

P. L.

L. L. V.

A.-T. L.

F. M.

A. M.

H. M.

R. M.

P. M.

M. N.

A. N.

R. O.

M. d. C. O. P.

J. O.

U. O.

S. P.

K. P.

H. P.

G. P.

F. P.

G. R.

R. R.

P. R.

G. R.

M. R.

C. R.-S.

R. R.

J. R.

M. R.

G. S.

C. S.

H. S.

R. S.

W. S.

R. S.

S. S.

M. S.

B. S.

M.-B. T.-D.

D. V.

G. W.

W. W.

W. W.

S. W.

W. W.

C. W.

E. W.

H. W.

R. Y.

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

Having examined the written submissions and disallowed the complainants' applications for hearings;

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

A. Article 110 of the Service Regulations, is headed "Composition of the Appeals Committee"; paragraph 3 refers to the Appeals Committee that hears appeals against decisions taken by the Administrative Council, and paragraph 4 refers to the one that hears appeals against decisions taken by the President of the European Patent Office, the EPO's secretariat. It reads as follows:

"(1) The Appeals Committee shall consist of a Chairman and four full members.

[...]

(3) In respect of appeals against decisions of the Administrative Council, the Chairman and full members of the Committee shall be appointed by the Administrative Council each year.

(4) In respect of appeals against decisions of the President of the Office, the President shall each year, after consulting the General Advisory Committee, appoint a Chairman and two full members of the Committee. The Staff Committee shall at the same time appoint two full members of the Committee [...]."

The Appeals Committee of the Administrative Council was set up for the first time in 1996. At that time Article 37 of the Service Regulations provided that:

"The staff shall be represented on the following bodies:

a) the joint committees,

b) the Disciplinary Committees,

c) the Appeals Committees,

d) the Promotion Boards and

e) the Selection Boards."

By Judgment 1896, delivered on 3 February 2000, the Tribunal ruled on complaints filed in 1998 by four EPO staff members in their capacity as staff representatives. They were challenging the Administrative Council's rejection of a request made by the Central Staff Committee to have staff representatives sit on the Council's Appeals Committee. They cited Article 37(c) which allowed for such representation on the "Appeals Committees". The plural form, they claimed, referred to the President's Appeals Committee and the Appeals Committee of the Administrative Council as well. The Tribunal considered that Article 37(c) and Article 110 were not "totally incompatible, even if a gap must be filled to reconcile the two" and that the written law had to "be applied, in particular by the authority having enacted it, as long as it has not been repealed or modified". The Tribunal set aside the challenged decision and sent the case back to the EPO, indicating that "[s]ince the Service Regulations do not state how staff representation must be ensured, it is up to the Organisation to find a solution". It found it would be hasty to rule on that point because the complainants claimed that they were "willing to consult with the Organisation".

A draft decision amending the text of Article 37(c) was drawn up by the President of the Office in document CA/90/00 and submitted to the General Advisory Committee. The Administrative Council adopted it by decision CA/D 7/00 of 11 October 2000 at its 82nd meeting. The text henceforth read:

"c) the Appeals Committee referred to in Article 110, paragraph 4;"

and the effect of the amendment was that staff representatives would sit only on the Committee hearing appeals against decisions of the President of the Office.

Two of the complainants in the present case are members of the EPO Boards of Appeal which give final rulings in all litigation relating to patents granted by the Organisation. In early January 2001, they and 65 other chairmen and members of the Boards of Appeal filed identical appeals against decision CA/D 7/00. Sixty-six were filed on 10 January and one the following day. Their case became appeal IA/3/01. The first-cited complainant in the present case was a member of the Munich section of the EPO Staff Committee. He and two other staff representatives filed a similar appeal on 11 January 2001. It was heard under the reference IA/2/01. All the claimants sought the reinstatement of the original wording of Article 37(c). The Administrative Council could not allow the appeals and forwarded them to its Appeals Committee for an opinion.

The Council's Appeals Committee recommended dismissing appeal IA/2/01 as unfounded and IA/3/01 as inadmissible *ratione personae* and unfounded. At its 87th meeting held from 11 to 13 December 2001 the Council endorsed the Committee's recommendations and rejected the appeals. Communiqué No. 86 summarised the decisions taken at that meeting; it was notified to all staff by the President of the Office on 14 December 2001. The complainants impugn the Council's decision, which was forwarded to them by its Chairman on 2 January 2002.

B. The complainants are contesting the viewpoint of the Administrative Council reflected in its decision of 11 October 2000. They perceive that viewpoint to be that in order to comply with Judgment 1896 the Council had only to adapt the text of the Service Regulations to match its own intention - which was that it alone should appoint persons serving on its Appeals Committee. They argue that the Council's decision is unlawful for the following reasons.

Firstly, its position is contrary to fundamental legal principles, demonstrates misuse of authority and shows arbitrariness. By its decision it has deprived its Appeals Committee of a "balanced composition", and has given no substantive justification for doing that. Secondly, the Council's decision disregards Judgment 1896. The Tribunal's opinion in that judgment was that according to the wording of Article 37 as it then stood, staff should be represented on the Council's Appeals Committee. Its instruction was to find a solution as to how staff representation was to be ensured, but the Council has not followed that instruction. Thirdly, the different

composition of the two Appeals Committees mentioned in Article 110 leads ultimately to discrimination against a group of staff. It results in unequal treatment for members of the Boards of Appeal and other staff who are appointed by decision of the Administrative Council, because appeals lodged with the Council are heard by an Appeals Committee without staff representatives. Fourthly, in the event of disputes with their employer such staff are deprived of due process.

The complainant who was a member of the Staff Committee argues that the Council's decision results in an inadmissible curtailment of the rights of members of the Staff Committee. The other two complainants argue in favour of a joint appeals committee, particularly because a situation arises where appeals lodged by members of the Boards of Appeal are decided unilaterally by the Administrative Council that itself took the decision that is being appealed against.

All three seek the quashing of the Administrative Council's decision of 11 October 2000 amending Article 37(c) of the Service Regulations and claim costs. Additionally, the complainant who is a member of the Staff Committee asks the Tribunal to order that the Appeals Committee of the Administrative Council, referred to in Article 110(3), shall also have mandatory staff representation.

C. In its reply on the complaint filed by that staff member the Organisation argues that his complaint is irreceivable, primarily because his internal appeal was filed one day late and was therefore time-barred. Being one of the participants at the Council's meeting of 11 October 2000 he had knowledge of its decision regarding the amendment of Article 37(c) on that same day and the three-month time limit for filing an appeal expired on 10 January 2001. In any event it is also irreceivable for a further reason, which it puts forward in reply to all three complaints. They were filed outside the 90-day time limit set down in Article VII(2) of the Tribunal's Statute. The EPO contends that the letters dated 2 January 2002 did no more than confirm a decision the complainants already had knowledge of, as it had been made known to all staff on 14 December 2001.

In its replies on the cases filed by the members of the Boards of Appeal it says that the complaints and the applications to intervene are irreceivable because the staff members involved are seeking the rescission of a decision affecting all staff and which is thus one of general interest. While acknowledging that in Judgment 1896 the Tribunal recognised the right of staff representatives to contest decisions on matters of general scope, it points out that in this instance the complainants and interveners do not hold that status.

Subsidiarily, the Organisation rejects all three complaints as being devoid of merit. It denies that it disregarded Judgment 1896. In its view that judgment does not allow the conclusion that staff must be represented on the Appeals Committee of the Administrative Council. The Council's decision to amend Article 37 was not flawed by misuse of authority. The Tribunal did not exclude the possibility of amending Article 37(c), and in taking that action the Council made correct use of its legislative power. By that amendment it has also explicitly stated its view on how the Appeals Committee should be constituted. The EPO adds that there are no grounds for the claim made by the Staff Committee member in his complaint that the amendment constituted an infringement of his rights as a staff representative.

It asserts that staff appointed by decision of the President of the Office and those appointed by decision of the Administrative Council are in a different position in fact and in law. As is made clear in the Service Regulations the chairmen and members of the Boards of Appeal have a special status. There is therefore no foundation for the complainants' plea that there is breach of the principle of equality of treatment. Nor can it be said that the absence of staff representatives on the Council's Appeals Committee is prejudicial to the staff whose cases are submitted to that Committee. Despite the different composition of the two appeals committees concerned, the principles of due process are safeguarded for both.

D. In their rejoinders the complainants assert that their appeals to the Tribunal are receivable. The complainant who filed his internal appeal only on 11 January 2001 objects to the Organisation's computation of the time limit for the filing of the internal appeal, arguing that the three-month period has to be calculated from the day following the meeting of 11 October, and he points out that the Council's Appeals Committee thought likewise. They all maintain that it was the decision communicated to them on 2 January 2002 that triggered the time limit for filing a complaint with the Tribunal. As regards the general scope of their complaints, the two members of the Boards of Appeal assert that they and the interveners were adversely affected by decision CA/D 7/00 in respect of an individual right, from 11 October 2000, the date when the amended article came into force.

The Council, they submit, is not "absolutely free" to adapt the Service Regulations to meet its own views. It cannot assume that there are no restrictions as to the exercise of its legislative power. They do not accept that members of the Boards have a "special status" that can limit their statutory rights or exclude them from advantages that all other employees enjoy. Nor does their status justify having a one-sided composition of the Council's Appeals Committee. In their view the amendment of Article 37(c) has impaired the judicial relief system available to staff and hence constitutes "a flagrant violation of acquired rights".

E. In its surrejoinders the Organisation maintains in full its earlier submissions. It does not accept the complainants' argument that there was an infringement of acquired rights.

CONSIDERATIONS

1. By Judgment 1896, delivered on 3 February 2000, the Tribunal set aside a decision by the EPO's Administrative Council rejecting requests to have staff representatives sit on the Appeals Committee dealing with appeals against decisions of the said Administrative Council. The Tribunal indeed considered that Article 37 of the EPO's Service Regulations, which at the time provided that: "The staff shall be represented on the following bodies: [...] c) the Appeals Committees", had to be applied, even though Article 110 of the Service Regulations could be interpreted as drawing a distinction between the composition of the Appeals Committee that hears appeals against decisions of the President of the Office (and has to include two members appointed by the Staff Committee) and the composition of the Appeals Committee that hears appeals against decisions of the Administrative Council. Regarding the latter, Article 110 merely indicates that the Chairman and full members are appointed by the Administrative Council. The Tribunal therefore ruled that the written law had to "be applied, in particular by the authority having enacted it, as long as it has not been repealed or modified for the sake of the principle that similar acts require similar rules" and that, since the Service Regulations did not state how staff representation must be ensured, it was up to the Organisation to "find a solution". The case was therefore sent back to the Organisation.

2. Following that judgment, the Administrative Council decided on 11 October 2000, at its 82nd meeting, to amend the text of Article 37(c) of the Service Regulations by changing the above wording to read as follows:

"The staff shall be represented on the following bodies:

[...]

c) the Appeals Committee referred to in Article 110, paragraph 4".

That is to say, they would be represented on the Appeals Committee that hears appeals against decisions of the President of the Office. It was then clear that the composition of the Appeals Committee dealing with appeals against decisions of the Administrative Council was a matter for the Council alone to decide and was not governed by the staff representation rule of Article 37.

3. Sixty-seven members of the Office's staff, chairmen and members of the EPO's Boards of Appeal filed individual internal appeals against the decision of 11 October 2000, but the Appeals Committee of the Administrative Council recommended that the latter should reject the appeals as inadmissible *ratione personae* and unfounded. Three members of the Munich section of the EPO Staff Committee filed similar appeals before the Administrative Council. The same Appeals Committee found that those three internal appeals were admissible, but recommended dismissing them on the merits. At its 87th meeting held on 11 and 13 December 2001, the Administrative Council endorsed the Committee's recommendations.

4. The complaints before the Tribunal include two filed by members of the Boards of Appeal and one filed by one of the staff representatives who had lodged an internal appeal. These complaints raise the same issues, even though the claims are not the same in each case: all three seek the quashing of the Administrative Council's decision of 11 October 2000. Additionally, the staff representative asks the Tribunal to order that the Council's Appeals Committee shall include staff representation, like the Appeals Committee dealing with appeals against decisions of the President.

These complaints will be joined and considered, with the supporting applications to intervene, to form the subject of a single ruling.

5. The defendant does not deny that the staff member who challenges the impugned decision in his capacity as a member of the Staff Committee has a cause of action, an issue which was in fact settled by Judgment 1896, under 3(a). However, it deems his complaint to be irreceivable, on the grounds that his internal appeal was not filed within three months of the date on which he was informed of the decision he is challenging; he was present at the meeting of the Administrative Council during which the decision to amend Article 37(c) of the Service Regulations was taken. That decision was taken on 11 October 2000 and the complainant's appeal was received only on 11 January 2001. Without needing to consider whether the complainant's awareness of the decision on 11 October 2000 started the time limit for filing his appeal, the Tribunal, in accordance with the practice of many courts, considers that the time limit for appeal starts to run only on the day following the impugned decision. In this case, the *dies a quo* should be taken as 12 October 2000. It follows that the internal appeal received on 11 January 2001 was filed within the three months allowed under Article 108 of the Service Regulations.

The defendant's second objection to receivability is discussed under 7 below.

6. The defendant submits that the complaints filed by the two officials who assert that they have a cause of action not as staff representatives but simply as members of the Boards of Appeal are irreceivable for two reasons. First, the complainants learnt from Communiqué No. 86, addressed to all staff on 14 December 2001, that their appeal had been rejected. Their complaints, filed only on 22 March 2002, were therefore outside the ninety-day time limit required in Article VII(2) of the Tribunal's Statute. Second, since the two officials in question are not staff representatives, they do not have *locus standi* to challenge decisions of general interest taken by the Organisation.

7. These objections to receivability must fail. In the first place, while it is true that the decision to reject the internal appeals of the complainants was mentioned *inter alia* in Communiqué No. 86 of 14 December 2001, they were officially notified of the dismissal of their appeals only in the letters dated 2 January 2002, receipt of which they were asked to acknowledge. Contrary to the argument of the defendant, that was not a confirmation, but the first official notification of the decision to reject the internal appeals they had filed. Since they were received on 21 and 22 March 2002, the three complaints were not irreceivable *ratione temporis*.

8. In the second place, although the disputed decision is regulatory in character, it applies generally to a category of staff members whom it may adversely affect. The case law has it (see Judgments 1451 and 1618) that in such a case there is no need to await an individual decision before an appeal can be considered receivable, and that the staff members concerned have an interest in challenging the lawfulness of the general decision which may affect them. Their complaints are therefore receivable *ratione personae*.

9. On the merits, the defendant argues that the Administrative Council, in deciding to amend Article 37 of the Service Regulations, made correct use of its legislative power, thereby abiding by Judgment 1896, contrary to the view expressed by the complainants. It adds that, although the compositions of the Appeals Committees are different, the basic rules of procedure are respected and that officials whose appeals are dealt with by the Appeals Committee hearing appeals against decisions of the Administrative Council are not at a disadvantage in relation to other members of staff. The complainants assert, on the contrary, that the decision to amend Article 37 constitutes abuse of authority, deliberately breaches the Tribunal's ruling and causes discrimination against staff members appointed by a decision of the Administrative Council. In addition to their pleas based on illegality, they put forward arguments to show that the EPO's solution was inappropriate.

10. Leaving aside the arguments concerning the appropriateness of the solution, the Tribunal notes that the competent bodies of the Organisation may repeal or modify rules they have established, subject to compliance with the principle that similar acts require similar rules, as pointed out in Judgment 1896, but that those bodies' discretionary powers are limited by the general principles of international civil service law, including the principle of equality, whereby officials in the same circumstances should be treated in the same way.

11. Although in its Judgment 1896 the Tribunal did not expressly settle the issue of whether the staff should be represented on the Appeals Committee of the Administrative Council, it did point out that disputes relating to staff members appointed by the Council come mainly under the Council's jurisdiction and that, according to Article 1(4) of the Service Regulations, these employees in principle have the same rights and obligations as other staff. They can thus "hope that their disputes may, if necessary, be presented before an appeals committee on which the staff is represented, which is the case for other employees". In order to justify the fact that different procedures apply to the internal appeals of staff members subject to the same Service Regulations, according to whether they are appointed

by the President or by the Administrative Council, the defendant would have to show that this difference of treatment rests on objective considerations. According to the defendant, the only differences between the two categories of officials, under the terms of the Service Regulations, consist in the special guarantees of independence (Article 1(4) of the Service Regulations), the specific recruitment procedure (Article 7(1)), exemption from the probationary period (Article 13), certain special obligations, in particular to give a solemn undertaking (Article 15), exemption from the requirement to make good damage suffered by the Organisation (Article 25), the right to be reassigned at the end of a term of office (Article 41), the fact that they are not subject to appraisal reports (Article 47(2)) and, of course, the existence of a special appeals committee (Article 110(3)). Moreover, the defendant adds, the chairmen and members of the Boards of Appeal take every opportunity to refer repeatedly to their special status.

Without denying the specific status of these officials, whose special guarantees of independence are justified by the duties they perform, the Tribunal finds no reason founded on their special status, as defined above, that would justify, in their relations with their hierarchical authority, that the internal appeals they submit should be treated any differently from those of their colleagues appointed by the President. The fact that there may be different appeals committees is perfectly understandable and it would also be acceptable for the members of such committees to be appointed in different ways, but there is no reason to deny that special category of staff the guarantee, available to all other staff members, to have their appeals submitted to a body in the composition of which staff representatives would be involved, either by consultation or by direct representation. While the Tribunal rejects the plea, which is unfounded in the circumstances, of abuse of authority and the risk of partiality arising from the current method of appointing members of the Administrative Council's Appeals Committee, it nevertheless considers that the discrimination introduced by the amendment of Article 37 of the Service Regulations is unjustified and must therefore be deplored.

12. The Tribunal rejects the request of one of the complainants that it should issue instructions regarding modifications to be introduced in Article 110(3) of the Service Regulations, noting that it is for the defendant to take whatever steps are necessary to comply with the Tribunal's ruling.

13. As the complainants are successful, they are entitled to the overall sum of 2,000 euros in costs.

14. The applications to intervene are allowed and the benefit of this judgment shall be extended to the interveners, insofar as they are in the same legal and factual situation as the complainants.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The case is sent back to the EPO.

3. The Organisation shall pay the complainants the overall sum of 2,000 euros in costs.

4. All other claims put forward by the complainants are dismissed.

5. The benefit of the present judgment shall be extended to the interveners, subject to the comments under 14, above.

In witness of this judgment, adopted on 16 May 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Mrs Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 16 July 2003.

(Signed)

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 23 July 2003.