

109th Session

Judgment No. 2919

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr E. C. D. (his second), Mrs E. H. (her sixth) and Mr H. S. (his sixth) against the European Patent Organisation (EPO) on 10 June 2008, the EPO's single reply of 17 November, the complainants' rejoinder of 19 December 2008, corrected on 20 April 2009, and the Organisation's surrejoinder of 23 July 2009;

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 permanent employees of the European Patent Office – the EPO's secretariat – who work at its Headquarters in Munich. At the material time, Mr S., Mrs H. and Mr D. were respectively Chairman, Deputy Chairperson and Secretary of the Munich Staff Committee. By a letter dated 29 March 2006 to the Vice-President in charge of Directorate-General 2 (DG2), the complainants, in their capacity as members of the Staff Committee, expressed concern about the percentage of external contractors employed in Principal Directorate IT Infrastructure and Services. They argued that

these employees – who were not subject to the Service Regulations for Permanent Employees of the European Patent Office – were performing duties that were the same as or similar to those performed by permanent employees, and that by employing them under “inferior working conditions” the Organisation was violating their right to equal treatment. Furthermore, the recruitment procedure for external contractors excluded the staff representation from the selection process, thereby violating the rights of the staff representatives as laid down in Annex II to the Service Regulations. The complainants asked that permanent posts be created for the duties performed by the external contractors and that the contractors already performing those duties be given the opportunity to apply for the posts. In the event that their requests were rejected, they asked that their letter be treated as an internal appeal.

By a letter of 28 April 2006 the Vice-President in charge of DG2 rejected the complainants’ requests. On 26 May 2006 they were informed that, following an initial examination of the case, the President of the Office had concluded that the applicable rules had been correctly applied and that the case had therefore been referred to the Internal Appeals Committee.

In its opinion of 17 January 2008 the Committee unanimously recommended that an Office-wide regulation regarding the employment of external contractors be submitted to the General Advisory Committee (GAC) in order for the EPO to fulfil its duty to consult in accordance with Article 38(3) of the Service Regulations. In all other respects the Internal Appeals Committee recommended that the appeal be dismissed. By a letter of 17 March 2008 the complainants were informed that the President had decided not to follow the recommendation of the Committee, as she considered the appeal to be irreceivable in part and unfounded in its entirety. That is the impugned decision.

B. The complainants submit that Article 5 of the Service Regulations and the preamble to the Conditions of Employment for Contract Staff at the European Patent Office establish permanent employment within the EPO as the norm. They acknowledge that the Organisation has the

right to resort to other forms of employment, but they argue that it must first consult with the GAC and establish a statutory framework for such employment. In their view, by failing to consult, the Organisation hampers the staff representation in exercising its right to express an opinion in the employment framework of external contractors, in breach of Article 38(3) of the Service Regulations, thereby depriving it of a fundamental right in staff-related matters within the Organisation.

They assert that the recruitment of external contractors affects the working conditions of permanent employees because of the additional training requirements that flow from increased staff turnover. Also, there is a possibility that permanent employees will have to assume additional duties and responsibilities that external contractors are unable to undertake.

The complainants contend that external contractors are denied effective representation while they work within the EPO. They point out that these contractors have no access to the internal means of redress and that the Staff Committee receives no compensation for any efforts it makes on their behalf. Furthermore, the Organisation's employment practice violates their right to equal treatment enshrined in most national and international labour law instruments, because it subjects them to inferior working conditions as compared to permanent employees. The complainants also point out that Circular No. 286 on the Protection of the dignity of staff applies to external contractors.

They ask the Tribunal to quash the President's decision to employ external contractors without consulting the GAC on the ground that it constitutes a breach of the substantive rights of the Staff Committee. They also ask the Tribunal to order the EPO to consult with the GAC regarding the employment of external contractors and to refer the decision not to consult with the GAC back to the President in order for her to take a decision in that respect which follows the recommendation of the Internal Appeals Committee. Subsidiarily, they ask that it order a "stay" of the recruitment of external contractors with the creation of permanent posts for the tasks carried out by those

contractors. They also seek “reasonable compensation” for their time and effort, and costs.

C. In its reply the EPO contends that the complaint is irreceivable on several counts. First, the rights of permanent employees are sufficiently protected without the intervention of the Staff Committee. Employees may file internal appeals individually if they are adversely affected by the employment of external contractors. Second, the claim for the creation of permanent posts is irreceivable because the refusal of that request is not a decision within the meaning of Article 106 of the Service Regulations. Third, in the EPO’s opinion, the Staff Committee does not represent external contractors because the Service Regulations do not provide for such representation and, consequently, the complainants’ claims on their behalf are irreceivable. Fourth, as the complainants are members of the Staff Committee in Munich, the EPO considers that the complaint is receivable only insofar as it concerns recruitment at that duty station.

Lastly, the Organisation accepts that the complaint is receivable to the extent that the complainants claim that the Staff Committee has a right to participate in recruitment and that the GAC should have been consulted.

On the merits, the EPO asserts that the President has the authority, pursuant to Article 10(1) and (2) of the European Patent Convention, not only to appoint staff but also to have recourse to external contractors when it is in the interest of the Organisation to do so. The exercise of this authority is subject to only limited review by the Tribunal.

The Organisation states that external contractors have an employment relationship with their respective employment agencies and that they have recourse to national courts in order to protect their rights. They are not staff within the meaning of the Service Regulations. They do not participate in the election of Staff Committee members and it is not the function of that Committee to represent their rights and interests.

The EPO points out that external contractors are not mentioned in either Article 1 of the Service Regulations or in Circular No. 286. Referring to the case law, it states that a breach of the principle of equal treatment occurs when staff members in an identical or comparable position in fact and in law receive different treatment. In this case, as the Service Regulations do not apply to external contractors, their position is not identical or comparable in fact and in law to that of permanent employees or contract staff and the complainants' claim in this respect must fail.

The Organisation argues that the President does not have a duty to consult with the GAC regarding their recruitment because Article 38(3) of the Service Regulations is not applicable to external contractors. Moreover, the complainants have failed to demonstrate that consultation was necessary. As the Service Regulations apply solely to permanent employees and contract staff, selection boards are not competent with respect to the recruitment of external contractors. Therefore, the staff representation was legitimately excluded from the recruitment procedure. In addition, the EPO contends that the Internal Appeals Committee's recommendation regarding the submission to the GAC of an Office-wide regulation on the matter was *ultra vires*.

D. In their rejoinder the complainants assert that the absence of a regulated selection procedure for external contractors increases security risks for the Organisation, its staff and clients. They produce a legal opinion regarding the rights and obligations granted to the Staff Committee in respect of external contractors under German law which, in their view, supports their claims. They also seek disclosure of a specific document.

E. In its surrejoinder the EPO maintains its position. It argues that it has "sovereignty" with respect to personnel and organisational issues and hence the discretion to decide whether and to what extent national law applies.

CONSIDERATIONS

1. The complainants bring this complaint in their representative capacities as members of the Munich Staff Committee. The complaint concerns the Office's practice in relation to the assignment of duties to external contractors outside the employment relationships specified in the Service Regulations. These external contractors are employed by third-party agencies that have concluded agreements with the EPO for the supply of staff to the Office.

2. In summary, the complainants object to the recruitment of external contractors and, in particular, the absence of a statutory framework for their employment. They allege a breach of their rights of consultation and involvement in the recruitment procedure for external contractors. They request that the President's decision to employ external contractors without consulting the GAC be quashed and that the EPO be ordered to consult with the said Committee regarding the employment of external contractors. Subsidiarily, they request that permanent posts be created for tasks that could be performed by permanent employees and that the recruitment of external contractors be stopped until a legal framework has been put in place following consultation with the GAC. The complainants also take issue with the Office's unfair treatment of external contractors.

3. Before turning to the merits of the complaint, it is necessary to address a number of receivability issues. For the purpose of considering receivability, the substance of the complaint may be divided into five broad categories.

4. The first category concerns the allegations that the recruitment of external contractors affects the working conditions of permanent employees. The EPO acknowledges that the Staff Committee has the standing to contest a decision in the interest of permanent employees to the extent that external contractors are affecting working conditions at the Office. However, it argues that any permanent employees who believe that their positions are

compromised by the existence of external contractors must lodge individual complaints.

5. In Judgment 1618, under 4, 5 and 6, the Tribunal observed that members of the Staff Committee could challenge a general decision that is not implemented at the individual level and affects all staff. Further, as stated in Judgment 1451, under 18, it is often more efficient to have the members of the Staff Committee bring these types of matters forward rather than the individual staff members. This is equally applicable to this complaint. While it is true that the members of the Staff Committee may take action in the general interests of the staff, it is equally true that an individual staff member who claims to be adversely affected by a decision may take action to protect his or her individual rights. However, where decisions allegedly have a broad adverse impact on a large number of permanent employees, in the interests of efficiency, consistency in decision making and the timely resolution of disputes, it may be that the members of the Staff Committee have a legitimate role in bringing the issue forward. More will be said on this subject in the context of the GAC consultation issue.

6. The second receivability issue concerns the creation of permanent posts for those tasks carried out by external contractors. The Tribunal accepts the EPO's submission on this question. As the creation of permanent posts rests exclusively within the President's discretion under Article 10(2)(d) of the European Patent Convention, this case is not a complaint alleging the non-observance, in substance or in form, of terms of appointment or the Staff Regulations and is, therefore, irreceivable.

7. The third category concerns the allegations of unequal treatment of external contractors. In particular, the issue is whether the complainants have standing to bring this complaint. Article 1 of the Service Regulations states that the Regulations only apply to permanent employees, former employees, members of the Boards of Appeal and the Enlarged Board of Appeal, the President, vice-

presidents, principal directors of the Office, and contract staff so far as there is express provision in their conditions of employment. The Service Regulations do not extend to external contractors supplied by third-party agencies.

8. In response to the EPO's assertion that the Staff Committee members are limited to representing "staff" within the meaning of the Service Regulations, the complainants rely on the Tribunal's decision in Judgment 2649, under 7, in which the Tribunal stated that "it is not possible to conclude that the Staff Committee may never defend the interests of temporary workers". To the extent that the complainants rely on this statement for the proposition that they may represent external contractors in all cases, the Tribunal observes that the complainants have taken this statement out of context. The Tribunal stated that for a complaint to be receivable, "[the Staff Committee] must allege a breach of guarantees which the Organisation is legally bound to provide to staff who are connected with the Office by an employment contract or who have permanent employee status, this being a *sine qua non* for the Tribunal's jurisdiction". Absent a connection flowing from a contract or deriving from employment status, the Tribunal is not competent to entertain the complaint.

9. The Tribunal notes that there are no Staff Regulations mandating equal remuneration and benefits for external contractors. Additionally, reliance on the ILO Declaration on Fundamental Principles and Rights at Work does not assist the complainants. The ILO Declaration concerns fundamental rights in relation to labour, such as freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation. The complainants have not advanced any evidence that the fundamental rights of external contractors have been violated. Furthermore, as the Tribunal implicitly recognised in Judgment 2649, issues of remuneration must be distinguished from those involving fundamental rights. The complainants also point out that these external contractors

may not have rights under German law. If so, the EPO's refusal to recognise their right to be represented before the Tribunal by the members of the Staff Committee denies them any legal recourse. The EPO notes the conclusion of the Internal Appeals Committee that the German Act on the provision of temporary personnel (*Arbeitnehmerüberlassungsgesetz*) is not directly applicable to the EPO since it would constitute an interference with the EPO's administrative independence. While it is correct that the EPO is immune from the operation of national law in the administrative and technical operation of the Office, it does not follow that external contractors are without legal recourse in relation to their employment circumstances. Accordingly, the complainants' claims concerning unequal treatment of the external contractors are irreceivable.

10. The fourth receivability issue concerns the scope of the complaint. The EPO takes the position that as the complainants bring the complaint in their representative capacities as members of the Munich Staff Committee, the complaint is receivable only in respect of recruitment in the Munich Office. For reasons that will become evident, a finding on this issue is unnecessary.

11. The fifth issue concerns the complainants' claim regarding the President's failure to consult the GAC. The EPO does not contest that this claim is receivable. Accordingly, the only remaining issue is whether the President erred by refusing to consult the GAC with regard to the use of external contractors. In particular, the questions are whether Article 38(3) of the Service Regulations applies and, if it does apply, whether the practice of hiring external contractors constitutes a "proposal" within the meaning of that article.

12. As set out above, the Internal Appeals Committee found that the policy of employing external contractors was a proposal within the meaning of the Service Regulations. It stated that "[t]he introduction of a new employment policy as a result of which well over 30% of the staff in some areas are external employees constitutes a proposal within the meaning of Article 38(3)". The Committee thus accepted the

evidence of the Staff Committee that the interests of permanent employees were affected by the employment of external contractors through matters such as increased training needs, reallocation of duties, and frequent turnover.

13. Article 38(3) of the Service Regulations provides for GAC consultation in relation to proposals that concern the whole or part of the staff to whom the Service Regulations apply. Having regard to the content of the Office's report entitled "An Approach to Outsourcing", it is clear that the practice of outsourcing will have significant consequences for permanent employees. That report states "[the] replacement of permanent Office staff by external resources is attractive from a pure financial point of view: the Office pays substantially less per worked day [...], it increases its flexibility, it is less exposed to sickness/motivation/invalidity issues".

14. In Judgment 1618 the Tribunal recognised the importance of consulting the GAC in the context of a proposal tabled by the EPO to create a new category of employees, namely contract staff, and concluded that the GAC should be consulted. However, in Judgment 2562, where the President undertook temporary measures to employ "on-loan" staff from other departments to fill positions in his Office without GAC consultation, in dismissing the complaint the Tribunal stated:

"The complainant appears to be concerned that the use of 'on loan' staff may become a regular practice within the EPO. But there is no evidence that this practice has become widespread, nor is there any evidence that the President or the EPO developed any policy to make the use of 'on loan' staff more prevalent."

15. In the present case, although there is no formal policy in place, having regard to the prevalence of the practice of hiring external contractors, the existence of an informal policy is to be inferred. It also appears that the Office is at the very least considering the adoption of outsourcing on a wider scale, not limited to the Munich Office, as evidenced by its report entitled "An approach to outsourcing". Article 38(3) of the Service Regulations is meant to

“foster discussion and proper consultation between the parties regarding various proposals”. In the Tribunal’s view, although there is no formal proposal, this is the type of circumstance contemplated in Article 38(3). Accordingly, the President will be directed to consult the GAC in relation to the question of outsourcing. As the complainants have been partially successful, there will be an award of costs payable to them jointly in the amount of 300 euros.

In view of the nature of the issues raised, there is no need to order disclosure as requested by the complainants.

DECISION

For the above reasons,

1. The President’s decision of 17 March 2008 is set aside to the extent that it rejected the complainants’ claim with respect to consultation.
2. The President of the Office shall, within 60 days of the date of the publication of the present judgment, consult the General Advisory Committee on the practice of “outsourcing” in accordance with the recommendations of the Internal Appeals Committee.
3. The EPO shall pay the complainants jointly costs in the amount of 300 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 2010, 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 8 July 2010.

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