

**G. M.**

**v.**

**EPO**

**130th Session**

**Judgment No. 4317**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr O. G. M. against the European Patent Organisation (EPO) on 24 May 2013, the EPO's reply of 12 September, the complainant's rejoinder of 16 December 2013 and the EPO's surrejoinder of 24 March 2014;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant, in his capacity as a member of the Selection Board, challenges the decision not to allow a staff member holding a fixed-term contract to compete for a permanent post.

In June 2011 the EPO published a vacancy notice for a post of Management Assistant/Secretary in Directorate 5.2.2 (International Legal Affairs). The vacancy notice specified that the post was to be filled "by appointment as a result of an internal competition or by transfer". The complainant, who is a permanent employee of the European Patent Office (the EPO's secretariat), was designated by the staff representation to be a member of the Selection Board. The applicants for the vacant post included three staff members serving under fixed-term contracts ("contract staff"). The Selection Board decided by a majority that their applications should be excluded on the

grounds that the competition was only open to permanent employees. The complainant, who disagreed with that decision, wrote to the President of the Office on 24 August 2011 asking him to quash it and to re-open the selection procedure, allowing the three staff members concerned to participate. In the event that his request was denied, his letter was to be treated as an internal appeal.

After an initial examination of the case, the President concluded that the applicable rules had been correctly applied and he therefore referred the matter to the Internal Appeals Committee (IAC) for an opinion. The IAC held a hearing on 9 July 2012 and issued its opinion on 3 December 2012. A majority of its members found that the relevant provisions of the Service Regulations for permanent employees of the European Patent Office and of the Conditions of Employment for Contract Staff, properly interpreted, did not exclude contract staff from internal competitions and that the Office's position was "unjust, discriminatory and an abuse of power". The minority considered that the Office's interpretation of the provisions was correct, emphasising the fundamental differences between the respective legal positions of permanent staff and contract staff.

By a decision of 25 February 2013, the Vice-President of Directorate-General 4, acting on behalf of the President of the Office, dismissed the appeal in accordance with the IAC minority opinion. He explained that, contrary to the majority's view, contract staff were clearly excluded from such competitions under the applicable legal framework, and that this did not involve any breach of the Office's duty of care towards the staff concerned. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to award punitive damages owing to the fact that it is no longer possible to re-run the competition, moral damages and costs, with 8 per cent interest on all these amounts.

The EPO asks the Tribunal to dismiss the complaint as unfounded.

## CONSIDERATIONS

1. The complainant, a member of the Selection Board designated by the staff representation, filed an internal appeal against the decision, taken by a majority of the Selection Board, to exclude three candidates who had been recruited under fixed-term contracts, on the grounds

that the competition was only open to permanent employees. In the present complaint, the complainant impugns the 25 February 2013 decision by which the Vice-President of Directorate-General 4, acting on behalf of the President of the Office, dismissed the appeal in accordance with the IAC minority opinion. The Vice-President explained the reasons why he agreed with the IAC minority opinion. No objection has been raised at any point during the proceedings as to the complainant's standing to bring this complaint or indeed the underlying internal appeal.

2. The Tribunal considers that the present case raises two connected threshold issues which need to be resolved: a) whether the complainant's cause of action can be considered by the Tribunal even though this issue has not been raised by the parties; b) if the answer is yes, whether the complainant has the requisite standing to bring this complaint.

The Tribunal's answer is affirmative to the first question and negative to the second one.

3. The Tribunal must, in this case, raise the preliminary issue of the complainant's cause of action of its own motion, because the existence of a cause of action is a necessary pre-condition for the Tribunal's competence. If the complainant does not allege the violation of rights which the Tribunal is called upon to protect under the terms of its Statute, the Tribunal cannot adjudicate on the complaint. The Tribunal's case law connects this issue to the issue of receivability (see Judgments 3426, consideration 16, 3428, consideration 11, 3642, consideration 11, 3648, consideration 5, and the case law cited therein).

4. Regarding the second issue, it is worth noting that after the end of the written procedure in this case, the Tribunal adopted Judgment 3557, in a summary procedure, where it found that it was clear that the complainant, who was likewise acting in his capacity as a member of a Selection Board, did not have standing to challenge the outcome of the selection procedure. The same reasoning must be applied in the present case as "[the complainant] does not specifically allege any non-observance of his terms of appointment as required by Article II, paragraph 5, of the Tribunal's Statute".

As a matter of general principle, a complainant must, in order to raise a cause of action, allege and demonstrate arguably that the impugned administrative decision caused injury to her or him or was liable to cause injury (see, for example, Judgments 3921, consideration 6, and 3168, consideration 9). In accordance with this case law, a member of a board within an international organization, acting in this capacity, may only raise with the Tribunal the defects that have affected her or his prerogatives as a member of the board as defined by the internal provisions (see above-mentioned Judgment 3921, consideration 9). In the present case, the complainant does not specifically allege any non-observance of his terms of appointment or of board-related internal provisions.

5. In light of the above, the complaint is irreceivable in its entirety and must be dismissed.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 July 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ