

## SEVENTY-SIXTH SESSION

### *In re* MENAPACE

#### Judgment 1315

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought by Mr. Richard Menapace against the European Patent Organisation (EPO) on 8 January 1993 and corrected on 26 January, the EPO's reply of 8 April, the complainant's rejoinder of 17 May and the Organisation's surrejoinder of 24 June 1993;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 5, 7, 34(1) and 37 of the Service Regulations of the European Patent Office, the secretariat of the EPO, and Annex II to those Regulations;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. Articles 5 and 7 of the EPO Service Regulations read:

"5(1) Recruitment shall be directed to securing for the Office the services of permanent employees of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of the Contracting States.

...

(3) No particular post shall be reserved for nationals of any specific Contracting State.

7(1) Recruitment shall generally be by way of competition in accordance with the procedure laid down in Annex II.

...

A procedure other than that of competition may be adopted by the appointing authority for the recruitment of ... senior employees ... and also, in exceptional cases, for recruitment to posts which require special qualifications.

(2) For each competition, a selection board, the composition of which is laid down in Annex II, shall be appointed by the appointing authority. This board shall draw up a list of suitable candidates.

The appointing authority shall decide which of these candidates to appoint to the vacant post."

Article 1 of Annex II on Competitions says that "the Selection Board for each competition shall normally comprise a chairman, one or more members appointed by the appointing authority and one member appointed by the Staff Committee".

The complainant, an Austrian citizen, has been on the staff of the EPO in Munich since 1985 and is a permanent employee at grade A3. He served as chairman of the local Staff Committee in Munich in 1991-92.

On 11 April 1991 the President of the European Patent Office and the Central Staff Committee - which represents EPO staff at every level and duty station and is also in Munich - met to discuss new guidelines for protecting personal data in the Office. The President sought the agreement of the staff representatives to appointing Mr. Ludwig Kirst, a lawyer then employed in the German Ministry of Justice in Bonn, to a new post as data protection officer. In a letter to the President dated 15 April and signed on his behalf by the complainant, the chairman of the Central Staff Committee commented on the text of the guidelines and said that the Committee did not consent to the appointment of Mr. Kirst, "an outside candidate about whom little is known".

In mid-May 1991 the EPO invited Mr. Kirst to Munich for interview but withdrew the invitation because of the staff representatives' view that it was in breach of the selection procedure set out in the Service Regulations.

By a standard letter of 17 May the Personnel Recruitment and Administration Department asked the complainant,

who had just taken over as chairman of the local Staff Committee in Munich, to approve a draft announcement of a competition to fill a vacancy for a lawyer in the Legal Services Directorate (D 5.1.3) and to name the Committee's representative on a selection board. As chairman the complainant answered in a letter of 24 May that the Committee did not approve the text, for reasons that he set out in an appendix, and that he himself would be "the staff representative with responsibility for the competition".

On 22 May, however, the EPO had issued two notices of vacancy, one inviting applications from inside candidates, the other inviting outside applications, by 7 June. The title of the post was "Lawyer in Directorate 5.1.3" and the grade A2/3.

On 14 June 1991 the Administration drew up a list of candidates comprising two inside and eight outside ones, and it included Mr. Kirst. On 28 June an "interview panel" consisting of the Director of D 5.1.3, a personnel officer and the complainant saw Mr. Kirst but no-one else. The two members other than the complainant reported on 1 July to the President of the Office that Mr. Kirst might do provided he underwent training; but the complainant submitted a text dated 3 July stating doubts about Mr. Kirst's fitness and several objections to the procedure.

The President having decided that the post should go to Mr. Kirst, an offer was made to him, he accepted it, and he took up duty on 19 August 1991.

On 23 August the complainant filed an internal appeal asking the President to revoke the appointment and order a new procedure for recruitment to the post in D 5.1.3. As chairman of the local Staff Committee in Munich he sent the President an open letter on 26 August stating the staff representatives' strong objections to the procedure and to the "gross infringement of the rules on recruitment".

On 21 January 1992 the EPO issued a notice inviting applications for the post of data protection officer by 5 February. A special edition of the EPO "Gazette" was published on 29 June 1992 about the protection of personal data, and in it the President announced that "following an internal selection procedure and after hearing the Central Staff Committee" he had appointed Mr. Kirst to the post.

In its report of 31 August 1992 the Appeals Committee was unanimous that the procedure for recruitment to the post of lawyer in D 5.1.3 had not been in line with the Service Regulations and indeed showed serious errors and that the "sole purpose of the procedure" had been to put Mr. Kirst on the post "with a view to his appointment as the EPO's first Data Protection Officer". By a majority of three to two the Committee recommended allowing the complainant's appeal, revoking the appointment of Mr. Kirst and going through a new procedure for recruitment to the post of lawyer in D 5.1.3. But by a letter of 12 October 1992 a personnel officer signing on behalf of the Director of Staff Policy informed the complainant that the President rejected that recommendation. That is the decision impugned.

B. The complainant contends that the President's decision to appoint Mr. Kirst to the post as "lawyer" was unlawful on two grounds.

For one thing, there ought to have been proper participation by a staff representative in the process of selection. The President simply gave instructions to recruit Mr. Kirst: a vacancy was created just for him, he alone was interviewed, and the decision to appoint him was premature. In short, the whole exercise prevented the complainant from exercising his rights as a member of the Board.

Secondly, the notice of vacancy issued on 22 May 1991 did not set out the actual duties of the post. It was therefore not directed, as Article 5(1) of the Service Regulations requires, "to securing for the Office the services of permanent employees of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis ...".

As the Tribunal held in Judgment 1147 (in re Raths), a member of the Staff Committee of the EPO may rely on his position as such to ensure observance of the Service Regulations. Since the EPO prevented the complainant from doing so, the decision he is impugning was in breach of his rights and he therefore has a cause of action. He accordingly asks the Tribunal to set aside the appointment of Mr. Kirst as a permanent employee of the EPO. He also seeks 2,000 German marks in costs.

C. In its reply the EPO discusses the purport of Judgment 1147. It submits that the intent of that judgment is not to confer on members of selection boards and such bodies a right to file suit in the general interest or a power to

enforce observance of the Service Regulations. In its view the complainant may not just plead some flaw in the process of selection but must show that the procedure was such as to prevent him from exercising the rights and performing the duties inherent in his position as a member of the Selection Board and that he sustained injury on that account. The complainant suffered no such injury in this case.

It is clear from the evidence - and in particular from the letter of 15 April 1991 which the complainant signed on behalf of the chairman of the Central Staff Committee - that by mid-April 1991 he knew just what duties the holder of the post in D 5.1.3 would be expected to discharge and that the President had someone in mind to take up the post and then to become data protection officer. So the notices of vacancy could not have misled him.

In mid-May 1991, when he had the opportunity of interviewing Mr. Kirst, he refused to do so. What is more, though he must have known by 28 June 1991 that the Administration had, in accordance with Article 4 of Annex II to the Service Regulations, drawn up a list comprising two internal candidates and eight external candidates he does not seem to have called for any of the others to be interviewed. Nor did he seek to ensure that the Board drew up the shortlist of qualified applicants that was required under Article 5(1) of Annex II.

Even supposing there was any evidence of the President's giving instructions to recruit Mr. Kirst such instructions would not have kept the complainant from discharging his duties as a member of the Board. In fact he took an active part in the recruitment procedure and began his remarks of 3 July by saying that he "concur with the report on Mr. Kirst's interview": if he had been prevented from exercising his rights would he not have dissociated himself from the proceedings?

In any event the quashing of Mr. Kirst's appointment would not be a suitable remedy: Mr. Kirst should not be called to account for alleged procedural flaws. Besides, he no longer holds the disputed post, so quashing his appointment would have no practical effects.

D. In his rejoinder the complainant denies refusing to interview Mr. Kirst: the interview was cancelled after staff representatives told the Administration that they saw no lawful basis for one since there was no vacancy. What he alleged was that the notice of vacancy was misleading, not for him, but for any candidates other than Mr. Kirst who imagined they stood a chance of being appointed. He did not receive the Administration's list of candidates until the interview on 28 June 1991 and never saw their files. The EPO's interpretation of his comments on the Board's report does not square with the intended meaning in context.

What matters is whether the quashing of the appointment would be the lawful consequence of a flawed process of recruitment. Since the case law says that it would, Mr. Kirst's present duties are immaterial. To ensure that the effects of quashing are plain to the Organisation the complainant also asks the Tribunal to declare that Mr. Kirst's appointment announced in the EPO "Gazette" on 29 June 1992 as data protection officer "did not give him the status of a permanent employee of the EPO".

E. In its surrejoinder the Organisation states that the rejoinder contains nothing new that matters. That the notice of vacancy may have been misleading to potential candidates does not afford the complainant a cause of action. It is because the complainant was not a candidate for the material post that quashing is, in the EPO's submission, inappropriate. Insofar as the claim about Mr. Kirst's appointment as data protection officer did not form part of the internal appeal it is plainly irreceivable.

#### CONSIDERATIONS:

1. The complainant, acting on behalf of the EPO's local Staff Committee in Munich, is asking the Tribunal to set aside the appointment of Mr. Ludwig Kirst as a permanent employee of the Organisation on a post as "lawyer" in Directorate 5.1.3.
2. On 11 April 1991 the President of the Office sought the consent of the Central Staff Committee to appointing Mr. Kirst to fill a new post for a data protection officer. In a letter of 15 April to the President the Committee gave its reasons for not agreeing.
3. On 17 May 1991 the Personnel Recruitment and Administration Department wrote to the complainant as chairman of the local Staff Committee in Munich asking him to agree to the text of a notice of vacancy for a lawyer in Directorate 5.1.3 and to nominate a staff representative on the Selection Board. In a letter of 24 May the complainant answered that the Committee did not agree with the text of the notice and he gave his own name as

the staff representative.

4. On 22 May notices of vacancy had been posted inviting internal and external applications by 7 June 1991. There were two inside and eight outside candidates. On 28 June Mr. Kirst, who was one of the outside candidates, was interviewed by the Director of D 5.1.3, an official of the Personnel Department and the complainant. On 16 July the EPO offered Mr. Kirst the post and he took up duty on 19 August.

5. The complainant lodged an appeal objecting to the recruitment procedure the Office had followed. In a well-reasoned opinion of 31 August 1992 the Appeals Committee unanimously concluded that the procedure showed serious errors and that the sole purpose had been to appoint someone chosen in advance. By a majority of three to two the Committee recommended allowing the appeal, setting aside the appointment of Mr. Kirst and ordering a new recruitment procedure. But the President's decision of 12 October 1992 states:

"... the appeal is dismissed as unfounded. The Office concedes that there may possibly be grounds for doubting the formal correctness of the recruitment procedure. However, although the appeals procedure has brought certain formal deficiencies to light, the appointment of the candidate as a permanent employee has already entered into force, giving him a legal title to the post. The Office is therefore unable to accept the Appeals Committee's recommendation that a new competition be held."

That is the decision now impugned.

6. According to Article 34(1) of the Service Regulations the Staff Committee shall "represent the interests of the staff", "maintain suitable contacts" between the Administration and the staff and "contribute to the smooth running" of the Office. According to Article 37 the staff must be represented on selection boards. Annex II to the Regulations sets out a detailed procedure for the filling of vacancies by competition. Article 2(2) of that annex requires that in the case of external competitions notices must be published in each of the Contracting States not less than one month before the closing date; Article 4 requires the Administration to draw up a list of the candidates who meet the qualifications for the post and Article 5(1) requires the Selection Board to examine the files and draw up its own list of candidates with the requisite qualifications. Under 5(4), on completion of its proceedings the Selection Board shall "draw up the list of suitable candidates" and forward it to "the appointing authority, together with a reasoned report ... including any comments its members may wish to make".

7. The Organisation's first plea is that the complainant has to prove that the procedure was conducted in such a way as to prevent him from exercising his rights and performing his duties as a member of the Selection Board and that, failing such proof, the complaint is irreceivable. In any event the Organisation denies preventing him from exercising his rights as a member of the Selection Board and says he took an active part in the recruitment proceedings.

8. The plea cannot be sustained. In Judgment 1147 (in re Raths) under 4 the Tribunal held that if the members of the Staff Committee did not have power as such to enforce their rights the system of staff representation set up by the EPO would prove meaningless. Similarly, in Judgment 1269 (in re Errani No. 2) under 13 the Tribunal ruled that since "neither the Service Regulations of the EPO nor the Statute of the Tribunal allow staff associations as such to file suit, the only way for them to safeguard their interests is for individual officials to act as their representatives in furtherance of the common rights and interests of the whole or part of the staff". The Tribunal is satisfied on the evidence that at every opportunity open to him the complainant protested that the recruitment procedure the EPO was following was unlawful. The conclusion is that the Administration prevented him from carrying out his duties as a member of the Selection Board in accordance with the Service Regulations, that he has a cause of action, and that his complaint is therefore receivable.

9. Turning to the merits the Tribunal observes that the notice of vacancy failed to comply with the requirements of Article 2(2) of Annex II; the Selection Board failed to draw up the list required by Article 5(1) of Annex II; only one candidate was interviewed; the Board failed both to draw up the list of suitable candidates and to make the reasoned report required by Article 5(4) of Annex II.

10. Over and above those flaws, the Tribunal finds no evidence before it to disprove the Appeals Committee's conclusion that the sole purpose of the procedure was to appoint Mr. Kirst to Directorate 5.1.3 "with a view to his subsequent appointment" as data protection officer. Since the Organisation wilfully infringed the provisions of the Service Regulations and failed to show proper impartiality in the matter of the appointment it committed an abuse

of authority and the President's decision dated 12 October 1992 cannot stand.

11. The appointment of Mr. Kirst as lawyer in Directorate 5.1.3 as from 19 August 1991 must be set aside. That means that he was not lawfully a permanent employee of the EPO at the time when the post of data protection officer was advertised for internal appointment only and that he could not properly have the status of an internal candidate. The consequence is that his appointment to the post of data protection officer is also invalid. The Tribunal expects that the President will take such measures as will ensure that Mr. Kirst, who accepted the appointments in good faith, suffers no material injury.

#### DECISION:

For the above reasons,

1. The decision of 12 October 1992 by the President of the European Patent Office is quashed.
2. The appointment of Mr. Ludwig Kirst to the post of lawyer in Directorate 5.1.3 as from 19 August 1991 is quashed.
3. In consequence the appointment of Mr. Kirst to the post of data protection officer as from 1 July 1992 is declared invalid.
4. The Organisation shall pay the complainant 2,000 German marks in costs.

In witness of this judgment Mr. José Maria Ruda, President of the Tribunal, Sir William Douglas, Vice-President, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 31 January 1994.

José Maria Ruda  
William Douglas  
P. Pescatore  
A.B. Gardner