

106th Session

Judgment No. 2791

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs E. H. against the European Patent Organisation (EPO) on 22 February 2007 and corrected on 16 March, the EPO's reply of 21 June and the letter of 12 September 2007 by which the complainant informed the Registrar of the Tribunal that she did not wish to enter a rejoinder;

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

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

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

A. The complainant is a Dutch national born in 1957. She joined the European Patent Office – the EPO's secretariat – on 1 December 1988 as an examiner. At the material time she held grade A4.

In August 2003 a vacancy notice for the post of Principal Director, Corporate Communications Manager, was published under the reference EURO/3740 with a closing date of 15 September 2003. The appointment was to be made at grade A6 under an extendable

two-year contract. Approximately 100 candidates applied for the position but the Principal Director of Personnel considered that none of them was suitable and therefore decided, after having consulted the staff representatives and the Vice-President of Directorate-General 4, to engage a recruitment consultant. A few months later the consultant presented the Office with a list of ten candidates who were then interviewed by the Principal Director of Personnel. The latter preselected three of them and informed the President of the Office accordingly. One of the three preselected candidates, Mr S., who had not submitted an application in response to vacancy notice EURO/3740, was offered the post. On 3 August 2004 the President signed a contract appointing Mr S. to the post with a termination date of 31 August 2007. Mr S. joined the Office on 13 September 2004 and his appointment was published in the EPO's *Gazette* of 25 October 2004.

By a letter of 14 January 2005 the complainant, in her capacity as Deputy Chairperson of the Munich Staff Committee, asked the President of the Office to cancel the appointment of Mr S. or otherwise treat her letter as an internal appeal. She challenged the said appointment on the grounds that it had been made without a competition, in breach of Article 7(1) of the Service Regulations for Permanent Employees of the European Patent Office. She was informed by a letter of 28 February 2005 that the President had not acceded to her request on the grounds that there had been a proper recruitment procedure; the matter had therefore been referred to the Internal Appeals Committee. On 28 November 2005 the complainant informed the Committee of her intention to lodge a complaint with the Tribunal if the EPO's position was not submitted by the end of January 2006. The EPO submitted its position to the Committee on 30 January 2006.

In an opinion of 10 October 2006 a majority of the members of the Appeals Committee considered that the appeal was receivable insofar as the complainant alleged that the rights of the staff representatives had been infringed in the procedure leading to the appointment of the Principal Director, Corporate Communications

Manager. The majority observed that, according to Article 7(1) of the Service Regulations, principal directors are generally appointed by way of competition in accordance with the procedure laid down in Annex II to the Service Regulations. Article 1 of Annex II provides that for each recruitment procedure a Selection Board, which normally includes a member appointed by the Staff Committee, shall be convened. Since no Selection Board was appointed and the Staff Committee was not formally involved in the recruitment procedure, the Appeals Committee concluded that the Office had conducted an arbitrary procedure and had thus infringed the “consultation rights” of staff representatives. It also noted that the Office had acted in breach of Article 4(2) of the Service Regulations, since the staff had not been informed that the post of Principal Director was to be filled despite the fact that the recruitment procedure initiated by vacancy notice EURO/3740 had been terminated. The Appeals Committee recommended by a majority that the contested decision be set aside and that the complainant’s costs be reimbursed.

By a letter of 8 December 2006, which is the impugned decision, the Director of Personnel Management and Systems notified the complainant that the President of the Office had decided to reject her appeal as irreceivable in part and unfounded in its entirety. The President considered that the appeal was receivable only insofar as it concerned the rights of the Staff Committee and pointed out that in exceptional circumstances, such as recruitment to posts requiring special qualifications, Article 7(1) of the Service Regulations allows for the use of a procedure other than a competition. He was also of the view that the appointment of a Selection Board was not required for a recruitment conducted under that exception. The President added that, in accordance with Article 3(2) of the Conditions of Employment for Contract Staff, he may opt for a recruitment procedure different from that laid down in Article 7 of the Service Regulations when hiring a person under a contract of less than three years. The President also expressed the view that the obligation to convene the Selection Board applies only to the competition procedure and not to appointments made on the basis of Article 7 of the Service Regulations.

B. The complainant submits that the members of the Staff Committee have a “guardian function” and must be entitled to challenge appointment decisions that are made in breach of applicable rules.

She points to the fundamental principle that a law governing a specific subject matter (*lex specialis*) is not overridden by a law which only governs general matters (*lex generalis*). In her view, the Conditions of Employment for Contract Staff do not apply to the recruitment of principal directors since specific rules, in particular Article 1(5) and Part 2(b) of the Codex, deal with their recruitment and terms of employment; thus a specimen contract for principal directors can be found in Part 2(b) of the Codex.

According to the complainant, the decision to appoint Mr S. on the basis of a contract of less than three years was flawed. Indeed, Article 1(2) of the above-mentioned specimen contract stipulates that a principal director shall be granted a five-year contract. She also submits that the Office acted in breach of Article 7(1) of the Service Regulations, according to which recruitment shall generally be made by way of competition. Exceptions may be granted but only for the recruitment of senior employees and to posts which require special qualifications. She submits that the Office had no valid reason to depart from the general recruitment procedure. Indeed, principal directors are not deemed to be senior employees according to Article 11 of the European Patent Convention, and the Office had not shown that the post required special qualifications. She points out that it was her understanding that the post of manager in the communications sector had been filled by way of a competition in the past.

She submits that the combined effect of Article 7 of the Service Regulations and Article 1 of Annex II to the Service Regulations is that a Selection Board shall be convened for each competition and that the Staff Committee has the right and the duty to appoint one of its members. Since the Office wrongfully decided not to fill the disputed post by way of competition, no Selection Board was convened and the Staff Committee was deprived of its right to participate in the recruitment procedure.

In addition, the complainant argues that the Office violated Article 4(2) of the Service Regulations in deciding not to re-advertise the vacant post. Indeed, staff members were not informed of the Office's decision to "restart" the recruitment procedure by asking a recruitment consultant to find suitable candidates. She points out that in the original vacancy notice the post was offered as an extendable two-year contract whereas Mr S. was appointed under a contract exceeding two years. The procedure leading to the appointment of Mr S. was consequently different from the original one and was not transparent.

The complainant asks the Tribunal to set aside the impugned decision, to quash retroactively the decision to appoint Mr S. as Principal Director, Corporate Communications Manager, and to order the payment of moral and punitive damages. She also asks the Tribunal to order the EPO to initiate an open competition procedure for the disputed post and to pay her reasonable compensation for the time and effort spent in preparing her case.

C. In its reply the EPO submits that the complaint is irreceivable in part. It contends that the Tribunal is not competent to order that a vacancy be filled by way of a competition; the Tribunal may only rule on whether the Office correctly applied the recruitment procedure.

The Organisation stresses that, at the material time, no specific procedure had been adopted concerning the appointment of principal directors. The general rules on recruitment of staff applied, including Article 7 of the Service Regulations, which provides that in exceptional cases a procedure other than that of competition may be adopted for posts requiring special qualifications. In its view, the post of Principal Director, Corporate Communications Manager, required special qualifications because the selected candidate would be the press spokesperson for the EPO, and would thus have to work in close cooperation with the President. The Office was consequently justified in departing from the general recruitment procedure set out in Annex II to the Service Regulations. The EPO adds that a different recruitment procedure was used for the first time in the present case, which shows how "special" the disputed post was.

The defendant asserts that the recruitment procedure was conducted in conformity with the applicable provisions. It explains that it is a constant practice in the Office not to involve the Selection Board in the recruitment of short-term staff members. With regard to the duration of the Principal Director's contract, it indicates that Article 1(2) of the specimen contract provided in Part 2(b) of the Codex allows for some flexibility as it is merely a model contract.

Lastly, the EPO contends that the complainant's claim for costs should be dismissed since she has produced no evidence of the costs actually incurred. It points out that part of the complainant's working time was devoted to staff representation duties as she was Deputy Chairperson of the Munich Staff Committee.

At the Tribunal's request, the Organisation invited Mr S. to comment on the complaint. It attaches to its reply a letter from Mr S. indicating that he was not aware of any irregularities in the recruitment procedure and that he performed his duties well.

CONSIDERATIONS

1. The complainant filed this complaint against the appointment of Mr S. as Principal Director, Corporate Communications Manager, in her representative capacity as Deputy Chairperson of the Munich Staff Committee.

2. As to the issue of whether the complainant has *locus standi* to bring a complaint, the Tribunal has consistently held that individual members of the Staff Committee must have the power to file suit as representatives of that body. The rationale is that if the Staff Committee is not able to file suit, the only way to preserve common rights and interests of staff is to allow individual officials to act as representatives. This case law is also consistent with Article 34

of the Service Regulations, which states that elected staff representatives have a duty to “represent the interests of the staff” (see Judgments 1147, 1269, under 13, 1315, under 8, 2036 and 2562, under 10).

3. Before turning to the specific issues raised in this proceeding, a brief account of the background to the implementation of fixed-term appointments for principal directors is useful. In November 2001 the President of the Office proposed in document CA/68/01 that the terms of employment for principal directors be amended to permit their appointment under fixed-term contracts. Part 1 of that document, prepared at the time for consideration by the Administrative Council, explains that principal directors “perform senior executive roles in close co-operation with the President or a Vice-President and should, for this reason, be employed on terms that allow the President to fill these budget posts in accordance with the changing needs of Office management”. It provides that to establish the legal basis for such recruitment on contract, in addition to amending Article 1(5) of the Service Regulations, “the adoption of an implementing regulation laying down the specific terms of employment applying to these staff members (specimen contract)” is also required. It further explains that the “appointment procedure laid down in Annex II [Service Regulations] (competition) will apply as before”.

4. By decision CA/D 10/01 of 13 December 2001 the Administrative Council adopted the above proposal. Article 1 of that decision amends Article 1(5) of the Service Regulations to make the Regulations applicable to principal directors employed on contract to the extent that there is express provision to this effect in the employment contract. Article 2 of the decision provides that “Principal Directors shall be recruited on the basis of the following specimen contract”. The contract, entitled “Specimen Contract Concerning the Appointment and Terms of Employment of Principal Directors”, is set out in its entirety.

5. The Office grounded its decision to reject the appeal on the basis of the exception in Article 7(1) of the Service Regulations. That provision provided that recruitment shall generally be by way of competition in accordance with the procedure found in Annex II. It also permitted a procedure other than a competition “in exceptional cases for recruitment to posts which require special qualifications”. However, in the present case, the Office did not identify the special qualifications that necessitated an alternative recruitment procedure.

6. Before dealing with the applicability of Article 7(1) of the Service Regulations, the Tribunal notes that in these circumstances it was incumbent on the Administration to identify also the specific special qualifications required for the post. Without this information, a potential complainant has no basis upon which to assess whether there are grounds for a complaint flowing from the reliance on this provision. Additionally, on a review of the decision, the Tribunal only has an after-the-fact justification for the decision.

7. In its reply the EPO justifies its reliance on the exception in Article 7(1) of the Service Regulations by arguing that “[i]n view of the special qualifications required for the post at stake, i.e. to be the Head of Communication and the EPO press spokesman, necessitating close co-operation with the President [...] it was legitimate to adopt a recruitment procedure other than that provided for in Annex II to the Service Regulations, all the more so when it became clear that none of the candidates who applied after publication of the vacancy in line with Article 4(2) [Service Regulations] was suitable”.

8. The Tribunal observes that the seniority of the position and the close working relationship are simply descriptive of the position and do not identify the special qualifications required for the post. The Tribunal also observes that the seniority of the position and the close working relationship with the President mirror the stated rationale in Part 1 of document CA/68/01 for the implementation of fixed-term contracts for principal directors. According to Part 1 of document CA/68/01, it was contemplated that the principal directors

would be recruited by way of competition under Annex II. This does not mean that there could not have been recourse to the exception in Article 7(1) of the Service Regulations for the recruitment of principal directors. However, where there was reliance on the exception, the Organisation bore the onus of demonstrating that the post required special qualifications. In the present case, the EPO has not done so.

9. Relying on the absence of a recruitment procedure in the specimen contract, the Office also found further justification in Article 3(2) of the Conditions of Employment for Contract Staff for the use of an alternative recruitment procedure. The Tribunal rejects this reasoning. First, employment contracts provide the terms and conditions of employment. Not only is it unnecessary, but one would not expect to find recruitment procedure information in an employment contract. Second, the Conditions of Employment for Contract Staff was introduced in 1992 to add contract staff to the existing categories of permanent employees and auxiliary staff. Subsequently, a decision was taken in 2001 to permit the appointment of principal directors on fixed-term contracts. At the same time, rather than adopting the existing Conditions of Employment for Contract Staff, the EPO opted to establish specific terms and conditions of employment for these senior positions. For this reason, the Tribunal finds that the provisions of the Conditions of Employment for Contract Staff do not apply to principal directors. In particular, the recruitment provisions in Article 3 have no application to the recruitment of principal directors.

10. The remaining issue is whether the EPO violated Article 4(2) of the Service Regulations. Article 4(2) requires that staff be informed of each vacant post when the appointing authority decides that the post is to be filled. The complainant submits that the recruitment procedure initiated by vacancy notice EURO/3740 was terminated when the Principal Director of Personnel decided that none of the applicants was a suitable match for the position. The complainant argues that the engagement of a recruitment consultant started a new recruitment process and the failure of the EPO to inform

the staff of the new recruitment process constitutes a violation of Article 4(2) of the Service Regulations.

11. The EPO did not respond directly to this argument. Instead, it attempted to justify further its recourse to an alternative recruitment procedure on the basis that the Article 4(2) process had failed to yield any suitable candidates.

12. To the extent that it is an attempt to respond to the complainant's Article 4(2) argument, the Tribunal finds that the EPO's submission is fundamentally flawed as it is premised on the assumption that the adoption of an alternative recruitment process under Article 7(1) of the Service Regulations does not require compliance with Article 4(2). In addition to providing institutional transparency, Article 4(2) is the regulatory recognition and safeguard of a staff member's right to a fair opportunity to submit a candidature for a vacant post. It is a right that exists separate and apart from the recruitment procedures. The Tribunal also observes that there are no regulations limiting the applicability of Article 4(2) to only those recruitments by way of competition.

13. On the facts of the present case, the Tribunal finds that at the time the recruitment consultant was engaged a decision had been taken to abandon the initial recruitment procedure and a new recruitment procedure had been adopted. Without deciding whether a new vacancy notice was required in these circumstances, at a minimum the staff should have been informed that the recruitment had been assigned to a recruitment consultant and provided with information regarding the application process. The failure to do so constitutes a violation of Article 4(2) of the Service Regulations. Lastly, the Tribunal notes that the contract that was ultimately entered into was for a longer duration than initially advertised. This is a material change that may well have influenced a staff member's decision to apply or not apply for the post. Accordingly, the staff should also have been informed of this change.

14. For these reasons, the Tribunal concludes that the complaint must be allowed. In terms of relief, the complainant asks that the President's decision of 8 December 2006 be set aside; that the decision to appoint Mr S. be set aside retroactively; and that the EPO be directed to start a regulatory procedure by open competition for the disputed post. She seeks moral and punitive damages and reasonable compensation for her time and effort.

15. The Tribunal will set aside the President's decision of 8 December 2006. As the effect of the decision to appoint Mr S. is now spent, there is no appointment to set aside. With respect to the complainant's claim that the EPO be directed to start a regulatory procedure by open competition for the post of Principal Director, Corporate Communications Manager, it is rejected because it is beyond the Tribunal's power to make such an order.

16. On the claim for moral and punitive damages, the complainant takes the position that the EPO's conduct demonstrates contempt and a lack of respect for the regulatory procedures. She also contends that the EPO's disregard for the rules and the significant delays in the internal appeal process illustrate a lack of adequate legal protection for the staff. The Tribunal finds that the EPO's conduct in this case falls short of the level of egregiousness required to justify an award of punitive damages.

17. However, as a representative of the Staff Committee the complainant is entitled to moral damages for the violations of the Service Regulations. As well, the unexplained and inordinate delay in the processing of the internal appeal that has effectively denied the complainant one aspect of the relief to which she would have otherwise been entitled, namely, the quashing of the appointment decision, warrants an award for moral damages on that head. The Tribunal assesses the moral damages at 1,000 euros.

18. The Tribunal also awards the complainant costs for this proceeding and the internal appeal in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The President's decision of 8 December 2006 is set aside.
2. The EPO shall pay moral damages to the complainant as a representative of the Munich Staff Committee in an amount of 1,000 euros.
3. It shall also pay her 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 30 October 2008, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Mary G. Gaudron
Dolores M. Hansen
Catherine Comtet