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

EIGHTY-NINTH SESSION

***In re* Liaci** **Judgment No. 1964**

The Administrative Tribunal,

Considering the complaint filed by Mr Fabio Liaci against the European Patent Organisation (EPO) on 10 July 1999 and corrected on 20 September, the EPO's reply of 9 December 1999, the complainant's rejoinder of 29 February 2000 and the Organisation's surrejoinder of 4 April 2000;

Considering Articles II, paragraphs 5 and 7, and VII of the Statute of the Tribunal;

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. Under Article 8 d) of the Service Regulations of the European Patent Office, the EPO's secretariat, to be eligible for appointment as a permanent employee a candidate must "meet the physical requirements of the post".

Article 9 of the Service Regulations which refers to the initial medical examination required on recruitment specifies that, before being appointed, a successful candidate shall be "medically examined by a medical practitioner designated by the President of the Office" in order to satisfy the appointing authority that the candidate fulfills the requirements of Article 8 d).

Article 2 of the Pension Scheme Regulations of the Office reads as follows:

"Where the medical examination which every employee has to undergo at the time of his appointment shows him to be suffering from an illness or disablement, the Office may decide that, as regards risks arising from an illness or disablement existing before he took up his duties, the said employee shall not be entitled to the invalidity or death benefits provided for in these Regulations until the expiry of a period not exceeding five years from the date on which he entered the service of the Organisation ..."

The complainant, who holds both Italian and Swiss nationality, was born in 1967. In April 1996, following the publication of a vacancy notice in the press, he applied for a post of patent examiner in Directorate General 1 (DG1) at the EPO's Sub-office in Berlin. On 26 November 1998, the Head of Administration sent him a letter in which he offered him the above post as from 1 February 1999, while indicating that the appointment was conditional upon his complying with the requirements of Articles 8 and 9 of the Service Regulations. By a letter of 21 December 1998, the complainant replied to the Head of Administration accepting the offer of employment.

On 8 January 1999, the complainant's initial medical examination was carried out by his own doctor. The results were sent to the EPO's medical adviser. At the end of January, the Head of the Personnel Section in Berlin informed the complainant that the date of his entry on duty had been postponed to 1 April 1999, as the medical adviser had considered that he did not meet the medical requirements for appointment. In a letter dated 21 January, the medical adviser made a recommendation to the complainant, who had "considerable excess weight" and whose liver test results were found to be of a "pathological nature", to lose weight with a view to helping him meet the medical requirements mentioned above. By a letter dated 12 February, the Head of the Personnel Section confirmed the postponement of the date of his taking up employment until 1 April.

At the beginning of March, a further medical examination of the complainant was carried out by his doctor. In a letter of 10 March, the latter informed the medical adviser that the medical condition of his patient was "on a par" with that of January 1999, but that his condition could not serve as grounds "for exclusion". Following a telephone

conversation with the complainant on 24 March, the Head of the Personnel Section confirmed to the complainant in an e-mail sent to him the same day that he could not be appointed on 1 April as foreseen, as the medical adviser had not certified him fit to perform the duties of the post. During the telephone conversation, the complainant requested that the matter be referred to the Invalidity Committee. By a letter of 8 April 1999, the Head of Administration informed the complainant that the EPO was withdrawing the offer of employment made on 26 November 1998 since he did not fulfil the medical requirements for appointment. By an e-mail of 14 April 1999, the complainant accepted that decision.

By a letter of 7 May the complainant appealed to the President of the Office against the decision to withdraw the offer of employment. Having received no reply from the Administration, he filed the present complaint on 10 July. In a letter of 13 July, the Director of Personnel Development informed him that the President had decided to refer the matter to the Appeals Committee for an opinion.

B. The complainant contends that the Tribunal is competent *ratione materiae* and *ratione personae* under the terms of Article II(5) of its Statute. In accordance with the Tribunal's case law, this Article does not only apply to officials who have benefited from a formal act of appointment, but also to those with whom the international organisation has concluded a contract with a view to their appointment. In the material case, the exchange of letters of 26 November and 21 December 1998 resulted in the conclusion of a "conditional contract of appointment" between the parties, which the complainant alleges was breached.

On the merits, the complainant submits that the medical adviser drew manifestly wrong conclusions from the evidence. Article 8 d) of the Service Regulations does not require future employees to be "in perfect health"; what matters is that any illness or disablement should not render them incapable of discharging their functions. Citing the Service Regulations and Article 2 of the Pension Scheme Regulations, he endeavours to show that the fact that someone might be suffering from an illness or disablement does not constitute sufficient grounds for refusing to appoint that person, and that it is also necessary for the medical adviser to explain how such an illness renders the candidate incapable of discharging his functions. In his case, the complainant never received such an explanation. Moreover, the evaluation of physical capacity should not hinge on medical requirements for appointment "determined in an arbitrary manner" by the Administration or the medical adviser. Such criteria, which are not listed, only serve in practice to bring within the scope of Article 8 d) of the Service Regulations those illnesses and disablements which are in fact covered by Article 2 of the Pension Scheme Regulations. While the objective of Article 2 is to avoid "an excessive risk" for the Organisation's health insurance scheme, Article 8 d) is meant to exclude applicants who, for physical reasons, would not be capable of discharging the functions for which they are recruited. The complainant refers back to the opinion of his doctor and the professional activities which he was performing before and after the facts of the present case, and states that he is physically capable of discharging the functions of examiner.

Finally, he submits that his case should have been referred to the Invalidity Committee. By refusing to accede to his request, the EPO denied him a "fundamental procedural safeguard".

The complainant requests the Tribunal to set aside the President's implicit decision to reject his appeal of 7 May 1999 and to order any consequent redress, including: ordering the appointment of the complainant as from 1 February 1999, or subsidiarily from 1 April 1999, and authorising him to enter into service without further delay and without prejudice to the application, if appropriate, of Article 2 of the Pension Scheme Regulations; and, subsidiarily, to order that the dispute concerning the medical adviser's opinion be referred to the Invalidity Committee so that it can decide upon the physical aptitude of the complainant and whether Article 2 of the Pension Scheme Regulations should be applied. In this respect, the Tribunal would have to specify the scope of Article 2 and of Article 8 d) of the Service Regulations. Furthermore, the complainant requests the Tribunal to order the EPO to pay him the remuneration which he would have received had he entered service on 1 February 1999 and compound interest of at least 10 per cent per year on the amounts due from the date on which his appeal was lodged, as well as 20,000 German marks in moral damages and 5,000 marks to reimburse the costs he had incurred as a result of the impugned decision and the present complaint. He also wants the EPO to pay costs.

C. In its reply the EPO argues that the complaint is irreceivable as the Tribunal is not competent *ratione personae*. On 1 December 1977, the Organisation only recognised the jurisdiction of the Tribunal within the limits determined by the European Patent Convention. Article 13(1) of the Convention provides that "employees and former employees" may apply to the Tribunal "within the limits and subject to the conditions laid down in the Service Regulations for permanent employees or the Pension Scheme Regulations". However, the status of employee is

only acquired through appointment. Under the terms of the Service Regulations, appointment depends on the selected candidate's meeting the physical requirements referred to in Article 8 d) of the Service Regulations. The contract of appointment concluded by the candidate's acceptance of the offer made by the Office places the latter under the obligation to appoint the candidate. However, the Office is freed from that obligation if the candidate does not meet the requirement referred to in Article 8 d) as the appointment can no longer be made. As a consequence, it was not possible to appoint the complainant. Having failed to acquire the status of employee, he can neither claim to come within the jurisdiction of the Tribunal, nor within the scope of the Service Regulations and the Pension Scheme Regulations. Therefore, the claims whereby he seeks his appointment, the referral of the matter to the Invalidity Committee and the payment of the various sums are irreceivable. The EPO adds that the complainant's claim to be appointed as from 1 February 1999 is also irreceivable insofar as he lodged his internal appeal more than three months after he had been informed of the decision not to appoint him from that date.

Subsidiarily, the EPO submits that it is in the interests of the Office, which appoints its employees for life, to ensure that they enjoy a state of health, at least at the time of their recruitment, which gives grounds for hoping that they will be capable of discharging their functions for as long and as effectively as possible. It is in this sense that Article 8 d) should be interpreted. When undertaking an initial medical examination, the medical adviser must take into account the foreseeable development of any symptoms the candidate had at the time of his recruitment. In the material case, the results of the examinations carried out in March 1999 were "hardly encouraging" insofar as within the period accorded to him, the complainant had not been able or had not wished to ensure that the results of the new tests would be favourable. The EPO also cites the case law of the Court of Justice of the European Communities under which, in the event of doubt concerning the state of health of a candidate, "the institution cannot be obliged to take the risk of recruiting him". Finally, the EPO emphasises that the decision taken by the medical adviser was based on the test results provided by the complainant himself and not on criteria that were arbitrary.

D. In his rejoinder the complainant maintains that his complaint is receivable. He contends that an international organisation cannot make a reservation with regard to its acceptance of jurisdiction and doubts that the letter of 1 December 1977 contains such a reservation. Moreover, in accordance with its case law, the Tribunal could not take such a reservation into account. The complainant emphasises that Articles 106 and 107 of the Service Regulations, relating to appeals, refer to "a specific individual to whom these Service Regulations apply", which includes the candidates covered by Articles 7 to 9. Furthermore, the postponement of his entry into service was only a precautionary measure while awaiting the definitive decision of the Office, which was made on 8 April 1999. Until the Office had taken that decision, the complainant could still expect his appointment as from 1 February. The internal appeal was filed on 7 May and is therefore receivable *ratione temporis*.

With regard to the case law mentioned by the EPO, the complainant observes that in the case it cited, the candidate had refused to submit to a medical test. The situation was different in his own case. Furthermore, he affirms that according to the Community case law, this examination must reveal a risk liable to affect the discharge of functions in the foreseeable future, which excludes potential and long-term risks.

E. In its surrejoinder the EPO observes that the Tribunal, whose jurisdiction is limited, reserves the right to examine, as in the present case, the effect of a limitation of that jurisdiction inherent in the recognition of its competence. The Service Regulations, under the terms of Article 1, only apply to permanent employees. In accordance with Article 109(3) the right of recourse to the Tribunal is reserved for permanent employees or former employees. It would therefore be incorrect to give a different interpretation to Articles 106 and 107. Moreover, the decision taken at the end of January 1999 to postpone the complainant's date of entry into service was definitive, as has been acknowledged by the complainant in a letter of 29 January 1999. The internal appeal was therefore time-barred.

The EPO adds that the Appeals Committee, which issued its opinion on 31 January 2000, unanimously recommended the dismissal of his internal appeal as being without merit and upheld the decision of the medical adviser.

CONSIDERATIONS

1. The complainant, a graduate of the Federal Institute of Technology of Lausanne, applied in April 1996 for a post of patent examiner at the Berlin Sub-office of the European Patent Office. After having entered the competition organised to fill the post, he received a letter dated 26 November 1998 from the Head of Administration offering

him the post as from 1 February 1999, subject to his complying with the requirements of Articles 8 and 9 of the Service Regulations. Those articles provide that a candidate should produce certain certificates as well as meet the physical requirements of the post as verified by an initial medical examination. The complainant accepted the offer on 21 December 1998 and after some exchanges of letters, underwent the initial medical examination on 8 January 1999. Having received the results of the examination which had been carried out by the complainant's own doctor, the Office's medical adviser wrote to him on 21 January 1999 mentioning the "pathological nature" of his liver tests and his "considerable excess weight". The medical adviser proposed that he lose weight in order to meet the medical requirements for recruitment to the Office. The entry into service of the complainant was postponed until 1 April 1999. After the complainant had undergone a further medical examination in March 1999, the results were passed on to the EPO's medical adviser who was not able to certify him fit to perform the duties of the post. As a result of that medical opinion, on 8 April the EPO withdrew its earlier offer of employment. The complainant, having first admitted that this was the best solution, then changed his mind and appealed against the decision of 8 April 1999. He has filed this complaint with the Tribunal challenging the implied rejection of his claims. He requests the Tribunal to order the EPO to appoint him as from 1 February 1999 or from 1 April 1999. In a subsidiary plea, he requests the referral of the matter to the Invalidity Committee as provided for under Articles 89 *et seq*. of the Service Regulations. He also claims payment of the remuneration that he should have received, as well as damages for the moral injury caused by what he considers to be a breach of his contract of appointment.

2. The case raises a delicate issue of jurisdiction. The EPO contests the Tribunal's competence to examine a case concerning an applicant for a post who has not been granted the status of employee and whose contract of appointment was subject to a condition which finally was not fulfilled. The EPO has only recognised the Tribunal's jurisdiction within the limits set out in Article 13(1) of the European Patent Convention, under the terms of which:

"Employees and former employees of the European Patent Office or their successors in title may apply to the Administrative Tribunal of the International Labour Organisation in the case of disputes with the European Patent Organisation in accordance with the Statute of the Tribunal and within the limits and subject to the conditions laid down in the Service Regulations for permanent employees or the Pension Scheme Regulations or arising from the conditions of employment of other employees."

According to the EPO, as the complainant was not appointed as an employee and did not enter the service of the Organisation because he failed to meet the physical requirements set out in Article 8 d) of the Service Regulations, he cannot benefit from the Tribunal's jurisdiction.

3. In rebuttal the complainant refers to Article II(5) of the Statute of the Tribunal and to the case law, particularly in Judgments 307 (*in re* Labarthe), 339 (*in re* Kennedy) and 621 (*in re* Poulin). Article II(5) of the Statute of the Tribunal says:

"The Tribunal shall ... be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organization meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure, and which is approved by the Governing Body."

In Judgment 307, cited by the complainant, the Tribunal found that it was competent to examine a dispute submitted to it by a complainant who, even without being appointed to a post in an international organisation, was covered by a "binding contract". In that case, the Tribunal found that:

"There is a binding contract if there is manifest on both sides an intention to contract and if all the essential terms have been settled and if all that remains to be done is a formality which requires no further agreement."

In Judgment 339, the Tribunal found that, where the complainant establishes the existence of a binding contract of appointment with the organisation, but there is a dispute about the matter, it is a dispute on which the Tribunal is competent to rule. Finally, Judgment 621 recalls that, for a contract to arise, there has to be "an unquestioned and unqualified concordance of will on all terms of the relationship", in the sense that both parties have shown contractual intent, all the essential terms have been worked out and agreed on, and all that remains to be settled is a formality requiring no further agreement. The complainant deduces from this case law that, in view of his acceptance of the EPO's offer, followed by the letter accepting his candidacy, he is indeed covered by a conditional contract of appointment which is binding on the Organisation. Although the resulting obligations are undoubtedly

subject to a condition, namely, the physical aptitude of the applicant to discharge his functions, this is an objective condition over which the parties have no control and which does not require any new agreement.

4. Although this analysis is not without merit, the Tribunal cannot agree with it. It is within the competence of the Tribunal to determine whether or not there is a contract of appointment by which the parties are bound and which would entitle the official covered by the contract to the rights enjoyed by the officials of an organisation that has recognised the Tribunal's jurisdiction. However, in the material case, the EPO's agreement to appoint the complainant was subject to the fulfilment of a condition which cannot be said to be a mere formality, namely, recognition that he was physically fit enough to discharge his functions. The complainant was not appointed as an employee of the EPO, and under Article 8 d) he could not have been appointed as a permanent employee unless he met "the physical requirements of the post". Consequently, the complainant, who has never been an employee of the EPO, is raising a matter which is not within the scope of the Tribunal's competence. The Tribunal can only refer to its Statute and to Judgments 803 (*in re* Grover) under 3 and 1554 (*in re* Tögl) under 10, which exclude from its jurisdiction external candidates for employment and persons who have not concluded a contract of employment of which all the essential terms have been agreed. The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 25 July 2000.