

The Administrative Tribunal,

Considering the second complaint filed by Mr F. B. P. M. B. against the European Patent Organisation (EPO) on 30 December 2005 and corrected on 21 February 2006, the Organisation's reply of 7 June, the complainant's rejoinder of 7 August and the EPO's surrejoinder of 13 November 2006;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a French national born in 1960, joined the European Patent Office, the EPO's secretariat, in May 1993. He is serving in Vienna, Austria.

Acting in his capacity as Chairman of the Staff Committee of the Vienna sub-office, by a letter of 31 March 2003 he asked the President of the Office to forward "the salary scales referred to in the annex to Part 2 of the Codex"* to all agencies supplying temporary staff to the EPO in order that they might "pay their personnel in accordance with Article 10 of the Austrian Act on the provision of temporary personnel (AÜG**) of 1 July 1988". In the event of a negative reply, he asked the President to consider his request as an internal appeal. The President informed the complainant of his refusal by letter of 14 April 2003. The Appeals Committee issued its opinion on 12 September 2005. After noting that the additional pleas submitted by the complainant, and likewise the "requests" he had made during the hearing concerning the outsourcing of some of the Office's tasks and the general conditions of employment of temporary workers and employees of outside companies, constituted an unauthorised extension of the complainant's initial appeal, the Committee stated that it would give an opinion only on the appeal as filed, the purpose of which was to secure the forwarding of the salary scales. It recommended that the appeal be dismissed as irreceivable. By a letter of 23 September 2005, which constitutes the impugned decision, the President of the Office dismissed the appeal.

B. The complainant contends that the Staff Committee is entitled to represent temporary workers. Referring to the Service Regulations for Permanent Employees of the European Patent Office and to the Guidelines on the protection of dignity of staff contained in Part II of Circular No. 286, he submits that no text specifically excludes temporary personnel from the right to trade union representation. He adds that Austrian labour law "expressly provides that temporary employees [shall be] represented by the staff representatives of the enterprise where they are working throughout their period of employment". He asserts that under the terms of the AÜG of 1 July 1988, the European Patent Office is an "employer" (*Beschäftiger*) when it recruits temporary personnel through temporary employment agencies, the latter being merely "employment providers" (*Arbeitgeber*). The complainant accuses the Organisation of evading all legislation with regard to temporary personnel, by excluding the application of both national laws and the Organisation's internal regulations, thus leaving this category of personnel in a "legal vacuum" vis-à-vis its legal employer. He accuses it of "hid[ing] behind its immunity in order not to treat these employees with respect for their human dignity". As for the salary scales, he submits that "the Austrian Act indicates that temporary workers should be treated fairly and in the same way as their colleagues".

The complainant asks the Tribunal to declare that the Staff Committee represents the personnel at large and that the EPO must comply with "legal provisions and principles" with regard to all staff. He also asks it to order the Organisation to cease assigning permanent tasks to outside companies and to remunerate the temporary staff who have been performing these tasks up until now in accordance with the EPO's salary scales.

C. In its reply the Organisation contends that the complaint is irreceivable on several counts: not only has the complainant not exhausted internal means of redress, the complaint is also irreceivable *ratione personae* and *ratione materiae*. First, the Organisation considers that the purpose of the complaint is neither to secure the

quashing of the impugned final decision nor to obtain compensation for any injury. Moreover, none of the claims put forward in the complaint was submitted in the internal appeal initially filed with the Appeals Committee.

Secondly, in the EPO's opinion, the complaint is irreceivable *ratione personae* because the complainant does not assert that the impugned decision injures him personally, but only in his capacity as representative of the temporary workers supplied to the Office. It submits that the Staff Committee does not represent these temporary workers because no statutory text provides for such representation. The Staff Committee represents only the EPO's permanent employees and contract staff to the exclusion of all others, including personnel supplied by temporary employment agencies. In its opinion, this personnel is "by its very nature" employed by the agencies which send it on temporary assignments in various enterprises. It notes that the Guidelines on the protection of dignity of staff contained in Circular No. 286 directly concern the staff (that is to say permanent employees and contract staff), but that only the "principles" they embody are applicable to other categories of persons working for the Office. It emphasises that the Tribunal will not apply the national law of a State save where there is express reference thereto in the staff regulations of an organisation or in a contract of employment. The complainant therefore does not have *locus standi* to represent the interests of temporary workers assigned to the EPO.

Thirdly, the Organisation draws attention to the fact that the complainant's initial request, which formed the basis of the internal appeal, was for the forwarding of salary scales to agencies supplying temporary staff to the EPO, and that since this request does not rest on any provision of the Service Regulations, the present dispute does not fall within the Tribunal's limited jurisdiction.

The EPO replies subsidiarily on the merits. It asserts that it is under no obligation to forward its salary scales to temporary employment agencies. It emphasises that under the AÜG "the enterprise using temporary labour shall be 'deemed' to be an employer solely for the purposes of provisions relating to safety, health and hygiene in the workplace". Given that the AÜG excludes from its sphere of application workers supplied to a federal or local government service, it cannot be applied to persons supplied to an intergovernmental organisation such as the EPO.

D. In his rejoinder the complainant points out that, in the letter of 14 April 2003, the President of the Office "made no mention of staff representatives not being entitled to act in the case at issue". He adds that the term "staff" is not defined in the Service Regulations and that, according to the case law, an ambiguous text must be construed against the person responsible for drafting it. The Staff Committee therefore represents the personnel at large, including temporary workers. According to the complainant, this is also clear in light of the AÜG, and he invites the Tribunal to contact the Austrian authorities to verify this fact. Returning to Circular No. 286, he contends that this text makes it plain that any person working at the Office is entitled to respect for his/her dignity and that any person whose dignity is imperilled is entitled to consult whomsoever he/she chooses. He considers it "scandalous" that the EPO makes temporary workers sign a disclaimer in which they renounce "their right to be represented by the staff representatives" while invoking "its immunity in order to inform these workers that they have no rights". In his opinion, this proves *a contrario* that these employees do have a right to be represented since they are asked to renounce it. The complainant holds that the EPO is knowingly flouting Austrian law by taking advantage of its status in order not to recognise any of the moral obligations incumbent upon every employer. He disputes the Organisation's translation of the AÜG and accuses it of inventing the term "solely", which does not appear in the text of the Act. He takes the view that if the AÜG excludes from its field of application workers who are supplied to a federal or local government service, this is because it is the provisions covering persons directly employed by the government which apply – in which case there is no legal vacuum.

The complainant takes the EPO to task for choosing to recruit temporary workers through temporary employment agencies, or for assigning "hitherto permanent" tasks to outside companies without equipping itself with a suitable legal framework and without consulting the staff representatives. He accuses it of knowingly evading its legal obligations.

E. In its surrejoinder the Organisation reiterates its arguments and claims.

CONSIDERATIONS

1. Acting in his capacity as Chairman of the Staff Committee of the EPO's sub-office in Vienna, on 31 March 2003 the complainant submitted a request to the President of the Office that the "staff salary scales mentioned in the annex to Part 2 of the Codex" be forwarded to all agencies supplying temporary personnel to the

Office. The President replied to this letter on 14 April 2003 denying that temporary workers were entitled to remuneration equal to that of EPO staff and underlining that neither the Service Regulations nor the conditions of employment for contract staff applied to temporary workers. He therefore refused to grant the request submitted to him. The Appeals Committee, to which the dispute was referred, unanimously recommended, in an opinion dated 12 September 2005, that the appeal be dismissed as irreceivable. The President of the Office endorsed this opinion in a decision of 23 September 2005, which the complainant impugns before the Tribunal.

2. The complainant seeks the quashing of the decision of 23 September 2005 and asks the Tribunal to find that:

- “– The Staff Committee represents the Office’s personnel at large;
- The EPO must comply with legal provisions and principles vis-à-vis the personnel at large;
- The assigning of permanent tasks to outside firms must cease;
- Persons who have been performing such tasks through the agency of outside firms up until now must be remunerated according to the EPO salary scale.”

Before examining the receivability of these claims, which is challenged by the Organisation, it is worth considering the Appeals Committee’s carefully reasoned opinion, which the author of the impugned decision has endorsed.

3. The Committee first notes that, insofar as the appellant criticises the policy of outsourcing certain duties and protests about the terms of employment of temporary workers and the employees of outside companies, his claims extend beyond the ambit of the initial appeal and are therefore irreceivable. The only claims which it might be possible to entertain are those concerning the Office’s refusal to forward to temporary employment agencies the salary scales applicable to certain categories of the Office’s staff. However, according to the Committee, these claims are irreceivable because temporary workers are not employees of the Office, have no right to vote for staff representatives and cannot be deemed to be represented by the Staff Committee, which therefore does not have *locus standi* to assert their rights to appropriate remuneration.

4. The complainant disputes these findings and submits that the Staff Committee is perfectly entitled to represent these employees, since Austrian law specifically provides for such representation, which does not conflict with any of the EPO’s own statutory provisions.

5. The Organisation raises several objections to the receivability of the complaint: firstly, it submits that, since the claims set forth in consideration 2, above, were not made in the internal appeal as filed, they are irreceivable for failure to exhaust internal means of redress; secondly, it argues that the complainant does not have *locus standi* to represent temporary workers supplied to the Office and that the initial claim, which concerned the Office’s relations with temporary employment agencies, is not based on non-observance of the terms of appointment of permanent employees or of the provisions of the Service Regulations. It therefore considers that an examination of its merits lies outside the Tribunal’s jurisdiction as defined in Article II, paragraph 5, of its Statute.

6. The Organisation’s position on the first point cannot be impugned: the scope of the case before the Tribunal may not exceed the limits of the internal appeal and, as indicated above, the sole purpose of that appeal was to ensure that the President of the Office would “forward to all temporary employment agencies the salary scales referred to in the annex to Part 2 of the Codex”. Only the claims related to the lawfulness of the decision of 14 April 2003, confirmed by that of 23 September 2005, may therefore be examined by the Tribunal as, in any event, it is not for the Tribunal to make declarations of law such as the complainant requests.

7. The issue of the complainant’s *locus standi* to act on behalf of the Staff Committee in order to assert the rights of persons supplied to the Office by temporary employment agencies is more delicate. There is no doubt that these persons, unlike permanent employees or contract staff, may not vote for candidates or stand for election to the Staff Committee. Moreover, it is clear that temporary workers are employed by the temporary employment agencies which supply them to the Office. Nevertheless, some provisions instituting guarantees may apply to them. For example, under the heading “Guidelines on the protection of dignity of staff”, Part II of Circular No. 286, issued by the Office on 31 May 2005, provides that these protective guidelines, covering inter alia harassment at work, apply “to all employees of the Office, whatever their conditions of employment”, and that the principles enshrined in the guidelines “shall also apply to all persons who are not employees of the Office but who undertake

work on behalf of the Office or at the Office”. It is therefore easy to imagine cases in which temporary workers alleging disregard for their dignity and, more generally, the infringement of their individual rights, might be led to request the Staff Committee’s assistance and, in the absence of any statutory provision to the contrary, such assistance would certainly be lawful. For this reason, it is not possible to conclude that the Staff Committee may never defend the interests of temporary workers who carry out duties on behalf of the Office vis-à-vis the Administration. As the Appeals Committee clearly stated,

“It is natural that a temporary worker may have some influence over the conditions of employment at his/her workplace which directly affect his/her work station and which are the responsibility of the enterprise employing him/her, and that he/she may, in this context, seek the assistance of the staff representatives of the user enterprise (cf. Article 6 of the Austrian Act on the provision of temporary personnel, concerning employee protection; Article 14(2) of the German Act on the provision of temporary personnel; Directive 91/383/EEC). An entitlement of staff representatives to provide assistance might [...] flow therefrom.”

8. It is well settled that members of the Staff Committee may rely on their position as such to ensure observance of the Service Regulations (see Judgments 1147 and 1897); but in order for a complaint submitted to the Tribunal on behalf of a Staff Committee to be receivable, it 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. In the absence of such a connection resting on a contract or deriving from status, the claim that the Office should forward its salary scales to agencies supplying temporary personnel – whose conditions of employment and remuneration are in any event beyond the jurisdiction of the Tribunal – cannot be entertained.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 27 April 2007, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

* The Codex is the compendium of rules applicable to staff.

** *Arbeitskräfteüberlassungsgesetz*