

**119th Session**

**Judgment No. 3395**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 2919 filed by Mrs E. H. on 7 June 2011 and corrected on 5 July, the reply of 17 October 2011 from the European Patent Organisation (EPO), the complainant's rejoinder of 14 November, supplemented on 16 November 2011, and the EPO's surrejoinder of 24 February 2012;

Considering the *amicus curiae* brief submitted by Mr W. M. on 10 July 2012 and the EPO's comments thereon of 4 March 2013;

Considering the application to intervene filed by Mr L. P. on 21 August 2012 and supplemented on 22 August, and the EPO's comments of 29 November 2012 objecting to the application;

Considering Article II, paragraph 5, 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 and the pleadings may be summed up as follows:

A. Acting in their capacity as staff representatives, the complainant and two other members of the Munich Staff Committee of the European Patent Office – the EPO's secretariat – challenged before the Tribunal the EPO's practice in relation to the assignment of tasks to external contractors. In Judgment 2919, delivered on 8 July 2010, the Tribunal decided that the President of the Office should, within 60 days of the date of the publication of the judgment, consult the General Advisory Committee (GAC) on the practice of "outsourcing" in accordance with the recommendations of the Internal Appeals Committee.

On 4 August 2010 the President of the EPO wrote to the GAC informing them that he intended to implement the Judgment, but that he considered that it was “not serious” to submit to the GAC the 2007 report entitled “An approach to outsourcing” to which reference was made in the Judgment. He stressed that the document had no formal status and should not be interpreted as describing the policy of the EPO with respect to outsourcing. As the practice of the Office in this area was a complex topic, an analysis of that practice would be carried out and submitted to them as soon as possible.

The complainant filed an application for execution of Judgment 2919 on 7 June 2011.

B. The complainant indicates that at the time of filing her application for execution the GAC had not yet received the aforementioned analysis concerning outsourcing and that the EPO was still hiring external staff without consulting or even informing staff representatives. The EPO has therefore failed to execute Judgment 2919.

She asks the Tribunal to order the EPO to execute Judgment 2919, and to set a penalty in the event of further delay. She also asks the Tribunal to quash all decisions taken since 8 October 2010, to employ external staff and/or to outsource tasks done by permanent staff. In addition, she asks the Tribunal to order the EPO not to hire external staff or to outsource tasks performed by permanent staff until Judgment 2919 has been executed. Lastly, she seeks costs and damages.

C. In its reply the EPO submits that it has properly implemented Judgment 2919 by initiating a process aimed at the adoption of a comprehensive policy on the use of external contractors at the EPO. It indicates that the President timely announced to the GAC, on 4 August 2010, that he intended to implement Judgment 2919 and that he would undertake an in-depth analysis regarding the hiring of external contractors. A project board and a project team were set up to elaborate an outsourcing policy. The complainant was in fact a member of the project board, and the membership of the project team also included two staff representatives. The project was launched mid-

November 2010 and aimed at clarifying the applicable legal framework for external recruits working on EPO premises. The project board and team subsequently held several meetings and drafted policy documents, which were submitted to the President in September 2011. Staff were informed by the President in a Communiqué dated 4 October 2011 that the outsourcing policy elaborated by the project team would be presented in November 2011 to the GAC so that it could enter into force in January 2012.

D. In her rejoinder the complainant indicates that the EPO continues to outsource work that was previously performed by permanent staff and does so without any statutory consultation having been held. She contends that the documents concerning outsourcing that are to be submitted to the GAC on 30 November 2011 do not comply with the Tribunal's order in Judgment 2919 because none of these documents describes an outsourcing policy. Moreover, the most relevant document, an "outsourcing directive", explicitly provides that the external provision of manpower does not qualify as outsourcing for the purposes of the directive, which means that the type of employment that prompted the internal appeal leading to Judgment 2919 is excluded from the scope of the directive. One of the main issues addressed in the internal appeal leading to Judgment 2919 was the EPO's refusal to recognise any rights and responsibilities of the staff representation towards external staff (external contractors and agency staff); this issue is not addressed in any of the documents to be considered by the GAC.

The complainant asks the Tribunal to make a ruling that will "effectively dissuade" the EPO from persisting in its current attitude. She stresses that she is acting in her capacity as staff representative, and that any sums awarded by the Tribunal would be given to the Staff Union of the EPO.

E. In its surrejoinder the EPO indicates that it understood the Tribunal's decision as requiring a reflection on a "meaningful legal or strategic frame-work" and that it was required to foster discussions between the parties and consultation of the GAC on the practice of outsourcing, which it did. It adds that the President of the EPO and the

Central Staff Committee met to discuss common priorities for 2012 and issued a joint Communiqué on 2 February 2012, according to which the outsourcing policy was one of these priorities.

F. In his *amicus curiae* brief, Mr M., the Chairman of the Central Staff Committee, indicates that approximately two weeks after the written submissions before the Tribunal were brought to a close, the complainant was sent a document entitled “EPO Outsourcing Policy”. On 30 May 2012 the EPO submitted the document to the GAC, which discussed it on 27 June 2012 and issued its opinion. Mr M. asserts that this document was submitted to the GAC without the staff representatives of the project team being involved. He considers that it is in the interest of all to inform the Tribunal of that fact given that, in his view, this document did not meet the requirements set out in Judgment 2919. He contends that the EPO acted in bad faith in making available the document submitted to the GAC only after the written submissions were brought to a close.

G. In its comments on the *amicus curiae* brief, the EPO submits that the brief does not contribute to the clarification of the dispute as required by the case law. Indeed, Mr M. commented on a document on which the complainant herself had not commented. It adds that, in June 2012, the GAC discussed the document setting out the outsourcing policy and that, pursuant to the President’s decision of 24 July 2012, the outsourcing policy entered into force on 1 August 2012.

#### CONSIDERATIONS

1. The background facts giving rise to this application for execution may be found in Judgment 2919 delivered on 8 July 2010. In that judgment the Tribunal ordered the President to consult the GAC on the practice of outsourcing within 60 days of the date of the judgment.

The precise terms of the order were:

“The President of the Office shall, within 60 days of the date of the publication of the present judgment, consult with the General Advisory Committee on the practice of ‘outsourcing’ in accordance with the recommendations of the Internal Appeals Committee.”

The relevant part of the Internal Appeals Committee recommendation was:

“[In the GAC t]here will [...] be an opportunity to discuss issues such as the type of duties to be assigned, the applicable constraints and conditions, the terms of employment and the role of the staff representatives in relation to external employees, and the members appointed by the staff representatives will be able to defend the interests of the staff.”

The content of the duty to “consult” which the order required, was informed by the discussion by the Tribunal of Article 38(3) of the Service Regulations for Permanent Employees of the Office in its reasons. The purpose of that Article was noted by the Tribunal as being to “foster discussion and proper consultation between the parties regarding various proposals”. The Tribunal also noted that while there was then no formal proposal, there was an informal policy. The Tribunal further noted that notwithstanding there was no formal proposal, “this [was] the type of circumstance contemplated in” the Article.

Consultation is a process and not an event. The nature of the process was discussed by the Tribunal in Judgment 380. At the very least consultation involves listening and exchanging views. In addition, in the present case the recommendation of the Internal Appeals Committee (incorporated into the order) contemplated discussion by the GAC of a scheme or proposal concerning outsourcing. It is not possible to exchange views or discuss a scheme or proposal without an explication of the scheme or proposal. Accordingly the order required the President not only to engage with the GAC (which the EPO argued unsuccessfully in the proceedings the President was not obliged to do) but also to present them within 60 days with a scheme or proposal which the members of the GAC could discuss. That discussion would enable an exchange of views.

All the President did within the 60 days (in terms of engagement with the GAC) was to write to the GAC on 4 August 2010 indicating

an intention to implement the Tribunal's judgment, indicating that consultation based on a 2007 report was inappropriate, would not involve good-faith consultation and, in any event, the 2007 report could not be taken to be or embody the policy of the EPO. The President also indicated that, in effect, it would take some time to prepare material to present to the GAC. The Tribunal does not doubt that the President was acting in good faith in proposing consultation with the GAC. However what he failed to do was act in accordance with the order which required certain things to be done within a specified time. The Tribunal notes that the EPO has argued in these execution proceedings that the President complied with the order but has not argued, at least expressly, that the 60 days was too short (see, for example, Judgment 1620, consideration 10).

While the President did not comply with the Judgment, he did initiate a process aimed at elaborating a policy with the input of staff representatives. This process went on for almost a year, and produced documents which the President ultimately decided not to submit to the GAC. On 30 May 2012, the President submitted a document entitled "EPO Outsourcing Policy" to the GAC for opinion, approximately 20 months after the deadline set by the Tribunal. The members of the GAC gave a negative opinion on the proposal. In their view, the proposal did not comply with the requirements of Judgment 2919. On 24 July 2012 the President adopted the Outsourcing Policy that came into force on 1 August 2012. The complainant, among other forms of relief detailed above under B, asks the Tribunal to order the execution of the judgment with an appropriate penalty for delay.

2. A staff representative in The Hague applies to intervene in this application. He submits that the "Outsourcing Policy" signed by the President on 24 July 2012 does not set out goals or criteria, and as a staff representative, he cannot remain passive and let the policy go unchallenged. Therefore, he asks to be allowed to intervene. It is observed that this staff representative is not in a position in fact and in law similar to that of the complainant. Moreover, in effect, he is attempting to challenge the content of the Outsourcing Policy that is

clearly beyond the scope of the present complaint. This application to intervene will be dismissed.

3. An *amicus curiae* brief was also filed in this application. It is also largely aimed at matters beyond the scope of the application and will not be considered.

4. It is clear from the materials filed with this application that the judgment has now been executed. The judgment did not require, as the complainant contends, the production by the President of a document or documents of a particular character in order to satisfy the obligation to consult. However, the complainant is entitled to compensation for the EPO's failure to comply with the Tribunal's order. The EPO will be ordered to pay the complainant compensation in the amount of 500 euros and costs in the amount of 100 euros.

#### DECISION

For the above reasons,

1. The EPO shall pay the complainant compensation in the amount of 500 euros.
2. The EPO shall pay the complainant 100 euros in costs.
3. All other claims are dismissed.
4. The application to intervene is dismissed.

In witness of this judgment, adopted on 7 November 2014, Ms Dolores M. Hansen, Judge presiding the meeting, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ