

**119th Session**

**Judgment No. 3459**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs L. K. against the European Patent Organisation (EPO) on 26 July 2013;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 7 of its Rules;

Having examined the written submissions;

**CONSIDERATIONS**

1. The complainant has filed a complaint with the Tribunal naming the EPO as the defendant. The genesis of her complaint was a failure of the EPO to appoint her to a position for which she applied unsuccessfully in 2009. On the complainant's account of her employment history, this was a position she had occupied for a number of years.

In a memorandum dated 16 September 2009, written on the complainant's behalf to the President of the EPO, a request was made to quash the decision "not to employ her" and to grant consequential relief including damages. This request ultimately led to an internal appeal in which the members of the Internal Appeals Committee were divided in their opinion. The minority concluded that the appeal was "inadmissible" because the complainant had not had an employment relationship with the EPO. However the majority concluded that the complainant had been "de facto" employed by the EPO and the selection procedure concerning the position for which she had applied was defective as the complainant should have been, but was not,

treated as an internal candidate. The majority also concluded the complainant was entitled to monetary compensation.

In a decision dated 28 May 2013, a Vice-President, acting as a delegate for the President, rejected the complainant's appeal as "inadmissible". This is the impugned decision.

2. It is unnecessary to descend into any great detail about the facts. It can be accepted, for present purposes, that the complainant's account of her employment history is correct, namely that she had been performing the work of the position for which she unsuccessfully applied and that there were many objective signs that she was an "employee" of the EPO. Those signs were that she performed her duties at the premises of the EPO, did so under the direction of EPO staff, worked full time in the position and did so during the official working hours of the EPO, took recreational leave only with the approval of a superior at the EPO, similarly had to inform a superior if she took sick leave, her email arrangements and access to EPO databases were the same as those of EPO staff and she had security entrance to her workplace as if she was an EPO employee.

3. The Tribunal notes that the complainant sought unsuccessfully in the Munich Labour Court and later the Regional Munich Labour Court to establish that she was an employee (and not a consultant under a consultancy agreement) of a private company.

4. However the fundamental difficulty for the complainant in pursuing her complaint in this Tribunal is that she was not, at the time of the impugned decision, an "official" of the EPO for the purposes of Article II of the Tribunal's Statute having regard to the way that concept of "official" has been established and entrenched in the jurisprudence of the Tribunal. The complainant does not (and on her account of the facts probably could not) point to any contract under or by which she was appointed an official of the EPO. Her employment (in the loosest sense of the word) or engagement to work at the EPO was through a third party, a private company. Accordingly, her complaint is not one the Tribunal is competent to hear.

The complaint should be summarily dismissed in accordance with the procedure provided for in Article 7 of the Rules of the Tribunal.

DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 14 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, 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.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ