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

103rd Session **Judgment No. 2657**

The Administrative Tribunal,

Considering the complaint filed by Mr R. K. against the European Patent Organisation (EPO) on 1 February 2006 and corrected on 17 February, the EPO's reply of 1 June, the complainant's rejoinder of 11 July and the Organisation's surrejoinder of 11 October 2006;

Considering Article II, paragraph 5, 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 was born in 1973 and has German nationality. Following an accident in 1991 he lost his left hand, his left eye and part of the fingers of his right hand, and he also sustained injuries to his left ear. In 2005 he applied for a job as an examiner at the European Patent Office, the EPO's secretariat. He was interviewed and sat a series of tests, after which the Office informed him that it was considering employing him as from November 2005 but that, before a final decision was taken, he would have to undergo a medical examination. Indeed, Article 8(d) of the Service Regulations for Permanent Employees of the European Patent Office provides that, in order to be eligible for appointment as a permanent employee, a candidate "must meet the physical requirements of the post".

The complainant was examined on 23 June 2005 by a medical practitioner from the public health office of the city of Munich, then by the Office's medical adviser. The latter contacted the complainant by telephone on 30 June and explained that the outcome of the medical examinations was unfavourable. Referring to Article 8 of the Service Regulations, the Office informed the complainant by letter of 12 August 2005 that, for the reasons given to him by its medical adviser, it was not able to offer him an appointment as an examiner.

On 27 September 2005 the complainant wrote to the President of the Office, asking him to treat his letter as an internal appeal against the decision not to recruit him and/or as a request to establish a medical committee. He contended that the Office's own medical adviser had determined that he was currently fit to work as an examiner, but that he might not be "in the distant future", so that the grounds on which his application had been rejected constituted an obvious case of discrimination against disabled persons. He also asked the President to indicate, in the event that the EPO's internal means of redress were not available to him, what means of redress would be appropriate.

By a letter dated 2 November 2005 the Director in charge of the Employment Law Directorate informed the complainant on behalf of the President that his appeal could not be allowed, because under Articles 106 and 107 of the Service Regulations the internal means of appeal were only available to permanent employees, former permanent employees and rightful claimants on their behalf. He indicated that the complainant was entitled to file a complaint with the Tribunal, but pointed out that in Judgment 1964 the Tribunal had dismissed as irreceivable a complaint lodged by a person whose application for a job at the EPO had likewise been rejected on the grounds that he did not meet the physical requirements of the post. The complainant impugns the decision conveyed to him in the letter of 2 November 2005.

B. The complainant asserts that the Office's medical adviser stated that he was currently fit to work as an examiner, but that he was concerned that he might not be fit at some point in the future. He emphasises that in its letter of 12 August 2005 the Office clearly indicated that he did not meet the physical requirements of the post. By rejecting his application on the grounds that he is disabled, the Office breached the general principle of equal treatment, as well as Article 4(3) of the Service Regulations, which relevantly provides that "[p]hysically handicapped persons who possess the necessary qualifications and abilities required for a vacant post must not suffer discrimination on account of their disability". In this regard he recalls that he had passed all the technical and linguistic tests.

The complainant disputes the finding that he does not meet the physical requirements of the examiner's post. He submits that he demonstrated his ability to use a computer and that, in any case, the provision of suitable work tools, such as voice-recognition software, is part of the duty of care that any employer owes to disabled persons. In his view, the statement that he may not be fit at some point in the future is pure speculation, lacks any medical justification and is blatantly discriminatory.

He also contends that the Office breached the provisions of the Service Regulations by denying him the possibility of lodging an internal appeal. He argues that, at the very least, the provisions of the Service Regulations dealing with recruitment apply to job applicants, and that in his case Article 4(3) is of particular relevance. He submits that the impugned decision amounts to a denial of justice and an abuse of authority, and that under these circumstances the President has a duty, pursuant to the Protocol on Privileges and Immunities of the EPO, to waive the Organisation's immunity in order that he may seek redress before the German courts.

The complainant asks the Tribunal to quash the decision to reject his application for the post of examiner, and to declare that the decision to refuse his request to lodge an internal appeal is unlawful. He also asks the Tribunal to order the EPO to offer him a post as examiner or, failing that, to pay him compensation in an amount equal to one year of the salary he would have received had he been appointed. He claims 10,000 euros in moral damages and 20,000 euros in punitive damages, "to prevent repetition of discrimination against disabled persons, and denial of access to the internal appeal process". Alternatively, the complainant asks the Tribunal to order the EPO to waive its immunity so that he may bring an action before a German court, and to lift the immunity of its medical adviser, in order that a complaint for malpractice may be filed with the competent authority.

C. In its reply the EPO contends that the complaint is irreceivable. It points out that, having never been a "permanent employee" of the Office within the meaning of Article 1, paragraphs 1 and 2, of the Service Regulations, the complainant cannot avail himself of the provisions of the Service Regulations, in particular those relating to internal means of appeal. Moreover, Article II, paragraph 6, of the Tribunal's Statute does not include external applicants for vacant posts among the persons who are entitled to bring a complaint before the Tribunal. Referring to Judgment 1964, the Organisation submits that, in view of the above-mentioned provisions, the dispute is not within the scope of the Tribunal's competence.

In its subsidiary arguments on the merits the EPO recalls that, according to the case law, the Tribunal "may not replace the findings of medical boards with its own", although "it does have full competence to say whether there was due process and whether the reports used as a basis for administrative decisions show any material mistake or inconsistency, or overlook some essential fact, or plainly misread the evidence". It submits that, taking into account the fact that the work of an examiner relies heavily on the use of a computer, the medical practitioner from Munich's public health office was unable to declare the complainant physically fit for permanent employment as an examiner. The Office's medical adviser then discussed the matter with the EPO's occupational health physician, and after long discussions all three doctors agreed that the risk of damage to the complainant's health was too high and that he was likely to suffer early invalidity. The EPO notes that, according to the case law of the Court of First Instance of the European Communities, a finding of unfitness for work can be based on a medically sound prognosis of future disorders that are liable to compromise, in the foreseeable future, the normal performance of the duties envisaged.

The Organisation rejects the allegation that its decision not to recruit the complainant is discriminatory. It argues that because he did not meet the physical requirements of the post, he did not fall within the scope of Article 4(3) of the Service Regulations, which prohibits discrimination against physically handicapped persons "who possess the necessary qualifications and abilities".

The EPO also rejects the allegation of abuse of authority. Referring to the Tribunal's case law, it points out that international organisations have discretion in assessing whether it is appropriate to lift the immunity from legal process enjoyed by their employees. It expresses doubt as to whether the complainant, who has never been a staff member of the EPO, can derive any right from the Protocol on Privileges and Immunities on which he relies.

D. In his rejoinder the complainant presses his pleas. He asserts that the medical opinion underpinning the decision not to offer him employment is insufficiently substantiated. In his view, the ruling of the Court of First Instance of the European Communities to which the EPO refers indicates that, where a decision not to recruit a candidate is based on a future risk of incapacity, there must be a concrete assessment of that risk.

The complainant also notes that an external candidate for a post of official of the European Communities is not barred from access to the internal appeals bodies on the grounds that he or she is not yet an official. In view of the similarity that exists between the provisions governing internal appeals in the Staff Regulations of Officials of the European Communities, on the one hand, and in the EPO's Service Regulations on the other, he considers that the same situation should prevail at the EPO. He submits that his complaint must be considered receivable, because otherwise his fundamental right of access to a tribunal would be breached.

E. In its surrejoinder the EPO maintains the position set out in its reply.

CONSIDERATIONS

1. The complainant applied for a post as examiner at the European Patent Office in 2005. Having attended an interview on 10 May 2005 to assess his technical and linguistic skills, he was informed by telephone that he had passed the tests but that before being appointed he would have to undergo the medical examination required by the Service Regulations to determine whether he met the physical requirements of the post.

After undergoing medical examinations on 23 June 2005, he was informed by the Office's medical adviser that he did not meet the physical requirements. This was confirmed by a letter from the Recruitment Department dated 12 August 2005 informing him that he could not be appointed as a permanent employee. On 27 September 2005 the complainant wrote to the President of the Office, asking him to treat his letter as an internal appeal and/or as a request for the establishment of a medical committee. He asked the President to indicate, in the event that the EPO's internal means of appeal were not available to him, what means of securing a review of the impugned decision would be appropriate. He was informed in reply, by a letter dated 2 November 2005, that his appeal was irreceivable pursuant to Articles 106 and 107 of the Service Regulations, because the internal means of appeal were available only to permanent employees, former permanent employees and rightful claimants on their behalf, and that he could file a complaint with the Tribunal against the decision to dismiss his appeal; it was pointed out, however, that in Judgment 1964 the Tribunal had dismissed a similar complaint as irreceivable. The complainant proceeded to file a complaint with the Tribunal seeking the quashing of the decision not to recruit him as well as a declaration that the refusal to let him lodge an internal appeal was unlawful. He requests that the EPO be ordered to offer him a post as examiner and to pay him various amounts in compensation or, alternatively, that the Organisation be ordered to waive its immunity to enable him to bring proceedings before a German court and to lift the immunity of its medical adviser, who refused to acknowledge his physical fitness.

2. The complainant's disability is uncontested: at the age of 18 he had an accident that resulted in the loss of his left hand, his left eye and part of the fingers of his right hand and caused damage to his left ear. This situation did not prevent him from studying engineering with brilliant results or from passing the tests that he sat when he was interviewed on 10 May 2005. According to the file, the medical practitioners who examined the complainant concluded that while he was capable, with the aid of appropriate work tools, of performing the duties of an examiner, his disability was sufficiently serious to be incompatible with full-time employment and that there was a high risk that his condition would deteriorate.

3. The basic issue raised by this case is whether this Tribunal is competent to hear the complaint before it. The defendant submits that the Service Regulations bar the recruitment of a person who does not meet the physical requirements of the post for which he or she has applied and that the complainant cannot therefore be treated as an employee of the Office. Moreover, the Tribunal is not competent to hear complaints from external applicants for a post in an organisation that has recognised its jurisdiction. The complainant challenges this reasoning by referring to the case law of the Court of Justice of the European Communities (CJEC) and the Court of First Instance of the European Communities which, on the basis of regulations applicable to officials of the European Communities which are virtually identical to those applicable to the EPO, have never declined jurisdiction to hear complaints brought by external job applicants. Lastly, he points out that the letter of 2 November 2005 invited him to refer the matter to this Tribunal, which implies that the Office did not intend to evade the Tribunal's jurisdiction.

4. After the filing of the complaint, the German Federal Constitutional Court dismissed as irreceivable, on 22 June 2006, a constitutional appeal filed by the complainant against the same decisions as those impugned before the Tribunal.

5. However regrettable a decision declining jurisdiction may be, in that the complainant is liable to feel that

he is the victim of a denial of justice, the Tribunal has no option but to confirm the well-established case law according to which it is a court of limited jurisdiction and "bound to apply the mandatory provisions governing its competence", as stated in Judgment 67, delivered on 26 October 1962. Moreover, according to Article II of its Statute:

"1. The Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and of such provisions of the Staff Regulations as are applicable to the case.

[…]

5. The Tribunal shall also 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.

[…]"

It follows that persons who are applicants for a post in an international organisation but who have not been recruited are barred from access to the Tribunal. It is only in a case where, even in the absence of a contract signed by the parties, the commitments made by the two sides are equivalent to a contract that the Tribunal can decide to retain jurisdiction (see for example Judgment 339). According to Judgment 621, there must be "an unquestioned and unqualified concordance of will on all terms of the relationship". That is not the case, however, in the present circumstances: while proposals regarding an appointment were unquestionably made to the complainant, the defendant was not bound by them until it had established that the conditions governing appointments laid down in the regulations were met. As argued by the defendant, the issue is identical to that decided in Judgment 1964, which likewise concerned a dispute between the EPO and an applicant for a post with the Organisation. According to that judgment:

"[t]he complainant was not appointed as an employee of the EPO, and […] 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 […] under 3 and 1554 […] 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."

6. The arguments against a decision of lack of jurisdiction invoked by the complainant and addressed under 3, above, cannot be entertained. On the one hand, the case law of the CJEC and the Court of First Instance of the European Communities, which implicitly recognises the jurisdiction of those courts to hear complaints filed by external applicants for employment, cannot be applied to the present case inasmuch as the notices of competition provide for the possibility of appeal before the competent bodies and, in any case, application of that case law, which is in fact non-binding, would breach the provisions of the Statute which are binding on the Administrative Tribunal of the International Labour Organization. Furthermore, the letter of 2 November 2005, which invited the complainant to refer the matter to the Tribunal, carefully pointed out, with reference to Judgment 1964, that a complaint identical to his had been dismissed as irreceivable, and it cannot therefore be construed as recognising the Tribunal's jurisdiction to rule on the merits of the case. Lastly, the Tribunal has no authority to order the EPO to waive its immunity (see Judgment 933, under 6). It notes, however, that the present judgment creates a legal vacuum and considers it highly desirable that the Organisation should seek a solution affording the complainant access to a court, either by waiving its immunity or by submitting the dispute to arbitration.

7. The complaint must therefore be dismissed as irreceivable.

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

Updated by PFR. Approved by CC. Last update: 19 July 2007.