112th Session **Judgment No. 3051**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr E.C. D (his third), Mrs E. H. (her eighth) and Mr H. S. (his seventh) against the European Patent Organisation (EPO) on 27 February 2009 and corrected on 23 March, the EPO's single reply of 3 July and the complainants' letter of 2 September 2009 informing the Registrar of the Tribunal that they did not wish to enter a rejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. The complainants are permanent employees of the European Patent Office – the EPO's secretariat – who work at its Headquarters in Munich (Germany). At the material time, Mr S., Mrs H. and Mr D. were respectively Chairman, Deputy Chairperson and Secretary of the Munich Staff Committee. By a letter dated 29 March 2006 to the then President of the Office, the complainants, in their capacity as members of the Staff Committee, expressed concern about

the EPO's use of "non-statutory" contracts to employ staff for lengthy periods of time. In particular, they referred to the case of Mr B., who had been employed since 2000 under successive consultancy contracts. They argued that recruiting staff in this way excluded the staff representation from the selection process, thereby violating the rights of the staff representatives as laid down in Annex II to the Service Regulations for Permanent Employees of the European Patent Office. The complainants requested the termination of Mr B.'s employment under such conditions, without prejudice to Mr B. In the event that their request could not be granted, they asked to have their letter treated as an internal appeal.

On 2 June 2006 the President informed the complainants that Mr B. had been hired in order to provide flexibility in responding to temporary increases in the volume of work, or to perform tasks requiring specialist knowledge not available in the Office. He stated that the employment of external consultants in such circumstances was fully justified and that it was not the responsibility of the staff representatives to express an opinion on the efficacy of this practice. Consequently, he considered that the appeal was not admissible and he had referred the matter to the Internal Appeals Committee for an opinion.

By an e-mail of 8 June 2006 the complainants were informed that the appeal had been registered by the Internal Appeals Committee. In its opinion of 3 October 2008 a majority of the Committee noted inter alia that Mr B. had been hired under contracts concluded with two companies of which he was or had been a director. The contracts did not establish an employment relationship between Mr B. and the EPO. He was neither an employee nor a *de facto* employee and his activities did not affect the complainants personally or as staff representatives. Consequently, the appeal was inadmissible and the majority recommended that it should be dismissed as unfounded. By a letter of 5 December 2008, which is the impugned decision, the Chairman of the Staff Committee was informed that the President had decided to follow the majority opinion and to reject the appeal as irreceivable and unfounded.

B. The complainants state that they have filed their complaints in their respective capacities as members of the Staff Committee, both in their own interests and in the interest of the staff. Relying on the Tribunal's case law, they assert that they are only required to demonstrate that the decision challenged may impair the rights and safeguards that international civil servants enjoy under staff regulations or a contract of employment. Therefore, their complaints are receivable.

They submit that Article 5(1) of the Service Regulations and the preamble to the Conditions of Employment for Contract Staff at the European Patent Office establish permanent employment within the EPO as the norm. They contend that the Office is increasingly resorting to forms of recruitment which fall outside the Service Regulations, without having consulted the General Advisory Committee on related recruitment procedures, the types of contracts offered, the general policy regarding non-permanent employment or the representation of non-permanent staff. The Office's failure to consult with the General Advisory Committee constitutes a breach of Article 38 of the Service Regulations. Also, they state that the Staff Committee is vested with the right to participate in the recruitment process, as stipulated by Articles 34 to 37 of the Service Regulations and Annex II to the Service Regulations. Their right to be consulted with respect to Mr B.'s employment was infringed and they dispute the Office's contention that their participation was not necessary because he was employed in accordance with the Financial Regulations of the EPO.

In the complainants' view, although Mr B. is apparently working under service contracts as a consultant, he performs – on a regular basis and under the supervision of another staff member – duties that are the same as or similar to those performed by permanent employees. His duties do not require specialised knowledge. Many of his functions are operational and not related to specific projects. As a consequence, he should be regarded as a staff member. Furthermore, hiring a person as a consultant when they are, in fact, working full-time or primarily for a single organisation is not appropriate. The

complainants point out that under the national laws of both Germany and the Netherlands, similarly situated consultants are considered to be employed by the contracting organisation for the purpose of employer-funded social security contributions. They assert that Mr B. is employed by the Office both directly and indirectly, as a result of contracts the Office has concluded with another company.

The complainants state that questions as to the lawfulness of Mr B.'s employment have been raised by the Principal Directorate of Internal Audit and in a report of the EPO's Board of Auditors. In addition, they allege a breach of the principle of equal treatment, in that Mr B.'s daily salary is higher than that of regular staff members carrying out the same duties and there is no objective reason to justify this difference. Lastly, they argue that the Organisation has breached the principle of equality of arms because it failed to provide them with relevant documents related to Mr B.'s consultancy contracts.

They ask the Tribunal to quash the decision of the President not to terminate Mr B.'s employment. They claim moral damages in the amount of one euro per staff member, as well as costs and reasonable compensation for their time and effort.

C. In its reply the EPO submits that, subject to the limits set out in Article 10 of the European Patent Convention and Articles 32(b) and 32(c) of the Financial Regulations, the President of the Office has the authority to enter into consultancy contracts on behalf of the Organisation. The contracts challenged by the complainants were concluded by the President with a consultancy firm, of which Mr B. is one of four managing directors. The EPO has never had an employment relationship with Mr B., nor can he be considered a *de facto* employee. The contracts stipulate that they are governed by German law and therefore they are not subject to the Service Regulations. Furthermore, the termination of consultancy contracts does not fall within the scope of the protection of the rights of either the Staff Committee or the staff. As the EPO's use of consultancy contracts does not directly concern the terms of appointment of its employees, under Article II of the Statute of the Tribunal, ruling on

the validity or termination of such contracts is beyond the competence of the Tribunal.

On the merits, the Organisation states that the President's authority to enter into consultancy agreements is not subject to prior consultation with the General Advisory Committee. In addition, Mr B. does not provide his consultancy services on a full-time basis, nor are his services for the EPO his primary source of employment. The defendant asserts that some of the complainants' allegations are based on information contained in a draft internal audit report which was confidential and subject to revision. As such, it cannot be relied upon as evidence in support of those allegations. With respect to the complainants' claims regarding a failure to disclose documents, the EPO points out that the Internal Appeals Committee requested and was provided with parts of the relevant contracts during the internal appeal process. The Committee chose not to make those confidential documents available to the complainants and Article 113(2) of the Service Regulations does not compel the Organisation to disclose any additional information.

CONSIDERATIONS

1. The complainants bring these complaints in their representative capacities as members of the Munich Staff Committee. The complaints arise from the refusal of the President of the Office to act on the complainants' request to terminate Mr B.'s employment with the EPO.

2. Since the three complaints raise the same issues of fact and law and seek the same redress, they are therefore joined to form the subject of a single ruling.

3. Mr B., a managing director of a consultancy firm retained by the EPO, has worked for the Office since 2000. The complainants allege that certain aspects of his work at the EPO, including the number of hours he works, his relationship with the EPO management hierarchy, his level of integration into the Office infrastructure and the

fact that his assigned tasks are operational in nature and not project related, show that he is in substance an employee of the EPO. They contend that, properly construed, the consultancy contracts under which he provides his services to the Office are an attempt by the EPO to circumvent standard recruitment procedures as prescribed by the Service Regulations. As a result, they have been deprived of their right as staff representatives to be involved in the recruitment process as laid down in Articles 34 to 37 of the Service Regulations and Annex II to the Service Regulations. They submit that the President must consult with the General Advisory Committee before resorting to consultancy contracts. They also contend that Mr B.'s remuneration is higher than that of regular staff members who are carrying out the same duties and that this constitutes a breach of the right of equal treatment. Lastly, they claim a breach of the right of "equality of arms" because the EPO refused to provide them with documents concerning Mr B.'s contractual status.

4. On the question of receivability, relying on Judgment 1330, under 4, the complainants take the position that receivability is not contingent on proof of actual and certain injury. Instead, it is only necessary to show that the impugned decision may impair the rights and safeguards claimed under the Staff Regulations or contract of employment. As set out more fully under C above, the EPO submits that the complaints are irreceivable.

5. The Staff Committee's claimed right to participate in the recruitment process arises from Chapter 3 of the Service Regulations concerning recruitment. Article 7(1) of the Service Regulations provides that permanent employees will generally be recruited by means of a competition conducted in accordance with the provisions of Annex II to the Service Regulations. Pursuant to Article 7(2), a Selection Board having a composition as provided in Article 1 of Annex II shall be appointed for each competition. This latter provision requires that one member of the Selection Board must be appointed by the Staff Committee. By operation of Article 3 of the Conditions of Employment for Contract Staff, the Staff Committee is also involved

in the recruitment of staff members on fixed-term contracts. As the claimed right is limited to the recruitment of permanent employees and employees on fixed-term contracts, the question of receivability requires a consideration of whether Mr B. is in an employment or *de facto* employment relationship with the EPO.

6. Given that Mr B. did not have a direct contractual relationship with the EPO, the contract under which he performed his services was between a consultancy firm and the EPO, and as he was paid for his services by that firm and not the Office, it is clear that he was not in an employment relationship with the EPO. However, the question remains whether Mr B. was a *de facto* employee as the complainants allege.

7. With regard to his alleged integration into the Office infrastructure, although the EPO provides him with a user ID, access to the Office computer system, a listing in the internal telephone directory and an office with his name on the door and although he works under the supervision of an EPO manager, it is not disputed that his listing in the internal telephone directory and his user ID clearly indicate that he is not an employee. Nor do the complainants challenge the Internal Appeals Committee's finding that it is standard practice to give external staff such technical and organisational support as is necessary to permit them to do the work for which they are retained.

8. Of particular significance is the fact that during the material time, Mr B. also worked as a consultant for several other agencies and corporations. As well, between 2000 and 2005, he averaged only 70 work days per year at the Office and in only one of those years did he slightly exceed 100 work days in contrast with the 220 work days minus annual leave and public holidays for an EPO employee. Lastly, the contracts under which Mr B.'s services were provided to the EPO specified that they were governed by German law.

9. Having regard to these factors, it cannot be said that Mr B. was in any sense an employee of the EPO and it follows that the Service Regulations have no application to him. Accordingly, the

Staff Committee's claimed right under the Service Regulations is not engaged. As under Article II, paragraph 5, of its Statute, the competence of the Tribunal is limited to "complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations", the present complaints are beyond the jurisdiction of the Tribunal.

10. As noted above, the complainants also advance a claim concerning the President's obligation to consult the General Advisory Committee. As the present case concerns an alleged breach of a Staff Committee right specifically in relation to Mr B.'s status within the EPO and is not a challenge to the broader alleged practice of the Office to resort to various other forms of "non-statutory" recruitment, the claim is beyond the scope of the complaints. The same reasoning applies to the alleged breach of the staff right to equal treatment.

11. In terms of the refusal to provide the contracts between the consultancy firm and the EPO, Article 113 of the Service Regulations on which the complainants rely provides that the Internal Appeals Committee may call for any document relevant to the matter under consideration. Although they were not initially submitted to the Committee, they were provided, on a confidential basis, to the Committee at its request.

12. Lastly, the complainants refer to alleged concerns raised in audit reports regarding the contracts in question in this case. Aside from being clearly beyond the scope of these complaints, these are matters for the Administrative Council.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 4 November 2011, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet