G. (No. 4), D. M. (No. 4) and H. (No. 5)

v.

EPO

128th Session **Judgment No. 4194**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr R. W. G. (his fourth), Mr P. D. M. (his fourth) and Mrs A. D. E. H. (her fifth) against the European Patent Organisation (EPO) on 28 February 2013 and corrected on 2 July, the EPO's single reply of 18 November 2013, the complainants' rejoinder of 25 February 2014 and the EPO's surrejoinder of 10 June 2014;

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

Having examined the written submissions;

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

The complainants challenge the refusal to consult them concerning the use of external contractors.

At the material time, the complainants were employees of the European Patent Office, the secretariat of the EPO, and were assigned to its Munich office.

On 17 September 2009 the complainants' legal representative wrote to the President of the Office on their behalf, enquiring about the employment of external contractors. He requested that the complainants, in their capacity as members of the Munich Staff Committee, be provided with information concerning these workers such as their identity, their qualifications, their tasks or the duration of their employment. He also

asked that external contractors be granted the right to vote in the election of the Staff Committee. He added that the letter should be considered as lodging an appeal if these requests were not granted.

On 17 November 2009 the complainants' legal representative was informed that the President considered the complainants' requests to be irreceivable as the Staff Committee was only entitled to represent EPO staff members and there was no decision affecting EPO staff members nor the Staff Committee. The matter was therefore referred to the Internal Appeals Committee (IAC).

In its opinion of 5 September 2012, the IAC recommended that the appeal be allowed in part but rejected as unfounded as to the remainder. It held that in view of the wide use of external contractors in the Office, the latter was obliged to consult the Staff Committee on that matter in order to enable the Staff Committee to represent the interests of EPO staff members. It considered that the Office had to provide the information the Staff Committee needed to represent the staff members' interests, but that not all the requested information should be given as the right to privacy of external contractors should also be taken into account. The IAC recommended that explicit rules be established by the Administrative Council establishing minimum standards for external contractors in the areas not covered by their employment contract, especially on the issues of occupational health and safety and the right to be represented. These standards should be at least comparable to those granted to EPO staff members and could be inspired by EU Directives. The representation of external contractors could be taken over by the Staff Committee of the EPO.

Each complainant was informed on 3 December 2012 that the President had decided to reject their appeal. The President considered that external contractors fell outside the sphere of application of the Service Regulations for permanent employees of the European Patent Office and hence outside the jurisdiction of the IAC and the Tribunal. He concluded that the complainants had no *locus standi* as staff representatives to officially represent the interests of external contractors and to file an appeal on their behalf. He found that the other claims were unfounded, in particular the request for general information on external

contractors working in the Office. There was no entitlements in the Service Regulations, nor in EU Directive 2008/104 that was applicable to the EPO, for staff representatives to receive that information. That is the decision the complainants impugn before the Tribunal.

The complainants request that the Tribunal set aside the decision of 3 December 2012. They also ask the Tribunal to order that the documents filed in German during the internal appeal proceedings be translated (claim 3) and to order the EPO to evaluate the impact of the use of external contractors on permanent employees and the working conditions and to provide in full transparency the outcome of the evaluation to the "corresponding statutory bodies" (claim 4). They ask that the EPO abstain from concluding new contracts with "external Service providers and staff agencies" until the two last requests (claims 3 and 4) are fulfilled. They seek an order that decision CA/D 23/07 be implemented and that, as decided in that decision, supplementary treaties be concluded. They also ask the Tribunal to order the EPO to "close the legal lacunae identified by the IAC opinion", to be transparent with respect to "external Service providers and staff agencies", to allow "agency staff" to exercise their right to vote in the Staff Committee elections after three months of employment, and to count "agency staff" as permanent staff "under Comm. 45". They further ask the Tribunal to order the EPO to provide the Staff Committee with details on the contract, impact of the service and corresponding permission to supply "temporary workers" and to order that the Staff Committee be involved in all aspects of the working conditions with regard to "agency staff". Lastly, they claim costs and moral damages.

The EPO asks the Tribunal to dismiss the complaints as irreceivable *ratione personae* and *ratione materiae*, but also for failure to exhaust internal means of redress. Subsidiarily, it asks the Tribunal to dismiss the complaints as unfounded.

CONSIDERATIONS

1. In these proceedings, there are three complainants, Mrs H., Mr D. M. and Mr G.. Each was, at the time the grievance initially arose, a member of staff of the EPO and a member of the Munich Staff Committee (the Chairperson, Deputy Chairperson and Secretary respectively). Their complaints raise the same questions of law and are based on the same facts. They are joined and will be the subject of a single judgment. Each of the complaints was filed in the Tribunal on 28 February 2013.

On their complaint forms, the complainants request oral proceedings. However, as the written submissions are sufficient for the Tribunal to reach a reasoned decision, the Tribunal sees no need for oral proceedings. That request is thus denied.

2. Their complaints have their genesis in a letter written on their behalf by their legal representative to the President of the Office dated 17 September 2009. The general topic of the letter was the engagement of temporary staff by the EPO and the use by the Organisation of "other personnel employed under service contracts and contracts for work and services entered into with third parties". Information was sought of the numbers, personal particulars (names, dates of birth, addresses and qualifications), where they worked, the duties they performed, when they commenced work and the duration of their employment or engagement. In addition, the letter asked the EPO to do certain things. It is unnecessary to describe in detail all of what those things were but, by way of illustrative example, the letter sought that "[t]he [EPO] declare[d] that temporary staff employed with the [...] Office for more than three months ha[d] a right to vote in the election of the Staff Committee".

3. In the letter the status of the individuals, the complainants, on whose behalf it was written was identified. It was that each was a member of the Staff Committee of the Munich office of the EPO with each holding a different position on that Committee. Thus the request for information and the request that the EPO do certain things were

based, at least implicitly, on the assertion by each complainant, of a legal right as a member of the Munich Staff Committee to be provided with the information and to request the EPO to do the specified things.

4. The letter also asked that it be treated as an internal appeal to be forwarded to the IAC in the event that the requests were not met either in whole or in part. By letter dated 17 November 2009, the Director of the Employment Law Directorate informed the legal representative that the President had formed the view that the "appeal" was not receivable and, accordingly, the matter was referred to the IAC.

5. The IAC rendered an opinion on 5 September 2012. It recommended that the appeal be allowed in part but dismissed as unfounded as to the remainder. In a letter dated 3 December 2012, each complainant was informed of the President's decision following consideration of the IAC's opinion. Insofar as there was a "claim on the agency staff's rights", the President concluded the appeal was irreceivable. Insofar as other matters were concerned, the President concluded they were unfounded. This is the decision impugned in these proceedings.

6. The EPO raises, as a threshold issue, the receivability of the complaints. It does so on four bases. The first and decisive basis is that the complainants were, at the time the complaints were filed, no longer members of the Munich Staff Committee.

7. Each staff member of an international organisation has a right to freely associate and the organisation has a corresponding duty to respect that right. This is a necessary incident of their employment (see, for example, Judgment 911, consideration 3). On the assumption that, as an incident of freedom of association, an organisation has a duty to meet or satisfy a staff representative's legitimate request for information as an element of a broader obligation to consult (see, for example, Judgment 2919, consideration 15), and fails to do so, then a staff representative would, in that individual capacity and on this assumption, have a cause of action to enforce that duty.

8. There is no issue that, at the time these complaints were filed, each of the complainants had ceased being a member of the Munich Staff Committee even if one or a number may have held another office as a staff representative. Thus, when the proceedings were commenced in the Tribunal, the foundation of their cause of action had been removed. Their complaints are irreceivable.

9. This is not a barren technical conclusion. If their complaints were receivable, the merits of the case and the grant of relief would depend on the complainants demonstrating an ongoing right to be provided with the information and a right, if it existed, to continue to require the EPO to do what had been earlier requested. An immediate and probably insuperable problem would arise concerning relief if the complainants were able to establish, on the merits, they had been and were entitled to some or all of the information they had sought or had a right to request that certain things be done. But as they are no longer members of the Munich Staff Committee, they are not now entitled to any information of the type sought in the letter of 17 September 2009 nor to assert a right that the EPO do certain things. However this conclusion is not a barrier, more generally, to the enforcement of a right a member of a staff committee may have to be provided with information or a right to require the organisation to act in circumstances where the membership of the committee fluctuates over time. That is because when a staff representative has asserted a right arising from that status, the assertion or vindication of that right in proceedings before the Tribunal can be pursued by a newly elected staff representative as a "successor in title" (see Judgment 3465, consideration 3).

That would ordinarily involve the relevant committee approving the new staff representative assuming the role of the former staff representative. If approval was given then all steps taken by the former staff representative could be treated as steps taken by the new staff representative. In this way, steps taken by the former staff representative to pursue the grievance by way of internal appeal can be treated as steps taken by the new staff representative. The prosecution of a complaint in the Tribunal by the new staff representative would not be defeated by an argument that the new staff representative had not

exhausted internal means of redress. She or he would have done so vicariously because of the actions of the former staff representative. But in the present case there is nothing to suggest that a present member or members of the Munich Staff Committee have sought to stand in the shoes of the complainants.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 8 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, Ms Dolores M. Hansen, Judge, Mr Michael F. Moore, Judge, Sir Hugh A. Rawlins, Judge, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

FATOUMATA DIAKITÉ

YVES KREINS

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