

## EIGHTY-SEVENTH SESSION

### *In re Hemmerlein-Bengsch*

#### Judgment 1869

The Administrative Tribunal,

Considering the complaint filed by Mrs Helmtraud Hemmerlein-Bengsch against the European Patent Organisation (EPO) on 24 August 1998, the EPO's reply of 13 November 1998, the complainant's rejoinder of 18 February 1999 and the Organisation's surrejoinder of 20 April 1999;

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

Having examined the written submissions;

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

A. The complainant is German and was born in 1942. On 1 March 1992 she joined the European Patent Office, the secretariat of the EPO, on a one-year contract as an auxiliary staff member in the Public Relations Department of Directorate-General 5 (DG5) in Munich.

In February 1993 the Office transferred her to DG4 to a new Team for Communication and Culture and extended her contract to 31 May 1993. The post of administrator in that Team, at grade A3, was advertised under reference EXT/634 in the EPO *Gazette* 11/93 of 22 March 1993. The complainant applied and by a letter of 27 May from the Director of Personnel Management she was offered the post from 1 June 1993 on a fixed-term contract for five years. The reason for its being fixed term, he told her, was because "the Team for Communication and Culture is a new unit and it will therefore be some years before developments and requirements can be definitively assessed". Her first contract being about to expire, she signed the new one the same day and was appointed to the post.

The Team she joined was however dissolved on 1 December 1995 and in November 1995 the Office transferred the complainant and her post to the Department of Personnel Development. It reassigned her with her post in February 1997 to the Department of Service Regulations and Pay Policy and sent her a description of her duties for the period of her contract still to run. The Director of Personnel Development had a meeting with her on 4 July 1997 and gave her warning that her contract would not be renewed. The Director of Personnel Management confirmed as much in his letter of 9 July 1997 informing her that no extension would be possible beyond the expiry date of the contract on 31 May 1998 and there was no prospect of her employment becoming permanent.

She appealed against that decision on 6 October 1997. The Appeals Committee recommended rejecting her appeal in a report of 4 May 1998. In a letter of 25 May to the complainant the President of the Office endorsed the opinion of the Committee. That is the decision under challenge.

B. The complainant contends that the Office had assured her she would be employed permanently, but had reneged on its promise. It had led her husband to believe that she would be offered a permanent contract "at the latest after expiration of the fixed-term contract". On the strength of those assurances she had given up permanent employment in a national patent office to work for the EPO.

She says the post advertised in the *Gazette* of 22 March 1993 was announced not as a temporary post for a contract staff member, but as a "permanent position". Only immediately before signing her contract did she learn that the post had been limited to five years. Yet some of the duties relating to internal communication appeared to be of a permanent nature and corresponded to those she had already been doing. Her first contract had only days to run: because time was running out she signed the new one on 27 May, still trusting the Office to fulfil its promise.

The Office carried out a strategy to "undermine and weaken the duties and responsibilities" assigned to her, particularly those of a permanent nature. There was breach of the duty of care it owed her. Giving her a limited contract was moreover in breach of Article 1(2) of the "Conditions of Employment for Contract Staff at the European Patent Office". It was not a question of solving a "temporary staff shortage" or performing tasks which might occasionally arise: the duties she performed were permanently required. There was breach too of the terms of

the Office policy on contract staff published in the *Gazette* 7/97 of 21 April 1997 in which the management of the Office confirmed that "the conditions of employment for contract staff should normally only be applied where the task concerned is of a non-permanent nature". She was treated unfairly. Other staff members whose contracts expired in April and June 1998 got permanent positions. The complainant did not, which offended against the principle of equal treatment.

Furthermore her staff report was given to her one year late, on 18 February 1997, in order to deprive her of the opportunity to apply for another post. This was at odds with the General Guidelines on Reporting which provide for appraisal every two years. The appraisal, she submits, should have been carried out by December 1995 at the latest.

She is facing other consequences of the Office's failure to fulfil its promise in that she is not entitled to unemployment benefits and her pension entitlement will be affected by its refusal to grant her permanent employment.

She asks for the quashing of the decision of 25 May 1998 not to extend her contract, a permanent post at grade A3 and costs. Alternatively, she seeks compensation for "the actual damage that has already been sustained and will be sustained ... owing to the refusal of a permanent employment".

C. In its reply the EPO holds that the complaint is devoid of merit.

It denies making her a promise of permanent employment, an argument not put forward by the complainant in her internal appeal. The EPO finds it strange that she cites oral promises made to her husband when she was more directly concerned by her employment than he was and says that she has adduced no evidence of any promise. The complainant's letter to a member of the German Parliament, a former Federal Minister of Justice, asking her to intervene on her behalf, does not refer to any alleged promise either. That request for intervention was moreover in breach of the complainant's duty of discretion laid down in Article 14(1) of the Service Regulations.

Nothing in *Gazette* 11/93 said her post was permanent and she did not sign her contract under duress. Even vacancy notice EXT/634 for her post said "it is intended to fill this post on contract". At no stage did the Office give the complainant reason to hope for an extension of contract or permanent employment. The Director of Personnel Management warned her nearly one year before her contract expired that there would be no renewal. His letter of 9 July 1997 referred to her meeting with the Director of Personnel Development of 4 July when he explained the reasons. She was wrong to say extension was refused "without giving any further reasons". She had ample warning, and had the right to apply for other vacancies.

There was no breach of the Conditions of Employment for Contract Staff: Article 1(2) says, as the Appeals Committee pointed out, that fixed-term contracts can be concluded "for other legitimate reasons". There was a reason for such a contract: it was not known how the new Team she was assigned to would develop.

The Office did not "undermine" her duties. After the winding up of the Team she was given some tasks on an ad hoc basis. It was with the complainant's agreement that the Office amended her job specification in 1997, so she cannot claim her duties were withdrawn without notice. At the end of her contract the complainant was not performing work of a permanent nature.

The case of the other staff members who became permanent in 1998 was different. Tasks assigned to them proved to be permanent: therefore there was no breach of equal treatment.

It did not fail in its duty of care to her. The complainant could have opted for the German pension and social security schemes, including unemployment insurance when signing her five-year contract but she did not.

As for the matter of her delayed staff report, the Organisation points out that the argument was not raised during the internal appeal. In any event, the complainant contributed to the delay by, to date, not signing or returning the report to the Administration.

D. In her rejoinder the complainant rebuts arguments put forward by the defendant and enlarges on her pleas. She did mention the promises that the Office had made to her to the Appeals Committee. She referred to them at the hearing of 21 April 1998: there was simply no mention of them in the Committee's report.

She insists that the post of administrator was advertised in the *Gazette* as a permanent post. She was already

performing the duties of the post within the Team, and had no reason to consult the vacancy notice for more information: so it was only on 27 May 1993 that she was advised that the post was not unlimited in time.

Moreover the duties of the "internal communication" team were and still are of a permanent nature. She was offered a contract limited in time even though it was clear her duties were ongoing. She should have been employed on a permanent basis, at the latest when tasks were redistributed in Personnel Development, because the staff then continued the work they had been doing before the Team was set up.

She did not have the opportunity to opt for German pension and social security schemes. The assumption in the letter of appointment of 27 May 1993 was that she would opt for the EPO's own system. She had only one working day to accept the contract.

As regards her staff reports, there was a delay of more than one year in preparing the report for the period 1 June 1994 to 30 November 1995. There were irregularities for which the complainant was not responsible.

E. In its surrejoinder the Organisation enlarges on its arguments.

The complainant was never given a promise that her position would become permanent. As she acknowledged in her rejoinder, the alleged promises were to the effect that she would "be offered a permanent employment following the one-year contract", an auxiliary staff contract, from March 1992 to February 1993 which was extended to 31 May 1993. She should have mentioned such a promise upon signing the five-year contract.

The Gazette only announces that posts are open for applications: it is the vacancy notices which have legal validity and state whether a post is to be permanent or on a contract basis. The *Gazette* in question did not carry the information as to whether the post was permanent or not. The complainant must have read the vacancy notice in order to apply for the post. It was through her own negligence if she only became aware that the post was for a fixed-term when she signed the five-year contract. In any event, she would have been at liberty to sign the contract subject to reservations, but did not do so.

As the Appeals Committee underlined, the permanent nature of duties is not the only factor which determines whether a job is permanent. The Office can also take account of future staffing requirements. It told her at the outset that it was not known what future staff requirements would be.

## CONSIDERATIONS

1. The complainant joined the European Patent Office, the EPO's secretariat, on 1 March 1992 on a one-year contract as an auxiliary staff member and worked at headquarters in Munich. The conditions were governed by the employment and social welfare legislation in force at the place of work. The initial contract was extended to 31 May 1993 by mutual agreement.
2. The complainant applied for the post of administrator at grade A3 in the new Team for Communication and Culture at DG4. She was successful and was offered a five-year contract governed by the Conditions of Employment for Contract Staff which she signed on 27 May 1993. The Director of Personnel Management told her in a letter of 27 May 1993 that it would take some years until developments and requirements could be definitively assessed.
3. It was decided following a consultant's report in May 1995, that the Team was not functioning satisfactorily and would be dissolved as from 1 December 1995. The complainant was transferred with her post to the Personnel Development Department. By letter dated 14 January 1997 from the Director of Personnel Management she was informed that due to the reorganisation of the Department she was to be assigned to the Department of Service Regulations and Pay Policy from 1 February 1997 until the end of her contract. On 4 July 1997 she was orally informed by the Director of Personnel Development that her employment could not be extended beyond 31 May 1998. That was confirmed in writing in a letter of 9 July 1997 from the Director of Personnel Management.
4. The complainant lodged an internal appeal against that decision on 6 October 1997. In an opinion dated 4 May 1998 the Appeals Committee recommended that the appeal be rejected as unfounded. The President of the Office accepted that recommendation and rejected her appeal by a letter of 25 May 1998, which is the decision impugned.
5. The complainant seeks the quashing of the impugned decision, a permanent position at grade A3 and costs or,

alternatively, compensation for damage she has suffered.

6. The complainant contends that her husband was expressly assured in November 1991 by the Vice-President in charge of Legal and International Affairs (DG5) that she would get permanent employment at the latest after the expiration of the fixed-term contract and therefore she gave up her permanent employment in a national patent office. She states that the post for which she applied was announced in the *Gazette* 11/93 as a permanent position. It was only on 27 May 1993 when she saw that her contract was for a fixed-term of five years that she knew that it was not. She felt compelled to sign.

7. Following the dissolution of the Team for Communication and Culture, its work was divided in November 1995, between the Personnel Development Department (D 4.3.2) and DG5. The complainant's job description remained unchanged. She says she was in charge of "internal communications" which, as a task of a permanent nature, should not have been governed by a contract limited in time.

8. When the Personnel Development Department was reorganised and the complainant was assigned to the Department of Service Regulations and Pay Policy (D 4.3.2.3), a new Internal Communications Department was formed in which the complainant was not employed. She claims that the purpose of this action was to "undermine and weaken the duties" assigned to her. The new job description limited the scope of her duties to those of a non-permanent nature.

9. The Office policy requires that Conditions of Employment of Contract Staff should normally only be applied where tasks are of a non-permanent nature. Yet D 4.3.2.3 carried out some tasks which were, and have remained, permanent. She should therefore have got a permanent position. Twenty-eight staff members whose contracts expired in April and June 1998 were given permanent positions while she was not: that constituted breach of equal treatment. She complains that her appraisal was completed only on 18 February 1997, more than one year late, thus violating the General Guidelines on Reporting. Lastly she lists the damage she has suffered.

10. The Organisation denies there was any promise of permanent employment in November 1991. Whatever may have been said by the Vice-President of DG5 the latter was not assigned to a personnel department and did not have the authority to give a "promise" of a permanent position. The complainant did not invoke any such promise when offered the five-year contract and never filed an internal appeal in relation to the alleged promise. Furthermore, the complainant showed she was aware of the absence of a promise in her letter to the former German Federal Minister of Justice asking for her intervention with the President (which she should not have sought), when she stated: "It has not yet been possible to obtain from my employer a binding assurance that my employment will be extended beyond the term of the contract and made permanent". When she was notified of her reassignment to D 4.3.2.3 on 14 January 1997 she was informed what her duties would be from 1 February 1997 until the end of her contract. There was no mention of any possibility of extension.

11. The Organisation says that, under Article 1(2) of the Conditions of Employment for Contract Staff, fixed-term contracts may be "concluded not only for duties which are not permanent, but also if justified for other legitimate reasons". *Gazette* 11/93 of 22 March 1993 merely said the post had been advertised, while the vacancy notice stated that it was being filled "on contract". The Organisation does not therefore accept that the complainant was unaware that the post for which she applied was for a fixed term: indeed the covering letter accompanying the contract said so, the reason being that the Team was a new unit and it would be some years before development and requirements could be definitively assessed. Therefore, the Organisation had legitimate reasons for offering the complainant a fixed-term contract.

12. The Organisation refers to the finding of the Appeals Committee that there was no evidence to support the complainant's claim that the decisions taken by the Administration when dissolving the Team were designed to undermine her job. A job specification had been drawn up in January 1997, with her agreement, and there was no withdrawal of duties without prior notice, as alleged. The Appeals Committee says the Office was justified, following the failure of the Team, in giving her mainly ad hoc personnel duties until the expiration of her contract. These duties were not of a permanent nature.

13. The Organisation refers to the twenty-eight staff members who got permanent employment while the complainant was excluded. It says the persons whose contracts were converted into permanent appointments were recruited at a time when the Organisation was carrying out a significant reorganisation of its work. It was subsequently able to judge whether the duties of these persons were of a permanent nature. The complainant was

aware she was being recruited to join a newly created unit whose future would depend on results. The tasks performed by the persons mentioned proved to be permanent, whereas those performed by the complainant largely disappeared with the closure of the Team to which she had been reassigned.

14. The Organisation denies it is in breach of its duty of care. The complainant signed the five-year contract knowing there was uncertainty about future staffing needs. There is no obligation to create a permanent post without justification. One of the purposes of the discussion with the Director of Personnel Development on 4 July 1997 was to let the complainant know she could apply for any permanent vacancy.

15. The complainant's assertions about her staff reports were not raised in the internal appeal procedure. The staff reports had no bearing on the complainant's situation when her contract expired and they are irrelevant. Nevertheless, the Organisation says that she still has to sign and return her first report after the one covering her probationary period. Second and third reports for the periods 1 December 1995 to 31 December 1997 and 1 January 1998 to 31 May 1998 (in French) were sent to the complainant. Her lawyer requested a translation which was refused as the complainant's knowledge of French was very good. In view of her refusal to return these reports, they were sent to the President for decision in accordance with the reporting procedure.

16. Since the Vice-President of DG5 did not have the authority to offer the complainant assurances of permanent employment, any alleged comments the Vice-President may have made to the complainant's husband in this connection are irrelevant. Nor did the complainant refer to the alleged promise when offered the five-year contract and she subsequently failed to lodge an internal appeal based on the Vice-President's alleged assurances. The Tribunal will not therefore order a hearing of the complainant's husband.

17. The Tribunal holds that the complainant has not proved that any binding promise about permanent employment for her was made before she took up service with the Organisation in 1991. She signed the contract in 1993 knowing it was a fixed-term contract and without mentioning any "promise". It is not true that the position was advertised in the *Gazette* (11/93) as a permanent post as she alleges.

18. The complainant was informed there were doubts about the future of the post with the new Team. Therefore, there was a legitimate reason for the Organisation to offer her a fixed-term contract (Article 1(2) of the Conditions of Employment of Contract Staff).

19. The allocation of duties to her following dissolution of the Team was a matter for the Administration. When they did not fully occupy her time, she was given ad hoc duties. There is no proof that the aim was to "undermine" the complainant's position in any way.

20. As to the staff members who got permanent employment, the Tribunal accepts the assessment by the Administration that their tasks proved permanent whereas the tasks performed by the complainant largely disappeared when the Team was dissolved. Given those circumstances, there was no discrimination.

21. The question of the staff reports raised by the complainant is irrelevant. The failure to renew her contract was not because she was incompetent but because there were no permanent duties for her.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll  
Mark Fernando  
James K. Hugessen

Catherine Comtet

