

111th Session

Judgment No. 3005

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss D. against the European Patent Organisation (EPO) on 5 June 2009 and corrected on 10 August, the EPO's reply of 23 November 2009, the complainant's rejoinder of 9 February 2010 and the Organisation's surrejoinder of 2 June 2010;

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. Article 7(3) of the Service Regulations for Permanent Employees of the European Patent Office relevantly provides that "the appointing authority may, acting in the interests of the service and taking due account of the general recruitment criteria laid down in Article 5, appoint a contract staff member who fulfils the requirements of Articles 8 and 9 as a permanent employee without a new competition procedure". To be eligible for such appointment the contract staff member must fulfil the conditions laid down in Article 15a of the Conditions of Employment for Contract Staff at the European Patent Office, according to which:

“Appointment as a permanent employee

- (1) [...], a fixed-term contract shall not confer any right either to an extension or to conversion into another type of employment.
- (2) Where the President of the Office establishes that the tasks performed under a fixed-term contract have become permanent, the contract staff member concerned may be eligible for appointment to a corresponding vacant permanent post as a permanent employee under Article 7, paragraph 3, of the Service Regulations if the following requirements have been fulfilled:
 - a) the fixed-term contract was concluded as a result of a competition in accordance with Article 3, paragraph 1
 - b) the nature of the duties performed by the contract staff member, the level of responsibility and the qualifications required remain substantially the same for the vacant permanent post
 - c) the contract staff member has demonstrated in the course of his service that he fulfils the requirements of Article 5, paragraph 1, of the Service Regulations
 - d) there are no other contract staff members who fulfil the above requirements.

[...]

The complainant is a German national born in 1971. She joined the European Patent Office, the EPO’s secretariat, on 1 December 2003 under a fixed-term “Euro-contract”, within the meaning of Administrative Council decision CA/D 15/92, as an administrative employee at grade B1 in Directorate 5.1.1 within Principal Directorate 5.1. On 1 June 2005 she was assigned as a project assistant in the field of cooperation with the countries of the Commonwealth of Independent States (CIS) and Mongolia. Her contract was extended several times until 30 June 2008.

On 11 January 2007 the complainant’s Director, the Head of Directorate 5.1.1, requested that the complainant’s Euro-contract post be converted in the 2008 budget into a permanent post at grade B5/1. On the request form he stated that the work carried out by the complainant was “in fact work of a permanent nature” which “[i]n the past [...] ha[d] been carried out by staff on a permanent post”, but that “due to the [...] restructuring and reorganisation this [was] no longer the case”. By an internal note of 30 March the Director indicated that

he fully supported the request, noting that the complainant had proven to be a very capable and reliable project assistant.

On 14 December 2007 the Administrative Council adopted the budget for 2008. It approved the request for the conversion of the complainant's Euro-contract post into a permanent post, stating that "[t]o keep the activities and co-operation with CIS and Mongolia region running, a permanent administrative support [was] needed". In the meantime, the complainant's Director retired and a new Director was appointed as Head of Directorate 5.1.1 as from 1 August 2007.

By a letter of 17 January 2008 the complainant was informed that, in accordance with Article 15 of the Conditions of Employment for Contract Staff, her contract would expire, as stipulated, on 30 June 2008. On 16 April she lodged an internal appeal against this decision and on 16 May she elaborated on her initial pleas and claims. She requested that the decision to terminate her contract be annulled, that she be retained in her current position as a permanent employee beyond 30 June 2008, that she be paid retrospectively "the salary to which she [was] entitled from 1 July 2008 until her definitive reinstatement" and that she be awarded moral damages and costs. By a letter of 25 June 2008 the Director of the Employment Law Directorate informed her that her post would be suppressed due to the restructuring of Principal Directorate 5.1 and that, consequently, her request could not be granted. Her appeal had therefore been referred to the Internal Appeals Committee.

In its opinion of 20 January 2009 the Committee found that the complainant's duties had not become redundant as a result of the restructuring of Principal Directorate 5.1, but had merely been distributed among the remaining staff. It also noted that a B5/1 Euro-contract post with a profile similar to that of the complainant's post had been advertised as early as November 2008, which showed that there was still a need for staff to perform the duties for which the complainant was qualified. It concluded that the duties performed by the complainant were of a permanent nature, but that the Office had chosen to adopt a new approach whereby it systematically recruited staff under Euro-contracts solely to avoid taking on a permanent

employee. The Committee unanimously recommended that the decision to terminate the complainant's contract be annulled and that she be awarded reasonable costs. With regard to the request for conversion of her Euro-contract into a permanent appointment, the majority held that it was unfounded, but that the complainant was, nevertheless, entitled to have her contract extended until it was clear whether the post vacated was actually to be suppressed. It thus recommended that she be offered an extension for a term enabling her to obtain "a real and definite chance of appointment to a vacant B5/1 post". As to the request for retrospective payment of salary, the majority considered it to be well founded, but recommended that the complainant's earnings for the intervening period should be deducted from that payment. It also recommended that she be awarded compensation for moral damages in an amount equal to the monthly basic salary last paid to her in June 2008. In the event that she turned down the offer of a contract extension, the amount of compensation should be raised to three months' basic salary. The minority recommended that the complainant be offered a permanent post with effect from 1 July 2008 and that she be awarded moral damages in the amount of 5,000 euros and 1,000 euros in costs.

By a letter of 20 March 2009, which constitutes the impugned decision, the complainant was informed that the President of the Office had decided to set aside the decision to terminate her contract and to award her reasonable costs. She was also informed that, in line with the majority opinion, the President had decided to reject as unfounded her request for appointment as a permanent employee, but to offer her nevertheless a contract extension until 31 December 2009, during which time she would assess the possibility of offering her permanent employment under Article 7(3) of the Service Regulations. The President had also endorsed the majority opinion with regard to compensation and the payment of the remuneration due as from 1 July 2008.

By another letter of 20 March 2009 the complainant was offered a contract extension under Article 1(2) of the Conditions of Employment for Contract Staff and was advised, inter alia, that the conversion of her contract into permanent employment would occur

only if the conditions of Article 7(3) of the Service Regulations and Article 15a of the Conditions of Employment for Contract Staff were met, and that the Office retained the absolute right not to further renew her contract following its expiry on 31 December 2009. She did not accept the offer and the President was so informed by a letter of 27 April 2009.

B. The complainant asserts that the requirements stipulated in Article 15a(2) of the Conditions of Employment for Contract Staff are fully met in her case and that she should, accordingly, be appointed to a permanent post. She argues in particular that the duties she carried out are of a permanent nature, that she worked for the Office for a long period with a good performance record and that the conversion of her Euro-contract post into a permanent post was approved by the Administrative Council already in the 2008 budget. She also points out that, according to the explanatory memorandum contained in Administrative Council document CA/165/06 Rev. 1, the granting of permanent employment status to contract staff is not only consistent with the Organisation's duty of care towards its staff members, but is also a matter of efficiency and practicality, given that staff members with proven experience and good performance would in any case enjoy a preferential position if a competition were held.

While the complainant acknowledges that the Organisation has a wide discretion in deciding whether or not to convert a fixed-term contract into a permanent appointment, she emphasises that such discretion must be exercised in a lawful manner. She contends that her former Director had promised her that her Euro-contract post would be converted, and that this promise, coupled with the actual creation of a new permanent post in the 2008 budget, created in her the legitimate expectation and confidence that she would in fact be made a permanent employee. She refers in this regard to the case law of the Court of First Instance of the European Communities (referred to as the General Court of the European Union as from 1 December 2009). She further submits that, under Article 106 of the Service Regulations, the decision of 17 January 2008 is unlawful for failure to give reasons and points out that the reasons for the decision not to convert her contract

remained unclear even after the conclusion of the internal appeal proceedings.

The complainant requests that the decision of 17 January 2008 as well as that of 20 March 2009 be rescinded. She also requests that she be appointed to a permanent post at grade B5/1 with effect from 30 June 2008 or, subsidiarily, with effect from the first day of the month following the delivery of the Tribunal's judgment on her case. She claims moral damages in an amount to be determined by the Tribunal, and costs.

C. In its reply the EPO recalls that it enjoys a wide margin of discretion with regard to appointment decisions which, as the Tribunal has repeatedly confirmed, are subject to only limited review. It explains that there is no right to extension or conversion of a fixed-term contract and that, even if the requirements of Article 15a(2) of the Conditions of Employment for Contract Staff read together with Article 7(3) of the Service Regulations are fully met, a Euro-contract will not automatically be converted into a permanent appointment.

The Organisation is, nevertheless, of the opinion that, contrary to what the complainant may contend, the requirements of Article 15a(2) are not met in this case. It acknowledges that she fulfils the requirements stipulated under a) and c), namely that she was granted a fixed-term contract on the basis of a competition and that in the course of her service she fulfilled the requirements of Article 5(1) of the Service Regulations in that she demonstrated a high standard of ability, efficiency and integrity. It also admits that the requirement set forth under b) is satisfied because, although the post that was created at the request of the complainant's former Director was transferred to a different department and ultimately advertised as a Euro-contract post, the tasks it involved were similar to those carried out by the complainant. However, it argues that the requirement laid down under d) is not met, since another staff member, Ms L., who also fulfilled the other requirements of Article 15a(2), was at the relevant time working under a Euro-contract as a project assistant in Principal Directorate 5.1. The defendant also notes that, due to the restructuring of Principal Directorate 5.1, it was unable to foresee, at the time when

the complainant's contract was terminated, whether her services would still be needed after the restructuring. The decision to offer her a contract extension rather than an appointment to a permanent post was therefore justified.

With regard to the argument based on the complainant's legitimate expectations, the EPO observes that the case law of a European Court is not relevant in this case and that, in any event, it was not bound by the former Director's promise to her. It denies that it failed to give reasons for the decision not to convert her contract, emphasising that in the letter of 20 March 2009 it was explained why the President had decided to follow the majority opinion. It invites the Tribunal to dismiss the complainant's claim for damages and emphasises that it has already awarded her one month's basic salary in moral damages and three months' basic salary in compensation.

D. In her rejoinder the complainant reiterates that the requirements of Article 15a(2) of the Conditions of Employment for Contract Staff are fully met in her case. She asserts that the tasks she performed were of a permanent nature and remained so even after the restructuring, and that her post was not suppressed but was merely transferred to a different department. In support of her assertion she produces a statement by her former Director to the effect that her tasks were indeed permanent when the decision was taken to terminate her contract and that the restructuring had no impact on the tasks performed but only on the organisational structure. She refutes the contention that the requirement laid down under Article 15a(2)d) is not met in her case and argues that Ms L. did not fulfil the other requirements of that article, because her contract was not concluded on the basis of a competition and the nature of her duties, level of responsibility and qualifications were very different from those required for the vacant permanent post. The complainant also contends that by employing staff under fixed-term contracts to carry out permanent tasks, the EPO breached Article 1(2) of the Conditions of Employment for Contract Staff, which authorises the conclusion of fixed-term contracts "only [...] in response to a temporary staff shortage at the Office, for the purpose of carrying out occasional tasks

which by their nature are non-permanent, or for other legitimate reasons which justify limiting the term of the contract". Referring to other staff members whose fixed-term contracts were ultimately converted, she accuses the Organisation of discrimination and lack of good faith. She requests that her former Director, Ms L. and herself be granted a hearing before the Tribunal.

E. In its surrejoinder the Organisation invites the Tribunal to dismiss the complainant's request for an oral hearing, arguing that she has had ample opportunity to present her arguments. It asserts that Ms L., whose Euro-contract post was converted into a permanent post as of 1 February 2010, fulfilled the requirements of Article 15a(2), given that she was recruited on the basis of the selection procedure for vacancy notice EURO/3908 and performed duties substantially similar to those of the vacant permanent post. It draws a distinction between a budgetary post for a permanent employee and a budgetary post for a contract staff member, such as the complainant, explaining that the latter is suppressed once the incumbent's contract is terminated. Accordingly, the complainant's post no longer exists and her duties have been redistributed amongst permanent staff members. It denies having breached the statutory provisions governing the recruitment of contract staff and rejects the complainant's allegations of discrimination. As to the statement by the complainant's former Director, it submits that after his departure from the Organisation, he was not in a position to know the staffing needs of the directorates to which the complainant's duties had been transferred.

CONSIDERATIONS

1. The parties' briefs and the evidence they have produced are sufficient to enable the Tribunal to reach an informed decision. Accordingly, the complainant's application for an oral hearing is rejected.

2. The complainant launched an internal appeal against the decision of 17 January 2008 not to extend her fixed-term contract

beyond its expiration on 30 June 2008. On 20 March 2009 the President of the Office adopted the unanimous recommendation of the Internal Appeals Committee and set aside the decision at issue and awarded the complainant the reasonable costs associated with the internal appeal. In accordance with the recommendation in the majority opinion, the President also awarded the complainant compensation for moral damages.

3. In addition, the President offered the complainant an extension of her fixed-term contract until 31 December 2009, together with the payment of the remuneration due from 1 July 2008 to the date the complainant resumed her duties less a deduction for net earnings. In the event that the complainant did not accept the extension of her contract, she would be paid compensation in the amount of three months' basic salary.

4. The President rejected the complainant's request for a permanent appointment as unfounded. She observed that at the time of the expiry of the complainant's fixed-term contract, it had not been possible to ascertain whether her post would become redundant and whether the staff shortage would continue to exist. Relying on the Tribunal's Judgment 2213, under 6(a), the President observed that the approval of a post in the budget does not amount to an appointment. Further, the request for a permanent appointment was unfounded in view of Article 15a of the Conditions of Employment for Contract Staff, which states that there is no right to a conversion of employment and, also, in view of the discretionary nature of a decision to appoint a contract staff member as a permanent employee.

5. The complainant submits that she is entitled to a permanent appointment. While recognising the discretionary nature of a decision to convert a fixed-term contract to a permanent appointment, she asserts that Article 15a(2) of the Conditions of Employment for Contract Staff coupled with the explanatory memorandum contained in document CA/165/06 Rev. 1 establish the framework within which the EPO may exercise its discretionary authority. The complainant takes

the position that if a Euro-contractor meets the criteria found in Article 15a(2) then he or she may be eligible to have his or her fixed-term contract converted to a permanent appointment. The complainant maintains that she meets all of the criteria stipulated in Article 15a(2).

6. She also asserts that she is entitled to a permanent appointment on the basis of the promise given by her former Director and Head of Directorate 5.1.1, and the confirmation of this promise by the Administrative Council's subsequent approval of a permanent post in the budget for 2008. Relying on the case law of a European Court, the complainant contends that this created a "protectable confidence".

7. Lastly, the complainant submits that even if she cannot request a permanent post, she is entitled to a new decision. She maintains that the decision of 17 January 2008 was unlawful because the EPO, in contravention of Article 106 of the Service Regulations, did not give reasons for that decision. As well, the reasons for the impugned decision are unclear. The complainant argues that in these circumstances she is at least entitled to a decision that shows that the Organisation exercised its discretionary authority in a lawful manner.

8. In addition to moral damages and costs, the complainant asks the Tribunal to set aside the decision of 17 January 2008. As that decision was set aside by the President's decision of 20 March 2009, a consideration of the complainant's pleadings in that regard is unnecessary. The complainant also asks the Tribunal to set aside the decision of 20 March 2009 and to order that "[t]he EPO shall employ [her] on a permanent post with the grade B5/1 [with effect from] 30 June 2008".

9. In effect, this complaint is not a challenge to the underlying decision of 17 January 2008 not to extend the complainant's contract. Instead, it concerns the decision of 20 March 2009 in relation to the remedy, that is, the refusal to grant the complainant a permanent appointment. In these circumstances, the relevant question is whether

in January 2008 or in March 2009 the appointing authority was obliged to give the complainant a permanent appointment.

10. In Judgment 1349, under 11, the Tribunal noted the wide discretion an organisation enjoys in relation to the decision to convert a fixed-term appointment to a permanent one. Given the highly discretionary nature of the decision, it is subject to limited review and will only be set aside “if it is taken without authority or in breach of a rule of form or of procedure, or if it is based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was an abuse of authority” (see Judgment 2694, under 4).

11. Contrary to the complainant’s assertion, the Tribunal observes that there is no automatic entitlement to a conversion of a fixed-term appointment to a permanent appointment. Article 15a of the Conditions of Employment for Contract Staff provides that “a fixed-term contract shall not confer any right [...] to conversion into another type of employment”. Additionally, even if all of the four criteria stipulated in Article 15a(2) under a), b), c) and d) are met, the staff member concerned does not have a right to a permanent appointment but, instead, “may be eligible for appointment to a corresponding vacant permanent post as a permanent employee”. Further, it does not automatically follow from the creation of a permanent post in the budget that a staff member is entitled to a permanent appointment.

12. With regard to the consequences flowing from the alleged promise of the conversion of the appointment, as the Tribunal observed in Judgment 782, under 1:

“According to the rules of good faith anyone to whom a promise is made may expect it to be kept, and that means that an international official has the right to fulfilment of a promise by the organisation that employs him.

The right is conditional. One condition is that the promise should be substantive, i.e. to act, or not to act, or to allow. Others are that it should come from someone who is competent or deemed competent to make it; that breach should cause injury to him who relies on it; and that the position

in law should not have altered between the date of the promise and the date on which fulfilment is due.”

13. Even if it is accepted that the complainant’s former Director promised her a permanent appointment, he was neither someone with the authority nor someone deemed to have the authority to make such a promise. Nor does the subsequent creation of a permanent post in the budget amount to a promise by the appointing authority to give the complainant a permanent position. While the creation of a post may in certain circumstances corroborate the assertion that a promise was made, where the promise is alleged to have been made by a person competent to make the promise, it does not in the present case overcome the fact that the promise was not made by someone competent to make the promise.

14. With regard to the failure to provide adequate reasons for the decision of 17 January 2008, as noted above, this has been overtaken by the President’s decision to quash that decision. As to the impugned decision, in the Tribunal’s view, it was adequately motivated.

15. The Tribunal concludes that the complainant has failed to establish that there was an obligation on the part of the President to grant her a permanent appointment or that the President’s refusal to grant the claimed relief involved a reviewable error. Accordingly, the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 13 May 2011, Ms Mary G. Gaudron, 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 6 July 2011.

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