

**111th Session**

**Judgment No. 3007**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss K.v.L. against the European Patent Organisation (EPO) on 8 April 2009 and corrected on 6 July, the EPO's reply of 14 October 2009, the complainant's rejoinder of 12 January 2010 and the Organisation's surrejoinder of 23 April 2010;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant is a Dutch national born in 1973. She joined the European Patent Office, the EPO's secretariat, at its sub-office in Vienna in August 2001 as an administrative employee at grade B1. She held a fixed-term "Euro-contract" which was extended several times.

By a letter of 23 December 2005 the Head of Administration informed the complainant that her contract would be extended up to

31 December 2006 but that a further extension should not be anticipated because the tasks assigned to her were dependent on the implementation of new technical tools, which were due to become operational in the course of 2006. He added that a reduction in staff was foreseen following the introduction of the new tools. The complainant subsequently applied for various positions but was not selected. On 4 August 2006 she was notified that her appointment would not be extended beyond its expiry date. That decision was confirmed by a letter dated 20 September 2006. Thus, she separated from service on 31 December 2006.

On 20 February 2007 she wrote to the President of the Office asking him to reconsider her application for one of the vacant posts for which she had not been selected. The President replied on 30 March that the recruitment procedure for the post in question had been finalised, but he encouraged her to apply for other suitable vacancies. On 14 June the complainant wrote to him again, contending that the decisions rejecting her applications for vacant posts were contrary to the Tribunal's case law and to Administrative Council document CA/165/06, which concerns the possibility of appointing contract staff members to permanent posts without holding a competition. She asked the President to offer her a suitable position in order "to prevent a long appeal procedure". In a letter of 10 July 2007 the new President, referring to her predecessor's letter of 30 March, noted that the complainant's contract had come to an end on 31 December 2006 and stated that she could not offer her a permanent position without following proper recruitment procedures.

On 9 October 2007 the complainant filed an appeal with the President, challenging her decision of 10 July and seeking reinstatement, damages and costs. She argued that her contract should have been extended since the work she used to perform had not ceased at the time her contract ended and the number of staff in the area concerned had not been reduced. She also alleged that the EPO had acted in breach of its duty of care in failing to give her priority over external candidates for vacant posts. By a letter of 5 December 2007 the complainant was notified that the President considered that her appeal was time-barred and that the decision not to extend her

appointment upon its expiry was justified. The matter had therefore been referred to the Internal Appeals Committee and a hearing was held on 23 September 2008.

In its opinion of 24 November 2008 the Committee unanimously found that the appeal was time-barred. Nevertheless, referring to Article 17 of its Rules of Procedure, it recommended that the complainant be offered a settlement whereby the Office would pay her 10,000 euros and a reasonable amount in costs, provided that she agreed not to pursue the matter further. It considered that the Organisation had a duty of care to employ her at least for as long as her duties evidently continued to exist, and that her contract should therefore have been extended by at least five months. In the event that the complainant refused this settlement offer, the Committee recommended that the appeal be dismissed.

By a letter of 24 January 2009 the complainant was notified that the President had decided to reject her appeal as inadmissible and not to endorse the Committee's recommendation for a settlement offer. Given that the appeal was clearly time-barred, there was no reason justifying an exception to the principle of legal certainty. That is the impugned decision.

B. The complainant submits that the Internal Appeals Committee's finding that her appeal was time-barred is incorrect both in fact and in law. She argues that up to 10 July 2007 she was led to believe that she would be offered another position following her applications for vacant posts. When it became evident, through a number of rejections, that she was not being given priority over other candidates, she asked for a clear decision from the President, who replied on 10 July 2007. As she appealed that decision on 9 October, i.e. within three months of receipt of the contested decision, her appeal cannot be considered to be time-barred.

On the merits, she contends that her contract should have been extended, given that the work she used to perform was undertaken by others after she separated from service. She points out that those recruited to perform the tasks previously assigned to her were external

candidates. In her view, the EPO acted in breach of its duty of care in failing to give her priority over external candidates.

She asks the Tribunal to order that she be appointed to a permanent post at grade B2 or above. Alternatively, she seeks damages in an amount equivalent to the total loss of income and benefits incurred from the date of termination of her contract until the date of delivery of the judgment on her case. She also seeks 25,000 euros in moral damages and an award of costs for these and the internal appeal proceedings.

C. In its reply the EPO contends that the complaint is irreceivable because the complainant's internal appeal was time-barred. It emphasises that the decision to terminate her contract is distinct from the decisions not to select her for certain vacancies. In its view, the complainant should have challenged the decision of 4 August or that of 20 September 2006 confirming the decision not to extend her contract beyond 31 December 2006. Failing this, she should at least have lodged an appeal within three months of the expiry of her contract, but she failed to do so. As to the fact that she was not selected for certain posts, the Organisation argues that she should have lodged an appeal against the decisions rejecting her candidature. However, she is not entitled to challenge the decisions rejecting the applications which she submitted after having separated from service because she was at the time an external candidate.

Subsidiarily, the Organisation submits that the complaint is unfounded. The decision not to renew a contract is discretionary and hence subject to only limited review. It rejects the Internal Appeals Committee's finding that it exercised its discretion improperly in justifying the non-renewal of her contract by a decrease in the workload during 2006 whereas the expected decrease only occurred in mid-2007.

The defendant argues that the complainant's request for reinstatement as a permanent employee is unfounded, as the tasks she used to perform were not of a permanent nature, which is a prerequisite for the granting of a permanent contract. Moreover, even if her

contract had been extended for five months, she still would not have reached the maximum term of seven years of service under a Euro-contract. Lastly, it denies any breach of its duty of care with regard to the selection procedures in which the complainant participated.

D. In her rejoinder the complainant reiterates her arguments. In her view, the defendant showed bad faith and a vindictive attitude throughout the proceedings.

E. In its surrejoinder the Organisation maintains its position.

### CONSIDERATIONS

1. The complainant joined the EPO in 2001 on a fixed-term contract which was extended a number of times. She was notified of the last extension of her contract on 23 December 2005, at which time she was informed that it could not be anticipated that her contract would be renewed beyond 31 December 2006. On 4 August and 20 September 2006 she was informed that her contract would end as foreseen on 31 December 2006.

2. Starting in March 2006 and continuing into 2007, the complainant applied for a number of posts but was not selected. On 20 February 2007 she wrote to the President of the Office regarding her non-selection for a particular post and asked him to reconsider her application for the post in light of Administrative Council document CA/165/06 and the fact that she had been employed for more than five consecutive years. In his reply of 30 March 2007 the President reminded the complainant that she had been informed on several occasions in 2006 that her contract would not be extended, and that she had been invited to participate in training sessions with a view to enhancing her prospects of success in applying for a new post, and he encouraged her to continue to apply for suitable vacancies.

3. On 14 June 2007, in response to the President, the complainant took the position that the negative outcomes of her

applications were contrary to both document CA/165/06 and the Tribunal's case law. She pointed out that vacancies for posts having duties corresponding to those for which she was previously responsible were being advertised via recruitment agencies on the Internet. She asserted that these vacancy announcements showed that the reasons given for ending her contract were not valid, and she asked the President to offer her a suitable position.

4. On 10 July 2007 the new President responded to the complainant, stating that it was impossible to offer her a post as a permanent employee without following the proper recruitment procedures. The President encouraged her to continue applying for suitable vacancies.

5. On 9 October 2007 the complainant filed an internal appeal challenging the letter of 10 July 2007. By a letter of 5 December 2007 she was informed that the President considered that her appeal was time-barred and that the decision not to retain her in service was justified. The President had therefore referred the case to the Internal Appeals Committee.

6. On 24 January 2009 the President endorsed the Committee's opinion of 24 November 2008 that the appeal was time-barred and dismissed the appeal. The President also rejected the Committee's recommendation made pursuant to Article 17 of its Rules of Procedure regarding a settlement offer. This is the decision challenged before the Tribunal.

7. The complainant submits that the Committee's finding that her appeal was irreceivable is tainted by errors of fact and law. She maintains that the letter of 20 September 2006 stating that her contract would end on 31 December 2006 was only "a trigger for [her] to attempt, in good faith, to reach an agreement" with the Office.

Following the non-renewal of her contract, she made it clear that she was prepared to accept a suitable alternative position to avoid a long appeal process. In fact, she was encouraged by a number of people, including the Head of Human Resources, to apply for other positions and was led to believe that she would be treated as a priority candidate. When it became evident, through a series of rejections which did not show good faith on the part of the EPO, that she was not being given priority, she asked for a clear position from the President which was received on 10 July 2007. As this was the closest to a clear decision she had received, on 9 October 2007 she lodged her internal appeal against this decision within the requisite three months of receipt of the decision.

8. The complainant rejects the EPO's position that the various decisions concerning her employment are separate decisions and are to be treated separately. In the complainant's view, that position ignores the rule that a Euro-contract extended three times for a total duration of five and a half years and with "indefinitely continuing tasks" should have been converted into a permanent contract. Failing this, the EPO owed her a duty of care and should have treated her as a priority candidate for other posts.

9. At the core of the dispute between the parties on the question of receivability is the divergence of views regarding which decision is the subject of the proceedings. Accordingly, to resolve the matter, it is necessary to identify the decision at issue in the internal appeal process.

10. In the complainant's internal appeal letter of 9 October 2007, it is stated that the appeal is lodged against the President's decision of 10 July 2007. However, while the submissions are not entirely clear in terms of the specific decision at issue, they appear to be principally directed at the failure to extend the complainant's contract.

11. In her submissions dated 4 July 2008 in reply to the EPO's position paper before the Internal Appeals Committee, the complainant states:

“On the matter of receivability, the argument of the Office [...] shows a fundamental misunderstanding both of the nature of the Office's legal obligations and of the claim.

[...] For clarity, the claim expressed simply is the following: the Office should not have terminated [my] contract. Having done so, and then failing to rectify this decision, it should have reappointed [me] to another comparable post, which it wilfully and repeatedly failed to do, thus showing a gross neglect of its duty of care.”

12. In her “Response at hearing to reply by the Office” dated 22 September 2008 she states:

“It appears useful to repeat in clear and simple terms the essence of [my] case:

a) The Office should not have terminated [my] contract as the work [I] was engaged on had not finished. [...]

b) [H]aving wrongfully terminated the contract, and in view of more than 5 years employment, the Office had a duty of care to give [me] permanent employment. [...]

13. In her rejoinder the complainant states that “[t]he appeal is made against the decision of the President not to remedy the consequences of the wrongful non-extension or [non-]conversion” of her contract.

14. On a reading of the complainant's submissions in the internal appeal, it is evident that the decision she then contested was the decision not to renew her contract. This decision was first communicated to her on 4 August 2006. Even if it is accepted that 20 September 2006 is the date of the decision, the complainant did not file the internal appeal within the three months provided for in Article 108(2) of the Service Regulations for Permanent Employees of the Office.



15. Although the complainant attempts to treat a series of separate events as a single transaction culminating in the President's "decision" of 10 July 2007, they are separate matters and the subject of separate decisions against which the complainant did not lodge internal appeals. Additionally, the Tribunal observes that the letter of 10 July 2007 is simply a courtesy letter and cannot be regarded as a decision.

16. The Tribunal concludes that the President of the Office did not err in finding that the internal appeal was irreceivable. As the internal appeal was out of time, the complaint is irreceivable and will be dismissed.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 20 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