

**118th Session**

**Judgment No. 3343**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh complaint filed by Mrs E. H. against the European Patent Organisation (EPO) on 20 April 2010 and the EPO's reply of 2 August 2010;

Considering the application to intervene filed by Mr L. P. on 26 May 2010;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

A. In August 2006 the EPO signed a contract with a consultant company for services. No invitation to tender had been published, as the EPO had decided to place the contract directly with the company concerned. In a document dated 22 January 2007 the President of the Office informed the Budget and Finance Committee of the award of the direct placement, indicating that it had been made pursuant to Article 57(b) of the Financial Regulations, which provides for that possibility as an exception to the rules on tender when goods

or services are needed as a matter of urgency. The President also indicated that the search for possible suppliers had shown that the chosen consultant was in a position to offer the unique necessary tools and experience needed to provide the required service.

In her capacity as Chairperson of the Staff Committee in Munich, the complainant wrote to the President on 2 February 2007 in order to contest the justification for the direct placement. She contended that the underlying needs were evident from the first quarter of 2006 and that there was therefore no urgency. She noted that the President seemed to indicate that the direct placement was also justified under Article 57(d) of the Financial Regulations, which allows direct placement when, for technical, practical or legal reasons, goods or services can only be provided by a specific contractor or supplier. She contested that justification too, arguing that the President had not provided any evidence that the selected company was the sole company to offer the required product or services. She therefore asked the President to cancel the contract signed with the consultant and to follow the proper tender procedure. In the event that her request was not granted, she asked that her letter be considered an internal appeal and she reserved the right to claim costs and damages.

In a document dated 29 March 2007 the President informed the Budget and Finance Committee that he had decided to withdraw his previous communication of 22 January. He submitted a new document to the Budget and Finance Committee on 18 April 2007, informing it of the award decisions taken in 2006 pursuant to the tender procedure and of the direct placements concluded on the basis of paragraphs (c) or (d) of Article 57 of the Financial Regulations. He specified with respect to the contested contract, that the chosen consultant was the sole supplier who could deliver the requested services and products.

In the meantime, the complainant was informed by a letter of 3 April 2007 that the President considered her appeal to be clearly inadmissible and had decided to refer the matter to the Internal Appeals Committee (IAC) for an opinion. On 10 December 2009 the IAC recommended the rejection of the appeal as irreceivable and unfounded. The complainant was not challenging an individual

decision affecting her rights, nor was she challenging a decision affecting the employees' collective rights. The decision to grant a direct placement did not directly affect the staff's interests, and staff representatives had no right to be consulted with regard to tendering and contracting procedures. The IAC added that it found no evidence that the President's decision had been taken with the aim of favouring the external consultant.

The complainant was informed by a letter of 4 February 2010 of the President's decision to endorse the IAC's recommendation and consequently to reject her appeal as irreceivable and unfounded. That is the impugned decision.

B. The complainant indicates that she is acting in her capacity as a staff representative to protect the collective interests of employees and to ensure that the EPO acts in conformity with its own rules. She contends that only a staff representative may challenge a direct placement.

She alleges misuse of the direct placement procedure and, in particular, breach of Article 57, paragraphs (b) and (d) of the Financial Regulations. She maintains that there was no urgency justifying a direct placement, given that the underlying needs were evident from early 2006, and that there was no evidence of the fact that the external consultant company was in a position to offer the unique tools and experience required by the EPO. She adds that the EPO could have issued a restricted tender if there had been a need to avoid delays.

The complainant also alleges lack of transparency and favouritism in granting the contract, emphasising that the Director of the consultant company had professional connections with the President-elect. Even though, at the time the contract was concluded with the external contractor, the President-elect had not yet officially taken up her duties, she was already present in the Office for the smooth handover of the presidency. The complainant therefore contends that the EPO acted in violation of Article 14(1) of the Service Regulations for Permanent Employees of the Office, which provides that a permanent employee shall carry out her/his

duties and conduct herself/himself solely with the interests of the EPO in mind and that she/he shall neither seek nor take instructions from any government, authority, organisation or person outside the EPO. She submits that the use of irregular direct placement procedures may discredit senior managers, who could be suspected of having a personal interest in the placement, and ultimately the Organisation as a whole. She draws attention to a report from the Board of Auditors on the 2008 accounting period, which referred to the contested contract concluded in 2006. According to the Board, an invitation to tender would have been justified given that the consultancy provided by the external contractor was not “that special” and that other consultancy companies offered the required services.

The complainant asks the Tribunal to award her moral and punitive damages, because her initial request to annul the contested contract and proceed with a correct tender procedure no longer makes sense owing to the lapse of time. She also seeks compensation for her time and effort. She specifies that the sums that could be awarded to her would be entirely put at the disposal of the staff representation, given that she filed her complaint in her capacity as a staff representative.

C. In its reply the EPO submits that the complainant is not challenging an individual decision affecting her within the meaning of Article 106 of the Service Regulations. The complaint is directed against financial, budgetary and procurement operations for which staff representatives have only observer status, and not against a decision affecting the employees’ conditions of employment. The complainant therefore has no *locus standi* either in her own right or in her capacity as a staff representative. The EPO argues that the complaint is also irreceivable *ratione materiae* insofar as she claims damages; indeed, the impugned decision by which the President maintains the direct placement is not connected with her conditions of employment.

The EPO replies subsidiarily on the merits, contending that the complaint is unfounded. It asserts that the applicable rules for

tender were followed. According to Article 33 of the Financial Regulations, the President shall authorise expenditure and issue receipt orders, and according to Section B(3) of the Directive on legal vetting of contracts he is responsible for signing contracts above 375,000 euros. Consequently, the contract concluded with the external company, for an overall cost above 375,000 euros, was correctly approved and signed by the President. The EPO points out that the document informing the Budget and Finance Committee of the direct placement was modified on 21 February 2007 to indicate that the contract was placed directly on the basis of Article 57(d) of the Financial Regulations. It emphasises that the Board of Auditors approved the financial management of the Office for 2006-2007. The fact that the Board expressed the view that a tender would have been justified cannot be seen as proof of a flawed procedure. The view expressed by the Board has to be understood through the Office's endeavours to strike a right balance in the use of direct placements and tenders, and merely reflects the Board's preference, wherever possible, for ensuring more competition among bidders and for having access to a larger market by means of a tender in order to obtain better quality and more appropriate services.

Lastly, the EPO denies any violation of Article 14(1) of the Service Regulations. It submits that the complainant has failed to substantiate her allegation that managers might have been discredited, nor has she shown a causal link between the granting of the direct placement and any proven discredit. Moreover, she has provided no evidence that the decision to grant a direct placement injured her individual interests or the collective interests of employees.

#### CONSIDERATIONS

1. The complainant was at the material time the Chairperson of the EPO's Staff Committee in Munich. In her capacity as a staff representative, she challenges the EPO's direct placement of a contract with an external consulting firm under Article 57 of the Financial Regulations. She submits the EPO breached Article 57

of the Financial Regulations and alleges a possible violation of Article 14(1) of the Service Regulations.

2. On the issue of receivability, the complainant takes the position that she is acting to protect the collective interests of the staff. She contends that these interests are not limited to matters such as remuneration and other working conditions, but also include the broader interest of ensuring that the EPO respects its own laws. She claims that other than staff representatives, there is nobody either within or outside the EPO in a position to challenge a direct placement.

3. It is clear that this complaint is irreceivable and it will be dismissed. Chapter 2 of Title II of the Service Regulations provides a mechanism for staff representation at the EPO including the establishment of a Staff Committee, its functions (Article 34), composition (Article 35) and competence (Article 36). However, as the Tribunal stated in Judgment 2649, under 8, “in order for a complaint submitted to the Tribunal on behalf of a Staff Committee to be receivable, it must allege a breach of guarantees which the Organisation is legally bound to provide to staff who are connected with the [EPO] by an employment contract or who have permanent employee status, this being a *sine qua non* for the Tribunal’s jurisdiction”.

4. Article 57 of the Financial Regulations regulates the circumstances under which the EPO may contract directly for the provision of goods and services. It is clear that the allegation of a violation of Article 57 does not in any way implicate the employment conditions of employees or the rights guaranteed to employees. Moreover, nor does the allegation of a violation of Article 14(1) of the Service Regulations on the part of the President. On this ground alone, the complaint is irreceivable *ratione materiae*.

5. Unless it can be shown that the alleged violation of the rule has a direct and immediate bearing on the employment status or rights of employees, the staff representative does not have standing to bring the complaint. In this case there is no such violation. It follows that in her capacity as a staff representative, the complainant clearly does not have standing to bring this complaint.

6. Since the complaint will be dismissed, the application to intervene filed by Mr P. must also be dismissed.

#### DECISION

For the above reasons,

The complaint is dismissed, as is the application to intervene.

In witness of this judgment, adopted on 7 May 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller, Vice-President, Mr Seydou Ba, Judge, Ms Dolores M. Hansen, Judge, Mr Patrick Frydman, Judge, Mr Michael F. Moore, Judge and Mr Hugh A. Rawlins, Judge sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO  
CLAUDE ROUILLER  
SEYDOU BA  
DOLORES HANSEN  
PATRICK FRYDMAN  
MICHAEL MOORE  
HUGH RAWLINS  
DRAZEN PETROVIC