D.

v.

EPO

126th Session **Judgment No. 4045**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. D. against the European Patent Organisation (EPO) on 20 March 2012 and corrected on 8 May, the EPO's reply of 23 August, corrected on 30 August, the complainant's rejoinder of 27 November, corrected on 4 December 2012, and the EPO's surrejoinder of 18 February 2013;

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 complainant, who had worked at the EPO as a consultant, asks the Tribunal to confirm that he was employed under the conditions applicable to permanent employees or, alternatively, to auxiliary staff.

From 26 February 2007 to 30 June 2008 the complainant worked at the EPO's premises under a consultancy agreement with a private company in the field of information technology. As from 1 July 2008, he worked at the EPO's premises under a second consultancy agreement signed with the same company. By a letter dated 30 November 2009, the company informed him that his contract would be terminated as from 31 December 2009, in accordance with its terms.

On 12 February 2010 the complainant wrote to the President of the European Patent Office, the EPO's secretariat, requesting him to recognize, with effect from 26 February 2007 or alternatively from 1 July 2008, his "full-time employment" as an information technology specialist at the EPO in accordance with the Conditions of Employment for Contract Staff or, alternatively, the Conditions of Employment for auxiliary staff of the EPO. On 12 April 2010 he was informed that, as his request could not be granted, his appeal had been forwarded to the Internal Appeals Committee (IAC) for an opinion.

In its opinion of 14 November 2011 the IAC recommended that the appeal be dismissed as irreceivable *ratione personae* as it found that there had never been any "employment relationship" between the complainant and the EPO. On 22 December 2011 the complainant was informed that, in accordance with that recommendation, his appeal was dismissed. This is the impugned decision.

The complainant requests the Tribunal to quash the decision of 22 December 2011 and to confirm that he was employed by the EPO as from 26 February 2007, or alternatively, as from 1 July 2008 under the conditions applicable to permanent employees or, alternatively, those applicable to auxiliary staff. He asks the Tribunal to order the EPO to pay him the remuneration corresponding to that status. Alternatively, he requests the Tribunal to confirm that his internal appeal was receivable and should be processed or, failing that, to order the EPO to provide him access to a national court or to an arbitration proceeding. Lastly, the complainant seeks costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable *ratione personae* and, subsidiarily, as unfounded.

CONSIDERATIONS

1. The question which arises is whether the complainant was an official of the EPO at the material time thereby rendering the Tribunal competent, pursuant to Article II, paragraph 5, of its Statute, to hear his complaint. This is to be determined from the two consultancy agreements under which he rendered services to the EPO from 26 February 2007

to 30 June 2008 and from 1 July 2008 until the second agreement was terminated with effect from 31 December 2009.

2. Both consultancy agreements are in standard form with very minor variations. According to clause 1(1) of both agreements, a private company (hereinafter "the company") was to provide services in the field of information technology to the EPO and was authorized to delegate these contractual duties to a consultant. In clause 1(2) the company delegated the duties in question to the complainant. That clause further states, among other things, that the consultant "will perform his duties under his own technical/professional responsibility and working organisation", that he "is obliged to observe the vital interests of [the company] and of [the company]'s client" and that he "has to observe technical/professional instructions of [the company]" as well as "the [company]'s client in so far as this is necessary for the realisation of the project [but that] the consultant is not bound to further instructions or orders of [the company] or the client especially as to time and formalities". Clause 3(2) of both consultancy agreements states that "[d]ue to the nature of the project the consultant has to perform his contractual duties in the client's premises [but that] [a]s far as special tasks (i.e. programming) could be realised at a different place of work, the consultant is free to determine this place of work and the method of work in his own responsibility". Under clause 3(4), each party was responsible to obtain the relevant permits and authorizations which were necessary for the performance of the agreement. Under clause 4(1) the complainant was to be paid an hourly rate. Under clause 5(5), the complainant was liable for his own insurance and social security conditions and contributions, especially against the risks of illness, age, occupational accident and unemployment. Under clause 6(2) he was to maintain professional indemnity insurance to a specified value for the duration of the agreement.

3. The complaint will be dismissed. The foregoing shows that the complainant was an independent contractor employed by the private company to provide the subject services to the EPO. He had no employment connection with the EPO deriving from a contract of employment or from the status of a permanent employee (see Judgment 2649, under 8).

He was not an EPO employee or an auxiliary staff member. His employment relationship was with the private company. He never belonged to the category of employees to whom the Service Regulations for permanent employees of the Office or the Conditions of Employment for Auxiliary Staff applied. There are therefore no similarities between his employment relationships with the EPO which would bring him within the principles stated in Judgment 3090, considerations 4 to 7, for example. In that judgment, the Tribunal held that it had competence, under Article II, paragraph 5, of its Statute, to hear the complaint of a person who had been employed under successive short-term contracts for seven years with the World Intellectual Property Organization.

4. In the foregoing premises, the complaint is dismissed and the application to call witnesses is also dismissed as it is redundant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 1 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ