O. T.

v.

EPO

130th Session **Judgment No. 4320**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs A. M. O. T. against the European Patent Organisation (EPO) on 21 January 2015, the EPO's reply of 11 May, the complainant's rejoinder of 27 June and the EPO's surrejoinder of 16 October 2015;

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 may be summed up as follows:

The complainant challenges the decision to reject her application for a vacant post on the grounds that, as the holder of a fixed-term contract, she was not eligible to participate in the competition process.

The complainant was recruited to work at the European Patent Office (the EPO's secretariat) in 2008 under a fixed-term contract which was extended several times. In June 2012 a vacancy notice (TAI/5295) was published for a permanent post in the Directorate in which she was working, with duties similar to hers. According to the vacancy notice, the post was to be filled by appointment as a result of an internal competition or by transfer. The complainant applied but was informed by the Human Resources Business Officer that her application could not be considered because the post was for permanent staff only. Shortly afterwards, the EPO announced that not

one but two permanent employees who had participated in the selection process would be joining the complainant's team. At the end of that year, the complainant's employment ended when the EPO decided not to renew her contract upon its expiry. This decision, which is the subject of her second complaint (see Judgment 4321), was said to be based on the fact that the overall level of staff resources in her Directorate was to be reduced.

By a letter of 25 September 2012 addressed to the President of the Office, the complainant challenged the decision not to consider her application. She contended that it had not been taken by the Selection Board, in breach of the relevant provisions; that the appointment of two candidates following the announcement of a single vacancy was unlawful; and that this was a case in which the tasks of a contract staff member (herself) had become permanent, hence she was eligible for appointment to the permanent post under Article 15a(2) of the Conditions of Employment for Contract Staff. She requested that the selection procedure be annulled and that her application be considered in accordance with the aforementioned Article 15a(2).

Following an initial rejection of her appeal, the matter was referred to the Internal Appeals Committee (IAC) for an opinion. A hearing took place on 27 March 2014 and the IAC issued its opinion on 27 August 2014. A majority of its members recommended that the appeal be rejected as unfounded, as the Office's "long-standing and constant practice" according to which contract staff were not entitled to apply for transfer to a permanent post was lawful and involved no unequal treatment nor any breach of the duty of care. The minority, however, interpreted the relevant provisions of the Service Regulations for permanent employees of the European Patent Office and the Conditions of Employment for Contract Staff as allowing applications from contract staff. They therefore recommended that the challenged decision be annulled and that the competition procedure be re-run, with the complainant being treated as an internal candidate. The minority also recommended that the complainant be awarded 2,000 euros in moral damages and 500 euros in costs.

By a letter of 20 October 2014, the Vice-President of Directorate-General 4 (DG4), acting on behalf of the President of the Office, informed the complainant that he had decided to reject her appeal as unfounded in its entirety, in accordance with the IAC majority opinion.

He reiterated that contract staff were excluded under the current legal framework from participation in internal competitions and explained that this exclusion was justified by the fundamental differences between the respective legal situations of contract staff and permanent staff, amongst other things. He added that this could not be regarded as a breach of the duty of care, given that contract staff members were recruited to cover temporary needs, and "not [...] to build up a career in the Office". That is the impugned decision.

The complainant asks the Tribunal to annul the selection procedure (TAI/5295) and to order the EPO to re-advertise the subject post and to consider her application. She also claims moral damages and costs.

The EPO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. This complaint concerns the complainant's application for a vacant permanent post published in vacancy notice TAI/5295 in June 2012. The vacancy notice stated that the post would be filled by appointment as a result of an internal competition or by transfer. On 14 September 2012, after the vacancy notice was closed, Ms W., a Human Resources Business Officer, informed the complainant that her application could not be considered as the position was for permanent staff only. The complainant lodged an internal appeal against this decision in which the IAC majority recommended that the appeal be dismissed. In his 20 October 2014 decision the Vice-President of DG4 accepted the IAC majority opinion that, having regard to the regulatory framework, the internal competition procedures were not open to contract staff and dismissed her appeal. This is the impugned decision.

2. It is not disputed that the complainant's fixed-term contract was concluded and subsequently extended in response to a temporary staff shortage pursuant to Article 1(2) of the Conditions of Employment for Contract Staff (CECS) and that these conditions of employment were applicable to her. Article 3(1) of the CECS is particularly relevant in the present complaint. At the material time, it stated:

> "(1) When recruiting contract staff, the President of the Office shall take due account of the general criteria and conditions for recruitment laid down in Article 3 and Article 4, paragraph 1, third indent,

> paragraphs 2 and 3, second sentence, and in Articles 5 to 11 and Article 12, paragraph 2, of the Service Regulations. Contract staff shall be assigned to the grade corresponding to the duties to be performed."

3. The complainant advances three arguments in her complaint. First, the complainant submits that the rejection of her internal appeal is based on a flawed interpretation of the provisions in the Service Regulations referred to in Article 3(1) of the CECS, namely, Articles 1(7), 4 and 7. The complainant contends that correctly interpreted these provisions allow contract staff to apply for vacancies such as the one in the present case.

4. At this juncture, it is recalled that pursuant to Article 1, paragraphs (1) to (6), of the Service Regulations, the Service Regulations only apply to serving and former permanent employees of the Office; members of the Boards of Appeal and Enlarged Board of Appeal; the President and Vice-presidents employed on contract if there is an express provision in their contract of employment to that effect; and principal directors employed on contract unless their contract of employment expressly provides otherwise. However, Article 1(7) provides that the Service Regulations "shall apply to other contract staff in so far as there is express provision to that effect in the conditions of employment applicable to such staff".

5. The complainant takes the position that the IAC majority and, in turn, the Vice-President of DG4 erroneously found that as only the third indent of Article 4(1) of the Service Regulations was mentioned in Article 3(1) of the CECS, the first and second indents in Article 4(1) did not apply to contract staff. At the material time, Article 4(1) of the Service Regulations provided that "[v]acant posts shall be filled by the appointing authority [...]:

- by transfer within the Office;
- by appointment to a post corresponding to a higher grade or category as a result of an internal competition, after consulting the Selection Board in accordance with Article 7; or
- by recruitment and/or appointment as a result of a general competition open both to employees of the Office and to external candidates, in accordance with Article 7."

6. The complainant points out that as Article 3(1) deals with the recruitment of staff in response to the Office's temporary needs, Article 3 is drafted from the perspective of seeking candidates from outside the Office and it is for this reason that it only refers to the selection procedure in Article 4(1) of the Service Regulations regarding competitions open to external candidates. The complainant argues that the reference to Article 4(2) of the Service Regulations is relevant as it stipulates that staff shall be informed of each vacant post to be filled. The complainant also argues that "[t]he express mention of this Article in the CECS makes [it] clear that the term 'staff' includes 'contract staff'". The complainant submits that it necessarily follows that if contract staff are to be informed of all vacancies, they should also be allowed to apply for the vacancies.

7. As to Article 7, the complainant notes that it not only deals with recruitment procedures but also with the appointment of internal candidates to a different post. Thus, the complainant contends that as Article 7 is referred to in Article 3(1) of CECS, the internal appointment procedures must be open to contract staff. The complainant argues that the logic of Article 7 itself shows that this is the case. Article 7(3) of the Service Regulations contemplates the possibility of the appointment of a contract staff member to a permanent position without a new selection procedure if certain conditions are met. The complainant takes the position that it logically follows that it is also possible to make such an appointment following a new selection procedure irrespective of whether the specified conditions are met. The complainant argues that the express mention of Article 7 of the Service Regulations in Article 3(1) can only be interpreted as meaning that contract staff must be treated as internal candidates in the internal transfer or selection procedure.

8. The complainant's contention that the provisions in the Service Regulations referred to in Article 3(1) of the CECS allow contract staff to apply for vacancies such as the one in the present case is fundamentally flawed. At the outset, it is noted that in large measure the complainant's submissions are based on inferences drawn from the fact that particular articles of the Service Regulations are expressly referenced in Article 3(1). This approach runs contrary to the well-established

principles of statutory interpretation recently reiterated by the Tribunal in Judgment 4178, consideration 10. The Tribunal stated:

> "The primary rule is that words are to be given their obvious and ordinary meaning (see, for example, Judgments 3310, consideration 7, and 2276, consideration 4). Additionally, as the Tribunal stated in Judgment 3734, consideration 4, '[i]t is the obvious and ordinary meaning of the words in the provision that must be discerned and not just a phrase taken in isolation'."

9. In the present case, it is observed that having regard to the obvious and ordinary meaning of the introductory phrase "[w]hen recruiting contract staff" in Article 3 of the CECS followed by the general criteria and conditions of recruitment that the President must consider when recruiting contract staff, Article 3(1) only concerns the recruitment of contract staff. Additionally, the use of the word "recruiting" in the introductory phrase indicates that the provision only applies to candidates not already employed by the Office. It follows that the application of any of the provisions of the Service Regulations identified in Article 3(1) is limited to the recruitment of contract staff and these provisions have no application in relation to the eligibility of contract staff to apply for a vacant post to be filled by an internal competition as provided in Article 4 of the Service Regulations. In this connection, the complainant's related argument that the change of practice that occurred in 2015, when the EPO opened a number of internal competitions to contract staff, shows that this would also have been possible in previous years under the applicable legal framework, is plainly unfounded, as the legal framework was in fact modified with effect from 1 January 2015, and it was that modification that enabled the EPO to open the competitions in question to contract staff. The IAC majority and, in turn, the Vice-President of DG4 correctly determined that the complainant was not entitled to apply for the disputed post under the rules in force at that time.

10. In her second argument, the complainant contends that the decision to exclude her from the list of candidates who satisfy the conditions in Article 8(a), (b) and (c) of the Service Regulations taken by the Human Resources Business Officer breached the requirement in Article 4 of Annex II to the Service Regulations that this decision had to be taken by the Selection Board. This submission is unfounded.

11. Pursuant to Article 8, the following conditions must be satisfied:

> "(a) [the candidate] must be a national of one of the Contracting States, unless an exception is authorised by the appointing authority;
>
> (b) [the candidate] must enjoy [her or] his full rights as a citizen and produce satisfactory character references;
>
> (c) [the candidate] must be free from any irregularity in [her or] his status under the recruiting laws applicable to [her or] him concerning military or comparable service;
>
> [...]"

12. Article 4 of Annex II specifically provides that it is the responsibility of the appointing authority to draw up a list of the candidates who satisfy the conditions laid down in Article 8(a), (b) and (c) of the Service Regulations and to forward the list together with the candidates' files to the chairman of the Selection Board. As provided in Article 5 of Annex II, the role of the Selection Board on receipt of the list of the candidates who satisfy the conditions of Article 8, is to draw up a list of candidates who "meet the requirements set out in the notice of competition". Contrary to the complainant's assertion, the Selection Board is not involved in the initial step of the selection process to draw up a list of the candidates who satisfy the Article 8 conditions.

13. The complainant contends that the filling of two vacant posts when the vacancy notice advertised only one vacant post was in breach of Article 4(2) of the Service Regulations. It states that "[t]he staff shall be informed of each vacant post when the appointing authority decides that the post is to be filled". The complainant argues that because the second vacancy was not advertised the selection procedure was flawed. The complainant adds that contrary to the Office's position she was affected by the flawed procedure as she may have wanted to apply for the second vacancy after the closure of the first vacancy notice.

In the circumstances of this case, a determination as to whether the failure to advertise the second vacancy constituted a flaw in the selection procedure is unnecessary. In view of the fact that there is no evidence to support a finding that Article 4(1), second indent, that provides for the filling of a vacancy as a result of an internal competition, applied to contract staff at the material time, it cannot be said that the complainant was affected by the alleged flaw in the procedure.

14. Lastly, it is necessary to address a procedural issue raised by the complainant, who has asked the Tribunal to provide her with a copy of the communication by which it requested that the EPO show her complaint to the successful candidates and invite them to comment. She explains that this request is motivated by her concerns that personal information contained in her submissions may have been disclosed to third parties, in breach of her right to confidentiality. This request raises a cause of action that is distinct from the cause of action underpinning the present complaint. In the absence of any evidence that the complainant has exhausted internal remedies in respect of the alleged breach of her right to confidentiality, this request must be rejected.

15. Having regard to the above findings and conclusions, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 6 July 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ