

**A. S. (No. 11) and P. (No. 20)**

**v.**

**EPO**

**140th Session**

**Judgment No. 5060**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr J. A. S. (his eleventh) and by Mr L. P. (his twentieth) against the European Patent Organisation (EPO) on 27 January 2015 and corrected on 5 February 2015, the EPO's single reply of 14 August 2015, the complainants' rejoinder of 29 September 2015 and the EPO's surrejoinder of 22 December 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 none of the parties has applied;

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

The complainants, acting in their capacity as staff representatives at the material time, challenge the decision to appoint Mr L. to the post of Special Advisor.

By a note of 10 January 2008, staff members were informed that, "[i]n view of the business requirements which w[ould] arise in the short-to-medium term", Mr L. had assumed the function of Special Advisor to the Vice-President of Directorate-General 4 (DG4). The note indicated that this assignment would have immediate effect and that "[a]fter expiry of his current contract, Mr [L.] w[ould] exercise his function on an A5 contract basis". On 31 January 2008, a contract was concluded between the EPO and Mr L., whereby the latter was

appointed Special Advisor to the Vice-President of DG4, at grade A5, with effect from 1 April 2008. The appointment was for a 15-month fixed-term period with the possibility of renewal and was governed by the Conditions of Employment for Contract Staff (CECS) at the European Patent Office, the EPO's secretariat.

On 20 February 2008, the complainants and four other staff members, acting in their capacity as staff representatives, lodged an internal appeal against the decision to nominate Mr L. to the position of Special Advisor. They expressed the view that the nomination was tainted with procedural flaws and abuse of power, requested that it be revoked *ab initio*, and that the vacant post be advertised in accordance with Article 4(2) of the Service Regulations for permanent employees of the Office. They also requested moral damages in the amount of one euro per staff member represented for each of the appellants, punitive damages and costs. The appellants added that, in the event that the President of the Office decided not to grant their requests but to refer the appeal to the Internal Appeals Committee (IAC), they would expect the EPO to submit its position paper at the latest by 20 May 2008. They indicated that, failing this, they would consider that all internal means of redress had been exhausted and they would have direct recourse to the Tribunal.

By a letter of 14 March 2008, the Director of the Employment Law Directorate informed the appellants that the President had decided to refer their appeal to the IAC for an opinion. He stated that, taking into account Mr L.'s experience and specialised knowledge, he had been offered a "Euro-contract" for the purpose of providing temporary assistance to the Vice-President of DG4 in connection with the EPO's Strategic Renewal Process and that, as the contract was for a period of less than three years, a formal recruitment procedure was not compulsory.

On 25 June 2008, the complainants, along with the other appellants, challenged this decision before the Tribunal. In Judgment 2939, delivered in public on 8 July 2010, the Tribunal found that the complainants had failed to exhaust the internal means of redress and dismissed the complaints as irreceivable.

The EPO submitted its position paper to the IAC on 30 July 2013. It argued, in essence, that the nomination of Mr L. was lawful and aligned with Article 3(2) of the CECS, which, for contracts of less than three years' duration, enabled the President of the Office to opt for a procedure different from that laid down in Article 7 of the Service Regulations. Consequently, there was no obligation to proceed with a formal recruitment procedure and the requirement under Article 4(2) of the Service Regulations that the vacant post be advertised did not apply.

The IAC rendered its report on 17 September 2014. A majority of its members found that the appointment decision was tainted with a procedural flaw. In a minority opinion, one member concluded that the appointment of Mr L. was lawful and recommended rejecting the complainants' appeal.

By a letter dated 17 November 2014, the Vice-President of DG4 informed the complainants of his decision, taken by delegation of power from the President of the Office, to reject their appeal as unfounded, in accordance with the minority opinion of the IAC. He recalled that Mr L. was assigned to a specific function in view of his qualifications, competences and experience as well as in view of the urgent and specific operational needs at the time. Moreover, Mr L.'s assignment was of limited duration and was not renewed or extended. Therefore, the Office was entitled to exercise its discretion under Article 3(2) of the CECS, and to abstain from following a normal recruitment procedure. As a result, it had no obligation to advertise the post under Article 4 of the Service Regulations, especially since no permanent post existed as per Article 3(11) of the Service Regulations. This is the impugned decision.

The complainants request the Tribunal to quash the impugned decision. They claim moral damages in the amount of one euro per staff member represented, as well as "aggravated" and exemplary damages. Lastly, they seek an award of costs.

The EPO requests the Tribunal to dismiss the complaints in their entirety as unfounded.

## CONSIDERATIONS

1. The two complainants impugn the same decision and raise the same questions of law, which stem from the same facts. They rely on the same arguments, presented in a common brief. Accordingly, the complaints should be joined so one judgment can be rendered.

2. At all times, the complainants have pursued their challenges to the appointment of Mr L. as Special Advisor to the Vice-President of DG4 under a fixed-term contract of 15 months with effect from 1 April 2008, in their capacity as staff representatives and not in their individual capacity. They contend that the process by which he was appointed was procedurally flawed. They stated, in their internal appeal, that they instituted the appeal pursuant to Article 108 of the Service Regulations as “each member of the Staff Committee has the duty to be vigilant and ensure that the interest of Staff be safeguarded and that the procedures laid down in the Service Regulations be respected”. Having stated that the appeal was “admissible”, the IAC determined the appeal on its merits.

3. In their present complaints, the complainants do not allege that Mr L.’s appointment was made in breach of their own individual rights as staff members, which, without more, would engage the Tribunal’s jurisdiction under the provisions of Article II of the Tribunal’s Statute. They merely note, in their common brief, that the EPO has not raised any issue of receivability and that since the complaints were filed within the required time limit, they also remain receivable in the Tribunal.

4. The case law however makes it plain that in a case in which a complainant brings a complaint in a representative capacity, the Tribunal of its own motion may address, as a preliminary issue, whether that complainant can do so merely in such a capacity, and, by extension, whether she or he has standing to render the complaint receivable. Notably, in consideration 8 of Judgment 4322, the Tribunal stated that if a complainant does not allege a violation of rights which the Tribunal is called upon to protect under the terms of its Statute, the Tribunal

cannot adjudicate on the complaint. The complainant would have no cause of action, which is a necessary precondition for the Tribunal's competence to entertain a complaint under the provisions of its own Statute. The Tribunal further noted that this case law connects this issue to the issue of receivability.

5. This issue as it relates in the present case is informed by the analysis the Tribunal relevantly provided in considerations 11 to 14 of Judgment 3642, as follows:

“11. [...] [U]ltimately, the Tribunal's jurisdiction and the related question of a person's right to invoke that jurisdiction should be determined by reference to the Tribunal's Statute. Article II addresses both questions. The Tribunal is conferred with jurisdiction to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office and other organisations which have submitted to the Tribunal's jurisdiction, as well as complaints alleging non-observance of such provisions of the relevant Staff Regulations as are applicable to the case. Having identified and defined the jurisdiction, Article II identifies in paragraph 6, the class or classes of people who can invoke that jurisdiction. That paragraph provides that '[t]he Tribunal shall be open [...] to the official' and to any person to whom the 'official's rights have devolved' on death together with any other person entitled to some right of a deceased official. A legal normative document conferring jurisdiction on a court should not be narrowly construed. However there is little room to doubt that the expression 'shall be open to the official' is a reference to the official whose terms of appointment have allegedly not been observed or, in relation to whose circumstances (in 'a case'), applicable provisions of the Staff Regulations have allegedly not been observed. This is reinforced by the reference to 'the official's rights', in the singular, in relation to rights that have devolved on death. That is to say, standing is directed to the vindication or enforcement of the rights of an individual officer. The clause does not cast the net any wider in relation to who can invoke the jurisdiction of the Tribunal.

12. Similarly in Article VIII, dealing with remedies, the focus of the Article is the provision of relief or a remedy to an individual complainant on the assumption that the relief or remedy will overcome the effect or consequences on that complainant of the non-observance by either undoing the effect of the defendant organisation's conduct (by rescission) or the payment of compensation to the complainant.

13. Accordingly, in the present case, the question is whether any of the complainants is an official with some or all of these characteristics. [...]

14. [...] Consistent with the entire focus of the Statute, the right of an elected representative to enforce the Staff Regulations for the benefit of all staff is limited to circumstances where the provision (which has allegedly not been observed) confers a right on the elected representative as a member of staff. It might be a right limited to the staff representative (such as the right to be consulted) or it might be a right enjoyed by all staff (such as the right to freedom of association).”

6. Plainly, contrary to the case law relevantly stated in consideration 14 of Judgment 3642, the provisions which the complainants allege had not been observed did not confer on them, as elected representatives, a right which the Tribunal is called upon to protect under the terms of its Statute (see Judgments 4322, consideration 8, 4317, considerations 3 and 4, and 3775, consideration 6). The reasons the complainants advance (referred to in consideration 2 of this judgment) for instituting the challenge to the appointment of Mr L. to the contested position in their capacity as staff representatives are not legally founded in light of the applicable rules and case law which recognizes only a confined right. In the result, the complainants do not have standing to bring these complaints, which are accordingly irreceivable and will be dismissed.

#### DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 12 May 2025, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 3 July 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

RENÉ M. VARGAS M.