

EIGHTY-FIRST SESSION

In re VIEHBÖCK

Judgment 1555

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Erich Viehböck against the European Patent Organisation (EPO) on 14 February 1995 and corrected on 23 March, the EPO's reply of 12 June, the complainant's rejoinder of 10 September and the Organisation's surrejoinder of 1 December 1995;

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

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

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

A. The complainant, an Austrian, was employed by the European Patent Office, the secretariat of the EPO, at its sub-office in Vienna as an auxiliary staff member in the publications department. He had two fixed-term contracts, one from 1 February 1992 until 31 January 1993, the other from 1 February 1993 until 31 January 1994. There being a two-year limit on the employment of auxiliary staff under a decision by the Administrative Council of 17 January 1986, his appointment was not extended further.

In April 1994 he applied for a vacancy at the sub-office which was the very job he had been doing. On 9 August he learned from a letter the Head of General Administration had sent him on 26 July that his application had not succeeded.

By a letter of 23 September he appealed to the President of the Office under Articles 106 to 113 of the Service Regulations for Permanent Employees against the "termination" of his appointment, alleging among other things improprieties in the procedure to fill the vacancy he had applied for.

On 1 October 1994 the Head of General Administration issued an order not to admit him to EPO premises. In a letter dated 19 October 1994 he asked the President to rescind that order.

By a letter of 24 November 1994 the Vice-President in charge of Directorate General 4 (DG4) rejected on the President's behalf the complainant's claims in the letters of 23 September and 19 October. That is the impugned decision.

B. The complainant submits that there were "insufficient grounds" for employing him for a limited period: his post was a permanent one and his performance was satisfactory. The reason why his application for another position failed was that the Administration had a policy of discriminating against Austrians.

He claims the status of a permanent employee or, subsidiarily, reinstatement under a two-year contract and compensation in the amount of two years' pay. He wants the Tribunal to quash the order banning him from the sub-office and to award him 10,000 German marks in moral damages and 3,000 marks in costs.

C. In its reply the EPO contends that his complaint is clearly irreceivable. Although appeal to the Tribunal did lie against the non-renewal of his contract within ninety days of the date of its expiry, 31 January 1994, this complaint, not being filed until 14 February 1995, was out of time. Even if the internal remedies open to permanent employees had been available to him, his claims in his letter of 23 September 1994 to the President would again have been time-barred. As for his challenge to the recruitment procedure and to the order to keep him off the premises, he was not under contract with the Organisation at the time and so has no *locus standi*.

In subsidiary argument on the merits the Organisation says that the complaint is unfounded. Its reasons for taking him on as an auxiliary were sound and the annex to the contracts he signed stated that auxiliary staff could not stay on for over two years. He has produced no evidence of any flaws in the recruitment procedure. To ban him from entering the sub-office's premises was a proper exercise of the Administration's prerogatives.

D. In his rejoinder the complainant disputes the EPO's pleas on receivability and develops his pleas on the merits.

E. In its surrejoinder the EPO presses its earlier arguments and refutes several points in the rejoinder.

CONSIDERATIONS:

1. By a decision dated 17 January 1986 and numbered CA/D 14/85 the Administrative Council of the EPO authorised the President of the Office to employ auxiliary staff under contract for periods not to exceed two years. That decision, which defines the conditions applicable to the contracts of auxiliary staff, makes no provision for such staff to bring an internal appeal under the Service Regulations for Permanent Employees. But Article 13 of the European Patent Agreement confers on them the right of appeal to the Tribunal.

2. The EPO employed the complainant at its sub-office in Vienna under two contracts concluded in accordance with decision CA/D 14/85, one for the period from 1 February 1992 to 31 January 1993 and the other from 1 February 1993 to 31 January 1994.

3. On 23 September 1994 the complainant wrote to the President saying that his employment had been "illegally terminated", that the exact position he had filled in quality control had been advertised in April 1994 and that he had applied but the EPO had not even called him for interview. He asked him to "withdraw the termination", acknowledge that he had been employed as a permanent employee, pay him compensation and treat his letter as a formal appeal under Articles 106 to 113 of the Service Regulations.

4. On 1 October 1994 the Head of General Administration gave instructions to the reception of the sub-office not to admit the complainant to the Organisation's premises in Vienna. The complainant wrote on 19 October asking the President to withdraw the instructions on the grounds that they were "unfounded" and prevented him from getting help from staff representatives.

5. On 24 November 1994 the Vice-President in charge of Directorate-General 4 replied to both his letters on the President's behalf. The Vice-President informed the complainant that the EPO could not extend his contract; the conditions of employment of auxiliary staff did not allow the filing of an internal appeal; though auxiliary staff had the right under Article 13 of the European Patent Agreement to appeal to the Tribunal, he had missed the time limit for lodging a complaint against the decision not to extend his contract; the procedure for filling the vacancy he had applied for was in line with the rules and other applicants had been better suited; and no outside applicant - such as he - might appeal to the Tribunal. The Vice-President refused his request for free access to the sub-office in Vienna but said that arrangements would be made if he wished to consult local staff representatives. That is the decision he is impugning and he claims: recognition of his status as a permanent employee of the Organisation; reinstatement under a two-year contract of service; damages equivalent to two years' pay for the decision not to extend his appointment; withdrawal of the instructions to bar his entry to the EPO's premises in Vienna; 10,000 German marks in moral damages; and 3,000 marks in costs.

6. The Organisation pleads that insofar as the complainant is challenging non-renewal his complaint is irreceivable under Article VII(2) of the Tribunal's Statute because he failed to file it within ninety days of the notification of the final decision, whether express or implied, not to extend the contract which expired at 31 January 1994. It points out that two testimonials dated 19 November 1993 and 12 January 1994 it gave him were explicit that the Service Regulations of the EPO did not allow the extension of fixed-term contracts over two years. It argues that he should have filed a complaint within ninety days of 31 January 1994, not over a year later.

7. The complainant maintains that he was never given a copy of the decision, CA/D 14/85, which was cited on the first page of each of his two contracts, and so could not know that his only means of redress was a complaint to the Tribunal.

8. The Organisation retorts that if it was not appended to his contract it was up to him to ask for a copy. Besides, though he cited the provisions in the Service Regulations about internal appeals and therefore obviously knew about them, he failed even to meet the time limit for internal appeal, which was three months from the date of the decision adversely affecting him: in his case that was the date of expiry of his contract.

9. In his rejoinder the complainant points out that his complaint is directed not just against his "recruitment with an incorrect status, but against Contracts for Auxiliary Staff in connection with the filling of [his] position without

advertising and selection procedure and discriminating [against his] additional application for a post in the marketing department". He says he was "used" in that he was expected to solve "organisational problems". He submits that "the time limit should not be deemed to have started until all the circumstances were known" to him. He argues that the earliest possible date for the start of the ninety-day limit is the rejection in the EPO's letter of 26 July 1994 of his application for the post.

10. The complainant is wrong in contending that for challenging the non-renewal of his contract the time limit of ninety days was somehow held over because of a connection with his application for a post. His complaint shows two distinct elements: the non-renewal of his contract on 31 January 1994 and his unsuccessful application for a post in April 1994. His failure to file a complaint with the Tribunal within ninety days of 31 January 1994 means that any claim in relation to his contract is time-barred. As for his application for a post, by the time he made it he was no longer an employee of the Organisation. Since an outside candidate for employment does not have access to the Tribunal his complaint is irreceivable in that regard as well. Lastly, his subsidiary objections to being barred from entry to the EPO's premises in Vienna also fail because once his employment had ended he lost his right to access.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

William Douglas
Mella Carroll
Julio Barberis
A.B. Gardner