The Administrative Tribunal,

Considering the complaint filed by Miss M. F. against the European Patent Organisation (EPO) on 19 February 2007 and corrected on 3 April, the EPO's reply of 4 July, the complainant's rejoinder of 10 October 2007 and the Organisation's surrejoinder of 10 January 2008;

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

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

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

A. The complainant, an Italian national born in 1954, joined the European Patent Office, the EPO's secretariat, in 1985. In 1999 she was appointed Director of Contract and General Law at grade A5.

Responding to a vacancy notice published in March 2005, the complainant applied on 19 April for the post of Principal Director in charge of Legal Services at grade A6. By a letter dated 6 July she was invited to an interview. She was informed by e-mail of 25 July that, prior to the interview, she would have to undergo a day-long individual assessment with a consulting firm. On 1 August the consulting firm invited her to the assessment, which she underwent on 31 August. She was subsequently interviewed by the Office's Selection Board on 12 September and 14 October 2005.

On 28 November 2005 the complainant wrote to the President of the Office, stating that she had been informed that another candidate had been selected for the post and asking to be provided with a formal reasoned decision concerning her own application. On 29 November 2005 the Principal Director of Personnel informed her that she had not been selected for the post. Responding to a further request for a reasoned decision, on 8 February 2006 the Principal Director provided the complainant with a copy of the report of the consulting firm.

On 24 February 2006 the complainant submitted an internal appeal to the President against the decision not to appoint her, alleging that it was based on a flawed procedure and errors of fact. By a letter of 24 April 2006 the Director of Personnel Management and Systems notified her that the President considered the selection procedure to have been carried out correctly. The matter had therefore been referred to the Internal Appeals Committee. On 24 January 2007 the complainant enquired about the progress of the internal appeal proceedings, and on 26 January she forwarded additional submissions and documents to the Committee. The Director of Personnel Management and Systems replied on 31 January that the Office's position paper would be available in six weeks' time. On 19 February 2007 the complainant lodged the present complaint, impugning the implied rejection of her appeal.

The Appeals Committee issued its opinion on 26 November 2007 and by letter of 21 December 2007 the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided, in accordance with the Committee's majority opinion, to reject her appeal.

B. Relying on the Tribunal's case law, the complainant submits that her complaint is receivable on the grounds that the internal proceedings were not concluded within a reasonable period of time. Noting that 12 months elapsed between the lodging of her internal appeal and the filing of her complaint, she stresses that there is a "particular urgency" for her to obtain a decision because of the "five-year (extendable) contract" offered for the disputed post and also because the appointed candidate is now her direct supervisor.

The complainant alleges several flaws in the selection procedure. Firstly, the vacancy notice did not mention that there would be an individual assessment made by the consulting firm, in breach of Articles 2 and 5 of Annex II to the Service Regulations for Permanent Employees of the European Patent Office, which respectively set out the requirements governing the content of competition notices and the procedure for the shortlisting of qualified candidates by the Selection Board.

Secondly, the procedure was not timely and properly made known to the candidates. In particular, no information was given as to the skills that the consulting firm would consider during the individual assessment.

Thirdly, certain managerial skills were identified as areas for improvement in the assessment report notwithstanding the fact that the individual assessment did not cover the complainant's language skills and legal qualifications, or all aspects of her managerial responsibilities, though those were relevant to the position advertised. The complainant submits that, unlike the appointed candidate, she met all the requirements for the post and she argues that, to the extent that her assessment omitted relevant skills, it is based on errors of fact.

Fourthly, notwithstanding the e-mail of 25 July 2005 which stated that the individual assessment would prepare the complainant for her interview with the Selection Board, she was not duly informed of the results of the assessment, particularly of the areas for improvement which had been identified.

Fifthly, the Selection Board did not exercise control over the individual assessment as required by Article 7 of the Service Regulations and Article 5 of Annex II thereto. It had not defined the scope and purpose of the tests implemented by the consulting firm and none of its members – nor any observer – attended the assessment. It was thus wrong for the Selection Board to rely heavily on the assessment in order to recommend qualified candidates to the President of the Office.

Lastly, the complainant submits that the composition of the Selection Board was flawed because three of its members were employed on fixed-term contracts, in breach of Article 1 of Annex II to the Service Regulations in the version applicable at that time.

The complainant asks the Tribunal to find her complaint receivable, to declare the recruitment procedure null and void and to quash the decision not to select her for the post of Principal Director in charge of Legal Services, as well as any related decision which may arise in the course of the proceedings before the Tribunal.

C. In its reply the EPO submits that the complaint is irreceivable for failure to exhaust internal remedies. It points out that, by filing additional submissions on 26 January 2007 and her response to the Organisation's position paper on 10 May, and by attending the hearing on 3 July 2007, the complainant tacitly accepted that internal proceedings were still pending. Besides, the case law she refers to is not relevant to the present case since she has neither shown that the internal proceedings were unlikely to end within a reasonable time, nor done everything that could be expected of her to bring the proceedings to a close. The appeal was examined with no excessive delay, especially in view of the backlog of internal appeals and of the filing of her additional submissions, which the Office had to address in its position paper of 12 March 2007. The EPO points out that it responded promptly to the complainant's enquiry of 24 January and submitted its position paper in good time. It argues that it was unfair on her part to file a complaint without awaiting the expiry of deadlines she had accepted.

The Organisation replies only subsidiarily on the merits. It submits that, as established in the case law, the discretion with regard to appointment decisions is particularly important in cases of managerial posts. The vacancy notice was in accordance with the requirements set out in Articles 2 and 5 of Annex II to the Service Regulations, and consistent with the Office's practice.

It adds that the Office was under no obligation to provide the candidates with detailed instructions as to the selection method, and that the individual assessment method which had been introduced in 2003, was widely accepted within the EPO in 2005. By notifying the complainant one month in advance of the individual assessment and of the fact that personal and managerial skills would be assessed, it complied with the principles of transparency and openness. There was no need to indicate which particular managerial skills would be assessed. The complainant had an additional opportunity to obtain information when she was invited to the assessment by the consulting firm on 1 August 2005. Having accepted to participate in the individual assessment without reservation, she is now estopped from challenging it.

The EPO contends that the data concerning legal qualifications and language skills contained in the assessment report was based solely on the information provided by the complainant herself. The purpose of the assessment was to appraise her personality and managerial skills, and the Selection Board duly took into account the complainant's professional background and responsibilities based on her staff reports. Furthermore she has not shown any serious defect in the Selection Board's assessment warranting the setting aside of the selection of the appointed candidate.

The Organisation asserts that there is no reason to believe that the individual assessment was not carried out in a proper manner. The complainant has not established that the consulting firm failed to provide feedback. Moreover, the purpose of the assessment was not to coach the candidates in preparation of their interview with the Selection Board. In deciding to mandate the consulting firm, the Selection Board properly exercised the wide discretion it enjoys as to the methods used to assess the qualifications of candidates. The consulting firm acted only in an advisory capacity and it was for the Selection Board to make the final decision on the basis of all the information available. It was neither required nor necessary that a member of the Selection Board – or any observer – attend the individual assessment.

The EPO also submits that the complainant has misinterpreted Article 1 of Annex II to the Service Regulations, which did not prevent staff members employed on fixed-term contracts from being members of the Selection Board but rather provided that permanent employees who are members thereof must have a grade equal to that of the post to be filled.

D. In her rejoinder the complainant presses her pleas. She notes that the Appeals Committee had not yet issued its recommendation by the time she filed her rejoinder and that the EPO took concrete action only after she had enquired about the progress of the appeal. She rejects the contention that her filing of additional submissions delayed the proceedings. Moreover, she denies having tacitly or expressly agreed to any deadlines for the internal proceedings, and explains that she had to participate in them so as to protect her rights pending a decision on the receivability of the present complaint. She also stresses that, according to the case law, a backlog of internal appeals cannot excuse a breach of the right to a prompt resolution of her grievances. She maintains and develops her arguments on the merits, emphasising that the Selection Board did not provide the President with sufficient factual information.

E. In its surrejoinder the Organisation maintains its position. It adds that the complaint is also in part irreceivable on the grounds that the claim for annulment of the recruitment procedure was not put forward in her internal appeal. On the merits, it points out that in its opinion the Appeals Committee recommended by a majority that the appeal be dismissed. It submits that the Selection Board was not required to provide detailed reasons when communicating its conclusions to the President.

CONSIDERATIONS

1. It is to be noted, at the outset, that the determinative issue in this complaint centres on receivability. The complainant is the Director of Contract and General Law at the European Patent Office. On 19 April 2005 she applied for the post of Principal Director in charge of Legal Services and on 29 November, after the completion of the selection process, she was advised that the President of the Office had decided to appoint another candidate.

2. On 24 February 2006 the complainant asked the President to rescind his earlier decision. On 24 April she was informed that the President had concluded that the selection procedure had been carried out correctly and that the matter had to be referred to the Internal Appeals Committee.

3. On 24 January 2007 she enquired about the status of her appeal. The Director of Personnel Management and Systems replied on 31 January that the Organisation’s position paper was expected in approximately six weeks. In the meantime, on 26 January, the complainant had forwarded additional submissions to the Appeals Committee. She filed her complaint with the Tribunal on 19 February.

4. On 12 March 2007 the Organisation filed its position paper to which the complainant responded on 10 May. The Committee considered the appeal on 3 July and issued its opinion on 26 November. The majority of the Committee recommended the dismissal of the complainant’s entire appeal, while the minority found that the Selection Board’s composition was irregular. The President adopted the recommendation of the majority on 21 December 2007 and dismissed the appeal.

5. On the issue of receivability the complainant contends that 12 months had elapsed from the time she had initiated the internal appeal to the time she lodged her complaint with the Tribunal. At the time the complaint was filed, not only had the internal proceedings not been concluded, they had not been initiated. In her view, as the proceedings had not been concluded within a reasonable time, she was entitled to lodge a complaint.

6. The complainant also maintains that her enquiry regarding the status of the appeal and subsequent participation in the proceedings have no bearing on the issue of receivability. She submits that since this issue had not been decided by the Tribunal she had to preserve her rights.

7. Under Article VII, paragraph 1, of the Statute of the Tribunal, a complaint is not receivable unless the impugned decision is a final one and all internal means of redress have been exhausted. It is clear that the impugned decision is not a final decision as contemplated by this Article. However, the Tribunal has consistently held that the requirements of this Article will have been met if the complainant can show that despite having done everything that can be expected to have the matter decided, the internal appeal proceedings are unlikely to be concluded within a reasonable time.

8. At issue in the present case is whether the complainant has shown that it was unlikely that the internal appeal proceedings would have been concluded within a reasonable time. In her submissions, the complainant has stressed the lengthy delay up to the time of the filing of the complaint. While the period of approximately ten months from the time the appeal was forwarded to the Appeals Committee, 24 April 2006, to the time the complaint was filed, 19 February 2007 – without any real progress having been made – is a significant delay, it is important to note that the relevant date for the purpose of this analysis is the date on which the complaint was filed.

9. In this regard, the complainant has failed to identify any basis upon which it could be concluded that at the time of the filing of the complaint it was unlikely that her appeal would be concluded within a reasonable time. Nor has she pointed out any delays that could reasonably have been expected or were anticipated. Instead, the complainant appears to rely on the delay occurring from the time she requested an administrative review, on 24 February 2006, to the date she filed the complaint. It should also be noted that on 26 January 2007 the complainant submitted additional submissions and documents to the Committee.

10. The complainant has also failed to demonstrate that a more expeditious resolution of the appeal was required nor has she shown that any further delay would have resulted in injuries that could not be otherwise compensated.

11. The Tribunal concludes that as the complainant has failed to exhaust the internal means of redress the complaint is irreceivable.

DECISION

For the above reasons,

The complaint is dismissed as irreceivable.

In witness of this judgment, adopted on 16 May 2008, Mr Seydou Ba, President of the Tribunal, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Seydou Ba

Agustín Gordillo

Dolores M. Hansen

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.