

107th Session

Judgment No. 2834

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr I. H. T. against the European Patent Organisation (EPO) on 11 June 2007 and corrected on 28 June, the EPO's reply of 8 October, the complainant's rejoinder of 30 October 2007, the Organisation's surrejoinder of 19 February 2008, the complainant's additional submissions of 5 March and 14 April and the EPO's final comments of 27 March and 7 August 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, who has dual Greek and German nationality, was born in 1955. He joined the European Patent Office – the EPO's secretariat – in 1987 at its Headquarters in Munich as an examiner at grade A2. He was promoted to grade A3 in 1989. On 1 May 1992 he was transferred to The Hague, where he acted mainly as a tutor

in substantive examination. On 1 May 1995 he resumed work as an examiner in Munich. He was promoted to grade A4 in 1996 and to grade A4(2) in 2003.

On 29 April 2005 vacancy note TPI/4136 announced 11 vacancies for the post of Director for Search and Examination at grade A5. It stated *inter alia* that prior to the interviews applicants would be invited to participate in an assessment centre as part of the selection procedure. The complainant applied on 17 May for three of the aforementioned posts. By e-mail of 20 June 2005 he was informed that the Selection Board, which in view of the large number of applications had held a preselection meeting on 13 June, had decided not to invite him to an assessment or an interview.

On 21 June 2005 he lodged an internal appeal against the Selection Board's decision not to invite him to attend the assessment centre. He requested that it be quashed immediately and that he be allowed to participate in the assessment or, alternatively, that the assessment procedure be suspended until the Board had been given an opportunity to rectify it. By letter of 19 August the complainant was informed that after an initial examination the President of the Office had decided that his request could not be granted and that, accordingly, he had referred the matter to the Internal Appeals Committee. Prior to that, on 20 July, the Selection Board submitted its report on competition TPI/4136 to the President, who appointed the selected candidates on 31 August 2005; the complainant was not among them.

In its position paper of 28 September 2006, the EPO contended that the appeal was irreceivable on the grounds that the complainant had merely challenged the decision of the Selection Board not to invite him to an assessment and not the President's decision rejecting his application for competition TPI/4136. It also stated that because of the large number of applicants a preselection was necessary and that the assessment centre served merely as an advisory service for the Selection Board. The EPO's argument regarding receivability led the complainant to lodge a further internal appeal, on 6 October

2006, against the President's decision of 31 August 2005 "in order to avoid any loss of right" in the event that his appeal of 21 June 2005 was considered irreceivable. He submitted his reply to the EPO's position paper on 11 November 2006, arguing that he had not been provided with all information necessary for the preparation of his defence; he requested the disclosure of the names of the Selection Board members, the names of the candidates who had been invited to the assessment centre together with the names of the projects in relation to which they had allegedly performed as "project leaders", and the Selection Board's report on competition TPI/4136. He also requested that the selection procedure be cancelled – at least in respect of the posts for which he had applied – and that it be repeated correctly. He claimed moral damages and costs. In its rejoinder to the Internal Appeals Committee the EPO provided the names of the Selection Board members and submitted an anonymised version of the Board's report on the contested competition.

On 5 December 2006 a hearing was held before the Internal Appeals Committee at which the complainant, as well as Mr L., Chairman of the Selection Board and Principal Director of Personnel, and Mr S., a member of the Board, testified. In the course of the hearing, reference was made to the complainant's earlier unsuccessful applications for director posts and, in particular, his interview by the Selection Board for competition TPI/3793 in 2004. At the Committee's request, the Office submitted an anonymised version of the Board's report on competition TPI/3793, which was subsequently forwarded to the complainant. A Mr K. and Mr S. were listed as members of the Promotion Board for that competition. By letter of 15 January 2007 to the Chairman of the Committee, the complainant acknowledged receipt of the aforementioned report. He noted that at the hearing of 5 December 2006 the members of the Selection Board for competition TPI/4136 had confirmed that the earlier report on competition TPI/3793 had not served as a basis for the decision not to invite him to an assessment. He requested that any allegation to the contrary made by the Office in the future be dismissed.

In its opinion of 14 March 2007 the Committee held that the appeal of 21 June 2005 was admissible and that it was unnecessary

for the complainant to file a further appeal on 6 October 2006. It considered it to be unfounded on the merits but nevertheless recommended that the selection procedures be made more transparent and that employees be informed of the reasons for the rejection of their applications. The complainant wrote to the President of the Office on 21 March requesting him to allow his appeal. He challenged the Committee's findings and expressed the view that its recommendation was unfounded as it was "exclusively based" on the report on competition TPI/3793. By a letter dated 14 May 2007 the complainant was informed that the President had decided to reject his appeal of 21 June 2005 as irreceivable and unfounded. That is the impugned decision.

B. The complainant submits that his internal appeal lodged on 21 June 2005 was filed in good time against a decision that had adversely affected him. It was thus admissible and, therefore, his complaint before the Tribunal is receivable.

On the merits he argues that the Internal Appeals Committee's opinion, on which the impugned decision is based, is tainted with errors of fact and of law, procedural irregularities and improper exercise of discretion. He also argues that it was not substantiated. In particular, he contests the Committee's finding that the report of the Selection Board on competition TPI/3793 played a role in the selection procedure for competition TPI/4136, which, in his view, is contradicted by the witness testimonies made before the Committee on 5 December 2006. By proceeding on the erroneous assumption that the report was among the documents considered by the Selection Board at the preselection stage of competition TPI/4136 and that the Board members had actually taken knowledge of that report, the Committee did not only attempt to find an argument in favour of the Administration, but also relied on a document which had not been cited as relevant evidence by either party and which, therefore, cannot constitute evidence in the proceedings before the Tribunal. Furthermore, the Committee misrepresented the witness testimonies when it presumed that the witnesses remembered or were familiar

with the Selection Board's assessment of him in competition TPI/3793. In fact, the intervening period was too long for the witness who was involved in the selection procedure for that competition to be able to recall details from that earlier procedure.

The complainant asserts that the Selection Board's decision not to invite him to attend the assessment centre was contrary to the Tribunal's case law as well as Articles 4(3), 49(7) and (10) of the Service Regulations for Permanent Employees of the European Patent Office and Annex II thereto, which lay down specific rules as to how competitions should be conducted and objective criteria as to how candidates should be assessed. Notwithstanding his excellent staff reports, his seniority, his productivity – the highest in his directorate – and the fact that he had assumed special duties in the course of his career, he had consistently been refused a post of director, allegedly because he lacked the requisite “managerial skills”. However, as it was precisely the purpose of the assessment centre to evaluate such skills, the Organisation could easily have resolved the matter by inviting him to the assessment centre. The complainant also points out that the EPO refused to provide him with a copy of the Selection Board's report on competition TPI/4136, thereby impairing his right to defend himself. In his opinion, one testimony given before the Internal Appeals Committee revealed that his candidature was discussed at length at the preselection meeting and that the Board was prevented from assessing his qualifications independently and without bias, due to the fact that a negative decision in his case had already been made “at higher managerial level”. Moreover, there is evidence that the Board failed to apply objective and transparent criteria and that it showed favouritism towards other candidates, thereby improperly exercising its discretion.

The complainant requests that the Tribunal exercise its power of review with regard to competition TPI/4136. He also requests that the EPO be ordered “to repeat the selection procedure”, insofar as the three posts for which he applied are concerned, and to allow him to attend the assessment centre and to compete with the other candidates on equal terms or, alternatively, to award him “material compensation corresponding to a promotion to grade A5”. He asks to be provided with a copy of the Selection Board's report on competition TPI/4136.

He also claims “an equitable financial compensation for moral damage” and costs.

C. In its reply the EPO submits that the internal appeal was irreceivable and that the complaint is likewise irreceivable, because the complainant did not contest the President’s decision of 31 August 2005 by which he was informed that he had not been selected for any of the posts advertised by vacancy note TPI/4136; he merely contested the Selection Board’s decision not to invite him to an assessment.

On the merits the Organisation asserts that the complaint is unfounded. Noting that decisions based on recommendations by selection boards are discretionary and therefore subject to only limited review, it argues that the contested selection procedure was not tainted with any procedural flaw and that the Selection Board’s decision not to invite the complainant to the assessment centre was made in line with the applicable provisions and in the proper exercise of the Board’s discretionary authority. It also argues that the complainant has no acquired right to be invited to an assessment centre or to be appointed to a specific post. The defendant explains that an assessment centre merely serves as an advisory service to the Selection Board, which remains competent to assess a candidate’s suitability for a managerial post. The Board’s deliberations are strictly confidential and its members act impartially. With regard to competition TPI/4136 it emphasises that the Selection Board paid particular attention to the candidates’ management potential; thus only those for whom “a positive prognosis was likely” were invited. After having considered the complainant’s staff reports, record of performance and information concerning earlier interviews, it unanimously concluded that he did not have the requisite managerial abilities. The fact that the complainant’s performance as an examiner is beyond all question is not in itself an assurance that he will be able to fulfil the different and more onerous duties of a higher post.

The EPO points out that reports on earlier competitions are taken into account at the preselection stage. Hence, the report on the complainant’s earlier interview for competition TPI/3793, at which he was considered to have “little understanding of the tasks of a

director” and “no experience or knowledge of [human resources] issues”, was available to the members of the Selection Board for competition TPI/4136. The Organisation questions the complainant’s reservations as to the accuracy of the Selection Board’s report for competition TPI/3793 – especially since it was he who requested its disclosure. Moreover, it dismisses the allegation of bias and unequal treatment, emphasising that the members of the Selection Board were, by virtue of their position as senior managers, able to determine whether a candidate possessed management potential and that their decision with regard to the complainant was unanimous. It explains that it denied the complainant a copy of the Selection Board’s report for competition TPI/4136 for reasons of confidentiality.

D. In his rejoinder the complainant maintains that the complaint is receivable. He states that it was not he but the Chairman of the Internal Appeals Committee who requested the disclosure of the Selection Board’s report on competition TPI/3793 and contends that its introduction into the proceedings constituted a procedural error. In his view, his exclusion from the assessment centre was due to the fact that he had filed a complaint with the Tribunal challenging the objectivity of the Chairman of the Selection Board in an earlier competition. He accuses the EPO’s senior management for hindering his career development in a systematic and concerted manner.

E. In its surrejoinder the EPO reiterates that the complaint is irreceivable. It argues that the introduction of the report on competition TPI/3793 in the proceedings before the Internal Appeals Committee did not constitute a procedural error, given that under Article 113(2) and (4) of the Service Regulations the Committee may receive any oral or written evidence that it considers relevant. It also denies any bias on the part of senior management, emphasising that the Selection Board’s decision in competition TPI/3793 was unanimous.

F. In his additional submissions the complainant points out that the Selection Board’s decision in competition TPI/3793 was unanimous,

because the selection procedure for director posts does not provide for the possibility of majority or minority opinions. He introduces a new piece of evidence, which he considers relevant to his case.

G. In its final comments the Organisation indicates that the selection procedure for director posts does provide for the possibility of majority or minority opinions, which are expressed in the form of comments. It states that the new piece of evidence introduced by the complainant does not present any argument liable to modify its position.

CONSIDERATIONS

1. The complainant impugns the decision of the President of the Office dated 14 May 2007 to reject his appeal as irreceivable, on the basis that it only challenged the decision of the Selection Board and not the President's final selection decision "thus failing to exhaust all available means of redress", and also to reject it, in accordance with the Committee's unanimous opinion, as unfounded.

2. He submits that the decision of 20 June 2005 not to invite him to an assessment was a decision that had adversely affected him and is, therefore, receivable. He points out that this was the first time that an assessment centre was introduced into the selection procedure and that candidates excluded at the preselection stage were informed immediately.

He notes that the purpose of his appeal, which he filed immediately, was to obtain the opportunity to attend the assessment centre. He also observes that the President's decision to appoint the selected candidates only affected those candidates who had passed the first screening and that the remaining candidates, including himself, were adversely affected by the decision of 20 June 2005.

The complainant also points out that that decision was communicated to the candidates by Mr L. in his capacity as Principal Director of Personnel and not as Chairman of the Selection Board. In this regard, he submits that the Principal Director of Personnel

is authorised to communicate decisions of a final character. Additionally, the President of the Office would have no opportunity to take a different decision at a later date as he was limited in his selection of the successful candidates for a promotion to those individuals on the list prepared by the Selection Board.

Lastly, he states that had he not filed his appeal until after the President had rendered his decision on the selection of candidates, the EPO would have been in a position to claim that his appeal was time-barred. Accordingly, the Organisation's arguments relating to receivability undermine the principles of good faith and legal certainty.

3. The EPO takes the position that as the internal appeal was irreceivable, the complaint is likewise irreceivable.

It notes that Article 108(1) of the Service Regulations states that an internal appeal is lodged with the appointing authority that rendered the contested decision. In the present case, the complainant challenged the decision of the Selection Board not to invite him to the assessment centre but not the President's decision of 31 August 2005, which was the decision concerning the selection of candidates.

The Organisation considers that the decision not to invite the complainant to an assessment was simply a step leading to the final selection decision but not the final selection decision in itself. In support of its position, it relies on Judgment 2366, under 16, where the Tribunal stated:

“Ordinarily, the process of decision-making involves a series of steps or findings which lead to a final decision. Those steps or findings do not constitute a decision, much less a final decision. They may be attacked as part of a challenge to the final decision but they, themselves, cannot be the subject of a complaint [...]”

For this reason it also takes issue with the Internal Appeals Committee's opinion that:

“it was unnecessary for the [complainant] to file another appeal against the appointment decisions taken once the selection procedure had been completed. His appeal is to be construed as also encompassing the decisions subsequently taken in the procedure in so far as they confirm the pre-selection decision affecting him.”

The EPO points out that under Article 4 of Annex II to the Service Regulations the President of the Office, in his capacity as the appointing authority, draws up “a list of candidates who satisfy the conditions laid down in Article 8 a), b) and c) of the Service Regulations and [sends] it, together with the candidates’ files, to the chairman of the Selection Board”.

It also submits that the Selection Board relieves the President of the burden of the preselection procedure and that the President is not bound by the Board’s recommendations. Further, although the Principal Director of Personnel is authorised to communicate decisions of a final character, the decision not to invite the complainant to an assessment was not the final decision in the selection process. The EPO takes the position that the appointment decision taken by the President on 31 August 2005 is the individual decision adversely affecting the complainant within the meaning of Article 106(1) of the Service Regulations. Accordingly, the complainant’s assertion that he would have to file two separate internal appeals is not correct.

4. Article 106(1) of the Service Regulations provide:

“Any decision relating to a specific individual to whom these Service Regulations apply shall at once be communicated in writing to the person concerned. Any decision adversely affecting a person shall state the grounds on which it was based.”

Article 107(1) provides:

“Any person to whom Article 106 applies may lodge an internal appeal either against an act adversely affecting him, or against an implied decision of rejection as defined in Article 106.”

As noted above, in support of its position that the contested decision was only a step leading to a final selection decision, the EPO relies on Judgment 2366, under 16. However, in that consideration the Tribunal added the following observation:

“Occasionally however, what appears to be a single and final decision may embody more than one decision. That will be the case if separate and distinct issues have to be decided. So, too, a decision which does not resolve an entire dispute may nonetheless constitute a final decision if it is a decision on a separate and distinct issue.”

5. In the present case, the dispute concerns the integrity of the preselection process and the decision flowing from that process. This coupled with the adverse consequence of the impugned decision for the complainant, namely, that there would be no further consideration of his candidacy for the three positions for which he had applied leads the Tribunal to conclude that the impugned decision is a decision within the meaning of Article 106(1) of the Service Regulations.

However, the Internal Appeals Committee went on to frame receivability as encompassing the decisions subsequently taken in the procedure. The Tribunal is unable to find any support in law for this position. The only issues on appeal are those arising from the contested decision and the only remedies that can flow from a successful appeal must be in relation to the contested decision.

6. To the extent that the complaint is directed against the decision not to invite the complainant to an assessment, the Tribunal concludes that it is receivable.

7. It is well established that an organisation has a wide discretion in relation to the appointment and promotion of staff. For this reason, these decisions are subject to limited judicial review. That is, the Tribunal will only interfere if the decision was taken without authority; if it was based on an error of law or fact, a material fact was overlooked, or a plainly wrong conclusion was drawn from the facts; if it was taken in breach of a rule of form or of procedure; or if there was an abuse of authority (see Judgments 2060, under 4, and 2457, under 6).

8. In summary, the complainant's allegations in support of his plea that the preselection decision process was flawed may be grouped into three broad categories. First, the decision was not based on objective and transparent criteria and was arbitrary; second, the invitation to individuals having less seniority or lower-rated staff reports to participate in the assessment centre violated his right to equal treatment; and third, the Organisation refused to provide him with a copy of the Selection Board's report on competition TPI/4136.

Additionally, the complainant submits that the Board's report on competition TPI/3793 was not properly before the Internal Appeals Committee as it had not been considered by the Selection Board in reaching its decision. He further takes issue with the content and reliability of that report on the basis of alleged bias on the part of two members of the Selection Board responsible for its preparation. He also challenges the Committee's impartiality arguing that by requesting the production of the report on competition TPI/3793 it improperly assisted the Organisation.

9. This latter argument will be considered first. A review of the transcripts of the evidence before the Internal Appeals Committee clearly contradicts the complainant's assertion that the interview report on competition TPI/3793 had not been considered by the Selection Board. The two witnesses that testified before the Committee stated that the reports from previous selection procedures were available to the Selection Board and that they were taken into account in the preselection process. The fact that the witnesses only had vague recollections of the contents of the interview report on competition TPI/3793 is not surprising given the number of candidates that are screened. The vagueness of the recollection does not mean that the material was not considered.

As to the propriety of the Internal Appeals Committee's request to the Organisation to produce that report and its consideration of it, Article 113(2) of the Service Regulations authorises the Committee to call for the production of any relevant document or information. As the interview report in question was considered by the Selection Board, it was relevant to the appeal and properly formed part of the materials before the Committee.

Lastly, the complainant's challenge of the content and reliability of the report on the basis that two of the individuals who prepared the report were allegedly biased is a challenge in relation to a process outside the scope of the complaint.

10. The complainant's plea that the decision not to invite him to an assessment was not based on objective and transparent criteria

and was arbitrary appears to be grounded on the complainant's view that other less meritorious and less senior candidates were invited to participate in the assessment centre. Given that a key requirement identified in the vacancy note was managerial skills, in the absence of some evidence showing that the complainant possesses managerial ability or that he has the potential to be a good manager, the complainant's assertion is speculative at best.

11. The Tribunal rejects the complainant's allegation of unequal treatment. The allegation is based on the fact that individuals having less seniority and lower-rated staff reports were invited to the assessment centre. According to the vacancy note, a candidate was expected to demonstrate the ability to manage a directorate comprising 25 to 30 examiners; particular attention would be paid to management potential, and a candidate would be assessed on the basis of his or her ability to manage, resolve disputes, implement policies, and communicate and interact with others. As these managerial skills are not a function of seniority or the requisite skills of an examiner, it cannot be said that preferring candidates with potential managerial skills over those with greater seniority or higher ratings as examiners constitutes unequal treatment.

12. With respect to the Organisation's failure to provide the complainant with the Selection Board's report on competition TPI/4136, the complainant argues that the withholding of the report constitutes a withholding of relevant evidence and impaired his ability to defend his legitimate rights. The complainant explains that he requests the report "so that it can be further assessed to what extent favouritism of other candidates and bias against [him] had been practiced during the selection procedure".

13. The Tribunal rejects this argument. As the Internal Appeals Committee observed, the report the complainant seeks to have disclosed did not contain any detailed information on the decision not to invite him to an assessment other than the number of applications, the number of candidates selected to attend the assessment centre and

the outcome of the interviews to which the complainant was not invited. While a candidate is entitled to know the reasons for the rejection of his own candidacy, this does not extend to access to the Selection Board's consideration of the merits of other candidates.

14. As stated earlier, the complainant has advanced a number of other allegations including allegations of partiality and bias on the part of the decision-makers. The attempts to support the allegations are based on speculation and conjecture and are without merit.

15. It is not disputed that the complainant has an outstanding record as an examiner and is a valued staff member. However, he has failed to demonstrate that the decision not to invite him to an assessment was tainted by a reviewable error.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2009, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba
Mary G. Gaudron
Dolores M. Hansen
Catherine Comtet