

H. (No. 15)

v.

EPO

120th Session

Judgment No. 3520

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifteenth complainant filed by Mrs E. H. against the European Patent Organisation (EPO) on 7 January 2011 and corrected on 15 March, the EPO's reply dated 30 June, the complainant's rejoinder of 13 September and the EPO's surrejoinder of 16 December 2011;

Considering the applications to intervene filed by Mr A.C. K. on 29 July 2011 and Mr P. O. A. T. on 24 August 2011, and the objections raised by the EPO in its letters dated 24 September 2011;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal, and Article 13 of its Rules;

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:

In September 2006 the EPO published a vacancy notice for several positions of Directors. It was specified that, prior to interviews, selected candidates would be invited to participate in an assessment centre. On 30 January 2007 the names of eight appointed Directors were published on the intranet.

The complainant wrote to the President of the Office on 7 February 2007, in her capacity as Chairperson of the Munich Staff Committee.

She requested that the appointment of the eight Directors be cancelled on the ground that the selection procedure was flawed. She contested the use of an assessment centre in the selection procedure, alleging that this constituted a violation of Annex II to the Service Regulations for Permanent Employees of the European Patent Office. She submitted that Article 5(3) of the Annex provided that the Selection Board may be “assisted” for certain tests by one or more advisers, and that consequently, the Board should remain in charge of the tests, and external advisers should remain under permanent control and supervision of the Board. The complainant stressed that independent bodies, such as assessment centres, were not foreseen by the Service Regulations, and the Selection Board had not defined or formally approved the competencies to be tested in the context of the assessment centre, neither had it approved the tests that were used. The results of the tests had nevertheless been taken into consideration for the overall evaluation of the candidate, which, in her view, invalidated the selection procedure. She added that the use of the assessment centre, which was introduced on a “pilot” basis, was about to be formally acknowledged by a policy. She alleged that not all relevant aspects of the procedure had been submitted to the General Advisory Committee (GAC) for opinion. Lastly, she indicated that her letter was to be considered as the lodging of an internal appeal if her request was denied.

The complainant was informed on 27 March 2007 that her request could not be granted and that the matter had been referred to the Internal Appeals Committee (IAC) for opinion. The majority of the members of the IAC considered that the appeal was admissible only insofar as she was acting in her capacity as a staff representative and was contesting the alleged restriction brought to the rights of the members of the Selection Board during the selection procedure. The majority noted that, in Judgment 1477, the Tribunal had held that a selection board may transfer the assessment of certain technical skills to another body, but it could not delegate all of its authority unless the rules provided otherwise. In the present case, the majority saw no reason to deviate from the case law and found that there was no evidence that the rights of the Selection Board had been unlawfully

restricted. The use of external consultants to run the assessment centre did not go beyond the consultation of advisers provided for in Article 5(3) of Annex II to the Service Regulations. Indeed, it was stated in the vacancy notice, which was prepared after having consulted the Selection Board, that an assessment centre would take place; the Board did not raise any concern at that time. In addition, the Board received a detailed report on the basis of which it could interpret and, if necessary, review the tests conducted by the assessment centre. The majority also considered the argument the complainant raised before the IAC concerning an alleged violation of the rights of those who took part in the assessment centre to a reasonable protection of their privacy, but it failed to identify any such violation. It therefore recommended rejecting the appeal as unfounded.

To the contrary, the minority considered that, according to Article 5(3) of Annex II to the Service Regulations, the decision to use the assessment centre lay solely with the Selection Board. But, in the present case, the tests the candidates undertook in the context of the assessment centre had been prepared by the Human Resources Department and not the Selection Board, which had not even been made aware of the content of the tests prior to the candidates undertaking them. Hence, the Board did not enjoy full responsibility for the selection process. The minority also considered that the EPO had acted in breach of its duty of care in not ensuring that the candidates were expressly bound by the principle of confidentiality.

By a letter of 12 October 2010, which is the impugned decision, the Director of Regulations and Change Management informed the complainant that the Vice-President of Directorate-General 4, acting by delegation of power of the President, had decided to reject her appeal as unfounded. He stated that the use of assessment centres in the selection procedure had been endorsed by the Tribunal in Judgments 1477 and 2766. The exercise of the Selection Board's discretion was not adversely affected by the use of an assessment centre, as the Board could have requested the candidates to take different tests or could have decided not to use the assessment centre at all. He also considered that the candidates' right to privacy was respected given that all candidates

participating in a selection procedure are bound to secrecy under Articles 14(1) and 20(1) of the Service Regulations and Article 6 of Annex II to the Service Regulations.

The complainant asks the Tribunal to set aside the impugned decision and to order the EPO to pay her reasonable compensation for her “time and effort”. She also asks the Tribunal to quash the decision to appoint the eight above-mentioned directors and to cancel their appointment *ex tunc*.

The EPO asks the Tribunal to reject the complaint as partially irreceivable for lack of cause of action and failure to exhaust internal means of redress, and entirely unfounded. It therefore asks the Tribunal to order the complainant to bear her costs.

CONSIDERATIONS

1. This complaint by Mrs H., filed on 7 January 2011, challenges the appointment of eight directors within the EPO. Central to that challenge is the use of assessment centres in the selection of the candidates ultimately appointed to those eight positions. The issues raised in this complaint substantially overlap with the issues raised in another complaint (again filed on 7 January 2011) of Mrs H. and another, also considered at the 120th session of the Tribunal and for which judgment is being given at the time of this judgment. Indeed the submissions in the complainant’s brief are, in several respects, a verbatim repetition of the submissions in the other proceedings. Also the EPO in its reply simply appended its reply in the other proceedings for use in these proceedings. However neither the complainant nor the EPO sought the joinder of the complaints for the purposes of rendering one judgment. The reasons of the Tribunal in the other judgment (Judgment 3513) should be read in conjunction with this judgment.

2. The receivability of this complaint is disputed by the EPO insofar as it challenges the practice of using assessment centres per se though not in relation to the use of assessment centres in the procedures

leading to the decisions to appoint the eight directors. However this distinction becomes immaterial because the relief sought is directed only to the appointment of the eight directors and, in any event, receivability need not be addressed (save for one point discussed later) given that the complaint is to be dismissed.

3. The complainant argues that, on the facts of this case, three of the evaluations undertaken by the external consultant were not “tests” for the purposes of Article 5(3) of Annex II to the Service Regulations. The complainant identifies a personality questionnaire, a management questionnaire and a self-description questionnaire as being of this character. The complainant’s submissions do not descend into detail. This argument is without foundation. As noted in Judgment 3513, the expression “certain tests” should not be given a narrow meaning. Firstly questionnaires of these types, having regard to their description, are “tests” in the sense that they provide a rational and objective mechanism for evaluating aspects of the candidates’ suitability for appointment to the position. While they might not be “tests” in the sense that answers have to be given to questions or solutions provided to problems which are demonstrably correct or not correct, these questionnaires, to the extent that the name implies something about their content, are reasonably and fairly directed towards assisting the Selection Board in undertaking its task of identifying candidates suitable for appointment. This argument should be rejected.

4. The complainant argues that the Selection Board was neither consulted about the use of assessment centres nor given the opportunity to comment on them. However the EPO draws attention to the fact that the Selection Board, as part of the consultation on the competition notice, agreed on both the competencies to be tested and the tests to be carried out. This was approved by the representative of the Staff Committee. This account of what happened was not challenged by the complainant in her rejoinder. Thus this argument should be rejected.

5. The complainant’s next argument is that the vacancy notice did not specify how the test would be marked, as required by

Article 2(1)(e) of Annex II to the Service Regulations. The short answer to this argument is that that provision had no application in the present case as the competition was not simply on the basis of tests (see Judgment 2766, consideration 6).

6. The last argument of the complainant not raised in the other proceedings is that the use of assessment centres, at least in relation to appointments to grade A5 and A6 positions, was adopted without consultation with the GAC. In its reply the EPO argues that this plea was not raised in the internal appeal and accordingly cannot be entertained by the Tribunal because the complainant has not exhausted her internal remedies. This contention is not addressed by the complainant in her rejoinder. It is not a new plea. It is true that this issue was not raised in the internal appeal. However it is wrong to simply categorise the issue as a plea in the sense that it is a new argument. It is a new claim. That is to say, a claim that the general decision to use assessment centres was not adopted regularly because there had been insufficient consultation with the GAC. This claim was not the subject of internal appeal and, accordingly, cannot be raised before the Tribunal (see Judgments 435, consideration 1, and 2837, consideration 3). Thus the submission of the EPO should be accepted.

7. In the result the complaint should be dismissed.

Two applications to intervene were made. The applicants do not identify similarities of fact and in law that would justify the intervention. Those applications should be rejected.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The applications to intervene are dismissed.

In witness of this judgment, adopted on 15 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ