

The Administrative Tribunal,

Considering the complaints filed by Mr S. M.– his first – and Mrs J. S.– her third – against the European Patent Organisation (EPO) on 9 October 2003, the EPO’s single reply of 22 January 2004, the complainants’ rejoinder of 9 February, and the Organisation’s surrejoinder of 14 May 2004;

Considering Article II, paragraph 5, 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 complainants are permanent employees of the European Patent Office, the secretariat of the EPO. They both hold posts at grade A4.

Article 4 of the Service Regulations for Permanent Employees of the European Patent Office provides that:

“(1) Vacant posts shall be filled by the appointing authority, having regard to the qualifications required and ability to perform the duties involved:

[...]

– by promotion or appointment under the conditions laid down in Article 49, or, in exceptional cases, under those in paragraph 4;

[...]

[...]

(4) Where the vacant post cannot be filled under the conditions laid down in Article 49, a permanent employee may be called upon to perform the duties of the next higher grade, for a period not exceeding 5 years, if the Promotion Board so recommends with a view to the prescribed qualifications being acquired. [...]

On 31 October 2001 vacancy notice TPI/998 was published, advertising “a number of” vacant directorship positions at grade A5, under which A4 staff members could apply for promotion. The complainants submitted applications. The notice specified that candidates with less than two years in grade A4 “may also be considered”. However, since doubts were raised by the Staff Committee in Munich on 22 November 2001 about the procedure – in particular because the closing date was modified after publication – the President of the Office revoked the notice on 23 November. The vacancies were subsequently re-advertised in vacancy notice TPI/1000 dated 30 November 2001. Although this notice did not contain any statement concerning A4 grade candidates with less than two years in the grade, all candidates who applied under vacancy notice TPI/998 were informed that they would be considered automatically on the basis of the application filed under the previous notice.

In its report on its sessions held in January and February 2002 the Promotion Board recommended nine candidates. It noted that three of them lacked the minimum of two years experience for promotion to grade A5 and recommended appointing those officials under Article 4(4). The complainants were not recommended for promotion. By a note of 18 February 2002 the Director of Personnel informed the staff that the nine candidates were appointed as directors.

Considering the selection procedure to be flawed, the complainants, on 2 and 6 May 2002, appealed against the promotion process in general, and against the three appointments made under Article 4(4) in particular. In its opinion dated 16 May 2003, the Appeals Committee considered that the promotion procedure carried out under vacancy notice TPI/1000 was legally flawed and it recommended, unanimously, that the three contested appointments be revoked and that the application procedure be re-run. The three directors in question were

officially notified on 14 July 2003 that their nominations would be annulled. In a letter of 17 July 2003 from the acting Head of Conditions of Employment and Statutory Bodies the complainants were informed that the President had accepted the Committee's unanimous recommendation.

On 3 June 2003 a general vacancy notice, TPI/3712, had been issued for directorship positions "in various technical fields"; the closing date for applications was 3 July. Two of the three directors whose appointment had been contested applied on 3 July.

Following an enquiry dated 8 August from the complainants' counsel as to when the posts in question would become vacant, the Chairman of the relevant Promotion Board informed him on 21 August that, since the appointments had been quashed, it was as if the three director posts in question had never been occupied after the Promotion Board procedures in early 2002; thus, it was considered that these positions had been included under vacancy notice TPI/3712.

Following a recommendation of the Promotion Board, the two "directors" whose appointments had been annulled and who had also applied under vacancy notice TPI/3712 were promoted to directorship positions; an announcement to this effect was made on 3 September 2003. The complainants, considering this announcement to be the President's final decision not to afford them an effective remedy in accordance with the Appeals Committee's opinion, filed the present complaints with the Tribunal on 9 October 2003.

The third "director" whose appointment had been annulled was subsequently promoted to a directorship position with effect from 1 February 2004.

B. The complainants point out that they are not contesting in any way the technical qualifications of the three directors in question; they contest the manner in which the selection procedure was carried out, arguing that there were several procedural flaws. Firstly, prior to the nominations being officially annulled, two of the three directors in question submitted their candidatures for promotion to grade A5 pursuant to vacancy notice TPI/3712. But at that time, according to the complainants, they would still have been A5 staff members, and there were no provisions in the Service Regulations for "horizontal" promotion from A5 to A5. Secondly, only the three directors were forewarned that their appointments would be overturned, which prevented the complainants from applying for these directorship posts; this demonstrates bad faith. Thirdly, the complainants point out that they had requested that the selection procedure be re-run with a pool of candidates who were qualified at the time of the original selection; this would automatically have excluded the three directors in question, who lacked the "statutory seniority". They submit that the Office is trying to cover up one manipulation with another "in order to achieve a specific result", as two of the three directors have been renominated and, at the time of filing their complaints, the post of the third director was vacant.

They say that vacancy notice TPI/3712 could not have included the posts in question, because official notification was made on 14 July that the appointments were set aside; therefore, the posts could not have been considered vacant on the closing date for applications, which was 3 July. They contend that the Office has "rigged" a selection procedure under which they have suffered an injury.

They request the Tribunal to quash the impugned decision "not to afford an effective remedy" and to order that the selection procedures for the three posts in question be carried out again "properly and according to principles of law". Subsidiarily, they claim substantial moral damages for "loss of fair chance to compete for the posts". They also claim punitive damages and costs.

C. In its reply the EPO says that the complainants overlook essential facts, misinterpret Article 4(4) of the Service Regulations and draw erroneous conclusions. It submits that the staff members in question, although entrusted with the duties of a director, remained at grade A4, in accordance with the applicable Service Regulations. Thus, they had never been appointed to director posts at grade A5; they were only called upon to perform the duties of director. Therefore, they were not regarded as incumbents of director posts and their re-application before the deadline for posts under vacancy notice TPI/3712 gave no cause for concern.

The EPO points out that the general practice at the Office is to publish a general vacancy notice for director-level posts; an applicant's skills in managing human resources as well as other management skills are just as relevant as technical expertise. It is for that reason that one of the three directors in question was appointed to one technical field despite having a background in a different one. The complainants could have applied for a director post under

vacancy notice TPI/3712, but they did not.

It denies having acted in bad faith. The three staff members in question were informed in June 2003 that the President intended to declare their nominations under Article 4(4) null and void. It says that this information merely provided “an additional incentive for at least two of the directors in question to re-apply under TPI/3712”; and since they had not been promoted to A5, their re-application was not open to objection. This action does not call into question the validity of the selection procedure.

The EPO argues that the Appeals Committee simply recommended that the selection procedure be re-run, but that it did not specify “how” it should be done; it submits that the new procedure was properly carried out. Two of the three directors concerned were recommended for a second time by a properly constituted Selection Board and the President confirmed that recommendation; such decisions are discretionary.

The Organisation objects to the claim for costs, because the complainants’ counsel is a permanent employee of the EPO.

D. In their rejoinder the complainants submit that at least one of the three directors was promoted to grade A5 in June 2002, and they attach an official document announcing his promotion. Thus, at the time of the closing date for applications under vacancy notice TPI/3712 he was an A5 director and was no longer eligible to apply for promotion to grade A5. The fact that the third director, whose nomination was contested by them, has recently been promoted to a directorship at grade A5 because he had recently acquired the requisite number of years in grade A4 shows, according to them, that the EPO kept a position for him until he could qualify for promotion.

The reason why they did not apply under vacancy notice TPI/3712 was that they were not seeking an opportunity to apply for “any directorship”; rather they were expecting a remedy to the irregular nominations under vacancy notice TPI/1000. They were entitled to know when the posts that they had originally applied for would become vacant.

They would have applied if the contested director posts under vacancy notice TPI/1000 had been part of the new procedure. They submit that it is “plainly good common sense” that examiners at grade A4 will apply for a directorship in an area where they have some expertise.

They state that it is “preposterous” for the Organisation to assert that vacancy notice TPI/3712 was a call for candidatures for posts that had not yet been vacated.

E. In its surrejoinder the Organisation maintains that when the two individuals concerned submitted their applications under vacancy notice TPI/3712 they were not valid incumbents of A5 posts, because their appointment to a director post – and hence their promotions – were quashed following the Appeals Committee’s recommendation. Consequently, they were eligible to apply for promotion. Furthermore, it considers that the new appointment procedure satisfied the requirements set out in the Appeals Committee’s opinion and it explains how it was correct to include the three directorships under vacancy notice TPI/3712.

The EPO denies that it acted in bad faith by forewarning the three staff members in question that their appointments would eventually be set aside; in taking that action the Organisation was merely fulfilling a “duty of care” towards them. There was no obligation, however, to communicate this information to other staff members prior to the official notification on 14 July 2003. It reiterates that the complainants could have applied for a directorship post under vacancy notice TPI/3712.

CONSIDERATIONS

1. The complainants are both employed by the European Patent Office as examiners, at grade A4. In November 2001 they both applied for promotion to directorships at grade A5, which had been advertised in vacancy notices TPI/998 and TPI/1000 issued in October and November 2001. Applications were received from staff members who had served in grade A4 for at least two years, as well as from a number of persons who had less than two years’ service in that grade.

2. The complainants’ applications were not successful. The President of the Office, acting on the unanimous recommendation of the Promotion Board, appointed and promoted six persons who had served more than two years

at grade A4 and appointed three others who had not served two years in that grade – Mr B., Mr F. and Mr F. y B. – to the other three vacant directorships pursuant to Article 4(4) of the EPO Service Regulations. The two complaints arise out of those three appointments which were made in February 2002.

3. The complainants lodged internal appeals against the three appointments that were made pursuant to Article 4(4). Their appeals were successful, it being held by the Appeals Committee, in a report dated 16 May 2003, that the procedures that led to the appointments were irregular as the promotion procedure under Article 49(10) of the Service Regulations, which applied to those with two years' service at grade A4, could not be combined with the appointment procedure under Article 4(4), which provides for appointment to a vacancy only if it cannot be filled under the conditions laid down in Article 49. The Committee also held that the process had breached the principle of equality and that the EPO had not refuted the complainants' claim that it had been rigged to secure a predetermined outcome.

4. So far as is presently relevant, the Appeals Committee recommended that the appointments of the three directors be revoked and that the "application procedure" for appointment to the A5 posts be re-run. Following an enquiry, the complainants were informed on 17 July 2003 that the President had decided to follow the unanimous recommendation of the Committee. On 8 August their counsel wrote to the EPO Personnel Department asking when the posts would become free, when the "call for candidatures" would be published and when the closing date for applications would be.

5. On 21 August 2003 the Chairman of the relevant Promotion Board wrote to the complainants' counsel informing him that the appointments of the three directors had been annulled with retroactive effect and, thus, the three directorships were considered "as having never been occupied after the Promotion Board procedures [that led to their appointments]". The letter also stated that vacancy notice TPI/3712 had invited applications for all "vacant director posts in all technical fields [...] without specifying individual directorates" and that the directors' posts in question were covered by that notice. The letter concluded with the observation that there "appear[ed], therefore, no need [...] to reopen the vacancy procedure for the specific directorates previously occupied by [the three directors]".

6. Vacancy notice TPI/3712 to which the Chairman of the Promotion Board referred in his letter of 21 August had been issued on 3 June 2003, before the complainants had been informed of the President's decision to accept the recommendation of the Appeals Committee and, also, before his decision was formally communicated to the three directors concerned, although they had been given advance notice of the decision in June. The notice specified that it was intended to fill "Director vacancies in various technical fields in Munich, The Hague and Berlin". The closing date was 3 July 2003. Neither of the complainants applied for the vacancies advertised in that notice.

7. It was announced on 3 September 2003 that seven persons had been promoted to directorships, including two of the directors whose appointments had been revoked and who had submitted applications; by then, they had served two years at grade A4. The complainants treated that announcement as a decision by the President "not to afford an effective remedy in accordance with the opinion of the Internal Appeals Committee" and, thus, a final decision to reject their appeals. Each lodged a complaint with the Tribunal on 9 October 2003 seeking to have the selection procedure for the three contested posts re-run or, in the alternative, damages for the loss of a fair opportunity to compete for those posts. They also seek punitive damages and costs.

8. It is no longer disputed that the original procedures which resulted in the appointments of the three candidates pursuant to Article 4(4) of the Service Regulations were attended with irregularities warranting the two recommendations of the Appeals Committee set out above. Thus, the main issue in these proceedings is whether the procedure subsequently adopted following vacancy notice TPI/3712 gave effect to the recommendation of the Appeals Committee to re-run the application procedure for the three contested posts.

9. The EPO's argument that the procedures adopted by and pursuant to vacancy notice TPI/3712 gave effect to the recommendation of the Appeals Committee must be rejected. The Committee's recommendation related to three specific posts, not to general directorship vacancies. Moreover, as the President's decision to revoke the appointments in question was not taken until 14 July, the posts in question were not vacant either when the vacancy notice was issued or when applications closed on 3 July 2003. That much appears to be accepted by the EPO, but it claims that the notice invited applications for all vacant directorships and that, as the posts in question were vacant after 14 July and until the promotion decisions were taken on 3 September, the notice also covered those posts.

10. The argument that the vacancy notice of 3 June 2003 covered the posts in question must be rejected. The

notice referred to “Director vacancies in various technical fields in Munich, The Hague and Berlin”. In their natural and ordinary meaning, those words signify vacancies that were then existing and, perhaps, vacancies that might occur before the closing date for applications. Certainly, they cannot be read as applying to vacancies occurring after the closing date.

11. It follows that the announcement of the promotion of two of the three directors concerned on 3 September 2003 constituted a final decision to reject the complainants’ appeals insofar as they sought a re-run of the procedures that led to the three contested appointments. As it is not in issue that the irregularities involved in those procedures warranted the appointments being set aside and new promotion procedures being held, it follows that, to the extent that the President’s decision was a rejection of the complainants’ appeals, it must be set aside. However, it does not follow that the contested promotions should be annulled or that the procedures for promotion to the three posts in question should be re-run. Before explaining why that is so, it is necessary to say something on the complainants’ contention that the procedures should be re-run with applications only from those staff members who had served two years in grade A4as at November 2001.

12. The complainants’ contention that fresh applications should be limited to those who had the necessary qualifications in November 2001 is made on the basis that that is the only way they can be put in the position that they would have been in if the procedure had been properly conducted in the first place. However, that could well put them in a better position than previously as various persons who then had two years’ service at grade A4 have since been promoted to grade A5. More significantly, that course would conflict with Article 49(9) of the Service Regulations, which speaks of “selection from among permanent employees who have applied and who have the necessary qualifications”. That provision is to be read as applying to all persons who have the necessary qualifications at the time of their application and cannot be read so as to limit applicants to persons who had those qualifications some time previously.

13. The appointments and promotions in question were, on each occasion, the result of unanimous recommendations. Moreover, in their rejoinder the complainants acknowledge that, if the procedure had been re-run with applications from persons then eligible for promotion to grade A5, “[c]hances are that the Promotion Board [...] would still have found the three [directors concerned], now eligible for full A5 grades, to be the best candidates”. In these exceptional circumstances, the Tribunal declines to order that the promotion procedures be re-run.

14. The EPO contends in its reply that the complainants were aware of vacancy notice TPI/3712 and the closing date for applications for promotion to the various directorships that were then vacant, but they chose not to apply. The suggestion implicit in that contention is that, as they did not apply, they did not really lose a “fair chance to compete” for the three posts to which appointments were made pursuant to Article 4(4) in February 2002. That suggestion must be rejected. The complainants had no reason to think that vacancy notice TPI/3712 covered the three posts in question and, indeed, had good reason to think otherwise. And it may be that they refrained from making further application for promotion until they were informed of the outcome of their appeals. They are, thus, entitled to compensation for the loss of a fair chance to compete for the posts in question. However, the amount of compensation must be related to the value of that chance. In the absence of anything to suggest that there was a real chance of their promotion to those posts, compensation should be limited to 1,000 euros for each complainant.

15. There should also be an award of punitive damages. The process that led to the three contested appointments pursuant to Article 4(4) of the Service Regulations was found by the Appeals Committee not only to be irregular, but also a breach of the principle of equal treatment. Moreover, as already indicated, the Committee considered that the EPO had not refuted the allegation that the procedure had been rigged to ensure a predetermined outcome. The fact that the complainants were not told of the decision to be taken by the President before the closing date for applications pursuant to vacancy notice TPI/3712, whilst the three staff members whose appointments had been vacated were, indicates a distinct lack of even-handedness. In the circumstances, there should be an award of punitive damages in the sum of 2,500 euros to each complainant.

16. Although the EPO has disputed the complainants’ claim for costs of these proceedings on the basis that their counsel is a full-time EPO staff member, it is appropriate to award each complainant 1,000 euros to cover their out of pocket expenses, time and trouble.

For the above reasons,

1. The President's decision of 3 September 2003, insofar as it rejected the appeals of the complainants by refusing to re-run the procedure as recommended by the Appeals Committee, is set aside.
2. The EPO shall pay compensation to each complainant in the sum of 1,000 euros.
3. It shall pay each complainant punitive damages in the sum of 2,500 euros.
4. The EPO shall also pay each complainant the sum of 1,000 euros in costs.
5. The complaints are otherwise dismissed.

In witness of this judgment, adopted on 5 November 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet