

NINETY-NINTH SESSION

Judgment No. 2457

The Administrative Tribunal,

Considering the complaint filed by Mr I.H.T. against the European Patent Organisation (EPO) on 7 July 2004, the Organisation's reply of 15 November, the complainant's rejoinder of 3 December 2004, the EPO's surrejoinder of 10 March 2005 and the supplement thereto of 5 April 2005;

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 Service Regulations for Permanent Employees of the European Patent Office, the EPO's secretariat, provides in Annex II, headed "Competitions", that the appointing authority shall draw up a list of candidates who satisfy certain conditions of appointment listed in Article 8 of the Service Regulations and shall send it, together with the candidates' files, to the chairman of the Selection Board. On completion of its proceedings, the Selection Board forwards a list of suitable candidates to the aforesaid authority with a reasoned report.

Article 49(7) of the Service Regulations, which deals with promotion, provides as follows:

"Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them. The employees must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and at least two years' service in their grade in the Office."

Article 49(10) reads as follows:

"The President of the Office shall forward to the Promotion Board the names of all permanent employees who possess the necessary qualifications referred to in paragraphs 7 and 9 above.

The Board shall examine the personal file of all permanent employees satisfying the relevant requirements and may, if it so decides, interview any permanent employee under consideration.

The Board shall draw up and forward to the President of the Office for his decision a list, presented in order of merit, of permanent employees who are eligible for promotion, based on a comparison of their merits, together with a reasoned report."

The complainant, who has dual Greek and German nationality, was born in 1955. He joined the Office on 1 September 1987 as an examiner at grade A2. He was promoted to grade A3 in 1989 and then to grade A4 in 1996. He currently holds grade A4(2) and is employed at the Office's Directorate-General 2 (DG2) in Munich.

In April 1999 he applied unsuccessfully for several director posts at grade A5. In July 1999 he was, however, invited for an interview by the Selection Board, which considered the possibility of inviting him again for an interview at a later date.

On 13 November 2002 the Office issued vacancy notice TPI/3578 in order to fill several director posts in Munich, The Hague and Berlin. The notice invited all permanent employees who qualified under Article 49(7) and who possessed the necessary ability to send in an application. The complainant did so on 26 November. A pre-selection meeting of the Selection Board was held on 18 December 2002 in connection with the Munich posts. It was chaired by Mr K., the Vice-President in charge of DG2. The Board decided not to invite the complainant for an interview.

On 11 February 2003 the complainant filed an appeal against that decision and against the manner in which the

provisions of Article 49(7) and (10) of the Service Regulations had been implemented. He requested that his application be reviewed. The Appeals Committee, to which the matter was referred, issued an opinion on 26 January 2004 recommending by a majority that the appeal be rejected. In a letter of 26 May 2004, which constitutes the impugned decision, the Director of Conditions of Employment and Statutory Bodies informed the complainant that the President of the Office had decided to reject the appeal.

B. The complainant contends that by not inviting him to an interview the Selection Board breached the principle of equal treatment and acted arbitrarily. He points out that, with one exception, the examiners promoted in Munich had less seniority than he and did not fulfil at least one of the requirements mentioned in the vacancy notice.

The complainant also draws attention to the fact that when the Selection Board met one of its members was not present. Although the staff reports were available to the Selection Board, in his case at least they were not consulted. Nor did the members of the Board consider his merits. Furthermore, the report of the Selection Board which interviewed him in 1999 should have been made available to the Board chaired by Mr K., but that was not done.

The complainant points out that, despite his excellent staff reports and the large number of director posts that had to be filled, he was never interviewed by a Selection Board chaired by Mr K. between September 1999 – when Mr K., according to him, took up his duties as Vice-President – and February 2003, when he filed his internal appeal. He accuses the members of the Selection Board of having tolerated Mr K.’s biased attitude and adds that his application was rejected on the grounds of a lack of managerial skills without a shred of evidence.

Referring to the EPO’s statement in a letter of 17 June 2003 that he might expect a further interview five or six years after the one he had in 1999, the complainant emphasises that one of the members of the Selection Board asserted that no strict rules applied with regard to the waiting period between successive interviews. He points out that he was invited to an interview again in January 2004, but questions the impartiality of the members of the Selection Board who interviewed him on that occasion.

The complainant asks the Tribunal to recognise that at the pre-selection meeting of December 2002 in relation to the posts in Munich, the Selection Board was influenced by its chairman, who was prejudiced against him, that it seriously violated important procedural rules and that it neither exercised its power of discretion properly nor duly implemented the provisions of Article 49(7) of the Service Regulations. He asks for his “application for promotion to director” to be reinstated at the stage of the December meeting of the Selection Board and examined by an impartial body for due consideration of his merits for the purpose of retroactive promotion to grade A5. He claims compensation for moral injury, for the harm done to his career prospects since September 1999 and for professional damage resulting from the discriminatory behaviour of the Vice-President of DG2. In the event that his retroactive promotion is refused, he claims damages for the financial losses resulting from his not being promoted to grade A5. Lastly, he claims an amount of between 10,000 and 20,000 euros in costs.

C. In its reply the EPO contends that the complaint is irreceivable in part on the grounds that the complainant’s request to be awarded compensation for moral and material damages is put forward in the present specific manner for the first time. It adds that his claim for costs is irreceivable because he has not exhausted the internal means of redress in that respect.

Referring to Annex II to the Service Regulations, the EPO submits that the Selection Board examines the personal file of all candidates and may interview any of them. It then draws up a list of suitable candidates and a reasoned report, which it forwards to the President of the Office who takes a decision in the exercise of his discretion. It follows therefore that applicants meeting the minimum conditions for appointment to a post in a higher grade are not necessarily entitled to be appointed to such grade.

The EPO maintains that the personal files of all candidates, their staff reports and seniority lists were all available to the Selection Board. Mr K. also had access to documents informing him of the opinion of the Selection Board which had interviewed the complainant in 1999. Since then, the latter had not provided any substantiation for the assumption that he possessed the necessary skills and knowledge to manage a directorate and the decision not to invite him again for interview was taken unanimously. It acknowledges that one member of the Selection Board was not present at the meeting but considers that the Board would not have reached a different conclusion even if all its members had been present.

The Organisation also submits that staff reports on an examiner's performance might give some indication of his ability to manage an examining directorate but cannot be considered the sole objective source of information. It denies that the complainant's staff reports were not taken into consideration.

According to the EPO, experience shows that the waiting period between two interviews is usually five years. It recalls that one of the members of the Selection Board testified that the Board never had a reason to suspect that what Mr K. said was untrue. It rejects the accusation of unequal treatment. In conclusion, it contends that the decision not to call the complainant for interview was made in line with the applicable provisions, in the proper exercise of the discretionary power of the President of the Office, and was not taken *ultra vires*.

D. In his rejoinder the complainant contends that his claim for moral and material damages is "in substance identical" to the request for appropriate financial compensation submitted orally before the Appeals Committee in November 2003. He considers that by querying the receivability of his claims for the first time in the proceedings before the Tribunal the EPO is violating the principle of good faith. With regard to his claim for costs, the complainant submits that it relates exclusively to costs for the proceedings before the Tribunal and has therefore been filed in good time.

He reiterates his arguments on the merits. He asserts that he had the necessary qualifications for the post of director but that the members of the Selection Board rejected his application without having considered the relevant information. In his view, the majority opinion of the Appeals Committee was based on unfounded assumptions and false statements. The impugned decision, being entirely based on the reasons and justifications given in that opinion, has therefore been taken *ultra vires*.

E. In its surrejoinder the defendant reiterates its objections to receivability, but only with regard to the claims for material and moral damages, on the grounds that the complainant had every opportunity to submit those claims with his appeal of 11 February 2003.

It maintains its position on the merits and considers that the members of the Selection Board did indeed have enough information available to exercise their discretion properly.

CONSIDERATIONS

1. The complainant, whose career at the EPO is outlined under A above, challenges the decision of 26 May 2004 rejecting his internal appeal against the decision not to shortlist him for interview for several grade A5 posts of director and against the manner in which the provisions of Article 49(7) and the second and third paragraphs of 49(10), of the Service Regulations had been "implemented by the Promotion Board".

2. The facts of the case may be summarised as follows. The complainant applied in April 1999 for director posts at grade A5; his applications were unsuccessful, though he was interviewed by the Selection Board. According to him, however, his direct supervisor informed him that he had made a good impression during the interview and that he could expect to be invited again for an interview some time in the future.

On 13 November 2002 the EPO issued vacancy notice TPI/3578 to fill grade A5 director posts in Munich, The Hague and Berlin. On 26 November the complainant applied, but he was not selected for interview by the Selection Board that met on 18 December 2002.

By letter of 11 February 2003 he filed the aforementioned internal appeal asking for his application to be reviewed by the President of the Office on the basis of Article 49(4) and 49(10), first paragraph. On 24 March 2003 he was informed that his internal appeal had been referred to the Appeals Committee. In its opinion of 26 January 2004 the Committee recommended by a majority that the appeal be rejected for lack of foundation.

Having been notified of that recommendation, the complainant sent a letter on 9 February 2004 to the President of the Office, submitting supplementary comments in which he contended that the Selection Board had not exercised its discretion correctly; he also contended that there were errors of fact and procedural flaws. Despite those comments, the President endorsed the opinion of the Appeals Committee and rejected the internal appeal.

3. The complainant's claims are given under B above.

He accuses the Selection Board of having disregarded a number of material facts, particularly in his staff reports, which led to the systematic rejection of his applications for a director's post.

The complainant contends that the chairman of the Selection Board nurtured a prejudice against him which influenced the other Board members. He submits that the procedure was flawed insofar as one of the Board members was not present at the pre-selection meeting of 18 December 2002, and that flaw could not be remedied because, as the member concerned himself admitted when he was consulted later, he could not remember the complainant's case to give an opinion. He asserts that the principle of equal treatment was breached because the examiners promoted in Munich had less seniority than he and in some cases did not fulfil at least one of the requirements mentioned in the vacancy notice.

He adds that the Selection Board's discretion was improperly exercised due to the arbitrary way in which the procedure was conducted. Some staff members were promoted to director posts without the necessary steps being undertaken or the necessary time being devoted to examining which candidates possessed the required qualifications. It could not even be maintained that the employees had been selected because of their specific knowledge in certain technical areas, since the EPO's policy in recent years has manifestly been to nominate directors in quite different areas from the ones they had earlier worked in as examiners. He asserts that his high degree of flexibility and his professional experience within the Office were appraised in his staff reports and summarised in his curriculum vitae.

The defendant considers the claims for the award of moral and material damages and for legal costs as irreceivable and requests that the complaint be rejected in its entirety.

Receivability

4. The Organisation contends that the claims for damages are irreceivable because they were put forward in this specific manner for the first time in the complaint.

However, it appears from the submissions that the request concerning damages had in fact been made in the course of the internal appeal procedure, albeit only orally and in general terms. That was why the Appeals Committee gave an opinion on that request and recommended that it be rejected.

The Tribunal therefore considers that, in accordance with the case law (see in particular Judgment 2360), the claims for damages are receivable. His claim for costs, which, as the complainant explains in his rejoinder, relates only to the costs incurred during the proceedings before the Tribunal, is likewise receivable.

The merits

5. The relevant texts are reproduced under A above, where an outline is also given of the stages of the procedure established by the Organisation for the promotion of its permanent employees.

6. According to the Tribunal's case law as recalled in Judgment 1670 (under 14), promoting a staff member is at the President's discretion, and so his decision is subject to only limited judicial review. The Tribunal will set it aside only if it was taken without authority or in breach of a rule of form or of procedure, or if there was some mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a plainly wrong conclusion was drawn from the facts.

7. The complainant argues that the procedure was flawed owing to the fact that one of the members of the Selection Board, a member appointed by the President of the Office, was not present at the pre-selection meeting on 18 December 2002. The Organisation does not deny this fact but considers, like the Appeals Committee in its majority, that this procedural flaw could not invalidate the pre-selection since the Selection Board, which decided unanimously, would not have reached a different conclusion even if all Board members had been present.

According to Article 49(5) of the Service Regulations, "[t]he Promotion Board shall comprise a Chairman and four members belonging to a grade equal to or higher than the grade to be assigned". Article 49(1)f) provides that a permanent employee may obtain a higher grade "by appointment to a post in another category as a result of promotion or an internal competition in accordance with Annex II [to the Service Regulations]". This annex stipulates in Article 1 that "[t]he Selection Board for each competition shall normally comprise a chairman, one or more members appointed by the appointing authority and one member appointed by the Staff Committee".

The Tribunal agrees with the member of the Appeals Committee who submitted a minority opinion that the absence of one member of the Board did constitute a flaw, despite the fact that the Board's opinion was unanimous.

Since the flawed composition of the Selection Board could not be corrected through subsequent consultation of the absent member, the competition procedure, which is tainted with a formal flaw, must be set aside where the complainant is concerned, as must the decision of 26 May 2004, without any need to examine the remaining pleas. The complainant must therefore be restored to the position in which he was prior to the meeting of 18 December 2002, and his application must be reviewed in accordance with the applicable rules.

8. The Tribunal considers that the complainant has suffered moral injury owing to the unlawful nature of the procedure and deems it fair to remedy such injury by awarding him the sum of 5,000 euros.

9. The complainant is entitled to costs which are set at 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The case is referred back to the Organisation to take action as described under 7 above.
3. The Organisation shall pay the complainant 5,000 euros in moral damages and 2,000 euros in costs.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 5 May 2005, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 July 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet