

**106th Session**

**Judgment No. 2766**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. B. against the European Patent Organisation (EPO) on 3 August 2007 and corrected on 28 August, the EPO's reply of 21 December 2007, the complainant's rejoinder of 3 March 2008 and the Organisation's surrejoinder of 10 June 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, a national of Austria born in 1962, joined the European Patent Office, the secretariat of the EPO, in 1990 at grade A2. At the material time he held grade A4. On 29 April 2005 notice of competition TPI/4136 was issued to fill several director posts at grade A5. The complainant applied for one of these posts and was invited to an assessment centre exercise, which was to be preceded by an introductory evening. On 28 and 29 June he participated in the Assessment Centre exercise, following which the Selection Board decided not to call him for an interview; he was so informed by e-mail

dated 4 July 2005. During a meeting convened on 14 September by the Principal Directorate of Personnel, the complainant received feedback about the Assessment Centre report. A follow-up meeting was held on 13 October 2005.

In the meantime, on 21 September 2005, the complainant had lodged an internal appeal, alleging several procedural flaws in the competition procedure and unfair treatment compared with candidates taking part in subsequent selection procedures for certain director posts. He claimed compensation for moral injury. He also requested that competition procedure TPI/4136 as well as subsequent selection procedures for director posts be annulled and rerun. On 14 November he was notified that the President of the Office had decided to reject his appeal and that the matter had thus been referred to the Internal Appeals Committee.

In its opinion of 18 April 2007 the Committee considered that the claim to annul subsequent selection procedures was inadmissible as the complainant had failed to identify any concrete measure adversely affecting him within the meaning of Article 107(1) of the Service Regulations for Permanent Employees of the European Patent Office. It also considered that the allegations of procedural flaws and unfair treatment were without merit and it recommended that the appeal be dismissed. By letter dated 11 May 2007 the complainant was informed that the President of the Office had decided to endorse the opinion of the Committee and to reject his appeal as partly inadmissible and unfounded in its entirety. That is the impugned decision.

B. The complainant contends that the Internal Appeals Committee erred in considering that his claim for the annulment of subsequent selection procedures was inadmissible. He points out that, during the internal appeal proceedings, he explicitly indicated that he had unsuccessfully applied for other posts and he identified competition procedure TPI/4208 as one of the selection procedures in which he had taken part.

He alleges a breach of Article 112 of the Service Regulations, according to which the Committee's opinion shall include a statement

of the facts and of the law and specify the grounds on which it is based, and a breach of Article 113(4) of the Service Regulations, which provides that “[t]he appellant shall be informed of any document or new factor produced during the investigation” and that he may ask to be heard again if such information is given after he has been heard. According to him, by referring to documents related to an earlier internal appeal which were not publicly available, the Committee failed to provide a full statement of the facts, law and grounds on which its opinion was based, and it denied him the possibility of commenting on new evidence.

The complainant submits that the Committee misinterpreted Articles 2(1)(e) and 6 of Annex II to the Service Regulations. Contrary to the view held by the Committee, notice of competition TPI/4136 should have specified the kind of tests that would be held and how they would be marked, as required by Article 2(1)(e), since the selection procedure was based, albeit partly, on tests. Furthermore, the presence, during the Assessment Centre exercise, of a staff representative who was not actively involved in the selection procedure and who could not have been a member of the Selection Board, given that his grade was below that of the post to be filled, violated the secrecy of the proceedings of the Selection Board, enshrined in Article 6 of Annex II. In the complainant’s view, Circular No. 299, which was adopted in April 2007 to provide guidance on the use of assessment centres in management selection procedures, confirms his contention. The Committee thus erred in finding that his individual right to the secrecy of selection procedures was outweighed by the staff representatives’ general interest in upholding the fairness of such procedures. Drawing a parallel with the protection of automated personal data files, he argues that the fact that his Assessment Centre report was passed on to the Principal Directorate of Personnel without his consent further breached Article 6.

The complainant asks the Tribunal to annul competition procedure TPI/4136 as well as subsequent procedures, at least procedure TPI/4208. He also seeks moral damages in the amount of 15,000 euros and costs.

C. In its reply the EPO submits that the Internal Appeals Committee was correct in finding that the complainant's claim for the annulment of subsequent selection procedures was inadmissible since he had failed to specify competitions in which he took part and to explain how he was affected. It adds that the mere assertion that he had not been invited to an assessment centre exercise in the context of competition procedure TPI/4208 did not constitute a proper challenge of that procedure.

The Organisation points out that, in the earlier internal appeal to which the Committee referred, the appellant had challenged competition procedure TPI/4136 on the grounds that the rights of the Selection Board had been infringed. It further notes that in the present case the complainant did not make such a challenge before the Committee, which considered the matter *proprio motu*. Therefore, the complainant cannot allege that he was denied access to documents relating to that appeal. The defendant produces an anonymised copy of the Committee's opinion in the earlier appeal.

The EPO states that the Committee rightly considered that Article 2(1)(e) of Annex II was not applicable in the present case on the grounds that candidates taking part in competitions on the basis of tests and candidates taking part in competitions on the basis of both tests and qualifications are not in identical situations. It points out that notice of competition TPI/4136 mentioned the Assessment Centre and that candidates were invited to an introductory evening prior to the Assessment Centre exercise. Further, it denies any breach of Article 6 of Annex II. The staff representative who was present during the exercise was bound by a duty of confidentiality under Article 20(1) of the Service Regulations, and he reported on its fairness, not on the candidates' performance. The fact that the complainant's Assessment Centre report was forwarded to the Principal Directorate of Personnel in order for that department to conduct a feedback meeting did not, in its view, contravene the secrecy requirement; the provisions relating to the protection of automated personal data files do not apply, even by analogy.

D. In his rejoinder the complainant reiterates his pleas. He points out that the negative impact of the fact that he had not been invited to an interview in competition procedure TPI/4208 is “immediately evident”. He maintains that the Internal Appeals Committee’s reliance on another internal appeal constitutes a procedural irregularity and justifies that his case be referred back to the Committee. The complainant also argues that the introductory evening prior to the Assessment Centre exercise did not remedy the deficiencies of notice of competition TPI/4136 and that the fairness of the selection procedure is regulated by Article 1 of Annex II which provides for the appointment of members of the Selection Board by the Staff Committee.

E. In its surrejoinder the EPO maintains its position. It adds that, if the complainant wished to challenge competition procedure TPI/4208, he should have lodged a separate appeal. It also disputes the relevance of the complainant’s reference to Article 1 of Annex II.

## CONSIDERATIONS

1. The complainant, who applied without success for a position of director advertised in notice of competition TPI/4136, contests the way in which the selection procedure was conducted. He also challenges further selection procedures. He consequently seeks “annulment of the procedure TPI/4136 and subsequent procedures – at least procedure TPI/4208”, moral damages and costs.

2. Competition notice TPI/4136 stated that “[p]rior to the interviews [...] applicants will be invited to participate in an assessment centre [exercise] which [...] is part of the selection procedure”. As an applicant, the complainant was invited by the Principal Director of Personnel to attend an introductory evening prior to the Assessment Centre exercise “to explain to [him] how the [exercise] will be run and to answer any questions [he] may have”.

The Assessment Centre exercise was to include an individual oral feedback of approximately one hour, after completion of the procedures. The complainant was also informed that the procedure would take two days, and that 16 applicants had been preselected by the Selection Board. The Principal Director stated that following the Assessment Centre exercise, the Selection Board would convene to decide which of the applicants should be called for interview. He invited the complainant to contact a named official in the Principal Directorate of Personnel should he have any questions or queries.

3. After he had participated in the Assessment Centre exercise, the complainant was informed, in the name of the Principal Director of Personnel, that the Selection Board had decided not to call him for an interview. Later on, the official of the Principal Directorate of Personnel who was originally indicated as a contact for the selection procedure informed him that a written report had been prepared for each participant in the Assessment Centre exercise, and invited him for a meeting to discuss it.

4. The complainant asserts, *inter alia*, that he was not informed of “the kind of competition and the marking” in order for him to prepare accordingly. He invokes Article 2(1)(e) of Annex II to the Service Regulations, which concerns competitions.

The Internal Appeals Committee considered that that provision applied exclusively to competitions to be decided “solely on the basis of tests”. The President of the Office endorsed the Committee’s recommendation to reject the complainant’s appeal, both for that and other reasons that will later be commented on. It is the decision of 11 May 2007 which the complainant impugns before the Tribunal. He alleges that the distinction made by the Committee between competitions on the basis of tests and competitions on the basis of both tests and qualifications amounts to unequal treatment.

5. Article 2(1)(e) of Annex II provides that each notice of competition shall specify “where the competition is on the basis of tests, what kind they will be and how they will be marked”.

Article 5(2) makes a further distinction, providing:

“Where the competition is *on the basis of tests*, all candidates on the list shall be admitted to the tests.

[...]

Where the competition is *on the basis of both tests and qualifications*, the Selection Board shall state which of the candidates on the list shall be admitted to the tests.” [emphasis added]

According to this latter article, the Selection Board could have chosen not to invite the complainant to the Assessment Centre.

Article 5(3) further states that the Selection Board may, for certain tests, be assisted by one or more advisers.

6. The Tribunal finds that the Organisation acted in accordance with the above-mentioned provisions when concluding that there is indeed a distinction between competitions based only on tests, and competitions based on both tests and qualifications. Therefore, the requirement laid down in Article 2(1)(e) of Annex II that the notice of competition specify the kind of tests to be conducted and how they will be marked where a competition is on the basis of tests was not applicable to the procedure TPI/4136, which was going to be decided both on tests and other qualifications as indicated in the notice of competition.

The complainant’s assertions in that respect are therefore unfounded: the notice of competition and the information given to all participants the evening before the Assessment Centre exercise, as to how the tests would be conducted, and the offer to provide explanations or answers to any queries about the selection procedure, were sufficient for the kind of managerial post that was under consideration.

7. Besides, the Assessment Centre exercise was performed by an external body acting as adviser, and its seven-page written report is thorough and reasonable. The complainant fails to show how this report was in any way flawed. The Tribunal finds that it provided enough grounds for the Selection Board to proceed with the interviews

of the candidates that met the Assessment Centre selection criteria, which were comprehensive and sound.

8. The complainant alleges that the selection procedure is flawed by reason of “the presence of a member of the Staff Representatives as an observer at the Assessment Centre”, who reported to the staff representatives. According to the complainant, this constituted an infringement of the confidentiality of the proceedings of the Selection Board.

Given that the observer’s role is to monitor the fairness of the procedure, in the interests of all applicants, it is difficult to find fault with such participation in the selection procedure. The disclosure of the observer’s report being itself limited to the staff representatives, it does not *per se* infringe the confidentiality of the proceedings.

It is not so much that applicants have an absolute right to confidentiality, but rather a right to the reasonable protection of their privacy. The Tribunal finds that the participation of the staff representative, in an observer capacity and not taking part in the Selection Board’s meetings, does not unreasonably affect the complainant’s privacy.

9. In another development of this argument about the intervention of the staff representative, the complainant questions the fact that the grade of the observer’s post was below that of the post to be filled. However, he admits that the observer was not a member of the Selection Board. Again, it is hard to find fault with the presence of the observer. The fact that the Organisation later adopted Circular No. 299, which provides that members of the panel appointed by the Selection Board to observe candidates during the execution of an assessment centre exercise “must be of the same grade as or of a higher grade than the candidates concerned”, is irrelevant. In the absence of express rules, the staff representatives were free to choose whom to appoint as observer, and in such cases the Organisation is not entitled to question his or her representation.

10. The complainant also alleges breach of confidentiality insofar as the report of the Assessment Centre was forwarded to the Principal Directorate of Personnel. Yet he fails to take into consideration that that Principal Directorate actually hosted the selection procedure and that, as indicated in the notice of competition, applications had to be sent to the Principal Director of Personnel; that it was the same Principal Director who informed him of the fact that he had not been selected for a further interview; that the contact person for any queries about the selection procedure was part of the Principal Directorate of Personnel; and that the whole procedure had been explained from the beginning.

The complainant was offered follow-up and feedback on the later written report of the Assessment Centre, which he accepted: he cannot thereafter complain about this violating his privacy or the secrecy of the procedure.

11. The complainant asserts that when he later applied for director posts which were advertised in Munich, he was not invited to an assessment centre exercise or for interview. He contends that in contrast to the reasoning of the Internal Appeals Committee he explicitly indicated that he applied for further competitions without success. He also mentions one of these competitions, TPI/4208, for which he applied, and asks the Tribunal to annul it.

However, the complainant does not claim or prove to have properly initiated internal appeal proceedings against the decision not to invite him to take part in an assessment centre exercise with regard to that competition procedure or any other. As there is no evidence on file that he has filed an internal appeal in that respect, his claim to annul competition procedure TPI/4208 and “subsequent procedures” is not receivable for failure to have exhausted internal remedies.

## DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2008, Ms Mary G. Gaudron, Vice-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 4 February 2009.

Mary G. Gaudron  
Agustín Gordillo  
Dolores M. Hansen  
Catherine Comtet