

**T. (Nos. 18 and 19)**

**v.**

**EPO**

**120th Session**

**Judgment No. 3537**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighteenth complaint filed by Mr I. H. T. against the European Patent Organisation (EPO) on 29 April 2011 and corrected on 11 June and the EPO's reply of 14 October 2011;

Considering the letter of 2 December 2011 by which the complainant applied for a stay of proceedings, the letter of 7 February 2012 by which the EPO objected to that application and the letter of 13 February 2012 by which the Registrar of the Tribunal informed the complainant that his application had been rejected;

Considering the complainant's rejoinder of 1 March 2012 and the EPO's surrejoinder of 12 June 2012;

Considering the nineteenth complaint filed by Mr T. against the EPO on 6 May 2011, the EPO's reply of 14 October 2011, the complainant's rejoinder of 12 January 2012 and the EPO's surrejoinder of 19 April 2012;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

In his eighteenth complaint before the Tribunal the complainant is challenging the President's decision to confirm: (i) the Selection Board's pre-selection decisions on competitions TPI/4334 and TPI/4346 for director posts, i.e. the decisions not to invite the complainant to an assessment, and (ii) his final appointment decision on said competitions, whereby the complainant's application for a director's post was rejected. In his nineteenth complaint he is challenging the EPO's refusal to conduct an investigation into his allegations of harassment and prejudice.

Specifically, by an e-mail of 21 November 2006 the complainant was informed that the Selection Board for competitions TPI/4334 and TPI/4346 had decided not to invite him to an assessment.\* By a letter of 15 January 2007 to the President of the Office, he filed an internal appeal against the Selection Board's decision. He argued that his exclusion from the list of candidates invited to an assessment, which necessarily implied the rejection of his application for said competitions, appeared to be part of a tacit decision taken at the managerial level to prevent his further career development and amounted, in his opinion, to mobbing and a violation of Article 4 of the Service Regulations for Permanent Employees of the European Patent Office. He asked that selection procedures TPI/4334 and TPI/4346 be annulled, that he be allowed to attend the assessment centre and that his application for these competitions be reconsidered thereafter. He sought moral and material damages equivalent to two years' salary.

On 30 January 2007 the Office of the Vice-President for Directorate General 1 (DG1) announced via the intranet the appointment by the President of the successful candidates in competitions TPI/4334 and TPI/4346. By a letter of 20 February 2007 to the President, the complainant filed a second internal appeal, this time against the latter's indirect decision to reject his application for competition TPI/4334. In his letter he indicated that he was filing this second internal appeal in order to "ensure that no admissibility issues arise" and that the grounds for it were identical to those of his appeal of 15 January 2007.

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\* Although TPI/4334 and TPI/4346 were announced as separate selection procedures, they were subsequently combined.

On 5 March 2007 he was informed that his internal appeals had been referred to the Internal Appeals Committee (IAC) for an opinion as a single appeal registered under RI/7/07.

In the course of its proceedings, further to the complainant's request, the IAC held three hearings at which it interviewed the Chairman of the Selection Board for competitions TPI/4334 and TPI/4346, Mr M. L., the Vice-President of DG1, Mr T. H., and the complainant's Principal Director, Mr J. B., on 16 June 2009, 19 April 2010 and 18 June 2010 respectively. It rendered its opinion on 8 December 2010 recommending by a majority that the appeals be dismissed as unfounded. By a letter of 11 February 2011, the complainant was informed of the President's decision to dismiss his appeal as unfounded and to reject his request for a formal investigation on the ground that there were no indications that the members of the IAC had failed to examine his claims sufficiently and fairly. That is the decision impugned by the complainant in his eighteenth complaint.

On 15 February 2011 the complainant wrote to the President requesting a review of the decision not to order a formal investigation into his allegations of mobbing. He sought the President's confirmation of whether this decision was final so that he could pursue his right of recourse to the Tribunal, since he was not able to initiate a formal complaint of harassment under Circular No. 286 on the Protection of the dignity of staff, as this Circular had been suspended. Following a meeting on 23 March 2011 with a member of the President's Office, on 6 May 2011 the complainant filed his nineteenth complaint with the Tribunal, indicating on the complaint form that the complaint was directed against the EPO's implied rejection of a claim notified to it on 16 February 2011.

In his eighteenth complaint, the complainant asks the Tribunal to set aside the impugned decision and to order the EPO to repeat competition TPI/4334 under fair and lawful conditions. Alternatively, he requests financial compensation equivalent to a promotion to grade A5. He asks the Tribunal to rule on the "tendentious manner" in which the facts and evidence were selectively interpreted by the IAC Chairman

to the advantage of the EPO. He seeks moral damages for the EPO's breach of its duty of care and due diligence and its failure to show good faith and to respect his dignity. He also seeks moral damages for the IAC's improper handling of his appeals, its unnecessary procrastinations and delays in holding the requested hearings. He claims 15,000 euros in costs.

In his nineteenth complaint the complainant asks the Tribunal to set aside the President's decision rejecting his request for an independent investigation into his allegations of mobbing and harassment. He claims 1,000 euros in costs.

The EPO submits that none of the complainant's arguments are sound and invites the Tribunal to dismiss both complaints as unfounded and to order that the complainant bear his costs.

#### CONSIDERATIONS

1. In his eighteenth complaint, the complainant impugns the decision communicated to him by letter of 11 February 2011. In that letter, he was notified of the President's decision to reject his internal appeals (jointly registered under RI/7/07) in accordance with the majority opinion of the IAC and not to award him moral damages.

2. The complainant was also notified, in that same letter, of the President's rejection of his request for a formal investigation on the basis that there were no indications that the complainant had suffered mobbing or retaliation for having filed a complaint before the Tribunal. He also rejected the complainant's request to re-examine the case. The complainant impugns these two decisions in his nineteenth complaint.

3. In his eighteenth complaint he challenges the decision not to shortlist him for an assessment centre and consequently also not to invite him for an interview with the Selection Board in competition TPI/4334. He essentially bases his complaint on the grounds that the Selection Board was improperly composed, as the Chairman and a

member thereof were not permanent employees, in violation of Article 1 of Annex II to the Service Regulations; that the information available to the Selection Board members was not the same for all candidates and the candidates were not informed of the information provided to the Board, which in effect amounts to a violation of the adversarial principle and the principle of competition on equal footing; that the testimonies before the IAC of the Chairman of the Selection Board for competitions TPI/4334 and TPI/4346 (Mr M. L.), the Vice-President of DG1 (Mr T. H.) and Principal Director (Mr J. B.) were contradictory; that the IAC did not properly evaluate the evidence (i.e. that it did not recognize the alleged contradictions in the witness statements), thus failing to ensure due process; and that the former Vice-President of DG2 (Mr P. K.) was biased against him, ruining his chances with the various Selection Boards over the years.

4. The complainant bases his nineteenth complaint on the grounds that he suffered from harassment and mobbing which required an independent, external investigation. Specifically, he asserts that the former Vice-President of DG2 (Mr P. K.) personally influenced the Selection Board in its continuous rejection of his applications for higher-level posts; that his applications to attend management courses were ignored; that the Chairman of the IAC was biased in favour of the EPO and to the complainant's detriment; and that the procrastination in admitting the testimonies of the witnesses, and in processing the appeal, was a further element of the harassment.

5. The Tribunal finds that the two complaints rest primarily on the same set of facts, stem from decisions contained in the same letter (dated 11 February 2011), and contain similar arguments. For these reasons the Tribunal finds it appropriate that they be joined (see Judgment 3094, under 1). As the complaints are receivable, the Tribunal shall rule on the merits.

6. In an annex to his eighteenth complaint, the complainant produces the minority opinion of the IAC, which stated that the competition suffered from a procedural flaw, as not all members of the

Selection Board were permanent employees. The Tribunal points out that the version of Article 1 of Annex II to the Service Regulations applicable at the relevant time did not require that Selection Board members be permanent employees. It provided:

“The 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 grade of permanent employees who are members of the Selection Board shall be at least equal to that of the post to be filled.”

As the Tribunal explained in Judgment 3052, under 4, “the wording of Article 1 does not preclude contract staff from being members of the Selection Board. The first sentence of Article 1 defines the composition of the Selection Board without specifying the need for them to be permanent employees, and the second sentence refines the first by specifying that, if the members are permanent employees, then they must be of an equal or higher grade than that of the post to be filled”. Pursuant to this interpretation, the second sentence of Article 1, which specifies that permanent employees must hold a grade at least equal to that of the post to be filled, can be understood to mean that other categories of employees can be members of the Selection Board, otherwise the specification of “permanent employees” in that sentence would be meaningless.

Effective 8 March 2007, Article 1 of Annex II to the Service Regulations was changed to read:

“The 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 chairman and the members of the Selection Board shall be employees, permanent or other, of the Office. Their grade shall be at least equal to that of the post to be filled.”

This formal change was merely a clarification of the earlier version of Article 1 and does not in any way indicate that non-permanent employees were previously not allowed to be members of a Selection Board. Considering this, the Tribunal concludes that the inclusion of non-permanent employees in the Selection Board for the contested competition was lawful.

7. The complainant claims that the information available to the Selection Board members was not the same for all candidates, that the candidates were not informed of the information provided to the Board and that this was essentially in violation of the adversarial principle and the principle of competition on equal footing. The Tribunal considers that the selection procedure was properly conducted by the Selection Board. It is normal to expect that not every candidate will have the same application, work history, or professional references and experience. Therefore it was not unreasonable for the Selection Board to consider all of the information on the various candidates that was properly before it. Moreover, there is no provision which requires that candidates approve of each piece of information prior to its being considered by the Selection Board. Indeed, this would excessively delay, and possibly impede completely, the selection procedure and it would deprive the Board members of valid information on which they could normally base their evaluations. The adversarial principle does not apply to selection procedures.

8. The Tribunal is of the opinion that the witness testimonies taken in the course of the IAC hearings were not contradictory. The complainant asserts that the testimony of the Vice-President of DG1 (Mr T. H.) revealed that information such as that gathered in past selection procedures was not included among the items considered by the Selection Board, but there is nothing in Mr T. H.'s testimony to support that assertion. Mr T. H. described what was generally presented to the Selection Board in each competition and then specified that "additional information", whether written or oral, was often considered as well. Rather than being contradictory, his testimony was actually in line with the other testimonies, which also stated that past applications were considered relevant. The Tribunal agrees with the IAC's opinion that there is no use in ordering an investigation to discover the content of notes which were used in the contested competition, because it has been confirmed that those notes no longer exist as they were destroyed after the completion of the selection procedure.

9. The complainant asserts that Mr P. K. (then Vice-President of DG2) was biased against him and that his opinion, given in 2002, unduly influenced other members of the Selection Boards over the years. The Tribunal points out that it was not only Mr P. K.'s right to express his professional opinion but that it was also his duty to do so, particularly considering he was a member of the Selection Board. The Tribunal notes that this has already been considered in previous complaints which the Tribunal has ruled on. Therefore, as the complainant has not submitted evidence that Mr P. K. exerted direct influence on the competition contested by the complainant in his eighteenth complaint, the Tribunal will not revisit what has already been considered in previous judgments.

10. The Tribunal cannot substitute its evaluation for that of the EPO and will only interfere with a selection decision if that 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). No such vitiating flaw has been proven in the present case. The majority opinion of the IAC states in relevant part that “[t]he decision not to recommend the [complainant] as a suitable candidate was clearly based on the selection board’s legally and factually sound conclusion that the [complainant] did not have the requisite managerial skills. In view of that conclusion, he was likewise not invited for an interview. Accordingly, he was not shortlisted as a potentially successful candidate with the result that a positive outcome to the selection procedure became impossible in his case.” The Tribunal finds no vitiating flaw in either the selection procedure or in the conclusion of the majority of the IAC.

11. In his nineteenth complaint, the complainant reiterates his assertion that the former Vice-President of DG2 (Mr P. K.) was biased against him and that his personal opinion negatively influenced members of the Selection Boards over the years. He explains that, as his Principal Director (Mr J. B.) was below Mr P. K. in the hierarchy,

he was obliged to accept Mr P. K.'s negative influence with regard to judging the suitability of the complainant for a director's post. The Tribunal has already ruled on the legality of the previously contested selection procedures in Judgments 2457, 2612, 2834, and 2835. As noted under 9 above, the Tribunal has already considered the complainant's claims against Mr P. K. and the various Selection Boards in which the latter participated and has consistently held that there was no improper behaviour by him or by other members of those Selection Boards, which would vitiate the final selection decisions in those procedures. Considering this, the Tribunal finds that what the complainant considers to have been harassment by Mr P. K. and others was merely the proper execution of their duties in completing their professional assessments of the complainant's suitability for the posts in question.

12. The complainant also asserts that the Chairman of the IAC was biased against him and that bias was borne out by the IAC opinion which found in favour of the EPO. He also claims that the IAC Chairman's hesitation to allow the testimonies requested by the complainant contributed to his harassment. As pointed out by the EPO, the Chairman of the IAC is not solely responsible for the opinion rendered by the IAC. Furthermore, the selected passages quoted from the witness testimonies were not biased just to support the EPO's point of view, as claimed by the complainant. It is normal for an internal appeal body to quote in its opinion selected information which helped to shape it. The full witness testimonies were attached to the complaint and the Tribunal has reviewed them and finds that the parts quoted were not taken out of context or manipulated to show a specific point of view. The hesitation in allowing the witness testimonies was explained by the IAC's request that the complainant state the reasons for which he had required the examination of specific witnesses and that he clarify what information he hoped to obtain from their testimonies. The Tribunal finds that the complainant has not proved his claim that the Chairman of the IAC was biased against him.

13. The complainant claims that his applications for management training were ignored and that this constitutes another proof of harassment. The Tribunal considers that a complainant must contest a decision (whether express or implied) which negatively affects him, within the time limits allowed for in the applicable rules. Failure to do so renders this decision immune from challenge. As the complainant did not challenge any of the decisions not to respond to his requests for management training within the proper time limits, this argument cannot now be raised in the present complaint as a claim.

14. With regard to the length of the internal appeal proceedings, the Tribunal is of the opinion that it was excessive. The EPO has provided no explanation for the delay of one and a half years between the filing of the internal appeal and the filing of its position paper. Furthermore, while the internal appeal had numerous complications, in the form of organising hearings and witness testimonies, these were not serious enough to justify the length of the internal appeal proceedings which took nearly four years to complete. Considering this, the Tribunal sees fit to award the complainant moral damages in the amount of 3,500 euros. As the complaint succeeds in part, the complainant is also entitled to costs which the Tribunal sets at 3,000 euros. All other claims are dismissed.

#### DECISION

For the above reasons,

1. The EPO shall pay the complainant 3,500 euros in moral damages.
2. It shall also pay him costs in the amount of 3,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 8 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ