

The Administrative Tribunal,

Considering the eighth complaint filed by Mr J. D.-S. against the European Patent Organisation (EPO) on 8 September 2006 and corrected on 26 September, the Organisation's reply of 19 December 2006, the complainant's rejoinder of 16 March 2007 and the EPO's surrejoinder of 12 June 2007;

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 and the pleadings may be summed up as follows:

A. Facts relevant to this dispute are given in Judgments 1559, 1832, 1891, 2040, 2299, 2412 and 2579 concerning the complainant's previous complaints. He was promoted to grade A4(2) with effect from 1 November 2001.

In December 2004 the European Patent Office, the EPO's secretariat, published vacancy notices (INT/EXT/4011 and INT/EXT/4012) concerning two grade A5 posts for technically qualified members of boards of appeal dealing with mechanics. On 10 January 2005 the complainant applied for both posts. A further vacancy notice (INT/EXT/4049) concerning "several posts" for technically qualified members of boards of appeal dealing with mechanics was published on 1 March; the complainant again applied on 16 March. On 24 May 2005 the Recruitment Department informed him that "owing to unforeseen circumstances" the selection procedure for vacancy notice INT/EXT/4049 would be discontinued. By letters dated 15 and 24 June 2005, respectively, the complainant was informed that, further to a decision of the Administrative Council, his applications for the posts advertised in vacancy notices INT/EXT/4011 and INT/EXT/4012 had been unsuccessful.

On 17 August 2005 he lodged an appeal against the decisions of 24 May, 15 June and 24 June with both the Chairman of the Administrative Council and the President of the Office. He requested the rescission of the said decisions and, by way of redress, his appointment *ad personam* to the 13th and last step of grade A5; he relied on a precedent in support of the latter request. On 6 October the Organisation informed him that the President of the Office, being of the opinion that his requests were unfounded, had not granted them and that the Internal Appeals Committee had therefore been requested to give an opinion (Appeal RI/73/05). By a letter of 1 December 2005 the Chairman of the Administrative Council notified the complainant that the Council had "provisionally" rejected his requests and referred the matter to its Appeals Committee. The appeal was registered under the reference number IA/1/06.

In the meantime, on 31 October 2005, the Office had published two new vacancy notices, INT/EXT/4197 and INT/EXT/4205, each of which concerned a grade A5 post for a technically qualified member of a board of appeal dealing with mechanics; the complainant applied on 5 December 2005. He was informed by letters of 16 and 22 March 2006 that his applications had been unsuccessful. On 24 April he lodged a further appeal with the Chairman of the Administrative Council, in which he challenged the rejection of his two latest applications.

On 28 April the Appeals Committee of the Administrative Council forwarded to the complainant its opinion in which it unanimously recommended the rejection of appeal IA/1/06. By a letter of 5 July 2006, which constitutes the impugned decision, the Chairman of the Council informed the complainant that the Council had decided to endorse the Committee's opinion and to reject his appeal. The complainant also challenges the implied rejection of his appeal of 24 April 2006.

B. The complainant contends that his application for a post as a technically qualified member of a board of appeal has been "rejected indefinitely" without justification, although he has long demonstrated his ability. He submits that he has "very unjustly suffered from prolonged and systematic discrimination" without which he would have reached the last step in grade A5. In this connection he draws attention to the fact that his sole interview with

a Selection Board took place in 1996 and he emphasises that, in the report that it issued in April 2005 with reference to one of his previous appeals, the Appeals Committee of the Administrative Council stated that “after eight years, an invitation to attend an interview [...] might be a means to avoid giving the impression that the Selection Committee has a discriminatory attitude towards [him]”.

The complainant is of the view that the failure to supply any explanation for the rejection of his various applications and the publication of vacancy notices advertising “several posts” without specifying the exact number thereof contravene Article 4(2) and (3) of the Service Regulations for Permanent Employees of the European Patent Office, which provide respectively that “[t]he staff shall be informed of each vacant post when the appointing authority decides that the post is to be filled” and that “[v]acant posts shall be filled in the interests of the proper functioning of the Office and having regard to the need to offer career opportunities to permanent employees”.

The complainant requests his appointment to the 13th and last step of grade A5, damages in the amount of 1,000 euros and costs amounting to 2,000 euros.

C. In its reply the EPO contends that the complaint is irreceivable on several grounds. First, it relies on the failure to exhaust internal remedies, since the Internal Appeals Committee has not yet issued its opinion on appeal RI/73/05 and, for this reason, the President of the Office has not yet taken a final decision. Secondly, the complainant’s request to the Administrative Council and the Tribunal that he be appointed *ad personam* to the last step of grade A5 is irreceivable since, under Article 11(3) of the European Patent Convention, the Administrative Council appoints the members of the boards of appeal on a proposal of the President of the Office. Accordingly, as the Appeals Committee of the Administrative Council notes, the latter has “no power to appoint someone on its own initiative to an *ad personam* grade”. Lastly, the Organisation asserts that the complainant is relying on arguments already advanced in earlier proceedings and which must therefore be dismissed as irreceivable in accordance with the principle of *res judicata*.

On the merits the EPO affirms that the procedure related to vacancy notice INT/EXT/4049 had to be “suspended” for unforeseeable reasons pertaining to the interests of the Office. In point of fact, the Organisation had expected an increase in its workload necessitating the establishment of a new board of appeal dealing with mechanics but, in the course of 2005, it transpired that this increase would not be so large as to justify the setting up of a new board. It was therefore in the interests of the proper functioning of the Office that the EPO decided to “suspend” the selection procedure. The Organisation relies on the Tribunal’s case law, which “allows the suspension of a competition” in order that it may be reopened with changed requirements, “if this is what the organisation’s interests demand”.

The EPO wonders in what way the reference to “several posts” in vacancy notice INT/EXT/4049 is prejudicial to the complainant. The expression “each vacant post” to be found in Article 4(2) of the Service Regulations does not refer to budget posts but, as Article 3(1) makes clear, to the various types of job, such as that of examiner, administrator or member of a board of appeal. The absence of any obligation to specify the number of available posts is confirmed by Article 2(1) of Annex II to the Service Regulations, which describes the content of notices of competitions organised in accordance with the provisions of that annex. The Organisation states that, although none of the provisions of the Service Regulations obliges it to specify the exact number of posts advertised, the appointing authority may, circumstances permitting, announce the number of budget posts to be filled, but that this is not a binding obligation on the Office.

The Organisation points out in respect of vacancy notices INT/EXT/4011 and INT/EXT/4012 that the mere fact that the complainant’s applications were unsuccessful and that he was not invited to an interview is not sufficient to establish the existence of systematic discrimination. Similarly, it considers that it does not have to furnish him with an explanation of why it did not select him or call him for an interview, unless he can prove that the chosen candidates are less qualified than he is. In addition, even though the Appeals Committee of the Administrative Council stated that, after eight years and the rejection of his many applications, the Selection Board might consider inviting the complainant to an interview as a means to avoid “giving the impression that the Selection Committee has a discriminatory attitude towards [him]”, that was no more than a recommendation without any binding force.

As for the complainant’s claim that he should receive an *ad personam* appointment, the Organisation explains that not only is this request irreceivable, but there is no basis for it, as none of the articles of the Service Regulations provides for this type of appointment and, as the Tribunal has consistently held, such an appointment may be made

only in “exceptional circumstances”.

Lastly, with respect to vacancy notices INT/EXT/4197 and INT/EXT/4205, the EPO states that the President of the Office and the Administrative Council arrived at the conclusion that the two chosen candidates fulfilled the requirements. Consequently, unless the complainant can prove that he was better qualified than they were, their appointment is not “challengeable”.

D. In his rejoinder the complainant holds that his complaint is receivable, because he has exhausted internal remedies, since in this case the Administrative Council constitutes the appointing authority. He explains that “for safety’s sake” he lodged an appeal with both the Administrative Council and the President of the Office. With regard to the expression “several posts” to be found in vacancy notice INT/EXT/4049, the complainant reiterates that the number of posts should have been specified, in accordance with Article 4(2) of the Service Regulations. In his opinion, the “defect” which he denounces gives the Administration greater latitude in choosing the number of applicants to be appointed. He considers that the purpose of this practice is systematically to rule out his application. He notes that according to Judgment 1832 “[t]he [Administrative] Council does not have to pick any of the President’s nominees and may ask him to offer others”, and he concludes from this that the Council, like the President of the Office, may “assess the merits of an *ad personam* appointment”, which in his case is “quite justified”. The complainant submits that the decision to discontinue the selection procedure following vacancy notice INT/EXT/4049 reflects “a lack of foresight, or even malfunctioning, on the part of the Office”.

E. In its surrejoinder the EPO maintains its position. With respect to the appeal lodged with both the President of the Office and the Chairman of the Administrative Council, it asserts that according to the Tribunal’s case law a complainant loses his or her right of appeal by lodging an appeal with the wrong body. The Organisation emphasises that the Administrative Council is not obliged to accept the nominees of the President of the Office and may request him to nominate other candidates. Nevertheless, it can act only upon a proposal of the President and may not therefore make any *ad personam* appointment. Consequently, neither the Administrative Council nor the Tribunal has the authority to make such an appointment. The Organisation adds that the fact that vacancy notice INT/EXT/4049 did not specify the exact number of posts to be filled has caused the complainant no injury, since appointment or non-appointment do not *per se* depend on that figure being specified.

## CONSIDERATIONS

1. The complainant joined the European Patent Office on 1 July 1980 as an examiner at grade A3. He was promoted to grade A4 on 1 May 1989 and to grade A4(2) with effect from 1 November 2001. Since 1991 he has on several occasions applied without success for grade A5 posts as a technically qualified member of a board of appeal.

In January, March and December 2005, the complainant again applied for various posts as a technically qualified member of a board of appeal dealing with mechanics, for which the Office had published vacancy notices. These applications were unsuccessful, one of them being rejected for the specific reason that, “owing to unforeseen circumstances, it ha[d] been decided not to continue the selection procedure”.

2. On 17 August 2005 the complainant lodged an internal appeal with both the Chairman of the Administrative Council and the President of the Office, challenging the decisions rejecting the applications that he had submitted in January 2005 as well as the decision to discontinue the selection procedure opened in March 2005. He requested the rescission of the said decisions and proposed that “[by] way of redress [...] the appointing authority should award [him] the last step (13th step) of grade A5 ‘*ad personam*’”, as had been done in the case of a colleague some 20 years earlier. Claiming that he was the victim of “prolonged and systematic” discrimination, he lodged a second appeal, dated 24 April 2006, against the decision to reject the application that he had submitted in December 2005. He addressed this appeal only to the Chairman of the Administrative Council.

3. (a) At its session in June 2006 the Administrative Council, acting on the unanimous recommendation of its Appeals Committee, rejected the appeal of 17 August 2005. The complaint is directed firstly against this decision of which the complainant received notification on 6 July 2006.

(b) The Administrative Council has not issued a decision on the appeal of 24 April 2006. The complainant correctly claims that it has been implicitly rejected and the Organisation does not dispute this. The complaint is

directed secondly against this implied rejection.

4. On the basis of the opinion issued by its Appeals Committee, the Administrative Council considered that the internal appeal of 17 August 2005 was irreceivable as far as the request for personal (*ad personam*) promotion was concerned. It rightly held that it had “no power to appoint someone on its own initiative to an *ad personam* grade”.

The distribution of the power to make appointments within the Organisation is determined by Articles 10 and 11 of the European Patent Convention. According to Article 10(2)(g), the authority to appoint and promote employees lies with the President of the Office, subject to the provisions of Article 11 concerning the appointment of senior employees. On the other hand, under Article 11(3), the Administrative Council is responsible for appointing the members of the boards of appeal and of the Enlarged Board of Appeal, including the Chairmen of these bodies, and for the decision to reappoint them; in this area the President of the Office has the right only to make proposals or to be consulted.

As a result of this distribution of powers, it is the President of the Office, and not the Administrative Council, who decides on the promotion of employees and hence on their special, *ad personam* promotion as well. The complainant himself made no mistake in this connection, since, for “safety’s sake”, he carefully ensured that his internal appeal of 17 August 2005, in which he requested an *ad personam* promotion by way of redress, was also addressed to the President of the Office. It emerges from the submissions that the President of the Office did not, however, take any decision on this request. From the wording of the complaint the Tribunal deduces that it is also directed against this implied rejection within the meaning of Article VII(3) of the Statute of the Tribunal.

5. The Organisation contends that the complaint is irreceivable, in whole or in part, for two reasons:

(a) As the President of the Office did not take a decision on the appeal submitted to him on 17 August 2005, the complaint does not fulfil the requirement laid down in Article VII(1) of the Statute of the Tribunal that internal means of redress should be exhausted. This objection is unfounded.

According to the provisions of the European Patent Convention recalled under 4, above, the power to appoint members of the boards of appeal is vested in the Administrative Council. Its decision is not subject to any review by the President of the Office who, in this specific area, may only make proposals. The complainant has therefore taken the appropriate action in turning to the Tribunal in order to challenge the final rejection of his applications for posts as a technically qualified member of a board of appeal; he did not have to wait until the President of the Office took a decision on the main claims in his internal appeal, namely the claims for rescission of the decisions rejecting the applications he submitted during the first quarter of 2005.

(b) In the Organisation’s opinion, the complainant also overlooks the principle of *res judicata* “[i]n so far as [he] relies on arguments already advanced in earlier proceedings before the Appeals Committee of the Council or the Administrative Council, or in a complaint to the Tribunal”. This objection is likewise irrelevant.

The *res judicata* rule applies only where the parties, the purpose of the suit and the cause of action are the same as in the earlier case (see Judgments 1263, under 4, and 2058, under 5). Moreover, it applies only with respect to the operative provisions of judgments, and not with respect to the reasoning, unless the latter is intrinsic to the operative provisions.

In requesting that the Tribunal abstain from examining the merits of the complaint on the grounds that the complainant merely repeats arguments on which it has already ruled in earlier cases involving him and the Organisation, the latter confuses the *res judicata* rule with the rule of precedent. Inasmuch as it is unnecessary to depart from its findings in those earlier cases, the Tribunal will base its decision upon them, but in so doing it will have regard to the particular circumstances of the present case.

6. The Tribunal does not deem it necessary to order the oral proceedings requested by the complainant, since the parties have expressed their position quite plainly in their written submissions.

7. The complainant takes the EPO to task for having rejected the applications he submitted at the beginning of 2005 without providing any reason whatsoever.

(a) An administrative decision adversely affecting a staff member must be properly substantiated in order that the

latter can consider whether an appeal is likely to succeed in full knowledge of the facts, and in order that the authorities to which an appeal might be referred can ascertain whether the decision is lawful. The reasoning may be brief; it may consist in just a reference, express or implied, to some other document which does set out the reasons for the decision.

The appointing authority which notifies the rejection of an application must show restraint when giving its written reasons, particularly so as to avoid compromising the candidate's chances in a future competition. That is why, according to the case law, the reasons for rejection need not necessarily be spelled out in the authority's decision. Moreover, the lack or inadequacy of an explanation can be remedied at the appeal stage provided that the appeal body may examine the complete file and that the staff member is given his or her full say (see Judgments 1787, under 5, 1990, under 4, and 2035, under 4).

(b) In the instant case, no reasons were given for two of the three decisions forming the subject of the internal appeal of 17 August 2005. In its decision of 5 July 2006, the Administrative Council referred to the reasoning contained in the opinion issued by its Appeals Committee, which had already been forwarded to the complainant, and indicated that it was "an integral part" of the decision. As far as the merits are concerned, the opinion of this Committee, which had heard the complainant, merely recalled the unfavourable decisions which the Administrative Council had taken previously in contexts which it regarded as identical. At first sight, this might seem to be a strange manner of proceeding, for the review body is expected to state, at least briefly, in each of its decisions, the reasons leading it to reject the appeal on the substantive basis of the circumstances obtaining when it reaches its decision. However, this will not lead the Tribunal to find that the decisions rejecting two of the applications submitted by the complainant at the beginning of 2005 were inadequately substantiated, because the meaning of the opinion was quite clear to him. The reference to the position taken earlier by the Administrative Council informed the complainant sufficiently of the reasons why his two new applications had also been turned down and why his appeal would probably be rejected. The previous proceedings to which this opinion alludes include those on which the Appeals Committee had issued opinions in 2004 and 2005, opinions which the complainant produces before the Tribunal. It emerges from these two opinions that the complainant's application was turned down in favour of persons considered to be better qualified for the work of a board of appeal and that there had been no discrimination against him.

(c) The third application, submitted in March 2005, was rejected because the selection procedure was discontinued "owing to unforeseen circumstances". The Appeals Committee's opinion, which was endorsed by the Administrative Council, explained these circumstances so that there are no grounds for describing the reasons given in this respect by the appointing authority as inadequate.

The plea that the decisions at issue were inadequately substantiated must therefore be dismissed.

8. The complainant claims that one of the selection procedures in which he participated was flawed because the corresponding vacancy notice – that of 1 March 2005 – indicated that several posts were to be filled, without specifying the number. In the complainant's opinion, that defect opened the door to a somewhat wider choice of candidates, "thus leaving the appointing authority completely free to appoint another candidate in addition to the most qualified candidate, or in place of the complainant, thereby providing a means of systematically eliminating the complainant's application at a whim". He submits that the decision not to continue this procedure reflected a lack of foresight or malfunctioning on the part of the Office. These pleas are devoid of merit.

The selection procedure in question was opened with a view to establishing a new board of appeal dealing with mechanics, a field in which an increase in the workload was then foreseeable. The complainant does not dispute the Organisation's statement that this forecast proved to be inaccurate before the procedure was completed. It was therefore the Office's duty to interrupt this procedure, the continuation of which would have compromised its proper functioning within the meaning of the first sentence of Article 4(3) of the Service Regulations. While the complainant may regard the opening of this competition which involved him in fruitless administrative steps as irresponsible, the Tribunal does not consider that it injured any interest of his which needed to be protected. Moreover, his two other applications were still under consideration. Since the interruption of this selection procedure cannot be faulted, the complainant has no present interest in showing that the advertising of "several posts" in a single notice was incompatible with Article 4(2) of the Service Regulations, which stipulates that the staff shall be informed of each vacant post when the appointing authority decides that the post is to be filled.

9. The complainant also taxes the appointing authority with not calling him for an interview before deciding

on his application. This criticism is unfounded. Quite apart from the fact that the appointing authority is not obliged to call a candidate for an interview when the information contained in the file shows that the application has no chance of success, in the instant case it must be noted that on 23 March 2006 the Appeals Committee of the Administrative Council heard the complainant, who was assisted by counsel.

10. From a substantive point of view, the Tribunal finds no fault with the rejection of the new applications submitted by the complainant in the course of 2005.

(a) The complainant points out that members of the boards of appeal are generally chosen from among the examiners, that he had been an examiner for many years and that his professional abilities, which had been acknowledged in all the staff reports drawn up by his superiors, had led the President of the Office to promote him to grade A4(2), to which the most meritorious examiners belong. He is of the opinion that the further rejection of the applications which he submitted in the course of 2005 is therefore attributable to the Organisation's constant discrimination against him.

(b) It should be remembered that the appointing authority has a discretion to select from among the candidatures submitted to it in a competition. It has full responsibility in this area. The Tribunal must never substitute its own assessment of the merits and qualities of the various candidates for that of the appointing authority. It interferes only if the complainant shows that the appointing authority has abused its discretion to the extent that its decision is arbitrary. This will be the case only if it transpires that this authority, in conducting the selection procedure and taking its decision, has flouted the applicable rules or fundamental principles such as good faith and equal treatment, which seek to ensure fair competition among the candidates (see Judgments 1077, under 4, 1990, under 6, and 2250, under 10).

(c) The new applications submitted by the complainant during the first quarter of 2005 were rejected for the same reasons as his previous ones. The appointing authority has never disputed the complainant's abilities, nor the experience he has acquired as an examiner, but it has always emphasised that the post of a technically qualified member of a board of appeal calls for different skills. The vacancy notices on the basis of which the complainant submitted his candidature stipulate that "[c]andidates must have a special aptitude for judicial work". In his complaint, the complainant does not present any new information which would persuade the Tribunal that the Organisation abused its discretion by considering that other candidates were more suited than he was to sit as a technically qualified member of a board of appeal. In the instant case, there are therefore no grounds for departing from the Tribunal's earlier findings on this issue, in particular as set out in Judgment 2299, under 7.

As for the plea of unequal treatment, it is not supported by any evidence that would convince the Tribunal that the complainant has suffered discrimination.

This is true of both the decision of 5 July 2006 and the implied rejection of the appeal filed on 24 April 2006, which also forms the subject of the complaint.

11. Lastly, the complainant criticises the President of the Office and the Administrative Council for not granting him the *ad personam* promotion which he requested by way of redress. Personal promotion constitutes advancement on merit and is supposed to reward a staff member for services of a quality higher than those ordinarily expected of the holder of the post. In the absence of any provision to the contrary, it is an optional and exceptional discretionary measure which is subject to only limited review by the Tribunal (see Judgments 1500, under 4, and 1973, under 5).

In his career the complainant reached the highest grade possible for a patent examiner. He does not claim or show that while working at the Office he performed duties of a higher level than those required of staff members promoted to that grade. He does not rely on any provision which would have entitled him to personal promotion for the reasons he puts forward. The Tribunal cannot therefore find that the conditions for the exceptional awarding of a personal promotion were met.

Moreover, the refusal to grant him such promotion does not constitute discrimination; the precedent on which the complainant relies clearly relates to circumstances different to those in which he found himself when his request was considered.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 November 2007, Mr Seydou Ba, Vice-President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet

Updated by SD. Approved by CC. Last update: 27 February 2008.