Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

D. (No. 6) and H. (No. 16)

v.

EPO

120th Session **Judgment No. 3513**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr E. D. (his sixth) and Mrs E. H. (her sixteenth) against the European Patent Organisation (EPO) on 7 January 2011 and corrected on 15 February 2011, the EPO's reply of 6 June, the rejoinder submitted by Mrs H. on 13 September and the EPO's surrejoinder of 21 December 2011;

Considering the applications to intervene filed by Mr A. C. K. and Mr P. O. A. T. on 29 July 2011, and by Mr I. H. T. on 2 August, and the EPO's letters of 24 September 2011 concerning those applications;

Considering Article II, paragraph 5, of the Statute of the Tribunal, and Article 13 of its Rules;

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

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

The complainants are permanent employees of the European Patent Office, the secretariat of the EPO, and, at the material time, Mr D. was Chairman of the Munich Staff Committee and Mrs H. was Vice-Chairwoman.

The use of assessment centres, which are composed of external consultants, had been encouraged in the EPO since 2003, initially aimed at improving the selection procedure for grade A6 management posts in Directorate-Generals 1 and 2 by ensuring that the management skills of candidates could be evaluated. In the course of 2005 the use of assessment centres was extended to selection procedures concerning grade A5 and grade A6 management posts Office-wide. On 5 April 2007, Circular No. 299 on the use of assessment centres in management selection procedures entered into force.

On 30 April 2007 Mr D. wrote to the President of the Office contesting the content of the Circular and requesting that it be withdrawn. He alleged that the Circular was incompatible with Annex II to the Service Regulations for Permanent Employees of the Office, in that it restricted the authority of the Selection Board in its ability to supervise assessment centres (Article 2 of the Circular) and in that it obliged the Board to invite all candidates who had participated in an assessment centre to an interview (Article 4). He wrote a similarly worded letter on 2 May but, this time, indicated specifically that he was acting in his capacity as Chairman of the Munich Staff Committee. By a letter of 28 June 2007 he was informed that his request was rejected and the matter referred to the Internal Appeals Committee (IAC).

On 16 May 2007 Mrs H. also wrote a letter to the President worded in the exact same terms as the letter sent by Mr D., and making the same request that the Circular be withdrawn. She indicated that she was acting in her capacity as Vice-Chairwoman of the Staff Committee in Munich. By a letter of 28 June 2007 she was informed that her request was rejected and the matter referred to the IAC.

The IAC examined both appeals at the same time and issued its single opinion on 11 August 2010. It recommended, by a majority, that the President reject the appeal as unfounded on the ground that Circular No. 299 was not contrary to the Service Regulations. It noted that Article 1 of the Circular expressly provided that the use of assessment centres did not restrict the authority or competence of the Selection Board, and that the commissioning of an external firm to run

an assessment centre did not go beyond the consultation of advisers provided for in Article 5(3) of Annex II to the Service Regulations. The majority also considered that the use of an assessment centre did not violate a candidate's right to the reasonable protection of his or her privacy, given that anyone involved in the selection procedure was bound to secrecy under Articles 14(1) and 20(1) of the Service Regulations and Article 6 of Annex II to the Service Regulations. To the contrary, the minority recommended allowing the appeal and thus withdrawing the Circular on the ground that it was contrary to the Service Regulations, in particular its Annex II.

By a letter dated 12 October 2010 the Director of Regulations and Change Management informed each complainant that the Vice-President of Directorate-General 4, acting by delegation of power of the President, had decided to reject their respective appeals. He stated that the use of assessment centres had been endorsed by the Tribunal in Judgments 1477 and 2766. The exercise of the Selection Board's discretion was not adversely affected and Circular No. 299 did not contravene Annex II to the Service Regulations. Indeed, the Circular expressly provided that the use of an assessment centre did not restrict the authority or competence of the Selection Board, and that the use of an assessment centre was at the discretion of the Board. On the issue of privacy, he repeated the arguments developed by the majority of the IAC. That is the decision each complainant impugns before the Tribunal.

The complainants ask the Tribunal to set aside the impugned decision of 12 October 2010, to order the EPO to withdraw Circular No. 299 and to pay reasonable compensation for their time and effort.

The EPO asks the Tribunal to reject the complaints as unfounded, and to order the complainants to bear their costs.

CONSIDERATIONS

1. Complaints were filed on 7 January 2011 by Mr D. and Mrs H.. They were, at the time the internal appeals were filed, the Chairman and Vice-Chairwoman respectively of the Staff Committee in Munich. As the two complaints rest on the same material facts and

raise the same issues of fact and law, they may be dealt with in one judgment, and are joined (see Judgment 1541, under 3).

The central issue in these complaints concerns the use of assessment centres by the EPO in the selection and appointment of staff at certain grades within the Organisation. The use of assessment centres is addressed by Circular No. 299 promulgated on 5 April 2007. The recruitment of staff is governed by Chapter 3 of Title I of the Service Regulations. Central to that process is the requirement in Article 7 that recruitment shall generally be by way of competition in accordance with the procedure laid down in Annex II to the Service Regulations. Article 7(2) contemplates the creation of a Selection Board whose primary function is to draw up a list of suitable candidates to be provided to an appointing authority. Details of the way in which a Selection Board goes about performing that function are found in Annex II. Article 5(3) of Annex II provides that:

> "The Selection Board may, for certain tests, be assisted by one or more advisers."

In fact, the testing and initial evaluation of candidates using assessment centres is undertaken by an external body contracted to the EPO for that purpose.

2. The use of assessment centres at the EPO has been considered by the Tribunal in three earlier judgments. Judgment 2766, delivered on 4 February 2009, concerned an applicant for a grade A5 position in the EPO who was not invited to an interview by the Selection Board after having participated in an assessment centre exercise. The applicant, Mr B., had responded to a notice of competition TPI/4136 which was issued to fill several director posts. The relief Mr B. sought included the annulment of competition procedure TPI/4136. His complaint was dismissed.

Mr B.'s first argument considered by the Tribunal was whether he had been informed of "the kind of competition and the marking" as contemplated in Article 2(1)(e) of Annex II. This argument failed because the obligation to provide this information arose only if the competition was to be decided solely on the basis of tests whereas the

competition in question was based on both tests and qualifications. The Tribunal went on to observe that, as a matter of fact, the complainant was provided with sufficient information about how the test would be conducted and additionally there had been an offer to him to provide explanations and answers to any queries about the selection procedure. The Tribunal further noted that the report from the external body which conducted the assessment centre exercise was thorough and reasonable and provided enough grounds for the Selection Board to proceed with interviews. The Tribunal also rejected an argument that there had been a breach of confidentiality.

The Tribunal next considered the assessment centre exercise in Judgment 2834 though, in that case, the complainant had not been invited to participate in the exercise and the focus of the judgment was not on that exercise. In Judgment 2884 the central issue on which the complainant succeeded was whether the assessment undertaken by the consulting firm needed to be mentioned in the competition notice. It had not been. The Tribunal concluded that the individual assessment performed by the consulting firm was, at least in part, a testing mechanism and there had been a breach of Article 2(1)(e) of Annex II. That provision required the notice of competition to specify what type of tests will be used and how they will be marked where the competition is on the basis of tests.

3. In the present case, the first argument of the complainants is that while Article 5(3) of Annex II contemplates that the Selection Board may "be assisted" by an adviser, the Board must actively request the assistance of the adviser and must have full control over the nature of the tests and supervision of their conduct. The complainants contend that, in fact, this does not occur. In its reply the EPO challenges what the complainants say about the very limited control by the Selection Board. The EPO says the Board has considerable discretion as to the arrangements for and the contents of the tests, provided that they are consonant with the purposes of the competition. In their rejoinder the complainants provide statements from four staff members who, it appears, have sat on Selection Boards and say that, in their experience, there has been no control by the Board over the

use of the assessment centre. The complainants also refer, in general terms, to reports that the Staff Committee receives from its nominees on Selection Boards. In its surrejoinder, the EPO says that the fact that control has not been exercised in particular instances, does not deny the existence of the power to exercise that control.

It cannot be doubted that the Circular invests a Selection Board with a discretionary power to decide whether or not an assessment centre should be used. So much is clear from paragraph (a) of guideline 1 in the Circular. The evidence relied upon by the complainants to establish absence of control, in addition to the experiences of the four staff members just referred to and general feedback, is a statement in the EPO's position paper in the internal appeal. However it is necessary to bear in mind that the complainants challenge the lawfulness of the Circular. Nothing in the Circular limits the power of the Selection Board to be involved in the identification of the tests to be undertaken and their content. It can, of course, be expected that the external consultant undertaking the tests will have expertise about the contents of tests to evaluate attributes of candidates potentially identified by the Board. Accordingly there would be nothing untoward about the Board relying on that expertise. This argument of the complainants should be rejected.

4. The next and related argument of the complainants is that Article 5(3) of Annex II allows for "certain tests" and not the type of more comprehensive testing and evaluation presently undertaken, so the complainants contend, by the external consultant and referred to in the Circular. However there is no basis for giving the expression "certain tests" a narrow meaning. Plainly what the Article contemplates is a Board, in any given situation, calling upon an adviser to undertake some form of testing or evaluation where the Board itself is not likely to have the expertise (and perhaps the time) to undertake the testing or evaluation itself. Such an arrangement is both reasonable and understandable. This argument of the complainants is also rejected.

5. The next argument of the complainants is that the provision in the Circular that allows the Selection Board to appoint an internal

panel of experts to oversee the procedure of group assessment of applicants by assessment centres but provides that none of the nominated experts shall be a member of the Selection Board, is unlawful. This argument is based on the contention that this mechanism denies the Board sufficient control over the selection procedure. However the Circular provides for a process whereby the panel of experts can report to the Board in relation to any irregularities in the processes undertaken. The complainants do not cite any authority of the Tribunal to support the argument that this process is unlawful. Nor do they develop a persuasive argument that, as a matter of principle, this process should be viewed as unlawful. Ultimately it is in the Board's hands to assess what weight should be given to the evaluations made by the external consultant aided, in appropriate cases, by any reports from the panel of experts. The Board exercises ultimate control over the use that might be made of these evaluations. This argument is rejected.

6. The final argument of the complainants is that a group assessment of applicants by an assessment centre does not afford reasonable protection to the privacy of the applicants. The gravamen of this argument is that participants will gain knowledge of the other participants' performance by virtue of the way the testing and evaluation is undertaken. However, this does not constitute a breach of privacy. Insofar as written assessments are made, by the external consultant, of the performance of any given individual, there is nothing to suggest that the confidentiality of this information is compromised in any way. Were it otherwise, then questions of breach of privacy might arise. However, on the basis advanced by the complainants, there is no such breach. This argument is rejected.

In the result the complainants have not established any basis on which the Circular should be set aside. The complaints should be dismissed.

7. Three staff members sought to intervene. They do not identify any relevant similarity in fact and in law to the position of the complainants. Accordingly the applications to intervene should be rejected.

DECISION

For the above reasons,

1. The complaints are dismissed.

2. The applications to intervene are dismissed.

In witness of this judgment, adopted on 15 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO
DOLORES M. HANSEN
MICHAEL F. MOORE

DRAŽEN PETROVIĆ