108th Session **Judgment No. 2884**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Miss M. F. against the European Patent Organisation (EPO) on 18 March 2008, the EPO's reply dated 30 June, the complainant's rejoinder of 28 October 2008 and the Organisation's surrejoinder of 3 February 2009;

Considering Articles II, paragraph 5, VII and VIII 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, an Italian national born in 1954, joined the European Patent Office, the EPO's secretariat, in 1985. She currently holds grade A5. The facts relevant to this case are given in Judgment 2738, delivered on 9 July 2008, in which the Tribunal ruled on the complainant's first complaint. Suffice it to recall that on 19 April 2005 the complainant applied for the post of Principal Director in charge of Legal Services, at grade A6, and was invited to a day-long individual assessment to be conducted by a consulting firm. At the end of August she underwent the assessment and she

was subsequently interviewed by the Office's Selection Board on 12 September and 14 October 2005.

Having been advised by a letter dated 29 November 2005 that she had not been selected for the post, on 24 February 2006 the complainant submitted an internal appeal to the President of the Office against the decision not to appoint her, alleging that it was based on a flawed selection procedure and errors of fact. She was informed on 24 April 2006 that the President had concluded that the selection procedure had been carried out correctly, and that the matter had been referred to the Internal Appeals Committee for an opinion.

Before the Committee issued its opinion the complainant filed her first complaint on 19 February 2007, impugning the implied rejection of her appeal. In Judgment 2738 the Tribunal dismissed the complainant's first complaint as irreceivable for failure to exhaust internal means of redress.

In the meantime, the Committee had issued its opinion on 26 November 2007. A minority of its members concluded that the Selection Board's composition was irregular, but a majority recommended that the complainant's appeal be dismissed. By letter of 21 December 2007 the complainant was notified of the President's decision to endorse the majority opinion and to reject her appeal as unfounded. That is the decision impugned in the second complaint.

B. The complainant refers to the submissions she made in her first complaint and contends that the impugned decision is tainted with procedural errors, abuse of power, errors of fact and law, and the omission of relevant facts. She alleges in particular that the Internal Appeals Committee, and subsequently the President of the Office, erred in finding that there was no breach of Articles 2 and 5 of Annex II to the Service Regulations for Permanent Employees of the Office, which respectively set out the requirements governing the content of competition notices and the procedure for the shortlisting of qualified candidates by the Selection Board. She points out that the vacancy notice did not mention that there would be an individual assessment performed by a consulting firm, and asserts that the fact that

she was aware of the Office's practice regarding the use of assessment centres is irrelevant. She argues that the Selection Board neither decided to engage the consulting firm nor exercised control over the assessment.

In her view, the Committee and the President wrongly assumed that engaging a third party to conduct the assessment had not affected the exercise of the Selection Board's discretion. In so doing, they failed to take into account the circumstances of the case, to wit the very large scope of the consulting firm's mandate, and the Selection Board's heavy reliance on the individual assessment in order to recommend qualified candidates to the appointing authority, i.e. the President of the Office. The complainant adds that the assessment did not cover language skills and legal qualifications, thus leading to "decisive" factual errors.

Lastly, she maintains her argument from her first complaint, namely, that the composition of the Selection Board was flawed because three of its members were employed on fixed-term contracts, in violation of the version of Article 1 of Annex II to the Service Regulations that was then in force.

The complainant asks the Tribunal to find her complaint receivable, to quash the impugned decision and to declare the recruitment procedure null and void. She requests that any other negative decision taken by or on behalf of the appointing authority in relation to the recruitment procedure be lifted.

C. In its reply the EPO submits that the complaint is irreceivable insofar as it raises new claims, pointing out that the complainant did not request the Internal Appeals Committee to declare the recruitment procedure null and void.

On the merits the Organisation submits that the complaint is unfounded, and indicates that it maintains the submissions it made in the context of the complainant's first complaint. It argues that the Committee duly took into account the Office's practice to use assessment centres, the complainant's knowledge of such practice as well as the fact that, by notifying her of the individual assessment one month in advance, she was given the opportunity to enquire about the

nature of the tests. It asserts that there is nothing in the Service Regulations to suggest that the appointing authority could not recommend that the Selection Board take certain steps in the course of a selection procedure, and that the decision to mandate the consulting firm was made by the Selection Board, not by the President of the Office. It notes in this respect that, although Circular No. 299 – which introduced guidelines for the use of assessment centres in the Office – is not applicable to the complainant's case, it confirms the understanding that the appointment of observers lies within the discretion of the Selection Board.

The EPO argues that the complainant has failed to identify the specific circumstances of the case that were allegedly overlooked. It maintains that the consulting firm was given a specific mandate which was duly reviewed by the Committee. It emphasises that legal and language skills were clearly excluded from the scope of the individual assessment and that the data concerning those skills contained in the assessment report was based solely on the information provided by the complainant herself, and it disputes her assertion that the use of an assessment centre led to decisive factual errors.

D. In her rejoinder the complainant asserts that her complaint is receivable, emphasising that, during the internal proceedings, she requested the Internal Appeals Committee to lift the decision of 29 November 2005 on the grounds that the recruitment procedure was null and void, and requested that it be rerun. She presses her arguments on the merits again referring to the submissions she made in relation to her first complaint.

E. In its surrejoinder the Organisation maintains its position in full. It argues that the complainant did not request the annulment of the recruitment procedure before the Internal Appeals Committee but merely pleaded that the procedure was null and void, and that it was only in February 2007, when she submitted her first complaint to the Tribunal, that she raised the annulment of the recruitment procedure as a claim. On the merits it submits that the complainant has not

shown that she suffered any prejudice. It contends that the individual assessment did not amount to a test within the meaning of Article 2 of Annex II to the Service Regulations. Rather, the consulting firm assisted the Selection Board in an advisory capacity pursuant to Article 5(3) of Annex II.

CONSIDERATIONS

1. The complainant joined the European Patent Office in 1985 and was at the material time Director of Contract and General Law.

2. In March 2005 a vacancy notice for the position of Principal Director in charge of Legal Services was advertised. It described the post's main duties and responsibilities and listed the minimum qualifications applicants were required to meet.

3. The complainant applied for the post on 19 April 2005 and by a letter of 6 July she was invited to attend an interview in September. On 25 July she was advised by e-mail that prior to the interview a day-long individual assessment would be conducted by a consulting firm. By an e-mail of 1 August the consulting firm invited her to attend the assessment scheduled for 31 August and gave her the details as follows:

> "The following program has been planned for you:
>
> First we will ask you to fill out several questionnaires. These will serve as the basis for an in-depth discussion which will take place during the afternoon. You will receive comprehensive feedback on our assessment findings the same day."

She attended the assessment and subsequently was interviewed by the Selection Board in September and October 2005.

4. On 14 November 2005 the complainant was informed orally that the President had decided to appoint another candidate to the position. She wrote to the President on 28 November requesting a formal reasoned decision regarding her candidacy.

5. By a letter of 29 November 2005 the Principal Director of Personnel informed the complainant that she had not been selected; however, no reasons were given. On 14 December the President replied to the complainant's letter of 28 November, informing her that it was common practice for line managers to provide feedback to unsuccessful candidates. That same day, pursuant to Article 106(1) of the Service Regulations, the complainant asked the Principal Director of Personnel to provide reasons for her non-selection. Specifically, she requested the list of candidates for the post, the Selection Board's assessment of her qualifications and the consulting firm's individual assessment.

6. On 8 February 2006 the Principal Director of Personnel met with the complainant and gave her feedback on the consulting firm's assessment and a copy of its report.

7. By a letter of 24 February 2006 the complainant asked the President to lift the decision of 29 November 2005, as well as any other related negative decisions, on grounds which included procedural flaws in the vacancy notice and in the individual assessment performed by the consulting firm, and the use of that assessment by the Selection Board.

On 24 April the Director of Personnel Management and Systems informed the complainant that the President had concluded that the selection procedure was carried out correctly. Accordingly, the matter had been referred to the Internal Appeals Committee.

8. The Committee issued its opinion on 26 November 2007. A majority recommended that the appeal be rejected. By a letter of 21 December 2007 the complainant was notified of the President's decision to dismiss the appeal in accordance with the majority recommendation of the Committee.

9. In the meantime, while her appeal was pending, the complainant had filed her first complaint with the Tribunal on 19 February 2007 claiming that the internal proceedings had not been

concluded within a reasonable time. In Judgment 2738 the Tribunal dismissed the complaint as irreceivable for failure to exhaust internal remedies.

10. The complainant now seeks a declaration that the recruitment procedure at issue is null and void. She asks the Tribunal "to lift the negative decision of 21 December 2007" and any other negative decision taken by or on behalf of the appointing authority in relation to that recruitment procedure "which may become known" during the proceedings before the Tribunal.

11. The EPO argues that the complaint is irreceivable in part because it raises a new claim for which the complainant has failed to exhaust internal remedies. In particular, it submits that the complainant did not ask the Internal Appeals Committee to declare the recruitment procedure null and void.

12. The Tribunal rejects this argument. The complainant's request for a declaration that the recruitment procedure is null and void is not a new claim. Instead it is the relief sought which flows from the claim of a flawed recruitment procedure, a claim that formed part of the appeal to the Committee.

13. The complainant submits that the selection procedure was flawed. The failure to indicate in the vacancy notice that there would be an individual assessment performed by a consulting firm and the failure to include the particular management skills that would be assessed by the firm constitute, in her view, a violation of Articles 2 and 5 of Annex II to the Service Regulations. She adds that it follows from the flaws in the notice that there was a lack of information concerning the kinds of tests the competition would be based on, as required by Annex II.

14. In rejecting this ground of appeal the Internal Appeals Committee found that, having regard to the responsibilities of the position, it would be presumed that the competition would be based on

both qualifications and tests; the complainant was not prejudiced by the fact that the individual assessment was not mentioned in the vacancy notice; all preselected candidates had undergone the same evaluation and interviews; the complainant was given ample notice of the individual assessment; and, as a Director, the complainant would have known that assessment centres were widely used by the Office in filling vacant managerial posts. The Committee also observed that Article 5(3) of Annex II to the Service Regulations permits the Selection Board to enlist the assistance of an adviser or advisers in assessing certain capabilities of the candidates and that, having regard to the complainant's senior position in the Office, she would have known that this was a widely adopted practice.

15. In addition to endorsing the Committee's reasons, the Organisation submits that as the consulting firm did not conduct any testing within the meaning of Article 2(1)(e) of Annex II to the Service Regulations the assessment did not need to be mentioned in the vacancy notice. The EPO points out that the consulting firm's mandate was "limited to establishing whether the candidates' qualifications fitted the relevant vacancy profile, and to detecting and evaluating possible shortcomings as regards their development and ability to learn". It maintains that the consulting firm was a "mere tool" to obtain input and expert information from an adviser, as provided in Article 5(3) of Annex II, with a view to facilitating the exercise of the Selection Board's authority. Additionally, the EPO argues that the complainant has failed to prove that she was prejudiced by the use of an assessment centre in these circumstances. It also emphasises, as noted by the Internal Appeals Committee, that the complainant has not suffered any injury from the application of the general practice to conduct competitions on the basis of qualifications and tests and the involvement of a consulting firm. Thus, the fact that the individual assessment was not expressly provided for in the vacancy notice cannot vitiate the selection procedure.

16. The Tribunal considers that the Internal Appeals Committee erred in law in finding that the failure to indicate that an individual

assessment would be performed by a third party in the vacancy notice did not constitute a breach of the applicable Service Regulations. In essence, the Committee found that, in view of the nature of the position being filled, the complainant's seniority and the widespread use being made of assessment centres, the complainant would have known that an assessment in such circumstances formed part of the selection procedure. The fundamental flaw in this reasoning is that these are irrelevant considerations in relation to the legal question as to whether the Service Regulations require the use of an assessment centre to be included in a vacancy notice.

17. Article 2 of Annex II to the Service Regulations requires that a notice of competition must specify, among other things, "the kind of competition (whether on the basis of either qualifications or tests, or of both qualifications and tests)" and "where the competition is on the basis of tests, what kind they will be and how they will be marked". As noted above, the EPO takes the position that the individual assessment performed by the consulting firm did not involve any testing, therefore, the assessment did not have to be mentioned in the vacancy notice. The Tribunal rejects this characterisation of the purpose of the assessment. According to the e-mail of 25 July 2005, one of the purposes of the assessment was "to undergo a professional and neutral appraisement […] especially with regard to personality and management requirements relating to the position". From this, it is evident that the assessment was aimed, in part, at testing and evaluating a candidate's managerial skills. Further, by taking the position that the Selection Board used the consulting firm as an adviser under Article 5(3) of Annex II, the EPO has, in effect, acknowledged that the assessment performed a testing function. Article 5(3) provides that the "Selection Board may, for certain tests, be assisted by one or more advisers".

18. As the individual assessment performed by the consulting firm was, at least in part, a testing mechanism, the failure to mention it in the vacancy notice constitutes a breach of Article 2 of Annex II. The EPO also asserts that, in many competitions in which an

assessment centre has been used in the past, it was not mentioned in the vacancy notice. The defendant has not adduced any evidence in support of this assertion and it will be disregarded. Although the EPO's guidelines concerning the use of assessment centres were only published after the competition at issue in this proceeding, the Tribunal observes that these guidelines recognise that the use of an assessment centre must be stated in the competition notice.

19. As the Internal Appeals Committee erred in law in finding that it was not necessary to include the use of an assessment centre in the vacancy notice, it follows that the President's decision endorsing this view involves an error of law. This error would ordinarily result in the impugned decision and the underlying selection procedure being set aside. However, having regard to the circumstances and the complainant's failure to demonstrate any link between the breach of the Service Regulations and the outcome of the process, the decision and the process will not be set aside. This should not be construed in any way as condoning the conduct of the EPO. In accordance with its power under Article VIII of the Statute, the Tribunal decides that the complainant is entitled to moral damages in the amount of 10,000 euros for the breach of the Service Regulations of the Office. In the circumstances, there is no need to consider the other arguments put forward by the complainant.

20. As the complainant succeeds in part, she is entitled to costs, which the Tribunal sets at 1,000 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant moral damages in the amount of 10,000 euros.
2. It shall also pay her costs in the amount of 1,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 3 November 2009, Mr Seydou Ba, 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 3 February 2010.

Seydou Ba
Agustín Gordillo
Dolores M. Hansen
Catherine Comtet