

107th Session

Judgment No. 2835

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr I. H. T. against the European Patent Organisation (EPO) on 29 November 2007, the EPO's reply of 10 March 2008, the complainant's rejoinder of 16 April and the Organisation's surrejoinder of 25 July, corrected on 10 December 2008;

Considering Article II, paragraph 5, 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's service history and the facts relevant to this case are to be found in Judgments 2457 and 2612 concerning his first complaint and his application for execution of Judgment 2457 respectively. Suffice it to recall that in his first complaint the complainant challenged the rejection of his appeal against the Selection Board's decision not to invite him for an interview in the context of competition TPI/3578 for several director posts at grade A5. In Judgment 2457, delivered on 6 July 2005, the Tribunal held that the absence of a member of the Board from the preselection

meeting constituted a formal flaw of the selection procedure. It accordingly set aside the impugned decision and referred the case back to the Organisation, in order for it to restore the complainant to the position in which he was prior to the preselection meeting and to examine his application in accordance with the applicable rules.

On 28 April 2006 a newly constituted Selection Board, chaired by Mr L., the Principal Director of Personnel, convened to consider the complainant's application for the post advertised in competition TPI/3578. Mr K., the Vice-President of Directorate-General 2 (DG2), who had previously acted as Chairman of the Board, participated as a member. The Board submitted its report to the President of the Office on 30 May 2006, again recommending that the complainant should not be invited to an interview. By letter of 28 July 2006 from Mr L. the complainant was informed that the Selection Board had considered his career development and qualifications and had decided that he did not meet the requirements set out in the vacancy note and therefore should not be invited to an interview. He was also informed that the President had decided to reject his application in accordance with that recommendation.

On 28 August 2006 the complainant appealed to the President against that decision, arguing that the statements contained in the letter of 28 July harmed his dignity and illustrated "the prejudice nurtured against [him]" by Mr K. and its catastrophic consequences for his career. He requested the setting aside of the Selection Board's report of 30 May, a review of the decision to reject his application for a director's post and moral damages. He also requested evidence substantiating the statements made and, in the absence of such evidence, an apology.

By letter of 13 October 2006 the Director of the Employment Law Directorate informed the complainant that after an initial examination the President had decided to reject his appeal and to refer the matter to the Internal Appeals Committee. On 19 June 2007 a hearing before the Committee took place, at which the complainant and a member of the Selection Board testified. The Committee rendered its opinion on 24 August 2007, recommending unanimously

that the appeal be dismissed as unfounded. On 31 August the complainant wrote to the President of the Office, stating that he had good reasons to believe that the Committee's opinion was based on political and not legal considerations. In early October 2007 the complainant informed the Chairman of the Committee that the transcript of the testimony of Mr M., who had appeared as witness before the Committee, was deficient. The Chairman replied that the Committee did not consider Mr M.'s response to be important to the outcome of the appeal.

By a letter dated 23 October 2007, which is the impugned decision, Mr L. informed the complainant that the President had decided to reject his appeal in accordance with the unanimous opinion of the Internal Appeals Committee. He added that the President considered that Judgment 2457 had been implemented correctly and that in his letter of 31 August the complainant had not put forward any arguments that had not already been considered by the Committee.

B. The complainant submits that the EPO did not review his application for a director's post in a fair and objective manner, thereby failing to implement Judgment 2457 properly. He contends that the Selection Board's review of his application contravened Articles 4(3), 49(7) and (10) of the Service Regulations for Permanent Employees of the European Patent Office and Annex II thereto, as well as the Tribunal's case law, which lay down objective criteria on the basis of which candidates for promotion should be assessed and the procedure to be followed.

The members of the Selection Board concluded that he did not have the necessary managerial skills without, however, having previously established precise and objective criteria or a specific method for assessing such skills and without having personal knowledge of him. Instead, the Board chose to ignore the meaningful and objective criteria set out in the vacancy note and to rely on a report from an interview he attended in 1999 – as confirmed by the witness testimony – thereby disregarding his subsequent career development and its obligation to decide every competition on its own merits. Furthermore, it again decided not to invite him to an interview in spite

of his outstanding staff reports, his seniority and his successful involvement in diverse tasks. In doing so, the Board not only approved the preferential treatment of other candidates but also overlooked material facts and drew plainly wrong conclusions from the evidence.

According to the complainant the Selection Board's decision was not taken in good faith and the statements contained in the letter of 28 July 2006, apart from being unsubstantiated, seriously damaged his career prospects. Furthermore, some members of the Board were prejudiced and biased against him. In particular, Mr K., who as a high-ranking official was readily supported by other members, had consistently refused to consider his applications for director posts and had also made false statements and highly prejudicial remarks.

The complainant also points to a number of procedural irregularities. Relying on the Tribunal's case law, he argues that the Principal Director of Personnel, Mr L., had no authority to act as Chairman of the reconvened Selection Board, which should have been chaired either by Mr K., the Vice-President of DG2, or by Mr H., the Vice-President of Directorate-General 1 (DG1). In his view, the Board's superficial examination of his case prevented the individual members from forming an independent opinion of his career development and qualifications. He contends that the Internal Appeals Committee did not assess the credibility of the witnesses and that it disregarded inconsistencies in their testimonies. It also failed to take duly into account his submissions.

The complainant asks the Tribunal to quash the impugned decision and to examine whether the EPO has "lawfully" implemented Judgment 2457, whether granting interviews to less senior, less experienced and less qualified candidates was in conformity with Article 4(3) of the Service Regulations, and whether the selection procedure was tainted with prejudice and bias. He also asks that the EPO specify the manner in which the Selection Board decided to evaluate the candidates' qualifications, in particular their managerial and communication skills. He requests that the statement concerning his skills and experience contained in the letter of 28 July 2006 be withdrawn and that the said letter be removed from his personal file.

He also requests that he be promoted to grade A5 or, alternatively, that he be granted material compensation in an amount “equivalent to [a] retroactive promotion”. He claims moral damages and costs.

C. In its reply the EPO submits that Judgment 2457 has been correctly executed and that accordingly the complaint is unfounded. Relying on the Tribunal’s case law, it argues that there is no acquired right to be appointed to a particular grade or step and that appointment decisions are at the discretion of the President and therefore subject to only limited review.

Referring to the complainant’s reservations as to the criteria used by the Selection Board for inviting candidates to an interview, it points out that the members of the reconvened Selection Board carefully considered his candidature, taking note of his education, his career development within the Office and his training experience. However, considering whether he had performed other additional activities involving tasks similar to those of a director, they found that he had not done anything specific enabling him to acquire management experience. The Organisation also emphasises that it was up to the members of the Board – who by virtue of their qualifications and position were able to recognise management potential – to assess whether a particular candidate had the necessary skills and knowledge to manage a directorate.

The defendant acknowledges that the Selection Board discussed the complainant’s interview report from 1999 – in line with its usual practice of also considering reports on earlier selection procedures – but denies that by doing so it disregarded its obligation to decide the competition on its own merits. It dismisses as unsubstantiated the allegation of preferential treatment, noting that many different criteria were taken into account by the Board when assessing the candidates. It similarly dismisses the allegations of prejudice and bias on the part of Mr K. and other members of the Board, and recalls that two Selection Boards with different compositions decided unanimously not to invite the complainant to an interview. Regarding his contention that Mr L., the Principal Director of Personnel, had no authority to act as Chairman of the Board, it refers to the Tribunal’s case law and

explains that since September 2004 selection procedures for director posts in DG2 in Munich have been organised by the Principal Directorate of Personnel and chaired by its Director.

D. In his rejoinder the complainant presses his pleas. Citing the case law, he asserts that a correct and fair competition is a prerequisite to the proper exercise of discretionary authority. In support of his allegation of preferential treatment, he refers to specific candidates who were promoted to director posts despite the fact that they did not meet all the requirements set out in the vacancy note. He accuses the members of the Selection Board, and especially Mr K., of discriminating against him and also of making defamatory statements, which eventually created a negative perception of him at the senior management level.

E. In its surrejoinder the EPO maintains its position. It submits that the crucial aspect in selecting a candidate for an interview for a director's post is his management potential. Without calling into question the complainant's considerable professional experience and excellent performance, the Selection Board properly exercised its discretion when it concluded that he was less qualified than other candidates. According to the Organisation, the complainant has failed to produce any evidence in support of his allegation that Mr K. made defamatory statements against him.

CONSIDERATIONS

1. Following the delivery of Judgment 2457, a newly constituted Selection Board held a preselection meeting to consider the complainant's application for the post advertised in competition TPI/3578. Mr K., the Chairman of the earlier Board, sat as a member and the position of Chairman was held by Mr L. The Board submitted its report to the President of the Office on 30 May 2006, unanimously recommending that the complainant not be invited for an interview. In addition to other comments, it stated:

“The Board took particularly into account that a director’s post requires managerial skills, well developed and proven human-relationship and communication skills. It therefore considered whether [the complainant] had performed other additional activities containing tasks similar to those of a Director like leading projects, managing JAB groups, deputising for a director, etc.

In view of the above, considering [the complainant’s] career development and qualifications in comparison to the other candidates, the Board came to the unanimous conclusion that he does not show the necessary level of management skills and experience and does therefore not meet the requirements set out in the vacancy notice. Therefore, the Selection Board decided anew not to invite [the complainant] for an interview.”

By letter of 28 July 2006 the complainant was informed that the President had accepted the recommendation of the Selection Board and had rejected his application. The complainant lodged an internal appeal against this decision.

He was subsequently informed that the President had decided to reject his appeal and that the matter had been forwarded to the Internal Appeals Committee for an opinion. The Committee issued its opinion on 24 August 2007 recommending that the appeal be dismissed as unfounded.

2. In early October 2007 the complainant informed the Committee that he believed the transcript of the testimony of Mr M., who had appeared as a witness before the Committee, was deficient. He stated that both he and his spouse, who had accompanied him to the hearing, had heard Mr M. respond in the negative to the question as to whether he had reviewed Judgment 2457.

A lawyer for the Committee replied that she had listened to the recorded tape of the examination and the answer described by the complainant was not audible. The complainant responded explaining his concerns relating to the presentation of his case before the Tribunal due to his assumption that Mr M.’s statement had been recorded.

On 9 October 2007 the Chairman of the Committee informed the complainant that the Committee considered Mr M.’s response not to be important to the outcome of the appeal and that no further action would be taken. He also advised the complainant that the matter would

remain an evidentiary question for the Tribunal and that the complainant could file an affidavit from his spouse if he wished.

In her affidavit of 12 October 2007, Mrs T. confirmed that she, like the complainant, had heard Mr M. answer in the negative.

3. By letter of 23 October 2007 the complainant was informed that, in accordance with the position advanced by the Office before the Internal Appeals Committee and the Committee's opinion, the President had decided to reject his appeal as unfounded and that she considered that Judgment 2457 had been implemented properly by the Organisation.

4. The complainant impugns that decision claiming that the EPO has failed to implement properly Judgment 2457. He also alleges various deficiencies in the competition process including the granting of interviews to less qualified candidates, bias and prejudice, violation of the Service Regulations and improper exercise of discretion on the part of the Selection Board. The Organisation denies the complainant's allegations and submits that it has fully implemented Judgment 2457.

5. It is well established that an organisation has a wide discretion in relation to the appointment and promotion of staff. For this reason, these decisions are subject to limited review. That is, the Tribunal will only interfere if the decision was taken without authority; if it was based on an error of law or fact, some 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).

6. The complainant takes issue with the composition of the Selection Board. He points out that Mr K., the Vice-President of DG2, served as Chairman of the first Selection Board; however, the composition of the Board changed and Mr K. sat as a member of the second Selection Board, and Mr L., the Principal Director of

Personnel, chaired the Board. The complainant submits that compliance with Judgment 2457 required that Mr K. or Mr H., the Vice-President of DG1, serve as chair. He relies on Judgment 1549, under 12, where the Tribunal stated that “[...] after the process of selection has begun the terms of competition may not be changed [...]”.

7. The Tribunal rejects this argument. First, the complainant’s reliance on Judgment 1549 is misplaced. While the cited passage does refer to a selection decision, the composition of the Selection Board is not one of the “terms of competition”. The composition of the Board has not modified the terms under which the complainant’s application was considered. It should also be noted that the Organisation’s reliance on Judgment 767, under 9, is equally misplaced. The cited passage concerns the interpretation of a provision of the Service Regulations and has no bearing on this issue.

8. The Tribunal finds that, as stated by the Internal Appeals Committee, the change in Chairman was not arbitrary and, in fact, was a change that had been implemented in 2004 for administrative reasons. Further, there is nothing to support the argument that the complainant was prejudiced by the change in the composition of the Selection Board. As well, the allegation of prejudice against him on the part of Mr K. is not substantiated. The Tribunal also observes that the complainant has not offered any rationale for his statement that the Board could have been chaired by Mr H., the Vice-President of DG1.

9. The complainant advances a number of allegations that generally fall within his assertion that the Selection Board’s decision not to invite him to an interview was not based on precise and objective criteria. Relying on Article 49 of the Service Regulations, he takes the position that the Selection Board “had no justification for disregarding the merits reflected” in his staff reports. Based on the testimony of a member of the first Selection Board and given the absence of any negative comments from a principal director or a supervisor, he argues that “only issues of personality or personal

prejudice may have occasioned the Selection Board's negative recommendation".

10. He submits, based on the testimony of Mr M., that the sole reason for the decision not to invite him to an interview was an opinion that had been expressed about him following a previous interview in 1999. In his view, this is a failure on the part of the Board to examine and compare the merits of the candidates independently. The Tribunal observes that a review of the transcript does not support the complainant's account of the testimony.

11. The complainant also asserts that some of the promoted candidates had no opposition experience despite this being an identified criterion in the vacancy note; that seniority was not properly considered; that the President of the Office has acknowledged that the selection procedure was deficient; and that he was informed that the Selection Board was convinced of the rightfulness of his case but a different opinion was expressed in writing.

12. The complainant contends that two of the members of the initial Selection Board failed to consult his supervisors prior to making the finding that he lacked managerial skills. He states that it can be assumed that the second Selection Board suffered from the same lack of information. He makes allegations that certain members of the Selection Board were influenced by Mr K. Further, he alleges discrimination on the part of Mr K. based on the promotion of another individual.

With regard to the Internal Appeals Committee, he alleges that it carried out a one-sided investigation in favour of the Organisation.

13. In the Tribunal's view, the complainant's arguments are not convincing; they are undermined by the failure on his part to put forward in his application information regarding his managerial abilities. Nor has he put forward, in his submissions regarding his managerial skills, any evidence that would call into question the

Selection Board's assessment. Instead he has relied on unsubstantiated allegations and speculation.

14. As to the complainant's allegation that candidates without opposition experience were promoted, it has not been substantiated either; it is therefore rejected. In terms of the argument concerning candidates having less seniority being selected for an interview, there is nothing inherently wrong with the promotion of a candidate having less seniority where specific skills are required for a position.

15. Lastly, the allegations of bias, prejudice and lack of impartiality are premised on inferences that are not factually grounded, misreading of testimony, and conclusions not supported by the evidence.

16. The Tribunal concludes that as the complainant has failed to establish any reviewable error the complaint must be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2009, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba
Mary G. Gaudron
Dolores M. Hansen
Catherine Comtet