T. (No. 16)

v.

EPO

120th Session **Judgment No. 3536**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixteenth complaint filed by Mr I. C. T. against the European Patent Organisation (EPO) on 18 March 2011, the EPO's reply of 4 July, the complainant's rejoinder of 2 August and the EPO's surrejoinder of 7 November 2011;

Considering the applications to intervene filed by Mr P. T. and by Mr A. K. on 4 August 2011 and the EPO's comments thereon of 23 September 2011;

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 sixteenth complaint before the Tribunal the complainant is challenging the final selection decision taken by the President of the European Patent Office – the EPO's secretariat - on competition TPI/4136. In his fourth complaint he challenged the pre-selection decision on that same competition, that is, the decision not to invite him to an assessment or an interview. In Judgment 2834, delivered on 8 July 2009, the Tribunal considered that the complainant's challenge to the pre-selection decision was receivable but unfounded on the

merits. It thus dismissed the complainant's fourth complaint on the ground that the decision not to invite him to an assessment was not tainted by reviewable error.

For the purposes of this sixteenth complaint presently before the Tribunal, it is useful to recall that on 31 August 2005 the President confirmed by telephone the Selection Board's list of selected candidates in competition TPI/4136. Their nomination was subsequently announced through a "Note to all DG1 [Directorate General 1] staff" issued by the Vice-President's Office for DG1 on 8 September 2005. On 6 October 2006 the complainant filed an internal appeal against the decision of 31 August 2005 (appeal RI/143/06) "in order to avoid any loss of right" in the event that his earlier appeal against the pre-selection decision (appeal RI/58/05) was considered irreceivable, given that in its position paper of 28 September 2006 on appeal RI/58/05 the EPO had raised an objection to receivability.

After holding a hearing on 18 June 2010, the Internal Appeals Committee (IAC) rendered its opinion on appeal RI/143/06 on 2 December 2010. It recommended unanimously that the appeal be dismissed as inadmissible and unfounded. By a letter of 26 January 2011, the complainant was informed of the decision to dismiss his appeal against the President's final selection decision on competition TPI/4136 as irreceivable. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to proceed directly with the examination of his internal appeal filed on 6 October 2006 (appeal RI/143/06) on its merits. He also asks the Tribunal to award him appropriate compensation for the moral damage which he suffered as a result of the EPO's delay in dealing with his complaint and its having made false submissions to the IAC and the Tribunal in the context of other proceedings which may have a bearing on the outcome of the present complaint. He claims 3,000 euros in costs.

The EPO invites the Tribunal to reject the complaint as irreceivable and, subsidiarily, as unfounded. It asserts that there is no evidence of unlawful conduct on the part of the EPO and that the

complainant's claims for damages and costs must therefore be rejected. It asks the Tribunal to dismiss the applications to intervene.

CONSIDERATIONS

1. The background to this complaint can be found in Judgment 2834, in which the Tribunal ruled on the complainant's fourth complaint impugning the decision of the President of the Office, dated 14 May 2007, to reject his appeal RI/58/05 as irreceivable, on the basis that it only challenged the decision of the Selection Board not to invite him to attend the assessment centre, and not the President's final selection decision on competition TPI/4136, "thus failing to exhaust all available means of redress", and also to reject it, in accordance with the IAC's unanimous opinion, as unfounded. The Tribunal found that the impugned decision was to be considered a decision within the meaning of Article 106(1) of the Service Regulations for Permanent Employees of the European Patent Office and that the complaint was receivable to the extent that it was directed against the decision not to invite the complainant to an assessment. The Tribunal rejected the complainant's allegation of unequal treatment, found that there were no flaws in the selection process which would vitiate the decision, and dismissed the complaint in its entirety.

2. In the present complaint the complainant impugns the decision of 26 January 2011, taken by delegation of power from the President and in accordance with the unanimous opinion of the IAC, to reject as irreceivable the complainant's appeal against the President's telephone confirmation on 31 August 2005 of the list of candidates selected in competition TPI/4136 and the final adverse decision on the complainant's candidature for an A5 post which it implicitly entailed. The complainant also asserts that new facts confirm the veracity of his earlier submission that the EPO's arguments were largely based on irrelevant facts, which was not accepted in Judgment 2834. He requests an oral hearing, stating the following: "Looking back at the events around the internal litigation

procedures concluded with the Tribunal's Judgments 2834 and 2835 it could be presumed that for the proper evaluation of the testimonies of the heard witnesses it would have been helpful, if the hearings had taken place directly before the Tribunal instead [of] before the Internal Appeals Committee or if at least oral explanations could have been given to the Judges of the Tribunal, who cannot have an overview of the reality existing in the individual International Organizations." He requests the Tribunal to set aside the decision of 26 January 2011, to examine his internal appeal directly on the merits, to award him moral damages for the delay in the proceedings and to award him costs in the amount of 3,000 euros.

3. The complainant raises no issue that would justify an oral hearing. The present complaint turns essentially on questions of law and the complainant had the opportunity to express himself in the hearings before the IAC and fully in writing before this Tribunal. Thus, the request for oral proceedings is denied.

4. It is true that, according to the case law, any official of an international organisation who is eligible for a post may challenge an appointment to that post, regardless of her or his chances of successful appointment to it, provided that she or he has applied for the post and thus has a cause of action (see Judgments 3449, under 2, and 2959, under 3). In the present case, however, the complainant, who had applied for competition TPI/4136, was eliminated from that competition at the pre-selection stage. Although he contested the decision to eliminate him in the complaint leading to Judgment 2834, the Tribunal found that decision to be lawful. The Tribunal further notes that any internal appeal against the final appointments would have been time-barred (and the subsequent complaint irreceivable), as he did not contest within three months the President's confirmation of the selected candidates (and thereby his implicit non-selection), which, according to the evidence on file, had been published via the intranet by 18 October 2005; indeed, he filed his internal appeal nearly a year later.

5. The complainant's claim of new facts which were allegedly not considered by the Tribunal in the proceedings leading to Judgment 2834 amounts to an application for review of that judgment. It is therefore appropriate that it be treated as such (see Judgments 2993, under 9, and 3078, under 6). As provided in Article VI of the Statute, the Tribunal's judgments are final. Accordingly, they are subject to the application of the principle of *res judicata* and will only be reviewed in exceptional circumstances and on limited grounds, that is, failure to take account of particular facts, a mistaken finding of fact that involves no exercise of judgement, omission to rule on a claim, or the discovery of some new fact which the complainant was unable to invoke in time in the earlier proceedings. A new fact is a fact on which the party claiming it was unable to rely through no fault of its own; it must be a material fact likely to have a bearing on the outcome of the case (see Judgment 3197, considerations 2 and 4, and the case law cited therein).

The complainant asserts that a number of additional issues concerning the lawfulness of the selection procedure were raised in the proceedings leading to Judgment 2834 but were not dealt with by the Tribunal in that Judgment and hence cannot be said to be *res judicata*. He submits that the testimony of Mr T. H. (the Vice-President of DG1) taken in the course of another of the complainant's internal appeals confirmed that in all selection proceedings in which Mr T. H. had taken part, only the statutorily foreseen documents had been made available to the Selection Board and not the reports to the President issued during earlier selection procedures. He further states that the Vice-President's declarations confirm the validity of the written statements made by the complainant to the Tribunal in the earlier proceedings leading to Judgments 2834 and 2835 and that they re-open the question of the credibility of the submissions of the EPO and of the independence of the IAC's Chairman. The complainant believes that the wording of consideration 9 of Judgment 2834 makes it clear that the Tribunal was convinced that an earlier evaluation of his qualifications contained in a report relating to a previous competition (TPI/3793) had played a "catalytic role" in the Selection Board's discretionary decision not to send him to the assessment centre and

that, in the Tribunal's opinion, it did not matter whether the report for TPI/3793 had been written in good faith or not. He also contests the composition of the Selection Board in competition TPI/4136 and that of the IAC which considered his appeal leading to Judgment 2834 (appeal RI/58/05).

6. The Tribunal points out that in consideration 14 of Judgment 2834 the Tribunal confirmed that "the complainant has advanced a number of other allegations including allegations of partiality and bias on the part of the decision-makers. The attempts to support the allegations are based on speculation and conjecture and are without merit". This shows that in Judgment 2834 the Tribunal did take account of his further allegations and not only on the issues of receivability and the pre-selection decision. As to the allegations of lack of good faith, the Tribunal reminds the complainant that bad faith must be proven and cannot be assumed. The fact that the complainant disagrees with the Selection Board's weighing of the candidates' skills and abilities, and later with the IAC's and the Tribunal's assessment of that process, does not prove that any of these assessments were unlawful. As to the alleged existence of new facts emerging from the testimony of Mr T. H., the Tribunal notes that the testimony of Mr T. H. does not contradict the testimonies of the members of the Selection Board who were questioned about the pre-selection procedure for competition TPI/4136. In his testimony, Mr T. H. starts by explaining that he is speaking in a "general nature" because he does not keep files and notes after the selection process has ended. He goes on to describe the basic files that are received by members of the Selection Board and adds that "[he also usually gets] additional information because not everything can be put down in writing". The testimony of Mr T. H. does not contradict what was said in the two specific witness testimonies (that the reports from previous selection procedures were available to the Selection Board and that they were taken into account in the pre-selection process) considered by the Tribunal in the case leading to Judgment 2834. Thus this "new fact or evidence" does not warrant a review of the judgment. Further, the Tribunal notes that the complainant cannot now contest the composition

of the Selection Board for competition TPI/4136 and that of the IAC for his previous appeal (appeal RI/58/05). Those claims could only have been brought during the original internal appeal or at the latest, in the complaint leading to Judgment 2834. Such claims are thus irreceivable in the present complaint.

7. Considering the above, the complaint is irreceivable and will accordingly be dismissed in its entirety. Thus, the complainant has no right to an award of moral damages and he must bear his own costs.

8. As the two officials who filed applications to intervene are not in a similar situation in fact and in law to the complainant, their applications must be dismissed.

DECISION

For the above reasons,

1. The complaint is dismissed.

2. The applications to intervene are also 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