

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

B.
v.
EPO

134th Session

Judgment No. 4552

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr F. B. against the European Patent Organisation (EPO) on 6 March 2019, the EPO's reply of 8 July, the complainant's rejoinder of 20 September 2019, the EPO's surrejoinder of 6 January 2020 and the complainant's further submissions of 9 May 2022 concerning a document provided by the EPO at the Tribunal's request;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the decision not to select him for the post of director of the Language Service.

The complainant joined the European Patent Office, the EPO's secretariat, in 1987. In 2008 a selection procedure was initiated for the post of director of the Language Service at grade A5. The complainant, who at that time held grade A4, submitted an application and was shortlisted, but he was not selected in the end.

In December 2014 a new vacancy notice (EUR/5742) was published for the same post of director of the Language Service. The complainant applied on 19 January 2015, together with 168 other candidates. In an

email of 4 February 2015 the complainant was informed of the Selection Board's decision not to advance his application any further. By a letter of 3 March 2015 he requested a review of that decision. That request was rejected by a letter of 5 May 2015.

In the meantime, none of the six shortlisted candidates was appointed to the vacant post. In fact, only two of those candidates had been recommended by the Selection Board, and they had withdrawn their applications (see the additional evidence submitted by the EPO: an extract from the report of the Selection Board in procedure EUR/5742). The Office then decided to fill the post of director of the Language Service by internal transfer. Thus, a new vacancy notice (TRF/5845) was published on 24 June 2015. As the internal transfer procedure is restricted to employees who already hold the grade of the post to be filled, the vacancy notice was aimed solely at employees holding grade A5. An appointment to the post in question was eventually made following that procedure, from which the complainant was excluded on account of the fact that he did not hold a post of that grade in the Office.

On 24 July 2015 the complainant lodged an internal appeal against the decision of 5 May 2015 rejecting his request for review. After hearing the parties on 23 May 2018 the Internal Appeals Committee (IAC), in its report dated 17 October 2018, unanimously recommended that the appeal be rejected as unfounded.

By a letter of 6 December 2018, the Principal Director of Human Resources decided, by delegation of power from the President of the Office, to endorse the IAC's opinion and reject the complainant's internal appeal as unfounded. That is the impugned decision.

The complainant asks the Tribunal to award him 94,584 euros in material damages, representing the difference between the basic salary for his present grade, G13, step 5, in the Office's new career system, and the basic salary he would have received if he had been appointed in 2015 to the disputed post at grade G14, step 2, until his retirement. That sum also includes an adjustment of the amount of his retirement pension on the basis of 14 years of pension contributions at a rate of 50 per cent. The complainant further seeks moral damages in the amount of 5,000 euros for what he describes as "manifest abuse" and "repeated

and intentional bias” on the part of the Organisation. In his rejoinder, the complainant asks the Tribunal to set aside the impugned decision and find that procedure TRF/5845 was unlawful.

The EPO asks the Tribunal to dismiss the complaint as unfounded in its entirety and to reject the claims for compensation.

CONSIDERATIONS

1. In his first plea, the complainant submits that various flaws affected the conduct of the selection procedure for the post of director of the Language Service. He argues that the EPO did not properly consider his application and thereby breached its duty of care. He adds that, unlike the two shortlisted candidates who eventually declined the position, he would have accepted the post of director of the Language Service had it been offered to him. Lastly, he contends that gender-based discrimination was intentionally committed by favouring applications from women candidates as a matter of principle.

The EPO submits, firstly, that the President of the Office, as the appointing authority, has broad discretion; that an employee does not have a right to be selected for a post; and that the complainant has not established, in this case, that his application was plainly superior, or at least equal in merit, to those of the shortlisted candidates. Secondly, it submits that the Selection Board properly considered the complainant’s application, bearing in mind that his shortlisting in 2008 did not confer any rights on him, and that the Selection Board duly evaluated all aspects of the complainant’s application. Thirdly, the Organisation contends that the complainant does not appear to have been better qualified than the candidates shortlisted to continue the procedure in an assessment centre. Lastly, it submits that the decision not to shortlist the complainant complies with the principle of non-discrimination.

2. At the outset, the Tribunal recalls its case law under which an organisation has wide discretion in appointing or promoting staff. Such a decision is therefore subject to only limited review by the Tribunal, which will interfere only if the decision was taken without authority, if

it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, if a rule of form or procedure was breached or if there was abuse of authority (see, in particular, Judgments 2060, consideration 4, 2457, consideration 6, 2834, consideration 7, and 4019, consideration 2). It is therefore appropriate to consider the complainant's various contentions in support of his first plea in the light of this case law.

3. As grounds for the allegation that his application was not properly considered, the complainant submits that the Selection Board did not take account of his successful participation in a previous selection procedure organised to fill the same post in 2008.

The Tribunal considers, however, that the fact that a candidate has already been shortlisted in a previous selection procedure for the same post does not of itself imply that the candidate should necessarily be shortlisted in a subsequent selection procedure for the same post. The candidate's career progression between the two selection procedures, the organisation's evolving needs and changes in its approach to selecting management staff, and the fact that the candidates applying are not necessarily the same, are all factors that, taken individually or considered in combination, might explain why a candidate who was shortlisted in the first procedure is not in a subsequent one. This is especially so when an interval of almost seven years separates the two selection procedures.

In the present case, the Tribunal observes that, in the application he submitted in 2015, the complainant did not mention that he had already been shortlisted on the basis of an application previously submitted in 2008. The complainant argues that this was because the EPO should necessarily have been aware of that fact, but the Tribunal considers that, if the complainant took the view that the previous shortlisting was an important aspect to take into consideration in respect of his application, he might have been expected to make explicit reference to it in support thereof.

Insofar as the complainant observes that the Selection Board was wrong to consider that the "challenges" facing the Language Service and its needs had changed considerably since 2008 whereas its three

principal tasks had stayed the same, the Tribunal notes that the IAC considered, for the reasons explicitly stated in its opinion, that the EPO had argued persuasively that the Language Service's needs and the profile required for the post of its director had changed considerably since 2008, which was why the IAC did not see any valid reason for shortlisting the complainant solely on the basis of the selection procedure that took place in 2008. This leads to two findings. Firstly, contrary to what the complainant submits, the EPO did not ignore his shortlisting in the 2008 procedure. Secondly, in support of his contention, the complainant does not put forward any specific arguments capable of calling into question the EPO's assessment made on the basis of the IAC's opinion. Moreover, the circumstances that a new career system had operated in the EPO since 1 January 2015 and a new competency framework had been established, placing greater emphasis on managerial-type responsibilities, confirm that the complainant's reference to the competition held in 2008 is irrelevant.

To the extent that the complainant also contends that his entire career was not properly taken into account when his application was examined, including during the internal appeal procedure, the Tribunal considers that there is nothing in the file to suggest that such was the case. This contention is therefore unfounded.

Lastly, the complainant's assertion that it is incomprehensible why an application from an external candidate was shortlisted whereas an application from an internal candidate is obviously stronger and ought therefore to have received the EPO's special consideration, is based on circular reasoning, not on any tangible evidence submitted by the complainant. This contention cannot be accepted.

4. The complainant further argues that if he had been shortlisted at the same time as the two internal candidates who were, even if he had ultimately been ranked below them, he could nevertheless have been appointed to the post at issue as they both withdrew their applications.

This argument is, however, completely irrelevant since, as discussed above, the complainant has not established that the decision not to shortlist him was unlawful.

5. The complainant contends that it is apparent from the conduct of the selection procedure that, from the outset, the EPO wished to select only women candidates for the post to be filled and that the initial intention was to appoint a woman to head the Language Service. According to him, there was thus a clear intention to discriminate on the basis of gender, which is unacceptable.

As the Tribunal found above that the decision not to shortlist the complainant was lawful, it likewise finds that the discrimination on the basis of gender alleged by the complainant cannot be considered as established in the circumstances of the case in the light of the evidence submitted by the parties, including at the Tribunal's request. The Tribunal observes in this regard that four of the shortlisted candidates were women and two were men. Furthermore, although the first candidate presented by the Selection Board was female, the second was male. The complainant's argument that the EPO wished to favour applications from women candidates is therefore not established.

6. The complainant submits a new plea in his rejoinder. He argues that the EPO failed to take account of an essential fact, within the meaning of the Tribunal's aforementioned case law, when considering his application and thereby breached its duty of care. According to him, the Selection Board did not take account of specialist training that he had undertaken at the Office's invitation in 2008 in order to improve his communication and managerial skills.

Given that the Selection Board had the complainant's personal file before it, the Tribunal fails to see how it could have been unaware of the completion of this specialist training in 2008.

This last contention is unfounded.

7. It follows from the foregoing that the complainant's various contentions in support of his first plea must be dismissed.

8. In his second plea, the complainant submits that the decision to initiate in June 2015 an internal transfer procedure to fill the post of director of the Language Service, which had the effect of automatically

excluding him from that procedure, is fundamentally flawed. In his view, there was no justification for the changes in the eligibility criteria for candidates in comparison with the selection procedure and the fact that a university qualification or experience in translating or interpreting was no longer required, whereas the competencies expected of the incumbent could not have changed in the few months that had passed between the two procedures. In the complainant's opinion, this amendment of the criteria can only be explained by the EPO's intention to reserve this "made-to-measure post" for a director in Directorate-General 5 who had a disagreement with the President of the Office and so had to be transferred. The complainant regards this as evidence of a formal flaw or even misuse of authority. He further contends in his rejoinder that the vacancy notice was unlawful in that it did not contain a list of "minimum qualifications", contrary to the usual practice of the EPO and other international organisations.

9. The selection criteria were indisputably amended between the selection procedure and the transfer procedure. As the complainant points out, the criterion of translation or interpretation skills was not included in the vacancy notice for the second procedure.

However, like the IAC in its opinion of 17 October 2018, the Tribunal considers that, when an initial selection procedure is unsuccessful owing to a lack of suitable applications, it is for the competent authority to decide if a new selection procedure must be initiated and, if so, which of the procedures provided for in the applicable rules is to be used (see, to this effect, Judgments 1223, consideration 31, 1771, consideration 4(e), 1982, consideration 5(a), 2075, consideration 3, and 3647, consideration 9). In the present case, the procedure for internal transfers at the same grade within the EPO is expressly provided for in the first indent of Article 4(1) of the Service Regulations for employees of the Office.

Moreover, the Tribunal considers that the EPO has adequately explained, both in the internal procedure and in its submissions to the Tribunal, why it ultimately decided between the two procedures to prioritise managerial competencies and, as a result, to use an internal transfer restricted to candidates who already held grade A5.

It is true that the “minimum qualifications” section was removed between the two vacancy notices. However, that was because the procedure in question was no longer an open selection procedure involving both internal and external candidates, but a transfer procedure, which requires candidates to hold the grade needed for the vacant post already, and hence to possess already the minimum qualifications necessary. The Tribunal points out that, under its case law, misuse of authority may not be presumed and the burden of proof is on the party that pleads it (see, for example, Judgment 4283, consideration 9, and the case law cited therein). In this case, the complainant has not produced any evidence to substantiate these allegations. This plea will therefore be dismissed.

10. It follows from the foregoing that the complainant’s various contentions in support of his second plea must be dismissed as unfounded, without there being any need to rule on the EPO’s objection to receivability.

11. The complaint must therefore be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 4 May 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ