

The Administrative Tribunal,

Considering the second complaint filed by Mr E. W. against the European Patent Organisation (EPO) on 22 June 2006 and corrected on 27 July, the EPO's reply of 18 October, the complainant's rejoinder of 14 December 2006 and the Organisation's surrejoinder of 5 February 2007;

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, a Swiss national born in 1947, joined the European Patent Office, the EPO's secretariat, in 1980 as an examiner at grade A2. He was promoted to grade A3 and grade A4 in 1982 and 1987 respectively. In 1989 he became a director at grade A5. He was Head of Examining Directorate 2.1.04 until 31 August 2000, and as from 1 September 2000 he was appointed Head of Examining Directorate 2.1.19. In the period from 1 November 1997 to 31 December 2001, he also acted as the permanent deputy of the Principal Director of Chemistry (PD2.1). When the latter retired on 31 December 2001, the complainant was called upon to carry out the duties of the post on an interim basis until 30 April 2002. With effect from 1 January 2004 he was transferred to Directorate-General 3 (DG3). In addition, he was a member of the EPO's Internal Appeals Committee from 1986 to 1989 and again from 1997 to 2004.

In response to vacancy notice INT/EXT/1166 of December 2001 advertising three principal director posts at grade A6, the complainant applied for the post of Principal Director in Directorate-General 2 (DG2) on 31 January 2002. He was interviewed on 11 March by a Selection Board consisting of five members, including Mr K., Vice-President of DG2. By a letter of 6 May 2002 he was informed by the Principal Director of Personnel that he had not been selected. In January 2003 two further principal director posts were advertised in internal vacancy notice TPI/3614. The complainant again applied for a post in DG2. By a letter dated 18 March 2003 the Principal Director of Personnel informed him that his application had not been successful.

In a meeting with his immediate superior, Mr H., on 16 May 2003 the complainant objected to the fact that despite his requests he had not received any feedback on his applications. A few days later, on 20 May, after consulting with Mr K., Mr H. gave the complainant a verbal summary of the Selection Board's assessment of his merits in connection with his application for vacancy INT/EXT/1166. By a letter of 23 May to Mr K., the complainant remarked on the delay with which he had been provided with a response and on the contrast between the Selection Board's assessment and the feedback on his work he had been receiving until then. He also expressed concern about the Board's reservations regarding his professional profile and requested a written confirmation of the assessment he had been given orally by Mr H., as well as a staff report covering a period of at least six years. In his reply of 5 June, Mr K. told the complainant that the oral summary he had received from Mr H. was valid, and that in the Selection Board's assessment his managerial profile did not correspond to that required for principal directors. He added that the complainant's request for a staff report would be forwarded to Directorate-General 4 (DG4).

In a letter to Mr K. dated 12 July 2003, the complainant expressed the view that both the Selection Board's assessment of his merits and the manner in which that assessment had been communicated to him contravened the principles laid down in the Service Regulations for Permanent Employees of the European Patent Office (hereinafter "Service Regulations"). He requested that a review of his case be carried out for the purpose of remedying the situation. Mr K. returned that letter with a handwritten comment assuring the complainant that "this [would] not arise again". On 28 July the complainant wrote an e-mail to the Principal Director of Personnel explaining that his request for a staff report was linked to the Selection Board's assessment, against which he intended to lodge an appeal if no action was taken to correct it.

On 10 August 2003 the complainant appealed the assessment of merits made by the Selection Board for vacancy

INT/EXT/1166. He argued that the assessment was flawed because of procedural irregularities, errors of fact, non-consideration of essential facts, abuse of authority and prejudice. He requested that the Selection Board's report be placed in the appeal file, that its assessment be withdrawn and that a proper staff report be drawn up. He also claimed moral damages and costs. By a letter of 23 October the ad interim Head of the Employment Law Directorate notified the complainant that the President of the Office considered the selection rules to have been correctly applied and that he saw no reason for a staff report to be drawn up. The matter had therefore been referred to the Internal Appeals Committee. On 22 December 2003 the complainant wrote to his immediate superior asking that a formal staff report be established for 2003. He sent a reminder on 22 April 2004. Having received no reply to his initial request or the reminder, he lodged a second appeal challenging the implied decision to reject his request for a formal staff report. He asked that a proper staff report be established and sought compensation for the material and moral damages he had incurred. The two appeals were subsequently joined by decision of the Internal Appeals Committee.

At the Committee's request, the Office submitted anonymised versions of the Boards' reports on the two competitions. In its opinion of 12 January 2006, the Committee recommended by a majority that a staff report be drawn up for 2002 and 2003 and that the complainant's costs be reimbursed, but that the appeal be otherwise dismissed as unfounded. One member of the Committee held in his dissenting opinion that the Promotion and Selection Boards had not adhered to the applicable Service Regulations and Circulars and that the complainant's claim for moral damages should also be allowed. By a letter of 23 March 2006 the complainant was informed that the President of the Office had decided to endorse the majority opinion. That is the impugned decision.

B. The complainant contends that he was deprived of his right to have his applications for vacancies INT/EXT/1166 and TPI/3614 considered in good faith, according to the set procedure and the basic rules of fair competition. In support of his contention, he puts forward four pleas.

First, he submits that the selection procedures for both competitions were tainted with a number of flaws, resulting in an incorrect assessment of his merits. He argues that, in the case of vacancy INT/EXT/1166, the Selection Board did not consider any staff reports as a result of which it was prevented from carrying out an objective evaluation of all candidates in breach of the principle of equal treatment. He contends that the report drawn up by the Selection Board was flawed because it did not contain an assessment of his merits against the criteria set out in the vacancy notice, nor an indication of the evidence underlying that assessment. Furthermore, different criteria were applied in the appraisal of each candidate, and the evaluation was made in a purely subjective manner without reference to facts or evidence.

The complainant further submits that the Promotion Board for vacancy TPI/3614 relied on the earlier report drawn up by the Selection Board for vacancy INT/EXT/1166. The dissemination of that report without his consent not only constituted a breach of the "obligation of secrecy" under Article 6 of Annex II to the Service Regulations, which provides that "[t]he proceedings of the Selection Board shall be secret", but also compromised the objectivity of the Promotion Board for vacancy TPI/3614. He contends that a copy of the report drawn up for vacancy INT/EXT/1166 should have been included in his personal file and that the fact that it was not amounts to a breach of due process.

Second, the complainant asserts that the manner in which he received feedback on his applications was unacceptable. He argues that Mr K. acted in breach of the "obligation of secrecy" when he disclosed details of the proceedings before the Selection and the Promotion Board to a third party, namely Mr H. He emphasises that the disclosure of information on his assessment adversely affected his working relationship with Mr H. and impaired his dignity and good name. Another aspect of the feedback process that he considers unacceptable is the discrepancy between the account given by Mr H. on 20 May and that provided by Mr K. later on; he notes that the Organisation has not provided a plausible explanation for this discrepancy.

Third, he asserts that Mr K. decided to prevent him from applying for other posts at grade A6 and from participating in further training. In his view, these decisions represent an abuse of authority since, under Article 49(10) of the Service Regulations and Article 5(2) of Annex II thereto, the authority to examine applications lies with the competent Board. The complainant also alleges bias on the part of Mr K. While praising his work when he was performing the duties of Principal Director in PD2.1, he was at the same time, as a member of the Selection Board for vacancy INT/EXT/1166, denying his ability formally to assume the duties of principal director and even concealing the fact that he was actually assuming them.

Fourth, he contends that the defendant failed to deal with his case in a timely and diligent manner. He recalls that the interview for vacancy INT/EXT/1166 was held in March 2002 and that it was only in May 2003 that he received some oral feedback on the reasons why his applications had been unsuccessful. Subsequently, it took the Organisation almost three years to conclude the internal appeal proceedings and to provide him with a final decision. Similarly, the EPO has not yet provided him with the requested staff report for 2002 and 2003. He believes that the EPO intentionally obstructed the proceedings so as to prevent them from being concluded within a reasonable time, and submits that as a result of the delay he has suffered injury warranting redress.

The complainant asks the Tribunal to set aside the impugned decision to the extent that it dismissed his appeal and to quash the assessments of his merits made in connection with his applications for vacancies INT/EXT/1166 and TPI/3614. He requests that the case be remitted to the EPO for a new assessment of his merits for the period until 31 December 2003. He also claims moral damages and costs.

C. In its reply the EPO dismisses the contention that the selection procedure for vacancy INT/EXT/1166 was tainted with flaws and therefore resulted in an incorrect assessment of the complainant's merits. It submits that the vacancy notice satisfied the requirements governing the content of competition notices set out in Article 2, Annex II, to the Service Regulations because it indicated that the successful candidate would be required to perform overall management of a principal directorate; it was thus evident that enhanced managerial skills were required.

The Organisation rejects the allegation that the Selection Board did not give due consideration to the complainant's experience as deputy and acting Principal Director. The Selection Board was aware of the duties he had performed and the abilities he had demonstrated over recent years. The EPO emphasises that a principal director post at grade A6 is subject to higher demands than that of a director. Even if the complainant had thus far carried out all the duties assigned to him to the complete satisfaction of the Organisation, the Selection Board was not compelled to consider him as a suitable candidate. In the EPO's view, there is no implication that the Board exercised its discretion incorrectly when carrying out its assessment. The Organisation also points out that earlier appraisals referred to his work as an interim Principal Director whereas the Selection Board was assessing his suitability for the post on a long-term basis and in comparison to other candidates. In any event, established precedent has it that an assessment is not subject to substantive review and cannot be replaced by that of the Tribunal.

The Organisation dismisses as unfounded the complainant's objections concerning the proceedings before the Selection Board. It argues that it is up to the Board to decide how to proceed with regard to the selection of the candidates to be interviewed and which documents to consult. In the case of vacancy INT/EXT/1166, the Selection Board included three Vice-Presidents and hence was capable of appreciating the complainant's past performance and merits without the need for staff reports. It also refutes the allegation of unequal treatment, underlining that all candidates were in the same position: the Board did not consider staff reports for any candidate and the complainant himself was well known to at least two members of the Board.

With regard to vacancy TPI/3614, the EPO submits that the Promotion Board indeed relied on the assessment made by the Selection Board for vacancy INT/EXT/1166; however, that did not render the selection procedure flawed and did not amount to a breach of the "obligation of secrecy". Nor does it indicate bias on the part of the Promotion Board. As for the Office's alleged omission to include a copy of the Boards' reports in the complainant's personal file, the Organisation submits that the reports referred to in Article 32(1) of the Service Regulations and the Guidelines on Personal Files for EPO Employees are individual staff reports and not reports drawn up by selection and promotion boards.

Furthermore, the Organisation contends that the confidentiality in the feedback process was lifted at the complainant's explicit request, since it was he who requested feedback on his application. It may be that he did not ask to receive it from his immediate superior; however, in the EPO's opinion, there is no evidence that this caused him any injury. Also, the delay in the feedback process is not to be seen as an indication of unfair treatment or bias on the part of Mr K. The EPO denies that Mr K. decided to block the complainant's applications for similar posts or to exclude him from management training or assessment centres. It points out that the complainant has provided no evidence to support these allegations and that neither the vice-president nor the principal director of a directorate-general have the power to decide such matters.

The Organisation refers to its long-standing practice of dispensing with biennial reporting for directors at grade A5 and explains that the complainant, who was aware of the practice, should have asked for a report at the end of each reporting period in order not to waive his right in respect of these earlier periods. It adds that his request for a staff

report for 2002 and 2003 has been granted and that a report will be drawn up shortly. Regarding the assertion that it did not deal with the appeal in a timely and diligent manner, the EPO observes that the pace at which the internal proceedings were conducted was normal. It denies that it intentionally obstructed the proceedings.

D. In his rejoinder the complainant presses his pleas. He asserts that, even if the Selection Board has a certain degree of discretion concerning a selection procedure, it is not free to disregard the Service Regulations. The information that the Selection Board considered was not sufficient, and thus it should have requested staff reports. He disputes the contention that at least two members of the Selection Board were familiar with his experience and performance and submits that it was not correct for the Promotion Board for vacancy TPI/3614 to have access to the Selection Board's report for the earlier competition before he had an opportunity to see it. He reiterates his request for a staff report.

E. In its surrejoinder the Organisation maintains its position. It draws attention to the fact that, by reason of the confidentiality of the proceedings before the Selection and Promotion Boards, the reports drawn up by these bodies are never sent to the candidates.

CONSIDERATIONS

1. The complainant impugns the decision of the President of the Office dated 23 March 2006 insofar as it did not quash the assessment of his merits made by the competent Boards in connection with his applications for vacancies INT/EXT/1166 and TPI/3614, and insofar as it dismissed his request for moral damages. He puts forward the following pleas: (i) the proper selection procedures for the two vacancies were not followed, as a result of which the reports issued by the competent Boards were based on a flawed assessment of his merits; (ii) the reasons for the failure of his applications were not explained in a timely and proper manner; (iii) the decisions by Mr K. to block any further applications and training of the complainant were taken *ultra vires* and represented an abuse of authority; and (iv) the Organisation failed to deal with his appeal in a timely and diligent manner.

2. The plea that the proper selection procedures for vacancies INT/EXT/1166 and TPI/3614 were not followed is unfounded. Regarding vacancy INT/EXT/1166 the complainant argues that "the [Selection] Board failed to comply with the obligation to consider reports" when assessing his merits for the vacancy and he cites Article 49(7) of the Service Regulations as the basis for his argument. He also states that the report drawn up by the Selection Board is flawed since it did not give "a summary of the candidate's professional experience in the field [...] the background and concrete experience in performing management functions, and the language skills", as required by Article 49(10) of the Service Regulations.

Article 49(7) of the Service Regulations provides that:

"Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them. The employees must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and at least two years' service in their grade in the Office. For promotion within a group of grades, employees must also fulfil the conditions of access referred to in Article 3, paragraph 1."

Article 49(10) of the Service Regulations provides that:

"The President of the Office shall forward to the Promotion Board the names of all permanent employees who possess the necessary qualifications referred to in paragraphs 7 and 9 above.

The Board shall examine the personal file of all permanent employees satisfying the relevant requirements and may, if it so decides, interview any permanent employee under consideration.

The Board shall draw up and forward to the President of the Office for his decision a list, presented in order of merit, of permanent employees who are eligible for promotion, based on a comparison of their merits, together with a reasoned report."

3. The Tribunal is of the opinion that the provisions of Article 49 of the Service Regulations were complied with since the requisite documents were reviewed and assessed during the selection procedure for vacancy

INT/EXT/1166. Of the 90 applicants, the complainant was one of the few who were invited to an interview. The interview resulted in the Board not recommending the complainant for the post of Principal Director as he “did not convince the [Board] of his qualities as a leader of 400 staff”. The complainant’s application therefore failed primarily because the complainant was not successful at his interview and not because his personal file and work experience were not considered. Nothing has been presented which constitutes a procedural flaw. The plea therefore fails.

4. As for vacancy TPI/3614, the complainant also contests the selection procedure, stating that it was “tainted with a number of flaws”. Individuals invited to interview for the post included “applicants whom the [B]oard had seen before, and on which occasion had been judged to have management potential, and [...] candidates who had applied for an A6 post for the first time”. Having failed in his previous application, the complainant did not meet the selection criteria. The fact that the Promotion Board for this vacancy based its decision not to invite the complainant to an interview on the assessment of the Selection Board for vacancy INT/EXT/1166 is coherent with the selection criteria mentioned above. The complainant argues that since the Board for vacancy TPI/3614 differed in composition from the Board for vacancy INT/EXT/1166, it could not have been possible for the former to “have seen any candidates before”. In fact, the expression “applicants whom the Board had seen before” had to refer, not to that specific Board, but to the Selection Board constituted for vacancy INT/EXT/1166.

It can be added that the selection criteria mentioned above are not unreasonable as the assessment was made for a position similar to that of the earlier competition and hence with similar requirements. Since the Selection Board had declared that the complainant did not show the qualities necessary for the position just a year earlier, it is not unreasonable that the Promotion Board for vacancy TPI/3614 would depend on that assessment while making the selection. There was, therefore, no error in the selection procedure for vacancy TPI/3614.

5. With regard to the complainant’s plea that the reports issued by the competent Boards were based on a flawed assessment of his merits the Tribunal finds that it is unfounded. The Board for vacancy INT/EXT/1166 was mainly concerned with assessing the candidates’ merits on the basis of their interviews because, having arrived at the interview stage, it was clear that their professional merits were already established. It was reasonable, therefore, that in its report the Board put emphasis on striking personality traits and made relevant observations instead of merely reviewing each candidate’s professional history. The report was intended to indicate which candidates were most likely to succeed in the vacant post, following the completion of the selection process. Nothing has been presented that proves the assessment was mistaken. Since the Tribunal has held that there was no error in the selection procedure for vacancy INT/EXT/1166 and no evidence that the Selection Board’s report was based on a flawed assessment of the complainant’s merits, it must by implication, conclude that there was no error in the selection procedure for vacancy TPI/3614 either.

6. In a third plea the complainant contends that the reasons for the failure of his applications are not explained in a timely and proper manner. The Tribunal finds that the complainant was notified of the failure of his applications within a reasonable time. As his requests for reasons were informal, it is understandable that the response was also of an informal nature. However, the Tribunal observes that it was inappropriate for the complainant’s immediate superior to be advised of the Board’s reasoning without the complainant’s permission, as that supervisor was not involved in the selection process. According to Article 6 of Annex II to the Service Regulations “[t]he proceedings of the Selection Board shall be secret”. Therefore, the Tribunal awards the complainant 2,000 euros in moral damages for the breach of the “obligation of secrecy”.

7. The complainant’s plea that Mr K.’s decisions to block him from further applications and training were taken *ultra vires* and represented an abuse of authority is unfounded. The comments made by Mr K. are not to be considered as a final decision, but rather as an opinion. The Tribunal concurs with the comment of the Internal Appeals Committee that “[w]hatever the [complainant] may think, [Mr K.] did not refer to an embargo on future applications in the letter of 5 June 2003. What he said was that the Selection Board’s rating of the [complainant’s] profile still [held] true, thus making it clear to the [complainant] that further applications were likely to have little chance of success. As the [complainant’s] superior [Mr K.] was entitled to offer this assessment of the [complainant’s] prospects of promotion in DG1/DG2 in this form in order to give him some form of guidance for his own professional planning, especially as he had asked for an explanation of why his two applications had been unsuccessful.” The plea therefore fails.

8. The complainant’s plea that the Organisation failed to deal with his appeal in a timely and diligent manner is well founded. The Tribunal recalls that “[s]ince compliance with internal appeal procedures is a condition

precedent to access to the Tribunal, an organisation has a positive obligation to see to it that such procedures move forward with reasonable speed” (see Judgement 2197, under 33). The delay of about three years in processing the complainant’s internal appeal is, by any standards, unacceptable and the Tribunal awards the complainant 2,500 euros in damages.

9. As the complainant succeeds in part, he is also entitled to costs in the amount of 2,000 euros.

DECISION

For the above reasons,

1. The decision of 23 March 2006 is set aside in part.
2. The EPO shall pay the complainant the sum of 4,500 euros in damages.
3. It shall also pay him 2,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 2 November 2007, Ms Mary G. Gaudron, Presiding Judge for this case, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Mary G. Gaudron

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet