

112th Session

Judgment No. 3052

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mrs E. H. against the European Patent Organisation (EPO) on 18 June 2009 and corrected on 21 July, the EPO's reply of 2 November and the complainant's letter of 14 December 2009 informing the Registrar of the Tribunal that she did not wish to enter a rejoinder;

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 is a permanent employee of the European Patent Office, the EPO's secretariat. At the material time she was Chairperson of the local section in Munich (Germany) of the Staff Committee.

On 30 December 2005 a vacancy notice for the post of Director of Legal Research and Administration for Directorate-General 3 (DG3) was published under the reference INT/EXT/4233 with a closing date of 28 February 2006. The appointment was to be made at grade A5. The successful external candidate in the

competition, Ms K., joined the Office on 1 October 2006 and her appointment was published in the EPO's *Gazette* of 16 November 2006.

By a letter of 29 January 2007 the complainant, in her capacity as Chairperson of the Munich Staff Committee, asked the President of the Office to cancel the appointment of Ms K. or otherwise treat her letter as an internal appeal. She reserved the right to claim costs and moral damages. She challenged the said appointment on the grounds that: the composition of the Selection Board was flawed; an assessment centre had been incorrectly introduced into the recruitment process; Ms K. did not satisfy the minimum qualifications for the post, as specified in the job description for grade A5 contained in the Service Regulations for Permanent Employees of the European Patent Office; and at the time of Ms K.'s appointment the post in question was not yet vacant. On 6 March the complainant was informed that the President considered that Ms K.'s appointment was lawful, and that the matter had therefore been referred to the Internal Appeals Committee.

In the course of the internal appeal proceedings, the complainant asked to be provided with both the Selection Board's report and Ms K.'s application documents. In an opinion of 22 January 2009 a minority of the members of the Internal Appeals Committee considered that this request should be granted. They further found that the Board's composition was irregular because one member of the Board – the Vice-President of DG3 – was employed under a fixed-term contract and was thus not a permanent employee. In their view this was a breach of Article 7 of the Service Regulations and the version of Article 1 of Annex II to the Service Regulations in force at the material time. However, a majority of the members of the Committee considered that the complainant had no right to disclosure of the documents she had requested. Furthermore, they considered that the wording of Article 1 – which provided that the grade of permanent employees who were members of the Selection Board should be at

least equal to that of the post to be filled – could be interpreted as meaning that the grade requirement applied only to those members of the Selection Board who were permanent employees, and this did not preclude the participation on the Board of staff members who were employed under fixed-term contracts. The majority concluded that the competition and the recruitment decision were lawful and they recommended that the appeal be dismissed as unfounded. By a letter of 20 March 2009, which is the impugned decision, the complainant was informed that the President had decided to follow the opinion of the majority and to reject her appeal as unfounded.

B. The complainant submits that the composition of the Selection Board was flawed because at least one member of the Board, who was Vice-President of DG3 at the material time, was not a permanent employee and this was a violation of the version of Article 1 of Annex II to the Service Regulations then in force. She argues that the subsequent amendment of Annex II to permit the participation of both permanent and “other” employees on a Selection Board demonstrates that prior to the amendment it was not lawful to constitute such a Board with staff other than permanent employees. She contends that the clear wording of Article 1 does not allow for any other interpretation and in support of this contention she refers to the opinion of the Internal Appeals Committee in another case relating to the membership of the General Advisory Committee.

The complainant asserts that Ms K. does not meet the minimum requirements for the post as specified in the vacancy notice and in the job description for employees at grade A5 contained in the Service Regulations. In her view, Ms K. lacks the required years of professional and management experience stipulated by the job description, and her appointment constitutes a breach of the principle of equal treatment insofar as considerably more experience would have been required of an internal candidate. Also, she lacks a detailed knowledge of EPO law, does not have an adequate knowledge of French and does not possess the level of written communication skills

necessary for the post. Therefore, the Selection Board failed to assess correctly the basic minimum requirements of the job description and the vacancy notice. She adds that the Board does not have the discretion to waive those requirements and, consequently, its actions were *ultra vires*.

Referring to the Tribunal's case law, the complainant argues that the Office's failure to disclose to her documents relevant to the appeal is a breach of Article 113(4) of the Service Regulations.

The complainant requests that the Office submit translations of several documents to the Tribunal, if the latter considers that they are relevant. She asks the Tribunal to quash the impugned decision and she seeks costs and reasonable compensation for her time and effort.

C. In its reply the EPO contends that the Selection Board was properly constituted and it points to the opinion of the majority of the Internal Appeals Committee in this respect. It submits that the amendment to Article 1 of Annex II to the Service Regulations was proposed solely for the purpose of legal clarity and transparency and that it was in fact possible for a non-permanent employee to be a member of a Selection Board prior to the amendment.

Referring to the case law, the Organisation asserts that the complainant bears the burden of proving her allegations that Ms K. did not fulfil the minimum requirements for the post. In this regard it draws attention to the findings of the Internal Appeals Committee and submits that the complainant has failed to discharge the burden of proof.

The EPO contends that decisions regarding appointment and promotion are subject to limited review by the Tribunal and that the decision to appoint Ms K. was taken in conformity with the case law.

The defendant notes that the report of the Selection Board and Ms K.'s application documents were submitted to the Internal Appeals Committee and the complainant was given relevant information on the content of those documents by both the Administration and the Committee during the course of the appeal hearing. Furthermore,

under Article 6 of Annex II to the Service Regulations, Selection Board proceedings are confidential, and the Tribunal has held that as a general rule a complainant is not entitled to consult any records that may have been made of discussions by a selection committee. In the Organisation's view, there is no justification for any further disclosure of documents to the complainant.

At the Tribunal's request, the EPO invited Ms K. to comment on the complaint. In a statement of 9 September 2009 appended to the Organisation's reply she strongly objects to the complainant's allegations against her and provides details of her skills and experience.

CONSIDERATIONS

1. The complainant is contesting the decision of the President of the Office to appoint Ms K. as Director of Legal Research and Administration for Directorate-General 3 (DG3) with effect from 1 October 2006. Ms K.'s appointment was made following an external competition and it was published in the EPO's *Gazette* on 16 November 2006. At that time the complainant was the Chairperson of the local Staff Committee in Munich. In that capacity, on 29 January 2007 she filed an internal appeal against Ms K.'s appointment, requesting that it be revoked.

2. The complainant based her internal appeal and subsequent complaint on three main contentions: that the composition of the Selection Board was in breach of Article 1 of Annex II to the Service Regulations, as applicable at the relevant time, because it included a non-permanent employee, namely the Vice-President of DG3; that the Selection Board chose and the President appointed a candidate who did not meet the minimum requirements of both the vacancy notice and the job description for employees at grade A5; and that the Organisation failed to disclose to the complainant documents relevant to the appeal.

3. On 22 January 2009 the Internal Appeals Committee issued a majority opinion as well as a minority opinion. The Committee

members were indeed unanimous on all but two points. The first point concerned the complainant's procedural request for disclosure of the Selection Board's report and Ms K.'s application documents. Relying on the Tribunal's case law, a majority of the members acknowledged that permanent employees have the right to be given access to all documentation which affects them personally and that refusing to do so on the basis of confidentiality may be justified only under quite specific circumstances (see Judgment 1756, under 10). They nevertheless pointed out that, while the reports of selection and promotion boards, which contain information on other staff members, may be disclosed to the Internal Appeals Committee and to the Tribunal, there is no general requirement that they also be disclosed to the respective appellant (see Judgment 1728, under 16). A minority of the Committee's members, nonetheless, found that the complainant had the right to access all documents pertaining to the appeal and that disallowing her access was a breach of procedure.

The second point on which there was no unanimity amongst the Committee's members concerned the composition of the Selection Board. Whereas the majority considered that the Service Regulations do not prevent contract employees from membership in the Selection Board, the minority held that the wording of the Service Regulations in the version applicable at the relevant time excluded non-permanent employees from membership and that the subsequent amendment, explicitly allowing for their participation, constitutes proof that they were previously not authorised to sit on a Selection Board.

The Committee unanimously concluded that the complainant's remaining claims were unfounded. These claims, which are also put forward in the present complaint, are that the successful candidate's knowledge of French was inadequate; that she lacked the required years of professional and management experience and a detailed knowledge of EPO law; and that she did not have the necessary leadership and communication skills. Furthermore, the Committee was unanimous in concluding that the complainant's claim that it was unlawful for the Office to appoint Ms K. a month before her predecessor left the service of the Organisation was irrelevant as it did not affect the selection process.

4. Article 1 of Annex II to the Service Regulations in the version applicable at the material time provided:

“The Selection Board for each competition shall normally comprise a chairman, one or more members appointed by the appointing authority and one member appointed by the Staff Committee.

The grade of permanent employees who are members of the Selection Board shall be at least equal to that of the post to be filled.”

The Tribunal is of the opinion that the wording of Article 1 does not preclude contract staff from being members of the Selection Board. The first sentence of Article 1 defines the composition of the Selection Board without specifying the need for them to be permanent employees, and the second sentence refines the first by specifying that, if the members are permanent employees, then they must be of an equal or higher grade than that of the post to be filled. Moreover, the Vice-President of DG3 who is a contract employee has a higher grade than that of the post in question. Further, the explanatory memorandum to the proposed amendment of Article 1 of Annex II, dated 6 October 2006, states that the amendment was introduced “for the sake of legal clarity”. Article 1 of Annex II in the amended version specifies that the grade of permanent or other employees who are members of the Selection Board “shall be at least equal to that of the post to be filled”. Moreover, as the majority of the Internal Appeals Committee’s members noted it was neither logical nor in the interest of the Office to exclude the Vice-President of DG3 from participating in the Selection Board, especially since in the particular case “it was absolutely impossible to arrange for the participation in the selection process of any future superior of the selected candidate who was a permanent employee of the Office. This is because only the Vice-President of DG3 and the President of the Office are ranked above the [post of] Director [that was to be filled]. However, both of these staff members are not permanent employees, but contract staff members recruited by the Administrative Council.”

5. It appears that the complainant has not established that her lack of access to the confidential documents has in any way rendered the internal appeal procedure unlawful or that either the

Selection Board or the Internal Appeals Committee reached a clearly mistaken conclusion. Consequently, and also in line with its case law, the Tribunal finds that the complainant has no right to access the confidential documents which do not pertain to her personally (see Judgments 1513, under 6, and 1728, under 16).

6. The complainant is contesting the technical assessment made by the Selection Board which chose Ms K. as the best candidate for the post. It is consistent case law that the Tribunal will not substitute its opinion for that of the Organisation unless the decision was taken without authority, shows some procedural or formal flaw or a mistake of fact or of law, overlooks some material fact, is an abuse of authority, or draws a clearly mistaken conclusion from the facts. The complainant has not shown that the Selection Board's assessment of Ms K.'s candidacy or the Internal Appeals Committee's assessment of the Selection Board's proceedings involved any reviewable error.

Moreover, the Tribunal points out that the arguments which the complainant presented in support of her claims are unfounded. Specifically, her assertion that by reason of her age and qualifications Ms K. could not meet the minimum requirements for the post has no basis and can appear to be discriminatory. Her comparison of the "at least fourteen years" experience generally required for internal candidates for A5 posts is misguided because this requirement does not necessarily apply to external candidates. The vacancy notice required "[m]any years' professional experience" and the Internal Appeals Committee unanimously endorsed the Selection Board's assessment that Ms K. satisfied that requirement.

The complainant also contends that Ms K. did not fulfil the A5 job description requirement of having "detailed knowledge of EPO law", but again, the Internal Appeals Committee unanimously found that the Selection Board had made no error in accepting Ms K.'s knowledge of patent law as adequately satisfying this requirement. Furthermore, the complainant's assertion that Ms K. admitted to a lack of detailed or any knowledge of patent law was not accompanied by any proof and was in fact contradicted by Ms K.'s submission to the Tribunal, which states in relevant part: "I have not admitted at any time that I lack

knowledge of the relevant legal areas of the EPO. This is again a totally false assertion for which the complainant has not given any kind of proof. [...] I had and I have at any time the ability to manage comparative studies in the legal research department in my directorate as well as the ability to deal with decisions of the boards of appeal. Furthermore it is absolutely logical that an external applicant has to become familiar with the EPO's specific labour law as it is not publicly accessible before joining the EPO."

The argument that Ms K. did not have adequate knowledge of French, allegedly proven by the fact that she had 25 hours of private French lessons after joining the Organisation, is also unfounded. The vacancy notice required "excellent knowledge of one official language and ability to understand the other two" (the official languages being English, French and German). The Selection Board found that Ms K.'s knowledge of French fulfilled the requirement and noted in their evaluation: "French: correct understanding but limited practice". The Internal Appeals Committee further pointed out that the private tutoring which Ms K. had after joining the Organisation was at the intermediate level, i.e. level 4 out of 5 possible levels, and consisted of 25 lessons over a one and a half year period, neither of which shows a particular lack of knowledge as claimed by the complainant. Additionally, it is common practice for employees at the director level to be offered private language lessons within the Organisation.

The complainant uses the fact that, after joining the Organisation, Ms K. attended along with another staff member at the B-grade level a course called "Writing for Results", as proof that she did not have the required level of written communication skills. This argument is unreasonable as courses of various levels for various subjects are a natural part of the work experience (continuous training), aimed at improving performance in a variety of areas. There is always room for growth and improvement, and enrolment in development classes does not automatically indicate a lack of basic knowledge. As with the French lessons, the attendance of further classes does not invalidate the Selection Board's assessment that Ms K. did indeed fulfil all the requirements and was therefore chosen as the ideal candidate for the post. The Internal Appeals Committee found no flaws or mistakes in

the selection process or in the outcome of that process and, as the complainant has not established any vitiating flaws or errors, the complaint must be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 4 November 2011, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 February 2012.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet