

114th Session

Judgment No. 3191

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr J. A. S. (his eighth), Mr L. R. (his fifth) and Mr D. S. against the European Patent Organisation (EPO) on 22 October 2009 and corrected on 16 February 2010, the EPO's reply of 9 June, the complainants' single rejoinder of 3 September and the Organisation's surrejoinder of 20 December 2010;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. Article 4 of the Service Regulations for Permanent Employees of the European Patent Office provides that:

“(1) Vacant posts shall be filled by the appointing authority, having regard to the qualifications required and ability to perform the duties involved:

- by transfer within the Office;
- by promotion or appointment under the conditions laid down in Article 49, or in exceptional cases, under those in paragraph 4; or

- by recruitment or appointment as a result of a general competition open both to employees of the Office and to external candidates.

[...]

- (4) Where the vacant post cannot be filled under the conditions laid down in Article 49, a permanent employee may be called upon to perform the duties of the next higher grade, for a period not exceeding 5 years, if the Promotion Board so recommends with a view to the prescribed qualifications being acquired. [...]"

The version of Article 49 of the Service Regulations in force at the material time read, in relevant part:

- “(1) A permanent employee may obtain a higher grade by a decision of the appointing authority:

[...]

- (b) following appointment to another post as a result of the general competition referred to in Article 4 of these Regulations;

[...]

- (4) Where the appointing authority is the President of the Office he shall take his decision after consulting a Promotion Board.

[...]

- (7) 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. [...]"

The complainants are permanent employees of the European Patent Office, the EPO's secretariat. At the material time, Mr A. S. held grade A3, Mr R. had held grade A4 for less than two years and Mr S. had held grade A4 for more than two years.

On 28 October 2005 a vacancy notice for the grade A5 post of Director of Infrastructure Services in The Hague was published under reference INT/EXT/4218. The competition was open to both internal and external candidates. Of the three complainants, only Mr S. applied but he was not successful. With effect from 1 April 2006 Mr H., an

internal candidate who held grade A3, was appointed to the post in question.

In a letter of 29 May 2006 to the President of the Office, Mr A. S. challenged Mr H.'s appointment, asserting that it was, in fact, a promotion from grade A3 to grade A5, which contravened Articles 49(1) and 49(7) of the Service Regulations. He stated that only employees who had at least two years of service at grade A4 could be considered for promotion to grade A5, and that it was for this reason that he had not submitted his candidature for the post. He requested that the decision to appoint Mr H. be revoked *ab initio* and that the vacancy be re-advertised with a clear indication that employees holding grade A3 were eligible for consideration. In a letter to the President dated the same day, Mr R. sought similar relief, based on the same grounds. However, he requested that the new vacancy notice stipulate that candidates were not required to have served at grade A4 for two years. In a letter to the President of 31 May, Mr S. challenged Mr H.'s appointment on the same grounds. He requested that only employees who had held grade A4 for two years be considered for the post. In the event that their requests were not granted, the complainants asked that their letters be treated as internal appeals and they claimed moral, material and punitive damages, and costs.

On 20 June 2006 the Director of the Employment Law Directorate informed the complainants that the President considered that the appointment of Mr H. had been lawful and, consequently, their appeals had been forwarded to the Internal Appeals Committee. In its opinion of 4 June 2009 the Committee held that, pursuant to Article 49(1)(b) of the Service Regulations, an employee holding grade A3 could be appointed to a grade A5 post. It pointed out that decisions regarding appointments are discretionary. It found no flaws in the selection procedure and it held that the Office had respected the principle of equal treatment and complied with its duty to inform. The Committee unanimously recommended that the appeals be dismissed as unfounded. By letters dated 15 July 2009 the complainants were

informed individually that, in accordance with the opinion of the Committee, the President had decided to dismiss their appeals. Those are the impugned decisions.

B. The complainants, while acknowledging that there is a distinction between appointment and promotion, submit that in this case the recruitment procedure was flawed. They explain that during the relevant period, whenever a vacancy was open to both internal and external candidates, in the event of applications from internal candidates it was the Office's practice to constitute a five-member Promotion Board (which included two members nominated by the Staff Committee) to examine whether those candidates fulfilled the relevant criteria for promotion outlined in Article 49 of the Service Regulations, i.e. whether they had at least two years of service at a grade one grade lower than that of the advertised post. Only internal candidates satisfying those criteria could be considered for an appointment pursuant to Article 4(1) of the Service Regulations. Candidates who did not fulfil the promotion criteria could only be considered for appointment pursuant to Article 4(4). As evidence of this practice, the complainants point to Administrative Council decision CA/182/07 – a proposal by the President of the Office to amend the Service Regulations – in which the President explained that the relevant provisions were confusing and that they had been “misinterpreted in practice” so as to involve the Promotion Board in competition procedures if the appointment of an internal candidate would result in that candidate obtaining a higher grade. They assert that, in the present case, a five-member Promotion Board was initially constituted, but after the two Staff Committee nominees objected to Mr H.'s candidature on the basis of his grade, the Board was reconstituted as a Selection Board. At this point, two of its members, including one of the Staff Committee nominees, withdrew, and it was this three-member Selection Board which, though not competent to do so, issued the recommendation to the President to appoint Mr H.

The complainants submit that the Office was notified of the flaws in the recruitment procedure when the Staff Committee appointees

raised objections to Mr H.'s candidature. Referring to Judgment 2418, they contend that, in light of those objections, the Office should have revoked the disputed vacancy notice, re-advertised the vacancy providing accurate information regarding the selection criteria to be applied and followed the appropriate procedure. In their view, Mr H.'s appointment clearly amounted to a promotion, which, given his grade, was a breach of the version of Article 49(7) of the Service Regulations then in force and of the Office's practice. They point out that the Internal Appeals Committee dismissed their allegations of lack of equal opportunity without providing proper justification for doing so. Furthermore, given that two of the complainants did not apply for the post on the basis that they did not meet the requirements of the aforementioned Article, it is possible that other staff members failed to apply for the same reason.

In addition, they allege that the selection process was tainted by favouritism and was an abuse of authority, with the aim of ensuring the appointment of a preferred candidate who did not meet the required criteria. They also accuse the Office of bad faith.

Although they initially requested the Tribunal to quash the disputed appointment, the complainants no longer ask for this relief, pointing out that Mr H. has served in the disputed post for more than three years now. Instead, they argue that significant punitive damages are warranted. They each claim material damages of no less than 1,000 euros, moral damages of no less than 5,000 euros, punitive damages of no less than 7,500 euros and costs.

C. In its reply the EPO denies that there were flaws in the recruitment procedure. It states that the disputed appointment was made as a result of a general competition open to both external and internal candidates, pursuant to the third subparagraph of Article 4(1) of the Service Regulations, and the Office correctly applied the recruitment procedure set out in Article 7 and Annex II to the Service Regulations. As the post was filled by the appointment of an internal candidate and not by a promotion, the applicable provision is

Article 49(1)(b) of the Service Regulations and not, as asserted by the complainants, Article 49(7).

With respect to the constitution of the Board responsible for the selection, the defendant submits that that Board was initially composed of five members, two of whom had been appointed by the Staff Committee. The Board unanimously considered that Mr H. was the best candidate for the post, but the two Staff Committee nominees took the view that he did not meet the requirements of Article 49(7) of the Service Regulations as he was still in grade A3. The Board members then discussed the situation and concluded that it was a matter for a selection board and not a promotion board. Consequently, only three members, including one staff representative, were required to sign the report recommending Mr H. for the post.

The EPO admits that there have been cases in which the applications of internal candidates for open competitions have been evaluated by a promotion board in order to determine whether they met the statutory requirements for promotion, but it asserts that this was not the Office's practice. In any event, according to the Tribunal's case law, staff members are not entitled to be afforded the same unlawful treatment that has been afforded to others. The Organisation denies that it has abused its authority and points out that appointments are discretionary decisions. Mr H. met the minimum qualifications for the post and all five members of the original Board agreed that he was the most suitable candidate. As the recruitment procedure was conducted in accordance with the Service Regulations, there was no reason to halt the procedure. The EPO points to the findings of the Internal Appeals Committee with respect to the complainants' allegations of breach of the principle of equal treatment and asserts that it cannot be held responsible for the fact that Messrs A. S. and R. failed to apply for the disputed post.

Lastly, it denies that the recruitment procedure was tainted by favouritism and asserts that the complainants have failed to prove their allegations in this respect.

D. In their rejoinder the complainants press their pleas. They dispute the EPO's assertion that all five members of the original Board agreed that Mr H. was the most suitable candidate and contend that the constitution of the Board was changed only when it became apparent that he did not meet the criteria for promotion laid down in the relevant provisions of the Service Regulations.

E. In its surrejoinder the EPO maintains its position. It argues that as the complainants have abandoned their primary claim to have the disputed appointment quashed, according to the "subsidiarity rule", their subsidiary claims should be treated likewise and be dismissed accordingly.

CONSIDERATIONS

1. The EPO published a vacancy notice for the grade A5 post of Director of Infrastructure Services between 28 October and 28 November 2005. Mr H., an EPO staff member holding an administrator post at grade A3, applied for the Director post and was the successful candidate.

2. A brief summary of the process that led to Mr H. being recommended to the President of the Office will help to situate the complainants' submissions. It is not entirely clear from the record if the selection process was initially undertaken by a five-person Promotion Board or if it was constituted as a mixed Selection/Promotion Board because the competition was open to both internal and external candidates. However, as will become evident, this lack of clarity is not material to the outcome of this case.

3. During the preparation of the shortlist of candidates to be interviewed, the two Staff Committee nominees on the original Board observed that some of the internal candidates did not meet one of the above-mentioned Article 49(7) requirements of the Service

Regulations for promotion to grade A5, i.e. at least two years' service in their current grade. However, the other members of the original Board did not hold the same view that Article 49(7) applied in the circumstances. Following a discussion in which no agreement was reached, the shortlist was prepared and those candidates were interviewed. Although there was unanimity in terms of there being only one suitable candidate for the post, namely Mr H., the Staff Committee nominees maintained their view that he did not fulfil the Article 49(7) requirements for promotion to grade A5. Therefore, they could not make a positive recommendation to the President. In the end, a three-member Selection Board prepared and signed a report containing the Selection Board's recommendation to the President that Mr H. was the only suitable candidate for the post. The President accepted the recommendation and appointed Mr H. to the Director post.

4. At the time of the competition, the complainant Mr A. S. was at grade A3 and the complainants Mr R. and Mr S. were at grade A4; however, Mr R. had less than two years' service at grade A4. Of the complainants, only Mr S. applied for the disputed post. He was found to be unsuitable for the position.

5. The complainants challenge the selection process on the grounds that Mr H. did not meet the Article 49(7) requirement for a promotion to grade A5 as he did not have two years' service in his grade, and that the selection procedure was flawed and was tainted by favouritism and inequality because other candidates who did not meet the alleged minimum requirements were not aware that they could also apply.

6. In summary, the EPO stresses that Mr H. was appointed and not promoted to the grade A5 post. The defendant takes the position that the relevant statutory provisions are Articles 4(1) and 49(1)(b) of the Service Regulations. Article 4(1) provides that the appointing authority may fill vacant posts in a number of ways, as quoted under A, above. In the present case, the competition was open to both

external and internal candidates. Since external candidates cannot be transferred or promoted, the third of the listed options was applied to fill the post, that is, “by recruitment or appointment as a result of a general competition open both to employees of the Office and to external candidates”. Further, pursuant to Article 49(1)(b), “[a] permanent employee may obtain a higher grade by a decision of the appointing authority [...] following appointment to another post as a result of the general competition referred to in Article 4 of these Regulations”. The EPO maintains that Article 49(7) and the other promotion provisions do not apply in this case because an appointment and not a promotion procedure was used to fill the vacancy. As well, Article 49(7) only applies to promotions to the next higher grade.

7. With respect to the selection procedure, the EPO states that the constitution of a five-member Promotion Board for the competition was done in error. However, this error was remedied by the formation of a three-member Selection Board to assess the candidates and make a recommendation to the President, in accordance with the Service Regulations and Annex II.

8. The EPO’s position grounded on a distinction between an appointment and a promotion is fundamentally flawed. An appointment is simply the assignment of an individual to a particular position or post. A promotion is the assignment of an individual to a higher position or rank. The fact that a so-called appointment process is used to make a selection or that the assignment is called an appointment does not exclude the fact that it may also be a promotion by virtue of the fact that it also involves the attainment of a higher position or rank or, in this context, grade. Indeed, that is precisely what occurred in the present case.

9. For the purpose of resolving the dispute, it is not necessary to decide whether Article 49(7) is applicable in these circumstances. Article 49, among other things, sets out the various mechanisms by which an employee, such as Mr H., may be promoted. Regardless of

the mechanism that results in a promotion, Article 49(4) provides that the President must consult with a Promotion Board before making a promotion decision. In this case, that was not done.

10. The EPO argues that if it was a mistake to constitute a “mixed” board, that is a five-member Board, instead of a Selection Board, this was only an error of formality that did not invalidate the procedure since Mr H. was chosen unanimously by the same members. Although it is true that there was unanimity in terms of suitability, the two Staff Committee nominees did not resign from the position that he did not meet the Article 49(7) requirements.

11. The Tribunal observed in Judgment 2906, under 12, also concerning the EPO:

“Although in theory the President of the Office may grant promotions at his or her discretion, the Tribunal’s case law has it that, in view of the crucial role assigned to the Promotion Board in the procedure laid down in Article 49 of the Service Regulations and various subsequent guidelines, the President may promote someone only on the Board’s recommendation (see Judgments 1600, under 10, and 1968, under 16 and 17).”

12. As the President’s decision was based on the report of a Selection Board and not a Promotion Board, it was fundamentally flawed and must be set aside. However, the successful candidate who accepted the appointment in good faith must be protected from any negative consequences flowing from the setting aside of the decision.

13. The complainants also claim inequality in the selection process because the vacancy notice did not indicate that candidates who did not meet the Article 49(7) requirement could also apply. By failing to do so, they argue, the EPO did not provide sufficient guidance to potential applicants for the position. Moreover, according to the complainants, there was a practice of applying Article 49(7) to internal applicants in these competitions which led to the unequal treatment of those candidates. In support of their assertion of the existence of such a practice, the complainants point to the 2007 amendments to the Service Regulations to address this inequality.

14. As it is evident that Article 49(7) was not applied in the competition at issue and for the purpose of the present dispute, it is not necessary to decide whether it ought to have been applied. There is no evidentiary foundation for a plea of unequal treatment. Regarding the contents of the vacancy notice, the confusion, to the extent there was some confusion among potential applicants, involved confusion about the interpretation of the Service Regulations and not the interpretation of the content of the vacancy notice itself. However, in these circumstances, where the EPO was aware of the confusion surrounding the interpretation of its Regulations, it was incumbent on the Administration to clarify the requirements for the position in the vacancy notice. As a result of the failure to do so, Mr A. S. and Mr R. could not make informed decisions regarding their candidature. They are entitled to moral damages in the amount of 500 euros each under this head. Although members of the original Board concluded that Mr S. was not a suitable candidate for the post, this was the result of a flawed process for which he is entitled to moral damages in the amount of 500 euros.

15. The Tribunal notes that the complainants stated in their joint submissions that they no longer claim that the appointment of Mr H. be revoked and the post reopened on the grounds that it would not seem realistic. However, they claim punitive damages against the Organisation for procedural flaws. In the circumstances, this is not an appropriate case for punitive damages and the award of moral damages will afford sufficient compensation.

16. The complainants are also entitled to costs. As they were jointly represented and made a single joint submission, there will be an award of costs of 500 euros each.

17. Lastly, the EPO submits that by no longer seeking to have the appointment quashed, the complainants have abandoned their

main claim leaving only their subsidiary claims for compensation and costs. In advancing this argument, the EPO is confusing the relief sought with the claim. In terms of relief, the complainants no longer seek the quashing of the disputed appointment, although they maintain the claim with respect to the legality of the President's decision.

DECISION

For the above reasons,

1. The impugned decisions of 15 July 2009 are set aside.
2. The EPO shall pay the three complainants moral damages in the amount of 500 euros each.
3. It shall also pay them 500 euros each in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2012, Mr Seydou Ba, 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 6 February 2013.

Seydou Ba
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet