

NINETY-SIXTH SESSION

Judgment No. 2272

The Administrative Tribunal,

Considering the complaint filed by Mr P. O. A. T. against the European Patent Organisation (EPO) on 13 January 2003, the Organisation's reply of 13 May, the complainant's rejoinder of 18 June and the EPO's surrejoinder of 19 September 2003;

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

Having examined the written submissions;

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

A. In 1980 a career policy for categories A and L staff, bearing the reference CA/20/80-VIII, was drafted by the then President of the European Patent Office - the EPO's secretariat - and approved by the Administrative Council. That policy included the following provision, which is often referred to as the "age-50 rule":

"Promotion [to the A4 grade] at age 50 will be offered to all who have served at least 5 years in the A3 grade, irrespective of their total previous experience, provided their record of work is good."

From 1981 until 1998 the age-50 rule was consistently applied by successive Presidents, who referred to it expressly in the notes on promotion which they addressed annually to the Chairmen of the Promotion Boards, although the required number of years of service at grade A3 sometimes changed. However, from 1999 onwards the President's notes on promotion contained no such reference. After consulting the General Advisory Committee he had decided to abolish the rule in question.

The complainant, an Italian national born in 1950, joined the EPO in 1990 as a patent examiner at grade A3. By May 2000, when he reached 50 years of age, he had acquired ten years' experience at grade A3, during which time his performance had invariably been rated "good". When his name did not appear on the lists of promotions for 2000, he wrote to the President of the Office, asking him to promote him to grade A4 with effect from his 50th birthday, in accordance with the age-50 rule, and failing that, to consider his letter as initiating an internal appeal. By a letter of 23 November 2000 the Director of Personnel Development informed the complainant that the President had rejected his request and that the matter had therefore been referred to the Appeals Committee. On 14 November 2001, while his internal appeal was pending, the complainant was informed of his promotion to grade A4 with effect from 1 January 2001.

In an opinion dated 26 September 2002, a majority of the Appeals Committee recommended that the appeal be dismissed, finding no legal objection to the President's ceasing to apply the age-50 rule from 1999 onwards. One member of the Committee expressed the dissenting view that the President was not entitled to abandon the age-50 rule without the approval of the Administrative Council. By a letter of 17 October 2002 the Principal Director of Personnel informed the complainant that the President had decided to endorse the majority opinion of the Committee and hence to reject his appeal. That is the impugned decision.

B. The complainant submits, firstly, that by abolishing the age-50 rule the President altered the EPO career policy approved by the Administrative Council in 1980 and applied consistently for almost 17 years. Any amendment to that policy required the prior approval of the Administrative Council, which has not been obtained.

Secondly, he points out that no reasons were given for the President's decision to abandon the age-50 rule. Referring to the case law, he asserts that the reasons for any administrative decision affecting a staff member must be given.

Thirdly, he considers that the career policy defined in CA/20/80, and hence the age-50 rule, formed part of the conditions of employment offered to him by the Office at the time of his recruitment. Citing the case law he argues that the EPO may change its career policy for future recruits, but it cannot retroactively alter the conditions of employment of staff already in service.

Fourthly, he contends that the impugned decision discriminates against him, particularly in relation to staff who reached the age of 50 before 1999 and were promoted on the basis of the rule in question. Furthermore, the age-50 rule compensated for some of the adverse effects of the Office's rule concerning the recognition of prior experience. Without it, staff of certain nationalities who were able to complete their academic studies at an earlier age than others have an unfair advantage as regards the years of experience taken into account for promotion purposes. Similarly, since previous experience in industry is recognised only at 75 per cent, staff with considerable experience of that type are at a disadvantage in relation to those whose previous experience is recognised in full.

The complainant asks the Tribunal to order the Organisation to apply the age-50 rule and consequently to change the date of his promotion to 1 June 2000. He also claims 3,000 euros in costs. He requests oral hearings in the event that the Tribunal is not willing to uphold his claims on the basis of his written submissions.

C. The Organisation replies that the complaint is irreceivable. Referring to Judgment 2187, it asserts that the Tribunal has no authority to declare that the age-50 rule should remain in force or to order it to promote the complainant.

In subsidiary arguments on the merits, the Organisation emphasises that, as an individual decision regarding promotion, the impugned decision was taken at the discretion of the President and is subject only to limited review by the Tribunal.

It considers that the age-50 rule was validly set aside by the President in 1999. The career policy proposed by the President in CA/20/80 merely set guidelines. The Administrative Council approved the policy in principle, but left the President a degree of latitude in its implementation. He was entitled to disregard the age-50 rule without seeking the Council's prior approval, and he gave sufficient reasons for his decision: he considered that an almost automatic promotion to grade A4 did not reward merit.

The EPO denies any breach of the complainant's conditions of employment, since the President's decision affected only one of several promotion mechanisms. It rejects the complainant's allegation of discrimination on the grounds that he is not in an identical situation in fact and in law to employees who were subject to promotion guidelines for earlier years, or indeed to staff members of other nationalities or with less professional experience.

According to the defendant, even when it was in force, the age-50 rule did not lead to automatic promotion with effect from the staff member's 50th birthday, and the President retained his discretion in the matter. The complainant's case was correctly assessed by the Promotion Board in 2000 in accordance with the applicable regulations and with the President's note on promotions for that year.

D. In his rejoinder the complainant presses his pleas. In the event that the Tribunal decides that the age-50 rule does not mean promotion with effect from the staff member's 50th birthday, he asks to be awarded one euro in moral damages for the psychological stress caused to him by the fact that he was informed of his promotion only 18 months after the date on which he had expected to be promoted.

E. In its surrejoinder the Organisation maintains in full the submissions made in its reply. It considers that since the Tribunal held in Judgment 2187 that it lacks jurisdiction to hear a complaint against the setting aside of the age-50 rule, it can only dismiss the present complaint.

CONSIDERATIONS

1. The complainant, who joined the EPO in 1990 as a patent examiner at grade A3, reached the age of 50 on

31 May 2000. He hoped to benefit from a policy in force at the EPO since 1981 and implemented by means of a series of notes from successive Presidents of the Office to the Chairmen of the Promotion Boards, stipulating that promotion to grade A4 would be offered at age 50 to all staff members of grade A3 who had served a minimum number of years, provided their record of work was good. However, the President had decided to abolish the so-called "age-50 rule" in 1999, after consulting the General Advisory Committee. Neither in 1999 nor in 2000 did the notes on promotion addressed by the President to the Chairmen of the Promotion Boards and published in the *Gazette* - the Office's in-house magazine - contain any provisions specifically concerning staff members of grade A3 having reached the age of 50. When the complainant saw the promotion list issued in June 2000, he found that his name did not appear. He then filed an appeal with the President, who referred the matter to the Appeals Committee, whereupon the latter recommended by a majority that the appeal be dismissed. The President decided to endorse the Committee's recommendation in a decision of 17 October 2002, which is now referred to the Tribunal. Meanwhile, the complainant had been informed on 14 November 2001 that he had been promoted to grade A4 with effect from 1 January 2001. However, that promotion does not make his complaint groundless insofar as he considers that it should have taken effect on 1 June 2000.

2. The complainant requests oral hearings before the Tribunal, to which he maintains he is entitled in view of the rules concerning the EPO's Appeals Committee. However, such rules are not applicable to proceedings before the Tribunal, which considers that oral hearings would not be useful in this case and therefore rejects the complainant's claims in that respect.

3. The Organisation argues, principally, that the complaint is irreceivable on the grounds that, in accordance with the Tribunal's ruling in Judgment 2187 delivered on 3 February 2003, the latter has no authority to set aside a regulatory decision taken by the Organisation, nor to declare that the age-50 rule remains in force, nor to order the Organisation to promote the complainant. However, this plea of irreceivability must be dismissed: as stated in the judgment referred to by the defendant, the Tribunal has jurisdiction to hear individual complaints of staff members who consider that their rights have been violated. The complaint, which follows an internal appeal filed within the time limits and which challenges an individual decision that the complainant deems to be unlawful, is receivable.

4. The complainant submits four pleas in support of the claim to set aside the decision refusing to promote him as from 1 June 2000: (1) the impugned decision was based on the President's decision to abolish the age-50 rule, which could lawfully be taken only with the approval of the Administrative Council; (2) reasons should have been given for the President's decision; (3) the complainant's acquired rights were disregarded; (4) the impugned decision discriminates against the complainant.

5. The first plea is the trickiest. The question is whether the President of the Office was authorised to abolish a system which had been regularly applied on the basis of a career policy proposed in 1980 and approved by the Administrative Council or whether he could do so only with the latter's approval. Even though the Tribunal has no authority, as recalled in Judgment 2187, to set aside the general decision no longer to apply the age-50 rule, the complainant has the right to contest this decision in the context of the complaint he lodged challenging the individual decision by which he was denied promotion at the age of 50.

6. According to the defendant, the President was fully entitled to set aside the age-50 rule since, while it is true that the Administrative Council had in June 1980 approved "the introduction of a career policy for permanent employees in categories A and L which had been proposed by the President", that approval amounted to an agreement in principle regarding only the guidelines of the proposed policy. The Council on that occasion gave the President directives, stating that "career prospects should be based upon the principle of merit", and that it favoured "equal career opportunities for permanent employees in Directorates-General 1, 2, 4 and 5", but without giving any opinion regarding the application of an automatic system of promotion for grade A3 staff reaching the age of 50. The Administrative Council's silence in that respect clearly implied that while the Council took note of the President's intention to apply the rule, it left the matter to his discretion, having emphasised that promotions should be based on staff members' merit rather than seniority, as shown by the minutes of the meeting which took place in June 1980.

7. In the complainant's view, the Administrative Council's silence bears an entirely different meaning: document CA/20/80-VIII, which had been submitted to the Administrative Council for approval on 3 April 1980, contained guidelines regulating the careers of permanent employees in categories A and L, and it expressly provided that all staff members reaching the age of 50, whatever their previous experience, would be promoted to grade A4, on condition that they had served at grade A3 for at least five years and that their record of work was

satisfactory. This matter was not specifically raised, however, in the course of the Council's meeting in 1980 and no objection was voiced at the time, whereas any of the President's proposals which were not accepted were explicitly mentioned in the directives given to him. The fact that the Council had emphasised the need to promote staff members on the basis of merit rather than seniority did not imply that it rejected the age-50 rule, and if that was the case, it is surprising that the rule was applied until 1999. The President was, therefore, not at liberty to cancel, at his discretion, a rule which had been approved by the Administrative Council.

8. The Tribunal cannot accept the defendant's interpretation. It is clear from the evidence that the Administrative Council expressly approved "the introduction of a career policy for permanent employees in categories A and L which had been proposed by the President" and that the age-50 rule was mentioned in the document it approved. It is true that the Council gave the President certain directives, applicable from 1 January 1981, none of which concerned the said rule. But the Council's silence on this point, as on others, cannot be regarded as expressing opposition to a measure proposed by the President, which in fact was applied without interruption from 1981 to 1998. The mere fact that it pointed out that "career prospects should be based upon the principle of merit" in no way implied disapproval of the proposals put forward by the President regarding the possibility of promotion for grade A3 staff, since it was made clear that only staff members whose work record was deemed satisfactory, and who had therefore shown sufficient merit, should receive the promotion. Having thus been approved by the Administrative Council, the rule could not be called into question by the President. It is true that, when deciding to promote or not to promote a permanent employee, the President enjoys discretionary authority, subject to the Tribunal's limited power of review. Within the bounds of this limited power of review, however, the Tribunal considers whether decisions referred to it are not flawed by abuse of authority or error of law. In the present case, the complainant argues rightly that by refusing to apply to his case a rule which had been approved by the Administrative Council, despite the fact that he met the necessary requirements, the President committed an error of law and abused his authority.

9. As a consequence, without any need to entertain the complainant's other pleas, even though he considers that some of these take precedence over the one allowed, the Tribunal sets aside the decision taken by the President of the Office on 17 October 2002.

10. Since he succeeds, the complainant is entitled to costs, which the Tribunal sets at 1,500 euros.

DECISION

For the above reasons,

1. The decision by the President of the Office of 17 October 2002 not to promote the complainant to grade A4 as from 1 June 2000 is set aside.
2. The complainant's promotion shall take effect as of 1 June 2000. He is entitled to the retroactive payment of the resulting salary difference plus interest at 8 per cent per annum.
3. The EPO shall pay the complainant the sum of 1,500 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 7 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.