117th Session **Judgment No. 3316**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr H. S. against the European Patent Organisation (EPO) on 9 February 2010, the EPO's reply of 21 May, the complainant's rejoinder of 23 June, the EPO's surrejoinder of 1 October, the complainant's additional submissions dated 20 October and the EPO's final comments of 16 December 2010;

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

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

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

A. The complainant was born in 1944. At the material time he was a permanent employee of the European Patent Office, the EPO's secretariat, working in the Industrial Chemistry Joint Cluster in Directorate-General 1 (DG1). He was due to reach the normal retirement age of 65 in July 2009. In December 2008 he was granted, under Article 54(1)(b) of the Service Regulations and Circular No. 302, a one-year prolongation of service beyond the age of 65, i.e. until 31 July 2010.

Article 54(1) of the Service Regulations for Permanent Employees of the European Patent Office (hereinafter "the Service Regulations") and Circular No. 302 of 20 December 2007, which sets forth the Guidelines for applying Article 54, provide in pertinent part:

"**Article 54**

Date of retirement

(1) a) A permanent employee shall be retired

- automatically on the last day of the month during which he reaches the age of sixty-five years;
- at his own request under the conditions stipulated in the Pension Scheme Regulations.

b) Notwithstanding the provisions of paragraph (a), a permanent employee may at his own request and only if the appointing authority considers it justified in the interest of the service, carry on working until he reaches the age of sixty-eight in which case he shall be retired automatically on the last day of the month in which he reaches that age."

"**CIRCULAR No. 302**
(20 December 2007)

Guidelines for applying Article 54 of the Service Regulations for permanent employees of the European Patent Office

[…]

[…]

I. **Prolongation of service beyond the age of 65 (up to 68) under mutual agreement**

1. The decision on prolongation of service lies with the President of the Office.

2. A permanent employee in active service may submit a request to carry on working beyond the age of 65 and up to 68 at the latest nine months prior to the date on which he reaches the age of 65.

[…]

4. With the administrative assistance of the Personnel Department and after consulting the employee's superiors, the President will decide on the request. The decision shall be taken with due consideration to the interest of the service, as laid down in the Annex. The decision shall also specify the agreed duration of prolongation of service.

5. The employee concerned shall be notified of the decision within two months from the date on which the request was made and, at the latest,

> seven months prior to the date on which he reaches the age of 65. The Personnel Department shall also be informed of the decision and charged with its administrative implementation."

On 9 October 2009 he requested a further prolongation of service until 31 July 2011. By a letter of 20 November 2009, which constitutes the impugned decision, Mr B., the Principal Director of Industrial Chemistry, informed the complainant that a further prolongation would not be in the interest of the service, because "the conditions prevailing at the time of first prolongation of service beyond the age of 65 [were] no longer present". On 26 November and again on 9 December 2009 the complainant wrote to the Vice-President of DG1 requesting a review of Mr B.'s decision not to prolong his service. The Vice-President of DG1 replied on 14 January 2010 that "there [was] no critical backlog situation in the directorate in either search or examination" and that therefore "a further prolongation of [his] contract was not in the interest of the service". The complainant wrote to his Director the next day, offering to take over work from another directorate in the Industrial Chemistry Joint Cluster, in which there was purportedly a critical backlog. By a letter of 19 January 2010 Mr B. confirmed the decision of 20 November 2009 not to prolong the complainant's service.

B. The complainant contends that the impugned decision was *ultra vires*, first, because it was not taken by the President of the Office, who alone has the power under Circular No. 302 to make decisions on requests for prolongation of service and, second, because at the time of his request he only spent a small part of his working time in the Joint Cluster Industrial Chemistry, i.e. under Mr B.'s supervision. Consequently, the management of the directorates where he spent large parts of his working time should also have been consulted before his request for prolongation was turned down. Relying on an internal document, he argues that the legislator's intent in introducing the possibility for staff to work beyond 65 was to establish a presumption that requests for prolongation would be granted, unless serious reasons dictated otherwise. The complainant also asserts that there were no reasons to deny his request and that the decision not to prolong his service lacked proper and detailed reasoning. Moreover, by ignoring

the conditions prevailing at the time of his request, namely the backlog in neighbouring directorates with similar technical orientation, as well as his overall contribution to the Organisation and ability to work, the Administration failed to properly evaluate the interest of the service, in accordance with Circular No. 302 and the Annex thereto.

The complainant asks the Tribunal to quash the impugned decision and to order the EPO to allow him to work up to the age of 67. Should this claim become impracticable, he requests compensation in an amount equal to the difference between his net retirement pension and the salary, including benefits and allowances, which he received prior to his retirement, with interest at the rate of 8 per cent per annum. He also requests moral damages and costs.

C. The EPO submits that Mr B. properly exercised his authority in taking the decision not to prolong the complainant's service. It points in this regard to the President's decision to delegate to Vice-Presidents the power to take decisions on requests for prolongation of service, vested to her under Circular No. 302, and their authorisation to further delegate, subject to her approval, that power to Principal Directors. It also points to the subsequent decision by the Vice-President of DG1 to further delegate, as of 1 March 2008, his power in the matter to Principal Directors. It rejects the argument that the management of other directorates should have been consulted and notes that the interest of the service was rightly evaluated on the basis of the needs arising in the complainant's directorate. Relying on Judgment 2896, it also rejects the argument that the legislator's intent was to establish a presumption in favour of granting requests for prolongation of service. According to the EPO, the Administration was perfectly entitled under Circular No. 302 to only consider the workload in the complainant's field when evaluating the interest of the service. As this workload had been considerably reduced since the complainant's first prolongation, the Administration's evaluation was correct and the grounds provided to the complainant for the refusal of his request were sufficient and appropriate.

D. In his rejoinder the complainant reiterates his pleas. He asserts that neither the Principal Director's letter of 20 November 2009, communicating to him the impugned decision, nor that of 19 January 2010, explained the reasons for the refusal of his request. He contends that the workload in his technical field at the material time justified a prolongation of his service. In support of this argument, he refers to the interviews scheduled in 2010 for the recruitment of new examiners in the Joint Cluster Industrial Chemistry and to a colleague's declaration, which he also appends to his rejoinder, confirming the existence of a backlog in the field of chemistry.

E. In its surrejoinder the EPO maintains its position. It notes that the complainant's colleague, whose statement is appended as evidence of the backlog in the field of chemistry, works in a different directorate than the complainant, which has its own organisation and which deals with a different technical area. As a result, their fields of work differ. It points in this connection to a declaration by the complainant's former Director confirming that the complainant would have needed to undergo a training, learning and adaptation period before he could be given work from his colleague's directorate. It explains that the Organisation has wide discretion in conducting succession planning for retiring staff and that decisions on requests for prolongation are therefore subject to limited review.

F. In his additional submissions the complainant invites the Tribunal to ignore his former Director's declaration, appended to the EPO's surrejoinder. He expresses his astonishment at the declaration made by his former Director who, he notes, had at the time encouraged him to request a further prolongation. Emphasising his extensive experience in a broad variety of technical areas, he denies that he would have needed an additional training, learning and adaptation period.

G. In its final comments the Organisation denies that the complainant was encouraged by his former Director to request a further prolongation.

CONSIDERATIONS

1. The complainant commenced employment with the EPO in 1986. His 65th birthday fell on 14 July 2009. The EPO Service Regulations provide in Article 54(1)(a) that a permanent employee shall be retired automatically on the last day of the month during which he reaches the age of 65 years. By operation of this provision, the complainant would have been retired automatically on 31 July 2009. However, this provision is the subject of a qualification found in Article 54(1)(b) to the effect that a permanent employee may carry on working until aged 68 if the appointing authority "considers it justified in the interest of the service". This might occur only if requested by the employee.

2. In fact, the complainant made such a request in October 2008 and a decision was made to prolong his employment for a period of one year, until 31 July 2010. A further request was made on 9 October 2009 for another year's prolongation. However, a decision was made and communicated to the complainant by a letter dated 20 November 2009 that there would not be a further prolongation as it was not, as stated in the letter, "in the interest of the service". This is the impugned decision. It was made by Mr B., the Principal Director of Industrial Chemistry. Regrettably, the Service Regulations do not provide for an internal appeal in a case such as the present, before an employee can appeal to the Tribunal.

3. In his complaint, the complainant challenged the impugned decision on several bases. First, he argued that the impugned decision was *ultra vires*. His argument had two elements. One was that the decision should have been made by the President whereas, in fact, the decision was made by a Principal Director. The operation of Article 54(1)(b) is addressed by Circular No. 302. The Circular provides a mechanism for the consideration of a request made under the Article. It makes express reference to such a request being submitted to the President of the Office and the President "decid[ing] on the request". The complainant's argument was that the Principal Director

had no authority to make the impugned decision as the repository of the power was, and only was, the President.

In its reply, the EPO annexed three documents relevant to this element of the complainant's first argument. One was a memorandum dated 11 February 2008 signed by the President delegating to the Vice-President with direct responsibility for the employee concerned, the power to "take decisions on prolongation of service for all employees with grades A5 and lower". The memorandum further provided that the relevant Vice-President could, with the President's approval, provide for a further delegation of the power to Principal Directors. The Vice-President of DG1 (the organisational area in which the complainant mostly worked), in an instrument dated 21 February 2008, delegated the power to Principal Directors for the employees under their direct line management. This delegation was said to be effective from 1 March 2008. This arrangement was approved by the President in writing on 6 March 2008.

It can be assumed, having regard to the nature of the power the President delegated, that it was open to the President to delegate the power and provide for its further delegation. This, in fact, occurred. Fairly obviously, it was the type of decision that administrators lower down in the organisational hierarchy would be likely to be well placed to make. This element of the complainant's *ultra vires* argument should be rejected. This conclusion is supported by the reasoning of the Tribunal in Judgment 2896, consideration 3.

4. The second element of the *ultra vires* argument was that the complainant had only spent a minority of his time working as an examiner in the Joint Cluster Industrial Chemistry, that is, under the supervision of Mr B. This submission was not made with the complainant having the benefit of the instrument of delegation of 21 February 2008. However it is conceivable that the complainant was saying that he was not under the direct line management of Mr B. who would have only had the delegated power to make a prolongation decision in relation to employees with that status. No attempt was made by the complainant in his rejoinder (then having the benefit of

the instrument of delegation) to elaborate on this argument. The Tribunal cannot assume, as the complainant is in effect asking, that the asserted fact that he spent a minority of his work under the supervision of Mr B. established an organisational arrangement in a more formal sense in which he was not under direct line management of Mr B. The fact that Mr B. approved the initial prolongation of employment from 31 July 2009 militates against a conclusion that the complainant was not under his direct line management.

The complainant also argued that, at the least, Mr B. should have consulted with management in other areas of the EPO in which he worked in 2009. This would only be an *ultra vires* issue if a condition precedent to the exercise of the power to make a decision in relation to a prolongation request, was that such consultations take place. There is nothing express or implied in either Article 54 or Circular No. 302 that would justify a conclusion that it was a condition precedent. These aspects of the complainant's *ultra vires* argument should be rejected.

5. A second basis for challenging the impugned decision was described by the complainant in his brief as concerning the "Legislator's intent". He argued that, in effect, documents prepared within the EPO proposing the amendment to the Service Regulations enabling prolongation of employment, evidence an intention favouring the prolongation of employment beyond 65. The complainant argued that it was intended that there be a presumption that prolongation requests would be decided in favour of the employee who made the request. The short answer to this argument, is that it has already been rejected by the Tribunal in Judgment 2896, consideration 4, and likewise should be rejected in this matter.

6. The next bases on which the complainant challenged the impugned decision concern the reasons for it. The complainant argued that adequate reasons for the decision were not provided to him. The complainant also argued that the prevailing circumstances were not properly evaluated having regard to criteria in Circular No. 302.

In Mr B.'s letter of 20 November 2009, the reason for rejecting the complainant's request for prolongation was stated as "the conditions prevailing at the time of first prolongation of service beyond the age of 65 are no longer present and that a further prolongation would not be in the interest of the service".

7. The jurisprudence of the Tribunal establishes that, generally speaking, an employee is entitled to reasons for a decision that adversely affects the employee, though the reasons may be apparent from the notice given to the employee of the decision, or some other document, from prior proceedings, orally, or in answer to his objections (see Judgment 1590, consideration 7). In the present case, the reasons given in the letter of 20 November 2009 were, at best, a cursory explanation of the decision. It would likely not have been sufficient for the EPO to have simply said prolongation was not in the interest of the Organisation (see Judgement 1234, consideration 19). However Mr B., in his letter, made it tolerably clear that the reasons for not prolonging the employment were that the circumstances which had existed at the time of the initial decision to prolong the employment (a decision made in December 2008) did not exist at the time the impugned decision was made in November 2009.

8. It is equally tolerably clear from the brief, reply, rejoinder and surrejoinder and supplementary submissions made by both the complainant and the EPO that at the time of the initial prolongation decision, there was an unacceptable backlog of matters to be dealt with by examiners such as the complainant, and that was the reason underpinning the initial decision. Similarly it is tolerably clear from the same material that from the EPO's perspective, there was not an unacceptable backlog at the time the impugned decision was made in November 2009. It can be readily inferred that the complainant knew of this fundamental difference when informed of the impugned decision in November 2009. Mr B., in drawing the distinction between the circumstances in December 2008 and the circumstances in November 2009, was informing the complainant of the reason why the

decision was made not to prolong his employment. The Tribunal concludes that the complainant was sufficiently informed of the reasons for the decision not to prolong his employment.

9. It must be said, the complainant disputes that the circumstances in November 2009 nonetheless warranted a decision to refuse his request for prolongation. However, as the Tribunal observed in Judgment 2896, consideration 7, it will not ordinarily interfere with the assessment in similar circumstances by the decision-maker unless there is some obvious flaw in the decision (which is a discretionary decision), such as if it was made without authority, or if it was tainted with a procedural or formal flaw or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was an abuse of authority, or if clearly mistaken conclusions were drawn from the evidence. In the present case, the substance of the complainant's argument is that he disagreed, as a matter of subjective assessment, with the conclusion of the EPO. This is insufficient to justify the Tribunal intervening.

Moreover, the complainant argued that the EPO failed to consider matters identified in the Annex to Circular No. 302 which, in the first instance (see Judgment 2896, consideration 6), directed the decision-maker's attention to criteria that inform the question of whether prolongation was in the interest of the service. Those criteria are: workload in a specific area, necessity of continuity to complete a task or a project, management of succession planning and other organisational reasons. However, on the material before the Tribunal, it is clear that an assessment was made of the first two matters at the time of the decision and the complainant has not established that, on the facts, the third was a matter that should have been taken into account. In the result, the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 February 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 April 2014.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS

DRAŽEN PETROVIĆ