

K.
v.
EPO

129th Session

Judgment No. 4259

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr D. T. K. against the European Patent Organisation (EPO) on 17 October 2016, the EPO's reply of 30 January 2017, the complainant's rejoinder of 14 March and the EPO's surrejoinder of 15 June 2017;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the decision not to extend his appointment beyond the statutory retirement age.

In 2011 the complainant, who was born on 25 November 1951, was appointed as a Legally Qualified Member of the Boards of Appeal of the European Patent Office, the secretariat of the EPO.

Paragraph (a) of Article 54(1) of the Service Regulations for permanent employees of the European Patent Office stipulates that the normal age of retirement is sixty-five years. However, at the material time, paragraph (b) stated that 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", and that this provision applied to members of the Boards

of Appeal, “provided that the Administrative Council, on a proposal of the President of the Office, appoints the member concerned pursuant to the first sentence of Article 11, paragraph 3, of the [European Patent] Convention [...]”.

On 25 November 2015 the complainant submitted a request to carry on working until he reached the age of sixty-eight. The Selection Committee responsible for submitting proposals to the President of the Office concerning the appointment of members of the Boards of Appeal unanimously recommended that the complainant’s request be granted. On 23 February 2016 the Vice-President of Directorate-General 3 (DG3) informed the complainant that the President had decided to reject his request and that accordingly he would not submit a proposal for appointment to the Administrative Council.

On 20 May 2016 the complainant requested a review of the decision of the President, pointing out that he had not been given reasons for the refusal of his request, which made it “not easy for [him] to formulate specific arguments to challenge the refusal”. By a letter of 20 July 2016, which is the impugned decision, the complainant was informed that the President maintained the earlier decision denying his request. The President addressed the complainant’s specific allegations and concluded that he had properly exercised his discretion. He further indicated that the impugned decision was excluded from the internal appeal procedure. The complainant thus filed his complaint directly before the Tribunal. He retired on 30 November 2016.

The complainant asks the Tribunal to set aside the impugned decision. He seeks financial compensation equivalent to the 36 months of salary he would have received from 1 December 2016 to 30 November 2019 had his request been granted.

The EPO asks the Tribunal to dismiss the complaint as unfounded in its entirety.

CONSIDERATIONS

1. The central question to be determined in this case is whether the President's decision communicated on 23 February 2016, which he confirmed in the impugned decision of 20 July 2016, was unlawful, as the complainant contends, and should be set aside. In those decisions, the President rejected the recommendation which the Selection Committee made to grant the complainant's request for an extension of his appointment as a member of the Boards of Appeal until he attained the age of sixty-eight years.

2. Under Article 11(3) of the European Patent Convention (the Convention) the members of the Boards of Appeal are to be appointed by the Administrative Council on a proposal from the President of the Office. The normal retirement age of members of the Boards of Appeal is sixty-five years as Article 54(1)(a) of the Service Regulations provides. It relevantly states that a permanent employee shall be retired automatically on the last day of the month during which she or he reaches that age. However, at the material time, under Article 54(1)(b) of the Service Regulations, a member of the Boards of Appeal could continue to work until the age of sixty-eight. The provision stated as follows:

“(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 [...]. This applies to members of the Boards [of Appeal] provided that the Administrative Council, on a proposal of the President of the Office, appoints the member concerned pursuant to the first sentence of Article 11, paragraph 3, of the Convention [...].”

3. Communication 2/08 provides for the preparation of proposals of the President pursuant to Article 54(1)(b) of the Service Regulations. It relevantly states, in paragraph 2, that the proposal is prepared by the Selection Committee within DG3. Paragraphs 3 and 4 state as follows:

“3. The member of the boards of appeal will be requested to undergo a medical examination [...] in order to establish whether it is likely that the health requirements of the post will continue to be met during the prolongation of the service.

4. The request under Article 54(1)(b) [of the Service Regulations] shall be submitted to the Vice-President DG3.”

4. On 25 November 2015, the complainant, who was due to retire on 30 November 2016, submitted his request for prolongation. In January 2016 he underwent the medical examination and was interviewed by a Selection Committee. The results of the medical examination were positive and the Committee unanimously recommended that he be reappointed with effect from 1 December 2016. However, by an email of 23 February 2016 the Vice-President DG3 informed him as follows:

“Your request for prolongation was forwarded to the President on the 9th of February 2016. As you know the prolongation of a member of the Boards of Appeal takes the form of an appointment by the Administrative Council on a proposal of the President of the Office.

I herewith confirm that on the 10th of February 2016 the President has decided to refuse the request, which means that he will not submit a proposal for appointment in your case to the Administrative Council.”

5. In his request of 20 May 2016 for the review of this decision, having chronicled the reasons which in his view made it advantageous for his appointment to be extended, the complainant stated that it was difficult to formulate specific arguments to contest this decision because no reasons were given for rejecting his request for the prolongation of his appointment. He further stated, among other things, that “the failure to state reasons is in itself scarcely compatible with the general principle that administrative decisions adversely affecting the individual should be reasoned”. The complainant also stated that the speedy reply to his request for prolongation caused him to assume that the decision was based on “a blanket opposition” to permitting members of the Boards of Appeal to serve beyond the normal retirement age of sixty-five at a time when the future workload of the Boards was uncertain. He opined that that position should be reconsidered in light of the announcement in autumn 2015 that the freeze on recruitment would end and new Board members were recruited. He suggested, in effect, that the prolongation of the appointment of someone in his position beyond the age of sixty-five might be more advantageous or in the interest of the EPO in terms

of the flexibility which a three-year extension would provide over recruiting a new member on the full five-year appointment.

6. The duty to provide reasons for an administrative decision that adversely affects an official is a fundamental requirement in international civil service law and the Tribunal's case law requires such a decision to be motivated in order for the official to know the basis on which it was taken and to facilitate her or him to formulate an appeal from the decision if necessary. However, the Tribunal has accepted that the reasons for a decision may be provided in response to a subsequent challenge of the decision (see, for example, Judgment 3662, under 3).

7. The EPO submits that the impugned decision of 20 July 2016 precisely states the reasons why the President rejected the complainant's request for the prolongation of his appointment and that he made the decision pursuant to his wide discretionary power to extend appointments of members of the Boards of Appeal. The EPO also states that the President had thoroughly weighed all relevant aspects in view of the prevailing general interest of the service. In these proceedings the EPO provides document CA/16/15 dated 6 March 2015. The EPO states that it provides additional background information to strengthen the justification for the impugned decision. According to the EPO, this document was drawn up following the decision R 19/12 (of 25 April 2014 of the Enlarged Board of Appeal) which deemed that the Vice-President DG3 could not impartially exercise judicial activities while hierarchically subordinated to the President of the Office. This resulted in a new structural organization of DG3 which had to be adopted. The document was prepared at the request of the Administrative Council which had entrusted the President with the duty to present a structural reform of the Boards of Appeal. In the meantime, all appointments, renewals and extensions of service beyond the normal retirement age were handled "with precaution and parsimony in due respect with the Office's interest".

8. The impugned decision correctly states that the President's decision whether to propose to the Administrative Council a prolongation of service of a member of the Boards of Appeal is an exceptional

measure and the decision is subject to only limited review. The Tribunal stated as follows in Judgment 3970, under 2:

“The Tribunal has consistently held that a decision to retain an official beyond the normal retirement age is an exceptional measure over which the executive head of an organisation exercises wide discretion. Such a decision is therefore subject to only limited review by the Tribunal, which will interfere only if the decision was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority [...].”

9. The impugned decision then rejected the complainant’s assumption that the decision not to prolong his appointment was due to a blanket opposition to the prolongation of the service of members of the Boards of Appeal. It also rejected his suggestion that the President did not consider the matter thoroughly and stated that the decision was taken “after weighing all relevant aspects and with due respect to the Office’s prevailing general interest of [the] service”. It further stated that, as the complainant had noted, since the end of 2015 the Office had resumed recruiting members of the Boards of Appeal; that the Office was fully aware of the workload of the Boards and was managing the situation; that this “was taken into account in the decision making process” and that there was no flaw in the decision not to prolong the complainant’s appointment.

10. The complainant states that there could be no doubt about his professional competence; his performance over the previous five years; his mental and physical ability to continue to work for another three years or his conduct in the service. The Selection Committee would have taken into consideration the medical tests which the complainant undertook when it recommended the prolongation of his appointment. The President was also aware of it but did not reject the request for prolongation on the ground that he was not mentally or physically fit to continue. Moreover, the argument that insufficient weight was given to the complainant’s personal attributes and merits does not fall within the limited vitiating grounds on which the decision not to prolong his appointment may be set aside (see, for example, Judgment 3285, under 19). Further, the Tribunal

concludes, contrary to the complainant's contention, that the President's decision had no impact on the preservation of the independence of the Boards of Appeal, which is underpinned by Article 23 of the Convention.

11. The critical question, however, is whether, as the complainant in effect submits, the President's decision is vitiated because it breached the principle that, inasmuch as it adversely affected his rights, the reasons for it should have been clear and coherent, particularly as it departed from the recommendation of the Selection Committee.

12. Under Article 54(1)(b) of the Service Regulations, a member of the Boards of Appeal could continue to work beyond the normal retirement age if the appointing authority (the Administrative Council), on the proposal of the President, considered that this was justified in the interest of the service. The President stated that he did not consider the prolongation justified "after weighing all relevant aspects and with due respect to the Office's prevailing general interest of [the] service". It is not clear from the impugned decision or from any document which the EPO presents what the "relevant aspects" are. The EPO does not explain it and the Tribunal does not discern a nexus between any aspects of the proposed structural reform of the Boards of Appeal contained in document CA/16/15 and the President's decision not to propose the prolongation of the complainant's appointment to the Administrative Council. Moreover, there is no indication as to what the Office's prevailing general interest of the service in rejecting the complainant's request for prolongation of his appointment was. Merely repeating that phrase in similar terms to the formulation in Article 54(1)(b) was insufficient. The Tribunal therefore concludes that the President's decision not to propose the prolongation of the complainant's appointment to the Administrative Council and rejecting the request was irregular. Accordingly, the impugned decision, as well as the initial decision of 23 February 2016, will be set aside.

13. The complainant seeks compensation equivalent to the salary which he would have received over the three-year (thirty-six months) period from 1 December 2016 to 30 November 2019 "if [his] request to

continue working beyond the age of 65 had been granted". He states that his salary was approximately 16,000 euros per month. The EPO submits that the complainant is not entitled to compensation, as, contrary to the case law stated for example in Judgment 2471, under 5, he provides no evidence of the actual injury and of the causal link between the unlawful act and the injury which he alleges he suffered.

No purpose would be served by sending the matter back to the EPO to secure a reasoned decision, given the time that has elapsed. The Tribunal cannot know whether the President, if required to make a fresh decision, would adhere to his original decision and explain why with cogent reasons, or, confronted with the need to motivate the decision, alter it. Notwithstanding the above observations, the complainant is entitled to moral damages, which the Tribunal assesses in the sum of 10,000 euros.

DECISION

For the above reasons,

1. The impugned decision, dated 20 July 2016, as well as the prior decision of 23 February 2016, are set aside.
2. The EPO shall pay the complainant moral damages in the amount of 10,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 23 October 2019, Ms Dolores M. Hansen, Vice-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 10 February 2020.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ