Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

108th Session **Judgment No. 2896**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr B. T. against the European Patent Organisation (EPO) on 6 March 2008, the EPO's reply dated 23 June, the complainant's rejoinder of 29 July and the Organisation's surrejoinder dated 14 November 2008;

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 December 2007 the Administrative Council amended Article 54 of the Service Regulations for Permanent Employees of the European Patent Office, the EPO's secretariat, in order to allow permanent employees to carry on working beyond the age of 65. New subparagraph (b) of Article 54(1) relevantly provides 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". Circular No. 302 of 20 December 2007 contains guidelines for applying Article 54. Its annex lists criteria for evaluating the interest of the service. Those criteria relate to the need of the service, which

should be assessed first, and the suitability of the employee to fulfil that need.

The complainant, an Italian national born in June 1944, joined the Office in 1982. At the material time, he was working in the Operational Services Directorate within Directorate-General 2 (DG2) and he held grade B5. By an e-mail of 1 February 2008 he submitted a request to his line manager for prolongation of service beyond the age of 65. By a letter of 21 February 2008 the Vice-President in charge of DG2 informed him that, after consulting his supervisors, it had been decided to reject his request. He explained that it was not possible to justify his continuation in the post in view of the decreasing ratio of permanent employees to contract staff in the Operational Services Directorate. The internal means of appeal being deemed exhausted in accordance with Article 107(2)(b) of the Service Regulations, that is the decision which is appealed directly before the Tribunal.

B. The complainant submits that the decision to reject his request was taken *ultra vires* since the letter of 21 February 2008 was signed by the Vice-President in charge of DG2 whereas, according to Circular No. 302, it is for the President of the Office to decide on requests for prolongation of service. He notes that the circular does not foresee any implicit or explicit delegation of power to the Vice-President in charge of DG2 and that the latter did not purport to act on behalf of or under the instructions of the President.

He also submits that the impugned decision was not justified on the basis of the criteria listed in the annex to Circular No. 302. He emphasises that he is a long-serving staff member with good performance records and very motivated to carry on working. Relying on an explanatory note contained in an Administrative Council document, the complainant contends that the legislator's intent in amending Article 54 of the Service Regulations was to favour EPO staff members to carry on working at the end of their career, thereby establishing a presumption that requests for working up to the age of 68 would be allowed unless there were reasons relating to the interest of

service. In his opinion, the organisational reason put forward in the letter of 21 February 2008, that is the progressive shift from permanent to contract staff, is insufficient to rebut this presumption. He believes that the true reason is, paradoxically, his age. Therefore, the rejection of his request is discriminatory and arbitrary. Besides, the shift to contract staff is a long-term plan whereas in his e-mail of 1 February 2008 he requested no more than a three-year prolongation and stated that he would be satisfied with a two-year or even a one-year prolongation. The rejection of his request is thus disproportionate to the goal set by the Administration.

The complainant requests that the impugned decision be quashed and that the EPO be ordered to allow him to carry on working until he reaches the age of 68 or in the alternative 67, or subsidiarily 66. In the event that lengthy proceedings render his claim moot, he seeks compensation equivalent to the difference between the net retirement pension and total amount of salary, emoluments and benefits he currently receives with compound interest at the rate of 8 per cent per annum. He claims compensation for additional pension entitlements that would have accrued had he been allowed to carry on working, moral damages and costs.

In addition to applying for hearings, the complainant asks the Tribunal not to grant the Organisation any extension of time limits for filing its submissions on the grounds that if the Tribunal takes up his case within more than one year his main claims for relief will become "illusory".

C. In its reply the EPO argues that the complaint is unfounded. It adduces two documents in evidence, one dated 11 February 2008 and the other dated 25 February 2008, showing that, with effect from 1 January 2008, the President of the Office expressly delegated her power to take decisions on requests for prolongation of service to the Vice-Presidents and Principal Directors with responsibility for grade A5 and lower-grade employees.

It submits that the extracts of the explanatory note on which the complainant relies show that the legislator's intent was to establish a

mere possibility, not a right, to carry on working beyond the age of 65. Furthermore, subparagraph (a) of Article 54(1) of the Service Regulations lays down the rule of automatic retirement at the age of 65 and new subparagraph (b) provides for an exception to that rule. This, the Organisation contends, demonstrates that the prolongation of service is not automatic.

According to the EPO, the decision to reject the complainant's request was a discretionary one and it was taken with due regard to the interest of the service, particularly the decreasing workload, his supervisors' view that the continuity of his duties could be ensured by contract staff and the fact that he was not considered to be indispensable for the purpose of succession planning or knowledge transfer. The complainant is not performing highly skilled tasks and in an e-mail of 16 April 2008, a copy of which the Organisation appends to its reply, his line manager explained that upon his departure his tasks would be performed by contract staff. The EPO contends that there was no need to consider the criteria relating to the complainant's suitability to fulfil the need of the service given that his prolongation was not in the interest of the service.

Lastly, it objects to his application for hearings and to his request not to grant any extension of time limits. It argues that even if the Tribunal is late in dealing with the complaint and quashes the impugned decision, there would be no obstacle for the Organisation to reinstate the complainant retroactively.

D. In his rejoinder the complainant contends that the retroactive effect of the delegation of power casts doubt on its lawfulness and that there is no evidence that such delegation of power was conveyed to the Vice-President in charge of DG2 before 25 February 2008. He presses his plea of lack of reasons, stressing that the failure to balance the interests of employees against those of the service amounts to an abuse of discretion, and that the e-mail of 16 April 2008 constitutes belated hearsay evidence and, as such, is inadmissible. It reiterates his "special applications".

E. In its surrejoinder the EPO maintains its position. It points out that the Vice-President in charge of DG2 was among the addressees of the document of 11 February 2008 and that the document of 25 February merely confirmed the delegation of power. As to the e-mail of 16 April 2008, it does not reveal any new fact and simply restates the reasons already put forward in the decision rejecting the complainant's request.

CONSIDERATIONS

1. The complainant, who was born on 17 June 1944, joined the European Patent Office on 26 April 1982. He was always employed in the Organisation's information technology services, where he rose to grade B5.

On 1 February 2008 he asked to be allowed to carry on working for at least one year after the normal retirement age. He stressed, on the one hand, the satisfaction he derived from pursuing his career in a field where he had acquired great technical expertise and, on the other, his family and financial situation.

This request was rejected by a letter of 21 February 2008, which was signed by the Vice-President in charge of DG2. The reason given for this refusal was that it was the Organisation's policy to reduce the number of staff and increase the number of contractors in the service to which the complainant was assigned.

It is this decision that the complainant impugns before the Tribunal.

2. Article 54(1)(a) of the Service Regulations for Permanent Employees of the Office stipulates that permanent employees shall retire on reaching the age of 65 years. Subparagraph (b) introduces a degree of flexibility by stating 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 in which case he shall be retired automatically on the last day of the month in which he reaches that age."

The scope of this text was clarified by Circular No. 302, section I of which, entitled "Prolongation of service beyond the age of 65 (up to 68) under mutual agreement", reads:

> "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.
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> 3. The request shall be submitted via the normal line management channels to the President. A copy of the request will be sent by the immediate superior to the Personnel Department. The request shall indicate the desired duration of prolongation.
>
> 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.
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> 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. […]
>
> 6. The prolongation of service expires at the end of the agreed period, at which time the employee is retired automatically.
>
> […]"

The criteria to be taken into consideration with respect to the prolongation of service of an employee beyond the normal retirement age are listed in paragraphs 1 and 2 of the annex to this circular, which is entitled "Evaluation of the interest of the service" and worded as follows:

> "A two-step approach will be followed to evaluate the interest of the service relating to the prolongation of service of an employee after the age of 65. The first step will comprise the assessment of the need of the service. Only if the need has been established will the suitability of the employee to fulfil the identified need be assessed.
>
> 1. Criteria relating to the service are, inter alia:
>
> - workload in a specific area
> - necessity of continuity to complete a task or a project
> - management of succession planning (e.g. knowledge transfer, age structure, training needs)

- other organisational reasons

2. Criteria relating to the individual employee are, inter alia:
   - appropriate qualifications and expertise
   - performance record
   - estimated work capacity
   - staff member's motivation

[…]"

3. First, the complainant disputes the formal validity of the impugned decision on the grounds that it was signed by the Vice-President in charge of DG2 and not by the President of the Office, as required by Circular No. 302.

This plea fails, since the Organisation appended to its reply two documents, dated 11 and 25 February 2008, showing that the President of the Office has delegated to Vice-Presidents or Principal Directors, as appropriate, the authority to take decisions on prolongation of service beyond the age of 65 in the case of permanent employees in grade A5 or below. Although this delegation of authority had not been published by then, it applied to the impugned decision issued on 21 February 2008. It would have been appropriate for the decision to mention that fact but this omission does not mean that the signatory Vice-President acted *ultra vires* and it cannot lead to the quashing of the impugned decision.

4. The complainant, relying on an explanatory note contained in an Administrative Council document, further submits that a permanent employee is entitled to assume that his or her request to continue working until the age of 68 will be granted, unless it is ruled out for reasons connected with the interest of the service.

The Tribunal rejects this argument, because such a presumption would imply that requests from permanent employees who wish to continue in active service after reaching the normal retirement age should be granted as a matter of course, or that permanent employees could even choose to retire between the ages of 65 and 68, unless the proper functioning of the service required that they be retired at the age of 65. Such a solution would ignore the fact that this retirement

age has been established in order to protect workers' rights but also, more generally speaking, in order to promote a reasonable employment policy.

5. Further, the complainant considers that insufficient grounds were given for the rejection of his request. While the lack of more detailed reasons for the decision of 21 February 2008 is certainly regrettable – reference is simply made to the Organisation's policy of reducing the ratio of staff to contractors – it does not constitute a formal defect which would justify the quashing of this decision.

6. The first question to be addressed by the Organisation was whether it was in the interest of the service to prolong the complainant's service. The procedure for determining this involved two steps, the second of which was conditional upon the first, which consisted in assessing the needs of the service in the light of the criteria listed in paragraph 1 of the annex to Circular No. 302. These criteria included workload, necessity of continuity to complete a task or a project and the management of succession planning. In its reply the Organisation provided a satisfactory account of how it applied these criteria in this case.

7. It then had to ascertain whether there were other organisational reasons for prolonging the complainant's service beyond the age of 65, and in this respect the EPO had wide discretion because, according to firm precedent, the Tribunal will quash a discretionary decision only if it was taken 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 abuse of authority, or if clearly mistaken conclusions were drawn from the evidence (see Judgment 1969, under 7). In the instant case the complainant does not put forward any argument showing that the impugned decision is tainted with such flaws. There is nothing to indicate that the policy relied on by the Organisation was devoid of an objective basis, or that the refusal to prolong the complainant's service beyond the age of 65 has been detrimental to the Organisation.

8. Moreover, the Organisation in no way called into question the complainant's qualifications, experience, the quality of his work or indeed his motivation; but as the needs of the service did not justify the prolongation of his service, it could, in accordance with the provisions of the annex to Circular No. 302, forgo assessment of the criteria relating to the complainant's capacity to fulfil these needs.

9. In the circumstances the complaint must be rejected, without there being any need to order the hearings for which the complainant has applied, or to rule on his requests regarding time limits in proceedings before the Tribunal; these may be set at the latter's discretion pursuant to Article 14 of its Rules, which has been properly applied.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Seydou Ba
Claude Rouiller
Catherine Comtet