

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

L. (No. 2)

v.

EPO

120th Session

Judgment No. 3524

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms A. L. against the European Patent Organisation (EPO) on 12 September 2012 and corrected on 10 October 2012, the EPO's reply of 24 January 2013, the complainant's rejoinder of 4 March and the EPO's surrejoinder of 7 June 2013;

Considering Article II, paragraph 5, 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 fact that a rule concerning automatic promotion was not applied to her.

In 1980 the President of the European Patent Office, the EPO's secretariat, submitted to the Administrative Council a document bearing the reference CA/20/80-VIII, which set out the career policy for category A and L staff. It contained 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."

This rule was abolished by the Administrative Council, with effect from 1 January 2005, in Administrative Decision CA/D 8/04 of 17 June 2004.

At the material time, the complainant, who had joined the EPO in 1990, had held a post at grade A3 since June 2000. By a letter of 8 September 2010, having discovered that her name was not on the promotion list published one month earlier, and believing that she met the conditions for promotion to grade A4 under the age-50 rule, she requested such a promotion backdated to 30 May 2010, the date on which she had reached that age. Failing that, she requested that her letter be treated as an internal appeal and she asked for 5,000 euros to cover damages and costs. This request was denied on 27 September 2010 on the grounds that the aforementioned rule had been abolished as of 1 January 2005. The Administration pointed out that the Internal Appeals Committee had already found against employees who had lodged similar appeals and asked her if she intended to maintain her appeal.

On 3 October 2010, the complainant made it clear that she would maintain her appeal unless she was promoted to grade A4 before the end of the year. This appeal was forwarded to the Internal Appeals Committee on 8 November 2010. The Committee issued its opinion on 19 April 2012 at the end of written proceedings, since the complainant had not indicated that she wished to be heard. Three of the five Committee members considered that, as the age-50 rule constituted only one of the possibilities of obtaining promotion to grade A4, it could not be considered to be a crucial factor influencing the complainant's decision to enter the EPO's service and that it did not therefore constitute an acquired right. Moreover, they took the view that the complainant could not assert any contractual right stemming from her appointment with the EPO, and that she had no grounds for alleging a breach of the principle of equal treatment, since she was in a situation of law and of fact different to that of her colleagues who had turned 50 before the disputed rule had been abolished. The majority of the Committee members therefore recommended that the appeal be dismissed as unfounded.

On the other hand, the other two members of the Committee considered that the complainant had an acquired right to receive promotion to grade A4 at the age of 50. They therefore recommended that the President allow the appeal.

The complainant was informed by a letter of 18 June 2012, which constitutes the impugned decision, that her appeal had been dismissed by the President of the Office in accordance with the opinion of the majority of Committee members.

On 12 September 2012 the complainant filed a complaint with the Tribunal in which she asked it to set aside the impugned decision, to rule on her right to obtain promotion to grade A4 backdated to 30 May 2010 and to award her 10,000 euros in compensation for moral injury as well as costs in the amount of 3,000 euros.

The EPO asks the Tribunal to dismiss the complaint as unfounded and to rule that the complainant should bear her costs.

CONSIDERATIONS

1. It is not disputed that the age-50 rule stipulated that promotion to grade A4 at the age of 50 “[would] be offered to all who [had] served at least 5 years in the A3 grade, irrespective of their total previous experience provided their record of work [was] good”. Nor is it disputed that on 17 June 2004 this age-50 rule was abolished by an Administrative Council decision that took effect on 1 January 2005.

2. The complainant, who was promoted to grade A3 on 1 June 2000, contends that the EPO committed an error of law and an abuse of authority by abolishing the age-50 rule with retroactive effect in disregard of paragraph 17 of document CA/20/80-VIII, which the Administrative Council did not rescind and which, she argues, requires the continued application of the abolished rule to employees recruited before 2005.

This argument is baseless.

As the Tribunal has often stated, a provision is retroactive only if it effects some change in existing legal status, rights, liabilities or interests from a date prior to its proclamation, but not if it merely alters the effects of this status or of these rights, liabilities and interests in the future (see Judgments 2315, under 23, and 2986, under 14).

In this case, quite apart from the fact that the abolition of the age-50 rule as of 1 January 2005 did not unlawfully give retroactive effect to that measure, at that juncture the complainant was almost five and a half years short of the requisite age for the application of the automatic promotion rule. It is to no avail that the complainant relies on paragraph 17 of document CA/20/80-VIII containing a special rule on promotion which was adopted in specific circumstances in favour of a different category of employees, namely those recruited before 1 January 1981.

3. The complainant further contends that the age-50 rule was “an essential, fundamental condition of [her] terms of employment which played a major role in [her] decision to work for the EPO”, as from 1 June 1990. She therefore considers that she had “a well-established acquired right to be promoted to grade A4 at the age of 50”.

The Tribunal’s case law, as recalled in Judgment 2682, under 6, establishes that “an acquired right is breached only when [...] an amendment adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced him or her to stay on. In order to determine whether there has been a breach of acquired rights, it is therefore necessary to ascertain whether the altered terms of employment are fundamental and essential within the meaning of Judgment 832”. This case law was confirmed in Judgment 3074 (under 15 and 16).

It is well settled that the particular arrangements for the grant of promotion confer no acquired rights, because on recruitment staff cannot foretell how they will fare in their career. An organisation may always change the rules on promotion for the sake of efficiency and so as to cope with changing circumstances. (See Judgment 1025, under 4.)

As it already found in Judgment 3256, under 15, the Tribunal considers that the age-50 rule at issue in this case is merely one of the arrangements for the grant of promotion within the meaning of the case law. This plea will not therefore be accepted.

4. The complainant also submits that “the unfavourable decision clearly frustrates [her] legitimate expectations of promotion to grade A4”, and that this decision constitutes a “breach of the principle of good faith, failure [on the part of the Organisation] to honour [its] undertaking [towards] its employees, failure to keep its word and breach of contract”. These pleas will also be rejected, since the age-50 rule, on which the complainant rested her expectations, had been lawfully abolished more than five years before all the conditions for its application to her would have been met. Moreover, the complainant supplies no evidence that she received formal, personal and specific assurance that the age-50 rule would in due course be applied to her when she reached the required age.

5. The complainant contends that she is entitled to be promoted to grade A4 on the basis of a constant administrative practice. An administrative practice cannot, however, continue to apply when it has been expressly abolished by a legal provision. This is true of the age-50 rule in this case.

6. The argument that the principle of equal treatment has been breached cannot be accepted. According to the Tribunal’s case law, this “principle [...] requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently” (see Judgment 2313, under 5). This means that a different situation warrants different treatment. The complainant offers no proof that employees of the same age as her and who were in the same situation received promotion to grade A4 pursuant to the practice on which she relies, after it had been abolished. It is incorrect to speak of discrimination in comparison with colleagues who reached the age of 50 before the entry into force of the Administrative Council’s decision abolishing the age-50 rule.

7. It follows from the foregoing that, as none of the complainant's pleas may be accepted, the complaint must be dismissed, as was that which formed the subject of the aforementioned Judgment 3256.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 30 April 2015, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

(Signed)

CLAUDE ROUILLER

SEYDOU BA

PATRICK FRYDMAN

DRAŽEN PETROVIĆ