

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

J.
v.
EPO

123rd Session

Judgment No. 3787

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr Y. G. A. J. against the European Patent Organisation (EPO) on 1 March 2013 and corrected on 10 April, the EPO's reply of 14 August, the complainant's rejoinder of 18 October 2013 and the EPO's surrejoinder of 27 January 2014;

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 disputes the step in grade assigned to him on his appointment as a member of a board of appeal.

Under Articles 10 and 11 of the European Patent Convention, the EPO has two appointing authorities: the President of the European Patent Office, the EPO's secretariat, who appoints most employees, and the Administrative Council, which appoints the President, the Vice-Presidents and the members of the Boards of Appeal. Some of these members are recruited externally, while others, who are already employees of the Office, are appointed internally.

Until 2002, members of boards of appeal who were recruited externally were subject to the "age-55 rule", according to which their

step on recruitment to grade A5 or A6 was determined in such a way as to enable them to reach the final step in their grade at the age of 55. Circular No. 271, published on 12 June 2002, concerning the implementation of the career system for category A posts, provided that with respect to A5 or A6 posts for which the President was the appointing authority, the step in grade on recruitment would be that which enabled the persons concerned to reach the last step in their recruitment grade at the age of 60. This circular was also applied to staff members appointed by the Administrative Council. On 27 February 2009, however, after several members of boards of appeal who had been recruited externally between 2001 and 2007 had successfully appealed against their step assignment, the age-55 rule was applied retroactively to all members of the Boards of Appeal.

The complainant, who had been an EPO employee since 1983, was appointed a member of a board of appeal at grade A5 as from 1 October 2004. He was advised by a letter of 30 June 2004 of his step in grade, determined on the basis of Article 49 of the Service Regulations for permanent employees of the European Patent Office, which concerns promotion.

By a letter of 20 August 2009, the complainant, who contended that he had learnt of the decision of 27 February 2009 on 15 July, asked to have the step in grade assigned to him on 1 October 2004 redetermined on the basis of the age-55 rule and to be paid the resulting difference in salary and allowances. He stated that if his request was denied, his letter should be regarded as an internal appeal. By a letter of 5 October 2009, his request was rejected as irreceivable, on the grounds that it was time barred because the complainant had not challenged the step assigned to him on his appointment as a member of a board of appeal within the time limits laid down by the Service Regulations, and as unfounded, since the age-55 rule did not apply to members of boards of appeal who had been appointed internally. The appeal was referred to the Internal Appeals Committee on 20 October 2009.

The Committee delivered its opinion on 14 September 2012 after a hearing of the parties at which the complainant asked to be awarded damages for the injury allegedly suffered on account of the undue length of the proceedings. The Committee unanimously held that the

appeal was receivable since, at the time of his appointment, the complainant could not have known about the decision of 27 February 2009 informing him of the age-55 rule, and this fact justified reopening the time limit for appealing against the decision determining his step in grade on appointment. On the merits, the Committee considered that there was a “*de facto* and *de jure* difference” between internally appointed members of boards of appeal and those recruited externally, which warranted the application of different rules when determining their step in grade on appointment or recruitment. As an internally appointed member of a board of appeal, the complainant was subject to the application of Article 49 of the Service Regulations. The Committee unanimously recommended that the appeal be dismissed as unfounded. A majority of members recommended an award of 1,000 euros and a minority recommended an award of 250 euros in response to the complainant’s request for damages on account of the undue length of the internal appeal proceedings.

The complainant was informed by a letter of 3 December 2012, which constitutes the impugned decision, that his appeal had been dismissed as irreceivable and unfounded, and that his claim for damages had been rejected.

The complainant filed a complaint with the Tribunal on 1 March 2013 in which he seeks the application of the age-55 rule to the step assigned to him on recruitment to grade A5, with retroactive effect from 1 October 2004, the payment with interest of the related arrears in salary and allowances and an award of damages for the undue length of the internal appeal proceedings.

The EPO asks the Tribunal to dismiss the complaint as irreceivable *ratione temporis* and as unfounded.

CONSIDERATIONS

1. The complainant was appointed internally as a member of a board of appeal at grade A5 as of 1 October 2004. After his internal appeal of 20 August 2009 was dismissed on 3 December 2012, he filed a complaint with the Tribunal on 1 March 2013 asking for the application of the

“age-55 rule” to the step assigned to him on recruitment to grade A5, with retroactive effect from 1 October 2004, the payment with interest of the related arrears in salary and allowances and an award of damages for the undue length of the internal appeal proceedings.

2. The complainant bases his case on the contention that the decision of 27 February 2009 resulted in an unjustified difference in treatment whereby externally recruited members of boards of appeal benefited from more favourable terms governing their step assignment on recruitment.

3. The Tribunal has consistently held that the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example Judgments 1990, under 7, 2194 under 6(a), 2313, under 5, or 3029, under 14). The Tribunal notes, as did the Internal Appeals Committee, that while it is true that the duties of all the members of boards of appeal are identical, their legal and administrative status is different depending on whether they are recruited externally or appointed internally. As far as the application of the age-55 rule is concerned, the Tribunal concurs with the unanimous main finding of the Internal Appeals Committee that, unlike employees already serving in the Office, external candidates who apply to become members of a board of appeal may have to forgo some of the benefits which they enjoyed in their previous duties, such as their previous pension scheme or a degree of job security. Although in his submissions the complainant questions the lawfulness of this difference in treatment, he does not put forward any argument of substance which might controvert this finding. The Tribunal therefore considers that the difference in treatment to which he objects is legitimately based on a difference in situation between the two categories of members of boards of appeal, which is related to the purpose of the age-55 rule.

4. It follows from the foregoing that the complaint must be dismissed, without there being any need to rule on the EPO's objection to receivability.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 8 November 2016, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ