

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

116th Session

Judgment No. 3256

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. S. against the European Patent Organisation (EPO) on 25 May 2010, the EPO's reply of 3 September, the complainant's rejoinder dated 18 November 2010 and the EPO's surrejoinder of 1 March 2011;

Considering the application to intervene filed by Mr I. K. on 14 September 2013 and the EPO's letter of 10 October 2013 informing the Registrar of the Tribunal that it had no comment to make on that application;

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 and the pleadings may be summed up as follows:

A. 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, by Administrative Decision CA/D 8/04 of 17 June 2004.

The complainant, who had joined the Office in 1991, turned 50 in January 2006. At the material time he held a post at grade A3. In December 2006 he requested retroactive promotion to grade A4 as from January 2006 pursuant to the “age-50 rule”.

His request was denied on the grounds that the aforementioned rule had been abolished as of 1 January 2005.

The complainant’s appeal was forwarded to the Internal Appeals Committee the majority of whose members recommended in its opinion of 18 January 2010 that the appeal should be rejected as unfounded. The complainant was informed by a letter of 12 March 2010 that the President of the Office had endorsed the Committee’s majority recommendation. That is the impugned decision.

In the meantime the complainant had been promoted to grade A4 as of 1 January 2007.

B. The complainant asserts that, as the age-50 rule was an essential, fundamental condition of his terms of employment when he entered the EPO’s service, he had an acquired right to be promoted on reaching that age. He also contends that the decision of 17 June 2004 “frustrated [his] legitimate expectations” stemming from more than 25 years’ “administrative practice” based on that rule. In his view, that decision should apply only to staff members who joined the Organisation after the abolition of the age-50 rule. Lastly, he relies on the principle of equal treatment in order to maintain that it is not right that a staff member recruited after him, but who turned 50 before 1 January 2005, could obtain promotion under that rule.

The complainant asks the Tribunal to set aside the impugned decision, to rule on his right to receive retroactive promotion as of

January 2006 and to award him moral damages in the amount of 10,000 euros and 3,000 euros in costs.

C. In its reply the EPO submits that it is doubtful that the prospect of promotion to grade A4 at the age of 50 was a crucial factor influencing the complainant's decision to enter the Office's service. Referring to the Tribunal's case law, it argues that, while an acquired right to prospects of career advancement does exist, conditions of promotion, such as the age-50 rule, do not confer an acquired right on an official. The EPO submits that, in this case, the abolition of the aforementioned rule, which did not eliminate or lessen the complainant's prospects of advancement, breached neither his acquired rights nor the relationship of trust which the EPO must maintain with him, as is shown by the fact that he was promoted to grade A4 with effect from 1 January 2007, in other words with only one year's "delay".

Moreover, the EPO cites Judgment 734 in which the Tribunal found that staff members of the Office who had applied for promotion before certain rules governing the promotion procedure had been amended were not in the same position as those who had done so afterwards, and that the principle of equality did not therefore require them to be treated alike. It infers from this that the abolition of the age-50 rule did not entail any breach of the principle of equal treatment.

D. In his rejoinder the complainant maintains his line of argument.

E. The EPO also maintains its position in its surrejoinder.

CONSIDERATIONS

1. The complainant, who was born on 13 January 1956, was recruited by the EPO on 1 March 1991 as a patent examiner at grade A2. He was promoted to grade A3 as of 1 January 1999.

2. After he reached the age of 50 and having discovered that his name was not on the list of staff members promoted in 2006, he sent a letter to the President of the Office in which he requested a promotion to grade A4 as of 1 January 2006.

He argued that the so-called “age-50” rule, which had previously applied at the EPO and which was considered by the Tribunal in Judgment 2272, though abolished by the Administrative Council with effect from 1 January 2005, ought to have enabled him to be promoted to grade A4, because he satisfied all the requisite conditions and because this rule, which was in force at the time of his recruitment, was part of the “legal framework which had prompted him to enter the Office’s service”.

3. The Director of Employment Law informed the complainant by a letter dated 22 January 2007 that his request could not be granted, because the rule whose application he was requesting had been abolished and he could not legitimately rely on acquired rights in those circumstances.

He was notified that the Internal Appeals Committee had been asked for an opinion on his case.

4. On 18 January 2010 the majority of the members of the Committee recommended that the appeal should be rejected as unfounded. A minority was of the view that the complainant should have been promoted to grade A4 as of 1 February 2006.

5. The complainant was informed by a letter of 12 March 2010, which constitutes the impugned decision, that the President of the Office had dismissed his appeal in accordance with the opinion of the majority of the Committee’s members.

6. The complainant asks for the setting aside of the impugned decision, his promotion to grade A4 as of 1 January 2006, the award of 10,000 euros to compensate for the moral injury which he considers he has suffered and costs.

7. A permanent employee who claims to be in the same situation as the complainant has submitted an application to intervene.

8. The complainant maintains that the decision of the President of the Office breaches an acquired right, infringes the principle of equal treatment, frustrates his legitimate expectations and was taken in breach of “more than 25 years of consistent administrative practice of promoting examiners with an overall marking of at least “good” to chief examiners (grade A4) at the age of 50”.

9. The EPO asks the Tribunal to dismiss the complaint as unfounded.

10. It is not disputed that the age-50 rule provided 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.

11. In support of his request for promotion to grade A4, the complainant argues that since the age-50 rule was part of the “legal framework which had prompted him to enter the Office’s service”, it constituted an acquired right, which the President of the Office had unlawfully breached by refusing to promote him to grade A4.

12. The Tribunal’s case law, as recalled in Judgment 2682, under 6, establishes that “an acquired right is breached only when such 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 more recently in Judgment 3074 (under 15 and 16).

13. In the present case, the complainant maintains that one of the essential, fundamental terms of employment which played a major role in his decision to work for the Office was the guarantee of a promotion to grade A4 as a chief examiner at the age of 50, subject to the conditions laid down in Article 49 of the Service Regulations for Permanent Employees of the European Patent Office.

14. The Tribunal will not accept this line of argument because, as it already found in Judgment 1025, under 4, “rules on promotion do confer an acquired right insofar as they offer staff an expectation of advancement. But the particular arrangements for the grant of promotion confer no such right because on recruitment staff cannot foretell how they will fare in their career. [...] In any event an organisation may change the rules on promotion for the sake of efficiency and so as to cope with changing circumstances.”

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 this case law. This plea will not therefore be accepted.

16. The complainant submits that the impugned decision “frustrated [his] legitimate expectations of promotion to grade A4”.

However, this plea must also be rejected, since the age-50 rule, on which his expectations were based, had been lawfully abolished.

17. The complainant relies on consistent administrative practice in claiming a promotion to grade A4.

An administrative practice cannot, however, continue to apply when a legal provision expressly excludes it, as is the case here in respect of the age-50 rule.

18. The argument that the principle of equal treatment has been infringed cannot be accepted. Precedent has it that this “principle requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently”. For this reason, a different situation justifies different treatment.

The complainant offers no evidence that permanent employees of the same age as him, who are in the same situation, have been promoted to grade A4 in accordance with the practice on which he relies, subsequent to its abolition.

The alleged 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 is of no relevance.

19. It follows from the foregoing that, as none of the pleas succeeds, the complaint must be dismissed, as must the application to intervene.

DECISION

For the above reasons,

The complaint and the application to intervene are dismissed.

In witness of this judgment, adopted on 14 November 2013, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Claude Rouiller
Seydou Ba
Patrick Frydman
Catherine Comtet