Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

M. (No. 2)

v.

EPO

125th Session **Judgment No. 3970**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr T. J. H. M. against the European Patent Organisation (EPO) on 4 February 2015, the EPO's reply of 5 June, the complainant's rejoinder of 30 July, corrected on 11 August, and the EPO's surrejoinder of 13 November 2015;

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 decision not to prolong his service beyond the mandatory retirement age.

At the material time, the complainant was a member – at grade A5 – of a board of appeal in Directorate-General 3 (DG3) at the EPO's headquarters in Munich, Germany.

Subparagraph (a) of Article 54(1) of the Service Regulations for Permanent Employees of the European Patent Office, the secretariat of the EPO, stipulates that the normal age of retirement is 65. However, subparagraph (b) states 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 option is open 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 with effect from the day following the last day of the month during which he reaches the age of sixty-five".

The Vice-President in charge of DG3 made it clear in Communiqué 2/08 of 11 July 2008 that members of boards of appeal who wished to continue working beyond the age of 65 had to send him the request referred to in Article 54(1)(b) of the Service Regulations and that the President's proposal would be prepared by a Selection Committee within DG3.

On 2 September 2013 the complainant sent the Vice-President in charge of DG3 a request to prolong his service beyond the age of 65, which he would reach in November 2014. The complainant underwent the requisite medical examination and on 24 September 2013 was found fit to continue working. The Selection Committee, which interviewed him on 20 January 2014, proposed to the President of the Office that his request should be granted.

In a letter of 4 August 2014, the complainant pointed out to the President that he had received no reply to his request of 2 September 2013 although the Administrative Council had met in March and June 2014. The complainant said that he "inferred" from this that a prolongation of his service "includ[ing] the 68th year" seemed inappropriate to the President and he proposed that he continue working only until the last day of the month in which he would reach the age of 67.

In the meantime, in decision R 19/12 of 25 April 2014, the Enlarged Board of Appeal upheld an objection to its Chairman on the grounds that he was also Vice-President in charge of DG3, which could raise concerns that his employment in that capacity interfered with the exercise of his judicial function.

On 21 October 2014 the President of the Office informed the complainant that in the interest of the service he had decided not to propose a prolongation of his service to the Administrative Council. In his view, it was inappropriate to propose a prolongation until the full consequences of decision R 19/12 on the functioning, structure and staffing of DG3 became clear. He informed him that the Administrative

Council was considering delegating the task of examining possible solutions to the issues raised by the aforementioned decision to its Board. Lastly, he told the complainant that discussions on changes to the organisation of DG3 were under way in anticipation of the setting up of the Unified Patent Court.

On 3 November 2014 the complainant was informed that he would be retired on 30 November. On 6 November he requested a review of the decision of 21 October and in a letter of 15 December 2014 he was advised that the President of the Office had decided to maintain it. That is the decision which the complainant challenges directly before the Tribunal in accordance with the relevant provisions of the Service Regulations.

The complainant principally seeks the setting aside of that decision, compensation of 292,802 euros for the loss of income that he considers he has suffered as a result of the non-extension of his appointment and a recalculation of his net retirement pension from 1 December 2017. He also claims the sum of 2,005 euros corresponding to the rent and telephone and Internet subscription charges that he paid in December 2014 and January 2015, 5,000 euros in moral damages and 176 euros in costs. Subsidiarily, he submits the same claims, except the claim for compensation of 292,802 euros, but requests that his net retirement pension be recalculated from 1 December 2014.

The EPO submits that the complaint should be dismissed as unfounded.

In his rejoinder, the complainant requests a measure of investigation, namely that the Vice-President in charge of DG3 in office at the material time be heard.

CONSIDERATIONS

1. The complainant challenges the rejection of his request for his service to be prolonged beyond the mandatory retirement age of 65, which he submitted with a view to continuing to work as a member of a board of appeal for three additional years. That request was made

under Article 54 of the Service Regulations for permanent employees of the European Patent Office, which is applicable on certain conditions to members of boards of appeal and which provides that a prolongation may be granted "if the appointing authority considers it justified in the interest of the service".

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 (see, for example, Judgments 1143, under 3, 2845, under 5, or 3765, under 2, and, specifically in respect of the application of Article 54 of the Service Regulations to members of boards of appeal, Judgments 3214, under 12, and 3285, under 10).

3. Among the pleas entered by the complainant in support of his complaint, there is one which falls within the limited scope of the Tribunal's power of review thus defined and is decisive for the outcome of this dispute. It is the plea that the grounds for the disputed refusal to prolong the complainant's service are not relevant to the outcome of his request, and that by basing his decision thereon, the President of the Office drew a plainly erroneous conclusion from the facts.

4. The decision of the President of the Office of 21 October 2014 refusing to grant the complainant's request for a prolongation of his service and the decision of 15 December 2014 dismissing the complainant's request for a review of the earlier decision were both said to be justified by the uncertainty created by two circumstances that were likely to affect the organisation and functioning of DG3, of which the boards of appeal form part. These were, first, the adoption of decision R 19/12 of 25 April 2014 in which the Enlarged Board of Appeal had upheld an objection to its Chairman – the Vice-President in

charge of DG3 – on the grounds that his involvement in the management of the EPO could raise doubts as to his ability to exercise his judicial functions independently and, second, the pending implementation of the Agreement on a Unified Patent Court that had been signed on 19 February 2013.

5. As far as the adoption of decision R 19/12 is concerned, it is true that while the decision itself concerned only the particular configuration of the post of Vice-President of DG3, from the outset the EPO planned to widen its impact by launching an internal consultation on a possible reform of the boards of appeal aiming inter alia to better safeguard the autonomy of their members in general. Indeed, the evidence shows that the Administrative Council asked its Board to consider this issue, which resulted in a "[p]roposal for a structural reform of the EPO Boards of Appeal" that was submitted by the President of the Office to the Administrative Council for its opinion on 25 March 2015.

However, given that the consultation was confined to the issue of safeguarding the autonomy of members of the boards of appeal and increasing the boards' efficiency, it is clear that it could not lead to changes in the staffing, organisation or functioning of the boards of appeal themselves. An examination of the aforementioned proposal for reform confirms this conclusion since the measures that it recommended had no impact in those respects. Although the document contains various suggestions on changes to the status of members of boards of appeal concerning career progression, performance appraisal, disciplinary measures and increased ethical obligations, it is difficult to see what bearing the proposed changes could have had on the assessment of whether the complainant's retention was in the interest of the service. Moreover, while the aforementioned document also suggested that the conditions for the reappointment of members of boards of appeal might be changed for the future, the possibility of such a change, which would in fact have required an amendment of the European Patent Convention, cannot be accepted as a legitimate basis for refusing the complainant's request, which had to be assessed in light of the provisions that were then in force.

6. Neither can the creation of the Unified Patent Court under the aforementioned Agreement serve as a reason for dismissing the complainant's request for the prolongation of his service. It is true that, at the time, the Office had launched an internal consultation on possible changes to the organisation of DG3 in anticipation of the Agreement's entry into force. However, apart from the fact that the Agreement's entry into force during the period in which the complainant wished to be retained in service was purely hypothetical, the powers to be assigned to the new court did not encroach on those of the EPO boards of appeal and there is no indication in the file that its creation would result in a change to the manner in which those boards operated.

Indeed, the EPO appears to acknowledge the weakness of this ground for rejecting the disputed request when it emphasises in its submissions that "the ground based on decision R 19/12 alone suffic[ed] [...] to establish the greater interest of the service and to justify the President's discretionary refusal to [...] propose a prolongation of the [c]omplainant's service to the Administrative Council". However, as stated above, the Tribunal does not concur with the EPO on this point.

7. Neither of the grounds underlying the decisions of the President of the Office can be accepted as a legitimate justification for the rejection of the complainant's request for his service to be prolonged. This rejection was therefore tainted by an obvious error of judgement.

The Tribunal notes that this flaw is particularly unacceptable given that the Selection Committee had issued a proposal favourable to the complainant's request. That proposal was based on sound reasoning and emphasised, in addition to the complainant's profound competence, the service's interest in retaining him in view of the particular need of the boards of appeal for expertise in his specific field. Considering that proposal, the President ought to have at least provided adequate justification for his own position.

8. It ensues from the foregoing that the decisions of the President of the Office of 15 December 2014 and 21 October 2014 must be set aside, without there being any need to rule on the complainant's other

pleas or to order the investigative measure requested by him in his rejoinder.

9. The complainant is entitled to financial compensation for the material injury caused by the refusal to prolong his appointment, the assessment of which must be based in particular on the loss of income that he suffered as a result of that decision. Contrary to what the EPO submits, the fact that he did not actually work during the period for which he requested a prolongation of his service does not mean that compensation for that loss of income constitutes unjust enrichment.

10. The length of the extension of the complainant's service taken into account to determine this material injury will be, in this case, the period of three years running from 1 December 2014, the complainant having been retired on 30 November. It should be noted in this respect that although the complainant stated in his letter to the President of 4 August 2014 that he "would be willing to agree" to "retirement [at the age of] 67", the EPO is mistaken in asserting that he thereby amended his initial request. In fact, the letter makes plain that the complainant only meant that he would accept a prolongation for a reduced period of two years if that would overcome what he surmised to be an obstacle to the extension of his appointment in the President's mind, but he did not withdraw his principal request for a three-year prolongation.

11. Although the complainant's request for a prolongation of his service was dismissed on the basis of irrelevant grounds, it cannot be said with certainty that the request would not have been rejected by the Administrative Council for another reason – assuming that the President had submitted a proposal in the complainant's favour – in view of the broad discretion exercised by that collective body in applying Article 54 of the Service Regulations to members of boards of appeal. Nevertheless, the complainant was indisputably deprived of a valuable opportunity to have his appointment prolonged, which was all the more significant in view of the Selection Committee's proposal in his favour, and the loss of that opportunity warrants redress.

12. In the light of these various considerations, the Tribunal finds, in the circumstances of the case, that the complainant must be awarded a sum equivalent to two years' remuneration, calculated on the basis of his final net salary before he left the EPO, less the amount of payments from various retirement pensions which he received in respect of the 24 months following his departure and any professional earnings during that same period.

As this lump sum must be regarded as compensation for all material injury suffered by the complainant as a result of the refusal to prolong his service, there is no reason to grant the complainant's claims for a recalculation of his net pension benefit from the pension scheme for permanent employees of the Office.

13. The complainant also claims compensation for the material injury arising from the fact that he was informed too late of the dismissal of his request for a prolongation of his service to be able to cancel in a timely fashion the lease on his accommodation and the related telephone and Internet subscriptions.

It must be observed in this respect that the procedure for considering requests by members of boards of appeal for a prolongation of service prescribed by Communiqué No. 2/08 of 11 July 2008 does not specify an exact time limit in which the competent authority must decide on a request submitted to it. Moreover, since such a request can be granted only on the condition that a prolongation of service is in the interest of the service, a decision can logically be taken only on a date sufficiently close to that on which the employee concerned will reach normal retirement age for that authority to be in a position to make an informed assessment of the advisability of such a prolongation in the light of that criterion (see aforementioned Judgment 3214, under 16).

Nevertheless, it is incumbent on the Organisation, in view of its duty of care towards its employees, to ensure that members of boards of appeal who submit requests for their service to be prolonged are informed of the outcome thereof sufficiently far in advance to enable them to make adequate arrangements for their personal lives after they attain normal retirement age. The Tribunal further observes that in respect of employees of the Office who belong to other staff categories,

Circular No. 302 of 20 December 2007, which governs their requests to continue working beyond the age limit, provides that "[t]he employee concerned shall be notified of the decision [...] at the latest, seven months prior to the date on which he reaches the age of 65". There is clearly no reason why the requirement of timely notification of decisions on this matter from which that provision ensues should not extend to requests submitted by members of the boards of appeal, even if the time limit of seven months is not applicable to them as such. Belated notification of such a decision therefore constitutes a breach by the Organisation which, if it causes injury to an employee, must be redressed, notwithstanding that a prolongation of service is never automatic and that no legitimate expectation can be invoked in that respect.

14. In this case, the complainant was not informed of the rejection of his request until 21 October 2014, 40 days before he was retired on 30 November.

The evidence makes it plain that this did not allow him to terminate the lease for his accommodation and the abovementioned subscriptions in a timely fashion.

The Organisation's argument that the complainant's decision to leave Munich was a personal choice for which it is not responsible cannot exonerate it from liability.

The EPO will therefore be ordered to pay the complainant the sum, in the duly substantiated amount of 2,005 euros, which he claims as compensation for the material injury which he suffered under this head.

15. The unlawfulness of the refusal to prolong the complainant's service and the Organisation's breach of the duty of care identified above also caused the complainant moral injury, which was exacerbated throughout the proceedings by the often disrespectful manner in which the Office's authorities treated him.

The Tribunal hence considers it appropriate to award the complainant the sum of 5,000 euros which he claims in compensation for that injury.

16. As the complainant succeeds for the most part, he is entitled to the sum of 176 euros which he claims in costs.

DECISION

For the above reasons,

1. The decisions of the President of the Office of 15 December 2014 and 21 October 2014 are set aside.
2. The EPO shall pay the complainant financial compensation for the material injury resulting from the refusal to prolong his service, as indicated in consideration 12, above.
3. The EPO shall pay the complainant 2,005 euros in material damages for the belated delivery of the decision of 21 October 2014.
4. It shall pay the complainant moral damages in the amount of 5,000 euros.
5. It shall also pay him 176 euros in costs.
6. All other claims are dismissed.

In witness of this judgment, adopted on 10 November 2017, Mr Patrick Frydman, Vice-President of the Tribunal, Ms Fatoumata Diakité, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

(Signed)

PATRICK FRYDMAN FATOUMATA DIAKITÉ YVES KREINS

DRAŽEN PETROVIĆ