

NINETY-FOURTH SESSION

Judgment No. 2187

The Administrative Tribunal,

Considering the complaint filed by Mrs G. C.-V. S. against the European Patent Organisation (EPO) on 16 April 2002, the EPO's reply of 5 July, the complainant's rejoinder of 1 August, and the Organisation's surrejoinder of 29 August 2002;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a British citizen born on 25 January 1949, joined the staff of the European Patent Office, the EPO's secretariat, on 1 September 1986 as a search examiner. She currently holds grade A3.

With effect from 1 January 1981 the EPO's Administrative Council endorsed proposals submitted by the President of the Office for a career policy for category A and L staff. One element of the policy was the so-called "age-50 rule", under which A3 staff members were eligible for promotion to grade A4 upon reaching the age of 50. Implementation of the policy was carried out through instructions from the President to the Chairmen of the Promotion Boards. At the material time, the instructions for promotion from grade A3 to grade A4 specified:

"Candidates who have reached the age of 50 and who have at least 3 years' service with the EPO may be considered eligible for promotion if this is also supported by the individual's merit."

In April 1999 the President submitted a proposal to abolish the age-50 rule to the General Advisory Committee because it did not "promote performance". The Committee, as indicated in the minutes of its meeting held in April 1999, questioned whether the President had the authority to repeal a rule that had been adopted by the Administrative Council. In his instructions to the Chairmen of the Promotion Boards published in the *Gazette*, the Office's in-house magazine, on 31 May 1999, the President omitted any reference to the age-50 rule.

The complainant reached the age of 50 in January 1999. On 16 June 2000, noting that her most recent pay slip reflected that she was still at grade A3, she requested the President to refer her case to the next Promotion Board, with a view to her promotion to grade A4 as from January 1999. In the event that he was unable to meet her request, she asked that it be treated as an internal appeal. On 18 July 2000 the Principal Director of Personnel informed the complainant that the President did not consider that he could grant her request and had therefore referred it to the Appeals Committee.

In its opinion dated 14 January 2002 the Committee considered that her appeal had been filed out of time and unanimously recommended rejecting it on those grounds; by a majority it also found that it failed on the merits. In a minority opinion, one of the Committee members questioned the authority of the President to repeal a rule promulgated by the Administrative Council. In his opinion, only the Council had the authority to repeal or modify the age-50 rule. Endorsing the majority opinion of the Committee, the President rejected the appeal on 24 January 2002. That is the impugned decision.

B. The complainant states that the Office and the Appeals Committee should have taken into account her personal situation during the better part of 1999 and 2000, of which the Administration was well aware, and found, as a

matter of equity if not as a matter of law, that her internal appeal was receivable. In any event, when on 18 July 2000 the President refused her request for promotion, the Organisation itself automatically referred the matter to the Appeals Committee; it follows that her internal appeal was lodged in time, and was therefore receivable. She argues that "a non-communication of a non-promotion" cannot seriously be construed as a decision fulfilling the criteria established by both the Service Regulations for Permanent Employees of the European Patent Office and the Tribunal; the absence of a name on a promotion announcement cannot be considered as providing the employee with "unquestionable and final notice that a decision has been taken". Thus, the correct decision for her to challenge was the one of 18 July refusing her request. Subsidiarily, she argues that her appeal was allowable as she also impugned her pay slip for May 2000, since a pay slip constitutes an impugnable decision under the Tribunal's case law.

On the merits, she argues that the President has acted *ultra vires* by "summarily delet[ing]" the age-50 rule. His decision to do so was also flawed because it was not properly reasoned. She submits that the Appeals Committee's finding, that the duty to state reasons does not apply to administrative decisions, is "unsound".

There were also procedural errors. It is an "elementary" principle of law that the same procedure must be used for both enacting and repealing a rule. This principle has been made "abundantly clear" by the Tribunal's case law. The minority opinion of the Appeals Committee had found that the President had not followed the proper procedure in repealing the age-50 rule. The General Advisory Committee had also expressed doubt as to whether it was within the President's authority to repeal the rule. She contends that it is clear that the Administrative Council was the authority that approved the rule, and that the President was only entrusted with its implementation.

Even if it could be argued that the President had the right to repeal the rule "unilaterally", the new one offends against the principle of non-retroactivity. The new rules on promotion were not published until 31 May 1999, but she was eligible for promotion in January of that year.

She requests the Tribunal: to quash the President's decision not to submit her case to the Promotion Board; to order her promotion to grade A4 retroactively to 25 January 1999 including retroactive payment of the appropriate salary plus 10 per cent compound interest per annum; to award legal costs and moral damages; to make a declaration that the age-50 rule is still legally enforceable for her and other staff in a similar position; to order the EPO to offer promotion to all staff who reach the age of 50 until such time as the rule is repealed following the proper procedures; and correspondingly, to order that the President's decision refusing her request for promotion be set aside and likewise for other staff who may have made similar requests.

C. The Organisation argues that the complainant's internal appeal was irreceivable as she did not file it within the statutory time limit after the 1999 promotions had been announced in the *Gazette* in August 1999 and February 2000. For an employee who is not promoted, it is the publication of the promotion list that gives rise to an appealable decision under the meaning of Article 108(3) of the Service Regulations. To interpret the time limit as starting from the date of the Office's letter of 18 July 2000, as the complainant has argued, would be tantamount to giving the staff member control over the starting point of the three-month period, which would run contrary to the provisions in the Service Regulations. The Tribunal's case law would only support her interpretation of receivability in the context of an appeal against her non-promotion in 2000. The EPO disagrees with her argument that equity warrants the receivability of her appeal, and points out that she did not bring up her personal situation during the internal appeal procedure. Her claim for moral damages is irreceivable, as she did not put this forward in her appeal. Insofar as she makes claims for all staff in a similar position, these are also irreceivable: the Tribunal is only competent to hear cases impugning individual decisions adversely affecting a staff member.

On the merits, it denies that the President acted *ultra vires*. The EPO contends that the Administrative Council endorsed, "in principle", the document submitted to it by the President outlining a career policy for category A and L staff and that neither that document nor the minutes of the Council's meeting actually referred to the age-50 rule. The Organisation asserts that the proper interpretation of the minutes is that the Council took note of the existence of the rule and subsequently tolerated its application. Consequently, the President was entitled, in the exercise of his discretionary power, to modify or repeal the rule. It rejects the argument that the President did not give sufficient grounds for his decision. He does not have a duty to give reasons for amending a rule, but he nevertheless did: automatic promotion under the rule did not reward merit.

The rules for promotion in 1999 were published in May of that year and the Promotion Boards had not yet met. Thus, the rules applied to all promotions in 1999 and fully complied with the principle of non-retroactivity. The

complainant did not meet the criteria as defined that year, so she was not promoted. The EPO submits that such a decision is a discretionary one, and therefore is open only to limited review by the Tribunal.

D. The complainant rejects the EPO's objections to receivability. She submits that the time limit for contesting a decision starts running when the decision is communicated to the interested party. To interpret this otherwise would put it in the Office's hands to withhold information, arbitrarily, until it was too late to appeal.

She interprets the meaning of "in principle" differently from the EPO and maintains that the Administrative Council was indeed the body that adopted the age-50 rule. The Council approved the concepts outlined in the policy and the President was given the authority to implement them. She points out that the rule was consistently applied for 18 years, during which time the Council never expressed any opposition to it.

She contends that under the rules that were in force in January 1999 she should have been granted "an age-based promotion".

E. In its surrejoinder the EPO maintains its objections to receivability and it presses its plea that the age-50 rule was not adopted by the Council, thus it was within the President's authority to repeal it without returning to ask for the Council's approval. Furthermore, his decision to repeal it had been carefully considered and discussed in the General Advisory Committee, which is a joint committee of representatives of the administration and staff.

The rules in force in January 1999 were those published in the *Gazette* in May of that year, thus the age-50 rule was no longer in force by the time she reached that age.

CONSIDERATIONS

1. The complainant has been an EPO search examiner at grade A3 since 1 January 1990. By a letter of 16 June 2000 she asked the President to submit to the next Promotion Board her request for promotion to grade A4 with effect from 25 January 1999, which was the date when she had reached the age of 50. She was relying on a policy which had been in force at the EPO since 1981 and which had been the subject of several notes from the President to the Chairmen of the Promotion Boards, stipulating that staff members of grade A3 with at least three years' service and a satisfactory appraisal would be eligible for promotion to grade A4 on reaching the age of 50.

2. On 18 July 2000 the complainant was informed that the President had decided to reject her request and that he had referred the matter to the Appeals Committee. In its opinion of 14 January 2002, the Appeals Committee unanimously recommended that the appeal be dismissed as time-barred. A majority of the Committee also considered that the appeal was in any case unfounded. On 24 January 2002 the Principal Director of Personnel informed the complainant that the President had decided to dismiss her appeal.

3. In her complaint, which was filed with the Tribunal on 16 April 2002, the complainant seeks the quashing of the decision of 24 January 2002, promotion to grade A4 with retroactive effect from 25 January 1999 including payment of the sums owed to her as a result of such promotion, moral damages and costs. In addition, she asks the Tribunal to:

- declare that the "age-50 rule" is still in force and that it applies to her and to staff members who are in a similar position;

- order the EPO to grant a promotion to all staff members who have reached the age of 50 until such time as the said rule is repealed in accordance with a proper procedure;

- set aside the decision by which the President refused her promotion and likewise that of any other staff members who may have made similar requests.

4. According to the Organisation, which reiterates the arguments on which it relied successfully before the Appeals Committee, the complainant's appeal was irreceivable. Indeed, Article 108(3) of the Service Regulations provides that an appeal must be filed within a period of three months beginning on "the date of publication, display or notification of the act appealed and, in any case, at the latest on the date on which the appellant became aware of it". The note from the President to the Chairmen of the Promotion Boards for promotions in the year 1999 was

published in the *Gazette* on 31 May 1999; this note contained the modified rules concerning promotion from grade A3 to grade A4. The list of promotions for 1999 also appeared in the *Gazette*, a first list of promotions having been published on 30 August 1999 and the remainder in February 2000. The Organisation asserts that since the complainant's appeal was filed on 16 June 2000, it was time-barred.

5. The complainant considers, on the contrary, that she received no written notification of any individual decision refusing her promotion - which she did not in fact request until her letter of 16 June 2000 - and that the period within which her appeal had to be filed could not begin to run until she was notified of the decision of the President on 18 July 2000. She argues that this approach is consistent with the Tribunal's case law (see Judgment 1393) and with the requirements of Article 106 of the Service Regulations, which stipulates, *inter alia*, that any individual decision concerning a staff member "shall at once be communicated in writing to the person concerned", and that any decision adversely affecting a person shall state the grounds on which it is based.

6. The Tribunal cannot endorse the complainant's view: an employee whose name does not appear on a list of promoted staff members is naturally entitled to challenge the implied decision to exclude him or her from that list. To grant employees the possibility of contesting such decisions without limit of time would mean, in effect, that decisions communicated to staff in accordance with Article 31 of the Service Regulations and published in an official document, not only with a view to informing employees of their promotion but also so as to enable those who consider themselves to have been wrongly excluded from the list to exercise their rights, could be challenged indefinitely.

The appeal filed by the complainant on 16 June 2000, which concerned only the refusal to grant a promotion for 1999, was filed after the three-month deadline stipulated in Article 108(2) of the Service Regulations. The complainant raises arguments which may excuse her delay in appealing to the competent authority, and which the Organisation ought to have taken into account on the grounds of equity; but the Tribunal, though sympathetic to these considerations, does not consider them to provide sufficient grounds for rejecting the plea of irreceivability entered by the Organisation.

7. The complainant's claims concerning promotion must also be rejected: the Tribunal, which has jurisdiction to hear individual complaints of staff members who consider that their rights have been violated, has no authority to set aside a regulatory decision taken by the Organisation, nor to declare that the "age-50 rule" remains in force, nor to order the Organisation to adopt certain measures in favour of EPO employees. Similarly, the Tribunal cannot directly order the Organisation to promote the complainant.

8. Since her claim for quashing the President's decision fails, her claims for moral damages and costs must likewise fail.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

(Signed)

Michel Gentot

James K. Hugessen

Seydou Ba

