

NINETY-SEVENTH SESSION

Judgment No. 2344

The Administrative Tribunal,

Considering the complaint filed by Mrs S. T. against the European Patent Organisation (EPO) on 1 May 2003 and corrected on 18 June, the EPO's reply of 25 September, the complainant's rejoinder of 29 October 2003 and the Organisation's surrejoinder of 6 February 2004;

Considering Article II, paragraph 5, 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. In 1980 the President of the European Patent Office submitted document CA/20/80-VIII to the Administrative Council setting out a career policy for category A and L staff. That policy included 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."

As indicated in document CA/36/80, the Council in principle approved the introduction of the proposed policy.

From 1981 until 1998 the age-50 rule was consistently applied by successive Presidents of the Office, who referred to it expressly in the Notes on promotion which they addressed annually to the Chairmen of the Promotion Boards, although the required number of years of service at grade A3 sometimes changed. However, from 1999 onwards the Notes from the President contained no such reference. After consulting the General Advisory Committee (GAC) he had decided to abolish the rule in question.

The complainant is of German nationality and was born on 2 July 1951. She entered the service of the European Patent Office – the secretariat of the EPO – on 1 November 1987 as an assistant examiner at grade A1. She was promoted to A2 in 1989 and to A3 in 1996. In 2001 she attained the age of 50. Over the previous five reporting periods she had received the overall rating of "good".

The Promotion Board met in the autumn of 2001. A list of those who had been promoted was published on 9 November 2001, but the complainant's name was not included. On 11 January 2002 she lodged an internal appeal with the President of the Office, contesting the implied decision not to promote her. She cited the age-50 rule and claimed promotion to A4 from her 50th birthday. By a letter of 7 February 2002 the complainant was informed that her request could not be granted and that the matter was being referred to the Appeals Committee. In a report dated 9 December 2002 the Committee recommended by a majority that her appeal be dismissed. In a dissenting opinion one member expressed the view that the age 50 rule was an integral part of the Office career policy adopted in 1980, and since it had never been altered by a Council decision it remained in force. By a decision of 6 February 2003 the complainant was informed that, in accordance with the majority opinion of the Appeals Committee, the President of the Office had rejected her appeal. That is the impugned decision.

B. The complainant submits that under the age-50 rule she would have been eligible for promotion to A4 at the first Promotion Board meeting following her 50th birthday. By this complaint she is contesting the repeal of the rule in 1999. She does that on the grounds that she can challenge a general measure once it is applied in a manner that is prejudicial to her as an individual; that, she argues, has occurred as she has suffered prejudice through her non-promotion.

She considers that the repeal was unlawful on procedural grounds. The purpose of her complaint is not to argue that the measure of repealing the rule was unreasonable; rather she considers that the procedure followed by the President was improper, and the decision to repeal it was not taken through the proper channels. The President abolished it unilaterally, without “any proper reasoning”, even in the face of opposition within the GAC. She submits that the modification of a rule has to respect the same process as was used for its adoption. In this case it was the Administrative Council that approved the rule, and it alone has the authority to abolish it. There is no evidence that the Council gave the President the power to repeal it unilaterally or to disapply it and until such time as the Council repeals the rule, it cannot be considered as properly abolished.

The complainant seeks the quashing of the impugned decision; promotion to grade A4 retroactively to 2 July 2001; retroactive payment of the corresponding salary increase from that date, with 10 per cent compound annual interest; moral damages; and costs.

C. In its reply the Organisation argues that in setting aside the age-50 rule the President acted within his competence. Document CA/20/80 set out only the outlines of a career policy, and insofar as it concerns promotion on the grounds of age it was not binding on the President. In the exercise of his power of discretion he is entitled to modify the promotion criteria to take account of prevailing circumstances.

When the President submitted the career policy to the Administrative Council in 1980, the Council was requested to “examine the proposals and endorse the conclusions in principle”. In document CA/36/80 the Council approved the introduction of the career policy in principle; but neither that document, nor the minutes of the relevant meeting, mentioned the age-50 rule. Instead, in document CA/36/80 the Council made it clear that “career prospects should be based upon the principle of merit”. The Organisation concludes that the Council took note of the age-50 rule and subsequently “tolerated its application”. The Council’s omission of all mention of the rule in the said minutes, and its wish to refuse automatic promotion could even mean it rejected the rule.

Contrary to the argument put forward by the complainant, the President was entitled to abolish the age-50 rule without seeking the Administrative Council’s approval. The legal principle she cites, whereby the modification of a rule has to respect the same process as that used for its adoption, would be applicable in the case of an amendment to the Service Regulations; but such is not the case here, and so the complainant’s argument on this score is of no relevance. The President was not bound to give grounds for his decision to repeal the age-50 rule, because contrary to what the complainant contends it was not an individual decision needing to be substantiated. His decision to abolish the rule was not taken *ultra vires*. It was carefully considered and had been put to the General Advisory Committee.

Given the abolition of the rule in question, in July 2001 the complainant did not meet the promotion criteria. Her reckonable experience at that time amounted to 13 years and 8 months. For someone with a “good” overall rating over three reporting periods, 19 to 23 years of reckonable experience were required. For employees with 12 to 15 years of experience an “outstanding” record of performance was needed to be eligible for promotion to A4. Added to which, the President has wide power of discretion in the matter of promotion decisions. Promotion rules do not give rise to acquired rights and a decision to promote an employee is made on the basis of merit. The President has the right to review the Notes to the Chairmen of the Promotion Boards and to submit new Notes for each year.

D. In her rejoinder the complainant states that the age-50 rule was part and parcel of the career policy approved by the Council, and since the Council approved the policy *in toto* it must have assented to the rule, because it was then applied for 18 years. It follows that the President cannot simply revoke it unilaterally, but must obtain the Council’s assent.

The complainant says she is not arguing that promotion is an acquired right. Rather, she holds the view that if a rule providing a limited exception to the normal promotion procedure is in place, she has a legitimate expectation that the rule will be applied until properly repealed.

E. In its surrejoinder the Organisation maintains the arguments put forward in its reply. It recognises that the complainant had never explicitly claimed promotion on the ground of acquired rights, but states that implicitly her argument appeared to be that she had been deceived in her legitimate expectation of a promotion. It reiterates that the assessment of merit is the basic principle governing promotions.

CONSIDERATIONS

1. The complainant, a patent examiner at the European Patent Office, was promoted to grade A3 on 1 March 1996. Having reached the age of 50 on 2 July 2001, and having always received satisfactory ratings from her supervisors, she considered she was entitled to be promoted to A4 under the so-called “age-50 rule” applied at the EPO since 1981 and analysed in Judgment 2272. But when the first promotion list following her birthday was published, that is, on 9 November 2001, she saw that her name was not on it and that the decision had therefore been taken not to promote her. As explained in Judgment 2272, the President of the Office had decided in 1999 to abolish the age-50 rule and thus no longer automatically to promote A3 staff who had served a minimum number of years at that grade and who had obtained satisfactory ratings. The complainant appealed against the implicit refusal to promote her, but the Appeals Committee recommended by a majority that her appeal be dismissed. The President followed that recommendation and, by a decision notified on 6 February 2003, which is the impugned decision, rejected the appeal.

The complainant asks the Tribunal to set aside that decision; order her promotion to grade A4 with retroactive effect from 2 July 2001; and order the payment, with interest, of the difference of salary resulting from such a promotion. She claims 2,000 euros for the moral injury she alleges she suffered, and costs.

2. As in the case leading to Judgment 2272, the defendant contends that in deciding to abolish the age-50 rule, the President of the Office acted within his authority and committed no procedural error. It adds that the complainant was not eligible for promotion in 2001, because she did not meet the criteria set out in the Note from the President to the Chairmen of the Promotion Boards for the year 2000 and since the President has broad discretion in the matter of promotion.

3. The main issue raised in this case was settled in Judgment 2272: the career policy proposed by the President and approved by the Administrative Council included the rule that “[p]romotion [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”. Since this rule had been approved by the Administrative Council, it could not be called into question by the President. Even though the latter has discretionary authority, subject to the Tribunal’s limited power of review, when deciding to promote or not to promote a permanent employee, his decision must comply with the law. In the present case, it did not: according to the evidence, when she reached the age of 50, the complainant had served more than five years at grade A3 and her ratings had all been either good or very good. The Organisation could not therefore use the argument that the President’s Notes to the Chairmen of the Promotion Boards no longer mentioned the age-50 rule, and, since the conditions laid down in that rule were met, it should have granted her promotion.

4. As a consequence – without any need to entertain the complainant’s other pleas – she is justified in claiming the quashing of the impugned decision on grounds of abuse of authority, as well as her promotion from 2 July 2001 with the financial effects resulting therefrom.

5. In the circumstances of this case, there are no grounds for entertaining the complainant’s claim for compensation for moral injury.

6. The complainant is entitled to costs, which the Tribunal sets at 1,500 euros.

DECISION

For the above reasons,

1. The decision by the President of the Office notified to the complainant on 6 February 2003 is set aside.
2. The complainant is referred back to the Organisation in order to obtain her promotion to A4 with effect from 2 July 2001 and the retroactive payment of the resulting salary difference plus interest at 8 per cent per annum.
3. The EPO shall pay the complainant the sum of 1,500 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 21 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.