117th Session **Judgment No. 3317**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr U. S, against the European Patent Organisation (EPO) on 8 September 2010, the EPO's reply of 21 December 2010, the complainant's rejoinder of 27 January 2011 and the EPO's surrejoinder of 11 April 2011;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order 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. The complainant was born in 1946. At the material time he was a permanent employee of the European Patent Office, the EPO's secretariat, assigned to the Pure and Applied Organic Chemistry (PAOC) Cluster in Directorate-General 1 (DG1). He was due to reach the normal retirement age of 65 in August 2011. On 20 May 2010 he requested, in accordance with Article 54(1)(b) of the Service Regulations and Circular No. 302, a six-month prolongation of service beyond the age of 65. That same day his Director, Mr d. J., and Principal Director, Mrs L., forwarded his request to the Coordination Committee, expressing the opinion that "a six-month extension [could]

be granted in view of the examination stock in the directorate and in view of [the complainant's] personal examination stock".

Article 54(1) of the Service Regulations for Permanent Employees of the European Patent Office (hereinafter "the Service Regulations") and Circular No. 302 of 20 December 2007, which sets forth the Guidelines for applying Article 54, provide in pertinent part:

"**Article 54**

Date of retirement

(1) a) A permanent employee shall be retired

- automatically on the last day of the month during which he reaches the age of sixty-five years;
- at his own request under the conditions stipulated in the Pension Scheme Regulations.

b) Notwithstanding the provisions of paragraph (a), 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 in which case he shall be retired automatically on the last day of the month in which he reaches that age."

"**CIRCULAR No. 302**
(20 December 2007)

Guidelines for applying Article 54 of the Service Regulations for permanent employees of the European Patent Office

[…]

[…]

I. **Prolongation of service beyond the age of 65 (up to 68) under mutual agreement**

1. The decision on prolongation of service lies with the President of the Office.

2. A permanent employee in active service may submit a request to carry on working beyond the age of 65 and up to 68 at the latest nine months prior to the date on which he reaches the age of 65.

[…]

4. With the administrative assistance of the Personnel Department and after consulting the employee's superiors, the President will decide on the request. The decision shall be taken with due consideration to the interest of the service, as laid down in the Annex. The decision shall also specify the agreed duration of prolongation of service.

> 5. The employee concerned shall be notified of the decision within two months from the date on which the request was made and, at the latest, seven months prior to the date on which he reaches the age of 65. The Personnel Department shall also be informed of the decision and charged with its administrative implementation."

Effective 19 July 2010, Mr S. became the new Principal Director of the PAOC and Biotechnology Joint Cluster. By a letter of the same day, which constitutes the impugned decision, Mr S. informed the complainant that a prolongation would not be in the interest of the service, in particular because his intention was to reallocate some of the workload in the complainant's field so as to "rebalance the workload between [the] Clusters of Biotechnology and PAOC" and also because there was sufficient time for the Office to prepare the complainant's handover prior to his retirement. On 20 August and again on 10 September the complainant wrote to the President of the Office, requesting a review of Mr S.'s decision not to prolong his service. Acting on behalf of the President, the Vice-President of DG1 confirmed in a letter of 17 September 2010 the President's support of that decision.

B. The complainant contends that the impugned decision was taken without authority. Indeed, according to the information communicated to staff through an EPO newsletter published in 2008, the decision on his request for a prolongation of service ought to have been taken by the Vice-President of DG1, following the recommendation of the Coordination Committee. Alternatively, should the Principal Director of PAOC be considered the appropriate authority, the endorsement of his request by his former Principal Director should have been viewed as a favourable decision. Hence, in view of Mrs L.'s viewed of his request, Mr S. had no right to intervene in the process by revoking the support given by his predecessor. This intervention constituted, in his view, a procedural flaw. Moreover, by rejecting the complainant's request on his first day in office, i.e. without a proper evaluation of the workload in the PAOC and Biotechnology Joint Cluster, and by ignoring his readiness to be transferred to a different field, Mr S. committed a mistake of fact and failed to take into account an essential fact. Although he gave early notice of his wish to continue

working beyond 65, the EPO failed to properly consider his request: the dates referred to in Mr S.'s letter of 19 July 2010 were wrong by a year. In addition to showing the carelessness with which his request was handled, this fact demonstrates an abuse of power.

The complainant asks the Tribunal to quash the impugned decision and to order the EPO to grant his request for prolongation of service. Alternatively, he requests compensation in an amount equal to the salary and pension benefits which he would have received had he been allowed to remain in service until 29 February 2012. He also requests 5,000 euros in moral damages and "[c]osts, including 500 euros, as compensation for the complainant's own time and effort".

C. The EPO submits that the impugned decision was taken by Mr S., the Principal Director of the complainant's cluster, in the proper exercise of his authority. It points in this regard to the President's decision to delegate to Vice-Presidents the power vested to her under Circular No. 302 to take decisions on requests for prolongation of service and their authorisation to further delegate, subject to her approval, that power to Principal Directors. It also points to the subsequent decision by the Vice-President of DG1 to further delegate, as of 1 March 2008, his power in the matter to Principal Directors with the caveat that they "may not take a decision on prolongation of service without consultation of the Coordination Committee". It denies the existence of procedural flaws and emphasises that Mr S. was fully entitled to make a different decision than his predecessor. In any event, the endorsement of the complainant's request by Mrs L. predated Mr S.'s decision to transfer files and staff from the PAOC to the Biotechnology Cluster, considerably reducing thereby the workload in the complainant's field. According to the EPO, Mr S. was fully informed of the situation in PAOC well before taking up his duties and in evaluating the interest of the service he was perfectly entitled to only consider the workload in the complainant's cluster. Hence, there was neither a mistake of fact nor failure to consider an essential fact in examining the complainant's request. The Organisation rejects the allegation of abuse of power and asserts that

the error in relation to the dates referred to in the Principal Director's letter of 19 July 2010 was unintentional and immaterial.

D. In his rejoinder the complainant questions the extent to which decisions that were never communicated to staff, such as the delegation of power by the Vice-President of DG1 to Principal Directors relied upon by the EPO, are valid. He argues that the impugned decision was not properly substantiated: Mr S.'s rejection of his request was based on intentions regarding the reallocation of work and staff rather than on decisions already implemented, while the reasons given by the Vice-President of DG1 in his letter of 17 September 2010 were different from those given by Mr S. He points to the absence of any evidence that the Coordination Committee actually took an unfavourable position on his request, or that Mr S. in fact consulted that Committee prior to deciding on his request, and characterises this omission a serious procedural violation.

E. In its surrejoinder the Organisation asserts that the delegation of power by the President and the Vice-President of DG1 was fully valid even without having been made public. It maintains that the impugned decision was adequately substantiated. Mr S.'s refusal to grant the prolongation was based on actual decisions made with regard to the reallocation of work and staff while the reasons given by the Vice-President of DG1 in his letter of 17 September 2010 were fully consistent with those given earlier by Mr S. With regard to the requirement for consultation of the Coordination Committee, it explains that it was fully met. In its surrejoinder it appends copies of e-mails which, in its opinion, confirm that the Committee was consulted and unanimously recommended against the complainant's prolongation.

CONSIDERATIONS

1. The complainant was employed by the EPO. In August 2011 he turned 65. The EPO Service Regulations provide in Article 54(1)(a) that a permanent employee shall be retired automatically on the last day of the month during which he reaches the age of 65 years. By

operation of this provision, the complainant would have been retired automatically on 31 August 2011. However, this provision is the subject of a qualification found in Article 54(1)(b) to the effect that a permanent employee may carry on working until aged 68 if the appointing authority "considers it justified in the interest of the service". This might occur only if requested by the employee.

2. In fact, the complainant made such a request on 20 May 2010 for a six-month prolongation, namely from 31 August 2011 until 29 February 2012. A decision was made and communicated to the complainant by a letter dated 19 July 2010 that there would not be a prolongation. While this is the impugned decision, the complainant argued that at that time a decision had already been made acceding to his request. The impugned decision was made by Mr S., the Principal Director of PAOC. Regrettably, the Service Regulations do not provide for an internal appeal in a case such as the present, before an employee can appeal to the Tribunal.

3. In his complaint, the complainant challenges the impugned decision on several bases. First, he argues, in effect, that the impugned decision was *ultra vires*. He argues that the decision should have been made by the Vice-President of DG1 (having regard to what had been said in an EPO newsletter) whereas, in fact, the decision was made by a Principal Director. The operation of Article 54(1)(b) is addressed by Circular No. 302, which provides a mechanism for the consideration of a request made under the Article. It makes express reference to such a request being submitted to the President of the Office and the President "decid[ing] on the request".

4. In its reply, the EPO annexed three documents concerning the delegation of this power by the President. One was a memorandum dated 11 February 2008 signed by the President delegating to the Vice-President with direct responsibility for the employee concerned, the power to "take decisions on prolongation of service for all employees with grades A5 and lower". The memorandum further provided that the relevant Vice-President could, with the President's

approval, provide for a further delegation of the power to Principal Directors. The Vice-President of DG1 in an instrument dated 21 February 2008, delegated the power to Principal Directors for the employees under their direct line management. This delegation was said to be effective from 1 March 2008. This arrangement was approved by the President in writing on 6 March 2008. The instrument of delegation by the Vice-President of DG1 stated that "Principal Directors may not take a decision on prolongation of service without consultation of the Coordinating Committee […]". There was a lawful delegation of the power to Principal Directors notwithstanding, as the complainant contended, that this further delegation by the Vice-President of DG1 was not publicised.

5. Mr S. made the impugned decision not to prolong the complainant's employment on his first day in the position of Principal Director of PAOC, namely 19 July 2010. This fact was relevant to two arguments advanced by the complainant. The first argument was that, at this time, a favourable decision had already been made by the previous Principal Director of PAOC, Mrs L., to prolong the complainant's employment. It is true that in a note dated 20 May 2010, the complainant's Director, Mr d.J. recorded that both he and Mrs L. were of the opinion that a six-month extension could be granted. This note was to the members of the Coordinating Committee. However the delegation of the power to make a decision in relation to a request for prolongation of employment was the subject of a qualification. It was that a decision could not be made without consultation with the Coordinating Committee. This requirement that there be consultation created a condition precedent to the exercise of the power to make a decision. That is to say, a lawful decision could only be made after the consultation had taken place. Accordingly, any opinion Mrs L. had formed before 20 May 2010 could not have constituted a legally effective decision in relation to the request. No decision had been made on the complainant's request before the impugned decision was actually made on 19 July 2010.

In its reply, the EPO stated that "the […] Coordinating Committee unanimously felt that there was no service interest in prolonging the complainant's service beyond 65". In response to a suggestion by the complainant in his rejoinder that there was neither evidence of this unfavourable conclusion of the Coordinating Committee nor evidence that Mr S. was aware of this unfavourable conclusion when he made the impugned decision, the EPO annexed to its surrejoinder copies of several e-mails from which it can readily be inferred that the Committee did reach this conclusion and that it was communicated to Mr S. before he made the impugned decision. Accordingly the condition precedent had been met when the impugned decision was made and the decision was, in this respect, a lawful decision.

The second argument of the complainant based on the fact that the decision was made on the first day Mr S. was in the position of Principal Director, was to the effect that no proper evaluation of the workload in the complainant's field or his readiness to be transferred to a different field was made. However, this argument is without substance.

In his letter of 19 July 2010, Mr S. did not refer to the adverse advice of the Coordinating Committee, and it would have been preferable for him to have done so. Nonetheless, he explained why he concluded, for operational reasons, that the prolongation would not be in the interest of the service. The complainant does not agree with this conclusion and he detailed why, for operational reasons, his request should have been the subject of a favourable decision. However, it is not the Tribunal's role to make an evaluation itself of whether the discretionary decision actually made was the correct one. The complainant accepted, correctly, that the role of the Tribunal is limited and that, in relation to an assessment of the facts, a discretionary decision cannot be impugned unless there has been a mistake of fact, essential facts were overlooked or clearly mistaken conclusions were drawn from the evidence (see, for example, Judgment 2896, consideration 7). To successfully impugn a discretionary decision, a complainant must demonstrate some fundamental flaw in the decision-making process. It is unnecessary to detail the

complainant's analysis of the circumstances prevailing at the time the impugned decision was made because they do not, even remotely, demonstrate a fundamental flaw in the decision made by Mr S.

One matter of detail relied on by the complainant was that Mr S. mistakenly referred in his letter of 19 July 2010 to a request for prolongation "up to February 2011" and mistakenly referred to the complainant reaching the age of 65 "on 20 August 2010". Both dates were wrong by a year. The complainant made his request for prolongation well before it might otherwise have been made. Circular No. 302 permits a prolongation request to be made up to nine months before the affected employee turns 65. Thus, the complainant's request could have been made as late as December 2010. The complainant's request was made on 20 May 2010. Circular No. 302 requires a decision within two months of the request. Accordingly, Mr S. had to make a decision by 20 July 2010. This error in relation to dates is immaterial because the reasons given by Mr S. related, in substance, to future operational arrangements. There is nothing to suggest that those future operational arrangements would not have remained relevant in not only 2010 but also 2011.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 February 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 28 April 2014.

GIUSEPPE BARBAGALLO
MICHAEL F. MOORE
HUGH A. RAWLINS

DRAŽEN PETROVIĆ