

The Administrative Tribunal,

Considering the complaint filed by Mr A.W.J. J. against the European Patent Organisation (EPO) on 4 June 2007, the EPO's reply of 12 September, the complainant's rejoinder of 1 October and the Organisation's letter of 21 December 2007 by which it informed the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

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 Dutch national born in 1952, joined the European Patent Office, the secretariat of the EPO, on 1 June 1980, at grade B4. He was promoted several times, attaining grade A3 on 1 January 2003. He was employed in The Hague.

In 1980 a career policy for staff of categories A and L, bearing the reference CA/20/80-VIII, was drafted by the then President of the European Patent Office and approved by the Administrative Council. One element of the policy was the so-called "age-50 rule" under which, subject to certain conditions, staff members holding grade A3 were eligible for promotion to grade A4 upon reaching the age of 50. Paragraph 16 of document CA/20/80-VIII provided that "a fundamental aim of the new system should be that every A3 staff member who has served a minimum of 5 years in the EPO and is of standard competence, [would] be promoted to A4, whatever his total experience, by the age of 50". However, point (v) of the summary provided at the end of CA/20/80-VIII stipulated that "[p]romotion [to the A4 grade] at age 50 [would] 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". The President's Note to the Chairmen of the Promotion Boards A2/3, A3/4 and A4/4(2) for the year 2004 (hereinafter "the President's Note") was published in Gazette No. 05/04. He stated under point 7 that "[c]andidates in the grade A3 who have reached the age of 50 and who have at least 3 years of service with the EPO may be considered eligible for promotion to A4 if this is also supported by the individual's merit". The age-50 rule was abolished with effect from 1 January 2005 by Administrative Decision CA/D 8/04.

Following the publication of a list of employees promoted to grade A4 in 2004, the complainant wrote to the President on 17 November 2004 to express his surprise at the fact that his name did not appear on the list. As he met the requirements laid down in point 7 of the aforementioned Note, he asked to be promoted to grade A4. In a letter of 8 December 2004 the Principal Director of Personnel, replying on behalf of the President, indicated that the complainant was not eligible for promotion under Decision CA/20/80-VIII because he did not fulfil the criterion of three years of service in grade A3.

By a letter of 1 March 2005 the complainant filed an internal appeal against the decision not to promote him to grade A4, contending that it was based on an erroneous interpretation of Decision CA/20/80-VIII and of the President's Note. He was informed, by a letter dated 21 April 2005, that the matter had been referred to the Internal Appeals Committee, since the President considered that the rules in force had been correctly applied. It was also pointed out that there was no right to promotion, even where the minimum requirements were met, and that since it was only on 1 January 2005 that he had acquired the two years' experience in his grade required by Article 49(7) of the Service Regulations for Permanent Employees of the EPO, he was not eligible for promotion in 2004.

In his submissions before the Internal Appeals Committee, and in particular in his letter of 3 November 2005, the complainant argued, *inter alia*, that if the requirements of Article 49(7) were decisive, which he contested, then his promotion to grade A3 ought to be backdated. In support of this claim, he referred to Circular No. 271 which contains guidelines concerning the implementation of the career system for category A staff. In its opinion of 14 March 2007 the Committee held that the complainant's claim concerning backdating his promotion to grade A3, which would have enabled him to fulfil the requirement of two years in grade A3, was time-barred and hence irreceivable. It considered that the decision not to promote him to grade A4 was in line with prevailing promotion

practice and stressed that he lacked the requisite years of experience for promotion to that grade. It consequently recommended rejecting the appeal as irreceivable in part and unfounded in its entirety. By a letter of 23 April 2007 the Director of Administration and Systems informed the complainant that the President had decided to endorse the Committee's recommendation. That is the impugned decision.

B. The complainant contends that the decision not to promote him was taken in breach of both point 7 of the President's Note and paragraph 16 of Decision CA/20/80-VIII. He argues that the statement made by the Principal Director of Personnel in his letter of 8 December 2004 contravenes the aforementioned provisions. According to the complainant, he was not required to have held grade A3 for three years to be eligible for promotion to grade A4. He points out that, according to paragraph 16 of document CA/20/80-VIII, staff members who have served "a minimum of 5 years in the EPO" and are of "standard competence" will be promoted to grade A4 when they reach 50 years of age. When he asked to be promoted in 2004, he was 52 years of age and had held grade A3 since 1 January 2003; thus he totalised two years in grade A3 on 31 December 2004. Moreover, his performance has always been rated "very good" since he joined the EPO in 1980. Paragraph 16 of document CA/20/80-VIII should prevail over the condition laid down in Article 49(7) of the Service Regulations, that is to say a minimum of two years in a grade in order to obtain a promotion. Nevertheless, he asserts that he had been in grade A3 for two years on 31 December 2004 and that he met the requirements for promotion to grade A4 prior to the entry into force of Administrative Decision CA/D 8/04. Citing the Tribunal's case law, he contends that he is entitled to rely on the provision that is more favourable to him, and that the President is bound by the rules and criteria he had previously set up with regard to promotion.

Referring to Circular No. 271, he alleges that the Promotion Board mistakenly promoted him to grade A3 as of 1 January 2003. In his view, he should have been promoted from an earlier date.

The complainant seeks the quashing of the decision not to promote him to grade A4. He also claims compensation in the amount of 50,000 euros for loss of salary and pension entitlements, moral damages and costs.

C. In its reply the EPO submits that the complainant's claim to have his promotion to grade A3 backdated is time-barred and hence irreceivable. Indeed, the complainant was promoted to grade A3 with effect from 1 January 2003 but failed to contest the date of that promotion within the three-month period provided for in Article 108(2) of the Service Regulations.

On the merits the Organisation indicates that decisions concerning promotions are discretionary and subject to only limited review. Thus, there is no right to promotion. In its view, the President correctly exercised his discretion in the present case. It explains that, contrary to the complainant's contention, Article 49(7) of the Service Regulations takes precedence over the age-50 rule laid down in Decision CA/20/80-VIII. It adds that the complainant totalised two years of service in grade A3, as required by Article 49(7), only on 1 January 2005, the date on which the age-50 rule was abolished by the Council in its Decision CA/D 8/04.

Concerning the alleged breach of point 7 of the Note from the President, the Organisation points out that the Note was addressed to the Chairmen of the Promotion Boards and not to employees. Moreover, under the normal career system, as laid down in Circular No. 271, employees must have 19 to 25 years of total experience or a seniority in grade of 11 to 15 years before they can be promoted to grade A4; it is consequently "disproportionate" to interpret the criterion set out in point 7 of the Note as meaning three years of service with the EPO, irrespective of the grade. Concerning the alleged violation of paragraph 16 of document CA/20/80-VIII, it says that point (v) of the summary of that document expressly refers to service in grade A3. Lastly, it argues that the complainant's claim for damages is devoid of merit as he did not meet the criteria to be promoted to grade A4.

D. In his rejoinder the complainant maintains his pleas.

CONSIDERATIONS

1. The complainant joined the European Patent Office on 1 June 1980 at grade B4. He was promoted several times attaining grade A3 on 1 January 2003. A list of employees promoted to grade A4 in 2004 was published in November of that year; the complainant, whose name did not appear on that list, subsequently wrote to the President of the Office claiming that he met the criteria for promotion to grade A4 under the age-50 rule and requesting that he be promoted. By letter of 8 December 2004 the complainant was informed that the President had

rejected his request, since he did not fulfil the criterion of three years of service in grade A3 as required by the age-50 rule. By letter to the President dated 1 March 2005, the complainant, considering that he met the requirements to be promoted to grade A4 in accordance with paragraph 16 of document CA/20/80-VIII and point 7 of the President's Note, asked to be promoted to grade A4. By a letter of 21 April 2005 the complainant was informed that his appeal had been referred to the Internal Appeals Committee because the President had considered that the rules in force had been correctly applied and that he did not have a right to promotion.

2. In its opinion of 14 March 2007 the Internal Appeals Committee recommended rejecting the appeal as irreceivable in part. It found that the claim concerning the backdating of the complainant's promotion to grade A3 and the request for damages were time-barred. On the merits it held that the requests for promotion to grade A4 and for damages in respect of the promotion decision for 2004 were unfounded. By a letter of 23 April 2007 the complainant was informed that the President of the Office had decided to endorse that recommendation. He impugns that decision before the Tribunal.

3. The complainant alleges that the impugned decision did not comply with the provision of point 7 of the President's Note and paragraph 16 of document CA/20/80-VIII. He also contends that the Promotion Board made a mistake in deciding not to advance the date of his promotion to grade A3 prior to the initial date of promotion of 1 January 2003.

4. The Tribunal is of the opinion that the argument concerning the backdating of the complainant's promotion to grade A3 which was considered irreceivable by both the Internal Appeals Committee and the President of the Office must be rejected. The complainant lodged an internal appeal on 1 March 2005. In his submissions before the Committee and in particular in his letter dated 3 November 2005, he requested that his promotion to grade A3 with effect from 1 January 2003 be backdated. Considering that he was formally informed of his promotion in December 2003, the three months' time limit for filing an internal appeal, as provided for under Article 108(2) of the Service Regulations, had already passed when he lodged his internal appeal.

5. The complainant's claim for promotion to grade A4 is unfounded. The Tribunal notes that the age-50 rule, as described in point 7 of the President's Note, required a minimum of three years' experience in grade A3 prior to promotion to grade A4. It would be illogical to interpret the term "3 years of service" as meaning three years of experience in the EPO, considering that according to the requirements for promotion to grade A4 under the normal career system, 19 to 25 years of total experience or a seniority in grade A3 of 11 to 15 years is necessary. In addition, paragraph 16 of document CA/20/80-VIII, which stated that "a fundamental aim of the new system should be that every A3 staff member who has served a minimum of 5 years in the EPO and is of standard competence, [would] be promoted to A4, whatever his total experience, by the age of 50", refers to five years in grade A3; the minimum period requirement was later reduced to three years. Document CA/20/80-VIII is entitled "Career policy for Category A and L staff of the EPO"; it would therefore be illogical to assume that the requirement of five years of experience, or later three years, would refer to experience in any grade. This is confirmed by point (v) of the summary in document CA/20/80-VIII which, in its original form, provided that "[p]romotion at age 50 [would] be offered to all who have served at least 5 years in the A3 grade".

6. The complainant's interpretation of the age-50 rule is incorrect, but even if it were correct his complaint would still fail on the basis that he did not meet the minimum requirements necessary for promotion to grade A4, as provided for in Article 49(7) of the Service Regulations, according to which, "[t]he employees must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and at least two years' service in their grade in the Office". Since the complaint has failed for the above-mentioned reasons, it is not necessary for the Tribunal to analyse the Organisation's assertions that promotions are at the discretion of the President of the Office and that fulfilling the minimum requirements does not automatically entitle an employee to promotion. As the main claims of the complaint have failed, so too has the subsequent claim for payment of damages and costs.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 9 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.