110th Session **Judgment No. 2969**

THE ADMINISTRATIVE TRIBUNAL,

Considering the first and second complaints filed by Mrs M. H.-S. against the European Patent Organisation (EPO) on 17 April and 7 July 2009 respectively, the EPO's replies of 6 August and 14 October, the complainant's rejoinders of 3 and 7 December 2009 and the Organisation's surrejoinders of 12 March 2010;

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. The complainant is a Belgian national born in 1945. She joined the International Patent Institute in 1974 and, following the Institute's integration into the EPO in 1978, she became an employee of the European Patent Office – the EPO's secretariat. She reached the statutory retirement age of 65 on 22 January 2010. Her last assignment was to the Principal Directorate of Patent Administration at grade B6.

In December 2007 the Administrative Council amended the Service Regulations for Permanent Employees of the European Patent Office by introducing with effect from 1 January 2008 the possibility

for employees to work until the age of 68. This amendment was reflected in Article 54(1)(b), which provides 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 in which case he shall be retired automatically on the last day of the month in which he reaches that age". Guidelines for applying Article 54 were laid down in Circular No. 302 of 20 December 2007, whereby a two-step approach for evaluating the interest of the service was introduced. By a decision of 11 February 2008 the President of the Office delegated the authority for decisions on the prolongation of service for employees with grades A5 and lower to Vice-Presidents and Principal Directors with direct responsibility for the persons concerned.

By a letter of 9 December 2008 to the President, the complainant requested a prolongation of her service beyond the statutory retirement age and until 31 December 2012. Upon her return from annual leave in mid-February 2009, her director, Ms K., proposed to meet with her to discuss her request. The complainant rejected the proposal and by an e-mail of 19 February she asked that a decision on her request be notified to her in writing without delay. That same day Ms K. forwarded the complainant's request for prolongation to the Principal Director for Patent Administration. The complainant then fell ill and went on sick leave, from which she returned on 8 March 2009.

On 26 February she wrote to Ms K., explaining that she had turned down the proposed meeting so as to avoid further delays in the processing of her request. She alleged that on 20 February she had been informed verbally by her immediate superior that the policy of the Principal Directorate for Patent Administration was in principle not to grant any prolongations of service beyond the age of 65, and that this news had led to her hospitalisation. Ms K. wrote back on 27 February, noting that decisions on requests for prolongation of service required consultation of all levels of the management

hierarchy, and that a personal meeting had been proposed to the complainant in order to inform her of the circumstances determining the policy of the Principal Directorate for Patent Administration. She added that an earlier meeting had not been possible owing to ongoing consultation, public holidays and the complainant's leave. The complainant replied on 28 February that the involvement of all levels of the management hierarchy could not justify a failure to comply with the statutory time limits and that, if indeed the Directorate's policy with regard to requests for prolongation had changed prior to her request she ought to have been informed in due time. The Principal Director for Patent Administration informed the complainant on the same day that, although he had neither seen her request nor been officially consulted thereon, he was positive that extensions beyond the statutory retirement age were not possible in the Principal Directorate because of the risk of overstaffing.

On 17 April 2009 the complainant lodged a first complaint with the Tribunal against the implied rejection of her request of 9 December 2008. By a letter dated 24 April 2009 the Vice-President of Directorate-General 2 informed the complainant that her request for an extension beyond the age of 65 could not be granted because, due to the decreasing number of patent filings and the introduction of automation projects, there was an overcapacity of staff for the years to come and hence a need for the Office to reduce its capacity. On 7 July 2009 the complainant lodged a second complaint with the Tribunal impugning that decision.

B. The complainant submits that the decision not to grant her request for prolongation of service is unlawful because it is not reasoned and because it is tainted with errors of fact and procedural irregularities.

She argues that the Office failed to provide her with a decision on her request within the prescribed time limits and to carry out the evaluation of the interest of the service required by Circular No. 302. In particular, as her request was submitted on 9 December 2008 and the Service Regulations prescribe a two-month time limit for

a reasoned decision thereon, the evaluation of the staffing needs of the Principal Directorate for Patent Administration under Circular No. 302 should have been made only on the basis of those facts that existed during the two months subsequent to 9 December 2008. Nevertheless, the Vice-President's decision of 24 April 2009 was based on an evaluation of facts that emerged after 9 February 2009. Indeed, it was not until the second half of April 2009 that the policy on prolongation of service and issues of staff capacity were placed on the agenda of the Principal Directorate. Prior to that there was no indication that the Directorate's workload would be affected by a decrease in the number of patent filings or that automation projects would be implemented soon. On the contrary, her director had acknowledged that there was a heavy workload in her area of work.

She further argues that the Vice-President's decision not to grant her request reflected the implementation of a policy which negatively affects a large number of employees holding category B posts and which should have therefore been submitted to the General Advisory Committee (GAC) for an opinion, in accordance with Article 38 of the Service Regulations. The obligation to consult the GAC was all the more imperative for the fact that the policy in question was discriminatory, as it did not apply to all category B staff members but only to those in the Principal Directorate for Patent Administration. She asserts in this connection that 71 per cent of the requests for prolongation of service received Office-wide in 2008 were granted.

The complainant draws attention to the fact that, throughout her career with the EPO, her record of performance was very good and she was entrusted with important functions. Consequently, the decision not to prolong her service was not only contrary to the interest of the Organisation, which lost a competent and experienced staff member, but also detrimental to her personally, given that it deprived her of her work and her salary and caused her to suffer serious health problems.

She asks that the decision not to grant her request for prolongation of service be quashed and that the EPO be ordered to pay

her material damages in an amount equal to twice the difference between the pension she received as from February 2010 and the salary she would have received had she been retained in service until the end of January 2011. She claims moral damages in an amount equal to half the sum she seeks in material damages and she also claims costs.

C. In its replies the EPO contends that the complainant had no legitimate expectation of or entitlement to a prolongation of service, in view of the fact that such decisions are exceptional and discretionary. It submits that it properly exercised its discretion in consideration of all relevant facts and that it provided the complainant with adequate, objective and valid reasons for the rejection of her request.

In the Organisation's opinion, the complainant was notified of the decision on her request well within the time limits laid down in Circular No. 302, which stipulates that the employee should 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 or she reaches the age of 65. In view of the fact that the complainant's request was submitted via the normal line management channels and a decision was taken following consultation with her superiors, the time taken to notify her was neither inordinate nor inexplicable and there was no lack of due diligence in handling her request.

The defendant disputes the allegation that it did not conduct the evaluation process prescribed by Circular No. 302. It explains that under the existing legislative framework, namely Article 54(1)(b) of the Service Regulations and the said circular, the need of the service is the paramount consideration in evaluating whether an employee's prolongation would indeed be in the interest of the service. In assessing the need of the service the appointing authority must necessarily take into account medium and long-term considerations. In the case at hand, the decrease in the number of patent filings and the introduction of automation projects resulted in a reduction of the

workload and an attendant overcapacity in the Principal Directorate for Patent Administration, which required the implementation of measures aimed at reducing staff capacity in particular areas.

The EPO asserts that it was under no obligation to consult the GAC, given that the decision not to prolong the complainant's service was an individual decision fully within the management's authority and in no way reflective of a general policy in the matter. It denies that the decision was discriminatory, noting that the evaluation of the need of the service is by definition limited to a specific area. It adds that in 2008 only two requests for prolongation were made in the Principal Directorate for Patent Administration and hence, contrary to what the complainant may allege, the measures implemented did not affect a large number of staff.

The Organisation invites the Tribunal to dismiss the complainant's claims, arguing that the decision not to prolong her service was lawful and legitimate, and that there is no medical evidence establishing that the deterioration of her health was directly caused by that decision and could thus reasonably be attributed to the defendant.

D. In her rejoinders the complainant reiterates her arguments and maintains her claims.

E. In its surrejoinders the EPO maintains its position in full.

CONSIDERATIONS

1. With effect from 1 January 2008 Article 54 of the EPO's Service Regulations was amended to allow permanent employees to continue to work beyond the age of 65 if the appointing authority considers it justified in the interest of the service. Around the same time, Guidelines for applying Article 54 of the Service Regulations were adopted and set out in Circular No. 302. That circular provides a two-step process to evaluate the interest of the service. The first step consists of an assessment of the need of the service on the basis of certain identified criteria, including that of "workload in a specific

area". Only if the need has been established will the suitability of the employee to fulfil the identified need be assessed on the basis of specific criteria.

2. On 9 December 2008, pursuant to Article 54 of the Service Regulations, the complainant requested a prolongation of her service beyond the mandatory retirement age and until 31 December 2012. She received no reply until returning from annual leave on 16 February 2009, but she was then invited by her director, Ms K., to discuss her request for extension. However, she rejected the offer.

3. On 19 February she asked that a decision regarding her request be notified to her in writing without delay. The same day, Ms K. forwarded her request for prolongation to the Principal Director for Patent Administration.

4. Not having received a decision within two months, as required by the Service Regulations, the complainant filed a first complaint with the Tribunal on 17 April 2009 against the implied rejection of her request.

5. By a letter dated 24 April 2009 the Vice-President of Directorate-General 2 informed the complainant of the decision not to prolong her service. In rejecting her request, the Vice-President stated that "[i]n view of the current workload situation in Patent Administration, the decreasing amount of [patent] filings and the upcoming capacity savings due to automation projects, there is a slight overcapacity of staff in the formalities area for the years to come". He added that as a result there was a need for the Office to reduce its capacity where possible in this area. The Vice-President explicitly referred to Circular No. 302 and the requirement for an evaluation of the interest of the service and identified the "workload in a specific area", namely Patent Administration, as the criterion for assessing the need of the respective Principal Directorate and establishing that it did not warrant the prolongation of the complainant's service. The complainant then lodged a second complaint with the Tribunal against

that decision. At this point it is convenient to note that Article 107 of the Service Regulations provides that with respect to decisions taken under Article 54 the internal means of appeal are deemed to be exhausted upon notification of the decision to the employee concerned. Consequently, a complaint may be lodged directly with the Tribunal.

6. The issues raised by the complainant in relation to the implied rejection of her request in the first complaint have been overtaken by the second complaint. As both complaints raise the same issues of fact and law and seek the same redress, they are joined to form the subject of a single ruling.

7. The complainant submits that for the purpose of assessing the needs of the service as contemplated in Circular No. 302, only those facts in existence between 9 December 2008 – the date she submitted her request – and 8 February 2009 – the date on which the EPO was statutorily required to render a decision – should have been taken into account. She contends that the Vice-President erroneously took into account facts that emerged and evaluations that were made after 9 February 2009. She adds that even if facts and evaluations subsequent to that date could have been taken into account, her workload was not affected by a possible decrease in the number of patent applications or by automation.

8. The complainant also submits that the decision not to grant her request is flawed, because it reflected the implementation of a policy which negatively affects approximately 1,000 employees holding category B posts, but which nevertheless was not submitted to the GAC for an opinion, in breach of Article 38 of the Service Regulations.

9. The Tribunal finds that, if accepted, the complainant's argument that the assessment of the need of the service is limited to those facts and evaluations in existence between the date of the request and the date by which the Administration was required to make a

decision thereon would render an assessment of the need of the service meaningless, as it would preclude a consideration of any medium and long-term business planning exercises undertaken prior to the request for prolongation. So far as concerns the argument with respect to facts or evaluations that came into existence subsequent to the date on which a decision should have been taken, the Tribunal notes that the decision in the present case was not based on facts and evaluations that came into existence after 9 February 2009.

10. As to the substance of the decision, this is a matter specifically within the knowledge and competence of the EPO President or the person to whom the responsibility has been delegated. Given the discretionary nature of the impugned decision, the Tribunal will only intervene if "it can be shown that [the] decision was taken without authority, that a rule of form or procedure was breached, that the decision was based on a mistake of fact or law, that an essential fact was overlooked, that a clearly mistaken conclusion was drawn from the facts or that there was an abuse of authority" (see Judgment 2845, under 5).

11. In the present case, the complainant takes the position that the conclusions drawn regarding the workload in her area of work are not supported by the evidence. Having reviewed the materials submitted by the Organisation, it is evident that measures in response to concerns surrounding overcapacity of staff due to reduced patent filings and automation were being considered and adopted prior to the final decision at issue. The Tribunal finds that the EPO's assessment of its needs in the specific area of Patent Administration did not involve any reviewable error.

12. The complainant's argument that the impugned decision reflects the implementation of a policy, which negatively affects a large number of category B employees and which should therefore have been submitted to the GAC for assessment and opinion prior to its implementation, appears to be grounded on the complainant's statement that she was told by her immediate superior that, according

to their director, it was the policy of the Principal Directorate for Patent Administration in principle not to grant a prolongation of service beyond mandatory retirement age. However, this is not the reason given for the impugned decision. According to the Vice-President's letter of 24 April 2009, the decision was based on an assessment of the workload in the Principal Directorate for Patent Administration in the light of automation and a decrease in patent filings. In these circumstances, the question of a referral to the GAC does not arise.

13. As the Tribunal finds that the impugned decision was lawful, there is no need to consider the complainant's claims for material and moral damages and both complaints will be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 4 November 2010, Ms Mary G. Gaudron, 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 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet