H. (No. 4)

v.

EPO

120th Session **Judgment No. 3521**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr B. R. H. against the European Patent Organisation (EPO) on 19 May 2011 and corrected on 8 June, the EPO's reply of 20 September, the complainant's rejoinder of 24 October, the EPO's surrejoinder of 30 December 2011, the complainant's additional submissions of 28 March 2012 and the EPO's final comments of 30 April 2012;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant is a retired official of the EPO. He joined the EPO in November 1991 and reached the statutory retirement age of 65 in March 2012. On 20 August 2008 he submitted a request under Article 54(1) of the Service Regulations for Permanent Employees of the European Patent Office for a two-year prolongation of service beyond the age of 65. Having received no reply within the two-month time limit stipulated in paragraph 5 of Circular No. 302, on 5 December 2008 the complainant filed a complaint with the Tribunal (his third) against the implied rejection of his request. He subsequently withdrew this complaint, after he was informed in April 2009 that his request for

prolongation would be reviewed at the end of 2010 because a meaningful evaluation in the context of his directorate could only be done at that point, and after he was assured that he would be able to file a new complaint with the Tribunal in the event that his request was then refused.

By letter of 19 January 2011 to the Vice-President of Directorate General 2 (DG2), the complainant enquired about the status of his request for prolongation of service submitted in August 2008. Subsidiarily, he asked that his letter be considered as a new request for prolongation of service. In January and again in March 2011 the Administration attempted to contact the complainant to further discuss his request, but this was not possible as he was on leave during that period. On 19 May 2011 the complainant filed the present complaint with the Tribunal (his fourth) impugning the implied rejection of his request submitted on 19 January 2011.

Following the filing of this fourth complaint, the Administration asked the complainant in an e-mail of 12 July 2011 to indicate whether he was still requesting a two-year prolongation of service and to also specify the reasons for his request. It also asked him to submit a formal request. The complainant replied the next day expressing his disappointment at the Administration's failure to review his initial request as promised, i.e. at the end of 2010, and also its failure to reply to his request of 19 January 2011 within the applicable time limit.

He specified that he was now only requesting a one-year prolongation of service and he explained the reasons for which he wished to carry on working. He was then again asked to submit a formal request.

On 27 July 2011 he wrote to the Vice-President of DG2 explaining in more detail the reasons for his request. While admitting that the work he carried out for his directorate had substantially declined since he had become a Staff Committee member, he asserted that he was still able and willing to contribute to that work and that, in any event, through his work as a staff representative, he was making a significant contribution to the work of the EPO as a whole. By a letter of 5 August 2011, a copy of which the EPO has produced in its reply to the complaint, the Vice-President of DG2 informed the complainant that, further to an evaluation of the interest of the service, it had been

concluded that the workload in the complainant's department did not necessitate a prolongation of his service and that there was neither a need for continuity in completing a task or project nor a need to manage succession planning. Therefore, his request to carry on working beyond the age of 65 could not be granted.

The complainant asks the Tribunal to quash what he refers to as "the impugned decision" and to order the EPO to allow him to work beyond retirement age. He claims compensation for the loss of the pension rights that would have accrued had he been allowed to continue working after the age of 65, moral damages in an amount deemed appropriate by the Tribunal and costs.

The EPO replies that there are no grounds for awarding the complainant moral damages, not only because the delay in replying to his requests for prolongation did not constitute an injury to his dignity, but also because the complainant himself was in part responsible for this delay, as he failed to indicate the desired duration of the prolongation in his request of 19 January 2011 and was then unreachable for the next three months. It therefore asks the Tribunal to dismiss the complaint as unfounded and to order that the complainant bear his costs.

CONSIDERATIONS

1. The Tribunal considers the express decision of 5 August 2011 to be the decision impugned in the present complaint. In this decision the EPO notified the complainant that his request for prolongation of service beyond the automatic retirement date connected with his 65th birthday was rejected on the grounds that, following an evaluation of the interest of the service in line with the Annex to Circular No. 302, it was concluded that the workload in the Data Resources Directorate, where the complainant was employed, did not necessitate a prolongation of his service, nor was there a need for continuity in completing a task or project, or a need to manage succession planning. It was also mentioned that forthcoming changes to the data management system would lead to changes within the Data Resources Department to "realign existing tasks, competencies and skills". The complainant contests this

decision, claiming that the Organisation did not properly consider his work as a staff representative when evaluating the possibility of his continuation of service, thereby disregarding the provisions of Article 34 of the Service Regulations.

2. The EPO submits that any prolongation of service under Article 54 of the Service Regulations is to be decided on the basis of an individual's position as an EPO employee, not as a staff representative. It states that it has duly observed Article 34(2) throughout the complainant's (non-prolonged) EPO service, but it takes the view that staff representation activities are irrelevant when evaluating the interest of the service. It further notes that the appointing authority appoints permanent employees to specific posts in the interest of the proper functioning of the Office; in so doing, it takes no account of any staff representation work an employee may take up during his career, and the same applies when it comes to prolongation of service beyond age of 65. The EPO adds that it can evaluate the interest of the service only in terms of the specific post held by the employee.

3. The Tribunal considers that the complaint is well founded. In evaluating the interest of the service, the EPO had to consider the complainant's work as a staff representative. Staff representation duties, which under Article 34(2) shall be deemed to be part of a permanent employee's normal service, should be taken into account when evaluating the interest of the service in line with Circular No. 302.

Article 34 of the Service Regulations provides as follows:

"**Functions of the Staff Committee**

(1) The Staff Committee shall represent the interests of the staff and maintain suitable contacts between the competent administrative authorities and the staff. It shall contribute to the smooth running of the service by providing a channel for the expression of opinion by the staff.

(2) The duties undertaken by members of the Staff Committee and by the permanent employees appointed by the Committee to the bodies set up under these Service Regulations or by the Office shall be deemed to be part of their normal service. The fact of performing such duties shall in no way be prejudicial to the person concerned." (Emphasis added.)

4. The Tribunal does not agree with the complainant's interpretation of the provision enshrined in Article 54(1)(b) of the Service Regulations, which, according to him, creates a presumption that requests for working up to age 68 will be allowed unless there are serious reasons in the interest of the service to say otherwise. To the contrary, prolongation of service beyond the age of retirement usually arises only in exceptional circumstances.

Article 54 provides in relevant part:

"**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. […]" (Emphasis added.)

Circular No. 302 of 20 December 2007 provides the Guidelines for applying Article 54 of the Service Regulations, and states in relevant part:

"**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.

3. The request shall be submitted via the normal line management channels to the President. A copy of the request will be sent by the immediate superior to the Personnel Department. The request shall indicate the desired duration of prolongation.

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.

[…]"

The decision to allow or deny a prolongation of service is subject to the assessment by the President of whether such a prolongation is in the interest of the service. Pursuant to its case law, the Tribunal will interfere with such a decision only if it was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was an abuse of authority (see Judgment 3285, under 9 and 10).

5. In the assessment of the "interest of the service", the Organisation cannot disregard the work that employees do as staff representatives. As formulated under consideration 2 above, the Organisation's logic fails. It is clear that the EPO does not take into account potential future staff representation work when appointing employees, but it cannot continue to ignore the actual staff representation work that is done throughout the staff members' careers. In the present case, the EPO based its decision on a mistake of law by misconstruing the applicable provisions of the Service Regulations, and overlooked as well an essential fact by not considering the complainant's work as a staff representative and not considering the needs of the Staff Committee when assessing the "interest of the service", as staff representation work is indeed an integral part of the proper functioning of the service.

6. In light of the above, the impugned decision must be set aside. As there is no certainty that, even considering the complainant's staff representation work, the EPO would have decided to prolong his service, and noting that the Tribunal will not substitute its own assessment of the interest of the service for that of the Organisation, the Tribunal shall award the complainant material damages for the

loss of the opportunity to have his service prolonged. The Tribunal sets the amount as the equivalent of the total salary the complainant would have received had his service been prolonged by four months, including all allowances, entitlements and emoluments, less any amount of pension he received during that period, plus interest at 5 per cent per annum from due dates until the date of execution of the present judgment.

7. The EPO admits that it breached its duty of care in not responding within the applicable deadlines to the complainant's request for the prolongation of his service, but submits that as this was not done with malicious intent, there should be no award of moral damages. The Tribunal recalls that malicious intent is not required; it is enough that the Organisation breached its duty of care towards the complainant and that the impugned decision was unlawful and injurious to the complainant's dignity. Thus, the Tribunal will award the complainant moral damages for the unlawfulness of the impugned decision, which was taken without consideration of an essential fact; the breach by the EPO of its duty of care demonstrated by its failure to respect the deadlines; and the injury that the EPO caused to the complainant's dignity by essentially considering his work as staff representative to be irrelevant. The Tribunal sets the amount of this award at 5,000 euros. As the complainant succeeds in part, he is also entitled to an award of costs, which the Tribunal sets at 800 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The EPO shall pay the complainant material damages plus interest, as indicated under consideration 6, above.
3. It shall pay him moral damages in the amount of 5,000 euros.
4. It shall also pay him costs in the amount of 800 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Judge, and Mr Michael F. Moore Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ