

## EIGHTIETH SESSION

### ***In re* McLEAN (No. 2)**

#### **Judgment 1493**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Gregor McLean against the European Patent Organisation (EPO) on 17 March 1995, the EPO's reply of 2 June, the complainant's rejoinder of 6 August and the Organisation's surrejoinder of 11 September 1995;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. Information relevant to this case appears under A in Judgment 1433 on the complainant's first complaint against the EPO, which employs him in Munich.

By a letter of 29 July 1994 the Director of Personnel Administration informed the complainant that the place where he might take his home leave was Sydney, in Australia. The letter confirmed that on taking such leave with his dependants he would recover in travel costs no more than half the price of business class tickets unless it proved impossible to buy them at that price on the "free market". He would also be allowed three days for the purpose of such travel.

In a letter of 10 August 1994 he asked the Director to review the terms of that letter "both as to reimbursement and as to the period of leave" and to treat his request, in the event of rejection, as an internal appeal. The Administration put his case to the Appeals Committee. In its report of 15 December 1994 the Committee recommended that the President should reject the appeal.

By a letter of 17 February 1995, which he impugns, the Director of Staff Policy informed him that the President had decided to endorse the Committee's recommendation.

B. The complainant submits that under the material provisions of the Service Regulations he was entitled to the full price of an airline ticket for travel in economy class to Sydney and back. He also cites two provisions about time allowed for travel which he says warrant setting at 14 the total number of days due to him for the purposes of taking home leave in Sydney.

He is claiming reimbursement of the costs of travel on a "tourist economy class air ticket both upon taking home leave and upon leaving the service" of the Organisation; recognition of his entitlement to the grant of 14 days for home leave; the reckoning of his travel costs "both upon taking home leave and upon leaving the service" in the same manner as for duty travel; and an award of 2,000 German marks in costs.

C. In its reply the Organisation points out that as to the travel expenses he will be entitled to "upon leaving the service" his claim is premature and irreceivable: who can say what the terms of refund will be by then? In any event the claim is devoid of merit inasmuch as the terms of reimbursement are not the same for one-way travel as for a return journey made for the purposes of home leave.

The EPO says that its practice has always been to refund only "the cheapest possible" airline tickets to be found on the market. When the Service Regulations came into force such tickets were for travel in "tourist economy class". Nowadays cheaper tickets are to be had. The Organisation also limits refund to expenses actually incurred, and they generally come to about half the cost of travel in business class. When actual expenses are higher it pays the difference.

As to the complainant's claim to the grant of 14 days for home leave, he is wrong to assume that the two rules he cites on travel time are cumulative in effect. They cover different cases: one applies where the time spent on travel depends solely on the distance; the other where stopovers, for example, prolong the journey.

D. In his rejoinder the complainant answers the Organisation's pleas and presses all his claims.

E. In its surrejoinder the EPO observes that the rejoinder offers no new arguments.

#### CONSIDERATIONS:

1. The complainant was born in Australia and holds both Australian and British passports. He took up duty at the EPO on 1 December 1991. In a form headed "Entitlement to home leave", which he signed on 28 April 1992, he stated that he wanted Harrow, in England, to be the place of his home leave. But in a letter of 23 March 1993 he asked a personnel officer of the EPO to have it changed to Sydney on the grounds that that was the place with which he had the closest ties, his wife was Australian, and her parents and his own lived in Australia. On 5 May 1994 he filed a claim to the refund of costs he had incurred for travel to Sydney and back on home leave for his wife and son in December 1992 and for himself in November 1993. On 6 May the EPO agreed to pay him the full amount, which came to 7,783.20 German marks. On 29 July 1994 it changed the place of his home leave to Sydney.

2. Before it had made that change he lodged his first complaint, on 23 June 1994, asking the Tribunal to have the form headed "Entitlement to home leave", which he had signed on 28 April 1992, corrected so that he could take home leave in Sydney. In his rejoinder on that complaint he argued that the decision of 29 July 1994 had not given him full satisfaction: it set conditions he believed to be at odds with the provisions of the Service Regulations about the amount he might claim by way of refund and the number of days he might take for the purposes of home leave.

3. In Judgment 1433 of 6 July 1995 the Tribunal held that the complainant had got satisfaction in the recognition on 29 July 1994 of his entitlement to take home leave in Sydney. It therefore decided that it need not rule on his claim about the place of his home leave, although it awarded him 500 German marks in costs. It declined to entertain the claims he made in his rejoinder about the refund of travel costs and the length of home leave both because they had not formed part of his original complaint and because on those counts internal appeals were still pending.

4. By a letter of 10 August 1994 he lodged an internal appeal objecting both to the amount he had got back in travel costs and to the number of days' leave he had been granted. In a second appeal dated 17 August 1994 he claimed the difference between the cost of three return airline tickets for travel in economy class from Munich to Sydney and back at the rates prevailing at the time when he and his wife and son had made the journey and the amount the EPO had actually refunded, which was 7,783.20 marks. The EPO passed his appeals to the Appeals Committee, which joined them and in a report of 15 December 1994 recommended rejection. In a letter of 17 February 1995 the Director of Staff Policy told him that the President had endorsed the Committee's recommendation. That is the decision he is impugning in this complaint, which he filed on 17 March 1995.

5. The first of the complainant's two main claims is about how much the EPO should pay to meet the cost of travel by himself and his wife and son to Sydney. He submits that under Articles 60(1), 77(2)(c), 77(3), 79 and 80(1)(c) and (d) of the Service Regulations he is entitled to the refund of the cost of an airline ticket in economy class for each traveller. Moreover, the EPO informed him in its letter of 29 July 1994 that he might not recover in travel costs more than half the price of business class tickets unless it proved impossible to buy tickets at that price on the "free market": he considers that to be an unlawful restriction on his entitlements under the Service Regulations.

6. The material provision is Article 77(3) of the Service Regulations, and it reads:

"A permanent employee shall, on taking home leave as defined in Article 60 be entitled in accordance with the provisions of Article 80 to the reimbursement of travel expenses actually incurred for the outward and return journey between the place of employment and his home."

The term "expenses actually incurred" is plain: the employee may recover only such costs as he has already borne. The rule may not be the source of enrichment. Since the complainant and his wife and son were able to travel to Sydney on tickets that actually cost 7,783.20 marks, and since the EPO has paid that sum back to him, he may claim no greater amount.

7. The complainant's second main claim is about the length of home leave. Article 60 of the Service Regulations says that employees "shall receive eight working days' additional leave every two years to return home", and Rule 4(e) of circular 22 allows extra leave by way of compensation for travel time on home leave and contains two tables, one affording compensation for distance and the other related to the number of hours of the journey. Since the distance from Munich to Sydney was over 800 kilometres the first table entitled him to the grant of one-and-a-half days' extra leave, or three days for the journey there and back. And since the journey took more than twelve hours the other table also entitled him to the grant of three days' leave.

8. The complainant makes out that compensation is cumulative and so he is entitled to six days' extra leave. The EPO argues that the two tables are mutually exclusive.

9. The two tables in Rule 4(e) of circular 22 offer two possibilities: the official may choose whichever he prefers. For example, someone who takes home leave at a place 300 kilometres from Munich and goes by air will get an extra day's leave for the return journey according to the distance table, but none at all according to the other one. He will choose accordingly.

10. The complainant cites no precedent in favour of the cumulative grant of the time allowed according to both tables. The conclusion is that the tables are not to be construed as cumulative. That construction is in any event the more reasonable.

11. The complainant's claim about the costs of his travel "upon leaving the service" of the Organisation is, as the EPO points out, premature and therefore irreceivable.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Mark Fernando, Judge, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas  
Mark Fernando  
Julio Barberis  
A.B. Gardner