

EIGHTY-NINTH SESSION

In re Vézina

Judgment No. 1985

The Administrative Tribunal,

Considering the complaint filed by Mrs Danielle Vézina against the European Patent Organisation (EPO) on 12 June 1999 and corrected on 28 July, the EPO's reply of 9 December 1999, the complainant's rejoinder of 15 February 2000 and the Organisation's surrejoinder of 23 March 2000;

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

Having considered 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. The complainant holds both Canadian and French nationalities and was born in 1946. She joined the European Patent Office, the EPO's secretariat, on 25 January 1993 at the Vienna sub-office. The EPO having refused to extend her contract beyond 31 May 1995, she lodged an internal appeal on 27 June 1995. Her case was referred to the Appeals Committee but while the appeal was still pending the President of the Office allowed her claim and offered her on 23 June 1997 a five-year contract with retroactive effect from 1 June 1995. The complainant accepted the offer on 29 September 1997 but said that she would withdraw her appeal only when "all the administrative formalities and adjustments arising from [her] reinstatement" had been settled. She resumed her duties on 6 October 1997.

By letters of 30 October and 10 December she sought clarification about her entitlement to annual leave and home leave for the period from June 1995 to September 1997. The Administration replied on 19 December 1997 that she had no such entitlement. On 11 March 1998 she lodged a further internal appeal against that decision. In its report of 11 January 1999, which was forwarded to the President of the Office on 22 January and a copy of which was sent to the complainant, the Appeals Committee ruled that the first appeal had become devoid of substance and recommended rejecting the second one as devoid of merit. By a letter of 28 January the Director of Personnel Development informed the complainant that the President of the Office had rejected her appeal. The complainant acknowledged receipt of the letter on 7 April 1999. In this complaint she is challenging the rejection of her claims.

B. The complainant submits that the Service Regulations for Permanent Employees provide clearly that staff members may accumulate annual leave even when they are not working, provided that they are on paid leave. She alleges that the Appeals Committee made mistakes of fact and misconstrued the decision to reinstate her retroactively. She explains that, since the EPO paid her an expatriation allowance, it may not deny her home leave on the grounds that she was living in her home country during the period in question. In her submission, she is entitled at least to home leave from the date on which she resumed work, namely 6 October 1997.

She asks the Tribunal to quash "the non-explicit decision of the President ... following the opinion of the Appeals Committee", and to order the Organisation to grant her the leave she claims, or its monetary equivalent. She claims costs.

C. The EPO replies that the complaint is irreceivable because the complainant did not impugn the express decision in the letter of the Director of Personnel Development dated 28 January 1999. She stated in the complaint form that she was challenging the implied rejection of her two appeals but in the complaint itself, that she is impugning the "decision" constituted, she says, by the Appeals Committee's report of 11 January 1999. Furthermore, her claims to monetary compensation in lieu of annual and home leave and to costs are irreceivable because she did not make

them in her second internal appeal.

In subsidiary pleas the EPO observes that the employment contract governs entitlement to annual leave and home leave for the future and even if it is applied retroactively, gives rise to no leave entitlement for the past. It cites circular No. 22 setting out guidelines for leave, which provides that annual leave entitlement accrues, inter alia, on the basis of service completed. The circular contains an exhaustive list of authorised absences which do not reduce the length of annual leave. The list does not mention the case of a staff member who takes up his or her duties retroactively and is paid though having not actually worked. Nor does the case law on reinstatement provide for the retroactive grant of leave. It observes that during the period in question the complainant was not on leave within the meaning of the rules. Furthermore, the prerequisite for granting home leave - namely expatriation - was not met because from mid-November 1995 to the beginning of October 1997 the complainant lived in Canada where she was *de facto* on home leave. The EPO showed generosity towards her by paying her the expatriation allowance. It points out that the complainant was entitled to home leave as from 6 October 1997 and recalls that, for the period prior to that date, it paid her remuneration without deducting any other income she may have earned.

D. In her rejoinder the complainant accuses the Organisation of bad faith: she received the final decision of 28 January 1999 - in the form of a photocopy of the original, the date of which she questions - only on 7 April, i.e. sixty days after the Appeals Committee had forwarded its report to the President of the Office.

On the merits she notes that circular No. 22 "draws up a list of authorised absences (including home leave) and [expressly] excludes" only unpaid leave. She submits that, for the expatriation allowance, the EPO clearly interpreted the start of the contract - 1 June 1995 - as being the date on which she took up her duties. It should have done likewise for the leave she is claiming. She points out that there is a contradiction in the EPO's position: it states on the one hand that she was not on leave within the meaning of the rules and on the other, that she was *de facto* on home leave.

E. In its surrejoinder the Organisation notes that the complainant received the final decision on 7 April 1999 at the latest and that it was therefore the only lawfully challengeable decision when she filed her complaint on 12 June. Circular No. 22 says that the length of leave depends on the length of service completed; but the complainant completed no service during the period in question. It adds that although she was not on leave within the meaning of the rules she was on leave "*de facto*"; however, that does not affect her leave entitlement. Lastly, the complainant may not rely on the fact that it paid her the expatriation allowance, since it was not bound to do so.

CONSIDERATIONS

1. The complainant worked for the EPO from January 1993 to January 1995 as an auxiliary staff member at the Vienna sub-office of the European Patent Office. She was given a four-month extension as a contractual employee.

The EPO having refused to extend her appointment beyond 31 May 1995, she lodged an internal appeal on 27 June 1995. Her case was referred to the Appeals Committee, but while it was still pending the President of the Office revoked his decision and on 23 June 1997 offered her a five-year appointment with retroactive effect from 1 June 1995.

On 29 September 1997 the complainant accepted the offer and said that she would take up her duties on 6 October 1997. She indicated, however, that her acceptance should not be construed as an immediate and automatic withdrawal of her appeal.

2. In October 1997 the EPO paid her the remuneration of an expatriate staff member - without deducting any income she may have earned in the meantime - for the period from June 1995 to September 1997.

By letters of 30 October and 10 December 1997 respectively, she asked for retroactive annual leave and home leave. The EPO having refused her request, she filed a second internal appeal on 11 March 1998 which was referred to the Appeals Committee.

3. In its report of 11 January 1999 the Committee unanimously recommended rejecting her second appeal as devoid of merit and found that there was no longer any reason for her first appeal, against the refusal to extend her appointment, since she had been given a five-year contract.

4. By a letter of 28 January 1999, of which she acknowledged receipt on 7 April 1999, the complainant was

informed that the President of the Office had rejected her second appeal.

On 12 June 1999 she filed this complaint, in which she asks the Tribunal to quash "the non-explicit decision of the President ... following the opinion of the Appeals Committee" of 11 January 1999, to allow her claim to leave or else award her monetary compensation. She also seeks an award of costs.

5. The evidence shows that the case turns on whether, according to the EPO's rules, the case law and general principles of law, the complainant could be granted annual leave and home leave with retroactive effect for the period from June 1995 to September 1997.

6. Article 59 of the Service Regulations says in part:

"(1) Permanent employees shall be entitled to annual leave of thirty working days per calendar year. ... Annual leave should normally be taken before the end of the current calendar year. If this is not possible because of the requirements of the service, it must be taken in the next following year.

(2) The President of the Office, after consulting the relevant joint committee, shall lay down:

a) the rules for granting annual leave;

b) the list of public holidays applicable to each place of employment."

Article 60 of the Service Regulations says:

"(1) Permanent employees who are nationals of a country other than the country in which they are employed shall receive eight working days' additional leave every two years to return home. Travel expenses for such leave shall be reimbursed to the employee concerned under the conditions laid down in Article 77.

(2) For the purposes of these Regulations, the home of such permanent employee shall be the place with which he has the closest connection outside the country in which he is permanently employed ..."

Circular No. 22, which is about leave, states in pertinent part under Rule 2:

"Leave entitlement will accrue on the basis of the total length of service completed, including any period of sick leave or annual leave or home leave, as well as any period of notice, even though not actually worked. Periods of unpaid leave will not count towards entitlement to annual leave or home leave."

7. The construction to be put on the above texts is that for the period from June 1995 to September 1997 the complainant is entitled to neither annual leave nor home leave.

8. This construction emphasises that annual leave is a period of rest granted to employees each calendar year, the length of which is calculated on the basis of service completed, and that the right to such leave may be acquired only after a period of actual work which may include periods, of which there is an exhaustive list, that are treated as periods of actual work.

The complainant completed no period of service which may be treated as a period of actual work, and so may not claim annual leave for the period in question.

9. The purpose of home leave is to allow employees whose work separates them for a specified period from the place with which they have the closest connection outside the country in which they are employed, to return there in order to maintain their ties.

The complainant was not required to work during the period from June 1995 to September 1997; and she does not deny residing in Canada, her home country, during that period. Therefore, she may not claim home leave for the period in question. The fact that the EPO granted her the expatriation allowance retroactively does not imply that she was also entitled to home leave.

10. The complaint is without merit and must be dismissed, there being no need to entertain the defendant's objection to receivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 19 May 2000, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet