

Registry's translation, the French text alone being authoritative.

FIFTY-THIRD ORDINARY SESSION

In re VAN DER PEET (No. 2)

Judgment No. 617

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Mr. Hendricus van der Peet on 26 October 1983, the EPO's reply of 13 January 1984, the complainant's rejoinder of 14 February and the EPO's surrejoinder of 2 May 1984;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 23, 72(1), 79(7) and 82(2) of the Service Regulations for permanent employees of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. Before he joined the staff of the EPO in The Hague on 1 July 1980 the complainant, a Dutch citizen, was living at Puchheim in Bavaria. The Netherlands Government demanded 12,339 guilders in taxes on the import of his motor car from the Federal Republic of Germany. An attempt to get tax relief, supported by the EPO, failed, and he chose instead to live at Emmerich in the Federal Republic, just over the Dutch border, and to commute to The Hague every day, 190 miles there and back. At his request the EPO was to transfer him on 1 January 1981 to its office in West Berlin, where he expected to be paid an expatriation allowance. His transfer was postponed to 1 February 1981. Early in January he took a lease for a flat in West Berlin. He then learned he would not qualify for the expatriation allowance under Article 72(1) of the Service Regulations since he was resident in the Federal Republic. Fearing that in the long run he would suffer serious financial loss he withdrew his request for a transfer. In December he moved to the Netherlands. On 30 August 1982 he wrote to the Vice-President of The Hague office claiming various forms of financial compensation and two months' leave with pay. Having had his claims rejected on 15 September 1982 he appealed to the Appeals Committee. In its report of 21 July 1983 the Committee recommended rejecting his appeal, and its rejection -- the decision he impugns -- was notified to him, on 8 August 1983, by a letter of 28 July from the President of the Office.

B. The complainant alleges that the EPO's officers gave him to believe he might import his car into the Netherlands free of duty when in fact he was exempt neither under the Protocol on Privileges and Immunities of the EPO nor under the EPO's Agreement with the Kingdom of the Netherlands. Again, when he thought of moving to West Berlin Personnel misled him into expecting the expatriation allowance. On the grounds of such misinformation, for which in his view the EPO should be held liable, he seeks "(1) the reimbursement of expenditures,

(2) the granting of smart money, (3) the granting of compensatory extra leave" and "(4) the retroactive correction of [his] marking in the Staff Report 1980-81 from 'Good' to 'Outstanding' in view of the extreme conditions under which [he] had to perform [his] duties".

C. The EPO replies that the complainant's claims are devoid of merit, the fourth being besides irreceivable because he failed to exhaust the internal means of redress. Not being at fault, it should not be held liable for any injury he may have suffered. As the Appeals Committee observed, the official he consulted warned that he was not qualified to give the information, and the complainant has only himself to blame for not heeding the warning. He could have seen for himself, from the Protocol and the Agreement with the Netherlands, that the Netherlands Government reserved the right not to grant Dutch citizens the privilege of duty-free import of personal effects. A letter which the EPO received from the Dutch inland revenue in January 1981 and passed on to him explained he might import a vehicle tax-free if it had been used abroad for over six months. The EPO showed tolerance in allowing him to live at Emmerich: Article 23 of the Service Regulations requires a permanent employee to reside "either in the

place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties". He has failed to show he was misled over the matter of expatriation allowance in Berlin. It was plain that he did not qualify under Article 72(1), having decided to continue to live in Germany.

D. In his rejoinder the complainant withdraws his fourth claim. He maintains that despite his prudent inquiries he has been caused serious financial loss by misinformation from EPO staff on two occasions. He claims: "(a) recognition of the period 1 July 1980 to 1 December 1981 as an official mission or time spent abroad, i.e. the reimbursement, with interest as from 1.12.84 of daily travelling costs in accordance with Article 79(7) and payment in arrears of the expatriation allowance; reimbursement with interest of monies expended in accordance with Article 82(2). Subsidiarily: (b) compensation for the depreciation in value of [his] car in the period till 1 December 1981 and the operating costs during that period, reduced by 5 per cent for private use" (amounting to 38,950 guilders). He also claims "compensation for pain and suffering", to be determined by the Tribunal, and two months' paid leave, equivalent to annual leave over a period of one-and-a-half years.

E. In its surrejoinder the EPO observes, among other things, that in any event it is not responsible for informing staff on matters of national tax law; it merely advises them as far as it can. The complainant has only himself to blame for not making proper inquiries about tax on the import of his car. He was correctly informed early in 1981, orally and in writing, that he would not get the expatriation allowance in Berlin since he had not been resident in the Netherlands; indeed, he had gone to great trouble to keep his residence in the Federal Republic so as to avoid tax on his car. As to the further statement of claims in his rejoinder, his daily travelling costs were incurred in his own interests, not the EPO's. His other claims should also fail since any loss he incurred was by his own fault.

CONSIDERATIONS:

1. The complainant has two main objections to the decision of 28 July 1983.

His first plea is that he is entitled to compensation because the EPO was liable for his being required, as a Dutch citizen taking up duty at The Hague, to pay an import levy on a motor car he had bought in the Federal Republic of Germany.

Article 22 of the Protocol on the Privileges and Immunities of the EPO provides that no contracting party is bound to grant its own nationals the privileges and immunities prescribed in Articles 12, 13, 14(b), (e) and (g) and 15(c). The headquarters Agreement between the EPO and the Kingdom of the Netherlands also states in Article 9 that Dutch citizens employed in The Hague office of the EPO do not enjoy the privileges and immunities set out in the Protocol.

The complainant was therefore not entitled to import his car free of duty. The EPO duly provided him with the text of the Protocol and of the Agreement and gave him no reason to suppose he would not have to pay the levy. In an attempt to help him the Personnel Office raised the matter in a letter of 7 July 1980 with the international tax branch of the Dutch Ministry of Finance, but on 9 January 1981 the Ministry refused exemption. The Administration of the EPO may not be held liable for any omission or negligence.

Nor is the EPO liable for a direct and inevitable consequence of the Protocol and the Agreement. The complainant may not have been aware of what the texts said -- though they were at all times at his disposal -- but the Administration cannot on that account be held liable for failing to give him express warning of his tax liability. It is obvious that tax liability depends not on warnings or information from the Personnel Office but on the EPO's official agreements with States.

2. The complainant's second plea is that he should be awarded damages for the injury he alleges he suffered for having chosen to forgo a transfer from The Hague to Berlin.

On 22 September 1980 he applied for a post with the EPO in Berlin, and the EPO decided to transfer him as from 1 January 1981. But he found out that he would get no expatriation allowance in Berlin and on 27 January 1981 he said he had changed his mind; his purpose in seeking the transfer had been to avoid the levy on import of his car into the Netherlands, but if the transfer did not bring him the expatriation allowance he wanted no part of it.

The complainant was not entitled to the allowance: Article 72(1)(b) of the EPO Service Regulations states that the allowance is payable to employees who "were not continuously resident" in the country in which they are serving "for at least three years, no account being taken of previous service in their home country's administration or with

other international organisations". Although the EPO had transferred him to its office at The Hague, he had been officially resident in Emmerich, in the Federal Republic, since 18 September 1980, i.e. before his application for transfer to Berlin. Though living during that period in the Netherlands, he had always kept his official place of residence in the Federal Republic. This curious anomaly came about because of his difficulties over the Dutch car tax and was questionable as a breach of Article 23 of the Service Regulations: "A permanent employee shall reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties." The complainant may not rely on such an anomaly to support an interpretation of the rule which would be in favour of paying him the allowance.

It would be quite unreasonable to hold the EPO liable for telling him he would not be paid an allowance he was not in fact entitled to and for not transferring him to Berlin. That he was not transferred was the outcome of his own decision, taken in the light of his tax problems in the Netherlands.

Accordingly, the EPO is under no liability and the claim fails.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and Mr. Héctor Gros Espiell, Deputy Judge, the aforementioned have hereunto subscribed their signatures, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 5 June 1984.

(Signed)

André Grisel

Jacques Ducoux

H. Gros Espiell

A.B. Gardner