

FIFTY-SEVENTH ORDINARY SESSION

In re VAN DER PEET (No. 4)

Judgment No. 692

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed against the European Patent Organisation (EPO) by Mr. Hendricus van der Peet on 14 January 1985, the EPO's reply of 1 April, the complainant's rejoinder of 29 April and the EPO's surrejoinder of 19 July 1985;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 12(2), 28(2), 53(1), 59, 73 and 81 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, a Dutchman, joined the EPO staff as an examiner at The Hague in 1980. On 23 September 1983 the President of the Office offered him a post in Munich and he accepted the offer on 28 October. He was to take up duty at the beginning of January 1984. Like all other examiners transferred at the same time from The Hague, he was allowed two days' leave, on 10 and 11 November, to go on mission to Munich to prepare his removal, and three days' special leave, on 23, 29 and 30 December, to carry it out. On 6 January he wrote to the Chief of Personnel at The Hague to say that he had needed another five days to stable his horse and remove his furniture and another day to register his motor car; he claimed compensation. The Chief of Personnel refused his claim on 19 January on the grounds that there were no special circumstances warranting more favourable treatment than for the others. He repeated his claim in a letter of 10 February to the President, but asking for seven days' leave in all this time. His claim was rejected on 5 March on the same grounds and he appealed to the Appeals Committee. In its report of 13 July 1984 the Committee recommended rejecting his appeal, and the President did so by a final decision of 15 October 1984, notified to him on 23 October and now impugned.

B. The complainant explains that he spent five days driving from The Hague to Munich and looking for a flat; one day loading his furniture; two days moving it and unloading it; three days making the flat in Munich habitable and attending to his horse; and one day registering his motor car: 12 days in all. Since the EPO have given him only five days off, he spent seven days' spare time on a removal which was entirely in the EPO's own interest. The employee's spare time is intended to be spent entirely as he pleases, and the EPO therefore owe him seven days' leave. He claims seven days' special leave under either Article 59 of the Service Regulations, which relates to the grant of special leave, or else Article 28(2), which says that if an employee "suffers injury by reason of his office or duties" the EPO shall compensate him.

C. The EPO replies that the complaint is devoid of merit. The impugned decision was taken in accordance with Article 59 of the Service Regulations. Article 59(3)(d) entitles permanent employees to not more than two days' special leave when they change residence. The President is empowered to lay down rules on the grant of such leave and of additional leave for travelling time, and also, at his discretion, to include additional cases in which special leave may be granted. These rules are in circulars 22 and 133. Furthermore, by custom and usage the official is also allowed one or two days for a preparatory visit to his new duty station and, after his installation, time off to attend to necessary formalities. The rules and custom were fully respected in this instance. Invoices which the EPO produces show that the complainant was removing to Munich on 23, 27, 28 and 29 December 1983; his horse was transported on 30 December. Over and above the public holidays, the office in Munich was closed on 27 and 28 December and so, with the special leave added, the complainant had in all 14 free days with pay, from 23 December to 1 January 1984, to remove to Munich. There were no circumstances warranting additional special leave. Nor was the transfer exclusively in the EPO's interests: he accepted its offer of transfer and had previously applied several times for it. Article 28(2) does not apply, its purpose being to compensate the employee for injury caused to him by a third party by reason of his duties.

D. In his rejoinder the complainant contends that his earlier applications for transfer to Munich do not mean that the transfer satisfied any wishes of his own: besides, that would be no reason for depriving him of spare time. He

explains why he believes that the treatment of him was an abuse of authority. It was in breach of international instruments and provisions of Bavarian and Dutch labour law which limit the President's discretion. Article 28(2), if given its true meaning, does apply. The Appeals Committee was not objective. The complainant presses his claim to another seven days' special leave. He seeks damages amounting to 25,000 Deutschmarks for alleged moral injury and to cover "expenses". He asks the Tribunal to order the President of the Office and the Administrative Council of the EPO to negotiate matters of leave with the Staff Union and set up an impartial committee to hear internal appeals.

E. In its surrejoinder the EPO contends that the complainant had no reason to believe he was obliged to accept the transfer in the first place: his acceptance shows that it was in his interest. It is not bound to grant special leave to meet every demand on time that a transfer may make. It already takes on most of the burden by making generous payments and allowing reasonable time off. The rules were correctly applied. The treatment of the complainant was fair and in any case satisfied the instruments he cites. Special leave is granted only in limited circumstances. The Appeals Committee, an independent body, based its opinion on the rules. The Service Regulations leave the grant of special leave to the discretion of the President, who is not obliged to negotiate with the staff. Such claims as first appear in the rejoinder are, for that reason, irreceivable. In any event all the claims are devoid of merit.

CONSIDERATIONS:

1. On 1 July 1980 the complainant entered the service of the Organisation as a permanent employee and as an examiner. His duty station was at The Hague. In May and again in September 1982 he applied unsuccessfully for a vacant post as examiner at Munich. A year later, by letter dated 23 September 1983 the President offered him the post of examiner at Munich which on 28 October he accepted.

2. The complainant thus became one of a group of examiners who were all transferred from The Hague to Munich at the same time. Article 12(2) of the Regulations provides that a permanent employee may be transferred within the Office either on the initiative of the President or at his own request. The President's letter of 23 September shows that he did not intend to transfer the complainant unless he was willing to go. But by accepting the transfer the complainant put himself in the same position as if he had been instructed by the President to go to Munich. Thereafter, if he had refused to take the necessary steps to effectuate the transfer, his service could, contrary to the contention of the Organisation, have been terminated under Article 53(1).

3. It follows that the complainant is entitled to be reimbursed by the Organisation expenditure which he necessarily incurs in carrying out the transfer; and likewise that any time spent by him for the same purpose is time spent in the service of the Organisation. As to the first, no difficulty has arisen; a number of articles, principally Articles 73 and 81, provide for reimbursement of expenses. But, as to time, the Organisation contends that the complainant is not entitled to draw his ordinary remuneration but must apply for special leave with pay under Article S9. This article deals with annual and special leave and specifically mentions "change of residence" as one of the grounds for a grant of special leave. The Tribunal rejects this contention for the following reasons.

4. "Leave" in Article 59 does not mean leave of absence from the place of work so that the employee can temporarily serve the Organisation elsewhere. It means a suspension of the duty to serve. If it be annual leave, the employee can do what he likes with the time. If it be special leave, he can use it for the private purpose for which the leave is granted. It is not appropriate that an employee should have to apply to another part of the Administration for special leave with pay to enable him to carry out instructions given to him by the President.

5. A second reason is that in the case of each of the grounds specified in Article 59 a time limit is set to the extent of the leave which can be granted. These limits show that the leave is not intended to cover the whole period reasonably required for the purpose specified. Thus for "serious illness of a child" leave may be granted up to two days. Leave of this sort must be regarded only as a contribution to the time which the employee has to find to cope with a private emergency. It is quite inappropriate in a case in which the time is being used in the service of the Organisation.

6. In the case of "a change of residence" the limit for a grant of special leave is likewise two days. Admittedly two days would be insufficient in the present case where the Organisation is willing to grant up to five days in all to the complainant and to the other examiners transferred. The Organisation makes the period up to five days, partly by adding (though it is not clear under what power) one day to the two specified and partly by granting the employee two days' "leave on mission", which does not come under Article 59. The purpose of the leave on mission, the

Organisation says, is so that the transferred employees can "make contact with their new supervisors and colleagues and begin their search for new accommodation".

7. Finally, the Tribunal observes that in Article 59 supplemented by Circular 133 thirteen out of the fifteen grounds on which special leave may be granted can be used only for the private purposes of the employee. Most of them are of the type generally known as "compassionate leave". The two cases which, if the words are read without restriction, could cover time spent in the service of the Organisation as well as time spent for a private purpose are "change of residence" and "court appearances". Both these might be concerned either with a private matter or with a matter in which the Organisation is concerned. The Tribunal concludes that on the principle of *noscitur a sociis* the meaning to be given to both grounds must be restricted so as to bring them within the category to which the thirteen belong, that is, a category of occasions on which leave is being sought by the employee for a private purpose. It follows that "change of residence" applies only to changes which the employee is making for his own convenience within his place of work and does not apply to a change made in order to comply with an instruction given by the President. Accordingly, Article 59 has no application to the present case.

8. The complainant alleges in his statement of claim that he spent five days in the preparation of the emigration and seven days on the actual emigration making twelve days in all. He gives credit for five days of special leave allotted to him and asks for compensation, equivalent to a further seven days of special leave, for the spare time spent on the transfer. This method of calculation is not above criticism. It is not, however, criticised by the Organisation which no doubt attaches more importance to the principle at stake than to the amount.

9. The rejoinder concludes with nine further heads of claim which are inadmissible as not within the terms of the complaint or are outside the Tribunal's competence or are manifestly ill-founded.

DECISION:

For the above reasons,

1. The appeal is allowed, the President's decision of 15 October 1984 is quashed and the Organisation is ordered to pay to the complainant a sum equivalent to seven days' leave with pay.
2. The claims in the rejoinder are dismissed.
3. The Organisation shall pay the complainant 1,000 Deutschmarks as costs.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 14 November 1985.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner