SEVENTY-NINTH SESSION

In re McLEAN

Judgment 1433

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gregor Adrian McLean against the European Patent Organisation (EPO) on 23 June 1994, the EPO's reply of 8 September, the complainant's rejoinder of 9 October and the Organisation's surrejoinder of 11 November 1994;

Considering Articles II, paragraph 5, and VII, paragraph 1, 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. The complainant, who has both Australian and British nationality, joined the EPO on 1 December 1991 as an examiner at grade A3. On 28 April 1992 he stated on a standard form - No. 4340.1, headed "Entitlement to home leave" - that he wanted Harrow, in England, to be "the place for home leave". But in a letter of 23 March 1993 he asked a personnel officer to change his home to Sydney, in Australia, where his and his wife's families lived, and he explained that when he had filled up form 4340.1 he had not realised that he was free to take home leave in a country that was not a member of the Organisation.

In a note of 24 March the personnel officer promised to answer his request for the change as soon as it had been decided whether an official might change home from a place within the territory of a member State to a place outside.

The complainant retorted in a note dated 25 March that what he wanted was not a change of home but mere correction of information he had put on the form by mistake. But the officer told him in a note dated 30 April that the Administration regarded his request as an application for change of home.

By a letter of 21 June 1993 to the President of the European Patent Office, the secretariat of the EPO, the complainant filed an internal appeal against the Personnel Department's refusal to let him correct the form and, subsidiarily, against its implied refusal to let him "change" his home country. The Director of Staff Policy informed him in a letter of 17 August that the President had referred the matter to the Appeals Committee.

The complainant having filled up a form applying for permission to take home leave from 15 to 30 November 1993 in Sydney, the head of Administration and Recruitment changed the entry in the form from "Sydney" to "Harrow" and added "Final decision pending".

By a letter of 7 January 1994 the Director of Personnel Administration told the complainant of a provisional decision to regard Sydney as his home "for the current 2 years' period".

On 5 May the complainant put in a claim to refund of the costs of taking home leave in Sydney, and the Administration gave its approval on 6 May.

After lodging the present complaint the complainant had notice of a final decision of 29 July 1994 from the Director of Personnel Administration confirming that his official home was Sydney. The Director of Staff Policy informed him in a letter of 16 August 1994 that since the decision of 29 July had given him satisfaction the appeal procedure was closed.

B. The complainant infers rejection of his internal appeal from the "protracted absence of any response from the Administration". The Administration led him to expect an explanation of the refusal of his claim "as soon as possible" but no explanation ever came.

He wants the Tribunal to have form 4340.1 corrected and his home changed from Harrow to Sydney. He also seeks

awards of 1,500 German marks in moral damages and of 2,000 marks in costs.

C. In its reply the EPO contends that the complaint is irreceivable because the complainant has failed to exhaust the internal means of redress as Article VII(1) of the Statute of the Tribunal requires. His allegation that the Administration failed to respond is mistaken: it gave him provisional satisfaction in January 1994 and duly refunded in May the costs of travel to Sydney.

In subsidiary argument on the merits the Organisation contends that his main claim is devoid of merit because he no longer has any cause of action. Nor is there any basis to his claim to damages since he took home leave in Sydney and had his expenses paid. His claim to costs is "exaggerated".

D. In his rejoinder the complainant maintains that his complaint is receivable and objects to the Administration's unilaterally closing the internal appeal procedure. He denies that his main claim was met: the decision of 29 July 1994 laid down unacceptable conditions about the number of days he might take for travel and the amount of the refund he might claim. He says that the Administration fails to inform new staff of their rights and he presses his claims.

E. In its surrejoinder the EPO observes that there is nothing in the rejoinder to cause it to change its position. The Director of Staff Policy's letter of 16 August 1994 declaring the appeal procedure closed bears a date nearly two months later than the date of filing the present complaint. Not only is the complaint as a whole irreceivable but the complainant's challenge to the refund of travel costs and to the credit he was allowed for travel time is unrelated to the material issues and did not form part of his internal appeal.

CONSIDERATIONS:

1. The complainant, who was born in Australia, has Australian and British nationality. He joined the staff of the EPO on 1 December 1991. In the form headed "Entitlement to home leave" which he signed on 28 April 1992 he gave Sydney, in Australia, as the place where he had been brought up and Harrow, in England, as his place of residence and the place where he had property. He claimed entitlement to home leave in Harrow under Article 60 of the Service Regulations. In a letter of 23 March 1993 to a personnel officer he asked that his "place of home leave" should be Sydney on the grounds that that was the place with which he had the closest connection, that his wife was Australian, and that his wife's and his own parents, his wife's and his own brothers and their families and his own sister's family were all living in Australia. Having got no decision, he lodged an internal appeal on 21 June 1993. By a letter of 17 August the Director of Staff Policy told him that the President of the European Patent Office had refused his request and referred it to the Appeals Committee. On 29 July 1994 the EPO approved Sydney as his place of home leave and by a letter of 16 August the Director of Staff Policy informed him that "the appeals procedure has been closed".

2. Before the EPO approved Sydney as the complainant's place of home leave he had, on 23 June 1994, filed this complaint with the Tribunal seeking an order for the correction of the "Entitlement to home leave" form, an order that his country of origin be his country of home leave, and awards of damages and costs. Although the form has not been corrected the complainant has had satisfaction in the recognition of his entitlement to take home leave in his country of origin. The only outstanding issues are therefore the receivability of his complaint and, if it is receivable, his claims to damages and costs.

3. As to receivability the EPO pleads that he has not exhausted the internal means of redress and should have awaited the outcome of his internal appeal before filing his complaint.

4. Article VII(1) of the Tribunal's Statute requires that for a complaint to be receivable the complainant must have "exhausted such other means of resisting a final decision as are open to him under the applicable Staff Regulations". The Tribunal recognises that reasonable time must be allowed for completing the internal appeal procedure. Yet in this case objections to receivability ill become the defendant. As was said in 1 above, it was on 23 March 1993 that the complainant asked that Sydney be recognised as his place of home leave. Although a personnel officer wrote the next day to tell him that he would be informed "as soon as possible" of the final decision, no decision was taken, and so on 21 June he lodged his internal appeal. Not until 17 August 1993 was he told that the matter was being referred to the Appeals Committee. On 24 August the chairman of the Committee wrote to him to say that his appeal would be "dealt with as soon as possible, bearing in mind the Committee's caseload and meetings timetable", that the Administration would "need to prepare a complete dossier" on the

appeal, "together with the Office's comments on it", and that the probable date of hearing was May 1994. In spite of several requests by the complainant the EPO did not file its reply to his appeal until 19 September 1994 and thereby prevented the Appeals Committee from dealing with the matter.

5. In the meantime, on 31 January 1994, the Tribunal delivered Judgment 1324 (in re Rivero) on a similar case in which the EPO was a party. In that judgment the Tribunal made it clear how Article 60 of the Service Regulations should be construed and applied to staff with dual nationality like the complainant.

6. The complainant was kept waiting over sixteen months - until 29 July 1994 - for an answer to his request of 23 March 1993 and fifteen months for the EPO to file its reply of 19 September 1994 to his appeal of 21 June 1993 and so let the internal appeal procedure go ahead. The Tribunal holds that since he took all the steps he could take to obtain a final decision and since the EPO failed to discharge promptly its obligations under the internal procedure he was justified in coming to the Tribunal. That is in keeping with what the Tribunal ruled in, for example, Judgment 1243 (in re Singh No. 2).

7. He claims an award of damages for "suffering caused by the refusal of an opportunity to correct a simple oversight". The Director of Personnel Administration informed him by a letter of 7 January 1994 of a "provisional" decision that he might take home leave in Sydney "for the current 2 years' period" but that the decision was not to be binding on the EPO "for whatever future final solution" it might take. The complainant then took home leave in Australia and has had his travel expenses reimbursed. He has failed to show any moral injury which would warrant an award of damages.

8. The conclusion is that the Tribunal need make no ruling on the place of the complainant's home leave. As to his further claims in his rejoinder, the Tribunal observes that, as the Organisation states in its surrejoinder, the complainant neither challenged the reimbursement of travel costs for home leave in Sydney in his internal appeal of 21 June 1993 nor set out the claims in the form introducing the present complaint. He has made the claims in internal appeals which are still pending, and the claims are therefore at present irreceivable under Article VII(1) of the Tribunal's Statute because he has failed to exhaust the internal means of redress. The Tribunal will, however, award him 500 German marks in costs.

DECISION:

For the above reasons,

1. The Tribunal need not rule on the complainant's claim as to the place of home leave.

2. The European Patent Organisation shall pay him 500 German marks in costs.

3. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas
Michel Gentot
Mella Carroll
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.