

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

P. (No. 7)

v.

EPO

120th Session

Judgment No. 3529

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr A. P. against the European Patent Organisation (EPO) on 15 February 2013, the EPO's reply of 27 June, corrected on 5 August, the complainant's rejoinder of 6 September, corrected on 31 October 2013, and the EPO's surrejoinder of 17 February 2014;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the amount of the daily subsistence allowances which he received for duty travel on two occasions.

At the material time the complainant held a post at grade A3 at the headquarters of the EPO in Munich (Germany). He was also a member of the Internal Appeals Committee (IAC), and in that capacity he attended two IAC meetings in 2010. The first was held on 1 and 2 July 2010 in Berlin (Germany) and the second from 18 to 21 October 2010 in The Hague (Netherlands).

In the duty travel request which he had submitted with a view to attending the IAC meeting in Berlin, which was approved, the complainant had stated that his flight would take off from Munich on

30 June at 3.15 p.m. On 8 September 2010 a provisional travel expense statement was drawn up. It mentioned that the daily subsistence allowance to which he was entitled for this duty travel had been calculated on the basis of a departure on 30 June at 3.40 p.m. On 14 October the complainant sent an e-mail to the President of the European Patent Office, the EPO's secretariat, in which he argued that the allowance should have been calculated on the basis of a departure from Munich at 1.45 p.m., in other words one and a half hours before his flight took off, in accordance with Article 78(1) of the Service Regulations for Permanent Employees of the European Patent Office. He objected to the fact that, for reasons of thrift, the Administration had expected him to have taken the following flight – which departed at 5.10 p.m. and hence corresponded to a notional departure at 3.40 p.m. – and had therefore based its calculations on that time, and he requested the recalculation of his daily subsistence allowance, with interest at 8 per cent per annum, and an award of moral and/or punitive damages. He also claimed costs. The complainant was informed by a letter of 14 December 2010 that the President of the Office saw no reason to grant his request and that the matter had been referred to the IAC for an opinion. Since Rule 1(1) of Circular No. 319, entitled “Guidelines on duty travel”, specified that “budgets must be used with thrift and economy”, it was considered correct to calculate his daily subsistence allowance on the basis of a departure at 3.40 p.m.

In the duty travel request which he had submitted with a view to attending the IAC meeting in The Hague, which was approved, the complainant had stated that his return flight would land in Munich on 22 October 2010 at 12.30 p.m. On being informed that the amount of his daily subsistence allowance for that duty travel would be calculated on the basis of a return to Munich on 21 October at 10 p.m., on 14 December 2010 the complainant wrote to the President of the Office. He contended that his duty travel had “taken place as scheduled and approved” and, although the IAC's deliberations had ended at 4 p.m. instead of 5 p.m., he requested the recalculation of the amount of the allowance in question and that interest at the rate of 8 per cent per annum be added to the amount which he considered was due to him. He also claimed moral damages and costs. The Director of

Regulations and Change Management replied by a letter of 10 February 2011 that his request could not be granted, since Rule 1(1) of Circular No. 319 and “long-standing practice” required employees to keep their duty travel as short as possible. He explained, in particular, that as the IAC meeting had finished at 4 p.m. on 21 October 2010, it would have been reasonable for him to return to Munich the same evening. The matter was therefore referred to the IAC for an opinion.

The IAC heard the complainant on 16 February 2012 and issued a single opinion on both appeals on 16 August. It took the view that a retroactive amendment of “mission data” was possible only if it did not breach the legitimate expectations of the parties and was compatible with the principle of good faith. It added that, unless the request for duty travel showed an obvious mistake or abuse, the Administration was not entitled to recalculate the amount of the daily subsistence allowance due. It considered that the complainant’s duty travel requests were not “extravagant or abusive” and that the EPO had committed an error of law by amending the times of his duty travel on both occasions *a posteriori*. It therefore unanimously recommended that the President should pay him the daily subsistence allowances – plus the interest which he claimed – on the basis of the approved mission orders, but that his claims for moral or punitive damages should be dismissed. A majority of the IAC members also recommended that the complainant should be awarded costs in the amount of 250 euros for each appeal.

The Vice-President in charge of Directorate-General 4, acting with delegation of authority from the President, informed the complainant by a letter of 3 December 2012, which constitutes the impugned decision, that he had decided to reject both of his appeals. He explained that as the complainant had not complied with the guidelines of Circular No. 319 in submitting his duty travel requests, the EPO was entitled to revoke its approval, which had been given on the assumption that those guidelines had been observed. The Vice-President further stated that the aforementioned approval did not constitute a decision binding the Administration and could not give rise to any expectation on the part of the employee concerned. Lastly, he rejected the recommendation that the complainant should be awarded costs.

The complainant requests the setting aside of the impugned decision, the payment of daily subsistence allowances on the basis of the originally approved terms and compensation for the moral injury which he allegedly suffered on account of the unlawful nature of the decisions challenged in his two appeals and the “possibly excessive length” of the internal appeal proceedings and those before the Tribunal. He also claims costs.

The EPO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complaint concerns solely the rejection of the complainant’s claim for daily subsistence allowances corresponding to those which would have been paid to him had the EPO abided by the data contained in the two duty travel requests which it had approved for two meetings of the IAC held in Berlin and The Hague in the second half of 2010. Indeed, the question of whether the morning of 22 October 2010, which the complainant spent in The Hague, should be treated as a half day of leave or as work time is no longer at issue before the Tribunal.

2. Articles 77(1) and 78 (1) of the Service Regulations stipulate that permanent employees holding a travel order requiring them to work at or travel to a place other than that at which they are employed are entitled to a daily subsistence allowance calculated from the scheduled departure time of the flight, train or ship at the beginning of the duty travel, until the actual arrival time of the flight, train or ship at the end of the duty travel. One and a half hours are added to the travel time at the beginning and end of the duty travel to compensate for travel to and from the airport, station or port.

3. Circular No. 319, entitled “Guidelines on duty travel”, was adopted on 14 December 2009. At the material time, the first two rules of these guidelines read as follows:

“Rule 1

Implementing the duty travel budget

- (1) Limited funds are available for duty travel every year. Pursuant to the Financial Regulations, budgets must be used with thrift and economy. Meetings should therefore be scheduled so as to use the duty travel budget as efficiently as possible.
- (2) Duty travel may only be approved if it is necessary, that is, if the business cannot reasonably be conducted in any other way, such as by video conference.
- (3) If a permanent employee has to undertake duty travel for several purposes, the events should be combined whenever possible and approved by the budget holder(s) concerned.
- (4) Internal EPO meetings should in principle be held at the place of employment at which the majority of participants are employed.

Rule 2

Submitting duty travel requests

- (1) Before submitting a request for duty travel, the permanent employee must obtain the approval of his line manager for him to be absent from his place of employment, except where the provisions of Communiqué No. 45 apply.
[...]
- (4) On his return from duty travel, the permanent employee should submit his electronic duty travel claim to [Human Resources] Travel Administration for final settlement.”

4. The request for duty travel to Berlin signed by the complainant on 11 June 2010 and approved in accordance with the above-cited rules indicated that he would take a Berlin flight taking off from Munich at 3.15 p.m. on 30 June and that he would start work the next day at 9 a.m. He did in fact take this flight, but his daily subsistence allowance was later calculated on the basis of a Berlin flight leaving Munich at 5.10 p.m. on the same day.

The IAC found that this change constituted an error of law. As the complainant, who was recovering from the aftereffects of a serious accident, had a reduced work capacity, it did not consider his request to take a flight that would enable him to arrive at his destination during working hours to be abusive.

In the impugned decision the Administration did not follow the IAC's recommendation, since it considered that, as the principles of thrift and economy referred to in the above-mentioned circular had not been complied with when the complainant had submitted his duty travel request, it could lawfully revoke the approval given by the budget holder.

In impugning this decision, the complainant relies on the opinion of the IAC, which held that by revoking its approval of his duty travel request, the defendant organisation had breached the principle of legitimate expectations. In response to this plea the EPO argues that the approval of a duty travel request is not a final decision which cannot be changed even if it later transpires that it was based on incorrect information.

5. The duty travel request contained the following information:
“Plane take-off 30.06.2010 15:15
Start of work 01.07.2010 09:00”.

It is not disputed that the budget holder approved the duty travel request based on this unequivocal information and did not immediately ask for it to be changed. He could easily have checked whether the complainant could not have taken a later flight, given that he would not start work until the following morning. It therefore follows, on the one hand, that the budget holder gave his approval in full knowledge of the facts and, on the other, that the complainant cannot be accused of having tried to mislead the Organisation.

The submissions provide no indication of the reasons which led the budget holder to give his approval in these circumstances. It is, however, established that at the time the complainant's work capacity was reduced. It is therefore likely and understandable that he wished to leave Munich at the beginning of the afternoon in order that he might travel during working hours and that the budget holder had no objection to this.

In these circumstances, and bearing in mind Article 78(1) of the Service Regulations, the EPO should have used the information contained in the duty travel request when calculating the complainant's daily subsistence allowance.

This first aspect of the complaint is therefore well-founded.

6. The complainant had to travel to The Hague to attend a meeting of the IAC which was to be held in that city from 18 to 21 October 2010. In his duty travel request he indicated that his work would end at 5 p.m. on 21 October and that he would return to Munich on 22 October at 12.30 p.m. This request was approved, as it stood, by the budget holder.

In the event, however, the meeting which the complainant attended ended on 21 October at 4 p.m., in other words one hour earlier than expected and shown on the duty travel request. The Organisation inferred from this that he could have caught a flight leaving The Hague that evening at 7.05 p.m., instead of waiting to take a flight the following morning, as planned. It therefore calculated the daily subsistence allowance on the basis of a return at that hour.

The IAC considered that, since the complainant's request was not abusive in view of his state of health, this alteration also constituted an error of law. In substance the submissions of the complainant and the EPO before the Tribunal are the same as those with respect to the duty travel to Berlin.

7. The factual circumstances are different to those of the duty travel to Berlin insofar as, in this instance, it was an unforeseen event which led to the daily subsistence allowance being calculated on a different basis to the information contained in the duty travel request approved by the budget holder.

As the IAC meeting ended one hour earlier than scheduled, the EPO maintains that, in accordance with the principle of thrift, the complainant should have returned to Munich that evening, unless it had been agreed that he could remain in The Hague for a few days in a private capacity. The daily subsistence allowance should therefore be calculated on the basis of a flight which it might have been possible to take since the meeting had ended ahead of time.

8. As the IAC noted and as the complainant very credibly contends, in October he was still suffering from the aftereffects of a serious accident.

Furthermore, the Organisation, which bears the burden of proof in this regard, has provided no evidence that the complainant had been informed beforehand that the meeting would end earlier than was indicated in the duly approved programme of work.

In these particular circumstances, it cannot be held that, if he did not intend to stay in The Hague for a few extra days for personal reasons, the complainant should have enquired whether a seat was available on the last flight to Munich – and there is nothing in the submissions to show that this was the case – in order that he could return home that evening at a relatively late hour of the night.

This being so, the EPO ought to have calculated the complainant's daily subsistence allowance on the basis of the information contained in his duty travel request.

This second aspect of the complaint is therefore also well-founded.

9. The EPO shall pay the complainant the daily subsistence allowances due to him in accordance with the information shown on the two duty travel requests which were approved. These allowances shall bear interest at the rate of 5 per cent per annum as from the mid-point date of 1 September 2010.

10. However, the claim for compensation for the injury which the complainant allegedly suffered on account of the excessive length of the internal appeal proceedings, and which was allegedly aggravated by the prospect of lengthy proceedings before the Tribunal, must be dismissed. While the duty of care of an employer requires the latter to decide with particular alacrity on disputes regarding calculations of periodic remuneration, it cannot be said, having regard to the evidence in the file, that the EPO failed in its duty in this case.

11. The complainant is entitled to moral damages, which the Tribunal sets at 750 euros.

12. As the complainant succeeds in part, he is entitled to an award of costs, which the Tribunal sets at 500 euros.

DECISION

For the above reasons,

1. The impugned decision of 3 December 2012 is set aside and the EPO shall proceed as indicated under 9, above.
2. The EPO shall pay the complainant 750 euros in moral damages.
3. The EPO shall also pay him costs in the amount of 500 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 19 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Claude Rouiller, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

(Signed)

GIUSEPPE BARBAGALLO CLAUDE ROUILLER DOLORES M. HANSEN

DRAŽEN PETROVIĆ