

NINETY-FIFTH SESSION

Judgment No. 2262

The Administrative Tribunal,

Considering the second complaint filed by Mr A. R. against the European Patent Organisation (EPO) on 24 June 2002 and corrected on 19 August, the Organisation's reply of 6 November, the complainant's rejoinder of 6 December 2002 and the EPO's surrejoinder of 12 March 2003;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, who was born in 1959 and has Spanish nationality, joined the European Patent Office, the EPO's secretariat, in 1991. He is currently an examiner at grade A3.

Having enrolled for an economics course offered by the Spanish Distance Learning University, on 11 May 1999 the complainant submitted a request for special leave for the period from 25 to 28 May and for 7 June, followed on 21 July by a further request for special leave for the period from 2 to 8 September, to enable him to sit for examinations which were to be held in Spain. These requests were denied on 4 October on the grounds that the examinations in question were not in the interests of the EPO. By an e-mail message of 6 October to Personnel the complainant pointed out that he was entitled to the requested special leave because Rule 3 of Circular No. 22 provided that "[i]n granting such leave, due account shall be taken of the requirements of the service", and those requirements had "been discussed and approved by [his] director". He also requested two additional days to compensate for his travel time. By a letter of 2 December he asked the President of the Office to set aside the decision denying his requests for special leave and for two days' travel time or, failing that, to consider his letter as initiating an appeal. The Director of Personnel Management acknowledged receipt of this letter on 15 December 1999 but stated that in view of departures for end-of-year leave no reply would be given before mid-January 2000. On the following day the complainant requested a swift reply, because this would determine whether he could take annual leave at the end of the year. On 31 January 2000 the Director of Personnel Development informed him that his appeal had been registered.

In a letter of 9 February the Director of Personnel Management confirmed that he had met the complainant that day and offered to grant him five days' special leave, but that the remaining five days would have to be taken as annual leave. The complainant rejected this offer by a letter of 14 March 2000. He declared that he was being denied equal treatment and set out his claims, requesting ten days' special leave, three days' travel time and 4,000 German marks in damages in respect of the injury he had suffered as a result of being prevented from spending the end-of-year celebrations with his family. In its opinion of 23 January 2002 the Appeals Committee unanimously recommended that the complainant be granted five days' special leave and that his other claims be rejected. By a letter of 22 March 2002 the Principal Director of Personnel informed the complainant that the President of the Office had decided to follow the Committee's recommendation. That is the impugned decision.

B. The complainant argues that under the applicable provisions, in granting special leave it is not necessary to take into account the interests of the Office, but only the requirements of the service. This criterion must be assessed "independently of the purpose of the leave". The complainant considers that he has established that, from the point of view of the requirements of the service, he could have been granted special leave. Furthermore, Article 1 of the

Guidelines for basic and further vocational training, which form an annex to Circular No. 172, provides that the objective of furthering the "skills and personal development" of the staff member must be taken into account. This, he asserts, was "a case of personal development". Subsidiarily, the complainant submits that in the present case the condition concerning the interests of the service was considered by the Appeals Committee to be satisfied.

The complainant also contends that the defendant breached the principle of equal treatment because, in accordance with a long-standing practice, special leave was granted to several colleagues to enable them to sit examinations abroad, not only in 1999 but also subsequently. Lastly, he argues that the considerable delay in replying to his requests caused him injury.

He claims five days' special leave in addition to those already granted, three days' travel time and 4,000 marks (2,045.17 euros) in damages. He also asks the Tribunal to acknowledge that the provisions in force permit "the granting of special leave for training in the interests of the staff member".

C. In its reply the EPO points out that the complainant claimed only two days' travel time in his internal appeal. Consequently, his claim for an additional day is irreceivable.

On the merits, it argues that it correctly exercised its discretion to grant special leave, which is recognised by the Tribunal's case law. Its initial refusal of the request was justified because the complainant, who is an examiner in the field of chemistry, was not likely to further his vocational skills by taking a course in economics; nevertheless, it ultimately granted five days' special leave when its initial proposal was endorsed by the Appeals Committee. It considers that this was a fair decision based on a correct assessment of the parties' respective interests. It emphasises that the Committee unanimously approved its interpretation of the criterion of the interests of the Office.

The EPO asserts that it complied with the principle of equal treatment and that the complainant has not produced the slightest evidence to support his claims. Regarding the time taken to process his requests, it submits that the complainant cannot rely on this in support of his case, because his request concerned a matter falling within the President's discretionary authority and he must have been aware that it might be refused. As for the fact that he was unable to go to Spain at the end of the year, the complainant ought to have kept a sufficient reserve of annual leave, or asked for an advance on his annual leave for 2000.

D. In his rejoinder the complainant submits that the case law cited by the defendant is irrelevant because it deals with entirely different cases, including requests for leave for the purpose of preparing for examinations, which is expressly excluded by the provisions in force at the EPO. Referring to the Service Regulations, which in his view represent the fundamental information provided to staff members on recruitment, he asserts that the systematic denial of his requests for training, which satisfied the criteria defined in Article 29, disappointed his legitimate expectations in that domain. He considers that the Office's position constitutes a "breach of the procedural rules, an error of law and the denial of a staff member's unquestionable right" to vocational training.

Regarding evidence of unequal treatment, the complainant points out that the EPO can easily identify the cases in which requests similar to his were accepted. He reiterates that the delay in processing his request caused him injury and considers that the Administration had a duty to reply within a reasonable period, and in any case before the date when the requested leave was due to begin.

E. In its surrejoinder the Organisation maintains all its arguments. It asserts that the complainant's interpretation of the provisions in force is erroneous: the interests of the Office cannot be disregarded. Indeed, those interests are implicit in the reference to the proper functioning of the service. As far as the case law is concerned, the EPO observes that Judgment 1855 turns precisely on the interpretation of Article 29 of the Service Regulations and of Circulars Nos. 22 and 172, and the Tribunal held that special leave is a matter for the discretion of the President of the Office.

Regarding the alleged unequal treatment, the defendant believes that it has identified the person to whom the complainant refers but points out that the complainant, like that person, was offered special leave in respect of part of his period of absence.

CONSIDERATIONS

1. Following an exchange of correspondence between the complainant and the Administration concerning two requests for special leave, totalling ten days' leave, which he had submitted with a view to sitting university examinations in Spain, the complainant refused to accept the compromise proposed by the Office, which had offered to grant him five days' special leave on the understanding that the remaining five days would have to be taken as annual leave.

In its opinion of 23 January 2002, having considered the parties' written and oral submissions, the Appeals Committee recommended, on the basis of the Administration's renewed offer, that the complainant be granted five days' special leave and that all further claims be rejected.

On 22 March 2002 the complainant was informed that the President of the Office had decided to follow that recommendation.

That is the decision challenged by the complainant before the Tribunal. He claims five days' special leave in addition to those already granted, three days' travel time and the equivalent in euros of 4,000 marks in damages.

The Organisation submits that the complaint is irreceivable, as regards the claim for a third day of travel time, for failure to exhaust the internal remedies, and that his other claims should be dismissed on the merits.

2. The Tribunal's power of review depends on the nature of the decisions at issue.

If the impugned decision, concerning the granting of special leave, is a matter for the discretion of the President of the Office, the Tribunal will set it aside only if it was taken without authority or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the evidence (see, for example, Judgment 1969, under 7).

3. Articles 29 and 59 of the Service Regulations for Permanent Employees of the European Patent Office read as follows:

"Article 29

Vocational training

The Office shall facilitate such further training and instruction for permanent employees as is compatible with the proper functioning of the service and is in accordance with the interests of the permanent employees. Such training and instruction shall be taken into account for the purposes of promotion in their careers.

Article 59

Annual and special leave

[...]

(3) In addition to annual leave, a permanent employee may, on application, be granted special leave. In the following cases special leave in terms of working days shall be granted as shown:

- a) marriage of the permanent employee: four days;**
- b) change of residence of the permanent employee: up to two days;**
- c) serious illness of spouse: up to three days;**
- d) death of spouse: four days;**
- e) serious illness of a relative in the ascending line: up to two days;**
- f) death of a relative in the ascending line: two days;**

- g) birth or marriage of a child: two days;**
- h) serious illness of a child: up to two days;**
- i) death of a child: four days.**

The conditions and rules relating to special leave shall be laid down by the President of the Office, after consulting the relevant joint committee. In view of particular family circumstances the President of the Office may grant leave in addition to special leave under the first sub-paragraph of this paragraph, as compensation for the travelling time involved."

Rule 3 of Circular No. 22 provides as follows:

"Special leave with pay; Authorisation

[...]

(3) In addition to the cases provided for in Article 59, paragraph 3, special leave may be granted inter alia in the following cases and within the following limits:

a) [...]

b) Further training: examinations

Permanent employees may be granted upon request up to 10 days' special leave per year for further training and/or examinations. In granting such leave, due account shall be taken of the requirements of the service.

c) Special leave shall be supplemented, where applicable, by the necessary travelling time. The duration of the journey and the route shall be calculated in accordance with the regulations governing duty travel.

The following travel times shall be considered as the minimum necessary:

i) ½ a day when the distance between place of employment and destination in either direction is between 100 and 400 km or the journey in either direction takes between 4 and 8 hours;

ii) ½ a day each way when the distance in either direction is between 401 and 800 km or the journey in either direction takes between 8 and 12 hours;

iii) 1 day each way when the distance in either direction is more than 800 km or the journey in either direction takes 12 hours.

However, this regulation shall apply only where no part of any day(s) necessary for travel involves a weekend or public holiday."

The annex to Circular No. 172 includes the following text:

**"Guidelines for basic and further
vocational training**

[...]

Article 5

**Voluntary attendance at outside educational
establishments and courses**

[...]

5.2 Grant of special leave

The grant of special leave to enable a staff member to attend an educational establishment or course is governed by Rule 3 (b) and (c) of Circular no. 22 of 16 January 1979 (Guidelines for Leave). The Personnel Department responsible decides on the grant of special leave.

If the further training is of longer duration than the special leave granted, the difference is deducted from the staff member's annual leave.

[...]"

The new version of Circular No. 242 states the following, in particular:

**"Administrative practice regarding carry-forward of leave,
part-time work and unpaid leave**

[...]

3. Unpaid leave

[...]

b) The granting of special leave for training purposes is governed by Rule 3(b) and (c) of Circular No. 22.

[...]

Please note that special leave for training purposes can now only be granted in the following cases:

- to enable members of staff to sit examinations (not to prepare for them)

- for 50% of the time spent abroad attending language courses in one of the three official languages.

[...]"

4. The texts cited above show that the decision as to whether or not to grant special leave to enable a staff member to follow a course chosen by him/her outside the Organisation is discretionary in nature (see Judgment 1855, under 2 and 5). The staff member concerned does not have an unconditional right to obtain such leave from the EPO, but a right which is subject to the conditions stipulated in the applicable texts, and the authority must not abuse its discretion. The case law establishing that staff members do not have a right to benefits which are granted at the discretion of the competent authority of the Organisation, such as facilities for training, is to be viewed in that light (see Judgment 691, under 2).

Thus, the Tribunal's power of review is limited as indicated in consideration 2, above.

5. The foregoing provisions show that facilities requested by a staff member for the purpose for further training must not be contrary to the interests of the Organisation, and in particular the proper functioning of the latter. The Organisation also has an interest in furthering the training of its staff, but a financial contribution on its part will only be justified where a definite advantage can be gained by it.

In this case, it is apparent from the impugned decision that the course in question and the ensuing examinations do not compromise the functioning of the Organisation and are consistent with the interests of the staff member, who wishes to extend his knowledge of economics, which the Organisation should, in principle, encourage. Thus, the President acknowledged a certain link between this further training and the interests of the Organisation, which justified a contribution by the latter, in the form of the grant of some of the requested days of special leave.

The complainant is mistaken as to the interests to be taken into account. In his view, special leave ought to be granted where it is in the interest of the staff member and the proper functioning of the service is not compromised, but that the interests of the Organisation need not additionally be taken into account. He considers that those conditions were satisfied in his case. The basic text is Article 59 of the Service Regulations, which provides that the President of the Office shall determine the conditions and rules relating

to special leave. The President did so in the above-mentioned circulars. However, it is obvious that the interests of the Organisation constitute one of the main criteria to be taken into account by the President in establishing rules or in exercising his discretionary authority.

The way in which the President weighed the interests at stake appears to be reasonable. Indeed, whilst the enhancement of the complainant's knowledge might not provide an immediate benefit for the Organisation, the possibility that it may do so in the context of future developments in his career at the EPO cannot be excluded, and from that perspective the granting of a certain number of days of special leave was justified.

6. (a) The complainant invokes his right to equal treatment, referring to the fact that other staff members in similar situations allegedly obtained longer periods of special leave. He gives two examples, without identifying the individuals concerned. The first is the case of a colleague who enrolled for a law course at the Spanish Distance Learning University and who allegedly obtained eight days' special leave in 1994 for the purpose of sitting examinations in February and June, followed by ten days' special leave (five for the February examinations and five for those held in June) in each year from 1995 to 1998. The second example concerns a colleague who followed a course in corporate economics at another Spanish university and who was allegedly granted two days in June and two in September for examinations in 1999, one day in June and three days in September in 2000 and one day in January and two days in September in 2001.

In its reply, without commenting on the examples put forward by the complainant, the EPO submits that the offer of five days' special leave was fair, taking into account all the circumstances.

The Appeals Committee, for its part, considered that the "similar cases [...] to which the complainant rightly (in at least one case) refer[red], confirm[ed] that the granting of special leave seem[ed] [...] appropriate", at least to some extent, on the basis of the principle of equal treatment.

The defendant argued initially that it was not able to investigate the alleged precedents, and that since there was no requirement of confidentiality as to the identity of the individuals concerned, the complainant could and should have provided their names. Then, at the express request of the complainant, the Office investigated the matter, and it states in its surrejoinder that it has identified a case which appears to correspond to one of the two mentioned by the complainant. It explains that the requests for special leave submitted by that person for 1999 had been refused, but that following an appeal, four days' annual leave had ultimately been credited to her for 2000, the balance of three days having been deducted, with her agreement, from her annual leave for 1999. She had obtained four days' special leave in 2000 and three days in 2001. However, the defendant emphasises that it is not certain that it has actually identified the person to whom the complainant referred.

(b) Staff members have a right to equal treatment.

This principle must be observed, particularly when adopting and applying rules.

The principle of equal treatment implies, on the one hand, that similar or comparable situations should be governed by the same rules and, on the other hand, the dissimilar situations should be governed by rules which take into account that dissimilarity (see Judgments 347, under 4; 754, under 6; 1864, under 5; 1990, under 7; and 2194, under 6(a)); failing that, there would be a breach of the principle of equal treatment.

(c) The complainant invokes the former type of inequality.

However, the facts of this case, as related by the complainant himself, do not appear to be similar to those of the examples to which he refers, particularly as regards the periods for which special leave was granted (given that the ten-day limit for special leave is an annual limit) and the connection that may have existed between the professional duties of the staff member concerned and the field in which he intended to further his training, since the latter is clearly a factor which was taken into account in deciding whether or not to grant the full period of special leave requested. In the first example, the leave was spread over several years, and one may reasonably assume that further legal training was deemed to afford an immediate benefit for the performance of the duties of an EPO staff member. In the second example, according to the complainant's own statements, the number of days of special leave granted for each year was considerably less than ten days.

It is also worth noting that in an area in which the authority has a broad discretion, to require identical solutions in all cases would undermine that discretion.

Consequently, the plea is unfounded.

7. The complainant criticises the defendant for not having granted him any leave for travel time. He claims three days' leave under this head. He refers to the length of the journey from Munich (his duty station) to the Spanish university where he sat his examinations; it took more than one day to travel there and his travel days did not include weekends or public holidays.

The defendant organisation maintains that the offer of five days' special leave was fair, taking into account all the circumstances.

Had the Office granted the complainant special leave amounting to half the maximum grant of ten days (under Rule 3(3)(b) of Circular No. 22) for the purpose of sitting examinations (as provided for in the new version of Circular No. 242), without taking into account the problem of the travel time which may be added to the special leave (pursuant to Rule 3(3)(c) of Circular No. 22), then its decision would be open to criticism.

However, the impugned decision cannot be interpreted in that way. The offer of five days' special leave as a compromise was first made at a time when the complainant was already claiming travel time; the offer was then renewed during the internal appeal proceedings, in which travel time was again expressly claimed; the Appeals Committee, for its part, recommended that the President of the Office should grant the complainant five days' special leave, which was in fact what the President himself had offered the complainant. The conclusion to be drawn from this is that the President did not overlook the issue of travel time.

The solution that he adopted, that is to say five days instead of the total of thirteen days requested by the complainant, did not exceed the scope of the broad discretion that he exercises in this domain.

8. (a) The complainant claims the equivalent in euros of 4,000 marks in damages on the grounds that the EPO, to which his two requests for special leave were submitted on 11 May and 21 July 1999, respectively, replied with a refusal on 4 October 1999, but did not partially accept his requests until after the internal appeal proceedings, when the impugned decision was taken. He explains that the Office's refusal to grant him special leave obliged him to use annual leave in order to sit his examinations, as a result of which he was prevented, for want of sufficient annual leave, from spending the end-of-year celebrations with his family, and thus suffered moral injury.

The defendant emphasises, and the Appeals Committee noted, that the complainant ought to have anticipated the possibility that his requests for special leave might be refused or only partially accepted. If he wanted to be sure of having enough days to cover both his examinations and his holiday with his family, he ought to have saved up some annual leave. He could also have asked the Administration to grant him, on an exceptional basis, an advance on the annual leave to which he would be entitled in 2000. The Organisation also considers that it replied to the complainant's requests within a normal time frame.

The complainant's personal interests were not seriously harmed. Moreover, the Organisation has committed no fault warranting an award of moral damages in favour of him.

(b) In his submissions to the Tribunal, the complainant also refers to the "extraordinarily long delays" in the procedure culminating in the partial acceptance of his request.

It cannot be denied that the procedure was subject to excessive delays largely attributable to the Administration. However, the nature of the dispute did not warrant particularly urgent processing, at least not after the end of 1999. The complainant would no doubt have been entitled to request greater diligence on the part of the defendant and, failing that, to apply directly to the Tribunal for that purpose. However, he abstained from doing so.

Under those circumstances, he cannot claim damages on that basis.

9. The complaint must therefore be dismissed, without there being any need to rule on the receivability of some of the claims it contains.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2003, 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 16 July 2003.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet