

SEVENTY-THIRD SESSION

In re VOLLERING

Judgment 1194

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Johannes Petrus Geertruda Vollering against the European Patent Organisation (EPO) on 7 November 1991, the EPO's reply of 24 January 1992, the complainant's rejoinder of 24 February and the Organisation's surrejoinder of 27 March 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 5 and 59 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

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

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

A. The Federal Republic of Germany and the German Democratic Republic were to combine on 3 October 1990 to form the country that is now known as Germany. The Government of the Federal Republic declared that that date would be a public holiday. By a communiqué of 12 September 1990 the President of the European Patent Office informed the Office's staff in Berlin and Munich that in keeping with international custom the Organisation's offices in those cities would be closed on 3 October 1990. In answer to requests from "a certain number" of German staff members of General Directorate 1, the EPO's office at The Hague, the Personnel Department issued a notice on 28 September announcing the President's decision to grant German employees there one day's leave on 3 October 1990 to mark national unity. Several non-German staff members having demurred, the Vice-President of General Directorate 1 explained in a notice of 2 October 1990 that the Administration had meant "to emphasise the language of the heart over that of principle".

The complainant, a Dutchman, is a permanent employee of the EPO in General Directorate 1. On 2 October 1990 he applied for the grant of "special leave" on the morrow. At a general meeting which the Staff Union at The Hague held on 3 October it decided to apply collectively for special leave on that day. In a resolution it adopted it deplored the "de-unifying" effect on EPO staff of the President's decision to discriminate "on the grounds of nationality" and what it saw as breach of an agreement with staff representatives to grant the same number of holidays at all duty stations, and it demanded the grant of one day's compensatory leave to anyone who had not had the day off.

By a notice of 12 October the Head of Personnel at The Hague rejected the collective application for one day's compensatory leave. That decision prompted the lodging of appeals from 23 October 1990 to 11 January 1991. By a letter of 10 January 1991 the complainant appealed to the President against the implied rejection of the application for leave he had made on 2 October 1990. In a communiqué of 11 January the Head of Personnel announced that the President had rejected all the appeals and referred them to the Appeals Committee.

In its report of 3 July 1991 the Committee recommended by a majority that the President allow the complainant's and the other appeals on the grounds that the decisions were unsound in law. In a minority opinion two Committee members held that the decisions were at the President's discretion under Article 59(3) of the Service Regulations. In a letter of 28 August, the decision impugned, the Principal Director of Personnel conveyed to the complainant, among others, the President's endorsement of the minority view.

B. The complainant submits that it was unlawful to grant special leave to the German staff at The Hague. He has three main pleas.

He contends, first, that the preferential treatment of employees according to nationality is discriminatory within the meaning of the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) of the International Labour Organisation and offends against Article 48(2) of the Treaty of Rome - the basic instrument of the European Communities - and Article 5 of the EPO Service Regulations. Everyone should have either had the day

off or been required to work as usual. Since, as the Tribunal held in Judgment 692 (in re van der Peet No. 4), special leave may be granted under Article 59(3) of the Regulations only to answer private or family needs, the President was wrong to deny the complainant special leave while granting it to the Germans, many of whom had not even asked for it.

His second plea is that the grant of leave on a public holiday to EPO staff in Germany but not in the Netherlands was a breach of the President's written agreement of 16 September 1988 with the Central Staff Committee that staff should have the same number of holidays at all duty stations.

Lastly, he contends that Article 59(3) lays an implied duty on the President to consider the merits of each single application for special leave and does not empower him to grant such leave indiscriminately to groups of employees. Though it would have been in line with Article 59(2) for him to change the number of public holidays warranting leave for all employees and not just for one group, that would have required him to consult the General Advisory Committee (GAC) beforehand. He did not.

The complainant seeks the quashing of the decision of 28 August 1991 and an award of one day's compensatory leave or one day's pay, plus interest at 10 per cent as from 3 October 1990. He also seeks awards of 7,000 guilders in moral damages and 10,000 in costs.

C. In its reply the EPO submits that the complaint is devoid of merit. It observes that Article 10(2)(a) of the European Patent Convention empowers the President to "take all necessary steps ... to ensure the functioning of the European Patent Office" and that by virtue of the powers so delegated he may act as required when there are unforeseen circumstances or historic events like the unification of Germany.

Since 3 October 1990 was not a public holiday in the Netherlands there were no grounds for closing General Directorate 1 under Article 59(2), which requires the President to draw up a list of public holidays for each duty station. Some German employees at The Hague having applied for special leave to mark the occasion, the President consented under Article 59(3), which says that "the conditions and rules relating to special leave shall be laid down by the President ... after consulting the relevant joint committee". Only after consultation with the GAC did the Administration issue circular No. 22, which provides that "special leave may be granted inter alia in the following cases ...". The cases listed in Article 59(3) and circular No. 22 are not the only admissible ones, and adding others is quite lawful.

Since the German staff all had a common and - to quote Judgment 692 (in re van der Peet No. 4) - "private purpose" in applying for special leave, the President chose, in the exercise of his discretion under 59(3) and for the sake of administrative convenience, to grant special leave to all of them. As the only staff "directly, and therefore most deeply, affected by the event commemorated on 3 October 1990", the Germans were not in the same factual position as the other employees at The Hague. Some provisions of the Service Regulations, like those that make up for the consequences of expatriation, take account of nationality yet do not offend against the principle of equal treatment.

The EPO denies breach of the agreement on the number of public holidays to be recognised at its duty stations. The agreement concerned only normal public holidays laid down in pursuance of Article 59(2), not exceptional events like that of 3 October 1990.

Besides, if the decision to grant special leave to all German staff at The Hague was unlawful the complainant would not be entitled to have it applied to himself: equality in law does not mean equality in the breach of it.

D. In his rejoinder the complainant answers the Organisation's pleas and develops his own. In his submission the unification of Germany was an event of interest to people of other nationalities and it would have been logical for them too to be allowed time off to celebrate it on 3 October 1990. The President's discretion under the European Patent Convention does not allow him to rely on the international convention whereby local customs are respected but flout the provisions on discrimination in international instruments. Since Article 59(3) says "a permanent employee may, on application, be granted special leave" it affords no basis for granting such leave to employees who fail to apply.

The grant of leave to citizens of one country may not be likened to such benefits as expatriation and home leave, which are rights all permanent employees enjoy, whatever their nationality. That German and non-German staff at

Berlin and Munich got the day off while only German staff at The Hague did is a flagrant breach of equal treatment.

The EPO is mistaken in saying that the agreement was only about public holidays under Article 59(2). The words "inter alia" in circular No. 22 cover only cases "similar" to those set out in the circular that are relevant to Article 59(3); other, unrelated, cases require prior consultation of the GAC.

E. In its surrejoinder the Organisation submits that the complainant's arguments in his rejoinder in no way impair the validity of the pleas in its reply.

CONSIDERATIONS:

1. The complainant objects to the EPO's decision to grant special leave to its German employees in General Directorate 1 (DG1) at the Hague to mark the reunification of Germany on 3 October 1990 and not to grant such leave to non-German employees in DG1.

He puts forward three pleas.

2. The first is that the Organisation's refusal to grant the one day's leave to its non-German staff is tainted with misuse of authority because it gives preferential treatment to one group of officials on the strength of nothing but nationality. He points out that although he and several German staff members gave the same reason for applying for special leave, only the applications from Germans were granted. So what he is alleging is breach of equal treatment.

The case law says that for there to be breach of equal treatment there must be different treatment of staff members who are in the same position in fact and in law. In other words, equal treatment means that like facts require like treatment in law and different facts allow of different treatment. It follows that treatment may vary provided that it is a logical and reasonable outcome of the circumstances. The material question is therefore whether the difference in treatment of EPO staff at The Hague rested on any difference in factual circumstances that the President of the Office was free to take into account according to that criteria.

A notice issued by the Principal Director of Search on 28 September 1990 said that the President's purpose in granting the German employees in DG1 special leave was "to celebrate the day of reunification in an appropriate manner". Reunification did of course have consequences for Europe and indeed for the world at large and so was an important event for other nations too. Yet it was the Germans themselves who were most deeply concerned and indeed the historic importance of the occasion is seen in the declaration of 3 October as Germany's national day. German staff were therefore not in the same position of fact as staff of other nationalities.

Since 3 October 1990 was an exceptionally historic day and since only in that year did German staff get the leave, the conclusion is that the distinction made in favour of German staff may be deemed to have been logical and reasonable.

The first plea fails.

3. The complainant's second plea is breach of an agreement the Organisation concluded on 16 September 1988 with the Central Staff Committee whereby there should be the same number of leave days at each of the Organisation's duty stations.

As the Organisation submits, the agreement is only about normal public holidays, not about leave granted on account of unforeseen circumstances. The day off granted to the German staff at The Hague on 3 October 1990 did not correspond to a public holiday but was special leave under Article 59(3) of the Service Regulations. The agreement does not apply to special leave.

Since there was therefore no breach of the agreement the second plea fails as well.

4. The third line of argument is to allege a procedural flaw in the decision to grant one day's leave to the Germans.

The complainant submits that insofar as the President purported to change the list of recognised public holidays he infringed Article 59(2) of the Service Regulations which requires him to consult the General Advisory Committee

beforehand for the purpose.

For the reasons given in 3 above the argument fails: the President did not change the list of public holidays applicable in the Organisation's office at The Hague.

The complainant further contends that insofar as the President granted the German staff special leave under 59(3) he again acted improperly since he was not empowered to grant all of them leave of his own accord: as the Organisation acknowledges, most of them had not even applied for it.

Although 59(3) leave is ordinarily granted on individual application, it would have been a pointlessly formal approach in the exceptional circumstances of this case as set out above to demand that every single German staff member apply for special leave. It was only proper that the President should be allowed a degree of discretion in the matter.

Be that as it may, even supposing that the President's grant of one day's special leave to some German staff members were unlawful because they had not made individual applications, the complainant would be no better off. As has often been said - for example in Judgments 614 (in re Ali Khan No. 3) and 845 (in re West No. 5) - one official may not rely on an unlawful act that was to the benefit of another: equality in law is not equality in the breach of it.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, the Right Honourable Sir William Douglas, Deputy Judge, and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

Jacques Ducoux
William Douglas
José Maria Ruda
A.B. Gardner