

EIGHTY-SEVENTH SESSION

In re Wright

Judgment 1855

The Administrative Tribunal,

Considering the complaint filed by Mr Jonathan Peter Wright against the European Patent Organisation (EPO) on 26 June 1998 and corrected on 17 August 1998, the EPO's reply of 6 November, the complainant's rejoinder of 6 December 1998 and the Organisation's surrejoinder of 11 January 1999;

Considering Article II, paragraph 5, 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, a British citizen born in 1964, joined the staff of the European Patent Office, the EPO's secretariat, in 1990 in Directorate-General 1 (DG1) at The Hague. At the material time he was an examiner, at grade A3, in DG2 in Munich.

On 24 November 1995 he completed a form claiming, under Circular 22, two-and-a-half days of special leave to attend a preparatory course for the European Qualifying Examination on 30 November and 1 December in Geneva. His supervisor signed the form adding "in the interest of the Office", but on 30 November the Personnel Department in DG4 refused his request on the ground that "DG2 have decided that special leave for preparation courses for the European Qualifying exams can not be granted".

The complainant attended the course and the Office granted him financial assistance to do so, under Article 5 of Circular 172, but did not allow his application for special leave. In a letter of 26 February 1996 he asked the President of the Office to reverse the decision to refuse him the leave as other officials had been allowed such leave to attend the same course in 1994 and early 1995: otherwise his letter was to be treated as an internal appeal. On 6 May 1996 the President confirmed the rejection of his claim on the grounds that in 1995 a decision had been taken to stop granting special leave for those preparation courses. In any event, he added, in the past before such leave could be considered the official had to have "completed the internal training as examiner". This meant that "the 'experience-coefficient' must have reached 100%": a condition not met in his case.

The Appeals Committee reported on 7 January 1998. The majority recommended the rejection of the complainant's appeal. A minority argued in his favour since at the time of his request he had a legitimate expectation that leave would be granted to him and had not been informed of changes in the policy of leave-granting in good time.

By a letter of 31 March 1998 - the impugned decision - the President endorsed the opinion of the majority and rejected his appeal.

B. The complainant submits that special leave for the course he attended should have been granted to him. He filed his request with the "appropriate" department under Circular 22, Rule 3 (1) which says:

"All applications for special leave, and for additional leave for travel time in connection with any case of special leave, shall be referred to the appropriate Personnel Department with the recommendation or otherwise of the official competent to countersign applications for annual leave."

Rule 3 (iii) b) of that circular requires that in the granting of such leave "due account shall be taken of the requirements of the service". His director countersigned his claim and wrote that the leave was "in the interest of the Office".

The EPO, he pleads, unlawfully denied him his right to "sound, consistent and transparent management". It supplied no evidence of DG2's purported decision to cease granting special leave for preparatory courses for the European Qualifying Examination. Besides which his director in DG2 approved his claim. The President's letter of 6 May stated that a claimant for special leave had to have "completed the internal training as examiner". The

complainant argues that the Administration has not proven that this condition existed or was made public at the time of his application. In any event, according to the 1996 Training Development Guide, already in circulation at the time he made his claim, special leave could be granted for training for the European Qualifying Examination.

Moreover, the training clearly did serve the interest of the Office although it refused his special leave, since it granted him financial assistance under Article 5.1 of Circular 172 towards the cost of the course.

He seeks the grant of two-and-a-half days of annual leave and 2,000 German marks in costs.

C. In its reply the Organisation submits that the complaint is unfounded. The decision to grant special leave is a discretionary one. The EPO was justified in adopting a restrictive practice because under the terms of Article 29 of the Service Regulations vocational training has to be "compatible with the proper functioning of the service". Circular 22 states that "the requirements of the service" must be considered when taking a decision. Special leave was refused because there was a "growing backlog" of work in DG2 at the time. It was the "principal director responsible for administration in DG2" and not the complainant's supervisor, who had the final say: a course that is "in [the] interest of the Office" is not necessarily consistent with "the requirements of the service".

The complainant had not reached the "experience coefficient" of 100 per cent required by the Handbook for DG2. He was an examiner in the Search Directorate (DG1) in The Hague, but in Munich his work involves substantive examination, for which he has not yet completed the internal training. As from 1995 the Organisation grants special leave for the European Qualifying Examination, but not for the preparatory courses.

The fact that the Office might bear part of the cost of the course will not necessarily result in the grant of special leave. It is the Training Department which decides on financial assistance whereas the Personnel Department decides on the grant of leave, basing its decision on the opinion of management in the relevant Directorate-General.

D. In his rejoinder, the complainant submits that an administrator in the Personnel Department "summarily overruled" his supervisor's decision to support his claim. The policies invoked by the defendant to support the refusal of his claim were unknown to the staff. At the time he made his claim for leave he was not aware of them and neither was his supervisor.

He recognises that the grant of special leave is discretionary: the discretion "was exercised in his favour" when his supervisor approved his claim for leave. E. In its surrejoinder the EPO explains that only the Personnel Department has the discretionary power to grant leave and that it does so after a recommendation from the claimant's supervisor.

The EPO denies a lack of transparency in its policy for authorising special leave. The policy for training is based on Article 29 of the Service Regulations and Rule 3 of Circular 22. It "deliberately refrained" from laying down detailed rules for granting special leave, in order to have "a certain degree of flexibility on the grant of training facilities".

It points out that the complainant has never claimed to have reached the 100 per cent "experience coefficient". He was aware of the Handbook for DG2 and from that publication it is clear that examiners do not reach that level with less than three years' training. Both he and his supervisor were aware of the condition. He had been transferred to Munich only two years before he claimed special leave and so, he did not fulfil the condition.

CONSIDERATIONS

1. The complainant appeals against the decision of the President of the European Patent Office, accepting the majority recommendation of the Appeals Committee to dismiss his appeal against the refusal of the Organisation to grant him special leave to attend a two-day training course in Geneva.

2. Since it is common ground that the decision as to whether or not to grant a staff member special leave to attend training courses is discretionary, it is clear that the principal pleas put forward by the complainant are without merit. The fact that his request for special leave was approved by his immediate superior can be of no assistance to him since such approval was obviously subject to acceptance at a higher administrative level. Likewise, the complainant could not have had a reasonable expectation that the discretion would necessarily be exercised in his favour. Finally, the fact that the reasons given for the initial refusal by the Personnel Department were inadequate does not confer any rights upon the complainant since full reasons for the exercise of discretion against him were later given.

3. There is, however, one aspect of this matter which requires closer examination: (a) the governing provision of the Service Regulations is Article 29, which reads as follows:

"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."

(b) Two subordinate rules dealing with the application of this provision are also relevant: Rule 3 (iii) b) of Circular 22 makes the grant of special training leave as applied for by the complainant subject to "the requirements of the service"; and, Article 5.1 of Circular 172 provides for the grant of financial assistance to staff members who attend a training course provided it "serves the interests of the Office".

4. The complainant applied for both special leave and financial assistance in connection with the two-day training course in question. He was denied the former but granted the latter.

5. While the decision to grant financial assistance and to refuse special leave may appear incompatible, the obligations under Article 29 of the Service Regulations to facilitate training may involve different considerations when one looks at the desirability of the staff member's taking such training, and when one has regard to the effect of the staff member's absence on the functioning of the service. In the present case, the refusal of special leave was justified by the growing backlog of patent applications. The impugned decision was accordingly not flawed so as to require the Tribunal's intervention.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 1999, Miss Mella Carroll, Vice-President of the Tribunal, Mr Mark Fernando, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Mrs Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 1999.

Mella Carroll
Mark Fernando
James K. Hugessen

Catherine Comtet