Registry's translation, the French text alone being authoritative

NINETY-EIGHTH SESSION

Judgment No. 2379

The Administrative Tribunal,

Considering the fourth complaint filed by Mr A. R. against the European Patent Organisation (EPO) on 24 November 2003 and corrected on 4 December 2003, the Organisation's reply of 12 March 2004, the complainant's rejoinder of 6 April and the EPO's surrejoinder of 26 July 2004;

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

Having examined the written submissions;

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

A. The complainant, a Spanish national born in 1959, joined the European Patent Office, the EPO's secretariat, in 1991. He is an examiner at grade A3.

Article 29 of the Office's Service Regulations for Permanent Employees reads as follows:

"**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."

On 4 April 2002 the complainant filed an appeal against Circular No. 267 concerning basic and further vocational training, which was published on 8 January 2002. In particular, he asked the President of the Office to modify the wording of the circular in order to bring it into line with Article 29 of the Service Regulations or, alternatively, to publish a supplementary provision. In its opinion dated 4 August 2003 the Appeals Committee, referring in particular to Article 14 of the Service Regulations, considered that "a permanent employee's general obligation to carry out his duties with the interests of the Office in mind […] also applies in the area of training". It unanimously recommended rejecting the appeal. In a letter of 3 September 2003 the acting Director of the Conditions of Employment and Statutory Bodies informed the complainant that the President had decided to endorse that recommendation. That is the impugned decision.

B. The complainant contends that Article 1 of Circular No. 267 does not take account of "further training in accordance with the interests of the permanent employees" as provided for in Article 29 of the Service Regulations. Article 1 of the circular reads as follows:

"**Definition of objectives**

The objectives of training are to further the skills and career development of Office staff, in order to help the staff member to:

- meet the present and future demands of his post

- prepare himself for assuming new duties and/or responsibilities.

[…]"

The complainant submits that the circular does away altogether with the rights conferred on permanent employees by Article 29 since it refers only to the interests of the Office. He accuses the Personnel Department of totally ignoring this article. Lastly, he believes that the Appeals Committee was wrong to have referred in its opinion to Article 14 of the Service Regulations, concerning the general obligations of permanent employees, which is not

relevant.

He asks the Tribunal to annul Circular No. 267, to express an opinion regarding the Office's attitude of ignoring Article 29, to award him days of special leave, which he was denied by the Office, to take examinations, and to quash the "decision" of the Appeals Committee.

C. In its reply the EPO contends that the complaint is irreceivable because it challenges a rule of general application which has not given rise to an individual decision causing the complainant injury. Furthermore, internal remedies have not been exhausted regarding the claim for leave, which appears to be a new claim.

On the merits, the Organisation argues that the two conditions stipulated in Article 29 of the Service Regulations – namely the compatibility of further training and instruction with the proper functioning of the service and with the interests of the permanent employees – have to be fulfilled. It adds that the circular must be interpreted in the light of that article, which by its wording obliges the Office to take account of the interests of the permanent employees. Nevertheless, the reference to "the proper functioning of the service" in Article 29 shows that the interests of the Office must also be taken into consideration, as the Tribunal agreed in its Judgment 2262 concerning the complainant's second complaint. This is all the more justified by the fact that the Office bears part of the cost of training. Lastly, the Appeals Committee was right to make a reference to Article 14 of the Service Regulations in its opinion insofar as that article provides that "[a] permanent employee shall carry out his duties and conduct himself solely with the interests of the […] Organisation […] in mind".

D. In his rejoinder the complainant recalls that the provisions of the Service Regulations take precedence over those of a circular. The disputed circular goes against the spirit of Article 29 insofar as it does not take account of the interests of the permanent employees or the proper functioning of the service and instead sets forth a new sole criterion, namely the interests of the Office, which is a pure invention of the latter, clearly reflecting its policy of denying staff the right to training. He considers he was misled at the time of his recruitment because he was given a copy of the Service Regulations before he took up his functions and came to believe he could acquire training in his own interest while respecting the proper functioning of the service. Yet the EPO has systematically denied him that right. In his view, the defendant's reference to the cost of training is "altogether unacceptable" considering that all the entitlements and social benefits of employees imply a cost and that the interests of the Office are not systematically taken into account.

E. In its surrejoinder the Organisation reiterates that Circular No. 267 does not contradict Article 29 of the Service Regulations, for which it provides a set of implementing rules. Alleging, as the complainant does, that the interests of the Office are taken as the "sole criterion" is wrong. Both sides, the interests of the employee and those of the Office, have to be taken into consideration and a balance must be struck between them. The EPO argues that in Judgment 2262 the Tribunal noted that "a financial contribution on its part will only be justified where a definite advantage can be gained by it". It denies that it systematically turns down requests for vocational training but asserts that it does consider whether such requests serve the interests of both parties.

CONSIDERATIONS

1. According to Article 59, paragraph 3, of the Office's Service Regulations, a permanent employee may be granted special leave in certain cases non-exhaustively listed; no mention is made of special leave for the vocational training of permanent employees, which the Office must facilitate, according to Article 29 of the Service Regulations, so long as the training "is compatible with the proper functioning of the service and is in accordance with the interests of the permanent employees". The connection between Article 29 and Article 59, paragraph 3, arises from Circular No. 22 of 16 January 1979, where the conditions under which permanent employees may be entitled to special leave for training purposes are set out in Rule 3, paragraph 3, sub-paragraphs b and c. Further details regarding these provisions were provided successively by Circular No. 172 of 19 September 1988 entitled "Guidelines for basic and further vocational training"; by President's Communiqué No. 242 of 3 January 1994 on "Training guidelines for the coming years"; and by the revised version of Circular No. 242 of 17 June 1999 entitled "Administrative practice regarding carry-forward of leave, part-time work and unpaid leave", which deals with this matter in paragraph 3b.

2. Circular No. 267 was issued on 8 January 2002 and contains "Guidelines for basic and further vocational training". It supersedes Circular No. 172 as well as President's Communiqué No. 242 of 3 January 1994. The

guidelines “are intended to assist employees to perform their tasks well, in a rational way and to their own satisfaction”. The preamble to the guidelines, which refers to Article 29 of the Service Regulations and to the opinion of the General Advisory Committee, states that “[b]asic and further training includes all training supplementing school and professional qualifications obtained prior to appointment to the Office”. Article 3 of the guidelines sets out types of training, and includes self-training as well as courses, seminars or lectures given inside or outside the Office. In paragraph 3 of the annex to the guidelines, it is stated that “[t]he 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 dated 16 January 1979”.

Circular No. 267 entered into force on 1 January 2002.

3. The complainant essentially seeks “the quashing of Circular No. 267 because it abolishes the right enshrined in Article 29 of the Service Regulations and [in] Circular No. 22”. He maintains that Circular No. 267 takes no account of the staff member’s interests, codifying in that respect the Office’s constant practice, which is contrary to Article 29 because it systematically gives precedence to the interests of the Office over those of the staff member.

4. The parties’ briefs and the evidence they have produced are sufficient to enable the Tribunal to reach an informed decision. The complainant’s application for hearings is therefore rejected.

5. The challenged circular is a regulatory text intended for all the Office’s employees. At the time of their adoption, such general provisions affect the protected personal interests of individual employees only in theory. A staff member may challenge their lawfulness or conformity with the Service Regulations but only in the context of an appeal against a decision applying these provisions which actually causes present damage to his or her personal interests. A complaint cannot therefore be brought before the Tribunal against such provisions if, as in this case, in order to take practical legal effect, they must ordinarily be followed by individual decisions against which internal appeal will lie (see Judgments 1134, under 4; 1601, under 11; 1660, under 9; 1786, under 5; and 1852, under 3).

The complaint is therefore irreceivable to the extent that it seeks the quashing of Circular No. 267, which causes no present damage to the complainant’s personal interests.

6. The complainant also claims days of special leave, which he had been denied, to sit architecture examinations. The Tribunal notes that it does not have the authority to order such action. In any case, this claim was not made in the internal appeal; it is therefore irreceivable because internal means of appeal have not been exhausted in accordance with Article VII, paragraph 1, of the Statute of the Tribunal (see for instance Judgment 1380, under 12).

7. In the circumstances and in the absence of any tangible decision, it is not for the Tribunal, as the complainant requests, to pass a general opinion regarding “the attitude of the EPO of systematically ignoring Article 29”.

8. Even if it were receivable, the complaint would clearly be unfounded.

The wording of Circular No. 267 is not as restrictive as the complainant alleges. In practical terms, it does not affect the obligation of the body faced with a request for special leave to take into consideration all the interests involved, including those of the staff member making the request. In that sense the explicit reference to Article 29 of the Service Regulations and to Circular No. 22 is a guarantee of continuity.

In his rejoinder the complainant points out that in terms of precedence Article 29 of the Service Regulations is placed above the challenged circular and that it cannot therefore be overridden by the latter. While this is true, it means that Circular No. 267, which does not imply the restrictions alleged by the complainant, must be interpreted in the light of Article 29 of the Service Regulations and Circular No. 22, to both of which it refers explicitly. In other words, the processing of requests for special leave for basic or further vocational training must, under the challenged circular, take account of the staff member’s interests to at least the same extent as would have been the case under the circular and communiqué it replaced. The staff member’s interests are in fact not inherently opposed to those of the Office, if only because the skills acquired by an employee outside the Office can improve his performance. Even where that is not the case, those interests may still prevail depending on the circumstances, provided that the grant of leave does not affect the proper functioning of the service and is therefore in accordance

with the interests of the Office.

Article 14 of the Service Regulations, which according to the complainant the defendant should not have considered, does not in fact prevent an objective and reasonable balance being struck between the different interests involved in any application for special leave.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Agustín Gordillo

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.