EIGHTY-NINTH SESSION

***In re* Wacker** **Judgment No. 1969**

The Administrative Tribunal,

Considering the complaint filed by Mr Karl-Heinz Wacker against the European Patent Organisation (EPO) on 2 September 1999 and corrected on 1 November 1999, the EPO's reply of 24 January 2000, the complainant's rejoinder of 23 February, and the Organisation's surrejoinder of 30 March 2000;

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 German national born in 1947, joined the European Patent Office, the secretariat of the EPO, in 1984. He was assigned to the Office's Directorate-General 1 in The Hague, the Netherlands.

Article 60(2) of the EPO Service Regulations reads:

... the home ... shall be the place with which [the employee] has the closest connection outside the country in which he is permanently employed. This shall be determined when the employee takes up duties, taking into account the place of residence of the employee's family, where he was brought up and any place where he possesses property.

Any review of this decision may take place only after a special decision by the President of the Office upon a reasoned request by the permanent employee."

At the time the complainant took up his duties, Schwäbisch Gmünd, Germany, was determined as being his home within the meaning of that article. This was based on the fact that he grew up and studied there, had been working there before joining the EPO, and that his mother and other members of his family lived there.

Since 1979 he has been married to a Philippine national. His wife's family lives in Zamboanga City in the Philippines. He and his wife have spent most of their family holidays there and they have purchased a home there for when he retires.

By a letter dated 2 March 1998 the complainant requested that his place of home leave be changed from Schwäbisch Gmünd in Germany to Zamboanga City in the Philippines. He stated that his mother and one sister had recently passed away, most of his other relatives no longer live in Schwäbisch Gmünd, and that he has closer personal relationships with members of his wife's family than with his own. On 23 March the Director of Personnel denied his request. On 18 June 1998 the complainant appealed to the President of the Office against the rejection of his request. On 12 April 1999 the Appeals Committee recommended dismissing his appeal as unfounded and on 5 May 1999 the Director of Personnel Development informed the complainant that the President had rejected his appeal. That is the impugned decision.

B. The complainant argues that the EPO "has not duly considered essential facts" in reviewing his request. He points out that the crucial issue is whether "the personal circumstances of the complainant constitute a radical change concerning the place with which he has the closest connection". The only relative he has left in Schwäbisch Gmünd is a much older half-brother and he contends that his "family bonds ... and spiritual, emotional and material ties" are much stronger with his wife's whole family in the Philippines than with any remaining family he has in Germany. He says that although in similar cases the Tribunal has considered these links, which are difficult to substantiate and cannot be formally proved, the EPO has failed to consider them and has applied a strict and rigid interpretation to the notion of "home".

He requests that the President's decision denying him the change of his place of home leave to the Philippines be quashed.

C. In its reply the Organisation stresses that review of place of home leave is "an exceptional measure" which under the terms of Article 60(2) "may take place only after a special decision by the President of the Office upon a reasoned request by the permanent employee". In this case, the President's decision shows no procedural or formal flaw such as would lead the Tribunal to quash it.

The EPO argues that due account was taken of the changes in the complainant's situation, and although his ties to Germany may have been weakened with the death of his mother it believes these ties to be "still stronger" than those he may have built up with his in-laws in the Philippines. In addition, the complainant has failed to provide evidence that essential facts were overlooked.

Furthermore, it points out that the purpose of home leave for permanent employees is to maintain ties with their home country while they are still serving the Organisation and not to prepare them for retirement.

D. In his rejoinder the complainant disputes the Organisation's representation of his submissions and presses his argument that the President has "exercised his discretionary power without giving due weight to the facts". In assessing whether there has been a "radical change" in circumstances since the time he joined the EPO one must look at more than just what circumstances prevailed at the time he joined the Office and consider what circumstances prevailed at the time he made his request to change his place of home leave.

E. In its surrejoinder the EPO contends that it has weighed all essential facts and arguments but that it was nonetheless justified in rejecting the complainant's request.

CONSIDERATIONS

1. In a request notified to the European Patent Office on 2 March 1998 the complainant asked that in accordance with the provisions of Article 60(2) of the Service Regulations his home for the purposes of home leave be changed from Schwäbisch Gmünd in Germany to Zamboanga City in the Philippines, following changes that had taken place in his family circumstances.

2. By a reply dated 23 March 1998 the Director of the Personnel Department informed the complainant that at the time he joined the Office it was decided that Schwäbisch Gmünd was his home within the meaning of Article 60. He was born and grew up there, studied and was living there at the time of recruitment. The Director recognised that the death of the complainant's mother, in 1997, had reduced his ties with Germany and that his marriage had created links with the Philippines. Nevertheless, he did not allow his request.

3. The complainant appealed to the President of the Office and in the course of the internal appeals procedure submitted further facts in support of his request.

4. The Appeals Committee, in its report dated 12 April 1999, said that the "special decision" of the President allowed for under Article 60(2) is a discretionary one. It is clear that the Committee reviewed all the essential facts and none had been overlooked. It had taken account of the factors mentioned in Article 60(2) and given due consideration to the fact that the complainant's ties with his family and Germany may have become less close, and that he had bought property in Zamboanga City, where his wife's family lived, with a view to retiring there. It stated that there had been no mistake in law and unanimously recommended that the appeal be dismissed.

5. By a letter dated 5 May 1999 the President in accordance with the unanimous opinion of the Committee rejected his appeal. That is the decision impugned.

6. The complainant claims that the Administration, in assessing whether there had been a radical change in his personal circumstances, did not duly consider essential facts. It had applied a strict and rigid interpretation of "home". It had also failed to give any weight to his submission that the "spiritual and psychological" links he had with the Philippines were stronger than those he had with Germany. That aspect was not even considered. He submitted that the assessment that his personal circumstances did not qualify as a radical change was an erroneous conclusion resulting from not giving the proper weight to the facts.

7. Since the decision of the President under Article 60(2) is a discretionary decision (see Judgment 525, *in re* Hakin

under 4) the Tribunal will quash such a decision only if it was taken without authority, or if it was tainted with a procedural or formal flaw or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.

8. If none of those grounds is established the Tribunal may not substitute its view for that of the President. The ground put forward by the complainant is that essential facts were overlooked in the sense that proper weight was not given to the facts, leading to an erroneous conclusion. This is tantamount to saying that the President would have come to a different conclusion on the relevant facts.

9. There is no evidence to show that any fact was overlooked. All the points put forward by the complainant were considered. The impugned decision was based on a consideration of all the facts. A review of a decision under Article 60(2) is an exceptional measure (Judgment 525 under 3). It is not possible to say that clearly mistaken conclusions were drawn from the evidence. After taking everything into account, the President took a different view to the one held by the complainant in his submissions. It follows that there are no grounds for setting aside the decision and the complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 25 July 2000.