Registry's translation, the French text alone being authoritative.

NINETY-THIRD SESSION

Judgment No. 2164

The Administrative Tribunal,

Considering the complaint filed by Mrs C. M. against the European Patent Organisation (EPO) on 10 April 2001 and corrected on 14 May, the EPO's reply of 6 August, the complainant's rejoinder of 11 September and the EPO's letter of 20 September 2001 to the Registrar of the Tribunal declining to submit a surrejoinder;

Considering Article II, paragraph 5, 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. Article 72 of the Service Regulations for Permanent Employees of the European Patent Office, the EPO's secretariat, concerns the expatriation allowance. It provides that:

"(1) An expatriation allowance shall be payable to permanent employees who, at the time they take up their duties or are transferred:

a) hold the nationality of a country other than the country in which they will be serving, and

b) were not permanently resident in the latter country for at least three years, no account being taken of previous service in the administration of the country conferring the said nationality or with international organisations."

The complainant, a French national born in 1958, entered the service of the EPO in May 1997 as a contracted staff member at grade B3 in Directorate-General 1 at The Hague (Netherlands).

On 2 July 1997, in support of an application she had submitted for an expatriation allowance, the complainant sent a letter to an official in the Personnel Department certifying that on joining the EPO she had not been permanently resident in the Netherlands for at least three years. She indicated that she had moved there permanently in the autumn of 1995 on leaving Saint-Cloud (France) to live with Mr F., also an EPO employee and the father of her daughter, born in 1991. The official replied on 21 July 1997 that he had examined the documents at his disposal, including those produced by Mr F. when applying for a dependant's allowance for the child. Those documents included a statement by Mr F. that the complainant and her daughter had been "living under his roof" since the birth of the child, and a letter of 1995 in which the complainant stated that she had lived in the Netherlands since 1993. The official concluded that the complainant had been resident there during the period from May 1994 to April 1997 while maintaining a residence in Saint-Cloud, and that the expatriation allowance could not therefore be granted.

In a letter of 11 February 1999 addressed to the Director of the Personnel Department the complainant asked for the allowance to be awarded as from November 1998 or, failing that, for her letter to be considered as notice of an internal appeal. The Director of Personnel Development replied on 22 February 1999 that the President of the Office had not acceded to her request and that the matter had been referred to the Appeals Committee. The latter issued its opinion on 8 December 2000. It unanimously recommended the rejection of the internal appeal as devoid of merit. In a letter dated 20 December 2000, which is the impugned decision, the new Director of Personnel Development informed the complainant that the President had decided to reject her appeal.

B. The complainant contends that, as her personal situation was considered "unusual" by the Administration, her claim for the allowance was treated in a biased manner. She explains that when he entered the EPO's service, Mr F. was separated from his wife. As from September 1989, he rented a flat in Saint-Cloud with the complainant. When he applied for the dependant's allowance in 1992, the complainant's occupational situation did not allow her to leave France. As a job seeker, she had to remain in France to continue receiving the unemployment benefits to which she was entitled. When Mr F. stated that the complainant and her daughter lived under his roof, he was therefore necessarily referring to the flat in Saint-Cloud. She submits that it was only after Mr F.'s divorce, in January 1995, that she officially left France. Before then, she had visited the Netherlands only sporadically. It was accordingly in 1995 that the Dutch authorities were informed that she would be residing there permanently. Her partner was therefore mistaken in his statement: in a "fit of enthusiasm", he indicated that she had lived with him since 1993. According to the complainant, the contradictions in Mr F.'s statements are due to the "emotional context of a long process of separation and divorce".

The complainant requests the Tribunal to set aside the impugned decision, order the EPO to grant her the expatriation allowance and award her 500 euros in costs.

C. In its reply, the EPO submits that in 1995 Mr F. informed the Administration that he, the complainant and their daughter were living together since 1993, which was confirmed by the complainant. They both gave their address in the Netherlands, and Mr F. stated on the application forms for the dependent child's allowance that his daughter had lived there in 1994 and 1995. Being based on these facts, the EPO's determination as to whether the complainant met the requirement concerning the period of residence in the Netherlands was proper. And in refusing to award her the expatriation allowance the EPO did not, as she alleges, pass judgment on her private life. Moreover, the complainant has no grounds for asserting that the emotional context surrounding the divorce procedure was the cause of the contradictions between the above facts and Mr F.'s statements, as her statements accorded with those of her partner. Furthermore, the fact that her partner made the same statements on several occasions means that they cannot be attributed to a temporary lapse. On the contrary, they were made deliberately to obtain a dependant's allowance.

The EPO casts doubt on the value of a residence certificate produced by the complainant certifying that she was resident in Saint-Cloud until December 1995. It asserts that the maintenance of a residence in France does not in any case constitute sufficient proof that she was actually living there. The written submissions show that her actual place of residence since 1993 has been the Netherlands. The EPO adds that when the complainant was selected for a post of clerk with effect from 1 January 1998, the offer that she received excluded payment of an expatriation allowance. She nevertheless accepted the offer without reservation.

The EPO emphasises that knowingly making erroneous statements in order to obtain a financial benefit constitutes a "highly reprehensible failure" in the duty of honesty incumbent on every employee. Deeming the complaint to be clearly vexatious, the EPO asks the Tribunal to order the complainant to pay costs.

D. In her rejoinder, the complainant asserts that the EPO has taken refuge in its reply behind "rigid" rules. She criticises the EPO's arguments as being "over-simplistic" and explains that she expected a personalised analysis of her case, but that her hopes were disappointed. She comments on several points of the Appeals Committee's opinion.

CONSIDERATIONS

1. The complainant, who is a French citizen, joined the European Patent Office on 1 May 1997. In 1991 she gave birth to a daughter. At the time, the child's father, Mr F., also a staff member, in service at The Hague since 1990, was separated from his wife. It appears that his divorce was pronounced in 1995.

On 2 July 1997 the complainant applied for an expatriation allowance under Article 72 of the Service Regulations. In support of her claim she certified that she had moved to the Netherlands permanently in the autumn of 1995, when she had left France in order to live with Mr F.

On 21 July 1997 the EPO rejected her claim on the grounds that documents in its possession - including documents Mr F. had submitted to claim the dependent child's allowance and a letter of 1995 in which the complainant stated

she had been resident in the Netherlands since 1993 - showed that she had resided in the Netherlands during the three years prior to her recruitment. That being so, it was unable to grant her the expatriation allowance.

On 11 February 1999 the complainant filed another application claiming the allowance with retroactive effect from November 1998 and noting that if her claim was turned down, her letter should be treated as notice of an internal appeal. On 22 February she was told that, the President of the Office having disallowed her claim, the matter had been referred to the Appeals Committee. On 20 December 2000 she was informed that the President had decided to endorse the Appeals Committee's unanimous recommendation to reject her appeal. That is the impugned decision.

2. This case turns on whether, from 1 May 1994 to the autumn of 1995, the complainant did, as she asserts, live in Saint-Cloud or whether, as the Office alleges, she lived with Mr F. in the Netherlands.

a) In support of her assertion that she lived in Saint-Cloud during that period, the complainant points out that her occupational situation prevented her from leaving France at the time, and that not until Mr F. divorced in January 1995 was she able to envisage joining him in the Netherlands. She produces a certificate of residence, dated 21 June 1997, issued by the municipality of Saint-Cloud on the strength of two witness statements, which attested that she lived in Saint-Cloud from 1991 to December 1995. As to Mr F.'s statements of 1995, which the Office cites, to the effect that he had lived with the complainant and their daughter in the Netherlands since 1993, she submits that she was not a party to them. The explanation, she says, is that at the time Mr F.'s name was on the lease contract for the apartment in Saint-Cloud where she lived with their daughter.

b) The Organisation observes that the earlier statements made by the complainant and Mr F. conflict with the complainant's latest ones. In order to benefit from the dependent child's allowance Mr F. affirmed in a letter of 17 August 1995, bearing his address in the Netherlands, that the complainant and their daughter had been living with him since 1993; whereas in order to obtain the expatriation allowance the complainant affirmed the contrary, stating that she had not taken up residence in the Netherlands until the autumn of 1995. The EPO cites several documents in this connection, including:

- a written statement by Mr F. dated 11 August 1992 to the effect that his daughter had lived under his roof since her birth and so had her mother;

- an attestation from the complainant, dated 17 August 1995 and bearing the same address in the Netherlands as Mr F.'s, to the effect that she had had the same place of residence as Mr F. since 1993;

- a curriculum vitae the complainant sent to the Office indicating that for the period from 1994-1995 she had taken a course in Dutch at The Hague; and

- EPO dependent child allowance forms for the years 1994 and 1995, on which Mr F. stated that his daughter lived with him in the Netherlands.

3. In justifying its refusal of the expatriation allowance the EPO seems to be alleging that, the complainant's latest statements conflicting with earlier ones and with statements by Mr F., there was a breach of good faith.

The Tribunal points out that a change in a statement does not offend against good faith if what the new statement reflects is the truth. It is therefore for the administration to ascertain the real facts and, if necessary, re-establish a situation that is legally correct.

4. The EPO rejected the application for an expatriation allowance on the strength of documents available to it.

While it is true that an administration must *proprio motu* endeavour to establish the truth, it is also true that staff members claiming some benefit must cooperate in that endeavour, particularly in respect of facts that concern them and with which they are bound to be better acquainted than the administration. If they fail to cooperate they face the possibility of facts being overlooked by the administration and, in that event, will have to bear the consequences.

a) Here, the EPO had enough evidence to determine the complainant's place of continuous residence (see Judgments 1099 and 1150) over the period from 1 May 1994 to the autumn of 1995. While it may not have had absolute proof, it none the less had written statements of the complainant and her partner as to their place of residence, and had no reason to suppose that these were inaccurate despite the residence certificate issued by the

Saint-Cloud municipality.

If it deemed the statements by the complainant and by Mr F. to be inaccurate, it had a duty to allow the complainant to produce proof to the contrary. And it did give her such an opportunity by telling her what was in her file. In that respect it did not fail in its duty.

b) In the light of the evidence available to the Tribunal, the Organisation's submission appears the most plausible being based on what the complainant and Mr F. themselves said. The residence certificate issued at Saint-Cloud is not such as to reverse the presumption that their earlier statements were accurate.

In view of the foregoing, the complainant's submission appears the least plausible, as she has failed to provide the necessary evidence.

The conclusion is that the Office did not act unlawfully in rejecting the complainant's claim. The complaint must therefore be dismissed.

5. The EPO asks the Tribunal to award costs against the complainant. The Tribunal sees no reason for doing so and accordingly rejects the Organisation's counterclaim.

DECISION

For the above reasons,

The complaint and the EPO's counterclaim are dismissed.

In witness of this judgment, adopted on 10 May 2002, 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 15 July 2002.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 22 July 2002.