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

102nd Session **Judgment No. 2597**

The Administrative Tribunal,

Considering the complaint filed by Mr X. B. O. against the European Patent Organisation (EPO) on 19 December 2005 and corrected on 13 March 2006, the Organisation's reply of 15 May, the complainant's rejoinder of 25 June and the EPO's surrejoinder of 19 September 2006;

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. The complainant, who is a French national born in 1969, entered the service of the European Patent Office, the secretariat of the EPO, on 1 November 2002 as an examiner at grade A2 in the Office's Directorate-General 2 in Munich.

Before being recruited by the EPO, the complainant lived and worked in Germany from December 1997 until 1 August 2002, when he left the country to settle in France.

In a letter of 16 January 2003 he requested the Organisation to pay him, inter alia, the expatriation allowance. He referred to Article 72(1) of the Service Regulations for Permanent Employees of the European Patent Office, which specifies that this allowance is payable to permanent employees who, at the time when they take up their duties, "hold the nationality of a country other than the country in which they will be serving" and "were not permanently resident in the latter country for at least three years". Having received no reply, the complainant lodged an internal appeal by a letter of 29 January in case his request was refused. The Head of the Personnel Administration Department notified him on 8 August that it was impossible to accede to his request because he had been resident in Germany "for at least three years" immediately prior to his appointment. The complainant maintained his appeal on 1 October 2003.

By a letter of 29 April 2004 the Director in charge of the Employment Law Directorate informed the complainant that his appeal had been forwarded to the Appeals Committee. In its opinion dated 12 September 2005, the Committee recommended by a majority that the appeal should be dismissed. Two members gave a dissenting opinion.

In a letter of 23 September 2005, which constitutes the impugned decision, the Director in charge of Personnel Management and Systems notified the complainant that, in accordance with the opinion of the majority of the Committee members, the President of the Office had decided to dismiss his appeal.

B. The complainant submits that he meets the conditions set out in Article 72 of the Service Regulations for payment of an expatriation allowance because he had not been permanently resident in Germany for at least three years when he took up his duties. He states that his decision to leave Germany on 1 August 2002 was a firm decision because it was impossible for him to find work in the country after the closure of the company which had been employing him; this decision was therefore not taken in order to obtain the expatriation allowance. In addition, he draws attention to the fact that he had vainly looked for work in France, the country where his daughters were living, and that he had accepted the job offered to him by the EPO only in order to avoid a period of unemployment. He emphasises that on the application form he had indicated that he would rather be based in The Hague than in Munich or Berlin, because from that city it would have been easier to go to Paris to see his daughters. In his opinion this proves that as from the end of 2001 he had no intention of remaining in Germany. Furthermore, he points out that he did not accept the EPO's offer of employment until 10 September 2002, that is one month after the deadline set by the EPO.

The complainant requests the quashing of the decision of 23 September 2005 and payment of the expatriation allowance.

C. In its reply the EPO asserts that the complainant lived and worked continuously in Germany from December 1997 to July 2002 and that his stay in France from August to October 2002 did not suffice to interrupt his permanent residence in Germany. The EPO points out that, according to the Tribunal's case law, residence may be deemed to be interrupted only if departure is accompanied by an intention to sever links with the duty station country and to leave it for some length of time. It submits that the fact that the complainant may have left Germany to optimise his chances of finding work in France cannot be seen as a final severance of his links with Germany. The Organisation had in fact made him a firm offer of work in June 2002, which he wished to hold on to since, before leaving for France, he attended the interview and the requisite medical examination. By accepting the Organisation's offer of employment on 10 September 2002 the complainant had clearly expressed his intention to return to Germany. In addition, it argues that, as the complainant continued to work for and receive wages from his former employer in Germany during his stay in France, he maintained objective and factual links with Germany.

The Organisation submits that the refusal to pay the complainant the expatriation allowance is consonant with the purpose of this allowance which is to compensate for the disadvantages arising out of expatriation. It considers that the complainant's family ties with France should not be regarded as decisive because, for payment of the expatriation allowance, it is the situation of the employee concerned which counts, that is to say his residence in Germany for several years prior to taking up his duties.

D. In his rejoinder the complainant asserts that he interrupted his residence in Germany; while he was in France he did not keep a pied-à-terre in Germany, nor did he go there regularly, and he did not receive any mail there. He emphasises that he was looking for a job in France and not in Germany and points out that the fact that he did not accept the EPO's offer of employment until 10 September 2002 shows that he was keeping open the option of settling in France.

Referring to the Tribunal's case law, he contends that the fact that he worked for his former employer while he was in France does not negate the fact that he was living in France. He adds that he continued to receive sums of money from this former employer until January 2003 as redundancy payment.

He submits that the EPO's allegation that his stay in France had been too short to amount to a severance of his links with Germany is irrelevant, as the minimum length of the interruption is not established by Article 72 of the Service Regulations or by the case law.

In addition, he asserts that he still suffers from the disadvantages of expatriation because his daughters live in France and the place for meeting them, established by the French courts in order that he may exercise custody, is Paris.

E. In its surrejoinder the Organisation maintains its position. It adds that the length of time required in order that residence in a country may be deemed to have been interrupted must be assessed on a case-by-case basis.

CONSIDERATIONS

1. The complainant, a French national, entered the service of the EPO in Munich on 1 November 2002 as an examiner at grade A2. On 16 January 2003 he requested the Administration to pay him the expatriation allowance provided for in Article 72 of the Service Regulations. This request was rejected on 8 August 2003 on the grounds that the complainant had been permanently resident in Germany since 1 December 1997 and that this residence could not be deemed to have been interrupted by the brief period, in the summer of 2002, when he had returned to France, since this stay had taken place after the Office had offered him his current post.

On 23 September 2005 the complainant was notified that the President of the Office had dismissed his appeal against that decision, thereby following the recommendation issued by the majority of the members of the Appeals Committee. That is the impugned decision.

2. Article 72(1) of the Service Regulations reads as follows:

"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."

3. The expatriation allowance, called the "non-resident's allowance" in some international organisations, is additional remuneration which is paid in order to permit the recruitment and retention of staff who, on account of the qualifications required, cannot be recruited locally (see Judgment 51, under 4).

This allowance is intended to compensate for certain disadvantages suffered by persons who are obliged, because of their work, to leave their country of origin and settle abroad. The disadvantages are indeed greater for them than for those who do not have the nationality of the country of their duty station either, but who have been living in that country for quite a long time before taking up their duties. Equal treatment demands that the provisions establishing the right of international civil servants to receive an expatriation allowance take fair and reasonable account of these different situations. The length of time for which foreign permanent employees have lived in the country where they will be serving, before they take up their duties, therefore forms an essential criterion for determining whether they may receive this allowance. It has been held that the period of three years' residence required by Article 72(1)b) of the Service Regulations is not unreasonable (see Judgment 1864, under 6).

4. The complainant does not criticise that case law.

Nor does he dispute the fact that he had been permanently resident in Germany – the country of his duty station – for more than three years when he applied for the post to which he was appointed.

The point at issue is whether this residence was interrupted during the summer of 2002, which would imply, if such is the case, that when he took up his duties on 1 November 2002 the complainant was no longer resident in Germany but in France. It is therefore necessary to ascertain in which of these two countries the complainant was effectively living on taking up his duties, and where he was permanently resident within the meaning of Article 72(1)b) of the Service Regulations.

5. The country in which the permanent employee is effectively living is that with which he or she maintains the closest objective and factual links. The closeness of these links must be such that it may reasonably be presumed that the person concerned is resident in the country in question and intends to remain there. For instance, the fact of retaining an address, or even a home, in a country in which he or she is no longer resident is not sufficient to rebut that presumption.

It is accepted that a permanent employee interrupts his or her permanent residence in a country when he or she effectively leaves that country with the intention – which must be objectively and reasonably credible in the light of all the circumstances – to settle for some length of time in another country (see Judgments 926, 1099, 1150 and 2214, under 3(b) and (c)).

6. The complainant, who since 1 December 1997 had been living in Germany where he was working for a private company, was informed in 2001 that his employer was contemplating major restructuring which would jeopardise his further employment. At the end of 2001 and during the first half of 2002 he unsuccessfully applied for jobs with several companies which were active in France. On 21 December 2001, however, he applied for the post of patent examiner at the EPO, stating that he would prefer to be stationed in The Hague, Munich or Berlin in that order.

By a letter of 21 June 2002, which was sent to the complainant's German address in Bruchsal, the Office offered him the post to which he was subsequently appointed. The letter stated that if he accepted the offer, he would be asked to take up his duties on 1 November 2002. The complainant was simply asked to undergo a medical examination. On 1 August the Office informed the complainant that the results of this examination were "favourable" and added that he would in due course receive more details about the date on which he was to take up his duties.

That same day the complainant officially left Bruchsal, his German place of residence, to become domiciled in Ville-d'Avray in France, the country where his two young daughters live, whom he regularly visits under child

custody arrangements. On 10 September he confirmed that he would take up his duties at the EPO in Munich on 1 November 2002.

7. It is hardly disputable that the complainant contemplated leaving Germany for France, the country where he has family ties, approximately one year before he entered the service of the EPO, that is at the time when he realised that his economic prospects in the former country were uncertain. But he did not take a final decision in this connection then or during the first half of 2002. His regular approaches to the EPO show on the contrary that he by no means ruled out the possibility of continuing to work and live abroad, preferably in the Netherlands, or in Germany if necessary. The complainant did not transfer his effective residence to France until 1 August 2002, the very date on which the EPO gave him the only favourable reply he received to his numerous job applications. The complainant stayed in France for only three months after leaving Germany, where he had been based for more than four years. His hesitation about giving a clear or final reply to the Office's offer confirms at the most that he was certainly thinking about settling in France but that, since he was unable to find employment in that country, he had not yet decided to leave Germany where he had long had his permanent residence.

In view of all of these circumstances it must be concluded that the complainant has not shown that his departure for France sprang from an intention to settle in that country for good and to take up permanent residence there. On the contrary, the complainant's return to France in the summer of 2002 must be deemed to have been only temporary. The Office could therefore quite reasonably consider that at the material time, that is to say when he took up his duties, the complainant had not interrupted his permanent residence in Germany within the meaning of the case law, and that consequently the condition laid down in Article 72(1)b) of the Service Regulations for the payment of an expatriation allowance had not been met.

The complaint must therefore be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2006, 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 7 February 2007.

Michel Gentot

Agustín Gordillo

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.