Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

108th Session **Judgment No. 2865**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. C. against the European Patent Organisation (EPO) on 24 May 2008, the EPO's reply of 10 September, the complainant's rejoinder of 15 October 2008, the Organisation's surrejoinder of 26 January 2009, the complainant's further submissions of 10 February and the EPO's final observations thereon of 11 March 2009;

Considering Articles II, paragraph 5, and VII 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, a French national, joined the European Patent Office, the EPO's secretariat, on 1 February 2006 as a patent examiner based in Munich. He currently holds grade A2.

When he took up his duties, the complainant filled out the declaration concerning the expatriation allowance provided for in Article 72 of the Service Regulations for Permanent Employees of the European Patent Office, paragraph 1 of which provides for the

payment of an expatriation allowance to permanent employees who, at the time they take up their duties or are transferred, 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.

The complainant declared that he had not been permanently resident in Germany for the previous three years. He explained that he had worked in that country from 1 September 2002 to 31 August 2005, but that he had returned to France for the period between 4 October 2005 and 31 January 2006.

The complainant was asked in an e-mail of 6 February 2006 to supply further information, particularly with regard to his stay in France during the months before he took up his duties. He explained that he had returned to France in October 2005 to live with his mother because he was unemployed and was not due to take up his duties in Munich until February 2006.

The complainant was informed in an e-mail of 22 February 2006 that it had been decided not to grant him an expatriation allowance; according to an e-mail of 1 March, the reason for that decision was that he had still been registered as resident in Germany during his stay in France.

The complainant challenged this decision by a letter of 18 May 2006 in which he asked to be paid an expatriation allowance as from 1 February 2006. On 21 June the Personnel Administration Department informed him that his “brief return” to France could not be viewed as having interrupted his residence in Germany. By a letter of 5 July 2006 the Director of Employment Law notified the complainant that the matter had been referred to the Internal Appeals Committee for an opinion. On 7 January 2008 the Committee issued a unanimous opinion recommending the dismissal of the appeal as groundless.

The President of the Office adopted this recommendation and the complainant was informed by letter of 29 February 2008 that his appeal had been dismissed. That is the impugned decision.

B. The complainant denounces the length of the recruitment procedure which, he submits, had a crucial impact on the decision not to grant him an expatriation allowance. By dragging out the procedure so that his residence in Germany would exceed the three-year period specified in Article 72(1)(b) of the Service Regulations, the EPO penalised him and did not treat him with dignity.

He submits that he meets the conditions laid down in the above-mentioned paragraph (b) for two reasons. First, relying on the Tribunal's interpretation of the terms of this paragraph, he explains that the material period is the three years immediately preceding the date on which he took up his duties. In this connection he emphasises that he was not resident in Germany for four months of the three years preceding his entry into service. He then refers to the Tribunal's case law establishing that, in order to deem residence in a given country to have been interrupted, it is not sufficient for the person concerned to have stopped living in a particular country; he or she must also have intended to leave it for some length of time. The complainant states that in April 2005 he intended to leave Germany for some length of time to go and work in the United States of America, and he infers from this that his permanent residence in Germany was indeed interrupted during the said three years.

The complainant also submits that the decision of 1 March 2006 was procedurally flawed. He claims that he was treated in an undignified manner because the decision not to grant him an expatriation allowance was communicated to him "offhandedly" by the e-mail of 22 February 2006. Furthermore, he contends that inadequate reasons were given for this decision, and he notes that Article 72 of the Service Regulations does not contain any requirement that he should produce a document certifying that he was no longer registered as resident in Germany.

He considers that he did not receive all the information necessary for a thorough understanding of the conditions of application of Article 72(1) of the Service Regulations and that the Organisation deceived him and "manipulated the length of the recruitment process" in order to prevent him from obtaining the expatriation allowance.

The complainant enters the following claims:

"(1) The decision of 29 February 2008 should be quashed;

(2) The expatriation allowance should be paid, with accrued interest, as from the date of entry into service;

(3) Three years' basic salary should be paid for material injury if the expatriation allowance is not granted to [him];

(4) One year's basic salary should be paid for the moral injury suffered during recruitment;

(5) Six months' basic salary should be paid for the moral injury occasioned by the decision of 1 March 2006;

(6) Three months' basic salary should be paid for the moral injury occasioned by the length of the internal appeal;

(7) Three months' basic salary should be paid for the time [he has] had to invest in the internal appeal and the appeal before the [Tribunal]."

C. In its reply the EPO submits that the complainant's claim to three years' salary to compensate for the material injury he would suffer if the expatriation allowance were not granted to him, and likewise his claim to one year's salary for the moral injury suffered during recruitment are irreceivable because internal means of redress have not been exhausted.

On the merits it argues that the complainant does not satisfy the terms of Article 72(1)(b) of the Service Regulations, because from 1 September 2002 until 4 October 2005 he was permanently resident in Germany, and his stay in France between October 2005 and the end of January 2006 does not constitute an interruption of that residence. It points out that the complainant did not cancel his registration as a resident of Germany and observes that he therefore had no intention of leaving the country for some length of time.

The Organisation asserts that the complainant's allegation that he was treated in an undignified manner is unfounded, as are his allegations concerning the length of the recruitment procedure and the way in which it was conducted. It states that there are no provisions stipulating time limits for the recruitment procedure and that the appointing authority has the discretion not only to choose candidates but also to set the date on which they take up their duties. Moreover, a

copy of the Service Regulations and of other texts concerning terms of employment were sent to the complainant as an enclosure with the letter of 3 August 2005 containing the offer of employment, and he could have requested further details of his terms of employment had he so wished.

In addition, the Organisation states that the complainant was duly informed of the reasons why he had not been granted an expatriation allowance.

It is also of the opinion that the length of the internal appeal procedure was "reasonable".

D. In his rejoinder the complainant challenges the EPO's objection to receivability. He submits that the claims which are deemed irreceivable by the Organisation must be regarded as subsidiary claims that he presses in the event that his main claim, namely that he be granted an expatriation allowance, is dismissed.

He criticises the length of the internal appeal procedure and reproaches the EPO for taking more than a year to submit its position to the Internal Appeals Committee, whereas he was allowed only two months to reply.

He also maintains the other arguments put forward in his complaint to show that he is entitled to an expatriation allowance.

E. In its surrejoinder the Organisation reiterates its position. It considers that the complainant's arguments as to the receivability of some of his claims for redress are erroneous. It emphasises that in his internal appeal the complainant merely requested the granting of the expatriation allowance. It adds that, in any case, as his main claim is unfounded, all his subsidiary claims must be rejected.

Referring to the complainant's criticism of the length of the internal appeal procedure, it draws attention to the number of cases it has to handle.

F. In his further submissions the complainant relies on an e-mail of 10 February 2009 from the head of a human resources section responsible for recruitment to support his argument that, in his case,

the recruitment procedure was too long and did not comply with the Office's practice in this area.

G. In its final observations the Organisation comments that the complainant cannot deduce from that e-mail that he was entitled to know the result of his selection interview within six weeks.

CONSIDERATIONS

1. The complainant, a French national, joined the European Patent Office in 2006 as a patent examiner at its headquarters in Munich. He had immediately to fill out an expatriation allowance declaration, in which he stated that he had not been permanently resident in Germany for the previous three years. He explained, however, that he had worked in that country from 1 September 2002 until 31 August 2005 but that, after losing his job and as he had not been entitled to unemployment benefit, he and his wife had returned to France, where he had lived as from 4 October 2005.

A section reserved for Office use at the end of this document shows that on 16 February 2006 it was decided not to grant the expatriation allowance to the complainant. He was informed by an e-mail of 1 March 2006 that the reason for this refusal was that he was still registered as resident in Germany when he took up his duties and that he had not worked during his stay in France, which the Office regarded as an extended family visit before his return to Germany.

On 7 January 2008 the Internal Appeals Committee unanimously recommended the dismissal of the complainant's appeal against this decision. The President of the Office decided to follow this recommendation, and the complainant was informed of her decision, which he now challenges before the Tribunal, by a letter of 29 February 2008.

2. The complainant submits that due process was not observed in the procedure leading to the decision of 1 March 2006, that inadequate reasons were given for that decision and that he was not

notified of it in the required manner. More generally, he states that the EPO did not treat him with dignity in dealing with his request for an expatriation allowance.

It is clear that these procedural defects, if indeed they existed, would have been remedied during the internal appeal procedure, in the course of which the parties fully debated the issues raised by the complainant's request.

3. Still with regard to procedure, the complainant submits that his internal appeal was not examined within a reasonable period of time.

The internal appeal was filed on 18 May 2006. On 21 June the Personnel Administration Department again explained to the complainant why his request for an expatriation allowance had been rejected. The Director of Employment Law then informed the complainant by letter of 5 July 2006 that after a preliminary examination it had been concluded that his appeal could not be allowed and that it had been referred to the Internal Appeals Committee.

It was not until 27 June 2007 that the Office issued its position on the appeal, which it considered to be receivable but groundless. The complainant commented on this position in a brief of 29 August, which he corrected on 30 September after having received the Office's brief of 21 September. The Committee deliberated on 24 October 2007 and issued its opinion on 7 January 2008, unanimously recommending that the appeal be dismissed. The complainant was informed of the decision of the President of the Office on 29 February 2008.

Administrative authorities and organs have a duty to ensure, without prompting, that their procedures are properly conducted. It cannot be argued that a staff member has breached the principle of good faith by failing to request that these procedures be expedited. Indeed, a host of reasons connected with the employment relationship may explain that person's reluctance to chase up the advisory or decision-making organ.

In view of all the circumstances of the case, the period of a little more than a year which elapsed between the referral of the internal

appeal to the Committee and the adoption of a position by the Office, though rather long, may be considered acceptable. Furthermore, the remainder of the procedure was plainly conducted at a normal pace.

The plea that there was an unjustified delay must therefore be dismissed.

4. The complainant submits that when he took up his duties at the Office he had been resident in Germany for less than three years, because he had lived in France from 4 October 2005 until he took up his duties in Munich.

(a) He therefore relies on Article 72(1)(b) of the Service Regulations as the basis of his entitlement to an expatriation allowance. Article 72(1) reads:

> "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
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> 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."

(b) The expatriation allowance 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. This allowance compensates for certain disadvantages suffered by persons who are obliged, because of their work, to leave their country of origin and settle abroad. 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, forms an essential criterion for determining whether they may receive this allowance (see Judgment 2597, under 3).

The country in which the permanent employee is permanently resident, within the meaning of Article 72(1)(b) of the Service Regulations, is that in which he or she is effectively living, that is to say the country 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. 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 Judgment 2653, under 3).

(c) The complainant's somewhat muddled arguments do not justify any departure by the Tribunal from this line of precedent, which pays reasonable heed to the interests of international organisations, on the one hand, and to those of their staff members, on the other.

5. The complainant does not deny that from 1 September 2002 until 4 October 2005 he was permanently resident in Germany within the meaning of Article 72(1)(b) of the Service Regulations, but he says that he was no longer permanently resident there in the four months prior to taking up his duties. He states that his intention to leave Germany for some length of time, which goes back to April 2005, when he signed an employment contract with a company which had its headquarters in the United States, is evidenced in particular by the fact that he terminated both the lease on his flat and his employment contract with his employer in Germany, and that his wife resigned from her job in order to follow him to the United States.

These circumstances, on which no doubt will be cast, are not sufficient to convince the Tribunal that the complainant met the conditions laid down in Article 72(1)(b) of the Service Regulations. Before leaving Germany to stay in France, the complainant had applied for the post he now holds at the Organisation's headquarters in Munich, attended a selection interview and received a job offer, which he accepted on 20 August 2005. The offer and acceptance of the job in Munich starting on 1 February 2006 led to the cancellation of the employment contract which he had signed a few months earlier with the above-mentioned American company. The Office was therefore right to view the complainant's stay in France as a temporary solution while he was waiting to take up his duties on 1 February 2006.

The condition for granting the expatriation allowance laid down in Article 72(1)(b) of the Service Regulations was therefore not met when the complainant took up his duties.

6. There is no doubt that the complainant took up permanent residence in Germany on 1 September 2002 and that the three-year period to which reference is made in Article 72(1)(b) of the Service Regulations for entitlement to an expatriation allowance ended on 31 August 2005.

The complainant submits, in what must be regarded as a subsidiary argument, that the Office procrastinated so that he would not take up his duties until after 31 August 2005, when he would be deemed to have been permanently resident in Germany for more than three years, in order to deprive him of his entitlement to this allowance. He alleges that the recruitment procedure was unduly prolonged for that purpose and that, in addition, the Office deliberately omitted to inform him as to how his entitlement to an expatriation allowance would be affected if he stayed in France prior to taking up his duties.

The complainant endeavours to establish by various means that the recruitment procedure was abnormally long in his case. He points in particular to the time taken by the Office to process his application. More than three months elapsed between the submission of his application and the selection interview, and a further two and a half months went by before he received an offer of employment. He considers that the Office's conduct was therefore contrary to the principle of good faith, inasmuch as a prospective employee of the Office cannot be expected to have a detailed knowledge of the workings of Article 72 of the Service Regulations, which specifies that the decisive date for the granting of an expatriation allowance is that on which an employee takes up his or her duties, and not the date of appointment.

7. The Tribunal will concur with the Office that a recruitment procedure requires the careful selection of candidates and that this is generally a complicated operation for an organisation like the

EPO, which receives some 20,000 applications every year for posts requiring specific training and technical knowledge. It must likewise be noted that the date on which an employee takes up his or her duties depends on the number of staff the Organisation needs in order to function efficiently, which is a matter lying within its discretionary authority. Of course this does not exempt it from objectively weighing its own interests against those of the new recruit. In particular, it must not act arbitrarily or abuse its authority. In the instant case, there is nothing in the file to corroborate the complainant's argument that the recruitment procedure and the date set for his entry on duty were calculated to deprive him of his entitlement to an expatriation allowance.

Consequently, this plea must likewise be dismissed.

8. The complaint proves to be ill-founded in every respect, and there is therefore no need to rule on the receivability or merits of the complainant's subsidiary claims.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 12 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Seydou Ba
Claude Rouiller
Catherine Comtet