A.-M.

v.

EPO

128th Session **Judgment No. 4188**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs S. A.-M. against the European Patent Organisation (EPO) on 12 January 2013 and corrected on 18 April, the EPO's reply of 5 August, the complainant's rejoinder of 28 October 2013, the EPO's surrejoinder of 31 January 2014, the complainant's additional submissions of 5 April and the EPO's final comments of 17 July 2014;

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 may be summed up as follows:

The complainant challenges the rejection of her application for payment of an expatriation allowance.

Under Article 72(1)(a) and (b) of the Service Regulations for permanent employees of the European Patent Office, the EPO's secretariat, an expatriation allowance is granted to non-nationals of the country where they are serving, provided they were not "permanently resident" in that country for at least three years prior to the taking up of duties. However, according to an administrative instruction known as the "Lamadie Note", issued in June 2001 by the then Principal Director of Personnel, in some specific cases the allowance could be granted notwithstanding a period of *de facto* residence exceeding three years.

The Note indicated, for example, that periods during which the employee had resided in the country for the principal purpose of pursuing studies were not to be taken into account in calculating the three-year reference period.

The complainant, a Greek national, worked for the EPO as an external contractor between March 1991 and February 1993. As from 1 October 1993, she was recruited by the EPO as a contract staff member. She then applied for an expatriation allowance, which was denied. With effect from 1 April 1998 she was employed under a permanent appointment with the EPO. On 21 August 2009, having become aware of the existence of the Lamadie Note, she applied again for an expatriation allowance. Her request was rejected on 9 February 2010 on the ground that she had been permanently resident in Germany.

On 5 March 2010 the complainant lodged an internal appeal. She requested the retroactive payment of the expatriation allowance as from 1 October 1993 or for the six months preceding the month in which the application for the allowance was submitted (in accordance with Article 65(1)(c) of the Service Regulations) or as from the date of the application. She also claimed moral damages and costs. The appeal was referred to the Internal Appeals Committee (IAC) for an opinion.

A hearing was conducted on 23 May 2012. In its opinion of 17 August 2012, the IAC recommended by a majority that the appeal be rejected as receivable but unfounded. By a letter of 17 October 2012, which constitutes the impugned decision, the complainant was informed that the President of the Office had decided to dismiss her appeal as irreceivable *ratione temporis* and unfounded.

The complainant asks the Tribunal to quash the impugned decision, to order the EPO to grant her the expatriation allowance retroactively as from February 2009 with annual interest rate of 4 per cent, and to compensate her for the material and moral injury she considers she has suffered, which she assesses in the amount of 78,000 euros and no less than 20,000 euros, respectively. She also claims costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable *ratione temporis* and, subsidiarily, as unfounded.

CONSIDERATIONS

1. The complainant requests an oral hearing under Article 12, paragraph 1, of the Tribunal's Rules. The Tribunal however notes that the parties have presented ample submissions and documents to permit the Tribunal to reach an informed decision on the case. The request for an oral hearing is therefore refused.

2. The complainant contends that the EPO wrongly rejected her request for an expatriation allowance under Article 72(1) of the Service Regulations. At the material time this provision stated as follows:

> "(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."

3. The complainant satisfied the requirement of Article 72(1)(a) since she was a Greek national when she took up her duties with the EPO. She lived in Germany from the age of six. She returned to Greece, lived and studied there between June 1985 and February 1988 when she returned to Germany. Her evidence is that she returned to be with her ailing mother but then returned to her hometown in Greece. She stayed there from July to early September 1988 when she returned to Germany and worked for a private company until July 1989 when she again left for Greece to seek employment in the private education sector. She however returned to Germany in September 1989 and "probably planned for the first time in her adult life to stay for some indefinite length of time" there. She worked with a private sector company between September 1989 and February 1991. From 1 March 1991 to 28 February 1993 she worked as an external contractor in the EPO's Registry. The Tribunal notes that the complainant was employed as an assistant in the Registry and that Articles 2 and 8 of her contract provided for a trial period of six months during which a one-day period

of notice applied. The complainant's further evidence is that when that contract ended she received unemployment benefits in Germany for a month and then deregistered with the authorities as she intended to leave. She left Germany for the United Kingdom on 11 April 1993 and embarked upon an intensive English course there from 13 April to 4 June 1993. She then made short visits to Munich and Athens before going to her hometown in Greece from 15 June to 6 August 1993. At this latter date, she returned to Germany and on 10 August she re-registered with the national authorities and received unemployment benefits until 30 September. She was employed from 1 October 1993 as a contract staff member of the EPO and applied for an expatriation allowance, which was denied. On 1 April 1998 she was employed under a permanent appointment with the EPO and on 21 August 2009 she applied again for an expatriation allowance. Her request was rejected on 9 February 2010 and on 5 March she lodged an internal appeal which was referred to the IAC. In its opinion of 17 August 2012 the IAC recommended by a majority that the appeal be rejected as unfounded. The minority recommended that the appeal be allowed to the extent that the complainant was to be granted payment of the expatriation allowance with retroactive effect for the six months preceding her application. The impugned decision of 17 October 2012 informed the complainant that the President of the Office had decided to dismiss her appeal as irreceivable *ratione temporis* and unfounded.

4. The Office rejected the complainant's first application for the expatriation allowance in October 1993. Article 108(2) and (3) of the Service Regulations required the complainant to lodge an internal appeal against that decision within three months of "the date of publication, display or notification of the act appealed". As she did not challenge the decision of October 1993 to reject her request for the allowance within the specified time, the majority of the IAC correctly found that the decision which was made when she was recruited in 1993 could no longer be challenged by way of her internal appeal of 2010. However, it erred when it then found, in effect, that she could have made a new request for the allowance because she had entered into a new employment relationship with the Office in 1998. It is noteworthy that the minority

opinion did not dissent from this finding when it went on to find in favour of the complainant on the merits.

While any right of the complainant to the allowance from 1993 to 1998 derived directly from Article 10 of the Conditions of Employment for Contract Staff, it also derived from Article 72(1) of the Service Regulations. Thus her application in 1993 raised the question of her entitlement under Article 72(1). That was resolved against her and she did not appeal that decision.

5. The complainant advances the plea that her new request in August 2009 was admissible by reference to the Lamadie Note.

The Tribunal wishes to clarify the legal status of the Lamadie Note. It is an administrative instruction of indeterminate legal status. As a matter of law it cannot modify or limit the Service Regulations. However, it has long been treated within the EPO, and accepted by the Tribunal, as informing the interpretation and application of Article 72(1) and, accordingly, references to it in this judgment should be viewed with this in mind.

6. The existence of the Lamadie Note was a new fact which may be taken into account as the basis for the complainant's renewed request for the expatriation allowance. However, the claim fails on the merits.

The complainant commenced her duties with the EPO on 1 October 1993. The question raised by Article 72(1)(b) of the Service Regulations is whether the complainant was permanently resident in Germany for at least three years. How this provision operates is discussed in Judgment 4191, delivered at the same time as this judgment. The three-year period is the period immediately preceding the "tak[ing] up [of] duties". The issue is whether, if in that three-year period there is service which is not to be counted, the consequence is that the expatriation allowance is payable, or whether that service is ignored when identifying, looking backwards, the end point of the three-year period. The answer does not clearly emerge from the text, but does from a consideration of the purpose of the provision and the rationale for the benefit. The provision is intended to compensate employees who have

left their permanent home in one country to take up employment in another (see Judgment 2925, under 3). That purpose is best served by the latter approach to the meaning of the provision, rather than by the former approach, which would reward a person who has mainly resided in the duty country, even for decades, but had for a period within the three years, perhaps extremely briefly, been, for example, employed by an international organisation.

Accordingly, the three-year period is extended by the length of the period or periods which, in accordance with the provisions of Article 72(1)(b) of the Service Regulations, must not be taken into account.

Applying this approach to the facts of this case, the complainant is not entitled to the expatriation allowance. That is because she has mainly lived in Germany since the age of six. In the period of three years before 1 October 1993 she was resident in Germany. That conclusion is not affected by the fact that she spent some time out of Germany in either the United Kingdom or in Greece. Those periods of absence did not interrupt her permanent residence in Germany in the sense that she effectively left Germany with the intention, objectively and reasonably credible in the light of all the circumstances, to settle for some length of time in another country (see Judgement 2865, under 4(b)). It does not matter whether her employment between 1 March 1991 and 28 February 1993 is not to be taken into account because it was service with an international organisation. That is because, if it was, the answer remains the same as she was resident in Germany for the equivalent period before 30 September 1990.

7. In the foregoing premises, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 17 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ