

**108th Session**

**Judgment No. 2866**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs C. M. R. d. S. against the European Patent Organisation (EPO) on 8 January 2008, the EPO's reply of 22 April, the complainant's rejoinder of 28 May and the Organisation's surrejoinder of 15 September 2008;

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 is a Portuguese national born in 1968. She joined the European Patent Office, the EPO's secretariat, at its branch in The Hague on 1 November 2006 as an examiner at grade A3. Prior to entering the service of the EPO, she had been registered as a job seeker in the Netherlands from 29 September 2003 to 29 March 2004 and again from 18 July 2005 to 18 January 2006.

Upon taking up her duties, the Office requested her to provide evidence of residence outside the Netherlands during the three years preceding her date of entry into service so as to assess whether she was entitled to the expatriation allowance provided for in Article 72(1) of

the Service Regulations for Permanent Employees of the European Patent Office, according to which:

“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 provided a statement to the effect that she had resided in the Netherlands from 1 September to 31 October 2003 and submitted a certificate issued by the Portuguese authorities attesting that on 16 May 2004 she was resident in Portugal. She also provided a declaration signed by her indicating that since November 2004 she had resided in the Netherlands. In early January 2007 the Personnel Directorate informed her that the certificate issued by the Portuguese authorities did not constitute sufficient proof of her residence in Portugal and asked for a copy of her registration in the Netherlands and a certificate of work or study attesting that she had resided in Portugal up to November 2004. The complainant replied that she had already submitted proof of her residence in Portugal, satisfying the requirements of Article 72(1) of the Service Regulations, and she sought clarification as to why that evidence was deemed insufficient. The matter was subsequently discussed at a meeting held on 8 February 2007 between the complainant and officials from the Personnel Directorate.

By letter of 2 May 2007 the Remuneration Section informed the complainant that the certificate issued by the Portuguese authorities on 16 May 2004 did not prove that she was not permanently resident in the Netherlands at that time, and that it could not therefore be accepted as the sole evidence for the determination of her entitlement to the expatriation allowance. It stated that a positive decision on her request would be subject to the receipt of documents showing that her permanent residence during the three years prior to joining the EPO was indeed outside the Netherlands. The complainant replied by letter of 20 May 2007 that the said certificate unequivocally confirmed her residency in Portugal in 2004 and hence satisfied the requirements of

Article 72(1) of the Service Regulations. She drew attention to the documents issued by the Dutch authorities attesting to her registration as a job seeker in the Netherlands in 2003 and 2005 – a copy of which she submitted in an attachment to the letter – and reiterated her request to be granted the expatriation allowance.

In a letter of 18 July 2007 the Remuneration Section advised the complainant that, as she had failed to provide proof of her residence in Portugal in the period preceding her entry into service, the Office had concluded that her permanent residence as from 29 September 2003 was in the Netherlands. Accordingly, she did not fulfil the requirements of Article 72(1) of the Service Regulations and was thus not entitled to the expatriation allowance.

On 19 September 2007 the complainant's representative wrote to the Remuneration Section to submit further evidence of the complainant's residence in Portugal during the period in question. This included a new certificate issued by the Portuguese authorities indicating that in 2004 the complainant had resided in Portugal at her parents' address, a copy of her driver's licence issued in Portugal on 21 July 2004, a copy of her record of marriage, which had taken place in Portugal on 4 September 2004 and a statement from her parish priest to the effect that in 2003 and 2004 she had resided with her parents. He asked the Administration to reconsider its decision in light of the new evidence and, in the event that it did not, to consider his letter as an internal appeal against the decision of 18 July 2007. By an e-mail of 19 October he reminded the Remuneration Section that a reply to the complainant's request should be given by 19 November 2007 so as to comply with the time limits stipulated in the Service Regulations. The Remuneration Section replied on 29 October that, based on the evidence provided to it, the Administration had decided to confirm its earlier decision and that the complainant would be notified shortly.

On 28 November the Director of Personnel wrote to the complainant to inform her that the additional documents submitted by her representative did not provide a basis for reconsideration of the decision of 18 July 2007 and that her representative's letter of 19 September was being treated as an internal appeal. By letter of

20 December 2007 the Director of the Employment Law Directorate advised the complainant that the President of the Office had decided not to grant her request and to refer the case to the Internal Appeals Committee for an opinion. On 8 January 2008 the complainant filed a complaint with the Tribunal impugning the implied rejection of her appeal lodged on 19 September 2007.

B. The complainant notes at the outset that the EPO agrees that she is entitled to the expatriation allowance provided that she can prove that she did not permanently reside in the Netherlands between November 2003 and November 2004. She argues that she has provided the Administration with sufficient evidence that she permanently resided in Portugal during that period and that, in any event, the standard of proof to be applied in the particular case is not “beyond reasonable doubt” but “on the balance of probabilities”.

The complainant submits that following her first registration in the Netherlands as a job seeker on 29 September 2003, she was unable to find a job; consequently, she did not stay in the country until 29 March 2004, when her registration expired, but returned to Portugal in November 2003. However, she was not aware at the time that she needed to notify the Dutch authorities of her departure so as to cancel her registration. In her opinion, the Administration failed to evaluate properly the evidence adduced by her. In particular, it considered the certificates issued by the Portuguese authorities as insufficient proof of her residence in Portugal in 2004, notwithstanding the fact that Portuguese law imposes very strict requirements for the issuance of certificates of residence. Similarly, it did not give due consideration to her record of marriage, which proves that she married a German national in Portugal in September 2004, despite the fact that under canon law marriage banns may be published by a parish priest only if at least one of the spouses has his or her domicile or residence in the parish prior to the application.

She further submits that the Administration did not give proper reasons for its refusal to accept the evidence she provided, that it showed ill will or, at least, a lack of good faith in its handling of her request and that it failed in its duty of care towards her.

The complainant asks the Tribunal to quash the impugned decision and to award her the expatriation allowance provided for under Article 72(1) of the Service Regulations as from the date of her appointment together with compound interest on the arrears at 8 per cent per annum. She also claims punitive damages and costs.

C. In its reply the Organisation argues that there was no implicit rejection of the complainant's appeal, because a decision was in fact taken by the President, albeit with some delay, and her case was referred to the Internal Appeals Committee. It therefore considers that Article VII, paragraph 3, of the Statute of the Tribunal does not apply and that, in accordance with Article VII, paragraph 1, the complaint is irreceivable for failure to exhaust the internal means of redress.

Subsidiarily, the EPO submits that the decision not to grant the complainant the expatriation allowance was sound, in light of the fact that she did not fulfil the requirements of Article 72(1)(b) of the Service Regulations. In particular, she did not provide cogent evidence that, following her registration with the Dutch authorities on 29 September 2003, she returned to Portugal in November 2003 and only moved back to the Netherlands in November 2004. There is no evidence that she actually returned to Portugal, and the certificate of residence issued by the Portuguese authorities in 2004 did not give any indication as to the duration of her stay in the country. Similarly, the record of marriage does not constitute proof, since Portuguese law merely requires that one of the spouses be domiciled or resident in the parish for a minimum of 30 days prior to the publication of marriage banns. Moreover, the statement from her parish priest that she resided in Portugal in 2003 did not seem to be accurate, given that, according to her initial job application, she was employed in France until the end of June 2003. Also, she has not submitted any document showing that she actually lived in Portugal during the time she worked as a freelance consultant for a postgraduate school in the United States of America, i.e. from March 2004 to October 2005, whereas she indicated in her job application that the Netherlands was her "work base" during that time.

The defendant notes that, contrary to the view expressed by the complainant, the evidence is assessed not according to the standard of proof applied but according to its “soundness”. It rejects the allegations of ill will, lack of good faith and failure in its duty of care, emphasising that the complainant was given ample opportunity to submit evidence that would enable the Administration to reconsider its decision.

D. In her rejoinder the complainant refers to Judgment 2562 and contends that the Organisation’s plea of irreceivability is manifestly frivolous and vexatious. She asserts that she did not receive any information on her appeal from the President, as required by Article 109 of the Service Regulations. She reiterates her arguments on the merits.

E. In its surrejoinder the EPO maintains its position in full and emphasises that the complainant was informed by the Personnel Directorate that her request was being treated as an internal appeal and that the file would be forwarded to the Legal Department for further procedure.

## CONSIDERATIONS

1. When the complainant joined the European Patent Office at its branch in The Hague on 1 November 2006, she claimed entitlement to an expatriation allowance pursuant to Article 72(1) of the Service Regulations. By a letter dated 18 July 2007 the Personnel Directorate informed her that, as she had failed to provide evidence to substantiate her statement that her permanent residence was not in the Netherlands during the three years preceding her date of entry into service, her claim was rejected.

2. On 19 September 2007 the complainant’s representative wrote to the Remuneration Section and submitted additional documentation in support of the complainant’s entitlement to the expatriation allowance. He also requested that his letter be treated as an

internal appeal against the decision of 18 July 2007 in the event that that decision was not reversed.

3. The Director of Personnel advised the complainant on 28 November 2007 that the additional documentation had been reviewed; however, it was insufficient to alter the decision. He also advised her that the letter of 19 September was being treated as an internal appeal and would be forwarded to the Legal Department. By a letter of 20 December 2007 the complainant's representative was informed that the President had rejected the complainant's request for an expatriation allowance and had referred the matter to the Internal Appeals Committee for an opinion. The complainant filed her complaint on 8 January 2008.

4. The EPO argues that although it was outside the time contemplated in Article 109(2) of the Service Regulations, a decision on the complainant's appeal was taken by the President and the appeal was forwarded to the Internal Appeals Committee prior to the complaint being filed. Accordingly, there was no longer an implicit rejection of the complainant's appeal and Article VII, paragraph 3, of the Tribunal's Statute does not apply. In its view, as the Tribunal held in Judgment 533, under 5, the complaint is irreceivable on the grounds that the internal means of redress have not been exhausted.

5. The EPO's reliance on Judgment 533 is misplaced. In the present case, by the EPO's own admission the decision was not taken within the time provided in Article 109(2) of the Service Regulations. As the Tribunal stated in Judgment 2562, under 6:

"The EPO cannot be heard to argue that the complainant has failed to exhaust internal means of redress when the sole reason for his failing to do so was the EPO's own failure to abide by its own Service Regulations and to follow the timelines under Article 109(2). The decision in Judgment 533 must be restricted to the very particular facts of that case."

Accordingly, the complaint is receivable.

6. On the merits of the complaint, the Tribunal notes that the onus was on the complainant to provide the Administration with

sufficient evidence to establish that she did not reside in the Netherlands during the three years prior to entering into service, namely, from 1 November 2003 to 1 November 2006. The specific time frame at issue is the period from November 2003 to November 2004. The complainant states that she was briefly in the Netherlands in the fall of 2003 but returned to Portugal in November 2003 and did not return to the Netherlands until November 2004. She submitted a number of documents, detailed above, which, she contends, establish that she was resident in Portugal during the material time.

7. However, in one of the documents provided by the complainant with her application for employment with the EPO, she states that between 2004 and 2005 she worked as a consultant for a postgraduate school in the United States. Although she maintains that she performed the work while she was residing in Portugal, according to the curriculum vitae which she provided with her application for employment, her work base was in the Netherlands.

8. In her application for employment, she also indicated that she taught at a university in France, from 2002 to 2003. Her stated reason for leaving the University was “[m]oving to the Netherlands”.

9. In the light of this evidence, the onus was on the complainant to adduce cogent evidence that she had taken up permanent or continuous residence in Portugal throughout the relevant time. Although the complainant’s documentation shows that she had been in Portugal, it falls far short of establishing that she was resident in Portugal throughout the relevant time. As the complainant has failed to discharge her evidentiary burden, the complaint must be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 29 October 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Agustín Gordillo, Judge, and

Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron  
Agustín Gordillo  
Dolores M. Hansen  
Catherine Comtet