

## EIGHTIETH SESSION

### *In re* SCHUITEMAKER

#### Judgment 1472

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Peter Schuitemaker against the European Patent Organisation (EPO) on 28 March 1995 and corrected on 7 April, the EPO's reply of 23 June, the complainant's rejoinder of 25 July and the Organisation's surrejoinder of 25 August 1995;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Dutchman born in 1955, joined the staff of the EPO on 1 November 1990 as a substantive examiner at grade A3 at the Organisation's headquarters in Munich.

Article 60(2) of the Service Regulations of the European Patent Office, the Organisation's secretariat, says:

"... the home ... shall be the place with which [the employee] has the closest connection outside the country in which he is permanently employed. This shall be determined when the employee takes up his duties, taking into account the place of residence of the employee's family, where he was brought up and any place where he possesses property.

Any review of this decision may take place only after a special decision by the President of the Office upon a reasoned request by the permanent employee."

On 9 June 1992 the complainant submitted a form asking the Administration to make Welton, in England, the place for his home leave. A personnel officer replied on 23 June that the Administration considered Baarn, in the Netherlands, to be his home.

In a letter dated 24 June he asked the personnel officer to review his application for home leave in England. In a note of 10 July 1992 the personnel officer upheld the earlier decision, explaining that Baarn was where the complainant had been born and brought up and where his parents still lived.

The complainant appealed on 2 September 1992. In a report dated 21 November 1994 the Appeals Committee recommended rejection.

By a letter of 10 January 1995, the impugned decision, the Director of Staff Policy told him that the President had endorsed the Committee's recommendation.

B. The complainant submits that the President erred in law and overlooked essential facts. England is the country with which he has the closest ties. He owns a home there, his wife is British, her family live there, and English is the language he and she speak at home. His only link with Baarn is his parents' residence there.

He wants the Tribunal to set the impugned decision aside, make Welton the place of his home leave as from 1 November 1990 and pay him the difference between the costs of travel on home leave to Baarn in 1992 and 1994 and what the costs would have been had he gone to Welton.

C. In its reply the EPO contends that the impugned decision was right. Not until April 1989 did the complainant go to Welton, and that was only to take up a job. Though he owns a home at Welton he lived there for only 19 months before going to Munich. The six-and-a-half years he has spent in England must be weighed against the 28 for which he lived in the Netherlands. Ties with his own family matter more than ties with his wife's.

D. In his rejoinder the complainant objects to the Organisation's account of the facts. More than six years before

joining the EPO he made a conscious decision to settle in England. He says he was "made to understand" in an interview with the Administration that it was the place of his recruitment that would be the place of his home leave.

He presses his earlier claims and also seeks an award of 2,500 German marks in costs.

E. In its surrejoinder the EPO observes that there is nothing new in the rejoinder to make it change its pleas. The place of recruitment and the place of home leave are quite different. His allegation that an interviewer misled him is "unverifiable".

#### CONSIDERATIONS:

1. The complainant, who is a citizen of the Netherlands, was born at Bussum, in that country, on 29 September 1955. In 1958 his family moved to Baarn, which is also in the Netherlands, and his parents still live there. He attended school at Baarn from 1961 to 1974 and the University of Delft from 1974 to 1983. In 1981, while he was at the university, he married a citizen of the United Kingdom. He and his wife moved to Sheffield, in England, in April 1984. He bought a house there in June 1984 and worked there until March 1989. In April 1989 he moved to Welton, in Northamptonshire. At the end of 1989 he bought a house at Welton, having sold the one in Sheffield. He entered the Organisation's service on 1 November 1990 and is stationed at its headquarters in Munich.
2. On 12 May 1992 he applied to the Organisation for permission to take home leave at Welton. The EPO then found that the place of his home leave, as provided for in Article 60(2) of the Service Regulations set out in A above, had not yet been established.
3. On 9 June 1992 he asked that Welton should be the place where he might take home leave. His request having been refused on 23 June, he lodged an internal appeal on 2 September 1992. In its report of 21 November 1994 the Appeals Committee recommended rejecting his appeal. The President of the Office did so in a final decision that was conveyed to him in a letter dated 10 January 1995 and is the one impugned.
4. The complainant submits that his closest connections are with England, where his wife's family live; that the address from which he corresponded with the Organisation at the time of recruitment was at Welton and so Welton should be the place of his home leave as well; that he owns a house there; that he has a bank account, savings account, life assurance and private pension in England; that he has a permit for permanent residence in the United Kingdom; that he transfers a part of his salary to that country to repay the mortgage he took out on his house; that he has a will drawn up in England; and that on recruitment the EPO gave him to understand that the place of his residence at that time would be the place where he might take home leave. He cites Judgment 525 (in re Hakin No. 5), whereby the Tribunal allowed an application for review of the place of home leave, and the case of a colleague whom the EPO authorised to take home leave at the place where she had a house.
5. The Organisation replies that the President has correctly applied the criteria for determining the place of the complainant's home leave. It points out that his parents live at Baarn and, contrary to what he implies, he is in regular touch with them. The Appeals Committee found that he had paid three visits to Baarn from England in five years and two in the four years since he had moved to Munich. The Organisation observes that he spent "at least 28 years" in the Netherlands as against some six-and-a-half years in England, including only 19 months at Welton.
6. The decision impugned is a discretionary one. The Tribunal will quash such a decision only if it was taken without authority or if it shows some procedural or formal defect or a mistake of fact or law, or if some essential fact was overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.
7. In the case it ruled on in Judgment 525 the Tribunal held that the EPO had committed a mistake of law in that it had construed Article 60(2) of the Service Regulations as requiring that the place of home leave should be in the country of the employee's birth or nationality or in the country where the employee had been resident before taking up duty. Although "the home will generally be in the country of birth", that is "not an absolute and invariable rule". In that case the Tribunal also found that the Organisation had overlooked essential facts.
8. There is no question of any mistake of law in this case. The only material plea is whether the President overlooked some essential fact or drew clearly mistaken conclusions from the evidence. All relevant factors must be weighed to determine the place with which the complainant has the closest connection outside Germany, the country in which he is stationed. Yet, though the other factors he mentions are relevant, particular account must be

taken of the three criteria in Article 60(2): the place of residence of his own family, the place where he was brought up and the place where he possesses property. Baarn is the place where his family still live and where he himself lived until the age of 19. He was then at university, still in the Netherlands, until the age of 28. His only connections with Welton are that he worked there for 19 months and bought a house there in December 1989.

9. The letter which the Director of Personnel wrote to the complainant on 4 July 1990, at the time of recruitment, merely said "your place of recruitment for the calculation of expenses etc., is considered to be Welton": it did not mention the place where he was to take home leave.

10. The making of payments by the Remuneration Department to service the mortgage on his house at Welton is not decisive: that department does not determine where the place of home leave is to be.

11. The case of the colleague whom he mentions is not similar. She is a citizen of the United Kingdom, besides having a house in that country.

12. In his application of 9 June 1992, in which he asked that Welton be "considered as the place for home leave", he entered against "Place where the employee was brought up" both Baarn and "Sheffield/Welton". That is an extraordinary claim for him to make inasmuch as he had got married, had completed nine years' university education and was aged 28 before he moved to England. His connection with Welton did not even begin until he went there in April 1989.

13. The conclusion is that the President has not overlooked any material fact or drawn any clearly mistaken conclusions. He was entitled on the facts to come to the conclusion which he reached and it is not for the Tribunal to substitute another assessment for his. Since the complainant cites no other grounds for quashing the decision it must stand.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

William Douglas  
Mella Carroll  
Mark Fernando  
A.B. Gardner