P. (No. 2)

v.

EPO

128th Session **Judgment No. 4192**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr E. W. P. against the European Patent Organisation (EPO) on 24 December 2014 and corrected on 24 February 2015, the EPO's reply of 2 June, the complainant's rejoinder of 4 August and the EPO's surrejoinder of 19 October 2015;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the rejection of his 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.

In particular, the Note indicated 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. If, during such periods, the employee had exercised a gainful activity, the Office would assess whether the activity had been ancillary or not, in order to determine whether the stay in the country in question was principally for the pursuit of studies and not for a gainful activity.

The complainant, who holds both German and Austrian nationality, moved to Munich (Germany) in 1988 to complete his university studies. Between 1995 and 2000 he pursued doctoral studies while working at the same time as a research assistant. He joined the EPO in Munich on 2 November 2000. Upon entry, he applied for an expatriation allowance. On the expatriation allowance declaration form he indicated that in the ten years prior to his appointment he had been partly or continuously resident in the country in which he was serving. On 6 November 2000 he was informed that his request could not be granted.

On 15 September 2011 the complainant made another application for the payment of an expatriation allowance indicating that he had resided in Germany exclusively for the purpose of pursuing his studies. On 23 February 2012 the Administration informed him that the decision not to grant him the allowance was maintained. On 2 March the complainant submitted a request for review to the President of the Office against the decision of 23 February 2012, requesting its withdrawal, the retroactive payment of an expatriation allowance, together with interest on the arrears, and compensation of 100 euros per day since 15 September 2011. On 30 April he was informed that the President could not give a favourable reply to his request, which had been referred to the Internal Appeals Committee (IAC) for an opinion.

A hearing was conducted on 2 April 2014. In its opinion of 17 September 2014 a majority of the IAC members noted that the complainant held the nationality of a country other than that in which he was serving (given his Austrian nationality) and that the Lamadie Note applied to his situation in the sense that the period of residence in Germany had to be disregarded because its primary purpose was the completion of studies. The majority recommended that the appeal be

allowed, that the decision of 23 February 2012 be quashed and that the complainant be granted the expatriation allowance with interest. On the contrary, a minority of the IAC members recommended that the appeal be dismissed as unfounded on the grounds that the complainant's gainful activity as a research assistant could not be considered as a secondary activity for assessing the purpose of residence. By a letter of 18 November 2014, which constitutes the impugned decision, the complainant was informed that the President of the Office had decided to follow the IAC's minority recommendation.

The complainant asks the Tribunal to quash the impugned decision, to order the EPO to grant him the expatriation allowance retroactively as from 7 June 2001, the date of the Lamadie Note, together with interest, and to compensate him for the moral injury he considers he has suffered.

The EPO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The issue to be determined is whether the impugned decision, which was issued on 18 November 2014 by the President of the Office, wrongly dismissed as unfounded the complainant's internal appeal. That decision informed the complainant that, in accordance with the opinion of the minority of the IAC, his internal appeal against the EPO's refusal to grant him the expatriation allowance for which he had re-applied on 15 September 2011 was dismissed. The complainant seeks orders quashing the impugned decision; granting him an expatriation allowance retroactively as from 7 June 2001, moral damages and interest.

2. The EPO grants an expatriation allowance to a permanent employee who at the time of taking up her or his duties with it holds the nationality of a country other than the one in which she or he would be serving (the duty country) if that person was not permanently resident in that country for at least three years prior to taking up her or his duties. At the material time, Article 72(1) of the Service Regulations 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."

These are compendious provisions which must both be satisfied by a staff member in order to qualify for the expatriation allowance. The complainant had dual nationality – German and Austrian – at the time when he took up his duties with the EPO on 2 November 2000. Because of his Austrian nationality, he met the requirement of Article 72(1)(a) of the Service Regulations.

3. In his internal appeal, the complainant stated that he had filed the new application for the expatriation allowance in 2011 when he learned that periods of residence for the purpose of studies were not to be taken into account in calculating the period of permanent residence in the duty country (Germany in his case) for the purpose of Article 72(1)(b) of the Service Regulations. According to him, some four days after he joined the EPO on 2 November 2000 he was informed of the refusal to grant him an expatriation allowance on the ground that he had not satisfied the requirements of Article 72(1)(b). He did not appeal that decision but made the new application for the allowance when he discovered in 2011 that he could have qualified for it because of the Lamadie Note, an administrative instruction of June 2001.

4. In his complaint and rejoinder, the complainant relies on paragraphs 5 and 6 of that Note which provide, in effect, that periods of study (in particular PhD) while staying in the duty country are not to be counted when calculating the three-year period of reference under Article 72(1)(b) of the Service Regulations. Paragraphs 5 and 6 state as follows:

> "5. The following periods of residence are not taken into account for the calculation of the period of permanent residence referred to in Article 72(1)(b) of the Service Regulations:
>
> [...]

(c) periods during which the person recruited resided in the country in which he or she would be serving for the principal purpose of pursuing studies.

6. Periods of study (in particular PhD) normally come under [paragraph] 5(c). However, if during such periods the applicant exercised a gainful activity, it is necessary to assess whether this activity was ancillary or not, in order to ascertain whether the stay in the country in question was principally for the pursuit of studies and not for a gainful activity. The mere fact that this activity was remunerated does not suffice to conclude that the gainful activity was predominant."*

5. The Tribunal provided the following perspective on Article 72(1)(b) in light of paragraphs 5 and 6 of the Lamadie Note in Judgment 2924, considerations 3 and 4, which were recently restated in Judgment 3783, under 7:

"3. The complainant makes his argument that he was a permanent resident of the Netherlands for less than three years by reference to an administrative instruction, the so-called 'Lamadie note' of June 2001 prepared by the then Principal Director of Personnel. It is stated therein that for the purposes of Article 72(1)(b) of the Service Regulations 'periods during which the person recruited resided in the country in which he would be serving for the principal purpose of pursuing studies' are not to be taken into account. This qualification is not found in Article 72(1)(b). However, that is not to say that the fact that a person was present in a country for the purpose of pursuing studies is always irrelevant to the question whether he or she was permanently resident in the country.

4. It was held in Judgment 2597, under 5, that '[t]he 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.' Within the context of that test, the fact that a person was present in a country for the purpose of pursuing his or her studies may well be insufficient to establish permanent residence, particularly if there are strong links to another country. [...]"

(See also Judgment 3693, consideration 6.)

* Registry's translation.

6. Since the complainant relies on paragraphs 5 and 6 of the Lamadie Note, what becomes relevant are the findings of the IAC, the statements in the impugned decision and the submissions of the parties on the question whether the complainant was entitled to the allowance by reference to these paragraphs, as they inform the interpretation and application of Article 72(1)(b) of the Service Regulations, in light of the evidence.

The Lamadie Note 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 the present judgment should be viewed with this in mind.

The Tribunal finds that given the foregoing statements on the status of the Lamadie Note and the purpose of the expatriation allowance, it cannot be concluded from the evidence that the complainant was entitled to the allowance pursuant to paragraph 6 of the Lamadie Note by reference to Article 72(1)(b) of the Service Regulations. This is because it is clear that the complainant had resided in Germany for thirteen years, with no evidence of residence during that period in any other country. Moreover, he is a German citizen. Accordingly, his claim for the expatriation allowance was rightly rejected and his complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 16 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