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

FIFTY-SIXTH ORDINARY SESSION

In re BARTHL

Judgment No. 664

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Miss Jonetta Barthl on 9 May 1984, the EPO's reply of 17 August, the complainant's rejoinder of 21 September and the EPO's surrejoinder of 10 December 1984;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 8(c) and (d), 10, 62, 72 and 108(2) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. On 22 September 1981 the complainant, an Austrian citizen, accepted an offer of 11 August from the EPO of an appointment as a trainee examiner in Munich to start on 11 January 1982; she was to be considered to have been recruited in Dusseldorf. On 5 January she telephoned the EPO from a hospital in Munich to say she had had a skiing accident on Christmas Eve 1981 and could not start work on 11 January. Also on 5 January the Principal Director of Personnel said her appointment must be postponed until she was declared physically fit in accordance with Article 8(d) of the EPO Service Regulations. On leaving hospital in January she went to recover in Austria. On 19 February she was given medical clearance in Munich. By a decision of 17 March 1982 she took up duty on 1 April. By a letter of 5 April she claimed payment of the expatriation allowance prescribed in Article 72 of the Service Regulations on the grounds that before appointment she had been in Austria, not the Federal Republic of Germany. Her claim was refused on 23 April. On 16 May she wrote to the Principal Director of Personnel asking that her appointment begin as from 11 January, the original starting date, or, subsidiarily, that she be paid the expatriation allowance. The Director refused on 13 July and on 11 October 1982 she appealed to the Appeals Committee. In its report of 10 November 1983 the Committee recommended that her appointment start as from 11 January 1982. By a letter of 20 February 1984, the impugned decision, the President informed her that he rejected her appeal as time-barred.

B. The complainant submits that her internal appeal was receivable and she correctly exhausted the internal means of redress. The letter of 13 July 1982 from the Principal Director of Personnel did not just confirm earlier decisions. As to the refusal of the expatriation allowance, the reasoning was different: the earlier decision of 23 April said that her stay in Austria was accidental, whereas the letter of 13 July said it was not long enough. As to the starting date of her appointment, the letter of 13 July was in response to her request of 16 May 1982 for review. As to the merits, she endorses the Appeals Committee's conclusions. Article 10 of the Regulations says that "the date on which the [employee's] appointment takes effect ... shall not be prior to the date on which he takes up his duties except in a duly substantiated case of force majeure". The Committee held that it had been in disregard of an essential fact and in breach of good faith not to treat her accident as a case of force majeure. Subsidiarily, should the Tribunal uphold the starting date, she endorses the Committee's conclusions on her claim to expatriation allowance. Since the EPO regarded the original offer of employment as void, it must take account of the new situation at the starting date of the appointment: by then she was living in Austria and there was no reason to think she would have gone back to Germany had the EPO not renewed its offer. The President's decision is tainted with an error of law. The fact that it was the accident that forced her to leave Germany is irrelevant: she qualifies for the allowance under Article 72. She invites the Tribunal to quash the decision of 20 February 1984 and order her appointment as from 11 January 1982 or, subsidiarily, to award her the expatriation allowance as from 1 April 1982; and to order payment of interest at 10 per cent a year on the sums due and award her 2,000 United States dollars in costs.

C. The EPO replies that the complaint is irreceivable because the internal appeal was not filed until 11 October

1982, after the three-month time limit set in Article 108(2) of the Service Regulations. The decisions challenged were dated 17 March and 23 April 1982, and that of 13 July merely confirmed them. Nor can the complainant's letter of 16 May 1982 be regarded as an appeal within the meaning of Article 108, to which it did not even refer. Subsidiarily, the EPO argues that the complaint is devoid of merit. On 11 January 1982 the complainant did not "meet the physical requirements of the post" as stipulated in Article 8(d). Whether the date of appointment might be earlier than 1 April 1982 because of force majeure within the meaning of Article 10 was a matter of discretion. In proper exercise of that discretion the President took the view that force majeure should not count when, as in this case, it was a risk inherent in the official's private life. The complainant's subsidiary claim to the expatriation allowance is also unsound. She was continuously and officially resident in West Germany from 1974 to 25 January 1982, i.e. after the date on which she was originally supposed to take up duty. She was registered as resident in Austria from 28 January. Although strictly she qualifies for the allowance under Article 72 since she has not been "continuously resident" in Germany for at least three years at the time of appointment such an interpretation of the rule would be in breach of good faith. Hampered from starting on the due date by something which had happened in her private life, she was under a duty not to exploit it to her own advantage. She was entitled only to such benefits as she would have had had she been continuously resident in West Germany.

D. In her rejoinder the complainant submits that the only decision taken by the appointing authority within the meaning of the Service Regulations is that of 13 July 1982 by the Principal Director of Personnel. Her complaint is therefore receivable. As to the merits, she submits that Article 8(d) does not apply to her case since it relates to permanent disability. The argument that she should not incur risk would be upheld only if skiing were known to be highly dangerous and recognised as such by insurance companies; but it is not. The EPO admits that the conditions for granting the expatriation allowance are fulfilled. There is no abuse of right since it was because of force majeure that she had to go to Austria. She presses her claims.

E. In its surrejoinder the EPO deals in detail with several points in the rejoinder and seeks to show in particular that the complaint is time-barred because the complainant failed to challenge the decisions of 17 March and 23 April 1982 within the three months' time limit. It discusses the concept of force majeure. It believes it cannot reasonably be held liable for the accident which befell the complainant in her private life and before she had been appointed, or for the consequences thereof. It again asks the Tribunal to dismiss the complaint.

CONSIDERATIONS:

1. By an exchange of letters dated 11 August and 22 September 1981 the complainant, who is an Austrian citizen, was granted an appointment as a trainee examiner at EPO headquarters in Munich, to start on 11 January 1982. Because of injury she sustained while skiing on 24 December 1981 she was not fit to report for duty on 11 January 1982. After periods in hospital in Munich and of convalescence in Austria she took up duty on 1 April 1982. On the same day she received notice of a decision taken by the President of the Office on 17 March 1982 to appoint her as from 1 April.

Her first reaction was to put in a claim for expatriation allowance on 5 April on the grounds that at the date of appointment she had been resident in Austria. The claim was refused a few days later.

She then wrote to the Principal Director of Personnel. The chief claim in her letter to him of 16 May 1982 was that her appointment should take effect as from 11 January 1982, the date in the original contract. Her claim of 5 April, which she repeated, was subsidiary. The EPO rejected her claims, they form the subject of the present complaint, and the Tribunal will take them up in turn.

2. The exchange of letters of 11 August and 22 September 1981 constitutes a contract which was binding on both sides in its entirety. Thus the complainant was required to take up duty on 11 January 1982 and the EPO to appoint her at that date.

She did not report for duty then, and the EPO resolved to wait. Knowing that it was just a matter of time before she would be fit for work, it decided that the contract should merely be suspended. When she was again fit the EPO chose to apply Article 10 of the Service Regulations, which reads: "The written instrument appointing a permanent employee shall state the date on which the appointment takes effect; this date shall not be prior to the date on which he takes up his duties except in a duly substantiated case of force majeure".

What Article 10 says is no more than a corollary of the general rule that a unilateral act may not be retroactive. The

EPO resorted to the article in the belief that one term of the contract which governed relations between the two sides had proved unenforceable because of an incident beyond its control. Its view on this point is sound and the Tribunal upholds it.

Article 10 exempts the case of force majeure. The EPO submits that only force majeure warrants a retroactive act, but that the complainant may not allege it in the circumstances and that, even if it were established, the President would have discretion in the matter which he exercised correctly.

The last part of the argument is mistaken: if there was force majeure the President was bound to accept the consequences in law.

3. If the complaint is to succeed it is necessary and it is sufficient that the complainant's absence from 11 January to 1 April 1982 should have been due to force majeure: in that case the contract ought to have been fully complied with.

Force majeure is an unforeseeable occurrence, beyond the control and independent of the will of the parties, which unavoidably frustrates their common intent.

The plea will not succeed if he who alleges force majeure was himself responsible for the occurrence. Thus it must fail where he was himself negligent or, though not negligent, put himself in such a position as to incur risk of the occurrence. Moreover, the plea will fail even if there is no direct and necessary link between the victim's behaviour and the occurrence.

Applying these principles to the case before it, the Tribunal rejects the complainant's plea. There was, it is true, no negligence in indulging in a sport countless people practise. But no-one who does so can afford to ignore the very real risk of accident. The EPO was right in deciding that it could not be held to the consequences of the breach of contract.

4. The Tribunal turns to the subsidiary claim for expatriation allowance.

Article 72 of the Service Regulations states that an expatriation allowance shall be payable to permanent employees in certain categories -- including the complainant's -- who at the time of appointment are not nationals of the country in which they are serving and have not been continuously resident in that country for three years or more.

5. The complainant satisfies the first of these conditions: she is an Austrian citizen and her duty station is Munich.

6. The complainant maintains that she also satisfies the second condition.

The facts are not in dispute. The complainant had been living in the Federal Republic of Germany since 1974. When she accepted the offer of appointment she left her job in Dusseldorf and continued to live in West Germany. It was there that the accident of 24 December 1981 occurred, and she was in hospital in Munich until 23 January 1982. She then travelled to Austria. She visited Munich on 19 February to get medical clearance and then went back to Austria. She returned to Munich for good on 27 March to take up duty on 1 April.

7. Thus her stay in Austria lasted two months. She submits that that is long enough to support her contention that she had not been continuously resident in West Germany for the previous three years. She states that on arrival in Austria she registered, as Austrian law required, in the municipality of Rosenthal, where she spent the two months.

The EPO Appeals Committee accepted her case, but its reasoning was rather different. The Committee held that, believing as it did that the original offer of appointment was no longer valid, the EPO ought to have accepted what that entailed with regard to the grant of the expatriation allowance by considering the complainant's position at the new date of appointment, 1 April 1982. By then over three months had passed since she had left her employment in Düsseldorf, and she was resident in Austria. Had the EPO not appointed her she might perhaps have sought and found employment in Austria. Her residence in West Germany had therefore, in the Committee's view, been interrupted.

8. The EPO's letter of 11 August 1981 offering the complainant an appointment, which she accepted, stated that Dusseldorf was to be the place of recruitment. Had the contract been fully respected she would have been treated as locally recruited. On this the parties are agreed.

9. For the complainant's claim to succeed she must first show that the delay in her appointment led to full novation of the contract.

But it did not. The exchange of letters did not cease to be valid because the complainant had a skiing accident. Only one term of the contract was altered. The others remained in force and were applied in full. The suspension of the contract did not lead to its frustration. If the complainant's reasoning were correct, the EPO might have refused to appoint her when she eventually became fit to start work. Yet that would have been neither fair nor reasonable.

As to the broader point, the Tribunal cannot allow that a stay of two months in one country for the purpose of convalescence will have the effect of breaking several years' continuity of residence in another. The fact that the complainant had to register in a municipality in Austria cannot be treated as evidence of an intention on her part of leaving German territory for any length of time. Nor, for that matter, does she contend that she took any steps which would suggest she meant to interrupt her residence in West Germany: indeed her correspondence with the EPO at that time shows that she did not.

10. The Tribunal rejects both claims. It therefore dismisses the complaint and need not entertain the EPO's plea that the complaint is irreceivable because the complainant's internal appeal was time-barred.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, Mr. Jacques Ducoux, Vice-President, and the Right Honourable the Lord Devlin, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 19 June 1985.

(Signed)

André Grisel

Jacques Ducoux

Devlin

A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.