**SIXTY-FIFTH SESSION**

# *In re* BENZE (No. 7)

**Judgment 926**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr. Wolfgang Eberhard Benze against the European Patent Organisation (EPO) on 25 January l988, the EPO's reply of 11 April, the complainant's rejoinder of 23 April and the EPO's surrejoinder of 8 July 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 72 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 facts of the case and the pleadings may be summed up as follows:

A. Article 72(1) of the EPO Service Regulations provides for payment of an expatriation allowance to permanent employees in staff categories A, L and B who at the time of appointment are "not nationals of the country in which they are serving". Article 72(2) says that the allowance shall cease if the employee "is transferred to the country of which he is a national"; but 72(3) adds that it shall still be paid to employees "who, although nationals of the country in which they are serving, have been continuously resident for at least ten years in another State at the time of their appointment".

The complainant is a citizen of the Federal Republic of Germany. From 1 February until 30 October 1980 he was employed in the German Patent Office in Munich. He worked for the EPO at Rijswijk from 3 November 1980 until 31 December 1981. After a year's unpaid leave he was at Rijswijk again from 1 January 1983 to 31 August 1986. During his two stints there he qualified for the expatriation allowance under 72(1) but as from 1 September 1986 he was transferred to the Munich office and lost it. On 25 September 1986 he claimed payment under 72(3), alleging that he had not been an established resident of his own country in the ten years up to the date of his appointment to Rijswijk. The Personnel Department rejected his claim in a letter of 20 January 1987 and he lodged an internal appeal on 3 February. In its report of 12 October 1987 the Appeals Committee recommended rejecting his appeal, and a letter of 4 November, the decision he impugns, informed him that the President of the Office accepted the recommendation.

B. The complainant contends that the purpose of 72(3) is to meet the exceptional case of someone who at appointment has lost affinity with his own country because of long residence abroad. Continuous residence in another country is irrelevant: what matters is that the claimant should not have been an established resident of the country of his duty station if he is a citizen of that country. That construction is borne out by the German version of the rule. When transferred to Munich he had not been an established resident of the Federal Republic for many years. In twenty years he had spent only 27 months in the country spread over five periods. He therefore qualifies for the allowance under 72(3).

He alleges breach of the principle of equal treatment. He cites the case of another permanent employee who is a citizen of the Federal Republic, who gets the allowance and who spent over ten years at a university in Austria before joining the EPO in Munich: his own affinity with his country is much weaker since he lived in several countries, and more distant ones.

He asks that the EPO report any case in which a citizen of the country of the duty station gets the allowance. He claims payment of it as from September 1986.

C. In its reply the EPO observes that of the ten years up to the date of his appointment - 3 November 1980 - the complainant had spent the last nine months in Munich, thereby breaking his residence abroad. He therefore fails to satisfy the requirement in 72(3) that he should have been "continuously resident for at least ten years" abroad at the time of appointment. So 72(2) has been correctly applied.

The complainant's interpretation of 72(3) is a distortion because it entails paying the allowance even if at appointment the employee has been continuously resident abroad for less than ten years. Since all three versions of the rules are authentic, why should the German text prevail, even supposing it differs from the English and French? The meaning of the German is unclear. The system of "co-ordinated organisations" uses French and English; the intent of the EPO Administrative Council in adopting 72 was to follow their practice; and the French and English texts do not bear out the complainant's interpretation. None of his arguments warrants departing from the obvious and literal interpretation. In particular the text is not at odds with the purpose of the allowance, which is indeed to meet cases where the employee has no affinity with the country of the duty station. Where the employee is a citizen he will ordinarily have such affinity, but under 72(3) residence outside his own country for at least ten years is recognised as breaking it. It is only reasonable to demand that such residence be continuous because any interruption will restore the affinity.

There is no breach of equal treatment. The case of the other employee differs on the facts in that he had spent at least ten years, without a break, in Austria.

Having applied 72(3) consistently, the EPO has no duty to report on cases in which it pays the allowance thereunder. Besides, the complainant has no right to such information unless there is a presumption of unequal treatment, and there is not.

D. In his rejoinder the complainant enlarges on his earlier submissions. Comparing the German and English texts of 72, he says that the German requires the "putting down of roots", not just a brief stay. His stay in Munich from February to October 1980, while he was with the German Patent Office, was transient; yet it is the sole bar to his getting the allowance under 72(3) and plainly did not restore his affinity with the Federal Republic, the lack of which warrants paying the allowance. The allowance is being paid to others who do have affinity with the country of their duty station. The EPO no longer aims at equality of treatment between its own employees and those of the co-ordinated organisations.

E. In its surrejoinder the Organisation submits that the complainant's rejoinder in no way weakens its case. It discusses the general principles on the interpretation of rules drafted in more than one language, arguing that the complainant's interpretation is tendentious and rebutted by the English term "resident". The fact is that he does not qualify under 72(3): the test of residence is an objective one and he fails because he was living in Munich at appointment. Whatever may have happened since, the EPO Council's intent in adopting the Service Regulations was to keep in line with practice in the co-ordinated organisations.

CONSIDERATIONS:

1. On joining the EPO as a permanent employee in category A the complainant, a citizen of the Federal Republic of Germany, was stationed in its office at Rijswijk, in the Netherlands. There he was paid the expatriation allowance provided for under Article 72(1) of the Service Regulations, which says that such an allowance shall be payable to permanent employees in categories A, L and B who at the time of appointment "were not nationals of the country in which they are serving".

Article 72 goes on:

"(2) This allowance shall cease to be payable if a permanent employee is transferred to the country of which he is a national.

(3) The expatriation allowance shall also be paid to permanent employees in the above-mentioned categories who, although nationals of the country in which they are serving, have been continuously resident for at least ten years in another State at the time of their appointment, no account being taken of previous service in their home country's administration or with other international organisations".

On his transfer to the EPO office in Munich the complainant was no longer paid the allowance.

2. The issue in this case is whether, as he contends, the complainant is entitled under 72(3) to payment of the allowance while stationed in his own country.

3. The complainant was rightly paid an expatriation allowance, in accordance with 72(1), when he was employed at

Rijswijk, since he was not a national of the Netherlands, and he is rightly refused the allowance under 72(2), on transfer to Munich, because there he is stationed in his own country.

4. But he is founding his claim on 72(3) and contending that, though a citizen of the Federal Republic, he is entitled to the allowance while stationed in Munich because he did not have established residence in his own country in the ten years preceding the time of appointment. He says, quite correctly, that the purpose of 72(3) is to meet the exceptional case of someone who at appointment has lost affinity with his own country because of long residence abroad. He argues that continuous residence in another country is irrelevant: to qualify for the allowance it suffices that an employee who is a national of the country of his duty station should not have been an established resident of that country. That interpretation, he submits, is borne out by the German version of 72(3), which uses the term "ständig ansässig", to be translated "permanently established" or "domiciled". Even though he had spent several periods of weeks or even months in the Federal Republic in the ten years before transfer he had lived in distant countries for twenty years and at the time of appointment was not permanently settled in the Federal Republic. Throughout the 20 years he had spent only 27 months in that country, spread over five periods.

5. The complainant's arguments are mistaken. His interpretation is untenable because it entails paying him the allowance even though at appointment he had been continuously resident abroad for less than ten years. Since all three versions of the Service Regulations - English, French and German - are authentic, the German cannot be followed if it is at odds with the other two versions.

6. It is plain from the text that the allowance is to be refused to an employee who is a citizen of the country where he is stationed unless at the time of appointment he has been continuously resident in another country for at least ten years. That is indeed the purport of the English and French texts, which are clear: the terms "resident" and "résidaient" do not necessarily connote permanent or established residence. The English and French versions being explicit, the German is to be interpreted in a way that reconciles all three; and in its English and French versions 72(3) requires that a citizen of the Federal Republic serving at Munich shall be paid the allowance only if at the time of appointment he has been "continuously resident for at least ten years" outside the Federal Republic.

7. The complainant having joined the EPO on 3 November 1980, the critical period is from 3 November 1970 up to that date. From 1 February until 30 October 1980 he served in the Patent Office of the Federal Republic at Munich and he and his family had an address there. So at the time of appointment to the EPO he had not been "continuously resident" for at least ten years outside the Federal Republic. He had at appointment been continuously resident abroad for only 9 years and 3 months and he therefore fails to qualify under 72(3).

8. The purpose of the allowance is, after all, to meet the case where the employee has no affinity with the country of his duty station. Although the employee who is a citizen will ordinarily have such affinity, 72(3) recognises that residence abroad for at least ten years before appointment will break it. But it is only reasonable to require that the residence abroad be continuous because any interruption of it will restore the affinity.

9. The case the complainant cites of another citizen of the Federal Republic and permanent employee who does get the allowance is different from his own in that the other employee spent over ten years at a university in Austria before joining the EPO and so qualifies for the allowance under 72(3).

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 8 December 1988.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner

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