

H.-C.

v.

EPO

128th Session

Judgment No. 4189

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs C. H.-C. against the European Patent Organisation (EPO) on 15 May 2015 and corrected on 9 June, the EPO's reply of 23 September, the complainant's rejoinder of 7 November 2015 and the EPO's surrejoinder of 9 February 2016;

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 her 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 in paragraph 5(b) that periods during

which the person recruited had resided in the country as the dependent child of an expatriated civil servant were not to be taken into account in calculating the three-year reference period.

The complainant, a British national, moved to Munich (Germany) with her three children in December 2003. Her husband, a civil servant, had been seconded to the European School Munich for a non-renewable nine-year term expiring in September 2012. The complainant joined the EPO on 1 September 2010 after having worked for the Organisation on a freelance basis since January 2007. On 11 April 2011 she made an “exceptional claim” for an expatriation allowance invoking the “highly unusual nature” of her residence in Germany, which was only temporary as it was limited by the duration of her husband’s secondment. Referring to the Lamadie Note, she argued that the exception provided for in paragraph 5(b) concerning children of expatriated civil servants should be extended to include the spouse of a temporarily seconded civil servant.

Her request having been rejected on 20 July, she made another claim for an expatriation allowance on 7 September 2011 stating that, in case of refusal, her letter was to be considered as an internal appeal. On 7 November 2011 she was informed that the President of the Office considered that her request could not be allowed and had referred the matter to the Internal Appeals Committee (IAC) for an opinion.

A hearing was conducted on 26 June 2014. In its opinion of 7 October 2014, the IAC unanimously found that the appeal was receivable. On the merits, a majority of the IAC members considered that the appeal was unfounded and recommended that it be dismissed, whereas a minority of the members recommended extending the scope of paragraph 5(b) of the Lamadie Note to cover the complainant’s situation and thus allowing the appeal. By a letter of 13 February 2015, which constitutes the impugned decision, the complainant was informed that the President of the Office considered her appeal receivable only to the extent that it concerned the application of the Lamadie Note to her case, and had decided to dismiss it as unfounded in accordance with the IAC majority opinion.

The complainant asks the Tribunal to quash the impugned decision, to order the EPO to grant her the expatriation allowance retroactively

as from 1 September 2010, and to compensate her for the moral injury she considers she has suffered. She also claims costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable *ratione temporis* and, to the extent that it is receivable, as unfounded.

CONSIDERATIONS

1. The complainant challenges the impugned decision, dated 13 February 2015, in which the President of the Office accepted the recommendation of the majority of the IAC and dismissed the internal appeal she had filed on 7 September 2011 as a new request for an expatriation allowance. This was her second request as she had made a prior “exceptional” request by letter dated 11 April 2011 and had been informed by letter dated 20 July 2011 that “the decision not to grant [her the] expatriation allowance [was] upheld”. This was an apparent reference to the decision that was made when she took up her appointment with the EPO on 1 September 2010 which had not been communicated to her then.

2. An expatriation allowance is granted to staff members who are entitled to it pursuant to Article 72(1) of the Service Regulations. At the material time it 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. The complainant had to satisfy both in order to qualify for the expatriation allowance. She met the requirement of Article 72(1)(a) as she was a British national at the time when she took up her duties with the EPO on 1 September 2010.

3. The complainant requested the allowance pursuant to Article 72(1)(b) of the Service Regulations. Alternatively, she requested it under what she referred to as “the decision of 07-06-2001, evident in the [Human Resources] Best Practice database, in which exceptions to the rule stated [in Article 72(1)(b)] are described”. For this purpose she relied, in particular, on the provision which stated that an “expatriation allowance can be granted, even if the last requirement is not met, when the employee lived in the country of employment due to the following reasons: 1) because the employee’s father was an expatriated civil servant working there”. This is a reference to paragraph 5(b) of the Lamadie Note.

4. The parties are in accord that the complainant joined the EPO on 1 September 2010 as an A2 grade contractor in Directorate-General 4 in the EPO’s Office in Munich. This was a contract for three years due to expire on 31 August 2013. As she met the requirement of Article 72(1)(a), the question is whether she also met the requirements of Article 72(1)(b) in that she was not permanently resident in Germany in the three years prior to 1 September 2010, or, alternatively, whether she had an entitlement to the allowance under the Lamadie Note as she asserts. The Tribunal is prepared to assume for the purposes of this judgment that an entitlement may have been created by the Note but this is not correct as explained in Judgment 4188, under 5. In rejecting the complainant’s request under Article 72(1)(b), the EPO relevantly stated in its letter dated 20 July 2011 that from the documents on the complainant’s file it appeared that she had been resident in Germany since September 2003 [*recte* December 2003] and that, furthermore, she had been employed there since September 2007 [*recte* January 2007]. This was a reference to the fact that the complainant worked for the EPO as a “freelance” from January 2007 until her appointment on 1 September 2010. The letter concluded that the complainant “effectively left the United Kingdom with the intention to settle in Germany for a considerable length of time, i.e. [nine] years”, which coincided with the length of her husband’s contract. In rejecting the request under the plea based on the Lamadie Note, the letter stated: “[i]t is finally pointed out that the decision of 7 June 2001, as you indicate yourself, applies to **children** of international civil servants. You, as a spouse of [a] seconded staff, are in a different factual

and legal situation and thus this exception is not applicable in your case.” Given that paragraph 5(b) of the Lamadie Note is for the benefit of a dependent child of an expatriated civil servant, there is no principle on which to extend that benefit to any other person. The complainant’s plea on this ground is therefore unfounded.

5. It is noteworthy that the complainant’s second request of 7 September 2011 for the allowance was made expressly in response to the EPO’s letter to her dated 20 July 2011 rejecting her first application. She requested the Organisation to consider her application for the expatriation allowance again and essentially reiterated the pleas set out in her first application. The EPO accepted it as a request for the review of its decision of 20 July and, in a letter dated 7 November 2011, it again rejected the application and referred the matter to the IAC as the complainant had requested. The EPO determined that the complainant had left the United Kingdom with the intention to settle in Germany for nine years and that despite her retaining links with the United Kingdom she had moved the centre of gravity of her life to Germany and had thereby interrupted her permanent residence in the United Kingdom in the sense explained by the Tribunal in consideration 3 of Judgment 2653.

6. In the IAC proceedings, the EPO contended that the appeal was time-barred because the complainant made the request for the allowance on 11 April 2011 when she knew that she would not be granted the allowance at the end of September 2010 at the latest upon receipt of her first payslip, and, accordingly, her appeal was not lodged within three months, as Article 108(2) of the Service Regulations required. The IAC unanimously determined that the appeal was “admissible”. This, it stated, was because the Lamadie Note, which was centrally important to the complainant’s case and was only available to a limited number of staff members, was first mentioned in the complainant’s request of 11 April 2011. The Office had replied to it on 20 July 2011. The IAC concluded that given that it considered that the Lamadie Note amounted to “facts or evidence of decisive importance” of which the complainant was not and could not have been aware, “the O[rganisation]’s confirmation, after review, of the original decision [did] set a new time limit”.

The letter, dated 13 February 2015, which informed the complainant of the IAC's opinion, stated that the President of the Office considered the appeal "receivable only inasmuch [as] the application of the Lamadie Note and its possible effect on the initial refusal to grant the allowance [were] concerned, but unfounded in accordance with the majority opinion of the IAC", as paragraph 5(b) of the Note for children of expatriated civil servants was not applicable to spouses. The EPO notes this in its pleadings in the Tribunal, but insists that the internal appeal was time-barred so that the complaint should be dismissed pursuant to Article VII, paragraphs 1 and 2, of the Tribunal's Statute. The Tribunal does not agree.

7. At the material time Article 106(1) of the Service Regulations required that any decision relating to "a specific individual to whom these [...] Regulations apply shall at once be communicated in writing to the person concerned [and that a] decision adversely affecting a person shall state the grounds on which it was based". The decision not to grant the expatriation allowance to the complainant was an individual decision that related to and adversely affected her. The EPO was therefore required to communicate that decision to her in writing in accordance with Article 106(1). Article 106(2) of the Service Regulations permitted the complainant to request that a decision be taken on which the President of the Office was mandated to notify her "of his reasoned decision within two months from the date on which the request was made". The complainant was first so notified in the letter of 20 July 2011 rejecting the first request for an expatriation allowance. Accordingly, her letter of 7 September 2011 which asked the EPO to refer her case to the IAC in the event that the decision not to grant her the expatriation allowance was not reversed constitutes her internal appeal contemplated in Articles 107 and 108 of the Service Regulations against the decision of 20 July 2011 which is the act that adversely affected the complainant. It was submitted within the three-month time limit pursuant to Article 108(2) of the Service Regulations. It was not therefore time-barred and her complaint is accordingly receivable.

8. The Tribunal has explained the rationale and context for the grant of the expatriation allowance, and has given guidance as to the interpretation of the terms "permanently resident" for the purpose of

Article 72(1)(b), in the following statements in Judgment 2865, under 4(b), for example:

“The expatriation allowance is additional remuneration which is paid in order to permit the recruitment and retention of staff who, on account of the qualifications required, cannot be recruited locally. This allowance compensates for certain disadvantages suffered by persons who are obliged, because of their work, to leave their country of origin and settle abroad. The length of time for which foreign permanent employees have lived in the country where they will be serving, before they take up their duties, forms an essential criterion for determining whether they may receive this allowance (see Judgment 2597, under 3).

The country in which the permanent employee is permanently resident, within the meaning of Article 72(1)(b) of the Service Regulations, is that in which he or she is effectively living, that is to say the country 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. A permanent employee interrupts his or her permanent residence in a country when he or she effectively leaves that country with the intention – which must be objectively and reasonably credible in the light of all the circumstances – to settle for some length of time in another country (see Judgment 2653, under 3).” (Emphasis added.)

9. The IAC relied on this statement of principle, but the complainant insists that it applied it wrongly. She stated that the IAC should have recognized that her only link to Germany was her residence there and that all other links, which were her closest ones, objective and factual, remained with the United Kingdom. She lists those links as follows: the retention of a family home and its availability to the family as it was not rented out; none of her three children had entered into the German school system; they made frequent return visits thereby retaining and nurturing family ties in the United Kingdom; there was “no deepened integration with Germany” and no membership of political parties or other forms of social organization; she retained English as her principal language, received child benefits from the United Kingdom, retained entitlement to medical treatment under the British national health service and did not apply for German citizenship. The complainant is mistaken given that these considerations are irrelevant to a determination whether an employee was permanently

resident in a duty country (Germany in this case) for the purpose of Article 72(1)(b) of the Service Regulations. The test is one of simple residence (see, for example, Judgments 1099, under 8, and 2596, under 3). It is common ground that at the time when the complainant took up her duties with the EPO, she had resided continuously in Germany since December 2003.

10. In the present case, the complainant took up her duties with the EPO on 1 September 2010. The relevant three-year period for the purpose of the present case was from 1 September 2007 to 31 August 2010. During that period, the complainant worked under what the parties refer to as a “freelance” contract or “as an external member of staff” with the EPO. As the EPO has said, correctly, under that work arrangement, at the time when the complainant took up her duties with the EPO on 1 September 2010, she had been working with it “as a self-employed consultant for remuneration and salaries as from January 2007”. As that arrangement does not constitute previous service with an international organisation, that exception in Article 72(1)(b) does not apply to qualify her for the expatriation allowance thereunder. Her claim to the allowance under Article 72(1) of the Service Regulations therefore fails.

11. In the foregoing premises, the 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