

**L. P.**

**v.**

**EPO**

**128th Session**

**Judgment No. 4190**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs R. L. P. against the European Patent Organisation (EPO) on 22 May 2014 and corrected on 1 August, the EPO's reply of 18 December 2014, the complainant's rejoinder of 28 February 2015 and the EPO's surrejoinder of 3 June 2015;

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

Having examined the written submissions;

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 taking up their 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. The Note indicated, for example, 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.

The complainant, a Spanish national, went to Munich in October 2001 to improve her proficiency in the German language. She attended German language courses as from 2002 and worked on a freelance basis as a Spanish teacher in a school a few hours per week. She joined the EPO on 1 March 2005 and, that same day, applied for an expatriation allowance. On the expatriation allowance declaration form she indicated that she had not been continuously resident in Germany in the three years prior to taking up her duties. Indeed, between May and August 2002, she had returned to Spain on two occasions. On 20 October 2009 she was informed that the conditions for granting her the expatriation allowance were not met since her short stays in Spain had not interrupted her permanent residence in Germany.

In January 2010 the complainant asked the Administration to re-examine her case, but she was informed on 9 March that the decision not to grant her an expatriation allowance was maintained. On 6 May 2010 she submitted a request for review to the President of the Office, reiterating her request for the payment of the allowance as from 1 March 2005, together with interest. On 6 July 2010 she was informed that the President could not give a favourable reply to her request, which had been referred to the Internal Appeals Committee (IAC) for an opinion.

A hearing was conducted on 5 June 2013. In its opinion of 17 December 2013, the IAC unanimously found that the period of time during which the complainant had attended German language courses should have been disregarded according to the Lamadie Note, and that she had provided sufficient arguments to show that she had interrupted her permanent residence in Germany during the three-year period prior to taking up her duties. The IAC recommended that the appeal be allowed in its entirety and that the complainant be granted the expatriation allowance retroactively with interest on the arrears. By a letter of 3 March 2014, which constitutes the impugned decision, the complainant was informed that the President of the Office had decided to dismiss her appeal as unfounded.

The complainant asks the Tribunal to quash the impugned decision and to order the EPO to grant her the expatriation allowance retroactively as from 1 March 2005, together with 5 per cent interest per annum.

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

### CONSIDERATIONS

1. The complainant requests an oral hearing under Article 12, paragraph 1, of the Tribunal's Rules. The Tribunal however notes that the parties have presented ample submissions and documents to permit the Tribunal to reach an informed decision on the case. The request for an oral hearing is therefore refused.

2. The issue to be determined is whether the impugned decision, which was taken on 3 March 2014 by the President of the Office, wrongly dismissed the complainant's internal appeal against the decision not to grant her an expatriation allowance when she joined the EPO on 1 March 2005. In that decision, the President did not accept the IAC's unanimous recommendation that the complainant be granted the allowance retroactively from the date when she joined the EPO, with interest at 5 per cent per annum.

3. The IAC found that the complainant was entitled to the grant of an expatriation allowance under Article 72(1) of the Service Regulations as she did not hold German nationality when she took up her duties with the EPO and she was not permanently resident in Germany during the period of at least three years prior to joining the EPO. Alternatively, the IAC found that the complainant was entitled to the allowance by virtue of paragraphs 5 and 6 of the Lamadie Note because part of the language study programme which she had pursued in Germany as from 2002 fell within the subject period and that was a relevant period of study which should have been disregarded in calculating the period during which she was permanently resident there under Article 72(1)(b) of the Service Regulations. These findings were not accepted in the impugned decision. The complainant maintains her pleas on these two grounds in her complaint.

4. 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 met the requirement of Article 72(1)(a) as she was a Spanish national at the time when she took up her duties with the EPO in Germany on 1 March 2005.

5. Paragraphs 5 and 6 of the Lamadie Note, on which the complainant relies, 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.”\*

---

\* Registry’s translation.

6. Inasmuch as the complainant met the requirement of Article 72(1)(a) of the Service Regulations, the question is whether she also met the requirements of Article 72(1)(b) thereby entitling her to the grant of an expatriation allowance. The Tribunal has explained the rationale and context for the grant of the expatriation allowance, and 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.)

7. It is common ground that the relevant three-year period to be considered is from 1 March 2002 to 1 March 2005. The complainant arrived in Germany in October 2001 to improve her proficiency in the German language. In her submissions before the IAC, dated 29 May 2013, she accepted that she was permanently resident in Germany at the time when she took up her duties with the EPO. She stated that “[f]rom September 2002 onwards, [she] came to Germany with the intention of starting a new period of her life in Munich”. She had in fact returned to Germany from Spain on 1 September 2002. The question is whether she was also permanently resident in Germany, by reference to Article 72(1)(b)

of the Service Regulations, for the period from 1 March 2002 to 31 August 2002.

8. The facts show that on 1 March 2002 the complainant was in Germany pursuing a ten-week German language course and commenced teaching on a part-time basis before she returned to Spain on 18 May 2002. She then returned to Germany on 9 June 2002 for ten days to complete a seminar and also to complete her teaching hours in a school by the due date: 17 June 2002. According to the complainant, prior to returning to Germany on that occasion, as she had done before, she again requested permission from the Spanish unemployment authorities to travel abroad to study and was advised to ask for six months: the maximum time permitted. She accordingly requested permission for the period from 10 June to 9 December 2002 to cover any eventuality. On or about 19 June 2002 she travelled to France and she returned to Spain late in June or early July 2002. She sought employment in Spain until 1 August 2002 and was registered with the unemployment office there from 1 August to 1 September 2002 when she returned to Germany.

9. In finding that the complainant had “indeed interrupted her residency in Germany towards the end of June/beginning of July 2002” when she returned to Spain and was therefore entitled to an expatriation allowance, the IAC doubted the EPO’s assertion that the complainant’s request for permission from the Spanish unemployment authorities to travel abroad for six months until December 2002 was evidence that she did not interrupt the period that she was permanently resident in Germany. It concluded that “[i]t can only be inferred that her request [was] aimed at covering at least the period until the end of June 2002”. The IAC based its finding on the evidence that the complainant was aware of a vacancy notice in the Office which was published in April 2002 but she did not apply for a job there until the end of September 2003, and, secondly, because when she ended her teaching at the school at the end of the first semester (17 June 2002) she did not then express an intention to teach there during the second semester.

10. The Tribunal's assessment accords with that of the IAC and not with that of the President. The complainant was not permanently resident in Germany for the purpose of Article 72(1)(b) of the Service Regulations. Accordingly, it is unnecessary to consider her plea by reference to the Lamadie Note. Her complaint is well founded.

11. In the foregoing premises, the impugned decision dated 3 March 2014 will be set aside. The EPO will be ordered to pay the complainant an expatriation allowance and to pay her arrears thereof from 1 March 2005 with interest at the rate of 5 per cent per annum until the date of final payment.

#### DECISION

For the above reasons,

1. The impugned decision dated 3 March 2014 is set aside.
2. The EPO shall pay the complainant the expatriation allowance to which she is entitled under Article 72(1) of the Service Regulations with effect from 1 March 2005.
3. The EPO shall pay the complainant all arrears of the expatriation allowance to which she is entitled under point 2 of this decision, together with interest thereon at the rate of 5 per cent per annum until the date of final payment.
4. All other claims are dismissed.

In witness of this judgment, adopted on 17 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