NINETY-SIXTH SESSION

Judgment No. 2278

The Administrative Tribunal,

Considering the complaint filed by Mr A. H. against the European Patent Organisation (EPO) on 31 March 2003, the Organisation's reply of 8 July, the complainant's rejoinder of 4 August and the EPO's surrejoinder of 22 September 2003;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Article 23 of the Service Regulations for Permanent Employees of the European Patent Office, headed "Residence", provides as follows:

"A permanent employee shall reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties."

The complainant was born in 1968 and has British nationality. He joined the European Patent Office - the EPO's secretariat - in 1997 as an examiner at grade A2, based in The Hague. His current grade is A3. The letter containing the EPO's initial offer of employment included the following statement:

"The Office expects you to reside in the Netherlands and at a place at no greater distance from the Office than is compatible with the proper performance of your duties (Article 23 of the Service Regulations)."

For the first three and a half years of his employment, the complainant lived in the Netherlands, within ten kilometres of the EPO's premises. In November 2000 he purchased a house in Essen (Belgium), situated close to the Dutch border at a distance of 89 km from his place of work.

The relevant provisions of Article 1 of the EPO's Regulations for the Grant of Home Loans read as follows:

"(1) Any permanent employee of the European Patent Office having active status shall be entitled to apply for a loan for the building, purchase or conversion of residential property that is his main residence or is intended to become same after his retirement. [...]

(2) The property must be a residence within the meaning of Article 23 of the Service Regulations [...]."

In December 2000 the complainant applied for an EPO home loan for his house in Belgium. By a note dated 25 January 2001 the Director of Personnel informed him that he was not allowed to take up residence in Belgium, since he had accepted the terms of the letter offering him employment, and particularly the "condition" that he reside in the Netherlands. An exchange of correspondence ensued, in which the complainant contested the decision of 25 January, but the Administration maintained its position and on 8 March 2001 he was informed by the Director of Personnel that his address in the Netherlands "[would] continue to be considered as [that of his] residence in accordance with Article 23 of the Service Regulations". The complainant replied that if this meant that the decision of 25 January had not been withdrawn, he was initiating an internal appeal against it.

Six months later, another member of the Personnel Department contacted him and invited him to sign and return the above-mentioned letters of 25 January and 8 March 2001. The complainant wrote back on 19 November 2001, referring to his earlier replies. On 17 January 2002 he was informed that following an initial examination of the case, the President of the Office had concluded that the applicable rules had been correctly applied and the case

had therefore been referred to the Appeals Committee.

In its opinion of 6 November 2002, the Appeals Committee unanimously recommended that the appeal be allowed. It considered that the Office should, in principle, be entitled to establish a general rule, based on criteria such as travel times or kilometre limits, to determine whether the distance of a staff member's residence from his place of employment complies with Article 23 of the Service Regulations. Indeed, it considered that a general rule would be conducive to equal treatment of staff. However, the rule invoked by the Office in this case, namely that the residence should be within one hour's travel time by public transport, was considered by the Appeals Committee to be inapplicable, firstly because that rule had been established in order to limit claims to expatriation allowances by Belgian nationals living in Belgium and working in The Hague, and not for the purpose of restricting the right of staff members to choose their place of residence, and secondly because the Office had not applied it to another staff member who was in a similar situation. The Committee also found that the Office's "expectation" as to the place where the complainant should reside, as mentioned in the letter offering him employment, did not constitute a contractual obligation.

On 14 January 2003 the complainant was informed that the President had decided to reject his appeal, "for the reasons put forward by the Office during the appeals proceedings". That is the impugned decision.

B. The complainant contends that the Office's refusal to allow him to take up residence in Belgium is contrary to Article 23 of the Service Regulations. He submits that the possibility that permanent employees may reside in places other than the place where they are employed is clearly contemplated by the wording of Article 23. Moreover, by rapidly promoting him and rating his performance as "very good", the Office acknowledged that his work is of a high standard, and it can therefore hardly argue that the distance between his residence and his place of work is incompatible with the proper performance of his duties.

The complainant also asserts that the impugned decision contravenes several articles of the Universal Declaration of Human Rights, as well as the Declaration adopted by the EPO's Administrative Council at its 55th Meeting, affirming the Office's adhesion to "general legal principles, including human rights". Furthermore, he considers that the expectation expressed in the letter by which the Office offered him employment cannot be construed as a binding contractual obligation.

Lastly, he accuses the Office of unequal treatment, drawing attention to other cases in which staff members have been allowed to take up residence in Belgium, and particularly the case of a colleague in an identical situation who was granted a home loan in respect of a property in the Dutch/Belgian border region situated at a distance from his place of work comparable to that of his own property.

The complainant asks the Tribunal to set aside the decision of 14 January 2003, and also the Director of Personnel's decision of 25 January 2001, and to order the Office to write him a letter officially acknowledging his right to reside in Essen. He claims material damages to compensate for the losses he has incurred as a result of having his home loan application "effectively blocked", having to maintain a second residence in the Netherlands and use annual leave and home leave in order to prepare his case. He also claims moral damages in respect of the trauma and anxiety caused by the decision of 25 January 2001, the EPO's interference in his private life and its refusal to accept the unanimous recommendation of the Appeals Committee. Lastly, he claims 500 euros in costs.

C. The EPO submits that the complainant's claims for material and moral damages are irreceivable, since he did not claim damages during the internal appeal proceedings.

It considers that the definition of what is "compatible with the proper performance of [a permanent employee's] duties" is a matter for the President to determine in the exercise of his discretion, and the President's decision on such matters is subject only to limited review by the Tribunal.

The Organisation contends that pursuant to a decision taken in the 1980s by the then President, if an employee needs more than one hour to commute between his place of residence and his place of work he will not be considered as meeting the requirements of Article 23. It acknowledges that this decision was originally associated with the Office's desire to prevent Belgian nationals working in The Hague from claiming an expatriation allowance whilst residing in their home country. However, it points out that in the complainant's case this is irrelevant, since as a British national working in The Hague he would be entitled to an expatriation allowance irrespective of whether his residence was in Belgium or the Netherlands. Nevertheless, according to its

interpretation of Article 23, staff employed in The Hague are obliged to reside in the Netherlands, and that obligation reflects the Office's legitimate interest in securing the "uninterrupted and predictable discharge by its staff members of their duties".

The EPO states that it listed the complainant's conditions of employment in its letter offering him employment, and that since he accepted its offer without querying those conditions it was entitled to expect that he would also conform to its expectations as to his place of residence.

It dismisses his allegations of unequal treatment, stating that the small number of staff concerned were former members of the International Patent Institute who had been living in Belgium at the time when the Institute was absorbed into the EPO.

D. In his rejoinder the complainant reiterates his arguments at length. He accuses the defendant of failing to address the issues raised in his complaint and of giving an incomplete presentation of the facts. He maintains that the Office's interpretation of Article 23 constitutes a violation of human rights, particularly in that it denies him his freedom to choose his place of residence, and he insists that his claim for damages is receivable.

E. In its surrejoinder the defendant Organisation maintains its arguments in full, including its objection to receivability. It denies that its interpretation of Article 23 is in breach of human rights, noting that certain principles enshrined in the Universal Declaration of Human Rights may vary in scope according to the context. The "one hour public transport rule" was adopted to ensure that Article 23 would be applied uniformly. Moreover, as far as the Netherlands is concerned, it was considered that a residence situated within the territory of the Organisation's host state and no further than 100 km from the Office's premises complies with Article 23.

The Organisation submits that the complainant's reference to his good performance is irrelevant, since its interpretation of Article 23 is based on "the average performance of employees", and on the "risk" that an excessively distant place of residence may prove disruptive to the proper running of a department. It dismisses his example of a colleague who allegedly received a home loan in similar circumstances, since the residence in question was in fact located in the Netherlands and within 100 km of the Office's premises.

Lastly, the Organisation contends that the complainant purchased his house in Belgium before seeking advice on home loans from the appropriate sources. Had he consulted the officer in charge of processing loan applications in due time, he would have been told that a residence in Belgium does not comply with Article 23.

CONSIDERATIONS

1. The complainant, a British citizen, is employed by the EPO in The Hague. The EPO's original written offer of employment, accepted by the complainant, contained the following statement: "The Office expects you to reside in the Netherlands and at a place at no greater distance from the Office than is compatible with the proper performance of your duties (Article 23 of the Service Regulations)."

2. Article 23 reads as follows:

"A permanent employee shall reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties."

3. In November 2000 the complainant purchased a house in Essen, which is in Belgium, close to the Dutch border, where he intended to reside. His property is less than 100 km from his place of work. When he applied for an EPO home loan in respect of this property, he was informed by the Office that he was not allowed to reside outside the Netherlands.

4. His attempts to obtain a more favourable decision from his superiors were unsuccessful and he lodged an internal appeal. The Appeals Committee, in a detailed and closely reasoned report, unanimously recommended that his appeal be allowed. The President, however, refused to follow that recommendation. A letter written on his behalf and dated 14 January 2003, stated:

"On the 15.11.2002 the President received the opinion of the Internal Appeals Committee dated 6.11.2002

concerning the place of your permanent residence (Article 23 of the Service Regulations).

I was asked to inform you that after careful consideration of the recommendation of the Committee the President has decided that the reasons which appear therein are not convincing. He thus decided to reject the appeal for the reasons put forward by the Office during the appeals proceedings."

5. That is the impugned decision.

6. The complainant argues that since Essen is situated some 89 km or 57 minutes' travel time from his place of work, and since his work performance is acknowledged by the Office to be very good, the EPO's attempt to prevent him from residing outside the Netherlands is contrary to the Universal Declaration of Human Rights and to the EPO Service Regulations. He also alleges unequal treatment, referring to colleagues who have been allowed to reside in Belgium and who have obtained EPO home loans for Belgian properties. He asks the Tribunal to set aside the impugned decision and to award him material and moral damages, and costs.

7. The EPO submits that his claims for material and moral damages are irreceivable since he did not claim damages during the internal appeal proceedings. It invokes the President's discretion to determine what is "compatible with the proper performance of [a permanent employee's] duties" and submits that Article 23 has been interpreted since the 1980s as implying a journey time of no more than one hour by public transport.

8. It is manifest that the impugned decision cannot be allowed to stand.

9. In the first place, the Tribunal has repeatedly stressed the necessity for administrative decisions to be properly supported by reasons. That is especially the case where, after an elaborate internal appeal procedure in which each side has filed extensive and detailed pleadings, the executive head of an international organisation, acting in a quasi judicial capacity and as the penultimate arbiter of disputes between the administration and the staff, decides not to accept the recommendation of the internal appellate body. In Judgment 2092, under 10, the Tribunal said:

"When the executive head of an organisation accepts and adopts the recommendations of an internal appeal body he is under no obligation to give any further reasons than those given by the appeal body itself. Where, however, [...] he rejects those recommendations his duty to give reasons is not fulfilled by simply saying that he does not agree with the appeal body."

10. As the titular head of the very administration whose conduct is being called into question, the President of the Office must be scrupulous in the performance of his function as final decision-maker in internal appeals. It is his duty not only to be fair and objective; his conduct must also make it manifest that he has been so. It is not enough to state, as the President appears to do in the impugned decision, that he thinks the administration has put forward the better case. That is not a reason but a conclusion. The internal appellate process is designed and intended to provide fair, satisfactory and rapid resolution of staff grievances in international organisations. To treat it in the cavalier manner displayed in the present case tends to throw the whole process into disrepute. That is not in the best interests of anybody, least of all the Organisation itself. For its failure to respect an essential formality, the decision must be quashed.

11. But there is more. The impugned decision is not only bad in form. It is flawed in substance as the Appeals Committee so conclusively demonstrated in its report. The Tribunal cites and adopts the following passages which are fully supported by documentary references:

"4. <u>Requirement to reside in the Netherlands</u>

20. The purpose of the 'one-hour rule' renders it open to objection. The DG 1 circular dated 24 September 1990, and even more clearly the note from Personnel dated 7 November 1996, show that the aim was to prevent employees from taking up residence outside the Netherlands. The memo of 14 January 1998 from the Principal Director Personnel explains, in this connection:

'The rule is connected with a problem arising with the former [International Patent Institute]. Belgian employees were living in Belgium and working in The Hague (and were even receiving an expatriation allowance). This was seen as contravening the [Service Regulations]. DG 1 therefore published a circular making it clear that residence in Belgium constitutes a breach of the obligation under Article 23 (the border is more than an hour away from The Hague). Home loans for "residences" in Belgium are therefore no longer granted. This was eventually accepted by

the staff.'

This indicates that the rule was not based on the question of what distance from the place of employment was no longer compatible with the proper performance of the employee's duties. Instead, the key issue was the expatriation allowance for Belgian nationals. The residence obligation was restrictively interpreted in such a way as to exclude residence outside the Netherlands. Within the Netherlands, however, the Office accepts any residence within a 100 km radius of the place of employment (see the [Office's] statement of 9 October 2002).

21. The one-hour rule is therefore based on extraneous considerations which lead to a limitation, beyond the requirement of Article 23, of the employee's right to freedom of residence.

5. Principle of equal treatment

22. The case of the EPO employee residing in St. Willebrord/Netherlands shows that the Office does not only take into account the time required for travel by public transport. In the case in question, the travel time is around two hours. The Office has agreed to residence (in the Netherlands), since Rijswijk can be reached in approximately 50 minutes by car and St Willebrord is less than 100 km from the place of employment [...].

23. It is doubtful whether the travel time by car is an appropriate criterion, as this depends on several variable factors (traffic links, traffic schemes, volume of traffic, weather conditions, etc). The question of the time required for the car journey to the place of employment is - as the present case shows - difficult to answer in individual cases. The route planner submitted by the appellant gives the travel time from Essen/Belgium to Rijswijk/Netherlands as less than one hour [57 minutes], while the route planner cited by the Office shows a time of just over one hour [1 hour and 3 minutes]. There is no obvious justification for treating the two cases differently. The mere fact that Essen is outside the territory of the Netherlands does not - as explained above - constitute a sufficient reason for refusing to acknowledge fulfilment of the residence requirement.

6. Offer of employment

24. Finally, the Office cannot claim that the appellant committed himself to taking up residence in the Netherlands by accepting the offer of employment. The appellant makes the valid point that the 'expectation' that he would take up residence in the Netherlands ('the Office expects') is not a contractual obligation. Moreover, the circular of [24 September 1990] guardedly states that residence outside the Netherlands does not 'in principle' satisfy the residence criteria. The only categorical ruling in the circular concerns the loss of entitlement to the expatriation allowance if (contrary to the Office's 'expectation') the employee does not take up residence in the Netherlands. However, the Office has not challenged the appellant's entitlement, as a UK national, to the expatriation allowance. In cases of the present kind, the rule laid down in the circular is clearly not applicable."

12. For these reasons the complaint must be allowed and the impugned decision set aside. The claim for damages, not having been asserted before the Appeals Committee, is irreceivable.

13. Normally, in a case of this degree of complexity, the complainant would be entitled to an award of costs which the Tribunal might have fixed at the amount claimed. The complainant here is unrepresented. While the employment of a legally trained advisor is not a requirement and is no guarantee that a case will be well presented, the complainant's written pleadings are repetitive and contain largely unhelpful personal attacks on the member of the legal department who wrote the EPO's pleadings. They also contain unfounded and insulting comments about the EPO to which the latter properly objects. The Tribunal will limit the award of costs to 300 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The President is directed to take all necessary steps to acknowledge the complainant's right to reside in Essen (Belgium).

3. The Organisation shall pay the complainant 300 euros in costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 7 November 2003, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.