109th Session **Judgment No. 2924**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr O. V. against the European Patent Organisation (EPO) on 25 June 2008, the EPO's reply of 17 November, the complainant's rejoinder of 3 December 2008 and the Organisation's surrejoinder of 12 March 2009;

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 72 of the Service Regulations for Permanent Employees of the European Patent Office relevantly provides:

> "(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.

> (2) An expatriation allowance shall also be payable to permanent employees not referred to in paragraph 1 a) above and who at the time of taking up their duties have been permanently resident for at least ten years in a country other than the country in which they will be serving, no account being taken of previous service in the administration of the latter country or with international organisations."

The complainant, who holds dual Greek and Dutch nationality, was born in 1976. He lived in Greece from 1984 to 1994. He then took up residence in the Netherlands, where he lived from September 1994 to 1 November 2005 – the date on which he joined the European Patent Office, the EPO's secretariat, at its branch in The Hague – with the exception of the period from September 2001 to September 2002 during which he lived in Spain.

In a letter of 10 January 2006 to the Personnel Department, he explained why he believed that he fully met the conditions set forth in Article 72 of the Service Regulations and requested that he be awarded an expatriation allowance. The Director of Personnel replied on 20 February that, as the complainant had held Dutch nationality at the time of taking up his duties and had been permanently resident in the Netherlands since 1994, he did not fulfil the requirements for the award of the expatriation allowance, laid down in Article 72(2) of the Service Regulations. On 18 April the complainant filed an internal appeal requesting that the decision of 20 February 2006 be set aside and that he be awarded the expatriation allowance as from the date of his entry into service. On 24 May 2006 he was informed that it had been decided not to grant his request but to refer the case to the Internal Appeals Committee. The Committee issued its opinion on 2 April 2008, recommending by a majority that the complainant's appeal be rejected as unfounded. By a letter of 30 May 2008 the Director of Personnel informed the complainant that, in accordance with the Committee's majority opinion, the President had decided to reject his appeal. That is the impugned decision.

B. The complainant contends that the decision not to award him the expatriation allowance is tainted with procedural irregularities, errors

of law, bias and lack of due process. He points out that the final decision of 30 May 2008 was signed by the Director of Personnel, notwithstanding Article 109(1) of the Service Regulations which reserves the final decision on an appeal for the appointing authority – the President in the present case. Hence, in the absence of an express authorisation for the Director of Personnel to act on behalf of the President, the former's decision to reject the complainant's appeal was *ultra vires*. He further argues that the Organisation did not review his appeal in accordance with the terms of Article 109(1), thereby failing to act with due care and in good faith.

The complainant asserts that the EPO committed errors of law in determining that he did not fulfil the conditions for the award of the expatriation allowance. In particular, it erroneously considered that by reason of his dual nationality Article 72(2) of the Service Regulations was applicable to his case, whereas it should have applied Article 72(1). By doing so, it disregarded the fact that at the time when he took up his duties he held the nationality of a country other than that in which he would be serving and had been permanently resident in the Netherlands only since February 2004, i.e. for a period of less than three years. Indeed, his residence in the Netherlands from September 1994 to February 2004 was for the purpose of study and should thus, according to the internal practice of the EPO, as laid down in the "Lamadie note" – an administrative instruction of June 2001 – be excluded from the calculation of his period of permanent residence under Article 72(1)(b) of the Service Regulations. The complainant considers that the majority of the Internal Appeals Committee applied a distorted interpretation of the law, which in his view demonstrates its bias and failure to afford him due process.

He asks the Tribunal to quash the impugned decision and to order the EPO to pay him the expatriation allowance as from January 2006, together with compound interest on the arrears at the rate of 8 per cent per annum. He also claims punitive damages and costs.

C. In its reply the EPO argues that the complainant's claim for punitive damages did not form part of the internal appeal but was

introduced for the first time in his complaint before the Tribunal. It is therefore irreceivable for failure to exhaust the internal remedies.

On the merits, the Organisation states that the impugned decision, which was taken by the President and merely conveyed to the complainant by the Director of Personnel, is not tainted with any procedural irregularity. It denies having failed to act with due care or in good faith in reviewing the complainant's appeal.

The EPO acknowledges that Article 72(1) of the Service Regulations is applicable to the complainant's case, but contends that the complainant does not meet the condition set forth in subparagraph (b) of that provision. It argues, in particular, that he took up permanent residence in the Netherlands in 1994 and had thus been permanently resident in the country for more than three years at the time of his recruitment in November 2005. It adds that the administrative instruction relied upon by the complainant, the so-called "Lamadie note", does not apply in his case and is, in any event, not in line with the provisions of Article 72 of the Service Regulations and the Tribunal's case law. According to the defendant, the majority of the Internal Appeals Committee applied an interpretation of the law based on an analysis of its context and the intention of its author.

D. In his rejoinder the complainant asserts that his complaint is fully receivable. He accuses the Organisation of having circumvented the prescribed decision-making process and of seeking to amend the applicable law with retroactive effect. He requests the disclosure of a document referred to in an annex to the EPO's reply.

E. In its surrejoinder the EPO contests the allegations made by the complainant in his rejoinder. It rejects his request for document disclosure, noting that the complainant has already received all the information to which he is entitled. It otherwise maintains its position.

CONSIDERATIONS

1. The complainant challenges a decision rejecting his internal appeal with respect to the payment of an expatriation allowance. It is agreed that his entitlement, if any, depends on Article 72(1) of the Service Regulations, which relevantly provides:

> "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."

2. The complainant, who holds dual Greek and Dutch nationality, was appointed to the EPO at its branch in The Hague on 1 November 2005. By reason of his Greek nationality, he satisfied the requirement in Article 72(1) that he hold the nationality of a country other than the Netherlands. The only issue is whether he had been permanently residing in the Netherlands for three years before taking up his duties. In this regard, it is convenient to note that the complainant was born in the Netherlands in 1976, resided in Greece between 1984 and 1994, and returned to the Netherlands in 1994 where he has remained, with the exception of a period coinciding with the 2001-2002 academic year, which he spent studying in Spain. He claims that the time spent in the Netherlands between 1994 and 2004 was for the main purpose of studying. Certainly, he was registered as a student at the Hogeschool of Utrecht between 1994 and 1998 and at the Delft University of Technology between 1998 and 2004. Between February 2004 and November 2005, the time he joined the EPO, he worked in the Netherlands. He claims that, as he was a student until February 2004, he became a permanent resident only at that time and, thus, was a permanent resident in the Netherlands for less than three years when he took up his duties.

3. The complainant makes his argument that he was a permanent resident of the Netherlands for less than three years by reference to an administrative instruction, the so-called "Lamadie note" of June 2001 prepared by the then Principal Director of Personnel. It is stated therein that for the purposes of Article 72(1)(b) of the Service Regulations "periods during which the person recruited resided in the country in which he would be serving for the principal purpose of pursuing studies" are not to be taken into account. This qualification is not found in Article 72(1)(b). However, that is not to say that the fact that a person was present in a country for the purpose of pursuing studies is always irrelevant to the question whether he or she was permanently resident in the country.

4. It was held in Judgment 2597, under 5, that "[t]he country in which the permanent employee is effectively living, is that 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." Within the context of that test, the fact that a person was present in a country for the purpose of pursuing his or her studies may well be insufficient to establish permanent residence, particularly if there are strong links to another country. In the present case, there is no indication of any close link with any country other than the Netherlands, or, indeed, of any intention to take up residence in any other country. Further, the evidence indicates that the complainant was living in the Netherlands as part of a family unit and not that he was there solely for the purpose of studying. In these circumstances, it must be concluded that he was permanently resident in the Netherlands for at least three years before taking up his duties with the EPO. Accordingly, he is not entitled to an expatriation allowance.

5. The complainant raises a number of subsidiary arguments. He argues that the decision to reject his internal appeal – which is

the impugned decision – was taken by the Director of Personnel, and not by the President as required by Article 109(1) of the Service Regulations. This argument must be rejected. The letter of 30 May 2008 conveying the decision to reject his appeal makes it perfectly clear that that decision was taken by the President and that the Director of Personnel was merely informing the complainant of it.

6. The complainant also contends that there was a lack of due care and absence of good faith in the initial consideration of his request to be awarded the expatriation allowance and in the review of the initial decision rejecting it. In this regard the initial rejection of his request on 20 February 2006 was based on Article 72(2) and not Article 72(1) of the Service Regulations. Moreover, in response to his request for review, the letter of 24 May 2006 simply stated that the relevant provisions had been correctly applied. Thus, the complainant's contention must also be rejected. An error of reasoning establishes neither ill will nor a breach of the duty of care, particularly when the actual decision is correct. Nor is it established that the review was not conducted in accordance with proper procedures. In addition, as the claim is clearly without merit, there is no need for an order for the production of the documents requested by the complainant. Further, there is no substance in the complainant's allegations of bias on the part of the Internal Appeals Committee or lack of due process in its proceedings and deliberations.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 7 May 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet