Ó F.

v.

EPO

128º Session **Judgment No. 4191**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr C. M. Ó F. against the European Patent Organisation (EPO) on 11 February 2013 and corrected on 29 May and the EPO's reply of 6 August 2013, the complainant having chosen not to file a rejoinder;

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 his 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, no account being taken of previous service with international organisations.

The complainant, an Irish national, moved to the Netherlands in October 1999. His spouse was then working in the Netherlands as an international civil servant. The complainant joined the EPO at its branch

in The Hague on 1 September 2010. Prior to his entry into service, he had worked for another international organisation also based in The Hague, the Organisation for the Prohibition of Chemical Weapons (OPCW), between December 2002 and October 2007. On 1 October 2010, following an exchange of correspondence between the complainant and the EPO Administration, he was informed that he was not entitled to receive an expatriation allowance. The Administration explained to him on 12 October that, prior to his appointment, no account being taken of his service with the OPCW, he had been a permanent resident in the Netherlands for six years, which was in excess of the three-year maximum foreseen in Article 72(1) of the Service Regulations.

In the meantime, on 7 October, the complainant had lodged an internal appeal against the decision of 1 October. He asked the President of the Office to reverse that decision and to grant him the allowance. On 9 December 2010, the President forwarded the appeal to the Internal Appeals Committee (IAC) for an opinion.

A hearing was conducted on 20 April 2012. In its opinion of 4 September 2012, the IAC unanimously found that the complainant's status was inextricably linked to that of his wife who, as an international civil servant, was by definition not a permanent resident. Neither was he. The IAC recommended that the appeal be allowed and that the complainant be awarded the expatriation allowance with interest on any arrears. By a letter of 14 November 2012, which constitutes the impugned decision, the complainant was informed that the President of the Office had decided to dismiss his appeal as unfounded.

The complainant asks the Tribunal to quash the impugned decision and to order the EPO to grant him an expatriation allowance and pay interest on the arrears in accordance with the IAC's recommendation. He also asks for any other relief that the Tribunal may deem appropriate.

The EPO asks the Tribunal to dismiss the complaint as unfounded. The EPO also asks the Tribunal to confirm that the language used by the complainant during the internal appeal proceedings and in his brief are unnecessarily offensive to the Organisation and certain of its employees.

CONSIDERATIONS

1. The issue to be determined is whether the impugned decision, which was issued on 14 November 2012 by the President of the Office, wrongly dismissed the complainant's internal appeal against the decision by which the EPO refused to grant him an expatriation allowance when he joined the Organisation on 1 September 2010. In that decision, the President did not accept the IAC's unanimous recommendation that the complainant be granted the allowance with any arrears subject to interest.

2. Article 72(1) of the Service Regulations provides the basis for a staff member's entitlement to an expatriation allowance. 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 which must both be satisfied by a staff member in order to qualify for the expatriation allowance. The complainant satisfies the requirement of Article 72(1)(a) as he was an Irish national at the time when he took up his duties with the EPO in the Netherlands on 1 September 2010. The question then is whether he also satisfied the requirements of Article 72(1)(b).

3. It will be recalled that 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.)

4. The Tribunal's case law has it that a permanent employee is "permanently resident in the [duty] country" if she or he had simply resided or lived there during the relevant period. The test is one of simple residence (see Judgments 1099, under 8, and 2596, under 3). Except for any period of "previous service in the administration of the country conferring the said nationality or with international organisations" referred to in Article 72(1)(b), the reasons for having not resided in the duty country for the period of "at least three years" at the time of taking up duties there are irrelevant to determine the permanent residence. The fact that during the employee's residence in the duty country she or he did not pay taxes there is also irrelevant (see, for example, Judgment 1099, under 8). Neither is it relevant that the employee travelled a lot due to the nature of her or his work (see, for example, Judgment 2596, under 5) so long as the employee has not interrupted her or his residence in the duty country in the sense stated in Judgment 2865, under 4(b). Neither is the status of the employee's residence relevant in the sense stated, for example, in Judgment 2214, under 3. The evidence shows that the complainant resided uninterruptedly in the Netherlands from the time of his entry into the territory in October 1999 to 1 September 2010 when he joined the EPO.

5. The EPO contends that, under Article 72(1)(b) of the Service Regulations, the expatriation allowance which is payable to an employee who was not permanently resident in the duty country "for at least three years" at the time of taking up her or his duties "refers to a three[-]year period preceding the appointment of the employee, but not necessarily the three years immediately preceding the employee[']s appointment". It submits, among other things, that the three-year period is to be calculated by taking the date of the appointment and looking back three years but not including any period during which the employee was either in the service of the state of her or his nationality or in the service of an international organisation. According to the EPO, in the context of the present case, this means that the three-year period is to be calculated backwards from 1 September 2010 without including the time during which the complainant was employed with another international organisation (the OPCW). The EPO insists that, as a result, the relevant three-year period "consists of 16 October 2007 to 31 August 2010 and [from] 30 September 2002 to 16 December 2002". In effect, it states that the words "no account being taken of previous service [...] with international organisations" mean that, in order to calculate the relevant three-year period, all periods during which the employee was resident in the duty country prior to taking up her or his duties with the EPO must be taken into account, however subtracting therefrom the period during which (in this case) the complainant worked with the OPCW. On the other hand, the complainant contends that the relevant three-year period of residence to be taken into account under Article 72(1)(b) is only the three-year period that immediately preceded the date of his appointment on 1 September 2010.

6. In these proceedings there is no real issue that the three-year period is the period immediately preceding the "tak[ing] up [of] duties". The issue is whether, if in that three-year period there is service which is not to be counted, the consequence is that the expatriation allowance is payable, or whether that service is ignored when identifying the end point of the three-year period counting backwards. The answer does not clearly emerge from the text, but does from a consideration of the purpose of the provision and the rationale for the benefit. The provision

is intended to compensate employees who have left their permanent home in one country to take up employment in another (see Judgment 2925, under 3). That purpose is best served by the latter approach to the meaning of the provision, rather than by the former approach, which would reward a person who has mainly resided in the duty country, even for decades, but had for a period within the three years, perhaps extremely briefly, been, for example, employed by an international organisation.

Accordingly, the three-year period is extended by the length of the period or periods which, in accordance with the provisions of Article 72(1)(b) of the Service Regulations, must not be taken into account.

In the present case, the complainant commenced his duties at the EPO on 1 September 2010. But for his service with the OPCW, the relevant three-year period would have commenced on 31 August 2007. However, at the beginning of that period, the complainant was, for approximately two months, employed by the OPCW and had been so employed since December 2002. Accordingly, it is necessary to take into account his status in the two-month period prior to his work for the OPCW, which is, in substance, October and November 2002. In that period he was permanently resident in the Netherlands, as he was for the period from October 2007 to 1 September 2010. Accordingly, he had no entitlement to the expatriation allowance.

7. In the foregoing premises, the complaint is unfounded and 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