SEVENTY-SECOND SESSION

In re NARCISI

Judgment 1150

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Claudio Narcisi against the European Patent Organisation (EPO) on 6 June 1991, the EPO's reply of 28 August, the complainant's rejoinder of 30 September and the EPO's surrejoinder of 5 November 1991;

Considering Articles II, paragraph 5, and VII, para- graphs 2, of the Statute of the Tribunal and Articles 72 (as in force until April 1991) and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The complainant, an Italian citizen who was born in 1960, joined the staff of the EPO on 1 November 1989 as a permanent employee in category A. He had been employed at the Technical University of Munich as a part-time research assistant from 1 December 1985 to 28 February 1989 and as a full-time research assistant from 1 March to 31 October 1989.

Article 72 of the EPO Service Regulations provided at the time for payment of an expatriation allowance to a permanent employee in category A who at the time of appointment was not a national of the country in which he was serving nor had been continuously resident in that country for at least three years.

The complainant received his first EPO pay slip on 26 November 1989 and discovered that he had not been paid the allowance. By letter of 13 December to the Principal Director of Personnel he applied for payment of the allowance. By letter of 5 January 1990 the Director refused. On 4 April 1990 he appealed to the President of the Office. In the report it submitted on 5 February 1991 the Appeals Committee recommended by a majority that his appeal be allowed. By letter of 10 March 1991, the decision under challenge, the Principal Director of Personnel said that the President, in keeping with the minority opinion, had rejected his appeal.

B. The complainant submits that he should be paid the expatriation allowance because he was not continuously resident in the Federal Republic of Germany from 1 December 1985 to 28 February 1989. The only purpose of his stay in Munich during that time was to work on his doctoral thesis and the pittance he got from the Technical University scarcely even eased his financial burden. Throughout the material period he remained financially dependent on his parents, kept a lodging in Rome and had student status in the Federal Republic. His part-time employment left him time to obtain an advanced diploma in agriculture from a technical institute in Rome. He could not have done so had he been continuously resident in the Federal Republic at the time.

No provisions in the rules of international organisations bar officials who have spent lengthy periods abroad for the purpose of study from getting an expatriation allowance provided they can give proof, as the complainant does, of regular home visits. Besides, he did not then qualify as a resident of the Federal Republic under German or Italian law.

He asks the Tribunal to quash the EPO's decision and order the Organisation to grant him payment of the allowance as from 1 November 1989. He seeks an award of 2,000 Deutschmarks in costs.

C. In its reply the EPO submits that the complaint is irreceivable. Though the complainant did comply with the time limit in Article VII(2) of the Tribunal's Statute, the decision he impugns rejected his internal appeal mainly on the grounds that it was out of time. Under Article 108(2) of the Service Regulations he had three months in which to lodge an appeal from 26 November 1989, when he discovered that he had not been paid the allowance. All he did in his letter of 13 December 1989 was express the view that he qualified for it and ask for consideration of "the

possibility" of letting him have it. Not until 4 April 1990 did he file an internal appeal against the refusal of 5 January 1990, but by then he was too late.

In subsidiary pleas on the merits the Organisation points out that, according to Judgment 1099 (in re Theodoropoulos), in order to establish whether an official has objective and factual links with the country of his duty station what matters is whether he had to live there and did so. The complainant's employment contract and residence permits show that he did. National law and the rules of any other international organisation are irrelevant.

So are the complainant's links with Italy and his professions of financial dependence on his parents. The diploma he cites is dated 17 July 1986, so he obtained it before the start of the three-year period to which Article 72 refers.

D. In his rejoinder the complainant disputes the EPO's plea of irreceivability. His first pay slip may not be treated as a proper decision but one that was taken without knowledge of the facts, which he first brought to the Administration's attention in the documents he attached to his letter of 13 December 1989.

Besides, instead of telling him his case could not be reconsidered the Administration took the time to review the matter before giving notice of a "negative decision" on 5 January 1990.

Developing his pleas on the merits, he submits that the time he had to spend in Munich when under part-time contract with the University was no more than two days a week for seven months in the year. That did not make him continuously resident. He presses his claims.

E. In its surrejoinder the EPO enlarges on the pleas in its reply, the force of which it submits the complainant's rejoinder in no way weakens. It points out that the material period according to Article 72(1)(b) was the three years immediately preceding the date of his recruitment, i.e. from 1 November 1986, and that he held a contract of employment with the Technical University from 1 December 1985. Moreover, he did not get five months' holiday a year while under part-time contract with the University as a research assistant but according to the terms of the contract was subject to the rules on duration of leave that apply to anyone employed in the Federal Republic.

CONSIDERATIONS:

1. The complainant joined the EPO as a trainee examiner in category A on 1 November 1989. His first pay slip, which he received on 26 November 1989, did not reflect payment of the expatriation allowance provided for in Article 72 of the Service Regulations. By letter dated 13 December 1989 he asked that his status be reconsidered but on 5 January 1990 the Organisation refused. He filed his internal appeal on 4 April 1990. In its report of 5 February 1991 the majority of the Appeals Committee recommended allowing it. But the President preferred the minority opinion, which was in favour of rejecting it, and he was so informed by a letter of 10 March 1991, the decision he is impugning.

2. From 1 December 1985 until 28 February 1989 the complainant was a candidate for a doctorate at the Technical University of Munich and was also in part-time employment there. From 1 March until 31 October 1989 he was a full-time research assistant at the University.

The merits

3. At the material time Article 72(1) of the EPO Service Regulations read:

"An expatriation allowance shall be payable to permanent employees in Categories A and B who, at the time of their appointment:

a) were not nationals of the country in which they are serving and

b) were not continuously resident in that country for at least three years, no account being taken of previous service in their home country's administration or with other international organisations."

4. The complainant contends that since he was in Munich solely for the purposes of study he kept his primary residence in Rome. He points out that he had his own flat there, separate from that of his parents; that he had to renew each year his residence permit for the Federal Republic of Germany; that his income from his part-time employment at the University was so low that he depended financially on his parents; that that employment allowed

him to spend long periods in Rome; and that the EPO evaluated his previous experience as study and only partly as work.

5. The majority of the Appeals Committee accepted his contentions and held that "entitlement is not merely a question of residence", that "other factors are relevant" and that he had adduced sufficient evidence to show "that he did not permanently move the focal point of his life to Germany until 1 March 1989".

6. Considerations of that kind are immaterial. In interpreting the term "continuously resident" in Judgment 1099 (in re Theodoropoulos) the Tribunal held that the condition turned on the existence of objective and factual links with the country and that the test was one of simple residence. The purpose of the rule is to grant an allowance to the official who has no affinity with the country of his duty station. To make that clear, Article 72(3) further provides that the allowance may be paid to the staff member who, even though he is a national of the country in which he is serving, has been continuously resident for at least ten years in another country.

The condition of simple residence is met in the complainant's case. It is not at issue that he was resident in Munich from 1 March to 31 October 1989, i.e. within the period of three years specified in Article 72(1)(b). That fact alone suffices to bar him from entitlement to the allowance, and there is no need to consider what his status in Munich was from 1 December 1985 to 28 February 1989.

His complaint therefore fails on the merits, and the Tribunal will not take up the Organisation's objections to its receivability.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and the Right Honourable Sir William Douglas, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Jacques Ducoux
Mella Carroll
William Douglas
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.