The Administrative Tribunal,

Considering the complaint filed by Mrs C. M. against the European Patent Organisation (EPO) on 26 September 2005, the EPO's reply of 13 January 2006, the complainant's rejoinder of 25 January and the Organisation's surrejoinder of 18 May 2006;

Considering Article II, paragraph 5, 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. The complainant, an Irish national born in 1973, joined the European Patent Office – the EPO's secretariat – in April 2002. With effect from 1 February 2003 she was appointed as a permanent employee of the Office.

Before joining the EPO in The Hague, she worked intermittently for an Irish employment agency from October 1997 to July 1999 and was seconded to the Netherlands. She then worked for private companies from August 1999 to March 2002, except between November 1999 and August 2000 when she worked at the European Patent Office as a temporary administrative assistant.

The Office specified in the letter offering her employment as from 1 April 2002 that, in accordance with Article 72 of the Service Regulations for Permanent Employees of the European Patent Office, she was not entitled to an expatriation allowance because she had been residing in the Netherlands for more than three years prior to becoming a staff member. Article 72 of the Service Regulations reads in part 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."

By a letter of 5 September 2003 the complainant asked the President of the Office to grant her an expatriation allowance with retroactive effect from the date of her recruitment, or alternatively from June 2003, the date of her last salary slip constituting a challengeable decision under Article 108 of the Service Regulations. She pointed out that her intermittent presence in different parts of the Netherlands between October 1997 and July 1999 had been mistakenly interpreted as continuous residence and asserted that she had become a continuous resident with objective and factual links to the country only as from August 1999, when she had taken up permanent employment with a Dutch company, that is to say less than three years before joining the EPO. In the event of an unfavourable reply, she asked that the letter be considered as the lodging of an internal appeal under Article 108 of the Service Regulations. She was informed in December 2003 that her request could not be granted and that her case had been referred to the Internal Appeals Committee.

In its opinion of 13 June 2005 the Appeals Committee unanimously concluded that, pursuant to Article 108(2) of the Service Regulations, the appeal was admissible only insofar as it sought payment of the expatriation allowance with effect from three months before the date of lodging the appeal, i.e. 5 June 2003. It nevertheless recommended by a majority that the appeal be dismissed because the complainant had been a permanent resident in the Netherlands during the three years preceding her appointment and thus had forged objective and factual links with that country, as required by the Tribunal's case law. It further rejected the complainant's assertion that she had become a permanent resident only as from 1 August 1999, in particular because she had lived and worked in the Netherlands between April and July 1999, except in June 1999. The fact that the complainant had maintained

intensive links with her country of origin and had worked in different places in the Netherlands was deemed irrelevant.

By a letter of 2 August 2005 the Director of Personnel Management and Systems informed the complainant that, in accordance with the recommendation of the Appeals Committee, the President had decided to reject her appeal. That is the impugned decision.

B. The complainant maintains that she was a permanent resident in the Netherlands for the purposes of Article 72 of the Service Regulations only between August 1999 and March 2002 – i.e. for less than three years before taking up her duties with the EPO – and therefore was entitled to receive an expatriation allowance. She points out that from October 1997 to July 1999 she was seconded to the Netherlands but was employed, on a temporary basis, by an Irish employment agency, so that whenever there was no need for her services in the Netherlands she returned to Ireland. Referring to what she describes as the "Guidelines on the granting of the expatriation allowance", she contends that the Office should not take into account the period during which she was seconded to the Netherlands because her employment contract was signed in Ireland and conferred on her the status of expatriate.

Citing the Tribunal's case law, she asserts that the term "permanent resident" applies to a person who is physically present in a country and has forged objective and factual links with it. Contrary to the findings of the majority of the members of the Appeals Committee, she considers that her intermittent presence in the Netherlands between October 1997 and August 1999 cannot be construed as giving rise to objective and factual links with that country. Indeed, she was sent to work in different parts of the country and lived in temporary accommodation. In her view, the Committee did not explain satisfactorily why it considered that the uncertainty linked to her status as a temporary employee seconded to the Netherlands for seasonal work did not "negate the formation of objective and factual links with the country". She also points out that the dissenting members of the Committee provided a more exhaustive analysis of the facts, which she invites the Tribunal to follow.

The complainant further submits that no account should be taken of the ten months (from November 1999 to August 2000) during which she served as a temporary assistant at the EPO. Indeed, it is not clear whether Article 72(1)b) of the Service Regulations, which provides that previous service with international organisations shall not be taken into account in determining a permanent employee's entitlement to the expatriation allowance, is or should be limited to service performed as a permanent employee. She recalls that any ambiguity in the Regulations should be construed *contra proferentem* and in favour of the staff member concerned.

In addition, she asserts that the EPO showed bad faith in not disclosing the aforementioned "Guidelines" to her and contravened her "right to proper administration". In her view, that document indicates that she had been right all along and that the Personnel Department wilfully disregarded internal regulations. For that reason, she seeks moral damages. She also claims the payment of the expatriation allowance as from June 2003 with compound interest at 8 per cent per annum, as well as costs.

C. In its reply the Organisation submits that the complainant misunderstood the Tribunal's case law and states that the term "permanently resident" does not mean permanently established but residing continuously in the country of assignment. It points out that it is not contested that the complainant lived continuously in the Netherlands between April 1999 and April 2002. In its view, this fact alone would justify the refusal to grant the expatriation allowance.

According to the EPO, the complainant's presence in the Netherlands was not intermittent, but "continuous and steady". It considers that the fact that she lived and worked in the country constitutes, in itself, "factual and objective links" with that country. The absence of a private domicile of her own in the country and her precarious situation is irrelevant. It further contends that, in accordance with the Tribunal's case law, the fact that the complainant maintained some linkswith her country of origin is not sufficient for her to qualify for the expatriation allowance, adding that the one-month break during which she went back to Ireland is not long enough to conclude that her residence in the country of assignment was interrupted.

With regard to the time spent by the complainant at the EPO between November 1999 and August 2000, it asserts that it cannot be considered as service with an international organisation within the meaning of Article 72(1)b) of the Service Regulations because she was employed by a temporary agency and not by the Organisation itself.

Lastly, the Organisation points out that the Personnel Department and subsequently the President of the Office quite rightly based the refusal to grant the expatriation allowance on the Service Regulations rather than on the so-called “Guidelines on the granting of the expatriation allowance”. It explains that these “Guidelines” are merely an internal note distributed only to the Personnel Department and can hardly be considered as binding on the President. It adds that since the complainant’s case did not give rise to difficulties with regard to the application or interpretation of Article 72, there had been no need to apply the note in question.

The Organisation concludes by requesting that the complaint be dismissed as devoid of merit and that the complainant be ordered to bear her costs.

D. In her rejoinder the complainant maintains that she did not forge sufficient objective and factual links with the Netherlands to be considered as a permanent resident prior to August 1999. In addition she notes that, according to the Tribunal’s case law, if an official has kept a “pied-à-terre” to which the latter returns frequently for reasons of work, that is tantamount to maintaining sufficient links with the country in question to negate expatriation.

She further argues that the EPO’s decision not to rely on the above-mentioned “Guidelines”, despite the fact that this document introduced an element of clarity and legal certainty for all parties, confirms that the decision not to grant her the expatriation allowance involved arbitrariness. She therefore reiterates her claim for moral damages. She also points out that, according to the Tribunal’s case law, a complainant may be awarded costs for the effort and time devoted to her/his defence.

E. In its surrejoinder the Organisation maintains its position, noting that the complainant’s rejoinder adds no new arguments. It observes that the complainant has misunderstood its comments on the applicability of the “Guidelines” and stresses that it did examine her case in the light of that document but found that it did not apply to the complainant’s situation.

CONSIDERATIONS

1. The complainant worked intermittently in the Netherlands between 13 October 1997 and 30 July 1999 as a temporary agent for an Irish employment agency. On her own admission, she did return to her country of origin, that is to say Ireland, for eight weeks and received unemployment benefits in 1998. In June 1999 she worked for a month in that country because no assignment was offered to her in the Netherlands. During the whole period from October 1997 to July 1999 she had no “fixed domicile” in the Netherlands, and her “fiscal and administrative domicile” was in her country of origin.

2. In August 1999 she took up permanent employment with a private company in the Netherlands and became a permanent resident in that country. On 1 April 2002 she joined the EPO as an administrative employee based in the Netherlands; she held a two-year contract. She was appointed as a permanent employee with effect from 1 February 2003. She then asked to be granted an expatriation allowance but her request was denied by reason of her being a permanent resident of the Netherlands for more than three years. The complainant contests that assertion on the basis of the Tribunal’s case law and contends that she was a permanent resident for the purposes of Article 72 of the Service Regulations only between August 1999 and March 2002.

3. In Judgment 1099 the Tribunal held, regarding the interpretation of this article, that the test was one of simple residence and that the purpose of the rule is to grant an allowance to the official who has no affinity with the country of his/her duty station; Judgment 926 used the affinity argument too. In the instant case, the employee obviously had a lot of affinity with the country of her duty station, where she did in fact reside, even though she was not, according to her own criterion, officially a permanent resident from 1997 until 1999.

4. In Judgment 51, the Tribunal ruled on the nature of such allowance; it found that the aim of the non-resident’s allowance is to compensate for the disadvantages arising out of expatriation in order to permit the recruitment and retention of staff who, by virtue of the qualifications required, cannot be recruited locally. The complainant was recruited locally in the Netherlands, so this argument does not apply in her favour either.

5. According to a steady line of precedents, in particular Judgment 2214, “permanent or continuous residence” requires “actual long-term presence in the country concerned” and the existence of “objective and

factual links with that country" (see Judgment 2597 also delivered this day). The fact that the complainant has been working in the Netherlands on an almost continuous basis for several years means that she had "objective and factual links" with that country even if at the beginning she travelled a lot within the country due to the nature of her work.

6. The fact that the complainant did return quite frequently to her country of origin is indeed not uncommon for a person who has a permanent residence abroad, as the Internal Appeals Committee noted by a majority.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2006, Mr Michel Gentot, President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Agustín Gordillo

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2007.