

The Administrative Tribunal,

Considering the complaint filed by Mr S. V. against the European Patent Organisation (EPO) on 21 September 2006, the Organisation's reply of 20 December 2006, the complainant's rejoinder of 7 February 2007 and the EPO's surrejoinder of 20 March 2007;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, who was born in 1967, is a citizen of the United States and also has French nationality. He was offered an appointment as an examiner at the European Patent Office, the EPO's secretariat, commencing on 1 November 2003. By fax of 11 October 2003 he received a copy of the offer of appointment, the acceptance of which he was asked to confirm in writing by 23 October. Attached to it was a calculation of his reckonable experience for purposes of recruitment and promotion. This calculation showed that the Office would take into account as reckonable experience his period of employment from 24 May 2000 to 31 October 2003 and on that basis would assign him grade A1, step 3. The complainant accepted this offer by letter of 22 October 2003. Two months later, he informed the Office that there was an error in the preliminary calculation of his reckonable experience and that he would submit a request for recalculation once he had received all relevant documents from his former employers.

By a letter to the Personnel Administration Department dated 15 January 2004, he requested that his reckonable experience be recalculated to take into account his professional experience in the period from 15 May 1994, when he received his Bachelor of Science (BSc) degree in Electrical Engineering, to 24 May 2000, when he obtained his Master of Science (MSc) degree in Electrical and Computer Engineering, and that accordingly he be assigned grade A2, step 4. He indicated that this experience had been gained "after acquisition of the level of education required under the minimum qualifications of the job description for the post in question", as required by Circular No. 271, given that his BSc degree was a "diploma of completed studies at university level" – the minimum qualification for the post of examiner. He also noted that under the Washington Accord, an international agreement for the recognition of equivalence of accredited engineering degree programmes, his BSc degree was equivalent to a United Kingdom Bachelor of Engineering with Honours (BEng (Honours)). In the event that his request was rejected and no mutually acceptable solution was found, he asked the Office to consider his letter as an internal appeal.

By a letter of 11 June 2004 the Recruitment Department informed the complainant that his request could not be granted. It pointed out that document CI/376/77 of 8 September 1977, specified which diplomas applicants for posts as examiners were required to hold in the various member states. For degrees acquired in non-member states the EPO had decided that only a Master's or similar degree would be considered as equivalent to "an average European level of completed university education". On 1 July 2004 the complainant requested a copy of the document containing that decision and confirmed that he was lodging an internal appeal. In a letter of 9 August 2004 the Director ad interim of the Employment Law Directorate informed the complainant that the matter had been referred to the Internal Appeals Committee. On 31 August 2005, while the case was pending before the Committee, the Personnel Legal Affairs Department sent a Note to the Director of Recruitment indicating that the EPO's minimum requirement for A-grade posts was a Master's degree for both member and non-member states, with the exception of Ireland and the United Kingdom for which a three-year degree was considered sufficient.

A hearing was held on 7 December 2005, after which the Committee requested the Office to clarify its practice concerning the recognition of BSc degrees with regard to both member and non-member states. In its Opinion of 24 April 2006 the Committee unanimously recommended that the appeal be dismissed as devoid of merit but that the Office should credit the complainant with all or at least part of the experience he gained in the period between his Bachelor's and his Master's degrees, as an *ex gratia* settlement in view of the special circumstances of his case.

By letter of 23 June 2006 the complainant was informed that the President of the Office had decided to reject his appeal as unfounded and not to offer him an *ex gratia* settlement. That is the impugned decision.

B. The complainant submits that the Office's refusal to recognise his United States BSc degree in Engineering as a "diploma of completed studies at university level" and accordingly credit him with the professional experience he acquired as from the date he obtained that degree, is based on an incorrect application of the Service Regulations for Permanent Employees of the European Patent Office (hereinafter "Service Regulations"). He argues that the impugned decision is *ultra vires* because it was made on the basis of the Office's earlier "decision" not to recognise United States BSc degrees, which was taken in violation of Article 33 of the European Patent Convention. Indeed, according to that article it is the Administrative Council which has the authority to amend the Service Regulations. Thus, the Administrative Council alone would be competent to introduce into the Service Regulations a rule according to which only Master's degrees from the United States shall be recognised for purposes of reckonable experience. Since no such rule was ever adopted by the Administrative Council and there is no regulation under which the Office may properly claim to have acted, the President exceeded his authority.

He argues that, contrary to the Office's contention, its "constant practice" regarding the recognition of Bachelor's degrees is neither consistent nor well known or long-standing, nor has it been published. He asserts that a review of the cases of colleagues he cites, in which United States BSc degrees were recognised "on an exceptional basis" for purposes of calculating reckonable experience, demonstrates that "exceptions to the rule are the norm". He points to a number of other colleagues whose Portuguese or Spanish degrees were recognised even though they were not Master's degrees, and refers to another colleague, who was recruited on the basis of his "*Licenciado*", a four-year first-level diploma, which he himself identified as a Bachelor's degree. He also mentions that a number of colleagues were considered to meet the minimum qualifications for the post of examiner on the strength of their Danish degree, which the Danish authorities had designated as a Bachelor's degree for the purposes of document CI/376/77. Given that no written law has been produced to support the practice adopted by the Office and that such practice has been applied on a purely ad hoc basis, there is no legal obligation to adhere to it.

The complainant also contends that the decision not to recognise United States BSc degrees is tainted with errors of fact and law, non-consideration of essential facts and abuse of discretion. The assertion by the Office that the United States does not have a standardised level of diplomas is incorrect. Moreover, the practice of the Office fails to take into account that State practice regarding the recognition of equivalence of professional qualifications has considerably evolved since document CI/376/77 was drawn up, and especially after the adoption of the Washington Accord. It does not consider that his BSc degree, which is accredited by ABET Inc. (hereinafter "ABET"), formerly the Accreditation Board for Engineering and Technology – an organisation responsible for the accreditation of engineering programmes offered in the United States – is recognised by Norway and the United Kingdom, as being equivalent to degrees which the Organisation considers as diplomas meeting the minimum requirements for an A-grade post. Similarly, the Office's practice overlooks the fact that the United Kingdom Patent Office recognises his BSc degree as satisfying the requirements for the post of examiner; it therefore contravenes the Tribunal's ruling in Judgment 851 that "the only fair and practical approach is to demand for an examiner's post the qualifications required for equivalent duties in the applicant's home country". The practice of the Office also carries errors of law as it is founded on an incorrect interpretation of the Organisation's Regulations and an *ultra vires* exercise of discretion.

In the complainant's opinion, the Office's practice is both arbitrary and discriminatory. It is arbitrary because it is an indiscriminate acceptance of all United States MSc degrees and a blanket rejection of all United States BSc degrees. Also it is not based on objective criteria. It is discriminatory because, in breach of the principle of equal treatment, it requires for the same post much higher qualifications from member state nationals who study in the United States.

Moreover, the complainant contends that the EPO acted in bad faith in that it failed to inform him accurately during the recruitment process of its practice with regard to United States BSc degrees and of the implications that practice would have for the calculation of his reckonable experience and consequently his career prospects. By doing so, the Office placed him at significant disadvantage in comparison to other colleagues with identical experience.

The complainant asks the Tribunal to overturn the impugned decision, to determine that his BSc degree in Engineering is a "diploma of completed studies at university level" and to order that his reckonable experience be correctly calculated from the date he obtained that degree, namely 15 May 1994, counting the period of his Master's studies at 50 per cent, and that accordingly he be placed at grade A2, step 4. He also asks to be awarded

full payment of his salary at that grade. He claims 15,000 euros in moral damages and 8,000 euros in legal costs.

C. In its reply the Organisation submits that the complainant has no legal claim to recognition of his BSc degree and that his complaint is therefore devoid of merit. It refers to the Internal Appeals Committee's finding in a comparable case that, as the Office has a certain "discretionary leeway" in deciding whether and when a diploma of completed studies at university level exists within the meaning of the job description, it is not bound by the practice of individual member states or their national authorities regarding the recognition of diplomas. Neither is it bound by the Washington Accord, since it "has not ratified it".

It refutes the allegation that, by refusing to recognise the complainant's BSc degree, it acted in breach of the principle of equal treatment. It argues that the cases cited by the complainant are not comparable to his case. As noted in its submissions before the Internal Appeals Committee, in one case, the Office justifiably took special account of the person's extensive experience with the United States Patent and Trademark Office and did not require a degree more advanced than her BSc degree. Indeed, the job description for A-grade posts requires either a "diploma of completed studies at university level or – in exceptional cases – equivalent knowledge acquired over many years of qualified work". It dismisses another case as not relevant, since, at the time of the person's recruitment in 1987, the EPO did not yet have a standardised practice regarding the recognition of United States BSc degrees. It further recalls that in another case, the Internal Appeals Committee confirmed that only experience gained after a MSc degree may be taken into account, and attributes the fact that the person in question was ultimately credited with some of the experience he had gained prior to his MSc degree to a misunderstanding as to the date of that degree. Only one case, according to the Office, constitutes a departure from its standard practice, possibly as a result of a mistake. In its opinion, however, that case alone is not indicative of a general weakening of the Office's practice and, in any event, the complainant cannot claim "equality in injustice".

The EPO further submits that all staff members identified by the complainant as having been recruited on the basis of their Spanish or Portuguese degrees did in fact possess a degree corresponding to a diploma of completed studies at university level. With regard to the Office's acceptance of a Danish degree, which in document CI/376/77 is designated as a Bachelor's degree, the Office asserts that it is a further permissible instance of recognition being exceptionally granted to a member state's Bachelor's degree, alongside that granted to the United Kingdom and Ireland.

It rejects the contention that its decision regarding United States degrees is arbitrary and without objective justification and emphasises that, since the recognition of degrees from non-member states is a highly complex issue, resorting to purely formal criteria is justified to reduce the administrative workload. It emphasises that the Office must be allowed considerable discretion in this domain, and recalls that document CI/376/77 is not a binding document but rather a source of information. Furthermore, it dismisses the assertion that the President of the Office exceeded his authority when determining the Office's practice with regard to United States BSc degrees without the approval of the Administrative Council. It argues that the interpretation of statutory texts, including the concept of a "diploma of completed studies at university level", falls within the President's authority. It denies the allegation that it acted in bad faith.

The Organisation also contends that, since all relevant rules have been applied correctly, the President of the Office rightly decided to refrain from offering an *ex gratia* settlement. Referring to the Committee's recommendation, it submits that at no point did it commit itself to recognising the complainant's professional experience prior to his MSc degree and that, if that was the determining factor in his decision to enter the service of the EPO, he ought to have consulted the Personnel Department before accepting the job offer.

D. In his rejoinder the complainant reiterates his pleas. He maintains that the interpretation of the concept of "diploma of completed studies at university level" as not encompassing United States BSc degrees restricts the general meaning of the concept beyond what may reasonably be inferred from the applicable texts. He contends that in its effort to prove a constant practice, the Organisation describes each case which contradicts that practice as another legally irrelevant mistake. He considers the distinction drawn between degrees obtained in member states and those obtained in non-member states as arbitrary and argues that the Office should be guided by the finding of the Disciplinary Board of Appeal, which in February 2005 in a case concerning enrolment for the European qualifying examination held that, as "qualifications and their labelling may differ even within the same country", it is "particularly important to examine not only titles of degrees but also their substantive content".

E. In its surrejoinder the EPO maintains its position. It submits that the complainant errs in inferring from the

decision of the Disciplinary Board of Appeal that the Office has an obligation to investigate the content of various study programmes leading to diplomas. Indeed, the qualifications required for professional representatives before the EPO are completely independent from those required for EPO examiners, as a result of which the decision of the Disciplinary Board of Appeal has no bearing on the complainant.

## CONSIDERATIONS

1. The complainant joined the EPO on 1 November 2003 as an examiner at grade A1. He impugns the President's decision of 23 June 2006 to dismiss his appeal against the Office's refusal to recognise his BSc degree as a "diploma of completed studies at university level" and accordingly credit him the professional experience he acquired after obtaining that degree in determining his grade and step. He puts forward the following pleas: (i) the impugned decision was taken *ultra vires*; (ii) the alleged practice of non-recognition of United States degrees is neither consistent, well known, published nor long-standing; (iii) the alleged practice of non-recognition of these degrees is based on errors of fact, non-consideration of essential facts and errors of law; and (iv) the alleged practice is in breach of the principle of equal treatment.

2. The Tribunal notes at the outset that the complainant was at no point informed prior to taking up his duties that the Organisation had a standard practice of not recognising a United States Bachelor's degree as a "diploma of completed studies at university level". It is uncontested that when he received his offer of appointment together with the calculation of his reckonable experience, he called the designated officer for clarification and was told that the calculation was preliminary and that there would be an opportunity to correct it upon taking up his duties. He was also advised to contact another person for further information, but he was unable to reach her. The deadline for accepting the offer of employment was 23 October 2003 and the complainant accepted the job, trusting that the calculation of his reckonable experience would be corrected.

3. According to Circular No. 271, part I(3)(a), the criterion for crediting previous professional activity is that it "must occur after acquisition of the level of education required under the minimum qualifications of the job description for the post in question", which for the post of examiner is, according to the Service Regulations, a "diploma of completed studies at university level". Therefore, the issue in the present case is whether or not the complainant's ABET-accredited United States BSc degree satisfies that requirement. The Tribunal is of the opinion that a United States ABET-accredited BSc degree must be considered a "diploma of completed studies at university level". It also considers that the explanation given by the Organisation for ruling otherwise is unsatisfactory, that the Washington Accord, while not binding, should be taken into consideration, that document CI/376/77, intended to facilitate the procedure for recruiting examiners, should not be ignored, and that Judgments 851 and 895, while not identical to the present case, contain considerations which strongly support the complainant's position.

4. It is the Tribunal's opinion that, contrary to the defendant's view, recognising ABET-accredited United States degrees would not entail an unacceptable level of administrative effort as it would be just as easy to recruit on that basis as it is to recruit on the basis of an MSc degree. Further, under the terms of the Washington Accord, which is an international agreement for the recognition of the substantial equivalence of accredited engineering degree programmes, an ABET-accredited United States BSc degree is equivalent to the United Kingdom BEng (Honours) degree, which is recognised by the Organisation. Therefore, logically, the Organisation should have no difficulty in recognising the complainant's BSc degree as fulfilling the minimum education requirement. While the Washington Accord is not legally binding on the EPO, it derives from a sound technical evaluation and the Organisation has a responsibility at least to consider it when making a choice based on the same technical evaluation. Given that the United Kingdom recognises the ABET-accredited United States BSc degree as being equivalent to its own BEng (Honours) and that the Office recognises the latter degree as corresponding to a "diploma of completed studies at university level", although it is not bound by the practice of member states, the Office, nevertheless, has a duty to explain the apparent inconsistency of its approach.

5. Document CI/376/77 shows that subject to certain conditions a United States "Bachelor of Science Degree in Engineering from an educational institution sanctioned by the Engineers' Council for Professional Development", the predecessor of ABET, is recognised by Norway as the minimum qualification for an examiner. The Organisation alleges that this document is intended to facilitate the procedure for recruiting their examiners but is not binding. The Tribunal observes that this document, compiled by the Organisation itself, cannot reasonably be ignored when considering the complainant's application.

6. It is worth recalling that in Judgment 851, under 10, the Tribunal said that “some differences will have to be allowed in the content and standard of engineering degrees until there is international standardisation. For an international organisation [...] the only fair and practical approach is to demand for an examiner’s post the qualifications required for equivalent duties in the applicant’s home country.” In the same vein, in Judgment 895, under 5, it said that “[f]or appointment as an examiner of patents with the Organisation the complainant is required to have the qualifications he would need for appointment as an examiner in the patent office of his own country”. Since those judgments were delivered there has been a move towards international standardisation with the coming into force of the Washington Accord. As the complainant’s BSc degree would make him eligible to work as an examiner in his home country, the United States, according to the Tribunal’s rulings in the two judgments listed above, he should also be deemed eligible to work as an examiner for the Organisation.

7. The EPO submits that it “would not recognize the [United States] BSc [degree] at issue even for [an employee from the United Kingdom]. The only possible link here is the degree itself; but [United States] bachelor’s degrees are not recognized on principle, regardless of which member state’s nationality the applicant holds.” The Tribunal notes that this statement is contrary to the considerations in Judgments 851 and 895, mentioned above, and is also contradictory to another statement by the Organisation, namely that “[i]t would be difficult for the member states to comprehend why the requirements for an examiner’s post at the defendant [O]rganisation should be disregarded or made stricter than for national authorities”. Since the United Kingdom national authorities recognise the ABET-accredited United States BSc degree as being equivalent to the United Kingdom BEng (Honours) and would therefore consider the applicant eligible for the post of examiner, the Organisation should also find it reasonable to recognise that degree when recruiting and hiring employees. It should be noted that the Organisation’s blanket disregard for United States BSc degrees appears discriminatory.

8. According to the above considerations, the Tribunal concludes that the complainant’s ABET- accredited United States BSc degree must be considered a “diploma of completed studies at university level” and therefore the decision to deny his request for recalculation of his reckonable experience from the date of his United States BSc degree, must be set aside. The complainant’s reckonable experience and salary have to be calculated in accordance with the Organisation’s Service Regulations and Circular No. 271, from the date of receipt of his completed BSc degree, i.e. 15 May 1994, and the complainant must receive all consequential salary adjustments. The Organisation must pay the complainant 3,000 euros in costs. Although there has been no clear demonstration of bad faith on the part of the Organisation, the Tribunal awards the complainant moral damages in the amount of 4,000 euros to take account of the extended period during which he has been retained in the wrong grade.

## DECISION

For the above reasons,

1. The impugned decision must be set aside as must the earlier decision of 11 June 2004.
2. The calculation of the complainant’s reckonable experience and salary must be made in accordance with the EPO’s Service Regulations and Circular No. 271, from the date of the complainant’s receipt of his United States BSc degree on 15 May 1994, with all consequential salary adjustments.
3. The Organisation shall pay the complainant 4,000 euros as moral damages.
4. It shall also pay him 3,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2007, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Mary G. Gaudron

Giuseppe Barbagallo

Catherine Comtet

Updated by SD. Approved by CC. Last update: 27 February 2008.