107th Session **Judgment No. 2823**

THE ADMINISTRATIVE TRIBUNAL,

Considering the first and second complaints filed by Mr T. G. against the European Patent Organisation (EPO) on 11 September 2007 and corrected on 12 December 2007, the Organisation's replies of 10 April 2008, the complainant's rejoinders of 14 May and the letters of 3 June 2008 by which the EPO informed the Registrar of the Tribunal that it did not wish to enter a surrejoinder for either complaint;

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 cases and the pleadings may be summed up as follows:

A. The complainant, a German national born in 1965, joined the European Patent Office, the EPO's secretariat, on 1 May 2002 as an examiner at grade A2. On taking up his duties he was sent a provisional calculation of his reckonable experience for the purposes of recruitment and promotion according to which he had seven years and two months of reckonable experience. By a letter of 28 May 2002

the complainant pointed out an error in that calculation and also asked the Office to credit the period of his PhD studies at 75 per cent instead of 50 per cent. On 17 June 2003, after he had supplied further details concerning various periods of previous employment, the Office sent him a second calculation showing that his reckonable experience was seven years and eight months. On 1 July 2003 the complainant asked the Office to revise its calculation on the grounds that one of the periods of employment taken into account ought to have been credited at 100 per cent rather than 75 per cent. The Office agreed to credit the period in question at 100 per cent and, under cover of a letter dated 28 July 2003, sent the complainant a third calculation according to which he had seven years and nine months of reckonable experience. On 8 November 2004 he was informed of his promotion to grade A3 with effect from 1 May 2004.

In a letter dated 24 January 2005 to the Principal Director of Personnel the complainant again requested a recalculation of his reckonable experience, arguing that the Office had mistakenly omitted to give credit for his work as a freelance consultant for the period from July 2000 to October 2001. He wrote to the Principal Director of Personnel again on 4 February 2005 stating that "as a precaution" he wished to file an appeal against the effective date of his promotion. Referring to his letter of 24 January 2005, he submitted that this matter was linked to the "incorrect" calculation of his reckonable experience, dated 28 July 2003, which, he added, he had only accepted because he had been assured that his unrecognised previous experience would be taken into account at the time of his next promotion by backdating the promotion accordingly. He requested recognition of his freelance consultancy work and asked the Principal Director of Personnel to forward his appeal to the President of the Office. In an e-mail of 28 February 2005 the Recruitment Department explained why the complainant's work as a consultant could not be recognised and informed him that his letter of 4 February would be treated as an internal appeal. By a letter of 1 April 2005 the complainant was informed that the President of the Office considered that his request could not be granted and had therefore referred his appeal to the Internal Appeals Committee.

The complainant met with staff members of HR Administration and Systems on 10 May and 19 July 2006 to discuss his case; he was then informed that the calculation of 28 July 2003 was final. On 12 October 2006 he wrote to the President of the Office and asked to be credited with at least three months of reckonable experience in respect of his work as a freelance consultant and the time he had spent preparing for the European qualifying examination for professional representatives (EQE). In the event that his request was denied, he wanted his letter to be treated as an internal appeal "against the refusal, received on 19 July 2006, to recognise" that previous experience. By a letter of 10 November 2006 he was informed that the President of the Office had referred this second appeal to the Internal Appeals Committee.

The Committee considered the complainant's appeals jointly. In its opinion dated 9 May 2007 it found that his appeal of 4 February 2005 was partly admissible, because he had challenged the effective date of his promotion within the prescribed time limits, but that his claim for recognition of his consultancy work was time-barred and, consequently, his claim for a retroactive assignment to grade A3 was also time-barred. It held that his appeal of 12 October 2006 overlapped with the first appeal insofar as he was seeking recognition of his consultancy work and, to that extent, it was irreceivable. It further held that his request for recognition of the time that he had spent preparing for the EQE was time-barred. It recommended that the appeal of 4 February 2005 be rejected as partly irreceivable and otherwise unfounded and that the appeal of 12 October 2006 be rejected as irreceivable. By a letter dated 5 June 2007, which constitutes the decision impugned in each complaint, the complainant was informed that the President had accepted these recommendations.

B. In his first complaint the complainant argues that the calculation of his reckonable experience was continuously under discussion from May 2002 until July 2006, and he contends that he had a legitimate expectation that his request of 24 January 2005 for a recalculation was being examined by the Office up until 19 July 2006. He points to the meetings that took place in May and July 2006 and submits that the

EPO did not, as it asserts, merely explain its previous calculations but that it requested additional information from him and engaged in a new analysis of his reckonable experience. Thus, he did not receive a final decision until 19 July 2006. Furthermore, in his view, because the injustice resulting from that decision is repeated every month upon receipt of his salary, his claims should be receivable at least with respect to the period commencing with the filing of his complaint.

On the merits he submits that the EPO cannot justify refusing to take into account his professional activities during the period from July 2000 to mid-September 2001. He contends that the actual hours he was employed as a freelance consultant far exceeded his invoiced hours and that the Office's refusal to recognise this work is arbitrary. In addition, he argues that his preparation for the EQE was an important part of his studies to qualify as a patent attorney and that it should be recognised as reckonable experience, even though at the time he had passed only part of the EQE.

In his second complaint the complainant submits that, because the Office made a mistake in its calculation of his reckonable experience, his grade upon appointment should be corrected to grade A3. The arguments on which he relies in support of this claim are the same as those put forward in his first complaint. He also argues that, in the course of the discussions concerning the calculation of his reckonable experience, he was assured that any promotion to grade A3 would be backdated to August 2002 on the basis that he would by then have acquired eight years' reckonable experience, which, under the rules then in force, "by default resulted in an appointment in grade A3". He notes that at the material time at least two years' experience in grade A2 were required for promotion to A3 but argues that, in view of the legitimate expectation engendered by that assurance, he should nevertheless be granted an A3 salary retroactively from August 2002.

In his first complaint he asks the Tribunal to quash the impugned decision and to order the EPO to recalculate his reckonable experience according to one of the formulas he has provided. Alternatively, he requests that the Tribunal determine the amount of additional reckonable experience to which he is entitled. He also claims

compensation for the resultant difference in salary from May 2002 or from the date of filing his complaint. In the alternative, he asks the Tribunal to determine an amount of compensation with respect to his salary. In his second complaint he asks the Tribunal to quash the same impugned decision and to order the EPO to "correct" his grade upon recruitment from grade A2 to A3 and pay him the corresponding difference in salary with effect from August 2002. In both complaints he claims costs.

C. In its reply to the first complaint the EPO argues that the complaint is irreceivable as time-barred. The complainant did not challenge the calculation of his reckonable experience dated 28 July 2003 within the three-month time limit prescribed by the Service Regulations for Permanent Employees of the European Patent Office. It denies that a new decision was taken at the meetings in May and July 2006. Likewise, his salary slips do not constitute recurrent decisions regarding reckonable experience.

On the merits it points out that at the material time, the rules dealing with the calculation of reckonable experience attained prior to entry into service were set out in Circular No. 144. It argues that the complainant has not met the requirements of the circular in that he has not proven that his freelance consultancy work corresponded to the level and type of duties of his post or that his preparation for the EQE led to the award of a diploma no later than the date on which his appointment was confirmed. It notes in that respect that he passed the EQE four years after he began working at the EPO. Also, the Organisation does not normally recognise the EQE for the purposes of reckonable experience because EQE preparation usually takes place concurrently with periods of employment that are recognised by the Organisation as professional activity. It states that the calculation was correct and not arbitrary.

The EPO also points out that the complainant has amended his calculations of his reckonable experience a number of times since he began challenging the Organisation's calculation and that this behaviour is not in conformity with his obligations under the Service

Regulations or with what may be expected of an international civil servant.

In its reply to the second complaint the Organisation argues that the complaint is also irreceivable as time-barred. The complainant did not challenge his grade upon appointment within the prescribed time limit. It points out that he bases his claim to be appointed to grade A3 with effect from 1 May 2002 on his requests for recognition of his freelance consultancy work and his preparation for the EQE, which are time-barred. In addition, since he failed to file an internal appeal within three months of receiving his salary slip for August 2002, his claim for payment of the difference in salary between grades A2 and A3 with effect from that date is also time-barred.

D. In his rejoinders the complainant maintains his pleas. He claims moral damages in response to submissions made by the EPO which he considers to be offensive and damaging to his dignity. He also states, in his rejoinder on the second complaint, that he wishes to withdraw that complaint if the Tribunal finds that his first complaint is receivable.

CONSIDERATIONS

1. These two complaints are concerned with the calculation of the complainant's reckonable experience for the purposes of Article 11 of the Service Regulations. They also both raise the question as to when a final decision was made with respect to that calculation. Accordingly, it is appropriate that they be joined.

2. The complainant entered the service of the EPO on 1 May 2002 at grade A2. After taking up duty, he was given a provisional calculation of his reckonable experience at seven years and two months, subject to proof that he had worked full-time during the periods on which the calculation was based. By letter of 28 May 2002, the complainant requested that credit be given at 75 per cent for his PhD studies and informed the Recruitment Department that the period from 16 February to the end of April 2002 had been recognised

erroneously. Later, on 5 March 2003, he supplied invoices for periods during which he worked as a freelance consultant. He was informed on 6 May 2003 that the invoices did not establish that he had worked full-time during the relevant period and was asked whether he had further assignments that could be taken into account. Nothing further having been heard from the complainant, he was informed by letter of 17 June 2003 that his reckonable experience had been calculated at seven years and eight months, with credit being given for his PhD studies at 75 per cent but without recognition of the freelance period from July 2000 until October 2001. He thereupon requested recognition at 100 per cent of a period that had previously been recognised at 75 per cent. His request was granted and, by letter dated 28 July 2003 but received on 4 August, he was informed that his reckonable experience was seven years and nine months. Again, the calculation did not include the freelance period between July 2000 and October 2001.

3. On 8 November 2004 the complainant was informed that he had been promoted to grade A3 with effect from 1 May 2004. That promotion would have taken effect from an earlier date had his reckonable experience included the period of his freelance consultancy. By letter of 24 January 2005 to the Principal Director of Personnel, the complainant requested a recalculation of his reckonable experience to include the period from July 2000 to October 2001. On 4 February 2005 he lodged an internal appeal with respect to the effective date of his promotion to grade A3, requesting recognition of his freelance work for the purpose of calculating his reckonable experience.

4. In an e-mail of 25 February 2005 to the Recruitment Department the complainant stated that his appeal had been filed as a precaution and that he wanted to avoid an appeal if at all possible. The Recruitment Department replied in an e-mail on 28 February. It referred to the complainant's letter of 24 January and explained that the period of freelance work could not be recognised as it amounted, on average, to only four hours per week and the general practice was

that “part-time work should equal at least 50% of a normal activity”. The e-mail concluded with the statement that:

> “The position of the Office had not changed and your letter of 4 February will, therefore and according to your request, be recorded as an internal appeal.”

On 2 March 2005 the complainant replied to the Recruitment Department stating that he agreed that his “average working time for [the] period [in question] appear[ed] to be very small and indeed insufficient to be recognised [...] in the light of the general practice”. However, he suggested that, at least for the period from June to October 2000, the invoiced hours worked be multiplied by 2.63, which would result in 59 working days. He asked that he be credited with three months’ experience for that period and stated that, if accepted, he “would withdraw [his] internal appeal as [he] agree[d] that for the remaining months the actual hours worked [were] below what is expected to be recognizable”.

5. Apparently, the complainant spoke to his Director in early 2006 and asked to discuss the question of his reckonable experience with somebody from the Principal Directorate of Personnel. In any event, the evidence is that the complainant’s Director contacted the Director of HR Administration and Systems, indicating that there was a chance that the complainant would withdraw his appeal if someone explained the reasons for the non-recognition of parts of his professional experience. Meetings occurred on 10 May and 19 July 2006. In those meetings the complainant sought the recognition of his freelance work and also the time he spent preparing for the EQE. At the second meeting, on 19 July 2006, he was informed, orally, that the calculation of 28 July 2003 was final and that no new decision would be taken. On 12 October 2006 the complainant filed a second internal appeal with respect to what was said to be a final decision of 19 July 2006, seeking at least three months’ reckonable experience on the basis of his freelance consultancy work and his preparation for the EQE.

6. The complainant's first and second appeals were referred to the Internal Appeals Committee and were considered together. In its opinion of 9 May 2007, the Committee recommended that the first appeal be rejected as partly irreceivable and otherwise dismissed as unfounded, and that the second be rejected as wholly irreceivable. The complainant was informed by letter of 5 June 2007 that the President of the Office had decided to reject his first appeal as unfounded and partly irreceivable, and the second as unfounded and irreceivable. The complainant lodged his complaints on 11 September 2007, the first with respect to the decision to reject his second appeal, and the second with respect to the decision to reject his first appeal. In both complaints, he seeks to have his reckonable experience include periods that were not taken into account in the calculation made on 28 July 2003, although the formulation of the relief claimed is different in each case. In his rejoinder in the second complaint, the complainant states that the second complaint was filed only as a safeguard and that he wishes to withdraw it if his first complaint is receivable. That being so, it is convenient to deal first with the first complaint.

7. Receivability of the first complaint depends on whether a decision was taken in July 2006 with respect to the complainant's reckonable experience. The complainant does not contend that a new decision was taken on 19 July 2006, but, rather, that until then "no final appealable decision had been issued". In this regard, he claims that his reckonable experience was an "issue of continuous debate starting in May 2002 and ending in July 2006". Additionally, he claims that "the fact that the [Principal Directorate of Personnel] seriously considered [his] request of 24 January 2005 in view of recalculating [his] reckonable experience le[d him] to believe that [his] request ha[d] been received and examined until 19 July 2006". These arguments must be rejected.

8. There was nothing continuous about the discussions between the complainant and the Principal Directorate of Personnel. The complainant did nothing to initiate discussions between 4 August 2003, when he received the letter of 28 July informing him that his

reckonable experience had been calculated at seven years and nine months, and 24 January 2005. Moreover, no discussions were initiated by the Directorate. Only on 24 January, and then only in the context of a decision with respect to the effective date of promotion, did the complainant contact the Directorate. From the perspective of the latter, those discussions terminated on 28 February 2005 when it was explained to the complainant why his freelance work could not be recognised and he was informed that "[t]he position of the Office had not changed". Although the complainant sought to put an alternative calculation of his freelance work to the Principal Directorate of Personnel on 2 March 2005, nothing further occurred between that date and May 2006 when the complainant sought to advance another basis for calculating his reckonable experience. Again, it was the complainant who initiated discussions and, again, in the context of his pending appeal. The discussions ended when he was informed that no new decision would be taken.

9. The fact that the Recruitment Department communicated with the complainant in February 2005 in response to his request for a recalculation of his reckonable experience provides no basis for a reasonable belief that the issue was the subject of continuing consideration. As already indicated, at that stage, the Department merely explained why the period of the complainant's freelance consultancy could not be taken into account and pointed out, in clear terms, that the "position of the Office had not changed".

10. Article 108(2) of the Service Regulations requires that an appeal be lodged within three months of an adverse decision. The oral communication of 19 July 2006 cannot be considered as the only final decision on the question of the complainant's reckonable experience. Nor is there any basis on which it can be said to be a fresh decision, as distinct from the confirmation of an earlier decision, no new basis having been advanced for maintaining the calculation of the complainant's reckonable experience at seven years and nine months as communicated by the letter of 28 July 2003. And save for the complainant's salary slips, there is nothing within the three months

preceding 12 October 2006, the date on which his second internal appeal was lodged, that could conceivably be considered as a decision with respect to his reckonable experience. Although the complainant relies on his salary slips, that reliance is misplaced. It is correct, as pointed out in Judgment 1798, that "pay slips are individual decisions that may be challenged before the Tribunal". However, they cannot be challenged as new decisions if they merely confirm a decision that was taken at some earlier time and outside the time limits in which an appeal may be brought. More particularly, and as is clear from Judgment 847, an EPO staff member can only challenge the determination of seniority or reckonable experience within three months of its original determination.

11. The President of the Office was correct in rejecting the complainant's second internal appeal as wholly irreceivable. That being so, the first complaint is also irreceivable and it is necessary to consider the second complaint based on the complainant's first internal appeal with respect to the decision of 8 November 2004 as to the effective date of his promotion to grade A3.

12. It is not disputed that the complainant's first internal appeal was brought within time insofar as it challenged the decision as to the effective date of his promotion to grade A3. That being so, the second complaint is, to that extent, receivable. However, the only ground upon which it is contended that the effective date was wrong is that the complainant's reckonable experience should have included periods that were not taken into account in the calculation of seven years and nine months communicated by letter of 28 July 2003.

13. To the extent that the decision as to the effective date of the complainant's promotion involved the issue of his reckonable experience, it was merely confirmatory of the calculation communicated by the letter of 28 July 2003. For the same reasons given with respect to salary slips in relation to the first complaint, an appeal with respect to the date of promotion cannot be used to challenge that calculation. It could only be challenged by an appeal

brought within three months of the receipt of the letter of 28 July 2003, a period which expired on 4 November 2003, and well before the first internal appeal was lodged on 4 February 2005.

14. The complainant also seeks to have his reckonable experience recalculated on the basis that:

> "In the course of the debate [...] [he] was informed that in [his] situation (seven years and nine months of reckonable experience) [he would] gain eight years of reckonable experience by the end of July 2002, which at that time (before July 2002) by default resulted in an appointment in grade A3."

On that basis, he contends that the effective date of his promotion should be 1 August 2002. Presumably, the argument is put on the basis that good faith requires that the complainant should now be permitted to establish that his reckonable experience should include periods that were not included in the calculation of 28 July 2003 and his promotion backdated accordingly.

15. Contrary to the submissions of the EPO, it may be accepted that some statement was made along the lines for which the complainant contends. However, the statement refers to seven years and nine months' reckonable experience, a calculation that most probably was arrived at on the hypothetical basis that the complainant's freelance activities for the period from June 1997 to June 2000 were credited at 100 per cent, his PhD studies at 75 per cent and a deduction made from the provisional calculation in May 2002 of the period from 16 February to the end of April 2002 that had then been erroneously credited. Whatever the basis of the calculation, the complainant was informed at all times from May 2002, that crediting of his freelance activity at 100 per cent was "subject to the production of supporting documents showing that the activity amounted to a 100% activity". As he did not provide those documents for the remaining period, there was no reasonable basis for him to assume that he would be credited with more than a period of seven years and nine months or any other period that was not substantiated to the satisfaction of the Office. In these circumstances, he cannot rely on the statement in question as a basis either to challenge the calculation of 28 July 2003

or to argue that his promotion should be backdated to a date prior to 1 May 2004.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 14 May 2009, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba
Mary G. Gaudron
Dolores M. Hansen
Catherine Comtet