**S.**

***v.***

**EPO**

**122nd Session** **Judgment No. 3701**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. S. against the European Patent Organisation (EPO) on 29 October 2011, the EPO's reply of 13 February 2012, the complainant's rejoinder of 25 February and the EPO's surrejoinder of 18 April 2012;

Considering Article II, paragraph 5, 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 contests the calculation of his reckonable previous experience upon recruitment.

The complainant joined the European Patent Office, the secretariat of the EPO, on 1 April 2007. By a letter of 30 November 2007 he was informed of the definitive calculation of his reckonable experience, in accordance with Circular No. 271 of June 2002, and that he had been placed in grade A3, step 3, with 9 months in step.

On 20 February 2008 the complainant wrote to the President of the Office contesting his assignment to this grade and step on the ground that the professional experience he had acquired performing post-doctoral activities at Technion from 1 February 1994 to 31 December 1994 and from 1 January 1995 to 14 December 1996, and at the University of

Jyväskylä from 15 December 1996 to 31 October 1997, should have been credited as periods of "professional activity" at the rate of 75 per cent (without cap) rather than periods of "training" at the rate of 50 per cent. He contended that the EPO should have acknowledged a total of 1,026.75 days as relevant experience instead of the 191.25 days calculated. He also claimed moral damages and costs. His request for review was rejected and the matter was referred to the Internal Appeals Committee (IAC).

Having held oral hearings, the IAC issued its opinion on 9 August 2011. It unanimously considered that the complainant's activities at the University of Jyväskylä should be considered as professional activities within the meaning of Section I(3) of the Circular, and that the EPO should modify the definitive calculation of previous reckonable experience. The majority of the IAC's members recommended that the period at the University of Jyväskylä be credited at 75 per cent, that his step be modified accordingly and that he be paid any amount due as salary and benefits together with interest at 8 per cent per annum. However, it recommended that his appeal be dismissed with respect to the other two periods at issue (at Technion) on the ground that he had not shown that he had performed professional activities. It further concluded that he had not shown any moral injury and therefore recommended dismissing his claim for moral damages, but recommended awarding him 500 euros for undue delay in the appeal proceedings and reimbursing him any reasonable expenses incurred. The minority recommended that the period spent at the University of Jyväskylä be credited at 75 per cent and be acknowledged when determining his grade and step anew, and thereafter with respect to possible promotion. It also recommended that he be paid the amount due to him with respect to his salary and entitlements based on the grade and step that should have been assigned to him, plus 8 per cent interest per annum. It further recommended that he be paid 1,500 euros in moral damages and 500 euros in costs.

By a letter of 10 October 2011, the complainant was informed that the Vice-President of Directorate-General 4, acting with delegation of authority from the President, had decided to reject his appeal as unfounded but to award him 500 euros for undue delay. The rejection

was said to be based on the EPO's well-established and uniform policy on post-doctorates, according to which activities covered by a fellowship or a scholarship are essentially different from professional activities, inter alia as regards the nature and level of duties and the working conditions (remuneration, working hours, social security etc.), and are credited at 50 per cent. The Vice-President agreed with the majority of the IAC that the nature of the tasks and the conditions of the activity the complainant performed while at Technion clearly indicated that his activities were rather of a training nature and did not fulfil the conditions of professional activity. As regards the period spent at the University of Jyväskylä, he deviated from the unanimous opinion of the IAC considering that the principle purpose of the complainant's activities (i.e. research and supervision of younger researchers) seemed to remain advanced training and specialisation and did not suffice to make the work he performed "equivalent to employment" within the meaning of the Circular. The Vice-President agreed with the majority's finding that the complainant had incurred no moral damage. This rejection of his appeal is the decision he impugns before the Tribunal.

The complainant asks the Tribunal to set aside the impugned decision and to order the EPO to acknowledge the three contested periods as relevant professional experience (i.e. for a total of 1,369 days) and to credit them at the rate of 75 per cent of the total time he worked. Thus, 1,026.75 days should be acknowledged as relevant professional experience instead of the 191.25 days calculated upon recruitment. He also asks the Tribunal to order the President of the Office to provide him with a corrected definitive calculation of his reckonable experience and to assign him to a grade and step that correctly reflects his reckonable experience. He further claims at least 500 euros in moral damages in addition to the 500 euros already paid to him for undue delay, and costs.

The EPO asks the Tribunal to dismiss the complaint as unfounded. It emphasises that the complainant has not proved that he suffered any moral harm, and that the payment of 500 euros made with respect to the delay in the internal appeal proceedings was sufficient.

## CONSIDERATIONS

1. The central issue for determination in this complaint is whether, as the complainant contends, three post-doctoral periods of research and study at universities should be considered as "periods of professional activity", pursuant to Section I(3) of Circular No. 271 of June 2002 on the Guidelines for applying Articles 3(1), 11(1) and 49(7) of the Service Regulations. If it is determined that they are, the complainant would be entitled to a re-calculation of his reckonable previous experience by which the periods will be weighted at 75 per cent rather than the 50 per cent at which the EPO weighted them on his recruitment, because it determined that they were periods of training, pursuant to Section I(1) of the Circular, rather than periods of professional activity. The applicable provisions are relevantly reproduced.

2. Article 11 of the Service Regulations is under the rubric "Grade and seniority". Paragraph 1 of the Article states as follows:

> "The appointing authority shall assign to each employee the grade corresponding to the post for which he has been recruited. Employees recruited to posts classified in a group of grades shall be assigned the grade corresponding to their reckonable previous experience, in accordance with the criteria laid down by the President of the Office."

3. The President laid down the relevant criteria that define periods of training and periods of professional activity in Sections I(1) and I(3) of the Circular, for implementing the career system for category A as follows:

> "**I. Reckonable previous experience**
>
> Activity prior to recruitment to an EPO permanent post is credited for step-in-grade assignment and career development purposes in accordance with the rules below.
>
> (1) Periods of training
>
> (a) Such periods must occur after acquisition of the diploma required under the minimum qualifications of the job description for the post in question.

(b) The training must be relevant for duties which can be performed at the Office, and must have given rise to a diploma or certificate awarded no later than the date on which appointment is confirmed.

(c) Subject to sub-paragraph (d) below, these training periods are normally credited at 50%, up to a maximum of 18 months.

(d) If however these periods led to the award of a doctorate (eg PhD) in a field relevant to duties which may be performed at the Office, they are credited at 75%, up to a maximum of 36 months' total experience credited for training.

(e) Any professional activity performed during a credited training period is not taken into account under paragraph (3) below.

(2) Periods of military service

[…]

(3) Periods of professional activity

(a) Such activity must occur after acquisition of the level of education required under the minimum qualifications of the job description for the post in question.

(b) It must occur after the age of 21.

(c) It must correspond to that of an EPO category A post as regards type of work and level of responsibility.

(d) Periods of employment of less than three months with any one employer are not taken into account, unless the type of work (eg freelance) justifies frequent changes of employer.

(e) Periods of professional activity are normally credited at 75%. The President may, in exceptional cases, credit at 100% periods considered particularly relevant and useful to the Office (eg work at a national patent office of a member state, or as a patent attorney or in a patent department in industry in an EPO member state).

Each of the periods credited is expressed in days, and the total reckonable period rounded off to the nearest full month.

The total period thus credited is the 'reckonable previous experience'; added to 'seniority', i.e. the period of EPO service (in category A), it gives the staff member's 'total experience'."

4. Inasmuch as the determination of the central issue will be a function of interpretation, it would be helpful at this juncture to recall the basic principles of interpretation as stated by the Tribunal. Those principles state that the words of a provision are to be interpreted in good faith giving them their ordinary and natural meaning in their context.

Where the language of the text is clear and unambiguous, the words must be given effect without looking outside of the text to determine the meaning. Texts which are ambiguous are to be construed in favour of the staff member. Thus it was stated as follows in Judgment 2276, consideration 4:

> "When it comes to interpretation, the primary rule is that words are to be given their obvious and ordinary meaning (see Judgment 1222, under 4) and any ambiguity in a provision should be construed in favour of staff and not of the Organization (see Judgment 1755, under 12)."

The following was stated in Judgment 691, consideration 9:

> "The text being unambiguous, the EPO and the Tribunal have no choice but to apply it without reference to the preparatory work or the supposed intent of the lawmaker. Strict textual interpretation is an essential safeguard of the stability of the position in law and so of the Organisation's efficiency.
>
> Only when the text is ambiguous need more subtle methods of construction be applied. Difficulty may occur in international organisations precisely because language versions disagree, and it was just such a difficulty that the Tribunal had to resolve in Judgment 537, for example. But it need not do so here. Since the text is clear in the three official languages of the EPO, the Tribunal concludes that there was an error of law and it allows the complainant's plea."

The following was stated in Judgment 2641, consideration 4:

> "Staff Rules are to be construed in context and according to the natural and ordinary meaning of the words used."

5. The words of Sections I(1) and I(3) of the Circular are clear, unambiguous and not obscure. They are to be construed according to the natural and ordinary meaning, in order to determine, on the evidence, whether the activities which the complainant undertook during the contested periods were "professional activities" as he asserts.

6. The EPO's case may be set out as follows: the decision that the complainant's activities in each of the contested periods were periods of training was based upon "a well-established and uniform policy". The policy or practice is based on discretion under the Circular which the EPO has applied consistently. Under the policy, the EPO relies upon the following factors to distinguish between a period of professional activity and a period of training for the purposes of Circular No. 271:

(i) the existence of an employment contract or certificate of employment, (ii) the existence of a relationship of dependence between the applicant and previous employer and the type of remuneration received and services performed, and (iii) the nature of the work and responsibilities associated with the activity in question.

Given these factors, the EPO's policy is that funded post-doctoral activities are not professional activity because of the nature and level of the duties involved and the working conditions. They would be considered as professional activity only if accompanied by a contract of employment. The contested periods were not periods of verifiable professional activity as the complainant simply stated that he had been a "postdoctoral researcher" for the periods mentioned without referring to an employment relationship. As regards the activities at the University of Jyväskylä, the EPO rejected the IAC's unanimous opinion that his work there should be considered professional activity because he not only carried out research but also supervised and taught fellow and younger researchers. Accordingly, the EPO determined that the principle purpose of that activity was the complainant's training and specialization in the form of research and other tasks (for example, supervising younger researchers).

7. The question whether activities are "training activities" or "professional activities" is not, however, a function of the exercise of discretion. Neither is it a function of long-standing and uniform practice. The fact that Section I of the Circular does not specifically provide for periods of post-doctoral training as a specific category, as it does for "periods of military service" and "periods of professional activity", does not leave a gap that the EPO may fill by discretion or by practice or policy, as it seems to suggest. It is therefore a moot point whether the three criteria which the EPO referred to in the foregoing paragraph establish a specific regulation or implementing rule which is of no effect because there was no consultation with the General Advisory Committee (GAC) as Article 38(3) of the Service Regulations requires. Post-doctorate and internship periods are periods of activity which may fall into either the first or the third categories provided in Section I of the Circular, so long as they fit the criteria set for the category in that section.

In the present case, the question whether the activities are professional activities, as the complainant insists, or training activities, as the EPO determined, is a function of analysis. The analysis must be based on the criteria set out in Section I(3) of the Circular, for the former, and in Section I(1) for the latter, in light of the factual circumstances of the given activities in each case. The staff member, who bears the burden of proof, must provide the evidence of those circumstances.

8. The evidence which the complainant presents satisfies Section I(3)(a) of the Circular. The contested activities occurred after he acquired the level of education that was required under the minimum qualifications of the job description for the post in question. He has also satisfied Section I(3)(b) as the subject activities occurred after he had attained the age of 21. Section I(3)(d) is also satisfied as the claim relates to periods of more than three months. He needs to show that the activities were of a professional nature, and, in addition, that they correspond to that of the category A post to which he was recruited as a patent examiner as regards type of work and level of responsibility in order to satisfy Section I(3)(c) of the Circular.

9. With respect to his activities during the two contested periods at Technion, the complainant presented a letter dated 3 February 1994 from Professor P.S. to him. That letter informed him of the award of the Postdoctoral Fellowship to Technion. It contains no pointers from which it may be concluded that his activity would have been a professional activity within the meaning of Section I(3) of the Circular. Neither do the letters dated 18 October 1994 and 15 November 1995 from Professor D.S. to him, which informed him, respectively, of the award of the MINERVA Fellowship to pursue further research in the second period at Technion and of the extension of that Fellowship. The complainant also presents a recommendation by Dr M.S.E. of Technion, dated 8 April 1999. It states that from February 1994 to December 1996 the complainant did postdoctoral research on a Fellowship and on a MINERVA Stipend. Dr M.S.E. further states that he considered the complainant a highly skilled research worker and a

creative and innovative synthetic chemist. He explains the work that the complainant did and the experience that he gained and refers to this as "postdoctoral training". There is no evidence therein that shows that the complainant's endeavours at Technion in the two contested periods involved professional activities that were relevant or corresponded to the work to which he was recruited. Dr M.S.E.'s letter dated 2 March 2007 does not change this. It merely confirms that the complainant worked as a postdoctoral fellow in his group at Technion as a researcher for the periods February to December 1994 and January 1995 to December 1996. Accordingly, his claim as it relates to these two contested periods is unfounded and will be dismissed.

10. In relation to the third contested period, the complainant presents two letters of recommendation, dated 13 October 1997 and 13 October 2006, respectively, from Professor K.R. to support his case that his activities at the University of Jyväskylä were professional activities that were relevant or corresponded to the work for which the EPO recruited him. The letter of 13 October 1997 relevantly states as follows:

> "Dr S. has worked 11 months […] in my research group doing post doctoral research work. The work was funded by the Centre of International Mobility, CIMO (Helsinki) as a post doctoral grant. The aim of Dr S.'s post doctoral work was to develop and prepare new chiral macrocyclic supramolecular receptor molecules called Resorcarenes and study their supramolecular properties. During his stay in my group Dr S. has demonstrated that he is sincerely devoted to research work, has a clear and creative research mind and has shown excellent abilities to develop his own research topics. Dr S.'s research work has involved preparative work coupled with various sophisticated analytical techniques, including NMR-spectroscopy, mass-spectrometry, IR-spectroscopy and the practical aspects of single crystal X-ray diffraction analysis. He has shown to be able to combine all these in very intelligent and innovative way. Dr S. has done his research work in a research group of several graduate and post-graduate students. He has shown excellent abilities to work in a research group, both as a group member and also as a mentor and a teacher to the younger researchers.
>
> During his very successful 11 month research period, he managed to solve a lot of synthetic problems and give scientific proof for a very facile ring closure reaction and to show how the products are formed. This alone will produce a high standard publication, preparation of which is currently in progress. […] Based on his earlier results Dr S. has now presented an

> innovative and highly interesting research plan for linking Resorcarene Chemistry with Organometallic Chemistry. This type of multidisciplinary research has been rare in my group and it will have a major positive impact for the research done in my group."

11. The letter of recommendation dated 13 October 2006 relevantly states as follows:

> "Dr T. S. worked as a researcher in my group at the University of Jyväskylä from December 1996 to October 1997, Finland. Being a trained inorganic/organometallic chemist, he set up and carried out a project concerning resorcinarenes, a new type of inherently chiral macrocyclic receptor molecules and studied their supramolecular properties. The excellent results of his Jyväskylä research are documented in several publications. As a trustworthy, self-reliant researcher he was fulfilling his duties always with excellence. He has shown exceptional abilities to work in a research group, both, as a group member and as a mentor and teacher for his colleagues [...]."

12. The Tribunal considers that the foregoing passages show that the complainant's work at the University of Jyväskylä from December 1996 to October 1997, the third contested period, involved more than training activity. To a great extent his work involved activities which by their nature permitted him to acquire professional experience that was relevant or corresponded to that of the category A post as a patent examiner to which he was recruited. Section I(3)(c) of the Circular was therefore also satisfied.

In the foregoing premises the complainant's work during this contested period should have been taken into account with a 75 per cent weighting pursuant to Section I(3)(e). His complaint is therefore well founded on this ground and the impugned decision will be set aside to the extent that it determined that the complainant's activities for this third contested period involved training rather than professional activities. The EPO will be ordered, on this basis, to re-calculate the complainant's reckonable previous experience, under Section I(3) of the Circular, and, accordingly, re-adjust his initial salary and grade if the re-calculation of his reckonable previous experience requires. The EPO will also be ordered to pay the complainant interest on any outstanding sum by which his salary may be adjusted at the rate of 5 per cent per annum, from due dates until the date of final payment.

The EPO has accepted that there was undue delay in the internal appeal proceedings and has agreed to pay the complainant 500 euros in moral damages therefor. This was inadequate, given that the length of the delay in the internal appeal process was approximately 3 and a half years. The EPO will be ordered to pay the complainant an additional 750 euros in moral damages for the undue delay. The EPO will further be ordered to pay the complainant 750 euros costs.

## DECISION

For the above reasons,

1. The impugned decision is set aside to the extent that it determined that the complainant's activities for the third contested period involved training rather than professional activities.

2. The EPO shall re-calculate the complainant's reckonable previous experience, under Section I(3) of the Circular, from 1 April 2007, the date on which he joined the EPO, with all consequential salary adjustments.

3. The EPO shall pay interest on any outstanding sum by which the complainant's salary may be re-adjusted, under point 2 above, at the rate of 5 per cent per annum from due dates until the date of final payment.

4. The EPO shall pay the complainant 750 euros in moral damages for undue delay in the internal appeal process.

5. The EPO shall also pay the complainant costs in the amount of 750 euros.

6. All other claims are dismissed.

In witness of this judgment, adopted on 13 May 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Andrew Butler, Deputy Registrar.

Delivered in public in Geneva on 6 July 2016.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

ANDREW BUTLER