

**K.**  
**v.**  
**EPO**

**123rd Session**

**Judgment No. 3788**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr E. K. against the European Patent Organisation (EPO) on 29 July 2011 and corrected on 7 November 2011, the EPO's reply of 17 February 2012, the complainant's rejoinder of 23 May and the EPO's surrejoinder of 28 August 2012;

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

Having examined the written submissions;

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

The complainant challenges the EPO's refusal to apply its recalculation of his reckonable previous experience with retroactive effect to the date of his entry into service.

The complainant joined the European Patent Office, the secretariat of the EPO, on 1 October 1990. At the time of his recruitment, the rules dealing with the calculation of reckonable experience attained prior to entry into service were set out in Circular No. 144 (2 September 1985). This Circular was superseded by Circular No. 271. Although his offer of appointment indicated that he would occupy the position of examiner at grade A1, step 2, after numerous exchanges with the Administration, in April 1991 he was informed that his reckonable experience had been recalculated and that he would be placed at grade A2, step 2, with 9 months in step, as from the date of his entry into service.

Further exchanges ensued between the complainant and the Administration regarding, in particular, recognition of the Bachelor of Science (BSc) degree which he had been awarded by Boston University, Massachusetts, United States of America, on 25 September 1981, and the consequent effect that such recognition would have on the calculation of his reckonable experience. Having been unable to resolve the matter, on 28 January 1999 he filed an internal appeal (registered as IA/10/99) in which he sought to have his professional work experience from September 1981 (following the award of his BSc degree) to May 1984 credited as reckonable experience. In its opinion of 5 April 2001 the Internal Appeals Committee (IAC) unanimously recommended that the appeal be dismissed. The appeal was dismissed accordingly and the complainant did not appeal that decision before the Tribunal.

On 6 February 2008 the Tribunal delivered Judgment 2709 in which it set aside a decision of the EPO to deny a request for recalculation of reckonable experience from the date when the complainant in that case was awarded a United States BSc degree, and ordered that his reckonable experience and salary be calculated in accordance with the Service Regulations for permanent employees of the European Patent Office and Circular No. 271, from the date of receipt of his completed BSc degree, and that he receive all consequential salary adjustments.

By a letter of 7 March 2008 the complainant asked the Administration to recalculate his reckonable experience and salary, as from the date of receipt of his BSc degree (25 September 1981), in accordance with Judgment 2709. Having received no reply, on 14 May 2008 he filed an internal appeal (registered as IA/85/08) challenging the implied rejection of that request.

In September 2008 the EPO notified staff of its decision, in view of Judgment 2709, to review the calculation of the reckonable previous experience of those staff members for whom that experience had been considered only as from the award of a Master of Science (MSc) degree and who had obtained a BSc under specific conditions. The BSc degree in question had to have been acquired in the United States and been credited by the Accreditation Board for Engineering and Technology (ABET). It also had to be equivalent to a United Kingdom (UK)

Bachelor of Engineering (Honours) degree according to the Washington Accord. In the event that these conditions were met, the reckonable experience of the staff member concerned would be recalculated with three months' retroactive effect from the date of her or his request. Concerned staff members were advised to contact the Administration within two months.

On 19 December 2008 the complainant was informed that his request of 7 March could not be granted. The Computer Engineering program at Boston University had been accredited by ABET as from 1 October 1981 and his BSc degree had been awarded before that date (i.e. on 25 September 1981).

On 4 May 2009 the complainant requested that appeal IA/10/99 be reviewed in light of new evidence of which he had become aware as a result of Judgment 2709. In the absence of a response, on 9 June he sent a reminder of this request. By a letter of 3 July he was informed that his request was being examined but that the matter might take some time. On 17 July he was notified that a decision had yet to be taken on his request and he was asked to inform the Administration in the event that he intended to file an internal appeal at that stage.

On 31 August 2009 the complainant filed an internal appeal (registered as IA/141/09) in which he expressly requested a review of the decision in IA/10/99 not to recognise his BSc degree. The Internal Appeals Committee (IAC) considered appeals IA/85/08 and IA/141/09 together and held an oral hearing on 10 February 2010. In its report of 28 February 2011 the IAC unanimously recommended that the complainant's BSc degree be recognised and that the EPO recalculate his reckonable experience and salary accordingly. A majority of the IAC members recommended that the recalculation be made with effect from 1 December 2007 and that the complainant's claims for moral damages be rejected. A minority of the members considered that complainant's BSc should be recognised as from the date of his entry into service and that he should be awarded 5,000 euros in moral damages.

By a letter of 3 May 2011 the complainant was informed that the Vice-President of Directorate-General 4, acting with delegation of authority from the President of the Office, had decided to reject his appeal.

The rejection was said to be based on several grounds. First, the ABET had not accredited the complainant's degree and the EPO did not agree with the unanimous opinion of the IAC in this respect. Second, the facts in Judgment 2709 were different from those in the complainant's case in that they concerned a United States BSc degree which had been accredited by ABET and which was equivalent to a UK (Honours) degree under the Washington Accord. Third, the recruitment practice of the United States Patent and Trademark Office or of other national patent offices of non-member states was not binding on it and could not be invoked to substitute the formal requirements of the EPO's recruitment policy. Fourth, there was no evidence that the earlier proceedings in IA/10/99 had been flawed or that the EPO had knowingly withheld crucial information from the complainant which would justify a breach of the *res judicata* rule. Fifth, as the EPO had not shown any bad faith during the proceedings the complainant's request for moral damages was unfounded. However, despite the foregoing, after considering the circumstances of the case (i.e. that ABET had accredited similar degrees as from 1 October 1981; that the Associate Dean of Boston University had provided relevant evidence; and that at the time the complainant's degree had been awarded, the Washington Accord had not yet been signed) it had been decided, without prejudice, to exceptionally recognise his United States BSc degree as from 1 December 2007 with all subsequent salary adjustments and also to take it into consideration for the purpose of any retroactive promotion as from that date. Lastly, the complainant was offered an *ex gratia* payment of 5,000 euros in full and final settlement of the case. The complainant indicates on his complaint form that he impugns the decision of 3 May 2011.

By a letter of 10 May 2011 the complainant welcomed the decision to recognise his BSc degree as from 1 December 2007, but indicated that he could not accept the EPO's settlement offer as this would entail relinquishing his rights for an appeal before the Tribunal.

As a preliminary matter, the complainant requests oral proceedings. He asks the Tribunal to quash the impugned decision. He requests it to order the EPO to recognize, as from 1 October 1990 (the date when he joined the EPO), that his BSc degree awarded by Boston University

fulfilled the EPO requirements of an A-grade examiner post. He asks the Tribunal to order the EPO to retroactively recalculate his professional experience and to award him all salary, benefits, indemnities, pension contributions and other emoluments that he would have received had his undergraduate degree been recognized as from 1 October 1990, through until the date of the Tribunal's judgment. He seeks moral damages in an amount not less than 100,000 Swiss francs, and full reimbursement for the actual legal fees and costs that he incurred in bringing his complaint. He claims interest at the rate of 8 per cent per annum on all amounts awarded to him, from 1 October 1990 until the date all sums due under the Tribunal's judgment are actually paid in full, and such other relief as the Tribunal determines to be just, necessary and equitable. In his rejoinder the complainant requests, in the alternative (with respect to his claims regarding the date from which his degree should be recognised), that the EPO recognise his degree, at a minimum, as from "the date of his internal appeal" IA/10/99.

The EPO asks the Tribunal to dismiss the complaint as partly irreceivable and entirely unfounded.

#### CONSIDERATIONS

1. The complainant requests oral proceedings. This request is denied as his claims turn mainly on issues of principle and the related factual circumstances are clear and uncontroverted.

2. The question for determination in this complaint is whether the EPO erred when it did not take the complainant's BSc degree into consideration when it calculated his reckonable previous experience. The determination of the date from which a staff member's reckonable previous experience is calculated is made pursuant to the Service Regulations and the relevant guidelines.

3. The guidelines which were in force at the time when the complainant joined the EPO in 1990 were contained in Circular No. 144

of 1985. The criterion for crediting professional activity relevantly stated as follows:

- “(1) Professional activity prior to appointment to an established EPO post is credited for step-in-grade assignment purposes if it corresponds in level and type of duties to the post of recruitment and **requires completed university education** or – in exceptional cases – equivalent knowledge acquired over many years of professional experience.
- (2) Periods of training and supplementary studies relevant to EPO work may be credited, provided they took place after the documented date on which the study referred to in point 1 was completed.” (Emphasis added.)

The purport of this provision is similar to that which was contained in the subsequently promulgated Circular No. 271, Section I(3)(a), which was in force when, in *Gazette* 9/08, the EPO invited persons (who satisfied specific criteria) to apply for a review of the calculation of their reckonable previous experience in view of Judgment 2709 “concerning the recognition of a BSc degree acquired in the United States as a diploma of ‘completed studies at university level’ for the purpose of [Section I(3)(a)] of Circ[ular] 271”.

Under Section I(3)(a), the criterion for crediting reckonable previous experience 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, according to the job description set out in the Service Regulations, is a “diploma of completed studies at university level” for the post of patent examiner. Additionally, document CI/376/77 was intended to facilitate the procedure for recruiting examiners.

4. In assigning the complainant’s initial grade and step, the EPO did not recognize the BSc degree which he obtained from a United States university in September 1981. Accordingly, the EPO did not calculate his reckonable previous experience from that date, but from January 1988, the date on which he was awarded an MS degree in electrical engineering. By doing this the EPO had determined, in effect, that his United States BSc degree, his “completed university education” in 1981, did not correspond “in level and type of duties to the post of recruitment” pursuant to Section 1 of Circular No. 144.

After various exchanges between the complainant and the Administration, the EPO informed him in 1991 that his step-in-grade on recruitment was grade A2, step 2, with 9 months in step. The complainant continued to query that decision and eventually formally challenged it in January 1999. He has insisted that his BSc degree should have been taken into account in calculating his previous reckonable experience, and that accordingly, it should have been calculated at least from September 1981 when he was awarded the BSc degree. His challenges have culminated in the present complaint which the complainant filed on 29 July 2011 against the impugned decision dated 3 May 2011.

5. In the impugned decision, the Vice-President of Directorate-General 4 rejected the recommendations of the majority and the minority of the IAC, which are contained in the IAC opinion dated 28 February 2011. In that opinion the IAC unanimously recommended that the complainant's BSc degree be recognised and that the EPO recalculate his reckonable experience and salary accordingly. The majority of the IAC recommended that the recalculation be made with effect from 1 December 2007 and that the complainant's claims for moral damages be rejected. The minority considered that the complainant's BSc degree should have been recognised as from 1 October 1990 when he joined the EPO and that he should be awarded 5,000 euros in moral damages. The Vice-President of Directorate-General 4, however, rejected the IAC's recommendation that the complainant was entitled to have his BSc degree recognized as the point from which his reckonable previous experience was to have been calculated. However, he seemingly decided to recognise the complainant's BSc degree, exceptionally, for that purpose, as from 1 December 2007 with all consequential salary adjustments and to take this recognition into account for the purpose of any retroactive promotion as from that date. In addition, the complainant was offered an *ex gratia* payment of 5,000 euros in full and final settlement of his case.

6. The relief which the complainant seeks is fully set out in the summary of facts, above.

7. The EPO submits that the complainant's claim that he be granted such other relief as the Tribunal determines just, necessary and equitable is irreceivable as it is not formulated with sufficient clarity or precision to enable the Tribunal to properly rule on it. The EPO relies on, among other cases, Judgment 2381, under 5, and the statement that it is for complainants to put forward specific arguments in support of their complaints, concisely and precisely, so that it may rule on their claims in full knowledge of the facts. The Tribunal sees that claim as an omnibus formulation which is intended to invite the grant of any relief which may arise by extension from the claims that are precisely stated. This is, however, inconsequential for the purpose of the present case.

8. The EPO does not object to the receivability of the complainant's remaining claims. This is correct in that the present complaint arose out of his request of 7 March 2008 for a review of the calculation of his reckonable previous experience. The Tribunal notes that the EPO subsequently (in September 2008) invited such requests from staff members.

In *Gazette 9/08* the EPO had specifically invited applications for review of reckonable previous experience from staff members who held United States BSc degrees but whose experience had been previously calculated from their MSc degrees.

9. The EPO specified three conditions for review. One was that the BSc degree must have been acquired in the United States. The Tribunal notes that the complainant's BSc was awarded by a United States university. The second condition was that the BSc degree must have been accredited by ABET. The third condition was that "the specific BSc degree must be equivalent to the UK BEng (Honours) degree according to the Washington Accord". The EPO indicated that the reckonable experience would be calculated with three months retroactive effect from the date of the request for review. It seems that these conditions were intended to encapsulate the actual objects which the Tribunal had held are the requirements for the recognition of a United States BSc degree as a reference point for calculating reckonable previous experience for determining a staff member's grade upon recruitment.



10. The Tribunal's reasoning in Judgment 2709 provides comprehensive guidance regarding the recognition of a United States BSc degree. The Tribunal determined that the EPO must recognize the ABET-accredited United States BSc degree which the complainant in that case had been awarded by a United States university in 1994 as a "diploma of completed studies at university level" fulfilling the requirement of Circular No. 271, Section I(3)(a). The Tribunal considered that notwithstanding that the Washington Accord, an international agreement for the recognition of the substantial equivalence of accredited engineering degree programmes, was not binding upon the EPO it should nevertheless take it into consideration. This, according to the Tribunal, was because the Accord derives from a sound technical evaluation and the EPO must at least consider it when making a choice based on the same technical evaluation. The Tribunal noted that since under the terms of the Accord, an ABET-accredited US BSc degree is equivalent to the United Kingdom BEng (Honours) degree, which the EPO recognized, the EPO should recognize the complainant's United States BSc degree as fulfilling the minimum education requirement for appointment as a patent examiner. The Tribunal also stated that the EPO could not ignore its own document CI/376/77 when considering the complainant's application, which document 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 (see Judgment 2709, considerations 3 to 5).

11. The complainant raises the plea of unequal or discriminatory treatment to support his claim to have his reckonable previous experience calculated from the date on which he was awarded his BSc degree. However, the Tribunal considers that this plea fails in the face of the EPO's invitation to staff members after the public delivery of Judgment 2709 to request reviews if they thought that that Judgment would benefit them. This belies the complainant's attempt to premise the plea on a blanket disregard by the EPO of the complainant's United States BSc degree. Further, the Tribunal considers that the example which the complainant provides of a colleague whose United States BSc degree the EPO

recognized is not in and of itself evidence of discriminatory and unequal treatment. The complainant has provided no evidence to show that he was “in an identical or comparable position in fact and in law [in order to] be treated in the same manner” as his colleague (see, for example, Judgment 3420, under 18). The complainant’s pleas of bad faith or lack of duty of care towards him by the EPO will also be dismissed as he has provided no evidence to prove them.

12. The parties have made lengthy submissions concerning whether Judgment 2709 amounted to the discovery of new facts of decisive importance which provided a basis for reopening the complainant’s appeal IA/10/99. The Tribunal considers that these submissions are irrelevant given that, following the public delivery of Judgment 2709 and the complainant’s request of 7 March 2008 for a recalculation of his reckonable previous experience, in September 2008 the EPO subsequently invited such requests from staff members who satisfied certain conditions and the complainant’s request was reviewed in that context. The question is whether the complainant met the two remaining conditions (set out above) which the EPO stipulated in *Gazette* 9/08.

13. First, the complainant’s BSc degree had to have been accredited by ABET. The EPO has insisted that that degree was not officially so accredited because ABET accredited the programme attended by the complainant (which led to the award of his United States BSc degree) with effect from 1 October 1981, after the complainant was awarded his degree on 25 September 1981. However, the Tribunal considers that that fact does not militate against the complainant. The relevant date is not the date on which he was awarded his degree but the date on which the evaluation was made about equivalence. In the circumstances, it is determined that the complainant’s BSc degree should be considered a “diploma of completed studies at university level” and accredited as satisfying the second condition in *Gazette* 9/08.

It is further determined that the complainant’s BSc degree was equivalent to a United Kingdom BEng (Honours) degree under the Washington Accord, which was in effect at the time when the complainant joined the EPO. The complainant therefore also satisfied the third condition

for the review of the calculation of his reckonable experience as set out in *Gazette* 9/08.

14. In the foregoing premises, the complaint is well founded and the impugned decision of 3 May 2011 must be set aside. The complainant is entitled to have his reckonable previous experience recalculated from 1 December 2007, the date identified in the *Gazette*. The Tribunal adopts this approach because it is the *Gazette* which revived the complainant's case on terms.

15. In Judgment 2709, consideration 8, the Tribunal stated that although there had been no clear demonstration of bad faith on the part of the EPO, it would award the complainant 4,000 euros in moral damages to take into account the extended period during which he had been retained in the wrong grade. The Tribunal considers that the sum of 6,000 euros is appropriate in the present case. The complainant will be awarded costs in the amount of 5,000 euros.

#### DECISION

For the above reasons,

1. The impugned decision of 3 May 2011 is set aside to the extent that it recognised the complainant's United States BSc degree without recognising the obligation to do so.
2. The calculation of the complainant's reckonable previous experience and salary must be made with effect from 1 December 2007, with all consequential salary adjustments.
3. The EPO shall pay the complainant 6,000 euros in moral damages.
4. It shall also pay him 5,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 25 October 2016, Mr Giuseppe Barbagallo, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 8 February 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ