

## SIXTY-THIRD SESSION

### ***In re* BENZE (No. 4)**

#### **Judgment 851**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Wolfgang Eberhard Benze against the European Patent Organisation (EPO) on 13 February 1987 and corrected on 20 February, the EPO's reply of 7 May as corrected on 1 June, the complainant's rejoinder of 22 June and the EPO's surrejoinder of 9 September 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 5, 6, 7, 11 and 49 and Annex II of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. Since 1 November 1980 the complainant, who is a citizen of the Federal Republic of Germany, has served as a search examiner of patents in the EPO's office in Rijswijk, General Directorate 1 (GD1). His grade is now A3.

On 12 June 1986, in Judgment 759, the Tribunal rejected his third complaint in which he had challenged the reckoning of his professional experience by the rules in force in 1984.

In the exercise of his authority under Articles 11 and 49 of the Service Regulations the President of the Office brought in new guidelines dated 1 August 1985 as from 1 January 1985 on the reckoning of experience of examiners and other staff for the purpose of determining their starting grade, step and seniority for promotion, the same criteria holding good for all three. The guidelines were made known in staff circular No. 144. They applied also to anyone, like the complainant, who had joined the EPO earlier if under them the tally of his experience happened to be higher.

On 21 November 1985 the EPO made a tally of the complainant's experience by the new guidelines. On 19 December he lodged an internal appeal seeking recognition as from 1 November 1980, the date of his appointment, of his full experience as a mining engineer and of his three years' study (after passing the first-grade State examination at the University of Leoben in Austria) and his one year's work in mining in West Germany and Austria required for his degree in engineering from the Technical University of Berlin. In its report of 14 October 1986 the Appeals Committee recommended rejecting his appeal, and the Principal Director of Personnel told him by a letter of 1 December 1986, the impugned decision, that the President did so.

B. The complainant observes that Article 11(2) requires the President to back up his guidelines with "duly substantiated reasons relating to the training and special professional experience" of the official. He objects to the application to him of the guidelines in circular 144 on the grounds that they are arbitrary and unfair. To his mind there is no good reason to give credit at the rate of only 75 per cent for engineering and at the full rate for patent work; to discount experience of engineering for anyone appointed before 31 December 1984; to equate irrelevant military service and compulsory professional training; to demand of an examiner a degree in engineering yet discount it in the reckoning, while counting a doctorate, which is seldom useful to the EPO; to count a master's degree in engineering only for the British; and to set a maximum of 12 years even if experience beyond that is useful. The guidelines work against the best qualified and wrongly assume that all examiners need to be fit for the hardest technical subjects. Unless given such a subject most of them are overqualified. The minimum professional qualifications do not answer any real need: thus a bachelor's degree in science is acceptable for an examiner from Great Britain merely because there a master's degree is rarer. Since military service, being largely irrelevant, counts at the rate of 75 per cent studies and practical experience required for a university degree should count in full.

The complainant asks the Tribunal to order the EPO to count in full, with retroactive effect, his professional experience, his three years' study at the Technical University of Berlin and his one year's practical training in mining in West Germany and Austria, and to award him costs.

C. In its reply the EPO submits that the new rules are more favourable - and therefore apply - to the complainant because general experience counts at 75 per cent as against only 50 under the old rules.

His claim to have his reckoning made retroactive is irreceivable because he withdrew it in his internal appeal and has therefore failed to exhaust the internal means of redress. Besides, the guidelines in circular 144 say that for anyone already on the staff the new reckoning applies only for the future, and retroactivity would mean altering the original reckoning, to which any challenge is now time-barred.

His claim to the reckoning in full of his prior experience is unfounded. Article 11 does not require an explanation of every one of the rules on reckoning experience: the President's evaluation is discretionary. In any case greater weight is given to patent work than to general experience because the former is more useful to the EPO. There is no reason to give an examiner more credit for his general experience when given a difficult technical subject: his general experience need not be any more useful to the EPO on that account. The greater difficulty of a subject is offset by allowing a lower output.

Military service and professional experience are not comparable: even if irrelevant to EPO work, the former is compulsory and in the public interest, whereas the latter is neither. It is for political reasons and to safeguard equality that the EPO counts military service at the same rate. Besides, general experience cannot be worth as much as patent experience, which counts in full.

Only professional experience after the date of award of a university degree will count - and study towards a degree does not - the reason being that examiners and other officials in staff category A perform duties at graduate level. For the purpose of the guidelines the EPO requires the qualifications that examiners have to have in each of its 13 member countries. Differences in university education between member countries are unavoidable and, besides, it is the quality of the degree that matters, not the number of years it took to obtain. Lastly, the setting of the maximum at 12 years has the sound purpose of preventing the overcrowding of A4, the highest grade for an examiner.

D. In his rejoinder the complainant points out what he sees as mistakes of fact and submits that the EPO's reply rests on misconceptions about the purpose of patent examination and about the Service Regulations. The EPO takes no account of the difficulty of technical subjects, save for the purpose of output in only one of its general directorates. It may not act arbitrarily or in breach of the Regulations or discard principle out of expediency. If the President puts military service, which he admits may be irrelevant, on a par with industrial experience, he must also count any relevant educational or professional experience national systems require for obtaining a degree, and he should count it in full. The error in the complainant's reckoning should be put right from as early a date as is possible and, in all fairness, it should be the date of his appointment.

E. In its surrejoinder the Organisation submits that the rejoinder puts forward no plea that in any way weakens the arguments in its reply, which it develops. It contends in particular that it committed no breach of Articles 5 or 11(2) of the Service Regulations and it again invites the Tribunal to dismiss as unfounded the complainant's claims to recognition of his mining experience and of the three years' study and practical training required for his university degree and to dismiss as irreceivable his claim to retroactive recognition thereof.

#### CONSIDERATIONS:

1. The complainant, a graduate in mining engineering, is employed as a search examiner at grade A3 in the European Patent Office. He is challenging a decision of 1 December 1986 determining his status according to circular No. 144, which informed the staff of new guidelines issued by the President of the Office on 1 August 1985 with effect from 1 January 1985 for reckoning professional experience at appointment and for the purpose of promotion.

2. The purpose of this complaint is in substance the same as that of the third one, which the Tribunal dismissed in Judgment 759. But as the Appeals Committee observed in its report of 22 November 1986, the complaint is not irreceivable on that account since the circular brought in new rules on how to reckon experience. The complainant

has an unquestionable right to have his status reviewed against the new rules. He filed his complaint in time and its receivability is beyond doubt.

3. His claims are:

- (a) the recognition and reckoning in full of his professional experience;
- (b) the recognition of three years' studies he carried out at the Technical University of Berlin after he passed the first-grade State examination (Erste Staatsprüfung) at the University of Leoben in Austria;
- (c) the recognition of the one-year practical training he underwent in mining enterprises in West Germany and Austria as part of his studies at the Technical University;
- (d) the retroactive application of those corrections; and
- (e) costs.

4. Apart from expressing a different opinion on an issue of fact that is material to the evaluation of his university qualifications, the complainant is objecting to several provisions of the guidelines in the circular. He describes them as arbitrary, unfair, inadequate and contrary to the principles embodied in the EPO Service Regulations, of which he cites:

Article 5, which is about the general criteria for recruitment and says that it shall be "directed to securing for the Office the services of permanent employees of the highest standard of ability, efficiency and integrity, recruited on the broadest possible geographical basis from among nationals of the Contracting States"; and

Article 7 and Annex II, which prescribe recruitment according to objective criteria of ability; and

Article 11, which is about grade and seniority and reads:

"1) The appointing authority shall assign to each employee the grade corresponding to the post for which he has been recruited.

2) Unless the appointing authority decides otherwise, for duly substantiated reasons relating to the training and special professional experience of the candidate, appointment shall be to the first step in the grade."5. Insofar as the complainant's claims touch on his own status they may be set out as follows:

The studies and practical training

6. Under paragraphs I.1 and I.2 of the guidelines training, supplementary studies and prior professional activity count only if they "took place after" the award of the degree that qualifies for appointment to the EPO.

7. What is in dispute is the nature of the qualification: the EPO says it is the degree the complainant took at the Technical University of Berlin, whereas he says that it is the passing of the first-grade State examination at the University of Leoben in Austria and that his studies at the University of Berlin are therefore "supplementary" within the meaning of I.2.

8. The Organisation's view is the right one. As it shows by adducing a great deal of evidence, the examination at Leoben was intermediate and it is the date of graduation from the University of Berlin that determines whether practical experience will count. Indeed the complainant acknowledges that in Austria someone who has gone no further than the first-grade State examination will not get on as an engineer in industry. So he himself admits that passing that examination will not satisfy Article 5 of the Service Regulations, which says that the EPO must try to find employees of the highest standard for every category of job.

9. The complainant further argues that the guidelines make for breach of equal treatment and therefore also of the Service Regulations in that the EPO puts on a par the final degrees awarded in member States although, as is well-known, there are differences in standard between them. In particular, an engineering degree is not so hard to get in Great Britain as in the Federal Republic of Germany.

10. As the EPO says, some differences will have to be allowed in the content and standard of engineering degrees until there is international standardisation. For an international organisation like the EPO 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.

11. The first claim fails for the foregoing reasons.

The full crediting of reckonable experience

12. The complainant further alleges that the EPO was wrong to read paragraphs I.3, 4 and 5 together and credit him at the rate of only 75 per cent for his own professional experience when full credit is given for compulsory military service and for experience in the old International Patent Institute, in national patent offices, as a patent agent and in a patent department in industry. To his mind it is discriminatory to rate his experience differently.

The Tribunal comments as follows.

13. As the Tribunal ruled in Judgment 819 (in re Franks), it is not discriminatory to credit military and comparable service in full; indeed the purpose and the effect are to restore parity between those whose professional training has been held up by having to serve in the national interest and those who have been able to get on with their training without discharging that duty.

14. What is more, there is no breach of the principle of equal treatment in the fact that the guidelines, so as to attract qualified people, set a higher value on a few kinds of experience, particularly those that are closely relevant to EPO work.

15. The second plea also fails.

The discounting of some experience

16. The complainant objects to paragraph IV.2, which says that staff on duty at 31 December 1984 may not benefit under I.6: in "exceptional cases" the President of the Office may count professional activity in full.

17. The rules the complainant is relying on have to be read against the final clause of the guidelines, which says that they come into force on 1 January 1985. The context shows that I.6 is about recruitment and intended to draw the skilled people the EPO needs. It is only right that it should not have wished to let existing staff benefit as well since that would have entailed a general review of the reckoning of their experience that matched no rise in the standard of their performance.

18. The plea is again rejected.

The twelve-year limit

19. The complainant objects to I.10, which limits total reckonable experience to twelve years. He submits that the rule makes no sense unless the EPO actually wants examiners with a better professional background to fare worse.

20. His plea belies the purpose of the rule which, as the EPO explains, reflects its policy on recruitment and career development.

21. Article 6 of the Service Regulations stipulates that "recruitment shall generally be to the post which corresponds to the lowest grade in each field of activity", and Article 11, on which the complainant relies, that "appointment shall be to the first step in the grade" unless the appointing authority decides otherwise "for duly substantiated reasons relating to the training and special professional experience of the candidate". Thus the Regulations authorise preferential treatment where most of the official's career is in the EPO, starting at the basic grade in each category.

22. It is in line with that policy to set an upper limit on prior reckonable experience to deter late-comers and those whose coming would otherwise hamper the advancement of others who have preferred to spend most of their career in the EPO.

23. The complainant's plea fails because it mistakes the purpose of the limit, which reflects a reasonable policy on recruitment and career development.

24. Since all the complainant's pleas are rejected his complaint will be dismissed. His application for retroactive reconstitution of his career is therefore without substance and his claim to costs unwarranted.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

Jacques Ducoux  
Mella Carroll  
P. Pescatore  
A.B. Gardner