

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**S. (No. 2)**

**v.**

**EPO**

**123rd Session**

**Judgment No. 3794**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr M. S. against the European Patent Organisation (EPO) on 15 September 2011 and corrected on 25 November 2011, the EPO's reply of 6 March 2012, the complainant's rejoinder dated 8 May and the EPO's surrejoinder of 10 August 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 May 2001. He holds a Bachelor of Science (BSc) degree with honours from the Ain Shams University in Cairo, Egypt, which he was awarded in June 1989 and a *Diplom-Ingenieur (Dipl.-Ing.)* from the Technical University of Darmstadt, Germany, which he was awarded on 15 March 1994.

At the time of the complainant's 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 This Circular was superseded by Circular No. 271.

On 7 February 2001, shortly before the complainant took up his duties, the EPO made an initial calculation of his previous reckonable experience and he was placed in grade A2, step 2, with one month in step. His BSc degree was not taken into account and consequently no periods of work prior to the award of his *Dipl.-Ing.* were included in that calculation.

On 29 October 2001 the complainant wrote to the Administration regarding the recognition of his BSc degree. He enclosed a letter from the National Academic Recognition Information Centre for the United Kingdom (UK NARIC) which indicated that his BSc degree was generally considered comparable to a British Bachelor degree standard and he requested that this information be taken into account. By a letter of 11 December he was informed by a member of the Administration that his professional experience had been calculated as from the date that he had been awarded his *Dipl.-Ing.* The EPO did not in principle recognise a bachelor degree as a sufficient qualification for an examiner post. British university studies which culminated in a bachelor degree were an exception to this rule. Thus, the calculation of his professional experience was correct.

By a letter of 22 January 2002 the complainant requested that the EPO recognise his BSc degree and the professional experience that he had acquired after the award of that degree (and before the award of his *Dipl.-Ing.*) for the purpose of calculating his reckonable experience upon recruitment. On 9 December 2002 he was informed that his request could not be granted.

On 27 March 2003 the complainant requested that the EPO recognise his professional experience during the period from 15 March 1994 to 14 July 1994 (after the award of his *Dipl.-Ing.*). The EPO consequently reviewed its calculation of his reckonable experience and, taking into account his professional activity during the aforementioned period, he was placed in grade A2, step 2, with 4 months in step, with effect from 1 May 2001 (his date of entry into service).

On 6 February 2008 the Tribunal delivered in public 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 and Circular No. 271, from the date of receipt of his completed BSc degree, and that he receive all consequential salary adjustments.

By an e-mail of 4 March 2008 the complainant requested, in light of Judgment 2709, that the EPO recognise his BSc degree and the professional experience that he had gained during the period between the award of that degree and the date upon which he had been awarded his *Dipl.-Ing.* Two days later he informed the Administration by e-mail that, in the event that his request of 4 March was rejected, it was to be considered an internal appeal. He reiterated these requests in a letter of 8 April.

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 of America 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 16 September 2008 the complainant received two separate letters from the Administration. One letter informed him that his request for a recalculation of his reckonable experience could not be granted and the other informed him that the President of the Office considered that the rules had been correctly applied, and that the matter had been referred to the Internal Appeals Committee (IAC) for an opinion.

Having held an oral hearing, the IAC issued an opinion on 14 April 2011. A majority of the IAC members recommended that the appeal be dismissed as unfounded. They found in particular that it was not possible to clearly determine that the complainant's BSc met the requirements for the post of examiner, particularly in the UK, Ireland, or other EPO

member states. In the absence of official proof in this respect, the EPO could not be expected to carry out independent further research and was entitled to refuse to recognise the degree in question. A minority of the IAC members concluded that, given the evidence provided by the complainant and the lack of concrete information provided by the EPO, it was only reasonable to assess the complainant's BSc degree as being comparable to a British BSc (Honours) degree and that the EPO should recognise the complainant's degree as completed studies at a university level.

By a letter of 17 June 2011, which is the impugned decision, the complainant was informed that the Vice-President of Directorate-General 4, acting with delegation of authority from the President, had decided to reject the complainant's appeal as unfounded, in accordance with the majority opinion of the IAC. The letter stated that it was considered that the complainant's case had substantially different legal and factual circumstances from those in Judgment 2709 and thus, could not be treated in a similar way. The majority of the IAC had thoroughly examined the matter in light of the conditions set out in Judgment 2709 and had concluded that the specific criteria for recognition of the complainant's BSc degree had not been met. Also, it was considered that he had failed to prove that his BSc degree would allow him to hold an examiner's post in the UK Patent Office.

The complainant asks the Tribunal to quash the impugned decision.

The EPO requests the Tribunal to reject the complaint as unfounded.

#### CONSIDERATIONS

1. The complainant seeks to set aside the impugned decision dated 17 June 2011 and to have his BSc degree recognized for the purpose of calculating his reckonable previous experience. He insists that his BSc fulfilled the requirements of Articles 3(1) and 11(1) of the Service Regulations for permanent employees of the European Patent Office and the Guidelines for applying those articles contained in Circular No. 271.

2. The version of Article 3(1) of the Service Regulations in force at the material time required the President to draw up job descriptions for

permanent posts and the Administrative Council, acting on the President's proposal, was required to determine the grade or group of grades for each job description. For posts classified in a group of grades, the President was also required to determine the conditions for access to each grade. The job description in force at the material time specified that the minimum qualifications for a grade A2 post was relevantly a "diploma of completed studies at university level". The version of Article 11 of the Service Regulations in force at the material time was under the rubric "Grade and seniority". Paragraph 1 of the Article stated as follows:

"(1) 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 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 the Office invited persons (who satisfied specific criteria) to apply for a review of the calculation of their reckonable previous experience in view of Judgment 2709.

According to Circular No. 271, 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, for the post of patent examiner, is a “diploma of completed studies at university level”.

4. In the impugned decision, the Vice-President of Directorate-General 4 accepted the opinion of the majority of the IAC and rejected the complainant’s appeal as unfounded. It was considered that his case was distinguishable legally and factually from the case leading to Judgment 2709.

5. In Judgment 2709 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) and the Service Regulations.

6. In Judgment 2709 the Tribunal considered that, notwithstanding that the Washington Accord, which is 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 in determining the minimum entry level qualification for patent examiners. 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 United States 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. That document indicated 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).

7. The impugned decision in the present case stated that the complainant could not be treated similarly to the complainant in Judgment 2709 as their cases were substantially different legally and factually. It further stated that the majority of the IAC had thoroughly examined the matter in light of the conditions set out in Judgment 2709 and had concluded that the specific criteria for recognition of the complainant's BSc degree had not been met particularly because he had failed to prove that his BSc degree would allow him to hold an examiner's post in the UK Patent Office.

8. The majority of the IAC recommended that the complainant's appeal be dismissed on reasoning which may be summarized as follows. In Judgment 2709 the Tribunal attributed particular significance to accreditation but the complainant submitted no proof that his BSc degree was accredited by the (then) competent authority. However, the fact that the Tribunal had in Judgment 2709 recognized United States BSc engineering degrees accredited by ABET as equivalent to the United Kingdom BSc (Honours) degree did not preclude similar qualifications awarded in other countries and opinions upon them from other accrediting bodies or opinions with reference to other international agreements from being regarded. The absence of a Washington Accord type of agreement with Egypt could not be held against the complainant, and, since the EPO expressly recognized British and Irish (Honours) degrees, it was reasonable that the complainant turned to UK NARIC for an opinion on his degree. That opinion was to be taken into consideration in principle. The complainant needed to establish that his BSc degree was equivalent to the United Kingdom BEng (Honours) degree. The precise classification of the degree was critically important since the Tribunal reasoned in Judgment 2709 that the standard of the complainant's BSc qualified him to work as a patent examiner "not just in his home country but also in certain member states". However, neither the UK NARIC's opinion nor the complainant's evidence before the IAC provided sufficient proof for a categorical comparison of equivalence without further written proof.

In particular, the complainant did not show conclusively that his BSc degree met the minimum requirement for the post of patent examiner in the UK, Ireland, or other member states. It would have been unduly difficult for the EPO to embark upon further investigations in order to determine whether the complainant's BSc degree was a "diploma of completed studies at university level". Judgment 2709 had in fact extended recognition to BSc engineering degrees which were officially recognized by any EPO member state, which Egypt is not.

9. In recommending that the appeal be allowed, the minority of the IAC relied on consideration 6 of Judgment 2709 as stating that whether a BSc engineering degree amounts to "completed studies at university level" also depended upon whether it allowed a staff member to work as a patent examiner in his home country and this criterion was not limited to EPO member states. In the view of the minority, the fact that the complainant in Judgment 2709 was a United States citizen who held a United States BSc degree confirms this. The minority opined that, similarly, the present complainant's BSc degree appeared to make him eligible to work as a patent examiner in the Egyptian patent office and, as was stated in Judgment 2709, a blanket disregard for a BSc degree from a given country (in this case Egypt) would appear to be discriminatory.

The minority also thought that even if the complainant did not provide a statement of full accreditation of his BSc degree as equivalent to the British BSc degree, he provided sufficient proof, by way of the UK NARIC certificate which he submitted, that his Egyptian BSc was comparable to the British BEng honours (while the EPO provided no concrete information on the matter) and in light of the very high honours which he had obtained. The minority insisted that in the absence of the certificate or of an equivalence system it was the duty of the EPO to study each case fairly, equitably and reasonably. In the view of the minority, since the EPO had not published concrete terms by which equivalence was to be determined, the Office had a duty to decide each case fairly and reasonably without discriminatingly disregarding a bachelor degree from any country.

10. The complainant submits that on the Tribunal's statements in considerations 6 and 7 of Judgment 2709 the EPO should have accepted the recommendation of the minority of the IAC. These considerations relevantly state as follows:

“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. [...] 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.”

11. It is noted that the words “his own country” in Judgments 851 and 895 referred to EPO member states. The fact that the Tribunal went beyond EPO member states in Judgment 2709 was, in the Tribunal's view, based on the reliance on the Washington Accord, in consideration 4, and the fact that two member states, the United Kingdom and Norway recognized the United States BSc degree as being equivalent to their own (see Judgment 2709, considerations 4 and 5). It was in this context that, in consideration 7, the Tribunal insisted on the recognition of the United States degree in the United Kingdom “[s]ince 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." Even so, the Tribunal had stated, in consideration 4, that the EPO "is not bound by the practice of member states". It is required to adopt a consistent approach to recognition of their degrees or the degrees which they recognize or to explain any apparent inconsistency in its approach.

12. Premised on the foregoing, inasmuch as Egypt is not a member state of the EPO and as it has not been established that Egypt has an equivalence recognition treaty with any of the EPO member states, the EPO is not bound to recognize Bachelor degrees from universities of that country as entry-level qualifications for patent examiners in the absence of adequate proof of equivalence. The complaint is therefore unfounded and will be dismissed in its entirety.

#### DECISION

For the above reasons,  
The complaint is 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