

## SIXTY-FOURTH SESSION

### *In re* VAN DER PEET (No. 11)

#### Judgment 895

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh complaint filed by Mr. Hendricus van der Peet against the European Patent Organisation (EPO) on 22 May 1987, the EPO's reply of 21 July, the complainant's rejoinder of 14 October 1987 and the EPO's surrejoinder of 8 January 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 28, 107(1) and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

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

A. The complainant, who is a Dutchman and was born in 1945, obtained a diploma in engineering on 2 July 1966 from the Higher Technical School (HTS) at Haarlem. From 1 November 1966 until 1 August 1968 he was employed as a technical assistant in industry in Amsterdam. From August 1968 he was at the University of Technology at Delft, from which he graduated in November 1973, his subject being the science of microwaves. He then worked in industry again. He took up duty with the EPO on 1 July 1980 as an assistant search examiner of patents at grade A1, step 2, with no seniority at that step. By a decision of 6 July 1981 he was promoted to examiner at grade A2, step 3, with no seniority.

A reckoning dated 13 November 1981 took account of his prior experience, for the purpose of determining his grade and step, from the date on which he graduated from Delft - 15 November 1973 - and he was granted grade A2, step 3, with eight months' seniority, as at 1 November 1981.

According to a revised reckoning of 10 May 1984 he was entitled to grade A2, step 7, with six months' seniority as at 1 January 1984. Again, the date of graduation was given as 15 November 1973.

Circular 144 announced new guidelines, issued by the President of the Office on 1 August 1985 as from 1 January 1985, for reckoning the experience of A staff for the purposes of recruitment and promotion. The complainant got a reckoning made on 15 September 1985 according to the new guidelines: as at 1 January 1985 he advanced to A3, step 2, with six months' seniority. Again the reckoning said "Diploma: 15.11.1973". In a letter of 15 November 1985 to the President of the Office he maintained that the date of his graduation should be 2 July 1966, when he had obtained his diploma at the HTS at Haarlem. Under point I.8 of the guidelines only relevant experience gained after completion of university education is recognised. He asked that the reckoning of his step be amended. He filed an internal appeal on 16 January 1986. In a letter of 12 August 1986 the EPO observed that, according to document CI/376/77 of 8 September 1977 on the "level of diplomas" to be held by EPO examiners, the HTS diploma was not regarded in the Netherlands as equivalent to a university degree. The letter rejected his claim, which was referred to the Appeals Committee. In its report of 14 January 1987 the Committee recommended rejecting his appeal, the majority holding it to be irreceivable. By a letter of 26 February 1987, the decision he impugns, the Principal Director of Personnel informed him that the President had rejected his appeal.

B. The complainant submits that his internal appeal was receivable because he duly challenged the first decision that could be identified as constituting the "act adversely affecting him" within the meaning of Article 107(1) of the Service Regulations. The earlier reckonings did not state the rules on which they were based. In any event, being invalid, they could not set off any time limit for appeal. The EPO does not let the staff see the relevant guidelines. It is in bad faith and so may not plead the time bar against him.

As to the merits, the complainant puts in a statement of 4 December 1985 from the Dutch Ministry of Education to the effect that the diploma from the HTS is granted on completion of a four-year full-time course at the bachelor level and that by Dutch law an HTS graduate may put the title of engineer ("ing.") before his name. The EPO's refusal to put his HTS diploma on a par with a university degree is at odds with that statement. At least three

English universities liken the HTS diploma to a British degree of bachelor of science: though not treated as a university degree in the Netherlands, it is tantamount to one in the United Kingdom. The EPO has never notified CI/376/77 to the staff; the text does not apply to search examiners; the list of degrees it sets out is not exhaustive; and the competent Dutch authority was not consulted. The decision is ultra vires and in breach of the principle of equal treatment because the EPO makes it easier for British graduates to qualify as examiners. The complainant alleges many formal and procedural flaws. He asks the Tribunal to quash all the reckonings of his experience and order the determination of a "proper grading with effect from the relevant dates". He seeks arrears of pay, plus compound interest, compensation for the time spent on his case equivalent to four months' basic salary of the Vice-President of the Office, and 5,500 Deutschmarks in costs. The "negative effects" of the case on his performance should, he adds, be "reflected" in his staff reports.

C. The EPO replies that the complaint is irreceivable. The internal appeal was out of time and the complainant has failed to exhaust the internal means of redress. On his recruitment the date of his Delft degree - 15 November 1973 - served as the starting point for reckoning his experience, as was plain from the original reckoning of 13 November 1981. The later ones, of 10 May 1984 and 15 September 1985, confirmed that date. He failed to challenge within the three-month time limit in Article 108 of the Service Regulations the decision on his starting grade and step which was notified to him on appointment, in 1980: the grade and step had been determined according to the reckoning then made, which took 15 November 1973 as the material date. The later reckonings were made only to take account of changes in the rules, but the rule relevant to this case - that only experience subsequent to university graduation counts - has held good all along. The complainant's answers to the plea of irreceivability are unsound. The terms of his appointment amounted to a challengeable decision. Since the unlawfulness of a decision is immaterial to the reckoning of a time limit, his allegations of formal and other flaws would be irrelevant even if sound, which they are not. The EPO made no attempt to mislead him: after all, official EPO papers are at the staff's disposal.

The EPO has subsidiary arguments on the merits. In its view it is reasonable not to take account of the HTS diploma. Examiners' posts require a university degree. The EPO demands the degree which the applicant would need to qualify as an examiner in his own country, and for that purpose it refers to the university system in that country. In the Netherlands, and so also in the EPO, the HTS diploma is not sufficient. Nor was there any breach of equal treatment, the reckonable experience being that which in each member State requires the possession of university qualifications. The EPO itself cannot assess the degrees and diplomas awarded in its member States. The claims to compensation are excessive and in any event unfounded.

D. The complainant rejoins that the Tribunal is not competent to hear the case. He develops in detail his submissions on receivability and on the merits. He contends, in the main, that neither the offer of appointment nor the later reckonings of his experience were challengeable decisions under the Service Regulations; that in any case the EPO thwarted his appeals and acted in such bad faith that it may not plead the time bar; that at least his appeal against the reckoning of 15 September 1985 was receivable because it was based on the first set of guidelines to be duly notified to the staff and to the Administrative Council of the EPO; and that his claims are sound because the EPO has recognised as adequate a diploma like his own awarded to another Dutch examiner. He asks for the disclosure of his personal file. He applies for oral proceedings and the hearing of witnesses. He submits that his claims are modest and increases his claim to costs to 35,000 marks. He asks the Tribunal to order the President to bring "criminal and disciplinary proceedings" against the members of the Appeals Committee or else to give him "assistance" under Article 28 of the Service Regulations.

E. In its surrejoinder the EPO answers the complainant's objections to the Tribunal's competence and further argues the issues of receivability and the merits. It submits that his pleas are mostly immaterial or misguided.

#### CONSIDERATIONS:

1. The Tribunal is competent to hear this complaint under Article II(5) of its Statute.
2. For the purpose of determining an examiner's starting grade and step on recruitment the EPO takes account of any professional experience he gained between graduation and entering the Organisation's service.

The issue in this case is whether the complainant's prior experience should count from 2 July 1966, when he obtained a diploma in engineering from the Higher Technical School (HTS) at Haarlem in the Netherlands. He claims that it should on the grounds that the diploma is equivalent to a university degree. Besides objecting to the

receivability of the complaint on the grounds that it is time-barred, the EPO maintains that the complainant's experience should count only from 15 November 1973, when he obtained a degree from the University of Technology at Delft, because the HTS diploma is not up to university standard.

If the complainant is right, some of his work experience after 2 July 1966 might count for the purpose of determining his seniority in the Organisation. If the Organisation is right, only some of his work experience after 15 November 1973 could so count.

3. The Organisation recruits examiners like the complainant from among university graduates in its 13 member States. Of necessity academic qualifications in different countries will differ in value, and there is a problem in evaluating them. The Organisation's approach is not to make an assessment of its own but to ask each national delegation to state which academic qualifications its country recognises as a degree or equivalent to a degree. The approach is the more reasonable in that there will be differences in quality even between universities within one and the same country.

Some of the graduates the EPO recruits have also had relevant work experience after graduation for which the Organisation gives them credit in determining starting grade and step.

4. The complainant joined the Organisation on 1 July 1980 as an assistant search examiner of patents. From 1962, when he was seventeen, until 1966 he had attended the HTS. He was employed as a technical assistant in industry from 1966 until 1968 and continued his education at the University of Technology at Delft in 1968. He graduated from the University in engineering on 15 November 1973. He was employed by two industrial firms, Siemens from August 1973 to September 1979 and Messerschmid-Bölkow-Blohm from October 1979 until June 1980.

The reckoning dated 13 November 1981 which was made for the purpose of determining his grade and step took account of his experience from 15 November 1973, the date of his graduation from the University at Delft. A revised reckoning of 10 May 1984 again gave the date of his graduation as 15 November 1973, and so did a second revised reckoning of 15 September 1985 made in accordance with the new guidelines announced in circular 144.

It was in a letter of 15 November 1985 to the President

of the Office that the complainant first contended that the decision that his reckonable experience should date only from 15 November 1973 was wrong and that it should date instead from 2 July 1966, when he had got his diploma at the HTS at Haarlem. The Organisation's answer was, and is, that he should have appealed against that decision within three months of 13 November 1981, the date on which the reckoning was originally notified to him, and that his internal appeal was time-barred.

5. Whether or not the complaint is receivable it is devoid of merit.

For 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, the Netherlands. According to information supplied by the Dutch delegation and set out in document CI/376/77, the qualifications admissible in the Netherlands do not include an HTS diploma.

According to the relevant passage of CI/376/77 the theoretical training provided by the four-year study programme at the HTS is at a lower level than university education. "For recognition at equivalent level additional years of experience after the obtaining of the degree may be required", and those who have nothing but an HTS diploma have been appointed examiners in the Dutch Patent Office only because of special ability and experience.

The conclusion that the HTS diploma is not considered in the Netherlands to be up to the standard of a degree is borne out by the fact that the complainant pursued his studies at the University at Delft: presumably he himself at the time did not believe the HTS diploma to be as good as a university degree.

6. Although three English universities liken an HTS diploma to a British degree of bachelor of science, the EPO does not have to treat it as such in the absence of confirmation from the Dutch delegation. It is the Dutch authorities that are best able to judge the academic standards required for the Dutch Patent Office and there is nothing unreasonable in the Organisation's relying exclusively on information from the Dutch delegation.

7. Until there is a common system of scientific diplomas and degrees in Europe there are bound to be differences

between the British and Dutch systems. In the circumstances, recognising such differences is not in breach of the principle of equal treatment.

8. The statement by the Dutch Ministry of Education put in by the complainant and referred to in B above is immaterial because it was issued in 1985. What is material is the value of his HTS diploma in 1966. In that year the Dutch Patent Office would not have recruited him as an examiner with that qualification.

DECISION:For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

(Signed)

Jacques Ducoux  
Mohamed Suffian  
Mella Carroll  
A.B. Gardner