

The Administrative Tribunal,

Considering the second complaint filed by Mrs M. S.-R. against the European Patent Organisation (EPO) on 2 December 2003 and corrected on 4 February 2004, the EPO's reply of 11 May, the complainant's rejoinder of 2 August, and the Organisation's surrejoinder of 5 October 2004;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. As is stated under A in Judgment 2400, also delivered this day, from 1987 the complainant worked as an examiner at the European Patent Office – the EPO's secretariat. At the material time she held grade A3.

On 9 October 2000 the complainant, in her capacity as first examiner of an examining division, had proposed granting a particular patent application. In line with usual practice she submitted the file to the other two members of the examining division. In November 2000 the second examiner of the division voiced disagreement with the granting of the patent. In October 2001 the second examiner again expressed disagreement in a short statement that was annexed to patent grant form 2035. The second paragraph of her comments read:

“I moreover find [it] unacceptable that the first examiner ignores the views of the group of examiners and directors trying to find an acceptable solution to this case. We had in my opinion reached a compromise together and this has been ignored.”

The chairman of the examining division was in favour of the grant of the patent and gave his agreement on 27 November. As from 5 December 2001 the complainant was on sick leave until her retirement on grounds of invalidity on 1 March 2003. In December 2001 she learnt of the comments attached to form 2035. On 25 March 2002 she wrote to her superior requesting that the second paragraph of those comments be deleted from the form. Having received no answer, she wrote to the President of the Office on 31 May, seeking, inter alia, the removal of the disputed paragraph. The President did not accede to her requests. That refusal was notified to the complainant by a letter of 2 August 2002. On 7 August 2002 she wrote again to the President, lodging an internal appeal against the rejection of her claims. The Appeals Committee issued its report on 4 August 2003. It recommended dismissing the appeal. The President of the Office endorsed that recommendation. By a letter of 3 September 2003, his decision was notified to the complainant. That is the impugned decision.

B. The complainant takes exception to the above-quoted statement which was made by the second examiner and appended to form 2035. While conceding that the second examiner was entitled to use that form to register her disagreement with the granting of the patent, in her opinion the remarks made were of a personal nature and were out of place on that particular form. They were not connected to patentability, and could not be perceived as reasons for disagreeing with the grant of the patent within the meaning of the “Internal Instructions” used by examiners. They merely constituted allegations about her conduct as first examiner during the examination procedure. She notes that the Appeals Committee too acknowledged that they were of a personal nature.

She objects because the second examiner's comments appear to qualify her conduct as “unacceptable”. She considers the allegations about her conduct to be “unfounded and malicious”. There was never any question of a “compromise” being reached within the examining division, and that fact alone shows that her colleague's remarks were unfounded. She considers the remarks to be “abusive and defamatory” and to have been written with harmful intent: not only do they give an inaccurate impression of her but they are likely to have a negative impact on her career prospects. In her opinion, she has been subjected to misrepresentation and the Organisation has failed to fulfil its duty of care. The challenged remarks do nothing to foster good staff relations and the Office should have ordered their deletion.

She seeks the quashing of the impugned decision; the deletion of the second paragraph of the second examiner's statement on form 2035; the sum of 3,000 euros in moral damages; 3,000 euros in material damages should the Tribunal consider that her career prospects have been harmed; and costs.

C. In its reply the Organisation considers the complaint to be irreceivable in part. Firstly, the complainant seeks compensation for moral damages and costs in higher amounts than those requested in her internal appeal. Secondly, her claim for material damages for loss of career prospects has been put forward for the first time in her present complaint, and she has consequently not exhausted the internal means of redress. The Organisation also considers the latter claim to be irreceivable for lack of cause of action, given that the complainant ceased to perform her duties on 1 March 2003 for reasons of invalidity and is no longer in active service.

The EPO submits that the complaint is unfounded and that the complainant's allegations do not withstand scrutiny. The second examiner's comments do not misrepresent the facts. They have to be seen in the light of the history of the patent application in question as well as the decision-making process. The comments are work-related. Moreover, as indicated by the Appeals Committee, the second examiner made it clear that she was giving her personal interpretation of events. The Organisation rebuts the complainant's allegation of defamation and denies that there was any intention to harm her reputation. Furthermore, it states that form 2035 is a purely internal document, and her accusation that the Organisation failed in its duty of care towards its staff is thus without substance. It asks that the complainant should bear her costs.

D. In her rejoinder the complainant justifies why she has a cause of action, stating that she made her initial claim for material damages during the internal appeal procedure when she was still an active staff member with career prospects.

Regardless of the internal character of form 2035 the inclusion of the challenged remarks represents abuse of an official document, as it is being used for purposes other than those foreseen under the European Patent Convention.

E. In its surrejoinder the Organisation maintains its earlier arguments. While it acknowledges that during the internal appeal procedure the complainant referred to the adverse effects that the second examiner's remarks may have on her career prospects, it states that she did not make a specific claim for material damages.

Given that form 2035 is merely of an internal nature, it considers that there are no grounds for her allegation that the second examiner's remarks constitute "abuse of an official document".

CONSIDERATIONS

1. The complainant, who was first examiner of an examining division at the EPO, was responsible for drafting a report on the granting of a particular patent. The second examiner objected to the granting of the patent in question and criticised the complainant's actions in remarks that were appended to patent grant form 2035.

The complainant objected to the second paragraph of those remarks. She considered the examiner's comments to be unfounded, malicious and defamatory, and claimed that she had been subjected to misrepresentation. In not removing the remarks the Organisation, in her view, had failed in its duty of care towards her. Since the remarks were not related to patentability they should have been deleted.

She seeks the quashing of the impugned decision, the deletion of the offending paragraph from form 2035, as well as moral and material damages. She also claims costs.

The Organisation considers the complaint to be irreceivable in part as the complainant has widened her claims before the Tribunal. Her claim for material damages for loss of career prospects has been put forward for the first time in her complaint to the Tribunal, and she has thus not exhausted the internal means of redress. In addition, the latter claim lacks a cause of action, as the complainant is no longer an active staff member and is in receipt of an invalidity pension. The EPO refutes her other allegations and says the remarks had no outside impact as the document in question was purely internal to the EPO.

2. The Tribunal accepts that the remarks were made in an internal document and need not be modified since they were not defamatory, but purely professional. The complainant lacks cause of action as she is now retired and cannot claim any harm. Therefore, the complaint must be dismissed without any need to deal with the issue of

receivability.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 11 November 2004, Mr Michel Gentot, President of the Tribunal, Mrs Flerida Ruth P. Romero, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Flerida Ruth P. Romero

Agustín Gordillo

Catherine Comtet