

The Administrative Tribunal,

Considering the thirteenth complaint filed by Mr R. H. against the European Patent Organisation (EPO) on 15 February 2006 and corrected on 24 March, the Organisation's reply of 24 August, the complainant's rejoinder of 26 September and the EPO's letter of 6 October 2006 by which it informed the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. Facts relevant to this dispute are given in Judgment 2381 dismissing the complainant's eleventh complaint, which was delivered on 2 February 2005 during the Tribunal's 98th Session.

In the *Gazette* published on 25 April 2005 by the European Patent Office, the EPO's secretariat, the Chairman of the Appeals Committee provided a summary in German of judgments delivered during the 98th Session in cases concerning the Organisation, including a summary of Judgment 2381. On 4 June the complainant sent a fax to the Editor in Chief of the *Gazette* in which he asked her to publish an article he had written with a view to "enlighten[ing] the reader about the case" that was the subject of his eleventh complaint. His request was refused on 23 June.

By a letter of 4 July the complainant asked the President of the Office to overturn this refusal. As the complainant received no reply, by a letter dated 22 September he requested that the President refer the matter to the Appeals Committee. On 17 November the head of the Employment Law Directorate informed the complainant that the President considered that the refusal to publish his article was justified, because the summary published in the *Gazette* provided a correct and objective analysis of the judgment in question, and that the matter had been referred to the Appeals Committee. On 1 December 2005 the Chairman of the Committee rejected the complainant's request that priority be given to the hearing of his appeal. The complainant, who filed a complaint with the Tribunal on 15 February 2006, challenges the implied dismissal of his appeal of 22 September 2005.

B. The complainant contends that his complaint is receivable under the relevant provisions of the Service Regulations for Permanent Employees of the European Patent Office and the Statute of the Tribunal.

On the merits, he submits that the refusal to publish his article is contrary to the principle of freedom of expression, especially since the sole purpose of the article was to inform the reader, "by making up for the blatantly inadequate analysis" of Judgment 2381, and to provide a "correct picture of the decision". He regards this refusal as an example of the way in which the EPO, in his opinion, is harassing him.

The complainant asks the Tribunal to:

- (1) find that "the Administration of the EPO is guilty [...] of withholding information from serving and retired staff for no good reason";
- (2) "quash" the decision of 23 June 2005;
- (3) order the immediate publication of his article in the *Gazette*;
- (4) if such publication is refused or unjustifiably delayed, fine the EPO 1,000 euros for each month's delay;
- (5) order the Organisation to preface the article with a brief note explaining the reason for the delay in

publication; and

(6) award him 10,000 euros in damages.

C. In its reply the EPO submits that the complaint is irreceivable on the grounds that “it falls outside the Tribunal’s jurisdiction”, which extends only to disputes concerning individual decisions causing injury, that the internal appeal against the decision of 23 June 2005 was filed out of time, that the complainant has not exhausted the internal means of redress and that his first, fourth, fifth and sixth pleas are new.

On the merits, and subsidiarily, the Organisation replies to each of the claims made by the complainant. It explains with regard to the first and second claims that it is responsible for deciding on the editorial content of the *Gazette* and that, to this end, it enjoys a wide margin of discretion which is not subject to judicial review. It endeavours to demonstrate that the refusal to publish the article written by the complainant was justified, if only on account of the errors to be found in it. The EPO states, with respect to the other claims, that the Tribunal is not competent to order the measures requested in the third and fifth claims. It adds that the summary of Judgment 2381 published in the *Gazette* correctly reflects the tenor of the decision and that it is unnecessary to re-examine the analysis thereof.

Lastly, the Organisation requests that the complainant be ordered to pay costs, because the “substance of the complaint is manifestly frivolous”, and because it is the third time that he has filed a complaint with the Tribunal without previously exhausting the internal means of redress.

D. In his rejoinder the complainant denounces the Organisation’s “laxity” and “inertia” in matters related to internal appeals and points out that it alone is responsible for the fact that his appeal has not yet been heard.

On the merits he states that the purpose of his article was to supplement the information contained in the summary published in the *Gazette*, which seemed “wrongly to denigrate” him whereas the “extremely reprehensible behaviour” of the Administration was passed over. In his opinion, censoring such an article is tantamount to infringing the right to information. Moreover, he points out that the decision of 23 June 2005 was not substantiated.

CONSIDERATIONS

1. On 25 April 2005 the *Gazette*, the in-house magazine of the European Patent Office, carried a summary of Judgment 2381 in which the Tribunal had dismissed the complainant’s eleventh complaint concerning the delay in the payment of his pension for January 2003 and the tax adjustment relating thereto. The summary in question was confined to a short recapitulation of the claims and arguments presented to the Tribunal by each of the parties followed by a brief analysis of the reasons for the judgment.

2. On 23 June 2005 the Editor in Chief of the *Gazette* refused to publish an article she had been sent by the complainant and which, in his words, was designed to “enlighten the reader about the case” that was the subject of his eleventh complaint. No reasons were given for this refusal.

3. On 4 July 2005 the complainant sent a letter to the President of the Office in which he asked him in essence to overturn the Editor in Chief’s decision and to order the publication of his article in the next edition of the *Gazette*. This request went unanswered. On 22 September the complainant requested that the President of the Office refer the matter to the Appeals Committee.

4. On 13 October the Chairman of the Appeals Committee informed the complainant, in response to a request from the latter for information as to how the proceedings were progressing, that the Position of the Office had not yet been received, that internal appeals were normally heard in the order in which they had been lodged and that “[a]s for the length of the proceedings [...] it [was] necessary to reckon with [...] at least one year”.

On 17 November the head of the Employment Law Directorate informed the complainant that, after a preliminary examination of the submissions, the President of the Office considered that the refusal to publish the complainant’s article in the *Gazette* was justified since the disputed summary provided a correct and objective analysis of Judgment 2381. He added that the matter had been referred to the Appeals Committee. On 18 November 2005 the Committee informed the complainant that it had received a copy of his appeal of 22 September 2005 and that the appeal would be heard at the earliest opportunity taking account of its workload, its schedule of meetings and the time the Administration needed to compile the file.

On 16 February 2006 the complainant informed the Chairman of the Committee that he considered that an excessively long time was being taken to deal with his case and that he was not obliged to wait for “the settlement of the internal appeal”. For that reason he filed a complaint with the Tribunal against the implied decision to reject his appeal of 22 September 2005.

5. The Organisation submits that the complaint is irreceivable, mainly on account of the fact that the refusal to publish the complainant’s article does not constitute a decision causing him injury, that the internal appeal was filed out of time and that, in any case, the complainant has not exhausted the internal means of redress.

These objections are unfounded.

(a) A decision to refuse to publish in an international organisation’s in-house magazine the corrigendum of an article which, in the opinion of the staff member concerned, injures his personal interests may constitute a breach of that staff member’s personal rights and an infringement of his freedom of expression. Insofar as such a decision in itself produces legal effects and infringes the rights of the staff member concerned, it constitutes an administrative act causing injury.

The complaint is therefore in principle receivable insofar as its purpose is to secure the overturning of the refusal to publish the complainant’s article in the *Gazette*.

(b) In consideration 4 of Judgment 2381 the Tribunal drew attention to the implications of Article 106, paragraph 2, Article 107, paragraph 1, and Article 108, paragraphs 1, 2 and 4, of the EPO’s Service Regulations. According to these provisions, a former permanent employee may request the President of the Office to take a reasoned decision relating to him. If the President does not take this decision within two months of the date on which the request was made, this amounts to an implied decision of rejection against which an internal appeal may be lodged within three months following the date of expiry of the period for reply.

In the instant case the complainant found himself in the situation referred to in these provisions. Indeed, his request of 4 July 2005 went unanswered and he initiated his internal appeal two and a half months after making that request. His appeal was therefore not by any means filed out of time.

(c) The complainant lodged his complaint with the Tribunal some four and a half months after the filing of the internal appeal. It appears from the submissions that at that point the Appeals Committee had not yet invited the complainant to state his position, a preliminary step mentioned in its letter of 18 November 2005. On 1 December 2005 it had simply stated that, for the time being, it was unable to accede to the complainant’s request to hear his case as a matter of urgency owing to the large number of internal appeals which had been submitted for its consideration.

Generally speaking, serving or retired staff members who turn to an internal appeal body are entitled to have their case heard within a reasonable period of time without having to endure excessive and unjustified delays resulting from the malfunctioning of that body, or from the inadequate resources at its disposal. This duty to take prompt action is reinforced where the dispute is such that it must be resolved rapidly if resolution is to serve any purpose. This is true of disputes relating to the right of reply of a person allegedly injured by the publication of an article, since that person’s interest in exercising the right of reply will dwindle with the passage of time.

In view of all the circumstances of this case and the nature of the dispute submitted to it, the Appeals Committee failed to comply with its duty to take prompt action. Contrary to the defendant’s view, the complainant therefore had good reason to consider that the lack of a decision within a reasonable time amounted to an implied decision of rejection which he was entitled to challenge before the Tribunal (see Judgments 499 and 791, under 2).

6. The Tribunal must, however, allow editorial bodies a wide margin of discretion in deciding on the advisability of publishing in an in-house magazine a commentary or a clarification proposed by a serving or retired staff member who considers that he or she has been injured by a publication.

The rejection of the complainant’s request clearly lies within the bounds of this discretion. Indeed, the summary published in the *Gazette* of 25 April 2005 presented the contents of Judgment 2381 succinctly and correctly. This presentation was unlikely to mislead readers as to the contents of the said judgment and in no way injured interests of the complainant which had to be protected. The article which the complainant wished to have published is, on

the other hand, a text which goes far beyond the subject matter of Judgment 2381 and which informs the public of other difficulties which the complainant alleges he encounters constantly in his relations with the Office.

If the complainant's intention was to criticise in the *Gazette* either the Tribunal's judgment or the summary thereof, he should have remained within the bounds which editors may set for such publications when they are used as a means of providing objective information for serving or retired staff members. The immoderate nature of the article written by the complainant justified the refusal to publish it in the in-house magazine.

7. The complaint must therefore be dismissed without any need to rule on the defendant's other specific objections regarding the receivability of some of the complainant's claims.

The complainant is right not to claim damages in respect of the procedural flaw noted under 5 of this judgment, since it did not cause him any injury.

8. The Organisation, referring to the frivolous nature of the complaint, submits that the costs should be borne by the complainant. The Tribunal is of the opinion that it should not accede to this request.

DECISION

For the above reasons,

The complaint and the EPO's counterclaim are dismissed.

In witness of this judgment, adopted on 27 April 2007, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet