The Administrative Tribunal,

Considering the complaint filed by Mr I. G. against the European Patent Organisation (EPO) on 20 April 2007, the EPO's reply of 26 July, the complainant's rejoinder dated 28 September and the Organisation's surrejoinder of 21 December 2007;

Considering Articles II, paragraph 5, and VIII 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. The complainant, a Swiss national born in 1965, joined the European Patent Office, the secretariat of the EPO, in 1997, at its branch in The Hague (the Netherlands). In addition to his duties as an examiner, he has acted as representative of EPO staff members in internal appeal proceedings and in proceedings before the Tribunal. On 4 May 2005 the Organisation submitted its replies to complaints filed by three staff members represented by the complainant, on which the Tribunal ruled in Judgment 2514. Paragraphs 26 to 28 of these submissions, which were identically worded in the three replies, read as follows:

"26. The defendant would like to note that the complainant's counsel is asking for costs although he is a permanent employee of the defendant. Pursuant to Circular No. 135 […], he should have sought authorization, which he has not appended to the complaint, to act as counsel, assuming his basic legal training entitles him to practice law […]. At any rate, any legal expenses should be documented by the complainant.

27. By indicating 'LLB' on the complaint form to the Tribunal, he creates the impression that he is a practising lawyer […].

28. Only after authorisation are permanent employees allowed to carry out what is called supplementary activities, for which payment is made and falling outside their normal duties. Clearly, the complainant's counsel is calling his colleague 'my client' […], thereby implying that he is receiving monies […] in consideration for his representing him. It is also doubtful, in view of the now large number of cases (internal appeals, including hearings, as well as complaints) in which the complainant's counsel has acted, whether Mr G. complies with the requirement that his '*normal Office duties must not be affected by supplementary activities*.'"

In a letter of 8 August 2005 to the President of the Office, the complainant alleged that the above comments were untrue and unsubstantiated. He claimed that in formulating them, the representative of the Office had "launched a defamatory attack against [him]", incompatible with the obligations of permanent employees set forth in Articles 14(1) and 16(1) of the Service Regulations for Permanent Employees of the European Patent Office. He added that they had been intended by their author to cause, and had indeed caused, harm to him and the colleagues he had represented in the proceedings leading to Judgment 2514. Consequently, he requested that a full retraction signed by the superiors of the Office's representative be sent to the Tribunal, that "appropriate action be taken against the perpetrator to discourage this type of behaviour" and that he be awarded moral damages in the amount of at least 5,000 euros. Alternatively, the complainant asked the President to treat his letter as an internal appeal, in which case he claimed punitive damages and legal costs.

By a letter dated 19 September 2005, the Director of Employment Law informed the complainant that the President had decided to reject his request as unfounded and that the matter had thus been referred to the Internal Appeals Committee.

The complainant was heard by the Committee on 26 October 2006. In its opinion of 27 November 2006 the Committee recommended, by a majority, that the appeal be dismissed. It unanimously considered that the Office's refusal to order measures against the author of the statements did not adversely affect the complainant. As a result, it recommended that the complainant's request in that respect be declared inadmissible. The Committee also

unanimously took the view that a request for a declaration withdrawing defamatory allegations was admissible. On the merits it rejected the complainant's request to that end by a majority of three members, as it found that the comments at issue, though inappropriate and to some extent irrelevant, did not contain false assertions of fact but merely indicated "certain possibilities by implication"; they could not therefore be regarded as insulting or disparaging. The comments of the Office's representative were protected by freedom of speech as they enjoyed the immunity that applies to statements made in legal proceedings. In their dissenting opinion, two members considered that the comments contained "clearly false and disingenuous insinuations", which constituted "an insulting, threatening and defamatory attack" on the complainant. As a consequence, they recommended that the requests for a full retraction and for punitive damages should succeed.

By a letter dated 26 January 2007, the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided to endorse the recommendations of the majority of the Committee and to reject his appeal as partly inadmissible and unfounded in its entirety. That is the impugned decision.

B. The complainant submits that the Internal Appeals Committee erred in considering that his request to take appropriate action against the author of the comments was inadmissible. He did not request that the Office take disciplinary measures against its representative but rather "appropriate action […] to discourage this type of behaviour". He emphasises that he had a justified interest in obtaining from the President not just an apology but also the assurance that both himself "and other staff members who voluntarily assist appellants […] will not be subject to such unprincipled attacks".

On the merits the complainant acknowledges the limitations to freedom of speech set out by the Committee in its majority opinion. However, he submits that the majority's interpretation of the comments made in paragraphs 26 to 28 of the Office's replies was erroneous. In his view, the comments are defamatory. Firstly, contrary to the majority's finding, they did constitute a "public expression", given that they were made known to the staff and the judges of the Tribunal, and to EPO staff members who had been informed of the case before the Tribunal. Secondly, in asserting that the comments merely indicated "certain possibilities by implication", the Committee ignored that they were so worded as to amount to factual assertions. Thirdly, according to the ordinary meaning of their terms, the comments were, in the complainant's view, clearly insulting or disparaging. Fourthly, they were false and constituted a breach of the duty to tell the truth. In addition, they had no relevance to the case at issue and were merely intended to harm the complainant, irrespective of the representative's motive to defend the Office's legitimate interests.

The complainant requests the Tribunal to order a full retraction of the defamatory comments and to take appropriate action to prevent future repetition. He seeks moral damages in the amount of at least 15,000 euros as well as costs.

C. In its reply the EPO maintains that the internal appeal was inadmissible insofar as it was based on an injustice suffered by third parties, to wit the EPO staff members whom the complainant represented. It considers that the request for appropriate action against the author of the comments is irreceivable, because the Office's refusal to grant that request has not adversely affected the complainant personally. As to the request for a full retraction, the Organisation points to the case law, which establishes that the Tribunal is not competent to grant redress of that kind.

On the merits the defendant contends that the comments made by the Office's representative did not constitute a violation of the latter's obligations within the meaning of Articles 14(1) and 16(1) of the Service Regulations. Relying on the case law, it asserts that the comments fell within the right to freedom of speech, which is wider in scope in legal proceedings and which applies equally to the parties and their representatives.

As to the issue whether the comments constituted a "public expression", the EPO states that both internal appeals proceedings and proceedings before the Tribunal are treated confidentially, and that since Judgment 2514 did not mention them, the comments had no effect "in the outside world".

The Organisation submits that the comments were not intended to defame the complainant. Neither were they unjustified, nor defamatory in view of the circumstances of the case. Indeed, the Office had a legitimate interest in challenging the complainant's claim for costs and in clarifying possible misunderstandings as to his status, especially sincethe mention of his legal qualification and his use of the term "client", when referring to a staff member whom he represented, created the impression that he was acting as a practising lawyer.

Lastly, the EPO observes that the claim for moral damages, which the complainant has increased on the basis of a vague assertion, is inappropriately high and that it is, in any case, for the Tribunal to decide such a matter.

D. In his rejoinder the complainant reiterates his pleas. He points out that the Office could simply have asked him to provide details, if it considered that there was any misunderstanding as to the costs incurred in the case leading to Judgment 2514. He adds that it is for the Tribunal to determine who is qualified to represent complainants before it, that the use of academic titles is not unusual within the Organisation, and that proceedings before the Tribunal are governed by "a long tradition of courtesy, honesty and respect for the other participants". As regards the increase in moral damages, he submits that it is justified by the fact that the Organisation has shown no remorse and has even repeated some of the disputed remarks in the present proceedings, which aggravates the offence.

E. In its surrejoinder the Organisation maintains its position. It emphasises that both the EPO and the Tribunal are entitled to know whether a complainant is represented by a practising lawyer, since this may lead to a higher award of costs. Lastly, it denies having intended to defame the complainant.

CONSIDERATIONS

1. The complainant is a full-time staff member of the European Patent Office. In addition to his duties as an examiner, he has regularly represented colleagues in proceedings before the Internal Appeals Committee and before this Tribunal. He represented three colleagues whose complaints to the Tribunal led to Judgment 2514. The complainants claimed costs for those proceedings. In each of its replies, the EPO resisted the award of costs. In so doing, it made the contested comments reproduced under A.

2. The complainant contends that the comments in question are untrue and defamatory. He argues that they are unjustified and malicious and that they constitute an attack on his professional reputation and integrity. His request for a retraction of the comments, the taking of action against their author and for moral damages was rejected by the President of the Office. It was then treated as an internal appeal, which was ultimately rejected on 26 January 2007. That is the subject of the complaint by which the complainant again seeks retraction of the comments, appropriate action to prevent future repetition, moral damages and costs.

3. Statements made in legal proceedings are privileged, whether those statements are made in writing in the pleadings or orally in the course of a hearing. The consequence is that, even if defamatory, they cannot be the subject of legal proceedings or sanction. The privilege, sometimes referred to as "in court privilege", exists, not for the benefit of the parties or their representatives, but because it is necessary for the proper determination of proceedings and the issues that arise in their course. In Judgment 1391 the Tribunal recognised that the privilege attaches to its proceedings, as well as those of internal appeal bodies. It explained the basis of the privilege as follows:

"A fair decision cannot be reached […] by an internal appeals body or by this Tribunal if witnesses, parties and their representatives are unable to speak candidly and without the risk of incurring a penalty for what they may say, and especially if one party is unduly inhibited by the fear that failure to prove his case may make him liable to disciplinary action by the other party."

4. In the same judgment the Tribunal was concerned with the question whether disciplinary proceedings might be brought against a staff member with respect to statements made in the course of various legal proceedings between himself and the EPO. The Tribunal stated:

"Disciplinary action will be justified only if the staff member's conduct amounts to [an] abuse of process or to a perversion of the right of appeal. Such, for example, will be the case if his allegations 'are clearly wholly unfounded' (see Judgment 99 [...]); or if he appeals 'to the Tribunal for the purpose of lending force to the wild and unnecessarily wounding allegations ... repeatedly made against the Organisation' and has thereby 'entirely perverted from its proper purpose the right of appeal' to the Tribunal and has 'affronted the dignity of his Organisation and of the Tribunal' (see Judgment 96 [...]); or if his actions 'could neither have been directed to defending [his] freedom and rights, however widely interpreted, nor ... make the slightest contribution to the disposal of the proceedings' (see Judgment 111 [...])."

By parity of reasoning, a claim may be made and pursued against an organisation if its conduct in proceedings before an internal appeals body or this Tribunal constitutes an abuse of process or a perversion of the right of reply.

5. Statements are not outside the privilege simply because "there is no clear justification supported by evidence" or because they are "offensive" and go "beyond what can usually be called for in the circumstances" (see Judgment 1391). Rather, as explained in that case:

"A litigant whose submissions contain language that is unacceptable, or ill-chosen, or damaging, or unseemly, does not thereby lose the immunity that attaches to statements made in judicial proceedings, however much the breach of good taste may be deplored."

6. As is apparent from the above analysis, the Tribunal's consideration of the extent of the privilege that attaches to statements made in the course of internal appeal proceedings or proceedings before the Tribunal has concentrated on statements made by staff members. However, the privilege is the same in the case of statements made by or on behalf of defendant organisations, and they must be allowed a similar degree of freedom in what they say and the manner of its expression. Even so, a statement will constitute a perversion of a defendant organisation's right of reply if it is wholly irrelevant and it can only serve an improper purpose.

7. There are three defamatory imputations in the comments that are the subject of the complaint. The first is that the complainant was taking payment for providing assistance to his colleagues; the second is that he misrepresented himself as a practising lawyer. These imputations are to be found in paragraphs 26, 27 and the first part of paragraph 28 of the replies filed by the EPO in the proceedings that led to Judgment 2514. The third, to be found in the second part of paragraph 28, is that the complainant's normal office duties were affected by his "supplementary activities". The first two imputations, although clearly defamatory and of a kind likely to reflect adversely on the complainant's position in the EPO, cannot be said to be wholly irrelevant to the issues to be decided by Judgment 2514. As earlier indicated, the complainants in that case had asked for an award of costs. It was relevant for the Tribunal to appreciate that the present complainant was representing his colleagues voluntarily and in his capacity as a serving staff member in order to determine whether and, if so, on what basis costs should be awarded. That being so, the first two imputations were within the privilege that attaches to the proceedings of the Tribunal even though it would have been preferable had the EPO clarified the issue by making comments that did not reflect on the complainant's position and that were less offensive and less confrontational.

8. The third defamatory imputation is in an entirely different category. The question whether the complainant's work performance was or was not satisfactory was wholly irrelevant to any issue that arose for determination in Judgment 2514.

9. In its reply in the present proceedings, the EPO states:

"It [is] regrettable that the remarks were interpreted as an attack on the complainant's integrity since it had in no way been intended to damage the complainant's reputation or […] to question [his] ability as an examiner or legal adviser."

The intention with which a statement is made is not necessarily determinative of the question whether a statement that is wholly irrelevant is also one that can serve no proper purpose. The disputed remark in the last part of paragraph 28 conveyed the meaning that, by reason of the time he spent providing legal assistance to staff members, the complainant's work as an examiner was less satisfactory than it should be. That was defamatory. It was also inconsistent with the duty of the EPO to respect the complainant's dignity. In the context of the other comments that were within the limits of the privilege that attaches to proceedings before the Tribunal, it carried the threat of possible administrative consequences for the complainant's employment. Such a remark can serve no proper purpose. Accordingly, it was not privileged and the complainant is entitled to seek relief with respect to it.

10. It is necessary, at this stage, to note three matters. The first is that the EPO contends that the complaint is irreceivable to the extent that the complainant relies on harm to the colleagues whom he was representing in the earlier proceedings that led to Judgment 2514. The argument is misconceived. The majority of the Internal Appeals Committee noted that the complainant did not claim on behalf of the staff members whom he had represented, but merely that he would do so if the need arose. Further, it is clear from his complaint that no such claim is made in the present proceedings.

11. The second matter to be noted is that the EPO also contends that the complaint is irreceivable to the extent of the claim for retraction of the defamatory statements. In this regard, it relies on Judgment 1635 where the Tribunal explained that it was not competent to order a written apology, as requested in that case. In Judgment 2720, also delivered this day, the Tribunal recognised, under 17, that publication of statements defamatory of a staff member by an international organisation gives rise to a continuous obligation to take steps to remedy, as far as possible, the harm done to the staff member's reputation. Moreover, the Tribunal held in that case that it could order performance of that obligation pursuant to Article VIII of its Statute. Accordingly, it is not correct to say that it is beyond the competence of the Tribunal to order the retraction of a defamatory statement. However, for reasons that will be given a little later, it is not appropriate to order a retraction of the statement now in question.

12. The third matter to be noted is the argument by the EPO that the claim made in the internal appeal for action to be taken "[a]gainst the perpetrator to discourage this type of behaviour" was not then admissible. That is correct. The claim now made is for "[a]ppropriate action to [prevent] […] repetition". That claim is wider than that made in the internal appeal and, *prima facie*, is to that extent, irreceivable. However, that issue needs to be further considered as the Tribunal is of the view that the award of damages is an adequate remedy.

13. As already indicated, the EPO states that it was not its intention to damage the complainant's reputation or to question his ability either as an examiner or legal representative. Even so, it maintains in its surrejoinder that "it is not absurd to ask whether [he] is still able to cope with his workload as an examiner, especially considering the large number of legal cases taken on by him". That remark indicates that, even now, the Organisation does not understand the seriousness of making entirely irrelevant comments in its submissions. However, the comments in the replies in the earlier proceedings had not been widely disseminated. The Tribunal saw no reason to replicate them in Judgment 2514 and knows of no reason why it should question the complainant's integrity, professional reputation or competence as a voluntary legal representative. Unfortunately, an order that the EPO now retract the last part of the comment in paragraph 28 of its replies in the earlier proceedings would only serve to further disseminate that comment. In the circumstances, it is preferable simply to compensate for the harm done by the remark in question. Accordingly, there will be an award of moral damages in the amount of 7,500 euros.

14. The complainant is also entitled to an order for costs in the amount of 4,000 euros.

DECISION

For the above reasons,

1. The decision of 26 January 2007 is set aside.

2. The EPO shall pay the complainant moral damages in the amount of 7,500 euros.

3. It shall also pay him 4,000 euros in costs.

4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 16 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Agustín Gordillo

Giuseppe Barbagallo

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.