

The ILO is alive

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Yesterday was St. Nicholas Day in Germany and many other European Countries. As Wikipedia helpfully as always explains, St. Nicholas fills the boot with gifts and sweets overnight, and at the same time checks up on the children to see if they were good, polite and helpful the last year. If they were not, they will have a stick (*eine Rute*) in their boots instead.

In Austria, Bavaria and Tyrol, St. Nicholas is accompanied by Krampus. Krampus is St. Nicholas' sinister servant, supposed to punish children who had misbehaved, and to capture particularly naughty children in his sack and carry them away. According to Wikipedia the creature has roots in Germanic folklore; however, its influence has spread far beyond German borders, in Austria, southern Bavaria, South Tyrol, northern Friuli, Hungary, Slovenia, the Czech Republic, the Slovak Republic and Croatia.

In other words, the perfect timing for ILO in Geneva to issue its verdicts on several complaints filed by EPO employees against disciplinary measures issued by the EPO management and/or the Administrative Council. Now, let us find out who the ILO thought were the good children and who misbehaved.

Case 3972 was a complaint of an EPO examiner from The Hague, who was dismissed for alleged misconduct. The complainant argued that he was suffering from a mental illness. The ILO decided in favour of the employee, referring to a similar earlier case that it had decided earlier:

“[T]he President’s decision to dismiss the complainant [...] is vitiated by the fact that neither the President, nor the Disciplinary Committee could have made a proper assessment of the allegations without taking into account whether the complainant acted intentionally, and in control of his faculties, or if the

complainant suffered from a mental illness that prevented him from behaving in accordance with his obligations as a permanent employee. Therefore, the principle of due process and the duty of care require the Disciplinary Committee in accordance with Article 101(3) of the Service Regulations (which provides that '[i]f the Disciplinary Committee requires Judgment No. 3972 further information concerning the facts complained of or the circumstances in which they arose, it may order an inquiry in which each side can submit its case and reply to the case of the other side') to order a medical assessment of the complainant by an expert, and the convening of a Medical Committee if necessary. The medical expert(s) shall also take into consideration all documents in the file submitted to the Tribunal."

Cases 3958 and 3960 were complaints filed by a Board of Appeal Member against several decisions of the Administrative Council who imposed upon him several measures in relation to an alleged misconduct, including to suspend him, to subject him to a "house ban", to request him to relinquish all EPO property in his possession, and to block his EPO User ID.

The decisions speak for themselves and I highly recommend reading them in full. To cut a long story short, the party that "misbehaved" here was found to be the President of the EPO and the Administrative Council (AC). The facts are quite complex, but in essence, the problem was that the President, who felt defamed and insulted by emails allegedly sent out by this Board member, issued a house ban against this Board Member and requested the AC to suspend him, which the AC did. The Board Member requested a review of this decision, asked the AC to afford him the right to be heard and requested that the EPO President should be excluded from this review process due to partiality. The AC rejected the request for review and continued to involve the EPO President in his advisory capacity for its decision-making process.

Thus, the President came into the convenient position to be allowed to act as both the (executive) "plaintiff" and the (judicial) "court advisor" of the review panel (the AC) in the same case. A bit too much for the ILO tribunal, which held:

13. In the present case, there is a conflict of interest on the part of the President. It stems from the fact that the alleged serious misconduct, with which the complainant was charged, might reasonably be thought to have offended the

President specifically, directly and individually. This situation, by itself, casts doubts on the President's impartiality. Considering the whole situation, a reasonable person would think that the President would not bring a detached, impartial mind to the issues involved. The argument raised by the President in his opinion to the Council (CA/C 6/15), quoted above, namely that pursuant to the applicable rules the President was acting within his competence and had the power and duty to take all necessary steps to ensure the smooth functioning of the Office, is immaterial. The question of a conflict of interest only arises if the official is competent. Accordingly, the question of competency is not an answer to a charge of a conflict of interest. Hence, the Administrative Council erred in not finding that the President had a conflict of interest in the matter. In this situation, in accordance with the provisions in force, the Administrative Council should have sent the matter back to the next most senior official to exercise authority instead of the President, who was precluded from exercising authority because of his conflict of interest (see Judgement 2892, under 11).

The ILO therefore set aside the two impugned decisions by the AC, ordered that the complainant shall be immediately reinstated in his former post, ordered that the EPO shall immediately allow the complainant access to the EPO premises and resources, return to him any EPO property it requested him to hand over pursuant to decision CA/D 12/14, and to immediately unblock his User ID. Moreover, the EPO was ordered to pay the complainant 10,000 euros in compensation for moral injury and costs in the amount of 5,000 euros.

The second decision came to a very similar result, such that the EPO will now have to reinstate the Board Member in its previous position and pay him moral damages totalling at 25,000 EUR. Provided that it observes the ILO's verdict.

Not a good day for the EPO management and its AC, when you are being found to have violated due process rights in one case and being accused of partiality – and, indirectly, violation of the principle of separation of powers, a known problem under the current Presidency – in two further cases.

Now, are all children of the EPO good and just its management a case for Mr. Krampus? Not quite. The ILO's last two decisions of the day, 3896 and 3895, ended successfully for the EPO. The two complainant's requests for interpretation of an earlier decision, which dealt with the (appropriate) composition of an EPO Appeals

Committee “composed in accordance with applicable rules” were dismissed on procedural grounds.