Kluwer Patent Blog

The EPO’s Vision (II) – “expert, well supported and motivated staff”

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Part II
(- sorry, this will be a bit longer, but a lot has accumulated recently…)

How does the EPO in 2018 fare with regard to the criterion “expert, well supported and motivated staff”? To what extent is it already reality, and to what “vision” in the sense of fancy?

In my personal view, it is difficult to give a satisfactory general answer to this question. The EPO employs almost 7000 staff from over 30 countries, among them more than 4300 examiners (in 2016). It is inevitable that not all of them are “expert, well supported and motivated” to the same degree. But let us look at the three categories in more detail:

1. Expert Staff

“Expert” staff probably mainly alludes to the technical and legal qualifications of EPO examiners and Board of Appeal (BoA) members. In this regard, my general impression is that the EPO staff leaves very little to be desired. Exceptions may confirm the rule, but on the whole, my experience is that EPO examiners and BoA members are adept to the technology at stake and perfectly capable of understanding also very complex inventions, which is commendable and not a given on a global scale. Legal knowledge and experience may be more variable between individual examiners, but fundamentally I would not complain about this. EPO examiners will probably think the same about the professional representatives with whom they are dealing on a day-to-day basis.

If there is any problem here at all, it is to maintain the status quo (aside from individual improvements). In my opinion, EPO staff is so “expert” because the EPO used to offer it a permanent position with high job security and a good salary, combined with a favourably low EPO tax rate, decent weekly hours and a generally pleasant international working climate. The combination of these factors enabled the EPO to recruit very good scientists and engineers and to train them on the job to become expert examiners. The EPO management would in my view be well advised to maintain these conditions.

I have heard rumours about the EPO intending to recruit new examiners on a temporary (5 year) basis only. Two commentators of my last contribution even alleged that an amendment is under discussion that would allow the President to dismiss any employee “should his/her services be not needed”. If true, that would indeed be outrageous.

Bearing the EPO's vision about staff in mind, I do not think that such amendments would make any sense, since they would remove an absolutely decisive advantage of an EPO job versus a job in industry or private practice. I would also note that many EU countries impose quite strict restrictions on temporary employment contracts, and for good reasons. Thus, I really hope that the Administrative Council will not cave in to such self-destructive proposals.

Even under the existing rules, staff job security has unfortunately already been jeopardized by the EPO President who has fired no less than three members of the Staff Union of the EPO during his tenure (which will end on 30 June 2018). Two of them were dismissed even contrary to recommendations of the EPO's own disciplinary committee, whose chairman is – you probably guessed it – also appointed by the EPO President and therefore unlikely to be overly staff-friendly. In the third case, the disciplinary committee apparently found the SUEPO chair Mr. Laurent Prunier guilty of a "campaign of harassment" against another staff representative "by exclusion, isolation and intimidation", which allegedly resulted in the "forced resignation" of this staff representative. According to Intellectual Property Watch the president wrote: *"The case of the forced resignation of this staff representative was well known and had further consequences; it was used as a threat by some staff representatives against other staff representatives in Munich, who would have exposed themselves to the action of the 'snipers of The Hague', if they refused to follow some instructions"*.

Mr. Prunier countered that by saying *"the file against me contains so many demonstrably fabricated accusations that I have little doubt I can defend myself – or, rather I would be able to if our internal system were not what it is currently, a kangaroo court."* According to Wikipedia, a "kangaroo court" is a judicial tribunal or assembly that ignores recognized standards of law or justice, and often carries little or no official standing in the territory within which it resides.

I do not know what happened and have no own judgment on the case itself (there is a lot in internet blogs and from SUEPO). However, I wonder how a SUEPO representative could have been able to "threaten" other staff representatives and to even "force" their resignation. Is it not much more plausible to assume that a staff member who feels threatened by one of his (SUEPO) colleagues would first contact his manager or even the President and that one of them would have immediately interfered and stopped this bullying, if any? I also wonder about the EPO President using the words 'snipers of The Hague' in regard to elected staff union representatives. Finally, I wonder what is so special or "evil" about elected SUEPO representatives (other than their elevated position in the Staff Union of EPO members) that no less than three of them apparently had to be sacked? The pattern as a whole has a very bad odour to it and the mere fact that no less than three staff representatives were fired during a relatively short time period suggests that an EPO job is not really safe unless you say and do what the President wants.

In this connection, the underlying problem seems to be that the EPO is not embedded in a proper court structure that guarantees independent decision-making and a proper judicial review. As the above cases have shown, the President (a) has a great influence on the composition of the EPO's disciplinary board and (b) neither is nor even feels bound by its decisions. This obviously raises the question what this board is good for at all, if the President can always overrule it. In my humble opinion, a disciplinary board is (or at least should be) empowered to make decisions in disciplinary matters exactly because the President has *delegated* his power to the board to this extent; otherwise such a board makes little sense. In addition, there is unfortunately no separation of powers or system of checks and balances within the European Patent Organisation. Neither the decisions of the President nor of the Administrative Council (AC) are subject to an effective judicial control,

which in my opinion is a fundamental flaw of the EPC under the aspect of the rule of law. (And, unfortunately, the UPC has the same construction.)

Employees and former employees of the EPO may apply to the Administrative Tribunal of the International Labour Organization in the case of disputes with the European Patent Organisation, pursuant to Art. 13 EPC. This may seem to be a solution at first glance, but this Administrative Tribunal is (a) no fact finding court and (b) only admits an appeal if all internal means of redress have been exhausted. The former is completely unsatisfactory, because it is very often the proper establishment and assessment of the relevant facts that is decisive for a lawsuit. The latter is equally strange because it may result in a complete denial of an employee's rights in the case when the employee seeks a certain measure from the EPO management and the EPO management simply does not react. Such an "implied denial" of an employee's request seems to be "not a final decision in accordance with Article 109(5) of the Service Regulations", and thus results in inadmissibility of the appeal according to the ILOAT in its decision 3968, ground 18, which was discussed in this blog earlier.

Prof. Broß, a retired judge of the German Federal Constitutional Court, has advanced an even more fundamental criticism to this dispute regulation mechanism. In his clear view, it is not legitimate for a state or association of states (such as the EPO) to outsource and "privatize" human rights. His reasoning has led him to the following damning verdict about Art. 13 EPC:

> e. Was nun die Ausgestaltung der Dienstverhältnisse der Bediensteten der EPO einschließlich des nach den eingangs erwähnten Regelwerken unabdingbar zu gewährenden effektiven Rechtsschutzes betrifft, ist folgendes festzuhalten. Die Gewährleistung der Menschenrechte und die Sicherstellung eines effektiven Rechtsschutzes für die Bediensteten der Staatenverbindung ist eine originäre und substantielle Verpflichtung als Mitgliedstaat dieser neuen Staatenverbindung. Damit ist verbunden, dass die Mitgliedstaaten wegen der Formung einer Staatenverbindung mit eigener Rechtspersönlichkeit und gekrönt mit Immunität sich nicht aus ihrer jeweils einzeln bestehenden Verpflichtung zur Gewährleistung und Sicherstellung eines effektiven Menschenrechtsschutzes zu Gunsten der Bediensteten "stehlen" können. Die Übertragung von Rechtsstreitigkeiten zwischen der Staatenverbindung und ihren Bediensteten auf die ILO ist nicht in Einklang mit der Europäischen Grundrechtecharta, der Europäischen Menschenrechtskonvention und den nationalen Grundrechtskatalogen wie auch der Stellung jedes einzelnen Mitgliedstaates als "Herr des Vertrages".

In English:

> The following should be noted as regards the structuring of the employment relationships of the staff of the European Patent Organisation – including the legal protection that must necessarily be granted under the canons mentioned at the outset. The guarantee of human rights and the safeguarding of effective legal protection for the staff of the association of states is a primary and substantial obligation as a member state of this new association of states. Connected to this is the fact that, faced with the formation of an association of states with its own legal personality and

> crowned with immunity, the member states cannot "relinquish" their separate individual obligations to guarantee and safeguard effective protection of human rights for the benefit of the staff. The transfer of legal disputes between the association of states and its staff to the ILO is not consonant with the European Charter of Fundamental Rights, the European Human Rights Convention, and the national catalogues of fundamental rights as well as the status of each individual member state as "master of the contract".

It remains to be seen whether this criticism will make its way to the Federal Constitutional Court in the four pending constitutional complaints against the EPO and the constitutional complaint against the UPC and whether it will have an impact on the court. In any case, it should not be lightly dismissed. Human rights are indeed the highest good that our constitutions, the EU Charter on Human Rights, and the European Convention of Human Rights are supposed to protect. It should indeed not be legitimate to "outsource" them and to create a space in the middle of Europe to which the independent courts of the member states have no access anymore. We need no second Guantanamo.

Will all of this have an impact on the "expertise" or "expertness" of EPO examiners? In the short term probably not too much, since most examiners were hired under more congenial conditions. However, I have repeatedly heard that several senior examiners and BoA members have recently left the EPO, or went into early retirement. The EPO management will have the appropriate data to confirm or disprove this. If so, the current situation at the EPO might even have short term effects on the expertise and experience of the EPO examiners, but in any case, I fear that the EPO has lost some of its attractiveness as an employer to young scientists and engineers. Job security might very well be a quite important factor if and when people consider a career at the patent office.

Contrast the situation at the EPO with the enormous level of protection that employees and particularly staff representatives enjoy in many European countries, particularly in Germany (where additionally patent examiners have "Beamtenstatus" and thus are essentially protected twice against being sacked), and it is easy to see that the EPO now has a significant comparative downside as an employer for new examiners. This worries me as a representative of parties before the EPO for the long-term future.

2. Well-supported staff

EPO staff may have the necessary technical equipment it needs for support, but the above raises doubts whether the EPO staff feels "well-supported" by management likewise. My own impression is that most (if not all) EPO examiners with whom I have spoken over the past years feel at least somewhat intimidated or even threatened by their management rather than "well supported". I should of course clearly state that I am not in a position to conduct any representative poll, so I concede that I may be wrong on this. Happy examiners, if you do feel well-supported by your current management, please speak up and let the world know!

For the time being, however, I am afraid that the situation is indeed as difficult and depressing as I myself have observed it many times. Here is some more evidence: The Committee on Social Affairs of the Council of Europe has recently (24 January 2018) deliberated about jurisdictional immunity of international organisations and rights of their staff and made several suggestions on how to improve the situation and issued a Committee Opinion that can be found here.

I had to remind myself that the Council of Europe is no EU institution, even though all EU member states and several more are members thereof. It has 47 member states from Albania through to the United Kingdom and also includes Russia and Turkey, for example. The Council of Europe understands itself as the guardian of the European Convention of Human Rights (ECHR). The aforementioned Committee Opinion includes an explanatory memorandum wherein the following remarkable statement can be found:

> It is no secret that the signatories of the original motion for a resolution had the situation at the European Patent Office (EPO) in mind when tabling this motion. The EPO – like other international organisations – is not exactly a paragon of transparency when it comes to its internal workings, but the situation has deteriorated so badly over the last few years that there has even been some media attention. From this media coverage it appears that the President of the EPO installed in 2010 has waged a campaign against staff who oppose his reform efforts (with staff representatives members of the trade union SUEPO being in the first line of fire): by 2016, three elected staff representatives had been dismissed, others had been demoted and/or had seen their salaries or pensions cut. Staff complain about a campaign of intimidation, harassment and discrimination, resulting in burn-out and other sickness, and even suicides: Over the past four years, five EPO staff members have committed suicide, two of them at their place of work.

I have already reported on the speech recently held by the AC's Chairman Dr. Christoph Ernst at the MPI in Munich on this blog. I may add to my report that the issue of these extremely sad incidents was also brought up in the discussion following his speech. This was the only time when I observed Mr. Ernst to become somewhat unsettled or even angry. He expressed his distaste in any attempt to exploit ("instrumentalisieren") these incidents to push for a political agenda. I agree with him on that. Nonetheless I think that ignoring such tragic events altogether or treating them as isolated and singular occurrences that surely have nothing to do with the EPO's management policy towards staff is also not the way to appropriately deal with such a situation. When somebody commits suicide at his/her place of work, it is in my view right for everybody who knew or was responsible for this person to do some introspection and at least consider what he/she/all of us can possibly do to prevent such tragic incidents from re-occurring. I cannot imagine that the EPO management did not do this and will say no more about it.

3. Motivated staff

Finally, a word on motivation. To begin with, I would like to observe that I know many examiners who still like their job and do it very well. I can understand that. An EPO examiner's work can be interesting, intellectually challenging and sometimes perhaps even entertaining, e.g. when there are oral proceedings, but then these can also be quite tedious at other times. And while I have heard that the financial conditions and career paths are no longer what they used to be, nobody has ever complained to me about his/her salary specifically.

So, is all well on this front? Not quite, unfortunately.

Sadly, I have also noted that the atmosphere at the EPO has changed over the last couple of years. Just a few examples: Every examiner who wanted to be a little bit more open to me cautioned me

not to mention her/his name by any means, as he/she might be subjected to severe sanctions if it came out that he/she was a source of the information just relayed to me. I find this very strange, to say the least, as we are not talking about professional or personal secrets here, but about the way in which the EPO generally works. I think the public has a right to know this and should have an unfiltered and unfettered access to this reality. But contrast this with Article 20(2) of the current "Service Regulations" of the European Patent Office:

> "A permanent employee shall not, whether alone or together with others, publish or cause to be published, without the permission of the President of the Office, any matter dealing with the work of the Organisation. Permission shall be refused only where the proposed publication is liable to prejudice the interests of the Organisation."

There is no doubt, according to my observations, that many examiners currently feel oppressed, intimidated and under constant supervision ("big brother"). Not every examiner sympathizes with every action by SUEPO, but nobody has ever expressed to me approval or even a shred of understanding about what happened to SUEPO's representatives. There are examiners who really feel oppressed and try to stand up to the oppression, there are examiners who have escaped into a state of inner emigration ("nothing can be changed, this management can do what it wants, so I just keep quiet and do my job"); and there are also examiners who have expressed to me an understanding for that the current management has a stronger focus on performance than earlier ones. And there are examiners who are a little bit of everything. It is obviously a question of degree.

I for myself think that the EPO has an important role to play as a public service provider and that examiners should – and overwhelmingly do – take this role seriously. I have no problem with a management that challenges those (few) employees who do not respect their duties to their employer and to the public and just try to cash in a decent salary for doing nothing or just the bare minimum. On the other hand, I think that a decent management should also understand and respect that people are different, and that some of them may perform less than others due to e.g. sickness or age. And I see no point in substantially increasing so-called "production targets" per capita every year. Charles Chaplin has sufficiently demonstrated in Modern Times (available for free on youtube, around minutes 14-15) that there are obvious (human) limits to productivity per person and that turning the conveyor belt faster and faster may result in more casualties, but not necessarily in better products. But this will be for another post.

Musing about motivation at the Board of Appeal level, I cannot refrain from thinking about the story of Mr. Mennessier. I remember Mr. Mennessier as an outstandingly correct, thorough and sincere technical Board of Appeal member who was respected by everybody. Mr. Mennessier was also motivated, even so much that he asked for his service at the EPO to be prolonged beyond the regular age of 65. He filed his request in good time in September 2013, more than a year before his regular retirement age and successfully underwent the requisite medical examination. The EPO's Selection Committee then interviewed him on 20 January 2014 and proposed to the President of the Office that his request should be granted, as it had been good practice before. However, Mr. Mennessier did not hear back from the President for many, many months, nor from the Administrative Council who would have to make this decision on proposal by the President. Only in October 2014, about one month before his regular retirement, the President informed him that

"in the interest of the service" he had decided not to propose a prolongation of his service to the Administrative Council. Why? Was there not a serious backlog of cases already in 2014? (Spoiler: yes, there was and every hand would have been needed!) Here are the reasons: The first was that in the EPO President's view, "it was inappropriate to propose a prolongation until the full consequences of decision R 19/12 on the functioning, structure and staffing of DG3 became clear".

WHAT??? Dear readers, when I read this story for the first time, my jaw dropped. A highly experienced, motivated and desperately needed TBA member was refused to continue working for another two or three years because three of his colleagues had issued a decision (R 19/12) which questioned the independence of the Chairman of the Enlarged Board of Appeal in view of his involvement in the administration of the office as Vice President of DG3, but which had absolutely nothing to do with the staffing of the Boards of Appeal. Not only is this reasoning completely arbitrary and capricious, at least in my opinion; it also ironically confirms in a very sad way how little independence the Board of Appeal members actually have. In which world do we live where Board of Appeal members run the risk of suffering personal harm if they (or even their colleagues) issue a decision that the President does not like? Montesquieu, have you lived in vain?

The second reason is equally strange and tenuous: The President argued that "discussions on changes to the organisation of DG3 were under way in anticipation of the setting up of the Unified Patent Court". Note, all of this happened in 2014. And what exactly should be the impact of the UPC on the Boards of Appeal? Does the President seriously believe there will be less oppositions and appeals if we have a Unified Patent Court, and if so on which basis?

The Administrative Tribunal of the ILO where Mr. Mennessier complained was not very complimentary to the EPO President about this. It first reminded itself about the applicable standard as follows:

> A decision to retain an official beyond the normal retirement age is an exceptional measure over which the executive head of an organisation exercises wide discretion. Such a decision is therefore subject to only limited review by the Tribunal, which will interfere only if the decision was taken without authority, if a rule of form or procedure was breached, if it was based on a mistake of fact or of law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts, or if there was abuse of authority.

But then it held that the reasoning by the EPO President was so weak and arbitrary that it violated even this generous standard:

> Neither of the grounds underlying the decisions of the President of the Office can be accepted as a legitimate justification for the rejection of the complainant's request for his service to be prolonged. This rejection was therefore tainted by an obvious error of judgement.
>
> The Tribunal notes that this flaw is particularly unacceptable given that the Selection Committee had issued a proposal favourable to the complainant's request. That proposal was based on sound reasoning and emphasised, in addition to the complainant's profound competence, the service's interest in retaining him in view

> of the particular need of the boards of appeal for expertise in his specific field. Considering that proposal, the President ought to have at least provided adequate justification for his own position.

As this blog is already long enough, I recommend studying the decision in full. In the end, the EPO was ordered to pay to Mr. Mennessier his full remuneration for two further years (less his pension), various further compensations and moral damages of 5000 EUR. I find this extremely annoying, because the EPO management could have retained a first-class and motivated Board of Appeal member in the biotech field for two more years. The average duration of contentious biotech appeals has meanwhile reached at least four years.

In addition, I wonder what effect the EPO President's handling of Mr. Mennessier may have had on the motivation of other Board of Appeal members and whether the President cared (or cares) about this at all. Furthermore, I wonder how much the Administrative Council knew and approved about this at that time. If the AC was not informed about the President's decision in 2014 and if I were an AC member today, I would get pretty upset. *In my opinion, this decision by the EPO President has inflicted damage to the European Patent Office and its stakeholders, and for no good reason.*

In summary, I am not sure whether the EPO's "vision" of a motivated staff matches with current reality. While many examiners and Board of Appeal members genuinely like their work, I have yet to find one who tells me that (s)he feels motivated by the current management, whilst many tell me the opposite. It seems to me that the current management focusses far too much on delusional and senseless objectives such as "raising production targets" every year and on "challenging staff", rather than positively motivating it to work together towards a common goal, i.e. the public weal.

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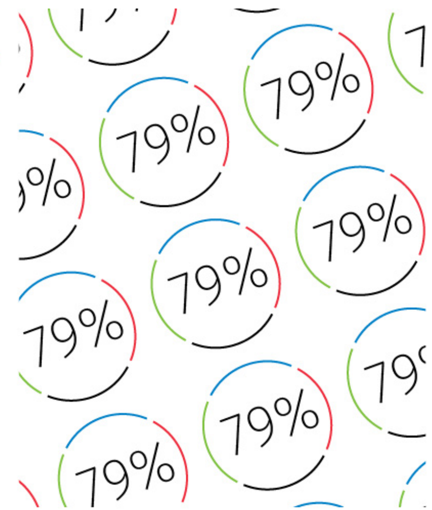

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