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ILOAT sees more violations of staff rights at European Patent Office

Kluwer Patent blogger · Saturday, July 9th, 2022

The EPO has violated the right of free association by imposing restrictions on staff's choice of members for the Appeals Committee and other statutory bodies of the EPO. The Administrative Tribunal of the International Labour Organisation ruled this in a case which was published on 6 July 2022. In another case it judged that restrictions put on the use of the internal mail system in 2013 were unlawful and must be quashed.

The two cases date back to the presidency of Benoit Battistelli, which was a time of deep social conflicts, the dismissal or degradation of many staff and union representatives and the introduction of measures curbing rights of staff. In a number of decisions since 2018, the ILOAT has judged that Battistelli's dismissals (cases 4042, 4043, 4047, 4051, 4052) and measures detailing conditions relating to the staff committee elections (case 4482), restricting the rights of staff members to strike and/or excessively reducing salaries of staff members who participated in strikes (cases 4430, 4432, 4433, 4434 and 4435), were unlawful and violated basic rights of staff.

Case 4550 also fits in this pattern. It concerns a decision of the EPO presidency, approved by the Administrative Council (CA/D 2/14 of 28 March 2014, implemented in particular by Circular No. 356) to amend 'Article 36 of the Service Regulations (…) in such a way that the Staff Committee would henceforth be obliged to choose the persons whom it appointed to sit on most of the statutory bodies of the Organisation, and in particular on the Appeals Committee, exclusively from among its own members, whereas it had previously been possible to appoint other employees of the Office for this purpose. This put an end to a practice whereby the Staff Committee often preferred to appoint staff members – sometimes referred to as "experts" – to these various bodies, and in particular to the Appeals Committee, who were chosen from outside its own membership on the basis of their ability to represent the staff in the most effective way.'

The Appeals Committee was and is a crucial body within the EPO, as is it the first body where staff members have to go to in case of conflicts with management. The CA/D 2/14 decision was seen as a way to undermine the power and independence of the Staff Committee within the paritary Appeals Committee; the complainant in the case is a former member of the Appeals Committee, an

expert nominated by the Staff Committee who was not an elected staff representative himself. He had to step down due to the new regulations. In protest to the CA/D 2/14 decision, the Central Staff Committee refused to appoint new members.

In its decision of 6 July 2022, the tribunal judged decision CA/D 2/14 violated the right of staff to freely associate.

‘9. In the present case, it appears from the file that the obligation imposed on the Staff Committee to choose the members to be appointed on the Appeals Committee exclusively from among its own members substantially undermined, in various respects, the quality of the effective representation of staff on that body.

10. Firstly, this obligation had the practical consequence, given that the Staff Committee was also required by decision CA/D 2/14 to appoint from among its own members the persons called upon to represent the staff in numerous other statutory bodies, of considerably limiting the time that the members of the Staff Committee called upon to sit on all the bodies in question, and in particular on the Appeals Committee, could devote to these tasks. This limited time availability was such as to impair the ability of the staff representatives who were members of the Appeals Committee to perform their duties efficiently. (…)

11. Secondly, it should be stressed that the members of the Staff Committee, who are often staff union representatives, are usually elected by the staff on the basis of their ability to defend effectively the staff’s collective interests before the Organisation’s authorities. They do not necessarily have any specific training in relation to the Appeals Committee’s role and their profile, which is well suited to the tasks of defending the position of a staff unions and social negotiation, is generally not in line with the functions of the Appeals Committee’s members, which are completely different and require, in particular, some legal competence to be successfully exercised. This is the main reason for which the Staff Committee often preferred to appoint “experts” from outside its own members to sit on the Appeals Committee until decision CA/D 2/14 was adopted. That possibility no longer exists pursuant to the reform, which is likely to affect the quality of staff representation within the Appeals Committee (…).

12. Thirdly, as the complainant rightly points out, the appointment of Staff Committee members to serve as Appeals Committee members has the disadvantage of multiplying situations of conflict of interest, since they themselves lodge numerous appeals in their capacity as staff representatives. (…)

13. Finally, the quality of staff representation on the Appeals Committee resulting from the restriction of the Staff Committee’s power of appointment will be further impaired by the fact that the President of the Office has retained the possibility of appointing to the Appeals Committee – whether as chairman, deputy chairman or member – any staff member in active employment. This unrestricted freedom of choice, which, in an asymmetrical manner, allows the President to appoint the persons with the best abilities and who can, consequently, be heard effectively within the framework of the Appeals Committee, confers a significant advantage on the Administration over the staff, in terms of the quality of its representation within the Appeals Committee. This further aggravates the imbalance created by decision CA/D 2/14 regarding the Appeals Committee’s composition.’

The ILOAT judged that ‘Articles 7 and 13 of the Administrative Council’s decision CA/D 2/14

modifying Article 36 (…)' should be set aside and that, 'pursuant to the quashing of Articles 7 and 13, the Staff Committee will again have the possibility to appoint members of the Appeals Committee that are not among its members, and consequently the EPO will have to either amend Circular No. 356 or adopt new rules concerning the deduction of working time for those members of the Appeals Committee similar to those laid down in the Circular for members of the Disciplinary Committees and the Selection Boards appointed under the same conditions.'

Case 4551

Case 4551, which also dates back to the Battistelli era, is especially interesting in view of the restrictions which are still in place at the EPO concerning the use of mass emails. Some quotes:

'On 13 May 2013, the President of the Office issued Communiqué No. 26 entitled "When enough is enough – the use of mass emails within the Office". He noted that staff representatives were using mass emails increasingly, and that, in many instances, these emails were polemical and factually incorrect. He therefore announced that he would shortly be setting up rules on mass communications. (…) as from 3 June, the sending of emails to more than fifty addressees would be subject to the criteria laid down in Communiqué No. 10 of 29 March 2006. Hence, only authorised employees wishing to exchange information in support of the EPO's mission, goals and objectives, job-related information retrieval and information to maintain or gain knowledge related to professional duties would be allowed to send mass emails.'

'the Tribunal holds that the EPO had granted a reasonable balance in the use of mass emails by means of Communiqué No. 10 and of the Announcement of 28 December 2011. (…) On the contrary, the Communiqué of 31 May 2013 is unlawful to the extent that it restrains the use of mass emails, requiring a prior authorisation by the Organisation for the sending of mass emails to more than fifty addressees. It is unlawful because it sets out an indiscriminate limitation, without providing specific reasons for this measure, irrespective of technical difficulties for the emails' dispatching, and, moreover, for an indefinite time.

The Organisation has not submitted that this prior authorisation was required for technical reasons, and has provided no evidence that mass emails to more than fifty addressees could jeopardise the operation of the IT System at the EPO.

In fact, the wording of the two impugned Communiqués revealed that the true reason for the requirement of the prior authorisation was to exercise a prior censorship on the content of the communications. Indeed, the one of 13 May 2013, deplored the "misuse" of mass communications by staff representatives, underlining the circumstance that "[i]n many cases they [were] polemical and factually incorrect". The one of 31 May 2013 required an authorisation for the dispatching of mass emails, but failed to give any further reason, since it did not explain whether an authorisation was required for technical needs or for other reasons. (…)'

'The Organisation did not have the power to prevent or to impede communications among staff representatives and staff members only on the basis that they appeared, according to the Organisation, to be "polemical" or "factually incorrect", or to substantiate "vindictive personal attacks". The EPO failed to provide evidence that the communications went beyond the bounds of legitimate, though harsh, criticism, and trespassed into the realm of gross violations of the rights of the Organisation or individuals. In the present case, the measures taken by the Organisation were disproportionate.'

Just weeks ago, trade union SUEPO said the EPO didn't allow the use of EPO mail addresses for the Technologia survey on working conditions at the organisation. Reading the ILOAT judgment in case 4551, one wonders whether this restriction can be upheld any longer.

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