

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

**H. (No. 4), T. (No. 4), M. (No. 2),
R. (No. 8) and S. (No. 3)**

v.

EPO

120th Session

Judgment No. 3522

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr W. H. H. (his fourth), Mr D. T. (his fourth), Mr W. M. (his second), Mr L. R. (his eighth) and Mr D. M. S. (his third) against the European Patent Organisation (EPO) on 28 February 2011 and corrected on 13 April, the EPO's reply dated 26 July, the complainants' rejoinder of 8 August and the EPO's surrejoinder of 14 November 2011;

Considering Article II, paragraph 5, of the Statute of the Tribunal, and Article 13 of its Rules;

Considering the applications to intervene filed by Ms D. H. on 10 August 2011, and by Mr P. T., Mr I. T. and Mr A. C. K. on 24 August 2011, and the EPO's comments thereon of 26 September 2011;

Considering the applications to intervene filed by the following interveners on 30 September 2011 and corrected on 20 October 2011:

[LIST OMITTED]

Considering the applications to intervene filed by the following interveners on 14 October 2011, and the EPO's comments thereon of 14 November 2011:

[LIST OMITTED]

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

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

The complainants are permanent employees of the European Patent Office, the secretariat of the EPO.

Circular No. 286 of May 2005 (hereinafter "the Circular") on the protection of the dignity of staff was issued to prevent behaviour which negatively affected the dignity of those working at or for the Office and to provide a means of dealing with problems should they occur. Thus, it provided for a formal procedure of settlement of harassment-related grievances if the informal resolution was unsuccessful.

By a letter of 5 April 2007 the Chairman of the Central Staff Committee (CSC) informed the President of the Office that a recent staff survey had revealed that the incidence of harassment was still high and that the application of the Circular had been plagued by a number of problems, including unacceptable delays and external interference in the procedure. The Administration and the staff representatives were aware of the problem and considerable work had been done. He nevertheless expressed his concerns at the Administration's failure to react to the report prepared by the Ombudsmen Contact Persons (hereinafter "OCPs"), which included detailed recommendations by the Ombudsmen for the necessary improvements in the procedure set out in Circular. He asked him to react and suggested that the Ombudsmen be offered a "multi-year contract" to strengthen their independence.

The President acknowledged on 3 May 2007 that there was an urgent need for revision of Circular No. 286. He indicated that he

would consult the General Advisory Committee (GAC) during its next meeting in June as to the possibility of suspending the Circular. Thus, on 10 May, he forwarded a document to the GAC for opinion and an exchange of communications ensued because the Chairman of the CSC, who agreed that the Circular had to be revised, considered that the proposed suspension of the Circular would constitute a breach of the staff's acquired rights.

The Munich Staff Committee published a communiqué on 24 May 2007 advising staff who might be considering initiating the formal procedure set out in Article 9 of Circular No. 286 to do so before 5 June 2007. The following day the President issued Communiqué No. 23 informing staff that, in the interests of the smooth functioning of the Office, he had decided to provisionally suspend with immediate effect the application of the Circular pending the final decision to be taken after having received the GAC's opinion. He added that the Munich Staff Committee's initiative was highly regrettable and its consequences could not be accepted. He nevertheless acknowledged that the Circular had a number of defects and that there was an urgent need to ensure that the problems that had arisen (especially regarding confidentiality) did not persist during the time required to revise it. He added that the President-elect was resolved to revise or replace the Circular by the end of the year.

The GAC met in early June 2007 and subsequently issued a divided opinion on the proposal to suspend the Circular. The members appointed by the President agreed in principle to the suspension of the Circular but suggested that the procedure regarding informal resolution of conflict be maintained, as it worked well. The members appointed by the Staff Committee stated that they were not in a position to give an opinion because the necessary information to assess the situation had been deliberately withheld from them.

In Communiqué No. 24 of 26 June 2007 the President informed staff that he had decided to suspend definitively the formal procedure set out in the Circular and provided reasons for his decision.

On 11 July 2007 the Chairman of the CSC wrote to the new President expressing concerns about the legal protection afforded to staff

following the decision to suspend definitively the Circular. He questioned the rationale for suspending that Circular in haste by an outgoing President, in particular given that it was due for revision anyway. He added that the President's decision merely reinforced the staff's impression that the suspension was motivated by the desire to protect certain influential staff members from independent judgement by Ombudsmen. He asked the President to repeal the "illegal suspension promulgated" by the previous President and to take measures to ensure that the Circular was amended.

In August 2007 Mr H.s, Mr R. and Mr S., acting in their capacity as members of the GAC, requested the President to withdraw Communiqués Nos. 23 and 24 and to "reinstate Circular [No.] 286 with retroactive effect to 25 May 2007". They alleged that the GAC had not been properly consulted before the Communiqués were issued. In August 2008 Mr T. and Mr M. also initiated internal appeal proceedings but merely requested the President to withdraw Communiqué No. 24. Mr M. indicated that he was acting in his capacity as a member of the Berlin Staff Committee. The President rejected these requests for review and referred the matter to the Internal Appeals Committee (IAC) for opinion.

Before issuing its opinion of 4 November 2010 the IAC heard the complainants or their representatives. It unanimously recommended that the President acknowledge the unlawfulness of Communiqués Nos. 23 and 24, and that the Office inform staff, in a Presidential Communiqué to be issued by 1 January 2011 at the latest, that the decision to suspend the Circular announced in the afore-mentioned Communiqués had been deemed unlawful. It also recommended that a proposal for a legal framework for handling formal dignity complaints be submitted to the GAC without delay so that the framework could enter into force by 1 April 2011 at the latest, and that the complainants be awarded costs and moral damages for the prejudice they had suffered as GAC members or staff representatives and for undue delay.

On 26 January 2011 the Director of Regulations and Change Management wrote to Mr H. indicating that the President

acknowledged the unlawfulness of Communiqués Nos. 23 and 24, which had led to the suspension of the Circular. He added that the Office would replace the Circular with a revised legal framework as soon as possible but that, given the importance of the matter, the Office could not commit itself to implement the new system within a fixed deadline. In any event, the staff would be informed accordingly as soon as possible. He explained that until the new system entered into force the Office would continue working with its external ombudsmen and deal with formal harassment claims on a case-by-case basis. The President also decided to depart from the IAC's unanimous recommendation concerning moral damages on the ground that the award of moral damages was not justified since no bad faith on the part of the Office had been established. However, she agreed with the majority's recommendation to award the complainants 1,000 euros for undue delay. She also agreed to reimburse the costs incurred during the internal appeal proceedings to a reasonable extent and upon evidence. Each complainant impugns a decision of 26 January 2011, but the complainants indicate that they have communicated to the Tribunal only the letter sent to Mr H. because the letter they all received was worded in identical terms.

On 1 February 2011 the Vice-President of Directorate-General 4 notified staff that the President had acknowledged the unlawfulness of the suspension of the Circular and that discussions were on-going with the Staff Committee concerning a new proposal to be submitted to the GAC at the earliest possible opportunity. He added that, until a new Circular was issued, the EPO would continue working with external Ombudsmen on a case-by-case basis as had been envisaged in Communiqué No. 24.

On 28 February the complainants filed their complaints with the Tribunal asking the Tribunal to set aside the decision of 26 January 2011 rejecting their appeals and to award them moral damages and costs. They also seek the quashing of Communiqués Nos. 23 and 24, and the "[r]eintroduction in its entirety" of the Circular with retroactive effect from 25 May 2007.

The EPO asks the Tribunal to dismiss the complaints filed by Mr M. and Mr T. as irreceivable insofar as they challenge Communiqué No. 23, which they did not contest in the internal appeal proceedings. It also asks the Tribunal to dismiss all the complaints as unfounded in their entirety. The EPO objects to the applications to intervene filed by some interveners on the ground that they have not demonstrated that they were in a similar situation to that of the complainants. It submits that only the applications to intervene filed by interveners who were representatives of the Staff Committee should be deemed receivable. Those who were neither members of the GAC nor representatives of the Staff Committee are in a different situation than the complainants and their applications should therefore be rejected as irreceivable.

CONSIDERATIONS

1. In May 2005, Circular No. 286 was published. It concerned the protection of the dignity of staff of the European Patent Office and, amongst other things, provided guidelines for the protection of the dignity of staff and mechanisms for the informal and formal resolution of harassment-related grievances. The guidelines were expressed to enter into force on 1 June 2005. On 25 May 2007, the President issued Communiqué No. 23 advising that “the application of Circular No 286 [was] being provisionally suspended as from today, 25 May 2007”. On 26 June 2007 a further communiqué was issued (No. 24) advising that the provisional suspension of the Circular was final.

In the proceedings before the Tribunal there are five complainants. As their complaints raise the same issues of fact and law and seek the same redress, it is convenient that they be joined to form the subject of a single judgment. At the relevant time, three of the complainants (Mr H., Mr R. and Mr S.) were members of the GAC, another (Mr T.) was a member of the staff Local Advisory Committee for Berlin and the last (Mr M.) was the Chairman of the Berlin Staff Committee. While there is an issue in these proceedings about what precisely each

of the complainants challenged in the internal appeals before they filed their complaints in this Tribunal, the complainants challenge before the Tribunal both Communiqués and seek, by way of relief, the retroactive reintroduction of the Circular. Having regard to the Tribunal's ultimate conclusion in these proceedings, it is unnecessary to deal with a point raised by the EPO, namely that two of the complainants could not challenge Communiqué No. 23 because they had not done so in the internal appeal.

2. It is, at this point, convenient to focus on the recommendations of the IAC in the internal appeals and the response of the Director of Regulations and Change Management on behalf of the President to those recommendations in a letter dated 26 January 2011. That letter contains the decision impugned in these proceedings before the Tribunal.

Except as to one recommendation, the decision of the IAC was unanimous. It made nine recommendations. The first was that the decisions to suspend the Circular (announced in both Communiqués Nos. 23 and 24) be declared unlawful. The second was that a proposal for a legal framework for handling formal dignity complaints be submitted to the GAC without delay, so that the framework should enter it into force by 1 April 2011 at the latest. In making this recommendation the IAC expressly rejected a claim that the two communiqués should be retrospectively annulled with the effect of automatically reinstating the Circular. The third was, in substance, that the staff be informed by Presidential Communiqué of the two matters just mentioned (including the structure of the legal framework). The fourth was that Messrs H., R. and S. (and another) be awarded 500 euros moral damages for the infringement of their right as staff representatives which resulted from Communiqué No. 23 and a further 500 euros damages for the additional infringement of their rights to consultation "of the GAC". The fifth recommendation was to the same effect in relation to Communiqué No. 24. The sixth recommendation concerned the payment of moral damages to an individual not involved in these proceedings before the Tribunal. The seventh was that Messrs T. and M. (and another) be awarded moral damages of 1,000 euros each for the infringement of their rights as staff representatives which resulted in

Communiqué No. 24. The eighth recommendation was that each of the complainants (and others) be awarded reasonable costs. The ninth recommendation, on which the IAC members were divided in their opinion, was that the complainants (and others) be awarded moral damages of 1,000 euros for the undue length of the proceedings. The minority thought that the sum should be 2,000 euros.

3. In the impugned decision, the President acknowledged that Communiqués Nos. 23 and 24 were unlawful. He accepted the first part of the second recommendation but was not prepared to commit to a timeframe. He accepted that the complainants were entitled to costs but was not prepared to award moral damages except with respect to undue delay in the proceedings, for which each complainant was awarded 1,000 euros. He thought moral damages were not justified as there had been no bad faith and there was a “sufficient remedy” if a note was sent to all staff acknowledging the “procedure’s illegality”.

In these proceedings before the Tribunal each complainant seeks the quashing of Communiqués Nos. 23 and 24, the retroactive reintroduction of the Circular effective 25 May 2007 and the “[q]uashing of the President’s decision dated 26.01.2011 finally rejecting the appeals”. They also seek moral damages and costs.

4. As noted earlier, the President acknowledged in the letter of 26 January 2011 that the two communiqués were unlawful and the EPO did not retreat from this position in its reply or surrejoinder. The foundation of the conclusion of the IAC, accepted by the President, that the decisions reflected in both communiqués were unlawful was that they were made without appropriate consultation with the GAC. The legal consequences of a failure to consult in a similar situation were considered by the Tribunal in Judgment 1488. That case also involved the EPO and Article 38 of the Service Regulations, which imposed an obligation to consult in the ordinary course. That Article was the provision the EPO failed to comply with in the present case.

The proceedings leading to Judgment 1488 concerned the introduction of a new system of granting points to examiners for

processing particular types of patent applications. In that Judgment the Tribunal said (at consideration 10):

“Article 38(3) [of the Service Regulations] does not interfere with the President’s exercise of his decision-making authority, but seeks to ensure that the proposal shall go through a formal process in which the staff have a right to be consulted through the General Advisory Committee. Indeed it makes for good relations between staff and administration not just to empower but to require that body, set up under the Service Regulations to represent both sides, to give ‘a reasoned opinion’. It does not matter that management may have consulted the staff on the subject in other ways. What was lacking in this case was what Article 38(3) required: the formal consultation of the General Advisory Committee and the submission of its reasoned opinion before the decision was made.”

The Tribunal concluded (at consideration 12):

“The conclusion is that the impugned decision was made in breach of the rules and must be set aside: the system of points that was in force before holds good.”

Two things can be noted about this passage. The first is that the Tribunal took the approach that once the breach of the rules requiring consultation was established then it followed that the impugned decision should be set aside. The Tribunal has said that a failure to adhere to the requirements of Article 38(3) is an error of law that vitiates the decision (see Judgment 3291, consideration 7). The second was a conclusion that the setting aside of the decision introducing a new points system had the effect, without more, of reinstating the old system which the new system replaced.

5. In the Tribunal’s opinion, the same approach and conclusion should be adopted in the present matter. If it be accepted, as it has been in the present case, that the decisions suspending (initially temporarily and later permanently) the operation of the Circular were unlawful, then the consequences of that unlawful decision-making should not be avoided by a discretionary decision not to set aside the unlawful decisions. That is particularly so if the question of unlawfulness has been raised in judicial proceedings. Otherwise there would be an appearance that the Tribunal condoned unlawful conduct involving non-observance of important procedural requirements in staff regulations.

One matter of detail should be noted. The IAC recommended that the staff should be informed by Presidential Communiqué that the decisions suspending the Circular were unlawful and that it be done by 1 January 2011. While this message was, in fact, conveyed to staff, it was not by the mechanism recommended by the IAC nor within the timeframe specified. The complainants say, correctly, no reasons were given why the President deviated from this recommendation. However nothing of substance, in the Tribunal's opinion, turns on the question of how the staff were advised of this conclusion and the time-frame within which they were.

6. While the complainants' challenge to the decision to suspend the Circular has been successful, the complainants, as staff representatives, are not entitled to moral damages (see Judgment 3258, consideration 5). However, they are entitled to their costs of the proceedings in the Tribunal. But as each complaint is repetitive of all the others, only one sum by way of costs should be awarded, collectively to the five complainants.

7. A large number of applications to intervene were made. Most of these applications were opposed by the EPO on the footing that the applicants were not staff representatives and therefore not in a similar factual and legal position as the complainants. This is correct. Eight of the applications to intervene were not opposed on the basis that the interveners were staff representatives. The Tribunal allows these applications to intervene.

DECISION

For the above reasons,

1. The decisions to suspend Circular No. 286 embodied in Communiqués Nos. 23 and 24 are set aside.
2. The EPO shall pay the complainants one amount in the sum of 2,000 euros by way of costs.

3. The complaints are otherwise dismissed.
4. The applications to intervene filed by Mr B., Ms H., Ms K., Mr P., Mr S., Mr S., Ms S. and Mr T. are allowed.
5. The remaining applications to intervene are dismissed.

In witness of this judgment, adopted on 7 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ