



Report of the 245th meeting of the GAC on 30-31.10.2012 in Berlin

Summary

The 245th meeting of the GAC (General Advisory Committee) was the eighth GAC meeting of 2012. The agenda comprised documents on the prevention of harassment and the resolution of conflicts at the EPO; Investigation Guidelines; a Collective Reward for EPO staff and the provisional PAX figures for 2013.

Policy on the prevention of harassment and the resolution of conflicts at the EPO and Investigation Guidelines

These two topics were presented together. Indeed, as will be clear from below, they are interrelated. Whilst the document on investigation guidelines could, to an extent, be introduced on its own, the document on the prevention of harassment and resolution of conflicts relies upon the structures put in place in the other document. We will thus consider them together.

In 2007, President Pompidou suspended the formal procedure of Circular 286, which set out the policy on protecting staff dignity (which includes prevention of harassment) at the Office. Mr Pompidou promised, and Ms Brimelow (who took over as Office President in July 2007) confirmed, that a replacement policy would be put in place before the end of 2007. However, more than five years later, no such replacement policy has yet been introduced. In 2010, the Internal Appeals Committee, for various reasons, ruled that the suspension was illegal. The IAC suggested various remedies in its opinion. Despite an announcement from VP4 dated 01.02.2011 which sounded as if the Office accepted the IAC's opinion, not a single recommendation made by the IAC was actually accepted and implemented. From this, the appellants derived that their appeals were rejected and filed complaints with the Administrative Tribunal of the ILO. The written pleadings in this case are

now complete. Thus the Tribunal will judge on this matter in due course.

From the Tribunal's case law, it is clear that if a staff member makes an allegation of harassment (or other ill treatment), the Office has a duty of care and must investigate the allegation fully. In the absence of a formal policy, any investigations will, to an extent, be adhoc. If the Office does not have a written down, formal policy that it follows, setting out the rights of both complainant and respondent, then it is harder for it to demonstrate to the Tribunal that a proper investigation was carried out. Thus it is in the Office's interest to have a formal policy covering what to do in such cases.

Accordingly, we welcome the principle of the Office introducing a policy designed to prevent harassment and resolve conflicts at the EPO.

Circular 286 used external ombudsmen to investigate allegations of harassment. The current proposal suggests to do the investigation internally. For this purpose, it is proposed to set up an Investigative Unit (IU) within Internal Audit (IA). The mandate of the IU will be to investigate all allegations of misconduct. That is to say, not only harassment related allegations, but also ones of (for example) fraud. This was set out in the document on investigation guidelines.

We also support the principle of the Office clearly setting out the limits within which it can investigate a staff member for alleged

misconduct, including setting out what the staff member's rights are and what the Office considers to be misconduct (even if such a list will always be non-exhaustive).

However, we had concerns with the specifics of both proposals.

Concerning the document on prevention of harassment and conflict resolution, we noted that it was presented as a replacement for Circular 286. However, there are a number of positive features of Circular 286 which we find lacking in the current proposal.

Firstly, Circular 286 was a policy on the protection of dignity of staff. It thus had as an objective to promote a culture where the dignity of others was protected. In contrast, the current proposal concerns the resolution of conflicts. That is to say, the emphasis has changed from promoting positive behaviour to what to do in cases of negative behaviour. We consider it better to try to send positive messages concerning expected behaviour, rather than merely to set out what will be done in the case of negative behaviour.

Secondly, building on the above, Circular 286, with a view to developing a culture of staff dignity, foresaw measures to provide awareness and prevention. This is lacking in the current proposal.

Thirdly, the current proposal concerns amicable conflict resolution and what to do if a formal allegation of harassment is made. Between these extremes, however, there may be disputes which, whilst too serious for amicable resolution, may nevertheless be possible to resolve. For these disputes, Circular 286 foresaw that, as part of the ombudsman procedure, resolution could be sought e.g. through conciliation or mediation. Either through this, or otherwise, the ombudsman could try to achieve resolution of the grievance and, if possible get the parties to sign a settlement. These possibilities are completely missing from the current proposal.

Thus, for the reasons set out above, we considered that the proposal was incomplete and lacking compared to Circular 286.

With respect to the document on investigation guidelines, we had even more serious concerns. In the meantime, the Munich

SUEPO Committee has published a paper setting out its concerns, which we generally share¹.

Basically, our objections concerned the competences of the IU and the obligations on staff to cooperate fully with the IU. In our opinion, this unit is being given excessive powers. For example it is possible to read the proposal such that the IU must be given access to private property such as computers, phones, private email etc. When on Office premises, the IU may even collect the private property. It is true that for gathering such private property outside the Office, the IU "must abide by all applicable provisions of local law". However, staff are "obliged to co-operate fully with the IU". Failure to do this is "prohibited, and may constitute misconduct". That is to say, if a staff member does not, on request, provide access to his private phone records, this may constitute misconduct, leading to (further) disciplinary action. Presumably, if a staff member "voluntarily" provides all access desired by the IU, the "provisions of local law" are met!

For potential evidence "inside" the Office, the IU has even more far reaching powers. "In accordance with the applicable rules" (what these rules actually are is unclear), the IU may search all computers, phones, email and electronic data stored on or in or communicated through devices owned by the Office. This could be interpreted as including private emails sent or read using an Office computer, including when using a private email account. This is despite the fact that the workstation guidelines expressly permit this.

We naturally asked what the Data Protection Officer thought of this. We assumed that, for such a project, a report from her would have been drawn up, and wondered if we could have a copy of it. In response, no matter how precisely the questions were formulated, the only answer we received was "the Data Protection Officer has been consulted, but no request was made under Article 15(2) of the data protection guidelines". The President's nominees refused to provide any more information on this point.

Since this Article concerns requests to

¹ This paper is available from <http://munich.suepo.org/archive/su12112mp.pdf>

investigate matters and occurrences directly relating to the field of data protection, we can only assume that the DPO has not been formally involved. This is, of course, unacceptable.

In our opinion, there are numerous other problems with the proposal. To give the reader a feel for how an investigation could look, within the regulations, consider the following:

The President requests that someone be investigated (this the President can do at any time, seemingly without any particular reason). The IU then starts an investigation, without any idea as to what it is looking for, and can carry on looking for something (anything) until it considers that it has found something that constitutes misconduct. The subject of the investigation does not even have to be informed of the allegations, up and until any time that it is decided to interview the subject. At the interview, the subject can't be helped by a lawyer. Indeed, if the subject even seeks advice from the staff representation or a lawyer, they have to inform the IU. However, they are kindly allowed to get "advice and support" from their immediate family or health professionals without informing the IU!

At any time during the investigation, the subject may have to provide the IU with anything that the IU considers may be necessary evidence, with practically no limit - phones, computers, data carriers, emails etc. If the IU considers that it would jeopardize the investigation, the DPO need not be involved. If the DPO is involved, and gives a negative opinion on the IU's activities, the IU can ignore this opinion (in such cases, it only needs to attach the DPO's opinion to its findings).

The result of the investigation is then sent to the President (who initiated the investigation), who decides if misconduct has been determined, and if so, what action should be taken.

We hope that a procedure as set out above would never actually occur. However, the very fact that, within the proposed guidelines, it *could* was reason enough for us to give a negative opinion on the proposal.

Accordingly, we gave negative opinions on both proposals. In these opinions, we advised the President that neither proposal was

currently ripe for implementation. We thus advised him not to implement the proposals as presented. Rather, they should be re-written and re-submitted to the GAC for opinion. Moreover, in order to give a full opinion, we noted that we would need the written opinion of the DPO.

The members nominated by the President welcomed the proposals and gave positive opinions on them. However, they also annexed a number of suggested changes to both proposals. Since these were mainly minor or editorial in nature, they would not have addressed our fundamental concerns set out above.

Collective Reward for EPO staff

The reader will know that the President has, for example in his September video message to staff, announced his intention to pay a collective reward to staff in 2012. The stated reason for this is that the Office had in 2011 produced good results. It is thus right to share the benefit of these with those i.e. staff, who enabled it. Accordingly, the President proposed to pay a part of the Office's operating result as a cash bonus to staff.

The audited 2011 operating result is of the order of €90 million. In the video, he mentioned keeping a portion of this as a cash reserve, paying a portion into the RFPSS to finance Office pensions and distributing a one third portion i.e. about €30 million to staff. The precise amount would be linked to presence at work. Thus in the video he explained that those who worked part time, or who had either ceased or started to work at the Office during the year would receive proportionately less. Taking this into account, the amount would be the same for all, regardless of the grade or function at the Office, and would be a bit more than €4000 per staff member.

It is, of course, a good move to strengthen the position of the Office's social security system by paying excess cash into it. It is also normal for an organisation to keep a portion of its operating result as a cash reserve. However, it is clear, e.g. from the results of the Munich survey, that different staff members have different ideas as to whether or not the Office should be paying part of its operating result to staff in the form of a cash bonus.

Moreover, when the survey was carried out, the staff had no idea of the precise modality of how to calculate the cash bonus.

In our opinion, there are a number of problems with how the bonus is calculated. In particular, the lump sum (now of EUR 4,000 per person according to the proposal) is reduced *pro rata temporis* for absences from work. The only absences which are not considered are annual and home leave. That is to say, absences for other items such as sick or maternity leave will lead to a reduced payment. This does not seem to be in accordance with the President's September video broadcast to staff, in which he merely indicated reducing the payment for staff who work part-time or who join or leave the Office part of the way during the year. Additionally, in said video message the President stated that it was "not (the) object to reduce the right to be ill". We also consider paying a reduced bonus in cases where staff members were in maternity leave to be discrimination against women.

Moreover, we understand that making deductions for sickness whilst a staff member continues to be paid a salary is problematic under at least certain national jurisdictions. Even if the Office has (functional) immunity from national jurisdictions, we argued that the Office should not be implementing proposals that are contrary to national law. We thus strongly suggested that no deductions from the lump sum should be made for types of leave such as sick leave, maternity leave or other special leave for which a staff member continues to receive payment. Indeed, we considered that a proposal so modified would be more acceptable to staff and easier to implement in FIPS.

There is also the obvious and unanswered question as to what the Office intends to do with the monies deducted from staff members' lump sums. We suggested that these monies should also be paid into the RFPSS.

In two differently worded written opinions (one submitted by the Munich and Vienna nominees, the other by The Hague nominees; Berlin's nominee supported both opinions) we set out the above.

The first of these opinions neutrally explained why staff members might not support elements of the proposal (in particular related to paying

of a cash bonus). It also made some suggestions as to how the proposal might be improved, so that staff acceptance might (in at least some cases) be increased.

The second of these opinions considered that the President, with this proposal, recognised the outstanding efforts of Staff. The proposal thus invested the result of these efforts into Staff and the EPO. They therefore thanked the President for this approach and gave a positive opinion on the proposal, while recommending two amendments.

The Hague nominees also appreciated in the proposal the fact that the retained part of the surplus would enable, for the first time in EPO history, the construction of a new office building in The Hague.

In the meeting, the members nominated by the President were asked if they could support comments such as the above concerning the deductions for absence. However, they made it clear that they supported the proposal as submitted. Indeed, in their written opinion, they praised the "simple and objective criteria" used.

Provisional PAX figures for 2013

It has become recent practice to present the provisional PAX Cluster and Peer Reference Examiner Data (CRED and PRED) for the following year to the GAC for opinion towards the end of the year. The final figures are then presented again when they become available in the following year.

In our opinion, we stated that we were satisfied that the figures contained in the document have been calculated following the correct procedure and thus that these figures properly reflect the production and productivity in the different Joint Clusters in DG 1. However, we also noted a slight variation of certain values in certain areas and invited the PAX Implementation Board to monitor these developments and, wherever necessary, report to the GAC on the reasons for these changes.

The members nominated by the President gave a positive opinion on the proposal.

Any other business

As reported, the 244th meeting of the GAC discussed reform of the internal appeals

system. The members nominated by the President (of course) gave a positive written opinion on the proposal. However, in the written opinion, they spent some energy regretting that our interpretation of the proposal was "biased by a very negative attitude", that we had "deep mistrust concerning the intentions of the management" etc etc.

In the current meeting, we thus took the opportunity to inform the members nominated by the President (most of whom are new in the GAC this year) that they were requested by the President to give an opinion on a proposal. They were not requested to give an opinion on our opinion or on what they perceived our attitude to be.

The management side tried to defend this by noting that, with our reports, we also inform staff of the tenor of the meetings. However, as we pointed out, this is quite different. Moreover, this possibility to inform staff is regulated by the Rules of Procedure of the GAC.

The members of the GAC nominated by the CSC.