



## Report of the 250th meeting of the GAC on 13.06.2013 in Munich

### Summary

The 250<sup>th</sup> meeting of the GAC (General Advisory Committee) was the fourth GAC meeting of 2013. There was just one proposal for opinion on the agenda: a document called "**Strikes and unauthorised absence**". The proposal comprises a Council decision introducing a new Article 30a and modifying Articles 63 and 65, as well as a Circular from the President, further detailing the regulations for strike.

### Introduction

Possibly the most controversial document ever to appear on the agenda of the GAC, the President had submitted his proposal on "Strikes and unauthorised absence" to the GAC without any prior discussion with the Staff Committee or with the unions. In parallel and, without waiting for the GAC's opinion, it is already on the agenda of the Administrative Council meeting of 26 June.

In essence, the President is asking the Council with this document to give him *carte blanche* to create rules for defining what a strike is, for who can call a strike, what for, for how long, how the ballot to strike is to be conducted, who may vote, what the quorum is and what majority has to be achieved. He also asks the Council to increase strike deductions from one thirtieth of a month's remuneration per day of strike to one twentieth.

Nine days before the meeting, we had written to VP 4 requesting:

- any legal analysis that had been done on the proposal
- any benchmarking information they had available on practice in other organisations
- the report of the Data Protection Officer on the proposal.

VP 4 had not reacted to our requests and in the meeting confirmed that he had no intention of granting them. Once more, we thus found ourselves in the situation of being at an information disadvantage to the other side of the table in the GAC. This question will ultimately be decided, no doubt, through a judgment at the Administrative Tribunal at the ILO, but that will take some years to achieve. In the meantime we shall continue to protest at this practice, which we see as sabotage of a fair consultation process.

### General discussion

The European Convention on Human Rights was at the core of the debate for much of the meeting, notably its Article 11:

Article 11 – Freedom of assembly and association

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

"2. No restrictions shall be placed on the exercise of these rights other than such as are

*prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”*

Fortunately, members of the GAC have rarely seen the need over the years to refer to such fundamental legal texts. In this meeting, however, we did not just refer to one text (see above), but to a whole range, including:

ILO Convention 87 (from 1947): Freedom of Association and Protection of the Right to Organise

ILO Convention 98 (from 1949): Right to Organise and Collective Bargaining Convention

ILO Convention 151 (from 1978): Labour Relations (Public Service)

We also cited ILC Recommendation 143, the Judgment of the European Court of Human Rights in the Case of *Demir and Baykara v. Turkey* (Application no. 34503/97) and numerous ILO-AT judgments, most notably judgments 3106, 2672, 2100 and 566. All of these are available on the internet, as is a very useful paper published by the International Labour Office in 2000, entitled “ILO principles concerning the right to strike” by Gernigon, Odero and Guido.

Considering all these texts, we asked the administration why they thought their proposal was in line with international law. We asked them to answer this from a number of perspectives:

#### Council's authority to decide and to delegate

We agreed that the EPC normally gives the President the right to put proposals to the Council for decision and for the Council to decide or delegate powers accordingly. But there are limits and it is clear that where such decisions touch fundamental rights those limits have been reached. In the ECtHR decision cited above, for example, the court found that even states' authority is limited.

#### Regulating strikes called by the Staff Committee

Throughout the legal texts we reviewed, the right to strike is a clear consequence of the principle of freedom of association. It thus follows that where there is no association (ie you cannot decide as an individual to associate, or to disassociate yourself), there is no right to strike. In fact, it is essential in law that there is no interference between the workers' associations and the employer or employers' associations. In other words, the entity calling for a strike may not be bound to instructions from the employer, and the employer may not interfere, or have a vote, in the decision process for strike.

The Administration representatives, who had perhaps not had time to study the legal background so carefully, claimed in a rather emotional tone that of course they too, as members of staff, should have a say on whether there was a strike or not. They became even more emotional when we pointed out that unfortunately the only precedents we could find for such a construction were in Italy and Spain in the pre-World War II period and that the international body of law put into place in the late 1940s and after was there precisely to prevent the excesses of earlier times.

#### Regulating the right to strike of unions and the right to collective bargaining

Firstly, we pointed out that the unions have legal personalities in the host states (Germany, The Netherlands and Austria) and not within the European Patent Organisation, where they – regrettably – are not recognised. We further pointed out that SUEPO would like clear strike regulations and that it had always been open to the possibility of a collective agreement with management on strike regulations. However, the first step would be to recognise the unions, the second step would be to introduce a machinery for collective bargaining and only the third step would then be the negotiation of strike regulations.

It was in any case against international practice, and probably against international law, to introduce strike regulations unilaterally. The only example we could find of such a thing was the Trade Unions Act (1984) of the Thatcher

government in the UK; and this was repealed in 1992.

### Imposing strike regulations during a conflict

Changing the rules in the middle of a game is generally considered unacceptable. The same applies to changing strike regulations during a conflict. The Administration's representatives argued that the current conflict was set to end on 30 June (!) and that they therefore felt free to introduce new rules that would enter into force on 1 July 2013. We cannot imagine from where they have the idea that the conflict might end by 30 June, unless, that is, the President is planning to withdraw the Investigation Guidelines, the new Internal Appeals procedures, his proposal on well-being and the current strike proposal, and has up his sleeve a solution for the problems caused by the introduction of the new pension scheme regulations.

The intention of the President to attack and weaken the right to strike is also apparent from other illegal measures implemented recently and that cannot be separated from the current proposal, such as the instructions for strike deductions issued in March 2013 by VP4 and the ban of the largest union in the Office, SUEPO, from all communication channels in the Office since the beginning of June.

### Definition of "strike"

The proposal presents a definition of strike that includes a limit to the duration of the strike (in the Council decision) and an exclusion of go-slows and work-to-rule (in the accompanying circular).

We could find no example in law where the duration of a strike is limited by a regulation.

Furthermore, the legal texts cited above clearly conclude that, "... restrictions as to the form of strike action can only be justified if the action ceases to be peaceful" (Gernigon, Odero and Guido, page 12). They clarify that the right to strike definitely includes the right to go-slow and work-to-rule actions.

We thus concluded that the Office's proposed definition of strike was in blatant contradiction to international law and, if imposed, would constitute an abuse of power by those imposing it. The Administration representatives

did not comment on this point, except to ask if we would agree that salary deductions were justified for go-slow or work-to-rule actions. We said yes, provided they were proportional. This has been accepted by the Tribunal in Judgement 2440.

### Ballot, entitlement to vote, observers

Basically, the proposal lays out a procedure where the Office (!) will organise a ballot of all (!) staff, not just union members, if applicable at the site concerned, supervised by a committee that includes two staff nominated by the President (!).

We pointed out that all the points marked with "(!)" above contravened the principle of non-interference described in various legal texts, and thus represented yet another breach of fundamental rights.

### Declaration of participation in a strike

The proposal, if adopted, would oblige all staff to register their participation in a strike both with their line manager and in the electronic strike registration system. We noted that we were unable to find an example of any similar rule anywhere in law. The Administration's representatives insisted that staff should declare their participation in a strike. We pointed out that if this were universally considered so, then there would be ample case law to support the Administration's position.

### Increase of strike deductions from 1/30 to 1/20 of monthly remuneration

Just in case there might be any doubt that the real objective behind this proposal is to make strike effectively impossible, the final insult to staff is the increase of strike deductions from 1/30 to 1/20 of monthly remuneration.

Fortunately, the proposed text is a bit of a mess and is certainly not implementable in its current form, something that even the Administration seemed to understand. However, if they make an effort to change the text, this change will clearly be one further element that hurts any staff participating in a strike.

## Conclusion

It will not surprise the reader that we gave a negative opinion on the proposal. We noted that it was in breach of international law, and constituted an abuse of power; anyone actively seeking the adoption of this proposal was, in our view, acting against the interests of the Organisation and risked bringing the Office into disrepute.

Finally, we also observed that the member states and in particular the host states (Germany, The Netherlands and Austria) had a solemn duty to ensure the respect of international law. Thus the delegations have a duty, when voting in the Council, not to contravene international laws that their country supports. And the host nations have a duty to intervene if they suspect breach of international conventions on their territory.

The members of the GAC nominated by the President said they would give a positive opinion on the proposal.

The members of the GAC nominated by the CSC.