Zentraler Personalausschuss
Central Staff Committee
Le Comité central du Personnel

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Opinion of the members of the GAC appointed by the Staff Committee on GAC/DOC 10/2013 Rev. 1 "Strikes and unauthorised absence"

We, the members of the GAC appointed by the Staff Committee give a negative opinion on the proposal GAC/DOC 10/2013 and recommend to withdraw it from the agenda of the Administrative Council.

The proposal constitutes an unprecedented attack on the fundamental rights of freedom of association and strike, is contrary to International Conventions on Labour Law and in particular constitutes a breach of the right to strike and the right to associate freely as defined in such International Conventions, and risks exacerbating the current industrial conflict, instead of contributing to putting an end to it.

An analysis of the proposal in the light of these International Conventions shows that

- the Administrative Council may not give the President of the Office the authority to regulate the organisation of strikes;
- a Staff Committee or a "group of employees" should not have the possibility of calling a strike;
- the document should have been negotiated with the trade unions, and not imposed unilaterally; and
- the document should not be introduced during a running industrial conflict.

1) The Administrative Council does not have the power to authorise the President of the Office to regulate the organisation of strikes

The Convention on the Protection of the Right to Organise and Procedures for Determining Conditions of Employment in the Public Service (Entry into force: 25 Feb 1981; known as C151) establishes in its Article 5 that:

1. Public employees' organisations shall enjoy complete independence from public authorities.
2. Public employees' organisations shall enjoy adequate protection against any acts of interference by a public authority in their establishment, functioning or administration.
3. In particular, acts which are designed to promote the establishment of public employees' organisations under the domination of a public authority, or to support public employees' organisations by financial or other means, with the object of placing such organisations under the control of a public authority, shall be deemed to constitute acts of interference within the meaning of this Article.

The possibility that the draft Article 30a(10) ServRegs grants to the President of the Office to organise and supervise a ballot on strike action, and – in combination with Article 30a(4) – even to participate as a voter to such ballot, constitutes such an "act of interference" prohibited in Article 5(3) C151.

The Administration has not been able to cite any European legislation that allows for direct intervention of the Head of an enterprise in the organisation and running of the affairs of a workers' association. The only examples we have been able to find of this stem from the pre-World War II period[1], and we are confident that everyone in Office up to and including the President would wish to distance themselves from any possibility of being associated with such examples.

The President is the appointing authority for most staff of the EPO. Giving him the power to impose strike regulations is analogous to giving the CEO of a company the power to impose strike regulations – a patently absurd idea.

ATILO judgments 3106 Consideration 7 and 2100 Consideration 15 confirm that the principle of freedom of association *"precludes interference by an organisation in the affairs of its staff union or the organs of its staff union [...]. A staff union must be free to conduct its own affairs, to regulate its own activities and, also, to regulate the conduct of its members in relation to those affairs and activities".*

2) The Administrative Council may not give to the Staff Committee or to any "group of employees" the power to call for a strike

Adoption of the draft Article 30a(3) ServRegs would introduce a conflict with Article 34(1) ServRegs that obliges the Staff Committee to contribute to the smooth running of the Office. This proposal is also contrary to the principle enshrined in ILC Recommendation 143 concerning the protection and facilities to be afforded to workers' representatives in an undertaking, which, in its Article 4, reads:

> 4. Where there exist in the same undertaking both trade union representatives and elected representatives, appropriate measures should be taken, wherever necessary, to ensure that the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives and to encourage co-operation on all relevant matters between the elected representatives and the trade unions concerned and their representatives.

Granting the Staff Committee the possibility to call for a strike, a faculty privative of the unions in the Office as has been derived from Article 34(1) ServRegs for the past 35 years, undermines the position of the trade unions. Article 34(1) ServRegs echoes higher international law in this respect, which derives the right to strike from the principle of freedom of association, as discussed in “ILO principles concerning the right to strike” (Gernigon, Odero and Guido, International Labour Office, 2000). This publications states on page 11 (bullet 3) that the right to strike is linked to “the objective of promoting and defending the economic and social interests of workers”. Clearly, the Staff Committee has nothing to do with freedom of association. It is not a workers' association, either in the strict meaning of the term, (since employees of the Office cannot associate or "dissociate" from the Staff Committee in the sense of initiating or terminating membership), or in the meaning attributed by the Tribunal, i.e. a group of employees that have given themselves an instrument such as Statutes that lays down as the aim of their association to defend and promote the interests of staff (cf. judgment 2672, Considerations 9 and 10).

The absurdity of giving this power to any group of employees constitutes a serious offence to the unions and causes a moral damage.

[1] We know of two examples: Carta del Lavoro, by Benito Mussolini, 1927, which, in its Article III, authorises exclusively those trade unions subject to the control of the State to legally represent its constituency with the aim of harmonising the divergent interests of workers and management in the common interest of the State, and Fuero del Trabajo, issued in 1938 in Franco's Spain, in practice a copy of the former.

3) The proposal should have been negotiated with the trade unions

C151 Article 7 reads:

> Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for negotiation of terms and conditions of employment between the public authorities concerned and public employees' organisations, or of such other methods as will allow representatives of public employees to participate in the determination of these matters.

Furthermore, in Demir and Baykara v. Turkey, the European Court of Human Rights notes in paragraph 50 of its judgment that, *"States which impose restrictions on collective bargaining in the public sector have an obligation … to arrange for the involvement of staff representatives in the drafting of the applicable employment regulations."*

The current draft regulation has not been discussed, let alone negotiated, either with the organisations directly affected by it (the unions) or with the Staff Committee. The President of the Office has opted for the bare minimum to which he is normally obliged: consultation of the GAC (note that in this particular case, we assert that he is obliged to much more: full collective bargaining). And even this consultation of the GAC has been severely affected by comments that the President has been reported to have made in answer to a question of the Staff Committee as to why should this proposal not be discussed with the unions:

> *"If SUEPO wants to organise a strike, here are the rules, they will have to follow them".*

The only democratic procedure to follow in order to regulate the right to strike starts by the recognition of the partners to industrial conflict, ie the unions, and the negotiation of the rights and obligations of the unions, including the right to call for a strike.[2] The procedure chosen to introduce the current proposal is thus far from democratic and unworthy of a European Organisation.

4) Unilateral imposition of a regulation on strikes during an ongoing conflict

The ILO recommends the ILO member states to introduce in their legislation the obligation to reach agreements with the unions concerning the regulation of the right to collective bargaining and the recommendation not to attempt or impose any such agreement during a time of conflict.[3]

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[2] From its very earliest days, during its second meeting, in 1952, the Committee on Freedom of Association declared strike action to be a right and recognised the right to strike to be one of the principal means by which workers and their associations may legitimately promote and
defend their economic and social interests (ILO, 1996d, paras. 473-475). Over the years, in line with this principle, the Committee on Freedom of Association has made it clear it is a right which workers and their organisations (trade unions, federations and confederations) enjoy (cf. Bernard Gernigon, Alberto Odero and Horacio Guido, ILO Principles Concerning the Right to Strike, *International Labour Review,* Vol. 137 (1998), No. 4, p. 11, International Labour Organisation 1998. The correct exercise of this right requires the recognition of the subjects of the right, the trade unions and staff associations, and the negotiation with them of the terms and conditions under which the right may be exercised.

[3] Cf. Gernigon, Bernard, Labour relations in the public and para-public sector. Working paper/Bernard Gernigon, p. 20; International Labour Office, International Labour Standards Department – Geneva: ILO, 2007.

As far as we can recall only Margaret Thatcher has imposed a regulation on strikes in democratic Europe without any prior consultation of the trade unions and during an ongoing conflict (Trade Union Act of 1984). Her aims were to beat an ongoing miners strike, to make strikes more difficult and to weaken the trade unions. The Act was repealed in 1992.

Exactly the same aims are apparent in the present proposal.

SUEPO is currently in industrial action. The clear intention of the President of the Office with this proposal is to make strikes difficult, or nearly impossible, by introducing an abusive quota of 25% of all staff in favour in order to be able to organise a strike, whereby "all staff" includes all managers of the Office, employees on sick leave (possibly also on invalidity, this is not clear from the proposal) and on long term leave. To add a further disincentive to go on strike, the salary deductions are increased from 1/30th to 1/20th of monthly remuneration per day of absence while the pay per day of presence when pay is due for 15 days or less in a month remains at 1/30th. This measure has as its only aim to discourage staff from taking part in the actions.

The disproportionate quorum and abusive salary deductions constitute an attack on the right of strike, are tantamount to its prohibition in practice and are contrary to case law, see ATILO judgment 2493, Consideration 9.

With respect to the increase of salary deductions the following is noted: Article 65 ServRegs divides a month in 30 days and requires a calculation of whether pay is due for more than 15 days of for 15 days or less. If an employee is on strike in a given month for a period of days such that pay is due for less than 15 days, he will be paid 1/30th of his salary per day for which pay is due, i.e. the month is deemed to have 30 days. However, if he is on strike for a period such that pay is due for more than 15 days in a month, his salary will be deducted with 1/20th of total remuneration per day of absence, i.e. the month is due to have only 20 "working" days. This method of calculation is abusive and contrary to the spirit of ATILO judgement 566, Consideration 5.

Furthermore, the sanctions foreseen for a form of misconduct, such as unauthorised absence are made equal to the consequences for taking part in a strike: a deduction from the salary in identical amounts for a day of strike or for a day of unauthorised absence (cf. draft Article 63(1) ServRegs). This makes evident that the President of the Office considers that an employee on strike is in breach of his obligations as an employee of the Office and deserves a sanction, an attitude that the Tribunal already considered to be "out of date" 30 years ago![4]

The intention 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.

Additional aspects that breach international law

Without any claim to completeness, here some further points that either breach international law, or appear to be without precedent:

- the imposition of a time limit on the duration of a strike (Art. 30a(2) and Art. 30a(5))
- extending the balloting beyond the membership of the workers’ association that calls a strike (Art. 30a(4))
- specification of the “scope” of a strike (Art. 30a(5))
- the obligation to inform the Office about participation in a strike (Art. 30a (6))
- defining a strike such as to exclude go-slow and work-to-rule actions (Circular, §1)

[4] ATILO judgement 566, Consideration 5

– organisation of the strike by the Office (Circular, §3)
– supervision of the strike by the Office (Circular, §3)

Risks of litigation

The Staff Unions have juridical personality in their countries of incorporation. For instance, SUEPO is a registered association in the Netherlands. They are not bodies internal to the EPO, and the EPO does not recognise them as such.

It follows that any dispute between the EPO and a staff union, and any damage caused by the former to the latter, is a matter for the domestic courts in accordance with Art. 9(2) and (4) EPC. Since the EPO is eager to avoid litigation that involves a limitation of its immunity, it is difficult to see why the President is willing to take this risk.

Conclusion

We have argued our fundamental objections against the proposal. We want to emphasise in particular that it contravenes the European Convention on Human Rights, notably Article 11, and ILO Conventions 87, 98 and 151. These international conventions were put in place to protect citizens from a repetition of the terrible things that happened in the first half of the twentieth century and before. They are not to be taken lightly and a breach of them is a very serious matter. All member states have a solemn duty to protect their citizens from any such breach. Any employee of the Office or member of the Organisation who defends or supports this proposal may be seen as bringing the Office into disrepute. Pressing ahead with the proposal in its current form would constitute an abuse of power and could make the present conflict escalate to unmanageable proportions.

Moreover, the proposal is likely to expose the Organisation to litigation before national courts.

The members of the GAC appointed by the Staff Committee