INTERNATIONALE GEWERKSCHAFT IM EUROPÄISCHEN PATENTAMT
STAFF UNION OF THE EUROPEAN PATENT OFFICE
UNION SYNDICALE DE L'OFFICE EUROPEEN DES BREVETS

Zentralbüro Central Bureau Bureau central

29 July 2021
su21018cp – 0.2.1/0.3.2/5.1

Strike!

On 7 July 2021, the Tribunal ruled that the EPO strike regulations put in place since 1 July 2013[1] created a regime placing several limitations on the exercise of the right to strike which, at least as to Circular 347, was unlawful because it ***violated the fundamental right to strike*** *(Judgment 4430). Judgment 4435 confirmed that salary deductions at the amount of 1/20th for absences on strike were unlawful and of a* ***punitive character****.*

Judgment 4433 ruled that SUEPO's call for strike on 2 July 2013 was lawful and strike participation could thus not be treated as unauthorised absence. The Tribunal furthermore considered the letter sent to the complainant, informing him that his absence was treated as unauthorised absence and that future unauthorised absences would lead to disciplinary action, to involve an attempt to stifle, by threat, the exercise of the lawful right to strike and that the Principal Director Human Resources (Ms Bergot) acted without authority when sending the letter.

Judgments 4432 and 4434 confirmed that Mr Battistelli abused his power when deciding not to hold or to delay strike ballots (IFLRE and UNITY).

After 8 years of breach of a fundamental right at the EPO (including 3 years under the mandate of Mr Campinos), it is now up to Mr Campinos to take the consequences and to repair the damage done to the Organization.

Changing the rules during the game…

Back in 2013, EPO staff was participating in a campaign of industrial actions[2] organised by SUEPO against the Battistelli administration and the HR policies[3]. In the middle of the conflict, Mr Battistelli tabled in the General Advisory Committee (GAC) meeting of 13 June 2013, a proposal[4] for a new legal framework governing the right to strike. The Principal Director Human Resources (Ms Bergot at the material time, and nowadays Chief Policy Officer) defended the proposal in the meeting as an "expert" (sic!) and *"referred to the "ILO principles concerning the right to strike" published on the website of the ILO and claimed that the proposal remained within the scope of these principles."*[5]
Shortly after the meeting, SUEPO invited its members to vote on a resolution to pursue the industrial action. On 27 June, after a favourable ballot[6], SUEPO published its "action plan for the summer 2013". One of the actions planned by SUEPO was a picket strike which would take place on 2 July 2013 if the Administrative Council adopted the proposal. The proposal was adopted by the

1 CA/D 5/13 and Circular 347
2 *"Outcome of four local ballots on the SUEPO Central Action Plan against multiple measures aimed at eroding the employment conditions and legal protection of EPO staff"*, SUEPO letter to the Administrative Council of 15 March 2013 (su13031cl)
3 *"Note to all staff: meeting with the President on 16 May 2013"*, CSC paper of 22 May 2013 (sc13074cp)
4 GAC/DOC 10/2013 rev. 1
5 GAC/PV 04/2013, page 3, section 2.5
6 *"Results of the four ballots on the continuation of the industrial actions"*, SUEPO paper of 27 June 2013 (su13091cp)

Administrative Council on 27 June 2013 in decision CA/D 5/13, which was to enter into force on 1 July 2013. The decision created a new Article 30a ServRegs for employees of the EPO concerning the right to strike and also amended the existing Articles 63 and 65 by setting deductions for unauthorised absence and strike at 1/20th of the monthly net remuneration per day. Until then, a deduction of 1/30th per day had been applied in both cases.

Relying on the above provisions, on 28 June 2013 Mr Battistelli also issued Circular No. 347 containing *"Guidelines applicable in the event of strike"*, which was also to take effect on 1 July. In that same Communiqué, the Vice-President of DG4 (Mr Topić at the material time) announced that as from 1 July 2013, any industrial action which does not fulfil the conditions laid down in the aforementioned new provisions will not be considered as a strike, with the result that participation in such action was liable to be considered as unauthorised absence.

On 2 July 2013 the strike announced by SUEPO took place. Employees who did participate received a threatening letter from the Principal Director Human Resources shortly afterwards informing them that, as that strike did not comply with the new rules, they were considered to have been absent without authorisation and a deduction from their pay would be made accordingly.

Judgment 4430: Circular 347 is unlawful and set aside in its entirety

On receivability
The complainants challenged the general decisions CA/D 5/13 and Circular 347 on the basis that they were prevented from going on strike on 2 July 2013. In the procedure, the Office continuously maintained that, as the complainants had not participated in the strike action on 2 July 2013, they had not been directly and adversely affected by the new strike regulations, they therefore had no cause of action and the complaints were thus irreceivable. There is indeed Tribunal case law to the effect that a general decision cannot be challenged by a staff member unless and until an individual decision is taken, *"[h]owever there are exceptions where the general decision does not require an implementing decision and immediately and adversely affects individual rights."* (Judgment 3761, cons. 14). In the present case, the Tribunal (cons. 15) found that there was an immediate and adverse effect, because at the date of promulgation of the Circular, it legally constrained future exercise of the right to strike and imposed burdens to the same effect. The complaints were thus found to be receivable.

On the merits
The Tribunal recalled that staff of international organisations have a right to strike and that generally it is lawful to exercise that right (Judgment 2342, cons. 5, emphasis added):

*"Employees who strike by ceasing work are deploying **a tool incidental to collective bargaining to place pressure on their employer, often in the context of a dispute about preserving or improving wages and working conditions, workplace safety, dismissals and freedom of association** amongst other things. It is a tool employees have to redress the imbalance of power between them and their employer. Absent a right to strike, it is open to an employer to ignore entreaties by employees advanced collectively to consider, let alone respond to, their grievances about wages and working conditions or, additionally but not exhaustively, the other matters referred to at the beginning of this consideration. However, at least ordinarily, the price the employees pay for deploying the tool is that they forfeit the remuneration they would otherwise have received had they worked (see, for example, Judgment 615, cons. 4)."*

The Tribunal's analysis of the lawfulness of Circular 347 revealed (cons. 16) that:

i. The definition of a strike is unlawful

First, the definition of a strike (C347, §1) ***travels beyond that in the amended Service Regulations (CA/D 5/13). It cannot do so as a subordinate normative legal document*** *(Judgment 3534).*

Secondly, ***"go slow" and "work to rule" are legitimate forms of industrial action*** *protected by the ordinary conception of the right to strike. Accordingly, by declaring that employees engaging in these forms of industrial action did not have the "protection granted by the right to strike" as ordinarily understood, this provision violated the right to strike.*

ii. The quorum for a call for a strike is unlawful

By imposing a minimum of 10 per cent of employees who may call for a strike (C347, §2), *the Circular violated the right to strike of any employee who, in combination with others, may wish to strike where the total number of employees is less than 10 per cent.*

iii. The quorum and the majority for starting a strike are unlawful

If the class who have a right to vote on whether the strike should start extends beyond (and potentially well beyond) the employees who wish to strike, then that wider class has a capacity to veto the strike (C347, §3)*. This problem is compounded by the percentages (40 per cent of employees and 50 per cent of voters) at the conclusion of this provision.*

iv. The organisation of the vote for a strike by the EPO is unlawful

Employees themselves should be able to make arrangements for the vote (see Judgment 403, cons. 3).

v. The time limit on the duration of the strike is unlawful

Striking staff should be able, themselves, to determine the length of the strike (C347, §4)*.*

The Tribunal declared itself competent (cons. 11) to declare the Circular unlawful and to set it aside. However, it was reluctant to set aside CA/D 5/13 because it would have the legal effect of setting aside current provisions of the Service Regulations. In the Tribunal's view, the matter should be resolved in an appropriate case by a plenary panel of the Tribunal constituted by seven judges, which is not presently possible. This statement can be seen as a clear warning that the EPO should rather not maintain unlawful Service Regulations if it wants to avoid a further governance crisis.

Decision
In view of the violations of the right to strike (cons. 17) and the injurious impact of the Circular which resulted in the diminution of the fundamental right to freedom of association (cons. 18), the Tribunal ruled that:

- **Circular 347 is unlawful and should be set aside in its entirety**.
- Each complainant is entitled to **2,000 euros for moral damages** and **800 euros for costs**

Judgment 4433: the SUEPO called strike of 2 July 2013 was lawful

On receivability
In this case, the complainant did declare himself on strike on 2 July 2013 (contrary to the complainant in Judgment 4430 who did not) and consequently received on 9 July 2013 a letter from the Principal Director Human Resources (Ms Bergot at the material time, and nowadays Chief Policy Officer)

informing him that his absence on that day was considered to have been unauthorised and a deduction of 1/20th (Article 65(1)(d) ServRegs) from his pay would be made accordingly.

The complainant challenged the decision contained in the letter, and asked the Tribunal to order the EPO to register his absence on that day as a day of strike and that Article 30a ServRegs (introduced with CA/D 5/13) and Circular 347 are repealed. The EPO could not argue that the complainant had no cause of action and the complaint was found receivable.

On the merits
The Tribunal found the EPO's reasoning wrong and went as far as to give two alternative reasons:

The first reason is that (cons. 10) the definition of strike in Article 30a ServRegs is descriptive of conduct (a collective and concerted work stoppage) and does not raise for consideration whether that conduct arose as a result of the procedures for calling a strike being followed. The complainant was on strike within the normal conception of that term and thus as defined in Article 30a. Accordingly, he was on strike for the purposes of Article 65(1)(c) and an adjustment to his salary should have been made under this provision. The decision was unlawful and should be set aside.

The second and alternative reason for setting aside the decision is that the EPO erroneously considered that there had been no lawful strike because there had been no vote in accordance with Circular 347 (§3). The Tribunal referred to the now fundamental Judgment 4430 (cons. 16) declaring that this provision is itself unlawful. That is because it significantly derogated from the fundamental right to strike, recognised by this Tribunal as something employees are lawfully entitled to do (see Judgments 615, cons. 6, 2342, cons. 5, and 2493, cons. 11).

The Principal Director Human Resources abused her authority when intimidating staff who went on strike. The letter of 9 July 2013 sent by her concluded with this observation:

> ***"[...] please also note that should such an unauthorised absence occur again**, the Office will be obliged to take the necessary steps to enforce its rules of law (under inter alia Art. 63, 65 and 93 et seq. [of the Service Regulations])."*

The cited Article 93 concerns **disciplinary measures**. Thus the letter was saying that disciplinary action would be taken and by implication, any discretionary power not to initiate such action would not be exercised in favour of the staff member. However, the delegation of authority to the Principal Director Human Resources dated 1 November 2008 contains the limitation that if the exercise of the delegated authority *"may have a political impact or may establish a precedent"* the matter must be referred to the Vice-President Administration (Mr Topić at the material time), for decision.

For the Tribunal, the Principal Director Human Resources clearly abused her authority by not respecting this limitation (cons. 13) because *"in the context of the organisation having adopted **highly contentious provisions concerning strikes** including a requirement that all staff (or sections of them) had to vote on the question of whether the strike should take place, the declaration that disciplinary action would necessarily be taken for an unauthorised absence which the organisation considered was not a strike, fairly clearly would have a political impact in the broadest sense of the expression."*

The Tribunal concluded (cons. 14) that "*the threat in the letter just referred to did involve an attempt to intimidate the complainant, aggravated by the adoption by the EPO of an erroneous interpretation of its own normative legal documents. It involved an attempt to stifle, by threat, the exercise of the lawful right to strike"*.

Decision

- The **salary deduction for unauthorised absence** pursuant to Article 65(1)(d) is **set aside**.
- The EPO shall repay the complainant the amount so deducted.
- The EPO shall remove the letter of 9 July 2013 from the complainant's personnel file.
- The complainant is entitled to **4,000 euros for moral damages** and **800 euros for costs**.

Judgment 4435: strike deductions of 1/20th are unlawful and punitive

The complainant had participated in the LIFER[7] strike of October 2013 and the UNITY – STILL![8] strike of December 2014. Among the claims for the strike were:

- Legal protection - fix the appeal system
- Investigation guidelines - amend in line with European rights
- "Fair strike regulations – 'No' to Circular 347",
- E-mails - freedom to communicate at the Office
- Repair the career system - remove the bottleneck

Now, 8 years later, the claim on the strike regulations was finally found to be legitimate and satisfied by the Tribunal. All other claims are still outstanding.

On receivability
In the present case, the complainant challenged the excessive strike deductions of 1/20th as well as the general decisions CA/D 5/13 and Circular 347.

The Tribunal (cons. 4) confirmed that in challenging those individual decisions (the salary slips with strike deductions) the complainant can challenge the general decision upon which the individual decisions are based and, in this particular case, the application of an amended statutory rule allegedly in breach of the complainant's right to strike. The complaint was thus found to be receivable.

On the merits

A former three decade long-standing methodology
The Tribunal confirmed (cons. 13) that the amendment to Article 65(1)(c) setting strike deductions at 1/20th did involve the alteration of a long-standing practice that, in relation to strikes and other unpaid lawful absences, any deduction of salary per day would be calculated by reference to 1/30th of the monthly salary. Reference was made to Judgment 615, ***"which concerned the EPO and strike action by staff and was delivered in public in June 1984, almost three decades before the adoption of the amendments"***. This consideration should serve as a warning to any HR manager pretending that reforms aiming at "modernising" are per se necessary and lawful.

The EPO acknowledged that deductions of 1/30th would still be used for unpaid leave on personal grounds, parental leave and family leave, but added that absence on such leave include weekend days *"as part of the absence period"* because such leave must be for a minimum of 14 days. The Tribunal found the argument flawed (cons. 14): *"To speak of an "absence period" obscures the fact that if, for example, a member of staff was on 14 days authorized leave on personal grounds, she or*

7 *"LIFER initiative: A vote on strike action has turned into a vote of non-confidence!"*, SUEPO paper of 1 October 2013 (su13135cpe).
8 *"Notification of a strike: Unity – still!"*, CSC letter to Mr Battistelli and the AC of 12 November 2014, (sc14264cl)

he would, at least ordinarily, be absent from work for 10 working days. In relation to each of those working days 1/30 of the monthly salary is deducted. Conceptually, weekend days are days of rest for which the employer pays."

A punitive new methodology

The complainant successfully demonstrated (cons. 15) that Article 65(1)(c) is punitive in the example of a strike for an entire month where the number of working days for that month exceeds 20 (a common occurrence). In such a circumstance, the amount deducted for working days on strike for that month by application of Article 65(1)(c) would exceed the monthly salary payable for that month.

What supported the Tribunal to arrive at the conclusion that Article 65(1)(c) is punitive is that the amount deducted for each day of unauthorised absence (which is, *prima facie*, misconduct) is the same as the amount deducted for each day a member of staff is on strike, which is entirely lawful conduct.

Decision

- The EPO **shall reimburse the complainant the amounts deducted** for the full or part working days on which he was on strike in 2013 and 2014, **with interest at 5 per cent per annum, less the amounts which could have been deducted under the Service Regulations as they existed before** the amendments made by CA/D 5/13.
- The EPO shall pay the complainant **800 euros costs**.

Judgment 4434: Mr Battistelli abused his power by not organising the ILFRE ballot

In 2013, in the middle of the LIFER strike days, a group of staff calling themselves the IFLRE[9] initiative forwarded another call for strike which had gathered 1.000 signatures. This time, Mr Battistelli refused to organise a ballot as he considered that the IFLRE call for strike contravened the new rules in two respects:

1 **First**, there was no interlocutor with whom the points of disputes could be discussed, as the IFLRE initiative had no designated representative.
2 **Second**, no new strike action could be organised until the one-month period of strike covered by the LIFER initiative had ended.

On receivability

Mr Battistelli conveyed his decision to the Central Staff Committee in a letter of 31 October 2013 and announced it to the staff on 21 November 2013 in Communiqué 41[10]. The complainants challenged the decision contained in Communiqué 41 and the general decision Circular 347. The complaints were found to be receivable.

On the merits

Mr Battistelli had no power to defer the vote

For the purpose of assessing whether Mr Battistelli had the power not to organize a strike ballot, the Tribunal assumed that he was proceeding at the time on the basis that Circular 347 was lawful and operative. In the Tribunal's view, **Mr Battistelli abused his power** because the power to defer the vote is not conferred by paragraph 3 or otherwise by Circular 347 or in Article 30a ServRegs (cons. 9)

9 *"CSC response to the President's publication of 04-11-2013 on the Intranet"*, CSC paper of 7 Nov. 2013 (sc13160cp)
10 *"Meeting with the CSC on 20 November"*, Communiqué 41 of 21 Nov. 2013

No warrant for interpreting Circular 347 in the way proposed by the EPO
Regarding the interpretation of Circular 347, the Tribunal made it abundantly clear (cons. 12 and 13) that Mr Battistelli being the author of Circular 347, could have readily made express what the EPO argued is implied with the new regime, the appointment of interlocutors, or made clear what is, at best cryptically embedded in paragraph 4 of Circular 347 (mandatory discontinuity of a month).

The Tribunal found that it can scarcely be suggested that the scheme is one directed to the resolution of industrial disputes including their amicable settlement. Were that so, one could have expected detailed procedures for dispute settlement involving discussion and even mediation: *"But they are singularly absent."* (sic!)

Decision
Mr Battistelli's conduct involved a significant and unilateral derogation of the complainants' right to strike even as arising under the materially constraining scheme in Circular 347 and CA/D 5/13 (cons. 18). For these reasons:

- The President's Communiqué 41 of 21 November 2013 is set aside.
- The EPO shall pay each of the complainants **6,000 euros as moral damages** and collectively, **8,000 euros for costs**.

Judgment 4432: Mr Battistelli abused his power by not organising the UNITY ballot

On 16 May 2014, the Central Staff Committee (CSC) notified Mr Battistelli of a call for strike by a group of staff members calling themselves the "UNITY initiative". Strike actions were foreseen on 25 and/or 26 June 2014, which would have coincided with the meeting of the Administrative Council at which the extension of Mr Battistelli's appointment was to be discussed.

The initiators had clearly designated the CSC as their representative or interlocutor. There was also no overlap with any other call for strike. Nevertheless, Mr Battistelli again found reasons in Communiqué 54 not to organize the ballot within the time limit:

1 **Firstly**, the election process for electing staff representatives (including the CSC members) was under way, and the newly-elected CSC members would not take up their functions until 1 July. In the meantime, according to Mr Battistelli, it was impossible to conduct meaningful discussions with representatives who would not be in a capacity to do so throughout the process.
2 **Secondly**, he argued that the organisation of a strike ballot during the ongoing electoral campaign would create confusion and could create inequality between the candidates. He proposed to meet with the CSC on 4 July to discuss the matter.

The planned strike action never took place.

On receivability
The complainant challenged the decision contained in Communiqué 54 and asked to set aside Circular 347 and CA/D 5/13 *ab initio*. The complainant referred to relevant ILO Conventions and to Article 4 of the European Social Charter and Article 28 of the Charter of Fundamental Rights of the European Union. The complaint was found to be receivable.

On the merits

The Appeals Committee opinion

The Appeals Committee (ApC) had found that Mr Battistelli ought to have discussed with the designated interlocutor (that is, the outgoing CSC members) at the outset the perceived problem arising from the fact that the strike would coincide with the staff representation elections. It unanimously concluded that, by failing to enter into any dialogue and effectively presenting the signatories of the UNITY initiative with a *fait accompli*, Mr Battistelli had taken disproportionate action and had violated their right to strike. The majority of the ApC considered that this finding would provide "sufficient satisfaction" to the complainant and that no damages should be awarded for the violation of his right to strike. In her decision, the Vice-President of DG4 (Ms Simon) followed the majority opinion and did not award any moral damages for breach of the right to strike.

Given that the EPO acknowledged the non-observance of paragraph 3 of Circular 347, the Tribunal in accordance with Article II of the Tribunal's Statute did not reassess the matter (cons. 8). However, it considered itself competent (cons. 9) to address the issue of appropriate relief or remedy.

In this respect, the Tribunal noted that the complainant was not deprived of the right to strike, at least in its entirety, but that there was only a delay in taking a procedural step which may have led to a strike in which the complainant was involved. However, the EPO had put in place **highly contentious provisions** concerning a matter of fundamental importance, namely the right to strike. It could be expected that all elements of those provisions would be followed to the letter unless there was some insuperable reason for not doing so. In this case, there was not (cons. 9).

Decision

Mr Battistelli acted unilaterally and arbitrarily in breach of the scheme the Organisation had adopted and, in any event, his conduct involved an abuse of power in that he purported to exercise a power which he did not have.

- The complainant is entitled to moral damages which are assessed in the sum of **8,000 euros** (including 2.000 euros for the length of the procedure) and **500 euros for costs**.

Conclusion

The Tribunal has ruled that the EPO breached the fundamental rights of its employees. Due to the procedural delays, mainly in the internal appeals system, and the persistent refusal of the management to re-negotiate the strike regulations, the violation of fundamental rights could take place for more than 8 years, thereof 3 years under the Presidency of Mr Campinos.

In the internal procedure, the majority of the internal Appeals Committee, including the presiding member, erred in its opinions. This is yet another evidence of the dysfunction of our internal justice system.

It is now up to Mr Campinos to bear the consequences of leaving the fate of the EPO to the advisors of the Battistelli administration, to compensate staff for the violation of their fundamental right to strike and to repair the damage done to the Organization.

From now on SUEPO can again call for strike without undue restrictions to put emphasis to our claims.

SUEPO Central