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ANOTHER SEVERE ATTACK ON BOTH DIGNITY AND FUNDAMENTAL RIGHTS OF EPO STAFF

At the European Patent Office (EPO), a large international organization with 38 European member states and more than 7000 employees, the regulations on sick leave and invalidity have recently been subject to radical changes. The changes are described in document CA/14/15 rev and though the changes are very radical, this document seems to have been subject to little legal scrutiny of the consequences.

It must be assumed that the civil servants in the Administrative Council are concerned about the long-term liabilities of the European Patent Organization, and how the liabilities might be placed at the door of the national governments. Such concerns are not unreasonable, but the new regulations were drafted in such a way that the member states will not necessarily be released from their legal obligations. Rather, the proposals expose the member states, who are vicariously liable for the acts of the EPO, to much more immediate, concrete, and likely claims.

<u>The main problems in brief:</u>

1) **<u>Medical incapacity of an employee to perform his services</u>**

Before the reform, the medical incapacity was determined by a Medical Committee of 3 qualified physicians. This system has been been abandoned.

a) The President will decide on medical incapacity, after having received the non-binding advice of a physician chosen by the President himself, without any input from the treating physicians.

b) If the President does not like the medical opinion of his adviser, he can expressly seek the opinion of another physician and again, if the second opinion is not to his liking and not identical to the first opinion, he can seek the opinion of a third physician. There is no clause in the new regulations guaranteeing that the President is bound by the findings of the physician(s); as such he may deviate from their medical opinion(s)[1].

[1] This is of great concern because the current President has ignored and overruled even the unanimous findings of the present Medical Committee of physicians.

c) According to the new regulations, if the employee contests the medical outcome it is a medical physician chosen by the President who decides on the validity of the challenge.

d) The wide discretion which the President has given himself is such that it is even unclear whether the medical advisers he choses are required to have a current license to practice, and in particular a license to practice in the country where the sick employee resides.

e) The President ultimately decides about a staff member's long-term incapacity to work. The question is: what information will he base his decision on? The President is not supposed to obtain the relevant medical data and even if he would, he does not have the competence to judge them. This raises profound concerns about the right of a patient to follow the medical advice of his treating physicians, the independence and integrity of physicians, advisory opinions from persons only appointed in the interests of an employer, medical malpractice from non-qualified persons taking medical decisions, and medical confidentiality.

2) Obligations of employees to stay home if they fall sick

Staff who fall sick are obliged to stay home between 10:00-12:00 and 14:00-16:00 on working days. A similar system exists in the Dutch system and serves the purpose of allowing a health care professional to check whether the sickness is genuine. In the Dutch regulations, however, the obligation to stay home typically expires when the genuineness has been established one way or the other; this subtle but important aspect is wholly missing in the EPO's system, thereby imposing a kind of unlimited "house arrest" on employees with health problems.

3) Obligations of fully incapacitated employees to remain at their place of employment

Under the new regulations, an employee who is declared fully incapacitated must remain a resident of the place of employment**.** This is unwarranted: if there is a hope that the disease can be cured, then the employee should be on sick leave until he gets better. But if the disease leads to complete and permanent disability, it is not only senseless but also cruel to oblige the patients to reside at the place of employment instead of repatriating them where they have family support. It is an unnecessary limitation to the freedom of movement and factually serves as a further form of "house arrest"[2].

The problem is that the new regulations, through inadequate drafting, do not make any difference between potentially reversible and irreversible disability.

Incapacitated staff will be put on compulsory "early retirement for health reasons" only after they have been on incapacity for at least 10 years *and* have reached the age of 55

[2] In a very cynical statement – which ostensibly has "reassured" our OHS physicians -- it has been suggested that the Office will graciously allow terminal cancer patients to go home. With a remarkable gall, senior management has then expressed resentment at the Staff Representation's suggestion that, if that is so, the Office basically decides where incapacitated staff can die.

years. Therefore, the “house arrest” will last more than a decade (unless the patient dies first). This *de facto* means that even fully and permanently incapacitated patients can repatriate early only by resigning from employment, in which case they have no economical support or pension and may not be able to enter any national systems at a cost they can afford.

4) **Invalidity pension**

Staff who has been on full incapacity status for at least 10 years and is 55 years of age or elder will obligatorily be put on “early retirement for medical reasons”. Thereby the employment status comes to an end. The provisions are such that the income from a pension for medical reasons will be much lower than what invalids could have expected under the regulations that have been in force for more than 35 years. Equally, the regular pension afterwards is also lowered. This, of course, poses a problem of acquired rights and legitimate expectations.

It could be argued that if the emoluments for invalids are lower than expected, they can supplement them with whichever work they can still do outside of the EPO. It is certainly conceivable that some type of disabilities may prevent further work at the EPO, but not some other activity elsewhere. However, under the new regulations, incapacitated employees are forbidden to take any (part-time) job, even one that takes account of the disability, and however poorly paid. This prohibition lasts until the age of 65, so the incapacitated employee is left without possibility to compensate for the much lower pension. This is largely resented as an unnecessary restriction on the right of privacy and constitutes forced impoverishment.

Further, it is incongruous that the prohibition should last until age of 65: once incapacitated staff reach age 65, their “early retirement on health grounds” is converted into a normal “retirement for old age” – but they will have a rate of pension as if they left at 60 years.

These examples emphasize how the lack of proper invalidity provisions force a dependence of economical and private nature for invalids on their last employer, and leave invalids in a deadlock situation.

5) **No insurance lump sum in case of invalidity**

In a similar vein, before the reform, employment at the EPO included participation in an obligatory death & invalidity insurance scheme, for which premiums were paid from the salaries. This insurance scheme comprised a lump sum to be paid out in the event of invalidity. The lump sum served to cover loss of income due to invalidity. This is particularly important for staff having dependents. Under the new regulations, not only is the emoluments lowered, but also the lump-sum is abolished outright, without replacement or alternative. This puts in a difficult situation employees who, now much elder, cannot hope to get a similar insurance in the private market at rates they can afford.

6) **Abolishment of occupational disease**

The new provisions squarely abolish the notion of occupational disease or occupational accident, and abolish the mechanisms to determine whether or not the service was a cause of the disability.

In theory, liability remains: an employee can always claim compensation if he shows that the employer has been negligent, and the negligence has caused an injury. In practice, this will be virtually impossible at the EPO, because the Office refuses to allow local health & safety authorities to enter the premises and does not cooperate with them, notwithstanding the provisions of Art. 20 PPI. Therefore, there is no way to investigate the possibility of negligence and ascertain a causal effect leading to the disability.

Victims are thus left without redress. This can be seen as a deliberate obstruction of Justice and a denial of reasonable means of legal redress. Should member states accept this practice, it is likely that they would be held to be vicariously liable in national court. Reference is made to recent Dutch court decisions concerned with immunity of the EPO.

7) **Acquired rights - grandfathering**

The Organization can, *within reason*, reduce benefits, provided it complies with the principles of general law, in particular if the financial situation of the Office requires such measures. But the mere desire to save money is not a sufficient reason. And any such reduction must respect acquired rights and the legitimate expectations of staff who accepted a job at the EPO on the basis of the conditions offered to them. The present reforms amount to a massive unilateral breach of contract. These reforms abuse the fact that a large part of the staff at the EPO, being highly specialized, can no longer find a job elsewhere.

Here, the doctrine of acquired rights poses a particular problem in respect of employees who joined the Office on the basis of very different employment conditions. Their acquired rights are being violated because all of President Battistelli's proposals (and the reform of the regulations on invalidity are no exception) do not include adequate transitional provisions or grandfathering..

The lack of Grandfathering and transitional measures could conceivably lead to liability of member states who allowed or endorsed the proposed regulations.

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