



11 December 2017
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Analysis of the EPO cases issued during ILO-AT extraordinary session of December 6th 2017

Judgment No. 3972

This involved a case where a staff member on certified sick leave was charged, *inter alia*, with unauthorised absence, failure to cooperate with medical procedures and to be present at normal place of residence as constituting misconduct. After an *in absentia* disciplinary proceeding, the staff member was dismissed from service.

On appeal, the Tribunal held that the staff member's actions and behaviour may have been manifestations of a medical condition. The Tribunal specifically noted that the medical evidence before the Disciplinary Committee (and the President) clearly pointed to a conclusion that, at least by the time the Disciplinary Committee was deliberating, the staff member was suffering from a serious medical condition.

Under such circumstances, the Tribunal held that the EPO had a duty of care to order a medical assessment of the staff member's health condition, so as to determine a nexus between that condition and the staff member's actions. The EPO's failure to do so amounted to a breach of duty of care and its response was held by the Tribunal as being inadequate.

Based on the following, the Tribunal has sent the case back to the EPO with instructions for the DC to consider whether the alleged misconduct can be entirely explained by the staff member's health condition (which the DC ought to do by requesting a medical assessment). EPO has also been asked to assess whether the staff member was entitled to benefits based on an invalidity stemming from the medical condition and service with the EPO. The staff member has been awarded 20,000 Euros moral damages for the moral injury suffered on account of the unlawful dismissal. Costs were awarded at 1000 Euros.

Judgments No. 3958 and 3960

These involved the cases of a member of the Boards of Appeal being suspended and his suspension being extended, pending the completion of disciplinary proceedings against him. These proceedings were in respect of allegations of misconduct which, *inter alia*, related directly to the President (such as allegations

of spreading defamatory statements against the President). In arriving at these decisions, the Administrative Council was advised by the President, who was involved in the decision making process.

The Tribunal stated that the question of the President's conflict of interest represented a threshold substantive issue in this case. The Tribunal stated that a conflict of interest occurs in situations where a reasonable person would not exclude partiality, that is, a situation that gives rise to an objective partiality. Even the mere appearance of partiality, based on facts or situations, gives rise to a conflict of interest.

In the present case, there is a conflict of interest on the part of the President. This stemmed from the fact that the alleged serious misconduct, with which the complainant was charged, might reasonably be thought to have offended the President specifically, directly and individually. This situation, by itself, casts doubts on the President's impartiality. Considering the whole situation, the Tribunal held that a reasonable person would think that the President would not bring a detached, impartial mind to the issues involved.

To the President's participation in the procedure against the complainant citing the EPO internal laws which provide for his participation in the Administrative Council's decision, the Tribunal held that the question of a conflict of interest only arises if the official is competent. Accordingly, the question of competency is not an answer to a charge of a conflict of interest. Therefore irrespective of what the internal laws provided for, there was a clear conflict of interest on the part of the President.

As for the house ban against the complainant, the Tribunal held that the President was wrong in stating that he was the final authority in imposing house bans. In so far as it relates to an employee appointed by the Administrative Council, that authority rests with the Council alone and not the President.

The Tribunal quashed both the decisions of the Administrative Council (the suspension, the extension of the suspension, the house ban, the relinquishment of EPO property previously at the complainant's disposal and the blocking of his UserID). It has ordered that the Complainant shall be immediately reinstated in his former post. EPO has been ordered to immediately allow the complainant access to the EPO premises and resources, return to him any EPO property it requested him to hand over pursuant to his suspension and immediately unblock his UserID. EPO has also been ordered to pay the complainant material damages in an amount equal to the deductions from his remunerations, together with interest at the rate of 5 per cent p.a. Moral damages in the amount of 25,000 Euros (for both cases) and costs in the amount of 10,000 Euros (for both cases) have also been ordered.

Claims relating to Circular No. 342 and Data Protection Guidelines violations, as well as procedural violations during investigation, were held as being irreceivable, as they did not relate to a final decision.

Judgments 3895 and 3896

In Judgments 3694 and 3785, the Tribunal sent back the cases to the EPO so that the Appeals Committee, composed in accordance with the applicable rules, may examine the appeal. The decision was founded on the fact that the Appeals Committee was not composed in accordance with the applicable rules, in force at the time, set out in Article 36(2)(a) and 111(1)(a) of the ServRegs. The EPO amended Article 36(2)(a) of the ServRegs regarding the competence of the CSC as one of the measures to implement Judgment 3785. The Complainants filed an application for interpretation of Judgment 3785, interpretation and execution of Judgment 3694. They requested the Tribunal to clarify whether 'the applicable rules' as referred to are to be understood as the rules that were governing the composition of the Appeals Committee at the time of the internal appeal or when the judgment was delivered. The Tribunal has held that this refers to the procedural rules in force at the time of the execution of the judgment (i.e. the new examination of the appeal). In saying this, the Tribunal did not express a view about the lawfulness of the new provisions. The important question was therefore clarified. Otherwise, the applications were dismissed. The consequence of these decisions is that when cases are sent back to the EPO to be heard by the Appeals Committee, they will be heard by the Committee constituted under the new regulations in force. Whether the rules themselves are lawful still remains to be seen.