

**B. (No. 8), F. (No. 5), K. (No. 2)
and P. (No. 12)**

v.

EPO

132nd Session

Judgment No. 4434

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr J. B. (his eighth), Mr T. A. R. F. (his fifth), Mr C. K. (his second) and Mr R. P. (his twelfth) against the European Patent Organisation (EPO) on 26 September 2019 and the EPO's reply of 16 January 2020, no rejoinder having been filed by the complainants;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

Considering that the facts of the case may be summed up as follows:

The complainants challenge the refusal to organise a strike ballot under the new rules governing the exercise of the right to strike at the European Patent Office (the EPO's secretariat).

In June 2013 the EPO's Administrative Council adopted decision CA/D 5/13, creating a new Article 30a of the Service Regulations for permanent employees of the European Patent Office concerning the right to strike and amending the existing Articles 63 and 65 concerning unauthorised absences and the payment of remuneration. Article 30a sets out some basic rules concerning strikes, indicating amongst other things that a call for a strike can be initiated by a staff committee, an association of employees, or a group of employees; that the decision to start a strike must be the result of a vote by the employees; that prior notice of a strike must be given to the President of the Office; and that

strike participation will result in a reduction of remuneration. Paragraph 10 of Article 30a authorises the President to lay down further terms and conditions for the application of Article 30a, including with respect to the maximum strike duration and the voting process. Relying on that provision, the President issued Circular No. 347 containing “Guidelines applicable in the event of strike”. This text entered into force on 1 July 2013, at the same time as CA/D 5/13. Circular No. 347 relevantly provides that a group calling for a strike must represent at least 10 per cent of all EPO employees and that, upon receipt of a call for strike, the Office is responsible for organising a strike ballot, which must be completed within one month from the date of the call for a strike. If the requisite number of votes is obtained, prior notice of a strike must be given to the President at least five working days before the event. The Circular also states that “[t]he duration of the strike shall not exceed one month starting from the date indicated in the prior notice as the beginning of the strike. Beyond this maximum duration any new strike shall be organised in compliance with Article 30a [...]”.

In September 2013 the Munich Staff Committee notified the President of a call for strike by a group of staff members calling themselves the “LIFER initiative”. After a successful ballot, the LIFER initiative notified the President, via the Staff Committee, of strike actions to be held during the 30-day period from 17 October to 15 November 2013 (strikes being planned on five days during that period). On 24 October 2013 the Central Staff Committee (CSC) forwarded to the President another call for strike from a group of staff members calling themselves the “IFLRE initiative”, which had gathered more than a thousand signatures. This time, however, the President refused to organise a ballot as he considered that the call for strike contravened the new rules in two respects: firstly, no new strike action could be organised until the one-month period of strike action covered by the LIFER initiative had ended, and secondly, there was no interlocutor with whom the points of dispute could be discussed, as the IFLRE initiative had no designated representative. The President’s decision not to organise a ballot was conveyed to the CSC in a letter of 31 October 2013 and announced to the staff on 21 November 2013 in Communiqué No. 41.

Numerous staff members, including the complainants, filed requests for review challenging the President’s refusal to organise a ballot. These requests for review were rejected on 17 January 2014 and the complainants (and 26 other staff members) then lodged appeals with the Appeals

Committee. The Committee resorted to its “test appeal” procedure and the complainants were selected as test appellants. A hearing took place in April 2018, but it was only a year later that the Committee issued its opinion, on 30 April 2019. A majority of the Appeals Committee (two of its three members) concluded that the President had lawfully refused to organise a ballot on the basis that the strike action overlapped with the ongoing LIFER strike action. For that reason, they recommended that the appeals be rejected as unfounded, without reaching a firm conclusion as to whether the new rules also required the group calling for a strike to designate a representative or interlocutor. The dissenting member, however, considered that the challenged decision was unlawful and that moral damages should be awarded for violation of the right to strike. The Appeals Committee unanimously recommended an award of 450 euros in moral damages to each appellant for procedural delays.

By a decision of 1 July 2019, the Vice-President of Directorate-General 4 (DG4), by delegation of power from the President, rejected the appeals in accordance with the majority opinion and awarded the complainants 450 euros for the delay in the procedure. That is the impugned decision in each of the complaints.

The complainants ask the Tribunal to set aside the impugned decision as well as Communiqué No. 41, and to declare that “the strike provisions” are unlawful and hence unenforceable. They claim moral damages in the amount of 5,000 euros each for being deprived of their right to vote in the strike ballot and, ultimately, of their right to strike. They also claim costs for these proceedings and the internal appeal proceedings, and interest at the rate of 5 per cent per annum on all sums awarded.

The EPO asks the Tribunal to dismiss the complaints as unfounded in their entirety.

CONSIDERATIONS

1. In 2013 the Administrative Council of the EPO, by decision CA/D 5/13 of 27 June 2013, amended the Service Regulations to add Article 30a concerning the right to strike and related changes to Articles 63 and 65 concerning directly or indirectly the reduction of remuneration when a staff member was absent from work or on strike. These changes were to take effect, and did, on 1 July 2013. On 28 June

2013 the President promulgated a circular, Circular No. 347, entitled “Guidelines applicable in the event of strike”, again effective 1 July 2013.

2. It is desirable to make one general observation at the outset and before considering the merits of the pleas. In these proceedings the complainants seek relief that, in substance, involves a declaration that CA/D 5/13 and Circular No. 347 are each unlawful and that each should be set aside. As to the Circular, the Tribunal is satisfied, having regard to its case law and its Statute, that it has jurisdiction to declare the Circular unlawful and set it aside (see, for example, Judgments 2857, 3522 and 3513). The position is not so clear in relation to CA/D 5/13 which, if it were set aside, would likely have the legal effect of setting aside current (at least as at the time the proceedings in the Tribunal were commenced) provisions of the Service Regulations. While the Tribunal can examine the lawfulness of provisions of a general decision (see, for example, Judgments 92, consideration 3, 2244, consideration 8, and 4274, consideration 4), whether it has jurisdiction to set aside a provision of the Service Regulations is a significant legal question on which the Tribunal’s case law is unclear. It should be resolved in an appropriate case by a plenary panel of the Tribunal constituted by seven judges, which is not presently possible.

3. In Judgment 4430, adopted earlier in this session, the Tribunal determined that Circular No. 347 was unlawful and set it aside. Accordingly, insofar as the complainants raise this question in these proceedings, it is now moot. Indeed, in some respects, the complainants’ pleas proceed on the basis that Circular No. 347 was lawful but not followed.

4. Circular No. 347 provided:

“A. Definition

1. Strike

A strike is defined in Article 30a(2) of the Service Regulations.

Industrial actions which are not a collective and concerted work stoppage, such as go-slow or work-to-rule actions, shall not be considered as a strike.

The protection granted by the right to strike does not apply to employees participating in industrial actions other than a strike.

B. Exercising the right to strike

2. Call for a strike

A Staff Committee (Central Staff Committee or a local section), an association of employees, or a group of employees representing at least 10% of all EPO employees may decide to call for a strike.

3. Decision to start a strike

The start of a strike shall be the result of a vote by the employees entitled to vote.

Entitled to vote are the active employees either office-wide or at sites concerned by the strike which has been called for.

The voting process shall be organised and completed by the Office within a maximum of one month following the decision to call for strike. The voters' confidentiality shall be guaranteed. Employees not able to vote personally shall have the possibility to vote by proxy. An employee can be given only one proxy vote.

The voting process shall be supervised by a committee composed of two employees designated by the President and two employees designated by the Central Staff Committee on an ad hoc basis.

To be valid, at least 40% of the employees entitled to vote shall participate in the ballot. The decision to start the strike has to be approved by a majority of more than 50% of the voters.

4. Prior notice

Pursuant to Article 30a(5) of the Service Regulations, prior notice of a strike shall be given to the President at least five working days before the commencement of the strike action.

As regards the scope of the strike, the notice shall indicate which sites of the Office are concerned.

The duration of the strike shall not exceed one month starting from the date indicated in the prior notice as the beginning of the strike. Beyond this maximum duration, any new strike shall be organised in compliance with Article 30a of the Service Regulations.

5. Declaration of participation in a strike

Employees participating in a strike shall inform their immediate superior and shall register via an electronic self-registration tool made available by the Office. The immediate superior will have access to the self-registration tool.

The registration shall occur before or, at the latest, on the day of the strike.

Employees may be considered on unauthorised absence within the meaning of Article 63 of the Service Regulations if they were not at their workplace during a strike action, did not register and did not inform their immediate superior of their absence from work.

6. Deduction of remuneration

For each working day during which an employee participated in a strike, the Office will apply a deduction of the monthly remuneration, in accordance with Article 65(1)(c) of the Service Regulations.

For participation in a strike for more than four hours in a single working day, the Office will apply a deduction of 1/20th of the monthly remuneration.

For participation in a strike for four hours or less in a single working day, the Office will apply a deduction of 1/40th of the monthly remuneration.

For staff working part-time, the deduction will be adjusted proportionally.

The basis for calculating the deduction is the remuneration defined in Article 64(2) of the Service Regulations.

A strike participant remains covered by the social security scheme during strike and therefore continues to contribute in full to the scheme.

C. Entry into force

This decision shall enter into force on 1 July 2013.”

What should be noted first is that the Circular was a normative legal document subordinate to the Service Regulations. As such, it could not modify or limit the Service Regulations in any respect (see Judgment 3534).

5. On 26 November 2019 four members of the staff of the EPO filed complaints in the Tribunal. The subject matter of the complaints was identical and one brief was filed in support of all of them. In these circumstances the complaints are joined so one judgment can be rendered.

6. On 21 November 2013, the President issued Communiqué No. 41. It traversed a number of topics. One was “the recent ILFRE petition” (*recte* IFLRE), in respect of which the President said “no ballot will be organised”. The reference to the “IFLRE petition” was to a call for strike initiated by 1,102 members of staff sent to the President on 24 October 2013 by the Chair of the Central Staff Committee. The acronym IFLRE was a summary way of describing an “Initiative For Lawful Resistance at the EPO”. Communiqué No. 41 had been preceded by correspondence between the President and the Chair about

what could or could not be done following the call for strike having regard to decision CA/D 5/13 and Circular No. 347.

7. Several staff members including the four complainants in these proceedings filed requests for review in November and December 2013 of the President's decision contained in Communiqué No. 41. These requests were rejected by the President in a letter dated 17 January 2014 in which he explained (including in a lengthy annex to the letter) the rationale for his decision not to organise a ballot in relation to the IFLRE call for strike. An internal appeal resulted in a division of opinion amongst members of the Appeals Committee. The majority recommended that the appeals, insofar as they were receivable, should be rejected as unfounded while the minority concluded there had been a violation of, relevantly, the complainants' right to strike and each should be awarded 3,000 euros moral damages.

8. In the decision impugned in these proceedings, the Vice-President of DG4, acting on delegation of power from the President, in a letter dated 1 July 2019 followed the recommendation of the majority of the Appeals Committee and rejected the complainants' appeals as unfounded insofar as they were receivable.

9. The essence of the legal dispute in these proceedings is whether the President had power not to, through the Office, organise a vote to ascertain whether a decision is made to start a strike within the time specified in paragraph 3 of Circular No. 347 notwithstanding what appears to be its mandatory terms. At that time, the parties, and the President in particular, were proceeding on the basis that Circular No. 347 was lawful and operative and the President's conduct must be evaluated on the same assumption. Even if, legally, the provision by reference to which the President was acting (or not acting) had no effect and thus could not be contravened, his conduct involved an abuse of power in that he purported to exercise a power which he did not have. Approaching the matter as the President should have at the time, the power to defer the vote is not conferred by paragraph 3 or otherwise by the Circular or in Article 30a or elsewhere in the Service Regulations.

10. In the present case, the substance of the EPO's argument is twofold. First, there was an implied condition precedent that there needed to be, at the time the call to strike was made, appointed identified interlocutors with whom the President or his delegates could discuss the grievance or grievances precipitating the call for strike action with a view to resolving those grievances by discussion and agreement. As a matter of fact in this case no interlocutors had been appointed.

11. The second was that, properly understood, paragraph 4 of Circular No. 347 created what was, as described in the EPO's pleas, a "mandatory discontinuity between strike actions". That is to say, once a strike had just taken place, or was taking place, no "new strike", to use the language of paragraph 4, could occur within a month of that immediately past or current strike and indeed, that no step could be taken, also within the month, with "a view to starting a new strike". This, it was said, justified the President's decision in Communiqué No. 41 not to hold a ballot. The factual foundation for this position was that, at the time the IFLRE call for a strike was communicated to the President on 24 October 2013, a decision had been made in a ballot conducted on 26 September 2013 to hold a strike (the LIFER strike) later scheduled for 17, 23 and 25 October 2013, and 4 and 12 November 2013.

12. The President was the author of Circular No. 347. He could readily have made express what the EPO now argues is implied in the new regime (the appointment of interlocutors) or made clear what is, at best, cryptically embedded in paragraph 4 of Circular No. 347 (mandatory discontinuity of a month). He did not, and there is no warrant for interpreting Circular No. 347 in the way proposed by the EPO.

13. There is simply no reference to interlocutors and the scheme of regulating industrial action operates as a cohesive whole without the implication proposed. Indeed 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.

14. The suggestion that the scheme contemplates mandatory discontinuity of a month does not bear close scrutiny. Having regard who may call for a strike, reflected in paragraph 2 of Circular No. 347, a strike can be called for by a multiplicity of groups within the staff of the EPO and can occur at a multiplicity of sites within the Organisation. It appears that the EPO's construction of paragraph 4 of Circular No. 347, at least at its broadest, would have the effect that a strike by any group within the staff at whatever site would preclude any other group at any other site calling for a strike within a month of the first-mentioned strike.

15. The better view is that paragraph 2 of Circular No. 347 meant what it said. That is to say there was a maximum duration of a strike (one month) for which prior notice must have been given. Paragraph 2 of Circular No. 347 went on to say that in circumstances where staff members had engaged in a strike (whether for the maximum period of one month or some lesser period) they could engage in a further strike (by clear implication by the same group of staff members) whether for the maximum period of one month or some lesser period, only when those staff members had revisited and followed the procedures specified in paragraphs 2 to 4 of Circular No. 347.

16. A ballot to decide to start the LIFER strike took place on 26 September 2013. The President was later notified that the strike would take place on several days between 17 October 2013 and 12 November 2013, that is, commencing almost a month after the ballot. There is no suggestion made by the EPO in the pleas that the call for the LIFER strike, the ballot to decide to start the strike and the subsequent identification of the days for the strike did not accord with the scheme established by Circular No. 347. The call for the ballot in the present case was communicated to the President on 24 October 2013. Thus, he had until 24 November 2013 to conduct the ballot. Had that happened on or about that day, it would have been open to the proponents of the IFLRE strike to identify, as happened in the LIFER strike, days for the commencement of the strike well beyond, and certainly more than a month beyond, the conclusion of the LIFER strike. Thus, in any event, the mandatory discontinuity propounded by the EPO would have been satisfied. An affirmative conclusion it would not be was not justified.

The EPO's suggestion that steps to have the strike rather than the strike itself are the subject of the mandatory discontinuity is untenable.

17. The complainants have been successful in impugning the decision embodied in Communiqué No. 41. It should be set aside.

18. The complainants are entitled to moral damages for the decision of the President not to hold a ballot for a strike they and others called for in accordance with the provisions of Circular No. 347, which constituted an abuse of power in that the President purported to exercise a power which he did not have. The President's conduct involved a significant and unilateral derogation of the complainants' right to strike even as arising under the materially constraining scheme in Circular No. 347 and CA/D 5/13. These moral damages are assessed in the sum of 6,000 euros for each complainant.

19. The complainants are entitled to costs assessed in the sum of 8,000 euros collectively.

DECISION

For the above reasons,

1. The President's Communiqué No. 41 of 21 November 2013 is set aside.
2. The EPO shall pay each of the complainants 6,000 euros as moral damages.
3. The EPO shall pay the complainants, collectively, 8,000 euros for costs.
4. All other claims are dismissed or are moot.

In witness of this judgment, adopted on 15 June 2021, Mr Patrick Frydman, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ