

# Disciplinary incident at the European Patent Office: Pyrrhic victory for suspended judge

**For years an Irish judge has not been allowed to get to his former place of work at the European Patent Office, because Office boss Benoît Battistelli had banned him from entering the building, but as of last week the man is once again back as a member of the Boards of Appeal at the European Patent Office (EPO). President of the Boards of Appeal, Carl Josefsson, has implemented two judgments by the Administrative Tribunal of the International Labour Organization (ILOAT). The Tribunal had ordered that the judge be reinstated. But he will only be able to exercise his duties as a judge for a few days, until the end of the year; the Administrative Council will not be extending his term of office.**



Christoph Ernst

So far the situation has not been confirmed by any official source. When asked, the President of the Administrative Council, Dr. Christoph Ernst, told JUVE that the gathering of the 38 EPO Member States would not voice an opinion in this confidential staff matter. The Administrative Council is the disciplinary supervisory body for members of the Boards of Appeal. Josefsson, too, who as President of the Boards of Appeal, is the hierarchy superior of the judge concerned, declined to make any comment.

According to an internal memo, however, which is in JUVE's possession, on 11 December Josefsson did allow the judge the right to enter the building, and he thereupon resumed his work. The case of the judge had been a feature of the heated debate about the independence of the Boards of Appeal since December 2014. It was only in September that the Boards of Appeal moved out of the main building in Munich city centre to Haar on the outskirts, a consequence of the reform of the EPO court, which is intended to make it more independent of the Office and its President. The day after the decision in the case of the Irish judge the celebrations were held marking the move into the new service building.

The judge's term of service concludes at the end of the year as part of a cycle of five years. The Administrative Council clearly could not agree to an extension. The Irishman's name does not appear on the list of reappointed judges who are still in office. In the past, the reappointment of EPO judges has always been a formality, but because his term of office is not being extended the judge will revert to his former activity as a patent examiner. This will mean that for disciplinary matters he will no longer be subject to the Administrative Council but directly to the EPO President.



Benoît Battistelli

### **Accusations against the judge not clarified**

The matter all started exactly three years ago. In December 2014, Office President Battistelli imposed a ban on the Irishman entering the building, and pushed through his suspension by way of the Administrative Council. The reason was the accusation that the man had passed on information which was not approved for the public domain, and had made critical comments about the Boards of Appeal and the controversial Director of the EPO, Željko Topić. The judge has always protested his innocence, and any infringement of EPO regulations has to the last always been denied.

It has already been six months since a decision by the Enlarged Board of Appeal with regard to bias on the part of its own chief executive due to his tasks in the management of the EPO triggered the discussion about the independence of the EPO Court. The ban on the Irish judge entering the building had been seized on by many critics as proof that Office President Battistelli was getting too involved with the dealings of the Court. The supervisory and disciplinary body responsible for the members of the Boards of Appeal is actually the Administrative Council of the EPO.

The case also heated up the discussion about how to deal with disciplinary proceedings. In formal terms, an EPO judge can only be suspended by the Administrative Council if the Enlarged Board of Appeal recommends this. But last year the court refused to do so, after Battistelli intervened in writing in the proceedings which were in hand. The Enlarged Board of Appeal regarded this as another massive exertion of influence, and ended to proceedings without a recommendation.

### **International Labour Tribunal awards suspended judge compensatory damages**

The case reached its most recent climax at the beginning of December, when the ILOAT in Geneva decided, in two of four appeals by the judge, that he must be reinstated (File Refs. 3958 and 3960). The highest labour court for staff members of international organizations also awarded the EPO judge a total of 35,000 Euro as compensation for moral damages and for loss of service income, plus 5 percent interest on the missed remuneration.

Many observers then demanded his permanent reinstatement. “In view of the massive procedural errors, confirmed by the Enlarged Boards of Appeal and now also by the ILOAT, failure to reappoint him represents a further violation by the EPC”, the judge’s attorney, Senay Okyay, told JUVE: “We shall of course be pursuing to the full all legal recourses which are available to my client”.

Unlike the situation before the decision by the Administrative Council, in the first instance the judge no longer has the option of another approach to the ILOAT open to him. He must now first go through the wearisome internal appeal procedure. (Mathieu Klos, Christina Schulze)