

EPO FLIER No. 42

The EPO-FLIER wants to provide staff with uncensored, independent information at times of social conflict

Status of EPO disciplinary cases

In June 2014, despite staff protests and a written position by the staff union, the Administrative Council (AC) of the European Patent Office (EPO) endorsed the extension of Mr Battistelli's term as the EPO President from July 2015 to June 2018¹. The last four years of his presidency will be remembered as an era of institutionalised harassment and bullying^{2,3,4}.

The Administrative Tribunal of the International Labour Organization (ILOAT) dealt with some EPO disciplinary cases from the Battistelli era in its 125th and 126th sessions, only a few cases being settled in favour of the accused⁵. This paper revisits the most prominent ones, highlighting remaining issues.

As a rule of thumb, whenever disciplinary proceedings were launched by Mr Battistelli, he found the accused guilty⁶; whenever the Investigation Unit was involved in a case, it concluded that the suspect had committed misconduct⁷; and whenever the Disciplinary Committee⁸ (DC) issued a recommendation for an appropriate sanction, the president imposed a harsher punishment than recommended⁹. (In the parallel, the success rate for internal appeals dropped to 1% in 2015¹⁰.)

Clear victories (Malika and Ion)

In judgments of the 126th session, issued on 26 June 2018, the Tribunal totally exonerated two officials of the EPO staff's largest staff union (SUEPO)¹¹.

Concerning Malika Weaver, the treasurer of the Munich branch of SUEPO, the Tribunal wrote:

*"Her conduct was, in the circumstances, reasonable conduct for a staff union representative ... It did not and could not constitute misconduct let alone serious misconduct. Both the Disciplinary Committee and the President erred in law in characterising her conduct in this way."*¹²

1 [EPO FLIER No. 39 - Reputation and patent quality after eight years of Battistelli: ruined](#) (26.06.2018)

2 [The tarnished legacy of an EPO president](#) (Kluwer Patent Blog, 21.06.2018)

3 [Landgericht München: Patrick Corcoran is Innocent and Acquitted of all Charges](#) (Thorsten Bausch, 20.06.2018)

4 [EPO FLIER No. 37 - Battistelli's record: legal harassment and retaliation](#) (12.06.2018), [CA/20/16](#) and [CA/21/15](#)

5 [EPO cases of the 126th session of the ILO-AT](#) (SUEPO, 04.07.2018)

6 ILO judgments [3958](#) & [3960](#), [3968](#), [3971](#), [4042](#), [4043](#), [4047](#), [4050](#), [4052](#) and the pending case of Laurent Prunier

7 ILO judgments [3958](#) & [3960](#), [3968](#), [4047](#), [4052](#)

8 Before 2014, the DC chairman and alternate chairman were members of the Legal Board of Appeal. From 2014 to 2017, Mr Battistelli nominated line managers instead, i.e. persons under the president's disciplinary authority. Some of them were even hired on (renewable) contract (see the [Report of the 254th meeting of the GAC](#)).

9 ILO judgments [3971](#), [4042](#), [4043](#), [4047](#), [4050](#), [4052](#)

10 [EPO FLIER No. 37](#), [CA/21/15](#) and [CA/20/16](#), point 287

11 [Tribunal ILO reverses dismissals and downgrading of SUEPO leaders](#) (Kluwer Patent Blog, 27.06.2018)

12 Judgment [4042](#) of the Tribunal's [126th session](#) (delivered in public on 26 June 2018)

And concerning Ion Brumme, at the time vice-chairman of SUEPO Munich, the judges concluded¹³:

"For the foregoing reasons no disciplinary sanction should have been imposed on the complainant including the sanction of dismissal. ..."

The Tribunal ruled that Malika's downgrading was to be reversed, Ion was to be reinstated, and both should receive compensation for moral damages. These two judgments have since been implemented *grosso modo*, or at least a settlement agreement has been reached¹⁴. It is sad to note that while the president was happy to trumpet their supposed guilt, the Office only published a very low-profile announcement about the judgments, and certainly wrote nothing that could be understood as a public apology for the misery it had subjected our colleagues to.

Stage wins (Patrick and Elizabeth)

In December 2014, the president accused Patrick Corcoran of severe misconduct. He was then pursued through legal harassment by the president and the Administrative Council (AC)^{15,16,4}. VP4 and the president also filed complaints against him at national courts, both in Belgrade and in Munich, which they lost. In 2017, a Bavarian court found that the complaint against Patrick was irreceivable. The Court nevertheless ruled on the substance and declared him **innocent!**¹⁷ The ILO Tribunal ordered that Patrick Corcoran be reinstated to his previous position of a Board of Appeal judge¹⁸. He was formally reinstated for two weeks, and then "permanently transferred in February 2018 to a post of senior expert in classification expressly created for him in The Hague"¹⁷, causing the institutionalised harassment by the European Patent Organisation to extend to more than 3½ years. This had severe consequences for his health². There is no indication of remorse from anyone involved in what happened to Patrick Corcoran. And, this case may have consequences that go beyond the appalling mistreatment of a colleague: the fate of the former DG3 judge has put the very independence of the Boards of Appeal into question, and might lead to severe consequences for the Organisation and the European patent system due to pending cases at the German constitutional court^{19,20}.

Elizabeth Hardon was suspended on 17 November 2015 together with Malika Weaver and Ion Brumme. At the time, Elizabeth was chair of SUEPO Munich. In her case, the Tribunal ruled that neither the Disciplinary Committee nor the president had correctly applied the appropriate standard of proof, and sent the case back to the Organisation for a repeat of the disciplinary procedure, with a newly constituted Disciplinary Committee.²¹

Here comes a pearl from this judgment: one of the allegations brought against Elizabeth was *"having assisted and/or cooperated with another employee in repeatedly disseminating defamatory information to the detriment of the EPO and of members of the Administrative Council, the President of the Office, the Vice-President of Directorate-General 4 (DG4) and others."* A careful

13 Judgment [4043](#) of the Tribunal's [126th session](#) (delivered in public on 26 June 2018)

14 *Message from Ion Brumme, Chairman SUEPO Munich. ILO case 4043 closed.* (17.10.2018)

15 [Remember the House Ban? How two years flies past](#) (The IPKat, 17.11.2016)

16 [Art. 23 1/15, Art. 23 2/15 and Art. 23 1/16](#) (Wikipedia)

17 [Landgericht München: Patrick Corcoran is Innocent and Acquitted of all Charges](#) (Thorsten Bausch, 20.06.2018)

18 Judgment [3958](#) of the Tribunal's [125th session](#) ([exceptional public delivery on 6 December 2017](#))

19 [Europe's Unified Patent Court fate in the balance amid German probing \(yes, Brexit is in the mix\)](#) (Kieren McCarthy, The Register, 22.02.2018)

20 [EPA-Disziplinarverfahren: „Verwaltungsrat und Battistelli handeln ohne rechtliche Grundlage“](#) (JUVE, 29.10.2015)

21 Judgment [4047](#) of the Tribunal's [126th session](#) (delivered in public on 26 June 2018)

reading of judgments 3958 and 4047 makes it obvious that the other employee Elizabeth was accused of “*having assisted and/or cooperated with*” was ... DG3 judge Patrick Corcoran²². In his case, the Tribunal²³ found that, since the president was a target of the alleged defamatory campaign, he had a conflict of interest in the matter, and ordered that the claimant “*shall be immediately reinstated in his former post*”. In its judgment on the (former) staff union official Elizabeth Hardon, however, the Tribunal - in a similar composition²⁴ - sent the case back to the Organisation “*to enable the charges ... to be considered afresh ... and the President of the Office to make a new decision.*” Are truly all equal in the eyes of the ILO Tribunal? Now Elizabeth has to go through the disciplinary process again, with an unknown outcome and with all the stress and uncertainty associated with a procedure of that nature.

Our legal system sometimes seems like a lottery. In an earlier judgment concerning Elizabeth, the Tribunal had taken a very formalistic approach which, we think, did not do justice to the case at hand²⁵. Firstly, the Disciplinary Committee had unanimously recommended to close the case but the president instead imposed a sanction of severe downgrading. The Tribunal found this punishment “not disproportionate”. Secondly, Elizabeth had reported an opinion of a group of persons through *private* emails. Reporting that opinion was interpreted as defamation and harassment, while neither the Office nor the Tribunal considered whether the opinion may have been correct.

Another judgment²⁶ concerns a former employee of the EPO, who had taken up employment with the staff union. The Investigation Unit initiated an investigation against him for, among other things, “*unauthorised publication on the Internet ... of information and opinions about the work of the EPO.*” In his decision, the president also took into account the charge of having published insulting and defamatory opinions, which the Disciplinary Committee had considered not proven. Although the Committee had concluded that pension cuts could not be imposed on former employees, the president reduced his future pension by one third²⁶.

While in this case the activities of the Investigation Unit extended outside the Organisation, the Tribunal failed to draw a clear line to avoid possible conflicts with national law.

The Tribunal did, however, criticise the president for not considering the instructions of the Administrative Council’s Resolution CA/26/16²⁷, aimed at “ending ‘the social unrest within the [European Patent] Office’.” It therefore found the decision unlawful and sent the case back to the EPO for a new examination.

Cases lost (Aurélien and Michael)

Two further judgments concern Aurélien Pétiard and Michael Lund, both members of the Internal Appeals Committee (IAC), appointed by the Central Staff Committee (CSC)²⁸. At some point in 2014, their heavy workload did not allow them to deal with all their tasks as IAC members, which include “*completing opinions or dissenting opinions following the hearings and sessions within the deadlines provided.*”²⁹ They had to make a difficult choice: either stop writing dissenting opinions

22 Referred to as “case C-062” in judgment [4047](#)

23 Judges Giuseppe Barbagallo, Dolores M. Hansen and Michael F. Moore

24 Judges Giuseppe Barbagallo, Michael F. Moore and Yves Kreins

25 Judgment [3968](#) of the Tribunal’s [125th session](#) (delivered in public on 24 January 2018)

26 Judgment [4052](#) of the Tribunal’s [126th session](#) (delivered in public on 26 June 2018)

27 [RESOLUTION ADOPTED BY THE ADMINISTRATIVE COUNCIL ON 16 MARCH 2016](#)

28 Judgments [3971](#) of the Tribunal’s [125th session](#), and [4050](#) of the Tribunal’s [126th session](#)

29 ILO Judgment No. [3971](#) (see eg considerations 12 and 16)

on cases of previous sessions, or refuse to work on new cases. Between a rock and a hard place, they decided not to attend a future session. For this, they were disciplined by the president. The Tribunal showed no understanding for their difficult situation and dismissed their complaints⁵.

Presidential bias and legal harassment

The Tribunal was aware of the pattern of institutionalised harassment and “witch hunts”³⁰ on staff union officials at the EPO: a March 2017 ILO report³¹ mentions that “*the Administrative Council of the EPO adopted a resolution in which it expressed deep concern about the social unrest within the European Patent Office, noted that disciplinary sanctions against staff or trade union representatives were widely questioned in the public opinion, ...*”

In several cases³² the claimants stressed that the punishment imposed on them was an act of “harassment”, “institutional harassment”, a “reprisal” or a “retaliatory” measure directed against them because of their activities as staff representatives. But the Tribunal seems to fail to consider this general pattern when judging their cases. The only case where the Tribunal requested the Organisation to respect the March 2016 Resolution is Judgment 4052 (discussed above)²⁶. We hope that the Tribunal will consider this when dealing with the cases still pending.

Open cases (Laurent)

Laurent Prunier was the third union representative dismissed by Mr Battistelli. His case is pending before the ILOAT. At the time of his dismissal, Laurent was the secretary of SUEPO The Hague and a full member of the Central Staff Committee. He was dismissed *after* the Council had issued its March 2016 Resolution²⁷ - which the president ignored³³. The dismissal was even implemented in a manner incompatible with the Service Regulations³⁴. Laurent's dismissal was also criticised in the specialised press for being “*not one of firm, balanced management, but of management by intimidation.*”³⁵ Reacting to this criticism, Mr Battistelli launched accusations against Laurent, implying that he belonged to a group of “*harassers*” who had subjected a colleague to “*intense defamation, threat and harassment*”, allegedly leading to the colleague's resignation from the CSC.³⁶ Apart from the fact that Laurent denied from day one any and all wrongdoings, the CSC has unambiguously stated that no-one resigned from the CSC for reasons of interpersonal problems within the CSC itself³⁴. The president made his accusations *public*, whereas Laurent was not allowed to clear his name by publishing all documents relevant to his case³⁷.

Finally, in addition to Laurent, another CSC member and SUEPO official in The Hague was also targeted by the former president, investigated and disciplined on the basis of equally false accusations. His case is now pending at ILOAT.

30 [Labor relations turn toxic in the European Patent Office](#) (Politico, 12.08.2015)

31 [Matters relating to the Administrative Tribunal of the ILO - Update on discussions with the European Patent Organisation on possible future action to improve the Tribunal's caseload](#), Programme of the 329th Session of the ILO Governing Body in March 2017

32 Judgments [3968](#) (page 4), [3971](#) (consideration 18), [4042](#) (cons. 10), [4043](#) (cons. 11), and [4047](#) (cons. 4)

33 [Firings will continue until morale improves - Merpel revisits the EPO](#) (The IPKat, 07.11.2016)

34 [Open letter: dismissal of a further staff representative](#) (CSC, 21.11.2016)

35 [EPO users and staff need the Administrative Council to get a grip on current events](#) (Joff Wild, IAM, 7.11.2016)

36 [EPO President Benoît Battistelli responds to IAM criticisms of recent union official dismissal](#) (IAM, 10.11.2016)

37 [Sacked EPO staff union official responds to Battistelli's IAM letter](#) (IAM, 17.11.2016)

Conclusions

The above cases and more generally recent trends in the ILOAT judgments raise a number of concerns. One of them is the inconsistent application of the case law, and another is the practice of treating cases individually. Both lead to legal uncertainty and a higher number of complaints being filed⁵.

The practice of sending cases back for re-examination when the Office has made formal mistakes, thereby giving the employer a second chance to make its case, seems particularly unfair - if the complainant makes a formal mistake, the case is dismissed, often summarily. The percentage of summary dismissals has seen a striking increase since 2015, and for EPO staff (32%) it is significantly higher than the average (15%)³⁸. The publicly declared personal friendship between the EPO's Director Employment Law, responsible for defending the EPO, and the Registrar of the Tribunal does not help to mitigate the perception of bias³⁸.

It is a staff representative's role to represent the interests of staff. This often brings them into conflict with their employer. In the world outside the EPO – at least that part covered by its member states – staff representatives therefore enjoy particular protection against the aggressions of employers. In the EPO, this is no longer the case. Under Mr Battistelli the Office started investigations against about a dozen elected or nominated staff representatives, and many of them were ultimately disciplined. This affected their health and families.

Mr Battistelli always claimed that the reason for initiating disciplinary procedures was misconduct. The Tribunal mostly supported his views. But even a superficial reading of the judgments makes clear that other motives were at hand. The risk of being down-graded or dismissed for merely doing their job no doubt dissuades many colleagues from standing for election and/or accepting a nomination as a staff representative³³.

Due to the persistent atmosphere of intimidation, employees cannot fully focus on the work to be done. This has a negative impact on the quality of our services. If the EPO continues to persecute its staff representatives, it will also further damage its reputation as a first class employer.

In its March 2016 Resolution²⁷ the Administrative Council called on the EPO President “*to ensure that disciplinary sanctions and proceedings are not only fair but also seen to be so, and to consider the possibility of involvement of an external reviewer or of arbitration or mediation*”. The Office still has not complied with this call.

Mr Campinos did not cause any of this damage. But if he truly wants to restore social dialogue and the reputation of the Office, he will have to find a way to restore the trust that has been lost.

38 [EPO FLIER No. 38 The ILO Tribunal - Is it still worthy of our trust?](#) (12.06.2018)