

Dura Lex, sed Lex: Legal Matters in The Hague

Executive Summary

Since September 2001 the Staff Committee of The Hague has enjoyed the cooperation of an internal "Legal Expert" (Advisor on Legal Matters) to support Staff. The Advisor has provided documentation and assistance in the evaluation of legal problems generally affecting staff. It has emerged that due partly to policy considerations, and partly to organisational problems (overload of the Personnel Dept.), the juridical security of EPO employees is sub-optimal. Moreover, juridical safeguards are missing, making cases of harassment possible.

The advisor has further provided advice and assistance to employees filing internal appeals and complaints with the ATILO, and advised them also in some cases to desist. either because their appeals/complaints were unfounded on the merits or, more worrying, they were irreceivable because time-barred. The Advisor recommends that the Staff be properly informed and instructed on the technicalities surrounding Internal Appeals.

The Advisor's tasks are:

- C collect information and advise the Staff Committee and SUEPO on points of law
- C liaise with the external lawyer retained by SUEPO
- C advise EPO employees who have grievances against the Office on the opportunity of lodging appeals, on their chances of success, and on the procedure to be followed
- C assist EPO employees in the formulation of pleadings for an internal appeal

- C represent EPO employees before the Administrative Tribunal of the International Labour Organisation
- C Counselling of employees on alternative options for redress and damage-control

The Advisor's activities have been:

1. Analysis of Legal Matters

Documentation and advice was provided on the foremost issue facing the Staff at the legal level, namely the lack of juridical security. The EPO is bound only by the Service Regulations (which provide only vague safeguards for employees) and by ILOAT jurisprudence. The fundamental problems are:

a) interpretation of the Regulations.

Often the Regulations (be it of the Service Regulations, circulars or Pension Regs.) are ambiguous. Where two interpretations are possible, one favourable to the Office and one favourable to the employee, the regulation is invariably interpreted in favour of the Office. This cannot be reconciled with the fact that the Service Regulations constitute the terms of the contract of employment. In contract law, the principle is that ambiguities are always interpreted against the drafter of the ambiguous language (the "contra proferentum rule"). The ambiguities are particularly pronounced in cases of Health and Safety policy.

b) enforcement

One of the few safeguards for the employee is the possibility to seek redress via the internal appeal route. The Internal Appeal Committee conscientiously evaluates the facts and the law, and issues a recommendation to the President. Unfortunately, the President is only morally, not legally bound to follow the recommendation.

In a string of recent cases, the President rejected appeals in which the IAC had issued unanimous opinions in favour of the appellants.

In the worst of the cases, the Internal Appeals Committee found clear evidence of intolerable abuse and issued a unanimous recommendation, exhaustively argued and reasoned, to allow the appeal on the main claims. Moreover, the facts were such that, in an unprecedented move, the IAC recommended the President to award damages. The President perfunctorily dismissed the Appeal, deeming the opinion of the IAC "unconvincing".

c) jurisdiction

In a recent Position of the Office in reply to an Internal Appeal, the Office clearly stated that (quote) "**la Convention Européenne des Droits de l'Homme n'est pas directement applicable à l'Office**", notwithstanding a Preamble to the Service Regulations to the contrary. No comment is necessary on this assertion.

Moreover, the Office insists that national law does not apply to the EPO. While this is true for administrative and labour law (as the applicable law is defined in the Codex), this is not at all evident for criminal and civil liability, especially for health and safety matters (what law applies, since none is defined in the Codex?) and tort law, in particular harassment (in how far is harassment an act committed in performance of one's duties?).

One would assume that national law in respect to family law would be applicable, but the Office seems to retain the prerogative to define who a dependent child is. The Office has also repeatedly claimed that it has jurisdiction to accept as valid or not a marriage validly celebrated and legally binding in a Member State. The assertion seems insupportable in view of ILOAT jurisprudence, but it is symptomatic of a trend in which the EPO attempts to take law into its own hands and redefine its ambit beyond the functions of a Patent Office. The question of whether this is an acceptable aspiration is currently being addressed by SUEPO and by its lawyer.

d) Lack of reasoning

Frequently, enquiries and complaints from employees, addressed to the Administration, are perfunctorily dismissed. On several occasions, when employees requested the reason for an adverse decision -- and in particular the legal basis or the basis for a given interpretation of the law -- no such reason was given. Moreover, when employees asked what kind of documents they ought to provide in order to prove their case and obtain a rectification of what they considered a mistake, no such information or any guidance was provided. While one can only be sympathetic with colleagues in the Administration in view of their workload, it is noted that the present situation results in unacceptable legal uncertainty for the employees.

e) conclusion

It is submitted that the Office ought to reevaluate its concept of what constitutes adequate enforcement of judicial opinions, interpretation of the law, respect of fundamental values. A speedy solution to the organisational problems underlying many of the aforementioned problems is equally to be desired.

2. Internal Appeals

Most of the time was spent on advising employees regarding the possibilities of lodging internal appeals. Assistance was offered in a number of cases, consisting in drafting the pleadings and researching relevant case law from the ILOAT. Four cases were argued before the Internal Appeals Committee on behalf of colleagues that chose to be represented instead of appearing in person, and one case was represented before the ILOAT. A number of problems have become apparent.

a) Problems on the Staff side

A striking number of people who consulted the Advisor, either on their own initiative or referred by the Staff Committee, **had to be advised against lodging an appeal**. Some of these cases were simply unfounded (the facts did not support a cause of action), but an alarming number of complaints were irreceivable, either because they were not based on an appealable decision (few cases) or because they were time barred (vast majority).

It is essential that the Staff be properly informed and instructed on these matters. Lodging an irreceivable appeal is an exercise in futility, and frustration can be avoided by a careful consideration of the introduction to Appeals found in a publication by SUEPO, "Memorandum: How, When and Why to File an Internal Appeal". (Other relevant publications in preparation.)

Very briefly, one must pay attention to what is an appealable decision, because an internal appeal must be lodged no later than three months from the notification of such decision. *Dura lex sed lex*: you file one day too late, and your appeal will be dismissed. To be appealable, a decision must affect the employee personally, and it must emanate from the President or from the Administration where it has explicit or implied delegation from the President. In practice, any communication from the Administration of an official character is (until proven otherwise) an appealable decision. Salary slips, promotion announcements in the Gazette etc. are all examples of decisions delegated from the President to the Administration under the implied delegation doctrine. All too often employees engage in correspondence with the office, trying to correct what may be a mere administrative mistake (e.g. wrong calculation of grade/step etc.), but if the final answer confirms the initial decision, the so-called "final answer" will be no final answer at all but a mere confirmation of an earlier decision and will NOT reset the deadline for an internal appeal.

b) Problems on the Administration side

When lodging an internal appeal, the proper procedure is to bring two copies of the appeal letter, duly dated and signed, to the office of the Director of Personnel (currently Mr. Wiek Crasborn). His assistant, Ms. Paloma Van Elferen, will stamp and sign the copies.

One copy is the appeal itself and will be processed. The other copy is the receipt for your records.

Note that Mr. Crasborn's department is overburdened with work and allegedly cannot ensure speedy processing of your appeal. This may cause some problems. Under Art. 106 SR, employees have the right to ask the President to issue a decision on a particular issue that affects you. The President has two months to reply, and if no answer is received one can deem the request rejected and appeal. It is not unusual for requests to languish in the Administration for longer than two months, which has the effect -- however unintended -- to compromise the employee's rights under Art. 106, by preventing the President from possibly giving a positive response.

It is therefore advisable, if the request is a matter of urgency, to send a photocopy of the "receipt" directly to the office of the President. The copy should be marked "copy FYI, original following by the hierarchical route".

3. Counselling

Six colleagues have sought the advice of the Advisor with regard to harassment-related matters. (More cases have been dealt by conciliation experts and other staff representatives and delegates, without the input of the Advisor). Harassment included:

- C intimidation, pressure
- C arbitrariness
- C threats of immediate dismissal, and undue pressure to resign
- C deliberate obstructionist tactics with the purpose of preventing the employee from insisting on his/her lawful rights
- C attempts of psychological manipulation

In one case the complainant had to be referred to urgent medical care within and outside the office to prevent a medical disaster.

The Office appears ill-equipped to handle these problems. There is no rule or policy to be enforced against harassment, there is no guideline regarding the evidentiary burden, and there is no effective protocol to tackle the effects. Only in the most clear-cut of cases could (incidentally, the only one supported by written evidence) the cooperation of the Administration be secured. It is suggested that the Office should develop a serious policy of prevention and assistance in this area.

MEMORANDUM: HOW, WHEN AND WHY TO FILE AN INTERNAL APPEAL¹

If you disagree with a decision of the administration which affects you, you can challenge it. The procedure to be followed depends on whether the decision concerns a medical or a non-medical question. For medical questions refer to the SUEPO AUser-s Guide to Van Breda@ (www.suepo.org).

The procedure for appeal against a non-medical decision of the administration has two stages: an internal appeal (Art. 106-108 SR) and an external complaint to the Administrative Tribunal of the International Labour Organisation (ILO-AT) in Geneva (Art. 13 EPC, Art. 109 SR). The internal appeal includes review by the Internal Appeals Committee. The conclusion of the Internal Appeals Committee is not binding on the President. In contrast, the decision of the ILOAT is binding.

1. What is a challengeable decision?

A decision, to be the subject of an appeal, must be **legally binding** and adversely affecting the **individual** Appellant.

1.1 *"Adversely affecting the individual appellant"*. This means that you may not challenge a general decision unless and until it harms you. So for instance, if there is a decision to inflict a negative step to all B staff, A staff has no right to lodge an appeal, and an employee from B staff can do so only when (s)he is actually notified that a negative step has been inflicted in his/her case.

1.2 *"A decision must be legally binding"*. This means that the decision must represent the official position of the Office, not a decision of (for instance) a director on a frolic of his own. Sometimes this is called, rather confusingly, a *"final decision of the appointing authority"*.

1.2.1 *The Appointing authority*: This means that the decision must come from the President. However, a decision emanating from the administration or another high-ranking manager can be *deemed* to be emanating from the appointing authority (and therefore legally binding) if (i) there is express delegation (e.g., the President delegates *in writing* the decision-making on a particular subject to a Vice-President or even a Principal Director, arguably a director) or (ii) there is implied delegation (e.g., the power of VPs to organize the work of their DGs as they think most efficient, including rotations and intra-departmental transfers -- this is a grey zone, though²). Note that salary slips, promotion announcements in the Gazette etc are all

¹Biblio: "SUEPO Guide to the EPO Codex"

²In such cases, it is best to consult SUEPO representatives.

examples of decisions delegated from the President to the Administration under the implied delegation doctrine. So if you receive a letter from the President (or from someone with *properly* delegated power) informing you, for instance, that you are dismissed, this is a legally binding decision.

- 1.2.2. *Non binding ("non final" decisions)*. A letter from your Director, without delegated power, telling you that you're sacked is *not* a decision from the appointing authority. Thus it does not necessarily reflect the official position of the Office and can be overturned by simple administrative action on behalf of the President (so it is "*not final*"). If the President confirms that the Director is right, **then** the President's decision is the legally binding one.
- 1.2.3. *Binding ("final") decisions and mere confirmations*. It is crucial to note that once you receive the notification of a decision that is legally binding because it stems or can be deemed to stem from the appointing authority, the time limit for lodging an appeal will start running. You may engage in correspondence with the office trying to correct what you may think is a mere administrative mistake (e.g., wrong calculation of grade/step etc.), but if the eventual answer (which you will receive maybe half a year later) confirms the initial decision, the so-called "final answer" will be no final answer at all (in a legal sense) but a mere confirmation of an earlier binding decision. The confirmation will NOT reset the deadline for an internal appeal.
- 1.2.4. *"Art 106 decision"*. An appealable decision can also be a so-called Art. 106 decision. Under Art. 106 SR, you have the right to ask the President to issue a decision on a particular issue that affects you, for instance to request the annulment of an adverse non-binding decision. In this case, you write a request under Art. 106. If you receive a negative answer, the refusal is a decision adversely affecting you, and you can lodge an appeal under Art. 108. If you receive no answer at all, after two months you assume that the request is denied and can lodge an appeal under Art. 108.

2. Deadlines

It is crucial that you respect the strict deadlines for lodging an internal appeal. If you miss the deadline by even one day, the appeal will be dismissed as irreceivable.

- 2.1 *Deadlines under Art. 108.* An appeal against a decision of the administration must be lodged within three months after the decision. The three months period starts from the date of publication, display or notification of the decision. In order to safeguard the legal stability of the Office, deadlines are very strict. One day too late, and your appeal will be irreceivable.
- 2.2 *Deadlines under Art. 106.* If you expressly requested a decision under Art. 106 and you did not receive an answer, the three months period for appeal starts to run on the day of the implied rejection, which is two months after the date of the request. In other words, if you send an Art. 106 request and receive no answer, you must file an appeal within five months of writing. Note however that in the request under Art. 106 you may add a "safety clause" which reads "if you are not able to accede to this request, please consider this letter as the lodging of an internal appeal pursuant to Art. 108 SR". In this case, the appeal is lodged automatically if the President (or who for him) is minded to refuse your request, and you do not have to worry about deadlines.
- 2.3 *Running deadlines and confirmations.* Note that appealable decisions are not necessarily labelled as such, so be careful to identify which communication from the Office sets the clock ticking. Be especially careful to distinguish binding ("final") decisions from mere confirmations. Once you receive bad news from the Office, if you then spend four months negotiating back and forth over it, it will be too late to lodge an appeal against this decision. Similarly: if you ask for further information about and/or a reversal of the decision and you receive no reply, the 3-month time limit continues to run.
- 2.4 *Continuous decisions.* The situation is slightly better in the case of recurrent/mutable decisions such as granting (or denial) of allowances, e.g., expatriation allowances. These are considered "continuous decisions". You are entitled to appeal on the day you receive your first salary slip (which constitutes notification of a binding decision) and you thus have actual or constructive knowledge that, for instance, the Office has denied you the allowance. You have three months time to appeal, even if you start negotiations trying to rectify the problem through the administrative way.

Here, though, if you miss the deadline, not all is lost. You can appeal on the basis of the salary slip of three months ago. This is possible because the decision of granting or not granting a periodic allowance (as opposed to a one-off benefit) is a continuous decision, one which is taken month by month and is reflected in your salary slip. So, if you become aware that the Office never paid you an expatriation allowance to which you now discover are entitled to, you can appeal, but only retroactively to the last three months. All the loss from the beginning to three months ago falls on you.

3. Legal remedies.

The legal remedies lie at two levels: the internal appeal process and a complaint to the ATILO.

- 3.1 Once you lodge an appeal, the Internal Appeals Committee will evaluate your case and issue a recommendation to the President. While the opinion of the IAC is authoritative and comprehensive, it is important to notice that the President is not obliged to follow the advice received, even when the IAC issue a unanimous and strong opinion. In practice this means that if the IAC finds in favour of the Office, the President is of course going to decide against you. And if the IAC finds in your favour, there is the possibility that the President will still decide against you.
- 3.2. If you receive a final decision from the President dismissing your appeal, you are entitled to lodge a complaint³ with the Administrative Tribunal of the ILO in Geneva, whose decision is final and binding on the Office.
 - 3.2.1 *Deadlines.* You must file the complaint within 90 days (not three calendar months!) of notification of the decision of the President. Again, if you miss the deadline, the complaint will be rejected as irreceivable.
 - 3.2.2. *Statutory preconditions.* You can only file a complaint if you have exhausted the internal means of redress, i.e., if you have diligently pursued an internal appeal and have received a decision of the President. This means that you cannot go directly to Geneva and bypass the IAC. However, if the Office fails to handle your appeal within a reasonable amount of time (as a guideline, you have not received a Position of the Office after one year) in spite of a clear reminder, then the ATILO will be prepared to assume that you have exhausted the internal means of redress

³The formalities and format are rather specific. SUEPO will be glad to provide guidance and, where appropriate, assistance including by way of representation.

in spite of the fact that the internal appeal process is not completed.

4. Procedural aspects

- 4.1 When lodging an internal appeal, the proper procedure is to bring two copies of the appeal letter, duly dated and signed, to the office of the Director of Personnel (currently Mr. Wiek Crasborn). His assistant, Ms. Paloma Elferen, will stamp and sign the copies. One copy is the appeal itself and will be processed. The other copy is the receipt for your records.
- 4.2 Note that Mr. Crasborn's department is overburdened with work and cannot ensure speedy processing of your appeal. This may cause some problems. As mentioned above, under Art. 106 SR, employees have the right to ask the President to issue a decision on a particular issue that affects you. The President has two months to reply, and if no answer is received one can deem the request rejected and appeal. It is not unusual for requests to languish in the Administration for longer than two months, which has the effect -- however unintended -- to compromise the employee's rights under Art. 106. It is therefore advisable, if the request is a matter of urgency, to send a photocopy of the "receipt" directly to the office of the President. The copy should be marked *"copy FYI, original following by the hierarchical route"*.
