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118th Session of the ILO-AT

Summary

In its 118th session the Tribunal delivered total of 63 judgments, of which 19 cases involving the EPO. Of the 19 EPO cases 16 were dismissed, 2 of those summarily, leaving 3 cases that were partially won. This paper discusses the cases that have broader relevance.

Introduction

As in the previous session, the Tribunal rejected the vast majority of the EPO cases: only 3 out of the 19 complaints were partially won. "Partially" – because even the cases that are "won" by staff may amount to hollow victories, as set out in the description of the cases below. Typically, the judgments on such cases end with the standard phrase: "*All other claims are dismissed*."

A common criticism of the ILOAT is the lack of consistency and reasoning in its judgments, and the failure to address all arguments. Often the Tribunal appears to pick one aspect, rule on that, and seemingly ignore other points

In the previous (117th) session not a single one of the nine EPO cases judged was even partially won by staff. In the 116th session only one out of twelve of the total EPO cases was partially won by a staff member.

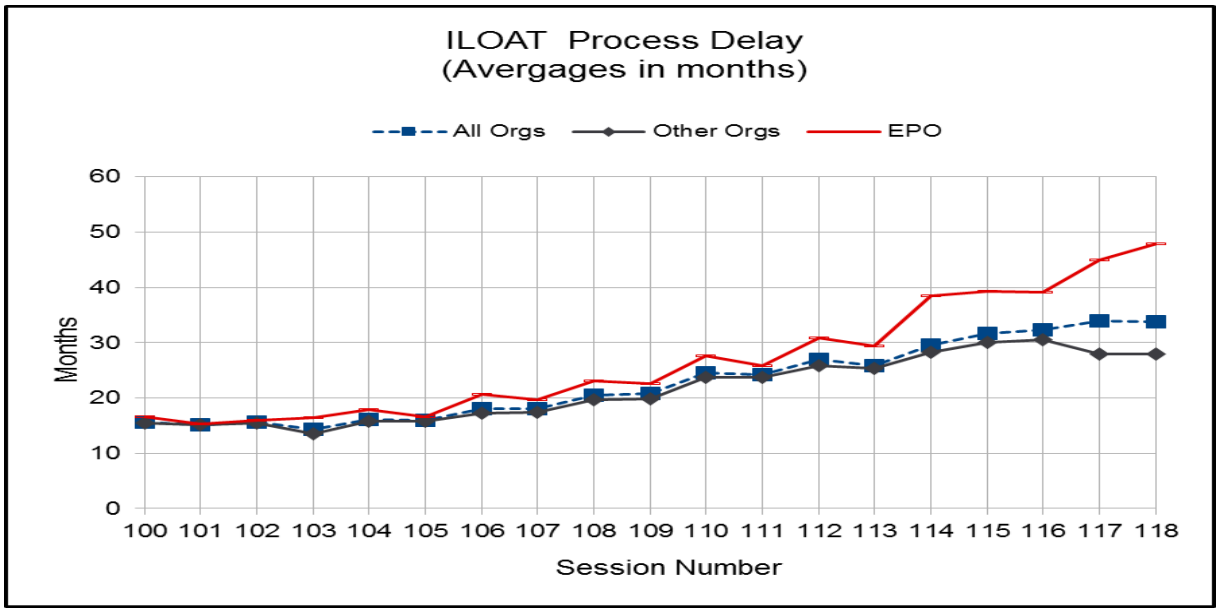
This means that out of the total of 40 EPO cases in the last three sessions only 4 (10%) were partially won by staff. Staff members of other organisations generally fare better: of the total of 44 non-EPO cases judged in the most recent session 17 (32%) were partially won by staff.

This raises the question whether staff at the EPO is particularly prone to filing hopeless cases or the Tribunal is particularly harsh with EPO cases.

Despite a small increase in capacity of the Tribunal, due to an extension of duration of the sessions held, **the average delay continues to increase**. The average for all organisations is now just under 3 years. As can be seen from the plot below, there has been a significant difference between the EPO cases and those from the other organisations.

One of the reasons for the difference is that the EPO legal department is less efficient in handling the cases than other organisations, and this causes delays in the EPO providing pleadings. The second reason can only be described as bias against the EPO on the part of the Tribunal. This became explicit in the year 2011 when the Tribunal announced a 5 case limit to the number of cases it would treat per session for each organisation.

As the EPO was the only organisation with a significantly higher caseload, this had a disproportionate negative effect on the delay of EPO cases. This measure caused a lot of public criticism of the Tribunal and it has subsequently been removed, but the bias in handling times is clearly still apparent.



Another issue is the **internal delays**. Before filing a case with the Tribunal, a staff member is required to exhaust all internal means. These internal mechanisms vary between the organisations and most take between 1 and 2 years. At the EPO there is an enormous backlog believed to be over 700 cases (the EPO will not provide official figures). The delays in internal handling are exacerbated by the compulsory Management Review mechanism, the only effect of which, appears to be a further delay for staff. The delay of cases at the EPO is well in excess of 3 years. There are some cases which have been pending for over 5 years.

The right of access to court in a reasonable time is fundamental and the European court has ruled that "reasonable" in this context would be under 3 years. It should be noted that this figure applies to the total delay from first challenging a decision, up until implementation of the final decision from a court, which in this case is the ILOAT. This criterion has not been met by the legal protection system for staff of the EPO for over 10 years.

Between 2000 and 2005, the Tribunal had ruled that excessive delays in the internal process would permit a staff member to file directly with the Tribunal on the grounds the internal process had not been completed in a reasonable time. In the mean time practice has been inconsistent. It now appears that a staff member must exhaust the internal process, regardless of the delay, the only compensation being an award of moral damages of between 500 and 2K. These paltry figures usually do not compensate fro the delay, and a so low that they have no deterrent effect on the EPO, which in most cases benefits significantly from the delay.

In Judgment 3363 the Tribunal confirmed its earlier Judgment 3146 that the Tribunal considers the **referral** of appeals against **decisions of the Administrative Council** filed with the Administrative Council to the President and subsequently the Internal Appeals Committee admissible. This was a clear deviation from the previous Judgement

3053. It furthermore stressed that the complainant must be individually affected by a decision in order for the complaint to be receivable. The Office has since written to many applicants claiming that Judgment 3146 applies to their case and asking them to withdraw their appeal. It seems that pursuing a direct complaint at the ILO-AT against decisions of the Administrative Council will now lead to your complaint being held irreceivable. We nevertheless consider that the Office interprets Judgment 3146 rather freely and claims that individuals are not personally affected in cases where they clearly are. This raises questions about the consistency of the ILOAT ruling and the EPO's interpretation with the fundamental right of access to court, since it in effect disbars many cases from the right of appeal.

Finally, we note an increasing tendency towards "**summary dismissals**", i.e. cases that the Tribunal considers so obviously without merit that they are dismissed with only summary reasoning. The current session saw 13 of such cases. Of these 8 were **requests for review**, i.e. cases where the complainant asks the Tribunal to reconsider an earlier judgment. In these cases the Tribunal invariably reminds that it judgments may only be reviewed in exceptional circumstances and on the grounds of "*failure to take account of particular facts, a mistaken finding of fact that involves no exercise of judgment, omission to rule on a claim and the discovery of some new facts which the complainant was unable to invoke in time in the earlier proceedings*". The Tribunal also invariably fails to see such circumstances. From which we must conclude that the Tribunal is omniscient and never overlooks any facts.

Summary of the most relevant EPO cases

Pensions and allowances

In Judgment 3335 the complainant, a retired EPO employee contended that his pension was *de facto* subject both to an EPO internal and to national tax. He considered the **double taxation** discriminatory and asked for it to be stopped. The EPO maintained that EPO retirement pensions are not subject to internal tax. The Tribunal recognized that EPO pensions are calculated on the basis of the final net salary, but held that the provisions the relevant provisions (PPI and PenRegs) "*make it clear that it is only the gross salary of serving employees which is subject to internal tax, to the exclusion of retirement pensions, which may therefore be subject to national tax at the place of residence of the person concerned.*" The complaint was dismissed in its entirety.

The above judgment, although not surprising, is disappointing and illustrative for the "letter of the law rather than spirit of the law" approach taken by the Tribunal.

In Judgment 3375 the complainant challenged his **invalidity retirement** under the new regulations that foresees a deduction for pension contributions not applicable under the old system. He argued that the Office had caused unacceptable delays in treating his case, as a result of which he had been prevented from benefiting from the old rules. He further argued that his entitlement to the old invalidity scheme was an acquired right. The Tribunal held that the change in the invalidity scheme was made on "*dispassionate actuarial and financial management considerations*" and as such justified. It further held that "*By its nature as remote*

and contingent right, the benefit to an invalidity pension arises only under conditions of invalidity to cover a risk that rarely occurs. This is not a fundamental term which could be said to have reasonably induced the complainant or any staff member of the EPO to enter into the contract of employment with the Organisation so as to preclude the Organisation from altering its terms as it did by the new arrangements." The complaint was dismissed. This judgment does not bode well for the upcoming pension reform.

Judgment 3370 concerned the remuneration of a B grade programmer who, in 2007, requested a so-called "**acting allowance**" (Art. 12(4) ServRegs) for having performed A-level duties for several years, and a promotion to an A-grade post. It was not disputed that the complainant had been performing duties equivalent to an A-grade for the two years preceding the application for a new job. The Tribunal nevertheless dismissed the appellant's claims for various reasons, amongst others because Art. 12(4) ServRegs that governs the acting allowance would only apply to staff who have been *called upon* to perform duties in a higher grade and not to those who are de facto performing such duties without a request of the administration. The Tribunal nevertheless found that "*It was an affront to his dignity to be exposed to a delay of over two years to resolve his status in circumstances where he believed, and more importantly where he knew his superior also believed, he had been performing duties of an A-grade post and was suitable for appointment to such a post.*" The complainant was awarded 15k€ in moral damages and 1.5k€ in costs.

This is another example of a "letter of the law rather than spirit of the law" judgment. Following this ruling we can only advise our colleagues in IM and elsewhere never to take up duties above their grading voluntarily but insist to be "called upon" since the good will shown in this respect apparently leads to a loss of rights.

Strike deductions

In Judgment 3369 the complainant challenged the more than full-time **strike deduction for staff working part-time**. The complainant worked 80% (4 days / week). The Office deducted the equivalent of 125% of a full day (i.e. 1/24th rather than 1/30th of a monthly salary) both from her basic salary and from her dependent's allowance. After the internal appeal the Office agreed to reimburse 1/3rd of the deduction applied to her dependent's allowance but it maintained the full 125% deduction from her basic salary. Concerning the salary deduction the Tribunal stated that the decision of the EPO to apply a deduction of 1/24th of her basic salary was "*based on arithmetically irreproachable principles*" (sic). It nevertheless found that this approach was "*legally inconsistent with the applicable statutory provisions.*" The Tribunal did not follow the argument of the complainant that the education allowance was a lump sum and therefore not subject to deductions. The Tribunal ordered the EPO to reimburse the sum that was unduly withheld from the basic salary. The Tribunal furthermore awarded the complainant 2k€ in moral damages and 1k € in costs. All other claims were dismissed.

Scope of Vanbreda coverage

Judgment 3354 concerns a refusal by **Vanbreda** to reimburse a medicament because the prescription did not indicate a diagnosis and the costs of the treatment would be reimbursable only when prescribed for a certain condition. The Tribunal referred to its earlier Judgment 3031 and 3158 in which it

held that. "*It is clear that the insurance broker's decisions to reject the complainant's claims were based on the unpublished agreement … between the medical advisors of the EPO and of the insurance broker whereby the costs of the medicine at issue would only be reimbursed for two medical indications."* This was considered contrary to the VanBreda insurance contract that is broader in scope. The insurance broker had thus acted outside the scope of its authority. The case was remitted to the EPO for reconsideration. The complainant was awarded 700 € damages and 600 € costs.

Job grading

Judgment 3352 concerns the grading of pre-classifier jobs. Following an Office-wide B/C job grade evaluation in 2003/2004 the complainants were informed that their posts would remain B5/B1. They challenged this decision, also alleging procedural flaws. The Tribunal stated that it had consistently held that the **grading of posts** is a matter within the discretion of the executive head of an international organization that is only subject to limited review by the Tribunal. "*A decision of this kind cannot be set aside unless it was taken without authority, shows some formal or procedural flaw or a mistake of fact or law, overlooks some material fact, draws clearly mistaken conclusions from the facts or is an abuse of authority*." The allegations of procedural flaws were rejected. The Tribunal saw no "judicially reviewable flaw" in the job classification process. The complaints were dismissed.

Harassment

Judgment 3337

In Sept. 2005 (!) the complainant filed a formal harassment complaint against his former superior, Principal Directors Personnel Mr ML. The Ombudsman found that the complainant had been "*subjected to recurring inappropriate behavior by Mr. L, whose mishandling of numerous conflicts had undermined the complainant's dignity.*" He recommended that the administration take swift measures to settle outstanding issues regarding the calculation of the complainant's reckonable experience, his staff reports and posts, and to take disciplinary measures against ML By a letter dated 15.09.2006 the then President, Mr Pompidou, merely warned ML that "*if he was informed of other repeated inadequate practices in the future, he would feel obliged to consider the possibility of imposing upon him disciplinary sanctions*" (sic). With another letter of the same day, the President informed the complainant that he accepted the Ombudsman's conclusions but did not want to interfere with the internal appeals on the outstanding issues. Three years and several reminders later no progress had been made.

On 30.10.2009 the complainant filed a second harassment complaint against his new superiors in DG5. This complaint did not receive a favourable opinion of a (new) Ombudsman and was subsequently dismissed by the President. On 19.02.2010 the complainant filed an internal appeal against the decision to reject his second complaint. This appeal was still pending when the complainant seized the Tribunal. Other than "*swift and concrete remedies*", the complainant asked the Tribunal for moral damages, material damages, exemplary damages and costs. The Tribunal found that "*the evidence plainly shows that the EPO failed in its duty … to provide a prompt resolution for his complaint of alleged*

harassment in PD 5.1.", given that the procedure took over a year. The Tribunal did not, however, rule on the substance of the complaint stating:
"*That question will be determined in due course in the relevant proceedings on his relevant underlying internal appeals.*"
The Tribunal did not express itself on the earlier unresolved issues. The complainant was awarded 4k in moral damages and 3k in costs.

The above judgment shows the ineffectiveness of the remedies provided by the EPO and by the Tribunal. Rather than providing solutions for the outstanding issues the Tribunal ignored half and sent the other half back to the Office where further procrastination can be expected.

Further limitation of rights accorded to EPO staff representatives

In January 2007 the CSC forwarded a **document for submission to the Administrative Council** to the then President of the EPO. In this document the CSC requested the Council to formally recognize the applicability of the European Convention on Human rights and its case law to staff of the EPO. The President refused to submit the document to the Council on the ground that substantive human right principles were protected at the EPO. In its **judgment 3341** the Tribunal referred to Art. 36 of the ServRegs and Art. 9 of the Admin. Council's Rules of Procedure.
The former allows the Central Staff Committee to require the President to arrange matters to be examined by the relevant joint committee. The latter stipulates that requests for items to be put on the agenda and documents from the staff representative to be submitted via the President. According to the Tribunal neither of these two provisions allows for the Chairman of the CSC to put documents before the Council. On the other hand: neither Article allows for the President to refuse documents from the Staff Committee. Nevertheless: the complaint was dismissed.

The Tribunal thus endorsed the President's decision to deny the Staff Committee the possibility to inform the Administrative Council of the position of staff.

In Judgment 3342 a number of elected staff representatives challenged the **nomination of interim Vice-Presidents** (VPs) by the President arguing that only the Administrative Council has the competence to appoint VPs. The Tribunal referred to earlier Judgments confirming that members of the Staff Committee can invoke the Tribunal's jurisdiction to preserve what have been described as "common rights and interests". It held, however, that these "common rights and interests" are limited to enforceable legal rights and interests derived from **terms of appointment or under the Service Regulations**. It found that "*whether the appointment of Vice-Presidents is vested in either the Administrative Council or the President or conceivable both"* (sic) is not a matter of the EPO Service Regulations. The complaint was dismissed.

Judgment 3343 concerns the direct placement of a **consultancy contract** worth 350.000 Euros that the EPO signed with a company called Celemiab in August 2006. The complainant, at the time chairperson of the Munich Staff Committee, contested the various justifications for a direct placement. The complainant also alleged **lack of transparency** and **favouritism** in granting the contract, emphasizing that the Director of the consulting company had professional connections with the President-elect. In their report on the 2008 accounting period the EPO

external auditors also found that "*an invitation to tender would have been justified given that the consultancy provided by the external contractor was not "special" and that other consultancy companies offered the required services*." By then the contract had been amended and additional assignments had been made raising the total value to 761.000 Euros (see page 159 of CA/20/09).
On the issue of receivability the complainant took the position that she was acting to protect the collective interest of staff that are not limited to matters like remuneration but include the broader interest of ensuring that the EPO respects its own laws. The Tribunal held that "*Unless it can be shown that the alleged violation of the rule has a direct and immediate bearing on the employment status or rights of employees, the staff representative does not have standing to bring the complaint*." The complaint was dismissed.

The above judgment is important because it illustrates how extremely weak the financial governance of the Office is. The spending of the EPO's 2 billion Euros budget is not subject to any external control other than that of a Board composed of three external auditors[1]. The Board issues a yearly report to the Administrative Council. These audit reports (CA/20/yy) are not published. The Board rarely finds any serious flaws and even if they do this has little, if any consequences[2]. In the above case the Office held that "*The fact that the Board expressed the view that a tender would have been justified … merely reflects the Board's preference, …*".
The elimination of the staff representation as the only critical internal observer further weakens the financial governance of the EPO.

Summary of the most relevant non-EPO cases

Outsourcing

In Judgment 3376 (ILO) the complainant's post as system analyst was abolished following a change of system and the "restructuring" of his department, essentially transferring the work to external contractors. The complainant complained against the **in-house outsourcing** to external staff on a permanent basis. The Tribunal pays lip-service to his arguments stating:
"An organsiation that resorts to subcontractors, be they companies or individuals, must ensure that the contract it signs with them will not have an adverse impact on the situation of officials who are subject to the staff regulations and will not unjustifiably infringe the rights they enjoy under those regulations. The risk of such an infringement is particularly great in the case of long-term contractual outsourcing and in cases where the tasks involved are still partly performed concurrently by regular staff (see Judgment 2919 passim). In such cases the duty of care requires the organisation to provide the staff concerned with adequate information concerning the outsourcing procedures and their possible impact on their professional situation and to prevent any possible adverse impact thereon (see Judgments 2519, under 10, 1756, under 10(b), and 1780, under 6(a))."

But the Tribunal then cheerfully dismissed the case holding that the complainant "clearly" (?) had **not** proven

1 SUEPO has criticised the recent appointment of Mr. Frédéric Angermann, a previous close associate of Mr Battistelli, to the Board of Auditors.
2 Eg. Example of the costs of the Grundstück for Bt8 … ?

that the outsourcing had "a direct adverse impact on the rights conferred by the official's terms of appointment."

Judgment 3373 (Eurocontrol) concerns members of a team of security guards, part of whose work (over-time, shift and stand-by hours) had been outsourced. The complainant considered the sharp loss of income caused by the outsourcing decision to be a breach of acquired right. The Tribunal disagreed but referring to the organisation's **duty of care** nevertheless found that the compensation scheme foreseen was insufficient to ensure that the implementation of the new arrangement "*did not place the complainant in financial difficulty.*" Eurocontrol was ordered to apply a more favourable compensation scheme. The complainant was furthermore awarded 4k Euros in costs.

Job grading

In Judgment 3374 (ILO) the complainant contested the result of a **job grade evaluation** that put his job at G6. At some point his job was found to be at G7 level. The Tribunal found that the impugned decision was based on a flawed procedure. It also found the 2.5 years' duration of the internal procedure unreasonable. The Tribunal ordered the Organisation to reclassify the complainant's post at grade G.7, "with all the legal consequences that this entails". The complainant was awarded 10k SwFr for moral injury and 1k SwFr for costs. This judgment is mostly fascinating in how different it is from judgment 3352 cited above wherein similar claims by EPO pre-classifiers were dismissed with reference to the Organisations's great discretion when it comes to job grading.

Disciplinary matters

The complainant in Judgment 3348 (WMO) had been accused by the organisation of manipulation his time recording in order to obtain some 31k SwFr in overtime. The complainant recognized having been negligent in clocking but denied intent to deceit and claimed not to have drawn any financial advantage. His claim that there had been no financial gain was later confirmed. The Joint Appeals Board found in his favour but he was nevertheless dismissed. The complainant maintained that the accusations had been vague, that the charges against him had not been proven but that he had been required to prove his innocence, that the sanction was disproportionate etc. The complainant claimed reinstatement. The Tribunal found that the process had been flawed and ordered reinstatement as of the time of dismissal, the payment of 20k SwFr in damages and 7k SwFr in costs. However, the Tribunal left the door open to (other?) disciplinary measures.

This judgment is highly unusual in that the Tribunal ordered reinstatement. This is extremely rare. Normally the Tribunal only makes financial awards. It is not clear what differentiates this case from the more usual cases.

Payment of over-hours

The complainant of **Judgment 3339 (**ICC) had officially been working 50% part-time for nine months but claimed that he had made an additional 370 hours overtime for reasons beyond his control. He requested to be reimbursed for that time. The Appeal Board found that he had no right to be paid but that he should be given compensatory time and recommended that in this case pay should nevertheless be considered. The Organisation refused. The Tribunal

found that on a plain reading of the terms of employment the complainant was entitled to compensation for the overtime.
The Tribunal ordered the organization to **pay the complainant for his 370 hours** and to pay him 1200 Euros costs.

Harassment

Judgment 3347 (WIPO) concerns a harassment complaint. The organization found none. The complainant claimed to have been refused **legal assistance** during the interview. The Tribunal held that "*There is no basis for this position in the case law or in the Staff Regulations, Rules or other internal documents*", i.e. since no legal assistance was foreseen by the internal regulations, the complainant had no right to legal assistance. For her other allegations the Tribunal did not see "evidentiary foundation." The complainant was dismissed on the substance but the complainant was awarded 2.5k SwFr in damages and 0.5k SwFr in costs because of the organisation's failure to provide her with a relevant document.

The above judgment once more throws serious doubts on the Tribunal's claims that it respects "general principles of law" above and beyond what the explicit rules and regulations of the organization concerned. Note that the refusal of legal assistance was in the context of a harassment complaint. Thus the refusal itself already seems to confirm that the treatment of the complainant was inappropriate.