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Zentraler Vorstand . Central Executive Committee . Bureau Central

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117th Session of the ILOAT

Summary

*The 117th Session of the **Administrative Tribunal of the International Labour Organisation (ILOAT**; herein after "Tribunal") pronounced 25 Judgements on 28.04.2014. Nine Judgements concerned the EPO, all were lost. This paper discusses the EPO cases and summarises the results from the non-EPO cases.*

Introduction

The 117th session was presided over by Mr Barbagallo (Italy). All seven Tribunal Judges participated in the 117th session (a full list of the members of the Tribunal can be found here).

The President opened the session presentation with an introductory statement: "*Once again, I would like to encourage the parties, both parties, to reach agreed solutions."* However, in the absence of any concrete suggestions as to how this could be achieved and without any concrete pressure on the defendant organisations - stronger party in the conflicts – these statements appear hollow.

Attached to the paper version of the Judgements distributed after the session, were 5 withdrawals: no information is given with regard to the content of these cases.

The president also stated that the 118th session of the Tribunal had started the same day and the 119th will start on the 27 Oct. This means that a further additional session in 2014 is not planned.

The number of EPO cases confirms the statements of Tribunal in the previous session that the 5 case limit has been removed. Nevertheless the delays in at the Tribunal remain significant. For the current session the duration from the filing date are :

(in months)	Min	Max	Average
EPO cases	36	51	45
Other orgs	12	45	28
All cases	12	51	34

For further information on delays see the SUEPO report on the Internal Justice System[1]. As has been clear for some years, the Tribunal no longer holds hearings.

[1] For further information see Justice System Report

Summary of EPO cases

Medical matters

Judgement No. 3306 joined two complaints from the same applicant The issue at stake was the nature of his part-time. The complainant had been granted a request under Art. 56 of the ServRegs to work 50% on personal grounds. The request had specified "for health reasons". He consequently worked at 50% - on 50% pay – from Sept. 2008 through August 2010. Following an extended period of sick leave the Medical Committee found the complainant's sick leave ended on "*13 September 2009, since then fit to work (50% part-time)".* The administration interpreted this as a confirmation that the complainant was fit to return to the previous arrangement. The complainant considered the medical committee's opinion to mean that he was only able to return at 50% on medical grounds according to Art. 62(9) ServRegs, which would make a considerable difference in his payment. The EPO contacted the two doctors in the medical committee to request clarification. The doctor appointed by the complainant declined to respond. The doctor appointed by the EPO responded confirming the interpretation of the EPO. The Tribunal concluded that there was nothing to support the complainant's argument and the complaint was dismissed.

Judgement No. 3309 also concerns the calculation of part-time sick leave. By decision of CA/D 23/07 of 29 June 2007, the Admin. Council amended Art. 62 of the ServRegs with effect of 2 April 2007. As a result for staff working part-time (e.g. half days) for medical reasons, a period of annual leave is no longer calculated on the basis of the hours that they actually worked but on a full-time basis. The new regulations were applied to the complainant although he was only informed of the change upon return from sick leave. Following a IAC opinion that was in his favour the complainant obtained his request of a recalculation under the old regulations. He nevertheless took his case to the Tribunal seeking to have the regulation itself quashed. The Tribunal rejected that claim referring to Judgement 3048: since the complainant was no longer negatively affected by the application of the general decision he could no longer challenge it. The complaint was dismissed as irreceivable.

This case shows the absurdity of the Tribunal's stance with regard to general decisions. In this case, although the Tribunal suggests he could file further complaints as and when the new Article 62(5) is applied to him, this will require a further management review and internal appeal, and ultimately a further complaint to the ILOAT. It also raises issues with regard to time limits for further appeals. Not only is this inconsistent with previous case law, the stance of the Tribunal means that each and every application of Art 62(5) must be appealed separately. SUEPO does not see how this can contribute to reducing the caseload of either the IAC or the Tribunal.

Recruitment/selection for A6 posts

Judgement No. 3308 was filed by a colleague in his capacity as member of the Staff Committee and of the GAC against decision CA/D 20/07 of the Admin. Council. This decision granted the President the authority to adopt a new recruitment procedure for Principal Directors. The Tribunal considered the complaint premature since until then the new procedure had not been implemented. The complaint was was dismissed.

Prolongation beyond age 65

Judgement No. 3316 dealt with non-prolongation beyond age 65 for a further year (the complainant has already been extended for one year). The Tribunal stated that: "*it will not ordinarily interfere with the assessment of similar circumstances by the decision-maker*" Significantly it commented that the reasons given by the EPO "were, at best, a cursory explanation of the decision". It continued that in his letter the Principal Director has nevertheless made it "tolerably" (sic) clear that the reasons for not prolonging the employment were that the circumstances which at the time of the initial decision to prolong no longer existed. The complainant further argued that the decision should have been taken by the President and not by a Principal Director. However, the Tribunal assumed (sic) that the power had been lawfully delegated. In an interesting aside the Tribunal criticised the lack of access to the IAC in this case[2]. However, no further consequence were attached. The complaint was dismissed.

[2] JN 3317 Consideration 2 "Regrettably, the Service Regulations do not provide for an internal appeal in a case such as the present, before an employee can appeal to the Tribunal."

Judgement No. 3317 dealt with a further case of non-prolongation after age 65 on the grounds that the decision had been taken without proper authority. In this case there was evidence of delegation of power to the Principal Director. Before taking that decision the Principal Director should have consulted a "Coordinating Committee". The (new) Principal Director had taken the challenged decision on his first day in the new post. The EPO nevertheless claimed that a consultation had been made and that the negative conclusion of the Coordinating Committee had been communicated to the Principal Director, providing copies of e-mails as evidence. The complaint was dismissed.

Education Allowance - handicapped child

Judgement No. 3310 filed on 29 Sept. 2010 concerned the calculation of the education allowance for handicapped child allowance (Art. 69 ServRegs). The Office based the calculation on the normal dependent's allowance rather than on the (double) allowance for handicapped children. The Tribunal disagreed with the Complainants interpretation since higher education costs could be claimed separately (Art. 69(10)). The complaint was dismissed.

In an interesting aside, the Tribunal observed that for the purpose of Article 69(10), what is relevant is the nature of the education and training provided to the child and not the broad characterization of the school providing the education or training. Whilst this does not appear to have played a role in the current judgement, it could be important for other cases.

Legality of Total Smoking Ban in EPO

In Judgement No. 3319 the complainant challenged the decision to no longer to allow smoking in the EPO's cafeteria. The Tribunal stated that a total ban on smoking is a matter under the discretion of the organisation. The argument that the EPO policy was not consistent with EU Directive 89/654/EEC was dismissed since according to the Tribunal such law does not apply to the EPO or its staff. The complaint was dismissed.

As far as we are aware the general ban on smoking still applies. Nevertheless there are reports of senior officials smoking within the EPO, and in EPO vehicles. Rumour has it that within the President's office the smoke detectors have been disabled to accommodate this behaviour. If the latter would turn out to be correct, not only would that contravene the EPO regulations, but it would neglect the EPO's duty of care towards other staff working on that floor, and represent an increased fire risk for all working in the building.

Other matters

Judgements 3325 and 3326 were filed by the same complainant. Judgement 3325 joined two applications and concerns the refusal of the IAC to provide a transcription of the hearings. Judgement 3326 related to an examination report.

In both Judgements, the Tribunal considered that the internal means of redress had not been exhausted since the complainant had failed to request a management review and file an internal appeal before filing with the Tribunal. The complaints were therefore considered irreceivable.

However, even though the refusal by the IAC Chair to provide access to the hearing's minutes may not be qualified as an administrative decision, as such, it is a decision which has a negative effect on the staff member. Since this decision was taken by the IAC, any meaningful review would need to under-taken by an independent body. The only suitable body available would appear to be the Tribunal. Therefore claiming that this must be subject to management review and internal appeal is strange, since its sole effect is to subject the applicant to further unnecessary delay.

Summary of non-EPO cases

Dignity and Harassment related issues

Judgement 3307 (OPCW). The Complainant had been directly appointed as Chief of Cabinet for three years. His initial appointment was challenged and set aside by the Tribunal. He apparently **agreed** to be put on special leave with full pay until the end of his appointment. Three months later he requested moral damages on the grounds that the above decision was humiliating and embarrassing. The Tribunal saw no unfair or humiliating treatment and noted that the Complainant had himself agreed to the measure. The complaint was dismissed as unfounded.

Judgement 3318 (FAO). The case concerns a complaint for harassment by the complainant's superiors. The Investigation Panel in charge considered the charges unfounded. The complainant subsequently filed and internal appeal. The Appeals Committee found in favour of the complainant. The Director-General (equivalent to our President) considered that "*the Appeals Committee had wrongly substituted its own assessment for that of the Appeals Committee and had, furthermore, confused the concepts of harassment and poor personnel management."* The Tribunal did not follow the reasoning of the Director-General and considered that this was a case of harassment. The complainant was awarded 30.000 US dollars in damages and 5.000 dolars in costs.

Judgement 3314 (OMS) concerns another harassment complaint. The Tribunal found that the Organisation had failed in its duty to investigate the complaint promptly and thoroughly ,thereby exposing her to continued harassment. The complainant was awarded 25k US dollars and 6000 US dollars in costs.

Judgement 3315 (OMS) joined two complaints by the same person (her second and her third). The complainant claimed that she had been submitted to a *"series of acts of institutional harassment and retaliatory actions".* The Tribunal agreed with the complainant and awarded her 65.000 US dollars for moral injury and 3.000 dollars in costs.

Judgement 3321 (ILO). The complainant had been dismissed following a conflict with his superior and reinstated following Judgement no. 2468. However, his negative staff reports of the previous period remained. No reports were made on the last 4 years before retirement. This was considered a procedural error and resulted in award of 10k SFR + 1k costs. Oddly the Tribunal did not address the other consequences of staff reports but rather stated his attitude towards the superior would have in any case prevented promotion. Whilst this is probably correct, if the attitude resulted from the original harassment, it hardly seems appropriate to hold this against the complainant.

Salary adjustment

Judgement No. 3324 (CCC) Salary adjustment of 1.1% rather than 2.2% recommended by the relevant regulations. Tribunal ruled that merely wanting to save money is not sufficient grounds. **The decision was set aside and sent back to the organisation for take a new decision in line with the Judgement.** The complainant was awarded 1000 Euros in costs.

Career / appointment / renewal

Judgement 3322 (ILO) The complainant challenged the decision of the Organisation not to grant her a promotion, instead promoting a colleague who clearly did not satisfy the criteria. ILO argued that the application of the ServRegs had been suspended by a Circular. The Tribunal considered that this constituted a "gross breach of the hierarchy of rules" and that the actions of the ILO were tainted by an error of law and unequal treatment. The complainant was awarded 10.000 SFR in moral damages and 1.000 SFR costs, but no promotion or even referral back to the Organisation for decision.

Judgement 3329 (UNIDO). The Complainant refused reassignment to Bangkok. Subsequently his contract was not renewed. The Tribunal considered this a hidden disciplinary measure. As is becoming increasingly the practice, the Tribunal did not order reinstatement but made an award of damages (25.000 Euro) and costs (2000 Euro).

Review, Recievability and time limits

Consistent with its case law, the Tribunal rarely admits an application for review. In this session two request for review were dismissed under the summary procedure.

Judgement 3327 (UNIDO) concerned the review of Judgement 2966. The earlier complaint was dismissed as irreceivable for being time barred. It appears from this Judgement that **the Tribunal considers e-mails to be legally valid form of notification.**

Judgement No. 3328 (UNIDO) Review of Judgement 2966 that was apparently favourable. The complainant left it to the Tribunal to "exercise its authority to determine itself the grounds for review put forward" (?).

Judgement No. 3311 (OIM) and Judgement No. 3330 (UNESCO) were time barred and dismissed in summary procedure.

Concluding Comments

General Matters

What is positive in this session is that the Tribunal is recognising harassment and taking it seriously. The Tribunal consistently ruled that harassment complaints must be investigated "thoroughly and promptly". In cases of harassment the Tribunal may award a considerable sum in damages, up to 65.000 US dollars in this session (Judgement 3315). On the negative side: even the relatively high damages often do not compensate for the loss of employment or career opportunities that are often the end result in harassment cases. In Judgement 3321 and 3322 concerning non-promotion the cases were won in the sense that the complainants were awarded damages but in neither case was a promotion ordered.

A negative point that must be mentioned is an increasing impression of bias in favour of the organisation. This is particularly obvious e.g. in Judgement 3316 where the Tribunal presumes correct delegation of power by the Organisation (point 3, last paragraph). In this context we note that the previous session the Tribunal accepted – without evidence – a delegation of power from the Administrative Council to the President for a decision concerning a DG3 member.

We note that from the last two sessions, of 17 EPO cases only one was won, i.e. less than 6%. For the other organisations the figures are 30 cases won from a total of 65 i.e. 46%. This is a marked difference. We doubt that it reflects the merit of the complaints themselves, rather we suspect that other factors biasing the outcome. One explanation could be that in an attempt to reduce the backlogs, the Tribunal is seeking to eliminate cases which clearly lack merit.

Another explanation could be that the EPO has become more effective at avoiding the formal errors which the Tribunal criticised in the past and therefore avoid the jurisdiction of the Tribunal. A contributing factor that is apparent is the readiness of the Tribunal to grant the EPO discretion on a number of issues. Whatever, the explanation, it is further evidence of lacking legal protection for staff of the EPO.

Since bringing complaints is time consuming and expensive, **we strongly advise staff to seek the advise of the staff representation and/or one of the lawyers working for the staff representation before filing a complaint at the Tribunal**.

Televising and publication of Judgements

The initiative of the Tribunal to promptly publish its Judgements is to be welcomed. The purpose of televising the announcement of the Judgements is less clear since this is only available from the following day at the same time as the Judgements themselves. It is also unclear why the availability of the video was restricted to 48 hours, particularly given this is the first time the Tribunal has done this and none of the interested parties were aware that it would take place. Whilst these measures are clearly helpful, one has to wonder if the goal is to reduce attendance at the public announcement sessions, the only situation in which the Tribunal is confronted with it's quasi-public audience.

The Executive Committee
SUEPO