

# 114th Session of the ILOAT

## Summary

*The 114th Session of the Administrative Tribunal of the International Labour Organisation (ILOAT; herein after "Tribunal") pronounced 43 Judgements on 06.02.2013. Five of the cases concerned the EPO. Formally, the complainants won 4 of the 5 cases, although in two cases this resulted in very low awards of damages. However, a number of interesting points were clarified by the Tribunal. This paper discusses the EPO cases and highlights interesting results from the non-EPO cases. In its final comments this paper also addresses the fundamental capacity problems of the ILOAT that triggered the Tribunal to impose an artificial limit of 5 cases per organisation per session. For some of the larger organisations, and in particular the EPO, this is a large reduction from previous sessions and will have a catastrophic effect on delays for complainants.*

## Introduction

The Tribunal hears complaints relating to disputes between employees and organisations for 59 international organisations. The Judgements are orally presented in open session twice a year in Geneva, at which time they become legally binding. Following the presentation, the Judgements are publicly available in paper form and are then sent to the parties via post. They are thereafter published online<sup>1</sup>. This report summarizes observations from the 114th session of the Tribunal, and important developments in the case law. For more general comments on the functioning of the Tribunal, we refer to the comments made in our reports from the 106th and later sessions of the Tribunal, available from the website <http://rights.suepo.org>

The 114th session was presided over by Mr Ba of Senegal. According to the Tribunal's statute, the Tribunal should comprise seven judges. Following the resignation of Ms Gaudron after the 113th session, taken with the earlier resignation of Mr Gordillo, the Tribunal had only five judges. Since then two further judges have been appointed Mr Michael Francis Moore and Sir Hugh Anthony Rawlins. Sir Rawlins does not appear to have participated in the 114th session. We hope that now the Tribunal is in full composition, the number of cases handled per session will

again increase to the level needed to prevent the backlog growing further.

As usual, the Tribunal did not hold hearings in any of the 43 cases. As set out in our previous reports, for example of the 110th session, public hearings are necessary to ensure transparency and thereby accountability of the Tribunal, an oral and public hearing being an essential element of a fair trial<sup>2</sup>. The Tribunal continues to claim that it could hold hearings; however, the last hearing was in 1989.

## Summary of EPO cases

### **Reimbursement of Medical Expenses**

Judgement number 3158 dealt with the non-payment of a Van Breda claim. The issue was whether the products in question would qualify as a medicine according to the four criteria set out in an explanatory note of 20th October 2000. The Administration consulted the EPO Medical Advisor, who agreed with the conclusion of Van Breda. Strangely the Internal Appeal Committee (IAC) seems to have recognised that it was not competent for medical matters but it nevertheless issued a negative majority opinion which stated that Van Breda had applied the terms of the CIC correctly. This opinion was followed by the President.

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<sup>1</sup> The Tribunal's website is <http://www.ilo.org/trib>

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<sup>2</sup> ECHR Judgement [Miller v Sweden](#) see p29-37

The Tribunal saw the matter differently: it considered that the terms of CIC and the explanatory note are implicitly medical and that judgement as to whether a particular product is both a "generally accepted medical treatment" and has a "proven therapeutic effect" (i.e. that they are medicines) must be determined by a Medical Committee in accordance with Article 90(1) Serv Regs. The Tribunal also cited prior case law (JN 3030 consideration 7) in support of its arguments, this judgement also states that it is not for the complainant to request the convening of a Medical Committee, but rather it was the Organisation itself which was responsible for referral of the matter. In conclusion the Tribunal annulled the decision of the President and referred the matter back to be re-decided after consultation of a Medical Committee in accordance with the guidance given in the judgement. This guidance included the reference to Judgement 3031 (consideration 14) in which it is stated that by applying the terms of the "unpublished agreement" Van Breda had "acted outside the scope of its authority". It is interesting to note that in Judgement 3031(7) the EPO itself described the "unpublished agreement" as being merely "indicative". In referring this case back to the EPO, the Tribunal also stressed that "The Medical Committee will give its opinion considering, **but not bound by**, the interpretation detailed in the explanatory note of 20 October 2000". Moral damages and costs were also awarded.

With this decision the Tribunal has clarified that such matters must be referred to the Medical Committee. It also reinforces previous case law that agreements between the EPO and Van Breda cannot limit either the Service Regulations or the terms of the Collective Insurance Contract

The ILO also raised an important procedural matter regarding the composition of the IAC; it stated that a complainant should be informed about any change in the IAC composition. The Tribunal also stated that a change in IAC composition, after hearings have been held, might unduly influence the proceedings.

## **Transfers and Scope of discretion of EPO and role of IAC**

Judgement 3161 involved the transfer of a staff member from DG5 to an examiner post in DG1 following a re-organisation in DG5 in 2007. The staff member had been originally recruited as an examiner in 1988 but was transferred to DG5 in 1992. The IAC provided a majority opinion that the appeal be allowed and that the staff member be assigned to a post commensurate with his skills and experience, preferably in DG5.1. The President however, rejected the appeal relying on the minority opinion.

The Tribunal described this decision as "fundamentally legally flawed" in that it was based on a flawed interpretation of the role of the IAC.

The reasoning given by the President was that the Majority opinion of the IAC had exceeded the limits of legal review citing Judgement 1929 consideration 5. This refers to a general principle that the ILOAT will not review "discretionary" decisions of the administration unless certain criteria have been met, for example error of law, or fact has taken place, or there is evidence of bias. However, the Tribunal stated that these criteria apply to "judicial review" and not to the internal appeals process that serves a different purpose. The Tribunal stated "this [the interpretation of the President] involves a fundamental misconception of the role of the Internal Appeals Committee and confused its role (and the principles governing it) with the role of a judicial body". The Tribunal went on to explain that the Role of the IAC was to review the decision under appeal, "on its merits". That is to say "to determine whether the decision under appeal is the correct decision or whether, on the facts, some other decision should be made".

The Tribunal notes that the IAC is advisory and its role is limited to making recommendations, however, "the President is obliged to give proper consideration to the recommendations of the Committee and not avoid addressing the reasoning of its members". In this case the erroneous

dismissal of the majority opinion had the effect that the President failed to address key features of the 15 page analysis of the Committee. There was no adequate answer to major elements of the Committees arguments. Referring to Judgement 2339 consideration 5 the Tribunal concluded that the decision of the President was "not fully and adequately motivated as is required".

The Tribunal further stated that the "right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority" (Judgement 2781). In this case the President of the Office "erroneously treated the lawfully founded recommendations of the majority of the IAC members as involving an excess of power". The decision was therefore set aside and remitted to the EPO to take a further decision considering the recommendations of the IAC. The staff member was also awarded 10,000 SFR in moral damages and 6000 SFR in costs.

On a general level this judgement is extremely important since it sets out the limits of discretion that a head of organisation has when deviating from the opinion of an internal appeal board without appropriate grounds and reasoning.

Another interesting aspect is the distinction the Tribunal makes between an internal appeal board and a judicial review. This is important because it means that the internal appeals bodies cannot be considered to meet the requirements of access to court (Article 6.1 ECHR) as is sometimes argued by the organisations. It also clarifies that the IAC has the role to check not only the legality of a decision or act, but also its correctness. This includes, where appropriate, making a recommendation for an alternative course of action. As such the Tribunal has clarified that the scope of the internal appeal is broader than that of the judicial review undertaken by the ILOAT.

In the light of this Judgement it is clear that removal (or weakening) of an internal appeal board will result in a reduction of the protection provided to staff.

## **Duty to inform the EPO**

Judgement 3167 dealt with the recovery of payments for household allowance. The staff member had not informed the Office that the income of her spouse had increased. When the EPO discovered the change they corrected the amount of payments and sought to recover the undue payments. The staff member challenged this and filed an appeal. The EPO suspended its efforts to recover the amounts pending outcome of the appeal. The IAC recommended rejection of the appeal and this was confirmed by the President. The staff member claims that the EPO was responsible for the error since it had failed to follow its own rules in that it had not requested the necessary information regarding her spouse's salary at the beginning of each year.

The Tribunal disagreed. As is the practice, upon requesting household allowance the staff member had signed a commitment to "give notice of any changes as soon as they occur". The practice of the Office to request such information did not in the Tribunal's view relieve the staff member of this obligation. It also noted that the EPO was fair in its dealing with the case, it had requested recovery as soon as the error was discovered and had suspended recovery pending the outcome of the appeal. As a result the Tribunal found with the EPO and rejected the appeal.

On the negative side, this decision appears to show bias in favour of the defendant organisations, in so far as it permits retroactive recovery for over 3 years. In general the Tribunal limits the retroactive application against an organisation to 3 months (presumably due to the time limit for appeal). This means for example if a staff member discovers that they have been underpaid for years, even where this can be clearly shown to be an error on the part of the organisation, they may only claim retroactive correction up to 3 months. It is not clear why the Tribunal applies a different standard to the Organisations and the Staff; both parties require some degree of legal certainty and it is clear that the consequences for staff are proportionately higher than for the Organisations.

This is a matter which SUEPO will address with the administration of EPO. In the meantime, we can only recommend staff inform the Administration promptly of any important changes to their personal circumstances which could have an effect on their entitlement to allowances. This way they can avoid unpleasant surprises.

### **Calculation of level of Invalidity Pension**

Judgement 3179 dealt with the case of a staff member who retired on invalidity. The point of dispute was the final grade and step. The EPO calculated the pension based on a basic salary of A3 step 11. The staff member challenged this claiming that he had attained A3 step 12 and that his pension should be calculated on this basis. The EPO initially claimed that the staff member lacked one day's seniority for step 12. In the appeal the staff member challenged this, but also argued subsidiary that he should be permitted to take outstanding leave for the missing day such that he would meet the criteria. In the end the Tribunal did not rule on the matter since the EPO realised that it had made an error and granted the request. The staff member, however, continued the appeal since he had incurred costs in the level of 2500 Euro and requested that these be paid. The Tribunal agreed and ordered the EPO to pay the costs.

It is interesting that the EPO took 3 1/2 years to realise its mistake. We assume from the timing that this case was one of those settled in the review that took place in 2010. The staff representation has always expressed the view that a lot of appeals result from such errors and that these could be avoided and/or corrected. We hope that this is the type of case that will be prevented by the new review mechanism introduced from 1 Jan 2013.

### **Appointment v Promotion**

Judgement 3191 filed by members of The Hague staff committee challenged the appointment of an A3 staff member to an A5 post. The Tribunal stated that it was not clear from the record of the selection process whether the board was "initially undertaken

by a five-person Promotion Board or if it was constituted as a mixed Selection/Promotion Board because the competition was open to both internal and external candidates". The Tribunal further noted that the Board had observed that some candidates did not meet the regulations for promotion to grade A5. The Tribunal notes: "In the end a three-member Selection Board prepared and signed a report containing the Selection Boards recommendation to the President".

In the Tribunals view this resulted in the procedure being "flawed and was tainted by favouritism and inequality because the other candidates [the complainants] who did not meet the alleged minimum requirements were not aware that they could also apply".

In its defence the EPO argued that the 5-member board was an error that it later corrected. The Tribunal's view was that this position was "grounded on a distinction between an appointment and a promotion" and was "fundamentally flawed". The Tribunal went on to state: "An appointment is simply the assignment of an individual to a particular position of post. A promotion is the assignment of an individual to a higher position or rank. The fact that a so-called appointment process is used to make a selection or that the assignment is called an appointment does not exclude the fact that it also involved the attainment of a higher position or rank and, in this context, grade. Indeed, that is precisely what occurred in the present case."

The Tribunal considered that it was not so significant whether the criteria in Art 49(7) had been met rather than since this involves a promotion, "the President must consult with a Promotion Board before making a promotion decision" in accordance with article 49(4).

The Tribunal concluded that the President's decision was fundamentally flawed and must be set aside. However, it went on to state "the successful candidate who accepted the appointment in good faith must be protected from any negative consequences". The complainants were awarded 500 Euros moral damages and 500 Euros costs each.

This and similar issues has been a source of constant dispute between the Staff and management, and the misapplication of selection and promotion procedures has been successfully appealed in the past. However, as with this case the measures ordered by the Tribunal have no corrective effect. 3000 Euros is a small price for the EPO to pay for the abuse/misapplication of such procedures. It is nevertheless interesting that the Tribunal has been so clear with regard to defining the nature of promotion which is independent of how it is achieved, e.g. by appointment. The regulations were changed by the EPO in 2007 following successful appeals on similar appointments.

SUEPO will be examining the current regulations very carefully to determine whether the clarifications of Tribunal have an effect on their interpretation. The statement of the Tribunal with regard to the person promoted by a flawed procedure is also interesting, it states that accepting an appointment in good faith would offer a staff member protection from negative consequences. It is not clear how the Tribunal defines good faith. Whereas an external candidate or staff member who has not been involved in any selection or promotion procedure could argue they did not know the procedures were flawed, we wonder whether the Tribunal would also consider this to apply to someone who has been working directly with such procedures including being responsible for their correct application.

### **Interesting findings from non-EPO cases**

#### **Freedom of speech (Freedom of association)**

In Judgement 3156 concerning the ITU (international Telecommunication Union) the Tribunal reiterated its unfortunate stands on freedom of speech for staff associations and extended this views on electronic publications.

The core of Judgement 3156 is the question whether an international organisation may demand management authorisation for staff representation communications prior to publication. The dispute was triggered by a communication of the local staff representation about the suspension of one of its committee members. This communication was considered by the ITU management to violate the principle of confidentiality by lodging allegations against certain managers, although these were not mentioned by name.

The Tribunal reiterated its prior case law, that it will not interfere with a requirement of prior authorisation. This view was established in Judgement 2227 which addressed the matter of the EPO staff representation distributing paper documents using internal mail services. The Tribunal stated that it would only intervene in case a publication request was unduly denied. The Tribunal repeated that publications could be lawfully denied, if, amongst others, it would impair the dignity of the international civil service. This is problematic because it is not determined what "impairing the dignity of the civil service" means in practice, and many Organisations appear to hold the view that voicing a critical opinion is in itself inconsistent with the dignity of the international civil service.

Misinterpreted, this Judgement could open the door for abuse and censorship. In practice, even though the Tribunal has indicated that there are limited grounds for denial of publication, review by the Tribunal would take place only years after the event. This again highlights the problems of the slow appeals process and the lack of means for accelerated treatment or preliminary rulings. If a staff association does not enjoy freedom of communication with staff, this can place a serious limitation on freedom of association.

#### **Selection procedures**

Judgement 3177 against UNESCO was related to a selection procedure, where the Tribunal ruled that the Organisation had not followed its own procedures. The Complainant was awarded moral damages and costs, but despite the flawed procedure

the Tribunal did not however, annul the outcome of the procedure. This Judgement is consistent with a number of rulings concerning the EPO. In effect, despite repeated findings by the Tribunal that organisations fail to follow procedures, the penalties awarded by the Tribunal offer little protection to staff from such abuse. In part this deficiency is probably linked to the delay between the challenged decision and the final judgement from the Tribunal, which is in excess of 3 years in most cases. As a consequence, it is difficult to correct the flawed decision. It would nevertheless seem appropriate that the Tribunal reconsidered its awards in such cases, since trivial amounts do not provide any meaningful protection from such abuse of procedure.

In Judgement 3182 against the ILO the complainant was ranked first by an internal selection board. The DG chose the person ranked third by the Board. Whilst the Tribunal rejected the complainant's claims of bias, it criticised the organisation stating that there are limits to the discretion of the head of an organisation to simply select another candidate without valid grounds. In this case the decision was annulled and the complainant awarded damages and costs.

In this case, as was the case in Judgements 3176 (also ILO) and 3191 (EPO) the Tribunal ruled that the person whose appointment had been annulled should be "shielded from any resulting injury". It is unclear what such a statement means and to what degree this undermines the essence of the decision. It also appears to assume that the person accepted the appointment in good faith. There appears to be little to indicate how such an assertion can be tested in practice.

## **Harassment**

Judgement 3170 against the WTO dealt with a severe workplace conflict that resulted in harassment. The Tribunal criticised the WTO for failure to take appropriate measures to protect the parties. It also criticised the organisation for failing to properly investigate the claims of harassment in an appropriate and timely manner, since it took over a year to conclude the internal investigation. The

complainant was also refused access to mediation on the grounds that it was too costly. The WTO staff has a right of access to mediation on request. The Tribunal awarded the complainant 50,000 SFR in moral damages and 6,000 SFR in costs.

## **General Comments**

### **Time limits and other formal aspects**

A number of cases were rejected summarily under Article 7 of the Tribunal Rules. The grounds included not filing in time (e.g. Judgement 3181), not exhausting internal means of redress (e.g. Judgements 3190, 3187, 3186) and not having a final decision (e.g. Judgements 3187, 3194). As we have stated in previous reports, complainants should take care to ensure they meet these formal criteria, the Tribunal is very strict on such formal aspects and only makes exceptions in very limited cases. If you have any doubts in this regard, please contact your local SUEPO committee.

### **Mass appeals**

The practice of filing mass appeals is often criticised by the EPO administration. In the 114th session there were a number of Judgements dealing with mass appeals from another organisation, in this case Eurocontrol (see Judgements 3189 and 3181). The practice of mass appeals is therefore not limited to the EPO and it is not abuse as is suggested by some administrations; it results from the nature of the appeals process which is essentially an individual system. If the administrations of International Organisations wish to avoid such cases, then it would behoove them to consider long-standing claims of staff to provide a means to efficiently file collective appeals and the means to appeal decisions of a general nature or ones which affect groups of staff.

### **Receivability - Degree of harm**

In Judgement 3180 against Eurocontrol, the organisation challenged the receivability of

the complaint on the grounds that the degree of harm was so low that it was derisory. The Tribunal ruled that the amount disputed may be low (~32 Euro) but this met the requirements or receivability. The Tribunal further added that if Eurocontrol considered the amount to be derisory then “it ought to have tried to put an end to it by reaching an amicable settlement”. The Tribunal ruled in favour of the complainant.

### **Justice delayed is justice denied!**

As reported earlier last year the Tribunal has decided to treat a **maximum** of five EPO cases per session. We were also informed that 150 EPO cases were pending before the Tribunal. With two sessions per year, this means that it will take around 15 years just to deal with the current backlog. We understand that roughly 35 new EPO cases were filed with the Tribunal in 2012, but given the number on internal appeals being (in our view illegally) rejected by the EPO we would expect this figure to increase, in the near future.

The decision of the Tribunal to limit the number of cases per organisation appears to be based on the allegation that the EPO is flooding the ILOAT with a disproportionate number of cases. The attached figures (see below) show that the EPO is indeed the highest user of the Tribunal; but a comparison of the number of case per staff member shows that the EPO cases are completely proportionate to the number of

staff per organisation. The backlog is therefore rather a capacity problem. The Tribunal seems unable (or unwilling?) to accommodate the growing number of cases which is largely the result of increasing numbers of staff having access to the ILOAT.

In the past the secretariat of the Tribunal has claimed that the Tribunal cannot increase its capacity due to the limited availability of the Judges. Clearly, the administrations needs to address this matter as soon as possible, since it is an obligation of the Organisations to provide staff with access to a Tribunal in a reasonable time. In fact, if this criteria is not met, it would bring into question the immunity of the organisations using the ILOAT, since the provision of an adequate protection of fundamental rights (including access to court) is a condition upon which the immunity is based.

SUEPO has written to the Tribunal and is seeking to address the problems in cooperation with other staff associations and federations who are equally alarmed about the situation. One outcome of these discussions is that PSI have written to the Chairman of the Workers' Representatives at the ILO requesting that the matter be placed on the agenda of the ILO Governing Body.

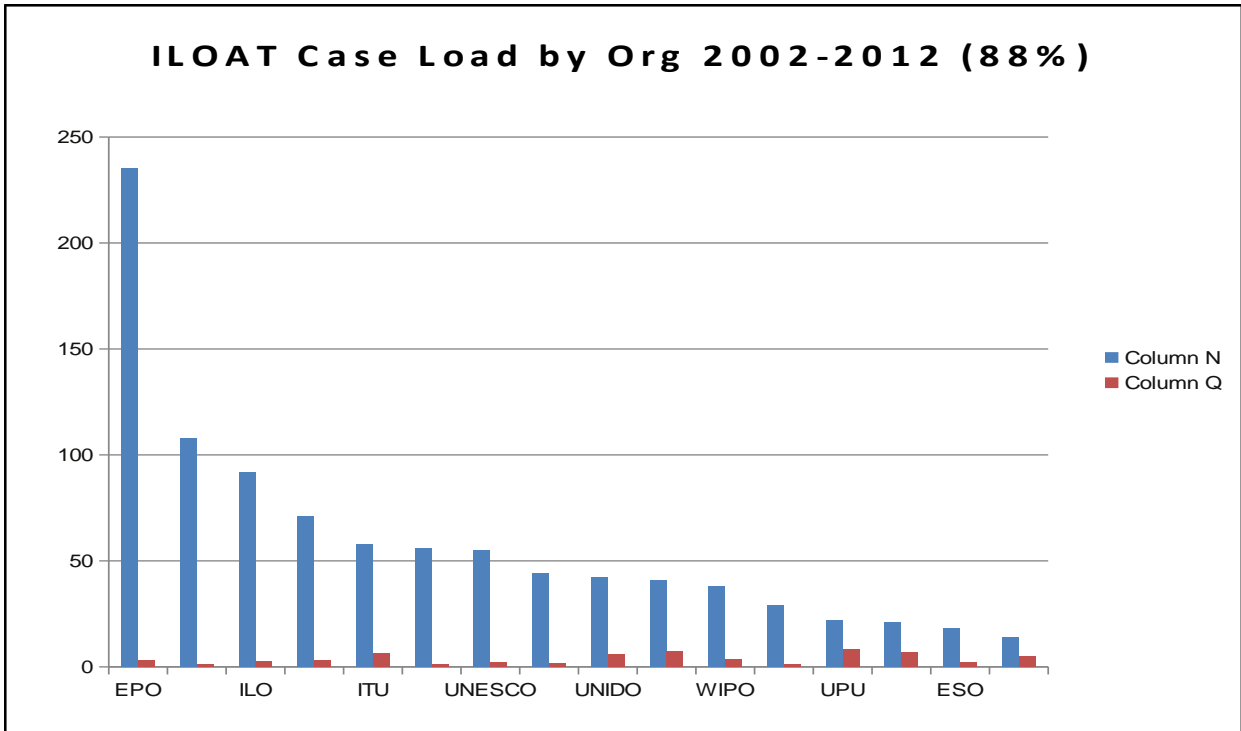
We hope to be able to report progress on this matter in the next few months.

### **The Executive Committee**

## Case Load Figures

The charts show 14 organisations reflecting 88% of the cases.  
Organisations with very low numbers of cases are excluded for readability.

On first appearance the EPO looks to have a very high proportion of the case-load ...



... but this is completely in proportion to the number of EPO staff.

