



112th Session of the ILOAT

Summary

The 112th Session of the Administrative Tribunal of the International Labour Organisation (ILOAT) pronounced 54 judgements on 8 February 2012. The EPO was again the Tribunal's largest "customer", accounting for no less than 12 of the cases! This paper discusses the EPO cases, in particular pointing out items of interest. Also, items of interest from the non-EPO cases are highlighted.

Introduction and General Comments

The ILOAT hears complaints relating to disputes between employees and organisations for 56 international organisations. The judgements are orally presented in open session twice a year in Geneva, at which time the judgements become legally binding. Following the presentation judgements are publicly available in paper form and are also sent to the parties by post. Online publication on the tribunal's website (www.ilo.int/tribunal) follows within a couple of weeks. This report summarises observations from the 112th session of the ILOAT, and any important developments in the case law.

In this session 25 of the Judgements were decided in favour of staff, a further 9 were partially in favour of staff. This represents a success rate of 45% or 61% respectively. The EPO cases fared less well and only 3 wins and 2 partial wins from 12 cases representing 25% or 41% respectively.

For more general comments on the functioning of the Tribunal, we refer to the comments made in our report from the 106th and 107th sessions, available from

<http://www.suepo.org/archive/su09019cp.pdf>

and

<http://www.suepo.org/archive/su09106cp.pdf>

As stated in said earlier reports, SUEPO will continue to monitor the work of the Tribunal and to push for needed reform. One issue which should be addressed is the lack of recognition of fundamental rights within international organisations. Discussions with the President of the EPO regarding staff concerns with the appeal process and fundamental rights of staff remain on the agenda but have to date not been addressed in detail. During meetings on the HR Roadmap, the President agreed to deal with these issues in 2012. We remain hopeful that progress can be made, but also point out that SUEPO will continue to support litigation in national and international courts where necessary. In this respect we remind staff that three cases supported by SUEPO are pending before the European Court of Human Rights (ECHR). Two of these cases deal with discrimination against job applicants on the grounds that they were disabled. The third case addresses staff who suffered harm as a result of inadequate health and safety protection within the EPO.

Technically, these cases are filed against the host state since the EPO is not a party to the ECHR. However, according to a consistent line of jurisprudence from the Court, member states continue to be responsible for fundamental rights protection of international organisations and may not rely on the immunity of the organisations to avoid

responsibility where fundamental rights are not adequately protected within the organisations themselves.

SUEPO representatives have also met with the representatives from other international organisations with a view to working together towards fundamental reform.

More information on these topics can be found at the site <http://rights.suepo.org>

Change of Presidency of the ILOAT

It was a surprise this session that the Tribunal has again changed its President. The 112th session was presided over by Mr Seydou Ba. The previous session was presided over by Mrs Gaudron. This change was not announced prior to the session presentation on 8 February. Such a change took place also in the 108th session, (see our report <http://www.suepo.org/archive/su10021cp.pdf>).

The Tribunal is of course at liberty to appoint its own president from within its members but the practice of rotating this function is unusual for judicial bodies.

Informal inquiries suggest that the Tribunal has reached an agreement to rotate the presidency between Mr Ba and Mrs Gaudron. If our information is correct, then we expect that Mr Ba will remain as President up until the 115th Session and thereafter Mrs Gaudron will become the President.

As we wrote in our report of the 108th meeting, each President (for better or worse) influences the course of the Tribunal. It remains to be seen what, if any, effect this unusual practice will have on the Tribunal.

Joining of Cases

The tribunal may join complaints which it considers to be sufficiently similar. This practice has varied over the history of the Tribunal. After the 109th session, we reported that the Tribunal had, in a number of cases, combined complaints, even if they seemed quite different. In the 110th session, the Tribunal seemed to reverse this practice. For

example, they turned down requests by the organisations to join the complaints leading to judgements 2955 and 2956. and also judgements 2965 and 2966, on the grounds that they were unrelated.

In this session, the 112th, a significant proportion of cases were joined. Seven of the judgements were the result of joined applications. In most of the cases it was the combination of two cases from the same applicant, one case however, 10 applications were joined into a single judgement.

Hearings

As with previous practice the Tribunal did not hold any hearings. We have pointed out previously that an oral and public hearing is an essential element of a fair trial¹. The systematic failure to hold hearings is one of the major criticisms of the working practices of the Tribunal. It is nevertheless noticeable that the Tribunal has begun to reason, albeit superficially, some of its refusals to hold hearings. Examples are Judgement No. 3057 and 3058 (consideration 2) and 3059 (consideration 9) in which the Tribunal confirms its consistent practice to deny oral hearings. The practice in the past has tended to be a standard clause rejecting the request. The example in the cited cases remains inadequate but is an improvement and could indicate that the Tribunal is becoming aware that its behaviour in this respect is not consistent with minimum standards of judicial practice.

Summary of EPO cases

Use of contract staff

Judgement no. 3051 was filed by a 3 members of the Munich Staff Committee. The application challenged the use of a consultant in the controlling office who the complainants claimed was in effect a de facto member of staff. The use of contracts in this manner would therefore undermine transparency and permit the administration to bypass selection procedures.

¹ ECHR Judgement [Miller v Sweden](#) see p29-37

The Tribunal stated that the contractor in question was not formally a member of staff since he was employed under German law by a company of which he was the CEO. It further stated that the practice of the EPO to grant facilities (an office) and telephone numbers or email addresses to contractors did not in itself mean that the person was in effect a member of staff. In determining whether or not the contractor in question was a de facto member of staff the Tribunal considered it relevant that he was simultaneously the manager of an external company and undertook work for other clients during the same period. The Tribunal noted that the work he undertook

was in general 70 days per year and that it had only exceeded 100 days in one year. Together with the fact that the employment contract and the contractual relations with the consultancy were governed under German law this led the Tribunal to conclude that it did not have jurisdiction in the current case since the service regulations did not apply.

The case was nevertheless interesting since it is clear that the decision of the Tribunal was not merely based on the fact that the person in question was an external contractor, but also assessed whether a de facto relationship existed. In this case the time spent working for the EPO vis a vis other companies appears to have been of primary importance to the Tribunal. The case may have been different were the person concerned working full time for the EPO.

Selection of Director

Judgement No. 3052 was filed by a member of the Munich Staff Committee and challenged the appointment of a Director in DG3 on the grounds that the selection procedure was flawed and that the successful candidate did not meet the minimum requirements.

The complainant argued that the Selection Board was flawed since it included a non-permanent staff member in its composition. The relevant regulation reads:

“The Selection Board ... shall normally comprise a chairman, one or more members

appointed by the appointing authority and one member appointed by the Staff Committee

The grade of the permanent employees who are members of the Selection Board shall be at least equal to that of the post to be filled”

The Tribunal's assessment was that this wording did not exclude the participation of non-permanent staff. It merely defined a grade requirement for any permanent staff member of the Board.

The Tribunal further noted that the issue of the suitability of the candidate was a matter for the Selection Board and reiterated its case law that it would not “substitute its [the Tribunal's] opinion for that of the Organisation unless the decision was taken without authority, showed some procedural or formal flaw or a mistake of fact or of law, overlooks some material fact, is an abuse of authority or draws a clearly mistaken conclusion from the facts.”

The Tribunal concluded that the complainant had not established any of these conditions and the case was therefore rejected as unfounded.

In the internal appeal procedure the Complainant had requested disclosure of confidential documents in order to provide proof of the argument that the candidate did not meet the minimum requirements. It was argued that this resulted in a procedural flaw.

The Tribunal supported the view of the Internal Appeals Committee (based on the Tribunal's case law) that there was a right of access to all documentation which affects staff personally and that confidentiality can only be invoked as a reason not to disclose such information in limited circumstances. However, the Tribunal stated that the complainant had not established that the lack of access to the confidential documents rendered the internal appeals procedure unlawful. Neither did the Tribunal consider that the complainant had any right of access to the confidential documents because they did not pertain to her personally.

This is not atypical of the reasoning of the Tribunal in that it establishes the right of access to confidential information in principle,

but then finds that it does not apply in the given case.

In this case, the staff member filed the complaint as a member of the Staff Committee. As such, according to the Tribunal's case law, the rights of the Staff Committee apply. Access to the confidential data did therefore have an impact on the complainants rights since it would have been necessary to establish whether or not the candidate met the minimum requirements. The requirement to demonstrate that the information requested is relevant is an extremely difficult standard to meet unless the information in question is already known.

Consultation of the General Advisory Committee for Patent Law matters

Judgement No. 3053 was filed by a member of the Berlin Staff Committee in his capacity as both a GAC member and a member of the local Staff Committee. The complaint challenged decision CA/D 2/09 and CA/D 3/09 which are amendments to the patent procedures. Neither of the two proposals had been submitted to the GAC.

The complainant argued that the decisions were also illegal since they changed the responsibilities of both search and examination divisions in a manner that was not consistent with the EPC.

The Tribunal considered that the key issue was whether or not the matter in question was within the meaning of "concerns the whole or part of the staff to whom the service regulations apply" as set out in Art 38(3) of the Service Regulations (GAC consultation) .

The applicant claimed that the decisions did have an impact of the staff since they were required to implement the changes.

The Tribunal confirmed their past interpretation of the wording of Article 38 and clarified that:

"10. [...] The same is true in the present context. What the expression directs is that the proposal or decision in question Proposals and/or decisions relating to the law and/or

procedures applicable to patent applications do not directly affect that relationship although, as recognised in Judgment 2874, decisions or proposals as to the implementation of changes to the law and/or procedures may well do so. [...]"

Therefore, even though the Tribunal considered that the decisions under appeal are unfounded, the implementation of such decisions may fall under the scope of Art 38(3), if they affect staff "in terms of the work to be performed, the way it is to be performed, the method by which is evaluated, or the like".

The decision further confirmed the conclusions of Judg. 2874 as the Tribunal reiterate that "the EPO was "correct in asserting that the Tribunal [was] not competent to rule on the lawfulness of the amendments to the Convention" but that did "not mean that the President could choose the method for implementing the amendments without consulting the GAC".

Accordingly since the Tribunal considered that standard set by this test was not met in the current case, Article 38(3) is not engaged by CA/D 03/09 and CA/D 03/09.

It is nevertheless apparent that the Tribunal in cases where an impact on staff is not considered to meet the test established in this judgement no legal remedy exists for staff.

The further aspect of this decision is related to receivability. Art 107 sets out the right of appeal and defines to which Appeal Committee appeals should be made. The Tribunal clarified that it was solely the body which had taken the decision which determined the jurisdiction and in this case it was unequivocally the Admin Council. This aspect of the decision demonstrates that the increasing practice of the Council to refer cases to the appeals committee of the President is not consistent with the Service Regulations.

Invalidity - occupational cause in case of alleged harassment - consequential issues

Judgements No. 3056 through 3060 were filed by a staff member from The Hague who was placed on invalidity in 2005 against his wishes and has subsequently been reinstated in 2011. The staff member claimed that he was the subject of an harassment which was the cause of his illness and therefore that his invalidity had an occupational cause. The cases are complex due to their interrelation and jurisdictional issues, and the Tribunal joined a number of these cases. In total the complainant has now 14 cases decided before the Tribunal, but the number of incidents appealed are greater than this since some were joined and some rendered redundant by earlier decisions.

Judgement No. 3056 deals with the complainants invalidity pension. As of 1 January 2008 the former invalidity pension was replaced with an invalidity allowance, under which the former staff member was considered to be inactive but was required to continue to pay pension contributions unless the cause of the invalidity was occupational. It also abolished the tax allowance. It was believed (assumed?) at the time by the EPO that member states would not tax the invalidity allowance, and this has subsequently been demonstrated to be incorrect.

The Tribunal had noted in previous cases that the issue of whether or not the cause of the complainants invalidity was occupational was in part dependent upon the outcome of other appeals which related to the issue of his alleged harassment.

Since the issue of whether or not the complainants invalidity resulted from an occupational cause had a significant bearing on the outcome of the case, this must first be established. Although the EPO argued that this had already been decided in 2005, the Tribunal considered that in the current case taking into account the outcome of the previous appeals meant that the matter of the occupational nature of his invalidity should be reviewed. However, the Tribunal was not competent to decide in such matters.

The matter was therefore referred back to the EPO for consultation before a newly constituted Medical Committee which should decide within 6 months from the date of the Judgement. The EPO is to provide the Tribunal with the report of the Medical Committee within 21 days of its receipt and the Tribunal will decide on the matter in its 114th session.

Judgement No. 3057 arose from two separate complaints both addressing payments made to the complainant on separation from service. The Tribunal considered that these were the result of the same decision of the President and related so has joined them into one complaint.

The complainant raised a number of claims for example payment in compensation of unused annual leave, and Kober days. The Tribunal found that all claims were unfounded with the exception of an additional 1.6 days annual leave which the EPO had miscalculated. It ordered the EPO to pay the complainant an additional amount of 1.6 days. It also awarded him 500 Euros in moral damages since the finding of the Tribunal was consistent with the recommendation of the Internal Appeal Committee and the President had failed to follow this recommendation without adequate grounds.

Judgement No. 3058 also from the same applicant dealt with allegations that the invalidity was a de facto disciplinary act and/or part of the harassment against him. It also sought to challenge the legality of the invalidity procedure.

The Tribunal stated that it considered the allegation of harassment to be essentially the same as the issue of occupational cause of his invalidity (consideration 3), and will therefore be determined by the assessment of the new Medical Committee ordered by the Tribunal in Judgement 3056. This is a strange conclusion, since the medical committee is not competent to determine whether or not harassment has taken place. This is also a different question as to whether or not the work environment was such that it was a significant factor in the cause of complainant illness. It is clearly possible for a situation to arise at work which negatively affects an employee and

which should have been avoided by the employee, but that this does not necessarily constitute harassment. Nevertheless, the Tribunal considered that since the matter was addressed elsewhere it must be struck out of the complaint. In this discussion the Tribunal also noted that it had ruled on the validity of the decision of the Medical Committee to declare the complainant invalidated in its judgement 2580 and considered that matter also closed.

The remaining issue in Judgement 3058 was that of reinstatement. The complainant requested reinstatement in April 2007, he also filed the appeal at that time. He did not however provide any evidence that he was medically fit until 2 years later. The President did not act at this time, apparently because he had provided copies and not the originals of the medical certificates. Only once the originals were submitted did the Office respond by establishing a medical committee. The Tribunal concluded that it was permissible for the President of the office to act in such a manner since "she" was under no obligation to order the establishment of an medical committee until she had appropriate evidence. On these grounds the Tribunal decided that the claim for (earlier) reinstatement was unfounded and rejected the remaining elements of the appeal.

Judgement No. 3059 filed by the same complainant was also the result of two appeals joined by the Tribunal. In this case the issue challenged is promotion to A4(2). The complainant does not appear to challenge that from his staff reports he did not meet the criteria used by the board to establish particular merit, which is a requirement for promotion. He however alleges that his staff reports were the result of prejudice and harassment and should not stand. The Tribunal stated that he had not proven either allegation and even if this had been the case he had not demonstrated that his performance during the relevant period met the particular merit requirement. The Tribunal also noted that it was not possible to allege long term harassment as the grounds to review previous staff reports.

The Tribunal rejected the case as unfounded.

Judgement No. 3060 from the same complainant challenged the non reimbursement of spa cures for family members. This case was rejected under summary procedure (Article 7 ILOAT Statute) on the grounds that it has been referred to the Internal Appeals Committee and therefore the internal means of redress have not been exhausted.

Incomplete corrections to staff report following successful internal appeal

Judgement No. 3062 was filed by a Staff member in Munich challenging his 2004/2005 staff report. Having failed to reach agreement in the D-Procedure the complainant filed an internal appeal. The complainant was contesting the inclusion of negative comments in the report including a statement with regard to productivity of "just barely good". The conclusions of the Internal Appeals Committee were that the contested reports should be annulled and a new report drafted correcting the challenged comments. In particular it recommended that the comment on productivity should reflect that the complainant's performance was in the middle of good. The President stated that she had decided to follow the recommendation of the IAC however the replacement report contained the comment "in the lower half of good". This is the point challenged by the complainant.

The Tribunal agreed that "in the lower half of good" does not reflect the view of the IAC stating "in the middle of good". That being the case the President had failed to implement the recommendation of the IAC. The Tribunal confirmed its view that "solid good" (requested by the complainant) was consistent with "in the middle of good" as stated by the IAC.

The Tribunal ordered the EPO to make an appropriate correction to the report and awarded the complainant moral damages of 2000 Euro.

With this case it is hard to understand given the clear evidence against the EPO and the cost to the organisation of an ILOAT case (more than 20K) as to why they did not simply implement the recommendation of the IAC. This sort of "fight to the death" mentality, is

reducing but as can be seen from this case, it is still present.

Access to non-public areas of EPO in the Hague for family members

Judgement No. 3075 was filed by a Staff Committee Member in the Hague with 4 interveners who were either Staff Committee members or experts nominated by the Staff Committee. The issue challenged was the access by family members to areas of the EPO designated as non-public. This provision was notified to staff in a note from the administration in 2006. The note was not consistent with the house rules in force at that time and had also not been the subject of a LAC consultation. The Internal Appeal Committee found in favour of the complainant on the grounds that the note had not been subject to proper consultation procedure. The IAC noted that it was not necessary to revoke the note since the Administration had subsequently (correctly) reissued the House Rules which removed the inconsistency challenged in the appeal. The Appeals Committee did however propose an award of 200 Euros for the breach of proper consultation procedures.

The President followed this recommendation. However, the complainant considered the failure to revoke the note to staff inappropriate and that is what is challenged in the application to the Tribunal.

The Tribunal agreed with the findings of the Internal Appeal Committee that it was not necessary to revoke the note, and it considered the issue of LAC consultation was addressed with the award of 200 Euro moral damages. However, they noted that the delay (caused by the EPO) in the internal appeal proceedings was egregious and ordered an award of moral damages of 250 Euro for the complainant and each intervener. It is interesting to note that the Office sought to argue that the complainant was responsible for this delay since he had not pursued his appeal with "due diligence". (NB the delay resulted from the failure of the EPO to provide its pleadings – over 2 years). The Tribunal stated that the EPO is responsible for the delay and that it "has the duty to respect the time limits and cannot rely on staff members to monitor the procedures".

This decision of the Tribunal demonstrates in our view a flaw since the failure to order withdrawal of the note creates a lack of clarity. Whilst formally both the Tribunal and the IAC have a point that the later revision of the House Rules removes most of the inconsistency between the note and House Rules this is only apparent upon detailed examination. It is also somewhat contradictory that where an action or decision is declared to be illegal that the document announcing the decision is permitted to stand.

Reduction in subsistence allowance on mission / Publication of biography on retirement / EPO's responsibility with regard to removal on retirement

Judgement No. 3086 was filed by a former staff member from Munich. The complainant challenges the rejection of 3 internal appeals.

The first issue addressed in the judgement was the reduction of daily subsistence allowance for duty travel on the grounds that a meal was provided at the site he visited. The Tribunal noted that contrary to his claim he had been treated identically as the other staff members who had taken part in this mission. It also noted that the claim was irreceivable since it was only submitted in the rejoinder.

The second issue involved the publication of a Gazette article which he argued did not reflect his criticism of the EPO. The Tribunal noted that he did not have a right to the publication of his criticism of the EPO in the article which was intended to pay tribute to his work and career in the EPO. There was nothing in the article which the tribunal considered was of a harmful nature and neither had this been challenged. The claim was dismissed as unfounded.

The third issue was a claim by the applicant that the EPO was in part responsible for damage to his personal property caused by the removal company following his relocation on retirement. The Tribunal found that neither the claim that the EPO is responsible as a consequence of "informally" recommending the removal company, nor the claim that it is responsible as a result of Art 28 service regulations stands. It therefore concluded that the

issue of the damage was purely an issue between the complainant and the removal company.

The complaint was dismissed in its entirety.

Authorisation of Duty Travel for staff committee members to attend AC

Judgement No. 3088 was filed by a former staff member in her capacity (at the time) as a vice-chairperson of the Vienna Staff Committee. The case dealt with the refusal of the President to authorise her duty travel for attendance at two meetings of the Budget and Finance Committee (BFC).

The Tribunal considered "that the central issue is whether ... the President of the Office could reject a duty travel request submitted by a staff representative and thereby deny her the possibility ... of attending meetings of the Administrative Council. The rules of procedure of the AC stated that unless the AC decided otherwise, staff representatives may attend those deliberations which were not confidential. The Tribunal concluded that only the AC could deny permission to attend the meetings and that the President was only permitted to withhold approval of duty travel where this was based on the interests of the service.

The reasoning of the President was that since another member was attending in his capacity as Chairman of the Central Staff Committee, the Vienna Staff Committee was represented at the meetings in question. The Tribunal judged these grounds to be unrelated to the needs of the service and consequently found in favour of the complainant. The decision was set aside (although it is not clear if this has any consequences), the complainant was awarded 2000 Euro moral damages and 1000 Euro costs.

Although it was not explicitly claimed in this appeal the background was that all four sites are represented at Council meetings. It cannot be assumed that the CSC Chairman represent both the CSC and a local committee. Following this Judgement we are looking forward to see if the President authorises duty travel to permit all 4 local committees and the central committee to be represented at the next meeting.

Non-EPO cases of interest

Same Sex Relationship - meaning of the term „spouse“

Judgement No. 3080 against the WHO dealt with the issue of the recognition of a same sex partner as a dependent.

The Tribunal clarified that the term „spouse“ unless otherwise defined included same sex partnerships (consideration 12). Also that the use of terms Husband or wife in the service regulations does not limit the meaning of the term spouse unless it is unequivocal that this was the intention in drafting the service regulations (consideration 14). The Tribunal also stated that in this case the right to recognition of the complainants partner as a dependent would be backdated to the date which the complainant had first applied for recognition (2003). Although the complainant did not file an appeal until much later, it appears in this case the WHO did not take a decision therefore the matter was ongoing. When the WHO did take a decision it sought to limit the rights to the date on which it issued a note recognising same sex relationships and referring to national law for definition of partnerships. The tribunal found this unlawful since the principle had existed prior to the note and also awarded moral damages for the failure at the level of 15000 USD.

Duty of care and good faith

Judgement No. 3055 against the IAEA. The complainant was recruited on a 2 year short term contract financed by the US State department. In his contract is stated that the second year was dependent upon continued funding.

The claimants supervisor alleged that the US Mission had raised concerns about the complainant and that on this basis terminated support for his post. The Complainant claimed that the source of this information was his supervisor with whom he had poor relations and that his supervisor had deliberately provided the US mission with the (incorrect) information as a retaliatory measure. This was not substantiated either by the

complainant nor an OIOS investigation report. Nevertheless the Tribunal determined that the complainants supervisor must have been the source of the damaging information, and whilst it could not determine that this was deliberate it did rule that it breached the duty of care an organisation has towards a staff member.

The Tribunal stated: (consideration 11)

„relations between an organisation and its staff must be governed by good faith“

„an organisation must treat its staff with due consideration and avoid causing them undue harm. In particular it must inform them in advance of any action that may imperil their rights or rightful interests.“

„it {the organisation} should refrain from passing on damaging information without first giving the staff member an opportunity to challenge it and give his or her own account“

The principles set out by the ILOAT are of fundamental importance and we can only underline them.

In the current case the Tribunal determined that since the withdrawal of funding was directly attributable to the information given by the complainants supervisor to the US mission, the organisation must compensate the complainant and pay him full salary and allowances up to this rightful termination date. It also awarded 10 K Euro or damage to his reputation, and 10 K Euro moral damages for harm to his dignity.

Receivability - Challengeable decision

Judgement No 3054 against Eurocontrol raised an important issues of receivability with the Tribunal. According to the case law of the Trib, „a complainant cannot attack a rule of general application unless and until it is applied in a manner prejudicial to him“ (see judgement 2953 consid 2).

The complainant was seeking to challenge the decision to grant contract staff the right to vote in staff committee elections and to stand for election provided they had more than one years service. The Tribunal considered that the right given to contract staff had no adverse affect on the staff member.

Grounds for review and/or extension of time limits

Judgement No. 3078 filed by 11 staff members against Eurocontrol sought to challenge aspects of the new pension scheme introduced in 2005. The challenged decisions had been the subject of both internal appeal and complaints to the ILOAT. The complainants argued that they had new information in the form of actuarial studies which were not available previously. They claimed that these studies showed that the calculations were flawed and as such should not have been used as the basis for the increase to the pension contributions. The Tribunal did not consider that that this „new“ information would have changed the outcome of the case since it was not demonstrated that the alleged flaw in the calculations was prohibited by the new pension regulations. Eurocontrol argued that the information was also available at the time the complainants had filed their original appeal and they merely needed to request copies. It is not clear from the Judgement whether this assertion was true, but it appears that the Tribunal puts the burden of proof with regard to demonstrating the lack of access to information on the complainants.

As a result the complaint was rejected as not receivable since it addressed matters already decided by the Tribunal.

Some of the complainants had not been party to the earlier appeals and referred to the ongoing nature of the impact of the pension increases. The Tribunal dismissed these claims on the grounds that they had been aware of the increase in pension contributions for some time. This part of the judgement appears to contradict Tribunal case law suggesting that decisions with ongoing effect can be appealed later albeit without retroactive effect.

Judgement 3099 Involved a summary dismissal from the ESO for the act of "secretly taping an internal and non-public interview and distributing the recording to third parties". The organisation further argued:

"[u]nauthorized taping" of "the words of another person, which are not spoken in public, constitutes a serious criminal offence in the national law of many countries including xxx" and that "[t]he recording, divulgation [sic] of the tape and its content to the Staff Union has [...] led to a serious disturbance of the working climate"

The Tribunal disagreed:

"11. Even if the taping of a "private conversation" is forbidden by national law, it is doubtful whether an official interview as part of an investigation into actions which, quite possibly, constituted a criminal offence is properly described as a "private conversation". Although staff members of international organisations necessarily have the right to protect their own interests, they must act in conformity with their duty as international civil servants. In the absence of an established procedure to ensure that an accurate record was made and kept of interviews conducted in the course of an investigation such as that being undertaken by ESO at the relevant time, the taping by a staff member of the interview and the subsequent provision of the tape, or a copy of it, to the Staff Union may be seen as an action directed to the protection of his or her interests but cannot readily be accepted as compatible with the standards of conduct required of an international civil servant."

The Tribunal concluded that the organisation was remiss in not providing for proper recording of the interviews and that although the taping of the interview was a misconduct, the actions of organisation in dismissing the staff member were disproportionate. The Tribunal also concluded that the actions of the staff member, motivated as they were to protect his rights, did not represent a lack of integrity nor a fundamental breach of trust.

An organisations Duty of Care

There were a number of judgements which dealt with the duty of care of an organisation towards its staff, and in particular with regard to harassment and conflict.

In Judgement 3085 the Tribunal stated that an organisation has a duty of care to fully inform and support staff members on probation; to guide them in the performance of their duties; to warn them of deficiencies and risk of dismissal; and to act in good faith and respect their dignity. (Judgements 1418 consideration 6, Judgement 2646 consideration 5, Judgement 2529 consideration 15).

Also in Judgement 3085 the Tribunal determined that a supervisors comment in a meeting was such that it must be considered as sexual harassment.

The Organisation had argued that it was merely a matter of poor taste. The comment in question was in response to the question from a staff member regarding the use of a wooden model during demonstration of condom use, in which the supervisor replied that she could demonstrate it on him.

Judgement 3065 dealt with an allegation of harassment. In Consideration 10 the Tribunal set out

"10. According to the Tribunal's case law, an accusation of harassment requires that "an international organisation both investigate the matter thoroughly and accord full due process and protection to the person accused". Furthermore, "[i]ts duty to a person who makes a claim of harassment requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context [...], that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed not be stigmatised or victimised on that account [...]" (see Judgment 2973, under 16, and the case law cited therein). "

The Tribunal also noted in this judgement that the investigation undertaken was flawed in that the complainant did not have adequate opportunity to attend interviews, or to examine

any record of statements made during such interviews. (Judgement 3065 Consideration 8)

In Judgement 3104 the Tribunal awarded substantial moral damages on the grounds that the organisation had failed to properly investigate the allegations of harassment, in breach of the organisations duty of care.

SUEPO considers such criteria as vital, and notes that despite repeated requests and successful internal appeals the EPO still has not reinstated Circular 286 nor provided an acceptable replacement.

In Judgement 3064 the Tribunal stated:

"15. While there is no need to dwell on the allegations concerning the assessment of the complainant's work, which does not formally form the subject of a claim, the Tribunal concurs with the Board's finding in its report of 14 September 2009 that the Administration "did not actively take measures to encourage dialogue" between the complainant and her supervisors in order to improve working relations within the German Section."

This further clarifies that the duty of care includes an active participation of the organisation in the resolution of conflict.

Further comments

Withdrawal of suit

Attached to the paper judgements were 6 "withdrawals of suit", 2 from WHO, one from the Customs Co-operation Council two from the EPO, and one from WIPO.

This happens when the complainant informs the Tribunal that he wishes to withdraw a complaint and the organisation in question has no objection. Then the Tribunal officially registers withdrawal.

We know neither the substance of these cases nor the reasons for withdrawal because these are not made public. However, it seems possible that the organisations in question attempted to settle the disputes. If so, this would serve to speed up proceedings by

reducing the number of cases which the Tribunal has to deal with, and would thus be something to be encouraged.

Receivability and Jurisdiction matters

A number of cases in this session have raised issues of jurisdiction and receivability. We wish to stress the importance of these issues and offer the following comments:

The time limits for filing appeals are not exactly generous, but must be respected. For an internal appeal you have 3 months from the final decision of the administration to file the appeal. The most difficult part of this is in determining what is a final decision. Be aware that the EPO will most likely argue that it was the first decision notified to you, regardless of whether they are in discussion with you on the matter. Our advice is that you either obtain a formal statement from the EPO that no final decision has been taken or file an appeal and notify the IAC that discussions are ongoing. If you miss the 3 month deadline you can no longer appeal the issue.

It is sometimes unclear what to do when the administration does not respond. If this is the result of a request from a member of staff (Art 106 Serv Regs), the failure to respond within 2 months can be interpreted as an implied negative decision which is final and may be appealed.

Another issue that can be problematic, is to which body you should submit an appeal. According to Article 107 Serv Regs this is clear, it is the body that took the decision, i.e. the ACAC in the case the council took the decision, and the IAC, in the case the President took the decision. This interpretation was confirmed by the Tribunal in Judgement 3053 discussed above.

As noted in Judgement 3054 the complainant must be negatively affected by the decision. For decisions of a general nature, this is often only where the President implements the decision, i.e. it has a negative effect on the staff member concerned. (NB this is different for Staff Committee members and experts since they are considered harmed in more general cases affecting staff as a whole).

Confusion can also arise where decisions of a Medical Committee are involved. Formally decisions following consultation of a Medical Committee may not be subject to internal appeal, however, as can be seen from Judgement 3056, some decisions of the President following such a medical committee consultation may be considered as a decision of the President and an internal appeal could be required before resort to the ILOAT.

Exhaustion of Internal Means - is a receivability requirement of the Tribunal. Failure to do so will result in your appeal being rejected without the substance being examined, as can be seen in the first issue raised in Judgement 3086. There are some exceptions to the above, where for example the internal process is subject to unreasonable delay. This used to be considered at about 12 months, but the case law of the Trib has extended this in the last few years, and a rough guide would be about 2 years. If you do file a case with the Tribunal prior to exhausting internal means and you are unsure whether it meets the requirements, we suggest you also file an internal appeal since if your case is rejected and you have no internal appeal pending, you will be time barred from filing the internal appeal. If you take this precautionary measure we recommend you to advise both bodies that you have done so.

A last point is that the Tribunal sets very high limits on the grounds for review or re-opening cases. This can be seen from Judgement 3078 (see report above).

In this case new information came to light after the Tribunal had ruled on the case, however, the organisation successfully argued that this information was available to the complainant at the time (or at least could have been provided on request).

It is quite possible that the organisation would have been very reluctant to provide full disclosure at the time, however, proving this retrospect is difficult.

Our advice would be that if you suspect there exists information which proves your case, you should make clear and specific requests to the administration for disclosure of this material. In these requests, provide all relevant information that you have and set out what it is that you are seeking to demonstrate and why it is important for your case. If you do this, and a document comes to light later which proves your case, it should at least be possible to demonstrate lack of due diligence on the part of the organisation, and therefore that the information is in fact new.

The above is meant as information and guidance, if you have any doubts we recommend you contact your local SUEPO committee for advice.

The Executive Committee