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108th Session of the ILOAT

Summary

The 108th Session of the Administrative Tribunal of the International Labour Organisation (ILOAT) pronounced 48 judgments on 03.02.2010. The EPO was again the Tribunal's largest "customer", accounting for no less than 12 of the cases! This session, six EPO judgments could be classed as "wins", a 50% success ratio. In a further case, although losing on the substance, a staff member was awarded moral damages. This paper discusses the EPO cases, in particular pointing out items of interest. Also, items of interest to EPO staff from the non-EPO cases are highlighted.

Introduction

The ILOAT hears complaints relating to disputes between employees and organisations for 56 international organisations. The judgments are orally presented in open session twice a year in Geneva, at which time the judgments become legally binding. Following the presentation judgements are publicly available in paper form and are then sent to the parties via post. Online publication follows within a couple of weeks [1]. This report summarizes observations from the 108th session of the ILOAT, 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 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 closely and to push for needed reform of the Tribunal. More information can be found at the site http://rights.suepo.org

The previous four sessions were presided over by Mr Seydou Ba of Senegal (including the President, the Tribunal comprises seven judges). We, and most other observers, were expecting Mr Ba to preside over the 108th session. To our surprise, however, the session was presided over by Ms Gaudron of Australia[2], with Mr Ba returning to the post of Vice-President. We do not know what criteria are used to decide who will preside over a particular session. We note, however, that the page in the internet announcing this (which seemingly hardly anyone noticed) bears the date of the opening of the 108th session. It is thus possible that the judges decide between themselves at the start of the session who will preside. In any case, the process lacks transparency. Usually, each President (for better or worse) influences the

[1] The Tribunal's website is http://www.ilo.org/trib this session's judgments have already appeared

[2] See http://en.wikipedia.org/wiki/Mary_Gaudron for more information, including criticism

course of the tribunal. In the current case, given her age (67) and apparently poor health, it seems unlikely that she will remain for very long. Additionally, we note that, although the Tribunal is meant to be bi-lingual, it is clear that, like her predecessor, Ms Gaudron has difficulty in communicating in more than one of the tribunal's working languages. This time, Ms Comtet, the tribunal's registrar, summarised all the judgments, be they in English or French. Ms Gaudron then (tried to) read out the one sentence summary of the decision (e.g. "for the above reasons, the complaint is dismissed" or equivalent). Despite her apparent language difficulties, Ms Gaudron has also continued the practice of Mr Ba of also presiding on cases which are in her weaker language. This of course raises questions about her (and also Mr Ba's) ability to understand the details of the cases.

Summary of EPO cases

Vice-Presidents' contracts

Three EPO judgments concerned the new specimen contracts concerning the appointment and terms of employment of Vice-Presidents of the European Patent Office in 2006. These can be found in part 2a of the EPO CODEX. The judgments are numbered 2875, 2876 and 2877 and were variously filed by members of the General Advisory Committee (GAC) and the staff committees of Munich and The Hague.

The complainants raised two basic arguments.

Firstly, they noted that the contracts foresee that Vice-Presidents recruited from within the Office should receive pension rights over and above those that other staff members receive. Since this effectively changes the pension regulations, and since in effect the remaining staff members pay for these additional rights, the GAC should have been consulted. For reasons set out in judgment 2875, the tribunal agreed with these arguments.

Secondly, the new contracts were illegal (in particular under Article 10(3) EPC) because they altered the balance of powers between the President and the Vice-Presidents on the one hand and the Administrative Council (AC) on the other hand. In particular, since the Vice-Presidents are appointed by the AC, and would, under the new contracts, be under annual performance appraisal by the Council, the position of the AC is strengthened by the new contracts, whilst that of the President, the Vice-Presidents, and by extension, that of staff serving under the Vice-Presidents, is weakened. However, the tribunal found that even if the balance of powers were altered by the new contracts, the regulations neither "expressly or impliedly directs that those powers must remain unchanged." The tribunal also dismissed as "speculation" the claim that the new contracts would influence the independence of the Vice-Presidents vis-à-vis the AC.

Additionally, the complainants claimed that the AC had committed various procedural violations in rejecting the complaints. These the tribunal partially agreed with.

Given that the complaints were successful, the tribunal could have set aside the contracts. However, the tribunal's order was considerably narrower. The tribunal set aside the AC's decisions rejecting the appeals. It also set aside the Vice-Presidents' contracts to the extent that they concerned the pensions of Vice-Presidents who previously served in the EPO. Two of the groups of complainants were awarded costs and moral damages. Concerning the other group of complainants, the tribunal found that although they succeeded in part, "they do so on an issue not raised by them" and awarded neither costs nor damages!

Statutory consultation

In addition to the three cases set out above, another case revolved around the question as to whether or not consultation in the GAC was necessary before introducing measures at the Office. Concretely, judgment 2874 concerned a complaint by an examiner in Munich against having to do BEST.

BEST was introduced, initially as a pilot project and from 1997, following approval from the Administrative Council (and later, the adoption of EPC 2000), as the standard.

This was all done without any GAC consultation. In the Office's opinion, GAC consultation was not necessary since this committee is not competent to examine the lawfulness of decisions taken by the contracting states (i.e. the AC).

The tribunal agreed with the Office that it was not competent to rule on the lawfulness of amendments to the EPC. However the tribunal also found "that does not mean that the President could choose the method for implementing the amendments without consulting the GAC. He could have dispensed with that consultation only if the amendments themselves foreclosed any choice as to the method of implementation. This was not the case; there were several factors not mentioned in the amendments in question which could be relevant in choosing a method of implementation. Therefore, there should have been a consultation of the GAC".

Accordingly, the decision under appeal was set aside, as was the decision to make the complainant participate in BEST. Moreover, the Office was instructed that "the question as to the method for implementing the amendments to the EPC is remitted to the President to be determined following consultation with the GAC". Costs and moral damages were awarded.

Expatriation allowance

Three complaints concerned (non-award of an) expatriation allowance.

Judgment 2864 concerned a rather individual case. At the time when the complainant joined the Office (in Munich), he indicated that he was German, but expected soon to receive French citizenship. This happened, retroactive to a date before starting his duties at the Office. Some years later, he received a letter from the German authorities, retroactively withdrawing his German citizenship with effect from that earlier date.

The tribunal accordingly ruled that in actual fact at the date of starting work at the Office, the complainant had only had French citizenship, and thus agreed with the complainant that the Office should grant him the expatriation allowance from the date requested.

Judgments 2865 and 2866 both concerned staff members who had been in the country of employment before joining the Office, but claimed not to have been permanently resident in the three years before joining the Office.

In this respect, the tribunal recalled its case law that "a permanent employee interrupts his or her permanent residence in a country when he or she effectively leaves that country with the intention – which must be objectively and reasonably credible in the light of all the circumstances – to settle for some length of time in another country".

In 2865, the complainant had left Germany to stay at his parents in France **after** the Office had made him an employment offer and sent him a copy of the EPO CODEX. During this time, the complainant remained registered with the German authorities.

In 2866, although the complainant provided some evidence that she had left Holland and spent time in Portugal before joining the Office, the tribunal found that she had not managed to provide "cogent evidence that she had taken up permanent or continuous residence in Portugal throughout the relevant time".

In both cases, the tribunal found that the complainants' cases did not meet the requirements set out in its case law, and dismissed the complaints.

Education allowance

Except in special circumstances, Article 71 of the EPO ServRegs limits payment of an education allowance to staff who are not nationals of the country in which they are serving. Judgment 2870 concerned a mass appeal by affected staff, claiming that the regulation was contrary to the principle of equal treatment, and that the regulations were poorly designed to meet their purpose. This case was filed after the Court of First Instance of the European Communities quashed a similar regulation at the European Central Bank (ECB).

At the ECB, payment of the allowance at the ECB is tied to the staff member receiving an expatriation allowance. Since at the ECB (and also to an extent at the EPO) the expatriation allowance is, in some cases, payable to nationals of the country in which the ECB was located and, in some cases, is not payable to non-nationals, it was found that this was not a suitable criteria for determining who should receive the allowance and who not.

However, at the EPO, payment of the allowance is linked solely to nationality, and not to payment of the expatriation allowance. Accordingly, the tribunal found that the ECB case law was not particularly relevant.

The tribunal recalled that "the principle of equality requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently. In most cases involving allegations of unequal treatment, the critical question is whether there is a relevant difference warranting the different treatment involved. Even where there is a relevant difference, different treatment may breach the principle of equality if the different treatment is not appropriate and adapted to that difference."

The tribunal thus, without further reference to the ECB case, considered if the different treatment of nationals and non-nationals was appropriate and if so, if the regulation was adapted to the difference.

Different treatment appropriate?

On this issue, the tribunal considered that "employees who engage in permanent employment outside their own country have a responsibility to take appropriate steps to permit their children to integrate or, perhaps, reintegrate in the country of their nationality", and that this went beyond providing education in their mother tongue whilst they were abroad. Rather, they found that "post-secondary education in their own country may well be critical to their subsequent integration in that country". Because of this responsibility of expatriate employees, and seemingly regardless of where children actually receive their post-secondary education, the tribunal considered that different treatment was appropriate.

Regulation adapted to the difference?

From the judgment, "the complainants contend that it is not a genuine educational allowance but a “hybrid financial benefit”". However, the tribunal found that "it is clear that the allowance has been designed to cover additional education costs associated with educating the dependent children of non-nationals on the basis of direct costs, indirect costs and travel expenses, and that it has been tailored to ensure that there is no double counting". Moreover, "payment of the education allowance depends on the production of supporting documents". Accordingly, the tribunal concluded that the allowance was appropriately adapted to its purpose.

Since the tribunal concluded that the EPO's education allowance meets the two tests outlined above, the complaints were dismissed.

Career issues

Judgment 2884 concerned the case of a director who appealed against their non-appointment to the post of principal director. The complainant argued that various procedural violations had taken place. Concretely, the procedure used was not in conformance with “Annex II” (the regulation by which appointment generally takes place at the EPO). In particular, it was not mentioned in the vacancy notice that an assessment centre would be used, and that there were procedural flaws in the individual assessment performed by a consulting firm, and the use of that assessment by the Selection Board. The Office tried to argue that this was not important, since the complainant was aware nature of the assessment to be performed and also that the nature of the assessment performed by the consulting firm was such that it fell within the requirements of Annex II.

The tribunal basically agreed with the complainant and found that “as the individual assessment performed by the consulting firm was, at least in part, a testing mechanism, the failure to mention it in the vacancy notice

constitutes a breach of Article 2 of Annex II". However, owing to the "complainant's failure to demonstrate any link between the breach of the Service Regulations and the outcome of the process", the tribunal decided that "the process will not be set aside". Rather, the complainant was awarded €10,000 moral damages and costs.

Judgment 2896 concerned the request by a (now former) staff member to be allowed to work beyond the age of 65. This possibility was introduced as part of the "first basket" of measures concerning pensions, with effect from the start of 2008. According to the regulation, staff may make such a request, and the Office may, if it decides that it is not in the interests of the organisation, turn down the request. Owing to the short times available, such negative decisions must be appealed directly to the ILOAT, without first having to file an internal appeal. This case is thus the first which the tribunal has had to pronounce upon.

Important for the tribunal was that the decision whether or not a staff member may work beyond the age of 65 is discretionary. The Tribunal recalled its (general) case law that it "will quash a discretionary decision only if it was taken without authority, or if it was tainted with a procedural or formal flaw or based on a mistake of fact or of law, or if essential facts were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence". It found that this was not the case, and turned down the complaint.

Judgment 2906 concerned the case of the promotion of an administrator. The complainant was informed by letter, and received a certificate signed by the President, that it had been decided to promote him to grade A5. The Office claimed that this was a mistake, and that the intention had been to promote him to A4(2). The Office sent him a new certificate, published his promotion to A4(2) and re-set his salary from that of A5 to that of A4(2). The complainant appealed against this, claiming that " the decision to promote him to grade A5 was lawful because it was taken by the President ..., and also because it was notified to him in accordance with standard Office procedures and, as the case law has it, a decision becomes binding on an organisation from the moment it is notified to the staff member concerned in the prescribed manner".

The Office essentially argued that the original decision was the result of a clerical error, and that there is no legal basis for promotion to grade A5 as part of the annual promotion round.

On examining the case, the tribunal came to the conclusion that a clerical error had indeed occurred, and found that "the novel aspect of the instant case in relation to this case law is that the decision in question, which in principle, like any promotion, created rights, was reversed on the grounds that it was due solely to a clerical error". On balance, the tribunal considered that "since the decision to promote the complainant to grade A5 stemmed from a clerical error ..., and not from a genuine intention of its author, ... it did **not** (*emphasis added*) create rights for the person concerned and that it could therefore be subsequently reversed."

Accordingly, the complaint was dismissed. However, the tribunal also found that the Office "displayed gross negligence, which is even less excusable in view of the fact that individual decisions on promotion are of a particularly sensitive nature". The tribunal thus awarded €3,000 moral damages plus costs.

Miscellaneous

Judgment 2886 concerned an appeal by a staff member against a calculation of annual leave. Owing to her working part-time for medical reasons, the Office had deducted one full day of leave for each of the ten days taken during the period in question. This is a complicated calculation, the regulations for which have in any case been changed since the deductions were made. There was a significant delay between the complainant requesting the deducted days back and when the deductions were actually made by the Office. The monthly salary payslips contain the Office's leave calculation at the bottom. The tribunal did not consider the validity of the Office's calculations. Rather, it determined that the complainant had been

notified of the Office's calculations monthly, that the complaint was thus filed late and was accordingly time barred and irreceivable.

Interesting findings from the EPO cases

Discretionary decisions (cf. Judgement 2896)

The standard of proof that the Tribunal requires to review what it refers to as "discretionary" decisions is very high. When combined with the failure of the Tribunal to enable proper discovery and call witnesses, this represents a serious deficiency in the review process. It is nevertheless something that staff should be aware of when filing cases. Wherever possible, complainants should thus make reasoned requests for disclosure of any further evidence and/or the hearing of witnesses.

Statutory consultation

Following on from judgment 2857, issued in the 107th session, judgments 2874, 2875, 2876 and 2877 from the current session, concerning the introduction of BEST and the specimen contracts for Vice-presidents, further strengthened the status of statutory consultation in the GAC, and underlined that the EPO has a duty to consult the GAC in a wide range of situations, and not only if amendments are made to the ServRegs. Moreover, the consultation has to be in good faith, and the administration has to provide the GAC with sufficient information for it to be able to give a reasoned opinion on proposals submitted to it.

It is, of course, pleasing that the tribunal protects the rights of the staff in this manner. It would of course be better if the administration would respect these rights in the first place, and not force staff to file complaints with the tribunal in order to get confirmation of these rights. In this respect, unfortunately we are aware of a number of cases coming up where this has not been the case.

Undue delay

In judgment 2865, the tribunal found that "the period of a little more than a year which elapsed between the referral of the internal appeal to the Committee and the adoption of a position by the Office, though rather long, may be considered acceptable".

To the best of our knowledge, this is significantly faster than the Office usually manages! We thus advise staff members who find that their appeals are taking somewhat longer than this - for example 18 months or more from filing until reception of the Office's position paper - to point this out during the proceedings, and claim additional moral damages for this reason.

Additionally, (see judgment 2418, Considerations 16), even in cases where complainants have no legal costs per se, the tribunal awards costs for "out of pocket expenses, time and trouble". We recommend claiming for these also.

Remedies

One finding that applies to both EPO and non-EPO cases alike is that in recent sessions the proportion of judgments which could be classified as a "win" for the complainant seems to have increased. For example, in the current session 50% of EPO cases were "wins" and in another case, moral damages were awarded, even though the case lost on its merits. However, the tribunal is finding ways of making awards which don't really inconvenience the organisation concerned.

For example, in the above discussed cases 2875, 2876 and 2877 concerning Vice-President's contracts, the tribunal could simply have set aside the AC decisions under appeal and left the EPO to sort out the mess. Or it could have set aside the AC decisions under appeal and quashed the contracts. Then the EPO would really have had a mess to sort out!! Rather, they set aside the AC decisions and quashed the contracts "to the extent that the specimen contract introduced provisions with respect to the pensions of Vice-Presidents who previously served in the Office". That is to say, they judged that a single clause in the contracts, awarding enhanced pension rights to the Vice-

Presidents concerned, was invalid. Although potentially annoying to the Vice-Presidents affected, who now have to make do with the same maximum pension as the rest of us, this clearly doesn't inconvenience the Office.

Similarly, beyond minor embarrassment, we doubt that the Office will be particularly put out by the outcome of judgment 2884. Here, as set out above, the tribunal declined to quash a selection procedure which it agreed was irregular, and merely awarded the winning complainant damages because of "the complainant's failure to demonstrate any link between the breach of the Service Regulations and the outcome of the process". It should be noted that this is just about impossible, and is a further example of the unreasonable burden of proof the Tribunal applies (see above).

Despite the fact that the Tribunal has complained about the number of appeals, the Tribunal's behaviour is unlikely to discourage the administration(s) from the actions which gave rise to the appeals in the first place.

Notification of decisions

As pointed out in a number of SUEPO publications, decisions at the EPO are often not labelled as such and may take several forms. Moreover, the German concept of "Rechtsbehelfsbelehrung" is unknown at the Office. Thus, for example, the calculation of leave at the foot of a salary payslip (see judgment 2886 discussed above) is taken as notification of a decision. Staff must be aware of this when considering an appeal, so as not to miss deadlines.

Interesting findings from non-EPO cases

Contracts

As in previous sessions, the largest single group of complaints (about 8 in total, including those where the organisation tried to get rid of a staff member by abolishing the post in question) from other organisations concerned non-renewal of contract. As we have previously commented, this area is a mine field. The organisations often lose, and have to pay substantial damages. Up to now, the EPO has largely avoided this, because up to now, the EPO has generally used permanent employment for all posts as its preferred form of employment.

Even where the organisation "wins" on the merits of a case, e.g. judgment 2885, the tribunal may award moral damages since the way that such a decision was reached may cause the complainant injury.

On the other hand, even where the complainant "wins" on the merits of the case, e.g. judgment 2868, there may be no order of re-instatement, but rather merely a (substantial) award of damages.

Accordingly, the outcome is rarely satisfactory for either party. Given the troubles that other organisations have in this area, we have repeatedly stated that it is ill advised for the EPO to be pressing ahead with increased use of non-permanent (including contract) employment in key areas of the Office. In this context, it thus remains to be seen if introducing new "non-renewable" contracts in addition to "euro-contracts" will save the EPO from problems in this area or, in actual fact, create them.

Admissibility / substance

Judgment 2895 was a continuation of case 2840. In that case, the organisation (the WHO), prior to filing its reply, sought and was granted leave to confine its reply to the issue of receivability. The tribunal found the earlier complaint to be receivable and gave the WHO thirty days to file its reply on the merits of the case. That resulted in the present judgment (which, whilst essentially lost on its merits, resulted in an award of moral damages and costs).

We find it worrying that the tribunal should allow an organisation to delay a case in this manner. This is particularly so in a case which was essentially a matter of stress related sick leave leading to the staff member leaving the service of the organisation. We hope that this case will remain an exception.

Withdrawal of suit

Attached to the paper judgments were 11 "withdrawals of suit", two concerning the EPO. 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 in such cases. 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.

Res judicata

The Tribunal's judgments are "final and without appeal" as stated in Article VI of its Statute, and carry the authority of *res judicata* (that which has been judged). They may be reviewed "only in quite exceptional circumstances and on strictly limited grounds: failure to take account of some material facts, a material error that involves no exercise of judgment, an omission to rule on a claim, or the discovery of some new essential fact that the complainant was unable to rely on in the original proceedings. Moreover, the plea must be such as to affect the original ruling. Pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea, on the other hand, afford no grounds for review". Put in other words, this is the principle of infallibility of the judiciary. The Tribunal does not make mistakes.

In the current session, there were two applications for review, cases 2908 and 2909. Both were summarily dismissed under Article 7 of the Rules of the Tribunal, for failing to raise new facts. It should be noted that 2909 was the complainant's fourth (?) application for review of the same tribunal judgment!

The Executive Committee