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STAFF UNION OF THE EUROPEAN PATENT OFFICE SUEPO
UNION SYNDICALE DE L'OFFICE EUROPEEN DES BREVETS USOEB

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120th Session of the ILO-AT

Summary
In its 120th session the Tribunal delivered a total of 90 judgments, of which 45 cases involving the EPO. Of the EPO cases, only 5 cases were won[1] at least partially by the complainants. Of the remaining cases 11 were summarily dismissed. The result is marginally better for the complainants than that of the previous session but remains extremely poor. Moreover, none of the cases that were won seriously inconveniences the EPO. The present paper discusses selected cases and the overall implications.

GENERAL OBSERVATIONS[2]

1) Composition[3] and functioning of the Tribunal

The ILO Administrative Tribunal normally sits twice a year at the headquarters of the ILO in Geneva. The Tribunal is self-financing. The overall costs of the sessions are divided over the number of judgments per session and the Organisations are charged accordingly[4]. The costs per judgment seem to be in the order of 15.000 Euros. For the last two or three years the EPO has been using external lawyers for ILO-AT cases. At a rough estimate, the lawyers' fees probably double the costs per case compared to the charges of the Tribunal.

The seven judges of the Tribunal are national judges, mostly at the end of their career and close to retirement or retired[5]. They can serve the Tribunal up to age 75. They are appointed for a renewable period of 3 years by the International Labour Conference (ILO, one of the defendant organisations) on a recommendation of the Governing Body of the ILO. The nomination procedure is not transparent. The post of judge at the ILO-AT is highly prestigious and appears to be well remunerated.
The judges receive a fee per file, plus daily allowance and travel costs[6]. These arrangements have raised question about the degree of compliance with the standards for judicial independence.
Other aspects of the functioning of the Tribunal have been the source of concern and criticism[7], such as the issues of procedural transparency, adequate reasoning, and consistency.

[1] Excluding two cases merely won on awards for procedural delays.
[2] The authors have made great efforts to ensure that the information provided in the report is accurate. Should you nevertheless find any errors than please inform us: central@suepo.org so that we can consider correction and at least avoid the same error next time.
[3] See Annex 1 for further information
[4] http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_145943.pdf
[5] Mr Ba (Senegal) left after 6 terms of office, having reached the maximum age of 75. Mr Barbagallo (IT) is now the longest serving judge on the Tribunal. For the 119th session he acted as President.
[6] http://www.ilo.org/public/english/standards/relm/gb/docs/gb294/pdf/pfa-18-2.pdf
[7] Robertson: http://www.ilo.org/public/english/staffun/info/iloat/robertson.htm
Rheinisch *et al.*: http://www.mpil.de/files/pdf3/mpunyb_13_knahr_12.pdf

The Tribunal systematically rejects requests for hearings. The last hearing the Tribunal held was in May 1989 (ILOAT judgment 986). None of the present judges have ever participated in an ILO-AT case with a hearing. The documents submitted by the parties are not public either and there is no possibility of file inspection. Consequently the only information revealed about the cases comes from the Judgment itself. This renders a true understanding and an objective analysis of the quality of the procedure and of the judgments difficult, if not impossible. We will come back to this below.

The regulations of the ILO-AT do not foresee the possibility of an injunction or of an accelerated procedure[8] in case of hardship. Paradoxically, some cases the Tribunal on occasion uses the time that has passed as a justification for not ordering reinstatement (e.g. Judgments 3290 and 3299), ordering only damages instead.

So far the ILO-AT has not considered reforming its functioning, unlike the UN Tribunal who, following its reform in 2009, now has a true two-tier process, with hearings and legal assistance for the complainants[9].

2) Inefficacy of the conflict resolution process

What is most striking when reading the EPO judgments of the 120th session is the inefficacy of the conflict "resolution" process. Internal conflicts are very damaging to an Organisation. There are the direct costs for the procedure (nominees in the Internal Appeals Committee, internal and external lawyers and the costs at ILO-AT). Litigation distracts colleagues from more useful work. But there are also important indirect costs. The adversarial nature of the process damages staff trust in and, with that, commitment to the organization. We have seen colleagues getting stuck in such conflicts and ending up in invalidity. These are very rare cases, but psychological damage due to conflicts with the employer is common and real. Proper conflict management should be aimed at avoiding such damage. But what we currently see is the contrary – at all levels[10].

A number of factors contribute significantly to the inefficacy of the conflict resolution process:

- Our current President, Mr Battistelli, routinely refuses unanimous recommendations of the Internal Appeals Committee (IAC) if they are favourable for staff, *even for trivial matter like a few hundred Euros compensation for delays in the procedure* (see e.g. Judgments 3530 and 3531). Some staff members give up. Others continue. As indicated above, the direct costs for the Office for a single ILO-AT case (whether won or lost) are of the order of 15.000 Euros for the judgment, plus the legal fees for defending the case. *Why the President would spend 15.000+ Euros to deprive a staff member of 500 Euros that are in fact due is beyond our comprehension.*

- Both the Office and ILO-AT have recently taken the view that any – no matter how minor - decision that has not been contested at the time counts as agreed. See e.g. Judgment 3537 point 13: "*The Tribunal considers that a complainant must contest a decision … which negatively affects him, within the time limits allowed for in the applicable rules. Failure to do so renders this decision immune from challenge."* In this case, the decisions in question were repetitive refusals to allow the complainant management training which, when considered together over time, could be regarded as evidence of bias against the complainant. This line of reasoning goes against the Tribunal's previous jurisprudence, that where a single event/decision is not contested, a pattern of

[8] A fast-track procedure is only foreseen for « easy » cases: *If the dispute regards only a question (or questions) of law, identified by agreement of both parties, and the main facts are uncontested, the parties may agree, at any time prior to the assignment of the complaint to a Tribunal session, to apply to the President of the Tribunal for a fast-track procedure. (Rules of the Trib., Art. 7bis)*

[9] Legal assistance for applicants could avoid that (as currently) half of the cases are dismissed on formal grounds.

[10] The "conflict resolution unit" created in by Mr Battistelli has failed miserably in solving conflicts. See CA/21/15 for an overview of the dysfunctioning of the EPO's internal procedures.

events/decisions may still establish bias and/or harassment. Within the Office the same line has been taken for less-than-positive staff reports: if the staff member does not contest these at the time, then the report will be considered as agreed. This obliges staff members to adopt an aggressive approach and contest even minor breaches in order not to weaken their position later. Obviously, this leads to more appeals.

- In the past staff representatives could contest general decisions affecting all or part of staff (e.g. Judgment 2919). This is now challenged, see for instance Judgment 3515. Similarly: where in the past staff representatives could often agree with the administration that a single test appeal, if won, would be applied to all staff, the Office has recently refused to apply judgments won by one staff member to others in the same situation if these have not themselves filed individual appeals. Once again this multiplies the number of appeals that need to be filed.

- Ideally the Tribunal would give solid, consistent guidance on the principles that govern an organization and provide clear interpretations of its law at the earliest possible occasion. This would create legal certainty and avoid future conflicts. Instead the Tribunal seems mostly interested in getting rid of cases <u>without</u> taking a position on the substance. Less than half of the Judgments pronounced in the 120th session, several of which deal with more than one complaint, were decided on the substance. All other complaints have been dismissed on formal grounds.

- "*So wie man in dem Wald hineinruft so schallt es heraus*" (or: "what goes around comes around"). Staff members frustrated with the general situation in the Office, with petty decisions that should not have been taken in the first place and with the overall lack of justice end up responding in kind. We recognize that not all complaints are reasonable (see e.g. Judgments 3508 and 3509). But open dialogue and conciliation is generally a more effective way to resolve conflicts than litigation. This is not at all what we see happening in the EPO.

The cumulative result of all the above is an explosion of appeals by frustrated staff confronted with arbitrary and erratic decisions and judgments. "Best practice" looks quite different to what we are currently experiencing.

What is striking is that this new trend began shortly after the Tribunal met with representatives of the Office – but without staff representatives present. We do not know what "arrangements" have been discussed, but they are not conducive to efficiency as we define it. <u>SUEPO once again calls upon the Organisation and the Tribunal to sit together *with the Staff Committee* and/or SUEPO representatives to try and find genuine solutions rather than contribute to a further escalation of the conflicts and ever-increasing backlog of litigation.</u>

3) Moral damages and costs

Another striking aspect of the 120th session is the increase in the number of cases where moral damages and/or costs are awarded. Whereas this can be seen as positive, it should not distract from the fact that a mere award of damages and costs – mostly in view of the delays in the procedure – does not substitute for a proper reasoned judgment on the substance.

The "basic" award for delays in the internal appeals procedure seems to be 250 € for damages and 200 € for costs. This sort of sum is unlikely to influence the behaviour of an organization that did not hesitate to "invest" well over 25.000 € into otherwise winning the case. It is furthermore unclear what logic the Tribunal applies when establishing the level of the awards, both for damages and for costs. In Judgment 3538 the Tribunal explains that for damages the relevant factors are time and importance. A longer delay is considered more damaging in case with a higher impact than in cases of lesser importance. This could explain relatively low awards in some Judgments. But it does not easily explain the wide variation in financial awards.

Questions about the level of the awards are not new. The complainants in the cases leading to Judgments 3530 and 3531 tried to help the Tribunal by informing it of the much more transparent approach of the European Court of Human Rights (ECHR). In its Judgment n° 64886/01 (§26) The ECHR provided a simple formula to calculate the amount of moral damages due in the case of excessive procedural delays. Basically: 1000–1500 € per year of procedure (duration, not delay), plus 2000 € if the case is of particular importance from a legal point of view or the offence has serious consequences for the person concerned. There is, however, no trace of these submissions in the Judgment. This also shows how the lack of procedural transparency makes it impossible to determine whether the Tribunal disagreed with the ECHR, or found grounds to distinguish the cases, or simply chose to disregard submissions as inconvenient.

4) Receivability issues

The Tribunal takes an increasingly restrictive approach towards receivability.
The complaint will be dismissed amongst others if:

a) it is late filed (i.e. over the 90 days time limit),
b) the internal remedies are held not to have been exhausted, or if
c) the complaint concerns a general decision that does not (yet) have a direct impact on the complainant, which now also seems to be applied in cases where the complaint is filed by a staff representation.

(a) Late filed

For the 90 days (not 3 months!) time limit for filing a complaint at ILO-AT nothing has changed: this limit has always been strict. Having said that, the Tribunal is generous in allowing deficiencies in the form to be corrected after the initial filing. It will also invite the complainant to file missing submissions such as lacking or incomplete reasoning, supporting documents and/or translations of documents (see Judgment 3556). But if the complaint form is one day too late it is too late and this cannot be corrected (see Judgment 3559). **We can only advise our staff to take a safety margin when filing their complaints.**

(b) Failure to exhaust internal remedies

In the past, the Tribunal may have held a delay of 20 months between the filing of an internal appeal and the reply of the Office as a sufficient reason to file a complaint at the Tribunal (see Judgment 1968, point 5). While long delays in the internal appeal procedure may now lead to an award of damages and/or costs, the Tribunal will in practice no longer accept complaints filed while an internal appeal is still pending. Such complaints are likely to be held irreceivable for failure to exhaust the internal remedies. This will not lead to a loss of rights for the complainant if an internal appeal is still pending. However, the practice of refusing direct complaints even after long delays does not contribute to effective and timely resolution of the pending conflicts.

After a single Judgment in which it held otherwise (Judgment 3053), the Tribunal now rejects as irreceivable complaints wherein the complainant challenges a referral from the Administrative Council to the Internal Appeals Committee of the President (Judgment 3291 et seq.). The rationale for overturning or distinguishing Judgment 3053 is not clear but, barring truly exceptional circumstances, it is now clear that *it is a waste of time to insist on another procedure than the one indicated by the Council or the President.*

What is new is that the Tribunal apparently no longer recognizes the conditional[11] filing of an appeal in case the Office does not meet a request. Until the introduction of the “Management Review” this practice was common and did not lead to problems. Failure from the Office to react would be considered an implicit rejection. But apparently the Tribunal has now changed its mind. In Judgment

[11] “if the request is not satisfied, please consider this letter as an appeal”

3519 the Tribunal held that no appeal had been filed and the complaint was held irreceivable for failure to exhaust internal remedies.

(c) Decision held not to have a direct impact

It is standing jurisprudence that a staff member cannot appeal a general decision that does not affect him or her individually. In the past the Tribunal has been pragmatic, see e.g. Judgment 2244 point 8: "… *although the disputed decision is regulatory in character, it applies generally to a category of staff members whom it may adversely affect. The case law has it (see Judgments 1451 and 1618) that in such a case there is no need to await an individual decision before an appeal can be considered receivable, and that the staff members concerned have an interest in challenging the lawfulness of the general decision which may affect them.*"
A similar reasoning can be found in Judgments 2583, 2204, 1712 and 1330.

More recently, however, the Tribunal has changed its practice. In its 116th session it flagged Judgment 3291 in which it rejected as irreceivable a complaint against regulatory changes that had not yet individually affected the complainant. Since then the Tribunal, and a fortiori the Office (the Internal Appeals Committee as well as the Administration) have rejected large numbers of appeals as "manifestly" (sic) irreceivable with the argument that the staff member is not individually affected. In many of these cases the irreceivability is anything **but** "manifest".

In its 120th session the Tribunal has now taken this approach one step further: it applied a similar standard to appeals filed by staff representatives, see Judgments 3515 and 3557. As discussed towards the end of this report, this approach is new and goes against a long line of established jurisprudence (see e.g. 2921, 2919, 2792, 2791, 2877, 2583, 2204, 1896, 1712, 1618 etc.). **Obliging every staff member to file an individual appeal instead of allowing staff representatives to file one single appeal on behalf of all staff is procedurally inefficient in the extreme.**

The Tribunal's role is, besides adjudicating individual cases, to increase legal certainty for the parties by explaining points of law through its Judgments, at the earliest possible opportunity. Raising **unprecedented** procedural hurdles and receivability issues decreases legal certainty, and, contributes to the explosion of the number of appeals, and costs.

5) The 120th session: overall success rate

The 120th session was presided over by Mr Rouiller (CH). The President of the Tribunal assigns each case to a panel of three judges, one of whom functions as "rapporteur". Mr Barbagallo appointed himself to most of the cases dealt with in the 119th session, including all but one of the EPO cases. In the 120th session he is still the first judge on all but four of the EPO cases[12].

As in the previous sessions, the Tribunal rejected the vast majority of the EPO cases: of the 45 judgments only 5 were won or partially won on merits other than the duration of the procedure. Note that "partially won" includes cases won on the substance but remitted for further consideration (e.g. Judgment 3539). Such cases tend to be hollow victories. Like most organisations, the EPO is a bad loser - the complainant is likely to be in for another round of haggling, with uncertain prospects about the final outcome.

In the previous session (the 119th), only **one** judgment out of the 24 pronounced was won on the merits. The complaint in question related to strictly personal issues, with no further consequences for the Organisation. In the 118th session **three** out of the 18 Judgments were (partially) favourable for the complainant(s). In the 117th session **not a single one** of the nine EPO Judgments was even partially in favour staff. In the 116th session only **one** out of the twelve EPO cases was partially won by staff.

[12] Already in 2009 Mr Barbagallo allegedly earned 30.000 Euros/year from ILO-AT work, see http://espresso.repubblica.it/palazzo/2009/10/08/news/consiglio-di-stato-e-di-casta-1.16244.

This means that out of the total of 108 EPO judgments in the last five sessions only 10 (i.e. less than 10%) were partially favourable for staff. All the remaining cases were dismissed. At worst, the EPO had to pay damages and/or costs in view of procedural delays. In fact, the situation is even worse than a simple analysis of the Judgments suggests, because the negative judgments often cover more than one complaint. According to the Tribunal, the 90 judgments of most recent session deal with 134 cases. The few Judgments that were won covered single complaints. Probably significantly, **not a single Judgment in the last 5 sessions seriously inconvenienced the EPO.**

SELECTED CASES

A) Summary dismissal of the complaints

Summary dismissals seem to have become a favourite short-cut for the Tribunal: there were 11 such cases in the 120th session. It seems that originally 7 more were foreseen. We do not know what made the Tribunal change its mind. In the case of summary dismissal very little information is provided making it even harder to judge the background to and the quality of the Judgment than in regular cases. Nevertheless, even on the basis of the meagre information on file, 2 of the 11 summary dismissals of EPO cases passed in the 120th session seem inappropriate.

Judgment 3560 concerns the decision of the President "*to suspend his decision as regards the relevant administrative consequences related to a possible* ***recognition of invalidity***" … "*following a finding of the Medical Committee in favour of allowing the claim*" for invalidity and consequential non-active status. What this probably means is that the Medical Committee found that the colleague was invalid but Mr Battistelli decided not to accept that finding. We are aware of several of such cases, and suspect that more than a dozen exist.

The complainant challenged that decision as a *de facto* rejection of his invalidity claim. Tribunal bluntly states: "*The complainant is wrong. The decision he impugns is not a final decision within the meaning of Article VII, paragraph 1, of the Tribunal's Statute. In substance and in form the decision he received postponed the taking of a final decision*."

This reasoning is problematic for several reasons. The Tribunal's statute indeed states "the complaint shall not be receivable unless the decision impugned is a **final** decision". However, the second half of the relevant Article makes it clear that in this context "final" means that the available internal remedies must have been exhausted. It does not mean that the originally contested decision must be "final" in any other sense. The sole condition set on the decision to be challenged by Art. 108(1) of the EPO Service Regulations is that the "act" (which includes decisions) **adversely affects the employee**. Postponing the invalidity retirement – *in particular pending the introduction of an invalidity reform that worsens the conditions* – is clearly a decision that adversely affects the staff member concerned. Even without a reform pending, postponement of a finding of invalidity creates uncertainty and hence stress, most likely involves compulsory medical examinations and procedural hurdles that are likely to be perceived as a burden, in particular for a colleague who is in seriously bad health. In the invalidity procedure there are no further internal remedies after the medical committee and the decision of the President. The decision of the President to postpone the invalidity retirement therefore qualifies as a final decision according to the Statute of the Tribunal.

There is another aspect to the President's decision that the Tribunal in its haste to dismiss the case failed to address, at least in the Judgment. The Tribunal states that the President's decision was "properly motivated". The question is: how? The President should not have been in the possession of any medical data (which are protected by medical secrecy) and even if he were, the President is not a medical doctor. So on what grounds could he have rejected the medical finding of invalidity? Whereas we do not wish to exclude that the President may have had valid reasons in this particular case, the summary handling of the case precludes any understanding of the reasons and casts doubt on the objectivity of the Tribunal.

The Judgment thus seems flawed at least from a procedural view, and possibly in substance. For this case a summary dismissal was clearly inappropriate.

Another case where the summary dismissal is incomprehensible is **Judgment 3557**. It concerns a **selection procedure** where the nominee appointed by the staff representation challenged the validity of the procedure for a post advertised as being in Munich whereas the candidate who was ultimately appointed to the post was in fact performing his duties in The Hague. Advertising a post for another place of employment than the one where it ends obviously affects the pool of candidates that will apply and hence distorts the selection procedure. In the appeal procedure the administration claimed that the person concerned was only transferred **after** the selection. This argument seems highly disingenuous. The Tribunal nevertheless found in favour of the Organisation. This is bad enough. What is surprising, however, that despite the alleged "summary" nature of the Judgment, the Tribunal went out of its way to explain in detail why it considers that the complainant, as a staff representative, would not have standing to submit his claim for a re-run of the selection procedure with a corrected vacancy notice. The reasons go against a whole range of previous case law that allows staff representatives nominated in statutory bodies (Selection Boards, the GAC, the COHSEC) to challenge the procedures handled by these bodies. At the end the Tribunal even asserts that the complainant "*also has a conflict of interest. Indeed, given that he participated in the selection process, he could not have been – even theoretically – a candidate for that vacancy. His claim is therefore clearly irreceivable as he lacks locus standi to bring it*."
This Judgment leaves us flabbergasted.

Judgments 3477 – 3490 concerned so-called "applications for review" of earlier Judgments. This means that the complainant thinks that the Tribunal has failed to take account of particular facts, failed to rule on some claim and/or that some new facts were that the complainant was unable to invoke in time in the earlier proceedings. All four cases were summarily dismissed. In fact, we are not aware of any applications for review that have been successful. From this we must probably conclude that the Tribunal considers itself infallible.

B) Circular 286 (protection of dignity of staff)

The case treated in Judgment 3522 was filed by a group of staff. It concerns the suspension of Circular 286 (first temporarily and then definitely) without prior consultation of the GAC by President Pompidou in the year 2007. The Tribunal agreed with the complainants and ordered the setting aside of the decisions to suspend Circular 286 – some 8 years later. Presumably the effect of this Judgment is that colleagues who feel that their dignity has been offended now no longer need to apply to the Investigative Unit but can again ask for an Ombudsman procedure under the old Circular.

The Tribunal considered that, as staff representatives, the complainants were not entitled to moral damages. It awarded the five complainants 2.000 € (total) in costs. This must probably be seen as generous. In a previous Judgment (ILO-AT 2919), following a complaint on the lack of consultation for outsourcing that cost close to 30.000 € in legal expertise ("Gutachten"), the 3 staff representatives were awarded 300 € *together*.

C) Family matters

In **Judgment 3541** the complainant challenged the lower rate (25% versus 140%) applied by the EPO to the retroactive payment of the **lump sum education allowance** for each of her four step-children living with their grand-mother in Senegal. When first applying for the payment the complainant was instructed by the administration to tick the box "living at home" on the application form. After being transferred to another place of employment she was informed that the children qualified as "not living at home" and that she was entitled to the higher rate of reimbursement. Considering that she had previously been misled into ticking the less favourable box "not living at home" she claimed retro-active correction of the payments. The judgment is lengthy (18 pages) but the Tribunal essentially agreed

with the complainant and ordered the EPO to pay the sums claimed, with 5% interest as of the due date, as well as 5000 € moral damages. The above case could be the EPO case in this session with the highest financial impact for the complainant. But it is a case that has no general impact and is not likely to inconvenience the Organisation.

Judgment 3510 concerns the Office's **lack of assistance for adoption** of the Thai niece of the complainant's wife. The case seems similar that of **a case** dealt with in the previous session: **Judgment 3432** which concerned the **lack of support by the EPO for family relocation**. The outcomes were, however completely different. Whereas in the previous case the Tribunal decided to award the complainant a total of 51.000 € in costs and damages, the present case was dismissed. The Complainant was just awarded 1.000 € for the 26 months delay between the filing of the internal appeal and the position paper of the Office. We fail to understand what made the difference.

Judgments 3522 and 3523 address the question of whether if both parents are working in the Office, both are entitled to a higher amount for a home loan resp. to the supplement in the expatriation allowance for their common dependent children or not. Although the answer ("no") may not surprise it must be pointed out that the relevant regulations, when taken literally, seem to suggest otherwise.

D) Salary and pensions

Judgment 3538 concerns the **increase in pension contributions** from 8% to 9.1% of the basic salary. The new rate applied from 1 April 2007. The complaint was dismissed. The basic argument was that the Administrative Council had based its initial decision on the basis of expert advice provided by the Actuarial Advisory Group and that the complainants, from their side, had not provided expert evidence. According to the Tribunal (point 15) the substance of the complainant's argument was that "*if wrong assumptions are made and wrong parameters are introduced in the actuarial calculation they may deliver wrong results*." The Tribunal then goes on to say that: "***In the absence of expert evidence*** *there is no basis for the Tribunal to accept the complainants' arguments about the discount rate and other criticism they make of the methodology used to justify the increase …*". In other words: unless the complainants bring recognized "experts" the Tribunal will not even **consider** their arguments.

The Tribunal further reproaches the complainants that they adopted the submissions made in internal appeal and relied on those through "incorporation by reference".
The Tribunal held that "*This practice of complainants or defendants of simply adopting arguments contained in a document prepared for an internal appeal is entirely inappropriate.*" We fail to see the problem. If the arguments have been clearly set out earlier then relying on these arguments saves all parties time and paper (the Tribunal still demands 6 printed copies of all submissions, in addition to an electronic copy). We nevertheless recommend future appellants to "cut and paste" the relevant passages from previous submission into the brief accompanying the ILOAT complaint.

Judgments 3515 – 3518 concern the **collective reward** to staff paid at the end of 2012. The complainants challenge deductions for absences due to part-time, to maternity leave and to sick leave. All four complaints have been dismissed as irreceivable. Complaints 3516 – 3518 were individual appeals. The paths followed by the complainants are not entirely clear but all three cases the Tribunal argued that the internal remedies had not been exhausted. What is positive, however, is that in the cases challenging the deduction for maternity leave the Tribunal noted that *"the complainants have referred … to a decision of the European Court of Justice No. C-333/97, which may provide argument that the approach of the EPO to adjust the reward to the disadvantage of the complainants by reference to the periods of maternity leave is questionable."* This would seem to suggest that the Tribunal also sees merit in the argument. **We therefore advise all colleagues who still have a similar case pending to maintain their internal appeal.**

The complaint leading to **Judgment 3515** concerned the same matter (deductions of the collective reward) but was filed by staff representatives. It was also considered irreceivable. Here the Tribunal held that: "*a staff representative cannot challenge a general decision governing all officials which will*

require individual implementing decisions. Judgment 3427 (at considerations 35 and 36) is a recent illustration of a case in which complaints were dismissed as irreceivable on this basis. To the extent that Judgment 2919 (which the complainants relied upon), indicates otherwise, it is at odds with the general jurisprudence of the Tribunal." In a previous Judgment 2919 the Tribunal very reasonably said that *where decisions allegedly have a broad adverse impact on a large number of permanent employees, in the interests of efficiency, consistency in decision making and the timely resolution of disputes, it may be that the members of the Staff Committee have a legitimate role in bringing the issue forward.*" Up until recently this **was** the "general jurisprudence of the Tribunal", see also Judgments 1451 and 1618 cited in 2919. Apparently the Tribunal, perhaps under pressure from its client organisations, has now decided to change direction.

This set of Judgments illustrates the Tribunal's tendency to raise new procedural hurdles and dismiss complaints on receivability **rather than resolve the underlying fundamental legal issues**. The ensuing legal uncertainty is detrimental to staff, costly for the Organisation and ultimately damaging to the Tribunal that finds itself inundated with a plethora of appeals trying to address the same issue.

E) Warning letters

In **Judgment 3512** the Tribunal held that a warning letter is not appealable because it does not constitute a "final decision". As indicated above, this seems to be based on a confusion. The "final decision" referred to in the Tribunal's Statute is the decision of the President following the exhaustion of whatever other internal remedies are available. Thus, in the case of a warning letter the "final decision" that can be contested at the Tribunal is the President's refusal to withdraw the warning letter after the internal appeals procedure. Article 106 of the Service Regulations allows employees to challenge "**any act adversely affecting him"**, where "act" includes decisions – "final" or not. A warning letter is considered a disciplinary measure (Art. 93(2)(a) ServRegs), It does have a negative impact on the individual concerned. It opens the way to negative reports and eventually dismissal. But even without that, having a warning letter in one's personal file will have a negative impact on the chances for regular promotion and/or of being successful in a selection procedure. The issuance of a warning letter is an administrative decision and should be challengeable. In the past this was recognized by the Tribunal e.g. in the case of suspension, see Judgment 1927 (point 5): *"In practice, while suspension is indeed an essentially interim measure which maintains the rights of the staff member concerned, [...], it is nevertheless a decision which causes injury to the person concerned."* However, for now the Tribunal holds firm to its position that a warning letter does not constitute an appealable decision, and it even seems to expand this concept to other situations (see summary Judgment 3560 discussed above).

F) Staff representation matters

Judgments 3513 and 3520 concern the **use of assessment centres** in selection procedures. The staff representation never opposed the use of assessment centres *per se*, but argues that these must be under the full responsibility and control of the selection committee. The complainants provided quite some evidence that this is not the case, including in case 3513:

- a declaration by nominees who have participated in the board that there was no control of the selection committee ("the Board") over the assessment centre,
- Circular 299 explicitly **excludes** the member of a selection committee from observing the assessment centre in "their" procedure, thereby clearly taking the possibility to control what goes on in the assessment centre, and
- a statement from the administration wherein the Office admits that "*through its **personnel department**, (it) receives drafts of the proposed exercises …, **makes amendments** … and **gives final approval** of the tests to be used*".

For the first piece of evidence, the Tribunal apparently accepted the EPO's rather dubious argument that "the fact that control has not been exercised in particular instances, does not deny the existence of the power to exercise control." Apart from citing the Office, the Tribunal did not comment. The Tribunal

has largely, or even completely, ignored the other two pieces of evidence. A reader who is not familiar with the prosecution history will not even be aware of them. This case shows why – in democratic states to the rule of law - judicial procedures are normally open to public scrutiny: this makes it harder for critical evidence to "disappear" from the file.

In the case considered in **Judgment 3519** the complainant requested that the Office submit to the COHSEC "*sufficient information to allow it to form an opinion on the potential impact of the Single Patent Process (SPP) project on the health of the staff concerned*". At the time, SPP was planned with an initial (!) budget already estimated to reach 156 million Euros. An early document contained a "change curve" depicting "*How people might feel about change*". The initial stages are described as "*Shock, Denial, Anger, Bargaining, Depression, …*". The letter indicated that it had to be considered as lodging an internal appeal should the request not be granted, as was the common – and unchallenged - practice at the time. The complainant never received a reply to her request. The complainant thus considered that her request for consultation of the COHSEC was inherently rejected, as was her request for an internal appeal. She thus took her complaint to the Tribunal. The Tribunal left the case for almost 5 years before holding that the letter had only "foreshadowed" an appeal rather than **lodged** an appeal. The complaint was dismissed as irreceivable for lack of exhaustion of internal remedies. In the meantime there is still no meaningful consultation on, and probably no meaningful monitoring of the impact of changes in IT on the health of staff in the EPO.

OUR CONCLUSIONS

The ILOAT is the successor to the League of Nations Administrative Tribunal (LNT), which was taken over by the International Labour Conference acting at the request of the League of Nations Assembly in 1946, and reconstituted with some modifications to its Statutes as the ILOAT.

The LNT arose from a report of the Rapporteur of the Supervisory Commission of the League of Nations in 1925, which proposed that it be:

"*a judicial tribunal which would ensure to officials the firm conviction of safety and security emanating from justice, provide a judge for every dispute, and preclude the possibility of one of the parties being a judge in his own cause. The Rapporteur also found that such an administrative tribunal would increase rather than reduce the authority and position of the administration, that justice was above all men, and that all men were subject to justice, no matter what their function or position.*

After its creation, the 10th League of Nations Assembly in 1929 noted with approval that the existence of the LNT was one of the safeguards enjoyed by the League staff for the proper application of their terms of appointment and the regulations to which they were subject.

Things have moved on since 1929. Today, we expect the Tribunal not only to defend the dignity and the values of the international civil service, but also to enforce fundamental rights enjoyed by all citizens of civilized countries, even when those rights are not explicitly enshrined in the applicable law of the international organisations on which the Tribunal has jurisdiction.

Sometimes organisations like ours enact regulations that are nefarious to staff, and not justifiable on objective grounds. They are enacted by bodies (viz., the EPO's Administrative Council) that are not democratically elected and mostly outside political control. The ruled (staff) has virtually no means to influence the decisions of the rulers. The recent jurisprudence of the ATILO seems to suggest a rather languid, if not subdued, approach. We are entitled to expect that the ATILO reassert its stated role of an independent defender of law and equity, and take a more pro-active approach on the issues that plague the EPO, as would demand the historic principles on which the Tribunal is founded.

Annex

COMPOSITION OF THE TRIBUNAL[13]
(Session 120)

Mr Claude Rouiller (Switzerland; born in 1941)
President of the Tribunal
Former President of the Federal Tribunal (Supreme Court of the Swiss Confederation)
First appointed in August 2004. Further information:
http://www.ilo.org/public/english/standards/relm/gb/docs/gb289/pdf/pfa-20-1.pdf
Current term of office expires in July 2016.
Further information from other sources: http://fr.wikipedia.org/wiki/Claude_Rouiller

Mr Giuseppe Barbagallo (Italy; born in 1943)
Vice-President of the Tribunal
President of the First Section of the Council of State
First appointed August 2006:
http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-ii.pdf (p. 7)
No further information (c.v.) available from ILO.
Appointment expected to be renewed in 2015 (4th term):
http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351461.pdf

Mr Patrick Frydman (France; born in 1961)
Conseiller d'Etat; President of the Administrative Court of Appeal of Paris
Former Secretary General of the Conseil d'Etat
Ancien élève de l'Ecole nationale d'administration (ENA).
First appointed August 2010. Further information (c.v.) from ILO:
http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_gb_298_pfa_21_2_en.pdf
Current term of office expires in July 2016

Ms Dolores M. Hansen (Canada; born in 1946)
Judge of the Federal Court
First appointed August 2006:
http://www.ilo.org/public/english/standards/relm/ilc/ilc95/pdf/rep-ii.pdf (p. 7)
No further information (c.v.) available from ILO
Appointment expected to be renewed in 2015 (4th term):
http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351461.pdf

Mr Michael F. Moore (Australia; born in 1951)
Judge of the Court of Appeal of the Kingdom of Tonga
Former Judge of the Federal Court and of the Industrial Relations Court of Australia; Former Additional Judge of the Supreme Court of the Australian Capital Territory
First appointed August 2012. Further information, see:
http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_176169.pdf
Appointment expected to be renewed in 2015 (2nd term):
http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351461.pdf
Mr Moore has been the target of serious criticism in his home country:
http://kangaroocourtofaustralia.com/2014/03/09/australias-new-export-corruption/

Sir Hugh A. Rawlins (Saint-Kitts and Nevis; 1950)
Former Chief Justice of the Eastern Caribbean Supreme Court (retired in 2012)
Chairman of the Judicial and Legal Services Commission of the Eastern Caribbean Supreme Court, of

[13] http://www.ilo.org/tribunal/about-us/WCMS_249193/lang--en/index.htm

Anguilla and the British Virgin Islands. Former High Court Judge of Antigua and Barbuda, the Commonwealth of Dominica and the British Virgin Islands.
First appointed in 2012. Further information, see:
http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_182730.pdf
Appointment expected to be renewed in 2015 (2nd term):
http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_351461.pdf
A citation of Sir Rawlins from another source:

"*To me the law is a passion and I like the application of it in as pure a form as it could be, without side wings, without other consideration outside of the law and the application of the law, …"*

http://www.themontserratreporter.com/tributes-to-sir-hugh-a-rawlins-outgoing-chief-justice-of-the-eastern-caribbean-court-of-appeal/

Ms Fatoumata Diakité (Côte d'Ivoire, born in 1958)
Judge of the Administrative Chamber of the Supreme Court of Côte d'Ivoire
Former President of a Chamber at the Appeals Court of Abidjan
Nominated for a term of three years starting in March (?) 2015

Registrar (permanent employee of ILO)
Mr Drazen Petrovic
Further information:
http://iomba.ch/faculty-biographies-2011-2012/
Dr. Drazen Petrovic was the Principal Legal Officer in the Office of the Legal Adviser of the International Labour Office in Geneva. He has rich experience with various international organizations belonging to the UN system. He holds a Ph.D. in international public law from the University of Geneva, LL.M from the European University Institute, Florence and the University of Belgrade, and LL.B. from Sarajevo University Law School.