



119th Session of the ILO-AT

Summary

In its 119th session the Tribunal delivered a total of 77 judgments, of which 24 cases involving the EPO. Of the 24 EPO cases, only one case was won by the complainant. The remaining 23 cases were dismissed, 13 summarily. This paper discusses the cases that have broader relevance and the overall implications.

GENERAL COMMENTS

Composition of the Tribunal

The ILO Administrative Tribunal is composed of seven judges (see Annex 1) selected from widely different geographical regions. The judges are appointed by the International Labour Conference on a recommendation of the Governing Body of the International Labour Organisation, for a renewable period of 3 years. The judges meet twice a year, in spring and autumn, for a period of 3 weeks, at the headquarters of the ILO in Geneva. At each session ILO-AT delivers between fifty and (more recently) eighty cases. Each of the cases is assigned by the President of the Tribunal to a panel of three judges, one of whom functions as “rapporteur”. Mr Barbagallo is the longest serving judge on the Tribunal and currently President. Mr Barbagallo appointed himself to almost **all** of the cases dealt with in the 119th session, including all of the EPO cases. The cases are generally examined in accordance with the procedure set out in Articles [6](#), [8](#) and [9](#) of its Rules. More recently, however, increasing use is made of the summary procedure provided for in [Article 7](#) of the Rules, in particular for EPO cases.

With one exception, the current judges are retired national judges in their late sixties or early seventies. The post of judge at ILO-AT is highly prestigious and the work appears to be well-remunerated¹. The procedure for selecting and appointing judges is intransparent and sometimes irregular (see annex). The selection to the post of judge by ILO (one of the defending organisations), and the appointment on short-term (3 year) renewable contracts, fails to meet international standards for judicial independence.

¹ The judges are apparently paid per file, see: <http://www.ilo.org/public/english/standards/reim/gb/docs/gb294/pdf/pfa-18-2.pdf> presumably in addition to a daily allowance and reimbursement of travel costs. Mr Barbagallo is alleged to earn 30.000 Euros a year from ILO-AT work, see <http://espresso.repubblica.it/palazzo/2009/10/08/news/consiglio-di-stato-e-di-casta-1.16244>.

Reasoning and quality of the Judgments

Other aspects of the functioning of the Tribunal, such as the lack of hearings, a lack of reasoning and a lack of consistency, have also been criticized². The Tribunal systematically refuses the request for hearings. The documents submitted by the parties are not public - there is no possibility of file inspection. The only information about the submissions made in the cases and about the reasons for the decision is provided in 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, especially in complicated cases. The regulations of ILO-AT do not foresee the possibility of an injunction or of an accelerated procedure even in cases of real hardship, e.g. unjust dismissal. Adding insult to injury, the Tribunal at times has used the time that has passed as an argument for not ordering the reinstatement of the person dismissed (e.g. Judgments 3290 and 3299). Despite the justified criticism, thus far the Tribunal has resisted any pressure to improve its functioning.

Overall success rate

As in the previous session, the Tribunal rejected the vast majority of the EPO cases: only one complaint out of the 24 cases judged was won on the merits. The complaint concerned was strictly personal, with no further consequences for the Organisation. In the previous (118th) session 3 out of the 18 cases were partially won by the complainant. In the 117th session not a single one of the nine EPO cases judged was even partially won by staff. In the 116th session only one out of twelve of the total EPO cases was partially won by a staff member. This means that out of the total of 64 EPO cases in the last four sessions only 5 cases (8% !!!) were partially won by staff. The remaining 59 (92%) were won by the Organisation. Staff members of other organisations fare much better: of the total of 53 non-EPO cases judged in the most recent session 19 (35%) were partially won by staff. This raises the question whether staff at the EPO is particularly prone to filing hopeless cases or the Tribunal is particularly harsh with EPO cases. We will come back to this point later. Note that “partially won” includes cases won on the substance but remitted to the Organisation for further consideration. Such cases may end up being hollow victories. Since most organisations seem to be bad losers, the complainant is likely to be in for another round of haggling with his or her organisation. See e.g. Judgment 3337 for an example of such a case: the Tribunal remitted back to the EPO problems that had been left festering for 9 years. It seems unlikely that the EPO will now do justice in a case that it mistreated for more than a decade.

Receivability issues

An examination of the cases shows that in the EPO cases the Tribunal has taken a very restrictive approach towards receivability. The majority of the dismissals (summary or other) fall in two categories:

- (a) failure to exhaust internal remedies, or
- (b) decision held not to have a direct impact on the complainant.

² 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

(a) Failure to exhaust internal remedies

Some of the complaints were dismissed for failure to exhaust internal remedies because the complainant went directly to ILO-AT after the initial decision (Judgment 3457) or after the management review (Judgment 3464). Although we sympathise with staff's impatience with the duration of the internal process (easily 3-5 years), it is clear that the failure to exhaust the internal appeals route when foreseen will always lead to the case being lost on formal grounds.

In one case (Judgment 3435) filed in March 2008, the complainants initially followed the Internal Appeal Route but went to the Tribunal after two years and two reminders to the Internal Appeals Committee, having been told that the Office "would do its best" (sic) to provide a position paper (i.e. not yet a IAC opinion) in half a year. The Tribunal took an additional 5 years (!) to dismiss the complaint as irreceivable on the grounds that the complainants "*could have a reasonable expectation of receiving a final decision*" from the IAC and should have waited for longer. This is a departure from earlier jurisprudence wherein the Tribunal awarded cost and damages for cases taking more than 3 years. It is worth noting that, in another case (Judgment 3429) relating to "not a particularly complicated" appeal, the Tribunal decided that four years constituted an excessive delay for the Office to submit its position paper in the internal appeal procedure. It awarded damages (2,000 euros) to the complainant.

Note that unless there is an internal appeal still pending, these cases are irremediably lost, even if the appeal would have been valid on its merits.

(b) Decision held not to have a direct impact

The majority of complaints that were dismissed (summarily or other) as not having a direct impact concern **decisions of the Administrative Council or Circulars**. *The Tribunal has consistently held that "a complaint will be irreceivable if it challenges a **general decision that must ordinarily be put into effect by individual decisions against which internal appeal will lie**"* (Judgment 1520). In practice, the Tribunal has acknowledged in a number of cases that, in limited circumstances, is possible to challenge general decisions³. More recently, however, the Tribunal has adopted a more intransigent line saying that "*an official ... cannot lawfully challenge ... a rule of general application unless and until it is applied in a manner prejudicial to that official*" but thus far had been more pragmatic. Such an obligation to wait for an individual decision becomes extremely problematic when those individual decisions are likely to be far in the future, like for the introduction of a New Pension System. In this case an initial decision can be expected at the earliest after 10 years (Art. 7 PenRegs), but may take as long as 35 years. In such cases the legal certainty ("Rechtssicherheit") of the staff member and the Organisation is not served by a delay of at least a decade. Judgment 3428 does not waste a word on this aspect.

The remainder of the cases in the category "held not to have a direct adverse impact" on the staff member concern matter such as outsourcing of the pension administration (Judgment 3460). Curiously no such explanation was given in what seems to be a similar case namely the outsourcing of the sick leave registration (Judgment 3462). This case was judged "clearly without merit" without much of a comprehensible explanation.

³ For instance: Judgments 1451, 1618, 2244, 2279, 2300, 3118; 1712; 2562, 2919, 3342.

SELECTED CASES

Family matters

Judgment 3434 concerns a request for the **reimbursement of school fees** under Article 120(a) ServRegs, i.e. in case where an employee is unable to have his children educated at the European School. The complainant, a pensioner, was previously employed in Berlin. Upon retirement he moved to Rio de Janeiro, Brazil. While he was in Berlin, the EPO reimbursed for two of his sons, who were recognized to be suffering from a medical condition, the fees of the British school in Berlin. He requested the same for the two of his sons the fees of international schools in Brazil. This was refused. He was, however, informed that the school fees would be reimbursed if his children would continue to attend the British school in Berlin. The Tribunal found that the complainant was not entitled to education allowance even in Germany. It further followed the EPO's arguments for not meeting the requirements in Brazil.

The appeal resulting in **Judgment 3432** concerned the **lack of support by the EPO for family relocation**. The complainant, with dual Kenyan and Dutch nationality, was refused visa for his two dependent step-children, allegedly in breach of the PPI. He incurred substantial costs for their maintenance in Kenya while sorting out the immigration status. He asked for support. The Tribunal found that the EPO had wrongly advised the complainant on the procedure to follow to secure a proper immigration status and had failed to use its influence with the local authorities to sort the problem. The Tribunal decided to award the complainant 15.000 Euro for moral damages, 30.000 Euros for material damages, 2.000 Euro for the delay in the procedure (total 7 years) and 4.000 Euros in costs, making a total of 51.000 Euro. We congratulate the complainant with his success and with the compensation for what was certainly personal hardship for him and his family. Still, it is surprising that the only case in this session that was won by the complainant seems not to have an explicit basis in the Service Regulations. We further note that this case virtually creates no precedent. Nevertheless, at the time of writing, the EPO has not yet proceeded to implement the judgment.

Financial matters, incl. pension appeals

The internal appeal resulting in **Judgment 3435** challenged the implementation of CA/D 28/07 and CA/D 31/07 revising the salaries and other elements of remuneration ("**new salary method**"). The appeal was lodged on the basis of their salary slips of December 2007 and 2008. Cases referred to the IAC on 08.05.2008. The complainants asked on 10.12.2008 when the IAC's opinion would be issued and were told this would take at least a year. They wrote again in Dec. 2009 and were told that the EPO "would do its best" (sic) to provide a position paper by mid-2010. On 17.03.2010 a complaint was filed at the Tribunal challenging the implied rejection of the internal appeals. The Tribunal considered the complaints premature (sic) and dismissed them as irreceivable for failure to exhaust all means of internal redress. It took the Tribunal another 5 years (!) to reach that conclusion.

Judgment 3426 concerns decision CA/D 25/07 of 29 June 2007 with effect of 1 Jan. 2009 that put an end to the **Member States' obligations to reimburse the partial tax adjustment** paid by the EPO to its pensioners by suppressing Implementing Rule 42/6 of the Pension Regulations. The complainants also challenged CA/D 18/07 according to which Art. 42 of the PenRegs (**partial tax reimbursement by the Office**) would not apply to employees joining the EPO on or after 1 Jan. 2009. Appeals were filed with the

Administrative Council, in parallel to appeals filed with the President of the Office. The complaints filed with the Administrative Council were forwarded to the President. Having not yet received an EPO position 2 years later, each complainant filed a complaint at the Tribunal. The EPO challenged the receivability of the complaint against CA/D 18/07 on the grounds that the internal means were not exhausted, claiming that the decision CA/D 18/07 was not mentioned in the internal appeal. The Tribunal followed the Organisation and ruled the complaint against CA 18/07 irreceivable on these grounds. The complaint against CA/D 25/07 was held irreceivable, although not challenged by the EPO, because the complainants had not shown a course of action: the Tribunal considered that *“it had not been shown that the contested decision has caused or is liable to cause the complainants any harm or injury.”* Both complaints were thus dismissed in their entirety.

Judgment 3427 concerns the same decisions as Judgment 3426 above as well as a whole series of others decisions. The mass appeal (some 850 complainants) was filed by colleagues who joined the Office **prior** to 1 Jan. 2009, i.e. who are themselves subject to the old pension system. Further complaints were joined into the same proceedings. Numerous applications to intervene were also filed. Given the complexity of the case, covering a large number of decisions, the judgment is complex. The complaints against the decisions affecting staff hired after 1 Jan 2009 (**New Pension Scheme** and **Salary Savings Plan** CA/D 12/08, CA/D 13/08 and CA/D 17/08) were held irreceivable because of lack of cause of action, i.e. because the Tribunal does not see a prejudicial effect, in particular resulting from “de-mixing”, or from the possible higher financial risk for the complainants. The Tribunal drew the same conclusion for the complaints against specimen contract for Principal Directors and Vice-Presidents (CA/D 10/01 and CA/D 18/08). A main argument of the Tribunal to dismiss the majority of the complaints seems to be that these were *“decisions of general application subject to individual implementation.”* For those complainants that were also staff representatives the Tribunal held that filing the complaint in this capacity *“does not overcome the fact of the nature of the contested decisions being ones of general application that at the material time had not been implemented”* (Cons. 36).

Judgment 3428 rules on a series of complaints against decisions CA/D 12/08 et seq. (**New Pension System** and **Salary Savings Plan**). The complainants are colleagues recruited **after** 01 Jan. 2009, i.e. to whom the New Pension System applies. On the instruction of the Tribunal the submissions were confined to receivability. In line with the above Judgments the Tribunal ruled that *“at the time when the disputes were submitted to the Tribunal, the impugned decisions of the Administrative Council had not yet given rise to individual decisions affecting the complainants.”* In doing so the Tribunal completely ignored the fact that such individual decisions may arise at the earliest after 10 years employment in the Office (before that no right to pension exist) and possibly much later. Postponing judgment until such individual decisions arise thus creates a very long period of legal insecurity which is neither in the interest of the staff nor of the Organisation. Moreover, the fact of allowing decisions – right or wrong - to stand for more than a decade renders them practically irreversible. It thus looks like staff is *de facto* denied access to justice.

In its judgment the Tribunal furthermore criticises the practice of lodging separate, concurrent complaints and appeals. In doing so it overlooks its own tendency to throw up procedural hurdles for complainants that lead to complaints being considered irreceivable. In the absence of a pending internal appeal such hurdles lead to a total loss of rights.

On the request for hearings the Tribunal stated that *“in view of the abundant and sufficiently clear submissions and evidence produced by the parties, the Tribunal considers that it is fully informed about the case and does not therefore deem it necessary to grant this request.”* A similar statement was made in the above and several other cases.

We could not disagree more. This is a complex case, with complex issues and a high impact on those concerned. By systematically rejecting requests for hearings the Tribunal conveniently avoids any personal contact with its subjects. The suspicion arises that avoiding direct contact with the complainants makes it easier for the judges to give judgments that fail to deliver justice.

Outsourcing

Judgment 3459 concerns an **“external” contractor** who had been employed by the Office in the Office on a series of short-term contracts. In 2009 the Office decided to advertise three positions, including hers, as permanent posts. The complainant applied for “her” post but was not taken. She complained against the decision not to employ her. The Tribunal recognized that *“there were many objective signs that she was an “employee” of the EPO.”* However, since she was not an “official” of the EPO or otherwise had a direct contract with the Office, the Tribunal considered itself not competent to hear the complaint. A similar complaint was lodged at the Munich Labour Court and equally lost, at least partially because the Office refused the hearing of witnesses who could have confirmed that the contractor had actually been employed as “Scheinselbständige”, which would have entitled her to be considered an employee of the EPO. The CSC and SUEPO have made several attempts to improve the position of external staff working on the premises (see also below) but thus far none have been successful.

Judgment 3395 concerns a request for execution of earlier Judgment 2919. The original complaint challenged the EPO’s lack of consultation on its policy of increasingly employing external staff for permanent work done on the Office’s premises. For instance, in IM about half of the staff consists of external contractors. The Internal Appeal Committee agreed with the appellant the lack of consultation had to made up for. According to the IAC such consultation would also provide *“an opportunity to discuss issues such as the type of duties to be assigned, the applicable constraints and conditions, the terms of employment and the role of the staff representatives in relation to external employees”*. In its Judgment 2919 the Tribunal had ruled that *“the President shall, within 60 days of the date of publication of the present judgment, consult the General Advisory Committee on the practice of “outsourcing” in accordance with the recommendations of the Internal Appeals Committee.”* Following Judgment 2919 it took the Office 2 years to produce an “outsourcing policy” document that addressed none of the issues listed by the IAC. The Staff Committee is still neither informed about, let alone consulted, on outsourcing decisions. The rights and obligations of the Staff Committee in respect of external staff working on the premises have not been clarified. The Tribunal was abundantly informed about these facts. Nevertheless the Tribunal concluded that *“it is clear from the materials filed with this application that the judgment has now been executed.”*

Managerial discretion and disciplinary measures

There are a number of areas where the Tribunal has always been reluctant to overturn the discretionary decisions of the client organisations. One of those is the decision to

retain or dismiss **probationers**. In **Judgment 3431**, the Tribunal dismissed a complaint by a probationer with the argument that *"a firm line of precedents of the Tribunal have established that such a decision is subject to only limited review."*

Similar considerations apply to permanent staff. In **Judgment 3430**, the Tribunal stated the general principle in **disciplinary matters**: *"according to firm and consistent precedent, a disciplinary authority has a discretion to determine the severity of a disciplinary measure justified by a staff member's misconduct, provided that the measure adopted is not manifestly out of proportion to the offence according to both objective and subjective criteria. Where such a decision lacks proportionality, there is an error of law which warrants setting aside the impugned decision"*. In the case under review, the complainant was heavily indebted and received assistance from the Office for repaying his debt. He failed on occasion to meet the conditions set. At some point the public prosecutor in Munich communicated to the EPO a penalty order against the complainant for negligent money laundering. The EPO referred the incident to the Disciplinary Committee that by majority recommended downgrading. The President (Ms Brimelow) followed the minority opinion and dismissed the complainant. The Tribunal ruled against the complainant. It found *"no basis on which to impeach the exercise of her discretion to dismiss the complaint as it was not manifestly out of proportion to the degree of seriousness of the proved allegations. The President did not exceed her discretionary authority."*

In **Judgment 3433**, the Tribunal follows the reasoning of the EPO and finds that **warning letters**, as disciplinary measures under Art. 93(2)(a) ServRegs, are not final decisions adversely affecting the complainant, because *"they must be considered as acts, or steps, of an administrative procedure which could lead to a final decision"*, i.e. the staff report. Challenging warning letters is thus premature and irreceivable. This reasoning seems questionable. We know from experience that warning letters can have an immediate adverse effect: we have seen several colleagues who suffered psychological harm from what they considered unjust warning letters. From a legal point of view, it is illogical to consider one disciplinary measure (a warning letter) not a final decision, whereas all other disciplinary measures listed in Art. 93(2) ServRegs (up to dismissal) are clearly adverse final decisions. This also seems inconsistent with recent Judgment 3299, where the Tribunal ordered removing such a letter from the complainant's personnel file.

CONCLUSIONS

Several aspects of the functioning of the Tribunal, such as the lack of hearings, a lack of reasoning and a lack of consistency, have long been criticized⁴. Recently the issue of exorbitant delays was added to the list. It seems that at least for the latter the Tribunal found a solution in the form of summary dismissals. This affects in particular the complaints from staff of the EPO. In a judicial system the relative percentage of "wins"

⁴ 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

and “losses” of the parties provides a quality indicator. Probably 50/50 is the most natural. One-third / two-thirds may still be plausible. But nobody is wrong all the time. The systematic (92%!!!) losses of EPO staff and their representatives, with the odd “winner” being a case that has no real impact on the EPO, raises serious concerns about the independence of the Tribunal. We have recently been informed that in the next session 55 EPO cases will be dealt with. We all know the saying “Justice delayed is justice denied”. But summary execution is not an alternative either. And that’s what the next session looks like.

Annex

COMPOSITION OF THE TRIBUNAL (Session 119)

Mr Giuseppe Barbagallo (Italy), age unknown

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 Claude Rouiller (Switzerland), born in 1941

Vice-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

Ms Dolores M. Hansen (Canada), born in 1946 (no c.v. available)

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:

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://kangarocourtsofaustralia.com/2014/03/09/australias-new-export-corruption/>

Sir Hugh A. Rawlins (Saint-Kitts and Nevis)

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 Anguilla and the British Virgin Islands

Former High Court Judge of Antigua and Barbuda, the Commonwealth of Dominica and

the British Virgin Islands

Apparently first appointed August 2012. First mentioned by ILO in 2013:

http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_203979.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

No further information available from ILO.

Further information from other sources:

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

“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,” he said.

Mr Seydou Ba (Senegal) born in 1939

President of the Council for Infrastructure Honorary Senior President of the “Cour de Cassation” of Senegal. Former President of the Court of Justice and Arbitration of the Organisation for the Harmonisation of Commercial Law in Africa (OHADA)

First appointed August 1997. Current term of office expires in July 2015 after 6 terms and will not be renewed (retirement after having reached the maximum age of 75)

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

Registrar (permanent appointment)

Drazen Petrovic

Further information:

<http://iomba.ch/faculty-biographies-2011-2012/>

Dr. Drazen Petrovic is 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.