



EPO cases of the 126th Session of the ILO-AT

Summary

In its 126th session the Tribunal delivered a total of 75 judgments, of which 17 concern the EPO. The good news of this session is that the Tribunal ordered Ion Brumme and Malika Weaver - who had been unlawfully disciplined for their work as staff representatives - to be fully restored in their previous positions. The same happened to a colleague in Berlin who had been dismissed. Two further disciplinary cases were remitted to the Organisation, which may count as a (very) partial win. But all other cases were lost. This paper presents the key cases and the problems, mainly: a lack of normative control and a clear bias in favour of the Organisation - to the detriment of staff.

Disciplinary cases against staff representatives – the wins

Most in the Office will be aware of the dismissals of Elizabeth Hardon and Ion Brumme, and the down-grading of Malika Weaver, at the time Chair, Vice-Chair and Treasurer respectively of SUEPO Munich. The initial suspensions were imposed on the same day (17 November 2015), at a time when the social conflicts at the Office and the protest organised by SUEPO Munich were intensifying. This context was conveniently overlooked by the Tribunal. What thus far few colleagues, if any, knew is what the accusations were actually about. This is now explained in the judgments.

The main accusation against **Ion Brumme** was that the standard contract which SUEPO Munich uses when agreeing with a staff member on financial support was allegedly illegal and that signing it (in the capacity of SUEPO Munich Chair) was misconduct. The contract had been drawn up by a German lawyer, checked by two more lawyers and been in use for several years without creating any problems for anyone concerned. It merely foresees that SUEPO will financially support a member in respect of a case as long as the beneficiary acts in accordance with the contract and does nothing to affect the interest of staff in general or that of SUEPO (a pre-condition for the support). But that did not convince the administration. As has become the case in disciplinary procedures initiated by Ms Bergot (PD4.3), various other and even more far-fetched accusations were added. Even informing SUEPO of the accusations against him was added as a charge. The Disciplinary Committee, these days in majority stacked with managers, recommended a down-grading. The President decided for dismissal.

The accusations against **Malika Weaver** were related mainly to having exercised “*undue pressure*” on the staff member concerned, “*requesting him to either reimburse the legal fees covered by SUEPO for his case or pursue his case further with a complaint before the Tribunal*”, the latter with the aim of obtaining a clear decision on the matter and possibly an award of costs. Again, an accusation of breach of confidentiality was added.

In both cases the Tribunal dismissed all charges. According to the Tribunal, the conduct of Ms Weaver was “**reasonable conduct for a staff union representative seeking to protect the resources of SUEPO that were to be used, in part, to fund the legal assistance given to ...**” ([Judgment 4042](#)¹, point 22).

The decision of the Tribunal on the alleged breach of confidentiality was equally clear. Ms Weaver had shared a letter of Ms Bergot outlining the accusations, including the objections against the standard contract, with her colleagues in within SUEPO. The letter of Ms Bergot was marked “Personal/Confidential”. According to the Tribunal “*Plainly enough the complainant was entitled to share the letter with others in SUEPO, both as a general critique of the lawfulness of the general agreement and a manifestation of the Administration’s view of her conduct ...*”. The take-home lesson is that a letter is not necessarily confidential just because the administration marks it as such. But a careful approach would nevertheless seem advisable.

In its judgment the Tribunal ordered the EPO to restore Ms Weaver “*with retroactive effect to the grade and step she would have held but for the imposition of the disciplinary sanction, with all legal consequences.*”

The Tribunal also awarded damages and costs.

The case against **Mr Brumme** was resolved in a similar way. The main accusation, “*asking and encouraging staff members to sign unlawful agreements*”, was not upheld since the Tribunal held the question whether the agreements was lawful or not “*plainly contestable*”. Moreover, “*A staff union should be free to conduct its own affairs, to regulate its own activities and, also, to regulate the conduct of its members in relation to those affairs and activities*” ([Judgment 4043](#)², point 13).

The remaining accusations were equally found to be baseless. The Tribunal ordered **reinstatement** to the position held immediately before the dismissal with all legal consequences, as well as moral damages and cost.

While these are happy endings, it is important to realise that the malicious accusations and subsequent disciplinary measures have caused incredible hardship to the accused, in particular to Ion and his family. The attacks also interfered with the functioning of SUEPO which was forced to defend its officials, thereby taking time and energy away from its core duties: defending staff. We can only hope that these judgments now finally settle the issues and allow Malika Weaver and Ion Brumme to get on with their life.

Disciplinary cases against staff representatives – some Pyrrhus victories

The accusations against Elizabeth Hardon were different from those above. In her case the Tribunal found that “*the impugned decision to dismiss the complainant should be set aside because in assessing the complainant’s guilt it is not demonstrated that the appropriate standard of proof was applied, namely proof beyond reasonable doubt*” ([Judgment 4047](#)³, point 14). What then follows is: “*The matter should be remitted to the EPO to enable a Disciplinary Committee, differently constituted, to consider the matter ... and for the President to make a fresh decision.*”

These instructions raise a lot of questions. If the complainant’s guilt was not demonstrated at the appropriate standard of proof she should be **acquitted**. This has been the norm of the Tribunal’s judgments for decades and there is no reason provided for a departure from this. What is happening here is that the EPO is given a second chance to patch up its arguments and procedure. Such a second opportunity would never be granted to a staff member. It is unimaginable that a staff member would ever see his or her case remitted in order to correct formal errors or to improve some arguments. But this now regularly happens to the Office, in particular in disciplinary cases, see [Judgment 3887](#) and [3972](#) (of 2017), and [Judgment 4052](#) (this session – more below). What this shows is **bias**: the Tribunal is treating the EPO more favourably

¹ Judges Barbagallo, Moore and Kreins

² Judges Barbagallo, Moore and Kreins

³ Judges Barbagallo, Moore and Kreins

than the complainants. One must note that the order is in respect of a fresh disciplinary proceeding – not a fresh investigation. Considering that the entire investigation was flawed and conducted in an unlawful manner, and that even a new disciplinary procedure will be based on the results of this flawed investigation, the Tribunal’s order is unfair, unjust and illogical.

But things get worse. In the above case concerning Ms Hardon the Tribunal found that the decision to dismiss the complainant should be set aside. She is, however, not to be reinstated. Does that mean that she at least gets her salary until the “fresh” (sic) decision of the President? For that we must have a look at [Judgment 3989](#)⁴ of this session. The case concerns another dismissal for disciplinary reasons (see [Judgment 3972](#)⁵) with a similar outcome as above: decision of dismissal for misconduct set aside, an award moral damages and costs but no reinstatement. In this case the EPO asked for explanations. The first question (point 3 of the Judgment) is a sly: “Does Judgment 3972 entail any additional payments other than moral damages and costs to the total amount of 21,000 euros?” The answer from the Tribunal (point 4) is: “*Self-evidently* (sic!), *the answer to the first question is no*”. This means that although the decision of the President is nominally “set aside”, **the person concerned is neither reinstated nor paid a salary in the time between the two decisions.**

Shortly after the Judgment Ms Bergot informed Ms Hardon that the house ban that had been imposed was also maintained. This begs the question what part (if any) of the initial decision is “set aside”! Note that in such cases, with several more years of salary at stake in the “fresh” decision, the Organisation is likely to be even less inclined to decide in favour of a staff member than the first time. Even presuming that a staff member remains mentally and financially able to continue such the battle, it will most likely be lost in the end.

This brings us back to [Judgment 4052](#)⁶ mentioned above. According to that Judgment the complainant was dismissed for serious misconduct in 2009. The Judgment **omits** to mention that the complainant challenged the accusations against him, lost in Geneva ([Judgment 3297](#)⁷) but **was acquitted by a Dutch court**. When he asked for a review of the ILO-AT judgment on the grounds that a national court found him innocent, the Tribunal snottily gave him its standard “*It is well settled that the Tribunal’s judgments are final ...*” and **summarily** (!) dismissed his request for review, making [Judgment 3563](#)⁸ one of the most disgraceful summary dismissals thus far. The Tribunal’s insistence of not reviewing its judgments, even after clearly new facts are brought to its attention, is proving to affect staff members who have no further instance of appeal. The Tribunal forgets that it is not an appellate court in the real sense of the term. It is the first judicial instance for staff members like us, as the internal appeals body is simply quasi-judicial and has no decision-making powers.

The new case originated in May 2015, about half a year after the complainant had been employed by SUEPO (!) to take care of its administration. The new accusations were the by now familiar “*unauthorised publication of information and opinions about the work of the EPO including non-public information and defamatory and insulting opinions*”. As indicated above, the complainant was no longer employed by the Office since almost 6 years. This should have put him out of reach of any sanctions. The Office nevertheless started a disciplinary procedure claiming a reduction of his future pension. The disciplinary committee’s opinion on the substance was mixed, but there was unanimity on the point that a reduction in pension provided by Article 93(2)(f) ServRegs could only be imposed together with the measure of dismissal hence the committee recommended that the complainant be issued a reprimand. Mr Battistelli nevertheless imposed a reduction of his future pension by one-third as well as a house ban. Of the counter-arguments brought forward by the complainant the Tribunal seized a single but major procedural one, namely that the President decided not to apply Administrative Council resolution CA/26/16 requesting him “*to ensure that*

⁴ Judges Barbagallo, Moore and Rawlins

⁵ Judges Barbagallo, Moore and Rawlins

⁶ Judges Barbagallo, Hansen and Rawlins

⁷ Judges Barbagallo, Moore and Rawlins

⁸ Judges Rouiller, Barbagallo and Rawlins

disciplinary sanctions and proceedings are not only fair but also be seen to be so, and to consider the possibility of involvement of an external reviewer or of arbitration or mediation". What is not clear is why the Tribunal seized this argument in this case, while ignored it in Ion and Malika's cases (where it was also made) and continued to decide their cases. If it could decide their cases, why could it not decide in Judgment 4052? With [Judgment 4052](#)⁹ the case is sent back to the EPO "for the President of the Office to undertake a new examination, which shall take into account the instruction to the President contained in Administrative Council Resolution CA/26/16 dated 16 March 2016" – whatever that means. **We note that this instruction not only applies to this case but to all the SUEPO cases.** Despite the apparent error at the side of the Office, the complainant was not awarded any damages or costs. His struggle continues.

Disciplinary cases against staff representatives – lost

In 2015 Mr Battistelli downgraded a staff representative (Aurélien Pétiand) in the Internal Appeals Committee (IAC) who had signalled irregularities in the functioning of that Committee and had indicated that he could not take part in the following session because of his backlog in minority opinions. The Office ignored the unanimous opinion of the Disciplinary Committee in his favour and seriously down-graded him. The gist of [Judgment 3971](#)¹⁰ delivered in the previous session is that a staff member cannot refuse to take on more work for the reason that he already cannot cope with the work that he has¹¹.

The case of Michael Lund is similar to the above in that he is equally accused of refusing to attend a session of the IAC and (of course) of "unauthorised disclosure". Michael Lund was relegated by three steps - two more than recommended by the Disciplinary Committee. [Judgment 4050](#)¹² focuses a single aspect of the case – the non-attendance – ignoring essential circumstances¹³ and dismissing what seem to be valid reasons given by the complainant for not being able to participate in that session. The complaint was dismissed.

Lack of normative control

In [Judgment 4049](#)¹⁴ the Tribunal once again (for the third time) considered the composition of the Internal Appeals Committee. In its earlier [Judgment 3694](#)¹⁵, two years ago, the issue was that the Staff Committee refused to nominate new Members pending a solution for the problems encountered in the functioning of the Appeals Committee and in view of the disciplinary procedures that were pending against its previous nominees (see above). The President refused to discuss the matter and appointed two "volunteers" from among the elected staff representatives. At the time the Tribunal held that: "*While it is true that the fundamental functions of that body must not be paralysed, it is also true that the body itself cannot be changed through a changed composition. The balance sought to be achieved by the composition of this body, which includes members appointed by the Administration and the staff representation, is a fundamental guarantee of its impartiality. That balanced composition is an essential feature underpinning its existence. Without it, it is not the Appeals Committee*" (underlining added). We agree with that statement. However, the consequences (an estimated two hundred of cases sent back to be redone by a properly constituted Appeals Committee) were highly unfavourable for staff.

True to style, Mr. Battistelli did not adapt his practice to the law but adapted the law to his practice to allow for staff representatives, this time selected by the drawing of lots, to be nominated by him should the CSC fail to do so. So what does the Tribunal say? It makes a complete U-turn. It first

⁹ Judges Barbagallo, Hansen and Rawlins

¹⁰ Judges Barbagallo, Hansen and Moore

¹¹ SUEPO report of the cases of ILO-AT session 125 ([su18003hp](#))

¹² Judges Barbagallo, Hansen and Moore

¹³ Mr Battistelli had just decided on a reform that essentially excluded Mr ML from further participation in the IAC. The members of the IAC nominated by the CSC were furthermore under threat of disciplinary procedures by Mr Topic (VP4) and Mr. Lutz (VP5). As recognised by the Enlarged Board of Appeal in the case of Patrick Corcoran, threats negatively affect the ability to act with the necessary independence.

¹⁴ Judges Barbagallo, Moore and Rawlins

¹⁵ Judges Barbagallo, Moore and Rawlins

piously states that “*The Tribunal’s examination is limited to considering the provision in force at the material time ...*” (point 5). And then “... *considers that the Committee’s balanced composition was guaranteed in accordance with the provisions of Article 36(2)(a) of the Service Regulations, which are not ambiguous*” (point 6). We notice a total absence of normative control (“whatever the Service Regulations say is right”) as well as the audacity with which the very same judges now call something white which only 2 years earlier they called black. In all the IAC cases the Tribunal completely fails to recognise and comment upon the dysfunctionalities in the Internal Appeals Committee. By failing to exercise any normative control on the Organisation’s internal justice system, the Tribunal makes itself co-responsible for the problems. Finally: if the nomination of staff representatives by the President is **not** a problem, where was the justification for sending all these previous cases back?

Medical cases

[Judgment 4051](#)¹⁶ concerns the complaints of yet another staff member who has been dismissed for alleged misconduct, in his case because of his alleged “*obstructive attitude in different procedures aimed at establishing his medical condition since 2013*”. Reading the Judgment it seems that it rather was the Principal Director HR who was obstructive and simply rejected the medical evidence provided by the complainant. ILO-AT reproached the Disciplinary Committee that it did not permit the complainant to call the witness whom he had named¹⁷. The Tribunal found that the President breached due process by re-opening the suspended disciplinary proceedings and imposing the sanction of dismissal, partly on the basis of subsequent events which had not been examined by the Disciplinary Committee. The Tribunal further found that “*Given that the findings of the medical expert were quite unequivocal as to the complainant’s non-accountability for his actions ... the Tribunal considers that the only decision that the President could legitimately take at that stage was to close the disciplinary case without any sanction*” (point 13). The Tribunal ordered reinstatement as well as an award of moral damages and costs.

[Judgment 4046](#)¹⁸ concerns the complaint of a staff member against the refusal of the Office to grant him an invalidity allowance. The complainant identified as the challenged decision the opinion of the Medical Committee. The Tribunal held the complaint to be irreceivable, indicating that the final decision to be challenged was the decision of the President. Whereas we would tend to agree with this assessment, we point out that the practice of the Tribunal has not been consistent in this respect. In [Judgment 1760](#) (point 9) the Tribunal held that the staff member should file his complaint within 90 days of notification of the report of the Medical Committee. In the older case the staff member waited for the decision of the President and the complaint was dismissed as irreceivable. Obviously the Tribunal should not be held to perpetuating incorrect assessments. Nevertheless the problem of inconsistency between judgments – even judgments that are very close in time and/or decided by the same judges – is one of the many problems plaguing the Tribunal.

Access to court for external staff

Two judgments delivered in this session, [Judgment 4041](#)¹⁹ and [Judgment 4045](#)²⁰, concern the question of access to court for external staff who are, or who have been working on the EPO premises. Both were dismissed as irreceivable *ratione personae*. While this was predictable and is formally correct it once again highlights the problem that large groups of persons who are working in the EPO – in the IT area or as patent attorney or consultants - are excluded from access to the Tribunal whereas any other routes ultimately fail because of the immunity of the EPO.

¹⁶ Judges Barbagallo, Hansen and Rawlins

¹⁷ This is ironical given that the Tribunal itself never allows for any witnesses to be called.

¹⁸ Judges Barbagallo, Hansen and Moore

¹⁹ Judges Barbagallo, Hansen and Rawlins

²⁰ Judges Barbagallo, Frydman and Rawlins

Failure to execute a Judgment

[Judgment 4044](#)²¹ deals with the complaint by a staff member that the Office had not properly executed previous [Judgment 3695](#)²². In the earlier Judgment the Tribunal held that the departure from a recommendation of an appeal committee must be explained and that the President had “*singularly failed to come to grips with the reasoning of the IAC*”. The case was sent back to the Office to do better. In the second round, VP4 still did not follow the unanimous recommendation of the IAC to reimburse the procedural costs incurred by appellant. The justification was “*that a decision to do so was exceptional in nature and there were no grounds to justify it in the present case.*” The Tribunal very helpfully (for the Office!) then cited Art. 8(9) of the Implementing Rules for Articles 106 to 113 of the ServRegs as having a bias towards the appellant bearing the costs of an internal appeal. Thus clarified, the judges considered the reasons given by the Office “*adequate, though they could have been more fulsomely expressed.*” The case was dismissed.

Conclusions

The judgments exonerating Ion Brumme and Malika Weaver are greatly appreciated. We consider that for them justice has been done. We also appreciate the support that the Tribunal gives to seriously ill colleagues who often find themselves confronted with threats and disciplinary measures from our PD HR (Ms Bergot) when care and assistance are due.

These positive results do not, however, distract from the fact that the Tribunal fails to deliver justice consistently and impartially, while also failing to exercise any normative control. As this session again shows: the ILOAT remains very much an employer’s court²³.

SUEPO Central

²¹ Judges Barbagallo, Moore and Rawlins

²² Judges Barbagallo, Hansen and Moore

²³ It risks to become even more so: ILO currently is floating proposals for reforms that are mostly disadvantageous for staff, see the [ILO - FICSA -SUEPO documents on the expected ILOAT reform](#)