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EPO cases of the 133rd Session of the ILOAT: *The most salient judgments*

In its 133rd Session, the Tribunal ruled on 51 cases among which 12 EPO cases. For the second time after the judgments on the unlawful strike regulations, the Tribunal ruled in Judgment [4482](#) that an EPO reform, “Social Democracy”, breached the fundamental right to freedom of association. Judgments [4488](#), [4489](#) and [4490](#) sanctioned the EPO’s institutional harassment of a former Principal Director and awarded above 250.000€ of damages in total. Judgment [4491](#) ordered the reinstatement of a single mother with babies (at the material time) unlawfully charged with fraud by the Investigative Unit which made an unfair and distorted analysis of the facts. This paper provides more details.

GENERAL DECISION AND RIGHT TO FREEDOM OF ASSOCIATION

Judgment No. [4482](#)

The right to freedom of association implies the right for staff associations to regulate their own affairs, including the election of staff representatives. The Tribunal quashed Article 6 of CA/D 2/14 introducing Article 35(5) ServRegs and Circular No.355.

At the outset, the Tribunal recalled that, if in principle, a general decision cannot be challenged by a staff member unless and until an individual decision is taken adversely affecting the staff member, an implementing decision is not required in cases where the general decision has an immediate and adverse effects on individual rights.

The Tribunal developed a two-part test for the receivability of a direct challenge against a general decision: (1) the existence of an individual right, (2) whether the decision has an immediate and adverse effect on this individual right.

On the existence of an individual right, the Tribunal recalled that the right to associate freely, which encompasses the right to strike has long been recognized by it for officials of international organizations and is protected under Article 30 ServRegs as a term of appointment for EPO staff, thus acknowledging it as an individual right. Of importance, **the Tribunal equally based this recognition on various international instruments, including the 1998 ILO Declaration on Fundamental Principles and Rights at Work, the 1966 ICCPR and the 1966 ICESCR.**

On the immediate and adverse effect on the right to associate freely, **the Tribunal recalled that international organizations must refrain from interfering in the affairs of staff**

associations or unions, which have the right to manage their own affairs, including the right to freely elect their representatives, irrespective of whether or not the associations/unions are established or operate under the organization's staff regulations.

Consequently, **the Tribunal ruled that the new regime was in violation of the right of staff to freely associate. The Tribunal quashed Article 6 of CA/D 2/14 which introduced Article 35(5) ServRegs and Circular No.355 without retroactive effect** - an intrusion into the powers of the Administrative Council justified by the fundamental nature of the right protected. The Tribunal ordered that former Article 35(6) ServRegs applies *mutatis mutandis* to the future elections of staff representatives for the Staff Committees.

UNLAWFUL DECISION OF TRANSFER AND OPINION OF INTERNAL APPEAL BODY

Judgment No. 4488

Deference given to the decision of an internal appeal body on an unlawful transfer decision that did not respect the dignity of the staff member being assigned to a post that did not correspond to the same level of duties. The Tribunal set aside the impugned decision and awarded 35,000€ in moral damages.

In this case, the Complainant challenged the decision to transfer her to another post. Insofar as the favorable opinion from the Internal Appeals Committee (“IAC”) was not followed by the President in the final decision, the Complainant requested the Tribunal to set aside the said decision and to award her material damages for loss of income as well as moral damages.

The IAC applied the test under Judgment No. 2819, comparing the assigned duties in the newly created post with the general duties of an A6 post, and found that the level of duties assigned to the post where the Complainant was transferred did not correspond to the requirements for an A6 grade post. The IAC thus unanimously concluded that the transfer was unlawful and did not respect the Complainant’s dignity.

On the EPO’s decision not to follow the unanimous recommendation of the IAC, the Tribunal found the arguments contained in the impugned decision unconvincing as the EPO is bound by its own rules. In particular, **the Tribunal recalled that the report by an internal body warrants considerable deference where (1) the report involves a balanced and thoughtful analysis of the issues raised in the internal appeal, and (2) its conclusions and recommendations are justified and rational.**

For those reasons, the Tribunal ordered that the impugned decision be set aside, 35,000€ in moral damages and 1,000€ in costs.

ARBITRARINESS AND PERFORMANCE EVALUATION

Judgment No. 4489

Arbitrariness in the completion of the performance management report leading to moral injury. The Tribunal awarded moral damages to the Complainant.

In the present case, the Complainant challenged the amount of moral damages paid to her by the EPO for the decision not to finalize her two performance management reports for 2011 and part of 2012.

The Tribunal examined the approach of the Appeals Committee (“ApC”) in the present case. Notably, the Tribunal agreed with the ApC that the statutory requirements concerning management reports had not been met and that it existed a direct relationship between the Complainant’s performance management reports and the end of her contract. However, it diverged from the ApC’s reasoning, finding that the President’s refusal to sign the 2011 and 2012 reports was arbitrary.

On the relief sought, the Tribunal held that the Complainant was entitled to 10,000€ in moral damages for the failure to complete the performance reports and in addition to moral damages already paid by the EPO for the President’s arbitrary decision. Moreover, **the Tribunal found that the 300€ recommended by the ApC for the length of the internal proceedings failed to compensate the moral injury suffered by the Complainant, recognizing that the delay of five years “would plainly have had a deleterious effect on the Complainant” and decided to award 3,000€ in moral damages.**

However, regarding the claim for material damages, the Tribunal found it to be inadmissible as it had not been introduced during the internal proceedings.

ABOLITION OF POST AND CONSTRUCTIVE DISMISSAL

Judgment No. 4490

Assessment of material damages in the case of an unlawful decision not to renew a contract after the abolition of a post and constructive dismissal. The Tribunal assessed the loss of future income and awarded 200,000€ in material damages and 20,000€ in moral damages.

In this case, the Complainant challenged the amount of damages awarded for the unlawful decision not to renew her contract and to reinstate her in a lower-level post instead.

The Tribunal found that the material damages in cases of unlawful dismissal, where reinstatement is not ordered, are “*the lost future income in the position with the organisation adjusted by an assessment of whether the staff member would have remained in that position and, if not, also adjusted by future income from other employment (see Judgment 4234, consideration 10). This assessment can also be approached compendiously by assessing the value of the lost opportunity to remain in employment (see, for example, Judgment 4305, consideration 14) (consideration 12).*” The Tribunal further stated that the financial effect on the Complainant of the unlawful decision should be assessed by reference to the circumstances existing at the time the decision was made.

In the present case, **the Tribunal considered that the Complainant’s unlawful dismissal occurred on the day of her resignation, which coincided with the date of expiry of her contract and the effective date of the abolition of her post (constructive dismissal).** As such, the assessment of her damages for unlawful constructive dismissal is the same in substance as for an unlawful abolition of the post leading to an unlawful non-renewal.

Therefore, the Tribunal assessed the loss of future income. The Tribunal held that there was a real prospect that the Complainant's contract would have been renewed for the period pending her retirement, had the decision been taken in good faith. The Tribunal also considered that the contract could have been lawfully not renewed and thus **decided to award the Complainant 200,000€ in material damages.**

With regard to moral damages, the Tribunal found that, contrary to the ApC's finding, the Complainant's claim did not depend on proof of harassment. Indeed, as evidenced by her letter of resignation and her recent medical certificates showcasing the deterioration of her health, the unlawful decision to abolish her post and to not renew her contract had a serious and negative effect on the Complainant's health and well-being, resulting in her resignation. The Tribunal awarded the Complainant 20.000,00€ in moral damages.

STANDARD OF PROOF BEYOND REASONABLE DOUBT AND DISMISSAL FOR SERIOUS MISCONDUCT

Judgment No. 4491

The Tribunal considered that the misconduct has not been established beyond reasonable doubt. It considered that the Complainant never had the benefit of the doubt and awarded her €30,000 in moral damages.

In the present case, the Complainant challenged the decision to dismiss her with immediate effect for serious misconduct and requested her reinstatement with retroactive effect and moral damages.

At the outset, the Complainant being charged with fraud (and misrepresentation), the Tribunal defined it as the intention to obtain financial advantage by deception.

The Tribunal therefore recalled the essential principles applicable to disciplinary proceedings:

- A staff member accused of wrongdoing is presumed to be innocent and is to be given the benefit of the doubt.
- The burden of proof of allegations of misconduct falls on the organization.
- The organization must prove the misconduct beyond reasonable doubt.
- The Tribunal will not ordinarily engage in the determination of whether the burden of proof has been met but rather will assess whether a finding of guilt beyond reasonable doubt could properly have been made.

Applying these principles to the present case, **the Tribunal found that the Complainant was never given the benefit of the doubt during the investigative process and the disciplinary proceedings, in particular it considered that an unfair and distorted analysis of the facts had been made.** The Tribunal was not satisfied that the misconduct was proven beyond reasonable doubt. The impugned decision was set aside, and the Tribunal considered that in view of the circumstances, the reinstatement of the Complainant was appropriate and awarded her 30,000€ in moral damages and 8,000€ in costs.

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