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113th Session of the ILOAT

Summary

The 113th Session of the Administrative Tribunal of the International Labour Organisation (ILOAT; herein after "Tribunal") pronounced 47 Judgments on 04.07.2012. Five of the cases concerned the EPO. This represents a large reduction from previous sessions. Although awards of damages were made in two cases, none of the EPO Judgments could, on their substance, be classified as a "win". This paper discusses the EPO cases, in particular pointing out items of interest. Also, items of interest to EPO staff from the non-EPO cases are highlighted.

Introduction

The Tribunal hears complaints relating to disputes between employees and organisations for 59 international organisations. The Judgments are orally presented in open session twice a year in Geneva, at which time they become legally binding. Following the presentation, the Judgments are publicly available in paper form and are then sent to the parties via post. It used to take a few weeks before the were published online[1]. This time, however, they were online within two days of the presentation. This report summarizes observations from the 113th session of the Tribunal, and important developments in the case law.

For more general comments on the functioning of the Tribunal, we refer to the comments made in our reports from the 106th and later sessions of the Tribunal, available from the archive section of http://www.suepo.org

More information on legal matters can be found at the site http://rights.suepo.org

The 113th session was presided over by Mr Ba of Senegal, replacing Ms Gaudron of Australia, who had presided over the Tribunal since the 108th session. Indeed, we learned that Ms Gaudron had resigned from the Tribunal, presumably after completing her work for the 113th session, since her name was on a number of Judgments. According to the Tribunal's statute, the Tribunal should comprise seven judges. Taken with the earlier resignation of Mr Gordillo, this would leave the Tribunal with only five judges. However, in its 101st session in June 2012 the International Labour Conference appointed one judge (The Hon Mr Moore - Australia) and authorised the direct appointment of another judge (unnamed). Thus from the 114th session on, we expect that the Tribunal will be back to full strength. The number of Judgments pronounced has been reducing over the last 4-6 session. There as also a slight shift in the language distribution of the Judgments in the last

[1] The Tribunal's website is http://www.ilo.org/trib

session ant the proportion of French language Judgments was marginally higher than usual (20 out of 47). These changes would appear to result from the composition of the Tribunal and the reduction in the number of Judges.

As usual, the Tribunal did not hold hearings in any of the 47 cases. As set out in our previous reports, for example of the 110th session, public hearings are necessary to ensure transparency and thereby accountability of the Tribunal. An oral and public hearing being an essential element of a fair trial[2].

Summary of EPO cases

Application for interpretation

Judgments 3109 concerned an application for interpretation by the organisation (i.e. the EPO in this case). This is when the organisation concerned considers that it does not understand fully how to execute a judgment issued by the Tribunal. In this case, the Judgment the Office didn't understand was 2972. As set out in our report of the 110th session of the Tribunal, 2972 concerned a complaint filed by two security officers in The Hague, who perform shift work. On recruitment (in 1990 and 1991), they were informed that, as compensation for this, rather than the usual shift allowance set out in the ServRegs, they would receive a flat-rate allowance amounting to 34.37% of basic salary as compensation for work performed outside normal working hours and on non-working days. This was called the "Van Benthem allowance". The Office abolished this, with the effect that their salary was reduced by about 20%. In 2972, the Tribunal had found that the Office had a duty of care towards the complainants not to cause them hardship. The Tribunal thus ordered the Office to pay the complainants, for as long as they performed shift work, the difference between the shift allowance and the Van Bentham allowance, until such a point as the shift allowance was at least equal to the level of the Van Bentham allowance.

[2] ECHR Judgement Miller v Sweden see p29-37

The Office claimed not to understand this, in particular because due to annual salary adjustments, the amounts involved had change.

From the phrasing of the new Judgment, it seems that the Tribunal was annoyed to be confronted by this application from the Office. The Tribunal set out why it considered that its previous Judgment was perfectly clear. The Tribunal thus dismissed the application for interpretation and awarded costs to the complainants from Judgment 2972.

Internal tax rates

Judgment 3146 concerned a complaint filed by a staff member against the changes to the rates used for calculating the internal tax rates in 2008. The complainant filed complaints with both the Administrative Council and the President, claiming quashing of both the general decision and its application to himself.

Rather than forwarding the appeal to its appeals committee, the Administrative Council referred the appeal to the President of the Office, for him to deal with it through his appeals committee. The complainant viewed this referral as the Council rejecting his appeal. Accordingly, he filed the current complaint with the Tribunal.

The Tribunal considered that it is a general principle of law that a person may not submit the same matter for decision in more than one proceeding. This is particularly so if separate proceedings are brought before separate bodies. Accordingly, given that the complainant had filed with both the Council and the President, it was necessary for one of these to defer to the other. The question was, which?

The Tribunal noted that the jurisdiction of the Council only extends to decisions taken by it, i.e. the underlying decision. On the other hand, when a complainant challenges an individual decision, as was the case here, they may at the same time challenge the underlying decision. Individual decisions however, fall within the jurisdiction of the President, and not the Council.

Accordingly, the Tribunal decided that the Council's referral of the appeals to the President was lawful and founded. The conclusion of this is that the complaint was irreceivable due to the lack of exhaustion of internal remedies, since the decision being appealed still pending before the Internal Appeals Committee and was not a final decision. Accordingly, the complaint was dismissed.

Career issues

Judgment 3151 concerned a complaint by an examiner about the date of his promotion to A4. As a result of the internal appeals proceedings, the complainant's staff reports were re-written. Because of this, the date of promotion was changed and the salary arrears paid with interest.

The Tribunal thus considered that most of the issues raised by the complainant had been addressed. The only remaining one being the question of moral damages. The Tribunal found in this respect that the Office, by amending (two) staff reports, had implicitly agreed that they were unlawful. Thus the Tribunal found that the staff member and been harmed and awarded moral damages and costs.

Pension transfers

Judgment 3117 concerned a complaint filed by a former staff member concerning a claim to be allowed to make a pension transfer from Italy.

On taking up duties at the Office in 1981, the staff member had requested that he be allowed to transfer a lump sum known as a "*liquidazione*", which he had received on leaving an Italian firm where he had previously worked, ought to have been transferred to the Office's pension scheme. The Office had refused this, since the Office considered that the *liquidazione* did not correspond to retirement pension rights accrued under previous employment.

The Tribunal considered that the dispute turns on the question whether the "*liquidazione*", now referred to as a "*trattamento di fine rapporto*" (or TFR), may, under the applicable rules, be transferred to the Office's pension scheme. In this respect, the Tribunal found that the *liquidazione* was an indemnity which a firm was obligated to pay, and that it is completely unrelated to contributions to a pension scheme. Thus it did not constitute "retirement pension rights" within the meaning of Article 12 of the Office pension Scheme Regulations (Article 12 is the text governing inward and outward pension transfers). Rather, it could be viewed as a severance grant.

Accordingly, on the merits, the Tribunal dismissed the complaint. However, the Tribunal found "deplorable" the lack of care and the length of time with which the Office had dealt with the case. Indeed, the Judgment was only issued five years **after** the staff member's retirement. The Tribunal thus awarded the complainant 4,000 euros moral damages.

Seat agreement

Judgment 3105 concerned a complaint filed by a number of Dutch colleagues in The Hague against the new seat agreement in The Netherlands which entered into force in 2006. The complainants argued that the new seat agreement resulted in a difference in purchasing power between Dutch nationals their non-Dutch colleagues. They asked the Office to introduce a compensation mechanism for this. The appeal was the result of the Office's refusal to do this.

According to its statute, the Tribunal is competent for judging disputes concerning observance of the terms of appointment, the ServRegs, the pension regulations and the like. However, a seat agreement is an international agreement. Whilst the Tribunal would have jurisdiction to consider if the agreement was being correctly applied, the Tribunal considered that it did not have jurisdiction to examine if the agreement was valid. This was particularly so given that the disputed effect is an intended consequence of the international agreement.
For these reasons, the Tribunal declined jurisdiction in the matter and dismissed the complaint.

Interesting findings from the EPO cases

The most interesting finding from the EPO cases was ... how few of them there were. In recent sessions, there have been about a dozen EPO Judgments per session.

We have been informed that the Tribunal has, at least for the moment, decided to treat a **maximum** of five EPO cases per session. The remaining cases will be put in stock. Currently, there are 150 EPO cases pending before the Tribunal. With two sessions per year, this means that, even if no new cases are filed, it will take 15 years just to deal with the current backlog. We understand that the cases will be treated in more or less chronological order. However, the Tribunal may prioritise particular cases, for example concerning dismissal.

It seems that a number of issues have led the Tribunal to take this line with respect to EPO cases. These include:

The number of cases. The Tribunal appears to have reached the conclusion that the EPO is swamping the Tribunal with cases, and that this is disproportionate and is having a negative effect on the ability of the Tribunal to serve all the organisations using the Tribunal. However, according to our data, the filing level of EPO cases per 1000 staff is completely in line with other organisations. The absolute filing figures for the EPO are higher than other organisations but this is simply a consequence of the EPO being large. Additionally, the EPO has a larger population of permanent employees that other organisations, which results is a larger population of pensioners (and invalids), both of which are eligible to file complaints with the Tribunal.

The fact that the number of cases is a problem for the Tribunal is known by the EPO, but despite this the problems which give rise to appeals remain largely unresolved. In our view the main causes are bad decisions and other inappropriate management behaviour ; and ineffective pre-litigation conflict resolution mechanisms. Other factors are the short time limits for filing appeals and the manner in which DG5 defends the EPO seeking have the appeal rejected on any and every formal point rather focussing on the substance of the problem. These latter factors forces staff to file appeals early and often result in multiple appeals dealing with essentially the same issue.

Correcting these problems is the only effective way to reduce the number of appeals. It is a pity that instead of doing so the EPO is seeking to limit the right of appeal and also taking up the Tribunal's time with Judgments such as 3109, discussed above, simply because the relevant organs of the Office are seemingly incapable of understanding perfectly clear Tribunal judgments. We also note that the concept of an "application for interpretation" is nowhere mentioned in the Tribunal's statute. However, since the Tribunal didn't dismiss the application as inadmissible, but rather dismissed it due to its (lack of) substance, it seems that the Tribunal considers it has the right to extend its jurisdiction in this manner.

The issues at stake. The Tribunal judges are judges from their highest national courts. It seems they do not view it as the role of the Tribunal to decide on disputes of low value, for example questions concerning 100 euro Van Breda re-imbursements.

This is an interesting development, since formally the Tribunal is the court of first and last instance for staff. The internal appeals systems are not Tribunals, they are advisory mechanisms. This does not mean that they cannot be effective. The stance of the Tribunal appears to be that "low value" cases should be resolved internally. Which of course, raises the question as to who should decide on such issues, if internal resolution is not possible.

Internal appeals still pending. We understand that there are up to 20 cases similar to Judgment 3146, where internal proceedings before one or the other of the EPO appeals committees are pending. The Tribunal considers that Judgment 3146 has clarified the issues for a number of appeals, and indicated how other appeals filed following referral from the Council to the President are likely to be dealt with.

The implication is that these appeals should be withdrawn and internal proceedings before the President's appeals committee should take place. In fact this is one of the problems referred to above giving rise to a proliferation of appeals. It results not from staff, but from the lack of clarity regarding jurisdiction between the various internal bodies, forcing staff to file multiple appeals. Another problem is that the failure of the EPO to deal with internal cases in a reasonable time results in staff seeking to rely on previous Tribunal jurisprudence and file directly with the Tribunal.

If this matter was resolved, it would not only significantly reduce the appeals backlog with the Tribunal but also reduce future appeals.

We understand that the Tribunal will contact the EPO on this matter in the near future.

It might well be that, by imposing the limit of five cases per session, the Tribunal is trying to put pressure on the EPO and complainants to settle cases. It might also be that they are trying at the same time to put pressure on the EPO to fix the flaws in the EPO procedure (see section below). If so, it is regrettable that it is the staff members who are caught in the cross fire between the EPO and the Tribunal in that they have to wait an unacceptable length of time in order to receive a judgment.

Nature of the EPO procedure. The Tribunal was originally set up to settle disputes between ILO staff and the ILO. Other organisations can accept the Tribunal's jurisdiction. However, the Tribunal also has to accept an organisation's request to use the Tribunal! As part of this, the organisation's statutes and other rules are examined to see if they are compatible with the workings of the Tribunal. Only if this is the case does the ILO's Governing Body (equivalent to the EPO's Administrative Council) grant access to the Tribunal. **The Governing Body can also withdraw access to the Tribunal**. The Tribunal has apparently now requested the legal advisor to the ILO's Director General to examine if the ILO should withdraw the EPO's access to the Tribunal. The reason for this is that the ILO is extremely unhappy with the case load and practice. Recent changes excluding internal appeals and forcing staff to go directly to the Tribunal have also been cited as a cause for concern. The Tribunal considers itself to be a final or appellate instance. This means that, except in truly exceptional cases, there must have been a internal instance, upon which the Tribunal can rely for gathering of evidence, holding of hearings and opinions from an internal body on which peers of the appellant also sit. The Tribunal is thus unhappy with the ever increasing list of situations in which staff members have to file directly with the Tribunal without first exhausting internal proceedings. The list currently includes requests to work beyond the age of 65 and decisions concerning Part Time Home Working. Worse, it also includes decisions taken after consulting a medical committee. The mandate of the medical committee includes giving medical opinions on all matters concerning the ServRegs. This includes disputes over 100 euro Van Breda reimbursements. That is to say, precisely the category of matters which (see above) the Tribunal considers should have been heard in an internal appeal process before being submitted to the Tribunal.

It is being suggested (see for example report of the 240th meeting of the GAC) to add to this list complaints following an opinion from the disciplinary committee and appeals against Council decisions. We are not aware to what degree the Tribunal is informed of such proposals, but it is clear that the Tribunal considers an effective internal appeal procedure to be a prerequisite for acceptance of its Jurisdiction. If this is the case, then the ILO Governing Body could withdraw access.

Access to a court to resolve disputes is a basic human right. Given its functional immunity from national jurisdiction, this means that the EPO has to ensure that we have access to some court. It was decided that this should be the Tribunal (it should be noted that the European Court, to which officials of the European Union address their complaints, and which would in theory be an alternative to the Tribunal, did not exist when the EPO was set up). The access to the Tribunal was written into Article 13 of the

EPC. That means that it would require a diplomatic conference followed by ratification in the member states in order for the EPO to change Tribunal.

Moreover, access to a court must be such that within a reasonable time the complainant receives a decision from the court. Case law of the European Court of Human Rights has stipulated that THREE years is a reasonable time for a first instance court. Bearing in mind that internal instances are not tribunals the ILO Tribunal is the first (and only) instance for staff. With delays of over 3 years in the internal procedures, and current delays of 2-4 years at the Tribunal, cases for EPO staff already significantly exceed limits set by the ECHR. If the Tribunal continues with its limitation of EPO cases to 5 per session, then composite delay will exceed 15-20 years. Such a situation is a clear violation of staff right and the EPOs obligations under human rights. Note that both the EPO and the Tribunal claim to protect fundamental rights.

It should be clear from the above that EPO staff no longer have access to a court which provides a judgment within a reasonable time. 15 years from filing with the Tribunal (generally following an internal procedure) is clearly not reasonable. Worse, there is also a very high risk that the ILO GB will withdraw access to the Tribunal and we will no longer have access to **any** court.

It is essential that the EPO management take steps to address this situation. Unfortunately, the steps being currently considered are such that the situation is likely to be made worse.

In our report of the 111th session, we criticised the fact that it is not always clear to which appeals committee staff members should address an appeal. The uncertainty on this matter resulted in the current session in Judgment 3146. In the 112th session, Judgment 3053 also addressed the matter of to which body appeals should be addressed. In that case, the Tribunal considered that the complainant had been correct in taking a referral as a rejection and thus the complaint was found to be receivable. The difference between these two appeals is that in 3053 there was no individual decision to be implemented, only the general decision.

Clearly, this is a matter that the administration should address as soon as possible, either by issuing clarifying guidelines to staff or by amending the regulations. However, in the latter case, for the reasons set out above, we insist that the change in regulations should not be merely to scrap the Council's appeals committee without replacement and to force staff members appealing a Council decision to file a complaint directly with the Tribunal! Neither should it result in preventing staff from appealing decisions of the Council by forcing them to wait until the President has implemented the decision or worse still have to wait until the decision has an individual negative effect on them, which could be years after the council decision.

Interesting findings from non-EPO cases

Some interesting findings from non-EPO cases are discussed below.

Limits of the Tribunal's jurisdiction

In addition to EPO Judgment 3105 discussed above, a number of other judgments showed how narrowly the Tribunal views its jurisdiction.

For example, in Judgment 3106 (UNIDO), the Tribunal reiterated that neither organisations nor (by extension) the Tribunal may interfere in staff association affairs.

Judgment 3112 concerned a complaint as a result of a selection procedure at the International IDEA. The complainant never had a contractual relationship with the International IDEA and never was an official of the organisation. The judgment cited (EPO) Judgment 2657, concerning similar subject matter, and found that it was not competent to hear the complaint and dismissed it. As with the complainant in Judgment 2657, the complainant was thus left without a court to which to put her case.

As set out above in the context of EPO Judgment 3109, the Tribunal offers Organisations which would otherwise have nowhere else to go the possibility to file applications for interpretation, which are not expressly covered by the Tribunal's statute. It is thus interesting to note that they do not offer such extension to others, in this case a job applicant, where the denial of jurisdiction results the complainant not having a court. This is in a violation of fundamental rights which the Tribunal claims it protects.

The claimant in the EPO case has an appeal pending with the European Court of Human Rights challenging the denial of access to justice.

Extension beyond retirement age

Judgments 3108 (IAEA), 3122 (WTO) and 3133 (ILO) all concerned applications to work beyond the normal retirement age. Since 2007, this has also been possible at the EPO. In contrast to the EPO, however, it seems that the other organisations allow a negative decision for extension to be contested internally before a complaint is filed at the Tribunal. For the reasons set out above, it would be helpful if the EPO would follow this practice, rather than obliging staff members whose application is turned down to file directly at the Tribunal.

Execution of Judgments

Judgments 3107 (ITU) and 3114 (UNESCO) concerned applications for execution of earlier Judgments. These can be filed if the complainant considers that the organisation in question has not properly executed a Judgment.

In the latter case, the Tribunal decided that the earlier Judgment had, in fact, been executed. However, the organisation had only done this after the execution request was filed. This was viewed as unacceptable. Accordingly, moral damages were awarded.

In the former case, the Tribunal found that "an international organisation which has recognised the Tribunal's jurisdiction is bound ... to take whatever action the judgment may require". They considered that the ITU had not. The Tribunal thus ordered the ITU to make sure the earlier Judgment was implemented, and awarded substantial moral damages and costs.

These Judgments should serve as warnings for the Office. We are aware of a number of Judgments e.g. 2874 concerning the implementation of BEST or 2919 concerning the Office's practice on outsourcing which the Office has not properly implemented. We are also aware that at least for 2919, an application for execution of the Judgment has been filed with the Tribunal.

Due process

A number of cases from other organisations were sent back to their respective organisations due to lack of due process or other formal violations in the proceedings leading up to the decision being complained about.

These included 3108 (AIEA), 3119 (WIPO), 3123 (Eurocontrol), 3124 (ITU), 3125 (BTBTO PrepCom), 3126 (EFTA) and 3127 (CDE).

There is, of course, no guarantee that the complainants will be successful in the new proceedings ordered by the Tribunal. The only thing that is certain is that, due to the failings of the respective organisations, the complainants will have to live with further delay and uncertainty concerning their complaints.

Renewal of contracts

As in previous sessions, the largest single group of complaints from other organisations concerned non-renewal of contract. One problem (for organisations) is that, after a certain period on contract, staff members may have a right to a permanent post, since their functions are clearly permanent in nature. One popular way to get rid of a staff member is to (or least pretending to) abolish the post in question, for example by carrying out a reorganisation. As we have previously commented, this area is a mine field. The organisations often lose, and have to pay

substantial damages. Up to now, the EPO has largely avoided this, because it has generally employed staff on permanent employment contracts.

Even where the organisation "wins" on the merits of a case, the Tribunal may award moral damages since the way that such a decision was reached may cause the complainant injury. On the other hand, even where the complainant "wins" on the merits of the case, there may be no order of re-instatement, but rather merely a (substantial) award of damages. It is often hard to determine precisely from the judgment why a particular case was won or lost.

In the current session, judgments 3110 (ILO), 3128, 3149 (both AITIC) 3135 (CTA), 3138, 3139, 3140 (all concerning the same complainant from the ITU), 3141 (WHO), 3142 (ECC), 3144, 3145 (WIPO), 3148 (CDE), and 3150 (ICC) all concerned staff on time limited contracts. Whilst some of these judgments also concerned other issues, that is to say that 12 out of 47 judgments concerned at least partially (non) extension of fixed term or short term contracts .

Given the troubles that other organisations have in this area, we have repeatedly stated that it is ill advised for the EPO to be pressing ahead with increased use of non-permanent (including contract) employment in key areas of the Office.

The Executive Committee