INTERNATIONALE GEWERKSCHAFT IM EUROPÄISCHEN PATENTAMT IGEPA
STAFF UNION OF THE EUROPEAN PATENT OFFICE SUEPO
UNION SYNDICALE DE L'OFFICE EUROPEEN DES BREVETS USOEB

Zentraler Vorstand . Central Executive Committee . Bureau Central

16.02.2011
su11016cp - 0.2.1/5.2

110th Session of the ILOAT

Summary

The 110th Session of the Administrative Tribunal of the International Labour Organisation (ILOAT) pronounced 48 judgments on 02.02.2011. The EPO was again the Tribunal's largest "customer", accounting for no less than 9 of the cases! This session, all the EPO cases were either clear "wins" or "loses". Four of the EPO judgments were "wins". In one of the five cases that lost on the substance, an award of moral damages was nevertheless made. 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 ILOAT hears complaints relating to disputes between employees and organisations for 56 international organisations. The judgments are orally presented in open session twice a year in Geneva, at which time the judgments become legally binding. Following the presentation judgments are publicly available in paper form and are then sent to the parties via post. Online publication follows within a couple of weeks[1]. This report summarizes observations from the 110th session of the ILOAT, 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 report from the 106th and 107th sessions, available from http://www.suepo.org/archive/su09019cp.pdf
and
http://www.suepo.org/archive/su09106cp.pdf

As stated in said earlier reports, SUEPO will continue to monitor the work of the Tribunal closely and to push for needed reform of the Tribunal. It is worth noting that the ILOAT reform discussions which started in 2002 and 2003 have resulted in some positive developments but these fall far short of the reform requested and which should have been achievable. It is frustrating, that in the meantime, the UN Justice Reform, which set out to address similar problems, has taken place. We consider it a pity that the ILOAT and the Organisations which subscribe to its jurisdiction have not yet seemed willing to enter into serious discussions on further reform. One issue which should be addressed is the lack of recognition of fundamental rights within international organisations. In this respect, SUEPO representatives met with the Staff Union of the ILO and it was agreed to work together towards fundamental reform.

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

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

As was the case with the previous ILOAT session, the session was presided over by Ms Gaudron of Australia. For comments on Ms Gaudron, we refer to our report from the 108th session, available from http://www.suepo.org/archive/su10021cp.pdf

As we wrote in our report of the 108th meeting, each President (for better or worse) influences the course of the Tribunal. After this session, with one exception we have no particular comments to make over and above those already made with respect to her handling of the cases made in our reports of the 108th and 109th sessions. This exception concerned the joining of complaints into one judgment. After the 109th session, we reported that the Tribunal had, in a number of cases, combined complaints, even if they seemed quite different. In the present, 110th, session, the Tribunal seemed to reverse this practice. For example, they turned down requests by the organisations to join the complaints leading to judgments 2955 and 2956 on the one hand and 2965 and 2966 on the other hand, on the grounds that they were unrelated.

Generally, the Tribunal does not hold hearings. It was noticeable that, before moving on to pronounce on the judgments in the 110th session, Ms Gaudron announced that there had been no public hearings, with the stress on public. However, from the judgments it seems that this also meant any hearings. We assume that by public Ms Gaudron was referring to the fair trial principles which generally use the term "public hearing". See, for example, Article 6.1 of the European Convention on Human Rights. The reason public hearings are necessary to ensure transparency and thereby accountability of the courts. An oral and public hearing is an essential element of a fair trial[2]. The systematic failure to hold hearings is one of SUEPO's major criticisms of the working practices of the Tribunal. We also consider that such hearing should be public.

Summary of EPO cases

Reporting and Career issues

It is worth pointing out at the start of this section that the Tribunal grants organisations wide discretion, in particular in areas such as promotions, transfers, confirmation of probation, renewal of fixed term contracts and even job classification. That said, the organisations may not abuse this discretion. This means that, provided that the Office follows the rules correctly, it is particularly difficult to win complaints against staff reports, non promotion or similar decisions of a discretionary nature.

Judgment 2957 concerned a complaint against a staff member's staff report for the period 2002 - 2003. Following a recommendation from the Internal Appeals Committee (IAC), the staff member's report was reviewed. A partial box marking (for aptitude) was improved from "good" to "very good", and comments made under the overall rating and the partial rating for productivity were changed. In particular, the productivity, whilst still given a rating of "good" was rated as being a "solid good". However, the overall rating itself remained unchanged at "good".

The complainant appealed, claiming that since three partial box markings were "very good" and the forth was a "solid good", the overall marking should also have been improved to "very good". The complainant also considered that procedural violations had been made by the Office. In particular, that the IAC should not have sent the case back for review; rather, it was competent and thus should have reviewed the markings itself. Subsidiarily, it should not have referred it back to the reporting officer responsible for writing the report in the first place.

Concerning the procedural violations, the Tribunal found that the IAC has the authority to recommend that a case be sent back for review or to recommend a precise remedy.

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

Thus the IAC properly exercised its authority by recommending that the matter be remitted for review. Moreover, the Tribunal found no evidence of bias, discrimination or bad faith against the reporting officer and that it was not unreasonable that the report be sent back to him for further review. Thus the Tribunal found no procedural violations.

On the substance, the Tribunal considered that a "good" marking is a positive rating. Moreover, the partial marking for productivity carries a significant weighting. The Tribunal thus found that the overall rating of "good" did not "involve reviewable error". Accordingly, on its merits the complaint was dismissed.

The Tribunal did, however, find that the Office had failed to deal with the appeal in a timely and diligent manner. The appeal was filed in 2006, and the final decision on it was only communicated in 2009, which the Tribunal found constituted unacceptable delay. Accordingly, the Tribunal awarded moral damages and costs.

Judgment 2977 concerned a complaint against termination of service at the end of the probationary period. In probationary cases, an organisation is given exceptionally wide discretion when deciding if an individual is suitable for the organisation. Generally, the Tribunal considers that this is the whole point of a probationary period. That said, when assessing performance, an organisation must establish clear objectives against which performance will be assessed, provide the necessary guidance for the performance of the duties, identify in a timely fashion the unsatisfactory aspects of the performance so that remedial steps may be taken, and give a specific warning when continued employment is in jeopardy. In judgment 2977 the Tribunal considered that this had been the case. In particular, they considered that "several strategies were employed by the complainant's director in an attempt to provide him with assistance, and that, this notwithstanding, there was no significant improvement in his performance which had been assessed as inadequate from the beginning". Accordingly, the Tribunal dismissed the complaint.

However, the behaviour of the Office in this case was extraordinary, it that on the same day that the staff member was informed that his appointment would not be confirmed, he was also asked not to return to work for the remainder of his probationary period, but instead to take his remaining annual leave. He was also asked that same day to collect his personal belongings and to hand in his EPO badge and key. In the internal appeal procedure the Committee recommended an award of moral damages for the undignified treatment he received in the amount of 5000 euros. The Office sought to negotiate this figure down, but eventually paid the full amount. We see no reason for treating unsuccessful probationers in this manner and hope that such behaviour will not be repeated.

The background to judgment 2995 was complex, involving multiple staff reports since 2000 and harassment. However, at its core, which was the only issue taken up by the Tribunal, it concerned a complaint against the staff member's report for the period 2000 - 2001.

Following an internal appeal, the Internal Appeals Committee found that the reporting procedure leading to the staff member's report for said period had been procedurally flawed. The IAC thus recommended that the reporting procedure be repeated and that a new staff report be drawn up. Note here an important difference to case 2957 discussed above. There, the report was modified. Here, the whole reporting procedure should have been repeated and a new report drawn up. The complainant was informed by the President that the IAC's recommendations would be endorsed, i.e. followed. However, rather than drawing up a new report following a new reporting procedure, the Office in effect merely modified the previous report. The report was then signed by the previous reporting officer, but by a new counter signing officer. When the complainant complained about this, he was informed that it was not appropriate that this report be subject to a further internal appeal. Hence the complainant was forced to go to the Tribunal.

The Tribunal found that the Office had committed procedural violations.

Firstly, since the Office had (at least stated that it had) carried out an entirely new reporting procedure, then the complainant should have been interviewed before completing the report. This was especially necessary given that the counter signing officer was changed, and it thus could not be assumed that he was fully informed of the complainant's performance during the period in question. However, the complainant was not interviewed before the new report was issued.

Secondly, since the complainant had received what should have been an entirely new report drawn up according to the reporting guidelines, the usual processes, i.e. conciliation followed by internal appeal, should have been open to him had he not been satisfied with the report. Instead, the Office informed him that the internal means of redress were exhausted. The Tribunal was particularly critical of this since they found that the complainant was thus deprived of due process and the right to a hearing.

Accordingly, the Tribunal found that the 2000-2001 staff report must be withdrawn. Given the elapsed time, however, it did not order that a new report be prepared. Rather, the withdrawal must be without prejudice to the complainant's rights that "may depend on satisfactory performance during the relevant period". The Tribunal also awarded substantial damages and costs.

Former staff members, such as pensioners and invalids (now called "inactive" staff), as well as other rightful claimants (such as recipients of a survivor's pension) may also file complaints with the Tribunal. In the recent past, there were a handful of such cases in each session. In the 110th session, there was only one. Judgment 2969 concerned the request by a (now former) staff member to be allowed to work beyond the age of 65. This possibility was introduced as part of the “first basket” of measures concerning pensions, with effect from the start of 2008. According to the regulation, staff may make such a request, and the Office may, if it decides that it is not in the interests of the organisation, turn down the request. Owing to the short times available, such negative decisions must be appealed directly to the ILOAT, without first having to file an internal appeal. This case is the second which the Tribunal has had to pronounce upon. The first was judgment 2896, upon which the Tribunal pronounced in its 108th session.

As with judgment 2896, the Tribunal stated that the decision is discretionary. The Tribunal recalled its (general) case law that it will only intervene if the decision "was taken without authority, that a rule of form or procedure was breached, that the decision was based on a mistake of fact or law, that an essential fact was overlooked, that a clearly mistaken conclusion was drawn from the facts or that there was abuse of authority". In the present case, the complainant was a former member of Patent Administration. The Office argued that concerns existed surrounding overcapacity of staff in this area. The Tribunal seems in effect to have accepted this as sufficient reason. They also seem to have considered irrelevant the claim by the complainant that there was a general policy in Patent Administration not to grant a prolongation, and that such a policy would have required statutory GAC consultation which was not the case. Accordingly, as with judgment 2896, the Tribunal turned down the complaint.

Other organisations, such as the IAEA, also have provisions where the President may, at his discretion, allow staff members to work beyond a particular age. As evidenced by the dismissal of the complaint in judgment 2979, also for these organisations the Tribunal gives great discretion as to whether or not to grant such extensions.

Money matters

Two complaints ruled upon in the 110th session concerned payments to staff members.

Judgment 2972 concerned a complaint filed by two security officers in The Hague. On recruitment (in 1990 and 1991), they were informed that 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". In 2005, they were informed that this arrangement would cease from the start of 2006. Rather, they would be paid under the guidelines for shift work. Under a transitional measure, they received a compensatory allowance. The Internal Appeals Committee calculated that, despite this allowance, long term the complainants would still be earning 10 to 20% less than if they were still in receipt of the Van Benthem allowance. Following on from the internal appeal, the Office agreed to pay a nominally guaranteed salary until the total of basic salary, shift allowance and transitional measure exceeded the amount they had received earlier with the Van Benthen allowance in place. This is what the complainants complained about to the Tribunal.

The Tribunal considered that the complainants did not have an acquired right to an allowance calculated precisely as the Van Benthem allowance. However, the Tribunal also considered that the Office had "a duty of care to ensure that the new arrangements did not cause financial hardship". Most importantly, they considered that this obligation was "entirely independent of the EPO's obligation to pay the complainants the full amount of their basic salary as adjusted from time to time". The effect of this was that they considered the transitional measures put in place both before and after the internal appeals proceedings to be inadequate, since neither preserved the complainants' basic salary. Rather, the Tribunal ordered that they be paid according to a transitional measure compensating for the difference between the shift allowance payable in accordance with Article 58(2) ServRegs and the amount received with payment of the previous Van Benthem allowance. This the Office must pay retroactively, with interest at 8%. The Tribunal also awarded costs.

Judgment 2976 concerned a complaint by a staff member concerning payments from the Office's Long Term Care Insurance (LTCI) scheme.

The complainant's wife is severely disabled. For her the complainant receives financial support as set out in the implementing rule for LTCI at level III, the highest normal level. In this case the payments do not cover either the costs of care or the costs of essential adaptation of the complainant's home. The complainant thus requested the maximum benefit (50% higher than level III), which may exceptionally be granted by the President. Following internal appeal and in the light of an opinion of the medical committee, this request was turned down by the Office on the grounds that hardship was only to be defined in financial terms, and that the costs with regard to long term care only related to the direct care costs, and not necessary equipment / adaptation to the home. In the judgment, the Office accepted that both the decision taken after the opinion of the medical committee and the internal appeal could be ruled on in the same judgment. This the Tribunal did, meaning that the Tribunal could proceed without having to decide on side issues such as the competence of the medical committee.

The Tribunal found that the Office had made several errors in the case.

The Tribunal found that, according to the regulations, the LTCI was "to provide a fixed amount of financial support to defray some of the expenses incurred". Thus it was reasonable to refuse exceptional benefit only if the benefit paid was sufficient to meet the expenses involved, which was clearly not the case. Moreover, the Tribunal also found that there was nothing in the regulations that excluded expenditure on equipment and on home or vehicle modifications from cover by the insurance.

Moreover, the Tribunal found that the Office had misunderstood the purpose of insurance. The Office had also taken hardship to be a purely financial criteria when deciding whether or not to make a payment under the policy and this was not the case.

Accordingly, the Tribunal set aside the President's decisions not to pay the complainant "exceptional benefit" and resubmitted the case to the Office to take a fresh decision within 60 days of publication of the judgment.

It has to be said that given the extremely difficult conditions the complainant is facing, the Office has exhibited a distinct lack of concern for the staff member and his spouse. The criteria applied were not only very formal but also wrong as the Tribunal has determined.

Harassment

Judgment 2984 concerned a complaint alleging personal attacks by a previous Office President (Mr Pompidou) and vice-President of DG4 (Mr Edfjäll) against a member of the (Munich) Staff and SUEPO committees.

These two former managers had sent a number of letters which in effect sought to hold the complainant personally responsible for actions of the local SUEPO committee, in particular:

- various publications;
- the partial rerun in Munich and Berlin of the 2006 staff survey, and
- the holding of SUEPO general assemblies,

and also for actions that she had allegedly taken in her capacity as a staff representative. One example of this was an email sent to the head of internal audit suggesting that the activities of the former principal director of HR should be looked into.

On examining the facts, the Tribunal came to the conclusion that there was no evidence to support the Office's conclusions that the actions committed were the actions of the complainant personally, as opposed to her acting in her capacity as a staff representative. Accordingly, it was not permissible that the Office should single out one individual as being responsible for the activities of a group of people, namely the (local) SUEPO committee members taken as a whole. Accordingly, the Tribunal found that "the president's letters in which he singled out the complainant for the actions of the Munich local section of SUEPO in relation to the Principal Director of Personnel and the letter of the Vice-president of DG4 concerning the staff survey were affronts to the complainant's dignity and, considered together, constitute harassment".
The Tribunal thus awarded 5000 euros moral damages and costs. The complainant has donated the award to the Amicale "Europe Third World Association" (ETWA Munich).

Although the above might sound like "good news", other aspects of the judgment were nevertheless strange and unsatisfactory. The reasons for these are that it seems that misleading information about SUEPO was provided to the Tribunal by the Office. For example, the Office informed the Tribunal that it had "not been possible to trace any registration, article or association, or constitution for this entity". Thus, "SUEPO has no legal status within the EPO" and is merely "tolerated"!

From this, the Tribunal concluded that SUEPO has no separate legal personality. Thus its members and officials are personally liable for any actions taken on its behalf.

At this point, it is worth pointing out that, under Ms Brimelow, Office resources were "invested" in two studies on this matter:

One study was undertaken by the Swiss Institute of Comparative Law dated 21 August 2007. This report concluded that law pertaining to freedom of association should apply to the EPO. Such law includes the right to legal personality for staff associations (see for example ILO Convention C87 available from the ILO website). The report further concluded that the EPO has de facto recognised SUEPO. After circulation to a small group of people this report appears to have been suppressed.

A further study was undertaken on the liability of SUEPO in front of national courts. The Office has so far refused to provide SUEPO with a copy of the study. Moreover, during Ms Brimelow's presidency, two law suits were filed against SUEPO in German courts by staff members alleging that SUEPO had

harmed them. At least one of these suits was partially financially supported by the Office. In the end, both suits ended acceptably for SUEPO. It is, however, clear from both cases that had the German courts taken the view that SUEPO lacked legal personality, they would have been deemed inadmissible for this reason alone. It is moreover, a further example of a failure to recognise and protect fundamental rights.

Thus although it is not clear precisely what the Office told the Tribunal, it is clear that it was inaccurate. Finally, if the Office has not been able to find a constitution for SUEPO, then they obviously did not look at the SUEPO website!

SUEPO is currently considering how and if to correct the misinformation which the Office has provided the Tribunal with.

Admissibility issues

The Tribunal considers itself to be a final instance. That means (c.f. its rules, which may be found on the Tribunal's website) that internal remedies, for example internal appeal or review proceedings, must be exhausted before a complaint is filed with the Tribunal.

Judgment 2994 concerned an appeal filed in March 2008 against the changes introduced at the start of 2008 concerning the conditions of sickness insurance applicable to employees' spouses. These changes resulted in mass appeals (about 150 appeals were filed). To deal with these appeals the IAC decided to implement an procedure which identified a number of the appeals as test appellants, and suspended the others pending the outcome of the test appeals. The complainant was not chosen to be one of the test appellants. In April 2008, it was confirmed to the complainant that his internal appeal had been registered. In June he was informed that the similar appeal lodged with the Administrative Council had been referred to the President. In July 2008, he filed his complaint with the Tribunal.

According to its previous case law, the Tribunal permitted appellants to file with the ILOAT prior to completion of internal appeals where there was an excessive time delay in the internal proceedings. In this case, the delay between filing the internal appeal and filing with the Tribunal was about four months. The Tribunal found the appeal irreceivable for failure to exhaust internal remedies.

An interesting issue with this case, is the “test appellant” procedure. It could be argued that due process has not been followed for those appellants who were not selected as test cases, and that this would permit them to challenge the procedure directly before the ILOAT. However, with this judgment the Tribunal seems implicitly to be supporting the Office's practice in this matter.

In the current session, non-EPO cases 2962 (WIPO), 2971 and 2999 (both WHO) were also dismissed for the same reason. Interestingly, the argumentation for 2971 was that internal remedies were not exhausted since the internal appeal was not filed on time and was thus irreceivable.

Summary dismissal of complaints

Article 7 of the Tribunal's rules concerns summary dismissal of complaints. If the President of the Tribunal considers a complaint to be clearly irreceivable or devoid of merit, when it takes up the complaint the Tribunal may dismiss it summarily as clearly irreceivable or devoid of merit. In the 110th session, this happened to one EPO case.

Judgment 2998 concerned an application for review of Judgment 2653.

As pointed out several times by ourselves in these reports, the Tribunal's judgments are "final and without appeal" as stated in Article VI of its Statute, and carry the authority of *res judicata* (that which has been judged). They may be reviewed "only in quite exceptional circumstances and on strictly limited grounds: failure to take account of some material facts, a material error that involves no exercise of judgment, an omission to rule on a claim, or the discovery

of some new essential fact that the complainant was unable to rely on in the original proceedings. Moreover, the plea must be such as to affect the original ruling. Pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea, on the other hand, afford no grounds for review",
In recent sessions, there has not been a single application for review which has been accepted by the Tribunal.

Likewise, in the current case the Tribunal found no grounds for review. Accordingly, the case was summarily dismissed under Article 7 of the Rules of the Tribunal.

In the current session, non-EPO cases 2954 (UNESCO), 2987 (WHO), 3000 (IFRCaRCS) and 3001(ILO) were also requests for reviews of earlier judgments. Each one was likewise summarily dismissed.

Interesting findings from the EPO cases

Each session, the Tribunal dismisses a number of cases due to lack of exhaustion of internal remedies. In the 110th session, this happened to one EPO case and three non-EPO cases. Potential complainants should thus note that, although the Tribunal does accept cases directly if the internal proceedings have been unduly delayed, this has become the exception..

Moreover, the Tribunal considers itself to be a final instance. We are not aware of any cases e.g. in the last 10 years where the Tribunal has agreed to review one of its judgments! This principle is based on the infallibility of the court, and is intended to create legal certainty. However, it seems that the Tribunal takes the principle to its limits if not beyond.

Undue delay I

It seems that the Office is now generally working through appeals filed in 2008. We are, however, aware of some earlier appeals which are still waiting for DG5 to produce a position paper on. We are also aware of more recent cases which have, for what ever reason, been treated with a higher priority. It is clear that the Tribunal does not see such delays as acceptable. For example, in judgment 2957, even though the complaint lost on the substance, the Tribunal awarded moral damages for the length of the internal proceedings.
Such delays are also not consistent with jurisprudence of the ECHR. The European Court has ruled in a number of judgments that a delay of greater than 3 years is not a reasonable time for a first instance court. In the case of staff at the EPO this means the completion of the procedure before the ILOAT since the IAC is not a judicial body, rather an advisory body.

We can only urge the Office to make the facilities available that staff members can get justice within a reasonable time. In the meantime, it seems that the Tribunal differentiates between cases where no progress has been made in the IAC and those cases where there is evidence that the process in ongoing. We advise staff members who find that their appeals have taken more than 18 months to point this out during the proceedings, and claim additional moral damages for this reason.

Interesting findings from non-EPO cases

Some non-EPO cases have been mentioned above in the context of the discussion of the EPO cases, if the core subject matter was the same. Other interesting findings are discussed below.

Formalistic

In case 2965, the Tribunal found that "an administration must not deprive a staff member of his or her right of appeal by being excessively formalistic". In the case in question, the staff member (at UNIDO) was deemed to have filed an internal appeal too early. The UNIDO appeals committee recommended giving the staff member a new time limit to file. The organisation turned this down and continued to argue that the appeal had been filed too early. They thus argued

before the Tribunal that the appeal was not receivable. The Tribunal found that it was, and sent it back to the organisation for a new decision. Moral damages were also awarded.

On the other hand, in judgments 2955 and 2966, complaints were dismissed for the reason that they had been filed after the time limits Even though, in the case of 2955, the internal appeals body had chosen to hear the complaint!

The conclusion that can be drawn is that the Tribunal may be formalistic, but not the parties.

Undue delay II

In the context of the Office, undue delay normally means the time taken to process an appeal. In the context of other organisations - evidenced for example by judgment 2988 concerning the WHO - undue delay can relate to the time taken for the organisation to execute a judgment fully and properly. In this case, it took the WHO almost exactly one year and four attempts to implement correctly the earlier judgment (2786). In judgment 2988, the Tribunal found that the judgment had indeed been correctly executed and found no evidence of bad faith in the delay. However, they nonetheless awarded additional moral damages since an organisation has a duty to calculate salaries and benefits in accordance with its regulations and rules.

Whistle blowers

Judgment 2983 is in some ways similar to EPO judgment 2984 discussed above. This concerned a situation at UNESCO where a member of the staff representation sent an email alleging misconduct to the Director of the Bureau of Human Resources Management. The allegation concerned the Director (and wife) of the San José (Costa Rica) office of UNESCO. Somehow (it was never determined by whom), this email was passed on to said office's Director. The complainant then received threatening correspondence from lawyers representing the Director's wife. She turned to the organisation to provide assistance defending herself, which the organisation refused to do.

The Tribunal found that, by sending the email, the staff representative "did not overstep the bounds of her mandate as an elected officer of the STU". They also found that an international organisation had a duty to protect a staff representative. Further, they considered that the organisation had been careless by "failing to prevent the leaking of the whole email to the director of the San José Office". Additionally, they in effect found that the organisation had wrongly suggested that she had failed in her duties.

As in EPO judgment 2984, they awarded 5000 euros moral damages and costs.

Judgment 2989 concerned a complaint against the FAO from a former staff member who alleged fraud, harassment and abuse of authority in Kenya. An internal study found that the "allegations were not supported by the available evidence". It was concluded that the allegations were malicious. Disciplinary action was taken and the staff member dismissed.

In such a case, if an organisation has (rightly or wrongly) come to the conclusion that no fraud is taking place, the staff member is in a weak position. This is especially so if the organisation manages to avoid committing any formal procedural violations. The Tribunal found that, given the seriousness of the case, dismissal was proportionate.

There are worrying issues on this case.

Firstly, it is clear that the Tribunal provides limited protection to whistle blowers, especially if the case has not been proven, which can be very difficult for an individual.

Secondly, and more worryingly, it seems that there were indeed serious procedural violations during the disciplinary and appeals proceedings. For example, the complainant was denied the right to present and defend his case in person before the (FAO) appeals committee. The Tribunal also held no hearings. The Tribunal felt that it was the FAO's discretionary right to decide that

hearings were not necessary and that the complainant had been "given the opportunity to present and defend his case fully (presumably, in written procedure)".

As stated above, in the introductory part of this paper, it is a basic right to have a public hearing (if requested) before a court. It is completely unacceptable for the Tribunal to pass judgment in this case, without a hearing. Clearly the fundamental rights of this complainant have been breached..

Acquired rights

Judgments 2985 and 2986 both concern appeals by staff at EUROCONTROL concerning the conditions under which they were allowed to make pension transfers from the Belgian national system to EUROCONTROL. In particular they concerned the number of years the complainants were credited for the transfer by EUROCONTROL.

The cases are complex and difficult to understand from the limited information presented in the judgments. About 200 staff members were either appellants or interveners in one of the other of the appeals.

In essence, it is possible, if the external system allows it, to transfer pension rights accrued elsewhere into the EUROCONTROL system. The request has to be made within six months of the date of the staff member's "establishment" (presumably, date of successful completion of the probationary period), or within six months of the date on which such a transfer becomes possible (if this is later). Previously, the years credited were calculated with reference to the basic salary on joining the organisation. If transfer was not yet allowed, then the persons concerned could either submit an application as a safeguard or wait until a transfer became possible (see last paragraph of this section for the relevance of this sentence).

A transfer became possible from Belgium to EUROCONTROL on 01.06.2007. With effect from 31.05.2007, EUROCONTOL changed the regulations governing how the years to be credited were calculated. According to this new regulation, basic salary and age at the date of the transfer application were taken into account. This clearly represents a worsening of the terms of the transfer for the staff members affected.

(The reader may recall that the EPO introduced the same change in 2004. However, the Office allowed that, for staff in place, transfers from the (immediately) previous system, the old regulation would continue to apply. In this way, the Office took some steps to safeguard the interests of existing staff.)

Naturally, this was appealed, and breach of acquired rights was argued. In the Tribunal's opinion, "the amendment to an official's detriment of a provision governing his / her status constitutes a breach of an acquired right only if it adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced him / her to stay on".

The Tribunal considered that since the possibility of a pension transfer was theoretical, it could not be considered a fundamental term of employment. Accordingly, they threw out the acquired right argument.

The lesson the reader should draw from this is that the Tribunal interprets acquired rights in an extremely limited manner. Conditions of employment may be worsened, even seriously. However, so long as the condition in question was not fundamental to the staff member joining, or staying with, the organisation, it is unlikely that an acquired right will be acknowledged.

However, the Tribunal did find that those staff members who had submitted an earlier transfer request as a safeguard were indeed eligible to transfer according to the previous regulation. It is clear from the judgment that this covered some but not all of the complainants.

The lesson to be drawn is that complaints are more likely to succeed in front of the Tribunal

on technicalities than on the substance. They are extremely unlikely to succeed on the basis of claims of acquired rights or equal treatment or other such criteria. Since many of these principles are general principles of law, and fundamental rights, it raises questions regarding how these are protected in practice by the ILOAT.

Sexual harassment

Judgments 2973, 2974 and 2975 all concerned complaints brought by women alleging misconduct at the WHO. The alleged harasser became ill and the investigation into the misconduct was stopped on the grounds that he was unable to participate. The complainants were paid damages of the order of 10,000 CHF by the WHO as compensation for the lack of investigation. The Tribunal found the handling of the cases by the WHO in this manner to have been insufficient. By terminating the investigation the WHO had put the interests of the alleged harasser above those of the complainants. The Tribunal thus found the awards of moral damages to have been inadequate and tripled them. The Tribunal thus again emphasised the need for all such allegations to be investigated completely, properly and in a timely manner by the organisation concerned. We hope that the Office is taking note, and will put in place as soon as possible a formal conflict resolution policy to replace Circular 286, the suspension of which the Office now admits was illegal, but has still refused to put back into force.. One of the measures contained in Circular 286 was a mechanism for investigating complaints. The lack of such a mechanism makes it more likely that complaints of harassment against the Office will be won on the basis that no proper investigation was carried out.

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 present session, the outcomes ranged from awards of several years salary plus tens of thousands of moral damages on the one hand to dismissal of the complaint on the other.

In the current session, judgments 2958, 2963 (both ITU), 2960 (ITER), 2964 (EMBL), 2980, 2981 (both PrepCom), 2982 (IOM, this complaint also revolved around allegations of harassment), 2990, 2991, 2992 (all CDE) all concerned renewal of contract. That is to say, 10 out of 44 judgments.

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 full monty

Judgment 2993 managed to combine the issues of admissibility, *res judicata* and costs against the complainants in one single judgment! The complaint concerned changes to the pension system at Eurocontrol. Formally, the complaint was dismissed by the Tribunal as being time barred and thus not admissible. On the substance, however, the Tribunal found that the complaint was really an application for review of judgment 2633.

Thus normally, as set out above, it would have been summarily dismissed for this reason. The organisation then asked for an award against the complainants on the basis that the proceedings were abusive. The Tribunal found that, although the complaint must be dismissed, it was "not an appropriate case for the award of costs against the complainants".

From this potential complainants should note that there are conditions under which the Tribunal will indeed award costs against the complainant. This might, for instance, be in a case where the complainant refuses to accept the Tribunal's judgments and continues to pursue the matter with further similar complaints.

To the best of our knowledge, the Tribunal has only ever awarded costs against the complainant (an EPO case as it happens), although organisations sometimes request it. Generally, these requests get turned down. Another example from the 110th session can be found in judgment 2996 (EMBL). Here the claim was turned down with the simple observation that the complaint was "partly well founded" and this "obviously means that this counterclaim will be dismissed".
The Tribunal has developed this thread of case law that costs may, under certain circumstances, we awarded against the complainant despite the fact that the Tribunal's Statute states that all costs will be paid by the defendant organisation. This is unusual because in most other cases the Tribunal strictly adheres to the wording of the Statute despite the gross injustice that can result from this (see for example Klausecker v EPO Judgment 2657).

Withdrawal of suit

Attached to the paper judgments were 3 "withdrawals of suit". This happens when the complainant informs the Tribunal that he wishes to withdraw a complaint and the organisation in question has no objection. Then the Tribunal officially registers withdrawal.

We know neither the substance of these cases nor the reasons for withdrawal because these are not made public . However, it seems possible that the organisations in question attempted to settle the disputes. If so, this would serve to speed up proceedings by reducing the number of cases which the Tribunal has to deal with, and would thus be something to be encouraged.

Language, language ...

Finally, judgment 2955 (mentioned twice above in different contexts) is also interesting because the organisation asked the Tribunal to censure the language used by the complainant. The Tribunal, however, considered that "the complainant, who is not assisted by a lawyer, has certainly used, in his complaint and rejoinder, blunt, colourful language which is not always very courteous. However, this wording does not exceed the bounds of what is acceptable in the context of legal proceedings". Unfortunately, we are not privy to what precisely the complainant filed. Complainants should, however, note that whilst the Tribunal grants wide discretion in such matters, there are limits. One example is Judgment 2751, where a staff member was awarded moral damages because the EPO representative made defamatory remarks about him in the context of another case which he was representing before the Tribunal.

The Executive Committee