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109th Session of the ILOAT

Summary

The 109th Session of the Administrative Tribunal of the International Labour Organisation (ILOAT) pronounced 44 judgements on 08.07.2010. The EPO was again the Tribunal's largest "customer", accounting for no less than 15 of the cases! Five of the EPO judgements were "wins". This paper presents the EPO cases, pointing out items of interest, as well as points of interest from non-EPO cases.

Introduction

The ILOAT hears complaints relating to disputes between employees organisations for 56 international organisations. The judgements are orally presented in open session twice a year in Geneva, at which time the judgements legally binding. Following the presentation the judgements are made available online¹. The summary statements of the Tribunal which are read out during the presentation are not published. This report summarizes observations from the 109th session of the ILOAT, and highlights important developments in the case law.

Reports from previous Tribunal sessions are available from the SUEPO website. 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 these reports, SUEPO will continue to monitor the work of the Tribunal closely and to push for needed reform. It is worth noting that none of the major issues raised during the ILOAT reform discussions (which started in 2000) have been resolved. In the meantime, reform at another major international tribunal, the Administrative Tribunal of the United Nations, has taken place. We consider it strange that the UN Justice Reform has not resulted in a similar initiative for the ILOAT, particularly bearing in mind that the current President of the ILOAT played a key role in motivating the UN Justice Reform. More information can be found at the site rights.suepo.org

As we wrote in our report of the 108th meeting, each President (for better or worse) influences the practice of the Tribunal. One noticeable change this session was increased use of the practice of joining cases into single judgement. For example, in EPO judgement 2947 two different complaints were combined into one judgement. The same happened in four other non-EPO cases. Similarly, 19 complaints by different Eurocontrol staff members were compressed

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

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into two judgements. None of this helps the understanding and transparency of the cases.

We have reported before that the Tribunal is paid on a "by case" basis by the "client" organisations. The judges remuneration is also on a per case basis² there is however a complete lack of transparency as to how the fees are calculated and distributed between organisations and judges.

A further worrying issue which we heard about recently is that the Tribunal appears to be employing staff on the basis of a series of repeating contracts which (may) get renewed, some after a one month break. If true such a could call into question the independence of the staff. It should not be forgotten that the senior Tribunal Staff (Registrar and Deputy) are employees of the ILO and the ILO Director General is their appointing authority. It is generally consider good practice to "secure" Judges (and legal staffs) tenure and remuneration in such a manner that their independence and impartiality is strengthened. This does not appear to be the case with the ILOAT.

We also suspect that the Tribunal is under pressure from some client organisations to keep costs low.

One consequence of these factors could be the Tribunals clear reluctance to hold hearings, which it has not done since 1989. This despite repeated reminders that (public) hearings are a fundamental right which the ILOAT claims to protect.

Looking at trends in the Tribunal there are signs that the "public interest" demonstrated during the ILOAT Reform discussions has had a positive effect. Specifically success rates have increased since the initiation of the ILOAT Reform project in 2000. However, closer examination shows some unsettling trends.

² ILO Governing Body decision GB 294/PFA/18/2 November 2005 (available from http://www.ilo.org/public/english/standards/relm/gb/do cs/gb294/index.htm)

One trend is a divergence from the Tribunals previous practice to receive cases where they have not been dealt with in a reasonable time within the organisation (in our case the IAC). Tribunal is showing increasing reluctance to take such cases, sometimes forcing complainants to wait for more than 3-4 years before achieving a decision. At the same time the Tribunal criticises the delays and has awarded moral damages, but this does not resolve the problems. SUEPO believes that the reluctance of the Tribunal to receive such cases is motivated, at least in part, by the concern that it would lead to a flood of cases. The current backlog of appeals within organisations is very high. The right to a judgement in a reasonable time is also a fundamental right, which the ILOAT (and the EPO) is failing to protect effectively.

Another trend is to make monetary awards rather than order the organisation to correct the error. For example to award damages instead of reinstatement. Such a practice limits the effect of the judgement. This is noticeable with particularly the illegal appointment cases in which the decision (and appointment) is set aside but no real corrective action is ordered. In these cases the cost of the damages awarded by the Tribunal is significantly lower than the cost of running a proper selection process. practice is not very satisfactory, particularly because the level of the awards does seem proportionate to the harm caused and can in no way be considered an effective deterrent to the organisations.

Language issues

This session, Ms Gaudron (President) and Comtet (Registrar) took turns to summarise all the judgements, be they in English or French. In Ms Gaudron's case, when summarising French language judgements she read out a formalistic one sentence summary of the decision (e.g. "for the reasons set out in Judgement No. xxxx, The Tribunal has decided as follows: the complaint is dismissed") from a piece of paper. From this we derive that, although the Tribunal is meant to be bi-lingual, she has difficulty communicating in one of the Tribunal's working languages. Despite this,

she has continued the practice of also presiding on cases which are in her weaker language. This of course raises questions about her ability to understand the details of these cases. This problem was also apparent with the previous President (Mr Ba) who appeared unable to read out prepared statements in English.

Summary of EPO cases

Appointments

Three EPO judgements concerned the appointment of managers at the EPO.

Two (2920 and 2921) were filed by members of the Munich Staff Committee (MSC) and concerned the transfer of directors to posts in DG2 without a formal selection procedure. The same complainants had won earlier appeals concerning transfers which took place without the Office informing staff of the vacancies through the publication of vacancy notices. In the current cases, the Office did indeed publish vacancy procedures, but failed to hold selection procedures. Rather, higher management simply decided and transferred the persons concerned.

The complainants considered that the requirements of Article 4(3) ServReas according to which "vacant posts shall be filled in the interests of the proper functioning of the Office and having regard to the need to offer career opportunities to permanent employees" were not met by such a procedure. All staff should be afforded equal career advancement opportunities, and this is all the more necessary when the posts to be filled are of particular importance for the acquisition of managerial skills and for personal development. This required a full selection procedure under Annex II, which involvement of foresees the representatives. This is particularly so for the posts in question, which are very different from the DG1 (examining) director posts for which the directors in question were initially selected for.

The Tribunal noted that in two of the three transfers concerned, the vacancy notices

were defective in that they lacked a description of the positions, the required minimum qualifications and in one case, a closing date. Staff members could not thus make an informed choice as to whether or not to apply for the posts in question. Since the notices failed to provide even the minimum information that a staff member would require to reach an informed decision, they were deficient.

The Tribunal thus set aside the appointment decisions in question and awarded costs.

The third judgement on this subject (2939) was filed by members of the Hague Staff Committee (THSC) against the appointment previous Principal Director the Personnel to the post of Special Advisor to VP4, at the grade of A5, on a 15 month contract. Currently, an internal appeal takes over three years to process. Clearly, in such a case delay renders ineffective any decision of the appeal process. Accordingly, the complainants informed the Office that if they deal with the appeal in a reasonable time (setting a 90 day limit for the Office to respond) they would consider the internal means of redress exhausted and file at the ILOAT.

The Tribunal disagreed with the complainants' approach. In particular, rather than unilaterally deciding in advance what an unreasonable delay was, they should have asked for the appeal to be expedited and then attempted to find out if the case had indeed been unilaterally delayed by the Office. Accordingly, the Tribunal deemed that the appeal was not receivable due to the lack of exhaustion of internal remedies.

This presumably means that the internal appeal will now continue. Given that the "special advisor" has now left the Office, whatever conclusion will be reached, it will be too late to have any particular effect. This is unfortunately similar to the case in EPO judgement 2792, also involving an appointment which had in the meantime become moot. We regret that the delays built into our appeal proceedings mean that the Office can arbitrarily delay proceedings, rendering justice available to complainants

severely limited - in judgement 2792 the complainant was merely awarded moral damages of 1000 euros, despite demonstrating that a transfer decision had been defective and should be guashed.

Statutory consultation

The last two sessions have seen a number of cases which revolved around the question as to whether or not consultation in the GAC was necessary before introducing measures at the Office. The complaints were sometimes GAC members, sometimes members of local staff committees and, in one case, an examiner in Munich who complained against having to do BEST. All the complaints were won.

Judgement no. 2919 (filed by members of the Munich Staff Committee) revolved around this point. The core of the appeal was related to the percentage of external contractors Principle emploved in Directorate Infrastructure and Services. In particular, it was argued use of contractors affects the working conditions of permanent employees additional because of the requirements that flow from increased staff turnover. Permanent employees may also have to assume additional duties and responsibilities that external contractors are unable to take. Accordingly, the employment framework of external contractors should have been presented to the GAC for opinion under Article 38(3) ServRegs.

The Internal Appeals Committee agreed with this. Indeed, the IAC unanimously recommended that an Office-wide regulation regarding the employment of external contractors be submitted to the GAC. The President (Ms Brimelow) decided not to follow this unanimous recommendation and dismissed the appeals.

The ILOAT recalled from its case law the importance of consulting the GAC and followed the line of the IAC. The Tribunal ordered the President (now Mr Battistelli) to consult the GAC on the practice of "outsourcing" in accordance with the recommendations of the IAC. This the Office

must do within 60 days of publication of the judgement (08.07.2010),

Within 60 days means before 06.09.2010. As it happens, a meeting of the GAC is currently scheduled for 01/02.09.2010. The deadline for submission of documents to this meeting is 10.08.2010. That means that the Office has a little over one month to produce an Officewide regulation regarding the employment of external contractors. This would not be a problem if the Office has a policy, but we suspect that this is not the case. Also this problem could, of course, have been avoided if Ms Brimelow had shown respect for and followed the unanimous opinion of the IAC. We presume that Mr Battistelli will be truly grateful for this early "present" from his predecessor. We know of other presents which will become apparent in the future.

Expatriation allowance

It is clear that the administration has recently been more strictly applying the regulations grant concerning of an expatriation evidenced This allowance. is by increased number of such cases concerning non-award of the allowance being brought to the Tribunal. The previous, 108th session saw three such complaints. In the current session there were two more.

Judgement 2924 concerned a staff member in the Hague with dual Greek and Dutch nationality. Except for a year of study in Spain, most of the ten years prior to joining the Office were spent in the Netherlands. The Tribunal agreed that, owing to his Greek nationality, his case should be considered under Article 72(1) ServRegs. However, they also noted that he had been born in the Netherlands and had indeed mostly been in the Netherlands from 1994 until he joined the Office in 2005. The complainant considered that he only became a permanent resident when he ceased to be a student in February 2004, and cited a note by a previous Principal Director personnel to that effect. The Tribunal, however, considered that there was no indication of any close link with any country other than the Netherlands, or, indeed, of any intention to take up residence in any other country. The Tribunal thus

considered that the complainant had indeed been permanently resident in the Netherlands for more than three years before joining the Office and dismissed the complaint.

Judgement 2925 concerned a case where a member in the Hague changed nationality from Dutch to Irish. However, in contrast to judgement 2864 from the 108th session, the date of application of the change was after the staff member joined the Office. The complainant recognised that he didn't the requirements of Article meet ServRegs, which sets out under what conditions the allowance may be granted. However, he considered the requirements to be discriminatory and that the Article should thus be changed in such a way that he be granted the allowance.

The Tribunal, however, considered that Article 72 makes reference to objective facts, namely nationality and permanent residence. The Article is thus appropriate and adapted to the general circumstances. Accordingly, the Tribunal dismissed the complaint.

It should be noted that in this way, the Tribunal closely followed it's own case law as set out in judgement 2870, which concerned Article 71 of the EPO ServRegs (see our report of the 108th session³), which governs the grant of an education allowance. The Tribunal thus dismissed the complaint.

Career issues

Judgement 2930 concerned an appeal against a staff member's staff report for the period 2000 - 2001. The Internal Appeals Committee (IAC) found that the relationship between the complainant and his director had become increasingly strained. The President followed the majority opinion of the IAC that, rather than being set aside, the staff report should be amended in part. The Tribunal, however, found evidence of "an inability on the part of the reporting officer to bring a fair and open mind to the question of the complainant's performance". lt thus

"concluded that the reporting officer's report was tainted with prejudice" and agreed with the minority opinion of the IAC that the staff report should be set aside. The Office must now draw up a new staff report for the period 2000 - 2001. The Tribunal also awarded 7000 euros moral damages and costs.

It should be noted that the Tribunal decided as above despite the fact that subsequent staff reports drawn up by different reporting officers also indicate that the staff member's service has not been satisfactory. Indeed, the Tribunal found the question of the staff member's performance irrelevant to the question of whether the reporting officer in question had shown prejudice against the staff member when drawing up the report in It is also noteworthy that in auestion. reviewing the findings of the IAC the Tribunal considered they had made an error of law. In that: the IAC found that each of the individual statements challenged ("inaccuracies") in the staff member's report did not in themselves prove abuse of power or prejudice. The Tribunal considered that it was necessary to consider whether "taken as a whole" the statements would lead to such a conclusion. Applying this standard, the Tribunal found that prejudice clearly existed.

SUEPO considers that given the impact that a staff report has, it is clearly not acceptable that it takes almost 10 years to remove the prejudice from this report. This will certainly have had an effect on the staff members career development, which is difficult to correct retrospectively. It is particularly egregious when it is considered that fair performance evaluations are essential to trust in an employment relationship. It is regrettable that the Office management fails to intervene effectively to prevent such behaviour.

<u>Judgement 2951</u> concerned application of Circular 271, which inter alia provides how periods of professional activity prior to recruitment are credited for step-in-grade assignment into the A-grade category at the Office. The complainant is an examiner, and had previously worked as a newspaper "editor in chief", "publishing house editor" and, (at the EPO) as an "external examiner

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https://www.suepo.org/rights/public/archive/ilo at108rep.pdf

assistant". None of these periods had been taken into account by the Office and the complainant was accordingly graded at A1 step 1. Both internally and in front of the Tribunal, the complainant requested that she be credited 50%, 75% and 100% reckonable experience respectively for the periods of time she performed the above duties.

The Internal Appeals Committee (IAC) found that the first request was irreceivable, since it was an extension of the original claim.

They furthermore concluded that the duties of publishing house editor did not correspond to those of an A grade post at the Office. Concerning the duties of an external examiner assistant, the IAC found that the work did not comprise the full range of an examiner's core duties and thus did not constitute an exceptional circumstance which would have justified recognition at 100%. They thus recommended that this period should be recognised at 75%. The IAC also suggested a date of application three months before the date of appeal. The President followed the IAC's.Tribunal

The Tribunal seems to have agreed with the assessment of the IAC, and dismissed the complaint. However, the case is interesting because the judgement sets out that "an appeal against a decision which has recurring effects cannot be time-barred: each month in which the complainant receives her payslip ... must considered a source of a new cause of action". This re-confirms that a payslip is a recurring decision concerning the step-ingrade calculation and grant of allowances. Each payslip is thus appealable, with retroactive effect limited to three months. On this basis, the Tribunal also agreed with the recommendation of the IAC concerning the date of application for the recognition at 75% of the time period spent as an external examiner assistant.

<u>Judgement 2884</u> concerned the grading of a staff member appointed from grade B6 to category A.

Circular 271 was adopted in June 2002, and is effective retroactively for promotions and

appointments taking effect after 31.12.2001. In August 2002, the complainant was informed that, with effect from April 2002, he was appointed to A2 step 13 from B6. The complainant felt that he should have been graded A3 and consequently appealed.

This case is different from similar EPO cases 2859 and 2624. Those cases concerned staff who were appointed to category A from the top step of grade B6. In the current case, it seems that the staff member was appointed from the penultimate step of grade B6. From the judgement, it seems that the complainant argued that the regulations governing his promotion should have been those in force at 21.09.2001, the date of publication of the vacancy notice. In that case, under an earlier administrative note, account should have been taken of the fact that in grade B6 he would have received an additional step in grade in May 2002 and he should thus have been promoted to grade A3, step 7.

The Tribunal, however, considered that the correct date for determining the grade and step was the actual date of the appointment. The Tribunal thus found that the calculation had been correctly performed and dismissed the complaint.

Former staff members

Former staff members, such as pensioners and invalids (now called "inactive" staff), may also file complaints with the Tribunal. There were three such cases in the 109th session.

Judgement 2911 concerned the case of the tax adjustment of an EPO pensioner who is separated from his wife, to whom he pays half his pension. When calculating the tax adjustment, it is assumed that the former staff member has one of two family statuses. Either that of being without dependants at all or that of being married, but without children.

Following a recommendation from the SIO, the Office paid the adjustment according to the latter status. The complainant claimed that since he was legally separated from his wife, he is considered unmarried for (German) income tax purposes and should

thus get a higher tax adjustment calculated according to the first status.

The Tribunal, however, found that the Pension Scheme Regulations do not contemplate that the civil status of a pensioner is determined by the tax law of the member states. Rather, a pensioner is deemed to fall into one of the two categories outlined above. It should also be noted that the PenRegs state that "no account shall be taken of individual factors related to the personal circumstances of a particular pensioner". The Tribunal found that although his status might be unmarried under German tax law, his civil status remained that of a married person. Thus the Office had correctly interpreted and applied the regulations. Accordingly, the Tribunal dismissed the complaint.

Judgement 2923 concerned a complaint filed by an invalid who was separated from the service in 2002. Up until 01.01.2008, invalids received an invalidity pension and a tax adjustment. From that date, they receive an invalidity allowance. This allowance theoretically tax free (however, SUEPO is aware that some member states do not accept this). Accordingly, no tax adjustment is payable. Unless invalidity is caused by occupational disease, pension contributions are deducted from the invalidity allowance payments. At the latest on reaching the age of 65, the invalids "retire" and receive a retirement pension.

For former staff members who were already in invalidity, a transitional compensation measure which is intended to ensure that the new measures will not result in any loss of benefits. Although the complainant did indeed complain about the loss of the adjustment, the fact that this measure did not apply to him would seem to indicate that this was not the case. Moreover, this point seems not to have been discussed during the proceedings and is not addressed in the judgement. It should be noted that the tax adjustment is paid up front throughout the year, whilst tax bills usually arrive after the end of the year. It is thus possible that the new measure can result in a loss of income throughout the year, but a reduced tax bill after the end of the year. This could have been the case here, but it was not discussed in the judgement

The complainant noted that, under the new regulations, if invalidity is found to have been due to occupational reasons, no pension contributions are payable by the invalid. His invalidity was originally determined not to have been occupational in nature. However, he requested, and the Office granted, a new medical committee decision.

In 2004, the name of the committee responsible for giving recommendations in medical matters was changed from "invalidity committee" to "medical committee". Its constitution was also changed. For the new determination, the Office convened a medical committee under the new regulations. The complainant objected to the presence of the Office's medical advisor on the committee and requested a committee with the same constitution as the original one in 2002. He also claimed that the committee should have consulted experts in the field of occupational diseases.

The case thus concerned the question of whether or not the invalidity was occupational or not, what the correct constitution of the medical (invalidity) committee should have been, and if an expert for occupational diseases should have been consulted.

The Tribunal found that the previous invalidity committee had completed its work. Thus the correct committee for the new examination and report was a medical committee comprised as per the new regulations. Moreover, it was up to the committee to determine if it needed to consult an additional expert. Moreover, the Tribunal was satisfied that the committee had reviewed all the evidence. Accordingly, the Tribunal dismissed the complaint.

<u>Judgement 2935</u> also concerned the case of a staff member separated from the Office for reasons of invalidity.

In an earlier judgement, 2557, the Tribunal had recognised that the complainant, who had been assigned a B-grade post, had

actually performed duties in excess of that called for by her job description. The Tribunal recognised this as an affront to her dignity and awarded substantial moral damages and compensation.

Prior to filing of and pronouncement on that earlier complaint, the complainant applied, in October 2004, for an A-grade administrator post at the Office. In January 2006, without having been interviewed, she was informed that her application had been unsuccessful. In May 2008, the Internal Appeals Committee (IAC) recommended that the selection procedure be annulled and a new procedure carried out. They recommended paying moral damages. However, the IAC rejected her claim for material damages. By the time the President decided on this recommendation. the complainant had left the Office on invalidity. Accordingly, the Office didn't annul the selection procedure, but paid her moral damages for procedural flaws during the selection procedure.

The Tribunal found that the complainant had indeed suffered material injury because she was denied a chance to be appointed to an A-grade post. For this, the Tribunal awarded 20,000 Euro damages. Moreover, this also caused her moral injury over and above those caused by the procedural flaws in the selection procedure. Additionally, the length of both the selection and appeals procedures had caused her moral injury. For this the Tribunal awarded an additional 10,000 Euro.

The Tribunal, however, summarily dismissed the claim for punitive damages. The reason for this is that the Tribunal considered that the Office had not been in gross breach of its obligation to act in good faith. From this we may conclude that the Tribunal requires an extremely high level of misconduct on the part of an organisation before making an award for punitive damages.

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, it may dismiss the case summarily

In the 109th session, this happened to two EPO cases.

Judgement 2948 concerned an appeal against a deduction on a payslip. Within the appropriate time limits, the complainant was informed in December 2008 that no favourable reply could be given and that the matter had been referred to the Internal Appeals Committee (IAC) for opinion. The complainant lodged a complaint with the ILOAT in April 2009 against the implied rejection of his request.

The Tribunal noted that complaints are not receivable at the Tribunal unless internal remedies at the Office have been exhausted. Since the complaint had been correctly referred to the IAC, the implied rejection had been "forestalled". Accordingly, the Tribunal found that the complaint was clearly irreceivable and dismissed it according to the summary procedure.

Judgement 2953 was filed by a member of the Hague Staff Committee against the adoption of a new pension scheme applicable to employees joining the Office on or after 01.01.2009. The basis for the appeal is that the decision adopting the new pension scheme was flawed since the independence of the external consultant involved could not be guaranteed due to a potentially serious conflict of interests. In relying upon the advice of the consultant, the Office was failing in its duty to take all relevant factors into account prior to taking the challenged decision. In this, the Office had not exercised its duty of care.

The Tribunal recalled from its case law that "a complainant cannot attack a rule of general application unless and until it is applied in a manner prejudicial to him". No further arguments were provided. The Tribunal decided that it "cannot but dismiss the complaint" according to the summary procedure.

Maybe the Tribunal considered that the decision had not been proven to have harmed staff, (and therefore not the complainant), recruited before the date in

question? However, the Tribunal appears to have overlooked to the obligation upon the organisation to exercise duty of care with regard to providing effective social security systems for its staff.

Miscellaneous

Judgement 2947 concerned an appeal by a staff member essentially against calculations relating to parental leave and sick leave, opinions and constitution of a medical committee and if decisions were notified to the complainant in a timely manner.

The Tribunal decided that the medical was committee properly appointed. Concerning its opinion, the Tribunal emphasised again that it will not replace the findings of medical boards (which comprise doctors) with its own (because the Tribunal itself has no medical expertise). It should be noted that this applies also to the President of the Office. He may also not disregard a medical opinion from a medical committee, for the same reasons.

Concerning the notification, the Tribunal confirmed that notification by e-mail is valid, especially if the complainant has clearly received it as evidenced by replying to it. In such a situation, letters sent later merely confirm this earlier decision.

Following on from this, the Tribunal concluded that the administrative decisions made concerning when sick leave ended and parental leave at 100% started were correct and dismissed the complaints.

This case is interesting for two reasons. Firstly, two complaints were joined into one judgement, against the express wish of the complainant. Secondly, staff should be aware that the Tribunal considers notification by email to be valid and take particular care not to miss final i.e. appealable decisions and thus deadlines for filing appeals.

Interesting findings from the EPO cases

Various observations of which staff should be aware e.g. concerning notification of decisions by e-mail or the receivability of appeals against recurring decisions, are made in the summaries above. In addition to these, we make below some additional observations which may be of interest to the reader.

Vacancy / transfer procedures (cf. Judgements 2920, 2921 and 2935)

As set out above, of the five EPO judgements which the Office lost, three concerned irregularities with selection procedures. Two of these concerned transfers of managers without proper procedures.

This continues the previous case law – see previous reports on 105^{th4} and 106^{th5} sessions. As set out in our reports, the 106th session saw two such cases (filed by members of the Munich Staff Committee) in which the EPO was overruled by the Tribunal. The 105th session case related to the appointment of Ms Pompidou quashed by the tribunal, following a complaint filed by members of the Hague Staff Committee,

In our opinion, the rules are very clear. If the Office were to observe them, rather than simply appointing favourites, it would in the long term save time and effort. It would also avoid damage to the Office's reputation which is created when the Office continually ignores its own regulations concerning appointment.

However, In such judgements, even where the Tribunal has found clearly for the complainants, the remedies offered have a very limited effect. It is at the Tribunal's discretion to award damages instead of a particular action, but where they do so the damages need to be proportionate to the

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damage. The current practice of the Tribunal is however more of a symbolic nature, it is no remedy to the repeated disregard of the EPO for its own procedures.

Statutory consultation

Following on from judgement 2857, issued in the 107th session and judgements 2874, 2875, 2876 and 2877 from the 108th session, judgement 2919 from the current session, concerning the Office's outsourcing policy, further strengthened the status of statutory consultation in the GAC.

With this judgement, the Tribunal underlined again, for the third session in a row, that the EPO has a duty to consult the GAC in a wide range of situations, and not only if amendments are made to the ServRegs. Moreover, the consultation has to be in good faith, and the administration has to provide the GAC with sufficient information for it to be able to give a reasoned opinion on proposals submitted to it.

As we wrote in our report from the 108th⁶ session, we are of course pleased that the Tribunal protects the rights of the staff in this manner. It would nevertheless be better if the administration would respect these rights in the first place, and not force staff to file complaints with the Tribunal in order to get confirmation of these rights.

We are, however, aware of a number of pending cases where this has not been the case.

Undue delay

It seems that the Office is now generally working through appeals filed in 2007. However, we are aware of some earlier appeals which are still waiting for DG5 to produce a position paper. We are also aware of more recent cases which have, for whatever reason, been treated with higher priority. It is clear that the Tribunal does not see such delays as acceptable. For example,

in judgement 2935, the Tribunal awarded moral damages for the length of the internal proceedings. However, in most cases the award of damages does not correct the harm caused by the excessive delays.

We remind the Office that access to judicial review in a reasonable time is a fundamental right, and we urge them to ensure that the necessary facilities are made available.. Currently it seems to us that the capacity of DG5 (who have to write the Office position papers) and the Internal Appeals Committee are in balance. That is to say, they are both equally "drowned" by appeals. Accordingly, the Office should provide additional staff to both DG5 (Directorate 5.3.2) and the Internal Appeals Committee. In the case of the IAC, this could take the form of opening a second board, e.g. to consider cases from the Hague and Berlin. However, in such a case, steps would have to be taken to ensure that the practices of the boards was harmonised.

Equally important: any such measures must be combined with efforts to avoid making the poor decisions and mistakes which results in appeals in the first place.

In the meantime, we advise staff members who find that their appeals are taking more than - for example 18 months or so from filing until reception of the Office's position paper - to point this out during the proceedings, and claim additional moral damages for this reason. If irreparable harm will be caused as a result of the delay, bring this to the attention of the Office and request expedition of the procedure and consider filing directly with the ILOAT.

Interesting findings from non-EPO cases

Right to Hearings and Examination of Witnesses

Judgement 2946 involved a complaint against the IAEA. Whilst the case was lost on the merits, moral damages and costs were awarded for the failure of the internal appeal

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process to hold proper hearings and permit the examination of witnesses.

In consideration 24 the Tribunal stated:

"'in the absence of special circumstances such as a compelling need to preserve confidentiality, internal appellate bodies [...] must strictly observe the rules of due process and natural justice and [...] those rules normally require a full opportunity for interested parties to be present at the hearing of witnesses and to make full answer in defence".

Whilst SUEPO fully supports the Tribunal's statement it is nevertheless remarkable. On the one hand it is an acknowledgement that hearings are a fundamental element of due process (In fact such rights are part of fundamental rights, e.g ECHR Artilce 6.1). On the other hand, the Tribunal does not apply these principles itself.

The members of the Tribunal, as eminent jurists, must be aware that the internal appeals processes of the defendant organisations are not quasi-judicial bodies, not least because they do not take decisions. They must also be aware of case law regarding due process and particularly the right to an oral hearing in courts like the ECtHR.

Why then would the Tribunal make such a statement, and at the same time not apply these rights itself. If this had been a deficiency in the internal process, why did the Tribunal not correct this by holding hearing and summoning witnesses?

We cannot answer these questions, only hope that the Tribunal will one day recognise that such rights apply to international organisations and that they will properly enforce them.

Sufficient Reasoning of Decisions

Judgement 2915 concerned three complaints against the WHO which were combined into one (rather thick) judgement.

One of the complaints concerned the calculation of an education grant for a child, which seems to have been rather complex. The Tribunal decided that the organisation

had, indeed, performed the calculation, which involved rounding, correctly. However, it found that the explanation for the rounding, namely that it was "according to internal practices" was not adequate. The Tribunal thus awarded moral damages.

Inadequate explanation of administrative decisions is a problem that staff members at the EPO often face. We hope that the Office will take note of this judgement, and will start to give full and proper explanations to staff when making such decisions. This applies particularly if (as was the case with the above judgement) the staff member explicitly requests information concerning the basis for a decision. In fact, it is not only a requirement (Art 106(1) Serv Reg)⁷ but also in the Office's own interests to provide detailed reasoning.

It is our experience that when the Office provides reasoned explanations the affected staff are less likely to file an appeal, and if they do they are less likely to receive moral damages.

Admissibility / substance

Judgement 2952 concerned a complaint by an elected member of a local staff committee at Eurocontrol. He complained to the Director General of the organisation concerning irregularities in the composition and functioning of the central staff committee (apparently Eurocontrol has local committees at each place of employment, plus a central committee). It seems that the DG considered that it was not his duty to interfere in the composition of the Central Committee.

The Tribunal noted that its competence is limited to complaints alleging non-observance of the terms of appointment of officials and the provisions of the staff regulations applicable to them. In the current case, this was not the problem. Rather, the dispute was with other members of the staff committee. Accordingly there was no cause of action and

(1) Any decision relating to a specific individual to whom these Service Regulations apply shall at once be communicated in writing to the person concerned. Any decision adversely affecting a person shall state the grounds on which it was based.

⁷ Article 106

the complaint was dismissed as being "wholly irreceivable".

From this we derive that neither the Office nor the Tribunal is likely to interfere in disputes either within the staff committee or between staff members and the staff committee.

Renewal of contracts

As in previous sessions, the largest single group of complaints from other organisations concerned non-renewal of contract. There were about 8 such cases in total. 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. It seems that one approach is 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 used permanent employment for all posts.

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 where the complainant "wins" the Tribunal rarely orders re-instatement, but rather merely award of damages. For example, in judgement 2916, involving the ILO, the Tribunal found that procedural errors had committed by the organisation. However, since it cannot be proven that correction of these errors would have meant that the contract would have been extended. the Tribunal made no order to reinstate the former staff member, rather, an award of 50,000 CHF plus costs was made. We can imagine that neither party is particularly satisfied with this outcome.

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.

Withdrawal of suit

Attached to the paper judgements were 5 "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 in such cases. 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.

It is strange that none of the withdraws of suit concerned EPO cases. Given the fact that the EPO is the main "customer" of the Tribunal, we would have expected a few, especially if the Office were making efforts to settle cases.

Res judicata

The Tribunal's judgements 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 judgement, 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". Put in other words, this is the principle of infallibility of the judiciary. The Tribunal does not make mistakes.

In the current session, there were three applications for review, cases 2928, 2929 (both concerning the ICGEB) and 2937 (concerning the ILO). 2937 in fact concerned an application for review by the ILO and a counter claim by the complainant.

In none of the cases did the Tribunal find any grounds for review. Rather, it found that no material errors had been made. All the cases were accordingly summarily dismissed under Article 7 of the Rules of the Tribunal, for failing to raise new facts. In recent sessions, there has not been a single application for review which has been accepted by the Tribunal. It is worth noting that in most legal orders review is undertaken by an independent tribunal or body. In this case it not uncommon for the same judges to undertake the review as those which ruled on the challenged decision.

The SUEPO Central Executive Committee