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105th Session of the ILOAT

Summary
The 105th Session of the Administrative Tribunal of the International Labour Organisation (ILOAT) pronounced 48 judgments on 09.07.2008. Of these 11 concerned the EPO. Of these, only four were clearly lost (and in even one of these cases, due to delays in the proceedings the complainant was awarded moral damages). This represents an impressive success rate of 73%. Moreover, all of the cases represented by the counsel of the Staff Representation or by the external lawyer retained by SUEPO in The Hague were won. Amongst the more interesting EPO wins were the case against the appointment of the wife of the former President, the slandering of a colleague who helps colleagues with their cases, and a case where a Medical Committee applied the wrong law to a question of invalidity due to an occupational disease.

Introduction

The ILOAT hears complaints relating to disputes between employees and organisations for over 40 international organisations. The judgments are orally presented in open session twice a year in Geneva, at which time the judgments generally also become publicly available in paper form. They are then also sent to the parties and put on the internet a couple of weeks later[1]. A delegation from SUEPO was present in Geneva on 09.07.2008 to observe, to meet with other interested parties and to discuss the conduct of the ILOAT and the cases before it. This report summarizes observations from this most recent, 105th session of the ILOAT, and developments in the case law.

[1] The tribunal's website is http://www.ilo.org/public/english/tribunal/

General Comments

This was the second session presided over by Mr Seydou Ba of Senegal, who replaced Mr Gentot. Although the tribunal is meant to be bi-lingual, it is interesting to note that Mr Ba only presented the French language judgments. The English language ones were summarised on his behalf by Ms Comtet, the tribunal's registrar.

One thing that has not changed despite there being a new tribunal president is that yet again, none of the complainants' requests for (oral) hearings were granted by the tribunal.
In 2002 and 2003, discussions took place concerning reform of the ILOAT. Unfortunately, the discussions on reform resulted in no concrete changes (in this respect we would like to mention that the EPO Administration was one of the few that displayed a positive attitude towards the reform discussions).

That said, there are signs that the tribunal feels that the quality of its work i.e. judgments, is under observation. In particular, it seems to make more of an effort to explain why it judged in a particular way and to present each judgment that it pronounces on. It also seems to have become less organisation friendly. Part of the reason for this is that the delivery of judgments is now well attended by observers from parties and their representatives. In particular SUEPO has taken a leading role in encouraging staff associations to maintain a strong presence at the ILOAT session presentations.

Another positive point is that the tribunal has continued its recent trend of awarding substantial damages - in some cases over 12 months pay!

SUEPO will continue to monitor the work of the tribunal closely and to push for effective reform.

Summary of Results

There were a total of 48 cases and 5 withdrawals. Of the 11 EPO cases the tribunal found in favour of the complainants in 8 cases. The other three were dismissed, one as not admissible. **This represents a success rate of 73%.** There were a further 37 cases from other organisations; of these 46% were successful. The overall success rate for this session was 54%.

This is a significant improvement. The previous session's results also showed an improved success rate of 47%. The overall success rates of cases before the Tribunal during the previous president's term of office (over 13 years) was around 35%. The current trend is looking positive and if it continues, suggests that the Tribunal could come into line with success rates of national labour courts/tribunals which are statistically much higher than ATILO's.

The change to the success of the EPO cases is quite dramatic: Session 103 (Mr Gentot's last session as President) has success rates of less than 10%. The previous session (104 : Mr Ba's first as President) had a success rate of 67% for EPO cases. Again, we hope this trend will continue.

Summary of EPO cases

Appointment of the former President's wife, **Mrs Pompidou**

Case 2762 was filed by a member of the SUEPO Central Executive Committee (from the SUEPO Committee in The Hague) against the appointment of Ms Pompidou to a post in the EPO. Seven staff representatives from the other EPO sites joined the action as interveners.

The action contested the fact that former President Pompidou appointed his wife to a post in the EPO through a shady procedure. Both procedural faults and issues of public policy were raised.

The judgment is devastating for the Office. The Tribunal found severe procedural flaws in the way the selection was carried out. Interestingly, and more importantly, the Tribunal ravaged the Office's position on grounds of bona fides behaviour, peppered with considerations of public policy. Basically, the judgment now makes it impossible for the President to recruit any family member or friend without first establishing (via GAC consultation) a procedure to ensure that the necessary transparency and neutrality is safeguarded. In the absence of such a procedure, the Tribunal cannot and will not presume that there is handling in good faith. Although the point was not raised by the claimant, the Tribunal also had doubts about whether the President has the *inherent power* to appoint a relative/close friend. The impugned decision was set aside (even though Mme P gets away with the dough). Each of the complainants and interveners received moral damages in excess of 6000 EUR.

Slandering of a legal advisor to complainants

The Staff Representation in The Hague has nominated a legal counsel to advise and support colleagues who have a grievance

against the Office. Where appropriate, he supports and represents them in internal appeals and before the Administrative Tribunal. In one case before the Tribunal, the representative of the Office attempted to discredit the StaffRep counsel by alleging that (1) he was taking payment for providing assistance to his colleagues; (2) that he misrepresented himself as a practising lawyer; and (3) that his normal office duties were affected by his “supplementary activities”. The StaffRep counsel found these unwarranted comments defamatory and asked for an apology and a retraction. Not only were these not forthcoming, the Office saw fit to support the allegations of its representative. This led to a cause of action in defamation, and the Tribunal took a dim view of the Office's conduct in case 2751 The claimant was awarded moral damages in the amount of 7500 EUR.

This case offers evidence to the criticisms raised by SUEPO that the manner in which the EPO litigates its cases is sometimes very aggressive, and in our view, inappropriate; it brings the Office into disrepute with those staff involved, and damages relationships.

Sickness and invalidity

One trend in recent years amongst EPO cases was unfortunately continued in the 105th session. The Office continually fails to apply properly the regulations surrounding sickness and invalidity.

Case 2746 concerned the question of whether an invalidity was the result of an occupational disease. Up until July 2007 the EPO had no criteria as to what constituted an occupational disease, despite being required to by the old Rule 14.2 of the Pension Regulations. This did not mean, however, that national law applied, especially as it is very different in the host countries. In this case the Medical Committee decided to apply German law and deny the appellant recognition of an occupational disease. Whilst external doctors on this committee might have an excuse for believing that German law applied, the same cannot be said of the Office’s Medical Advisor. The Tribunal set the decision aside and sent the case back to the EPO for reconsideration, with the award of moral damages.

In case 2756, the Internal Appeals Committee recommended to partially allow a staff member's complaint that her sick leave had been wrongly calculated. The Office followed the IAC's opinion only insofar as it recommended rejecting the remainder of her appeal!! Basically, the tribunal agreed with the IAC and ordered a recalculation of sick leave.

We find it worrying and unacceptable that in each session the Office loses cases relating to sickness and invalidity through a refusal to apply the rules correctly. In such cases, the complainants are the weakest of the weak. The Office should take particular care to treat these people with dignity, and their cases correctly.

Discretionary decisions

In cases such as promotion or probation, the tribunal gives organisations an extremely broad latitude. Generally, it rules that such decisions are discretionary and overrules the organisation in only if this discretion was misused or based on an error of fact.

In judgment 2759 the tribunal ruled against the EPO in a case concerning probation. The Office committed the serious error of not informing the probationer in good time that he was unlikely to be confirmed. He thus was in no position to improve his performance. The decision was accordingly set aside and the Office ordered to pay a year's salary and benefits, plus moral damages. It is interesting to note that this case is the second instance of wrongful dismissal perpetrated by the same former IS director in a short period of time (the previous case having been condemned in judgment 2710).

Judgment 2731 concerned non promotion to A4 under the "age 50 rule". The tribunal agreed with the Office that the complainant didn't meet the requirements to be promoted under said rule.

Judgment 2738 concerned a complaint by an unsuccessful candidate the post of principal

director. Although the procedure was confused, in the end the tribunal judged the case to be not receivable, presumably due to the lack of exhaustion of internal remedies since the complainant went to the tribunal before the IAC had given an opinion. The tribunal seemed to find the delay not unreasonable in the case in question.

Pension transfers

Pension transfers at the Office are often complex. In recent years there have thus been a number of cases surrounding calculation of rights. Generally, the tribunal has ruled that the Office applied the rules correctly. This was the case in judgment 2744. Despite losing the case on its merits, the complainant was awarded moral damages for the excessive delay (3+ years) in treating the case internally which was caused by the EPO's failure to provide its position paper to the IAC.

Grading to B6/4

Judgment 2737 concerned a staff member who clearly performed management tasks. Moreover, his staff reports referred to him variously as a manager, head of team, head of section etc. Despite this, the Office refused to grade him in B6/4 group of grades. The tribunal decided that in doing so, the Office was clearly wrong and that the duties performed were clearly those of a B6/4. The Office was ordered to grade the staff member retroactively (to 1999) to B6/4 and gave him the job title of "Head of Section".

Former staff members

Former staff members, such as pensioners, may also file complaints with the tribunal. There were two such cases in the 105th session.

One of these, 2721, was a follow up case to 2613 where the tribunal decided (in a very particular situation) that a former staff member who was not entitled to a pension could not just be thrown out of the EPO's Long Term Care Insurance if they were already drawing benefits. It seems that the Office was very slow in reimbursing the former employee and made some (minor) errors in the calculation. The tribunal awarded compensation for the injury suffered.

The other concerned a pensioner who (shortly before retirement) appealed his non promotion to A4(2). In judgment 2730, the tribunal in line with its usual case law in effect found that the complainant had failed to show that the EPO had misused its discretion in such cases and dismissed the case. What is interesting about this case is the criteria for determining when a case has not been handled in a reasonable time. In Judgement 2744, the complainant was awarded moral damages for excessive delay, In that case it was 3 years. This case was 22 months (also excessive), and at the time of filing with the ILOAT, no EPO position paper had been provided. There appears to be a lack of consistency in the approach of the Tribunal.

Interesting findings from non-EPO cases

Fraud and corruption

Maria Veiga is the former Chief Internal Audit and Investigation Service at World Meteorological Organization (WMO) in Geneva which she joined in June 2003. Here she conducted a 3,5 million USD fraud and corruption investigation in which some top management officials are allegedly involved. As a consequence she was summarily dismissed on 3 November 2006.

Following on from this, SUEPO Munich invited her to give a presentation in the Isar building on 28.01.2008 on hunting fraud and corruption. More details can be found at http://munich.suepo.org/archive/ex08011mp.pdf and http://munich.suepo.org/archive/ex08024mp.pdf

In case 2742 she won substantial damages with respect to her "reassignment" (in effect dismissal). From the judgment, it is clear that harassment cases are still outstanding.

Probation

As stated above with respect to EPO judgment 2759, generally the tribunal is reluctant to review dismissal within or at the end of probationary periods. Thus it was interesting to note that in cases 2727 and 2732, decisions to terminate employment at the end of probationary periods were set aside due to the organisations in question (FAO and IOM) having committed procedural violations. However, in both cases the tribunal merely ordered substantial payments of damages. In both cases the tribunal ruled that it was not clear that, even if the correct procedures had been followed, the appointments would have been confirmed. It thus seems that the tribunal has not, in fact, moved from its general position that it is appropriate to give the organisations latitude when deciding whether or not to confirm a staff member at the end of probation. An example of this is judgment 2728, where the complaint was dismissed, citing tribunal case law 1161 concerning the purpose of probation, which is to find out whether a probationer can make a satisfactory career and allowing the organisation "the widest discretion" in making this determination.

Dignity

Following on from EPO case 2751, which confirmed that an organisation has no right to slander its staff, case 2720 is interesting. The complainant won an earlier case, 2540. Whilst the organisation (ITU) executed the judgment, they also sent to all ITU staff an email criticising the judgment and infringing the dignity of the staff member concerned!!

The tribunal took a dim view of this, finding in particular that "the circulation after delivery of the said (earlier) judgment of a message defaming the complainant constitutes a very serious breach of the obligations incumbent on the organisation in its relations with its staff members". The tribunal ordered the organisation to pay substantial damages, and to circulate the new judgment to all ITU staff members!

Taken together, we understand these judgments as indicating that the tribunal will act if necessary to defend staff from being slandered by the organisations for which they work. This we of course welcome.

“Locus standi”, or can staff associations appeal on behalf of staff?

In judgment 2755, the chairman of the ILO staff union appealed a transfer procedure. The tribunal confirmed its case law that staff association members have locus standi in such cases since the decision causing injury concerns a process in which the staff association plays a central part - since, as in the EPO, they are represented in selection processes. On the substance, the decision under appeal was set aside since (even though it concerned a transfer in the same grade), no selection competition was held. The EPO might like to take note!

That said, we would like to emphasise that we would prefer staff associations or unions themselves, e.g. SUEPO, to have locus standi in front of the tribunal, rather than having to rely on the right of appeal of individuals. This was one of the items of discussion during the 2002 ATILO reform project, which was sadly dropped.

Equal treatment

Case 2725 concerned the award of extra days of leave to certain staff at Eurocontrol who worked in high stress areas. The complainant did not benefit from these measures and thus appealed against them. Eurocontrol argued that the complaint was not receivable since the complainant had suffered no harm through a measure which merely conferred benefits on others. The judgment is interesting because the tribunal disagreed with this, stating that "the complainant is entitled to challenge ... a decision that confers benefits on third parties if it may result in unequal treatment to his detriment." On its merits, however, the case was lost since Eurocontrol was in effect able to show that the staff who benefited from the measure were indeed subject to a higher work load. Although this time no mention was made of this, it should be pointed out that the test applied by the tribunal for equal

treatment is that (unless there are objective reasons for diverging), staff in the same situation should be treated the same, but staff in different situations may be treated differently. Usually, cases claiming equal treatment lose since the organisations manage to show that the staff member claiming unequal treatment was in a different situation from the third party.

Same sex marriage

Judgment 2760 concerns the non-recognition of a same sex marriage (in Canada) by the IAEA. The decision not to recognise the marriage was set aside and moral damages awarded. The reason is that according to the tribunal's case law (e.g. from case 2590), the status of spouse flows from a marriage publicly performed and certified by an official of the state where the ceremony took place.

Miscellaneous

In judgment 2740, the tribunal confirmed again that it is necessary for decisions from organisations to be reasoned. In the case in question, the matter was sent back to UNESCO for a reasoned decision and the complainant was awarded damages. Whilst the EPO has in recent sessions taken case to reason decisions taken after internal appeals, unfortunately we know of a couple of recent cases before the tribunal where this was not the case!

It is worth noting again that a number of cases from other organisations concerned renewal of contract. Some times, the organisation wins. Some times the organisations loses. Either way, the appeals result in much ill will, and cost both time and money which could be used more constructively. Given the trend at the EPO towards recruiting staff on contract, we hope that the EPO will learn from the problems of other organisations in this area and reconsider.

The tribunal again summarily dismissed a case (2765) under Article 7 of its rules as being "clearly devoid of merit" without any detailed discussions.

Can an ATILO judgment be appealed?

Finally, since SUEPO is occasionally approached on this matter, we would like to highlight judgment 2736. This was an application for review of an earlier judgment. The tribunal recalled that from its case law, that "the Tribunal's judgments are "final and without appeal" as stated in Article VI of its Statute, and carry the authority of *res judicata*. 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". Since no such grounds justifying a review were demonstrated, the application was dismissed.

The SUEPO Central Executive Committee