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103rd Session of the ILOAT

Summary

The 103rd Session of the Administrative Tribunal of the International Labour Organisation (ATILO) pronounced 48 judgments on 11.07.2007. Of these 13 concerned the EPO. Unfortunately, these were all lost. This paper summarises the EPO judgments and some of the items arising from other judgments which are of interest to EPO staff from the 103rd session.

Introduction

The ATILO hears complaints relating to disputes between employees and organisations for over 40 international organisations. The judgments are presented in open session twice a year in Geneva, at which time the judgments also become publicly available (they are then also sent to the parties and put on the internet a couple of weeks later). A delegation from SUEPO was present in Geneva on 11.07.2007 to observe, to meet with other interested parties and to discuss the conduct of the ATILO and the cases before it.

General Comments

The 103rd session, which ran from 23.04.2007 to 10.05.2007, was the last session chaired by Mr Gentot, who retired in June. However, he was present in person to announce the judgments. The fact that all 13 EPO cases were lost can thus be taken as his parting gift to the organisation which was his largest "customer". It is not yet known who will replace him. However, historically there has been a strong French bias in the tribunal.

As usual, the tribunal had no hearings. This is apparently done for cost reasons. In our opinion, having a hearing, if one is requested, is a basic human right, which should not be sacrificed for economic reasons. We will continue to pursue this matter.

The tribunal uses the term "complaint" rather than appeal. The appellant (i.e. the staff member or pensioner) is the complainant. The organisation (e.g. the EPO) is the defendant. Complaints are dismissed (either because they are not receivable or on their substance) or allowed. They may be allowed partially. If a complaint is allowed, the decision may be set aside or (in particular if a formal mistake was made by the organisation) sent back to the organisation for a new decision.

The tribunal can order damages (moral, actual, punitive) and costs against the organisation in question. If the tribunal finds a complaint frivolous, it can order costs against the complainant. However, to the best of our knowledge, in almost 2700 cases, this has only been done once.

Summary of EPO cases

Appeals by pensioners

According to the regulations, complaints can be filed by employees, former employees or rightful claimants (eg widows). Thus, pensioners can also file complaints against decisions of the Office. In the current session, four complaints filed by two EPO pensioners (by coincidence, for both of them the 12th and 13th cases) were dealt with.

The core of both pensioners' dissatisfaction related to the way in which the tax adjustment paid on EPO pensions is calculated and dealt with administratively. It is worth noting that the adjustment makes assumptions about the situation of the pensioner. If these assumptions do not reflect a pensioner's personal situation closely, then the actual adjustment can vary significantly from 50% of the tax actually paid.

Judgment 2622 concerned a pensioner who retired on 01.05.2003. Thus in 2003, he received a salary for four months and a pension for eight. Essentially, from the Office he received a tax adjustment as if the pension actually paid over eight months had been paid over 12. Moreover, the German authorities took the four months' salary into account under the tax progression for determining the amount of tax to be paid on the pension!

This "double whammy" resulted in the tax adjustment being significantly lower than the pensioner expected! The tribunal found that the regulations had been correctly applied and dismissed the complaint.

Colleagues should take this case into account when choosing a date for retirement. The conclusion to be drawn is that it could be highly advantageous to retire right at the start of a year, rather than in the middle. This applies in particular to countries such as Germany which take the EPO salary into account for determining the tax progression.

Judgment 2623 was the above complainant's next case. It seems that by now he was resident in Austria. He was asked to reimburse an overpayment of pension relating to his family situation. The Office then deducted it from its pension payments. At the same time, he was informed that since EPO pensions are not taxed in Austria, in future no tax adjustment would be paid. Seemingly without filing an internal appeal, a complaint was filed directly with the tribunal.

The tribunal summarily dismissed the case as irreceivable due to lack of exhaustion of internal remedies.

Judgment 2625 again concerned payment of the tax adjustment. In order to be paid the adjustment, pensioners have to submit a form suitably filled in by the tax authorities of the country in question showing that the pensioner has actually paid any taxes due. The pensioner lives in Spain. The EPO sent him a form in the three official EPO languages. Apparently, this caused the complainant some problems. Thus he appealed and demanded the Office provide him a form in Spanish.

Although the Office seemingly provided the complainant with a form in Spanish, the complainant nevertheless pursued the case, asking for various sanctions on the Office and for moral damages. These were summarily dismissed as "either

manifestly ill-founded or irreceivable". In fact, the tribunal refused to " elicit orders ... concerning the manner in which services of an international organisation ... should function". Also, the tribunal considers irreceivable claims "which are general in scope or which refer to acts that have not yet taken place".

This case does, however, point to a problem which may affect pensioners, namely that tax authorities might have problems in filling in a form when it is only provided in one of the EPO's official languages. We thus call upon the Office always to be flexible in providing translations of forms should a pensioner (or indeed any other former employee) require them.

The above complainant's next case was judgment 2626. On 25.04.05, the Gazette published a summary of the previous session's judgments concerning the EPO. These included a summary of the complainant's 11th judgment. The complainant asked for the EPO to publish an article he had written to "enlighten the reader about the case". This was turned down by the Gazette; a letter to the President on 04.07.2005 asking him to overturn this went unanswered, ie was implicitly refused. On 22.09.05 this implicit refusal was appealed (internally). On 15.02.06, the complainant filed the present complaint at the tribunal.

The Office claimed that the complaint was not receivable for three reasons.

Firstly, the internal appeal was filed too late. It clearly wasn't.

Secondly, the Office claimed that the complainant was not injured. The tribunal disagreed; it found that a refusal to publish in a house magazine a "corrigendum of an article which, in the opinion of the staff member concerned, injures his personal interests may constitute a breach of that staff member's personal rights ... [and thus could] constitute[s] an administrative act causing injury".

Thirdly, an most interestingly, the Office claimed that the complaint was irreceivable due to the lack of exhaustion of internal remedies (since the complainant had not awaited the outcome of the internal appeal proceedings).

Despite the fact that the complainant waited less than five months before going to the tribunal, the tribunal did not agree with the Office. Rather, the tribunal considered that those "who turn to an internal appeal body are entitled to have their case heard within a reasonable period of time. This duty ... is reinforced where the dispute is such that it must be resolved rapidly if resolution is to serve any purpose".

The tribunal clearly considered that a corrigendum published too long after the original article would be pointless and thus found the complaint fully receivable. Where this leaves other staff members who must routinely wait over a year before receiving the Office's position paper in internal proceedings is not clear. What is clear, however, is that this case increases significantly the pressure on the administration to provide the facilities (ie the staffing levels in DG5) required for rapid treatment of internal appeals.

On the substance, however, this case was lost. The tribunal found that editorial bodies have a wide margin of discretion when deciding on what to publish. Moreover, the tribunal found that the Gazette article in question "was unlikely to mislead readers as to the contents of the said judgment and in no way injured interests of the complainant which had to be protected".

Probation

The ILO has taken the consistent view that "in reviewing a decision not to

confirm the appointment of a probationer the Tribunal will be particularly cautious; otherwise probation would fail to serve as a period of trial. The purpose of probation is to ensure that new staff members are the best qualified. So an organisation must be allowed the widest measure of discretion in the matter and its decision will stand unless the defect is especially serious or glaring." (all citations from judgment 1418). Accordingly, a decision not to confirm appointment "will be set aside only if taken without authority or in breach of a rule of form or of procedure, or if based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority". This means that "where the reason for refusal of confirmation is unsatisfactory performance the Tribunal **will not** replace the organisation's assessment with its own".

Complaint 2646 concerned a former EPO staff member whose appointment was not confirmed at conclusion of (an extended) probation period. The tribunal concluded that since the reason for non confirmation was poor performance, and since the EPO had not committed any procedural errors, the complaint should be dismissed.

Equal treatment

In 2002, as part of the introduction of the (then) new A-career, there was a transitional measure which provided that staff members graded in A3 on or recruited after 31.12.2001 and who would have been graded more favourably according to the new scale structure would benefit from an exceptional 12 month advancement.

A number of staff members who did not benefit from this appealed. These appeals were dealt with in two judgments, 2663 and 2664.

According to the tribunal, "the principle of equality requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently" (see 2313). The tribunal essentially decided that the complainants were in a different situation to those staff members who had benefited from the extra 12 month advancement.

Accordingly, not only had the Office applied the transitional measure correctly, but the Office had also applied the concept of equal treatment correctly. The tribunal thus dismissed both complaints.

Reporting

Judgment 2630 concerned a staff member who in effect claimed that, under Circular 246 the Office had to provide him with a precise number corresponding to the minimum productivity necessary to be guaranteed a box three. It should be noted that '246 dates from 1998. The complaint related to a reporting period under ProPro II, namely 2002 - 2003. The tribunal noted that under ProPro II, the productivity factor (ie the single number) is not the only matter taken into account in assessing an examiner's productivity. Moreover, the tribunal cited from judgment 2414 that "a staff member whose service is not considered satisfactory is entitled to be informed in a timely manner as to the unsatisfactory aspects of his or her service so that steps can be taken to remedy the situation. Moreover, he or she is entitled to have objectives set in advance so that he or she will know the yardstick by which future performance will be assessed".

The tribunal also noted the existence of the EAP value in the ProPro II communiqué and cited from various parts of the communiqué.

Taking these together, the tribunal concluded that there was no requirement on the Office to provide

the examiner with a single productivity factor which, regardless of other factors which might change would guarantee a "good" marking. The tribunal thus dismissed the complaint.

Access to a court

One judgment which SUEPO was aware of and was following closely was 2657. This concerned a job application by a handicapped candidate.

After the selection procedure, it was decided that the candidate would be capable of doing the work of a patent examiner. However, on the advice of the Office's medical advisor, the candidate's application was turned down! In our opinion this is contrary to the provisions of Article 4(3) of the ServRegs which state that "Physically handicapped persons who possess the necessary qualifications and abilities required for a vacant post must not suffer discrimination on account of their disability."

The tribunal stated that it had "no option but to confirm ... (that) it is a court of limited jurisdiction". In the tribunal's opinion, this means that persons who have not been recruited don't (generally) have access to the tribunal. We write generally because the judgment gave the impression that if the EPO had taken steps to allow the complainant access to the tribunal, that the tribunal would have accepted jurisdiction. However, the EPO didn't.

Accordingly, the tribunal dismissed the case as inadmissible. However, the tribunal noted that "the present judgment creates a legal vacuum and considers it highly desirable that the Organisation (ie the EPO) should seek a solution affording the complainant access to a court, either by waiving its immunity or by submitting the dispute to arbitration".

We await with interest what the Office's response will be. In this respect, the Office actually has two problems. Firstly, what to do with respect to the case in question. Secondly, how to make sure that future job applicants are not in a legal vacuum.

Grading on promotion from B -> A

According to Circular 271, staff members promoted to A grade go to A2 of they are promoted from B6 and to A1 otherwise. At the same time as the introduction of the A-career in 2002 (see CA 13/02), the A1 and A2 salary scales were increased by aligning then with respectively the B5 and B6 scales plus a 12 month step. According to complaint 2624, if a staff member is promoted from the top step of B5 or B6, this causes a conflict with Article 49(11) ServRegs, which states that "a permanent employee who obtains a higher grade shall be appointed to the lowest step in the new grade which carries a higher basic salary than that received in his former grade and step increased by the equivalent of one 12-monthly incremental step in his former grade". The staff member claimed that the Office should have overcome the resulting anomaly by promoting him to A3.

The Office obviously recognised that there was a problem and attempted to overcome it by adding one cent (!) to the top step of grades A1 and A2. The tribunal found that this was a "rational and legal solution conforming with the requirements of ... the ServRegs" and thus dismissed the complaint!

In our opinion, there would have been equally rational but more staff friendly solutions to the anomaly, such as the one suggested by the complainant!

Vocational Training

Judgment 2651 concerned a complaint from a staff member requesting

special leave to be able to sit architecture examinations in his home country.

Special leave for such items is in particular covered by Rule 5 of Circular 22. This states that "in granting such leave, due account shall be taken of the requirements of the service". Moreover, the relevant article of the ServRegs, Article 29, is entitled "Vocational training". Such training should be "compatible with the proper functioning of the service and is in accordance with the interests of the permanent employees".

Accordingly, the tribunal considered that on the one hand, the granting of such leave was at the discretion of the Office and as such would only be overturned in rare cases. On the other hand, the Office must strike a reasonable balance between the interests involved.

Since examiner in question works in a very different field to that of architecture, the tribunal decided that the Office was justified in considering that it had no interest in granting special leave to sit architecture exams. Accordingly, the tribunal dismissed the complaint.

Temporary personnel

The Office is using more and more temporary personnel, supplied via agencies. These people generally have lower pay and worse conditions of employment than other staff at the Office. Moreover, they are in a legal vacuum when they enter the EPO. At least in the Vienna sub branch, they are asked to sign away some of their rights, for example to representation, when they start work at the Office.

Judgment 2649 came from a (turned down) request from the Vienna staff committee that the Office provide agencies with EPO salary scales so that the agencies can pay their employees in accordance with the Austrian Arbeitskräfteüberlassungsgesetz (AÜG).

The tribunal found that for such a case (filed by the staff committee) to be receivable, there must be a breach of a guarantee "which the Organisation is legally bound to provide to staff ... [with] an employment contract ..., ". Accordingly, since the workers in question have no individual contract with the Office, the case was found to be irreceivable.

However, the tribunal did find that, in general, temporary workers whose rights were infringed could request the Staff Committee's assistance, and that such assistance would "certainly" be lawful. The tribunal concluded "for this reason, it is not possible to conclude that the Staff Committee may never defend the interests of temporary workers".

It is clear from this that the staff representation do have some rights to represent temporary workers. SUEPO will have to consider carefully what the limits of this are, and what this judgment means for the future. The administration will also have to give some thought to the same considerations. Moreover, in the case in question, since the tribunal has essentially turned down jurisdiction, it is our information that the Austrian Arbeitskammer is now very interested in accepting jurisdiction, in order to ensure that no legal vacuum exists.

Expatriation allowance

Judgment 2653 was the complaint of a staff member whose request to receive an expatriation allowance was turned down by the administration.

The colleague had been in Germany longer than the three years foreseen in Article 72 ServRegs. However, he argued that during the last three years before he came to the EPO, the

periods of time he had spent outside Germany should be taken into account.

The tribunal found that during the periods spent outside Germany, the complainant had kept his home in Germany and had continued to work for the same employer in Germany. Accordingly the tribunal considered that he had not left Germany permanently (as would be required in order to be considered for an expatriation allowance) and thus dismissed the complaint.

Interesting points from non-EPO cases

Judgment 2662 concerned an appeal by the President of UNIDO's staff council. He had previously been released at 100% from his other duties within UNIDO in order to perform these functions. UNIDO tried to reduce his time release to 50%. This the organisation did with no consultation with the staff council, for example so as to discuss whether this was reasonable or not. The tribunal set aside UNIDO's decision and awarded the complainant substantial (15000 euros) damages. The complainant is also free to pursue claims with respect to intimidation, retaliation, harassment and prejudice.

Although it took the complainant some years to get justice, we take this as a sign that the tribunal will indeed take measures to protect elected staff representatives from harassment by their organisations.

Staff in Munich might be interested in judgment 2636 concerning WIPO. Although the events are in some respects different to those that occurred in Munich in early 2007, some facts are the same:

- resignation of a number of members of the staff association, leaving the association with fewer members than the number required to be validly constituted;
- seeming unwillingness to call new elections;
- petition from other staff members to call an extraordinary general assembly;
- the EGA takes place (with a "remarkable" attendance) and votes to call new elections;
- new elections take place and result in election of new staff association.

The complainant asked for the EGA, and thus the elections, to be declared null and void. WIPO refused to get involved, considering that it had "no authority to interfere in the internal politics of the Staff Association". WIPO further claimed it "took great care to remain neutral during the weeks leading up to the elections".

The claims for annulment of the elections and a claim for new elections were found not to be receivable. The reason is that these claims relate to affairs of the staff association, and are thus governed by the statutes of the staff association (similarly, at the EPO elections are governed by the election regulations, which are also separate from the ServRegs and are decided by staff in a general meeting). However, the tribunal is only competent to judge on matters relating to terms of appointment, applicable staff regulations or general principles of law applicable to international civil servants.

The tribunal also found that the principles of freedom of association also applied to those WIPO staff members who called the EGA. Thus there was nothing wrong with WIPO having provided them with the facilities enabling them to call said EGA and run the elections (this included setting up a generic email box for the organisers). In fact, given the obvious problems in the functioning of the staff association, WIPO had a clear interest

in restoring stability and confidence in the staff association. This attitude of WIPO is to be contrasted with that of the EPO administration, who took steps to make the organisation of the Munich EGM more difficult than necessary.

This case is also interesting because the complainant claimed to have been aggressed, and claimed remedies for this also. This the tribunal refused to do, since this would have infringed the rights of the accused aggressors to be heard first. In this respect, the case was re-submitted to WIPO for further consideration (with an award of moral damages since WIPO clearly should have investigated such accusations properly).

Judgment 2642 concerned a complaint for (sexual) harassment. The tribunal found the internal procedure to have been faulty. Thus the complainant was awarded 30000 CHF moral damages.

Moreover, the tribunal stated that in such cases it "requires that an international organisation both investigate the matter thoroughly and accord full due process and protection to the person accused". However, the case in question was "investigated neither promptly nor thoroughly".

Even after the suspension of circular 286, it is clear that the Office also remains under these obligations. How the Office intends to carry this out, in the absence of any clear procedure, remains to be seen.

Finally, the reader might be amused by UNESCO judgment 2641. UNESCO clearly has a similar provision to our Article 81 ServRegs covering removal expenses on leaving the service. UNESCO refused to pay for removal of a dog when a staff member left the service, and this was appealed. The tribunal agreed that a domestic animal is not a "personal effect" (note - our Article 81 ServRegs also uses the term "personal effect") and dismissed the complaint.

We hope that our administration will be as strict in applying provisions to those at the top of our organisation as UNESCO clearly is to those lower down the hierarchy.

Conclusions

Although there is naturally disappointment at the fact that no EPO cases were (even partially) won, actually there were some positive aspects for staff (and in particular the rights of staff) from the recent session.

These include (see EPO case 2649) clarification of the competencies of the staff representation. In particular the tribunal clearly supports SUEPO's contention that even temporary workers have a right to representation. In fact, it is now clear that in some cases, SUEPO (or the staff committee) will have a right to represent their interests.

In 2657, the tribunal confirmed the basic human right to a court. In our opinion, the Office now has an obligation to make sure that in all situations even non-employees have access to a court if they are negatively affected by Office actions.

Moreover, non-EPO cases 2636 and 2662 in our opinion strengthen the rights of the staff representation. In particular, they strengthen the rights of freedom of association. They also strengthen the rights of elected staff representatives with respect to being provided with sufficient time to perform their functions and not to be harassed whilst so doing.

It is clear from various cases, including 2642 discussed above, that despite suspending Circular 286, the Office has an obligation to protect staff from inappropriate behaviour.

More generally, the tribunal often (eg 2623) takes a formalistic view on admissibility and requires that internal means of redress (eg internal appeals) are fully exhausted before a case will be considered.

However, we are intrigued by judgment 2626! Several readers will no doubt have experienced that the Office often takes well over a year before even starting to deal with internal appeals. In 2626, however, even a five month delay was found not to be acceptable and it was accepted that the complainant could go to the tribunal without having to wait any longer. We take this as meaning that the Office will have to give serious thought at increasing the man power available for dealing with internal appeals or risk the expense of having more and more cases being accepted directly by the tribunal.

We also note that the Office continues to argue that clearly receivable appeals are not receivable. We can only condemn this practice and warn colleagues to expect this it. However, they should not be overly worried or intimidated by it.

The Executive Committee