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

Zentraler Vorstand . Central Executive Committee . Bureau Central

11.02.05
ZB/02/05 - 0.66/7.3 - cp05005

98th Session of the ILOAT

Summary

The 98th Session of the Administrative Tribunal of the International Labour Organisation (ILOAT) pronounced 52 judgments on 02.02.2005. Of these 12 concerned the EPO. Of these, only 4 were actually won. This paper aims to set out some of the items arising from the judgments pronounced which are of interest to EPO staff.

Introduction

The ILOAT 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 02.02.2005 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, 98th session of the ILOAT, and developments in the case law.

General Comments

The tribunal takes a strict view of the requirements for admissibility. For example, of the 12 EPO cases, 4 were deemed irreceivable on formal grounds. The same applied for complaints against other organisations. The main reasons for cases to be deemed irreceivable were:

- lack of exhaustion of internal remedies (e.g. not filing an internal appeal first, or not giving sufficient time to the internal appeal process - normally a minimum of one year);
- missing the deadline for appeal (e.g. by failing to file within the 3 month time limit of the announcement of the decision challenged);
- lack of concrete injury (e.g. appealing a general rule which has not caused a concrete injury to the appellant).

It is annoying (in some cases, considerably more than annoying) that the ILOAT takes this unnecessarily formal approach even where clear grounds exist (e.g. serious illness). The consequence is that otherwise well founded cases are found to be irreceivable and thus not even considered on their merits.

In decision 2411 the Tribunal referred to the "non hard and fast" nature of time-bar rules and cited Judgement 451 in support of this stating "justice requires that and exception should be made". Whilst this is a positive development, care should be taken since

prior practice of the Tribunal suggest such exceptions are unpredictable.

We urge appellants to take particular care in this formal respect. This even applies if they are being advised by a professional counsel! In particular, since decisions in the EPO are rarely labelled as such, and since the EPO doesn't attach a "Rechtsbehelfsbelehrung", colleagues must take care to recognise what constitutes an appealable decision. The time limit starts from the date on which the complainant was informed of a decision. Problems sometimes occur when discussions are ongoing, or no response is received. An applicant is entitled to interpret no response as a negative decision two months after their request, however, the office cannot interpret this 2 month limit as initiating the time limit for the appeal. If in doubt, you are recommended to either request a written statement from the administration that no final decision has been taken, or to file an appeal to avoid loss of rights. It is always possible to request a suspension of appeal procedures if negotiations or discussions are ongoing
In judgment 2416, the Tribunal clarified that time limits applied to the claims, not the pleas, and that claims that arise during the internal appeals process which are considered receivable by the IAC are receivable at the ILOAT.

If in doubt, advice can be obtained from your local SUEPO committee.

Summary of Successful EPO Cases

Dependent's Allowance

In judgment 2411 the complainant applied for retroactive payment of a dependent's allowance (Article 70 ServRegs). The tribunal noted that:

- (unlike for example with the education allowance), there is no time limit for applying for this allowance;
- the delay in applying for the allowance was not deliberate but as a result of an oversight;
- the complainant had implicitly recognised that he was partly to blame in that he did not claim interest or damages;
- given the Office's inconsistency in its approach to retroactivity, the delay in applying was not excessive.

Weighing everything up they found the claim fair and reasonable and awarded the allowance retroactively as requested. This possibility to claim allowances retroactively is clearly of interest to staff. However, it is clear from reading the judgment that the outcome of this case was clearly related to the specific facts of the case in question. In a case with different facts (for example a claim going back longer into the past, or where a previous request had been rejected), it seems possible that the tribunal would have come to a different conclusion. We thus urge colleagues to ensure that applications for allowances are submitted in reasonable time.

The Tribunal also stated in this judgment, that "It is not acceptable that the Administration has attempted to upgrade its practise to the status of law, when the law itself says nothing of the sort". SUEPO understands this to mean that the Administration may not treat practice as hard law, and in particular cannot enforce practices which are not supported by or are contradicted by the actual wording of the Service Regulations. Accordingly, SUEPO welcomes this statement.

Invalidity and Medical Matters

It is apparent from recent sessions of the ILO that the Office has great trouble administering invalidity cases. Judgment 2416 is to a follow up from successful case 2159. Essentially, the President had turned down an award (recommended by the IAB) for moral damages, due to the way that the complainant's illness and invalidity had been dealt with by the Office. The Office had also not paid all the costs claimed. The tribunal found for the complainant and awarded all costs outstanding and moral damages. The Tribunal noted that people on long term sick leave or invalidity are highly vulnerable. This case (and similar cases from earlier sessions of the ILOAT) show that the ILOAT supports the view that the Office has a duty to treat such people with care and respect. We hope

that the Office will learn from such cases and correctly exercise its duty of care.

It is also of note that in judgment 2386 regarding invalidity the Office had refused to accept the decision of the Invalidity Committee and had more alarmingly requested detailed grounds from the Doctors. SUEPO considers such behaviour violates medical secrecy and undermines the competence of the Invalidity Committee. Unfortunately the Tribunal did not rule on the substance of this case since it was considered irreceivable on formal grounds,

PCTLite

Under PCTlite, the IPER can be based merely on the search with no further examination. For non-BEST cases (e.g. resulting from searches by the SE or ES offices), the name of the director is used as the person responsible for the report (the "Authorized Officer" who according to the PCT should have "actually performed the examination work and prepared the IPER..."). The complainant is a director in The Hague. He argued that his name should not be used for such purposes without his agreement. The ILOAT considered that he cannot be considered to have supervised an examination which has not taken place or has not been undertaken under his supervision; this did not apply in cases where the examination was undertaken by a member of his directorate. However, since he could not have any influence of work undertaken by external agencies (e.g. SE and ES Offices), the practice of the office was illegal. The tribunal ordered the Office to stop using his name on such IPERs. Moral damages were also awarded.

It is worth noting that the tribunal also ruled that since the essence of the grievance was contained in the original appeal, it was permissible to expand the relief requested by adding, in proceedings before the IAB, claims for moral damages, a letter of apology and costs.

Promotion and Selection Procedures

Judgment 2418 concerned the "A4 directors" episode. The IAB found in the appellants' favour. The Office announced on 14.07.2003 that the promotions to director of the three staff members concerned had been quashed. However, it turned out that two of them had already applied on 03.07 for director posts advertised in vacancy notice TPI/3712 for vacancies "in various technical fields" with closing date of the same day. They were duly appointed. The appellants considered this to be the President's decision rejecting their appeals and complained to the ILOAT. The ILOAT found that since the announcement of the quashing of the earlier appointments was only announced on 14.07, the posts concerned could not have been vacant on 03.07. Thus the President's **decision** to promote the two people concerned was set aside. However, for reasons set out in the judgment, the **promotions** of the two staff members were not set aside! Rather, the complainants were awarded compensation. Additionally, in an exceptional move, punitive damages were also awarded, showing the tribunal's strong disapproval of the Office's actions. We take this as an indication that it was only for the exceptional circumstances set out in the judgment that the Office was not ordered to re-run the entire proceeding. Finally, an award of costs was made to each complainant to cover their out of pocket expenses, time and trouble, thus establishing the principle that costs need not actually be incurred for there to be an award of costs.

We note that the principal individual behind the introduction of PCTLite and the A4 directors debacle (and much else that has harmed the Office in the past) is rumoured to have a consultancy contract with the Office to advise the President. We hope that the above two cases will cause the President to reconsider the quality of advice he may be receiving from this individual.

Interesting points from non-EPO cases

In 2002 and 2003, discussions took place concerning reform of the ILOAT. The topics debated included "Locus Standi" for staff associations, i.e. whether staff associations and unions could file appeals in their own name, and "Amicus Curiae", i.e. whether other parties can file observations on a case. In the end, in the face of opposition from several of the organisations which recognise

the jurisdiction of the ILOAT, the discussions on reform have 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). Judgments 2420 - 2423 concerned the application of the salary method in various UN organisations. The complainants were individual staff members of the organisations concerned. In all cases, the staff associations were permitted to submit an amicus curiae brief. The tribunal considered that:

"although the possibility of gathering the observations of an association or union representing staff interests is not envisaged under its Statute, the Tribunal considers that it can only be beneficial to extend that possibility, as do other international administrative tribunals, to associations and unions wishing to defend the rights of the staff members whom they represent in the context of disputes concerning decisions affecting the staff as a whole or a specific category of staff members".

The tribunal thus considered the clarifying points raised in the briefs. Although it is preferable to have such rights enshrined in the tribunal's statute, rather than merely accepted, we welcome this step towards recognising the contribution that associations like SUEPO can make to cases of general interest. However, the Tribunal has limited the right, and unless SUEPO is aware of a pending case it is not clear how it will be in a position to take such action in general. Any member who files an appeal independently of SUEPO is encouraged to inform their local committee, since this will better enable to the committee to protect the rights of staff.

In judgment 2403 the ILOAT ruled that the duty of care of an organisation towards it's staff, also extends towards their property. In this case it related to the duty of the organisation to manage the social insurance fund at OPCW.

In other international organisations, particularly UN organisations, where there is a high percentage of contract staff, it is interesting to note that a large proportion of appeals relate to the non-renewal of contracts. A high percentage of these cases were won by the complainant. The ILOAT recognises that in such cases, although there is not absolute right to renewal, great care needs to be taken to avoid abuse of authority.

The EPO is the largest single "customer" of the ILOAT, being responsible for about a fifth of all cases. Observing the experience of other international organisations, it would seem reasonable to assume that should the EPO broaden use of contract staff, this will result in an increase in the proportion of EPO cases at the ILOAT.

The Executive Committee