

ILO-AT: 90 years old *and in need of repair*

Summary

On 5 May 2017 the Tribunal held a symposium to mark its 90th anniversary. The program can be found at the Tribunal's website¹. As can be expected from such an event there was much praise for the Tribunal. While some of it is merited, not all of it is: the Tribunal is showing its age. It needs to catch up with the current legal and practical developments. The present paper explains the reasons.

The symposium

The Administrative Tribunal of the International Labour Organisation (ILO-AT) is the successor of the Administrative Tribunal of the League of Nations that was created in 1927, hence the 90th anniversary celebration this year. Mr Rouiller (Swiss, 1941) is currently President of the Tribunal. Mr Barbagallo (IT, 1943) is its Vice-President². Mr Rouiller opened the symposium. He explained that one of the reasons for the symposium, other than marking a great anniversary, was to give the judges who normally only communicate through their judgments an opportunity to communicate directly with the public and listen to them. He referred to the history of the Tribunal as a success story, praised its authority and its independence, praised ILO as a “defender of social justice” and praised the judges for their selfless contributions to “fairness, justice and integrity”. Mr Rouiller was followed by Mr Petrović, Registrar of the ILO-AT, who reflected on the history of the Tribunal. Mr Petrović explained that the 3-year (renewable) contracts of the judges dated from the early days when it was not yet certain that the Tribunal would continue to exist. He mentioned that also the Statute of the Tribunal has hardly changed over the years. Mr Petrović praised the “undeniably high quality of the judgments”, saying that he “never heard anybody seriously argue that a judgment was political or biased.”

The invited presentations were mostly of a technical (as opposed to political) nature. Mr Germond, Director Employment Law at the EPO (now integrated in the HR Department) was among the speakers. He impressed the public with his extensive knowledge of the ILO-AT case law: Mr Germond must have cited some 50 ILO-AT judgments in less than 20 minutes. Only one of the presentations, by Mr Guido Raimondi, President of the European Court of Human Rights (ECHR), had a clear political message. Mr Raimondi stated that the ECHR had no standing over international organisations, and could only take complaints against their member states. Mentioning some of those complaints, all of which have the ECHR has chosen to reject, Mr Raimondi explained that the Court “exercises self-restraint” when it comes to international organisations. Complaints will be rejected if there is no proof of “manifest deficiency”. According to Mr Raimondi it is enough if e.g. Art. 6 of the Convention (“right to a fair trial”) is “grosso modo” respected by the organization: “the divergence must be flagrant” for the Court to act. Mr. Raimondi's position³ seems open to discussion: *it is difficult to see why the European Convention of Human Rights should not apply to*

¹ http://www.ilo.org/tribunal/news/WCMS_546213/lang--en/index.htm

² See annex 1 of [su15293cp](#) for more information on the composition of the Tribunal.

³ Note that Mr Raimondi, as President of the ECHR, is himself head of an international organisation.

staff working in international organisations, in particular in a European organization, in exactly the same way as it does to any other citizen of Europe.

A missed opportunity

Whereas one would not expect too many critical notes at a birthday party, the absence of self-reflection, or of any reflection on the future directions of the Tribunal, was nevertheless disappointing. The need for a modernization of the Tribunal has already been recognised 15 years ago, in 2002. Legal opinions commissioned by the Staff Union of ILO identified failures of the Tribunal in respecting fundamental rights principles, as well as non-observance of due process norms⁴. Among the deficiencies are:

- the recruitment of the judges by the Conference of ILO (a party to the proceedings) on 3-year renewable contracts⁵, with renewal to be decided by the same,
- the complete failure of the Tribunal to provide public hearings . This also leads to a lack of transparency as the only source of information about the cases judged comes from the judgments (i.e. the judges) themselves.
- the lack of effective enforcement and of sanctions against the employer organisations which refuse to comply with the Tribunal's decisions⁶,
- lack of a mechanism for an accelerated procedure or injunctive relief in cases where the decision of the Organisation causes the staff member serious, potentially irreparable harm.

At the time, the ILO Staff Union identified a total of 40 points to be addressed⁷. Most of the proposals the ILO Staff Union were opposed by the ILO administration. After a year of negotiations agreement was reached over 7 points⁸, but in the end nothing changed. The Tribunal continued as before⁹.

The Tribunal's workload crisis

In recent years the Tribunal itself has started to feel a need for change. Around 2011/2012 the ILO-AT recognised that it had a workload problem, for which it blamed the EPO¹⁰. The causes for the apparent increase in complaints coming from the EPO are clear: (a) the many highly controversial reforms imposed by Mr Battistelli, several of which are in violation of the acquired rights of staff members as well as fundamental rights such as right to freedom of association, and (b) the total breakdown of the EPO internal conflict resolution system. Concerning the latter: in the last two years (2015 and 2016) Mr Battistelli allowed in whole or in part only 4 of the appeals that came on his desk. The remaining 400 cases (99% !) were all dismissed in their entirety. Rejections included clearly justified modest awards for compensation for delays in the procedure (see e.g. Judgments 3530 and 3531)¹¹. The outcomes of the Appeals Committee¹² were similarly negative for staff. At the Conflict Resolution Unit staff fared marginally better: the CRU allowed (whole or in part) 21 of the 397 cases it dealt with in 2015 and 2016, but this is still only 5%. The obvious result is that a high number of cases that should have been solved internally within the EPO end up at ILO-AT.

As a first measure to reduce the workload the Tribunal **limited** the number of EPO cases per session. In the 113th session (July 2012) and the 114th session (February 2013) only five Judgments concerning the EPO

⁴ <http://www.ilo.org/public/english/staffun/info/iloat/>

⁵ The – presumably tax-free - remuneration is equally intransparent. The most recent document that is publicly available is [GB.294/PFA/18/2/](http://www.ilo.org/public/english/staffun/info/iloat/pdf/summary_note.pdf) of 2005.

⁶ See e.g. Judgment 2919. The consulation ordered by the Tribunal never took place. A request for an order of execution was refused (Judgment 3395).

⁷ <http://www.ilo.org/public/english/staffun/info/iloat/bulletpoints.htm>

⁸ http://www.ilo.org/public/english/staffun/info/iloat/pdf/summary_note.pdf

⁹ Only two minor changes (eliminating a second instance for the Ios and introducing a fast track procedure that requires approval of the IO) have since been implemented.

¹⁰ The increase in membership from 40 to 65 organisations between 2002 and 2017 probably also had an impact.

¹¹ The costs for a single ILO-AT case (whether won or lost) are of the order of 20.000 Euros for the Tribunal, plus the legal fees for defending the case. Why the President would spend 25.000+ Euros to deprive a staff member of 500 Euros that are in fact due is beyond comprehension.

¹² The composition of the Appeals Committee was twice judged incorrect and « unbalanced » by ILO-AT, see Judgments 3694 and 3785

were delivered, i.e. less than half the number dealt with in previous sessions. But simply limiting the number of cases merely increases the already unacceptable delay (up to 8 years for internal appeals plus up to 5 years at ILO-AT). This is contrary to general principles of law, including customary human rights law, and contrary to the Tribunal's own jurisprudence.

Subsequently, the Tribunal took measures to **increase** the number of cases dealt with. It appears that the increase in output has partially been achieved by the judges studying the cases at home before travelling to Geneva, as well as an increase in the number of weeks per session from 3 to 4. But part of that increase comes from the strong increase in the number of **summary dismissals**. Summary dismissals of cases were extremely rare in the history of the Tribunal. Until that 2014 there were merely 19 summary procedures out of a total of 3305 Judgments, i.e. 0.65%. Since then the numbers has risen to 20% overall (509 Judgments; 101 summary procedures) and **30% for the EPO** (168 Judgments; 55 summary procedures).

It obviously makes sense for the judges to study the cases from the comfort of their home¹³ in order to make better use of their time in Geneva, but the current use of summary dismissals is highly controversial. Summary dismissal seems justifiable for cases that are patently irreceivable, such as late-filed complaints. However, in some of the Judgments the summary nature of the decision seems inappropriate, sometimes shockingly so. See e.g. Judgment 3560 and 3557 of the 120th session¹⁴, and Judgment 3563 of the 121th session¹⁵. The published cases of summary dismissals may furthermore be only the tip of the iceberg. In several cases that we are aware of the Registrar informed the complainant shortly after filing or prior to the session that the President of the Tribunal has decided that the summary procedure will be applied, i.e. that a dismissal can be expected. This seems a rather obvious attempt to "encourage" (coerce) the staff member into withdrawing the complaint.

Damned if you do and damned if you don't.

There are other, more subtle, changes in the Tribunal's practice, none of which are favorable for staff. One is the Tribunal's insistence that to be contestable, the decision must have a direct, immediate negative impact on the complainant. In the past the Tribunal was satisfied if complainants could prove potential injury as a detrimental effect. The new obligation to wait for a direct, immediate impact becomes extremely problematic when those individual decisions are likely to be far in the future, like for the introduction of the EPO's new pension system¹⁶. Judgment No. 3428 does not waste a word on this aspect. Likewise, in the past staff representatives could contest general decisions that affect all or part of staff, see e.g. Judgment 2919. This also no longer seems to be the case, see Judgment 3515¹⁷. Similarly, until recently pay-slips would count as a decision on salary matters and could form the basis for an appeal on any pay matters, if with limited retro-activity (3 months). Judgment 3784 in the latest session now challenges this practice. This means that past errors with long-term effect can only be corrected if the organization agrees to do so. This is not necessarily the case. Worse: this Judgment provides an incentive to introduce such errors in order to make savings. A high rate of remissions to an unwilling first instance (Judgments 3785 apparently remits 140 cases at once¹⁸), often without any consideration of the substance of the complaint, a very low chance of winning the complaint, ineffective remedies (low awards) and extreme delays (up to 8 years at the Office and 5 years at the Tribunal) all conspire to discourage staff from filing further complaints.

¹³ Judge Hansen is from Canada, Judge Moore from Australia, Judge Diakité from Côte d'Ivoire.

¹⁴ See [su15293cp](#) for a report of the 120th session.

¹⁵ *Judgment 3563 is on an application for review of earlier Judgment 3297. The complainant was dismissed by the EPO on the basis of accusations of misconduct. The Tribunal confirmed the dismissal. Subsequently the complainant was acquitted of the same accusations by a Dutch criminal court. The Tribunal found that this was not a "new fact" or otherwise a reason to reconsider its previous decision. The application for review was summarily (sic) dismissed. In fact: applications for review are routinely dismissed, from which we must conclude that the Tribunal never oversees any facts.*

¹⁶ Previously changes could be contested at the time that they were introduced, see Judgment 2583, cons. 7 and Judgment 26433, cons. 4.

¹⁷ The foreseeable consequence is an increase in the number of cases as staff members feel obliged to file their own appeals.

¹⁸ CA/20/17, points 193 and 194

To make things worse ILO has contacted the **administration** of the EPO, a party to the disputes judged by the Tribunal, *“with a view to identifying a practical solution ... to the large volume of complaints filed by officials of the European Patent Office”*. There apparently have been several meetings¹⁹. The staff side has **not** received any invitation to talk. SUEPO has repeatedly requested to involve either the Staff Union or the Staff Committee in these discussions – to no avail. The written suggestions made by SUEPO²⁰ on behalf of several Staff Associations were noted²¹ but otherwise seem to have been ignored.

The Tribunal is the arbiter in legal disputes between international organisations and their staff. Fair, balanced “solutions” to its workload should not and cannot be achieved by discussing with representatives of only one of the parties. Such solutions can only be achieved through a genuine dialogue with **both** parties, a dialogue that allows the parties to understand each other’s aims and constraints, as well as the constraints of the Tribunal. Involving only the employer side also goes against the ILO’s tripartite nature. ILO-AT is to mediate between the governments, employers **and employees**. *By discussing matters concerning staff exclusively with the employer in a unilateral manner, the ILO betrays its mission as a defender of labour (staff!) rights²².*

Conclusions

The ILO-AT is one of the oldest and one of the largest Administrative Tribunals. It now serves more than 65 international organisations with more than 58.000 employees. If its size is a measure, ILO-AT is uncontestably a success. But the Tribunal risks to become a victim of that success if it does not find a way to deal with its increasing workload while meeting modern standards of justice.

SUEPO believes that there are a number of fundamental weaknesses in the way the Tribunal is organized and presently operates, many originating from the past. These weaknesses must be addressed if the Tribunal is to live up to the purpose for which it was originally created, namely to be a judicial tribunal that ensures to officials of its member organisations *“the firm conviction of safety and security emanating from justice, provide a judge for every dispute, and preclude the possibility of one of the parties being a judge in his own cause!”*

In 10 years the Tribunal will celebrate its 100 years anniversary. We encourage the **Tribunal** to reflect on what it wants to stand for, and how it wants to be seen in 10 years’ time: as a modern Tribunal that, through fair and transparent procedures, provides for the necessary balance of power between international civil servants and their organisations, or as a relic of the past that is seen by many as complicit with rogue administrations, not least the EPO?

To live up to their reputation as global defenders of peace and justice, **International Organisations** must themselves set the example and provide their staff with a justice system that operates, *and is seen to operate*, to the highest standards of transparency and fair play. This imposes on the Organisations that are Members of the Tribunal, first and foremost among these the ILO itself, to support the Tribunal in modernizing its practice.

SUEPO is looking forward to contribute in a constructive manner to the necessary discussions.

SUEPO central

¹⁹ See e.g. [GB.326/PFA/12/2](#), points 1-4. Maybe significantly, Ms Bergot (PD HR at the EPO) arrived in Geneva half a day early for the symposium.

²⁰ See [SUEPO’s reply to the 2015 ILO survey](#) on managing ILO-AT’s workload (su15345cl).

²¹ See [GB.325./PFA/9/1\(Rev.\)](#) points 21-23

²² *“The International Labour Organization (ILO) is devoted to promoting social justice and internationally recognized human and labour rights, pursuing its founding mission that social justice is essential to universal and lasting peace.”*

²⁴ Rapporteur of the Supervisory Commission of the League of Nations (1925)