

124th Session of the ILO-AT

Summary

*In its 124th session the Tribunal delivered a total of 80 judgments, of which only **nine** (!) concern the EPO. Of those only two cases were fully reasoned. Both concerned disciplinary sanctions. Six cases, of which 5 coming from the EPO, were summarily dismissed. This paper discusses the latest cases that illustrate the on-going changes in the jurisprudence the Tribunal. It also informs about changes in the composition of the Tribunal and the recent developments in the Appeals Committee.*

Composition of the Tribunal

The ILO Administrative Tribunal (ILO-AT) is composed of seven judges, all of different nationality^{1,2}. The Judges are appointed by the Conference (the Governing Body) of the International Labour Organisation (ILO) upon proposal of the Director General (President) of the ILO on three-year renewable contracts. The Judges are remunerated per case³. The appointment on short-term renewable contracts by an Organisation that is a party to the conflicts adjudicated has been criticised as not in accordance with modern standards of judicial independence⁴. The Judges themselves decide who will be President and Vice-President of the Tribunal. Judge Rouiller, a French-speaking Swiss national, held this position until he retired this summer having reached the maximum age (75) customarily set by the Judges themselves. The Tribunal elected Judge Barbagallo (IT) as its new President and Mr Patrick Frydman (FR) as Vice-President⁵, as of 1 July 2017. The ILO Governing Body appointed Mr Yves Kreins as a new Judge starting at the same date. Mr Kreins comes from a German-speaking part of Belgium. Like all the Tribunal's judges, Mr Kreins has a very impressive c.v. Among others, Mr Kreins was President of the State Council, the highest legal body in Belgium⁶. We wish Mr Kreins success in his job at ILO-AT.

Composition of the EPO Appeals Committee

In its recent [Judgments 3694](#)⁷ and [3785](#)⁸ the Tribunal ruled on the compositions of the EPO Appeals Committee. We refer to the report on the 123th session⁹ for more information. In short: in the second half of 2014 the EPO Appeals Committee delivered a large number of opinions without the participation of any members appointed by the Staff Committee. The following year Mr Battistelli unilaterally appointed three members of the Staff Committee who had, upon his request, volunteered for the job. The Tribunal considered these compositions “*not balanced*” and sent the

¹ http://www.ilo.org/tribunal/about-us/WCMS_249193/lang--en/index.htm

² See annex of [su15293cp](#) for more information on the ILO-AT judges.

³ See [GB.309/PFA/15](#) (“Financing of the Tribunal”)

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

⁵ http://www.ilo.org/tribunal/news/WCMS_561017/lang--en/index.htm

⁶ <https://brf.be/regional/714850/>

⁷ Judges Barbagallo, Moore, Rawlings

⁸ Judges Rouiller, Barbagallo, Hansen

⁹ [su17035cp](#)

cases concerned back to the Office to be considered by a Committee composed “*according to the applicable rules.*” True to style Mr Battistelli proposed the Administrative Council to change the rules to allow for volunteers to be nominated by him and, in the absence of volunteers, for Staff Committee members to be selected by him through the drawing of lots. The Council accepted his proposal but limited its application to half a year (Jan. – June 2017), after which a new Appeals Committee under the responsibility of an external chair should be ready to take over. Only one volunteer was found so the remaining three members were selected by the President by drawing of lots and appointed by the President despite their protests.

In June 2017 Staff Committee elections took place. Two of the non-volunteers did not stand for election. According to the President’s rules only elected Staff Committee members can serve to the Appeals Committee¹⁰. The Appeals Committee members who did not stand for election would therefore no longer qualify for the position¹¹. But Mr Battistelli persuaded the Administrative Council to adopt a transitional provision that foresees that the Appeals Committee in its current composition remains in place until the new Appeals Committee is operational. The members of the Committee were informed accordingly¹². There is no deadline for installing the new Appeals Committee.

The refusal of Mr Battistelli to take [Judgment 3785](#) seriously risks that the Tribunal will remit another year’s worth of cases to the Office. This probably doesn’t bother Mr Battistelli. His decisions apply in the meantime, and by the time the complaints will finally be judged they will be irreversible, whether the cases are won or not.

¹⁰ This regulation strongly limits the ability of the Staff Committee to appoint its best legal experts for the Appeals Committee and takes away a considerable amount of time from the elected staff representatives. No limitations apply to the nominations by the administration.

¹¹ [CAD 7/17](#) point (6): “The President may extend the terms of office of all members of the bodies under paragraph 1(b), (c), (d), (f), (g) and (h) beyond the duration defined in the applicable provisions of these Service Regulations, within the limits of the terms of office of the Staff Committee members.”

¹² “*You are thus hereby informed that you will continue to exercise your function as member of the Former Appeals Committee until the chair of the New Appeals Committee has been appointed in accordance with Article 111 of the Service Regulations as amended by [CAD 7/17](#) and has taken up his functions.*”

JUDGMENTS OF THE 124th SESSION

Summary dismissals

Summary dismissals used to be rare. In its first 116 sessions the Tribunal issued a total of 3305 judgments, of which only 19 (0.65%) were summary dismissals. In subsequent sessions 117 to 123 the Tribunal issued 509 judgments, of which 101 (20%) were summary dismissals. That is a 30-fold increase. The latest session added 6 more summary dismissals¹³, all but one for the EPO.

Summary dismissals may be justified e.g. in cases where clear formal requirements have not been met. [Judgment 3891](#)¹⁴ seems to be such a case. According to the judgment the complainants missed the deadline set by the Tribunal for filing corrections to their complaints. This is, however, the only summary dismissal in the latest session that seems relatively straightforward.

[Judgment 3890](#)^{15, 16} concerns the apparent failure of the Office to credit a file (PAX point) for the reporting system. In this judgment the Tribunal adheres to its recent case law holding that “a complainant cannot challenge a measure that is only a step in the process”. In [Judgment 3893](#)¹⁷ the complaint was also summarily dismissed with the argument that the decision (to remit the case to a Medical Committee) “was merely a step in the procedure leading to a final decision.”

The reasoning in these cases is open to discussion. Art. 108 of the EPO ServRegs allows a staff member to challenge **any act adversely affecting him or her**. There is no requirement that the act or decision challenged must be “final”. The only requirement is that the act adversely affects the staff member. The concept of “final” decision only appears in Art. 113 EPO ServRegs and concerns the **exhaustion of internal remedies**, not the nature of the initial act or decision. The same applies to Article VII(1) of the Tribunal’s Statute that states that for a complaint to be receivable, the complainant must have exhausted the internal remedies **foreseen under the applicable staff regulations**. In both of the above cases the complainants had gone through the internal process. The Tribunal’s additional requirement that the initial decision may not be “a step in the decision-making process” creates doubt about what is the decision that must be challenged the more so since the Tribunal has also dismissed complaints as time-barred in cases where a later (“final”?) decision was considered merely to confirm an earlier decision (e.g. Judgment 3735).

In the case leading to [Judgment 3892](#)¹⁸ the staff member challenged the lawfulness of decision [CA/D 10/14](#) (“new career system”) of the Administrative Council. The appeal was lodged on 4 December 2015. It took the Office half a year to inform the appellant that the appeal had been registered. On 20 January 2017, i.e. 13 months after filing, the appellant enquired when she could expect to be notified of the Office’s position. She was informed that due to Judgments 3694 and 3785 (“composition of the Appeals Committee”) it was not possible “to inform her of a fixed date or even estimated date could be expected”. The appellant then filed a complaint at ILO-AT arguing that it was impossible for her to obtain a final decision in the foreseeable future and that she should therefore be entitled to come directly to the Tribunal. We cite point 5 of the Judgment: “*The circumstances of this case are not such that the exercise of the complainant’s right of appeal can be said to be paralysed. The Tribunal recognizes that its finding in Judgments 3694 and 3785 that the composition of the Appeals Committee was unlawful is liable to have repercussions on many*

¹³ The figure is based on the number of references cited in the ILOAT database (Triblex).

¹⁴ Judges Rouiller, Barbagallo, Hansen

¹⁵ Judges Barbagallo, Hansen and Moore

¹⁶ [Judgment 3890](#) concerned a complaint that had been treated by an incorrectly composed Appeals Committee. With its decision to judge (dismiss) the case on its substance, [Judgment 3890](#) thus deviates from recent [Judgments 3694](#) and [3785](#). In [Judgment 3785](#) itself the Tribunal refused to rule on an objection for timeliness raised by the EPO arguing that the Appeals Committee could waive the requirement (sic) or decide that it was met. In doing so this Judgment goes contrary to 40 years of ILO-AT case law. Inconsistencies like these damage the reputation of the Tribunal.

¹⁷ Judges Rouiller, Barbagallo and Hansen

¹⁸ Judges Rouiller, Barbagallo and Hansen

other decisions taken by the EPO's appointing authorities on internal appeals, in addition to the decisions impugned in the complaints leading to those judgments. However, the necessary reorganization of the Appeals Committee's workload which ... can be expected to take same time, has not paralysed the complainant's rights." According to the Tribunal's own case law the Organisation has a duty to provide effective means of redress (see end-note). It now seems that the Tribunal expects staff to bear the consequences of the EPO's failure to do so. We wonder what it will take before the Tribunal recognizes that the appeals system at the EPO has de facto collapsed and can no longer be relied upon to provide any form of legal protection worthy of the name.

[Judgment 3894](#)¹⁹ is another summary dismissal. Here the complainant was suspended from service, with the threat of dismissal (which has since materialized). He appealed against the suspension. In Oct. 2016 he was informed that the Appeals Committee²⁰ had forwarded its opinion to the competent appointing authority²¹. Having received no further information from the EPO five months later, the staff member filed a complaint at the Tribunal. According to the Tribunal "*The complainant's approach is mistaken. The Tribunal's case law makes it clear that where the Administration takes any action to deal with a claim, by forwarding it to the to the competent authority for example, ... this step itself constitutes a "decision upon the claim", which forestalls an implied rejection that could be referred to the Tribunal*". In this case the Tribunal admitted that the amount of time taken by the EPO appears, prima facie, excessively long (!) but referred to its [Judgment 3785](#) on the composition of the Appeals Committee as the possible reason for the amount of time taken by the EPO to process the internal appeal.

This Judgment leaves us flabbergasted. The forwarding of the opinion of the Appeals Committee to the President hardly seems to qualify as a "decision". If anything it is to be considered an implicit request for a final decision on the claims of the appellant. Failure of the President to react should then be seen as an implied rejection of these requests and be open to challenge at the Tribunal. If not then the President can simply stop deciding on appeals and that would solve his problems. Furthermore it would not seem to be the task of the Tribunal to find excuses for the Office's delays that even the Tribunal admits appear to be excessive.

Applications for review

Judgments 3817 and 3819 concern applications for review. According to the Tribunal's case law, an application for review of an earlier judgment may exceptionally be allowed, but only on limited grounds, the only admissible grounds being "*a failure to take account of particular facts, a mistaken finding of fact involving no exercise of judgment, omission to rule on a claim and/or discovery of a new fact that the complainant was unable to invoke in time in the original proceedings.*" A "*mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea*" are not admissible grounds for review. Triblex, the Tribunal's database, identifies 121 applications for review. As far as we know only one has ever been granted²². It therefore does not come as a surprise that the request for reviews dealt with in Judgments 3817 and 3819 were dismissed.

Of these [Judgment 3819](#)²³ is particularly galling. The original Judgment 3714 dealt with an invalidity case where Mr Battistelli *refused to accept the findings of the Medical Committee* and decided to postpone his final decision pending receipt of a second medical opinion ordered by him. A second medical opinion (forum shopping?) is not foreseen in the invalidity procedure. The President is supposed to make a final decision after having received the findings of the Medical Committee. *In this he is in practice bound by the finding of the Medical Committee* ("invalid" or "not invalid"). The President is not in a position to judge the medical situation himself because (a) he is

¹⁹ Judges Rouiller, Barbagallo and Hansen

²⁰ The Appeals Committee was at the time irregularly composed

²¹ Previously the opinion of the Appeals Committee was sent to the President and the complainant at the same time. Mr Battistelli changed the regulations so that now the complainant only receives the opinion together with the decision of the President.

²² See [Judgment 1255](#)

²³ Judges Rouiller, Barbagallo and Hansen

not a medical doctor and (b) other than the Office doctor who is a member of the Medical Committee, nobody in the Office should have access to the staff member's medical data (medical secrecy). The President's refusal to decide on a request of a staff member when a decision is clearly due should be considered an implied rejection of that request. Anything else would allow the Office to keep procedures pending forever. This would seem to be particularly inappropriate in invalidity procedures. But apparently none of this bothered the Tribunal. In his request for review the complainant apparently tried to explain the situation to the Tribunal – to no avail. The Tribunal found that the complainant had not exhausted his internal remedies since he did not have a final decision – labelled as such - from the President and summarily (!) dismissed his request for review.

Fully reasoned cases

Both of the fully reasoned cases concern disciplinary procedures. [Judgment 3888](#)²⁴ relates to a case where, after more than 10 years of apparently satisfactory service, the administration found that the diplomas submitted by the complainant when applying for the job were false. The complainant denied the charges but the Tribunal considered that the evidence presented was “*specific and convincing*” and upheld the dismissal.

The case treated in [Judgment 3887](#)²⁵ is complex. Essentially: the Office accused the staff member concerned of “*disruptive and insubordinate behaviour*” including refusal to carry out work. He was suspended from service and disciplinary proceedings were started. The majority of the Disciplinary Committee found that the staff member displayed “*objective professional incompetence*” and agreed with the Office's demand for dismissal. A minority of the members stated that their overall impression was that of a person “*who did not act intentionally and who needed help rather than disciplinary measures.*” They added that if the EPO insisted on imposing a disciplinary procedure, a medical opinion would seem a “*condition sine qua non*”. The President disagreed with both the majority and the minority opinion, and dismissed the person for misconduct, further applying a 30% reduction of his pension. The Tribunal ruled that the President's decision was vitiated by the fact that neither he nor the Disciplinary Committee could have made a proper assessment of the allegations without taking into account whether the complainant had acted intentionally and in control of his faculties, or whether he suffered from a mental illness that prevented him from behaving in accordance with his obligations as a permanent employee. The decision to dismiss the complainant for misconduct was set aside and the case was sent back to the Office for a medical assessment and the convening of a Medical Committee, if necessary.

The context

The Judgments of the recent sessions of the Tribunal illustrate recent developments in its jurisprudence all of which are highly unfavourable for staff, in particular for staff at the EPO:

- As indicated above there has been a sudden, drastic increase in the numbers of **summary dismissals** (0.65% until 2014, up to 20% since then). It is not entirely clear what is the justification for this change of practice. An underlying equally drastic change in the nature of the complaint does not seem plausible.
- With [Judgments 3694](#) and [3785](#) the Tribunal remitted two cases that had been treated by the Appeals Committee without a substantive evaluation on the grounds that the Appeals Committee was not properly composed ([Judgments 3694](#) and [3785](#)). An estimated 213 (!) cases²⁶ (all cases dealt with in the second half of 2014, the whole of 2015 and the whole of 2016) are similarly affected. The EPO has not yet started to work on these cases. The additional delays will thus be of the order of (at least) 1 to 4 years, possible longer.
- With [Judgment 3976](#) the Tribunal remitted a case to the EPO without a substantive evaluation on the grounds that the EPO Administrative Council is not the competent to rule on requests for review of its decisions by staff members for whom it is not the

²⁴ Judges Barbagallo, Hansen and Moore

²⁵ Judges Barbagallo, Hansen and Moore

²⁶ [CA/20/17](#), point 196 (i.e. figure estimated by the Office)

appointing authority. This ruling of the Tribunal is open to question²⁷. It is not known how many cases are affected by this judgment but it is likely to be a considerable number.

- In the past the Tribunal would consider complaints against **regulatory decisions** if they were prejudicial or likely to become prejudicial to the rights and guarantees that staff members derive from their Statute ([Judgment 1330](#) point 4, [Judgment 2244](#) point 8). Starting with [Judgment 3291](#), the Tribunal has rejected a series of complaints against regulatory decisions as irreceivable with the argument that the staff member is not individually affected.
- In the past the Tribunal recognised staff's need to safeguard **future rights** ([Judgment 1712](#) point 10, [Judgment 2204](#) point 6, [Judgment 2583](#), point 7). Now the Tribunal seems to demand a "direct and immediate effect" even in the case of pension regulations ([Judgment 3428](#)).
- Until recently the Tribunal recognised the rights of elected Members of the Staff Committee to challenge regulatory decisions that affect the whole or part of staff ([Judgment 2919](#), point 6). Also this is now being put into question ([Judgments 3515, 3557, 3615](#)).
- Until recently each pay slip would be considered a decision on the level of payments and could be challenged as such, albeit with a retroactivity of only 3 months ([Judgment 2833](#)). The Tribunal now seems to limit this possibility to "exceptional cases" ([Judgment 3614](#)). If maintained, this means that errors in the calculation of professional experience or allowances become irreversible, unless the Organisation agrees to correction. In contrast, the Tribunal allows the EPO to forcibly recover amounts unduly paid with a retroactivity of several years ([Judgment 3167](#)).
- The Tribunal seems to have introduced the new requirement that the **initial** decision challenged must be "final". This has led to the (summary) rejection of complaints against decisions that the Tribunal considers "a step in a process". In other cases the Tribunal rejected complaints where the President failed to issue a final decision although one was clearly due ([Judgments 3894, 3819](#)).

The insistence on **individual** complaints not only leads to a lack of regulatory control but also strongly increases the number of complaints to be treated as staff members will have to file complaints for each one of their cases once they are personally affected. The frequent remittals further increase the workload of the EPO and the Tribunal. These also increase the already considerable delays which can be of the order of 4-6 years at the ILO-AT and a similar time internally in the EPO, see e.g. [Judgments 3793-3795](#) in the previous session.

The above list is not complete, but it shows a clear change of direction to the detriment of the complainant. As a consequence only very few EPO cases²⁸ are judged on the substance and even fewer actually won by staff. In recent years the majority of the EPO cases have been either dismissed as irreceivable or sent back to the Office for one reason or the other. The few EPO cases that have been won by staff members tend to be strictly individual ([Judgments 3541, 3781](#)) and have no impact beyond those individual cases. *We are not aware of any recent judgments that are favourable to staff as a whole or to a significant part of staff.* Although many complaints about Mr Battistelli's reforms have been filed and have reached the Tribunal, thus far all have been dismissed or sent back on the above grounds.

As indicated above, questions about the Tribunal's independence have been raised before. The most charitable interpretation of the current developments – including the extremely low number of

²⁷ The Tribunal examined this matter on its own volition, i.e. in the absence of an objection by the complainant. This ruling goes against the explicit intention of the legislator, see [CA/54/12](#), point 30 : « *Other decisions which are subject only to management review are those taken by the Administrative Council. In view of the institutional framework and the nature of the decisions challenged, it is considered more appropriate to provide for immediate review of the decisions by the Council itself. ...The final decision of the Council to partially or totally dismiss the request for review, whether or not on the basis of the opinion of the Appeals Committee of the Office after referral, could then be challenged before the ATILO.*

²⁸ Exact figures are not available but we estimate that, excluding the rather symbolic awards for delays, only about 1 in 10 judgments is favourable for the staff member concerned.

EPO cases dealt with in the latest session – is that the Tribunal is irritated about what it feels to be an excessive workload coming from the EPO. Should this be the case then the Tribunal apparently blames EPO staff and not the EPO management, as can be seen from Mr Rouiller's praise for the EPO management (introduction to session 123²⁹), and his gloating over the Dutch Court case won by the EPO (idem). It also clear from the fact that ILO and the Tribunal discuss workload matters with the EPO management ³⁰ but repeatedly refused requests from the staff representation to be involved. Finally, the outcomes of the Judgments speak for themselves.

The current lack of legal guidance will not, however, solve the workload problems of the Tribunal. It does not serve the EPO either: the extreme delays created by the mass remittals lead to long-term legal insecurity, whereas the lack of normative control further frustrates an already frustrated staff. The – by now obvious – collapse of the EPO's internal justice³¹ system and the failure of the Tribunal to provide effective remedies may ultimately lead to the EPO's immunity in labour matters being lifted. This would probably not be a bad thing for staff. But until then SUEPO will maintain its request for a constructive dialog between the representatives of the Tribunal, the EPO **and SUEPO** in order to address the current problems.

SUEPO Central

"The integrity of the internal appellate process is of fundamental importance to the proper functioning of the international civil service. Like the process before the Tribunal itself, it must be free of any taint of fraud or abuse of power. (...) Indeed, there is a positive obligation on the part of the administration of every international organisation to assist staff in the exercise of their recourse and to place no obstacle in their way." (ILO-AT [Judgment 2282](#)).

²⁹ <https://www.youtube.com/watch?v=oiPW2HnrnzQ>, at 1 minute, in French, repeated in English.

³⁰ [GB.326/PFA/12/2, point 11](#)

³¹ See CA/21/15 and CA/20/16