

## 111th Session of the ILOAT

### Summary

*The 111th Session of the Administrative Tribunal of the International Labour Organisation (ILOAT) pronounced 49 Judgments on 07.07.2011. The EPO was again the Tribunal's largest "customer", accounting for no less than 12 of the cases! Five of the EPO Judgments were "wins". However, whilst in each case the decision under appeal was set aside, in each case the complaint was sent back to the Office for a new decision. Whilst understandable in some limited cases, this practice appears to be an increasing trend which offers the EPO a disproportionate level of discretion, and delays the final outcome of the case. In one of the cases, the Tribunal didn't even make an award of costs! This paper discusses the EPO cases, in particular pointing out items of interest. Also, items of interest to EPO staff from the non-EPO cases are highlighted.*

### Introduction

The ILOAT hears complaints relating to disputes between employees and organisations for 56 international organisations. The Judgments are orally presented in open session twice a year in Geneva, at which time the Judgments become legally binding. Following the presentation Judgments are publicly available in paper form and are then sent to the parties via post. Online publication follows within a couple of weeks<sup>1</sup>. This report summarizes observations from the 111th session of the ILOAT, and important developments in the case law.

For more general comments on the functioning of the Tribunal, we refer to the comments made in our reports from the 106th and later sessions of the Tribunal, available from the archive section of <http://www.suepo.org>

Those readers who follow legal developments may remember that the ILO organised a meeting to discuss ILOAT practices and possible reform in May 2009. This being a matter of concern for staff, the Staff Committee and SUEPO requested participation at this meeting. A number of other staff associations from other Organisations made similar requests. The ILO refused these requests. This meeting was nevertheless held and included senior members of the Tribunal, namely Judges Ba and Gaudron, and the Registrar, Ms Comtet. At the time this was strongly criticised.

SUEPO and other staff associations have requested a meeting with the Tribunal but this has to date not been accepted. In informal discussions following the 111<sup>th</sup> Session presentations we learned that a possible meeting with legal staff and the Tribunal could take place early in 2012. If this meeting takes place, it appears likely that staff associations will be invited to this meeting.

<sup>1</sup> The Tribunal's website is <http://www.ilo.org/trib>

This could represent a significant step with regard to needed reform of the Tribunal.

More information can be found at the site <http://rights.suepo.org>

As was the case with the previous ILOAT session, the session was presided over by Ms Gaudron of Australia. Each President (for better or worse) influences the course of the Tribunal. With regard to Ms Gaudron we refer to comments already made with respect to her handling of the cases in earlier sessions. Earlier "innovations" introduced in by Ms Gaudron, such as the excessive combining complaints, even if they seemed quite different or naming the parties' legal representation, seem to have been dropped.

As usual, the Tribunal did not hold hearings in any of the 49 cases judged upon. As set out in our previous reports, for example of the 110th session, we remain of the opinion that public hearings are necessary to ensure transparency and thereby accountability of the Tribunal. An oral and public hearing being an essential element of a fair trial<sup>2</sup>. The systematic failure to hold hearings is one of SUEPO's major criticisms of the working practices of the Tribunal. We also consider that such hearings should be public.

## **Summary of EPO cases**

### **Reimbursement of costs for medicines**

Two Judgments (3030 and 3031) both concerned the refusal by Van Breda of claims for reimbursement of medicines. In both cases, the medicines were prescribed by a medically qualified person. In both cases, the reason given why the request for reimbursement was turned down was a "non published agreement" between the Office medical advisor and Van Breda. The Office refuses to publish these since this "would tend to finalise them, whereas in fact they evolve in line with medical progress". This, of course, does not make it easier to challenge non-reimbursement! The Office's position is that there should only be a reimbursement in

the case of a "documented pathology", and, in at least one of the cases, it seems that the previously mentioned guidelines concern the circumstances which would cover this. This is regardless of whether or not a medical professional has prescribed the medicine, possibly for another pathology.

The Tribunal seemed to consider it reasonable for Van Breda to require a claimant to substantiate that a medicine was prescribed for a medical treatment. However, they also noted that the form which the Office provides for claiming reimbursement does not foresee that a claimant may provide a medical diagnosis.

In one of the Judgments (3031), the Tribunal found that by failing to require the claimant to substantiate the claim (before refusing it), Van Breda failed to exercise due care in processing the claim. Accordingly, the decision under appeal was set aside and the case remitted to the Office for a re-determination. Moral damages and costs were awarded.

In the other Judgment (3030), the Tribunal found that since the dispute was about the nature of a medical treatment, a Medical Committee should have been convened. Moreover, rather than merely suggesting to the complainant that he should have requested forming such a committee, the Office itself should have sent the dispute to a Medical Committee and "invited the complainant to cooperate" with it. Accordingly, the Tribunal set aside the decision and sent it back to the Office for the Office to convene a Medical Committee. The claim for compensation to cover moral damages and costs was turned down.

Whilst in both cases, the matter was sent back to the Office for further consideration, the reasoning was very different, in each case the body within the Office which should process the case further was different, and in only one case were costs and moral damages awarded. This despite the fact that the Judgments are from the same session of the Tribunal! We do not know why the Tribunal judged differently in these cases. There may be reasons which would be

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<sup>2</sup> ECHR Judgement [Miller v Sweden](#) see p29-37

obvious from reading of the case files. However, no access to this documentation is provided. In fact, the Tribunal claims it destroys the case files following judgement.

There are seven judges on the Tribunal. Normally, each Judgment is signed by three judges. In exceptional cases, five judges may be involved. We note that the complaints were filed in different languages (3030 in French, 3031 in English). Although the Tribunal is meant to be bi-lingual, that is to say, the judges are meant to be able to work in both official languages, it is noticeable that the composition of the Tribunal was different in the two cases, with no overlap between the cases. This difference is an indication that the language in which a complaint is filed can influence the outcome.

### **Career issues**

It is worth pointing out that the Tribunal grants organisations wide discretion in career issues, in particular in areas such as promotions, confirmation of probation, renewal of fixed term contracts and even job classification. That said, the organisations may not abuse this discretion. This means that, provided that the Office follows the rules correctly, it is particularly difficult to challenge staff reports, non promotion or similar decisions of a discretionary nature.

Judgment 3043 was the tenth complaint brought by a now retired staff member. Basically all ten complaints concerned his non-appointment, despite numerous applications starting in 1991, to the position of technical member of a board of appeal. The current complaint concerned appeals against non successful applications to numerous vacant posts in the boards of appeal in 2005 made before the complainant's retirement in 2007. The complainant sought quashing of the decisions informing him that his application was not successful. He also requested that his retirement pension be re-calculated on the basis of the last step in grade A5 "on a personal basis and by way of redress" because of the "grave injustice" caused to him (his retirement grade was A4(2)).

Prior to going to the Tribunal, the complainant had filed internal appeals with the internal appeals committees of both the President of the Office and the Administrative Council (the two appointing authorities of Article 108(1) ServRegs). The Council's appeals committee functions rather quicker than the President's. The complainant thus received a decision from the Council before the President and appealed that decision also, which led to Judgment 2668, which case was dismissed.

In the current case, the Tribunal noted that the Council is the appointing authority for members of the boards of appeal. The complainant had (correctly) filed an appeal with the Council concerning his non-appointment. This was settled in Judgment 2668. The Tribunal thus limited consideration of this case to the issues for which the President is the appropriate appointing authority, namely the question of whether or not to grant him a pension on the basis of A5 step 13. On this point, there was an amusing discussion between the complainant and the Office concerning the difference between "ad personam redress", which the complainant insisted he was not claiming and redress "on a personal basis", which he was! The Tribunal obviously decided that "ad personam" was the correct term. The Tribunal made the interesting finding that "ad personam promotion constitutes advancement on merit to reward an employee for services of a quality higher than that ordinarily expected of the holder of the post". Moreover, "this kind of promotion should certainly not be granted as redress for an alleged injury". Accordingly, the Tribunal decided that the President acted lawfully in not granting a higher pension ad personam and dismissed the case.

In this case, the Office considered the complaint to be vexatious and requested that the complainant be ordered to pay damages. The Tribunal emphasised that the filing of a vexatious complaint may indeed lead to an award against its author. However, it also stated that, since it is essential that "the Tribunal should be open and accessible to international civil servants without the dissuasive and chilling effect of possible adverse awards", thus, the Tribunal would

only order against a complainant in exceptional circumstances. In the current case, the Tribunal noted that the case predated his retirement by two years; it was only the slowness of the Office's internal appeal procedure which meant that the case was not brought to the Tribunal earlier. The Tribunal thus "hoped that the complainant's retirement will prevent him from raising new disputes in the future" and refused to order damages as requested by the Office.

Finally, the complainant also requested a review of seven of the earlier Tribunal Judgments concerning him. This the Tribunal dismissed using its usual standard clause, namely that its Judgments "may therefore be reviewed only in exceptional circumstances and on strictly limited grounds; the only admissible grounds for review are failure to take account of material facts, a material error involving no exercise of judgement, on omission to rule on a claim, or the discovery of new facts on which the complainant was unable to rely in the original proceedings. Moreover these please must be likely to have a bearing on the outcome on the case". It should be noted that, according to the Tribunal's website, there has only ever been one successful application for review (and over 160 applications for review), namely Judgment 1255. Reading this Judgment, it is clear from the tone just how unwillingly the Tribunal realised that they needed to correct their earlier work. In the end, in that case, they awarded the wronged complainants the equivalent of 12 USD and 100 USD costs!

Judgment 3006 concerned a complaint by an examiner against (non) promotion to A4(2). He appealed against not having been promoted in 2005 and 2006. He was finally promoted in 2007, but appealed again against the date of application. All three matters were dealt together, both internally and before the Tribunal. In 2007, after the meeting of the 2007 promotion board, following a conciliation procedure, a partial marking in the complaint's staff report for 2004 - 2005 was improved. Thus, in 2008, the Internal Appeals Committee (IAC) recommended that the case be re-submitted to the promotion board to determine if the complainant was eligible for promotion at an

earlier date. The President followed this suggestion. However, the promotion board confirmed the date set by the 2007 promotion board.

The complainant argued, and the Tribunal agreed, however, that the Office had contravened the principle of equality. According to the Tribunal, this required that all candidates in a given year are assessed by reference to staff reports for the same period. This meant that the promotion board had to compare the complainant's reports, as amended during conciliation, with those of the members of staff who were actually promoted in the years in question. It is not clear if this was the case. Accordingly, in this respect the Tribunal found that the President's decisions had to be set aside.

For the date of promotion, the Tribunal thus remitted the case to the Office to determine properly if the complainant would have been promoted earlier if his staff report had always been in its current form.

Another issue raised by the complainant was the step in A4(2) to which he should have been promoted. Until 2002, reckonable experience resulting from employment before starting at the Office was capped at 12 years. From 2002, this cap was removed. Moreover, Circular 271 states that "staff whose reckonable previous experience was limited to 12 years ... will have their full experience recognised for the purposes of promotions and appointments taking effect after 31 December 2001". The complainant thus argued that, on promotion to A4(2) he should be granted a higher step-in-grade. The Tribunal, however, found that the criteria for promotion to A4(2) were different from those for promotion to (for example) A3 or A4, in that, again according to Circular 271, "it is reserved for staff who have demonstrated particular merit, either in their main duties or for example by taking on special duties ...". The Tribunal thus found that reckonable experience is not a factor to be taken into account in relation to promotion to A4(2). The Tribunal thus dismissed this part of the complaint.

## Money matters

Three complaints ruled upon in the 111th session concerned payments to (or by) staff members.

Judgment 3002 concerned a complaint filed by a staff member concerning a claim for the family allowance in respect to two of his partner's children. This request was originally made in 2000. In 2001, the Office turned down the request on the basis of Article 69(3) ServRegs as interpreted by Rules 1 and 2 of Communiqué 6, and this decision was promptly appealed internally. In 2002, following a unanimous recommendation from the IAC, the President rejected the appeal. At that time, the complainant failed to pursue the matter further. However, in 2004, in Judgment 2359 concerning a complaint by a different staff member, the Tribunal found that lower law such as Communiqué 6 could explain higher law such as Article 69 ServRegs, but couldn't re-define it, in particular if the Communiqué contradicted the ServRegs. Accordingly, the complainant in Judgment 2359 won, and the Office was ordered to pay him the allowance with interest and costs. Since the complainant's situation in 2359 was similar to that of the current complainant, he wrote to the President and requested re-consideration of his case in the light of this Judgment. Following a further internal appeal, the President refused to reconsider the case, for reasons of (the Office's) legal certainty.

The Tribunal found that, since the complainant had not appealed the President's decision in 2002 refusing to grant him the allowance to the Tribunal within the required time limit, it became final and that "he could no longer reapply for these allowances". The reason for this is that "time limits are an objective matter of fact", and that ignoring them "would impair the necessary stability of the parties' legal relations". Accordingly, the Tribunal found that the complaint was irreceivable since it was filed out of time.

This complaint is important for staff members since it demonstrates that there is no legal necessity for the Office to extend the benefit of an appeal filed by one member of staff to

other staff members. A practice which creates a high degree of uncertainty and potentially unequal treatment. The legal protection provided by the ILOAT is therefore only guaranteed if you are a party to an appeal or an intervener. This is a regrettable practice and contributes to the need for mass appeals on important issues since it is not clear if the EPO will apply the outcome of a judgement to all staff equally.

Judgment 3013 concerned an application for execution of Judgment 2846. In that Judgment, the Tribunal ordered that the complainant be retroactively promoted. The Office should additionally pay interest on all amounts owed "at a rate of 8 per cent per annum". The Office added simple interest to the amounts. The complainant appealed, claiming that the Office should have paid compound interest.

Citing its own (very old) case law, the Tribunal stated that "if the Tribunal had meant compound interest, it would have used words to that effect". Thus, it found that "the obligation to pay compound interest is always an exception" and dismissed the complaint.

The conclusion to be drawn is that, if a staff member wishes compound interest, it must be explicitly claimed.

Judgment 3019 concerns payment of contributions to the Office Long Term Care Insurance (LTCI) system in respect to coverage for a staff member's (employed) spouse.

Staff members' family members are covered either on a compulsory or on a voluntary basis by the Office's LTCI system. Staff members' spouses who are voluntarily insured are covered provided that the staff member "does not take an irrevocable decision to the contrary" (cited from the Implementing Rules for LTCI). Otherwise, the staff member has to pay a premium in respect of their spouse. According to the Office, the complainant's spouse was covered by the LTCI on this basis. In the case of employed spouses, this premium is dependent on the spouse's earnings. The Office thus requested the complainant to

provide details of her spouse's income. On receiving this, she filed a declaration that her spouse did not wish to be insured and refused to provide the requested information. The Office thus estimated her spouse's income and, on the basis that she had not provided this information for previous years, determined that she owed the Office about 1600 Euros in outstanding contributions, which were recovered from her salary. In her complaint, she not only objected to this retroactive deduction, but also what she considered the unlawful "forced sale" of unwanted insurance coverage. She also considered the regulations to be ambiguous and that automatic coverage should be disallowed.

The Tribunal disagreed that the system was not voluntary merely because a staff member must explicitly renounce the insurance. Moreover, the Tribunal found no ambiguity between Article 83a ServRegs, which deals with LTCI, and its Implementing Rule, which the Article explicitly mentions in its first sentence. Rather, the Implementing Rule merely provides clarification of the Article. Most importantly, the Tribunal considered that the Implementing Rules were reasonable and fulfilled the Office's duty of care. The reason for this was that, under the current situation, the worst that can happen is that a staff member could be "slightly financially penalised if they fail to opt out of the scheme". However, if a staff member had to opt in to the system, there could be severe financial consequences if a staff member's spouse was not insured when the need arose (in this respect, it is worth noting that whilst such systems may be known to, for example German staff members, this may not be the case for staff members from other member states; at the time such a decision has to be taken, e.g. when taking up their duties, such staff members may thus not understand the need for opting in to such an insurance system).

Accordingly, the Tribunal considered that the complaint was unfounded on its merits and dismissed it without considering the admissibility objections raised by the Office.

This Judgment demonstrates that, in order to avoid being asked for retroactive social security contributions in respect of spouse's coverage, staff members should ensure that the Office is up to date on their spouse's employment situation. This is, in any case, a requirement of Article 16 ServRegs. It should be noted that since the introduction with effect from 2008 of contributions for sickness insurance coverage for non-insured but working spouses, the Office now seems to be systematically asking staff members at the start of each year to provide details of their spouse's employment. Whilst we are aware of a number of staff members who were requested to pay retroactive LTCI contributions for their spouses, we expect that the number of new cases should reduce in the future.

### **Sickness**

Judgment 3028 concerned a complaint concerning the calculation of salary during extended sick leave. The appeal was lodged in October 2006. The complainant entered invalidity in February 2008. In July 2008, the Tribunal, in Judgment 2756, found that the Office's manner of calculating salary when the maximum period of sick leave with full pay was faulty. The complainant then asked for his salary to be calculated in accordance with this Judgment. In March 2009, the President followed the IAC's opinion that the appeal was in part not receivable and for the rest unfounded, since the case could be distinguished from the one in Judgment 2756. In April 2009, the complainant thus filed the current complaint with the Tribunal against this decision. However, in June 2009, the complainant was informed by the Office that the President had reviewed her earlier decision, and would apply Judgment 2756 to his case. The Tribunal found that this decision modified the earlier decision. However, the Tribunal also found no evidence that the Office had, in fact, carried out such a recalculation. Accordingly, the Tribunal ordered the Office to review the complainant's salary payslips and, if necessary, recalculate the complainant's salary. The Tribunal also awarded 5 per cent interest on any outstanding amounts from the

due dates until the date of payment. The Tribunal also awarded costs.

Judgment 3045 concerned a complaint against a decision taken by the President to follow an opinion of the medical committee that whilst the complainant was suffering from permanent invalidity, this had not been caused by an occupational disease. In particular, he asked the Tribunal to find that his illness was occupational since the deterioration in his state of health was due to harassment by his supervisor. He also requested substantial material, compensatory and moral damages.

The Tribunal noted, as usual, that it would not replace a qualified medical opinion with its own. Hence it refused to rule on whether the illness was occupational in nature. However, the Tribunal also found that the Office had refused, without legal basis, to allow the complainant to change the medical practitioner he had appointed to the medical committee. Concretely, he had initially appointed his regular (presumably general) practitioner and wanted to change this for an expert. The Tribunal accordingly found that the procedure was flawed. The Tribunal thus sent the case back to the Office for referral to a properly constituted Medical Committee. The Tribunal also awarded moral (but not material or compensatory) damages and costs.

Judgment 3048 concerned a complaint against changes made with effect from 01.07.2007 to the calculation of vacation for staff members on extended sick leave.

The complainant had written to the President, writing that he had "reason to believe that the Office has applied the new Article 62(5) ServRegs" to the complainant, and that "if this new practice has resulted in a loss of leave days, I ask those ... days be restored". He also asked that the new regulation be quashed.

The Tribunal found that neither the complaint nor any of its annexes identified any particular decision affecting the complainant. The mere supposition that he might have been harmed fell far short of identifying a

decision relating to the number of days vacation available to him. Moreover, Article 62(5) ServRegs was adopted by the Administrative Council. Any appeal against this should have been filed with the Administrative Council. There was nothing in the complainant's letter to the President indicating that it should be taken as an appeal against a decision of the Council.

Accordingly, the Tribunal found that none of the documents filed could be taken as raising an appeal. The appeal was accordingly summarily dismissed.

Several applications to intervene were filed. An application to intervene is when a staff member who is not a complainant asks to intervene by sending the Tribunal a letter of intervention in a complaint. This must be filed before the closure of written submissions to the Tribunal in practice this means before the EPO submits its surrejoinder (i.e. its second reply). An intervener is not a party to the complaint, however, should the complaint be successful, they will also benefit from the Judgment. Judgment 3002, discussed above, demonstrates that this procedure might sometimes be important in order that staff members avoid losing rights, without having to appeal on their own. The problem with this procedure is that it is dependent on someone else's complaint, since the intervener may not make any submissions on the substance. Also, should the complainant withdraw the case all rights of interveners are lost. In the current case since the complaint failed, the applications to intervene were also dismissed.

This Judgment shows that it is important for staff members clearly to identify the decision causing them harm, to clearly identify the harm caused and to file the appeal with the correct body.

### **Prolongation of contract**

We have repeatedly noted (see for example our report of the 110th session) that the largest single group of complaints from other organisations concerned non-renewal of contract. We have previously commented that this area is a mine field. The

organisations often lose, and have to pay substantial damages. Even where the organisation "wins" on the merits of a case, the Tribunal may award moral damages since the way that such a decision was reached may cause the complainant injury. On the other hand, even where the complainant "wins" on the merits of the case, there may be no order of re-instatement, but rather merely a (substantial) award of damages.

Up to now, the EPO has largely avoided these problems, because it has generally employed staff on permanent employment contracts. In the current session, however, two EPO Judgments concerned non-renewal of contract.

Judgment 3005 concerned a complaint by a former EuroContractor. After various contract extensions, her employment was finally terminated. She considered that her duties were permanent in nature and that her former Director had agreed and had asked for a permanent post to be created. However, following the Director's retirement and a reorganisation in DG5, the Office decided that the duties were, in fact, not permanent and thus the complainant could not be offered a permanent post.

Following proceedings before the IAC, the complainant was offered a contract extension. At the same time, the Office informed her that the Office "retained the absolute right not to further renew her contract". The complainant turned this offer down. Rather, she argued that she had been promised that her EuroContract post would be converted to a permanent post. Accordingly, she requested to be appointed to a permanent post.

The Tribunal noted that, even if all the requirements for conversion of fixed-term appointment to permanent appointment are met, there is still no right to permanent appointment. Rather, the regulations clearly state that the staff member "may be eligible" for permanent employment. Moreover, concerning the alleged promises by the complainant's former Director, the Tribunal cited from its case law. According to this, it is indeed true that "anyone to whom a promise

is made may expect it to be kept". However, "the right is conditional". One condition is that the promise "should come from someone who is competent ... to make it". The Tribunal found, however, that the former Director was not competent to have made the complainant any promises in this respect.

For these reasons, the Tribunal dismissed the complaint.

Judgment 3007 also concerned a complaint by a former EuroContractor. She was informed in August 2006, which decision was confirmed in September 2006, that her contract would not be extended and so would end at the end of December 2006. Both before and after this date, she applied for various other posts at the Office, but was not successful. In July 2007, confirming an earlier letter, she was informed that, since her contract had come to an end, she could not be given a permanent position without following a proper recruitment procedure. She appealed against this letter.

The Tribunal considered that this letter was not, however, a decision. Rather, it was a courtesy letter from the President. Thus it was not open to appeal. Rather, what the complainant was appealing against was the non-renewal of her contract (or possibly the non-conversion of her contract to a permanent post). Thus the appeal was filed out of time and was accordingly not admissible. Accordingly, the complaint was dismissed.

As with Judgment 3048 discussed above, this complaint shows the necessity of correctly identifying an appealable decision. Once identified, it must then be appealed within the correct time limits.

## **Interesting findings from the EPO cases**

A number of findings of interest to the reader are pointed out above in the discussion of the relevant case. In addition, considered as a whole, a few other findings came to light. It is worth noting that not only staff members but also former staff members to whom the



ServRegs apply such as pensioners or invalids, and also rightful claimants such as recipients of survivor's pensions, may file internal appeals and complaints before the ILOAT.

In the current session, seven out of twelve complaints were filed by former staff members. Two of these concerned former EuroContractors whose employment had been terminated. One concerned a pensioner. The largest group, however, with four of the twelve Office cases concerned invalids. Of these, three were won. Indeed, the three that were won all concerned medical issues, or procedure surrounding medical issues (the case that was lost was Judgment 3013 concerning if the Office should pay simple or compound interest in respect to an award made in an earlier Judgment). That is to say, all the cases brought by invalids concerning medical matters were won by the complainants. Invalids are, almost by definition, the weakest of the weak. It is simply not acceptable that the Office treats them (or others in vulnerable situations) with such a lack of care and attention. We suspect that this is only the tip of the iceberg and that many more invalids are being wronged in a similar manner but are simply unable to pursue their rights. *We thus urge the Office to take measures to ensure that former staff members in general and invalids in particular are treated with the care and respect that they deserve.*

Although the current session, where such cases formed the majority, is probably an exception, it seems to be a trend that former staff members make up a larger and larger percentage of appeals filed. We expect this trend to continue. Since the Office's internal appeals procedure already has difficulty coping with its workload, it is obvious to us that the Office must allocate more resources to this area.

As set out in the summary, in all five complaints that were won, the cases were merely sent back to the Office for the Office to take a new, hopefully correct, decision or to follow a correct procedure. Since the cases dated back to internal appeals filed as long ago (in two cases) as 2005, this is a worry.

After all, these complainants, who have now been found to be in the right, have already waited six years for justice!

As stated above with respect to Judgment 3048, the Tribunal considered a letter to the President as failing to raise an appeal with the Administrative Council against a decision (amendment of Article 62(5) ServRegs) which the Council had taken. This is interesting since the same session of the Tribunal, in Judgment 3026, cited earlier (EPO) Judgment 1832. In that Judgment, the Tribunal found that an appeal is not irreceivable merely because it has been filed with the wrong appeals body. Rather, it is a simple matter for the Organisation to forward the appeal to the correct body. The position adopted by the Tribunal in Judgment 3048 shows that staff members may not rely on Judgment 1832. Thus they should take care to file their appeals with the correct body, that is to say, either with the President or with the Administrative Council. It is not always clear which body is the correct one. Indeed, the EPO has been inconsistent in the criteria it applies. For example, the mass appeals against the New Pension System were dealt with by the Council's appeals committee. However, acting on the Office's advice the Council decided that the appeals filed by the GAC members in this matter should be dealt with by the President's appeals committee (where they are still pending). If in doubt, and until the Office and Council create clarity, it thus seems safest to file appeals with both bodies (as the GAC members had in the above case).

### **Interesting findings from non-EPO cases**

Some interesting findings from non-EPO cases are discussed below.

#### **Execution of Judgments**

Judgment 3003 concerned an application by the IFAD (International Fund for Agricultural Development) for suspension of the execution of Judgment 2867. In that Judgment, the Tribunal awarded the complainant two years' salary, moral

damages and costs. The reason for the requested suspension of execution is that, according to Article XII of the Tribunal's statute, if an organisation considers that a Judgment is "vitiating by a fundamental fault in the procedure followed, the question of the validity of the decision given by the Tribunal shall be submitted ... for an advisory opinion, to the International Court of Justice", and the IFAD wished to take this course of action. In Judgment 3003, the Tribunal noted that in the Tribunal's history this has only been done once before, unsuccessfully, in 1955.

The Tribunal noted that its Judgments are final and that they have the authority of *res judicata*. They also considered that its statutes are silent on whether or not they may (or may not) order such a suspension of execution. They noted that since only organisations may make use of Article XII, this created a procedure "fundamentally imbalanced to the detriment of staff members". Weighing these points up, the Tribunal decided that requesting advisory opinions from the ICJ may not stay execution of a Tribunal Judgment. Accordingly, the IFAD's application was rejected and they were ordered to execute Judgment 2867 immediately. The defendant (who was the complainant in Judgment 2867) was awarded costs because she had been forced to defend her interests. However, her claim for additional moral damages for the anxiety caused by the IFAD taking this course of action was dismissed.

This Judgment is positive for staff because it indicates that, if it rules in their favour, the Tribunal expects organisations to implement their Judgments promptly, correctly and fully. We are aware a number of Judgments against the Office which have not been implemented properly or fully. An example is 2919, where the Tribunal, on the **8th July 2010** ordered the Office, within 60 days, to consult the GAC on the practice of outsourcing at the Office. This the Office has **still** not done. We understand that, in this case (2919), the complainant has written to the Tribunal asking for an order of execution. The Tribunal has acknowledged receipt of this request and has forwarded it to the Office for comment. Judgments such as the current

one (3003) make it clear that, in cases like 2919, the Office is taking a major risk of the Tribunal pronouncing further sanctions against it.

Finally, it should be noted that the Tribunal judged on this case in a five Judge composition, not its usual three Judge one. This is, in our experience, an unusual occurrence (however, in the current session it also occurred in Judgment 3020). The Tribunal sits in this composition if the Tribunal (probably rightly in the current case) considers the case to be particularly complex e.g. because it concerns fundamental questions of law.

### "Rechtsbehelfsbelehrung"

In case 3012, the Tribunal found that the case was not admissible. Usually, that would be the end of the matter. However, in this case, the Tribunal considered that the decision being appealed "fails to mention the means of redress and the relevant time limits. ... in the very specific circumstances of this case, given the complexity of the applicable rules of procedure ... the Organization's duty of care required it to indicate these means of redress and time limits clearly in its decision". Accordingly, whilst the case was dismissed, the Organisation (the WHO) was ordered to give the complainant a new time limit for filing another appeal!

Whilst it is clear that this is a very particular and individual case, it does highlight again the necessity for organisations to make clear rules and to explain them clearly to their staff members. In this respect we note also Judgment 3024, also issued in this session. Here, the Tribunal found that the Organisation (the ILO) had "failed in its duty to inform and, as a result, in its duty of care towards its official. It therefore bears liability, since the complainant was deprived of timely information that would have prompted him to submit an application for restoration of his prior contributory service (for a pension transfer) within the prescribed time limit". The decision was thus set aside and the Organisation ordered to restore the complainant's rights. This Judgment cites earlier EPO Judgment 2768 which was also

won simply because the Office failed to explain a complex regulation (also concerning pension transfer) clearly to staff affected.

These cases taken together demonstrate again that the Office has a duty of care to explain to staff members complex regulations in a way that can be understood. This may include making staff members aware that a decision affecting them has been made and what remedies the staff member has.

### **Undue delay**

In the context of the Office, the time taken to process an internal appeal can take up to five years. In Judgment 3023 concerning the FAO, the Tribunal considered that the only question which the internal appeals body needed to look at was that of receivability. It thus considered that 17 months constituted unreasonable delay. Although the complaint was lost, the Tribunal nevertheless awarded 1000 Euros moral damages for this delay.

We note that recently the President has been refusing to award moral damages for the length of proceedings in internal appeals, even in cases where the IAC unanimously suggested that such damages should be paid. The Tribunal obviously views undue procedural delay more seriously than the President. It thus seems likely that, in at least some cases, if pursued in front of the Tribunal, the Tribunal will make an award in those cases that the President has turned down. We suggest again that all complainants who have had a delay of more than (say) two years in dealing with their internal appeal should request moral damages for this reason. If they have to pursue their case in front of the Tribunal, they should make the claim there too.

### **Safety and environmental standards**

Judgment 3025 concerned a claim that the ITU should be ordered to request the OCIRT (Office cantonal de l'inspection et des relations du travail) to inspect the working environment at one of its buildings in Geneva. This the ITU refused to do, despite the fact that the Council of the ITU in 1999

decided in a resolution that the organisation should "ensure that the safety, health and environmental standards in force in the host country of the Union (Switzerland) are applied at the ITU".

In the Judgment, the Tribunal concluded that neither Swiss nor Cantonal law applied directly at the ITU, since Swiss law on worker protection expressly excludes international organisations with a headquarters agreement with Switzerland, and Cantonal law is subservient to Swiss law. Moreover, the Tribunal considered that the ITU intended to comply with the above mentioned resolution. They also considered that the organisation had discretion as to how to do this, i.e. it could use its own internal services in order to ensure compliance with Swiss law, and did not have to call upon external organisations (such as the OCIRT) to do this.

Thus the complaint was dismissed.

This Judgment demonstrates again that, whilst international organisations will often at least claim to apply the law and standards of their host countries, there is a problem of jurisdiction i.e. which court is responsible, if a dispute arises. It is obvious that in front of a Swiss court the ITU would successfully have claimed immunity. Finally, and worryingly, the Tribunal seemed to indicate that the ITU didn't even have, of its own free will, to apply Swiss standards. Rather, they merely considered that the organisation had a duty to provide safe working conditions and it was up to the organisation to decide if Swiss standards were suitable.

### **Disciplinary measures**

Judgments 3035, 3036 and 3037 all concerned complaints against WIPO. The staff members worked in the IT area. Following security incidents, all three were suspended, following a preliminary report, in 2008. The suspension was confirmed, following appeals, in 2009.

The Tribunal considered that a "suspension is an interim measure ... nevertheless, (a) suspension must be legally founded, justified by the requirements of the organisation and

in accordance with the principle of proportionality". Given the accusations, and the fact that the decisions to suspend were based on preliminary information, the Tribunal found that the initial suspensions were all in order. However, the Tribunal also found that the later decisions maintaining the suspensions extended the duration "beyond the reasonable limit". Accordingly, in all three cases, the decisions were set aside and moral damages awarded.

The conclusions to be drawn are that, following a suspension, either a disciplinary measure should be imposed or the staff member cleared. This should be done within a reasonable time. However, the Tribunal didn't actually say what a reasonable limit for a suspension might be.

The Executive Committee