

EPO FLIER No. 38

The EPO-FLIER wants to provide staff with uncensored, independent information at times of social conflict

The ILO Tribunal

Is it still worthy of our trust?

The Administrative Tribunal (AT) of the International Labour Organization (ILO) is the successor of the League of Nations Administrative Tribunal, created as a judicial tribunal to ensure to officials the firm conviction of safety and security emanating from justice, provide a judge for internal disputes, and preclude the possibility of one of the parties being a judge in his own cause.

For European Patent Office (EPO) labour disputes, the ILO-AT is the only external legal instance.

Extent of jurisdiction

The applicable law, under the ILO-AT Statute¹, is formally limited to the terms of appointment and service conditions of the organisation concerned. But the ILO-AT's case law on this point has been inconsistent; in some judgments, general principles of law and human rights have been considered as additional sources of law, in others they have been excluded². The Tribunal does not order interim relief. Witnesses can give written statements but their cross-examination is not possible. Since 1989, the ILO-AT has declined to hold any oral hearings. The Tribunal has no means of enforcing judgments.

The Tribunal has recently changed its approach concerning general decisions. While Staff Committee members could, in the past, challenge general decisions directly, it now seems that general decisions (legislative decisions) may no longer be challengeable at all. Concerned employees must now wait until an administrative decision implementing a general decision, eg a career reform, produces a direct adverse effect on them,³ eg through a missed promotion that was due, visible on a payslip. This has as a consequence that every staff member must file an individual appeal instead of a staff committee member filing a model appeal for all. The number of internal appeals has thus since exploded.³ Another consequence is that many general decisions, eg decisions changing governance rules, may no longer be challengeable, even if they are presumably illegal.

1 [Statute of the Administrative Tribunal of the International Labour Organization](#)

2 Robin Silverstein, [REVISITING THE LEGAL BASIS TO DENY INTERNATIONAL CIVIL SERVANTS ACCESS TO A FUNDAMENTAL HUMAN RIGHT](#), Michigan State International Law Review, Vol. 25.2 (2017)

3 [Managing the ILO Administrative Tribunal's workload -Current challenges and possible improvements](#) (SUEPO's views, 17.09.2015)

Workload issues

The ILO-AT struggles to meet its caseload^{2,4}. In 2015, the Tribunal said: *“It is the number of complaints filed against a single organization, the EPO, rather than the rise in the overall number of organizations having accepted its jurisdiction, that represents the main challenge for its effective functioning.”*⁵ At the same time, the Tribunal has made it clear that it has *“reached its limits in terms of output”* and that it cannot increase it any further *“without compromising the quality of its services.”*

The Tribunal has recently reasserted that the main challenge to its functioning is the large number of EPO cases^{4,6}. Robin Silverstein reports that the chosen approach to reducing the backlog has affected the quality of the judgments being delivered: *“ILOAT staff rush through records of pending cases, and draft hundreds of judgments, dismissing as many cases as possible on technicalities, and glossing over the finer points of those appellant submissions that it accepts. It is a common gripe among appellants that the judgments finally rendered contain anomalies, mischaracterizations and factual errors, and fail to address key claims and legal arguments.”*^{2,7}

Until 2014, the Article 7 “summary dismissal procedure” was only rarely used⁸: Sessions 1-116 (3305 judgments) saw only 19 summary dismissals (**0.65%**). The Tribunal changed its approach, leading to a rapid processing of a large number of complaints and a corresponding reduction in the size of the backlog. This was achieved without increasing the number of judges or Registry staff⁴. The report⁴ of the 332nd Session of the ILO Governing Body is a little ambiguous in its wording, but it gives the impression that it was the goal of the new approach to reduce the case backlog. Sessions 117-125 (676 judgments) saw a striking increase: 124 summary dismissals (**15%**), 74 of them concern EPO complaints (**32%**). Summary dismissal denies in fact access to justice.

Independence and impartiality

It has been the subject of some debate whether the ILO-AT is truly independent.² The Tribunal's seven judges are appointed on three-year renewable contracts.² Renewable contracts for judges cast doubt on their independence⁹. The appointment of the ILO-AT judges is not transparent and there are no clear standards for their minimum professional qualifications³. The Tribunal is financed through fees paid by the defendant organisations on a per-dispute basis^{10,11}. About 60% of the ILO's caseload comes from just six organisations, about 20% from the EPO alone.

4 [Functioning of the Administrative Tribunal of the ILO – An update](#), ILO Governing Body, Programme of the 332nd Session in March 2018

5 [Matters relating to the Administrative Tribunal of the ILO - Workload and effectiveness of the Tribunal](#), Programme of the 325th Session of the ILO Governing Body (from 29 October to 12 November 2015)

6 The ILO is working on an amendment to the Tribunal's statute and rules of procedure, apparently with the aim of improving the backlog situation (see B28/6/18), but we are not aware of any details of that on-going process

7 Edward Patrick Flaherty, [LEGAL PROTECTION IN INTERNATIONAL ORGANISATIONS FOR STAFF—A Practitioner's View](#)

8 [ILO-AT: 90 years old and in need of repair](#), SUEPO (03.05.2017)

9 In a recent [decision](#), the Federal Constitutional Court clarified that the nomination of qualified judges to first instance administrative tribunals for a fixed term is in line with the German constitution, but under the condition that contract renewal is excluded

10 [Matters relating to the Administrative Tribunal of the ILO: Financing of the Tribunal](#), Programme of the 309th Session of the ILO Governing Body (November 2010)

11 The costs per case, which vary roughly between 15.000 Euros and 25.000 Euros, are calculated by dividing the “session costs”, which cover expenses for the judges, legal services and translations, by the number of cases dealt with during the session. The major share of the Tribunal's “overhead costs”, which include the office space and the operational costs of the Registry including staff salaries, have, at least until 2010, been borne by the ILO.

The ILO-AT has had several bilateral talks with the EPO administration – a party in the dispute – without informing or inviting representatives of the appellants⁸. A March 2016 ILO report¹² mentions that two video conferences were held in 2015, “with senior officials from the legal and human resources services” of the EPO, who “highlighted the internal challenges faced by the EPO in a context of ongoing reforms, called for improvements in the Tribunal’s case management in general, and appealed to the understanding of the Tribunal offering financial support if needed.” Written requests¹³ to involve staff representatives in these talks have apparently been to no avail⁸. Considering “the functioning and credibility of the Tribunal ... at risk”, the ILO’s Director-General arranged a meeting with the EPO President¹². To this meeting, which took place in April 2016, he (apparently) also invited the President of the Administrative Tribunal¹⁴. But when the Tribunal’s credibility is at risk, does it help to organise bi-lateral talks with one party to a dispute - while excluding the other party?

The EPO administration informed the Director-General about its “targeted communication campaigns on the Tribunal’s case law, as statistics show that a considerable number of complaints against the EPO are dismissed.”^{12,15} This measure was positively received at the ILO since it was expected to help reducing the number of complaints filed by EPO staff¹². But how can a Tribunal, whose task is to establish justice in labour disputes, welcome measures aiming at discouraging staff members from claiming their rights?

The March 2016 ILO report¹² further mentions several communications to the Director-General in which president Battistelli gives “an overview of recent disciplinary cases involving staff representatives of the European Patent Office, some of which had resulted in the dismissal of the individuals concerned”, and that “the analysis of the cases referred to the Tribunal indicates that a significant number of complaints stem from strained relations between staff representatives and management.”

A March 2017 ILO report¹⁴ lays out that in its March 2016 Resolution¹⁶, the Administrative Council had “noted that disciplinary sanctions against staff or trade union representatives were widely questioned in the public opinion”, and that during a meeting in April 2016, the Director-General, the EPO President and the President of the Tribunal had “exchanged views on the situation created by the high number of complaints against the EPO, the root causes of the backlog and possible solutions.” An agreement on certain points “prompted the Director-General’s optimism that real progress could be made in the coming months so as to alleviate the Tribunal’s workload ...”.

The drafting of judgements

For the Tribunal to work efficiently, the cases are prepared by the Registry: “The Registry is tasked with providing technical, factual and legal support to the judges, thus requiring its staff in effect to draft judgments.”² In 2010, the Registry was staffed by the Registrar and a part-time secretary¹⁰. Its current staff also comprises a “small team of legal officers.”¹⁷ The Tribunal has recently reformed

12 [Matters relating to the Administrative Tribunal of the ILO: Report on discussions with the European Patent Organisation on possible future action to improve the Tribunal’s caseload](#), Programme of the 326th Session of the ILO Governing Body (March 2016)

13 [Letter](#), on behalf of SUEPO, from Schwab, Flaherty & Associés to Guy Ryder, ILO Director-General (23.02.2016)

14 [Matters relating to the Administrative Tribunal of the ILO - Update on discussions with the European Patent Organisation on possible future action to improve the Tribunal’s caseload](#), Programme of the 329th Session of the ILO Governing Body in March 2017

15 The glowing reports on ILO-AT sessions by VP5 or the Director Employment Law, which are published in the EPO intranet and in the Gazette, form presumably part of these “targeted campaigns”. You can find an example [here](#).

16 [RESOLUTION ADOPTED BY THE ADMINISTRATIVE COUNCIL ON 16 MARCH 2016](#)

17 [The Tribunal](#)

the work of the Registry, so that it is now even “*better focused on assisting the judges.*”⁴ The seven judges themselves are generally not familiar with the defendant organisation’s own and very specific sets of rules since they “*do no work for the Tribunal on a full-time basis, but usually sit only twice a year for three to four weeks each time,*” and “*some of them have extremely busy schedules as they are still serving in the supreme courts of their respective countries.*”⁵ The judges will thus not study the full set of submissions but rather rely on the work done by the Registry. The preparatory work of the Registry has thus a significant impact on the decision which will be taken by the judges.

Personal ties

The ILO-AT has issued publications with contributions from members of its member organisations. For example, Laurent Germond, “Director Employment Law” at the EPO, and responsible for legal disputes of staff members with the European Patent Organisation, was invited to make a speech at a symposium¹⁸ to celebrate the Tribunal’s 90th anniversary in 2017. His speech can be found in a recent ILO publication¹⁹, edited by Mr Dražen Petrović, the Registrar of the Tribunal. Mr Petrović and Mr Germond have been personal friends for a long time²⁰. It may not be a coincidence that Mr Petrović joined the ILO on 1 December 2013 while Mr Germond joined the EPO at the end of 2013. Under the circumstances, the Registrar could naturally have more understanding for the arguments of the defendant organisation than for those of the appellants.

The 126th session

The ILO-AT judges met again from 23 April to 18 May 2018 at the International Labour Office in Geneva. The judgments will be delivered in public on Tuesday, 26 June 2018 at 3 p.m. and published on the Tribunal's website shortly thereafter.

Among the EPO cases judged are those of Elizabeth Hardon, Ion Brumme and Malika Weaver, at the time chair, vice-chair and treasurer respectively of the Munich branch of the EPO’s largest staff union SUEPO. They were collectively suspended (on the same day!). The SUEPO chair and vice-chair were then dismissed, and the treasurer down-graded by president Battistelli – officially for reasons that had nothing to do with their work as staff representatives.

It will be another test of the ILO-AT’s independence. It will show whether the Tribunal will recognise this amazing “coincidence” for what it really is – an attempt to get rid of pesky opponents and to suppress any meaningful dialogue.²¹

The ILO-AT has the mandate to guarantee that the over 60,000 international civil servants of more than 60 international organisations over which it has jurisdiction can enjoy protection against arbitrary acts committed against them by their employer.¹⁷ We fervently hope that it takes its duties seriously. If it does not, the entire legal framework for thousands of staff falls apart.

18 [Symposium in honour of the ILO’s Administrative Tribunal](#) (5 May 2017)

19 [Une contribution de 90 ans du Tribunal administratif de l’Organisation internationale du Travail à la création d’un droit de la fonction publique internationale - 90 years of contribution of the Administrative Tribunal of the International Labour Organization to the creation of international civil service law](#) (2017), edited by Dražen Petrović

20 Also “Märpel” has reported about this personal connection; see [The best friend of a key man on the R.I.P. Kat blog](#)

21 See [EPO FLIER No. 37 Battistelli’s record: legal harassment and retaliation](#) (12.06.2018), [CA/20/16](#) and [CA/21/15](#)