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Justice denied

In recent Judgments 4255 and 4256 the ILO Administrative Tribunal dismissed a total of 653 complaints coming from EPO staff. The majority of the complaints concern reforms and other controversial decisions dating back to 2012 - 2014. In earlier judgments the Tribunal found that the Administrative Council or the Office (i.e. the President) had made formal errors in the procedures and sent the cases back for re-examination. This line has now been confirmed. Arguments of the complainants why further delays would amount to a denial of justice were ignored.

Introduction

The judges of the Administrative Tribunal of the International Labour Organisation (ILO-AT) meet in Geneva twice a year, around November and around May. The judgments are then usually delivered early February or late June/early July respectively. Among the judgments of the 129th session delivered last month there are two, Judgments 4255 and 4256, that are of crucial importance to staff at the EPO. Below we will outline the judgments and discuss the consequences for staff.

A tale of three judgments

Judgment 4255 concerns the question of who is the competent authority to examine and decide on requests for reviews and appeals filed by staff on "general" decisions taken by the Administrative Council[1]:

i. the authority that took the decision, i.e. the Council, or
ii. the authority that appointed the complainant, here the President.

Judgment 4255 relies heavily on two earlier judgments, Judgment 3700 and Judgment 3796. So, to understand Judgment 4255 we need to go back in time.

In the first case (Judgment 3700), a complainant challenged the decision of the then President to re-direct a request for review of decision CA/D 9/12 (reform of the EPO internal justice system) that was addressed to himself (i.e. to the President) to the Administrative Council as the body that took the contested decision. The Tribunal found that the President had been wrong. It held that in this case the Council was not the "competent authority" for settling this dispute just because it took the contested decision. According to the Tribunal what matters is who was the "competent appointing authority" of the complainant. Since the complainant had been appointed by the President, the complaint was dismissed as irreceivable.

[1] To further complicate the issue: ILOAT and the EPO increasingly argue that general decisions are not challengeable at all, only individual decisions derived therefrom would be challengeable.

In a later extraordinary session the Tribunal delivered several judgments that it apparently considered of great importance. Among those was Judgment 3796 in which the Tribunal, *of its own motion*, i.e. without prompting by a party, came back to the question of who is the competent authority for examining a request for review of a general Council decision.

In Judgment 3796 the Tribunal followed the line taken in Judgment 3700. We cite the Tribunal[2]:

> *"This analysis was later confirmed in Judgment 3796, dealing with a challenge to decision CA/D 10/14[3] by a staff member who had likewise been appointed by the President. The Tribunal, having determined that "[t]he Administrative Council should have recognized that it was not the competent authority at all and should have referred the request to the President."*

But contrary to the earlier case which was dismissed as irreceivable, in Judgment 3796 the Tribunal remitted the matter to the EPO for the President to re-examine the case and take a decision on the complainant's request for review.

Judgment's 3796 new line on "competent authority" surprised many, including the EPO's lawyers[4]. But the consequences are clear: all similar pending cases are likely to be sent back by the Tribunal without a decision on the substance. With the Tribunal's fees being about €15 000 per case and an estimated 700 similar cases pending that could become expensive. The Office therefore asked the Council to withdraw its decisions, which the Council did in December 2016.

As a next step the staff members who had filed these cases were informed that the decisions had been withdrawn and invited to withdraw their complaints while the new procedure would be started. It seems that many colleagues were not impressed by the turn of events and did **not** withdraw their complaints but continued, providing arguments why their cases should be judged. Those 509 complaints are now the subject of Judgment 4255. The reasoning of the judgment is extremely short. Essentially: the internal means of redress have not been exhausted because the competent authority, i.e. the President, has not yet decided. The 509 complaints were therefore dismissed.

Judgment 4256

Judgment 4256 is in many ways similar to Judgment 4255. It relies on earlier Judgments 3694 and 3785, where the Tribunal found that decisions were flawed in that they were based on opinions given by the Appeals Committee in an incorrect composition. It sent the cases back to the Office for re-examination by a correctly composed Appeals Committee. The President considered that the same flaw affected a large number of further complaints. He withdrew his "final" (*sic*) decisions and referred the cases back to a newly composed Appeals Committee. Staff members were invited to withdraw the pending complaints awaiting a new procedure. Stunned to see their complaints, many of which had already been pending for years, sent back to "start", a large number of complainants refused to withdraw their cases. Without much ceremony or reasoning, Judgment 4256 dismissed the 144 complaints concerned.

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[2] In Judgment 4255, consideration 3

[3] CA/D 10/14 concerns the new career system

[4] See CA/105/16, in particular footnote 3

The arguments that were ignored

Due to the astonishing brevity of the above judgments we cannot glean from the judgments themselves what arguments the complainants brought forward in favour of maintaining their complaints and why these were not convincing for the Tribunal. We do, however, know about at least some of these arguments from the complainants[5].

What is striking is that in both sets of cases procedural **errors were made by the Office** (and/or the Administrative Council following the President's legal advice). In the case of the wrong composition of the Appeals Committee this happened despite clear warnings from the Staff Committee that this was the case. Note that, if a staff member makes a procedural error, the result is – without exception – that the complaint is dismissed or declared irreceivable and the complainant irremediably loses his or her case. So why, when the Office makes a mistake, would the case be remitted, giving the Office a second chance to win its case?

Remittals and their "raison d'être"

Remittals are an established remedy in legal procedures that may be used in exceptional cases. They are beneficial for both parties if correctly used. What is, however, critical is the reason for and the objective of the remittal. A remittal is justified e.g. when decisive information is missing in the case. As an example: when a staff member has been declared invalid but relevant medical reports are missing or clearly flawed. In such a case it is in the interest of both parties that the missing information be added and considered before a decision is taken because, without the missing information, the Tribunal cannot review the decision. This does not, however, apply to the cases remitted in the '4255 and '4256 judgments. In those complaints, remittal is based on purely procedural grounds. Re-examination by the Office is unlikely to bring new information: it is equally unlikely to change the outcome - refusal by the President. Should the current President want to re-examine these cases and change his decision, he could mitigate the consequences of his (predecessor's) errors by doing so without waiting for the outcome of the appeals procedure. As it stands, the remittals are just creating more work for all involved and further delays in the already excruciatingly slow procedures.

Playing for time

In consideration 1 of Judgment 4255 there is a list of the contested decisions. The majority are reforms dating from 2012 to 2014. One decision (CA/D 30/07) apparently dates from 2007. For Judgment 4256 the age of the decisions is less easy to determine, but given that the Appeals Committee was incorrectly composed from June 2014 until mid-2015, the contested decisions will mostly date from 2010 to 2013. Some of the complaints dismissed will concern purely individual grievances, but many will concern the impact of past reforms on individuals. Mr Battistelli's most controversial appointments will also be among the complaints.

The unbelievably long pendency time and the mostly negative outcome of the EPO complaints are, however, not a necessary feature of litigation in international

[5] There are further questions like: "what is the value of a "final" decision if it can be withdrawn?" and "is a decision really withdrawn if in practice it is still fully effective?"
And: "what if the Office makes another error? How many times can a case be remitted – as often as it takes until all complainants have given up?"

organisations, as is shown by Judgment 4134. This case concerns a decision by ILO to reduce the salary of all its staff in Geneva. The Tribunal quashed the decision and reversed the salary reduction - within 15 months of the decision.

The consequences

In recent years the Tribunal has consistently refused to rule on the substance when reforms or other political decisions (e.g. appointments) where challenged by EPO staff or their staff representatives. Literally hundreds of complaints have been dismissed or remitted to the Office. The former (dismissals) are bad news for staff. The latter (remittals) should be bad news for both the Office and its staff because it increases the period of uncertainty and will create administrative chaos should the Tribunal – after 10 years – find that the Office's decisions were wrong and need to be corrected.

So why is the Office not bothered? We do not know. One explanation might be that Mr Campinos hopes that any judgments that may inconvenience the administration will come only *after* his term of office. Given the Tribunal's record on EPO cases, Mr Campinos may even – and maybe rightfully so - speculate that there will be no inconveniences for the administration[6].

We will keep our finger on the pulse. Nevertheless, the latest judgments once again show that staff cannot rely on the ILO-AT alone to obtain justice. However unpleasant it may seem, for the next reforms this leaves only one option:

Back onto the barricades!

SUEPO Central

Annex: List of Administrative Council decisions challenged by requests for review

[6] NB the risk of losing appeals against the new career system and other reforms that have negatively affected staff benefits does not feature in Mr Campinos' Financial Study.

Administrative Council decisions challenged by requests for review.

CA document	Subject matter
8/12 & 9/12	Reform of the internal justice system
15/12	Confirmation of the 2007 invalidity reform
17/12	Collective reward
4/13	First set of measures regarding well-being
5/13	Strike regulations
2/14	Social democracy
3/14	Salary adjustment method
10/14	New career system
11/14	Abolishing the partial compensation scheme and re-enacting the tax adjustment
2/15	Invalidity scheme and sick leave

Table 1: Decisions challenged by the complaints in Judgment 4255.

(Source: CA/105/16, annex 1)