

**TIPS AND INFORMATION NEWSLETTER
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ILOAT Update: 106th Session
Unequal Treatment and Bad Faith in Selection Decisions

New UN Internal Justice System Set to Begin Operations in July

The International Labor Organization Administrative Tribunal issued its rulings on 4 February for its 106th session. I am pleased to report on two significant cases where I represented the staff members:

Unequal Treatment in Selection Process (Judgment No. 2679 (IAEA))

A P-4 staff member with two years left until he reached the IAEA's 7 year service limit applied for a P-5 section head post in his own reorganized Department. The staff member was not interviewed, and, after receiving notice of the appointment of another candidate, he sought a review of the decision together with reasons why he was not selected for an interview. The Agency replied that it received applications from a number of highly qualified individuals and that it had considered relevant the period during which the appointee might hold the position before leaving the Agency. The staff member, however, knew of at least two other staff members also nearing the 7 year service limit who were selected for interviews, and lodged an appeal with the JAB. The JAB recommended the payment of damages on the grounds that the staff member had not been evaluated properly and had suffered damage to his professional standing. It rejected the staff member's argument of unequal treatment on the grounds that the other two staff members held different contracts. The recommendation was rejected by the Director General.

On appeal to the Tribunal, the Agency argued that it had a practice of not considering applicants holding one year final contracts in order to ensure continuity and stability in its programs, and that the two other staff members who were interviewed held two year non-final contracts. The Tribunal found this difference irrelevant since all three staff members would soon reach the 7 service limit. On this basis, it held the staff member was not treated equally. The Tribunal awarded 5,000 euros in moral damages on the grounds that the staff member had lost a valuable opportunity.

The Tribunal is increasingly making its awards on the basis of lost opportunities. This is troubling. In cases of probation, for example, this reasoning is suspect since in those appeals the international organization is found to be in breach of contract (of the rules governing probation) and the Tribunal has held in its cases that damages for breach of contract should put the aggrieved staff member in as good a position as if the contract had been performed, i.e., the staff member should receive the value of the contract if it ran its term (less earnings from other employment). The Tribunal in recent cases has awarded nominal material damages and moral damages for the loss of a "valuable opportunity" to have the appointment confirmed.

Bad Faith in Non-Extension of Contract (Judgment No. 2800 (CTBTO))

In this appeal, the P-3 staff member was reaching the Commission's seven year service limit for professional staff. According to rules adopted by the Commission, staff members are eligible for extensions beyond the service limit based on the need to retain essential memory or expertise. The rules provide that the incumbent staff member's post will be advertised, interviews conducted and then a determination as to whether the staff member should be retained or separated. Whether or not the staff member has essential memory or expertise will be judged by a comparison with the general job market. In this case, the Commission, without following the rules on recruitment, hired an individual (Mr. T) who was assigned the same tasks and duties as the staff member. Thereafter, the Commission decided to abolish the staff member's post and not advertise the post. It further decided that there were no grounds for extending the contract beyond the service limit. The staff member argued that it was clear from the circumstances that the decision to abolish his post followed only after it had appointed his replacement. The Commission argued that it followed its procedures faithfully and the appointment of Mr. T was irrelevant to its consideration since Mr. T was occupying a different post at a higher level.

The Tribunal, although finding the decision to abolish the post lawful and therefore that there was no need to advertise the post as the rules explicitly required, was nonetheless troubled by the course followed by the Commission in this case. It reiterated its case law that "bad faith cannot be presumed, it must be proven. Additionally, bad faith requires an element of malice, ill will, improper motive, fraud or similar dishonest purpose (see Judgment 2293, under 12)." The Tribunal found that "viewed as a whole the circumstances surrounding the decision not to advertise the complainant's post show bad faith and a lack of transparency on the part of the Commission. In particular, the complainant's post was not affected by any planned reorganisation or restructuring prior to May 2006 and was contained on a list dated 27 June 2006 identifying posts to be advertised. Moreover, Mr T.'s duties and responsibilities were not those set out in his job description and were the same as those performed by the complainant. Likewise, the timing of Mr T.'s appointment and the fact that the usual recruitment process was not followed show bad faith and a lack of transparency."

The Tribunal awarded 25,000 in moral damages and 5,000 euros in material damages, and 1,000 euros in costs.

United Nations Internal Justice Reform

On 24 December 2008, the General Assembly quietly adopted the recommendation of its fifth committee on the system of internal justice at the United Nations. The action means that the new first level appeal body (United Nations Dispute Tribunal) and the second level appeal body (United Nations Appeals Tribunal) will begin operations as of 1 July 2009. On that date, the United Nations Administrative Tribunal will stop accepting new cases as it winds down its operations by the end of this year. It can be expected that the backlog of cases will increase during this transition period as the new system settles in over the next few years.

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