

**TIPS AND INFORMATION NEWSLETTER  
FROM LAURENCE C. FAUTH, ESQ.**

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ILOAT 106<sup>th</sup> Session:  
Reaffirming Important Principles of Due Process

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The ILO Administrative Tribunal based in Geneva issued its decisions for the 106<sup>th</sup> session in February 2009. It reaffirmed several important principles.

First, in an appeal balancing the interests of a fair selection/recruitment procedure versus the right of confidentiality, the Tribunal held the balance tipped in favour of ensuring a fair selection process. In **Judgment No. 2766** (EPO), the Tribunal was faced with a challenge to a selection procedure on the grounds of breach of confidentiality, i.e., that a staff representative was allowed to act as an observer to monitor the fairness of the selection procedure, and shared the report with other staff representatives. The Tribunal held that applicants for posts “do not have an absolute right to confidentiality but a reasonable protection of their privacy.” The Tribunal in my view struck the right balance since it did not entirely sacrifice privacy rights in favour of fairness. It did importantly further the right of freedom of association and approve of staff representatives role in ensuring transparency during the selection process. Internal applicants are usually left in the dark with respect to whether applications have been given proper consideration.

In **Judgment No. 2767** (UNESCO), the Tribunal reaffirmed that the right to transparency is a component of due process in the internal appeal process. It held in this case that the “staff member is entitled to be apprised of all items of information material to the outcome of his or her claims” including the composition of the appeals panel “since the identity of its members might have a bearing on the reasoning behind and credibility of the body’s recommendation or opinion”. Without knowledge of the composition, the staff member would not be able to lodge objections of potential bias.

In **Judgment No. 2795** (EPO), the Tribunal reaffirmed that where the administrative authority receives allegations of harassment, it must investigate. The Tribunal was unequivocal and cited its previous case law: an accusation of harassment “requires that an international organisation both investigate the matter thoroughly and accord full due process and protection to the person accused”. Moreover, citing Judgment 2642 it recalled that the Organisation’s duty “requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context (see Judgment 2524), that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed, not be stigmatised or victimised on that account (see Judgment 1376).” (See also Judgment 2522).

In **Judgment No. 2786** (WHO), the Tribunal set aside a disciplinary measure of summary dismissal for alleged fraudulent health claims, reaffirming the principle that international civil servants are entitled to put forward a defense before a disciplinary measure can be applied. One of the alleged infractions was based on facts of a conspiracy which were hard to believe, i.e., that the staff member had subjected his son to unnecessary invasive surgery. The conspiracy would necessarily have included the medical professionals who would have committed medical malpractice. The Tribunal set aside the decision on the grounds that the staff member “was not given an opportunity to test the evidence before the Regional Director determined that he was guilty of misconduct.” The Tribunal also reaffirmed that once a fraud charge is denied, “it was for the Organization to establish that the complainant had knowingly made a false claim”, and not the staff member’s onus to prove innocence. The administration had relied on slim evidence that was far from conclusive: a statement from a hospital official. Without more, the fraud charge could not be sustained.

Finally, in **Judgment No. 2802** (CTBTO), the Tribunal held that “[r]estructuring is, itself, an objective and valid ground for the abolition of a post, provided that it is a genuine restructuring and is not motivated by extraneous considerations such as bias or ill will towards the incumbent of the post.” It is for this reason difficult to challenge decisions that emanate from restructuring or reorganization exercises. With respect to whether a restructuring is genuine or lawful, the Tribunal will assess the written documents and memos from management detailing the restructuring. If only one or a handful of posts are affected, the Tribunal may not give the organization the benefit of the doubt. When faced with abolition of post, staff members should also look to see whether the restructuring or changes are permitted by the staff regulations or rules (including the financial regulations) which may require the approval of the governing body of the organization (made up of Member States). In Judgment No. 2742 (105<sup>th</sup> session), the Tribunal held that the Executive Head’s decision to strengthen the internal audit service could not be accomplished by abolition of the old service with a new service since the old service was specifically called for in the financial regulations approved by Member States. Subsequent approval by the governing body of the new service did not render lawful the prior transfer of a staff member from the old service to a post in the new service.

I will be presenting a fuller review of the ILOAT 106<sup>th</sup> Session in the “Semi-Annual Review” to be published next year.

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