

FICSA LEGAL ADVISOR*

TIPS AND INFORMATION NEWSLETTER

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The Luxembourg Colloquium: New Developments in the Legal Protection of International and European Civil Servants

FICSA was invited to participate in a colloquium held on the 1st and 2nd April 2011 in Luxembourg to discuss recent developments in the legal protection of International and European civil servants: It was aimed at evaluating the quality of the legal protection provided within the United Nations and the European Union and at comparing it with the protection existing within the Co-ordinated Organisations. Speakers discussed developments surrounding the new UN Justice System, the Administrative Tribunal of the ILO, the new system established within the European Union since 2004 and the various dispute resolution mechanisms in force within the Co-ordinated Organisations.

Written reports and other information relating to the conference can be found on: <http://colloquiumcrp.com/index.htm>

The New UN Justice System

Judge Louise Otis, one of the independent experts of the Redesign Panel, which submitted recommendations used for the reform of the administration of justice to the United Nations presented an excellent first assessment of the performance of the new system one year into its existence.

The new two-tier system, which replaced the internal review bodies of the United Nations (Joint Appeals Board and Joint Disciplinary Committee) by the UN Dispute Tribunal (UNDT) and the UN Appeals Tribunal (UNAT), has been operational since July 2009. According to her, this will make the United Nations system of Administrative Justice unique in the galaxy of international organizations. The new UNAT held its first hearings in March 2010. Judge Otis indicated that some recommendations of the Redesign Panel had not been implemented so far, especially as regards the competence of the Tribunals. According to Judge Otis, the decisions of the General Assembly of the UN lead to a 'marked discrepancy in the justice recourses available to different kinds of personnel within the Organisation', as only staff members have access to the new formal system but not a large and growing number of personnel on individual contracts within the UN (interns, volunteers, contractors, etc.). The Tribunals are furthermore deprived of the power to award punitive and exemplary damages and are not allowed to order specific performance, which means that the Administration has for instance still the possibility to pay compensation instead of having to reinstate a wrongful dismissed staff member, a far cheaper option most of the time.

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The Tribunals are moreover not allowed to hear class actions submitted by staff associations on behalf of their members, which was a recommendation of the Redesign Panel and an important request of staff representatives. The UN General Assembly made also changes regarding the selection and tenure of UNAT Judges. Originally allowing a broad pool of potential candidates, the finally adopted principle restricts eligibility to judges with administrative law experience. The Judges will now have the possibility to be re-appointed in non-judicial posts of the United Nations, thus calling into question the principle of strict impartiality.

The first cases decided by the Appeals Tribunal were also crucial in that they showed the scope of its powers. While in certain areas the Tribunal has been able to assert its independence, it was less willing to do so in others. It has thus affirmed its independence by deciding that it will consider the jurisprudence of the former UN Administrative Tribunal as not being binding but only “persuasive”, much to the dislike of the Administration. It will also impose interests on compensatory awards.

On the other hand, the Appeals Tribunal did implicitly reject the critique of the discretionary power granted to the Administration to pay compensation in lieu of fulfilling a specific performance, as it sent a warning to the Dispute Tribunal that it will not consider artificially high compensation awards as an option to force the Administration to accept a specific performance. The Tribunals are also engaged in a struggle to compel the Administration to produce documents necessary for the case, a power it has so far not been able to assert. Judge Otis furthermore expressed concern about the rarity of oral hearings, as they were so far only held when exceptional circumstances dictated it (thus only in two cases out of 100 judgments in 2010) and considers that for the appearance of justice and for the principle of due process, the parties should be given more often the opportunity to argue their cases fully, an opinion shared by the Secretariat of the UN.

Finally, one important issue remains the lack of proper legal counsel for staff members. Despite the creation of the Office for Staff Legal Assistance (OSLA), a significant number of staff members who appeared before the UNAT were still self-represented (only 33 % representation by legal counsels of OSLA). She therefore advocates for the recruitment and training of more competent counsels as well as an increased funding of OSLA, a crucial step to narrow the arms gap with the Administration. More generally, the question of adequate funding has affected the entire new system, prompting recently the President of the UNAT to inform the Fifth Committee of the General Assembly of his concerns regarding the long-term sustainability of the Tribunal.

In closing, Judge Otis expressed optimism about the new system and that it might take up to ten years to fully implement it. She also invites the staff and the Administration itself to understand and make more use of the new informal system of justice (Ombudsman and Mediation), as similar mechanisms statistically help to resolve up to 80-85% of conflicts.