



COMMUNICATION 25/19

FICSA Letter to the ILO AT Registrar concerning the 31 October 2019 meeting of the Tribunal

To: FICSA Members in Geneva

Geneva, 3 October 2019

From: Evelyn Kortum, General Secretary

Following the invitation of the Registrar to attend a meeting the Tribunal will hold at the ILO in Geneva on 21 October, FICSA requested its membership to provide input to the Tribunal's request to express our views and to make suggestions directly to the Tribunal in relation to its functioning or its case law. As many of you are going to attend the meeting, you have directly brought forward concerns. The input that we have received we pulled together in the letter reproduced below. This is for your background information.

Geneva, 23 September 2019

Dear Mr. Petrović,

On behalf of the Federation of International Civil Servants' Associations (FICSA), I would like to extend our members' appreciation to the ILO Administrative Tribunal for the invitation to a meeting of the Tribunal scheduled for 21 October 2019. In this respect, please find below a list of issues which our members, as well as lawyers who represent some of our members as complainants before the Tribunal, would like to see addressed at the afore-referenced meeting.



System for filing complaints: Nearly everyone who wrote to FICSA expressed concern regarding the ILOAT's lack of an electronic filing and notification system. They highlighted that, currently, complaints must be sent by registered mail accompanied by six copies, which frequently constitutes hundreds of pages of paper. They pointed out that other tribunals, including some national systems, already allow for electronic filing. Therefore, for purposes of efficiency and cost, we suggest that the ILOAT urgently implement an electronic system for filing complaints which would, at the same time, facilitate the management of the Tribunal's workload and increase the speed of case processing.

Length of the proceedings: FICSA members as well as their lawyers agree that the time required to receive a judgment from the ILOAT (as well as the time required to firstly receive an internal final decision from the organizations' executive heads) is too long, and that delays may disproportionately affect staff members, rather than the organizations which employ them. We would like to know what the ILOAT is considering in order to remedy this problem. At the same time, we would like to propose that, at the very least, one additional ILOAT session be held each year. We would also suggest increasing the number of ILOAT judges. Furthermore, it has been suggested that there should be a summary judgment mechanism to decide issues of receivability at an early stage instead of keeping the complainant waiting for approximately two years when the judgment on the complaint is delivered by the ILOAT. Some FICSA members have expressed concern that the Tribunal, when it determines that impugned decisions are unlawful, increasingly sends the cases back to the defendant organizations instead of issuing clear decisions with appropriate relief. Given the increased legal costs and even lengthier procedures encountered when cases are sent back to an organization, FICSA requests that the Tribunal restrict such practice to cases requiring assessment by a purely technical body.

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Oral hearings: These are currently absent from the ILOAT proceedings. Like many experts we see this as a potential contravention of the right to a fair trial. Therefore, we believe that oral hearings are important for key appeals in particular. This could, for example be in disciplinary cases where the right to an oral hearing may become necessary due to the existence of disputed facts. We propose the use of modern technology to provide opportunities for tele hearings through video links, Skype, WebEx or similar technology tools if geographical challenges need to be overcome. This would be an additional measure that guarantees fair judgments in key appeals and could prove to be time effective.

Moral damages: Our membership and their lawyers feel that the ILOAT could make an effort to make the amount of moral damages awarded to complainants more predictable and consistent. Currently, moral damages appear to be awarded on a case-by-case basis. FICSA members and their lawyers would like to understand how, in practice, the ILOAT decides on the amount of moral damages. Clarification and discussion as to how the ILOAT could make such awards more predictable would help the complainants to formulate realistic expectations.

Legal costs: Legal costs awarded to complainants differ greatly from one case to another. In addition, the ILOAT does not award actual legal costs incurred by complainants but a much lower amount which, in most cases, does not come anywhere near to their real legal costs incurred. Initiating legal proceedings may entail unaffordable expenses for staff members, and most organizations under the jurisdiction of the ILOAT do not provide any kind of legal support to staff. Moreover, legal costs incurred in the course of the internal process is rarely compensated by the organizations. This might often prevent staff from exercising their right to justice. We would like to know how the ILOAT decides, in practice, on the amount of legal costs it awards and would like to request that the ILOAT award the actual and reasonable legal costs incurred.

Fact-finding, disclosure and discovery: Acting as an appellant court, the ILOAT gives significant consideration to the findings of fact and conclusions on the merits of a case as determined by the first-level internal appeal bodies. Regrettably, these internal appeal bodies are far from being courts. In fact, they are simply peer-review bodies, frequently with no clear rules of evidence or procedure being followed. These internal bodies normally do not have the power to order discovery or obtain all relevant evidence which is usually in the hands of the administration and, therefore, frequently have enormous challenges to arrive at a conclusion on the facts. This is particularly serious in disciplinary cases and clearly contradicts the right to equality before the law and the right to a fair trial as enshrined in the Universal Declaration of Human Rights. FICSA proposes the automatic ordering of discovery immediately after an appeal is filed and upon motion of the complainant. The ordering of discovery could, for example, be decided by the President of the Tribunal.

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Judgments and consistency: FICSA members have reported a divergence of ILOAT outcomes for cases similar in fact and law, and they have expressed concern that the Tribunal has begun to increasingly diverge from its well-established jurisprudence. This affects staff members' confidence in the judicial system. As the greatest lack of confidence, however, lies with the system of justice and the appeal bodies internal to the organizations the ILOAT could, in order to avoid inconsistent rulings and to guarantee a minimum level of due process in the internal appeal processes, mandate that uniform and standard rules for internal appeals be adopted by the organizations in order to obtain ILOAT jurisdiction. It is of concern that some internal appeal bodies do not see themselves competent to rule on certain issues. This proposal would support the development of the internal appeal bodies and ensure a fairer and more efficient system.

We look forward to the discussions on these and other matters at the meeting with the Tribunal on 21 October 2019.

Yours sincerely,

A handwritten signature in cursive script that reads "Brett Fitzgerald". The signature is written in dark ink and is positioned above the printed name.

Brett Fitzgerald
FICSA President