FICSA
Federation of International Civil Servants' Associations

Conference Room Paper

FICSA COUNCIL

77th SESSION
Bern, 26 February to 1 March

FICSA /C/77/LEGAL/CRP.2 Geneva, 1 February 2024
Agenda item 11 (a)

Moving from the jurisdiction of the ILOAT to the UNAT

Advice for Staff Associations

At the 75th FICSA Council, the FICSA Standing Committee on Legal Questions requested a working group to compile lessons learned from organisations that are moving or have moved from ILOAT to UNAT.

The committee would like to remind the audience regarding its advice and guidelines for staff representatives about a neutral appeal instance process within the internal justice system (ILOAT and UNAT) FICSA/C/73/D/2 that is available on the FICSA website.

In addition to the guidelines, the working group reiterated the importance of consultation with staff representatives as a basic principle before any decision to transfer from one justice system to another. This will also discourage the 'forum shopping' practice, where organisations may look for justice systems that are more likely to rule in their favour.

In addition to the above, it is important to note that the UNAT statute (Article 2(10)) that allows specialized agencies to submit to its jurisdiction, since 2019, no longer accepts internal appeals systems that made ***recommendations*** to agency heads as a "neutral first instance process".

Staff representatives should be aware that The UN two-tiered recourse system was designed to be a comprehensive system, with a first instance tribunal (the UNDT), a second instance tribunal (the UNAT), and a function providing free legal assistance to complainants (the OSLA). If an organization chooses to bypass the UNDT and refuses or is unable to offer staff access to the OSLA or an equivalent remedy, the system cannot operate as designed because the UNAT can only order suspension of actions taken against staff when there is an appeal from the UNDT, not from an internal process, let alone where there is no "neutral first instance". Furthermore, the UNAT cannot award winning appellants their legal costs because they are presumed to have had access to the OSLA.
Staff representatives need to advocate to organizations, if they are moving from ILOAT to UNAT, to accept the complete UNDT/UNAT/OSLA package rather than implementing it piecemeal.

Specific actions to be taken by staff associations in the event their management seeks to move from the ILOAT to the UNAT

- The ILOAT statute provides that an organization which wishes to withdraw from its jurisdiction must refer in its request to "any consultations with the staff representative bodies prior to the withdrawal decision." Consultations are not always formally mandatory, but staff associations should insist on them. If management refuses to engage in them, the members of the ILO Governing Body (which must approve the request) should be notified.

- Staff members should be informed of what rights they stand to lose in the event of a move from the ILOAT to the UNAT, and they should be encouraged to contact their national representatives in their organization's governing bodies, insofar as this is permitted under the organization's rules.

- Staff associations should insist that organizations which move to the UN system adopt **all** of the elements of the system: the jurisdiction of both the UNDT and the UNAT and access to OSLA.

- Organizations that accept only the UNAT's jurisdiction (and not UNDT) **must have** a "neutral first instance process that includes a written record and a written decision providing reasons, fact and law." Staff associations should insist that the first instance process be as independent as possible, preferably with one or more qualified jurists as members. The appointment of the first instance tribunal members should not be solely at the discretion of the organization's management.

- The first instance tribunals created by organizations are not necessarily bound by the restrictive rules and jurisprudence of the UN system tribunals, and complainants should not hesitate to raise arguments and request relief that they might not be able to obtain in the UNAT.

- Staff associations should insist that the agreement between their organization and the UN granting jurisdiction to the UN tribunal(s) be disclosed publicly since the provisions of these agreements may affect the rights of staff members.

- If the organization does not grant staff members access to OSLA, staff associations should insist that an alternative method of free legal assistance be provided.

- In order to protect whistleblowers, victims of sexual abuse, and individuals who have suffered harassment or retaliation, staff associations should require organisations to adopt a policy whereby staff members who are found to have been unfairly dismissed are reinstated, except in clearly justified exceptional cases. This is because the UNAT statute, for example, allows organizations to pay compensation, which cannot exceed two years' base salary, in lieu of rescission of a decision involving appointment, promotion or termination. This is particularly

unfair when staff have been terminated; whistleblowers or victims of retaliation cannot get their jobs back.

- Staff associations also should note that the UNAT does not permit review of the decisions of governing bodies, and demonstrated by ruling in a case that there is no such thing as an acquired right. Staff of international organizations may find that any of their existing rights are considered "non-acquired" by UNAT.
