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Semi-Annual Review

*International Labour Organization
Administrative Tribunal 103rd Session*

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Table of Contents

<u>Topic</u>	<u>Page(s)</u>
Introduction	3
Table of Cases	4
International Organizations Subject to ILOAT Jurisdiction	5
I. Staff Association Activity	6-8
II. Same Sex Relationships	9
III. Selection/Probation/Termination	10-13
IV. Harassment/Retaliation/Abuse of Authority	14-18
V. Classification	19
VI. Abolition of Post	20-21
VII. Pension Rights	22
VIII. Discipline/Hidden Sanction	23
IX. Receivability	24-25
X. Applications for Interpretation/Enforcement	26

Introduction

I am pleased to present the Semi-Annual Review of ILO Administrative Tribunal Decisions decided during its 103rd Session (and made public in July 2007).

In this session the Tribunal addressed significant issues involving staff association activity. In Judgment No. 2636, it ruled that WIPO's administration did not unlawfully involve itself in the dispute between warring factions of its staff association, and indeed had facilitated the debates which were important to its staff. In another case where I represented the staff member, the Tribunal set aside the decision of UNIDO's Director-General to change the release time of the Staff Council President from full to half time since the views and opinions of the Staff Council were not considered before the decision was taken.

In an important case involving same sex marriages, the Tribunal considered whether discriminatory language in the ITU staff regulations and rules could be applied to deny benefits. The Tribunal decided that since the staff regulations and rules defined marriage in its traditional form, i.e., between two persons of opposite sex, the decision not to extend benefits to the staff member's same sex partner (pursuant to a Civil Solidarity Pact under French law and subsequently recognized by Great Britain) was not unlawful. The Tribunal has therefore settled the question whether general principles of non-discrimination will apply in these cases: they do not.

The Tribunal also provided stern warning that it requires, where there are written rules, that allegations of sexual harassment be thoroughly investigated. Judgment Nos. 2642 and 2645. In the former Judgment, it gave some guidance as to what conduct is considered inappropriate including flirtatious conduct: it is "difficult to conceive that handholding, embracing and kissing of female staff members by a senior male colleague is capable of more than one interpretation". In the latter, it held that the harasser had retaliated against the victim for making allegations of sexual misconduct.

In another case I represented a staff member seeking reclassification of his post at the CTBTO. The staff member filed an internal appeal after separation from service. Significantly, the Tribunal rejected the Commission's argument that the issue (the request for classification of post) was moot since the staff member had separated: to "accept that the Commission has no obligation to deal with the complainant's request would be to set a precedent encouraging organisations to ignore the claims of their employees until the date of their separation in order to avoid dealing with any problems submitted to them."

Finally, I have added a new feature to the *Semi-Annual Review* – a *Table of Cases* – which will appear in future editions as well. The *Table* provides a list of every case decided in the session, the primary issue addressed and the decision. Staff representatives therefore have an additional tool for finding relevant decisions.

Table of Cases

Number	Organization	Issue	Decision
2619	UNESCO	Resignation	Dismissed
2620	WHO	Selection	Decision set aside; 1,000 swf costs
2621	ITU	App for interp.	Award does not include pension benefits
2622	EPO	Pension	Dismissed
2623	EPO	Receivability	Dismissed; s/m did not file internal appeal
2624	EPO	Promotion	Dismissed
2625	EPO	Pension	Dismissed
2626	EPO	Freedom of speech	Dismissed
2627	EUROCONTROL	Internal tax	Reimbursement of tax overpayment; 5,000 euros costs
2628	EUROCONTROL	Internal tax	Reimbursement of tax overpayment; 5,000 euros costs
2629	OPCW	Provident Fund	1,500 euros material damages; 1,500 euros costs
2630	EPO	Performance	Dismissed
2631	WHO	Receivability	Dismissed
2632	EUROCONTROL	Pension	Dismissed
2633	EUROCONTROL	Pension	Dismissed
2634	WHO	Abolition of post	Reinstatement; pension benefits; 8,000 swf moral damages; 5,000 swf costs
2635	ITU	Transfer	10,000 swf moral damages; 5,000 swf costs
2636	WIPO	Staff Association	5,000 swf moral damages; 2,000 swf costs
2637	WTO	Home leave	Dismissed
2638	WTO	Education grant	Dismissed
2639	WTO	Nationality	Dismissed
2640	WHO	Selection	5,000 US dollars moral damages; 2,000 US dollars costs
2641	UNESCO	Repatriation costs	Dismissed
2642	WHO	Harassment	30,000 swf moral damages; 5,000 swf costs
2643	ITU	Same-Sex	Dismissed
2644	UNIDO	Allowances	5,000 euros moral damages; 2,000 euros costs
2645	FAO	Harassment/Retaliation	One year's salary and allowances
2646	EPO	Probation	Dismissed
2647	UNESCO	Promotion/selection	Dismissed
2648	ILO	Selection/competition	Dismissed
2649	EPO	Temporary personnel	Dismissed
2650	WIPO	Receivability	Dismissed
2651	EPO	Leave w/o pay	Dismissed
2652	ILO	Termination	Dismissed
2653	EPO	Allowances	Dismissed
2654	UNESCO	Harassment	2 years' salary; 2,000 euros costs
2655	CERN	Pension	Dismissed
2656	IAEA	Discipline	Dismissed
2657	EPO	Receivability	Dismissed
2658	CTBTO PrepCom	Classification	10,000 euros moral damages; 3,000 costs
2659	UNIDO	Hidden sanction	22,000 moral damages; 4,000 costs
2660	OPCW	Tenure policy	Dismissed
2661	OPCW	Discipline	5,000 euros moral damages; 2,500 costs
2662	UNIDO	Staff Association	10,000 euros moral damages; 5,000 costs
2663	EPO	Promotion	Dismissed
2664	EPO	Promotion	Dismissed
2665	UNIDO	Receivability	Dismissed
2666	FAO	Receivability	Dismissed (filed 14 years too late)

International Organizations Subject to ILOAT Jurisdiction

- International Labour Organization (ILO)
- World Health Organization (WHO), including the Pan American Health Organization (PAHO)
- International Telecommunication Union (ITU)
- United Nations Educational, Scientific and Cultural Organization (UNESCO)
- World Meteorological Organization (WMO)
- Food and Agriculture Organization of the United Nations (FAO), including World Food Programme (WFP)
- European Organization for Nuclear Research (CERN)
- World Trade Organization (WTO)
- International Atomic Energy Agency (IAEA)
- World Intellectual Property Organization (WIPO)
- European Organisation for the Safety of Air Navigation (Eurocontrol)
- Universal Postal Union (UPU)
- European Southern Observatory (ESO)
- European Free Trade Association (EFTA)
- Inter-Parliamentary Union (IPU)
- European Molecular Biology Laboratory (EMBL)
- World Tourism Organization (UNWTO)
- European Patent Organisation (EPO)
- African Training and Research Centre in Administration for Development (CAFRAD)
- Intergovernmental Organisation for International Carriage by Rail (OTIF)
- International Center for the Registration of Serials (CIEPS)
- International Office of Epizootics (OIE)
- United Nations Industrial Development Organization (UNIDO)
- International Criminal Police Organization (Interpol)
- International Fund for Agricultural Development (IFAD)
- International Union for the Protection of New Varieties of Plants (UPOV)
- Customs Co-operation Council (CCC)
- Court of Justice of the European Free Trade Association (EFTA Court)
- Surveillance Authority of the European Free Trade Association (ESA)
- International Service for National Agricultural Research (ISNAR) (until 14 July 2004)
- International Organization for Migration (IOM)
- International Centre for Genetic Engineering and Biotechnology (ICGEB)
- Organisation for the Prohibition of Chemical Weapons (OPCW)
- International Hydrographic Organization (IHO)
- Energy Charter Conference
- International Federation of Red Cross and Red Crescent Societies
- Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom)
- European and Mediterranean Plant Protection Organization (EPPO)
- International Plant Genetic Resources Institute (IPGRI)
- International Institute for Democracy and Electoral Assistance (International IDEA)
- International Criminal Court (ICC)
- International Olive Oil Council (IOOC)
- Advisory Centre on WTO Law
- African, Caribbean and Pacific Group of States (ACP Group)
- Agency for International Trade Information and Cooperation (AITIC)
- European Telecommunications Satellite Organization (EUTELSAT)
- International Organization of Legal Metrology (OIML)
- International Organisation of Vine and Wine (OIV)
- Centre for the Development of Enterprise (CDE)
- Permanent Court of Arbitration (PCA)
- South Centre
- International Organisation for the Development of Fisheries in Central and Eastern Europe (EUROFISH)
- Technical Centre for Agricultural and Rural Cooperation ACP-EU (CTA)
- The International Bureau of Weights and Measures (BIPM)

I. Staff Association Activity

Judgment No. 2636 (WIPO)

Decision: Decision set aside in part; 5,000 Swiss francs moral damages and 2,000 francs costs.

Facts: After new Staff Council elections were called following an extraordinary general assembly (EGA), the serving Staff Council President accused the Director General of interfering in Staff Council matters and demanded that he refuse to recognize the call for new elections. In particular, the President said it was inappropriate for the administration to provide use of the e-mails for transmitting the request for the EGA, for failing to act to prevent malicious criticisms of the President's handling of Staff Council matters by the former President over many years which constituted harassment, and for failing to act in response to physical aggression and verbal assaults after the EGA committed by four staff members in the President's office. The Director General refused to take any action except for referring the latter allegations to internal audit (6 months after they were alleged). Before the Tribunal, the President asserted that his right to freedom of association was breached.

Analysis: The Tribunal noted that every WIPO staff member is entitled to freedom of association by virtue of the staff regulations which establish a Staff Council. It also noted that freedom of association carries with it freedom of discussion and debate in relation to Staff Association matters. The Tribunal analyzed whether the administration interfered with Staff Council activity by supporting and encouraging the opposition, and whether it should have intervened on behalf of the serving President to, so to speak, suppress the opposition for its alleged unwarranted attacks on the President. In this regard, it recalled Judgment 274 which held that "activities within the Staff Association constitute an area that is 'prima facie' outside the Director-General's jurisdiction. Here again there may be exceptional cases" for malicious and indefensible slanders spread about other staff members whether in the office or outside the office and whether connected or not with the affairs of the Staff Council.

With respect to the former Staff Council's written criticisms of the President's performance, the Tribunal found they were marked by sarcasm, irony and strong language that the recipients were entitled to regard as offensive. However, they concerned the activities of the Staff Council and there was nothing to suggest that they were malicious i.e., that they contained knowingly false statements or were sent for a purpose unrelated to the Staff Association. The Tribunal held that so long as the former President honestly held the opinions expressed, he was entitled to express them in strong terms. Accordingly, there was no obligation on the part of WIPO to take action and if it had it would have been a breach of freedom of association.

On the issue of providing the use of the e-mails to those who had signed the petition for an EGA, the Tribunal held that the administration's actions were taken after the outbreak of the "civil war" and after the sides had taken firm positions. In providing use of the e-mail system, the administration was promoting freedom of speech in relation to a matter of concern to the Staff Association, which was in the interest of both the Association and the Organization. The Tribunal accepted the contention that the administration had encouraged attendance at the EGA and there was an unusually high attendance including by persons in senior positions.

These facts did not prove that the administration was “complicit in a campaign to destabilise the Staff Council or to remove the complainant as its President . . . it is equally probable that, if it did encourage attendance at the assembly, it did so in the hope that that would result in a resolution of the differences within the Staff Association”. Individual staff members, whether or not in senior positions, were entitled to express their views at the EGA. The Tribunal therefore concluded that there was no basis for finding “institutionalized harassment.”

The Tribunal reaffirmed that there are limits to freedom of association and to freedom of discussion and debate. It would not extend, for example, to intimidation, offensive behaviour or aggression. The Tribunal found that the allegations of aggression and verbal assault in the President’s office to be serious and unprotected free speech. It was the duty of WIPO, as part of its duty of care of ensuring a safe and secure working environment, to ensure that these allegations were properly and promptly investigated. Since it failed to do so promptly, the Tribunal awarded the President moral damages and costs.

Lessons: This case is a good lesson that when strife emerges within a staff union or association, it gives the administration the opportunity to lawfully get involved in the disputes by taking sides, voicing their opinions, and otherwise causing further discord. The administration also cannot be faulted for providing the means (e-mail system) for vigorous debate that outside the context of staff association activities could be considered grounds for disciplinary action. The administration cannot stand idly by however if (malicious) false statements are made knowing they are false or if other acts (physical aggression or verbal threats) are undertaken. The Tribunal has not yet decided in the context of freedom of association such a case nor given concrete examples or guidance of what constitutes malicious and indefensible slanders.

Citations: Judgment No. 274.

Judgment No. 2662 (UNIDO)

Decision: Decision set aside; 10,000 euros moral damages; and 5,000 euros costs.

Facts: The Director-General changed the release of the former Staff Council President in 2003 from full-time to half-time without first consulting staff representatives. UNIDO had argued that the issue was essentially a political issue that could not be decided by the Tribunal, and that the President had failed to invoke purportedly mandatory consultative procedures with respect to release of staff representatives. UNIDO also argued that the correspondence between the Staff Council and the administration officials after the decision was taken satisfied the duty to consult. The President argued that the business of the Staff Council could not be conducted efficiently with part-time release.

Analysis: The Tribunal held that the failure to in advance to consult and consider the views of the Staff Council on whether the business of the Staff Council could be conducted efficiently with the part-time release of its President constituted a breach of the right to freedom of association.

Lessons: On decisions affecting the efficient functioning of the staff association/union (in this case the release time of the President), the executive head of the organization must first consult with the body representing the interest of the staff members. Once that consultation has taken place, however, the Tribunal will in most cases uphold the decision as long as it is reasonable (broad discretion).

Citations:

II. Same Sex Relationships

Judgment No. 2643 (ITU)

Decision: Complaint dismissed.

Facts: A staff member (a British citizen) of the ITU entered into a Civil Solidarity Pact under French law in 2003. In 2004, Great Britain passed a reciprocity law which gave such Pacts the legal status extended to parties to a civil marriage. In 2005, he made a request for home leave for his partner as an “accompanying dependant”. The request was rejected on the grounds that the staff regulations and rules defined the term spouses as pertaining to a “conventional marriage in its traditional form, i.e., between two persons of opposite sex”. The internal appeal board noted that the issue of same sex partnerships and discriminatory treatment had been resolved by the UN and other international organizations, and that the Secretary-General should refer the matter to the ITU Council leading “rapidly to an amendment of the Staff Rules so as to afford the requisite protection against any form of discrimination on family status and sexual orientation.” The Secretary-General rejected the appeal without addressing the recommendations of the appeal board.

Analysis: The Tribunal held that the Secretary-General was bound to apply the regulations and rules as they stand, and therefore the decision “cannot be held to be discriminatory”. The Tribunal set aside the decision since the Secretary-General did not address the appeal board’s recommendation to refer the matter to the ITU Council: small comfort for the staff member.

Lessons: The Tribunal has thus settled the question whether a general principle of law (non-discrimination) will trump the internal law of an international organization; at least in the area of family status and sexual orientation. The Tribunal makes it clear by this conservative ruling that in this controversial area it will not legislate for international organizations and that it will limit its review to the language contained in the staff regulations and rules. The ruling does not affect organizations who have adopted the UN policy and/or that have not defined the term spouse in their regulations and rules (see for example the ruling in Judgment No. 2760 (105th session)).

Citations:

III. Selection/Probation/Termination

Judgment No. 2647 (UNESCO)

Decision: Complaint dismissed.

Facts: The staff member applied for a Director level post. She challenged the appointment of another candidate on the grounds that the selection procedures were not followed, that the organization failed to give her preference as a qualified internal candidate, and that she had been subjected to harassment. The internal appeal board recommended that the appeal be rejected.

Analysis: The Tribunal reviewed the evidence itself and agreed with the board's findings and in particular that the staff member's qualifications were not equal to the other 25 pre-selected candidates. The Tribunal rejected the allegations of bad faith and harassment since the staff member did not substantiate those claims. Finally, the Tribunal rejected the allegation that the selected candidate lacked the requisite qualifications.

Lessons: If selection procedures are followed correctly, challenges to appointment decisions are difficult. The staff member should also look to see if the selected candidate has the requisite qualifications that were advertised with the post. If not, the Tribunal will set aside the appointment decision on those grounds. As relief, the Tribunal will order the protection of the selected candidate. It will not order the appointment of the disappointed staff member, thus limiting relief to moral damages and costs.

Citations: Judgment Nos. 1017, 1223, 1497, 1549, 2040, 2074, 2163 and 2325.

Judgment No. 2620 (WHO)

Ruling: Decision set aside; new competition to be conducted; 1,000 Swiss francs in costs for each complainant.

Facts: The Director General requested and was provided with the names of two non-staff members to be considered for the position of Director of the NHD, one of whom was given a direct appointment. Several staff members challenged the appointment.

The Board of Appeal found that there had been an informal selection process and the process did not comply with Staff Regulations 4.2, 4.3 and 4.4, which provide among other things that “[so] far as is practicable, selection shall be made on a competitive basis” and that “[w]ithout prejudice to the inflow of fresh talent at the various levels, vacancies shall be filled by promotion of persons already in the service of the Organisation in preference to persons from outside”. The Board considered that there had been external influence from at least one entity but it did not find conclusive evidence of a breach of Staff Regulation 1.3, which provides that, in the performance of their duties, staff members shall not accept instructions from any authority external to the Organisation. The Board recommended that the appointment be cancelled and that a regular selection procedure be undertaken.

The Director-General argued that the staff rules authorized him to make the direct appointment, and rejected the appeal.

Analysis: The Tribunal reiterated the principle that “[u]nder the internal rules of the Organization, the Director-General has the discretion to fill a post by means other than a competition [and that it] will not interfere with such exercise of discretion as long as there is no abuse of authority . . .”. The Tribunal found that the WHO had been able to fill this post most of the time through competitive recruitment, and there were no circumstances upon which the Director-General could reasonably conclude that the competition was not practicable. The mere fact that a direct appointment was quicker than a competitive process did not provide a basis for a decision that a competition was not practicable, and if this ground were permitted to stand it would override the general requirement for a competition in staff regulation 4.3.

Lessons: Normally the Tribunal will not substitute its judgment for that of the executive head of the organization in these types of cases. However, where the reason cited by the executive head is plainly wrong (in this case why a competition was impracticable), the Tribunal will intervene. Appointment decisions like these provide an opportunity for the Staff Union or Association to take the lead in protecting the rights of its members by challenging appointments made for non-objective (favouritism) reasons.

Citations: Judgment Nos. 2105, 1158.

Judgment No. 2648 (ILO)

Ruling: Complaint dismissed.

Facts: In Judgment 2287, the staff member had successfully challenged the appointment decision for the post of unit head in the translation unit. The Tribunal ordered the case remanded to the ILO. In April 2004 a new competition was opened and the staff member again applied. She was short listed and was invited to an interview for the purposes of technical evaluation, but ultimately she was informed that another candidate had been chosen. She requested an explanation and was advised in writing that the selection board had acknowledged her solid experience as a translator and reviser, but it considered that she did not possess the requisite personnel management skills and had therefore selected a candidate whose overall profile was a better match for the post.

She filed a grievance with the Joint Advisory Appeals Board, claimed compensation and asked to be given a “post at an equivalent grade and with equivalent duties, which was also compatible with her eyesight”. The Board found the response given to her was “sufficiently substantiated and consistent with the technical report” and that her claims should be dismissed. The Board had noted that the documentation of the selection procedure, which was not given to the staff member for review, had not revealed any flaw.

Analysis: The Tribunal shared the same opinion as the board that there was no procedural flaw made in the selection. The Tribunal did not have the power to assess her personnel management skills, and there were no grounds for doubting the impartiality of the persons who conducted the evaluation. The staff member’s request for production of documents was rejected since there was no evidence of serious flaws.

Lessons: The Tribunal has consistently held that it will not interfere with the comparison of the respective merits of the candidates in a competition unless it appears possible that it is tainted with serious flaws, and it is only then that it will order the production and, perhaps, the disclosure of the evidence on which the Administration’s decision was based. In these cases, the staff member should make requests during the internal appeal to the appeal board or panel to review the entire file on the competition.

Citations: Judgement No. 2163.

Ruling: Complaint dismissed.

Facts: Following a successful probationary period, the staff member who joined the organization in 1998 as senior employer specialist was promoted to grade P-5. In 2002 he was appointed as a Deputy Director and thus held two positions. In July 2003 he was informed in writing of the Office's decision to relieve him of his duties as Deputy Director because of not satisfactorily carrying out his dual functions and that the Office "[was] actively working to identify another assignment for [him]". He was sent a document summarising the areas in which improvement was needed and that a progress review would be carried out. His supervisor expressed strong criticism of his work in his subsequent performance appraisal report and recommended to transfer him to another position. Also the second-level supervisor made critical comments. This performance appraisal report was transmitted to the Reports Board. After hearing the staff member and his supervisors it concluded that he did not meet expectations and that his profile did not match the requirements of any other position, and recommended termination of his appointment for unsatisfactory services. The internal appeal was unsuccessful.

Analysis: The Tribunal will not replace the organisation's assessment of the complainant's fitness for his duties with its own where services are terminated for unsatisfactory performance. The Tribunal agreed with the findings of the Appeals Board that some of the statements concerning the staff member's behaviour, while perhaps inappropriate, were not in any event material in the Report Board's conclusion and recommendation. The Tribunal concluded that there was no denial of due process because the staff member was aware of the concerns regarding his performance at all material times. The Tribunal found that the staff member was informed timely of the shortcomings of his performance and had enough opportunity to remedy his situation. The staff member also claimed that the organization had promised him a transfer. The Tribunal noted that there was no enforceable promise to transfer him but only acknowledged that an attempt would be made to accommodate him.

Lessons: The Tribunal requires international organizations in writing to identify areas where performance is lacking, and to provide a reasonable period of time for improvement. The staff member usually must also be warned that if performance does not improve, termination or non-extension is possible. The organization's staff regulations and rules, and pertinent administrative instructions should be reviewed for these and any other requirements. Failure to follow the written procedures for termination for unsatisfactory service will usually be set aside by the Tribunal.

Citations:

IV. Harassment/Retaliation/Abuse of Authority

Judgment No. 2654 (UNESCO)

Decision: Two (2) years' salary for all injuries; 2,000 euros costs.

Facts: The staff member joined UNESCO in September 1997 as a supernumerary. In July 1998 she was given a temporary contract as a secretary. In the performance appraisal covering her probationary period, her supervisor gave her a rating of unsatisfactory. Following mediation, the staff member's rating was revised positively and she was granted a 2 year contract in another section. She took sick leave for long periods, including in her home country as of August 2000. In May 2001, the Bureau of HRM informed her that, as she had exhausted her entitlement to sick leave on half pay her fixed-term contract would not be extended beyond its expiry date of 31 May 2001. The staff member challenged this decision with evidence from her physician stating that her state of health was "triggered by the moral harassment" she had suffered at UNESCO from her first supervisor. The Appeals Board, some four years later, found that, having regard to the applicable rules, the expiration of the staff member's contract was not tainted by any flaw. It nevertheless recommended that she be awarded an amount equivalent to six months' salary, calculated on the basis of the salary she had received in April 2001, for moral damage due to the lack of a proper investigation of her allegations of harassment and the failure to issue a performance appraisal. The Director-General accepted the Appeals Board's recommendation.

Analysis: The Tribunal found that the staff member had lodged complaints of moral harassment against her supervisor and the Organization, which was then under an obligation to initiate an objective inquiry into the validity of her accusations, failed to do so and instead merely regretted the fact that it held no investigations. According to the Tribunal, "by failing to conduct an inquiry to determine the validity of such serious accusations, the defendant breached both its duty of care towards one of its staff members and its duty of good governance, thereby depriving the complainant of her right to be given an opportunity to prove her allegations. This attitude is liable to have caused serious injury which the indemnity awarded at the proposal of the Appeals Board does not entirely redress."

Lessons: The Tribunal requires international organizations to conduct a thorough investigation according to its regulations and rules when allegations of harassment are reported.

Citations: Judgment Nos. 2552 and 2642.

Judgment No. 2642 (WHO)

Decision: 30,000 SWF moral damages; 5,000 francs costs.

Facts: The staff member joined the WHO in 1998. In late 2003, her supervisor was changed to a person who had previously made flirtatious remarks to her which she had either rebuffed or ignored. After she was placed under his supervision, certain events occurred which resulted in the staff member lodging a formal complaint of sexual harassment against him in July 2004. Additionally, it was confirmed that other women were subjected to a number of similar harassing behaviour. The Grievance Panel concluded that her supervisor “did not harass [her] in any sense whatsoever, including harassment without sexual content or motive”. The Director-General accepted this finding and the staff member appealed to the Tribunal requesting that it make a finding that she was the victim of sexual harassment, and award moral damages and compensation for the defamatory effect of the Grievance Panel’s report on her professional reputation, since it called into question her credibility.

Analysis: The Tribunal started with the findings of the Panel that the supervisor:

“made remarks suggesting that [she] should invite him for coffee or commenting on her perfume, or words to that effect”;

“touched [her] arm or shoulder outside [...] a [...] meeting at the [United Nations] Palais”;

“asked [her] secretary what she was going to get him for Valentine’s Day”;

“held Ms [X’s] hand in his apartment and [...] embraced and kissed Ms [Y]”;

“So, when will you invite me for coffee, [...]?”; and

Said “Hmmm, you smell really nice, [...], what is it?”

The Tribunal began by noting that it is “difficult to conceive that handholding, embracing and kissing of female staff members by a senior male colleague is capable of more than one interpretation”. It then recalled from Judgment 2552 the principle that 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’. Its duty to a person who makes a claim of harassment requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context, 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”.

The Tribunal then considered the definition of “harassment” contained in Cluster Note 2001/9 concerning the WHO Policy on Harassment. That policy relevantly defines “harassment” as: “any behaviour by a staff member that is directed at and is offensive to others, which that person knows or should reasonably know, would be offensive, and which interferes with work or creates an intimidating, hostile or offensive work environment.” The general definition of “harassment” also makes it explicit that “if a specific action [...] is reasonably perceived as offensive by another person(s), that action might constitute harassment, whether intended or

not”. “Sexual harassment” is further defined as: “any unwelcome [...] sexual advance, request for sexual favours, or other verbal or physical conduct of a sexual nature, when it interferes with work, is made a condition of employment, or creates an intimidating, hostile or offensive work environment.”

The Tribunal found that the WHO did not investigate the charges promptly or thoroughly, and that the Panel’s understanding of the nature of sexual harassment was flawed. The Panel did not interview witnesses or attempt to corroborate some of the allegations. The Tribunal criticized the Panel for reaching its conclusions based on the lack of loss of job-related benefits or entitlements or the threat of any such loss when the relevant definitions only require that the conduct in question interfere with work. Further, the Tribunal criticized the Panel for regarding irrelevant considerations, namely whether the victims objected to or protested against the conduct. Because of these errors, the Tribunal set aside the Panel’s finding that there was no pattern of harassing behaviour on the part of the staff member’s supervisor, and set aside of the Director-General’s decision.

The Tribunal did not end its inquiry there and faulted the Panel for accusing the staff member of having made false statements (defamation) without being given the opportunity to be heard, and that the Panel was therefore also not acting objectively. On the evidence available, the Tribunal did not find anything that could be construed as a misrepresentation on the part of the staff member. The Tribunal also criticized the Panel for denigrating the staff member by referring to her various leadership positions, including with the Staff Committee and the HBA, and using these positions of influence for personal benefit, which was not relevant to her complaint.

The Tribunal therefore substituted its judgment for that of the Director-General. Among other things, it held “that “flirtatious’ remarks made in the workplace by a male supervisor to female staff inevitably diminish their professional standing” and that the “overwhelming weight of the evidence requires a finding that the complainant was sexually harassed.” The Tribunal held the staff member was entitled to damages for the harassment she has suffered and for its natural and probable consequences.

Lessons: This demonstrates the type of evidence that a victim needs to demonstrate in order to show sexual harassment. It is important to review the organization’s definitions of harassment. The case also shows that internal panels, consisting of peers, are usually ill-equipped to examine and investigate allegations of sexual harassment.

Citations: Judgment Nos. 2524, 1376.

Decision: Decision set aside; one year's salary and allowances for injury under all heads.

Facts: In October 2001, the staff member who worked as a secretary to the FAO's Representative in Chad sent a memo to Headquarters in Rome complaining that she had been "reduced to registering mail and answering the telephone", although she held a higher vocational training certificate, had been awarded a "management degree" and was studying for a "master's degree". She ended her memo with a request for "intervention to restore [her] rights by providing [her] with the opportunity for professional development".

In December 2001, the Representative requested that she be confirmed in her post at the G-5 level. Later that month, obviously having received notice of the staff member's earlier memo, the Representative sent her a warning for "failure to respect confidentiality and the chain of command in the exercise of [her] duties" and for "sending documents and correspondence to Headquarters from the Office of the Representative without the latter's prior authorisation". He further notified her that as a provisional measure she was being transferred. She replied challenging the grounds for the warning and claimed to be the victim of intimidation, threats, exploitation and harassment on the part of the Representative.

In January 2002, the Administration informed the staff member that, owing to the "weaknesses displayed in the performance of [her] duties", her contract was extended for only 12 months. Later that month, she reported to an official that the Representative had demonstrated improper intentions by sending her a bottle of perfume with "a heart and the outline of a woman's body" on the box and by suggesting that she spend her leave with him in Gabon, his country of origin. She had also alleged that following those two incidents the Representative had begun to "find fault" and had "assign[ed] her to other activities". She also claimed that he invited her to join him on several occasions in hotel or inn rooms, and asked her to accompany him to his home in Gabon when on leave, and that he had bought her an airline ticket for that purpose and sent a *note verbale* to the French Embassy in Chad requesting that she be granted a visitor's visa.

In September 2002 the staff member once again informed the Medical Unit that she was being subjected to sexual harassment from the Representative. In November 2002, the Representative recommended that her appointment not be renewed on the ground that, "instead of seeking to improve her performance and to do the work for which she was recruited, she has opted to launch a personal attack on the Representative". In addition to examining the allegations of sexual harassment, the Organization investigated the disciplinary charge from the Representative that the staff member was engaged in outside business activities.

In November 2003 the Administration notified the staff member of a proposed disciplinary measure involving a one-month suspension without pay for engaging in outside business activities and claiming to have academic qualifications that she did not possess, a fact that had come to light in the course of the inquiry. In February 2004, the Organization imposed on her the disciplinary measure of a one-month suspension without pay for having engaged in outside business activities and presenting a forged certificate, and she was also advised that her service would cease on the expiry of her fixed-term contract for unsatisfactory performance and conduct, and her contract would however be extended one month in order to impose the disciplinary measure. She lodged an internal appeal requesting that the

disciplinary measure be revoked and reinstatement, and the Appeals Committee found that: 1) the inquiry into the allegations of sexual harassment should have been conducted in a more expeditious and appropriate manner; 2) the disciplinary measure of one month's suspension without pay was justified; 3) the decision not to renew the fixed-term appointment was flawed; and 4) having regard to the allegations of irregularities in the functioning of the Chad Office, it would have been fitting for the relevant departments to conduct an appropriate inquiry (audit). It recommended reinstatement with retroactive effect from the date of separation and compensation. The Director-General dismissed the appeal.

In her appeal to the Tribunal, she added a claim for monetary damages on account of the sexual harassment.

Analysis: The Tribunal began by dismissing the claim for monetary damages for sexual harassment for lack of receivability. During the internal appeal, damages had not been claimed on account of the sexual harassment, and therefore the internal means of redress had not been exhausted. With respect to the disciplinary charge, the Tribunal agreed with the assessment by the Appeals Committee that the staff member had engaged in outside business activities and that she claimed to hold a degree that proved to be a forgery. Since a penalty for misconduct had already been applied, the decision not to extend her contract constituted a wrongful application of an additional penalty.

The Tribunal therefore assessed whether the decision could be justified on the grounds of unsatisfactory performance. The Tribunal noted in December 2001 the Representative had recommended that the staff member be confirmed in her post, since her performance was entirely satisfactory and she had all the qualifications and skills required for the post, but that a few days later, after finding out that she had informed Headquarters about her situation, the same Representative said that he was unwilling to extend her contract for more than six months on account of unsatisfactory performance. This called into question the objectivity of the Representative following allegations of sexual harassment.

The Tribunal reiterated that according to the case law, “[a]ny organisation that is serious about deterring sexual harassment and consequential abuse of authority by a superior officer must be seen to take proper action. In particular victims of such behaviour must feel confident that it will take their allegations seriously and not let them be victimised on that account”. In this case, the allegations did not give rise to an inquiry as required by administrative circular no. 96/13. Instead, the inquiry focused on the staff member's conduct and the quality of her performance, leading to a decision which the Tribunal held constituted retaliation for the allegations made against the Representative.

Lessons: Supervisors or colleagues accused of harassment will quite predictably try to retaliate against the victim by for example alleging counter-allegations of misconduct and the like. Unfortunately, this strategy is all too often successful since international organizations on the one hand do not have the machinery in place or the experience to handle allegations of harassment and on the other do have well developed rules and experience in investigating its staff for alleged misconduct. Therefore, when lodging allegations of harassment, be mindful that you open yourself to an examination of your own conduct, including for example whether you were truthful on your employment application.

Citations: Judgment Nos. 1443, 1380 (recevability); Judgment No. 1376; see also review of Judgment No. 2659 (UNIDO) below.

V. Classification

Judgment No. 2643 (CTBTO)

Decision: Decision set aside and remanded for post classification exercise; €10,000 moral damages; and €3,000 costs.

Facts: The G-4 staff member had requested an updated job description following his appointment since it was out of date. A classification consultant met with him several months later to conduct a desk audit of the post. For several months thereafter, the CTBTO ignored his repeated requests for the results of the desk audit and an updated job description. The staff member declined to accept an offer for the extension of contract and after he separated lodged an internal appeal of the failure to provide an updated job description and properly classify his post, which he alleged was at the G-6 level. The organization argued that the delay in completing the job description (it was never completed) was justified and that the issue was rendered moot because the staff member separated from service before the process could be completed. In further defense, the CTBTO submitted the e-mail reply of the classification consultant that the post was properly graded at the G-4 level.

Analysis: The Tribunal reaffirmed the principle that staff members that have separated from service retain the right to challenge administrative decisions affecting their employment: to “accept that the Commission has no obligation to deal with the complainant’s request would be to set a precedent encouraging organisations to ignore the claims of their employees until the date of their separation in order to avoid dealing with any problems submitted to them.” The Tribunal also found that the classification consultant based the review on an incomplete desk audit and an incomplete job description, and therefore the assessment was not valid. The Tribunal remitted the case to the organization to “review the complainant’s job description and reassess the classification of the complainant’s post in accordance with the rules, standards and procedure that were applicable at the time the request was made in 2002.”

Lessons: The Tribunal will set aside classification decisions where it can be shown the procedures have not been followed. It normally will not engage in assessing the classification itself but will remand the case to the organization for further review.

Citations:

VI. Abolition of Post

Judgment No. 2634 (WHO)

Decision: Decision set aside; material damages equivalent to salary and post adjustment for 17 months; loss of pension of 90,980 US dollars; 8,000 Swiss francs moral damages, and 5,000 francs costs.

Facts: A Mauritian national born in 1947 joined the WHO Regional Office for Africa in 1981 as a Technical Officer at grade P.2. In May 1989 he transferred to Headquarters in Geneva where he worked as a Technical Officer for Information and Promotional Material (audiovisual communications) at grade P.3 on a one-year fixed-term appointment. After several extensions of his fixed-term appointment, he held a post of indefinite duration in the Audio-Visual Team of the Division of Health Promotion, Education and Communication as from May 1994. The Team was transferred in 2002 and in March 2004 the possibility of restructuring was examined, and to reduce costs it was decided to outsource the video production function and, as a consequence, to abolish the complainant's post. The staff member was notified on 1 December 2004 that his post would be abolished as of 1 January 2005, but that this "[did] not necessarily mean the termination of [his] appointment". His contract was extended for a period of six months while efforts were made to reassign him "through a formal process conducted by a Global Reassignment Committee". No position corresponding to his qualifications and experience was identified, and the Organization informed him by a letter of 26 June 2005 that his appointment would terminate on 30 September 2005. His contract was extended for a further three months, representing the period of notice required under the Staff Rules.

The staff member filed an appeal with the Headquarters Board of Appeal. The HBA found that the decision to abolish the complainant's post shortly before his retirement in February 2007 had caused him undue financial hardship, loss of dignity and significant distress. In particular, the Board stated that "[t]here was evidence that funds were available and that the tasks previously carried out by the [complainant] were being performed by a temporary staff member at the same grade". The HBA did not find that the staff member had proved that the Organization acted out of personal prejudice, but did assert that "the abolition of the [complainant's] post was unfair" and that "[t]he decision to abolish the [complainant's] post so shortly before his retirement ha[d] caused him undue financial hardship, loss of dignity and significant distress". The Board recommended that the Organization immediately reinstate the complainant, or as an alternative, that he be awarded, less all payments already received: salary until the age of 60; "post adjustment for the same number of months"; the Organization's monthly contribution to the pension during leave without pay until February 2007 or equivalent loss of pension; and moral damages in the amount of 5,000 Swiss francs.

Analysis: The Tribunal agreed with the findings and conclusions of the Board. Recalling its case law, it stated that "when a post is abolished the abolition must result 'in a reduction of the number of staff in the affected department'." The Organization hired a short-term staff member who occupied a post with duties and responsibilities that were not outside the capabilities of the staff member, and thus it was "self-evident that hiring a short-term employee to fulfil duties that could have been done by the complainant, while still employing the latter, shows that instead of a reduction of staff there was an increase in staff which is

directly contrary to the idea of programmatic and financial savings . . . the WHO could still have outsourced the video production element of the complainant's job which would have ensured financial savings for the Organization while maintaining the complainant as an active staff member. This would have allowed the complainant to end his career with the Organization in a positive and dignified manner.”

Lessons: The Tribunal usually will not interfere with decisions to abolish posts in connection with restructuring exercises intended to reduce costs. The Tribunal will however police the restructuring and assess whether the Organization's justification, cost-savings, reflects the written evidence. The simple test is whether the number of posts is reduced. This case also shows the importance of a well-functioning internal appeal board and the reliance the Tribunal will place on its findings and conclusions. Finally, the award of pension benefits was significant, since the Tribunal is usually reluctant to award the value of lost pension benefits unless it orders reinstatement (see summary below of Judgment No. 2621). Most of the cases where the Tribunal has awarded the value of lost pension benefits involve staff members who were very near to retirement age.

Citations: Judgment Nos. 139, 1961, and 2092.

VII. Pension Rights

Judgment No. 2622 (EPO)

Decision: Complaint dismissed.

Facts: Retired staff members started receiving pension payments on 1 May 2003. Article 42 of the EPO's pension scheme rules provide for additional payments to retirees whose pensions are subject to national taxes. The co-ordinated organizations have drawn up tables of equivalence as the basis of the calculation. The adjustment is equivalent to 50% of the amount by which the recipient's pension would theoretically need to be increased to counteract the tax effect. Under the scheme, the tax adjustment would amount to 525 euros per month for the year 2003 and 872 euros per month for 2004. The retiree objected since the calculation in 2003 did not account for the fact that the German tax authorities took into account his income while he was still employed from January to April 2003 and compensation for accrued annual leave, in effect subjecting his pension to a higher tax rate under Germany's tax law. According to his figures, the amount of the adjustment was 19% instead of 50% of the amount by which his pension would theoretically need to be increased to counteract the tax effect in 2003.

Analysis: The Tribunal found that the organization had "rigorously applied the rules to which it is subject and the method recognised as appropriate in Judgment 2257: even though the German tax authorities took into account the remuneration paid to the complainant during the first four months of 2003 in setting the rate of taxation and subsequently the amount of income tax that he owed, the tax adjustment must be calculated solely on the basis of the pension he received, without taking other income into account. It was incumbent on the Administration to refer to the tables of equivalence in force and it committed no error of law in basing itself on the amount of the pension effectively paid to the complainant during the reference year – i.e. the German fiscal year – even though the said pension was paid only from May 2003 onwards."

Lessons: The Tribunal rarely intervenes with decisions involving pension benefits and their calculation. The administrations are accorded great deference.

Citations:

VIII. Discipline/Hidden Sanction

Judgment No. 2659 (UNIDO)

Decision: Decision set aside; 22,000 euros moral damages; and 4,000 euros costs.

Facts: The administrative assistant to the Managing Director of the technical division alleged that her sudden transfer to the post of assistant to a P-3 officer was a hidden sanction for her alleged involvement in drafting an anonymous letter accusing the organization's head and its management of corruption and mismanagement. The staff member had been interviewed in connection with an internal investigation to determine the letter's author, however, the staff member was not advised of the outcome of the investigation and no report was ever published. She noted that the new post did not have a job description and was in fact a demotion since it entailed reduced responsibilities and duties.

Analysis: Tribunal explained that a "hidden sanction is a measure which appears to be adopted in the interests of the organization and in accordance with the applicable rules, but which in reality is a disciplinary measure imposed as a penalty for a transgression, whether real or imaginary." Since the true nature of the sanction is not always apparent, the Tribunal "will examine the particular circumstances in each case". A number of important points emerged which guided the Tribunal's analysis. First, the decision followed within 2 months after the staff member's last interview during the internal investigation. The internal appeal board found that there was no evidence of wrongdoing as a result of the investigation. Second, the staff member was given no prior notice of the decision and was denied the opportunity to be heard. Third, despite the bald assertion by the administration that the decision was in the interests of the organization ("exigencies of service"), the evidence offered by the staff member showed the opposite as her former division was without an administrative assistant for a number of months. Finally, it was relevant that there was no vacancy announcement for the new post and she was not given a job description although it did not expressly decide whether the sanction was a demotion as she had argued. After she lodged her appeal with the Tribunal, the administration offered to settle for an additional payment of 8,000 euros, which she rejected. The Tribunal awarded her 22,000 euros (above the 7,000 already paid).

Lessons: Staff members are entitled to due process with regard to disciplinary proceedings, which means that the applicable procedures must be followed before any disciplinary measure may be applied. If the procedures are not followed, but an adverse decision is taken (here transfer to a post with less prestige), the Tribunal will look at a number of factors to determine whether the decision can be deemed a hidden sanction, including whether the staff member is given notice of the decision and an opportunity to express a view. This case provides a good lesson for determining what type of circumstantial evidence will help to prove such a case.

Citations:

IX. Receivability

Judgment No. 2665 (UNIDO)

Decision: Complaint dismissed.

Facts: The staff member signed a special service agreement providing that any disputes would be settled by arbitration. After a dispute arose, the staff member invoked the arbitration procedures and also filed a claim in the domestic court system of Rwanda. UNIDO asserted its immunity before the Rwandan court. UNIDO also failed three (3) times to answer the summons to appear before the arbitral tribunal, which decided therefore to terminate the proceedings with the proviso that the parties could refer the matter to the competent judicial authority. The staff member then turned to the ILO Administrative Tribunal hoping to get some relief.

Analysis: The Tribunal summarily dismissed the complaint on the grounds that the staff member was not an official of UNIDO subject to its staff regulations and rules, and he therefore had no access to the Tribunal. The Tribunal did not say whether the Rwandan court had decided to take jurisdiction, but it is more likely than not the case was also dismissed – allowing UNIDO to have its cake and eat it too.

Lessons: The terms of the contract will determine whether you are a staff member of the organization or not. In most service agreements, there is a clause providing for arbitration in the event of a dispute. Unfortunately, those provisions are unenforceable and the Tribunal cannot intervene.

Citations:

Judgment No. 2657 (EPO)

Decision: Complaint dismissed.

Facts: After undergoing and failing a medical examination, the external job applicant for the post of Examiner was notified that he could not be appointed to the post. He was advised that he could appeal to the Tribunal but that it had dismissed a similar case as irreceivable in Judgment No. 1964.

He appealed to the Tribunal, and noted that the case law of the Court of Justice of the European Communities (CJEC) and the Court of First Instance of the European Communities which, on the basis of regulations applicable to officials of the European Communities which are virtually identical to those applicable to the EPO, have never declined jurisdiction to hear complaints brought by external job applicants.

Analysis: The Tribunal agreed with the EPO that it did not have jurisdiction. The Tribunal noted the recognition of jurisdiction in such cases by the CJEC and Court of First Instance of the European Communities can be linked to the fact that notices of competition for vacant posts in the European Communities provide for the possibility of appeal. The Tribunal was limited by its own Statute. Nonetheless, it opined that it had “no authority to order the EPO to waive its immunity . . . It notes, however, that the present judgment creates a legal vacuum and considers it highly desirable that the Organisation should seek a solution affording the complainant access to a court, either by waiving its immunity or by submitting the dispute to arbitration.”

Lessons: External applicants rejected following a competition do not have any right to file appeals since they are not staff members within the meaning of the staff regulations and rules. The EPO is not obligated to follow the Tribunal’s surprising advice, and the disappointed applicant may seek to file a claim in domestic court, which may take jurisdiction despite the immunity of the organization since any other course would infringe a fundamental right – access to an impartial tribunal for redress of grievances.

Citations: Judgment No. 1964.

X. Applications for Interpretation/Enforcement

Judgment No. 2621 (ITU)

Decision: Application dismissed.

Facts: Staff member filed an application for interpretation of Judgment 2515 in which the Tribunal awarded “an amount equivalent to his full salary, including the salary increment, from 19 January 2004 until 25 October 2004.” The staff member contended that the decision obliged the ITU to pay “pension fund contributions to the [United Nations Joint Staff Pension Fund] as if [his] employment contract had continued from 5 February 2004 through 25 October 2004”.

Analysis: The Tribunal rejected the interpretation. It noted that the judgment did not grant the staff member the relief he sought in the complaint namely, reinstatement including a declaration that he still held his post. If that had been the case, then he would have been entitled to all benefits accruing from reinstatement, including pension benefits. The Tribunal also rejected the argument that the use of the terms “full salary” meant that it intended to include the equivalent of pension entitlements. The Tribunal clarified that it used the terms “full salary” to express that the staff member “was to receive an amount, by way of damages, that included allowances and other entitlements that he would have received directly in the usual course of his employment, but not the benefits accruing from reinstatement or an amount equivalent to those benefits.”

Lessons: Staff members should request reinstatement or “notional reinstatement” with a request for all the benefits accruing from reinstatement in their complaints to the Tribunal. The Tribunal is reluctant to order reinstatement or order the payment of the value of lost pension benefits, which is very substantial in many cases. The policy of the Tribunal in effect waters down and erodes the award of damages further.

Citations: