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Semi-Annual Review

International Labour Organization Administrative Tribunal 104th Session

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Introduction

I am pleased to present the Semi-Annual Review of ILO Administrative Tribunal Decisions decided during its 104th Session.

In this session the Tribunal addressed significant issues involving freedom of association and the rights of staff unions. In Judgment No. 2682 (IOOC), the Tribunal set aside the decision to lower the retirement age since the Staff Committee was not consulted. The Tribunal interpreted the statutory duty (i.e., as written in the staff regulations and rules) to require the administration to do more than provide merely information about the proposed amendment. It required the administration to request an opinion from the Staff Committee: “the consultation of such an advisory body may not be deemed valid unless it is established that it has been formally asked to issue an opinion on the basis of precise information and documentation.”

Judgment No. 2685 (ITU), the Tribunal found it unlawful for the Director General to remove the staff representative from an advisory body without consulting the Staff Union on establishing procedures for effecting such removal.

Finally, in Judgment No. 2704 (UNIDO), the Staff Council President was not able to participate in a merit promotion exercise since the terms of the exercise required a recommendation from a supervisor. The Administration argued that the President was given due consideration even though he had no supervisor. The Tribunal held that in order to preserve the freedom of association the Administration has to guarantee the independence of staff representatives from value judgments by representatives of management, but the President should not suffer merely because he was not in the same situation as other staff members: the principle of equality requires that “dissimilar situations be governed by rules that take account of the dissimilarity” and if “the rules and procedures of international organisations do not ensure adherence to the principle of equality, it is their duty to initiate procedures that do, whether by way of general rule or some specific procedure for the particular case”.

The author wishes to express appreciation to Maximilian Girod-Laine, Legal Counsel for the Staff Union of UNESCO, for his contribution to this review.

Table of Cases

Number	Organization	Issue	Decision
2667	WTO	International Status	Dismissed
2668	EPO	Promotion	Dismissed
2669	FAO	Termination/Retirement	Dismissed
2670	WHO	Receivability	Dismissed
2671	EPO	Fair hearing/Impartiality	Decision set aside; 2,000 euros moral damages; 2,000 euros costs
2672	WIPO	Freedom of Association/ Recognition of New Staff Union	Dismissed
2673	EPO	Special leave	Dismissed
2674	UNIDO	Non-extension of fixed- term contract	Dismissed
2675	ILO	Receivability	Dismissed
2676	ILO	Selection/Competition	Dismissed
2677	ICC	Step-in-grade	Decision set aside; 3,000 euros costs
2678	ICC	Non-extension of fixed- term contract	7,500 euros material damages; 2,000 euros moral damages; 500 euros costs
2679	CTBTO PrepCom	Performance/Objectivity	Simple interest; 15,000 euros moral damages; 5,000 euros costs
2680	EUROCONTROL	Invalidity allowance	Dismissed
2681	IOOC	Retirement/Receivability	Dismissed
2682	IOOC	Provident Fund	3,000 euros moral damages; 1,000 euros costs
2683	UNESCO	Application for Execution	Dismissed
2684	ITU	Application for Execution	3,000 swf material damages; 1,500 swf costs
2685	ITU	Freedom of association	20,000 swf moral damages; 5,000 swf costs
2686	ICC	Receivability	Dismissed
2687	FAO	Discipline	Dismissed
2688	WHO	Assault/Receivability	Dismissed
2689	EPO	Transfer of pension	Decision set aside; 3,000 euros costs
2690	CTBTO PrepCom	Termination/Abolition of post	Dismissed
2691	IOM	Application for Execution	Reinstatement; education grant; 3,000 euros costs
2692	IOOC	Application for Execution	1,000 euros costs
2693	UNESCO	Application for Review	Dismissed
2694	ILO	Non-extension of fixed- term contract	Dismissed
2695	ILO	Harassment	30,000 swf moral damages; 6,000 swf costs
2696	PAHO	Abolition of post	Dismissed
2697	WIPO	Performance appraisal	Decision set aside; 2,000 US dollars moral damages; 1,000 US dollars costs
2698	WIPO	Discipline/Suspension	10,000 US dollars moral damages; 2,000 US dollars costs
2699	WHO	Discipline - fraud	Dismissed
2700	ILO	Performance/Termination	3,000 US dollars moral damages; 3,000 US dollars costs
2701	ITU	Selection	Dismissed
2702	IAEA	Tenure policy	Dismissed
2703	EPO	Pension	Dismissed
2704	UNIDO	Freedom of association/ Equal treatment	20,000 euros material damages; 5,000 euros moral damages; 5,000 euros costs
2705	EPO	Selection/Competition	4,500 euros moral damages; 2,000 euros costs

2706	WIPO	Harassment/Classification	40,000 swf compensation for all injuries; 7,000 swf costs
2707	ICGB	Irreceivable	Dismissed
2708	ILO	Short-term contracts	Decision set aside; 2,000 US dollars moral damages
2709	EPO	Reckonable experience	Decision set aside; calculation of experience; 4,000 euros moral damages; 3,000 euros costs
2710	EPO	Probation	15,000 euros material damages; 10,000 euros moral damages; 5,000 euros costs
2711	CERN	Termination	Dismissed
2712	WIPO	Selection/Competition	New selection procedure; 1 swf in symbolic moral damage; 1,000 swf costs
2713	UPU	Reformation of contract	6,000 swf moral damages; 3,000 swf costs
2714	EPO	Medical Board	Reimbursement of sums deducted from salary; interest 8% per annum; 2,000 euros costs
2715	WCO (CCC)	Probation/Termination	2 months in addition to amount of compensation already awarded; 5,000 euros costs
2716	WHO	Receivability	Dismissed
2717	WHO	Application for review	Dismissed

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/Freedom of Association

Judgment No. 2682 (IOOC)

Ruling: Decision set aside and remanded for new decision; 3,000 euros moral damages; and 4,000 euros costs.

Facts: In November 2005 the Council lowered the retirement age from 65 to 60 with effect on 1 January 2007 in order to reduce staff because of financial difficulties. The retirement age had been raised to 65 in 2001. Appeals were filed by four staff members asserting that the decision was taken without first obtaining an opinion from the Joint Committee and the Staff Committee, and was in breach of their acquired rights to retire at the age of 65.

Analysis: According to the pertinent Staff Regulation, the Executive Director must consult the Joint Committee “on any decision or draft decision which has or could have implications for the statutory situation of the staff”. The decision to lower the retirement age fell within the ambit of this provision. The failure to consult the Joint Committee rendered the decision unlawful.

The staff members also argued that the consultation of the Staff Committee prior to the decision was procedurally flawed. The relevant provision provided that Committee shall be consulted by the Executive Director "on draft amendments of the Staff Regulations". The Council argued that the Executive Director met with the Staff Committee four times before the decision was taken. However, while the Executive Director did supply some information about the content of the measure being contemplated, the Tribunal found that “it is not established that the Staff Committee was asked to issue an opinion on a specific text which had been submitted to it”. According to the Tribunal's case law, “the consultation of such an advisory body may not be deemed valid unless it is established that it has been formally asked to issue an opinion on the basis of precise information and documentation.” The decision was unlawful on these grounds as well.

The Tribunal further stated that an **acquired right** is breached only when such an amendment adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced him or her to stay on. In order to determine whether there has been a breach of acquired rights, it is therefore necessary to ascertain whether the altered terms of employment are fundamental and essential.” The Tribunal found that the staff members had joined the Council when the retirement age was 60, so the amendment returning the age to 60 could not be said to alter a fundamental terms of appointment in consideration of which they joined. The Tribunal also reasoned that the raise of the retirement age in 2001 to 65 was hardly likely to induce them to remain in the organization’s service [a dubious conclusion]. Finally, the altered term was not to be found in the terms of the employment contract, but in the staff regulations; the reasons for the change were reasonable (financial situation and need to reduce staff); and while the amendment “greatly prejudiced” the staff members’ interests, the impact of the amendment was mitigated by deferring the effective date, and the change did not create any discrimination.

The Tribunal dismissed the claims for moral damages of 2 staff members since they did not previously present their claims to this effect to the Joint Committee, and thus they were irreceivable pursuant to Article VII, paragraph 1, of the of the Tribunal's Statute.

Lessons: When there is a statutory duty to consult an advisory body such as the Staff Committee with respect to amendments to the staff regulations, consultation is not deemed valid unless the body has been formally asked to issue an opinion on the basis of precise information and documentation management must provide. The duty of consultation is not discharged when management simply provides topical information which is often the case in staff-management relations. The administration's duty to provide precise information and request an opinion may apply to other issues affecting terms of employment if the statutory language is drafted in broad and general terms. This is an area that should be tested by Staff Associations.

The Tribunal also held in this case that if moral damages are not requested during the internal appeal, they are not receivable before the Tribunal. The Tribunal has reached different conclusions on this issue and has held elsewhere that moral damages are consequential damages that may awarded regardless of whether they were claimed in the internal appeal.

Citations: Judgment Nos. 832, 2354, and 2615.

Judgment No. 2685 (ITU)

Decision: Decision set aside; 20,000 SWF moral damages; and 5,000 SWF costs.

Facts: The Secretary General removed a staff representative serving on the Appointment and Promotion Board for more than 18 years because of the alleged breach of the Board's code of conduct, including manipulating Board members. The alleged breaches were supported by a letter from one of the administrative representatives on the Board, who had recommended that she be removed. The staff representative had expressed disagreement with the working of the Board and left a meeting. The staff member challenged the decision to remove her from the Board on the grounds that it breached her right to freedom of association and expression as a duly elected staff representative. The internal appeal board agreed and also found that the decision was a hidden disciplinary sanction and recommended payment of moral damages. The Secretary General rejected the appeal in part on the grounds that the staff member had no personal right to be on the Board.

Analysis: The Tribunal found that the decision to remove the staff representative was, in addition to a breach of her right to freedom of association and expression, a misuse of authority – but not a disciplinary sanction. With respect to freedom of expression, the Secretary General's decision substituted the staff representative's opinion and "method of defending staff interests" with his own. With respect to freedom of association, the Secretary General was not free to remove a staff representative selected according to the staff regulations and rules without first consulting with the staff association and seeking agreement on the procedure for such action ("the Administration should hold consultations with the Staff Council and seek an agreement prior to removing a staff representative from the Board"). In making its award, the Tribunal considered the conduct of the staff representative: it criticized her for walking out on a Board meeting since she had a duty to attend and participate fully in the meetings regardless of disagreements.

Lessons: This case affirms an important principle that the administration cannot interfere with staff union activity, the latter including freedom of expression on advisory boards. The Tribunal did not go so far as saying that under no circumstances could a staff representative be removed from an advisory board, but before doing so at a minimum consultation with the staff union/association was required.

Citations:

Judgment No. 2704 (UNIDO)

Decision: 20,000 euros material damages; 5,000 euros moral damages; 5,000 euros costs.

Facts: UNIDO's former Staff Council President challenged a decision to exclude him from a merit promotion exercise. The Organization was of the view that the rules provided that only supervisors could submit recommendations for merit promotions to the Performance Review Committee. As the President had served on full-time basis for several years without a supervisor, it believed that it was entitled to exclude him from the exercise.

Analysis: The Tribunal found that the established procedures for merit promotion had been properly followed. In the absence of a proposal for merit promotion by a supervisor, the Performance Review Committee had no power to make any evaluation.

The Tribunal nevertheless relied on the principles of freedom of association and of equal treatment, which it combined in its judgment, to set aside the decision. It thus recalled that "the principle of freedom of association is infringed if a person is subject to a detriment or disability or is discriminated against because of his or her activities within a staff association." In this case, even if the Tribunal may agree with the Organization that in order to preserve the freedom of association it has to guarantee the independence of staff representatives from value judgments by representatives of management, the effect of the established procedure was discriminating. As Staff Council President, he may not be in the same situation as other staff members. But then the principle of equality requires that "dissimilar situations be governed by rules that take account of the dissimilarity". If "the rules and procedures of international organisations do not ensure adherence to the principle of equality, it is their duty to initiate procedures that do, whether by way of general rule or some specific procedure for the particular case". Because the Organization failed to do so, the Tribunal awarded compensation for the wrongful denial of a valuable opportunity that was available to all other staff members who had similarly served seven years in the same grade.

The Tribunal awarded moral damages for delays in the internal appeals procedure and for the breach of due process.

Lessons: The judgment reaffirms the principle that staff representatives may not be subject to unequal treatment or discrimination by virtue of participation in staff union activity. This case should be analysed in the wider context of the case related to freedom of association, issues addressed in Judgment No. 2662.

Citations: Judgments Nos. 2194, 2313, 2662.

II. Performance Appraisals

Judgment No. 2697 (WIPO)

Decision: Decision set aside; 2,000 US dollars moral damages; 1,000 US dollars costs.

Facts: After a long career with the Organization, which led the staff member to the Head of the Security Coordination Section in 2005, he obtained a negative appraisal of his performance. His conduct and the quality and quantity of his work were rated unsatisfactory. He lodged an appeal with the Appeal Board in order to obtain rescission of the periodical report and its removal from his file as well as the issuance of a new report “expressing satisfaction in all areas”. He contends that this report is related to harassment he had been subjected to since a contractor complained about him. The Appeal Board found no evidence that the periodical report was based on a factual error or a flawed procedure and concluded that the appeal was without merit. The staff member requested the Board to reconsider its findings, because they were predicated on facts, which were not mentioned in the proceedings and on which he had been unable to express any opinion.

Analysis: In line with its jurisprudence that “a decision of a staff report, being a discretionary one, may be set aside only on limited grounds such as a procedural or formal flaw, a mistake of fact or of law, the overlooking of some material fact, abuse of authority or the drawing of a mistaken conclusion from the evidence”, the Tribunal found that the Appeal Board based its recommendation on assertions which were given considerable weight in justifying the decision taken but that no evidence had been produced showing that the complainant was able to give his version of events and, if necessary, to produce supporting evidence. The Tribunal deduced from this that the complainant was not afforded due process and that the report of the Appeal Board was therefore tainted with a procedural flaw. It ordered the case to be sent back to the Organization for a decision to be taken in a manner, which complies with the applicable rules. Subsidiarily, the staff member’s plea that the statutory provisions require the signature of more than one supervisor for the periodical report to be valid was ignored by the Tribunal.

Lessons: The right to submit statements and evidence to rebut a poor performance report is a basic right to due process. If this right is not respected, the Tribunal will sometimes order the removal of the report but it may well send the case back to the organization with instructions to engage the applicable rules.

Citations: Judgment Nos.1144 (under 7), 2698, 2829, 2830, 2831.

III. Appointment/Probation/Non-Renewal/Termination

Judgment No. 2667 (WTO)

Decision: Complaint dismissed.

Facts: In 1984, the staff member was locally recruited within the meaning of the applicable rules, i.e., the staff member is a Spanish national or permanently resident in Spain or accepted local recruitment. Spain is considered the home of locally-recruited staff for the duration of service. Locally-recruited officials are not entitled to the same benefits as officials with international status, such as the education grant and home leave. She was promoted to the Professional category in 2000. In 2004, she requested the Secretary-General to grant her international status, which, in her opinion, she should have been awarded on entering the Professional category. The request was rejected. The Joint Appeals Committee recommended rejection of the appeal as well.

Analysis: The staff member argued that she was not a Spanish national and did not permanently reside in Spain, and that she was not explained the consequences of accepting an offer of local recruitment at the time she was appointed. The Tribunal found that the staff rules were followed properly. In particular, as noted above, the staff member's home was considered to be Spain. The staff member's arguments that she was not a Spanish national or permanently residing in Spain were irrelevant since she accepted the local recruitment appointment. With respect to the alleged duty of the organization to advise her at the time of appointment the difference between local and international recruitment, the Tribunal had this to say: "But this assertion cannot be accepted. It was up to the complainant to ask the Organization about the implications of the main clauses of the offer she was invited to accept and about the consequences of her replies on points which were decisive for her future career and salary. Rapid perusal of the Staff Regulations and Rules would have revealed the implications of accepting the offer of local recruitment. Her contention that the Organization has, to her detriment, breached its duty to inform staff is therefore unjustified."

Finally, the Tribunal rejected the staff member's claim that the internal appeals committee was biased for lack of credible evidence. However, on the right to due process, the Tribunal reiterated an important principle: "Every official has the right to due process before the authority responsible for taking a decision concerning him or her. This right presupposes, on the one hand, that the said authority is properly constituted, that is to say that its members have been appointed in accordance with the rules governing its composition and, on the other hand, that those members are impartial. The purpose of the second requirement is to ensure that administrative bodies dealing with disputes give fair treatment to the officials who turn to them, in other words that they display no bias, that they act in good faith throughout the proceedings and that they uphold the rights of the defence, especially the right to equal treatment and the right to a hearing in all its aspects, so as not to give any official cause to believe that his or her case has been prejudged. The duty to act independently and impartially is incumbent not only on the authority competent for issuing the final formal decision in proceedings, but also on bodies responsible for giving an advisory opinion or for making a recommendation to this authority, *a fortiori* where the recommendation is a formal part of the decision-making process".

Lessons: The United Nations has a practice of granting international status to staff members promoted to the Professional category. However, specialized agencies of the UN and other international organizations apply in some cases different rules. The Tribunal obligates the prospective staff member to ascertain his/her rights before signing the contract of employment – later on it is not an excuse that the details were not read. Finally, the Tribunal reiterated that the right to an impartial review in the internal appeal procedure is a fundamental aspect of due process.

Citations: Judgment No. 2315.

Judgment No. 2678 (ICC)

Decision: Decision set aside; 7,500 euros material damages; 2,000 euros moral damages; and 500 euros costs.

Facts: Former spokesperson joined the ICC in January 2005. In January 2006, he received a performance appraisal raising concerns regarding his performance. His supervisor advised him by e-mail that he would have an opportunity to improve his performance "in the next months" and that the acting head of section would speak to him to make a plan for those months, and a review scheduled for mid-April. However, in February he was notified that his contract, which was set to expire in July 2006, would not be extended because of poor performance. The internal appeal board rejected the appeal.

Analysis: According to the Tribunal's case law, a decision not to renew or extend a contract is treated as a discretionary decision that may be set aside if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority. Moreover, an organization may not "in good faith end someone's appointment for poor performance without first warning him and giving him an opportunity to do better". It is an abuse of authority if it purports to do so. If the procedures for evaluating performance are not followed properly, it is a "breach of form". In this case, the Tribunal found that the appraisal procedures were followed since the staff member had an opportunity to make comments on the performance appraisal in reply to the negative comments. However, since the organization did not give the staff member a reasonable opportunity to improve – only six weeks instead of the "months" referred to by his supervisor – there was an abuse of authority.

Lessons: International organizations must provide staff members who are not giving satisfactory service notice of the specific aspects of performance which are not satisfactory, warning that the appointment is at risk, and an opportunity to improve. Failure to do so will usually render a decision not to extend an appointment, or to confirm a probationary appointment, for lack of satisfactory performance unlawful. In cases of non-extension of contract, damages will consist of the value of the lost opportunity for possible contract extension since there is no presumption that if the organization had acted properly, the staff member would have been extended, and moral damages. In cases of probationary appointments, the damages will normally consist of the contract value and moral damages.

Citations: Judgment Nos. 1262, 2019, 1583 and 2660.

IV. Harassment/Retaliation/Abuse of Authority

Judgment No. 2675 (ILO)

Decision: Dismissed.

Facts: The staff member (translator) was suffering from an eye condition and spent several months on sick leave beginning in November 2002. On 2 February 2004 she was assigned to work at home. She considered this to be a “forced confinement”, and lodged a grievance on 18 April 2005. No reply was received, so she lodged an internal appeal. The internal appeal board recommended rejecting the grievance as unfounded, which the Director-General followed.

Analysis: The Tribunal noted that the Staff Regulations specified that “[a]n official who wishes to file a grievance on the grounds that s/he has been treated in a manner incompatible with her/his terms and conditions of employment shall [...] request the Human Resources Development Department to review the matter within six months of the treatment complained of”. The Tribunal determined that her grievance originated when she was assigned to work from home in February 2004. Her grievance of 18 April 2005 was therefore filed too late.

Lessons: This case raises the importance of timely filing harassment-related grievances and timely challenging other adverse administrative decisions.

Citations: Judgment Nos. 775, 2297.

Judgment No. 2679 (CTBTO)

Decision: Decision set aside; interest on material damages already paid; 15,000 euros in moral damages; and 5,000 euros costs.

Facts: In 2003, a P-3 radionuclide officer had been relieved of duties and her contract not extended allegedly for gross insubordination. These decisions were the subject of the Tribunal's ruling in Judgment No. 2524 finding that the staff member had been the victim of harassment and mobbing. As recalled in the earlier case, the staff member had been reassigned pending her internal appeal to a new section. Following a recommendation from the internal appeal panel on the first appeal to make a new decision on whether to extend the staff member's contract, the Commission obtained a new performance appraisal from her previous supervisor who reiterated the same allegations of insubordination that were deemed harassment by the Tribunal in Judgment No. 2524. The staff member submitted a rebuttal. Her new supervisor completed an appraisal indicating that the staff member's performance for the previous year was satisfactory. However, the new supervisor recommended in a separate memo against extension since the staff member's performance as an evaluator was suboptimal. The staff member was not provided a copy of this recommendation for rebuttal.

Based on the performance appraisal and the recommendation from her new supervisor, the Commission decided not to extend the contract in December 2004. The staff member requested suspension of the decision pending the rebuttal to the appraisal and her second internal appeal, which was rejected. The second internal appeal panel recommended that the decision be set aside, payment of material damages equivalent to salary and benefits of two years, and moral damages in the amount of 5,000 euros for the manner in which the decision was notified and swiftly carried out. The Executive Secretary accepted the recommendations. The staff member appealed to the Tribunal claiming interest on material damages and additional moral damages since the decision amounted to continuing harassment and taken for an improper purpose.

Analysis: The Tribunal found that the decision was taken for an improper purpose given that the Commission knew of the "serious professional difference between" the staff member and her previous supervisor who had accused her of "gross insubordination". The Tribunal found that a "number of matters point inexorably to the conclusion that the decision was taken for the purpose of ridding the Commission of a serious personal and professional problem which it had taken no steps to resolve and, by then, was unwilling to resolve", including the recommendation against extension of her new supervisor, the hostile attitude of her previous supervisor documented in the appraisal, and the short period of notice without suspending the decision to allow the staff member to rebut the appraisal or to allow her second appeal to be decided.

Lessons: In some cases, the organization may take a number of actions for which only one explanation may be deduced.

Judgment No. 2706 (WIPO)

Decision: 40,000 swf compensation for all injuries; 7,000 swf costs.

Facts: The staff was subjected to sexual harassment by her former supervisor a few months after her transfer to his division in 2001. The Organization issued a verbal reprimand to the supervisor. She lodged an appeal in 2006, as she had never been compensated and did not benefit from real career opportunities since then. The Appeal Board considered that she should be regarded as “twice victimised” and recommended a financial compensation as well as a reclassification of her post and/or a possible promotion. As the Organization finally refused to grant any promotion, the staff filed a complaint with the Tribunal.

Analysis: Recalling that “an international organisation has a duty to provide a safe and adequate environment for its staff”, the Tribunal found that the complainant was plainly not provided with such an environment. Moreover, the sanction imposed on her supervisor was not commensurate with the seriousness of his misconduct. As she was also the one transferred, she bore the brunt of the adverse practical consequences of the situation created by her supervisor. Therefore, the Organization’s behaviour towards this official showed little regard for the duty of care that it owed to the victim of the acts of which he was accused.

As regards the request for reclassification of the post and her promotion, the Organization may be right in stating that the compensation for the injuries of the staff should not take the form of being granted a higher grade, as promotions are governed by strictly regulated procedures. But indeed, the file shows that the complainant had been performing duties going far beyond those initially designed for the post. She also had been praised for her performance. Despite this, the complainant never received a job description matching her actual duties, a prerequisite for the examination of any application for the reclassification of a post and hence for any promotion related to such reclassification. The Organization’s further dilatory attitude to the request for promotion must be deemed improper because this may result in unequal treatment, in the sense that if the reclassification and the promotion were to be legitimate, the Organization would have failed to comply with the principle of equality requiring “that there be equal pay for work of equal value”. Notwithstanding that procedural and time constraints cannot legitimately be invoked by international organizations, as the Tribunal has consistently held, that if “the rules and procedures of international organisations do not ensure adherence to the principle of equality, it is their duty to initiate procedures that do, whether by way of general rule or some specific procedure for the particular case”, it appears that the rules actually required a swift consideration of the request. However the Tribunal sent back the request for promotion, as it has repeatedly stated that “the grading of a post is a discretionary decision and it depends on evaluation of the work done and the degree of responsibility involved”, and ordered that the post be evaluated by an experienced external United Nations classifier. Finally, the Tribunal awarded compensation as an international organization is liable for all the injuries caused to a staff member by their supervisor and because she was unduly prevented from applying for promotion.

Subsidiarily, the Tribunal decided that even if the deadline to protest a certain administrative decision has expired, related claims are not time-barred as long as the complaint is directed against the final decision taken by the Director-General.

Lessons: The Tribunal will consider that the dilatory attitude of an Organization preventing the right assessment of the classification of a post results in unequal treatment as it deprives the incumbent of the post of the possibility to be promoted. The Tribunal will also be very careful to control the duty of international organizations to treat staff members with dignity and to avoid causing them unnecessary injury in cases involving sexual harassment.

Citations: Judgments Nos. 929, 1609, 1647, 1874, 1875, 2067, 2313, 2524.

V. Discrimination/Equal Treatment

Judgment No. 2677 (ICC)

Decision: Decision set aside; new policy re in-grade step to apply; and 3,000 euros costs.

Facts: The staff member joined the ICC in 2003 at level G-4. Her appointment was subsequently extended for three years, with effect from 1 January 2005. At the time of the initial appointment, the ICC determined steps for new staff members recruited from outside the United Nations system by matching their previous salary against the United Nations common system salary scale without reference to employment experience. After a policy change in 2005, steps were determined on the basis of the staff member's employment experience. The staff member learned of the new policy and requested a human resource officer to be graded at a higher step within G-5 based on her experience pursuant to Staff Rule 103.21 that provides that "[a] staff member who is not paid the salary, allowances or other benefits to which he or she is entitled shall be paid such salary, allowances or other benefits retroactively provided that the staff member makes a written claim within one year of the date on which the staff member should have been paid the salary, allowances or other benefits." The request was rejected. The internal appeals board recommended that the staff member's in-grade step be reviewed in accordance with the new policy.

Analysis: The Tribunal first found the appeal receivable as Staff Rule 103.21 allows staff members to make claims for unpaid salary, allowances or other benefits within one year of when the payment should have been paid. The staff member had requested the higher step within one year of the new policy. On the merits, the Tribunal found that the new policy was applicable to all staff members, since a "contrary interpretation would violate the principle of equal treatment; indeed, there does not appear to be any logical reason for differentiating between existing and future staff members." Although the staff member did not request costs, the Tribunal nonetheless made an award of 3,000 euros.

Lessons: This is a significant case since it reaffirms that with respect to adoption of new policies affecting benefits or allowances, it applies to all staff in accordance with the principle of equal treatment. The downside of this principle is that the Tribunal also upholds new policies that result in reduction of a benefit or allowance, i.e., it finds no breach of acquired rights.

Citations: Judgment Nos. 506 and 2644.

VI. Classification

See Judgment No. 2706 (WIPO) above.

VII. Abolition of Post

Judgment No. 2696 (PAHO)

Decision: Dismissed.

Facts: This case involved several complainants and other staff members of PAHO who filed an application for intervention as the impugned decision – the amendment of a Staff Rule concerning abolition of posts – affected them as a class of officials. Until then, in the event of abolition or the coming to an end of a post, staff members benefited from the so-called “reduction-in-force” procedure, whereby a competition for retention was held between all staff members holding similar posts at the same grade or one grade lower. Retention under that procedure was based first on performance and, in the event that performance was not decisive, on seniority of service. Therefore, under this system the staff member whose post was abolished was not necessarily the person whose employment was terminated if reassignment was not possible, whereas the new procedure does not provide for such a competition. The Board of Appeal was of the view that because of the abolition of this procedure, staff members had lost security of employment. However, it concluded that the issue of whether they had an acquired right to the “reduction-in-force” procedure should have been referred directly to the Tribunal.

Analysis: The ILOAT recalled that “an acquired right is one that a staff member may expect to survive alteration of the staff rules” if “there has been an impairment of a fundamental or essential term of the official’s contract of employment, that being a term of a kind calculated to induce him or her to accept appointment or to stay with the organisation in question.” In the case at hand the Tribunal, having regard to the nature of the term (1), the reason for (2) and the consequences (3) of its alteration, considered that the amended Staff Rule did not constitute a fundamental or essential term: (1) This term of employment is only derived from the staff rules and has no direct and immediate application. It applies only in the event that a post is abolished or comes to an end – a contingency that occurs with some frequency but neither routinely nor regularly. (2) While the Tribunal nevertheless considered that the reasons for the alteration of the Staff Rule were actually not conclusive, as the Organization had no obligation to bring the Staff Rule into line with the separation policy adopted by WHO (for which PAHO acts as regional office), the old procedure did furthermore not give rise to significant practical difficulties, was already mainly based on a performance assessment and warranted equal treatment (3), it found that a consequence of this alteration was that the person whose post is abolished has a greater degree of protection than the unsuccessful candidate for retention under the old system. The Rule now makes reassignment more likely, provides preference in relation to vacancies and increased indemnity if reassignment is not possible. Lastly, it is impossible to apply the unamended Rule to some staff and at the same time to apply the new Staff Rule to others. This is because there is now no obligation on other staff members to participate in a retention competition and, even if they did, there is no longer a legal basis for terminating the employment of a candidate because of his or her lack of success in a competition of that kind.

Lessons: It is difficult to show that amendment to staff rules and related procedures violate the terms of appointment under the principle of acquired rights.

Citations: Judgments Nos. 61, 429, 832, 1226, 1330, 1446.

VIII. Pension Rights

Judgment No. 2689 (EPO)

Decision: Set aside; remanded for new decision; and 3,000 euros costs.

Facts: A German national joined the EPO's secretariat in 2001. In 2002, he applied for the calculation of the pension entitlements he had acquired under the German social security pension insurance scheme for the purpose of transferring them into the EPO pension scheme. He had last contributed to the German scheme in 1998. In 1999 and 2000 he made small and voluntary contributions to a Portuguese scheme while on scholarship at Coimbra University. The EPO denied the request since according to its interpretation of its own pension rules only contributions made to the immediately "previous pension scheme" were permissible. The applicable pension rules provided that periods of membership of pension schemes preceding entry into the service shall be credited, provided that they have been taken into account "under the pension scheme of the last government department, organisation or firm in whose service the person concerned was employed before entering the service of the Office". The internal appeal was dismissed.

Analysis: The EPO argued that the only pension entitlements that can be transferred are those held in the scheme the employee was a part of immediately before entering into the service of the Office, and that the regulations are only concerned with the last pension scheme prior to joining the EPO and not the legal nature of the relationship between the employee and previous organization. The Tribunal rejected this interpretation and instead assessed whether the staff member had been in an employment relationship with Coimbra University. It found that it was not. First, the staff member's scholarship was not the basis of an employment relationship. Its legal status was such that it did not qualify as taxable income, nor as income that would require contributions to the Portuguese social security system. Second, the staff member's voluntary participation in the Portuguese pension scheme was fundamentally different from participation in an employer's compulsory or voluntary pension scheme as contemplated in the regulations, and there was no linkage between the Portuguese pension scheme and the activities at the University such that it could be characterised as the pension scheme of the last government department, organisation or firm in whose service the staff member was employed.

The Tribunal then addressed whether the German scheme qualified as the "previous pension scheme" as contemplated by the regulations. It found that the staff member was last employed by Kassel University and that his employment was linked directly to the German scheme into which he was required to pay a percentage of his salary. The staff member was thus entitled to have those contributions credited.

Lessons: This is a case of statutory interpretation, i.e., how the Tribunal interprets staff regulations and rules which are not entirely clear or straightforward. The Tribunal gave effect to the provision in the regulations that specified that the last pension scheme is connected with employment. It therefore rejected the interpretation advanced by the EPO that the previous scheme must mean the immediately preceding scheme regardless of whether it was connected with an employment relationship.

Citations: Judgments 2012 and 2101.

IX. Discipline

Judgment No. 2698 (WIPO)

Decision: 10,000 US dollars moral damages; 2,000 US dollars costs.

Facts: After a long career with the Organization leading to promotion to the Head of the Security Coordination Section, the staff member's conduct, quality and quantity of his work were rated as unsatisfactory. In March 2006 the Organization decided to additionally investigate eight charges of serious misconduct on his part warranting a temporary suspension. He protested the suspension decision with the Director-General and asked for either his reinstatement throughout the investigation or the granting of special leave with full pay. After this request was rejected, the staff member then lodged an appeal with the Appeal Board, which confirmed the decision of the Director-General. The Board nevertheless asked the Organization to conclude the investigation with all due speed and in any case not to continue it much beyond the date of the submission of its report. On 22 November 2006, date at which the staff member lodged a complaint with the Tribunal, the suspension was still not lifted. He was eventually dismissed on 28 February 2007.

Analysis: The Tribunal stated that "since it imposes a constraint on the staff member, suspension must be legally founded, justified by the requirements of the organization and in accordance with the principle of proportionality." As such a decision lies at the discretion of the Director-General, it can only be reviewed by the Tribunal on limited grounds. In the course of this review it found that contrary to the staff member's contention, the documents produced and the sensitive nature of the post could justify the measure of suspension. At this stage there is no need to prove that the accusations are well founded, since "suspension is an interim measure which need not necessarily be followed by a substantive decision to impose a disciplinary sanction". Its purpose is merely to safeguard the interests of the Organization. However the Director-General did not implement the Appeal Board's recommendation that he should conclude with all due speed the investigation and should take a decision within a reasonable time: "In fact he did not conduct the investigation with the dispatch required by the Tribunal's case law and by the circumstances of the case, and he thus caused an unjustified delay in the handling of the case." By prolonging an essentially temporary measure beyond a reasonable time, without any valid grounds, the Organization placed the complainant in a situation of uncertainty as to his further career.

Lessons: This case confirms an important principle that international organizations must process disciplinary cases against staff members with reasonable diligence and speed.

Citations: Judgments Nos. 1927 (under 5), 2365 (under 4), 2697, 2829, 2830, 2831.

X. Due Process in the Internal Appeal

Judgment No. 2671 (EPO)

Decision: Decision set aside; remanded for constitution of new appeals committee; 2,000 euros moral damages; and 2,000 euros costs.

Facts: After the Tribunal had set aside a decision rejecting a challenge to new long-term care insurance provisions owing to the flawed composition of the appeals committee, and ordered a new appeal procedure, the EPO constituted a new appeals committee consisting of 2 members who sat on the first committee, and a staff representative who had favoured the adoption of the insurance. The staff member sought to disqualify the membership, which was rejected. The new Appeals Committee recommended rejection of the challenge to the long-term care insurance. The staff member appealed to the Tribunal on the grounds that the new Appeals Committee was not properly constituted.

Analysis: The EPO argued that the only grounds for rejecting the members under the rules were not met. The Tribunal found that the grounds set forth in the rule, personal interest or participation in the decision under appeal, was not the only possible grounds for disqualifying a member. Other grounds include bias or prejudice. Since two of the members in this case had already expressed an opinion owing to the first appeal, they were disqualified from participating in consideration of the new appeal. The staff representative likewise was disqualified since he had, in recommending adoption of the insurance, in effect participated in the decision under appeal.

Lessons: As part of the right to a fair hearing in internal appeals, the Tribunal requires that “the members of an internal appeal body should not only be impartial and objective in fact, but that they should so conduct themselves and be so circumstanced that a reasonable person in possession of the facts would not think otherwise.” International civil servants’ rights to an impartial and objective appeal cannot be confined by staff rules purporting to limit the circumstances in which an appeals body member can be disqualified.

Citations: Judgment Nos. 179, 1317, and 2448.