

Geneva, 21 October 2020

Follow-up action from the FICSA 73rd Council

Recommendation reference: FICSA/C/73/D/2

The Standing Committee recommended that FICSA Executive Committee prepare:

- a brief summary containing guidelines for staff representatives, to defend the legal requirement of a neutral appeal instance process within the internal justice system, including a written record and a written decision providing reasons, facts and law.
- a recommendation for staff representatives to include the UNDT as the most appropriate intermediary instance in case of an organization is part of, or become part of, the UNAT two-tiered system of justice.

FICSA Executive Committee guidelines for staff representatives about a neutral appeal instance process within the internal justice system (ILOAT and UNAT)

1. During the deliberations of the Standing Committee on Legal Questions (SCLQ), at the 73rd session of the FICSA Council, held in London from 8 to 14 February 2020, the question arose of what should be considered a neutral first instance to resolve internal administrative disputes in organizations, before escalating to the appeals court. This concern arose due to complaints about potential conflicts of interest between the administration and the internal boards. The participants asked for some guidelines for staff representatives, to defend the legal requirement of a neutral appeal instance process within the internal justice system (Report of the SCLQ, item 27)¹.

2. The chair of the SCLQ stressed that to respond to this request it must be remembered that in the common system there are two appeal courts: the International Labour Office Administrative Tribunal (ILOAT) and the United Nations

¹ In this respect, the FICSA President suggested that the Executive Committee could prepare a brief explaining the importance of signing to UNDT for those organizations already under UNAT's jurisdiction.

Appeals Tribunal (UNAT). Concretely this means two different jurisdictions, with their own mechanisms.

(a) In the jurisdiction of the International Labour Office Administrative Tribunal (ILOAT), when the appellant has exhausted the internal means of the organization, the possibility of appealing to the ILOAT is opened directly. In most cases the first internal instance is a Joint Appeals Board (JAB) with representatives of the administration and of the personnel. After deliberation on the on the case, the JAB issues a recommendation to the Executive Head of the organization that will make the final decision. The decision of the Executive Head can be directly appealed to the ILOAT. Consequently, the matter of a neutral first instance becomes subsidiary and the principle of respect for internal rules and general principles of law becomes fundamental.

(b) In the jurisdiction of the UNAT, the system is of two stages (two-tiered), so for the appeal to be accepted by the UNAT, it is mandatory that the organization has a neutral first instance, clearly established in an agreement or other legal act. For staff in the UN Secretariat the court of first instance is the UNDT whereas staff in some other UN agencies under UNAT jurisdiction have access to their own neutral internal court of first instance which sometimes is beset by questions of conflict of interest and lack of impartiality because all representatives are designated by the administration. Therefore, under these circumstances, the UNDT appears as the most realistic solution that could be considered a neutral first instance, according to the parameters of the two-tiered system.

3. However, for those that are already part of the jurisdiction of the UNAT, or are in the process of accession, it should be also be clear that the first neutral instance is mandatory. The UNAT considers receivable only appeals that have gone through a neutral first instance process. According to its own statutes and jurisprudence, this instance shall observe the following rules, defined in the article 10 *in fine* of the UNAT statute (and repeated in the UNAT jurisprudence):

Art. 10. The Appeals Tribunal shall be competent to hear and pass judgement on an application filed against a specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations or other international organization or entity established by a treaty and participating in the common system of conditions of service, where a special agreement has been concluded between the agency, organization or entity concerned and the Secretary-General of the United Nations to accept the terms of the jurisdiction of the Appeals Tribunal, consonant with the present statute. Such special agreement shall provide that the agency, organization or entity concerned shall be bound by the judgements of the Appeals Tribunal and be responsible for the payment of any compensation awarded by the Appeals Tribunal in respect of its own staff members and shall include, *inter alia*, provisions concerning its participation in the administrative arrangements for the functioning of the Appeals Tribunal and concerning its sharing of the expenses of the Appeals Tribunal. Such special

agreement shall also contain other provisions required for the Appeals Tribunal to carry out its functions vis-a-vis the agency, organization or entity. Such special agreement may only be concluded if the agency, organization or entity utilizes **a neutral first instance process that includes a written record and a written decision providing reasons, fact and law.** In such cases remands, if any, shall be to the first instance process of the agency, organization or entity.

4. For organizations under the jurisdiction of ILOAT, FICSA does NOT recommend to any staff association to accept or participate in any procedure of change of tribunal that the administration would like to undertake towards joining UNAT.

Recommendations for FICSA members:

1. Include the UNDT as the most appropriate intermediary instance should an organization be part of, or become part of, the UNAT two-tiered system of justice.
 2. FICSA does NOT recommend to any FICSA member under ILOAT jurisdiction to accept or participate in any procedure of change of tribunal that the administration would like to undertake towards joining UNAT.
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