

# FICSA LEGAL ADVISOR\*

## TIPS AND INFORMATION NEWSLETTER

---

**March – April 2010**

Discovery of Essential New Facts Revives Appeal Rights

New UN Justice System Continues to Make Headlines

---

The ILO Administrative Tribunal published its decisions for the 108th session in early February. In a case involving a potential time bar, I represented a UNIDO staff member who had held a D-2 post at headquarters at the time of the adverse decision to demote and reassign him from headquarters to the field at the L-6 level under a 200-series contract normally used for technical cooperation project staff (Judgment No. 2907). The decision was taken in January 2003, and the appeal was lodged in December 2005. UNIDO argued that the appeal was time-barred since the staff member had not timely appealed (within two months) the decision.

In the case, because of mistreatment the staff member justifiably felt intimidated and feared reprisal if he lodged an immediate appeal. In addition, and critical for the appeal, the staff member did not know at the time the decision was taken that UNIDO had a practice of granting parallel 100 and 200-series contracts for staff reassigned to the field from headquarters. This practice allowed such staff members to retain some significant rights only available under the 100 series contract. This practice was not disclosed to the staff member, and he was given solely a 200 series contract. On the day the Director General finished his term, and shortly after learning of this practice in November 2005, the staff member commenced the internal appeal process (almost 3 years after the initial administrative decision).

The Tribunal held that “fear of reprisal” is not enough to allow an exception to the applicable time limits (proven threats of reprisal would be sufficient); however, where an international organization misleads or has concealed some information from the staff member in breach of the obligation of good faith, the Tribunal will allow an exception. In this case, it described the practice of parallel contracts (“surprising”), which was not disclosed to the staff member, as an “essential fact”. Once the staff member had knowledge of this new fact, the applicable time limits applied.

On the merits, the Tribunal found the organization, soon after advising him that his post had been abolished, built up intense pressure on the staff member to accept a field assignment at a lower grade as his contract was approaching expiry. This pressure did not allow the staff member to decide “calmly” what position to take on the proposed field assignments. The Tribunal found that UNIDO had other reasonable options to offer, including open posts, which would have allowed the staff member to continue in service

at headquarters but they were not considered. It also found that UNIDO did not take into consideration his family situation, and under the entire circumstances (including the demotion) that UNIDO did not treat him equally or with respect for his dignity. In the result, the staff member was awarded an amount equivalent to the difference in pay at the D-2 level and L-6 level for a period of some 2 years, and moral damages in the amount of 25,000 euros.

I also represented a staff member (section head) in an appeal involving the application of the tenure policy procedures at the CTBTO (Judgment No. 2873). The procedures allow an exception to the 7 year service limit for professional staff where the staff member (“incumbent” of the post) has essential memory or expertise, which is determined in part by comparing the staff member to the outside job market (applicants for the post). In effect, the CTBTO advertises the staff member’s post and decides whether the applicants provide sufficient expertise and experience to ensure continuity. In this case, following a restructuring, the staff member was assigned to a new post with different functions and a new section head post was created incorporating the functions of his previous post with a few new ones. After rejecting the staff member’s request to be assigned to the new section head post, he was advised that the possibility of extension beyond the 7 year limit would be considered during the recruitment for the new section head post. This materially deviated from the written procedures since the staff member was entitled to have his possible extension considered against the new post he held. The Tribunal found that the procedure adopted by the CTBTO was flawed and awarded 20,000 euros in material damages and 5,000 euros in moral damages.

---

### **New UN Justice System: Judge Adams’ Battle with UN Lawyers**

There appears to be a 50 percent winning rate for UN staff in the initial appeal stage of the new two-tier justice system implemented with effect in July 2009. According to a recent *Washington Post* article, the first level United Nations Dispute Tribunal has ruled 35 times against the UN and 33 times for the UN. In the 35 cases, the UN has filed 25 appeals to the Appeals Tribunal. It also reports that the new Dispute Tribunal is making decisions and disposing of cases faster than under the old system (how much faster is not known – the old system could take 2-4 years to reach a decision so an improvement in this regard is not surprising).

There is a troubling development in the new system, however. For example, some of the orders issued by Judge Adams, who is a sharp critic of the old justice system, have not been followed by the UN, including some ordering production of sensitive internal documents. Instead of compliance with some orders, the UN lawyers have appealed Judge Adam’s orders directly to the Appeals Tribunal before he has even issued a final appealable judgment. This is a clever strategy by the UN lawyers since it may be successful and if not, Judge Adams may be gone by the time the case returns to the docket at the Dispute Tribunal, as his one year appointment is reported to set to expire in mid-May.

Judge Adams will be sorely missed if he is not extended.

UN staff and their lawyers will look closely at the decisions of the Appeals Tribunal to see if Judge Adams legal opinions and interpretations on the rights of UN staff are upheld by the Appeals Tribunal. His orders and judgments have been thoughtful, thorough, and in keeping with the principle that the right to due process, good faith and fairness in the justice system itself as well as in the employment relationship are paramount. He has found that UN staff regulations and rules, and administrative issuances are written (albeit in some cases not very clearly) for a purpose, namely to be followed as law, and that deviations - tolerated in the past or ignored entirely - constitute violations of a staff members' contract entitling the staff member to redress.

---

### **FICSA Appeals Training Workshops**

FICSA is tentatively scheduling appeals training workshops (“What Are My Rights?”) during the course of this year in Rome, Montreal, and Washington, DC, which I will be leading. If you are interested in attending or would like information about training tailored for your staff association/union specifically, please contact FICSA or visit their website for more information on scheduled dates and registration formalities.

---

*\*Laurence Fauth, FICSA's Legal Advisor, provides counsel and advice to international civil servants and staff unions. You can visit his website for more information: [www.unattorney.com](http://www.unattorney.com). The information and content contained in this newsletter is for general information only and does not constitute legal or other professional advice. You must not rely on any information or content contained in, or omitted from, this newsletter without obtaining independent legal advice.*