

**March – April 2012**

**Rights of Long Serving Short-Term Staff Given Boost By ILO Administrative Tribunal  
WEU Dissolution (bis)**

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In a previous newsletter (July 2011) we addressed the issue of the many employees of international organisations, who, because they do not enjoy the status of staff members, are mostly denied the right to lodge a complaint before the internal recourse mechanisms of their organisation and thus ultimately before the ILOAT. These consultants, supernumeraries, service contractee, to name but a few, are often employed for years without interruption and are de facto permanent agents who enjoy less rights than regular staff when it comes to health care, pension, the renewal of their contract or their separation indemnities. It is assumed that between 25 – 50 % of employees of international organisations fall under this category.

So far, the ILOAT has nevertheless granted standing to non-staff members when the complainant would otherwise be denied justice. In one of the first such case, the case *Bustos (ILOAT Judgment No 701, 1986)*, in which the division of the work done by the complainant over more than eleven years into short-term contractual periods was fictitious, the ILOAT recalled that the competence of the Tribunal does not depend upon staff membership: “*some general principles of international civil service law correspond to such evident needs that they must be considered applicable to any employees having any link other than a purely casual one with a given organisation. This applies in particular to the principle that any employee is entitled to the safeguard of some appeals procedure.*”

Unfortunately, the ILOAT would later on consider that a complaint filed by a non-staff is irreceivable, if the employment contract contains an arbitration clause, as such a clause has the effect of removing disputes from the jurisdiction of the Tribunal. (*ILOAT Judgment No. 1938, 2000*).

This principle is simply annoying if the Organization fails to call the complainant's attention to the arbitration clause and instead informs him that he could submit his complaint to the ILOAT as has happened in *ILOAT Judgment No. 1938*, for the employee could in this case still request an arbitration (provided the arbiter is entirely independent). It becomes more problematic should an international organization willingly decide to ignore the arbitration procedure and even deny the complainant any settlement she/he calls for. The Tribunal has thus decided that it will not entertain a complaint even if the organisation refuses to follow the arbitration procedure (*ILOAT Judgment No. 2665, 2007*). While the Tribunal probably believed it had little leeway to judge otherwise lest it undermine the principle of arbitration, it nevertheless created with this judgment a legal conundrum considering that no other venue is open to the agent to lodge his complaint due to the immunity of jurisdiction international organisations enjoy.

But the Tribunal has in a new judgment found an elegant solution. It bypassed any requirement for a special venue for non-staff by considering that a long succession of short-term contracts (24 contracts) gave rise to a legal relationship between the complainant and WIPO which was equivalent to that on which permanent staff members of an organisation may rely. The complainant should have therefore been treated in the same way as a permanent staff member and she did not have to exhaust the remedies reserved for non-staff (*ILOAT Judgment No. 3090, 2012*).

While the reasoning is slightly different than in the case *Bustos*, in which the Tribunal talked of a fictitious division of contractual periods, the Tribunal came to the same conclusion: the Organization's erroneous legal assessment resulted in the complainant being kept in a precarious employment situation throughout her service, although her work consisted in the performance of duties similar to those given in principle to permanent staff members.

In *Bustos*, the Tribunal decided it had no power to reconstruct the contract retroactively and only applied the terms of the true contract to the decision of non-renewal and accorded as damage a period of notice of twelve months salary (and \$1,000 legal costs). In the recent WIPO case (*ILOAT Judgment No. 3090, 2012*), it awarded *ex aequo et bono* 60,000 Swiss francs to the complainant for her seven years of continuous employment and 5,000 Swiss francs legal cost.

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### **The dissolution of the Western European Union (WEU)**

In the September 2011 issue of the *Tips and information newsletter*, we discussed the consequences of the dissolution of the WEU for its staff. The WEU Appeals Board, a genuine administrative tribunal with binding judgments, had on 25 May 2011 decided that the new, less advantageous social plan for the remaining staff in Paris was lawful. After a request for rectification of its decision lodged by the former staff, it has now confirmed its initial ruling. The so-called "WEU Social Plan 2010", which has thus been maintained, provides health insurance with less advantageous cover as the previous social plan and imposes financial ceilings for compensation payments.

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The ILOAT Tribunal held its 113th Session from 23 April to 11 May 2012 at the International Labour Office (ILO), Geneva. The Tribunal's judgments will be announced in public on Wednesday 4 July 2012 at 3pm at the ILO (room XI floor R2). The texts of the judgments will appear on the Tribunal's website within several days of delivery ([www.ilo.org/trib](http://www.ilo.org/trib)).

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