

FICSA LEGAL ADVISOR*

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Are ILOAT Judgments Final? It Depends.

When is an ILOAT judgment final? Normally, the principle of finality (*res judicata* in legal parlance) precludes the Tribunal from amending or changing its judgment. However, this rule and its permutations developed by the Tribunal seem only to apply in cases where the staff member seeks an amendment or reversal of the judgment. In cases where the staff member seeks enforcement in the face of resistance by the international organization, the Tribunal is applying a different standard when it comes to facts available to the Tribunal at the time of judgment.

In Judgment No. 3332, a former staff member of the IAEA at the G-4 level was awarded 1.5 years salary and emoluments for the unlawful decision not to extend her appointment - she was replaced by a temporary staff member while she was on sick leave – certainly behavior that shocks the conscience. After the written procedure closed but some six (6) months before the Tribunal decided the case, the staff member was awarded on appeal to the UNJSPF a disability pension retroactively to her date of separation.

The Agency refused to execute that portion of the Tribunal's award ordering back pay of some 90,000 euros on the grounds that the award of a disability pension by the United Nations Joint Staff Pension Fund **retroactively** was sufficient compensation for its former staff member and it could not reinstate her retroactively, making execution impossible.

In a complaint to enforce the judgment, and relying on Judgment No. 2889, the Tribunal agreed with the Agency and reversed its judgment on the grounds that execution was impossible "owing to facts of which the Tribunal was unaware when it adopted its judgment". The Tribunal found that it was not aware that the G-4 staff member was awarded a disability pension retroactively to her date of separation. Normally, in the context of an application for review by the staff member, the Tribunal will not change its judgment if the staff member had the opportunity to bring the information forth during the appeal and the information was fundamental or essential. Although the written pleadings had formally closed in the original case, the Agency had ample time if it considered it material or essential to advise the Tribunal of the award of the pension disability prior to the Tribunal's session where it decided the case: the Agency's Director of Personnel is the Chair of the staff pension committee. The Tribunal did not explore this issue in its judgment although the Parties had advised the Tribunal in its written pleadings that a request for a disability pension was pending, and the Tribunal could have dealt with this issue in its award.

What emerges is that the Agency was not held to the same standard by the Tribunal as it applies to complainants seeking review of a judgment although at bottom the issue is always whether the Tribunal will reverse, amend or change substantively its decision. This is not simply a case where a request for enforcement presents the Tribunal with a math problem on calculation of a benefit or salary. Staff members who seek review of a Tribunal judgment must meet a much higher burden. Indeed, in its entire history from the late 1940s, the ILOAT has only amended its judgment once when requested by a disappointed complainant (in well over 100 such applications).

The Tribunal further found that the award of the disability pension retroactively made the award of material damages “redundant”. In the vast majority of cases, the Tribunal normally requires the staff member to account for earnings in the relevant period which is subtracted from the award of material damages (back pay usually). There is no apparent reason why this well-settled rule was not followed by the Tribunal in this case, i.e., the Agency could have deducted the pension payments from the 1.5 years net base salary in material damages. A disability pension is to replace income. Indeed, since the staff member had barely 5 years contributory participation in the UNJSPF and was approaching the retirement age anyway, her monthly pension was meagre as compared to the monthly net base salary (at the G-4 level).

Finally, the delays in the appeal procedure also were to the Agency’s advantage in this case. The original decision was taken by the Agency in January 2009, and after an internal appeal the Tribunal judgment was not issued until February 2012 or three years later. If the judgment had been issued a year earlier, the award of the pension disability would have been retroactive to a different date, and the staff member would have been made whole for her injuries.

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