

## TIPS AND INFORMATION NEWSLETTER

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October 2016

**ILOAT Holds That International Organizations Cannot  
Offset Pension Benefits Against Awards**

**ILOAT Ordered CTA to Reinstate Complainant or  
Pay 5 Years' Salary and Benefits**

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In Judgment No. 3282 the ILOAT clarified the issue of whether international organizations may deduct pension payments received by the complainant after termination of employment from an award of damages. In this appeal, the complainant had been awarded damages for the loss of the valuable opportunity for a further contract extension against ESO in the amount of 2 years' salary, including all benefits, entitlements and emoluments plus interest at the rate of 5 per cent annum, less any amounts earned in that two year period. The latter condition allows the organization to offset or deduct the complainant's earnings from other employment obtained after the termination for a fixed period of time; this rule is derived from the legal duty of the complainant to mitigate his/her losses by seeking other employment. If, for example, the complainant is able to find other employment in a similar position soon after the termination, this offset can be quite significant.

In this case, the ESO, seeking to limit the amount it had to pay its former staff member, sought to deduct the German pension and CERN pension fund payments received by the complainant after termination, arguing that those benefits amounted to "earnings". The Tribunal disallowed the offset. The Tribunal's reasoning is rather opaque; but it can be said in cases where the staff member's contract was unlawfully not extended, and the Tribunal awards an amount of monetary damages for a period of time corresponding to what the extension would have been (usually 1 to 2 years' salary), and the complainant thereafter receives pension benefits for the same period, the organization may not deduct those benefits from the award. This is not insignificant as some individuals who are close to retirement age may receive significant pension benefits which could come close the amount awarded.

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In Judgment No. 3437 (CTA), the Tribunal reiterated that an organization may undertake restructuring "entailing the redefinition of posts and staff reductions in order to achieve greater efficiency and budgetary savings" but "every

individual decision adopted . . . must respect all the applicable legal rules and in particular the fundamental rights of the staff concerned . . .”. One of the fundamental rights is that, in cases of permanent contract holders, the organization must search for suitable alternative employment, and to follow any rules it has adopted for such exercise. In this case, instead of following its own rules to identify alternative employment the organization “called on the services of an external consultant who assisted in drawing up score charts to assess the suitability of the staff members concerned for these new posts.” The parallel exercise the organization adopted “did not offer staff members the safeguards inherent in the official system.” The Tribunal delivered its judgment in February 2015 and ordered reinstatement with retroactive effect to 14 March 2012, the date of termination. In the event reinstatement was not financially possible, the Organization was to pay the “equivalent of the salary and allowances of all kinds which he would have received had his contract remained in force for a period of five years as from 14 March 2012”, less termination indemnities and “remuneration” from other employment in this period, and to pay the organizations contributions to pension, provident or social security schemes it would have had to pay in this period. The Tribunal’s award shows the scope of its powers to provide meaningful compensation in the event of termination.

How does the ILOAT’s award in Judgment No. 3437 stack up to the awards made in the United Nations Justice System? In cases of appointment and termination, the Statutes of the United Nations Tribunals give the UN the option to either reinstate the applicant or pay a maximum of 2 years’ net base salary. The award may be higher but only in “exceptional cases”. The Judges of the Tribunal have not to my knowledge granted higher awards in very many cases, so the system in fact has a cap on damages. This is of course not a very satisfying state of affairs; the ILOAT is not subject to a cap. If the UN decides to revisit its internal justice system, amending the rules on damages to allow the victim to be compensated for all his/her injuries, as provided for in mature and transparent justice systems, should be a priority.

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The ILO Administrative Tribunal is holding its 123<sup>rd</sup> Session from 17 October to 18 November 2016, where it will decide some 70 cases. The judgments will be made public on Wednesday 8 February 2017 at the ILO at 3 p.m., and posted on the Tribunal’s website shortly after delivery.

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*Laurence Fauth represents international civil servants in internal appeals and before international tribunals, including the ILOAT, UNDT, and UNAT. 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.*