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Semi-Annual Review

*International Labour Organization
Administrative Tribunal 100th Session*

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Introduction

I am pleased to present the Semi-Annual Review of ILO Administrative Tribunal Decisions decided during its 100th Session (and published in February 2006).

This review covers several cases involving claims of harassment/mobbing. The Tribunal in Judgment No. 2524 (CTBTO) carefully explained how it evaluates claims based on mobbing, and found under the facts that the P-3 staff member had been subject to workplace mobbing, and was entitled to significant moral damages (€30,000). In Judgment No. 2515 (ITU), involving a director level staff member who was subject to harassment as a whistleblower, the Tribunal found that the breaches of due process were so significant that it could only conclude that the adverse decisions of the organization's head were motivated by personal animosity. However, in another case (Judgment No. 2484) (WHO), the Tribunal upheld the decision of the Director-General to reject the findings of the grievance panel based on evidence that was not presented by either party before the panel. In this case, the Tribunal compared the Director-General to an arbitrator who could consider evidence not presented by the parties and could take into consideration the interests of the organization; however, the Tribunal apparently forgot the basic principle that an arbitrator is appointed by agreement of the parties and can be discharged by either party if there are doubts about the arbitrator's impartiality and independence. This ruling unfortunately reinforces the power imbalance between management and staff. I have also reviewed a case (Judgment No. 2518) involving an application for execution of a judgment involving a harassment claim which had been remanded to the organization for further review by the internal appeals panel. The Tribunal warned the organization that if it continued to obstruct the implementation of its judgment it would consider awarding the staff member the significant amount she had sought in her original appeal. It seems that applications for executions of judgments are on the rise, which is symptomatic of further efforts of international organizations to avoid their obligation to treat staff with respect and dignity and delay the appeals process.

I hope you find this review of interest and please feel free to contact me if you would like to discuss any specific cases, or have comments.

I. Harassment/Mobbing

Judgment No. 2484 (WHO)

Ruling: Complaint dismissed.

Facts: Female P-4 staff member lodged a grievance alleging harassment by two supervisors. In the report issued by the grievance panel hearing the case, it was found that one of the supervisors had harassed the staff member. With respect to the other, the panel found the behaviour as constituting unfair management rather than harassment. It recommended that the Director-General take appropriate action with respect to both staff members. In a subsequent letter to the panel, the Director-General replied that three of the factual considerations contained in the report were open to challenge, and he provided new evidence that had not been considered by the panel. The panel considered the arguments and documentation submitted by the Director-General, but found no reason to change the substance of its report, pointing out that its conclusions were also based on the testimony of 26 witnesses.

The Director-General, who has the final decision-making authority, then decided that the harassment claims had not been proven and dismissed the grievance. The staff member appealed to the Tribunal on the grounds that the Director-General had abused his authority by introducing and considering new evidence that had not been given to the Panel prior to its finishing its consideration of the claims, and that the Director-General made mistakes of fact and improperly evaluated the evidence.

Analysis: The Tribunal decided that the Director-General had discretion to depart from the recommendations of the advisory panel. The only limitation on this discretion is the duty to fully explain and justify the decision to depart, which he did in this case. The Tribunal described the power of the Director-General as that of an “arbitrator” who could decide the dispute with reference to evidence not presented during the grievance procedure. The Tribunal also held that the Director-General can consider the “welfare” of the organization as a whole not only the specific harm to staff members. The Tribunal more or less dismissed the findings of the panel and concluded its views were too narrow and that its report was in some respects incoherent.

Lessons: This case is striking in that the Tribunal disregarded the procedural safeguards that should be available when a staff member is harassed, and allowed new evidence to be considered well after the staff member and administration had presented their side of the case. It is also troublesome that the Tribunal compared the head of the organization to an arbitrator. Arbitration requires that both parties agree to the choice of an arbitrator, and normally the arbitrator is limited to the evidence presented by the parties. And, most importantly, an arbitrator must be impartial. The Tribunal overlooked this fundamental aspect of due process. The staff member was also penalized because the panel, in the Tribunal’s view, did a poor job in reaching its conclusion. This case is a reminder that the Tribunal will not generally find harassment without clear and convincing evidence (a very high burden).

Citations:

Judgment No. 2524 (CTBTO)

Ruling: €30,000 in moral damages; €5,000 costs.

Facts: A P-3 female nuclear physicist alleged that she was subject to a 2-year period of mobbing by two (2) consecutive supervisors that started during her probationary period of service. Her first supervisor recommended against confirmation of her probationary appointment after the first year of service based in part on the rumours from subordinate staff members who were clearly jealous of her position. After a reorganization of the section, her appointment was confirmed and she came under the supervision of a new supervisor. He however continued the unfair treatment. After a meeting in which the staff member questioned the technical feasibility of a new software program, her supervisor who had supported the development of the new software accused her of sabotage, and relieved her of all duties. The Executive Secretary assigned her to a new division. In the meantime, she went on certified sick leave for 2 months. Her psychiatrist concluded that she had been subject to mobbing led by the actions of her 2 successive supervisors. During her absence, based on a meeting of an advisory panel in which her supervisor repeated his allegations of sabotage, the administration notified her of the decision that her contract would not be renewed. She filed an appeal of that decision, and also asked for an indemnification for the harassment/mobbing of her two supervisors. During the internal appeal, the staff member's tires were slashed in the parking garage on more than one occasion, and two (2) of her male subordinates who had complained about her behaviour were given promotions at the request of her supervisor. The organization also provided a copy of the confidential psychiatrist's report to the two supervisors for comment during the internal appeal. In reply, the first supervisor provided a memo to the appeal panel accusing the staff member of various unsubstantiated misdeeds going back as far as her university career, many of them of a sexual nature. The second supervisor also alleged that she was not fit for international service and that she was not qualified for the post.

The internal appeals panel found that the decision not to extend her contract was tainted by an error of law since the staff member had not been able to reply to some evidence presented by her supervisor to the panel that considered the contract extension. It did not find that she was subject to harassment and/or mobbing but instead found that the decision to relieve her of all duties and separate her from her colleagues for criticizing the new software to be an appropriate and responsible managerial action. It did not address the actions of her first supervisor. The staff member appealed the decision not to award moral damages for mobbing.

Analysis: The Tribunal extensively addressed the issue of mobbing. According to the Tribunal, the JAP was wrong when it concluded that it was necessary to establish an intention to "intimidate, insult, harass, abuse, discriminate or humiliate a colleague" or that there must be "bad faith or prejudice or other malicious intent" before that intention could be inferred. The Tribunal held that "[h]arassment and mobbing do not require any such intent. However, behaviour will not be characterised as harassment or mobbing if there is a reasonable explanation for the conduct in question. On the other hand, an explanation which is *prima facie* reasonable may be rejected if there is evidence of ill will or prejudice or if the behaviour in question is disproportionate to the matter which is said to have prompted the course taken." In addition, the Tribunal faulted the panel for focusing only on the mobbing of her second supervisor.

With these principles in mind, the Tribunal found that the staff member had been harassed. The Tribunal said that a “significant part” of the harassment was the result of a lack of due process. Specifically, it found that the supervisor’s decision to relieve her of all duties because of criticism of a new software program was an “extravagant overreaction” to the alleged offense (i.e., “disproportionate”), and that from that time forward the attitude of the supervisor was one of “open hostility”. With respect to her service in the section, the Tribunal found that she was subject to rumours and gossip, which formed part of her performance reports, for which she did not have the opportunity to respond. The Tribunal also faulted the organization for not providing a safe working environment by permitting her tires to be slashed, and for breaching her right to privacy and confidentiality by disclosing the doctor’s reports to her former supervisors.

Lessons: This case is significant for staff members who are unfortunately made to suffer, psychologically and career-wise, through mobbing activity. The Tribunal, acknowledging that mobbing is a process that can last many years, will take into consideration incidents over a long period of time. The organization had argued in this case that some of the incidents complained of were too late to challenge since the time to appeal had expired, for example, her first supervisor’s recommendation against confirmation of her probationary appointment based on rumours. The organization’s actions in defending the allegations can only be described as reckless. Instead of ensuring the confidentiality of the internal appeals process, it ensured all the details of the staff member’s psychiatric treatment would be disclosed to a number of staff members by giving the mobbers a copy of the doctor’s expert report. Staff members who submit such reports must advise the administration in writing that the report is confidential and is to be disclosed only to the internal review panel members. Unfortunately, it is a common practice of international organization’s to target the victim of harassment for further humiliating treatment as part of the price to pay for vindication. At the end of the day in this case, the victim and the primary mobber both had left the organization by the time of the judgment.

Citations: Judgment No. 2370.

Judgment No. 2485 (ILO)

Ruling: Decision set aside and remanded; 10,000 Swiss francs moral damages; and 5,000 francs for costs.

Facts: In 2003, a staff member stationed in Bangkok submitted a grievance to the Regional Director alleging “a series of acts over the period from February 2002 until [the] present” which he characterised as “unfair treatment in Human Resource matters”. After he returned to Geneva in late 2003, he filed an internal grievance which was referred to the Ombudsperson since the claim involved harassment. Following the issuance of the Ombudsperson’s report, the grievance was resubmitted to the internal appeal panel. The ILO administration did not respond to the substantive issues raised in the grievance before the internal appeal panel and merely argued that the grievance had not been submitted within 60 days of the individual acts upon which the staff member relied and thus was untimely filed and irreceivable.

The internal appeal panel advised the ILO administration that since the grievance concerned an “ongoing matter” as provided for by the staff regulations, the claim was receivable. The Director-General, contending that the Panel’s opinion on receivability was a recommendation, disagreed and made a final decision that it was not receivable, which was the decision taken to the Tribunal.

Analysis: The Tribunal held that the Director-General was wrong to dismiss the appeal since he only considered isolated events and he ignored the staff member’s explicit claim that his grievance was with respect to unfair treatment over a period commencing in 2002 and continuing until the end of his posting in Bangkok and having effects thereafter. The Tribunal criticized the Director-General’s characterization of the panel’s view on receivability as a recommendation. It repeated the principle that an internal “body charged with internal review of administrative decisions, like any tribunal, necessarily has the power to determine the receivability of matters brought before it . . . [a]nd if it finds the matter to be receivable, it has a duty to proceed to exercise its powers with respect to that matter.”

The Tribunal remanded the case back to the internal appeal panel to complete its review.

Lessons: Internal appeals bodies (panels, committees, etc.) have the power to decide all legal and factual issues raised by an appeal, including whether the appeal was filed timely. This case is also significant for staff members who have been subject to ongoing harassment (characterized by the Tribunal as “unfair behaviour”) for a number of years. Staff members can raise “old” decisions that would otherwise be time barred to show a pattern of harassment: “[the staff member] is entitled to have circumstances leading to his acceptance of his transfer and its aftermath taken into account in determining that issue, notwithstanding that, standing alone, the decision to transfer him to another post cannot, of itself, now be the subject of a grievance because of the passage of time.”

Citations: Judgment No. 2092.

Judgment No. 2515 (ITU)

Ruling: Decision set aside; 10 months salary and benefits; 30,000 Swiss francs moral damages; and 10,000 francs in costs.

Facts: The staff member joined the ITU in October 2002 at the age of 56 under a 2-year fixed term contract as Executive Manager, under the supervision of the Secretary-General. In December 2002 during an event in Hong Kong, he advised the Secretary-General that there appeared to be financial irregularities and asked him to order an internal audit. Shortly thereafter, the Secretary-General criticized his behaviour at the event which was placed in his personnel file.

In early 2003, the Secretary-General asked that the personnel chief interview 3 directors subordinate to the staff member without the staff member's knowledge. The chief reported back that the directors had expressed the need for strong management and that the directors believed the staff member should be given the time to prove himself. The possibility of removing the staff member from his post was discussed. In early March 2003, the staff member was assigned to the post of advisor to the Secretary-General pending completion of a management review. His name was removed from the website, which came to the attention to many in the industry. During the subsequent management review, the personnel chief interviewed many staff members and inquired specifically about the staff member. In April he was then advised that the Secretary-General had decided to terminate his appointment before its expiry date, and consultation with an advisory board would follow.

During this period, the organization also withheld his salary increment.

Before the advisory board, the Secretary-General advised that the staff member's performance and conduct were not consistent with the standards of conduct expected of an international civil servant, and that the Union's budget could not fund both posts. The staff member was not given an opportunity to respond to the allegations. The advisory board recommended either maintaining his position as advisor or finding a suitable post for him. In November 2003, the Secretary-General advised him that the advisory board did not recommend reinstatement to his post of Executive Manager, and that he was therefore confirming his assignment as advisor and that his contract would be terminated. The post of Executive Manager was then advertised, and he applied but was not short-listed.

In early December 2003, he asked the Secretary-General to review the decision to advertise his post and the decision to terminate his contract, which was rejected. He was then advised that the post had been filled and that "the current budgetary situation of the Union [did] not permit the financing of both the position of Executive Manager, TELECOM and the post of advisor", and that he had consequently decided to terminate the staff member's appointment. The staff member separated in February 2004.

He challenged the decisions to assign him as Advisor, to withhold the salary increment, to advertise his post, and to terminate his contract. The internal appeal board found that certain of the organisation's actions amounted to disciplinary action and that applicable rules had not been followed, and recommended that an amicable solution be found. For example, Staff Regulation 9.1 only permitted early termination for abolition of post, reasons of health, or for unsatisfactory service or conduct. The Secretary-General upheld his decisions.

Analysis: The Tribunal found that the decisions suffered from serious breaches of due process and errors of law. In particular, the Secretary-General justified the decisions following the results of the management review, which was seriously flawed since he was not advised “precisely” who had criticised his performance or conduct, and exactly what aspects of performance or conduct were at issue. That being the case, he obviously was not given the opportunity to question the witnesses or to rebut the allegations raised against him. The Tribunal found that the Secretary-General had made a misrepresentation involving the reason cited for confirming his assignment as advisor. The Secretary-General said that the decision was based on the recommendation of the board not to reinstate him to his post. However, the board never considered that issue. The Tribunal found that the decision to advertise his post was in substance a decision to terminate his contract. In its submissions to the Tribunal, the ITU stepped away from relying on budgetary reasons as the justification for the decision, as staff regulation 9.1 does not permit early termination on that ground.

The Tribunal concluded that given all the circumstances “it is impossible to escape the conclusion that, in respect of the decisions mentioned above, there was a degree of **personal animosity** on the part of the Secretary-General that led him to act in consistent violation of the complainant’s rights” and that “it is difficult to imagine a process that could have been better calculated to humiliate him, destroy his authority in the eyes of those whom he was appointed to supervise and thus render it impossible for him to return to his post”.

With respect to the salary increment, the Tribunal found that the ITU breached its obligation of good faith by withholding it. The staff member was entitled to be informed of the aspects of his performance or conduct that are said to be unsatisfactory and to provide him with an opportunity to remedy the situation. With respect to the post of Executive Manager, he was abruptly removed from it without the opportunity to remedy the situation. With respect to the post of Advisor, no tasks were given to him.

Lessons: Many international civil servants are subject to supervisors who make decisions based on personal animosity. As this case shows, personal animosity can be proven by showing a course of events where due process is repeatedly denied. Without breaches of due process, the Tribunal is normally reluctant to hold that management decisions are tainted by personal animosity or flowed from harassment.

Moreover, the staff member in this case had requested damages equivalent to what he would have earned if he had been retained in service until retirement age (65). He was 58 at the time he separated from service. The Tribunal held that the material damages should be limited to the amounts due if his fixed-term contract had run its term. Unfortunately, even though the prospects for other employment for this staff member are low at his age, and the staff member will lose valuable years of contribution towards retirement benefits, and the organization’s actions made the prospects for finding alternative employment even more difficult, the Tribunal showed that it will normally not compensate for this loss.

Citations:

Judgment No. 2518 (ILO) (Application for Execution of Judgment No. 2370)

Ruling: Remanded with order to make settlement offer and commence review by internal appeal panel; 10,000 Swiss francs moral damages; and 5,000 francs in costs.

Facts: In April 2005, staff member filed an application to execute Judgment No. 2370. In the latter judgment the Tribunal found that all the circumstances surrounding her harassment claim had not been considered, and sent the case back to the organization for referral again to the internal appeal panel, however, with the clear advice and signal that a settlement should be reached since the staff member had not been shown the respect or allowed the dignity to which international civil servants are entitled, and that she deserved compensation for the injury she had suffered.

In letters in August and September 2004 the staff member's counsel sent a settlement offer to the Director-General and advised that her client's case had to be either settled or heard again by the internal appeal panel. In a letter of 15 September the Director-General advised that since it had not yet been established whether there had been harassment, he would prefer that the case be referred again to the internal appeals panel. He was willing to consider the possibility of a settlement and invited the staff member's counsel to submit a revised offer of settlement since the initial offer was too high, and that he wanted advance agreement to keep any settlement confidential. In a letter of 28 September 2004, her counsel stated that no further settlement offer would be extended until the ILO had made "a counter-offer".

As from 1 October 2004, certain changes to the organization's internal appeals procedure were implemented, and the staff member's counsel was advised that in order for the internal appeal panel to have jurisdiction over a case filed after the 1 October 2004, the authorisation of both the Administration and the Staff Union would be required. The staff member then filed her application for execution, alleging further harassment and defamation. She asked for compensation representing the salary and emoluments she would have received if she had remained in her post for another 4 years, moral damages and costs.

Analysis: The Tribunal found that the organization, not the staff member, had a duty to reinstate the internal review after the case had been remanded. It also found that the organization was unreasonable and could not make confidentiality a condition even before starting settlement discussions or responding to the staff member's offer. In this regard, the Tribunal squarely found that the organization was obstructing efforts to implement its judgment "by refusing to make any counter-offer of settlement and by not immediately referring the case to the Joint Panel as it had been ordered to do." The Tribunal said that if the organization continued its obstruction tactics, it would consider awarding the compensation sought by the staff member. Finally, the changes to the internal appeal procedures should be disregarded and the review panel as it stood at the time the staff member filed her appeal should be reconstituted under the same procedures.

Lessons: Successful staff members should not wait too long before seeking the aid of the Tribunal in enforcing a favourable judgment. There has been a rise in the number of applications for execution of judgments over the last several sessions. This trend reflects the obvious efforts of international organizations to resist adverse judgments. As this case shows, the organization simply chose to ignore the plain instructions from the Tribunal in what can only be described as a conscious effort to delay the case further.

II. Extension/Termination of Fixed Term Contracts/Probation

A. Contract Extensions Beyond Retirement

Judgment No. 2500 (CTBTO)

Ruling: Ruling set aside; 6 months salary; €10,000 moral damages; €5,000 costs.

Facts: Since 1999, the organization had in place a 7 year service limitation policy on professional service, which allowed for limited exceptions. The first staff members who were reaching the service limit, however, challenged the policy in an appeal to the Tribunal. Pending the Tribunal's ruling, the organization announced that it was suspending any separations from service as a result of the 7 year policy pending the ruling. However, at about the same time, it announced to member States that it would be seeking a new Director for the International Data Centre (IDC) Division because the then-current Director had joined the organization in 1997, and would reach the 7 year service limit in 2004. With the assistance of the Director, the new Director was recruited and a contract concluded in December 2003. In February 2004, the Tribunal ruled that the 7 year policy could not be considered in deciding contract extensions. Thereafter, the organization announced that it was making new decisions without reference to the 7 year policy.

In the Director's case, the organization advised him that it was not extending his contract for a new reason namely, that he would reach normal retirement age (62) before his contract expired in 2004. It did not mention that his successor had already accepted the appointment. He appealed the decision internally, and the appeals panel found that the Director had been subject to discriminatory treatment.

Analysis: The Tribunal found that the organization's decision to replace the Director in 2003 made it impossible for it to extend his contract after the Tribunal set aside the 7 year service limit policy in February 2004 since it had already hired a new Director. According to the Tribunal, after the 7 year service limit was set aside, the organization "acted as though it had two options at this point: first, to deal openly and in good faith with the complainant and attempt to negotiate/mitigate his damages and do likewise with his successor; second, to come to the same conclusion by different means, thereby avoiding any payment of damages. In fact, the Commission did not have such a choice: only the first of those courses was consistent with its obligation to deal with all its staff members fairly, honestly and in good faith. It had through its actions placed itself in a position of owing conflicting obligations to two staff members, the complainant and his successor, and it was not open to it to favour only the latter at the expense of the former." The Tribunal therefore found that the Director was subject to discriminatory treatment, and his dignity was injured.

Lessons: When there is clear evidence that the organization had made an illegal decision and then attempts to justify the decision on entirely new grounds, the Tribunal will usually allow the appeal and award damages.

Citations:

Judgment No. 2513 (IAEA)

Ruling: Decision set aside; 1 year salary and benefits; €12,000 moral damages; €5,000 costs.

Facts: P-4 safeguards inspector joined the IAEA in 1983. He reached retirement age of 60 in December 2002. He was given a one-year contract extension beyond retirement based on the Agency's policy allowing extensions beyond retirement if certain criteria are met. His division director recommended him for a second extension of 1 year along with six (6) of his colleagues again in accordance with the policy. The Director General granted three (3) extensions. Two (2) were never decided because they had chosen to retire instead. In one case, the request for a one-year extension was refused but a six-month extension was later given to the staff member concerned. The staff member was not advised of the decision in his case, but 3 months before his date of separation he received two form letters reminding him that his appointment would end on 31 December 2003. Upon his enquiring as to the status of his division's request for an extension, he received another copy of the form letters previously sent to him. He therefore separated at the end of 2003, and appealed. The internal appeals board recommended dismissing the appeal on the grounds that he had no right to extension beyond retirement and the Director-General enjoyed complete discretion, and no reasons for the decision were required.

On appeal to the Tribunal, the staff member argued that he was entitled to a reason for the decision, especially in view of the Agency's written policy on granting extensions beyond retirement, which allows extension if certain criteria is met. Since he was not given a reason for the decision, and his other colleagues in virtually identical circumstances received extensions, he maintained that he received discriminatory treatment and/or the Director-General abused his authority/discretion. The Agency argued that he did not meet the need for proper succession planning. He also claimed breach of due process before the internal appeals panel since it heard witnesses in his absence and denied him the right of cross-examination.

Analysis: The Tribunal reiterated the principle that a mandatory retirement provision gives to the organization a wide measure of discretion and that the Tribunal will not interfere in the exercise of that discretion except in extremely limited circumstances. However, the power to extend appointments beyond normal retirement age must not be exercised arbitrarily. In an earlier decision involving the Agency's policy on extensions beyond retirement, the Tribunal found that the policy had fettered the Director General's discretion and he was bound to follow the criteria he had in fact established. The Tribunal said the Agency's reason for the decision "was clearly spurious" since the criterion that allegedly was not met was not a criterion at all but merely an exhortation to division heads to make proper succession planning. The Tribunal further found "with regard to each of the seven cases from the Department of Safeguards . . . there is simply no rational explanation as to why some of those requests were granted and some refused [and therefore it was] impossible to conclude other than that the decision in the complainant's case was made for some undisclosed or purely arbitrary reason."

On the issue of breach of due process during the internal appeal, the Tribunal reminded the Agency "in the absence of special circumstances such as a compelling need to preserve confidentiality, internal appellate bodies such as the JAB must strictly observe the rules of due process and natural justice and that those rules normally require a full opportunity for interested parties to be present at the hearing of witnesses and to make full answer in defence.

If that is not the practice observed by the JAB, the Agency should waste no time in instituting necessary reforms.”

Lessons: If the organization has a written policy setting forth criteria for granting contract extensions, staff members are entitled to know the reasons for denying a contract extension, and in particular which criteria are not met and why. Although the Tribunal did not need to find for the staff member on the basis of the breaches of due process in the internal appeal, the Tribunal made it clear that the right to be present during the taking of evidence and the right to cross-examine and question witnesses is a part of “natural justice”. Staff members should always request to be present before the panels that consider their appeals when the panels are hearing witnesses.

Citations: Judgment Nos. 2125 and 2377.

B. Termination Based on Abolition of Post

Judgment No. 2519 (FAO)

Ruling: Decision set aside; \$20,000 in damages; and \$1,000 costs.

Facts: In 2000, the staff member (P-2) joined the FAO on a one-year fixed-term contract, subject to a one-year probation. His contract was confirmed, and in March 2002 he accepted a two-year fixed-term appointment stationed in Eritrea. However, his post was soon abolished. FAO offered him a transfer to Kampala (Uganda), which he accepted. However, the FAO, without advising the staff member, abolished this post as well. He was advised that the transfer to Kampala was “on hold”. He was then informed that he had been assigned to Arbil (Iraq). He sought reconsideration of the transfer to Arbil for medical reasons, and he further advised that he was still interested in the transfer to Kampala.

On 15 October he was informed that a review of his medical records indicated that he was fit to work in Arbil. On 31 October he again requested reconsideration and advised that he was prepared to accept a transfer to Arbil. The staff member was then informed that his fixed-term contract would be terminated on 13 December 2002. During his internal appeal, the staff member contended that he should have been informed that the Kampala post had been abolished and, that if he did not accept the transfer to Arbil, his appointment would be terminated. The review committee recommended that the appeal be rejected, which was accepted by the Director-General.

Analysis: The Tribunal reiterated the principle that in cases where an organization is terminating a fixed-term appointment before its expiry on other than disciplinary grounds (here abolishment of post), it is under a duty to “scrupulously observe due process and the safeguards that an appointment with an international organisation affords”, citing Judgment 1350. The organization must therefore act in good faith – a duty which encompasses ordinary notions of fair dealing. The organization must also inform its staff in a timely manner of developments that may adversely affect his or her employment. These duties required FAO to inform the staff member immediately on receipt of his request for reconsideration of the decision to assign him to Arbil that it was no longer possible for him to be posted to Kampala and to advise him that Arbil was the only alternative. The Tribunal also held that the staff member had a duty to act in good faith. He should have indicated promptly after he was advised that he was considered medically fit, whether or not he was prepared to be posted to Arbil. However, that duty was not breached since the FAO’s failure to advise him of the abolition of the Kampala post was a “substantial contributing cause to the complainant’s loss of a valuable opportunity to accept the Arbil posting in a timely manner”.

Lessons: The duty of good faith should always be raised in an appeal, as it sometimes is sufficient by itself to win an appeal to the Tribunal, especially where an organization is not providing accurate information with respect to job security. When a post is abolished before the expiry of a fixed-term contract, the organization has a duty to make reasonable efforts to find a new post. In this case, that was initially accomplished, but when the new post itself was abolished, the organization chose not to disclose this to the staff member. The Tribunal also disclosed its expectations from staff members to act in good faith. The Tribunal will often rule against an otherwise meritorious claim on the grounds (often not expressly stated by the Tribunal) of lack of good faith on the staff member’s side.

C. Termination of Probationary Appointments

Judgment Nos. 2501 and 2502 (Energy Charter Conference)

Ruling: Decision to terminate contract set aside; 4 months salary and benefits in damages; and €5,000 costs.

Facts: On 1 January 2004, the complainant was employed by the Conference as Director for Transit, Trade and Relations under a three-year fixed-term contract subject to a six-month probationary period. In an e-mail of 30 May 2004 to the Director, the Secretary-General advised she did not intend to confirm his appointment, citing professional shortcomings. Following the procedure for extending probationary periods, on 29 June 2004 his probationary period was extended by six months. He immediately challenged that decision. On 16 July, the Secretary-General drew up a performance appraisal in which she recommended that the Director's appointment be terminated with effect from 31 August on the grounds that he had refused an extension of his probationary period and that he had continued to demonstrate major deficiencies in his professional performance. She advised the Director by letter of 19 July to his holiday address that she would shortly consult the advisory board, which met and did not object to the termination proposal. On 27 July, the Director was advised of the decision. The Director challenged the decision to extend his probationary period (Judgment No. 2501) and the decision to terminate his contract (Judgment No. 2502) on grounds of breach of due process and good faith.

Analysis: The Tribunal held with respect to the challenge to the extension of the probationary period that the rules of procedure were followed, and upheld the decision. The Tribunal, however, had no trouble setting aside the decision to terminate the probationary appointment. First, the decision to extend his probation was meant to give him a new chance to improve his performance. The Secretary-General, who decided within 3 weeks after the probation was extended to terminate the appointment, did not provide the Director the opportunity to demonstrate that he could improve his performance. Second, the Director was not given an opportunity to challenge the performance appraisal of 16 July, which reiterated the grounds in favour of extending the probation, since he was on annual leave and the decision was taken 11 days later. Lastly, the Tribunal found that the reasons given for the termination were ambiguous: the Director did not consent to an extension of his probationary period, and major deficiencies in his professional performance. On the first reason, the Tribunal noted that the Director was within his rights to challenge the decision, which the Secretary-General defended as lawful in defending the appeal. On the second reason, as noted above, the Tribunal held that it was basically impossible to assess whether or not performance had improved during such a limited period (12 days).

Lessons: As long as the procedures are followed with respect to extension of probationary appointments, the Tribunal will not normally interfere. However, in this case, the organization in effect extended the probation and then immediately reversed that decision by terminating the appointment a month later. The organization nevertheless “won” in this case as the damages awarded hardly provide an incentive for the organization to avoid breaches of due process in the future.

Citations: Judgment No. 1246.

III. Recruitment/Appointments/Promotion

Judgment No. 2508 (Eurocontrol)

Ruling: Decision set aside; results of competition for post set aside; and €3,000 costs.

Facts: Staff member joined Eurocontrol in 1992 as a typist at grade C2. In 2002 she applied for the post of administrative assistant. The interview board recommended the appointment of another staff member, who was transferred in May 2002 to the post concerned. Although the post had been advertised at grade B3/B2, the successful internal candidate remained at her lower grade of B5 grade. This practice was subsequently changed, and as a result the Agency readvertised to fill the same post. The staff member reapplied. The staff member who had been penalized by the earlier policy was given preference over all other candidates, and appointed. The disappointed staff member appealed. The internal review panel found that there had been “a lack of communication, firstly regarding the results obtained in the first competition, and secondly regarding the nature of the second appointment”, but concluded that “the results of these two competitions [were] not tainted with mistake and that the complainant’s career [had] therefore not really been adversely affected”, and recommended rejecting the complaint. The Director General followed the recommendation.

In her appeal to the Tribunal, she asserted abuse of process, abuse of authority and breach of the regulations on recruitment. She argued that there were clear, significant and undisputed indications that the Agency held the disputed second competition not in order to fill a vacancy by appointing the best qualified candidate, but purely in order to appoint a pre-selected candidate with a view to remedying the penalty she received from the old policy. The Agency argued that the competition had not “adversely affected” the staff member and that, even though the disputes committee found that the procedure followed was “tortuous”, it was not so flawed as to warrant being cancelled.

Analysis: The Tribunal reiterated its well-settled case law that anyone who applies for a post to be filled by an organisation through a process of selection is entitled to have his or her application considered in good faith and in keeping with the basic rules of fair and open competition. That right is not affected by the actual likelihood of his or her succeeding. The Tribunal found that the sole purpose of holding the second competition was to try to remedy the effects of a questionable practice and that the post concerned was that to which another staff member had already been assigned at the outcome of an earlier competition. Since the Agency used the competition procedure, intended under the terms of the pertinent regulations as a means of filling vacancies, for a purpose other than that specified in the regulations, all decisions based on the outcome of that competition had to be set aside.

Lessons: Staff members who have evidence that the recruitment process was not conducted fairly or transparently have good chances of appealing the decision to appoint another candidate. However, even if successful, the Tribunal will only order that the results of the competition be set aside without harming the incumbent of the post.

Citations: Judgment No. 2163.

Judgment No. 2520 (FAO)

Ruling: Complaint dismissed.

Facts: In April 2001, female P-4 staff member lodged a formal internal complaint of harassment against her immediate female supervisor alleging that she frequently adopted a hostile attitude towards her, that she did not show respect, masked tensions, and tried to give the impression that conflicts were the staff member's fault. When the organization agreed to place the letter of complaint on her personnel file, the complaint was withdrawn.

In October 2001, she applied for a P-5 post. The interview panel included her immediate supervisor and her second-level supervisor, the Director of the ESA Division, the latter having knowledge about the earlier complaint against her supervisor. She wrote to personnel claiming that she had been denied an impartial evaluation of her candidacy since her supervisor was on the interview panel, and requested that her harassment complaint be given to each member of the Professional Staff Selection Committee (PSSC) at the next stage of the selection process. The matter was referred to the Assistant Director-General who was told by the Director of the ESA Division that the interview process had been fair, transparent and unbiased. The staff member on her own initiative then sent her complaint to the PSSC. The interview panel recommended the staff member and others for the post. The PSSC endorsed the shortlisted candidates and the Director-General appointed someone other than the staff member.

She appealed to the Director-General, claiming that she had been denied an impartial selection process by reason of the presence of her immediate supervisor on the interview panel since she had shown "hostile and prejudicial treatment of [her] work and person" over a period of years. She also reinstated her harassment complaint. Both claims were rejected during the internal appeal.

Analysis: The Tribunal reiterated that candidates are entitled to equal treatment in a competition for an advertised post, which requires objective consideration. The Tribunal offered some guidance in this area. It advised that a "person's candidacy should not be evaluated by a person whose impartiality is open to question on reasonable grounds. The rule applies not only to those making or participating in the actual decision but also to those who have an advisory role, for they may exert influence on the ultimate decision." The Tribunal explained that it would be improper if a participant in the selection process had a relationship with the candidate that "goes beyond the proper bounds of a professional or supervisory relationship". The Tribunal accepted the staff member's assertions that her relationship with her supervisor was "harsh, unfriendly, strained and stressful for more than a decade" based upon the findings of the internal appeals committee which had noted in its report "a degree of lack of functional rapport between the [complainant] and her supervisor, a tense relationship and a breakdown in communication between the two".

However, the Tribunal also extensively assessed the complaints and descriptions of the staff member by her supervisors, who had noted her "extremely sensitive and sharp temper". The appeals committee had noted that her correspondence "language, tone and style were often inappropriate and hostile", and with her regard to her claim of harassment that there was "a degree of lack of functional rapport between the [complainant] and her supervisor, a tense relationship and a breakdown in communication between the two". The Tribunal characterized the working relationship as a difficult situation which the supervisor perhaps

should have handled better. The problems were also according to the Tribunal the fault of the staff member. It would not conclude that the relationship between her and her immediate supervisor went beyond the proper bounds of that to be expected between subordinate and supervisor. The participation of her supervisor in the selection process therefore did not violate her right to due process.

Lessons: When there is evidence that the staff member contributed to the tensions and breakdown in the relationship with the supervisor, and has otherwise not acted in good faith, the Tribunal is reluctant to find bias and prejudice on the supervisor's side alone. However, it is disconcerting and in fact unbelievable that the Tribunal did not find in this case that the relationship between the staff member and supervisor, in which there was a breakdown in communication, went beyond "proper bounds".

Citations: Judgment Nos. 179 and 1990.

IV. Reclassification

Judgment No. 2514 (EPO)

Ruling: Decision set aside; €500 moral damages; and €250 costs.

Facts: Three (3) staff members prior to 1999 held category C posts in the C3-C5 career band with the job titles and grades reflecting the technical nature of their jobs. At that stage, there were three relevant career bands: C1-C4, C3-C5 and C6. From 1 January 1999, those career bands were abolished and replaced with two new bands: C1-C5 and C4-C6. In the job descriptions provided in the regulations, a staff member in the new C1-C5 band was described as a “Service Employee”. An employee in the new C4-C6 band was described as a “Technician/head of team”, and the minimum qualification included the completion of an apprenticeship and eight years’ professional experience. The level of duties at C4 is specified as working “in a specialised field and/or as head of a team of technicians”. Moreover, the EPO’s website explained the difference between the two career bands in these clear terms: “C1-C5 are known as ‘Employee’ and comprise the non-technical and non-administrative staff of the Office such as porters, print shop and mail room staff; C4-C6 are technical staff with completed compulsory education and a training certificate such as an apprenticeship.”

The staff members were listed in their 2000-2001 staff reports as Service Employees even though they had been described in earlier reports as Technicians. They objected to being designated as Service Employees and were told that, as they were in the new C1-C5 band, they were properly described. After their request to be designated in a different career band went unanswered, they filed an appeal directly to the Tribunal.

Analysis: The Tribunal found that when regard is had to the staff reports, it is clear that they could not have been described in 1999 or at any time thereafter as “non-technical and non-administrative staff”. They were technical staff. As such, they should have been placed in the C4-C6 career band. The decision that they were correctly placed in the C1-C5 band could only be reached by overlooking the distinction which the EPO itself drew between the two career bands, which in part was set forth on the organization’s website. That was to overlook a material fact and resulted in the drawing of a clearly wrong conclusion. Accordingly, all three staff members were entitled to be placed within the C4-C6 career band, and entitled to be paid the salary difference, if any, resulting from placement in the C4-C6 band effective from 1999.

The placing of the complainants in the C1-C5 career band was a slight to their technical qualifications and the technical nature of their work.

Lessons: Information and data published on an organization’s website often provide potent evidence for use in an appeal. It should not be overlooked. Moreover, the Tribunal will not let organizations depart from their own regulations and rules when they contain plain and simple language.

Citations:

V. Right to Collective Action

Judgment Nos. 2493 and 2495 (Eurocontrol Agency)

Ruling: Decision imposing disciplinary measure for striking set aside; 22 striking staff members awarded €1,000 in moral damages and €500 in costs each.

Facts in Case 2493: Staff members participated in a general strike called by a trade union recognised by the Agency. The strike announced by notice of 7 March 2003 was to begin on 10 March for an indefinite period and was to take the form of temporary work stoppages involving all categories of CFMU operational staff. It was also specified in the strike notice that staff on duty would refuse to make up the delays caused by work stoppages or to take over the work of staff on strike. The Agency did not have a collective agreement in place with the union setting forth rules on collective action. The Director General advised staff that such action contravened the provisions of Article 11(2) of the staff regulations, and that any official who left his post without authorisation would be liable to disciplinary action. Article 11 of the Staff Regulations provides that a staff member is bound to ensure the continuity of the service and must not cease to exercise functions without previous authorisation. After the strike, striking staff members were advised by the Director of Human Resources of their right to a hearing to discuss the charges made against them in connection with their participation in an “illicit strike” and their breach of Article 11(2). After hearing some of the staff members, all were issued a written warning on the grounds that they had participated in an unlawful industrial action. The Joint Committee for Disputes rejected the internal appeals on the merits but suggested that, as a gesture of goodwill, the administration might withdraw the disciplinary measures concerned. The Director General upheld his decision.

Facts in Case 2495: The complainant in this case was the President of the trade union that called the strike. A short time after the work stoppage began, he called a staff member in one of the flight tracking units and requested that the work not be transferred to another back-up unit for tracking flights. The call was recorded. The Director-General notified the President that he was considering initiating disciplinary proceedings against him based on the telephone call. The disciplinary board that heard the matter recommended a reprimand. However, the Director-General instead imposed a relegation in step since in his view the President had voluntarily accepted that the safety of air passengers in the IFPS Zone might be jeopardised and a reprimand was therefore too lenient.

Analysis: The Tribunal noted that the call to strike did not contain unlawful actions, i.e., specific instructions calling for disregard for the staff rules, which according to the Tribunal would have rendered the action illegal. Given that the strike was legal, the Tribunal held that the Director-General could not make the exercise of the right conditional on obtaining leave of absence. This would have the effect of depriving the right to strike of all substance. In this regard, the Tribunal set forth an important principle: “general measures taken by the administration and the individual decisions taken to implement those measures must not have the effect of restricting the exercise of the collective rights of members of staff in such a way as to deprive them of all substance.”

The President of the Union did not fare as well. The Tribunal found that the telephone call that the President had with a staff member in the flight tracking unit supported the Director-General’s view that it constituted external interference with an operational service, which in

his view was liable to jeopardise the safety of air navigation, and that the Tribunal would not interfere with the Director-General's expertise. However, the Tribunal did find that the Director-General had violated the principle of proportionality in departing from the recommendation of the disciplinary board. The relegation in step was excessive. The case was remanded for reconsideration of a lesser sanction for the misconduct.

Lessons: Collective work stoppages called by a staff union are legal as long as there is adequate advance notice given to the administration and there are no instructions to disregard the staff regulations and rules. Otherwise, the staff member's action may constitute insubordination. In the absence of a collective agreement which could contain conditions on the exercise of the right to a collective work stoppage, the administration cannot impose conditions which make the exercise of the right impossible, for example, by requiring leave of absence or consent from the organization's head as in this case.

Citations: Judgment Nos. 566, 615, 2342, and 2391.

VI. Disciplinary Measures

Judgment 2491 (WHO – Regional Office for Southeast Asia)

Ruling: Complaint dismissed.

Facts: A maintenance worker removed a mobile phone from a desk drawer and took it home with him. The administration traced the calls that had been made on the phone to the staff member's home. He returned the phone some 2 months later when he learned that he was under suspicion. The administration advised him that there was evidence of misconduct and that he could be subject to dismissal. In reply, he claimed that he found the phone in an open drawer and had planned to give it to the caretaker and absent-mindedly took it home. He later found that his son had taken the phone and used it. However, three (3) fellow staff members signed a document stating that the staff member had confessed to stealing the phone. The Regional Director then notified him that the evidence was overwhelming that misconduct had been committed and he was dismissed for misconduct immediately with one month's pay in lieu of notice. The Regional Board of Appeal (RBA) and the Headquarters Board of Appeal (HBA) both recommended dismissing his appeal and their recommendations were endorsed by the Regional Director and the Director-General respectively.

Analysis: The Tribunal did not accept the staff member's account of events, namely, that he found the phone in an open drawer and mistakenly took it home. Instead, it adopted the findings of the RBA. The staff member also argued that he should have been given advance notice of the intention to dismiss him following the finding of guilt. The Tribunal significantly held that "[t]here is no such requirement either in the applicable staff rules or in the principles of natural justice and procedural fairness. The complainant was notified of the charges against him and was twice given the opportunity to reply to them. As he himself acknowledges, his attention was drawn on both occasions to the fact that he could be dismissed if found guilty."

Lessons: The Tribunal expects international civil servants to maintain the highest standards of honesty and integrity. In disciplinary cases, it is imperative that staff members seek help immediately from the staff council or an attorney before answering any charges. This staff member did not have a convincing "innocent story" to tell to explain why the phone ended up in his home, why it was not returned for 2 months, and why the matter was not brought to the attention of the administration sooner. Moreover, he confessed to the theft as well. Absent regulations or rules to the contrary, once a staff member is given notice that disciplinary charges could result in dismissal if found to be true, the staff member is not entitled to any further advance notice of dismissal once the administration after investigation and before an appeal can be lodged decides that the charges are true.

Citations: Judgment Nos. 203, 999, 1133.

VII. Medical Related Decisions

Judgment No. 2512 (CERN)

Ruling: The impugned decision is set aside; payment of the benefit allowed in a case of occupational disability plus interest; 5,000 Swiss francs in costs.

Facts: In 1998, a long serving staff member was admitted to hospital after twice falling ill at work. She went on sick leave and initiated a procedure to obtain recognition that her illness was of occupational origin. An independent medical expert examined the staff member and determined that the staff member's illness was of occupational origin. However, the expert did not state when the illness had been "consolidated", which means under the rules the date from which the condition of the person concerned can no longer be expected to improve as a result of suitable medical treatment. Under separate provisions, the staff member was notified of her dismissal and that the illness was recognised as being of occupational origin. She then requested CERN to advise her of the degree of disability. As a result, a second expert was appointed. The expert determined that the illness was consolidated and the illness gave "rise to permanent disability of non-occupational origin of approximately 60 per cent". Even though the first expert determined that the illness was occupational, CERN relied on the opinion of the second expert to deny that the illness was occupational, and denied her request for a disability rating.

Analysis: The Tribunal refused to allow CERN to disaffirm its earlier position, based on the first expert's opinion, that the staff member's illness was occupational. CERN was therefore out of line in accepting the second expert's opinion that the illness was non-occupational. The second expert's inquiry should have been limited to the date of consolidation of the illness.

Lessons: Medical experts appointed under staff regulations should be asked very specific questions regarding the pertinent medical issues at stake under the regulations. Generally, once a finding has been made by one expert agreed to by the parties, the findings should stand.

Citations:

VIII. Application of National Laws

Judgment No. 2504 (Eurocontrol)

Ruling: Complaint dismissed.

Facts: The complainant was a Belgian national born who was employed from January 1995 by consulting firms and placed with the Agency to provide specialised computing support. On 7 May 2004, the Agency advised the consulting firm that its employee (complainant) would be asked to leave the premises with immediate effect and requested a replacement. The employee of the consulting firm brought an appeal of this decision to the Tribunal on the grounds that he was in reality an employee of the Agency under Belgian law, and entitled to the same remuneration and benefits as other officials. He requested reinstatement or, failing that, €500,000, and €7,120.52 euros per month “until the ruling on his reinstatement is delivered”, and €5,000 euros for moral injury.

Analysis: The Tribunal made short work of this appeal. It found that the complainant entered into contracts with the consulting firms which supplied his services to the Agency, but never with the Agency itself. He had not produced an employment contract with the Agency. The Tribunal found that certain evidence, which was intended to prove that the Agency was his true employer, in fact “only reflect the control which an international organisation is entitled to exercise, on its own premises, over staff providing services to it on behalf of an external employer”. In this respect, the complainant’s arguments based on the interpretation and application of Belgian law were of no avail and the Tribunal had no jurisdiction to hear the present case.

Lessons: In order to qualify as an employee of an international organization, it is usually necessary to have a contract of employment, even though it may be the reality in cases of consultants for example that working hours, sick and annual leave and overtime pay are determined by the organization. The Tribunal will not assess whether the individual is a staff member with reference to national laws unless the staff regulations and rules require reference to them, which could well establish an employee-employer relationship. If the person claiming to be an employee seeks to enforce his rights in domestic courts of the host country, the courts will dismiss the claims based on the organization’s immunity extended by the host country.

Citations: See also Judgment 2480 delivered in the 100th session. The Tribunal held in that case that the staff member’s claim that the organization was following instructions from the Swiss government were unfounded. The organization had published a circular announcing changes to Swiss marriage laws. The staff member’s spouse filed for divorce and in part it appears she relied on the changes to her benefit during the proceedings. The Tribunal held that the circular was for information purposes only, the staff member had not identified a decision based on the circular that had impacted him, and that the staff member was in reality seeking immunity from the divorce suit, although he did not from the record ask the organization to extend immunity to him.