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Semi-Annual Review

*International Labour Organization
Administrative Tribunal 101st Session*

Presented By:

*The Law Office of Laurence C. Fauth
1629 K Street, N.W., Suite 300
Washington, D.C. 20006
Tel. 202-204-2220
Fax. 202-331-3759
www.unattorney.com
info@unattorney.com*

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Introduction

I am pleased to present the Semi-Annual Review of ILO Administrative Tribunal Decisions decided during its 101st Session (and published in July 2006).

In this session, the Tribunal has changed direction and recognized the rights of homosexual staff members pursuant to a life partnership under German law and a registered partnership under Danish law. Judgment Nos. 2549 and 2550. Rejecting a “formalistic” approach, even if domestic law does not describe such legal relationships as marriage, or extend the same exact rights, the Tribunal will nonetheless recognize the partners in such legal relationships as “spouses” within the meaning of the organization’s regulations. These decisions appear to overturn the formalistic approach taken by the Tribunal of rights claimed under the French Civil Solidarity Contract in Judgment No. 2193. It remains to be seen whether the Tribunal would uphold a discriminatory definition of spouse contained in an organization’s staff regulations or rules.

In other significant cases, the Tribunal found a “gross abuse of power” by the Secretary of the ITU in retaliating against the Human Resource Director for the latter’s having exercised the right to appeal. Judgment No. 2540. The Tribunal in language not often seen in its rulings wrote: “it is a most serious breach of the rights of international civil servants to take retaliatory action simply because they have pursued an internal appeal. International civil servants – no matter how high their rank is – cannot protect their rights in national tribunals. Their only recourse is through the mechanisms established by the relevant Staff Rules. To punish a person because he or she has had resort to those mechanisms is a gross abuse of power warranting an award of substantial exemplary damages as requested in the second and third complaints.” This case is also instructive because the staff member used the internal appeal process effectively to protect his rights by challenging a number of adverse decisions.

In Judgment No. 2535, the Tribunal held that an organization cannot deny a promotion to which the staff member was otherwise entitled based on a lack of funds. In Judgment No. 2562, the Tribunal reiterated the right of staff representatives to file suit as representatives of the Staff Committee as the only way to preserve common rights and interests of staff. Finally, in Judgment No. 2529, the Tribunal held that since the CTBTO failed to provide feedback, training and guidance during a probationary period, the P-5 staff member was no longer required to obtain a certification of satisfactory performance at the end of the probation and thus the appointment should have been confirmed.

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. Same Sex Relationships

Judgment Nos. 2549 and 2550 (ILO)

Rulings: 2549: decision reversed; 10,000 SWF moral damages; and 3,000 SWF costs; 2550: decision reversed; 5,000 SWF moral damages; and 3,000 SWF costs.

Facts: Both staff members (a female Danish national and a male German national) had entered into same sex partnerships pursuant to laws passed in Denmark (Danish Act of 7 June 1989) and Germany (German Life Partnership Act (*Lebenspartnerschaftsgesetz*) of 16 February 2001). In January 2002, the Danish staff member submitted a Certificate of Registered Partnership and asked to be granted dependency benefits, designating her partner as her spouse. The German staff member entered into a life partnership in July 2002 and requested spousal benefits for his partner in October. The organization noted that it had already recognized same sex marriages when contracted lawfully in the staff member's home country, but since the governing bodies had not yet addressed same sex partnership laws, it had to deny the benefits.

Analysis: The Tribunal reiterated that "there may be situations in which the status of spouse can be recognised in the absence of a marriage, provided that the staff member concerned can show the precise provisions of local law on which he or she relies." In Judgment 2193, the Tribunal found that the provisions of French law governing the "civil solidarity contract" (*pacte civil de solidarité* or PACS) were not precise enough to show that the staff member's partner could be considered a spouse. In the latter case, the Tribunal noted that the French law drew a clear distinction between spouses bound by marriage and partners bound by a PACS, and that "it is only by virtue of special provisions that the latter are entitled to certain benefits available to spouses." The Tribunal then analyzed the Danish and German laws.

With respect to the Danish Act, while it drew a distinction between registered partnership and marriage, the Danish law nevertheless applied provisions of the law equally to marriages and spouses and registered partnerships and registered partners. The latter, however, were excluded from the application of the provisions of the Danish Adoption Act. The Tribunal did not find this difference nor a few others as having significance. According to the Tribunal, the legislation pursued a "**policy of assimilation**". With respect to the German law, the Tribunal cited the German Federal Constitutional Court which found that the rights and obligations for same-sex life partnerships are equal or similar to those for marriage. The Tribunal also noted that the German law pursues a policy of "**assimilation**" and cited a Federal Labour Court decision which ordered the payment of family allowances to German civil servants living in partnership and governed by a collective agreement according to which such allowances were payable to married officials.

Lessons: The Tribunal has stepped back from its narrowly drawn decision in Judgment No. 2193 (rejecting French PACS as the source of rights to spousal benefits) which articulated the view that as long as the domestic legislation drew a "clear distinction" between same sex relationships and traditional marriages, the Tribunal would not extend the definition of spouse to the same sex relationship. The Tribunal has articulated a broader standard and will assess whether the domestic legislation seeks to place same sex partners on an equal footing with spouses, i.e., whether the country is pursuing a policy of assimilation.

Citations: Judgment Nos. 1715, 2193.

II. Contract Extensions/Termination/Probation

Judgment No. 2529 (CTBTO)

Ruling: Decision set aside; 2 years salary and emoluments ; €10,000 moral damages; and €5,000 costs.

Facts: In August 2003, P-5 staff member joined the organization under a fixed term contract of three years subject to satisfactory completion of six months of probationary service. At six months, the supervisor recommended that the probationary period be extended in order to provide more time to assess the staff member's work due to the complex nature of the job and due to the staff member's personal difficulties (as his wife was sick). The supervisor assured the staff member that he was confident the staff member would meet expectations. At the conclusion of the extended probationary period, his supervisor wrote in the second appraisal that he could not recommend confirmation of the appointment. During the six month extended probation, neither the supervisor nor other senior officials provided any written warnings of poor performance. The staff member was given notice of termination and placed on special leave with pay. He took two actions: he challenged the performance appraisal and lodged an internal appeal of the decision to terminate his probationary appointment. The panel that heard the performance report rebuttal found that the performance report contained a "significant number of material deviations from due process" and that it was "not 'frank, fair, and factual' or 'objective'", and recommended that the report not be maintained. The Executive Secretary decided that the performance report would not be maintained but did not concede that the consequence of setting aside the report would be that the decision to terminate the staff member's appointment could not stand. Instead, the Executive Secretary proposed that another review of performance be undertaken by another panel following the preparation of a new appraisal report by his supervisor, and both the supervisor and the staff members allowed to present their views to the new panel. The staff member objected to and did not participate in the proceedings of this second review panel. The second panel found that the staff member was not provided written warning but had received oral warnings from his supervisor. It also found that his subordinates told him that he was "falling short". It found that the second appraisal was "consistent". Based on the second panel's report, the Executive Secretary upheld his decision to terminate the probationary appointment. The internal appeals panel recommended that the decision be set aside because of lack of written warnings and feedback. The Executive Secretary rejected the recommendations on the grounds that the extension of probation by itself was the most explicit warning that performance would have to improve or risk termination.

Analysis: The Tribunal found that the staff member acted appropriately in rejecting to participate in the second panel review: "the [original] unfavourable performance appraisal report had been set aside and since the organisation was in breach of its obligation to provide him with any necessary training, guidance and support during his probationary period, his completion of his initial appointment term of three years was no longer subject to the condition that he receive certification of having given satisfactory service during probation". The staff member had been concerned that failure to participate could result in a misconduct charge.

It also reiterated its voluminous case law to the effect that an organisation owes to its employees, especially probationers, a duty to guide them in the performance of their duties and to warn them in specific terms if they are not giving satisfaction and are in risk of dismissal. The Tribunal found that alleged verbal warnings and criticisms from the subordinates was clearly not enough. The Tribunal also held that the mere fact of extension of probation is not by itself sufficient to constitute a warning of poor performance.

Finally, the Tribunal found that the second review panel improperly shared certain details of the staff member's performance appraisal reports with some of his subordinates and peers, thereby breaching his right of privacy and aggravating his damages.

Lessons: Staff members on probation, no matter how senior the post, are entitled to have objectives set in advance and generally should be given necessary training, guidance and support if improvement is needed. It is also significant that if an international organization does not fulfil the obligation to provide such assistance, the condition that service must be certified as satisfactory in order to confirm the appointment is no longer valid (unenforceable). However, this case is not easily squared with another case decided in the same session in Judgment No. 2558. In the latter case the Tribunal held that the decision to terminate the probation was lawful even though the staff member did not receive the training should would have needed. The Tribunal found that the staff member's "performance was assessed objectively and consistently in the light of the whole period covered by each of the two reports", and that she had been given warnings of poor performance, findings which were determinative.

Citations: Judgment Nos. 1212, 2414.

Judgment No. 2531 (WTO)

Ruling: Claims dismissed; three months salary and allowances for failure to give adequate notice; and SWF 2,000 in costs.

Facts: The staff member was employed by the WTO from 2 January 2001 to 30 January 2004 as a clerk in the editorial unit, on the basis of regularly renewed short-term contracts. Prior to that, between 1998 and 2000, he had worked periodically as an usher or clerk. A post encompassing the duties he performed in the editorial unit was created in October 2003. The staff member applied for the post, but the interview board recommended that the post be offered to another candidate. As a result the staff member's last contract, for the period to 30 January 2004, was not renewed. He was notified of the decision by registered letter which he received on 28 January 2004. He appealed on the basis among other things that the candidate appointed was unqualified. The Joint Appeals Board concluded that the decision not to renew the staff member's contract was not legally flawed and the Director-General confirmed the non-renewal decision. On appeal to the Tribunal, he alleged that he was subject to prejudice in the selection procedure by the comments of his supervisor and that he did not receive sufficient notice of the decision.

Analysis: The Tribunal rejected the argument that the selected candidate was unqualified for the post. The assessment of the interviewed candidates and the selection itself cannot be rejected by the Tribunal absent error of law or of fact or abuse of authority. The staff member also did not show that he was unfairly considered for the post even though it accepted that his relationship with the supervisor was "strained" and working conditions inadequate. Those considerations were unrelated to the reasons why another candidate was selected. With respect to the non-renewal of the contract, the conversion of his job as a clerk into a permanent post did not entitle him to remain in the job once he had failed to be selected for the permanent post. The organization was not obliged to do give him another post once his short-term contract had expired since the rules on short-term contracts provides, "[c]ontracts under these rules carry no expectation of renewal or of conversion to any other type of contract". With respect to whether the staff member had received adequate notice of the non-renewal, the Tribunal noted that precedent requires the staff member be given "reasonable notice", so that the affected staff member may exercise their right to appeal and take whatever action may be necessary. The organization argued that the announcement of the competition for the post in October 2003 constituted the "reasonable notice" required by the case law and that, from that date onwards, the staff member knew full well that if he was not selected he would not continue working for the WTO. Since the staff member had been with the organization for a number of years, the Tribunal decided two days notice was too short, and awarded compensation equivalent to three (3) months salary and allowances, and costs.

Lessons: Staff members who have served for a number of years are entitled to reasonable notice and generally in writing. It is not enough for international organizations, in the absence of written notice to the staff member, to argue that the staff member knew the appointment would not be extended when it comes indirectly from other sources. The Tribunal unfortunately did not find a duty to give him another post on the basis of the boilerplate clause that the contract contained no expectation of renewal or conversion.

Citations: Judgment No. 2104.

Judgment No. 2544 (ILO)

Ruling: Decision maintained; 10,000 SWF moral damages; and 2,000 SWF costs.

Facts: In August 2002, staff member was appointed under a two-year fixed-term contract as a project expert. In March 2004 a new expert was appointed and the staff member was assigned to other tasks unrelated to the project. In May, he was orally advised that his contract would not be renewed. He requested written confirmation of the decision and his supervisor sent him an e-mail of 7 July 2004 reminding him that his contract would not be renewed. The project for which he was recruited was extended. After two meetings a note was sent to him attributing the non-renewal of his contract because of his unsuitability for the tasks for which he had been recruited and his poor performance. In his internal appeal, he pointed out that the ILO's constant and recognised practice was to give two months' formal written notice of a decision not to renew a contract. He also never received a performance appraisal. The Joint Panel rejected his argument that the decision not to renew the contract was unlawful and found that the staff member knew that his contract would not be renewed when he was relieved of his project duties. It recommended two weeks salary since the ILO failed to complete a performance appraisal.

Analysis: The Tribunal agreed with the Joint Panel that the staff member could not have been unaware of the intention not to renew his contract since he was relieved from all of his project duties in May 2004. He also acknowledged his awareness of the decision by asking his supervisor for written confirmation. The Tribunal therefore found that the ILO followed its practice of giving at least two months' notice. With respect to the non-renewal of his contract itself, the Tribunal found that the ILO breached its fundamental obligation of completing a performance appraisal report before making the decision, which constituted a procedural flaw and an error of fact. The Tribunal rejected the argument that the staff member failed to complete the form, which was sent in January 2004. The ILO took no further steps and thus failed to make every effort to ensure that the appraisal was duly drawn up even if the staff member did not participate.

Lessons: Performance appraisals are a fundamental obligation of international organizations, and normally any decision resting on unsatisfactory performance taken without an appraisal will be unlawful.

Citations: Judgment Nos. 1351 and 2096.

III. Harassment/Abuse of Authority

Judgment No. 2540 (ITU)

Ruling: Decisions set aside; 10,000 SWF material damages; 25,000 SWF moral damages; and 25,000 SWF exemplary or punitive damages.

Facts: In 1999, staff member joined the ITU as Chief of the Personnel and Social Protection Department at grade D-2, on secondment from the ICAO. In 2002, he applied for the post of Director of Administration with the ICAO. After he informed the ITU Secretary-General of his candidature for the post, the Secretary-General offered to extend his contract from 1 November 2003 until 28 February 2006, the date on which the staff member would reach the mandatory retirement age at the ITU on the condition that he withdrew his application for the ICAO post. The staff member accepted the offer and withdrew his application. The Secretary-General confirmed the agreement by a letter of 29 January 2002. The final paragraph of that letter provided: “The contract extension from 1 November 2003 until 28 February 2006 will be issued at least four months before 1 November 2003.” He was transferred to the ITU in November 2003, and had no return right to the ICAO where his normal retirement age would have been 62 as distinct from 60 years of age with the ITU.

In the meantime, the staff member’s contract was extended from 1 November 2003 until 31 December 2004. The staff member requested that his contract be extended to February 2006 as per his agreement with the Secretary-General. The Secretary-General refused and the staff member objected in a memo in which he recounted what the Secretary-General had told him: “that in Japan staff at levels D.1/D.2 would never appeal”; “that [he] thought that the letter of 29 January 2002 did not bind [him]”; “that in Japan a Chief of Personnel would not protect himself while other staff were in a precarious position”; and “that staff members at D.1/D.2 level are more or less political appointees who should resign when executive heads change”. The memorandum also contained the following: “You urged me not to appeal and advised me that if I lodged an appeal I would lose the respect of the ITU staff and Member States’ delegates and that you would have no more confidence in me.” The Secretary-General returned the memorandum to him with a handwritten note stating: “I did not urge you at all. I said ‘you can make an appeal but it will be a silly action.’” He did not dispute any of the other statements in the staff member’s memo.

After the staff member lodged an internal appeal of the decision not to honor the agreement, the Secretary-General advised him that, if he did not withdraw his appeal, “the relationship of trust [...] could not be restored and without it [he] could not continue functioning as the Chief of Personnel”. The Appeal Board recommended that the Secretary-General sign an extension of the staff member’s contract within 60 days. The Board rejected the claim for moral damages and costs, which was the subject of the first complaint to the Tribunal.

In August 2004, the staff member’s contract was extended until February 2006.

In September 2004, the staff member was transferred to the post of Special Advisor with effect from 1 September. The staff member challenged this decision on the grounds that it was a disciplinary measure and was an abuse of authority. The Board decided that the transfer was not regular and that in order to “remain valid” the transfer decision had to be accompanied with assurances that the post of Special Advisor would “continue to be funded”

for the staff member's normal term of appointment. The Secretary-General did not respond to the report of the Appeal Board.

In October 2004, a vacancy notice was issued for the staff member's post, and he challenged that as well. Finally, in November 2004, in a memorandum the Secretary-General accused the staff member for a "lack of professionalism" and "poor performance" in the discharge of his duties as Senior Security Officer. The staff member challenged the memorandum.

Analysis: The Tribunal first rejected the ITU's argument that the appeal was moot since the staff member's contract had been extended to February 2006 as originally promised. The staff member had sought moral damages and costs in his first internal appeal which were rejected, so those claims were still alive. The Tribunal also rejected the ITU's argument that the issuance of the vacancy notice for his post was not a challengeable decision. The Tribunal found that the vacancy notice was in substance a decision to dismiss him from the post to which he had originally been appointed, and therefore the claim was also receivable.

On the merits, the Tribunal found that the ITU was in breach of the agreement to extend staff member's contract to the end of February 2006. The staff member had fulfilled his side of the bargain by withdrawing his application for the ICAO post, and after his transfer to the ITU, had surrendered his right to return to the ICAO. He was therefore entitled to have the agreement made with the Secretary-General performed according to its terms. When that became temporarily impossible, it was for the staff member to decide whether to repudiate the agreement and claim damages for its breach or to affirm it. He chose to affirm the contract, thereby extending the time for performance until November 2003. The Tribunal also found that the Secretary-General's "unilateral disregard" of the staff member's rights also constituted a failure to respect his dignity. Those failures were compounded by the efforts to have the staff member withdraw his first appeal and apologise for asserting his rights, and warranted an award of moral damages.

With respect to the decision to detach the staff member from his post and assign him as Special Advisor, the Tribunal was upset. The ITU justified these decisions on the loss of confidence for the staff member having abused his right to appeal. According to the Tribunal, the asserted loss of confidence could only be for the staff member's failure to accede to the Secretary-General's unilateral and wrongful refusal to grant the requested contract extension. In these circumstances, the Tribunal said "no matter how they are rationalised, the detachment decision, the transfer decision and, ultimately, the decision in substance to dismiss the complainant from the post to which he had been appointed, can only be viewed as retaliation for his having pursued his appeal [and] motivated by an improper purpose". The Tribunal issued a clear and concise statement of its views on retaliation for exercising the right to appeal: "it is a most serious breach of the rights of international civil servants to take retaliatory action simply because they have pursued an internal appeal. International civil servants – no matter how high their rank is – cannot protect their rights in national tribunals. Their only recourse is through the mechanisms established by the relevant Staff Rules. To punish a person because he or she has had resort to those mechanisms is a gross abuse of power warranting an award of substantial exemplary damages as requested in the second and third complaints."

Lessons: This case is a significant reminder that the Tribunal will not accept retaliation by an organization when a staff member exercises the right to appeal, regardless of the level of the staff member. This is a rare case in that the Tribunal was presented with overwhelming

evidence of the retaliation in writing from the head of the organization. This case also demonstrates how a staff member can go on the offensive by challenging timely a series of adverse decisions, including the decision not to honor the agreement, the decision to assign him to the post of Special Advisor, and the advertising of his post.

Judgments No. 2552 and 2553 (IAEA)

Rulings: Complaints dismissed.

Facts: Judgment No. 2553: In a memorandum dated in April 2004, the Head of the In-Service Administration Unit wrote that the staff member has “for several years . . . shown a consistent pattern of formulating his correspondence with colleagues in a rather superior and impolite manner, while on the other hand distorting statements of other staff members in order to make them appear to be attacks on himself [...]”. The staff member found the use of the word “impolite” in the statement offensive, and in May 2004 filed a harassment charge pursuant to the Agency’s written policy contained in SEC/NOT/1922. In July 2004, the staff member was informed that the Deputy Director General in charge of the Department of Management had decided that there was no harassment. The staff member appealed the decision. The internal appeals board concluded in its report issued June 2005 that the statement was not harassment and recommended dismissal of the appeal, which the Director General followed.

Analysis: The Tribunal stated that the Agency’s definition of harassment is broad and “requires reasonable interpretation and application to the circumstances of each particular case . . . [since it] contains both subjective and objective elements.” With respect to the Agency’s policy the Tribunal set forth a number of significant factors it will consider in examining a claim of harassment that has been rejected by the Director General. First, did the alleged victim actually feel humiliated, offended or intimidated by the impugned conduct, and was such conduct, viewed objectively, of a nature reasonably designed to humiliate, offend or intimidate? Second, if the conduct consisted of words, whether the words may or may not reasonably be true is relevant (as a defense). In some cases, the words may refer to the performance of duties. In other cases, the words may be merely gratuitous comments having no relationship to Agency business. Third, the Tribunal will review the personal characteristics of the victim (gender, race and ethnicity) as well as the reasonableness of the sensitivities of the alleged victim along with any previous history of relations between the alleged victim and the alleged offender. Finally, while a single injurious action may by itself be enough to constitute harassment, an otherwise apparently inoffensive comment may, with repetition, become a legitimate source of grievance. The Tribunal held that “in the final analysis, the question as to whether any particular act or series of acts amounts to harassment is one of fact to be answered only after careful consideration of the above factors and an examination of all the surrounding circumstances”.

With respect to the staff member’s harassment claim, the Tribunal held that the conclusions of the internal board were “unimpeachable”: “that use of the word ‘impolite’ [...] in describing in the course of a single memorandum the [staff member’s] conduct in a number of incidents, could not in itself be regarded as harassment”. The Tribunal also found that if the staff member found the words offensive, it was the product of the staff member’s hypersensitivity.

Judgment No. 2552: The same staff member filed a similar charge of harassment against another staff member in April 2005 and the Agency acknowledged soon thereafter that the matter would be investigated. In early August 2005 he lodged an appeal with the Tribunal

stating that the Agency had not notified him of the outcome of the investigation in more than two months and therefore an implied decision had been taken to reject his harassment charge. He claimed material and moral damages. The Agency sent formal notice dated 9 August advising that there was no evidence of harassment and the case had been closed, but the staff member did not receive it until late August or after he filed his appeal with the Tribunal.

Analysis: The Tribunal held that the filing of a harassment claim does not constitute a claim against the organization but is a charge of misconduct, which is a serious matter that requires a thorough investigation and full due process and protection to the person accused. The completion of such steps would be very difficult within 60 days, and there is no presumption of rejection of the accusation flowing from the mere passage of time. The Tribunal found that the staff member's accusation was investigated by the administration and dismissed by a decision of 9 August 2005, well within the time frame set by the applicable rules. The staff member did not appeal that decision, and therefore the complaint was irreceivable for failing to exhaust internal remedies.

Lessons: The Tribunal, while rejecting the appeals in these cases, provided some important lessons for international civil servants seeking redress for claims of harassment. Significantly, merely lodging a complaint of harassment is not enough to assert a claim against the organization. The organization is merely obligated to investigate the claim, and even if the organization finds evidence of harassment, the staff member is not thereby automatically entitled to any relief; the investigation is rather more concerned with whether there was misconduct committed by the offending staff member. Most organizations can drop a disciplinary case almost without any investigation. Once the victim has been notified of the outcome of the investigation, an appeal can be lodged of the decision in addition to a claim for damages. The Tribunal gives organizations latitude in conducting investigations as long as the internal rules are being followed, and in some cases they can last for years. In this regard, it is up to the staff member to review the relevant staff regulations, rules or other legislation governing such investigations. If the procedures are not followed, there is a solid claim to breach of due process. The breaches of due process must be raised in the internal appeal.

In my view, in order to increase the chances of success and to take charge of your own claim when you have been harassed, I recommend making a claim for monetary damages to the head of the organization simultaneously with lodging the harassment misconduct charge. When the claim for damages is rejected (normally within 1 or 2 months), an appeal can be lodged internally and the staff member can then present his or her own witnesses and evidence before the internal appeals panel, i.e., control the investigation. The organization's internal investigation of an harassment claim is normally motivated by and determined by political considerations, i.e., whether the victim or the accused has the favour of the administration. The investigator or official body investigating the claim (the Office of Internal Oversight at the IAEA, for example) can decide on its own which evidence to seek, reject and/or accept as relevant or significant, and thereby drive the outcome of the case.

IV. Classification/Promotion/Equal Pay

Judgment No. 2530 (FAO)

Ruling: Decision set aside; remanded to the organization's appeals committee; and €1500 costs.

Facts: The P-5 staff member joined the FAO in 1993, and in 1996 he became Chief of one of the branches. In September 2001, he asked that his post be regraded to D-1, and reiterated this request from time to time thereafter. In 2002, there was a restructuring of his Division, resulting in a redesignation of his post to senior officer effective 1 August 2002. He formalized his request for regrading of his post also in August 2002. After the restructuring, the staff member noticed a substantial reduction in the level of his duties and responsibilities although there was no change in his post description, eventually to the point in April 2003 that he believed he had been demoted. He lodged an internal appeal for the lack of action following his request for review of his post and against the demotion.

The staff member was informed that a desk audit of his post would be conducted as part of a classification review process and the remainder of his appeal was dismissed as "not receivable and unfounded". The FAO Appeals Committee found that there had been "inordinate delay" in the conduct of a desk audit. However, it considered that it was not competent to make its own assessment of the staff member's duties and stated that a desk audit was the only means available to address the question of regrading. On the question of demotion, it concluded that as an appeal had not been lodged with the Director-General within 90 days of the notification of redesignation, his appeal to the Appeals Committee was time-barred. The Director-General followed the Committee's recommendation. On appeal to the Tribunal, he sought compensation equivalent to the aggregate increment in salary and pension entitlements that he would have received had his post been regraded to D-1 in September 2001 and moral damages.

Analysis: The Tribunal reiterated that an individual administrative decision can only be challenged within the time set by the relevant staff rules. It found that the staff member was not challenging the decision to redesignate his post to Section Chief following the restructuring. He was clearly challenging a course of conduct involving both "lack of action" on his request to have his post regraded and an implied decision involving the reduction in the level of his duties and responsibilities which only became apparent many months after the redesignation of his post. Since that issue was never examined by the Appeals Committee, the Tribunal held it constituted an error of law and set aside the decision. The Tribunal did not reach the merits of the staff member's argument but referred it back to the Appeals Committee to consider whether he suffered a reduction in the level of his duties and responsibilities. He was awarded his costs.

Lessons: This case demonstrates that the Tribunal does have exceptions to its draconian rule that a staff member must file the appeal within the time limits or the appeal is irreceivable. In this case, the staff member challenged the steady reduction in his level of duties to the point that it was obvious he had been demoted.

Citations: Judgments 1132, 1393, and 955.

Judgment No. 2548 (ILO)

Ruling: Complaint dismissed.

Facts: The staff member held the post of statistical assistant at grade G.6. In June 2000, the administration sent him a description of his work assignments, and in March 2001 he was informed that his post was classified at grade G.6. He challenged that decision in May 2001 and requested regarding the post to the P.4 level. After the Director confirmed the grading, he requested a review by the IRG, the body responsible for reviewing grading decisions. The IRG recommended in its report to maintain the post at grade G.6. In October 2003, the staff member referred his case to the Joint Panel, which confirmed the IRG's decision and stated that the staff member was entitled to request a further review of the grading. The Director General endorsed the Joint Panel's recommendation. Instead of lodging an appeal with the ILOAT, the staff member filed a grievance. The Ombudsperson proposed to conduct an external independent evaluation of the work performed by a neutral statistical expert. This was not implemented and the staff member lodged an appeal. The internal panel recommended to implement the Ombudsman's proposal for appointment of an independent expert acceptable to both parties. The Director General did not follow that recommendation, which was the impugned decision.

Analysis: The staff member principally sought to challenge the original decisions finding that his post was properly graded at G-6. He requested that the organization be ordered to draw up an accurate job description. The Tribunal stated that it "will not call into question the findings of the internal bodies endorsed by the decision of 27 February 2004, against which no appeal was filed, namely, that the complainant occupied a post of statistical assistant graded G.6 and that he had already received the job description corresponding to that post's functions and attributions". The Tribunal rejected the argument that the grading of the post should account for the qualifications and experience of the incumbent, and held that "the level of a post must be determined not according to the abilities of the incumbent but rather to what the post is supposed to offer a programme, a service, a department or even the Organization as a whole." The Tribunal rejected the claim that the staff member was treated with lack of good faith or with dignity. Finally, the Tribunal held that the Director General was within the law in rejecting the Ombudsman's proposal to appoint an independent expert since he provided adequate explanation for not following that course. The Director General had advised that there was no procedure providing for the establishment of a post's job description by a third person independent of the Office, that the tasks pertaining to his post had already been considered by the IRG as part of the job grading exercise and that he was given the opportunity to submit whatever information he considered appropriate regarding the tasks assigned to his post, and that the procedure is now closed. The Director General nevertheless advised him that he could seek a grading review under the applicable circular. The Tribunal did not undertake any assessment of the validity of these reasons.

Lessons: The staff member's mistake in this case was failing to appeal the final administrative decision and instead lodging a grievance. He should have done both. The Tribunal clearly viewed this case as an effort to lodge an out of time challenge to the original grading decision. Absent breaches of procedural rules on grading or classification exercises, the Tribunal will not interfere.

Citations: Judgment No. 2339.

Judgment No. 2535 (UNIDO)

Ruling: Decision set aside; arrears of salary and allowances, and interest at 8 per cent.

Facts: In March 1999, P-4 staff member took up a field assignment in Teheran, Iran at the same P-4 level he held at headquarters. Seven months later he requested a promotion to the P-5/L-5 level since at the time he applied for the field assignment “it was custom to increase the grade of staff rotating to the field”. The staff member’s supervisor supported the request for promotion. By letter dated 21 March 2000, the staff member was informed that the conversion of his P-4 level to the level L-5 had been approved with effect from 1 March 2000. The staff member then requested that the promotion be made effective from the date he took up the assignment on 1 March 1999. That was denied, and he appealed. The internal appeals board recommended that “the conversion of the [complainant’s] assignment as UNIDO Representative in Iran to level L-5 take effect retroactively, from 1 July 1999, consistent with those colleagues fielded around the same time”. The Director-General rejected the recommendations.

The organization argued that there was no practice to justify the request for the P-5 level, and the staff member accepted the assignment at the P-4 level. It also stated that in December 1997 there was a major budget reduction, followed by policy changes, and that staff were advised all job descriptions would be reviewed and that postings would remain at the same level. With respect to the promotion, the organization argued that it becomes effective only on the date the decision is taken and not on the date the staff member assumes the responsibilities of a higher level post.

Analysis: The Tribunal noted that the staff member requested the promotion more than seven months after he was assigned to Iran. The Tribunal did not find a practice of promoting staff members immediately upon taking up the field assignment. The staff member’s post was classified as P-5 as of 9 September 1999, which “was the last obstacle to the complainant receiving the promotion to which his transfer to the field should have entitled him”. The organization denied the promotion because the budget did not provide funds for the post until January 2000. Significantly, the Tribunal held that the “lack of budgetary provision is not a reason which can be validly invoked by an international organisation to deny a staff member a promotion to which he or she would otherwise have a right and to deny him or her the salary which is commensurate with the duties of the post occupied”. The Tribunal ordered the organization to make the promotion effective to September 1999 when the post was classified to P-5. The Tribunal denied the claim for moral damages and costs since the organization’s reasonable settlement offer (matching closely the recommendation by the internal appeals board) was rejected by the staff member (the Tribunal “encourages parties to settle their claims and will make no award of moral damages or costs where a reasonable settlement offer has been rejected”).

Lessons: The Tribunal rejected the difficult budgetary reasons cited by the organization in defense of its decision to delay implementation of the promotion. The principle underlying the decision is equal pay for equal work. In effect, the organization was in effect paying the staff member a P-4 salary for P-5 work. Finally, the Tribunal raised an important point regarding settlement. Staff members must be careful to decide whether the settlement offer by the organization is reasonable before rejecting it. That is of course highly subjective – the Tribunal will normally hold that the amount the internal appeal board recommends is reasonable.

Judgment No. 2557 (EPO)

Ruling: Decision set aside in part; €20,000 in material damages; €5,000 moral damages; and €1,500 in costs.

Facts: In April 1999, this staff member was hired by the EPO (Munich) as an administrative employee at grade B1, although she worked previously as a consultant (journalist) for the EPO. In October 2000 she applied for the post of journalist, in the grade group A4/1, with the EPO PRAPECOM project in The Hague. The EPO later decided not to fill that post. In December 2000 she was offered and accepted the post of Administrative Employee-Floater in The Hague at the same grade and step as her post in Munich, and was informed that her manager would be the person responsible for the PRAPECOM project. She commenced work in February 2001, and was assigned work as a journalist immediately. She continued to perform that work for the next two years. She was promoted to grade B2 in December 2001. After she sought in August 2002 reclassification of her post to category A, and filed an internal appeal, she was placed under the direct responsibility of the Director of Personnel. Although a number of requests were made from other staff members for her to perform work as a journalist, the requests were denied on the basis that her post classification appeal was pending. Shortly thereafter she went on sick leave for a period of some 8 months because of psychological stress. The Appeals Committee recommended that she be paid compensation for the work she had done as a journalist, which was well above the B5/B1 level. It rejected the claim for reclassification, harassment, and costs. The EPO decided to reject the recommendation and instead compensate her an amount equal to a little over 5,000 euros.

Analysis: The Tribunal reiterated that it would not reclassify the post for her as it was the “prerogative of the executive head of an international organisation to redefine the functions of a post and to determine the qualifications required for it [and] the same is true of the initial definition of the duties of and qualifications for a post”. The Tribunal therefore denied her claim for reclassification. However, the Tribunal decided that the EPO was not entitled to place the staff member in an administrative post and then assign her duties as a journalist at a higher level. The Tribunal held that this was a failure to act in good faith and to respect her dignity. The Tribunal did not find retaliation even though it was clearly troubled by the fact she was assigned administrative tasks following the filing of her internal appeal. The Tribunal did not find any evidence that her illness was connected to her employment and therefore rejected the harassment claim. With respect to the issue of the appropriate level of compensation for the unequal pay for a period of 2 years, it awarded global damages. The Tribunal awarded costs even though the staff member was represented by a fellow staff member “free of charge”.

Lessons: If a staff member is clearly performing services at a higher level, a claim for compensation at the higher level will with solid evidence succeed under the principle of equal pay for equal work. The Tribunal reiterated that it will not engage in classification exercises.

Citations: Judgment No. 2373.

V. Reorganization

Judgment No. 2562 (EPO)

Ruling: Dismissed.

Facts: In July 2004 a new President took office at the EPO and announced a reorganisation of the President's Office which introduced a Head of Office. The Head of Controlling was detached from his function and assigned as Head of Office. The Principal Director was detached for one year from his functions to fill the gap in controlling. The Chairman of the Central Staff Committee filed appeals in his personal capacity and as staff representative. He argued that the reorganisation of the President's Office in July 2004 amounted to the creation of new posts and the filling of the posts by the appointment or transfer of employees without proper advertisement, competition and selection. No reply to these appeals was received within the two following months and therefore deemed to be rejected pursuant to the appeal regulations. The Chairman filed an appeal directly with the Tribunal.

Analysis: *Standing.* The organization challenged the standing of the Chairman to bring the appeal in his personal capacity and as Chairman of the Central Staff Committee. The Chairman argued that staff members were unable to apply for the post of Head of the Office, and so it would be difficult if not impossible to find an individual staff member who would have had clear standing to lodge an appeal in this case, and that he must be given standing in his personal capacity else the appointment could never be contested. The Tribunal rejected those arguments and noted that the internal appeal procedure is generally an individual appeals system, as is the complaint procedure before the Tribunal. Since the Chairman held the grade A3, he could not have been considered for appointment or transfer to any A6 position, and did not have standing in his personal capacity. On the other hand, the Tribunal held that individual members of the Staff Committee must have the power to file suit as representatives of that body. The rationale is that if the Staff Committee is not able to file suit, the only way to preserve common rights and interests of staff is to allow individual officials to act as representatives. This principle was also consistent with the regulations which provide that elected staff representatives have a duty to "represent the interests of the staff". The Chairman therefore had *locus standi* to bring a complaint on behalf of the Central Staff Committee.

Merits. The Tribunal found that the changes to the President's Office in July 2004 did not amount to the creation of a new structure or of any new posts, but to the organisation of work within the President's Office, a matter well within the President's authority to organise his own Office to be as efficient as possible. There was also no evidence to support the suggestion that the reorganisation was in some way an attempt to evade or avoid the provisions of the regulations concerning the appointment and promotion of staff.

The Chairman also argued that the organization breached its duty to consult the General Advisory Committee (GAC) which mandates communication with staff representatives. The Tribunal found that consultation was not necessary. The Tribunal noted that its previous decisions varied with respect to the EPO. In 3 of 4 cases, the Tribunal found a duty of consultation: covering changes to the Service Regulations to allow the employment of contract staff, on plans to raise standards of productivity, and on a proposal to raise employee contributions to the costs of death and invalidity insurance. The Tribunal found no duty to consult on guidelines for the recruitment procedure for Vice-Presidents. The Tribunal

decided the current case did not cast a wide enough net to require consultation and that the President's measures to use "on loan" staff were temporary, and there was no evidence to show the practice had become widespread or that there had developed a policy. The Tribunal rejected the argument that the new President gave himself new, wide-ranging powers.

Lessons: The Tribunal will not interfere with decisions assigning "staff to different posts" (Judgment 534), and changing "the duties assigned to subordinates" (Judgment 265). This case is particularly significant for reiterating that staff representatives, in the absence of injury to any specific staff member, may lodge appeals in their capacity as staff representatives on behalf of the staff association executive committee to preserve common rights and interests.

Citations: Judgments 1315, 1392, 1147, 1269, 1315, 2036 (standing); Judgments 534, 265 (authority to assign staff different posts and duties); Judgments 1618, 1488, 1062, 2036 (duty to consult general advisory committee).

VI. Pension Rights

Judgment No. 2527 (EPO)

Ruling: Complaint dismissed.

Facts: An examiner along with several colleagues sought to have their payments to the Italian pension scheme paid to the EPO's scheme. At the time of the request, the EPO did not have an agreement in place with the Italian national pension scheme (INPS) allowing for such transfer. The EPO had such an agreement with Germany, which according to the examiner resulted in unequal treatment among staff members. The EPO replied that it was studying the possibility of amending its regulations to "facilitate the transfer of pension rights". The examiner then asked that the EPO conclude a transfer agreement with the INPS. The internal appeal was unsuccessful.

Analysis: The Tribunal reiterated that it may not order an organisation to seek an agreement with any State or institution, so it could not order the EPO to conclude a transfer agreement with the INPS. With respect to the unequal treatment argument, the Tribunal found that it was "regrettable" that a transfer agreement had not been reached between the EPO and INPS, which had left some staff members at a disadvantage, but it would not order the EPO to amend its regulations making it liable for such payments. However, it left open the possibility of some relief if the EPO had shown negligence or ill will in resolving the issue with the Italian government. In this case, it found that the EPO had pursued an agreement with Italy as early as 1992 and, although the effort had been unsuccessful thus far, it was not the fault of EPO.

Lessons: The Tribunal will not direct an organization to reach agreements with national governments. However, if a staff member is adversely affected vis-à-vis other staff members by the lack of an agreement with a national government, the organization has a duty of good faith to seek an agreement.

VII. Medical Related Decisions

Judgment No. 2533 (OPCW)

Ruling: Imposition of settlement terms; €5,000 costs.

Facts: The staff member joined the Organisation at the age of 33 in April 1997 as a computer technician. On 15 January 2002 he severely injured his left foot which developed into an illness known as reflex sympathetic dystrophy which caused him loss of mobility in his legs. He underwent numerous operations, and suffered chronic pain and was eventually confined to a wheelchair. He exhausted his sick leave on 7 August 2003 and was declared totally disabled. Up until his separation from service on 31 January 2005, he tried to reach agreement with the organization on terms of compensation for his injury unsuccessfully. The organization's last offer included the following:

1. a life-long annual compensation of 38,755.33 euros;
2. a lump-sum compensation for permanent loss of function of both legs in an amount of 208,154 euros;
3. an annual lump sum for (non-nursing) in-home personal care of 28,800 euros (2,400 euros per month);
4. the payment of premiums for medical care for the staff member at an annual cost of 2,808.64 euros until he is able to join the national health system in the Netherlands; and
5. an *ex gratia* payment of 150,000 euros.

The staff member disagreed with the amount for in-home care, and sought an additional payment to adapt his home and car to his disability (approximately €90,000), which the organization argued was included in the *ex gratia* payment. The organization waived the internal appeal process to allow the staff member to file an appeal directly to the Tribunal. He argued that his compensation should be measured by the failure of the organization to provide a safe working environment under principles of negligence (degree of fault in causing his injury).

Analysis: The Tribunal first addressed the issue of negligence. It found that the obligation to compensate him adequately for his work-related injuries arose from his contract, and is not dependent upon any question of negligence or fault on the organization's part. The question of negligence is therefore irrelevant. If there had been evidence of gross or wanton negligence, the Tribunal may have reached the question whether punitive or exemplary damages would be appropriate.

With respect to the in-home care payments, the Tribunal found that the organization's rules provided that he should be reimbursed for the "reasonable cost" of such care. The Tribunal rejected the organization's argument that this care would not be needed constantly since some of the personal care would be provided by his wife and his nurse. The Tribunal held that the reasonable costs should be determined by the actual payments for the in-home care. This would reduce the likelihood of an underpayment by the organization and a windfall for the staff member.

With respect to the cost of adapting his home and car to his disability, the Tribunal rejected the organization's argument that this was covered by the *ex gratia* payment which "should be

seen as being compensation for non-pecuniary loss such as pain and suffering and loss of enjoyment of life and, viewed in the light of the complainant's dire situation, the amount is neither exaggerated nor unreasonable".

Finally, the Tribunal held that the staff member was not barred from seeking adjustments to his disability pension to account for increases in the cost of living even though the organization's insurance contract expressly precluded indexing. The Tribunal reasoned that the absence of an indexation clause did not remove the organization's obligation to provide the staff member with adequate compensation. In a period of high inflation, his pension could be significantly reduced.

Lessons: The Tribunal was keenly aware of the tragedy suffered by this staff member, and while acknowledging that the organization had made a decent effort with respect to a compensation package, it fell short of what was necessary, and ordered additional compensation. Staff members who suffer work-place injury should not accept offers which significantly discount the financial costs of the injury, including pain and suffering and loss of enjoyment of life. Most organizations will permit the settlement to be expeditiously decided by the Tribunal.

Citations:

Judgment No. 2537 (EPO)

Ruling: Decision set aside and referred back to the EPO; €4,000 for injury; €2,000 costs.

Facts: Staff member joined EPO in 1991. In 2001 his health deteriorated and by July 2002 he had reached the maximum number of days of sick leave he was entitled. An Invalidity Committee found that he could return to work in February 2003, which he did. However, he was not able to improve his work capacity, and it was decided to establish a new Invalidity Committee. Under the guidelines, the committee consisted of two (2) doctors – one appointed by the EPO and the other by the staff member. If the doctors could not agree, the guidelines called for appointment of a third doctor. The report was prepared by the EPO's doctor and forwarded to the staff member's doctor for review. The report found that the staff member suffered an invalidity owing to a serious chronic illness but that it did not arise from an occupational disease. The staff member's doctor signed the report but attached a note stating that the occupational origin of the invalidity may not be totally excluded. The Personnel Director and the consultant in charge of the case contacted the doctor by telephone in an effort to persuade him to change his opinion in his note. As a result, the doctor told the Director and consultant orally that he withdrew the note. The EPO therefore concluded that the reservation expressed by the staff member's doctor did not form a part of the opinion.

The staff member sought reversal of the decision to the extent it denied the occupational origin of his invalidity. He also requested appointment of a new committee.

Analysis: The Tribunal found a breach of procedures. It was undisputed that the staff member's doctor disagreed with the EPO's doctor since he attached the note expressing his disagreement with the conclusion that the invalidity did not have a causal link to the staff member's duties. Since there was disagreement between the medical experts, a third expert should have been appointed. It was inappropriate for officials of the EPO to contact the staff member's doctor in order to persuade him to withdraw his diverging opinion. It was more unacceptable since the doctor did not withdraw his opinion in writing but the officials themselves did so based on a mere phone call where the doctor was informed of the consequences of his diverging opinion. No objective reasons were provided why he changed his views.

Lessons: The Tribunal found that rules implementing the regulations on the invalidity committee had not been issued and therefore it relied in part on guidelines prepared for use by the invalidity committee. Staff members should always determine whether guidelines apply to the decision taken by the administration as they may provide evidence of breach of procedures (although not technically a source of law). In this case, the Tribunal criticized the administration's blatant effort to influence the committee's report by contacting the staff member's doctor.

Citations:

Judgment No. 2551 (ITU)

Ruling: Decision set aside; case referred back to the ITU to appoint a medical board; 7,000 SWF for moral damages; and 2,000 SWF costs.

Facts: In 2001, staff member filed an illness-accident report declaring that she suffered from a “major depressive syndrome” resulting from “mobbing activities” at work. A compensation board was appointed to determine whether her medical condition was related to her professional activity at the ITU and if compensation was due. It could not reach a decision and indicated a medical board was necessary. A medical board was then appointed and in its report in January 2005 found that she currently showed no depression symptoms or anxiety disorder or condition of post-traumatic stress and that she suffered a breakdown due to relational conflicts; it did not recognise an occupational illness, and found her current work capacity was unimpaired. The Secretary-General therefore rejected her request for compensation, which the internal appeals board recommended maintaining.

Analysis: The Tribunal repeated its basic principle in these types of cases that it “may not replace the findings of a medical board with its own. However, according to consistent precedent it is competent to review the procedure followed by the board and, in particular, to say whether the board’s report, used as a basis for an administrative decision denying the occupational origin of a recognised disability, shows any material mistake or inconsistency, or overlooks essential facts, or draws plainly wrong conclusions from the evidence.” The Tribunal found that the medical board based its opinion on the staff member’s state of health at the time when its examination took place (2004), and did not mention the illness that the staff member was suffering from in May 2001, or the possibility that such illness might be attributable to her working conditions during the last years of her employment. The Tribunal found the review conducted “unacceptable”. If the case was handled during the period immediately following the separation and the bodies were set up without delay, it could have been determined whether or not the staff member’s illness was service-related. The procedure was therefore tainted with denial of justice.

Lessons: In cases involving review by medical boards, the Tribunal will examine whether the procedures were followed scrupulously.

Citations: Judgment Nos. 1284, 1752, 2160, and 2361.

VIII. Allowances and Other Benefits

Judgment No. 2532 (EPO)

Ruling: Complaint dismissed.

Facts: The father sought payment of the household allowance for his daughter since he provided significant financial support. The mother, who was also an employee of the EPO, already received the allowance since she was determined by the organization to be the main provider for her daughter. He argued that the correct interpretation of the organization's rules did not preclude paying the allowance twice. His internal appeal was unsuccessful.

Analysis: The Tribunal held that since the mother was already deemed to be the daughter's main provider, he could not also be found to be the main provider, a condition necessary for claiming the allowance. Although the father could be recognized in other circumstances to have supported his daughter mainly and continuously under the applicable provisions, since he provided sufficient financial support for her maintenance, the circumstances of the case precluded that interpretation. The Tribunal did not find any ambiguity in the applicable provisions and rejected the rule whereby any ambiguity in regulations must be interpreted in favour of the staff member.

Lessons: When provisions of the staff regulations and rules are reasonably easy to understand, the Tribunal will not second guess the decisions reached by application of those provisions to specific circumstances.

Citations:

IX. Free Speech

Judgment No. 2561 (FAO)

Ruling: Decision set aside; order to remove memo from personnel file; €500 in moral damages; and €100 costs.

Facts: The staff member wrote an e-mail to her two supervisors and copied it to four other staff members criticizing management as follows: “Staff Development is a joke! I did all the computer courses for secretaries [...], studying for and passing Level C French, but all this training got me nowhere. It might mean that the Department benefits from our learning new skills but the staff member sees no personal benefit with regard to career prospects whatsoever. Therefore I see no point in doing any more training as it would be a waste of time.” She was given a memorandum containing a warning forbidding her to use the organization’s internal e-mail system for personal matters as follows: “As I explained to you today, staff [have] the right to express their opinion to fellow staff members in their own time, and by their own means, but not during staff time using the FAO email system. I hereby forbid you to further use the FAO email system for other than official use. I also warn you against ridiculing and insulting FAO management. Failure to comply will lead to formal disciplinary action.” The memo was placed on her personnel file.

The staff member sought damages for harassment and sought the removal of the memo from her file. The internal appeals panel recommended removing the memo but not compensation. The Director General refused to remove the memo from her file.

Analysis: The Tribunal agreed with the internal appeals panel that that “though the [staff member] should have been more prudent in the choice of [...] language, the Director’s response [...] definitely tended in a direction of being excessive and could have been more graduated and flexible”. It further found that “if a staff member’s comments on work matters are not deemed sufficient cause to initiate disciplinary action, then no strong and explicit warning can be admitted onto that staff member’s personnel file without respecting the requirements of due process of law”. The Tribunal further found that the memo could “have a chilling effect on the freedom of speech of other staff members on work-related matters; or worse, it may be construed as a precedent as to how far free speech is admissible in international organizations”.

Lessons: The Tribunal respects and defends international civil servants’ rights to free speech and will closely examine efforts by organizations to limit such speech. In this case, the Tribunal indicated that the speech crossed the border of acceptable behavior and misconduct charges would have been appropriate, but that did not justify a broad limit on the use of the e-mail system to express opinions.

X. Enforcement

Judgment No. 2528 (FAO) (Application to Execute Judgment)

Ruling: Complaint dismissed.

Facts: In Judgment 2207 the Tribunal set aside the FAO's decision terminating the staff member's appointment, and ordered FAO to pay him "damages equivalent to the salary, allowances and other benefits to which he would have been entitled until the end of May 2003", when he would have been able to claim pension rights. In executing the Judgment, the FAO withheld the amount paid for the termination indemnity which he was entitled to upon termination of his appointment. The staff member objected to the withholding of the termination indemnity in calculating the damages. He also claimed that the damages should have been calculated on the basis of the post adjustment applicable to Angola – since according to him it had been decided in the spring of 2000 to transfer him to that country – and not on the basis of the post adjustment applicable to Kenya, his duty station at the time his appointment was terminated. The staff member filed an internal appeal. The Appeals Committee rejected his claim for calculation of the damages based on the post adjustment applicable to Angola since he had not been given an offer or formally transferred at the material time, and recommended that the claim concerning entitlement to the termination indemnity be referred to the Tribunal.

Analysis: The Tribunal agreed with the Appeals Committee that the staff member was not entitled to the post adjustment for Angola since no mention was made in its Judgment of such transfer or offer. On the issue of the termination indemnity, the Tribunal held that the FAO was entitled to offset the damages by the amount of the indemnity since the decision to terminate the appointment had been set aside, and it would be wrong to allow the staff member to both collect the damages and retain the amounts paid for the termination set aside by the Tribunal.

Lessons: Collecting a favourable judgment is not always an easy task since the Tribunal rarely expressly specifies the exact method of calculating its award. When a dispute arises with the administration as to the measure of payable damages, the only recourse is to seek enforcement with the Tribunal. In this regard, successful staff members can go directly to the Tribunal without the necessity of filing an internal appeal as was done in this case. In this case, the Tribunal put the staff member in the position he would have been in if he had not been terminated (through a legal fiction). His right to the termination indemnity was therefore also extinguished, and it could be offset by the organization against the judgment.