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Semi-Annual Review

*International Labour Organization
Administrative Tribunal 102nd 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 102nd Session (and published in February 2007).

In this session in Judgment No. 2590, the Tribunal revisited the issue of same sex relationships. The staff member in this case validly contracted a marriage under the law of the Netherlands. The organization denied the request for spousal benefits on the grounds that a few of the staff rules employed the terms “husband and wife”, and thus the term spouse, although undefined, could only apply to staff members who are married to persons of the opposite sex. The Tribunal held that a passing reference to “husband and wife” was not sufficient to defeat the claim. In the 103rd session, the Tribunal however held that the definition of spouse contained in the organization’s staff regulations and rules was sufficient to deny benefits to the same sex spouse of a staff member.

In Judgment No. 2584, the staff member successfully challenged the hiring of an outside candidate who lacked the requisite educational requirement specified in the vacancy notice. In that case the Tribunal said that experience could not make up for the lack of the necessary academic degree.

In a decision involving allegations of harassment/mobbing and in response to the argument that internal appeal bodies are ill-equipped to evaluate such allegations, the Tribunal noted that internal appeal bodies consisting of peers are familiar with workplace harassment issues by virtue of working in a bureaucratic environment. There is therefore no need for such claims to be referred to experts in workplace harassment. In Judgment No. 2594, the Tribunal dismissed harassment allegations on the grounds that the staff member did not complain to management and the organization was therefore prevented from taking steps to remedy the situation.

The Tribunal dismissed two cases (Judgment Nos. 2571 (UNESCO) and 2610 (IAEA) not reviewed here) involving challenges to the International Civil Service Commission’s recommendations for adjustments to the salary scale for general service employees for duty stations in Paris and Vienna, following salary surveys of local employers. The Tribunal found in both cases that the ICSC had followed its methodology and that there was no breach of the Flemming principle. The Tribunal gives the ICSC and the organizations that follow its recommendations increasingly more discretion in the area of setting pay and other elements of remuneration and will only interfere in very limited circumstances.

Finally, in a blow to freedom of association in Judgment No. 2585, the Tribunal held it was lawful for an organization to abolish an elected representative’s post during the term of office. In that case, the staff member’s post was in a section subject to reorganization with the result that the post was abolished and a new post created with substantially the same duties. Before completing the term of service, the staff member asked to be assigned to the new post. Instead, the organization advertised the new post and it was filled by an outside candidate. The staff member was given a post at the same grade and step however with fewer responsibilities, and under the supervision of the individual selected for the new post. This case unfortunately will give incentive to organizations to penalize staff members for staff association activity under the guise of a reorganization exercise with the result that fewer staff members will be willing to stand for election.

I. Same Sex Relationships

Judgment No. 2590 (FAO)

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

Facts: Staff member claimed entitlements for his same sex spouse, with whom he had validly contracted a marriage under the laws of the Netherlands. The administration denied his request for spousal benefits on the grounds that a few of the staff rules employed the terms “husband and wife”, and thus the term spouse, which was undefined, could only apply to staff members who are married to persons of the opposite sex. It further argued that it could not provide any benefits to the staff member until the matter was referred to its governing body and an amendment to the staff regulations and rules adopted.

Analysis: The Tribunal reiterated the principle, first stated in its Judgment No. 1715 issued in 1998, that in the absence of a definition of the term “spouse” in the staff regulations and rules, the status of spouse will flow from a marriage publicly performed and certified by an official of the State where the ceremony has taken place, such marriage being then proved by the production of an official certificate. The Tribunal significantly also stated that a “passing reference to husband and wife in the English version of the Staff Regulation . . . cannot justify interpreting all the relevant texts as denying legally married, same-sex spouses any right to benefits.” Without expressly stating this it appears that the Tribunal also found significant that the FAO Council had already accepted the principle that the personal status of staff members for purposes of FAO’s entitlements is determined by reference to the law of the nationality of the staff member concerned, which is the general policy adopted by the UN. It rejected the argument that the decision was discriminatory since the issue was “controversial” in some member states and the FAO was acting properly in addressing those concerns. The Tribunal nonetheless awarded moral damages for the successive postponements.

Lessons: The Tribunal has taken a very conservative approach to the issue of same sex marriages, and several issues remain to be addressed. In the 103rd session, the Tribunal held that it was lawful for the ITU to discriminate on the basis of sexual orientation by denying benefits since the staff regulations and rules employed the terms husband and wife in several provisions. Staff members who work in organization’s with staff regulations and rules that do not define the term spouse can claim benefits for their same sex marriages. In 2008, the Tribunal will decide whether a discriminatory definition of spouse contained in an organization’s personnel manual is sufficient to deny spousal benefits in this context.

Citations: Judgment No. 1715.

II. Appointments/ Extension/Conversion/Termination/Probation

Judgment No. 2573 (ICC)

Ruling: Decision set aside; 6 months net base salary less the amount earned in the 6 month following the resignation; €2,000 moral damages; and €500 costs.

Facts: In October 2004, the staff member joined the ICC as a secretary on a one-year fixed-term contract. She worked for two judges, both of whom were her direct supervisors. In July 2005 they sent a memorandum to the Court in which they expressed concern as to her performance. They indicated that if her performance did not improve they could not continue their professional relationship with her. She was provided with a copy. Then she had various meetings with the Court administrative officials and also spoke with her two supervisors and asked them to give her another chance. After meeting the Chief, Human Resources Section to discuss her matter, he sent her an e-mail stating that her contract “may not be extended” and another one that it “will not be extended”. Because of some procedural vagueness, in September 2005 she was offered an extension for a further period of a little over two months, until 31 December 2005, as a second chance. She declined it and resigned “on short notice” with immediate effect. Her resignation was accepted.

Prior to receiving the memorandum she was not aware that her performance was lacking. She neither received a formal appraisal nor a proper opportunity to comment. She expected that her contract would be renewed for up to three years.

The ICC contended that there was no administrative decision made concerning her contractual status nor had it any legal effect because she was not separated from service on 24 October 2005. Her separation was brought forward by her own action in September. There was no final decision communicated to her before she submitted her resignation. Her initial contract specified that her appointment did not “carry any expectancy of renewal or of conversion to any other type of appointment”, so there was no basis for her expectation.

Analysis: The Tribunal found that the performance difficulties were not properly recorded and the staff member was not provided with a reasonable opportunity to improve performance, and therefore the staff member was not in a position to offer any explanation for her action or inaction. The Tribunal reiterated the principle that an “organisation may not in good faith end someone’s appointment for poor performance without first warning him and giving him an opportunity to do better”. With the acceptance of her resignation, the ICC agreed to vary or amend the terms of her contract. Had correct procedures been followed, her contract would have been extended for a period of six months to afford her a chance to improve. On a related point, the Tribunal held that the resignation did not alter the legal effect of the decision not to extend the contract but the organization’s acceptance of the resignation varied the terms of the appointment, namely the date it came to an end.

Lessons: Staff members on probation are entitled to proper notice of what aspects of performance are not satisfactory and to a reasonable period of time to improve once proper notice has been given.

Citations: Judgment Nos. 1583 and 2414.

Judgment No. 2584 (UNESCO)

Ruling: Decision set aside; €2,000 moral damages; and €500 costs.

Facts: A P-4 regional hydrologist, along with three other candidates, applied for the post of Director of the Executive Office of the Natural Sciences Sector at grade D-1. A panel interviewed all four candidates and provided its comments to the Director-General. The panel determined the hydrologist was not suitable for the post and the Director-General appointed another candidate. The staff member appealed the decision not to hire him and to appoint another candidate. The Appeals Board rejected the appeal.

Analysis: Before the Tribunal, the staff member argued that the vacancy announcement procedures were not followed and the selection process was flawed and unfair. The staff member provided evidence showing that the candidate appointed did not meet the academic qualifications set forth in the vacancy notice. The notice called for an advanced university degree in one of the fields of exact or natural sciences. The selection panel identified this flaw but concluded that the candidate's experience compensated for the lack of academic qualifications. The Tribunal reiterated the principle that "[w]hen an organisation chooses to hold a competition it must abide by its written rules and by the general principles set forth in the case law, particularly insofar as they govern the formal side of the process". The fact that the selected candidate had other desirable qualifications from the organization's perspective did not absolve the organization from the rule that the successful candidate must have at least the qualifications identified in the notice. The decision to hire the other candidate was set with the understanding that the Organization "must shield the successful candidate from any injury that may result from the setting aside of an appointment he accepted in good faith."

Lessons: When challenging a hiring decision, it is important to also expressly challenge the decision to appoint another candidate. This provides another ground for claiming compensation if you are subject to prejudice during the selection process.

Citations: Judgment No. 1646.

Judgment No. 2592 (UNIDO)

Ruling: Decision set aside; 2 years' salary and benefits with offset for any earnings in same period; €10,000 moral damages; and €5,000 costs.

Facts: Former managing director (D-2) was employed on a series of fixed-term appointments the last of which was due to expire on 31 December 2002. In the spring 2002, following the reorganization of the technical divisions, his post was filled by another candidate. From 1 September 2002 he was reassigned to the Director-General's office in an advisory capacity.

In November 2002 the managing director met with the Director-General to discuss his future with the Organization. The Director-General informed him that the post of Regional Director of the UNIDO Office in India would soon become vacant and he could be appointed to that post. He was advised in writing that the post was that of "Regional Director of the UNIDO Office in India at the L.6 level based in New Delhi", and was directed to consult with human resource regarding other details. The managing director then replied that he would prefer a posting in Qatar but stating that, if that were not possible, he "would accept the posting in India". He was then advised that a posting in Qatar was not possible and therefore the Director-General "ha[d] [...] noted [his] acceptance of the post of Regional Director of UNIDO's Office in India, based in New Delhi, at the L.6 level". The memorandum stated that UNIDO would be submitting his candidature to the Government of India and, in due course, he would be sent "details in connection with this assignment".

On 20 December 2002 the managing director was presented with a letter of appointment (bridging contract) offering him an appointment for a period of two months as "Regional Director Designate, UNIDO Office in India" based in Vienna at a salary equivalent to L-6, step 9. The letter of appointment made no reference to the New Delhi post although a personnel action sheet attached to it stated: "Staff member's appointment as Regional Director and change of duty station to New Delhi, India, pending medical clearance and government concurrence." The managing director was concerned that the post he was being offered did not match his acceptance of the appointment in India. If the clearances were not obtained, there was no obligation for UNIDO to appoint him to another post or seek a solution.

On 10 January 2003, UNIDO's Officer-in-Charge wrote to the managing director referring to the letter of appointment (bridging contract) of 20 December 2002 and advising him that if he did not accept the offer by close of business on 14 January 2003 it would be considered that he was "not interested in taking up the assignment in question". The managing director replied that the letter of appointment did not reflect the offer of the New Delhi post. He concluded by reiterating his "acceptance of the post of Regional Director [...] at the L.6 level". He also noted that he had not been contacted with respect to the medical clearance.

He was then presented with a new letter of appointment (bridging contract) with a special clause: "Appointment as Regional Director, UNIDO Office in New Delhi, India is subject to receipt of Government and medical clearances. Upon receipt of both clearances an offer of appointment for two years at [L.6] in New Delhi, India will be made." The letter also stated that the offer had to be accepted by 20 January after which UNIDO would initiate separation formalities. The managing director met with the Officer-in-Charge on 24 January, and on 31 January he was notified of his separation from UNIDO. He wrote the Director-General subsequently reiterating his acceptance of the India post and the 2 month bridging contract.

He lodged an internal appeal with the Joint Appeals Board. A majority of the Board recommended dismissal of the appeal on the grounds that the bridging contract was part of the same contract for the appointment in India, and he had not accepted it. The minority found that there was a breach of contract with respect to the New Delhi post.

Analysis: It is well settled by the Tribunal case law that “[t]here is a binding contract if there is manifest on both sides an intention to contract and if all the essential terms have been settled and if all that remains to be done is a formality which requires no further agreement”. The Tribunal found that the Director-General and the managing director had agreed on the terms for the post in India, since the terms offer and acceptance were used in the correspondence. The Tribunal noted the correspondence did not identify all the terms relating to the post, particularly the commencement and duration of the assignment. The Tribunal concluded that the managing director had discussed those matters with human resource as directed by the Director-General before his acceptance and therefore agreement was given. The larger question for the Tribunal was what was to happen between 31 December 2002 and the formal appointment to the India post: “the first question that arises is whether, on the one hand, it was intended that arrangements for that period should be comprehended in the contract relating to that post or, on the other hand, be the subject of a separate contract.” The Tribunal concluded that this period was to be covered by a separate contract, especially since the bridging contract and the post in India were being treated differently by UNIDO. It also rejected the argument that the bridging contract was necessary and even an essential term of the India post contract: “An essential term is only implied if it is strictly necessary for the contract to be performed and if its content is clear.” Accordingly, the contract for the post in India came into existence in December 2002.

The Tribunal rejected UNIDO’s defense that the failure of the managing director to sign the bridging contract frustrated its attempts to implement the contract and that it amounted to repudiation of the contract since UNIDO did not prove that the appointment to New Delhi could not be effectuated even if his immediate employment came to an end.

Finally, the Tribunal found that UNIDO did not negotiate respecting the terms of the bridging contract, and failed to act in good faith by setting unreasonable deadlines. It found that it was “unreasonable for the Director-General to rely on [the expiry of unreasonable deadlines] in refusing to reconsider the separation and in treating his failure to meet that deadline as signifying his rejection of the post notwithstanding his repeated written statements to the contrary”.

Lessons: The Tribunal does not require that all of the essential terms of the offer and acceptance appear in written documents. The parties can also discuss other terms and reach agreement in oral negotiations.

Citations: Judgment No. 307.

Judgment No. 2599 (ESO)

Ruling: Decision set aside; 12 months' salary less the amounts already paid as unemployment benefits for material and moral damages; and €3,000 in costs.

Facts: In April 2005, staff member joined the ESO as the Head of the Finance Department on a three-year fixed-term contract with a six-month probation period. On 9 May 2005 she sent her hierarchical superior, the Head of Administration, a report in which she expressed her views and made several critical remarks about the Enterprise Resource Planning (ERP) system which was adopted in order to re-engineer administrative procedures. In an e-mail of 23 May, Mr. B., who headed the ERP project team, informed her that, while he appreciated her feedback, she should nevertheless contact him first. On 28 June she sent the Head of Administration an updated version of her May report, in which she highlighted the lack of improvement in many areas. The Head of Administration sent her an e-mail on 11 July in which he recommended that she refer her queries directly to Mr. B regarding issues with the 2005 budget. On 15 July, in response to an e-mail from Mr. B, she drew attention to the fact that she and her team could receive instructions only from the Head of Administration. In a memorandum of 7 August she forwarded her comments on a document concerning the preparation of the 2006 budget, which had been drawn up by Mr B. and reviewed by the Head of Administration. The latter reacted "very negatively" to these comments.

On 7 September, during a meeting with the Head of Administration and the Head of the Personnel Department, she was informed that her performance was deemed unsatisfactory. On 12 September she learned that her contract would be terminated at the end of her probation period; then she was replaced. The parties tried to arrive at an amicable settlement of the dispute in late September to no avail. In a letter of 29 September 2005, she was advised that she was dismissed because her overall performance had been unsatisfactory based on a report from the Head of Administration. She was placed on special paid leave to 31 October 2005. She was not given a copy of the report.

In her appeal to the Tribunal, she argued that the administration did not give her any warning and did not establish a performance report or provide her the report from the Head of Administration. She noted that ESO should have provided "proper conditions for probation", but this was not done. Although she was supposed to report directly only to the Head of Administration, he constantly asked her to refer her queries to Mr B., to whom in theory she was not in any way subordinate. This situation was bound to give rise to tension, especially as Mr B. and his team could introduce changes in accounting procedures without informing her.

Analysis: The Tribunal quickly granted relief in this appeal although along the way it stated that it is very stringent in setting aside such decisions: "the competent authority will determine on the evidence before it whether or not to confirm the appointment and must be allowed the utmost measure of discretion in deciding whether someone it has recruited shows, not just the professional qualifications, but also the personal attributes for the particular post in which he is to be working [and] only where the Tribunal finds the most serious or glaring flaw in the exercise of the Director-General's discretion will it interfere." The Tribunal noted that there was no evidence to prove that the staff member was given any kind of access to the report on which the Director General is said to have based her decision to dismiss her. The decision was therefore taken in breach of the safeguards regarding the

provision of proper conditions for probation, resulting from the rules and regulations, from general principles of law and from the Tribunal's case law, and, in particular, in breach of the right to be heard.

Lessons: The Tribunal reiterated that it will only interfere with decisions to terminate probation under very limited and stringent circumstances. That being said, it is fatal if the organization has not given written warnings or prepared a performance appraisal when required, and given the staff member a chance to rebut the allegations and given a reasonable period of time to improve.

Citations: Judgment Nos. 1246, 2427 and 2558.

Judgment No. 2609 (ITU)

Ruling: Decisions set aside and conversion of contracts ordered; 1,000 Swiss francs moral damages for each staff member; and 500 francs each for costs.

Facts: In 2002, the ITU adopted rules providing that “[u]pon completion of four years of continuous service on fixed-term contracts, a staff member will normally be offered a permanent contract”, that the granting of such a contract is subject to “continued satisfactory service” and “confirmation that continuing work and funding is available”, and the decision “shall be taken by the Secretary-General and, as regards the staff of each Bureau, upon recommendation of the Director concerned”. Under these rules, the fixed-term contracts of more than 100 ITU staff members were converted to permanent contracts between 1 January and 1 July 2004.

Several staff members, who held fixed-term contracts for more than four years, were not given permanent contracts but instead contract extensions. After filing internal appeals, they were advised that at the ITU Council’s 2002 session the Union had indicated that 50 to 60 per cent of staff would eventually have permanent contracts, and by 2005 that percentage had been exceeded. They were also informed that “unrestricted and systematic conversion” of fixed-term contracts would “place the Union in a very difficult [budgetary] situation”. In effect, the rules for conversion were suspended in 2004.

In July 2005, the internal Appeal Board recommended converting their fixed-term contracts into permanent ones, which was rejected. In the appeal to the Tribunal, they noted that they met all the criteria for granting permanent contracts and the conversion would not result in additional costs to the organization.

Analysis: The Tribunal noted that all of the staff members had completed four years of continuous service and service had been satisfactory or better. The Tribunal rejected the argument that the rules required consideration of the overall budgetary situation of the organization. The Tribunal held that the terms of the rules required the position of staff members to be considered “individually” having regard to the recommendation of the Bureau Directors, and while the Secretary-General may account for overall budgetary issues, the assessment would have to be made as to the impact on the individual staff member concerned. The Secretary-General could have taken the proper steps to rescind or rewrite the rules but he did not do so, and was therefore bound to apply them according to their terms. He did not have the power to merely suspend the rules. The Tribunal also rejected the argument that the administration was entitled to exercise flexibility since the terms of the rules did not include administrative flexibility. Finally, with respect to the argument that the number of permanent contracts could not exceed 50 to 60 per cent, there was nothing to indicate that this might properly be taken into account when deciding on the conversion of an individual staff member’s contract. The decisions not to convert the appointments therefore involved an error of law.

Lessons: The Tribunal will not allow an executive head of an organization to suspend the operation of staff regulations and rules. In this case, to its credit the Tribunal did not send the cases back for new decisions, but instead decided to grant substantive relief since the criteria for the conversion of the appointments were straightforward and were satisfied (for all but four of the appealing staff members). It is also worth mentioning that the Tribunal held that

the claim for moral damages, raised for the first time before the Tribunal, was receivable: “the claim for moral damages is a claim for consequential relief which the Tribunal has power to grant”. In some cases, the Tribunal has held that moral damages must be claimed in the internal appeal proceedings in order to be receivable.

Citations:

III. Harassment/Mobbing/Abuse of Authority

Judgment No. 2587 (International Federation of Red Cross and Red Crescent Societies)

Ruling: Complaint dismissed.

Facts: The staff member, a typist in the language unit, joined the Federation in 1993. Beginning in 2000, she started to have conflicts with her supervisor that culminated in disagreements over comments in her performance evaluation for 2002. In 2004, she was notified that due to a mandatory reduction in the budget her post was to be reduced to 50 per cent. If she did not accept the offer of the reduced post, her contract would be terminated for redundancy. She declined the offer and advised that she would take early retirement. Before making this decision, she consulted with the social security office and was advised that she would receive Swiss unemployment benefits if she accepted redundancy. The subsequent vacancy notice for the reduced post included duties that had been removed from her because they were considered non-essential. She concluded that the reduction of her post was for the sole purpose to take her job away. She filed a grievance for harassment and mobbing for the period from 2000 onwards, including an allegation that her performance report contained an inaccurate statement, and for the failure of the Federation to take appropriate action. The staff member applied for unemployment benefits with the Swiss government which were denied since she had taken early retirement. She accused the Federation of providing her false information about her social security entitlements if she accepted redundancy.

The Joint Appeals Commission reported that there was no evidence of psychological harassment or mobbing, nor was there any evidence that she had been given incorrect information or had been wrongly advised about her entitlement to social security benefits. It expressed its “unease” as to why an “uninvestigated accusation of losing or misplacing a document” remained in her performance evaluation report and recommended that the accusation be removed. It also recommended that she be sent a letter of apology for any distress caused due to the weaknesses in the performance evaluation system. The Secretary General followed the recommendations of the Commission, including that the accusation that she lost a document be removed from her evaluation.

To the Tribunal, she argued that she was constructively dismissed as a result of mobbing, that the Federation breached its duty of care with respect to advice given about her social security rights, and that the Joint Appeals Commission was not competent to decide whether mobbing had occurred because of lack of expert advice. She asked the Tribunal to examine the facts and conclude that mobbing did occur. Lastly, she argued that the Commission’s review of her case was procedurally flawed since it believed that intent must be shown to prove harassment, and that there was no equality of arms.

Analysis: The Tribunal agreed with the staff member that harassment and mobbing do not require intent. However, if there is a reasonable explanation for the behaviour in question, it will not be considered harassment. The Tribunal found that there was no evidence of mobbing or harassment. It considered that the Head of Administration’s saying at the start of a meeting to the staff member that “not you, not you, you’re not needed” was neutral without evidence to show it was made with hostility or in a harassing manner. The Tribunal acknowledged that the working relations were tense but not due to misconduct or abnormal behaviour by the staff member’s superiors. The Tribunal also held that while the situation

could have been avoided if management had been more sensitive to her personal needs and history when dealing with her requests and formulating replies, “it is not always possible to cater to the needs of each individual employee, as the product or result of the work being done is often justifiably considered a higher priority over the individual’s personal interests, and therefore it cannot declare that any breach of care has occurred”. The Tribunal dismissed the value of two statements provided by colleagues attesting to the harassing treatment by the staff member’s supervisor. Since she did not show harassment, her argument of constructive dismissal failed.

With respect to the lack of expertise of the internal appeal body in cases of harassment, the Tribunal curiously wrote that the members “who work in bureaucracy have a working knowledge of the concept of harassment based on their daily involvement in social situations at work.” The Tribunal was not willing to find that internal review bodies as a principle should have experience in harassment as it would call into question the entire administrative process. It also found that the staff member was not deprived of due process by way of inequality of arms in the administrative procedure since she had the opportunity to submit evidence and arguments, and her counsel attended her interview. The attack on the Commission’s legal reasoning and report was dismissed by the Tribunal since it “clearly indicated its findings and conclusions.”

Finally, with respect to social security, the Tribunal found that the staff member had only argued that she received reassurance that she would be eligible. The Tribunal faulted the staff member for not checking with an official capable of detailing the particulars of her unemployment benefit eligibility, and that the person she alleges gave the advice denied having done so since it was neither his area nor responsibility.

Lessons: The Tribunal requires strong evidence of harassment. In this case, isolated comments by a senior official –without more evidence that the comments were said in a hostile manner and without similar additional evidence to show hostility – are not enough to prevail. The Tribunal also will not aid the staff member who could have – given the importance of social security – been more diligent in confirming important entitlements with national authorities.

Citations: Judgment No. 2524.

Judgment No. 2594 (WIPO)

Ruling: Complaint dismissed.

Facts: Staff member joined WIPO in 1992 and in 1996 was granted a fixed-term appointment as reproduction equipment operator at grade G-3. From 1999 onwards the staff member provided medical certificates indicating that he should not engage in activities placing a strain on his back or arms, and he was then transferred to a post as pamphlet maker. His medical condition did not improve however and during the next few years he made several requests for a transfer. During the same period, his supervisors tried to adapt his duties and workload to his physical limitations. He still found it difficult to carry out some of his duties and in 2003 he wrote to the Ombudsperson requesting a transfer to a post adapted to his state of health. Following his return from sick leave in February 2004, he verbally informed his supervisor that for medical reasons he was unable to carry out tasks involving the use of a bar-code reader. His supervisor decided to relieve him of his normal duties pending a decision on his transfer request and reassigned him to share an office with a colleague with which he had a dispute four months earlier. The staff member in the months after wrote to management asking for work and objecting to a reassignment to share an office. The Director advised that space was limited and tolerance and respect between colleagues was expected, and to let him know if problems arose.

In July 2004, his supervisor wrote in the periodic performance report that she had decided not to assign any tasks at his level due to his health situation pending his transfer and did not complete the form. He objected on the grounds that his supervisor did not report on his services for the period from May 2003 until his sick leave. In September 2004 he was transferred to a clerical post in the e-library. The staff member appealed the decisions not to grant him a permanent appointment, and alleged he was harassed and mobbed. The internal appeal board recommended granting a permanent appointment and that any new assignment take into account his health. It did not find any intention to mob or harass him, and that the administration had taken the necessary steps to redress his grievances. The Director General gave him a permanent appointment. He appealed to the Tribunal on the implied decision not to grant him compensation for mobbing or psychological harassment, especially for the period of six months while he shared an office with a colleague who had insulted him, and the transfer to the e-library.

Analysis: The administration argued that the complaint was not receivable on the grounds it had not addressed fully the claim of harassment and mobbing. The Tribunal rejected those grounds. It also argued that the staff member did not refer the matter to the Ombudsman. The Tribunal found that the staff member had in fact brought it to the Ombudsman but nothing was done and then the office fell vacant. With respect to the transfer, the Tribunal reiterated that international organizations owe a duty of good faith requiring that it provide its employees with work in accordance with their skills, training and abilities. The staff member alleged that the transfer was made for an improper purpose, but he had not identified which transfer was at issue nor did he identify circumstances or facts showing an improper purpose. His supervisor had given a reasonable explanation for not completing the periodical report.

With respect to the harassment, the Tribunal rejected the organization's argument that to prove harassment the staff member must demonstrate an accumulation of events over a period of time. The case law requires an examination of the relevant definition of harassment to

determine whether the definition allows for a single incident to be sufficient to constitute harassment. WIPO's definition of harassment permits that in exceptional cases a single incident of the type of conduct described can amount to harassment. With respect to the harassment by his colleague in the shared office, the Tribunal found that the administration had addressed his concerns when he raised the issue initially and had asked him to advise him if problems arose. He did not raise any problems with the administration during the following six months. The organization could not be faulted for not taking necessary steps to protect the staff member in the absence of notice of the problems. The Tribunal also found that with respect to his supervisor that the decision not to give him any work for a period of six months was not harassment but a prudent step given the circumstances – his health and pending transfer. The Tribunal rejected the evidence presented regarding other staff members who had received transfers out of the same unit and had complained that the supervisor was not professional and they did not like her management style. They did not support any inference that the staff member had been harassed.

Lessons: The Tribunal will not give much credit to claims of harassment when the staff member has not given the administration notice of the harassment and will not fault the organization for not taking appropriate action to protect the staff member. This is akin to requiring the staff member to follow procedural rules. When considering harassment cases, the Tribunal will examine the organization's definition of harassment to determine whether a single incident can amount to harassment. In the absence of any rules or definition, the Tribunal will rely on general principles of law against discrimination and/or harassment, and its own cases.

Citations:

IV. Classification/Promotion/Performance Appraisals

Judgment No. 2579 (EPO)

Ruling: Complaint dismissed.

Facts: The staff member submitted several unsuccessful applications for grade A5 posts as a technically qualified member of a board of appeal. From 1990 the staff performance appraisal reports contained a comment acknowledging his fitness to serve as a board member. However, that comment was removed from his report covering the period from 1 September 2000 to 31 December 2001. On 18 July 2002 the staff member requested that the comment in question be retained in the latter staff report but it was signed by the supervisor without amending its contents. His rating was “very good”. He appealed the decision not to include the comment about his fitness to be a board member in the report, which was rejected by the appeals committee.

Analysis: The Tribunal reiterated that a decision to maintain a staff performance appraisal, being a discretionary one, may be set aside only on limited grounds such as a formal or procedural flaw, a mistake of fact or of law, failure to take account of some material fact, abuse of authority or the drawing of a mistaken conclusion from the evidence. The person approving the report must allow the reporting officer wide discretion and the staff member’s own comments, which are inserted in the report, may serve to remedy any error of judgment there may have been. Approval of the report may be refused by the executive head if the reporting officer has made an obvious mistake of fact over some important point, if he has neglected some essential fact, if he has been grossly inconsistent, or if he can be shown to have been prejudiced.

The Tribunal stated that the aim of the reporting system is to ensure that the performance and abilities of individual staff members are fairly and objectively evaluated so that, with the passage of time, they have a reasonable chance of moving to more responsible work and securing promotion. In this respect, the performance reports are important documents especially for bodies considering promotion. Nonetheless, such bodies are not bound by the reports when they compare the assessment of the performance and abilities of a candidate for promotion with the requirements of the post that he or she is hoping to obtain. The Tribunal therefore held that the reporting officers did not have to make a statement recommending the staff member for promotion to board member or cite his fitness for such post.

Lessons: It is difficult or perhaps impossible to challenge a performance appraisal report that contains a satisfactory or better rating on the grounds that it fails to make a specific positive statement about the staff member’s performance. In most cases, an informal request by the supervisor to include the statement in the report is the best course and will be successful if the relationship with the supervisor is good.

Citations: Judgment Nos. 806, 1144, and 973.

Judgment No. 2606 (ITU)

Ruling: Decision set aside; 3,500 Swiss francs for material and moral damages; and 2,500 francs costs.

Facts: Staff member joined the ITU in 1979 and reached step 11, the highest in grade G-6, in 1992. On four occasions between 1990 and 2000 she unsuccessfully applied for posts at a higher grade. In 1998 a service order announced a Council decision to implement a personal promotion scheme to “give staff in occupational groups with limited career opportunities the possibility of being treated on an equal footing with staff members having more frequent promotion opportunities”. In order to receive personal promotion staff members had to satisfy the criteria set forth in an annex to the service order.

In March 2004 the Appointment and Promotion Board recommended her for personal promotion effective 1 January 2003. In December 2004, the Secretary-General suspended the personal promotion scheme with immediate effect “[i]n view of the [...] severe financial situation” of the ITU but that staff members already recommended for promotion will reviewed and finalized. The staff member was informed in March 2005 that her candidature for a personal promotion had been examined and that it had been decided not to follow the Board’s recommendation of March 2004. The reason given was that she did not meet one of criteria for promotion. In her internal appeal, she criticized the Secretary-General for having departed from the Board’s recommendation. The appeal board recommended that the Secretary-General review the reports, which was rejected.

In her appeal to the Tribunal, she alleged that the organization breached the terms of the promotion rules by ignoring the Board’s recommendation and relying instead, in a “confidential” or “secretive” manner, on the assessment of third parties.

Analysis: The Tribunal noted that the Secretary-General denied the promotion for the failure of the staff member to meet one criteria: she had not “shown evidence of any self-development efforts with a view to promotion or career development”, and assessed whether the reason given for the reason was adequate under the case law. The Tribunal in this respect explained its approach: “The scope of this obligation varies according to the actual circumstances of each case and the nature of the decisions in question. A mere reference to the applicable rule, the reproduction of its text and an indication of whether or not it applies to the case under consideration may suffice in some circumstances. Where the applicable rules confer discretion on the authority responsible for taking the decision, it is all the more necessary to comply with the obligation to specify the reasons for the decision [and in] all cases, the reasons given in support of the decision must be set forth in such a manner as to enable the persons concerned objectively to challenge the decision before an appeal body and to enable the latter to rule on the dispute in full knowledge of the facts.” The Tribunal also noted that discretion cannot be exercised arbitrarily and essential facts must be accounted for, especially where the departure is from a recommendation of an advisory body tasked with analyzing the decision. The Secretary-General could not ignore completely the recommendation of the Appointment and Promotion Board.

The Tribunal further noted that two of the three Board members had found that the specific criteria called into question by the Secretary-General was met, and that the impugned decision mentioned “only general considerations regarding the discretion enjoyed by the Secretary-

General and it specifies that the Appointment and Promotion Board's recommendation does not 'bind him'." The decision was therefore set aside and remanded back to the Secretary-General "to express an opinion on the complainant's candidature in the light of all the circumstances and to take a new decision on her case."

Lessons: The Tribunal will set aside a decision which is contrary to an advisory board or panel's recommendation when the decision does not set forth at least some minimal reasons for the departure. Unfortunately, the Tribunal often simply remands the case back to the organizations in order to give them an opportunity to give more detailed reasons for the decision, in effect precluding any substantive relief.

Citations: Judgment Nos. 1911, 2124, and 1369.

Ruling: Complaint dismissed.

Facts: In 1951, the staff member joined the organization. By August 1995 he held the post of clerical assistant in the travel unit at grade G-4. In November 2001 his request for reclassification was endorsed by his first-level supervisor but not processed by his second-level supervisor who did not consider the reclassification justified. He resubmitted the request in March 2003, and later that month he was reassigned to a new unit, and his request not reviewed. He lodged an appeal of the reassignment decision, and the internal regional appeal board recommended that he be assigned back to his post in the travel unit and his request for reclassification proceed. The Regional Director accepted these recommendations and in December 2003 a desk audit of his post was carried out. In January 2004 he was advised that his post was “well within the range applicable for GS.4 grade”, and notified him that he would shortly be reassigned to the post of Clerk II in another unit. Following another internal appeal of these decisions, the regional board recommended that the appeal be dismissed. The Regional Director informed the staff member that he accepted that recommendation. The staff member then lodged an appeal with the headquarters appeal board which found no flaw in the classification review and held that there was insufficient evidence that the reassignment to the new unit had been based on personal prejudice. However, it considered that the staff member was “not qualified to carry out the tasks in the Post Description” and recommended that he be either trained to perform his new duties, or reassigned to a post for which he fulfilled the requirements, or reassigned to his original post in the travel unit. The Director-General accepted the recommendation in September 2005. He was advised in January 2006 that a new post at grade ND.04, to which he could be appointed, was to be created in the travel unit and that training would be provided for him if required. He accepted the assignment and took up the post in April.

Analysis: The organization argued that the implementation of the board’s recommendations by assignment of the staff member to a newly-created post with similar level of duties and responsibilities satisfied his claim. The Tribunal noted that this satisfied only one aspect of the relief being sought. The Tribunal then reviewed the allegations of personal prejudice finding that the “core” of the allegations related to the efforts of the administration to frustrate the reclassification of his post in the travel unit, including the two-year delay in responding to his request for a reclassification. The Tribunal agreed with the internal board that the delay in responding to the request for reclassification was unfortunate and disrespectful of a staff member, but there was nothing in the record to suggest that it was motivated by personal prejudice. The first reassignment following immediately after his request for reclassification was part of a staff rotation pilot project that was applicable to a number of staff members and was under discussion sometime prior to its implementation. The staff member did not produce evidence that the classification consultant was not qualified by training or experience to conduct the classification review, and therefore the Tribunal accepted the findings that the classification was conducted properly. Although the reassignment to another unit was not in accordance with the staff rule, there was no evidence that this resulted in disadvantaged career prospects or other injury.

Lessons: Classification decisions can be challenged if the procedures are not properly followed, or if it can be shown the consultant did not possess the requisite expertise, which is difficult given that the administration will not give its staff information about the

classification consultant. In these circumstances, a request should be made first to the internal appeal board to obtain the information about the expert, and to the Tribunal if the appeal board fails to do so. It is somewhat surprising that the Tribunal dismissed the challenge to the transfer decision since it found a breach of the rules in this regard. The Tribunal was likely influenced by the seemingly good faith exercised by the administration, and the fact that the staff member was not able to present direct evidence that the delay in the classification exercise was caused by ill-will or prejudice.

Citations:

V. Reorganization

Judgment No. 2588 (IAEA)

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

Facts: Long-serving G-6 staff member worked as a web-based database developer. She experienced harassment by her colleagues in her section. When she indicated to the colleague that was harassing her that she planned on lodging a harassment charge, the colleague filed a pre-emptive harassment charge against her. During the ongoing disciplinary investigation against the staff member, her division managers recommended against a further contract extension based on programmatic changes following a reorganization exercise. Without notice she had been reassigned to a different section with a new supervisor, and moved to another office without notice on a different floor. After the reorganization, she applied for a post in the new section headed by her former supervisor, who had provided adverse evidence against her in the harassment investigation. After interviewing the staff member, the supervisor decided not to fill the post and withdrew the vacancy announcement. The staff member was advised by the personnel division that her contract would not be extended since her duties and responsibilities had been consolidated in a different section and that the ongoing work would be given to the IT division. Despite the reason given, in the next year and a half she continued to provide the same services for P-5 staff members on various projects.

She appealed the decisions not to hire her for the post under her former supervisor and the decision not to extend her contract. The reason given by the personnel section could not be right since she continued to provide the same services, i.e., her duties and responsibilities had not been given to a new section. The internal appeals board found favourably and in particular that the decision not to extend her contract was not based solely on programmatic reasons, but also taken because of the conflict in her section. It also found that her application had not been given adequate consideration. The post had been filled without further advertisement by a male staff member rated as unqualified for the post when it was originally advertised. The Director General rejected the recommendations of the appeal board to give her a post in line with her qualifications and a contract of normal progression of 5 years. Instead, in the month prior to the expiration of her contract, he offered her a two year temporary assistance post in the IT division subject to funding. She accepted the post and appealed to the Tribunal.

Analysis: The Tribunal rejected any suggestion that any of her superiors who recommended against contract extension were motivated by “animosity towards” her. The Agency was entitled to make organizational changes and the Tribunal’s review was limited. The managers were entitled to take into consideration personal conflicts when assigning staff to new sections following the reorganization, and the decision to offer the staff member a post in the IT division was within the discretion of the Director General. The Tribunal expressed surprise by the decision to fill the post without readvertising, but the staff member had not directly challenged the appointment, and, in any event, the staff member could not prove she would have been selected if the competition had been held anew. The Tribunal awarded moral damages on a procedural point namely, the failure to give the staff member a copy of the meeting minutes of the advisory panel that considered her contract extension. The minutes disclosed that some members of the panel expressed the view that given her long term employment with the Agency she was entitled to a five year contract.

Lessons: Staff members face difficult hurdles in proving that decisions, which are taken during the course of reorganization exercises, are motivated by prejudice, bias or some other improper motive. This is a case where the staff member's supervisors were able to implement a disciplinary sanction, dismissal from her post, under the cover of a reorganization exercise. See the summary for Judgment No. 2589 on page 31 of this review for the facts and decision of the disciplinary case against this staff member.

Citations: Judgment No. 2589.

VI. Pension Rights

Judgment No. 2615 (CERN)

Ruling: Complaint dismissed.

Facts: In July 2004 CERN received a report submitted by its actuaries showing that its Pension Fund had a technical deficit of 254 million Swiss francs. The Governing Board of the Pension Fund recommended that the CERN Council should not adjust pensions upward in 2005. In December 2004 the Council approved the 0 per cent adjustment of pensions “on the understanding that the whole situation of the Pension Fund would be re-considered as early as possible in 2005 and a comprehensive package of measures submitted to [it] relating to all parties to the Pension Fund, namely the active staff, the beneficiaries and the Organization in order to improve the capacity of the Fund to meet its long-term liabilities”.

A retired staff member appealed the pension adjustment decision and was granted consent to lodge an appeal directly with the Tribunal. The staff member argued that Member States had not met their obligation to compensate for the financial losses incurred by the Pension Fund and instead have made pensioners bear the actuarial deficit. Secondly, he argued that pensioners have a right to a “pension adjustment calculated by a method producing stable, foreseeable and clearly understood results”. Thirdly, he claimed that the pensioners’ right to a “pension adjustment averting an erosion of their purchasing power which could ultimately lead to spoliation” has been violated. In his opinion the impugned decision did not take account of the criteria adopted for the adjustment of salaries since the advisory bodies did not receive the actuarial review information. Fourthly, he challenged the arbitrary nature of the decision taken by the CERN Council and criticized the consultation process which had not been “conducted rigorously”, and finally that the decision was discriminatory as it did not tap the resources of either the Member States or the Organization.

Analysis: The Tribunal rejected the argument that failure to provide the advisory bodies the actuarial review and presentation by the actuary tainted the decision. The Tribunal noted in this regard that “procedural rules which provide for prior consultation or discussion, and which entrust certain bodies with the task of formulating an opinion or a recommendation before a decision is taken, are established particularly in order that the decision-making authority may be informed as objectively and fully as possible about interests worthy of protection which its decision may harm; this should make it easier to gain the support of those concerned by the decision and should ultimately contribute to its smooth implementation. Advisory bodies can naturally play their role only if they have access to all the relevant information necessary for the formulation of their opinion.” Having said that, it nevertheless did not find any provision requiring that the advisory bodies must be given the actuarial review or the actuaries must be heard, and therefore the issue was whether these bodies received enough information to be able to take a decision. The meeting minutes showed that these bodies were fully informed of the Pension Fund’s situation and of the precise circumstances prompting the recommendation. The minutes merely mentioned that some committee members would have preferred to have received this additional information before the recommendation was adopted.

The Tribunal noted that “consideration should be given to preserving retirees’ standard of living not just in the short term; that they must be protected not only against the periodic

erosion of their purchasing power but also against management measures that are liable to jeopardise the actual maintenance of their pension payments [and therefore] the obligation to adjust pensions from time to time in line with a rise in the cost of living is limited by the need to ensure the health of the pension scheme.” Having set forth these general rules, the Tribunal nevertheless found that the decision not to increase the pensions in 2005 was an “urgent protective measure, and it appeared to be the only measure of that kind that could be taken immediately.” The Tribunal also held that the Council did not abuse its discretion since in adopting the measure it demanded that the “whole situation of the Pension Fund should be reconsidered as soon as possible and that a comprehensive package of measures should be submitted to it concerning all parties to the Pension Fund, namely the active staff, the beneficiaries and the Organization, in order to improve the Fund’s capacity to meet its long-term liabilities.”

Lessons: When a pension fund is in financial difficulty, which is not contested, it will not interfere with measures to reduce pension benefits. The Tribunal will also look to whether the organization is taking other steps to remedy the financial difficulties.

Citations: Judgment No. 2089.

VII. Medical Related Decisions

Judgment No. 2578 (WHO)

Ruling: Complaint dismissed; 5,000 Swiss francs moral damages; 2,000 francs in costs.

Facts: In May 1980 the staff member joined the WHO as a supply assistant. Her appointment was terminated for reasons of health in November 2003 by a decision based on Staff Rule 1030: “[w]hen, for reasons of health and on the advice of the Staff Physician, it is determined that a staff member is incapable of performing his current duties, his appointment shall be terminated”. She would receive a “payment equivalent to three months’ salary [...] in lieu of notice”. She filed an appeal against it on the grounds of procedural flaws and called for her case to be referred to the Board of Appeal. The case was referred to a medical board for review and in the interim her contract was extended until March 2004. The medical board took account of her medical record, the disorders, illness and the consequences of a service-related car accident. It concluded unanimously that she was incapable for health reasons of performing her duties and that her accident-related condition should be considered as stabilised in January 2004 without functional after-effects. Her degree of incapacity was assessed at 50 per cent, with the rider that “regular activity cannot be guaranteed and significant absenteeism is to be expected”. Her medical condition was “of long duration and likely to recur frequently”. The Director General submitted this to the Board of Appeal, which requested further information from the Joint Medical Service and from the administration. The Board found that the Administration had looked for a more suitable post for her, contrary to her allegations. She had been informed about her pension rights and was clearly notified of her leave entitlements.

She contended that the WHO breached its obligations to act in good faith, to keep its staff informed and to safeguard her legitimate interests, reputation and dignity, especially by refusing to reply to her letters concerning the renewal of her contract, by dismissing her abruptly and unlawfully when she was two years from retirement, by accepting the adverse comments contained in the Chief of the Medical Services’ report which described her as unstable, unmotivated and unfit for work, and by leaving her without income until she was forced in march 2005 to admit disability in order to receive a pension.

Analysis: The Tribunal has no competence in replacing medical practitioners’ opinions with its own. It found that the Board was properly constituted and that it was not bound to hear or examine her personally. There was no animosity shown towards her or any evidence of objectivity and impartiality of the Chief of the WHO Medical Services. The Tribunal did find however that the staff member’s contract was wrongly terminated because she was not given three months notice, but this was remedied by postponing the separation date. In addition, the actions of the administration increased the staff member’s feeling of uncertainty regarding her situation, that she was not treated with due consideration, and therefore justified in claiming compensation for moral injury.

Lessons: In the absence of procedural errors, the Tribunal will not set aside a report of a medical board and/or substitute its views. The Tribunal will award moral damages if the administration does not address health issues with relative promptness.

Citations:

Judgment No. 2580 (EPO)

Ruling: Complaint dismissed.

Facts: The staff member joined the EPO in 1980. In March 2003 an official in the personnel department informed him that he had taken 307 days of sick leave during the previous three-year period and was asked to nominate a medical practitioner who would represent him on the Medical Committee (MC). In November 2003 he was told that he was approaching the maximum entitlement to paid sick leave. He appointed again a medical practitioner to represent him on the (MC). A third one was also appointed by mutual agreement between the first two. In September 2004 the MC met and concluded that the staff member's illness was serious. His was placed on compulsory sick leave. During a follow-up examination in March 2005 he expressed the wish to have his sick leave extended upon its expiration in September 2005. In November 2005 the MC met again and unanimously concluded that the staff member was permanently unable to perform his duties but that his invalidity was not the result of an occupational disease. The President decided that the staff member should "cease to perform his duties with effect from 1 December 2005" and that he would receive an invalidity pension.

His physician told the staff member that he was improving and that recovery was possible. The staff member argued that the MC's conclusion was therefore erroneous. He also argued that he had not yet exhausted the maximum allowable "bona fide" sick leave. He said that the invalidity was related to his working conditions, an "occupational disease" and alleged that he was harassed and mobbed by his director. To declare him "invalid" and not to recognize the occupational nature of his invalidity caused him great distress.

Analysis: The Tribunal found that in November 2005 the staff member had accumulated the maximum allowable period of sick leave as defined in the regulations. Under the regulations no distinction is made between "sick leave" and "compulsory sick leave", so the compulsory absence had to be counted within the maximum period of sick leave. The Tribunal noted it had full competence to determine whether the medical findings show any material mistake or inconsistency or overlook some essential fact, or plainly misread the evidence. Being scientifically based and scientifically relevant, the Tribunal will accept the MC's evaluations unless they are considered clearly unreliable according to current scientific knowledge. The Tribunal found that the evaluation was not seriously contradicted and it may not replace qualified medical opinion with its own.

Lessons: The Tribunal's review in medical cases is normally limited to procedural errors. Despite the seemingly broad standard of review set forth in the ruling, the Tribunal will not substitute its own opinion with the medical experts. Sometimes the medical experts or the administration do not apply the regulations and rules properly, and this can lead to errors of law for which the Tribunal will grant relief.

Citations:

VIII. Allowances and Other Benefits

Judgment No. 2582 (IOOC)

Ruling: Decision reversed and remanded; €1,000 moral damages; and €2,000 costs.

Facts: Former Executive Director of the IOOC was on detachment from the European Commission and, following an audit report on the IOOC's administrative budget, the competent department of the European Commission decided to terminate his detachment with effect from 1 January 2003. The Executive Director then asked to retire from the European Commission, but before leaving the IOOC, he credited his bank account with the sum of 228,950 US dollars, representing the repatriation grant which he considered was due to him. It was under those circumstances that the IOOC Heads of Delegation, meeting in Madrid in December 2002, asked him to return the sum – which he did – and agreed to his resignation, which immediately terminated his appointment.

The IOOC subsequently decided to waive the immunities of its former Executive Director and to forward the audit report to the Spanish authorities who brought charges before the criminal courts. The organization decided not to maintain any contact with the former Executive Director including not to reply to his requests for payment of the repatriation grant and of his travel and removal expenses. The matter was eventually taken up by the Heads of Delegation who referred the matter to the external legal adviser to study the case so a final decision could be made. Despite several reminders from the former Director, no answer was received and a complaint was filed with the Tribunal seeking setting aside of the implied decision not to pay the repatriation grant.

Analysis: The organization argued that the former Director did not exhaust internal means of redress and that his appeal was time-barred. The Tribunal held that exhaustion of internal means of redress was not necessary since the rules did not permit former staff members from lodging internal appeals: “if the right to file an internal appeal is enjoyed only by serving officials, it follows that former officials have no access to internal remedies and may appeal directly to the Tribunal, which is open to any official lodging a complaint alleging non-observance of the terms of his contract or the rules that apply to him, ‘even’ – as stated in Article II(6)(a) of the Tribunal’s Statute – ‘if his employment has ceased’”.

With respect to whether the appeal was time-barred, the Tribunal held that the organization advised him that it was consulting its legal advisor and would thereafter make a decision. Despite his repeated subsequent requests for a decision or status, no reply was ever received. The Director was therefore entitled to treat silence as an implied decision to reject his request.

On the merits, the former Director tried to show he satisfied the conditions for payment of the repatriation grant. The Tribunal said it was not competent to decide that issue: “it is up to the Administration to decide, on the basis of the applicable regulations and whatever information it has available regarding the situation of its former official, whether or not he is entitled to the benefits he is claiming and, if so, to settle them”. The Tribunal therefore remanded the case to the IOOC “for the latter, after considering the merits of the complainant’s request in accordance with the applicable rules and whatever information he has supplied, to take an explicit, reasoned decision regarding the benefits he is claiming.” For the delay, the former Director was granted 1,000 euros in moral damages, and costs.

Lessons: In this case, the delay gave no advantage to the former Director. The Tribunal will generally not make a calculation on behalf of staff members when the organization's rules and regulations provide for the calculation. If an organization does not reply to a request, the staff member should treat the failure to answer as an implied decision, which can be appealed.

Citations: Judgment Nos. 1399 and 2461.

IX. Staff Association Activity

Judgment No. 2585 (Eurocontrol)

Ruling: Complaint dismissed.

Facts: The staff member joined the Eurocontrol Agency in 1992 in the position of Head of the Library and Archives section. After being elected to an office of the Central Staff Committee, he was detached starting in February 2003. During his term of service, his post was modified, re-evaluated and redistributed as a result of restructuring, centralisation and modernisation of the Agency's documentation services. In November 2004 the staff member advised management that he did not intend to run for office again and wanted to return to his section head post. After negotiations failed he lodged a complaint seeking reinstatement to his former post. In March 2005 a notice of competition was issued for the post of Head of the Agency Library, Documentation and Archives Unit (ALDA). The staff member applied for the post, and shortly thereafter filed a second internal complaint seeking the cancellation of the competition and reinstatement in his former position. Another internal candidate was selected for the post. The Joint Committee for Disputes recommended rejecting the complaint pointing out that "because ALDA ha[d] undergone an in-depth reorganisation since June 2004, it [was] clear that the complainant [could] not be reinstated in exactly the same position as the one he held prior to his departure", and that the post advertised in the relevant notice of competition was different from the one he occupied previously. In October 2005, he was assigned to the post of Head of the Awareness Section under the supervision of the Head of ALDA. Before the Tribunal, he argued that the Agency breached his freedom of association by not protecting and guaranteeing his return to his previous post at the end of the detachment. He also deemed the new assignment as a demotion, and he challenged the hiring of another candidate to the Head of ALDA.

Analysis: The Tribunal recalled the principle that "elected representatives of the staff enjoy specific rights and safeguards in accordance with the general principles which govern employment relationships in international organisations and which are also generally recognised in national labour legislation". Nonetheless, the Tribunal said it is still up to the staff member complaining that such specific rights and safeguards have been violated to prove that fact and not merely rely on bald assertions. The Tribunal found that the Agency did not breach the staff member's right to freedom of association but facilitated it by agreeing to detach him to serve on the Central Staff Committee. The Tribunal further found that the duties of the staff member's previous post were not the same as the new post of Head of ALDA, and with respect to the competition, the procedures in the staff regulations were properly applied, and that the selection board was impartial. Since his new assignment was in the same category and grade, and the section to which he was assigned was reorganized, it was not possible to find the move had been a demotion.

Lessons: This decision diminishes the right to freedom of association. It provides an organization the ability to use an reorganization exercise in order to retaliate against staff representatives. It will deter staff members from seeking office since the security of returning to their post is not guaranteed and can even result in a demotion by virtue of diminished duties and responsibilities.

Citations: Judgment No. 2156.

X. Discipline

Judgment No. 2589 (IAEA)

Ruling: Complaint dismissed.

Facts: In July 2003, a long-serving G-6 female staff member, with expertise in developing web-based databases, was investigated following a harassment charge by her female colleague. The two worked closely as a team with two (2) professional (P-5 and D-1) staff members in developing a web-based database in 2001, which turned out to be very successful. After a six month investigation, the Agency's internal watchdog (Office of Internal Oversight Services (OIOS)) concluded that harassment had taken place because of her alleged "pattern of behaviour". During the course of the OIOS investigation, it received information from her colleagues alleging that she was seen often in her husband's office and that her husband was doing her work. Her supervisors advised the OIOS that they knew she was using her husband's computer for doing some of her work since she did not have necessary software tools, and the two (2) databases she was working on were not confidential – i.e., it was harmless. The OIOS concluded that she had breached confidentiality by giving her husband access to confidential databases and produced evidence allegedly showing that the databases she was using were simultaneously accessed for short periods from both her computer and that of her husband on 12 separate occasions. In August 2003, or within a year of the first charge of harassment, the OIOS took up a second charge of breach of confidentiality reported by the the D-1 project manager involving the successful web-based database developed by her under his supervision. The second OIOS report found that she had given unauthorized access. The case went to a Joint Disciplinary Board.

The Board recommended against the imposition of a disciplinary measure with respect to the harassment and the unauthorized access charges. With respect to the harassment, it concluded that both parties had difficulty working with each other. With respect to the charge that she gave access to a non-staff member to the web-based database who had been allegedly given an account in the test database, the Board expressed surprise that the account was not discovered for some 2 years. It found that the alleged person could not make changes to the database and had not introduced information, and the Director of IT Services had testified that the appearance of an account in the test database was of no relevance and that it was the responsibility of the professional managers on the project to ensure all test data was cleared before the production (or real) database was activated. The Board did not state in its report that the staff member created the account in the test database. With respect to the charge that she had used her husband's computer and therefore allowed unauthorized access to her husband to two (2) confidential databases, the Board said that such access was "wrong" even though the information was in fact not confidential. However, it also took note that her husband was a staff member (and presumably subject to the same confidentiality undertakings as his wife). Her husband had in fact been charged with misconduct for accessing confidential information. The Joint Disciplinary Board in that case rejected the charge noting the Agency's rules at the time of the alleged infraction did not prohibit staff members from using other staff members' computers although it could not explain how the databases were accessed almost simultaneously on 12 occasions. The Board noted that the Board in her husband's case rejected any disciplinary measure which the Director General had followed. The Board made no recommendation respecting the charge of unauthorized access to her husband.

The Director General accepted the recommendation with respect to the harassment charge. However, he rejected the recommendation regarding the alleged unauthorized access to the test database and found that an account in the test database had in fact been created by the staff member. With respect to the access allegedly given to her husband to confidential files, for which no recommendation had been made by the Board, he decided that she should be penalized for giving her husband the possibility of accessing information that was restricted to only certain users. In her appeal to the Tribunal, the staff member argued that the OIOS investigation breached her right to due process. She was denied the right to staff representation during her OIOS interview and was badgered during the interview to such an extent that she collapsed immediately after leaving the interview room and taken to the hospital in violation of her right to be treated with dignity and respect and her human rights. She also noted that the entire disciplinary procedure lasted for over three (3) years, and she was not given the chance to question any of the witnesses against her. While the staff member was vindicated by the recommendation of the Joint Disciplinary Board, the Director General did not adequately explain or detail his reasons for departing so significantly from the Board's recommendation. She noted that the Board did not interview any witnesses except herself and the IT Services Director, and therefore the case should be sent back at the very least to the Board in order that she be able to question the witnesses against her – a fundamental right during disciplinary proceedings.

Analysis: The Tribunal rejected all of the staff member's arguments and evidence. It reviewed the OIOS terms of reference and did not find any provision allowing staff members subject to disciplinary charges to be accompanied by a staff representative during the interview. It found that she had no right to question witnesses interviewed by the OIOS during the OIOS investigation, and she had not specifically called into question the Joint Disciplinary Board's proceedings, and "indeed the Board's recommendation gives full satisfaction to the complainant." The Tribunal did not reach her arguments that the OIOS violated her right to be treated with dignity and respect if not her human rights during the course of her interview. On the merits, the Tribunal accepted most of the staff member's evidence on whether her husband had been given access to confidential information. However, it was clearly swayed by the OIOS evidence that the databases had been accessed almost simultaneously on several occasions. On the strength of this evidence, it found that "she had given someone with another computer the possibility of accessing information reserved for a small number of users" and had violated rules of confidentiality "applying to her and to all the staff members of an international organization whose mission calls for particular vigilance." On the allegation that she gave access to a non-staff member to the web-based test database, the Tribunal accepted the OIOS findings that the account had been created by the staff member as alleged on the grounds that she had given various reasons to explain the existence of the account in the test database to the OIOS. Before the Board, she denied that she created the account, and that she had advised the OIOS of this fact. She argued to the Board that it was obvious the OIOS had not accurately recorded her comments. As no transcript of her interview was taken by the OIOS, there was no evidence of what she had said. It denied the request for compensation for the length of the disciplinary process (3 plus years) while nonetheless describing the duration as deplorable.

Lessons: The Tribunal will not review circumstantial evidence showing that disciplinary proceedings in reality are conducted as part of official mobbing. In this case, the Tribunal has articulated a new and very high standard for staff members of the Agency seeking to set aside unlawful disciplinary measures owing to the Agency's mission which allegedly calls for

“particular vigilance”. In disciplinary cases involving allegations of breach of confidentiality, the Tribunal will it appears now give absolute discretion to the Agency’s Director General in rejecting the recommendation of the advisory board. This case also shows unfortunately how one staff member, who is mobbing another staff member, can enlist the help of an organization’s administrative machinery to assist in the mobbing. The staff member in this case spent over three (3) years under intense duress during which 1) she and her husband were subject to disciplinary procedures that originated with charges from this staff member’s colleague, 2) although the charge was initially only harassment, the OIOS did not limit its investigation to that single charge but also to allegations of criminal acts, 3) a reorganization of her Division took place without giving her notice of the changes to her assignment, 4) she was isolated physically from her Division by assignment without notice to a new office on a different floor, 4) by a decision not to extend her contract on the grounds of abolition of post, 5) being denied a new post under the supervision of her old supervisor for which she was qualified and the post instead being filled by an unqualified male staff member behind the scenes, and 6) the organization having one month before the expiration of her contract offered her a new post in the IT Services Department which left her with no choice but to accept the appointment and the lack of future job security.

Citations: See companion case Judgment No. 2588 on page 22 of this review.

Judgment No. 2602 (WHO)

Ruling: Complaint dismissed.

Facts: The staff member worked at the WHO on a series of short-term contracts, from 1982 to 1986 and then from 1990 on an almost continuous basis until his last contract came to an end in July 2004. He was eligible for fixed-term status, because he met the criteria of a “long-term short-term” (LTST) staff member. He applied for a post of Clerk at grade G-5 for which he completed a personal history form with his date of birth and he claimed to have earned certain university diplomas from the University of Toulouse. As he was selected for the post, he was asked to submit copies of his educational certificates, to produce the originals, his birth certificate, at his convenience, for verification purposes. He was reminded to do it three times. His contract, which expired in May, was extended until June to provide him additional time to supply the original documents requested. The WHO informed him that discrepancies had been observed on the submitted documents. His contract was extended to July 2004. The University of Toulouse confirmed that he had not been enrolled and could not have earned the diplomas listed. The organization informed the staff member of the results of its investigation. It noted that the date of birth listed was incorrect and also about the diplomas. He got the opportunity to respond within eight days. He said that he was advised by “an individual in the Personnel Department” to alter his date of birth to enhance his pension entitlements. He did not have the original copies of the diplomas since he had given them to his brother so that he could study and live in France. The organization concluded that these explanations were not credible. His contract came to an end in July 2004, so the organization did not impose disciplinary measures.

Analysis: The Tribunal found that the organization’s action was clearly justified. The staff member’s contract came to an end and it is within the discretionary authority of the executive head of an international organisation to decide whether to renew a short-term contract. Misrepresentation and falsification of documents are serious matters that do not reflect the standard of integrity that is expected of staff members of international organisations, and are good grounds for not granting a contract extension. The Tribunal stated, “[c]ommon decency, good faith and honest dealing lie at the root of relations between employer and employee. Whoever ventures to ignore that does so at his own peril”. The Tribunal said that the explanations given by the staff member were wholly lacking in credibility and the principle of equal treatment was not violated.

Lessons: The Tribunal will not help staff members who have provided false information to the organization. The Tribunal will set aside the application of disciplinary measures when there are fundamental due process violations even where the violation is proven.

Citations:

Judgment No. 2605 (IOM)

Ruling: Decision quashed; claim for moral damages rejected; request for an apology and for appropriate “managerial action” rejected; 2,000 Swiss francs in costs.

Facts: The staff member joined the IOM in 1993. Since September 2003 he held the post of Chief of Mission, IOM London. The regional accountant was informed of irregularities relating to the staff member’s misuse of the representation fund and to his duty travel arrangements. He discussed it with the staff member. It was agreed that the Office of the Inspector General (OIG) would conduct a more limited review, focusing on the staff member’s travel expense claims. In that process, other irregularities with respect to the staff member’s compensatory leave and absence from the workplace without leave were uncovered. The staff member allegedly made untruthful statements and omissions in connection with some of his travels. He collected excess per diem for days when he was not working. The OIG recommended that the administration should apply severe disciplinary action in addition to seeking repayment of some expenses and a re-adjustment of his annual leave balance. This was told to the staff member. He responded that he very much regretted all the inaccuracies and accepted responsibility for signed documents, was ready to reimburse any amounts necessary, to make any retroactive adjustments in leave allotments required. He also objected that the mistakes had been wilfully dishonest. The Director General decided to impose a salary reduction of one step within grade.

Analysis: The Tribunal found that informing a person in advance that an investigation into certain allegations will be undertaken is not a requisite element of due process. In certain circumstances alerting an individual to the fact that an investigation is to be undertaken may well compromise the investigation. When irregularities are identified, the individual must be informed to enable him to respond and defend himself adequately. The Tribunal found that the requirements of due process were not observed since the OIG recommended disciplinary action without informing the staff member about the allegations. It is beyond the competence of the Tribunal to order an organisation to apologise or to demonstrate that “managerial action” has been taken to prevent such an irregular investigation from occurring again.

Lessons: The Tribunal usually limits its review in disciplinary cases to whether the staff member was given notice of the charges and an opportunity to answer the charges. Due process also requires that the staff member be given the opportunity to examine the evidence and to question and present defense witnesses.

Citations:

XI. Receivability

Judgment No. 2591 (IFAD)

Ruling: Complaint dismissed.

Facts: In 2003, the staff member, Finance and Budget Officer at grade P.3, joined the IFAD on a one-year contract. After receiving a positive performance evaluation report (PES) for the year 2003, his contract was renewed for another year. However, following a negative performance evaluation for the year 2004, his contract was not renewed. In July 2005, the President decided to set aside the poor rating and re-evaluate the performance, and the staff member was asked to complete his part of the PES. In early October, the staff member wrote that he disagreed with the proposed procedure, and lodged an appeal with the Tribunal.

Analysis: The Tribunal had no trouble dismissing the complaint since the staff member did not complete the PES preventing a final decision to be taken on his performance rating and he had not exhausted internal administrative remedies by filing an internal appeal. The staff member justified his failure to participate on the grounds that the process was flawed and that the management review group was biased and disregarded the requirements of due process. The Tribunal held that “his argument is not relevant, because it is necessary to complete the process regardless of the flaws.” He also argued that the Fund had not established an internal appeal board. The Tribunal said the staff member could still have lodged an appeal, and if there was no board set up, he could have proceeded to the Tribunal on the basis of having received an implied final decision.

Lessons: Even if the procedure set up to reach a final decision has obviously serious flaws which will affect the fairness of the outcome, or if an appeal board is provided for in the regulations but has not been formed, the staff member must still submit to the process and lodge an internal appeal with the appeals body once the adverse decision is received. In cases where there is no appeal board in existence (although provided for in the regulations), the staff member should send a letter or memorandum to the director of administration requesting that the appeal be forwarded to the appropriate body for review and recommendation. No reply is equivalent to the rejection of the internal appeal and an appeal with the Tribunal can be lodged.

Citations:

Ruling: See page 6 of this Review for summary of merits and ruling.

Facts: The staff member lodged a protest on 22 August 2003 of a decision of 30 June to appoint another candidate to the post for which he applied. Under the appeal rules, in the absence of a reply from the Director-General, his appeal to the internal Appeals Board was due by 22 September 2003. After the filing of his protest, on 5 September he received a memo inviting him to meet with an administration official on 15 September to discuss a possible amicable settlement. No settlement was reached during the meeting but agreement was reached that a desk audit of his post would be conducted. The staff member lodged his appeal on 2 October 2003. The administration objected to the receivability of the appeal on the grounds that the time limits in the rules had not been waived by the administration.

Analysis: The Tribunal noted that it is well established that if an internal appeal is time-barred and the internal appeals body was wrong to hear it a subsequent complaint to the Tribunal is irreceivable. It found that the memo of 5 September 2003 did not specify that the time limits in the rules would continue to operate while settlement discussions were under way, and therefore it was reasonable for the staff member to infer that the clock had stopped running while attempts at settlement were being pursued. The Tribunal went further and stated that “[i]f an organisation invites settlement discussions or, even, participates in discussions of that kind, its duty of good faith requires that, unless it expressly states otherwise, it is bound to treat those discussions as extending the time for the taking of any further step . . . because settlement discussions must proceed on the basis that no further step will be necessary.” Once the discussions terminate, the time limit for filing the appeal begins to run. Accordingly, the time limit did not start to run in this case until 15 September 2003, and his appeal was timely filed.

Lessons: Settlement discussions will normally toll the time limits pertaining to pursuing internal appeals unless the administration advises the staff member that such discussions have not waived the requirements of filing according to the rules. It is prudent to request in writing agreement from the administration that any settlement efforts will waive the time limits and to receive acceptance in writing. This will avoid the receivability issue altogether, and prevent the organization from using settlement discussions to set a trap for miss filing deadlines. Note also that settlement efforts undertaken after the internal appeal has finally been decided will not toll the time limit for filing an appeal with the Tribunal.

Citations: Judgment Nos. 775 and 2297.