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Semi-Annual Review

*International Labour Organization
Administrative Tribunal 99th Session*

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Introduction

I am pleased to present this Semi-Annual Review of ILO Administrative Tribunal Cases (99th Session). In the last session, staff members were successful in a modest third (31%) of all decided cases. That is not an uncommon rate of success with the Tribunal. The decisions handed down by the Tribunal involved many different issues affecting the international civil service, and I have endeavoured to limit the review to the most significant cases. Accordingly, you will find a review of 26 cases out of a total of 55 reported.

In the 99th session, the Tribunal was faced with the issue of same-sex marriages (Judgments 2443, 2444 and 2449), however, it was able to avoid a pronouncement of its views on the issue since in the first two cases, the Organization changed its policy during the appeal, and in the second case the Tribunal found the appeal untimely. In another significant case involving disciplinary procedures (Judgment 2475), the Tribunal held that staff members have the right to cross-examine adverse witnesses interviewed during a disciplinary investigation. The Tribunal continued to show its hostility towards claims of bias, harassment or bad faith in the context of hiring, reclassification and promotion decisions, and reiterated that the burden of proof is on staff members to prove such allegations.

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

I. Probationary Appointments

Judgment No. 2427 (CERN) (Judge Gordillo)

Ruling: Complaint dismissed.

Facts: Staff member's appointment on 1 April 2003 was subject to 12 months' probationary period, including the requirement that he acquire a basic working knowledge of French. At mid-way point in August 2003, his performance was deemed satisfactory. He took French classes as well. However, on 12 February 2004 he was advised that his work was unsatisfactory and that his work would be assigned to another staff member. His appointment was not confirmed. The staff member argued that he was not properly notified of the language requirements or given time to improve his French. He also argued that his poor performance appraisal was based on a project in which he spent little or no time, as his supervisor assigned other unrelated tasks.

Analysis: The Tribunal found that he was sufficiently warned, at the beginning of his probation period and later on, about the language requirements for his post. The staff member admitted that his knowledge of French did not improve enough to enable him to participate in meetings, right to the end of his probation period, and that alone constituted sufficient cause for his negative end-of-probation report. Such cause, and the resulting termination of his appointment, could not possibly have surprised him. Finally, when he was notified of the negative end-of-probation report and invited to comment on it, he declined to reply and admitted that he had been informed previously of the negative evaluation of his performance.

Lessons: It is important that the duties of the post as advertised be carefully reviewed by the probationer. When a conflict arises with a supervisor during the probationary period, it is imperative to address the issue immediately and in writing.

The staff member obviously had a conflict with his supervisor that was not addressed properly at the early stages (he alleged that she had in fact interfered with his work and did not allow him to work independently). The supervisor, in a much superior position of power vis-à-vis the staff member (a probationer), used the power of the negative appraisal to achieve the "lawful" termination of the probationary appointment. In this case, the Tribunal focused on the French requirements. It was satisfied that the staff member's admission that he lacked sufficient French language skills, a job requirement in the vacancy announcement, was enough for the administration to terminate the appointment. As for warnings, the Tribunal viewed this as a case of clear notice, specifically that French was required. Moreover, the staff member did not help his own cause by not asking for more French lessons, or objecting in writing to the negative appraisals.

Citations:

II. Duty to Substantiate Decision

Judgment No. 2428 (UNESCO) (Judges Gaudron and Gordillo)

Ruling: Decision set aside; new decision to be made stating reasons; \$1,000 in costs.

Facts: Staff member was promoted to grade D-1 with effect from 1 November 1999. A year later, Organization restructured providing that all director posts at headquarters which did not correspond to the new structure in terms of functions and/or grade would be abolished on 1 October 2000. The staff member was downgraded to P-5 after the Organization made no effort to find a suitable D-1 post at headquarters. Organization alleged that the staff member declined the offers for 2 posts at D-1 in the field. The Appeals Board recommended that “every effort be made to promote the [complainant] to a D-1 post at an early date” and that, in the meantime, “she should be placed at a P-5 post where her feeling of marginalization may be removed”. By letter of 23 February 2004, the DG decided not to accept the Board’s recommendation and to reject her appeal.

The staff member argued among other things that DG did not provide any reasons for not accepting the Board’s recommendation.

Analysis: The Tribunal reiterated that as it held in Judgment 2092 under 10, no further reasons are required when the executive head of an organisation follows the recommendations of an internal appeal body, but they are necessary when those recommendations are not endorsed. This is the case here. UNESCO had the duty to give reasons for its decision affecting the interests of a staff member.

Lessons: Successful appellants in the internal appeal should look to see whether the executive head of an organization gives a reason for not granting the relief recommended by the internal appeal body. This also demonstrates the Tribunal’s tendency to dispose of cases on narrow grounds and to decline to reach the substantive merits of the dispute, even though the fault lies with the organization. In this case, the appeal process will likely take another two to three years, with the result that the injury in this case may go unremedied for almost a decade. Justice delayed is apparently not justice denied in this case.

Citations: Judgment 2092.

Judgment 2445 (UNESCO) (Judges Ba and Rouiller)

Ruling: Decision set aside and remanded; €5,000 moral damages and €2,000 costs.

Facts: Staff member applied for the D-1 post of Director of the Headquarters Division for which a vacancy notice was published on 19 November 2001. He appealed when he was not selected. The Appeals Board, finding that the recruitment process was flawed, recommended to the Director-General that he should consider transferring the staff member to another post at the D-1 level or reclassifying his post with effect from 1 March 2002. Failing that, it recommended granting the staff member three extra steps. The Director General decided not to follow its recommendations: “After careful consideration of the report of the Appeals Board . . . , I have decided not to accept the recommendation of the Appeals Board”.

Analysis: The Tribunal had no trouble setting aside the Director-General’s decision for lack of any reason for not following the Board’s recommendation. The Tribunal has consistently stressed the requirement that where the DG refuses, to a staff member’s detriment, to follow a favourable recommendation of the internal appeal body such decision must be fully and adequately motivated. The final decision contained no indication which would allow the Tribunal to review the real reasons that led the Director-General not to accept the Appeals Board’s recommendation. Merely asserting that it was after examination of the entire dossier relating to the staff member’s appeal that the impugned decision – which according to the defendant merely confirmed an earlier decision – was taken in no way justifies not giving reasons. The Tribunal did not consider the other reasons cited by the Administration after the appeal was filed.

Lessons: Although the Tribunal made a total award of €7,000, it does not do enough to deter international organizations from fulfilling their obligations. The Appeals Board had found in the staff member’s favour, and the Tribunal should have ordered implementation of its recommendations. No purpose is served to send the case back to the organization for another decision which will no doubt be based on the same reasons proffered in the appeal process.

Citations: Judgment 2339.

III. Medical Opinions/Boards

Judgment No. 2432 (EPO) (Judges Ba and Rouiller)

Ruling: Decision set aside; €1,000 moral damages and €1,000 costs.

Facts: Staff member (A2) was on sick leave for one year, suffering from gynaecological and orthopaedic disorders, and she was referred to the Invalidity Committee to determine if entitlement to pay would continue. The three doctors on the Committee had differing opinions on the extent of Staff member's illness. The staff member's own doctor, interestingly, held the opinion that the staff member was fully able to work. The members filled out the standard form report and signed off on different dates. No meeting was held.

Ruling: The Tribunal repeated its position that it will not replace the findings of medical boards with its own, but it will review whether due process was followed. In this case, the Tribunal held that "before taking a final decision, any collegiate body must meet to deliberate. A meeting may not be absolutely necessary, however, as suggested in the form prepared in this case by the Organisation – which constitutes the Invalidity Committee's report – if the Committee members agree on all the points of their individual reports."

Since committee members held differing views on the seriousness of the illness and the incapacity it caused, a meeting should have been held prior to the issuance of its report.

Lessons: Staff members are entitled to have medical issues decided fairly and with full procedural due process. The Tribunal will not accept shortcuts.

Citations:

Judgment 2446 (WHO) (Judge Gaudron)

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

Facts: G-4 staff member began working as a secretary in July 1991. In October 1996, she was diagnosed as having tuberculosis, and requested that the tuberculosis be recognised as service-incurred. During the internal appeal process, following a request by a medical board, the Director-General authorized an investigation into her working conditions during the period from mid-1995 to October 1996 by an independent panel from outside the Organization. In their report of October 2002 the external consultants stated that they had not observed any significant facts which provided evidence of particularly difficult working conditions. They had, however, observed “some especially abusive forms of conduct at the management level”, though this did not in their view constitute harassment. The medical board did not reconvene to review the consultants’ report, and the Advisory Committee recommended rejection of the appeal, which the Director-General followed.

Analysis: The Tribunal referred the case back to the medical board to consider the consultants’ report and to give the requisite medical opinion, or if the medical board is unable or unwilling to do so, the WHO must take appropriate steps to have a new board appointed.

Lessons: Staff members should insist to their administrations that medical panels or boards have access to all necessary information and that a thorough report be provided of their findings and opinions. In this case, the staff member’s rights, which matured in 1996, await further deliberations.

Citations : Judgment 620.

Judgment No. 2458 (UNIDO) (Judge Gaudron)

Ruling: Case remanded for convening of medical board.

Facts: In Judgment 2189 delivered on 3 February 2003, the Tribunal ordered UNIDO to without delay establish a medical board to advise on the former staff member's appeal regarding a service-incurred illness. The proposed medical board consisted of UNIDO's Medical Advisor, the staff member's doctor, and a doctor from FAO. UNIDO's rules state that the medical board should be composed of a qualified medical practitioner designated by the staff member, the Medical Officer of the Organization or a medical practitioner selected by him or her and a third qualified member who was to be selected by the first two, and "who shall not be a medical officer of the Organization". The staff member, after first accepting the FAO medical officer, lodged an objection on the grounds that he was a member of an international organization. UNIDO's Medical Advisor requested the staff member undergo a clinical medical examination conducted solely by him. She instead suggested that the appropriate examination should be conducted by all three board members.

Analysis: The staff member sought a ruling on her internal appeal. The Tribunal declined the invitation even though it noted that it was deplorable that the internal appeal had been pending for 10 years. The Tribunal held that the staff member was not acting in good faith: "the complainant seems more interested in litigating rather than in attempting to resolve her difficulties with her former employer [and it] is deplorable that her internal appeal has still not been disposed of but . . . that is largely the consequence of her own misguided actions." The Tribunal also expressed disapproval in the staff member's efforts to impose non-negotiable conditions on the medical board. The Tribunal returned the case to UNIDO with instructions for convening a medical board.

Lessons: The staff member here presumed in advance that the FAO medical expert would be biased. The Tribunal will not usually accept such assumptions of bias. If a disagreement arises about the interpretation of a staff rule or regulation (or some other administrative rule), the staff member should note the disagreement in writing. The Tribunal will not usually permit the staff member to opt out of the procedure (in this case the medical board review) or demand special conditions because of the disagreement. If irregularities arise in the deliberations of the board, the Tribunal can intervene to protect the staff member.

Citations: Judgment 2189.

IV. Reorganization Exercises/Abolition of Post/Constructive Dismissal

Judgment 2435 (ITU) (Judge Gaudron)

Ruling: Case dismissed.

Facts: ITU went through a reorganization exercise in which P-5 staff member's post was abolished, and staff members were offered incentives to voluntarily separate. The staff member asked the Secretary-General for a voluntary separation package and the request was denied on the grounds that the staff member's services were essential to the Union. The staff member was then advised that he would be redeployed into a position corresponding to his qualifications and experience. He then resigned and appealed, alleging that he was constructively dismissed, and that the decision not to offer him an incentive package for voluntary dismissal showed bad faith and an abuse of authority.

Analysis: The Tribunal recognized the principle of constructive dismissal: It is a convenient expression to indicate that an employer has acted in a manner inconsistent with the further maintenance of the employment relationship entitling the employee, if he or she so elects, to treat the employer's actions as terminating the employment. The Tribunal held that the abolition of the staff member's post was a lawful part of the reorganization exercise, and since he was given notice that he would be offered redeployment to an equivalent post that corresponds to his or her experience and qualifications, he did not satisfy the grounds for constructive dismissal. Since the voluntary separation packages were expressly subject to approval at the Secretary-General's discretion, the staff member had no grounds to challenge the denial.

Lessons: The staff member had argued that the Union intended to give him an "illusory post". This is putting the cart before the horse. The Tribunal gave the Union the benefit of the doubt that it would make good on its offer to properly redeploy the staff member. The staff member should probably have filed his appeal and awaited for assignment to the new post and then determine if it was illusory.

Citations:

V. Promotions/Recruitment/Appointments

Judgment 2436 (WHO) (Judges Romero and Gordillo).

Ruling: Case dismissed.

Facts: A long serving staff member (35 years) applied to two posts, and after consideration by a Selection Committee, he was not selected for either post. In his appeal, he alleged personal prejudice and a series of allegations involving the selection process, and argued that he was best qualified for both positions and should have been given one of the posts.

Analysis: The Tribunal found no substantial basis to depart from its consistently-held view that in cases of promotion or appointment in international organisations, the Director-General has a considerable level of discretion and his decision is subject to only limited review. In cases like this, the Tribunal will “exercise its power of review with special caution, its function being not to judge the candidates on merit but to allow the organisation full responsibility for its choice”. The WHO had amended its hiring procedures to include giving weight to a criteria identified as “personality traits”, which in this case was a factor used heavily against the staff member.

Lessons: As long as the organization follows its procedures on hiring carefully, the Tribunal will not interfere with a hiring decision. It is regrettable that the Tribunal would approve of a system of selection that gave consideration to a staff member’s “personality traits” since that opens the door for decisions based on bias, prejudice, etc.

Citations: Judgment 2163.

Judgment 2457 (EPO) (Judges Ba and Rouiller)

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

Facts: The staff member applied for a director post. A pre-selection meeting of the 3-member Selection Board was held in December 2002 with one member absent. The two members present decided unanimously to recommend against an interview. The staff member complained that, including lack of equal opportunity, the procedure was flawed owing to the fact that one of the members of the Selection Board was not present at the pre-selection meeting. The Organisation did not deny this but considered that this procedural flaw could not invalidate the pre-selection meeting since the Board, even with the third member present, would have reached the same conclusion.

Analysis: The Tribunal agreed with the member of the Appeals Committee who submitted a minority opinion that the absence of one member of the Board did constitute a flaw, despite the fact that the Board's opinion was unanimous. The Tribunal sent the case back for reconsideration of the staff member's application according to the rules.

Lessons: Even though the decision on the post for the staff member will likely be the same when the organization decides it again, the Tribunal made it pay a small fine for the deviation from its own rules. This is hardly an incentive for managers of international organizations to follow rules on hiring and promotion, which in many cases are determined by political issues and favouritism rather than merit. Nonetheless, this case shows that staff members can obtain some relief when the organization fails to follow its own rules. It also shows that the Tribunal will sometimes not follow the recommendation of an internal appeals board.

Citations: Judgment 1670.

Judgment No. 2472 (WHO) (Judges Romero and Gaudron)

Ruling: Complaint dismissed.

Facts: Long serving staff member applied for vacant post along with 15 other staff members. The post had been vacant for several months. A written examination was given to all candidates, and the staff member was interviewed (of 5 total) by the selection committee. The committee submitted the staff member and two others to the Regional Director for decision. The staff member was not selected. The staff member argued that the delay in advertising the post was a conspiracy to allow the selected candidate to become eligible for the post, for which the latter was pre-selected. He argued that the written examination was used improperly to rank the candidates, rather than being only a qualification test. He also argued that the selection committee and interview panel were illegally constituted, biased and part of the conspiracy in the pre-planned promotion of the selected candidate. His internal appeal was unsuccessful.

Analysis: The Tribunal first determined that although vacant posts should normally be advertised within 2 weeks of falling vacant, the administration had provided a satisfactory explanation for the delay of 21 months, that the decision-making process was slow because of a general classification policy change. The Tribunal found that the selection committee had taken into account the test marks, but that was okay since the administration had not used the test marks to favour the selected candidate. It found no flaw in the constitution of the selection committee. The Tribunal repeated that the burden of proof is on the staff member who alleges bias and conspiracy. In this case, the Tribunal held the allegations unfounded and unsubstantiated.

Lessons: The Tribunal will not substitute its judgment for that of the organization when it comes to hiring decisions, except where procedures are not properly followed. Staff members have little ability to obtain evidence of bias and conspiracy, and the Tribunal remains remarkably hostile to such claims in the absence of tangible proof.

Citations: Judgment 1775.

Judgment No. 2473 (UNESCO) (Judges Ba and Rouiller)

Ruling: Decision set aside; reinstatement of classification from P-5 to D-1 with 8% interest from 1 November 1999; and €15,000 for moral injury.

Facts: In February 1999, P-5 staff member was assigned to head Task Force on Cyberspace Law and Ethics. On 12 November 1999, in a Note the Director-General advised that he was reclassifying the post of Chief of the Task Force to D-1 with effect from 1 May 1999, and that the staff member was promoted to the corresponding grade with effect from 1 November 1999. The Note was given to the staff member by his supervisor.

During November 1999 as well, the General Conference considered in a resolution that there had been “too many exceptions in the application of personnel policy and the personnel management system” and invited the Director-General to “review” all posts that had been reclassified and all promotions and appointments that had been made during the 1998-99 biennium. As a result, on 26 November 1999, the new Director-General decided to suspend temporarily the implementation of decisions taken as of 1 October 1999 relating to appointments, reclassifications and promotions, including taking the staff member’s promotion to D-1, announced only 2 weeks earlier. Easy come, easy go!

In 2003, the Appeals Board recommended by a majority to set aside the annulment of the reclassification and subsequent promotion, and secondly to consider redeploying the staff member to a D-1 post corresponding to his qualifications and aspirations. In a dissenting opinion, the Chairman of the Appeals Board, referring to the Tribunal’s Judgment 2201, recommended rejecting the appeal.

Analysis: The Tribunal found that the Director-General’s Note of 12 November 1999 concerned solely the reclassification of the staff member’s post and his promotion, which constituted a final decision which was duly notified to the staff member by his supervisor, even though the implementing measures, particularly the personnel action form, had not been undertaken by the authorised officials. A resolution of the General Conference, which had no authority in the matter, could not be used to suspend the final decision. The suspension decision and all subsequent measures were therefore illegal and set aside by the Tribunal. The staff member’s rights were restored by reclassifying his post from P-5 to D-1 as from 1 May 1999 and by promoting him to grade D-1 as from 1 November 1999.

Lessons: If you learn of a decision in your favour, seek to have the decision formally communicated to you by your supervisor or some other senior official with standing.

Citation: Judgment 2201.

Judgment No. 2474 (ILO) (Judge Gaudron)

Ruling: Decision set aside; promotion to P-5 with effect from 1 April 2003; 30,000 Swiss francs in moral damages; and 33,000 Swiss francs legal costs.

Facts: On 1 April 2002, the staff member was hired for the post of the Head of the Spanish Unit. He was promised that he would be promoted to P-5 on completion of one-year satisfactory service in the post. One of the disappointed internal candidates for the post in the meantime appealed the decision not to hire her alleging unfairness and lack of transparency in the competition, and that the staff member selected did not meet the minimum requirements. The Tribunal agreed in Judgment 2287, and awarded the disappointed candidate moral injury.

After Judgment 2287, on 10 April 2003, the Director-General set aside the competition and cancelled the appointment from its effective date. The staff member received a favourable appraisal for the year in which he held the post. The ILO refused to promote the staff member to P-5 on the grounds that he was never appointed to the post as a result of the decision to annul the appointment.

Analysis: The Tribunal stated that the decision to cancel the competition and vacate the post was legal based on the unlawful competition as decided by Judgment 2287 (*res judicata*). Nonetheless, it held that the ILO owes a duty to act in good faith towards its staff. Although the Tribunal held the decision to vacate the post to be legal, the circumstances that led to that decision arose from its own unlawful actions. Since the staff member performed the services of the post for a year satisfactorily, he was entitled to the promotion to P-5.

Lessons: The Tribunal protects the selected candidate when the competition for the post is held to be unlawful because of wrongdoing by the organization. In this case, the ILO tried to thwart the internal appeal, including raising allegations of misconduct against the staff member, and withholding documents from the staff member, which in the end the Tribunal sanctioned by an award for moral damages.

Citations: Judgment 2287.

VI. Tenure Rules

Judgment 2437 (IAEA) (Judge Gaudron)

Ruling: Decision set aside; payment of salary and benefits for period of 3 years; €10,000 moral damages; and €10,000 in costs.

Facts: Staff member (P-5) was given assurances by his management that he would receive a long term contract. According to the Agency's rotation policy, the normal tour of service for professional staff is a maximum of 7 years. Despite the assurances, the staff member received a final one year contract extension. According to the rotation policy, P staff can start a new tour of service if they are selected for a vacant post outside of their Division with functions unrelated to the old post. The staff member was selected for a vacant post in another Division with different job duties. He was not, however, given a new tour of service. He appealed the decision not to grant a long term contract and the decision not to grant a new tour of service. The Joint Appeals Board recommended upholding the decision.

Analysis: The Tribunal found the first leg of the staff member's appeal not receivable since he did not request a review by the Director General within the time prescribed by the internal appeal rules, counted from the day he signed the one year contract extension. The Tribunal had no problem finding, however, that the staff member met the criteria for granting a new tour of service. The Agency had argued that the selection process had to be competitive, and the Tribunal held that the written provision was plain and could not be read to require a competitive process, although there was evidence the selection was in fact competitive. The Joint Appeals Board had disagreed with that assessment, and also found that the job duties were related. The staff member showed that the Board had in fact reviewed the wrong job descriptions in making its analysis. The Tribunal found this to be a manifest error.

Lessons: Staff members are reminded to heed time limits prescribed in the staff rules on internal appeals. In this case, the staff member took advantage of the policy allowing a new tour of service, and rightly should have continued his career at the Agency. The Tribunal's award demonstrates that it did not look favourably on the Agency's decision to thwart a staff member's legitimate right to benefit from straightforward provisions in the staff rules and policies.

Citations:

Judgments 2452, 2453, 2454, 2455, 2456 (OPCW) (Judge Gaudron)

Ruling: All but one case dismissed.

Facts: In 1999 the Conference of States Parties adopted revised Staff Regulations stipulating that the OPCW is a non-career organisation and that subject to certain exceptions the total length of service of staff shall be seven years. In March 2003 the Executive Council decided that the starting date for calculating the 7-year tenure rule would be 1999, the date the Staff Regulations had been adopted. In addition, the Conference of the States Parties decided that as from 2003 the average rate of turnover of Secretariat staff subject to the tenure rule would be one-seventh per year. Staff members challenged both the tenure rule and turnover policy. In some cases, staff members contracts were not renewed even before they reached the 7 year limit based on the 5 year turnover policy.

The appeals and the grounds asserted for them were rejected by the Tribunal in Judgment 2407, delivered in February 2005. The staff members here, all but one, raised similar arguments, including failure to properly substantiate the decision and errors of law since the turnover policy did not form a part of their contracts. One staff member noted that a document about his performance, on which the Director-General relied in deciding not to renew his contract, contained incorrect information as it showed the date of his entry on duty as 24 May 1997, instead of 5 January 1998. Since the organization was applying a first in first out rule, this staff member should have been extended by at least one more year.

Analysis: The Tribunal dismissed all but one of these appeals on the same grounds it cited in Judgment 2407. However, the error in the data sheet of one staff member (Judgment 2456), indicating that he had served more than 7 years was a material factual error. The Tribunal awarded the staff member one year's salary less any earnings in the same time period, €15,000 in moral damages and €10,000 in costs.

Lessons: The Tribunal settled the question once and for all regarding the legality of the OPCW's 7 year tenure rule and the turnover policy used to implement the rule. Unfortunately, the Tribunal did so at the expense of the right to rely on contractual stipulations. It was clear that the turnover policy was not a part of the staff member's contract. Nonetheless, the Tribunal gave complete effect to the policy on the grounds that it was a reasonable implementation of the 7 year rule (Judgment 2407). Staff members can, as the lone successful staff member demonstrated, nevertheless challenge a decision if it suffers from some other defect.

Citations : Judgments 2407 and 2408.

VII. Reclassification

Judgment 2442 (IFAD) (Judges Ba and Rouiller)

Ruling: Case dismissed.

Facts: Reclassification exercise in 1998 resulted in staff member remaining at P-5. He then sought reclassification to D-1 in 2001, alleging breach of the procedures, and noting that key information was not taken into account, and the decision showed bias. The internal appeals board held that there were no breaches of the rules but recommended an immediate retroactive promotion to D-1. The Board also found that the appeal was not timely but allowed it because of special circumstances. The Fund did not object to receivability before the Tribunal.

Analysis: The Tribunal upheld its long standing principle that it does not want to involve itself with decisions regarding reclassification and will not set aside such decisions absent a clear error of judgment by the organization. It found that there was evidence in the file to support the conclusion that the managerial and supervisory responsibilities, as assessed by three classifiers according to objective criteria and ICSC standards, were correctly evaluated. It also reported that there was nothing to indicate that the staff member, whose personal qualities were not in question, was ever exposed to bias on the part of the Fund or subjected to unfair treatment. The Tribunal characterized the errors by the first classifier as “tiny” and not significant enough for it to be considered that the final opinion, shared by the other two classifiers, was tainted with a clear error of judgment, and there was no breach of the principle of equality. It did not address the issue of receivability.

Lessons: Unless there is a palpable and clear breach of procedures, it is difficult for a staff member to challenge reclassification decisions. The Tribunal could have dismissed (and sometimes does) the case on its own motion rather than reach the merits, but it usually will consider a case if the organization does not object to receivability.

Citations: Judgments 1647 and 1874.

VIII. Same Sex Marriages

Judgments 2443 and 2444 (EPO) (Judges Ba and Rouiller)

Ruling: €2,000 in moral damages and €5,000 costs for each staff member.

Facts: In 2001, staff member, a German national, was married to his same sex partner while serving in The Hague, Netherlands. In a similar case, a Dutch national, also married his same sex partner in 2002. Since 2001, the Netherlands has legally recognized same sex marriages. The organization advised both staff members that only marriages between a man and woman were recognized under the staff regulations. The cases were submitted for appeal. After a two year delay, the staff members filed appeals with the Tribunal in November 2003. In October 2004, the EPO's Administrative Council announced that same-sex marriages would henceforth be recognised by the Office, with retroactive effect from the date of the marriage.

Analysis: The Tribunal held that the claims relating to the recognition of the right to same sex marriages became moot. However, claims remained for moral damages, for special leave and for costs. The Tribunal did not find any ill-will for the delay or the actions of the organization in handling the claims. The delay did cause anxiety to the staff members and their spouses, so an award of moral damages was appropriate. The organization would have to make good for any unpaid leave.

Lessons: The Tribunal did not have much to do here, and it carefully avoided a pronouncement of its own view of same sex marriages. Despite the delay, if the EPO's reasoning for granting recognition of same sex marriages (according to the law of a contracting state authorising such marriages) is adopted by other international organizations, same sex marriages should become the rule rather than the exception in the international community.

Citations:

Judgment 2449 (WHO) (Judges Ba, Romero, Gaudron, Gordillo, Rouiller)

Ruling: Case dismissed.

Facts: American citizen (D-1) entered into a “civil union” with her same-sex partner, in the State of Vermont (United States), and asked to change her family status to obtain benefits to which dependents are entitled under the staff regulations. She was informed orally that such benefits could not be granted in the case of a civil union, which was not a marriage. The two partners married therefore in Vancouver, Canada under the law of the Province of British Columbia which legally recognized such marriages. The staff member then resubmitted her request.

On 20 November 2003, she asked for financial assistance from the Office to cover the medical expenses incurred by her spouse. In reply, the Director of HRD sent the staff member a letter dated 27 November 2003 pointing out that the Office followed the practice of the organisations belonging to the United Nations common system whereby matters of family status are determined according to the law of the staff member’s nationality, and, notwithstanding those considerations, the Director-General had approved an *ex gratia* payment of 75,000 United States dollars, such payment being made “for humanitarian reasons” as a one-time offer which was not to be considered as setting a precedent. She made a follow-up written request for benefits in March 2004, which was denied. She appealed directly to the Tribunal and the WHO argued that the appeal was out of time.

Analysis: The Tribunal agreed with the WHO that the appeal was out of time. The response of the WHO to the staff member’s request for benefits in March 2004 was merely confirmation of the earlier decision taken in November 2003. Firm precedent has it that a decision which merely confirms a final decision taken by an organisation cannot set off a new time limit for appeal.

Lessons: This was an issue the Tribunal was happy not to deal with. The Tribunal will likely be settling the legality of same sex marriages in the context of the international civil service in the next few sessions.

Citations : Judgment 1304.

IX. Tax-Exempt Status

Judgment 2450 (International Federation of Red Cross and Red Crescent Societies)
(Judges Ba and Roullier)

Ruling: Complaint dismissed.

Facts: Staff members (British and French) residing in France complained about having to pay income tax while residing in France without reimbursement from the Federation following amendments in 1997 to the French-Swiss double taxation treaty. Prior to that time, staff members did not pay income tax of any national authorities pursuant to the Headquarters Agreement between the Federation and the Swiss government, which were incorporated into the regulations. The staff members argued that it was a breach of their acquired rights and discriminatory since they were treated differently since no other staff members paid income tax, and the Tribunal recognized the principle of “exemption from national taxes” for international civil servants.

Analysis: The Tribunal rejected any argument of acquired rights noting that the provisions of the tax treaty did not form a part of their contracts. It also rejected its own jurisprudence holding that international civil servants are entitled to certain fundamental conditions of employment including “exemption from national taxes” because the Federation is an association under Swiss law whose international legal personality has been recognised by Switzerland as opposed to an intergovernmental organisation. With respect to the discrimination charge, the Tribunal held that it is okay not to reimburse for the French tax since non-Swiss staff members who have decided to live in France and who must pay income tax in that country are not in the same situation as Swiss staff members who pay Swiss taxes, and there is no rule or general principle that obliges an international organisation to reimburse its staff for taxes payable outside the host country pursuant to legislation which is not that of the host country.

Lessons: The Tribunal is loathe to expose international organizations to uncertain liabilities in the absence of agreement by the organization to take them on. In this case, the staff members will unfortunately be forced to choose between staying in France and paying the tax, or moving. There is no reason for not reimbursing the taxes of those who reside in France when the Federation reimburses Swiss nationals for the tax paid to the Swiss government. However, it is unlikely the Federation would amend its rules for the benefit of the few staff who decide to take up residence in France.

Citations: Judgment 2032.

X. Disciplinary Procedures

Judgment 2475 (WHO) (Judge Gaudron)

Ruling: Decision set aside and remanded; \$30,000 in moral damages and CHF 25,000 in costs.

Facts: Staff member (P-5) was dismissed for misconduct allegedly consisting of providing false information to obtain yearly rental subsidies for 2002. At the time of his dismissal, the staff member was “on loan” as President of the Federation of International Civil Servants’ Associations (FICSA). In July 2002 he had moved from the Philippines to New York to take up his duties with FICSA. The staff member contended that the decision to dismiss him involved a denial of due process and, also, showed bad faith. The WHO does not have written rules on formal investigatory or disciplinary procedures. In this case, the investigation was carried out by the staff members in the personnel section, and consisted of telephone interviews and in person interviews of witnesses, including security guards and household staff. They also made inquiries regarding the staff member’s travel and contact arrangements. As a result of this investigation, the staff member was notified that he could be subject to misconduct charges and disciplinary measures, and invited to respond in writing within 8 days. The staff member provided his comments, and further interviews were conducted of witnesses without the staff member present. The staff member was eventually informed that it had been decided that he had committed serious offences and that he would be dismissed. The memorandum informing him of the decision stated that his explanations were “incompatible with the evidence, taken as a whole, and [were] not credible”.

Analysis: The Tribunal was unequivocal that due process had been violated: “The procedure adopted in this case was clearly flawed in that the staff member was denied the opportunity to question any of the persons whose statements were used against him, evidence of little probative value was relied upon and, at least to some extent, he was required to prove his innocence instead of having the matters alleged proven against him.” The Tribunal did not throw out the charges, but referred the case back to the WHO to determine what, if any, further action should be taken.

Lessons: This is a significant victory for staff members subject to disciplinary charges. Staff members are often found “guilty” of misconduct on unreliable evidence and testimony from witnesses who may have undisclosed bias or prejudice. The investigations are sometimes held in secret and it is most often the case that the staff member is required to prove his or her innocence. The Tribunal has guaranteed a staff member’s right to cross-examine adverse witnesses and put a significant check on abuses by international organizations in disciplinary proceedings.

Citations: Judgments 203, 999, 1133.

Judgment No. 2470 (FAO) (Judges Romero and Gordillo)

Ruling: Case dismissed.

Facts: D-1 staff member was seconded to FAO from UNDP for a period of 2 year. She claimed a rental subsidy from FAO. The Inspector-General's Office investigated the claim and determined that the amounts paid should be recovered, as she was living with her partner who worked for IFAD. The staff member said there was no wrongdoing since she rented an adjacent and separate apartment from her partner, and entered into a separate lease. She produced a copy of a cancelled check which she later admitted she had forged, and she refunded the rental subsidies she had been paid. The administration recommended dismissal. She notified the FAO that she would be returning to the UNDP at the end of her secondment, rendering the ongoing disciplinary investigation moot. The FAO reported the misconduct to the UNDP, which opened its own investigation, resulting in a demotion to P-4. She challenged that decision in an appeal to the United Nations Administrative Tribunal. She asked the FAO to remove any negative reference to her performance in her FAO file and for payment back to her of the rental fees, and appealed to the ILOAT after the FAO internal appeal was rejected. The UNAT upheld the decision to demote her to P-4 and also stated that there was sufficient evidence which would have supported dismissal.

Analysis: The Tribunal held that the facts and issues had already been decided by the UNAT. Therefore, under the principle of *res judicata* (the thing has been judged), her claims were dismissed.

Lessons: Staff members who admit to wrongdoing, in this case forging a check as exculpatory evidence, stand little chance of success on appeal. Two Tribunals (UNAT and ILOAT) looked upon the admission of misconduct with disfavour, which both considered grounds for dismissal, which left the merits of the staff member's other contentions to violations of due process unconvincing. The Tribunal has also created a very loose standard for the application of the doctrine of *res judicata*. Normally, the facts and issues must be identical as well as the parties in order for it to apply, which was not the case here.

If you are subject to an investigation for misconduct, seek the advice and help of the staff council or a lawyer before answering questions from the investigator.

Citations:

XI. Staff Associations/Freedom of Association

Judgment 2459 (UNESCO) (Judges Ba and Rouiller)

Ruling: Complaints dismissed.

Facts: Staff members contested amendment to rules on staff representation on grounds of violation of the principle of freedom of association and non-retroactivity. The amendment specifically limited the right of participation and observation to representative associations, which “must comprise at least 15 per cent of the members of the staff”.

Analysis: The Tribunal held that the amendment observed the principle of proportionality as they unreservedly recognise the right of staff members to be organised into associations in accordance with the principle of freedom of association. The amendment merely restricts the representativeness of the associations, particularly through their right to participate in the decision-making process concerning staff and to submit observations. The intention behind the restriction is to achieve a balance between the interests at stake; it aims to ensure satisfactory participation for staff associations so that the rights of staff members are properly defended while ensuring that such participation will not unduly burden the smooth operation of the Organization. Furthermore, the association members put forward no cogent argument that shows that, in practice, the conditions for recognition of their association’s representativeness render such recognition so unlikely that they necessarily amount to a restrictive measure directed against freedom of association.

Lessons: The Tribunal has given the green light to organizations to limit the ability of staff associations with limited membership to effectively represent the association’s members’ interests.

Citations: Judgment 2315.

XII. Separation Agreements

Judgment No. 2466 (WIPO) (Judge Gaudron)

Ruling: Case dismissed.

Facts: In July 2003, the Deputy Director General said he would accept a comprehensive separation package with WIPO, following some 7 years of service. In October 2003 the DDG was presented with a document which set out some of the terms to be included in the agreed separation as well as certain elements that would not be granted. A finalised agreement was presented to him on 10 November. Deeming this to have excluded some provisions previously discussed, the staff member wrote to the Director General on 11 November asking him to review the administrative decisions related to the written proposal. The Director General replied in a memorandum dated 12 November, reminding the staff member that much of what was being awarded in the agreement was discretionary and that the staff member had until 30 November to decide whether he wished to accept the terms of the agreement. The DDG signed the agreement on 14 November 2003. Under Article 5 of the agreement, it was stated that the DDG renounced his “recourse to all present and future claims”, except in the case of non-compliance by WIPO with its obligations under either the agreement or the staff regulations.

The staff member argued breach of the staff regulations and claimed that he was entitled to a termination indemnity, given his 15 years of service in the UN system, equal to 12 months’ remuneration, plus an additional 50 per cent agreed upon during negotiations. However, he was “awarded” 7.31 months of remuneration, based only on his years of service at WIPO, plus an additional 50 per cent agreed upon during negotiations. He also alleged unequal treatment since other DDGs received more generous separation packages.

Analysis: The Tribunal held that the staff member is entitled to claim superior benefits to those contained in the agreement “save where rights have been expressly waived or the performance of obligations has been expressly acknowledged”. The Tribunal noted in this regard that the only benefit to which the DDG could claim superior benefits would be under the staff regulations for termination indemnity. However, fixed-term appointment holders have no right to a termination indemnity upon expiration of the fixed term appointment, as the case was here. Therefore, the staff regulations were complied with. The Tribunal held open the possibility of unequal treatment with respect to the packages offered to the other DDGs. However, it would not compel production of the agreements, preventing the staff member from proving the case.

Lessons: The Tribunal will hold staff members to the terms of an agreed termination package. The Tribunal unfortunately continues its policy of limiting staff member’s rights to discovery, citing its holding in Judgment 2142: “the Tribunal will not [...] itself undertake [...] a wholesale ‘fishing expedition’ based on nothing more than the possibility that something may turn up”. This of course ensures an uneven playing field.

Citations: Judgment 2142.

XIII. EOSA/Fleming

Judgment No. 2467 (UNIDO) (Judge Gaudron)

Ruling: Case dismissed.

Facts: Staff members challenged the calculation of the end of service allowance on the grounds that the calculation lacked the stability, foreseeability and clarity as required by the Tribunal's caselaw, that it was ambiguous both in its principle and in its application, and that it breached the Agreement between the United Nations and the UNIDO calling for the development of uniform standards "to the extent feasible". The EOSA was calculated on a methodology established in 1989. The calculation was revised in September 2001 because the methodology was in the organization's own words "questionable". The staff members drew attention to the fact that the United Nations in Vienna had revised the methodology in 1996, and the administration had acknowledged as early as 1997 that the methodology was flawed and staff members had legitimate concerns.

Analysis: The Tribunal rejected the challenge. First, it held that the methodology, while questionable, did meet the criteria of predictability and stability required by the case law, citing its holding in Judgment 2123 (*res judicata*). Second, the admission ("legitimate concerns") by an "administration official" that the methodology was not sustainable and had unforeseeable results was not binding on the organization and could not have resulted in unfair surprise to the staff members. Finally, the Tribunal decided that neither UNIDO's constitution nor the Agreement with the United Nations mandated that UNIDO align its methodology with the United Nations. The Tribunal acknowledged the slowness in which the change was eventually introduced, some 5 years, but did not consider it grounds to show lack of good faith since the issue was complicated and there was a need for discussions with staff representatives.

Lessons: The Tribunal is reluctant to expose organizations to large financial liability across a class of staff members despite the existence of cogent arguments in favour of relief.

Citations: Judgment 2123.

XIV. Termination of Appointments

Judgment No. 2468 (ILO) (Judge Gaudron)

Ruling: The decision set aside; reinstatement as from 1 February 2004; 25,000 Swiss francs in moral damages; 15,000 Swiss francs in costs.

Facts: Translator (P-4) recruited in 1982 had a long period in which his performance was rated as satisfactory or better. However, beginning in 2000, the staff member began to have conflicts with the newly appointed unit head (a rival over the years), and he was issued a warning. In 2001, his overall performance was rated as “not satisfactory”. The Reports Board retained an independent expert to assess the quality of his translation and revision work on the basis of 14 documents. However, only 5 of the documents were later confirmed as having been translated by the staff member. The expert determined that the translations were below normal standards. The Reports Board recommended terminating the appointment for unsatisfactory performance based on the strength of the expert report.

The Joint Appeals Board accepted the conclusions of the Reports Board, however, it recommended that the staff member be transferred to another section or that an agreed termination be reached. The staff member was terminated with effect on 31 January 2004.

Analysis: The Tribunal reiterated that when it comes to terminating a fixed or permanent appointment for unsatisfactory service it will not substitute its own assessment of a staff member’s services for that of the organisation except in a case of manifest error; however, such an assessment must be made in full knowledge of the facts, and the considerations on which it is based must be accurate and properly established. The Tribunal is vigilant where an organisation terminates the appointment of a staff member holding a contract “without limit of time, which in principle should secure him against any risk of job loss or insecurity”, and especially in this case since the staff member concerned received on the whole satisfactory or even excellent appraisals over a period of 15 years.

The findings of the Reports Board concerning the staff member’s performance were mostly based on the conclusions of an independent expert. The procedures used to assess the performance of staff members must be both transparent and adversarial. The “expert assessment” was undertaken in breach of the staff member’s right to an adversarial procedure, which would have given him an opportunity to object in good time to the choice of documents used as a basis for the conclusions reached by the expert who, moreover, was appointed by an unknown method. There was evidence to show that the staff member’s productivity was low during the period following the appointment of his rival who gave him few documents to translate and even fewer to revise. As soon as that situation was remedied, productivity improved to a satisfactory level.

Lessons: Before your contract is terminated for unsatisfactory performance, the organization must provide you with the opportunity to rebut and object to evidence used to assess the unsatisfactory performance. The Tribunal will gauge its review of such cases depending on the type of appointment at issue: probationary (least review); fixed-term (more thorough review); long-term or career (“vigilant” review).

Citations:

Ruling: Complaint dismissed.

Facts: P-4 staff member was hired on 6 August 2000 under 2-year fixed-term contract subject to completion of a probationary period of one year. In April 2001 he agreed with his supervisor on 20 work objectives for 2001. His appointment was confirmed on 7 May 2001. During the mid-year performance review in July 2001, the staff member was informed by his supervisor that he needed to focus on certain aspects of his work in order to achieve a number of his work objectives. On 7 December 2001 the staff member's supervisor rated his performance unsatisfactory since the staff member had allegedly failed to meet objectives and that his productivity and ability to integrate into a team were unsatisfactory.

In April 2002 the second-level supervisor met with the staff member and his supervisor to review his performance. By a memorandum of 2 May 2002, the staff member was informed that he would be offered an extension of his appointment until 31 December 2002 as an opportunity to improve his performance. He filed an appeal of that decision, and requested among other things that the negative statements of his supervisor be removed from his personnel file. On 30 September 2002, the staff member was offered a further extension of his appointment until 30 June 2003, which he accepted. His internal appeal was rejected accept for removal of all negative memoranda by his supervisor from his personnel file. He separated on 30 June 2003. Before the Tribunal, the staff member claimed prejudice by his supervisor, including a hostile work environment which had a negative impact on his productivity. He alleged that he informed PAHO about the conflicting situation with his supervisor by a memorandum dated 20 November 2001 but the Organization failed to solve the matter. He also asserted that the decision to extend his appointment and not renew his contract was tainted by incomplete consideration of the facts and that his personal dignity and professional reputation have been injured.

Analysis: The Tribunal found that the relations between the staff member and his supervisor deteriorated from June 2001 forward. However, the Tribunal did not take the staff member's claim of prejudice and hostile work environment seriously, as it did not even criticize the memoranda which the internal appeals board had found contained inappropriate language. The supervisor had complained about the staff member's "disrespectful attitude". The Tribunal credited the staff member's second level supervisor, whose "impartiality is not contested", since he had stepped in and had lengthy discussions with the staff member and his supervisor. The second level supervisor decided that there was deficiency in performance and recommended an extension to allow the staff member to improve. The Tribunal found that the decision, taken by the second level supervisor, was not motivated by personal prejudice.

Lessons: The facts of this case show some signs of mobbing, as the second level supervisor agreed with the assessment made by the supervisor. However, since the staff member had not challenged the impartiality of the second level supervisor, the Tribunal accepted the negative evaluation as being accurate. Once again the Tribunal has shown that it will not interfere with an organization's decision not to renew or extend a contract based on unsatisfactory performance, where the performance which is said to be lacking is identified by an unbiased supervisor and the staff member is given the opportunity to improve.

Citations: Judgment 1262.

Judgment No. 2462 (OPCW) (Judge Gaudron)

Ruling: Decision set aside; one year's gross salary plus all benefits, €25,000 moral damages; €10,000 costs.

Facts: Former staff member (P-4) appealed the decision not to extend his contract. His direct supervisor rated his performance as fully meets performance expectations. The Director of Administration, however, expressed reservations. The staff member's direct supervisor recommended extending the staff member's contract for a period of one year. The Board on contract extension concluded as follows: "The Director of Administration recommended non-extension of the contract in view of the staff member's performance problems, and the new requirements for the post in future". By letter, he was formally advised in May 2003 that his contract would not be extended because among other things, the scope and responsibilities of the post were to be redefined, and that the incumbent would, in the future, need to possess "different skills and knowledge" and would need "to act as a more pro-active co-ordinator and planner of the travel-related functions".

In July 2003, the post without modification of duties was advertised. The vacancy notice was cancelled in February 2004, and the post was subsequently re-advertised on 29 March 2004. The staff member appealed the decision not to extend his contract one year. The Appeals Council concluded that in the contract renewal process the Organisation appeared to have acted "on the basis of concerns over the [complainant's] performance" and not because of a "significant reorganisation affecting the post", and consequently there was a prescribed procedure that should have been followed but was not for tracking his performance. The Director-General upheld his original decision in spite of the Appeals Council's report. He appealed to the Tribunal on grounds of mistake of fact and breach of due process.

Analysis: The staff member was told that his contract would not be renewed because of expected future changes in the post requirements. When the post was in fact advertised no changes had been made. The Tribunal said that the evidence "strongly indicates that, when the Director-General decided . . . not to extend the complainant's contract, it was not planned to redefine the post in a manner that required its re-advertisement." This is a polite way of indicating the reason given to the staff member was false. The Tribunal also found violations of due process. It found that the positive performance appraisal of the immediate supervisor was not provided to the Board. The Board therefore only had the negative appraisal of Director of Administration; and "his recommendation had not been provided to the complainant and, to the extent that it was based on future reorganisation, that was not a matter that had been discussed with the complainant. These are matters which, taken together, can be said to have amounted to a failure of due process, denying the complainant any real opportunity to answer any of the matters put against the extension of his contract."

Lessons: Organizations often believe they can shield their arbitrary and unlawful decisions involving termination of appointments based on the mantra of "programmatic reasons". It has the ring and comfort of the phrase "diplomatic immunity". The Tribunal will look to see if the reason given for the decision is the true reason. It also reconfirms that staff members have the right to be heard when there is a recommendation against extension.

Citations: