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Semi-Annual Review

International Labour Organization Administrative Tribunal 105th Session

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Introduction

I am pleased to present the Semi-Annual Review of ILO Administrative Tribunal Decisions decided during its 105th Session. The ILO Administrative Tribunal hears complaints relating to disputes between staff members, former staff members, and other individuals who have standing, and international organizations that submit to the Tribunal's jurisdiction. The Tribunal issues its judgments publicly twice per year in February and July. This review covers some of the more significant cases decided during the Tribunal's 105th session.

In this session, the Tribunal addressed significant issues including whistle-blower protection. Judgment No. 2742 related to a corruption scandal at the World Meteorological Organisation (WMO). The Tribunal upheld the independence of the internal investigation by deciding that the Chief of the internal watchdog unit (Internal Audit and Investigation Service) could not be reassigned to a post with significantly diminished duties, responsibilities and status without proper authority. Were that not so, there would be no authority for the independent performance of those duties and responsibilities that are essential to the proper governance of an international organisation.

In Judgment No. 2757, the ILOAT found that the complainant, who had denounced an improper conduct by the Prosecutor, was improperly dismissed. The Tribunal considered that the decision to summarily dismiss him was tainted because the Prosecutor, although in clear conflict of interest, participated in the decision-making. The Tribunal will compensate staff members who have suffered retaliation following disclosures of improper behaviour.

In Judgment No. 2741, the Tribunal also developed a new general principle of law: the right to be protected against arbitrary or unlawful interference by the employer in his or her private life or correspondence. Any interference in a worker's private life ordered exceptionally by an employer to safeguard the normal and secure functioning of a company's information technology system must be undertaken in the presence of the worker or his or her representatives.

The author wishes to express appreciation to Maximilian Girod-Laine, Legal Counsel for the Staff Union of UNESCO, for his contribution to this review.

Table of Cases

Number	Organization	Issue	Decision
2718	UNIDO	Application for interpretation	Deduction of in kind payment to awarded damages; no pension contributions awarded
2719	WHO	Discipline	Dismissed
2720	ITU	Defamation	Decision set aside; 20,000 swf moral damages; 10,000 swf exemplary damages, 2,000 swf costs
2721	EPO	Application for execution	Late execution of judgment; 1,000 euros moral damages; 500 euros costs
2722	Eurocontrol	Reclassification	Dismissed
2723	ILO	Reclassification	Dismissed
2724	ILO	Probation	Dismissed
2725	Eurocontrol	Discrimination	Dismissed
2726	WMO	Allowance	Dismissed
2727	FAO	Termination/Performance	Decision set aside; 30,000 US dollars material damages; 20,000 US dollars moral damages; 1,000 US dollars costs
2728	ILO	Termination/Performance	Dismissed
2729	ILO	Non-extension of associate expert contract	Dismissed
2730	EPO	Promotion/Performance	Dismissed
2731	EPO	Promotion	Dismissed
2732	IOM	Termination/Performance Evaluation	Decision set aside; 15,000 euros material damages; 10,000 euros moral damages; 500 euros costs.
2733	IOM	Termination/Entitlements	Decision set aside; matter remitted
2734	WHO	Abolition of post	Dismissed
2735	AITIC	Non-extension	Decision set aside; 20,000 swf moral damages; 2,000 swf costs
2736	IAEA	Disciplinary	Dismissed
2737	EPO	Reclassification	Decision set aside
2738	EPO	Selection	Dismissed
2739	WHO	Transfer/Date of entry on duty	Decision set aside, matter remitted; 2,000 swf costs
2740	UNESCO	Receivability	Decision set aside; matter remitted; 3,000 euros moral damages; 1,000 costs
2741	IOOC	Disciplinary/Summary Dismissal	Dismissed
2742	WMO	Abolition of post/Reassignment/Termination	Decision set aside; 50,000 swf material damages; 20,000 swf moral damages; 8,000 swf costs
2743	WMO	Performance evaluation	Dismissed
2744	EPO	Pension	Dismissed; 1,000 euros moral damages for delayed procedure; 400 euros costs
2745	IAEA	Non-extension/Harassment	Dismissed
2746	EPO	Pension	Decision set aside; 1,000 euros moral damages; 1,000 euros costs
2747	UPU	Transfer	Decision set aside; 3,000 swf moral damages; 3,000 swf costs
2748	UPU	Selection	Decision set aside; 3,000 euros costs
2749	UPU	Discrimination	Dismissed
2750	IAEA	Pension	Decision set aside; 4,5 months' salary; 2,500 euros costs

2751	EPO	Freedom of Association	Decision set aside; 7,500 euros moral damages; 4,000 euros costs
2752	IAEA	Disciplinary/Performance	Decision set aside; order of removal of letter of warning from personal file; 10,000 euros moral damages; 500 euros costs
2753	UNIDO	Separation from Service/Health Insurance	Dismissed
2754	ILO	Selection	Dismissed
2755	ILO	Selection	Decision set aside; token damages of one Swiss franc; 2,000 swf costs.
2756	EPO	Benefits	Decision set aside; recalculation of sick-leave entitlement, correction of salary reduction, payment of withheld salary with interest at 8 per cent per annum; 400 euros moral damages; 2,000 euros costs.
2757	ICC	Disciplinary/Summary Dismissal	Decision set aside; salary, repatriation grants and other benefits from 13 April 2007 until 30 June 2007 with interest at 5 per cent; two year's salary material damages ; 25,000 euros moral damages ; 5,000 euros costs.
2758	ILO	Pension/Health insurance	2,000 US dollars moral damages; 1,000 US dollars costs.
2759	EPO	Termination during Probation	Decision set aside ; 12 months salary and benefits ; 7,500 euros moral damages ; 5,000 euros costs
2760	IAEA	Same-Sex Marriage Benefits	Decision set aside ; spousal benefits due retroactively ; 10,000 euros moral damages ; 5,000 euros costs
2761	WHO	Selection	2,000 swf costs
2762	EPO	Selection	Decision set aside ; 1 euro moral damage ; 1,000 euros costs
2763	CTBTO PrepCom	Non-extension	Decision set aside ; compensation equivalent to 12 months' salary and allowances. 5000 euros moral injury; 3000 euros costs.
2764	UNESCO	Termination during Probation	Dismissed
2765	UNESCO	Non-extension	Summarily dismissed

International Organizations Subject to ILOAT Jurisdiction

- International Labour Organization (ILO), including the International Training Centre
- World Health Organization (WHO), including the Pan American Health Organization (PAHO)
- International Telecommunication Union (ITU)
- United Nations Educational, Scientific and Cultural Organization (UNESCO)
- World Meteorological Organization (WMO)
- Food and Agriculture Organization of the United Nations (FAO), including World Food Programme (WFP)
- European Organization for Nuclear Research (CERN)
- World Trade Organization (WTO)
- International Atomic Energy Agency (IAEA)
- World Intellectual Property Organization (WIPO)
- European Organisation for the Safety of Air Navigation (Eurocontrol)
- Universal Postal Union (UPU)
- European Southern Observatory (ESO)
- European Free Trade Association (EFTA)
- Inter-Parliamentary Union (IPU)
- European Molecular Biology Laboratory (EMBL)
- World Tourism Organization (UNWTO)
- European Patent Organisation (EPO)
- African Training and Research Centre in Administration for Development (CAFRAD)
- Intergovernmental Organisation for International Carriage by Rail (OTIF)
- International Center for the Registration of Serials (CIEPS)
- International Office of Epizootics (OIE)
- United Nations Industrial Development Organization (UNIDO)
- International Criminal Police Organization (Interpol)
- International Fund for Agricultural Development (IFAD)
- International Union for the Protection of New Varieties of Plants (UPOV)
- Customs Co-operation Council (CCC)
- Court of Justice of the European Free Trade Association (EFTA Court)
- Surveillance Authority of the European Free Trade Association (ESA)
- International Service for National Agricultural Research (ISNAR) (until 14 July 2004)
- International Organization for Migration (IOM)
- International Centre for Genetic Engineering and Biotechnology (ICGEB)
- Organisation for the Prohibition of Chemical Weapons (OPCW)
- International Hydrographic Organization (IHO)
- Energy Charter Conference
- International Federation of Red Cross and Red Crescent Societies
- Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom)
- European and Mediterranean Plant Protection Organization (EPPO)
- International Plant Genetic Resources Institute (IPGRI)
- International Institute for Democracy and Electoral Assistance (International IDEA)
- International Criminal Court (ICC)
- International Olive Oil Council (IOOC)
- Advisory Centre on WTO Law
- African, Caribbean and Pacific Group of States (ACP Group)

- Agency for International Trade Information and Cooperation (AITIC)
- European Telecommunications Satellite Organization (EUTELSAT)
- International Organization of Legal Metrology (OIML)
- International Organisation of Vine and Wine (OIV)
- Centre for the Development of Enterprise (CDE)
- Permanent Court of Arbitration (PCA)
- South Centre
- International Organisation for the Development of Fisheries in Central and Eastern Europe (EUROFISH)
- Technical Centre for Agricultural and Rural Cooperation ACP-EU (CTA)
- The International Bureau of Weights and Measures (BIPM)
- ITER International Fusion Energy Organization (ITER Organization)
- Global Fund to Fight AIDS, Tuberculosis and Malaria
- International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM)

I. Staff Association/Freedom of Association

Judgment No. 2751 (EPO)

Decision: Decision set aside; moral damages of 7,500 euros. 4,000 euros costs.

Facts: The complainant joined EPO as examiner. In addition he acted as staff representative and defended as such staff members of EPO. He claimed damages from the Organization for having made defaming and disparaging comments during the proceedings leading up to ILOAT Judgment n° 2514: the first is that he was taking payment for providing assistance to his colleagues; the second is that he misrepresented himself as a practising lawyer. The third is that the complainant's normal office duties were allegedly affected by his "supplementary activities".

Analysis: The Tribunal found that the first two imputations were within the privilege that attaches to the proceedings of the Tribunal as it was relevant for the Tribunal to appreciate if the present complainant was representing his colleagues voluntarily and in his capacity as a serving staff member in order to determine whether and, if so, on what basis costs should be awarded. The third defamatory imputation is in an entirely different category. The question whether the complainant's work performance was or was not satisfactory was wholly irrelevant to any issue that arose for determination in the judgment. The disputed remark conveyed the meaning that, by reason of the time he spent providing legal assistance to staff members, the complainant's work as an examiner was less satisfactory than it should be. That was defamatory according to the Tribunal. In the context of the other comments that were within the limits of the privilege that attaches to proceedings before the Tribunal, it carried the threat of possible administrative consequences for the complainant's employment. EPO's other contention, that the complaint's claim for retraction of the defamatory statements would be irreceivable, has been dismissed. The Tribunal has recognised that publication of statements defamatory of a staff member gives rise to a continuous obligation to take steps to remedy, as far as possible, the harm done to the staff member's reputation and it can therefore order performance of that obligation.

Lesson: Statements made in legal proceedings are privileged. The privilege, sometimes referred to as "in court privilege", exists, not for the benefit of the parties, but because it is necessary for the proper determination of proceedings and the issues that arise in their course. But a claim may nevertheless be pursued against an organisation if its conduct in proceedings before an internal appeals body or the Tribunal constitutes an abuse of process or a perversion of the right of reply. ILOAT decided that EPO's contention that the complainant's work would suffer from his activities as counsel was not privileged, as it served no proper purpose. ILOAT also confirmed that it has the power to order a continuous obligation to take steps to remedy, as far as possible, the harm done to the staff member's reputation. Interestingly, neither parties nor the Tribunal considered the case to be related to questions of freedom of association although the complainant was working for the Staff Union as legal counsel.

Citation: Judgment No. 2514.

II. Performance Appraisals

Judgment No. 2727 (FAO)

Decision: Decision set aside; 30,000USD material damages; 20,000USD moral damages; 1,000 dollars costs.

Facts: The complainant, an Animal Production Officer at grade P-4 in the Animal Production Service (AGAP) of the Animal Production and Health Division (AGA), was terminated after a negative performance appraisal. Although the statutory provision foresees that his immediate supervisor would be in charge of the performance appraisal, the latter has been excluded from the process. The Appeals Committee rejected the relevance of the *ubi maior minor cessat* principle – according to which the delegation of the second appraisal to the Service Chief would be acceptable because it was consistent with the hierarchy of the Division.

Analysis: In the Tribunal's view, the replacement of the immediate supervisor with the Service Chief in the completion of the complainant's second performance appraisal was a violation of established regulation. The purpose of the latter is to ensure the objectivity of the appraisal process. Because of this, the Organization's reference to the *ubi maior minor cessat* principle is not relevant. If the Organization's argument were to be accepted, the Director would have the authority to change the appraiser whenever he disagreed with an appraisal, a situation that the rule seeks to avoid. Consequently, the performance appraisal is flawed. Since the complainant was also not provided with a clear plan of work for the period following his first performance appraisal and was not given a proper warning as to the fact that his appointment might not be confirmed, the decision to terminate the complainant's appointment was unlawful and must be set aside.

Lesson: An organization cannot bypass the immediate supervisor for performance appraisal when there is a specific rule: the principle *ubi maior minor cessat*, allowing the delegation of the appraisal to someone else because it is consistent with the hierarchy, is not applicable in such a case.

Citation: Judgment No. 1386.

Decision: Complaint dismissed.

Facts: The Reports Board of ILO reviewed the performance appraisal of the complainant, the Chief of the Client Services Section in the Bureau of Library and Information Services at grade P.5., and invited him and his supervisor to develop a detailed work plan, which would set the objectives that needed to be met. The second probationary performance appraisal drafted six months later recommended against an extension of his appointment. As the complainant claimed to never have obtained a detailed list of the issues, the Reports Board considered that the probationary period of the complainant should be extended by six months so as to enable the responsible chief to establish a work plan with clear objectives and time frames. The third performance appraisal report completed by a new supervisor expressed reservations concerning his ability to perform his duties as a senior manager. The Reports Board concluded that although the complainant had completed the work plans established, there were significant issues related to lack of autonomy, rigour and follow-through in his work and therefore recommended that his contract not be extended. The internal appeal board rejected his appeal because no essential facts had been overlooked. Before the Tribunal, the complainant contended that the Office disregarded the fact that he had completed the work plans agreed upon and that the Reports Board failed to respect the principles of due process and adversarial procedure.

Analysis: According to the Tribunal, the real issue, so far as concerns due process, is not whether essential facts were overlooked, but whether the complainant was given a proper opportunity to answer the case against him and to put his own case in reply. For the Tribunal, he had ample opportunity to provide his answer to the alleged deficiencies during the whole procedure before the Reports Board. The Tribunal therefore considered that there was no denial of due process in the proceedings of the Reports Board, even if it did not provide him with a copy of its report prior to the decision not to extend his contract or because he and his supervisor were interviewed separately. The report was then available to him for the purposes of the proceedings before the Joint Advisory Appeals Board and he availed himself of the opportunity to make a detailed response to it. Finally, the complainant's contention that his performance should have been assessed solely by reference to his completion of his work plans was rejected.

Lessons: International organizations are normally allowed wide discretion in assessing performance, and may consider the subjective assessment of the "personal attributes" of the probationer beyond the objective work plan. Finally, there is no breach of due process of the proceedings before the Reports Board if it does not provide its report to the staff member. Due process is guaranteed if it is provided to the staff member during the internal appeal procedure.

Citations: Judgments Nos. 1161 and 1183.

Judgment No. 2743 (WMO)

Decision: Complaint dismissed.

Facts: The staff member who served as Chief of WMO's Internal Audit and Investigation Service at grade P.5, lodged an internal appeal requesting that her appraisal report be invalidated, that the Secretary-General recognise that she had been performing the duties of the new post of Director of the Internal Oversight Office – for which she had applied without success – since June 2004 and that he issue her a letter of recommendation. In its report the Joint Appeals Board recommended that the appraisal report be referred to the Review Board, since that was the first step in the rebuttal procedure provided for in the Guidelines to Performance Appraisal. Before the ILOAT, the complainant contended that the procedure governing performance appraisal was violated and that it reflected the Secretary General's desire to retaliate against her for having challenged his authority by pursuing her fraud investigation.

Analysis: In the present case, the Tribunal found that the complainant took no steps to initiate the review procedures and declined to avail herself of them when the Secretary-General indicated his willingness to refer her appraisal report to the Review Board. Accordingly, there is no basis on which it can be deemed that internal remedies were exhausted.

Lesson: If there are rebuttal procedures available for challenging a negative performance appraisal, the staff member is obligated to follow them.

Citations: Judgment Nos. 2861, 2742, and 3046.

III. Appointment/Probation/Non-Renewal/Termination

Judgment No. 2732 (IOM)

Decision: Decision set aside; 15,000 euros material damages; 10,000 euros moral damages; 500 euros costs;

Facts: A Project Manager working for the International Organization for Migration was terminated before the expiration of her one-year fixed-term contract for alleged unsatisfactory service and conduct. She replied by claiming that the Chief of Mission was responsible for financial irregularities in the oversight of the project and that he had harassed her after she had proposed a budget revision to correct these irregularities. She requested an investigation, which found her claims to be unsubstantiated. Her internal appeal against her termination was rejected by the Joint Administrative Review Board (JARB), because the statutory provisions preclude an appeal against termination during a probationary period, unless the charge is misconduct.

Analysis: The Tribunal found that, as there is no means of internal redress for a staff member who is terminated during a probationary period for reasons other than misconduct, the decision to terminate her was a final decision, in which case the affected staff member might have direct recourse to the Tribunal. Moreover, as it is not entirely clear if the termination was not for misconduct, the time limit for lodging a complaint with the Tribunal did not start to run until a final decision had been taken in relation to her internal appeal. Therefore, the contention of the Administration, that the complaint was time-barred, because the complainant should have lodged the complaint with the ILOAT within ninety days of the decision to terminate her, is inaccurate. But for the Tribunal, the complainant cannot rely on the fact that the terms of her contract did not indicate that no period of notice exist during the probationary period, to find that the decision is unlawful. It nevertheless considered that, even if the Director General may terminate an appointment during the probationary period at any time, this does not displace the well-established principle that an organisation “*owes its employees, and especially probationers, to guide them in the performance of their duties and to warn them in specific terms if they are not giving satisfaction and are in risk of dismissal.*” (ILOAT Judgments 1212 and 2529). As the complainant is therefore entitled to a timely warning, the seven days to demonstrate improvement was clearly not sufficient. The Tribunal did not order reinstatement, as it is not clear that, even if she had been given a proper warning and an opportunity to improve, her appointment would have been confirmed.

Lessons: A newly appointed incumbent to a post has to request a copy of the Staff Regulations and Staff Rules upon signing the employment contract. Lack of access to the intranet, as claimed by the complainant in this case, is not sufficient to show that the staff member does not know the terms of the contract. The Tribunal also reiterated settled-law that

probationers have the right to obtain early warning and must be provided time to improve. Seven days is not sufficient. In these cases, the Tribunal usually will not order reinstatement and will award moral and material damages for the loss of a valuable opportunity or in some cases the value of the contract.

Citations: Judgment Nos. 1212, 2529, and 2414.

Decision: Complaint dismissed.

Facts: The complainant had a post with ILO as associate expert financed by the government of Italy. Her final year at ILO was provided for by a cost-sharing arrangement between the Organization and Italy. The Italian government at one point offered to finance her contract for an additional year, but her supervisor did not reply in a timely manner and had instead accepted that another Italian associate expert be transferred to her Programme so as to replace her. The complainant lodged an appeal against the decision not to renew her contract explaining that there is no valid reason not to renew a fixed-term contract when funds are available, when the position is maintained and her performance is satisfactory. She asserted also sidelining from work.

Analysis: According to the ILOAT, if a donor government offers to fund the post of an associate expert for a further period, there is an obligation on the organisation to consider that offer in good faith. The Tribunal nevertheless held that an organisation is not bound to accept any such offer if there is a valid reason for rejecting the offer. Thus, the Italian government was only prepared to have its contributions to the technical cooperation programme, for which she worked, used to pay the complainant's salary for another year. The Organization's obligations extended only to the consideration of an offer made within the context of the associate expert programme. Therefore, the fact that there was funding available from the technical cooperation programme which might have been used to finance her post and that another associate expert, also Italian, replaced her, is irrelevant to the question whether her contract should have been renewed. Even the fact that the complainant's last extension classed her as an expert under the technical cooperation programme did not alter the nature of her employment. That was merely the manner in which the ILO gave effect to the cost-sharing agreement with the Italian Government. The complainant thus remained employed under the associate expert programme. Although the complainant contends otherwise, persons employed pursuant to that Programme are not in precisely the same position as officials employed in posts funded out of the regular budget. Finally, there is also no evidence of actual bias and the fact that she might have been discriminated against during the recruitment procedure to other posts because of her nationality is not relevant to the case at hand, claims she should have raised in grievances with respect to the particular decisions relating to those posts.

Lesson: The Tribunal has in this judgment decided that there was no right to renewal for associate experts when a funding promise by the member state is not directly related to the funding of the associate expert programme as such. It also considered that the transfer of another Italian associate expert to take over her work is irrelevant for the case at hand, a decision, which might seem very strict when it usually decides that replacing a temporary by another temporary to accomplish the same duties is an evasion of the provisions regulating the employment of temporary assistance.

Decision: Decision set aside; 20,000 Swiss francs moral damages; 2,000 francs costs.

Facts: AITIC, the Agency for International Trade Information and Cooperation, which was a private association founded in 1998 registered under Swiss law, became an intergovernmental organisation in April 2004. In order to solve legal complications connected with the transfer of its staff, all contracts had to end on 31 December 2004 and new ones were concluded on 1 January 2005. The new contract of the Complainant, who worked as Trade Affairs Officer, was not extended after 31 December 2005 because of poor performance. He lodged an appeal with the Executive Board, which eventually upheld the decision.

Analysis: Although the Staff Regulation of AITIC does not say so expressly, the Executive Director may terminate a fixed-term contract if duties and obligations of a staff member are no longer fulfilled or performance proves to be unsatisfactory. The complainant, while claiming that his right to a hearing were infringed during the evaluation interview, has not proved that he was denied the right to express his opinion on the unfavourable comments in the evaluation document or to express a final reservation about them when signing the document. Moreover, he could have later on consulted the evaluation document at any time so that he could in full knowledge of the facts challenge the subsequent decision not to extend his contract. But in the event of separation from service as a result of the expiration of the contract in accordance with its terms, notice must nevertheless be given “two months before the end of a month” according to his employment contract. The provisions of AITIC regarding separation from service are silent as to the form in which the Agency must give notice to staff members whom it discharges. Therefore, the organisation should have manifested its intention to terminate the employment contract in a form which makes it possible to ascertain that the staff member was informed of the termination of the contract within the prescribed period of time. In the present case, the Agency did not discharge the burden of proving that it terminated the employment contract with the requisite period of notice. Facts described by the Agency show at the most that his performance and the advisability of extending his contract were discussed, but do not prove that the latter was terminated with the notice laid down in the contract and the Staff Regulations.

Lesson: As regards the performance of the staff, the Tribunal remains reluctant to review it, because of its difficulty to substitute itself in its evaluation.

Decision: Decision set aside; compensation equivalent to 12 months' salary and allowances; 5,000 euros moral damages; 3,000 euros costs.

Facts: On 8 July 1999 the Preparatory Commission issued Administrative Directive No. 20 (Rev.2) concerning recruitment, appointment, reappointment and tenure of staff. This Directive provides a policy whereby staff members appointed to the Professional and higher categories and all internationally recruited staff should not, except in certain limited exceptions, remain in service for more than seven years. It provides in paragraph 4.2 that exceptions to the period of seven years may be made because of the need to retain essential expertise or memory in the Secretariat and shall be kept to an absolute minimum compatible with the efficient operation of the Secretariat. The Executive Secretary also issued an administrative note providing for procedures for assessing whether the incumbent has "essential memory or expertise" justifying an extension beyond the service limit. The procedures require the incumbent to be compared against candidates in the outside market. The complainant, an external relations officer at grade P-4, was notified after 9 years that his appointment would not be extended. He contended that he was not treated fairly in comparison with external candidates, and that the vacancy announcement for his post did not match his actual duties and responsibilities.

Analysis: The Tribunal found that the procedure foreseeing the possibility of granting an exceptional extension is to be judged against what the general job market has to offer. This aspect of the process can only be accomplished if based on a vacancy announcement that accurately reflects the duties and responsibilities of the position. The ILOAT had held in an earlier judgment that Administrative Directive No. 20 (Rev.2) required that both the vacancy announcement and the job description must be accurate and up to date prior to the posting of a vacancy announcement. These terms of the directive were not met in this case.

Lesson: The Tribunal confirms its jurisprudence that violations of written procedures cannot be defended.

Citations: Judgment Nos. 2658 and 2981.

Decision: Complaint dismissed.

Facts: The complainant, the Director of Contract and General Law at grade A5, responded to a vacancy notice but another candidate was eventually selected for the post. She submitted an internal appeal against the decision not to appoint her alleging that it was based on a flawed procedure and errors of fact. The Internal Appeals Committee recommended rejecting her appeal, which the President accepted. She had in the meanwhile lodged a complaint with the ILOAT and believed that her complaint is receivable on the grounds that the internal proceedings (12 months) were not concluded within a reasonable period of time.

Analysis: The Tribunal considered that the date on which the complaint was filed with the ILOAT is the relevant date for the purpose of the analyses whether it was unlikely that the internal appeal proceedings would have been concluded within a reasonable time. As the complainant failed to identify any basis upon which this could be concluded or pointed out any delays that could reasonably have been expected or anticipated, she did not demonstrate that a more expeditious resolution of the appeal was required. Therefore the internal means of redress have not been exhausted.

Lessons: The Tribunal clarified the requirements for Article VII, paragraph 1, of its Statute: even if a long time has elapsed up until the moment a complaint is lodged with the Tribunal, it is nevertheless irreceivable, if it was likely that the internal appeal proceedings would be concluded within a reasonable time of the date of filing.

IV. Harassment/Retaliation/Abuse of Authority

See *infra* Judgment n° 2757 (ICC)

V. Discrimination/Equal Treatment

Judgment No. 2725 (Eurocontrol)

Decision: Complaint dismissed.

Facts: Given the strict safety requirements applicable to air traffic control, Eurocontrol decided to organise the working hours of air traffic controllers on the basis of a special system of alternating work periods (in principle four days) and rest periods (in principle two days). On 19 April 2006, the Agency circulated a document to the staff announcing a temporary initiative whereby two or three extra days' leave were offered during the summer months of 2006 to categories of staff who were most exposed to pressure and fatigue. This measure did not apply to all staff members, in particular to the complainant, a grade B1 air traffic controller in the Operations Division of the Maastricht Upper Area Control Centre assigned to the DECO sector covering the Netherlands and north-western Germany.

Analysis: The Tribunal found that the complainant, who was not belonging to the category of staff benefiting from this measure, provided no evidence to refute the finding that air traffic safety called for urgent and temporary measures on behalf of certain categories of staff or that these measures should also apply to his category of personnel. Subsidiarily, even if the complainant did not claim that he should be offered the same benefits, he is nevertheless entitled to challenge before the Tribunal a decision that confers benefits on third parties if it may result in unequal treatment to his detriment. The Tribunal has no power to decide whether a measure is the most appropriate.

Lessons: A complainant can challenge an administrative decision even if it is only a general measure affecting all the staff.

Judgment No. 2749 (UPU)

Decision: Complaint dismissed.

Facts: The complainant impugned a decision by which the Director General rejected his request for review of the decision not to allow him to continue to deputise for the Director of his Directorate on the Management Board. The Tribunal notes that in the absence of any specific provisions governing the function of substitute for the Director, the fact that the latter asked one of his most senior colleagues to deputise for him at a meeting did not constitute an administrative decision capable of forming the subject of the review procedure provided for in the Staff Rules, let alone a complaint before the Tribunal, which is “competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of [such] provisions of the Staff Regulations” (Article II, paragraph 5, of the Statute of the Tribunal).

Analysis: The complainant lodged his appeal directly with the ILOAT after sixty days. While he did not exhaust all internal means of redress, the Tribunal did not consider the complaint to be irreceivable but found that no administrative decision existed which could have been appealed.

Lessons: When neither the term of appointments nor the regulatory provisions specify the tasks which the complainant believes to have been deprived of, a staff member cannot claim to be discriminated. To establish discrimination in similar cases would therefore require a further claim of moral harassment, but which is usually difficult to establish in absence of clear evidence.

Citations: Judgment Nos. 2747 and 2748.

VI. Classification

Judgment No. 2737 (EPO)

Decision: Decision set aside; 400 euros costs.

Facts: The organization grouped together certain grades in 1991 and introduced a new career system in 1999 in which the grade groups in category B were reduced from three to two. The complainant wished his job title to be changed back from "Administrative Employee" to "Head of Section". But the Administration stated that since he was in grade group B5/B1, that his job title was correct. A job survey was undertaken. He then requested that his job title be changed and he be placed in group B6/B4. The Internal Appeals Committee found that the complainant performed 'management functions' and that he be assigned retroactively to grade group B6/B4. The EPO President rejected his appeal and the recommendation.

Analysis: The Tribunal stated that the question that arises in cases such is not one of "*grading, as such, but the allocation of established grades to the correct career band*". The Tribunal's concluded that because of his managerial functions, the complainant was entitled to be placed in grade group B6/B4 with the title "Head of Section".

Lessons: This is a rare judgment in which the ILOAT does not remit the case to the Organization for it to undertake a classification exercise (desk audit), as it does not consider this to be a classification of post.

Citations: Judgment No. 2514.

VII. Abolition of Post

Judgment No. 2734 (WHO)

Decision: Complaint dismissed.

Facts: The complainant's post in the Sustainable Development and Healthy Environments Cluster was abolished. She was then informed of the implementation of the six-month reassignment process undertaken by the Reassignment Committee, which was unsuccessful after two extensions of the reassignment period.

Analysis: The staff member contested the abolition of her post. The Tribunal analysed whether the threat to dismiss the staff member who participated in a work stoppage at approximately the same time might be related to the abolition of her post, in which case it would be an abuse of authority. The Tribunal concluded that it was not prompted by any personal prejudice towards her. The process of abolishing the post began well before the work stoppage and there was every indication that the decision was taken solely on the basis of objective considerations connected with the fact that this post was of little use and that the Organization had repeatedly experienced difficulty in funding it. In addition, the complainant's argument that the administration deliberately wished to harm her is not borne out by any evidence. The Director-General's Office had previously twice refused to grant requests for the abolition of the post in question, thus enabling the complainant to keep her job despite management considerations in favour of this abolition. All other claims (that the Organization open a new procedure of reassignment, provide vocational training and that she should be given preferential consideration for any vacancy) are not receivable as they were not submitted to the Board of Appeal.

Lesson: The Tribunal will make a difference between the abolition of post and the actual termination of appointment, which are two separate decisions within WHO (as certain categories of staff can be reassigned to another post if the post is abolished). See also a previous judgment concerning the same complainant (Judgment 2308), in which the Tribunal had decided that there was no basis on which the complainant, who had worked as temporary assistant for 12 years, could claim that she should be retroactively treated as if she had held a fixed-term appointment, given that she had freely signed all the short-term contracts offered to her. With this ruling the Tribunal momentarily departed from its older case law (Judgment Nos. 701 and 702) in which it had found that the granting of temporary contracts to employ someone on a permanent basis was an evasion of the provisions regulating temporary assistance. The Tribunal would only return to this appreciation of temporary assistance in Judgment Nos. 3090 (2012).

Citations: Judgments 2308, 269, 1131, 1614 and 2510.

Decision: Decision set aside; 50,000 Swiss francs material damages; and 20,000 francs moral damages; 8,000 francs costs.

Facts: The complainant, the Chief of the Internal Audit and Investigation Service (IAIS) of the World Meteorological Organization (WMO), was asked to investigate alleged fraud. The suspected staff member fled to Egypt. The Swiss authorities informed her that WMO's senior legal adviser had made a telephone call to the main perpetrator the day of his escape to Egypt. A lawyer acting on behalf of the senior legal adviser threatened to take legal action against her. At the same time, the Internal Audit and Investigation Service (IAIS), which she headed, was reorganized and replaced by an Internal Oversight Office (IOO). A vacancy notice for the new post of Director of IOO was published, but the complainant was not selected. She was to be reassigned to the new Internal Audit Service (IAS), from where she would report to the new Director of IOO. She contested this decision. She was of the view that the purpose of her reassignment was to conceal the fact that she had uncovered evidence showing that the defrauded funds were mainly used to influence the voting during the elections of the Secretary-General in May 2003. With her new position she would no longer be in a position to supply information to the investigating Swiss judge.

Analysis: The ILOAT found that some of the misappropriated funds were used to meet the expenses of certain delegates to the Fourteenth World Meteorological Congress. The Tribunal rejected the argument that the decision was a hidden disciplinary measure motivated by a desire to harm or injure the complainant in order to corrupt her investigation of the fraud. The Tribunal found that not only was the complainant a candidate in that competition, but she had also been encouraged to apply to the post by the Secretary-General. Moreover, the Secretary-General had conceived the idea of creating the post well before the events related to the complainant's reports referring to the senior legal adviser developed. But the ILOAT eventually looked into the authorization granted by the Member States to strengthen the audit service and found that the Secretary-General had no authority to restructure the Internal Audit and Investigation Service (IAIS) at that time. Thus, the Executive Council resolution of June 2005 cannot be construed as authorising the abolition of the IAIS, the existence of which was mandated by the WMO Financial Regulations. The whole tenor of those Regulations was not only that the Secretary-General should establish the IAIS but also that he should maintain it until it was lawfully decided otherwise. Were that not so, there would be no authority for the independent performance of those duties and responsibilities that are essential to the proper governance of an international organisation. Accordingly, any restructuring involving the abolition of the IAIS was contrary to the WMO Financial Regulations, as they stood until January 2008, and was until then beyond the power of the Secretary-General. Because the WMO Financial Regulations had not then been amended, the Secretary-General acted without authority in abolishing the IAIS and replacing it with the IOO on 1 February 2006. And as the complainant's reassignment from the same date was inextricably bound up in that course, it too was an act done without lawful authority. The circumstance that the Executive Council

later ratified the abolition of the IAIS and the complainant's reassignment cannot overcome the fact that the decisions were unlawful at the time they were taken. The complainant is entitled to substantial damages in consequence of the unlawful decision to reassign her to the post of Chief of IAS. The reassignment was to a post with significantly diminished duties, responsibilities and status.

Lesson: The Tribunal will do its best to uphold the independence of internal investigation and whistle-blowers when the staff regulations and rules provide it.

Citations: Judgment Nos. 2743, 2861, 3046, and 3047.

VIII. Benefits/Allowances/Pension Rights

Judgment No. 2726 (WMO)

Decision: Complaint dismissed.

Facts: The complainant who occupied a post of Administrative Assistant at grade G.6 in the Office of the then Secretary-General, worked overtime as a result of the former Secretary-General's requirement. His practice was not to certify that overtime was worked, but to compensate for it by opportunities for promotion or career development. The complainant accepted this practice. When the complainant later applied for a post, the recruitment procedure was interrupted and the post reclassified. She therefore requested compensation for the overtime she had worked under the previous Secretary-General. The new Secretary-General was prepared to consider some arrangement that did not include financial compensation, a solution to which the complainant agreed. He decided to offer a credit of 60 working days of compensatory leave. She requested 183.5 working days.

Analysis: According to the Tribunal, the Board rightly ruled that as it was neither authorized by the former Secretary-General nor notified in advance to the Personnel Division, the complainant had no entitlement to receive annual leave credits by way of compensation for overtime. The request is also time-barred, as a claim has to be made within one year following the date on which she would have been entitled to the initial payment. The offer of 60 days was therefore fair and reasonable.

Lessons: This case shows an inextricable conundrum. The former Head of the Organization, while expecting the overtime worked, did not authorize it. The complainant could obviously not refuse the duties assigned to her, lest she would displease the Secretary-General himself. The staff should have tried to insist on the application of the Staff Rules and Regulations while doing overtime.

Judgment No. 2733 (IOM)

Decision: Decision set aside; 400 euros costs.

Facts: In the case related to the decision to terminate an employee at IOM during her probationary period for unsatisfactory performance, which the ILOAT set aside for lack of timely warning which is needed to improve (See *supra* Judgment No. 2732), the complainant also refused to sign the separation forms on the belief that she would thereby waive her rights and amount to an acceptance of her termination. IOM purported to need these documents before it could release payment of terminal emoluments.

Analysis: The Tribunal found that the question may only be answered by reference to whether the Staff Regulations and Staff Rules subject any outstanding payment to the completion of a particular form and/or the remitting of any proof of expenditures. As this complaint is receivable, and all the complainant's specific claims ought to have been considered by the Joint Administrative Review Board (JARB), the Tribunal decided to remit the matter to the Board for determination of the dispute.

Lesson: While the Tribunal confirmed that the appeal was not receivable internally before the JARB, because the provisions forbid an employee on probation that has been terminated to appeal except in case of misconduct, the matter is nevertheless remitted by the Tribunal to the Review Board for it to determine the merits. In light of the staff regulations and rules, the Review Board will then have to decide whether a terminal payment may be properly withheld.

Citations: Judgment No. 2732.

IX. Discipline

Judgment No. 2741 (IOOC)

Decision: Complaint dismissed.

Facts: The complainant, a computer technician, purportedly installed espionage software on the computer of the Head of the Administrative and Financial Division. He was put on special leave without pay pending the investigation. The investigation undertaken by an external company discovered that the complainant had indeed installed spyware and had accessed the personal e-mail account of the Head of the Administrative and Financial Division. The installation of the espionage software occurred during the most active phase of the process of restructuring the Executive Secretariat, a process that could have adversely affected his professional status. In this context, the Executive Director attached some importance to the finding that the espionage software had been installed immediately after the expiry of the deadline for submission of candidacies for a post created in the new organisation chart that was coveted by the complainant, in other words at a time when he had the utmost interest in obtaining access to confidential information. The impugned decision also gives weight to the fact that several e-mails exchanged between the Head of the Administrative and Financial Division and another staff member regarding the staff restructuring process were found on the hard disk of one of the complainant's computers. After a disciplinary procedure and an internal appeal before the Joint Committee, the complainant was summarily dismissed for these acts constituting gross misconduct. The complainant lodged an appeal against the decision of dismissal. He alleged that searching his office computer breached his right to privacy.

Analysis: The Tribunal found that any worker has the right to be protected against arbitrary or unlawful interference by an employer in his or her private life or correspondence. Any such interference ordered exceptionally by an employer to safeguard the normal and secure functioning of a company's information technology system must therefore be undertaken in the presence of the worker or his or her representatives. If that is not possible owing to the urgency of the situation, all reasonable precautions should be taken to ensure that the accessing of the worker's personal files remains within the bounds of what is required for company security, that any unjustified disclosure or dissemination of personal information is avoided and that any tampering with the computer equipment is prevented. In addition, the person concerned must be informed without delay of the investigations conducted and given all reasonable means to assert his or her rights. These basic principles are applicable to employment relations within international organisations. This is the case at hand as the Organization complied with these principles. Moreover, a disciplinary penalty can be imposed only at the close of an adversarial procedure that fully guarantees the presumption of innocence and the staff member's right to be heard. The facts complained of must be clearly stated and notified in good time so that the staff member can participate actively and fully in the taking of evidence both before the body responsible for conducting the investigation and

before the advisory disciplinary body and the decision-making authority. These bodies must scrupulously avoid taking evidence from one party without the other's knowledge, whether or not the evidence is prejudicial to the staff member. The Tribunal considered that there is nothing in the file to indicate that the complainant's defense was impeded in any way whatsoever before the investigating officer, the Joint Committee or the Executive Director.

Lessons: In this judgment, the Tribunal developed a new general principle of law, which is the right to be protected against arbitrary or unlawful interference by the employer in his or her private life or correspondence. Any interference in a worker's private life ordered exceptionally by an employer to safeguard the normal and secure functioning of a company's information technology system must be undertaken in the presence of the worker or his or her representatives.

Citations: Judgment Nos. 1133, 1212, 2254 and 2475.

Decision: Decisions set aside; net base salary and post adjustment from 13 April 2007 until 30 June 2007; repatriation grant; two years' net base salary and allowances in material damages, 25,000 euros in moral damages, and 5,000 euros in costs.

Facts: The complainant, a Public Information Adviser, at level P-4, worked in the office of the prosecutor of the International Criminal Court (ICC) and denounced improper conduct of the Prosecutor who allegedly coerced a journalist to sexual intercourse. He filed an internal complaint. He was then subject to disciplinary proceedings and eventually summarily dismissed for serious misconduct.

Analysis: The ILOAT could not find that the statement by the complainant was falsely made. Thus, in the context of "serious misconduct", the question whether a statement was made falsely is not simply whether the statement is true or false. A statement made innocently, which turns out to be false, does not constitute serious misconduct. A statement is made innocently if the person concerned honestly believes on reasonable grounds that the statement is true. Conversely, for the purposes of serious misconduct, a statement is falsely made if it is both untrue and the person concerned did not believe on reasonable grounds that it was true. In the present case, there is nothing to suggest that the complainant did not believe in the truth of what he wrote in his internal complaint. Neither is malicious intent proven, as it was not defamatory as long as the information is not communicated to those who do not have a legitimate interest in obtaining that information. He only communicated his belief to those who were charged with consideration of the conduct of the Prosecutor. Finally, the Prosecutor should not have taken a decision in a matter in which he has a personal interest, which therefore constitutes a breach of due process.

Lessons: The ILOAT defines the boundaries of activities, which may be called "whistle-blowing". It will compensate staff members who have suffered retaliation following disclosures of improper/illegal behaviour. But for this, disclosures must have been made innocently, i.e. if the person concerned honestly believed on reasonable grounds that the statement is true and if it is also not motivated by malicious intent, for instance defamation, and has been disclosed to the appropriate authorities.

Judgment No. 2752 (IAEA)

Decision: Decision set aside; 10,000 euros moral damages; 500 euros costs; removal of the revised letter of warning from the complainant's personal file.

Facts: The complainant, the Director of the Division of Conference and Documents Services at the IAEA at grade D-1, was issued with a letter of warning for misconduct after one of his subordinates complained about him. The conflict started after the complainant made a proposal to transfer the subordinate from the Publishing Section to the Conference Services Section. Although the staff member concerned was initially happy with the proposal, it was ultimately abandoned when agreement could not be reached on a job description. The subordinate then alleged misconduct on the part of the complainant, who was responsible for the transfer, and two other staff members. After investigation by the internal oversight service, the complainant was issued a letter of warning for misconduct.

Analysis: The Tribunal found that the statutory provisions did not allow for the issuance of a letter of warning as it can only be done in cases of misconduct. So far as there were concerns about the complainant's performance as a manager, they should have been dealt with in accordance with the Staff Regulations and Staff Rules relating to performance matters. There is further breach of internal due process as the Administration did not provide the documents, and it did not substantiate the reason why it considered that action necessary, and for the inordinate delay in the internal appeal, which lasted 15 months.

Lessons: The Tribunal exercises only a limited power of review in the case of warnings or reprimands which are not of a disciplinary nature. "[A] warning or reprimand must be based on unsatisfactory conduct since what it is saying in effect is that if the conduct is repeated a disciplinary measure may be taken". If there is no misconduct and only professional shortcomings/performance issue, provisions pertaining to performance evaluation have to be applied.

Citations: Judgment Nos. 2604 and 2656.