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Tips and Information Newsletter for International Civil Servants

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Sick Leave and You as an International Civil Servant

Your rights and what you should know!

In Brief

Within the UN system, in cases where a staff member's illness or injury is service-incurred, international organizations (IOs) should in theory treat such injuries on a 'no-fault' basis. Most IOs indeed have provisions in their staff rules and regulations that provide for compensation in case of damage resulting from the service-incurred illness or injury.

However, exceedingly short periods for reporting illness/injury, administrative delay in the IO's formal recognition of an illness or injury as being service-incurred, or narrowly construed provisions on reimbursement has meant that, in practice, many staff have not been able to avail themselves of the full amount compensation available to them from a service-incurred illness/injury, if at all.

Staff members injured or made sick by their service must still often fight for such benefits via recourse to administrative tribunals, which is ultimately contrary to fundamental principle of 'no-fault' compensation.

Compensation for Service-Incurred Injury/ Illness in the UN System

Traditionally, sick leave benefits in IOs have often been far more generous than those offered in the private sector. In many IOs in the United Nations common system, for long-serving staff, such emoluments often amount to nine (9) months of full-time sick leave, and nine (9) months of half-time sick leaveⁱⁱ, and in some cases, under the jurisprudence of the ILOAT, or the applicable staff rules of various IOs, a staff member's illness or injury (even if resulting from a day on the ski slopes completely unrelated to their work) might result in the extension of a staff member's contract beyond the contract expiration dateⁱⁱⁱ.

However, in cases where a staff member's illness or injury is service-incurred/occupational (i.e., caused by or resulting from their service to an IO), in theory, IOs are supposed to treat such injuries on a 'no-fault' basis^{iv}, in line with so-called 'workmen's compensation' systems that have existed in most developed countries since the end of the 19th century^v. A workers' compensation system is considered no-fault whereby employers must cover occupational injury or illness. Employees do not have to prove employers' negligence in order to obtain benefits.

Most IOs indeed have provisions in their staff rules and regulations that provide for compensation in case of loss resulting from service-incurred illness or injury^{vi}. While one would therefore expect that IOs would adhere to the long-standing best practice in most national systems that provide salary and medical treatment/rehabilitation to a staff member whose disability is service-incurred until such time as they are able to work again, in our experience, the practice of most IOs in the UN system is inconsistent and often deficient in this area.

Many IOs have an exceedingly short period in which a service-incurred illness/injury must be reported to the IO for the staff member to qualify for the benefits provided in the staff rules/regulations. That period ranges generally from 3 to 6 months, although many have even shorter deadlines, such as the International Organization for Migration (IOM) which requires that it be reported within a mere eight (8) days. Even six months might be insufficient, particularly in cases of traumatic injury or illness which could prevent a staff member from meeting the reporting deadline even a year or more after the illness or injury.

In our view, the better practice would be for there to be no deadline for reporting a service-incurred illness and injury. In the event such an illness/injury when eventually reported is found after all internal medical proceedings and/or appeals not to have been service-incurred, any salary or other emoluments paid to the staff member because of the service-incurred claim could be reclaimed from the staff member's terminal benefits.

Furthermore, there are a number of cases pending before the ILOAT where the staff member's own treating physicians had clearly stated that the staff member's illness/injury was service-incurred^{vii}, but due to administrative delay or simple incompetence, the staff member had exhausted all their statutory sick leave benefits before they recovered. As the illness/injury had not formally been recognized by the IO or its insurer as service-incurred, the IO barbarically cut off the staff member's salary and health insurance and pension contributions, effectively constructively terminating the staff member's appointment. In several of these cases, the service-incurred nature of the staff member's illness/injury was eventually recognized by the IO, but only months or years after their salary and emoluments were cut-off, in many instances forcing the staff member and their family to fend for themselves with no means of support, and often resulting in the staff member's forced departure from their duty station.

This practice of many IOs of delaying recognition of a service-incurred illness/injury claim for months or years, often hiding behind their health insurer, particularly in cases where the staff member suffers serious illness due to harassment, depression, or burnout also often leads to abuse on the part of the IO: the IO may see the staff member not as someone legitimately injured or made ill at work, but as a malingerer or worse, to be driven out of the IO at any cost (very often the case when the staff member has complained about harassment by a senior colleague—see ILOAT Judgment No. 4241^{viii}).

While the ILOAT in its applicable judgments has generally found nothing wrong with this practice, asserting that the staff members can be made whole at the time of judgment by an award of damages including an additional amount for the IO's delay, it is certainly not in line with the fundamental principle of 'no-fault' workmen's compensation. A far better practice would be for IOs to continue to retain staff members asserting a service-incurred illness/injury, paying them their regular salary and other emoluments until such time as the illness or injury is finally adjudicated as service-incurred or not.

The current approach also contradicts the very principles on which the ILOAT was founded. The Tribunal is the successor to the League of Nations Administrative Tribunal (LNAT), which was proposed to be a judicial tribunal which would ensure the conviction of *safety and security emanating from justice, provide a judge for every dispute, and preclude the possibility of one of the parties being a judge in his own cause*. The LNAT was lauded as being was one of the safeguards enjoyed by the League staff for the proper application of their terms of appointment and the regulations to which they were subject.

For the ILOAT to live up to its auspicious beginnings, it must be seen to do justice, which means that it must ensure the principles of no-fault workmen's compensation are assiduously followed by IOs. It is respectfully submitted that to do any less would be a stark betrayal of the fundamental principles upon which the ILOAT was founded. For, in the inspiring and bold words of the late Irish Supreme Court Justice Mella Carroll (later a judge on the ILO Administrative Tribunal) to the UN Secretary-General:

"... The United Nations is a body dedicated to the protection of human rights worldwide. Surely the best interests of the organisation are not served by a denial of justice to ... its own employees..." (emphasis added).

Furthermore, even if a staff member has his or her claim for service-incurred illness/injury recognized by the IO, another common issue is the measure of damages inuring to a staff member who suffers a service-incurred illness or injury that causes them financial harm such as loss of salary, career, etc. What does that entitle the staff member to receive in damages?

Generally, most IOs will pay any insurance deductible for medical treatment or prescription drugs that the staff member would normally pay out of their own pocket (for many IOs its 20% of such expenses). It could also include reimbursing

the staff member to damage or loss to personal property in the course of their duties. Nevertheless, the IO will, in practice, assert that their staff rules do not provide for any other compensation (which is true—most IO staff rules/regulations do not provide for other compensation).

However, the ILOAT jurisprudence has made it clear that an IO that causes a staff member's injury or illness is liable to the staff member for all losses irrespective of the provisions of its staff rules/regulations or the terms of the contract the IO has with its health care insurer^{ix}. The Tribunal has asserted that where a causal link is established between a wrongful conduct and an employee's injury, there is an entitlement to compensation (see ILOAT Judgment No. 3507, Judgment No. 3215 and Judgment No. 641), and provisions for such entitlement should be interpreted liberally to the benefit of staff members (see Judgment No. 3396, consideration 12^x).

Sadly, despite this clear and obligatory language of the Tribunal, most IO staff members injured or made sick by their service must still often fight for such benefits.

Furthermore, the principle of no-fault workmen's compensation, as well as the legal principle of unjust enrichment (i.e., no person/entity should profit from a harm that they have caused—such as by an IO terminating a staff member's appointment due to their service-incurred illness/injury when they exhaust their statutory sick leave benefits) also should be interpreted to ensure that no staff member will be separated from service irrespective of their contract status (at least before their statutory retirement age), or have their salary or other normal emoluments cut while on service-incurred sick leave. Ultimately, that is not the common or accepted practice of most IOs today and is not provided for in most IO staff rules/regulations; a staff member often must file an appeal or appeals to vindicate such rights.

Bottom Line

- If you suffer an illness or injury during the course of your service to an IO, be sure to formally^{xi} announce it to the IO as soon as possible to avoid having such illness or injury not recognized as service-incurred. If you miss the deadline because of your illness or injury, ask your treating doctor to give you a medical certificate that states clearly that your service-incurred illness or injury prevented you from making a timely declaration and then file the service-incurred illness/injury notification as soon as possible with such certificate;
- Insist in writing that your sick leave not be deducted from your statutory entitlements on account of your service-incurred illness or injury, and if they have already been deducted, insist that they be re-credited and file an

appeal if necessary to ensure that happens. This could prevent your IO from cutting off your salary and other emoluments illegally when they deem your statutory sick leave benefits have been exhausted on account of your service-incurred illness/injury, which is improper but happens often in IOs, effectively constructively terminating your appointment, or otherwise separating you from service due to abandonment of post. In such instances, it is far better to start appealing against such decisions sooner rather than later;

- If you work for a UN organization bound by the UN Staff Rules and Regulations, and your claim for service-incurred illness under Appendix D^{xii} on account of “burn-out” or depression is rejected on the basis of the heightened standard for such conditions, do not accept such determination as it is illegal and not found in Appendix D, and file an appeal immediately. If such appeal is to be made to the UN Dispute Tribunal, you may be able to get free legal assistance from the UN’s Office of Staff Legal Services;
- If your service-incurred illness or injury resulted from the intentional or negligent acts of your IO or its staff members and ended in your separation from service or other financial loss, be sure to seek recovery of all your actual and moral damages, including loss of salary, benefits, and career, even if not provided in the IO’s staff rules.

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He is currently representing the Swiss not-for-profit association Hear Their Cries—Stop Child Rape in Aid (www.heartheircries.org) in class actions against the UN and other UN/IOs and NGOs on behalf of child rape victims of their staff. He was also lead counsel in two cases litigated before the 2nd Circuit Federal Court of Appeals challenging the immunity of UN/IOs (Brzak and Ishak v UN, Lubbers, Annan et al., [08cv2799, certiorari denied], and Veiga v WMO, Jarraud et al., [08cv3999]).

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ⁱⁱ The amount and terms of such leave nonetheless vary from organization to organization, and are usually set out in the applicable staff rules. The jurisprudence of the ILOAT on the issue of sick leave, both service-incurred and non-service-incurred, is also quite inconsistent and relatively sparse. Under the UNDT/UNAT system, the general trend of its jurisprudence is actually quite anti-staff—see recent Judgment UNDT/2020/142 where a UNOPS senior staff member who was on service-incurred sick leave at the time of the expiration of his fixed term contract was found not to have a right to remain as a paid staff member past the date of expiration of his contract despite the fact that at the time of the expiration of his contract, he was on 100%, undisputed service-incurred sick leave.

The UN Dispute Tribunals generally see the issue of service-incurred illness/injury as a separate administrative procedure under Appendix D to the UN Staff Rules, and to date have not been inclined to accept any argument that the service-incurred illness/injury of a staff member can be used to defer or postpone the separation date of a staff member, even if they are not able to take up other employment as a result of their service-incurred illness or injury! Additionally, the UN Medical Services has illegally instituted a heightened standard in cases of “burn-out” or depression before a finding that such conditions are service-incurred, which standards are not found in Appendix D.

ⁱⁱⁱ See, for example, ILOAT Judgement No. 938.

^{iv} See ILOAT Judgment No. 2533, consideration 6: *"It is common for a mature legal system to provide compensation on a 'no fault' basis to employees who suffer workplace injuries; the law of the international civil service can do no less."*

^v The Sickness and Accident Laws enacted in the late 19th century by Prussian Chancellor Otto van Bismarck may be considered the foundation for modern workmens' compensation systems. Bismarck's system covered medical care and rehabilitation costs if a worker got hurt on the job. It also created a precedent that injured employees couldn't sue their employers if they got workers' compensation, thus the moniker 'no-fault'. Countries throughout Europe began adopting similar workers' compensation systems for their workers.

^{vi} For example, UN Staff Regulation 6.2.

^{vii} The ILOAT in a recent judgment made clear that if a staff member makes a claim for recognition of a service-incurred illness/injury on the basis of a clear diagnosis from the staff member's own treating physician that has not been contradicted by the IO's own medical expert, the IO must accept the determination of the treating doctor - see ILOAT Judgment No. 4232, consideration 5.

^{viii} Many IOs have provisions in their staff rules that prevent even opening an examination of the service-incurred nature of the claimed illness or injury until the harassment claim has been proven after an investigation. This practice is in complete contradiction of the ILOAT jurisprudence—see ILOAT Judgment No. 3173, consideration 14, which makes clear that even if a service incurred illness was caused by harassment, the determination as to whether the illness is recognized as service-incurred does not require the harassment investigation to be completed or harassment found to have occurred; all that is necessary is for a medical determination that the conditions of service caused the illness/injury.

^{ix} See ILOAT Judgment No. 2533, consideration 26: *"[G]iven the possibly progressive nature of [the illness], the condition may continue to deteriorate seriously. [...] the Tribunal asserts unequivocally that **the defendant's obligation to pay the complainant reasonable compensation for the results of his workplace injury is a continuing one and is not affected or diminished by the terms of an insurance policy to which the complainant is not a party**"* (emphasis added), as well as Judgment No. 402, consideration 12: *"As to loss of earning capacity on account of long-term invalidity, "there is no general principle by which compensation is restricted to the period of the employee's contract with the employer who is liable." [...]"*

^x *"The[...]Rules [compensation for service-incurred illness] exist to benefit staff members. As it is a beneficial normative legal document it should be interpreted liberally and, in the event of ambiguity in a particular provision, a meaning favoring a wide application of the provisions for the benefit of staff members should be adopted rather than a narrow application of the provisions which could deny benefits to staff members."*

^{xi} Many IOs have specific forms to be used for such declarations.

^{xii} Appendix D to the UN Staff Rules provides the rules and procedures for addressing a service incurred illness or injury.

Disclaimer

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