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Commensurate financial damages at the ILO Administrative Tribunal: a work in progress

Two recent judgments from the ILOAT, Judgments 4303 and 4215, provide important elements to consider when asking the internal appeal board and the Tribunal for rightful compensation.

In Judgment 4303, 130th session, the complainant challenged an abolition of post. Due to the WHO's rules excluding submission of a harassment claim in an administrative appeal, a separate claim for harassment to the WHO Investigation Overseas Services (IOS) was also submitted. Indeed, the internal appeal board's recommendations recognized that the decision to abolish the complainant's post was not justified on financial or strategic grounds. It also found that a number of factors pointed towards personal prejudice against the complainant in relation to the abolition of her post. However, even two years after her request, the IOS had not started examining the complainant's separate harassment claim. Fully aware of the IOS's failure to act, the internal appeal board recommended that WHO take swift action to effectively address the longstanding complaint of harassment. Unfortunately, the IOS did not react to this recommendation, nor to the Director General's similar demand. Upon recommendations by the internal appeal board, the Director General awarded 8,000 United States Dollars for moral damages based on the irregular abolition of post but not on the fuller injury caused to the complainant.

Looking for the recognition of "lifelong harm done," the complainant had to go further and submitted a claim to the Tribunal for the full assessment of the moral damages suffered and its fair compensation. However, in accordance with the terms of Article VIII of the Tribunal's Statute, the relief the Tribunal can provide is confined to 'compensation for injury' without consideration for future injury: "In cases falling under Article II, the Tribunal, if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon. If such rescinding of a decision or execution of an

obligation is not possible or advisable, the Tribunal shall award the complainant compensation for the injury caused to her or him.”

As Article VIII stipulates, the Tribunal cannot compensate a staff member for any potential injury affecting him or her after the challenged decision was appealed. With the harassment issue not being part of the initial appeal, and the investigation not finalized, she could not legally invoke them in her claim as part of damages. She was however convinced that the internal appeal award was not fitting.

In rendering its judgment, the Tribunal made it clear that the element to be considered was limited to the prejudice that could be demonstrated at the time of the challenged decision. The Tribunal assessed that the abolition of the post was not for legitimate reasons and had the effect of removing the complainant from the field of expertise she had developed over several decades. The Tribunal also estimated that the moral side of the abolition in determining that the sense of hurt and resentment the complainant experienced was considerable. Those elements convinced the Tribunal that the 8,000 dollars awarded by the WHO was not adequate compensation for the unlawful abolition of the complainant's post. The Tribunal increased this amount to 25,000 dollars, citing that compensation should be commensurate with the real level of damages.

Similarly, in Judgment 4215, 129th session, the Tribunal quashed the decision of the President of the Administrative Committee of OTIF terminating the complainant's contract, and then considered the issue of prejudice and its compensation.

As a first step, the Tribunal identified material and moral damages. In paragraph 21, the Tribunal stated: “the Organisation will, however, be ordered to compensate the complainant, as he requests in the alternative, for the material injury resulting from the non-confirmation of his appointment and to redress all other injuries of any kind the various decisions identified above caused him.” The Tribunal also noted that the illegality of the OTIF decision “denied him a valuable opportunity to have his appointment confirmed at the end of his probation period and to receive in consequence the remuneration specified in his letter of appointment for the remaining 30 months of that appointment.”

As a second step, the Tribunal examined the elements minimizing the damage: “However, it must also be taken into account that the complainant was reinstated in his national civil service on 1 July 2013, the day after his probation period at OTIF ended, and he thus continued to receive an income for the entire period in question, which significantly decreased the quantum of that material injury.”

Taking these findings into account, the Tribunal decided on the amount of 50,000 Swiss francs as compensation for all causes of damage combined. However, although reinstated in his administration, the applicant did not find an appointment within his ministry at a rank equal to that of OTIF. The difference

in salary amounts to around 250,000 Swiss francs, a far cry from the 50,000 francs allocated.

The legal problem raised here is that the amount of compensation awarded is far from equal to the financial damage actually perceived and does not correspond to the separate material damage and moral damages identified by the Tribunal itself. As such, what could be done?

The Tribunal's case law is mostly favorable to a complainant who has been unduly deprived of his employment contract. For example, in Judgment 1157, it is stated that: "In determining the amount of compensation for the pecuniary damage suffered, the Tribunal must first take into account the administrative and financial situation of the complainant at the time of his termination. [...] The second element to be considered relates to the complainant's activity after his departure. The complainant would benefit from unjust enrichment if the Tribunal did not take care of this element."

By quantifying the damage, the Tribunal also differentiates between a complainant who wishes to be reinstated and one who does not. In the first scenario, the damage can be estimated at several hundred thousand dollars and in the second scenario, the damage is generally evaluated around 50,000 / 60,000 USD (see, for example, Judgment 4139). In Judgment 4215, the Tribunal appears to have merged material damage, moral damage, and impractical reinstatement into an amount much lower than what is normally awarded separately for these different damages. This is a trend to watch out for as it could diminish the overall amount for compensation awarded by the Tribunal. In the present case, the complainant has two courses of actions: application for interpretation (asking the Tribunal on which basis it considered that his income for the entire period in question significantly decreased the quantum of his material injury) and/ or application for revision, with the latter being usually difficult to win except if factual errors can be proven.

Conclusion

Several elements emerge from Judgments 4303 and 4215 that could be useful as a basis for an initial internal appeal or claim to the Tribunal.

- When pleading a case of abolition of post while maintaining another employment with the organization, a staff member could request at the internal appeal level a financial compensation from 25,000 USD upwards. By settling at the appeal stage, this minimum award could avoid, in the vast majority of similar cases, submission of additional claims to the Tribunal and allow staff and organization to profit from a rapid and fair settlement.
- Complaints to the Tribunal take time, even when it comes to review or interpretation. It therefore appears necessary when an applicant wishes to request compensation to produce all evidence justifying the request and

quantify it as accurately as possible, as an early stage but also as long as the case is not announced on the roll for the next Tribunal session. One should not hesitate to contact the Registrar of the Tribunal even after receiving the rejoinder from the Administration if the complainant's situation has changed or has deteriorated.

- Both judgments illustrate the staff's eagerness to receive fair compensation commensurate with their grief. They will not stop at the internal appeal level if the award is not perceived as fair, and will challenge the Tribunal's judgments even if they are deemed final. One possible solution to avoid extra claims could consist in the Tribunal providing upfront a scale of compensation, based on 50 years of jurisprudence, indicating a minimum to be expected for major violation of staff rules when proven. In one hand, this could act as a deterrent to organizations that hope that the lengthy process to obtain a judgment at the Tribunal will stop claims. In the other hand, it encourages organizations to enter early and fairer negotiation with its staff to settle cases once for all. It could bring transparency and consistency to a system of awards that some see as a lottery.
