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What are discretionary powers? Are there limits?

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Mr. Fishman helps employees claim their rights, by advising them and providing legal representation in disputes and appeals with their employer. He also advises staff associations of international organizations on a range of topics, as well as by serving as an investigator or mediator. Prior to starting a private practice, Mr. Fishman provided legal advice within the United Nations system, with an expertise in employment law, for nearly a decade. He served as a staff member in numerous international organizations, including the World Trade Organization, Special Tribunal for Lebanon and as part of the legal secretariat of the WHO Global Board of Appeal. This article provides general information and is not legal advice.

Introduction

In the employment law of international organizations, discretionary power (or discretionary authority) refers to an organization's power to make a choice among a range of acceptable possibilities.¹ In simpler words, this refers to an organization's "*freedom to act*" when taking decisions about its staff.²

Discretionary Powers are Wide-Ranging

The caselaw of the ILO Administrative Tribunal (and UN Appeals Tribunal) recognizes that organizations have discretionary authority over a wide range of decisions.

This authority covers topics such as suspensions and disciplining of staff, extensions beyond the age of retirement, carrying on outside activities, the non-renewal of fixed-term contracts, the opening of investigations for misconduct, the transfer of staff to other positions, changes to salary structures and grading systems, the classification of positions, decisions on restructuring, promotion and selection exercises and the waiver of deadlines to lodge internal appeals.

¹ See Council of Europe Committee of Ministers, Concerning the Exercise of Discretionary Powers by Administrative Authorities, Recommendation No. R (80) 2, at 2.

² At 242.

Discretionary Power is not Absolute

However, the existence of a “discretionary power” does not mean that an organization has absolute power to act in its own interest. On the contrary, an organization’s freedom to act is subject to constraints.

The five Limits on Discretionary Powers

Limitation #1: An Organization’s Rules

The first and most important constraint on discretionary power are the organization’s own rules. Because an organization is empowered to establish its own rules, it is obliged to follow these rules. In interpreting this limitation, a Tribunal will examine a decision to determine whether the organization correctly applied its own procedures and whether a decision was in “regular form”. A Tribunal can overturn a discretionary decision when the organization has not followed its own rules, but this breach must be shown to have caused injury to the staff member concerned. For example, in Judgment 4156, the ILOAT acknowledged that WIPO was obliged to remove and rectify a staff member’s performance appraisal because of irregularities in procedure (mainly, the complainant’s supervisor failure to engage in continuous dialogue, which was central to the evaluation procedure). By failing to do so, the decision was unlawful.

Limitation #2: A Decision Must Be Based on Correct Facts

A decision must also be based on correct facts. This means that a decision based on erroneous information will be deemed if this error played an important role in the decision-making process. For example, where a decision-maker refuses to appoint a staff member to a position because he or she considers that the selection panel did not unanimously recommend the candidate, an error of fact exists committed if the selection panel did in fact make a unanimous recommendation in favor of the candidate.³ However, for reasons of fairness, if the incorrect information on which a decision was based was due instead to the errors or negligence of the staff member who challenged the decision, a Tribunal may be hesitant to overturn the discretionary decision.⁴

Limitation #3: A Decision Must Consider Essential Facts

In addition to the requirement that a decision must be based on correct facts, a decision-maker must also properly consider the “*essential facts*”. In other words, if a decision-maker ignores important facts that clearly should have been considered when the decision was made, a Tribunal may find that the decision is unlawful. For instance, in Judgment 4062 (cons. 7), the ILOAT found that the UNESCO Director-General overlooked essential facts when deciding not to renew a staff member’s contract for unsatisfactory service. In that case, the decision-maker overlooked the extraordinary pressure on the section in which the employee worked, the serious lack of communication between the employee and her

³ ILOAT Judgment 4216, cons. 6.

⁴ See ILOAT Judgment 4332, cons. 8, in which an appeal board mistakenly concluded that a complainant did not apply for fire safety training, so any advantage that other colleagues had obtained from taking such training would not represent an unequal opportunity. The Tribunal concluded that because the complainant did not properly inform the internal appeal board that he had applied for the training and was rejected, it would draw no negative conclusion from the appeal board’s obvious factual error.

supervisor, and the employee's long and satisfactory work performance. Ultimately, the devil is in the details. A Tribunal will have to determine whether a fact is indeed essential.

Limitation #4: An Organization Cannot Reach a Clearly False Conclusion

A decision will also be found unlawful if it was based on a clearly mistaken conclusion. When considering this limitation, one must view the decision through the lens of an organization's "freedom to act". When taking discretionary decisions, a mere claim that an organization's specialist committee or expert made an incorrect assessment will not be enough for a Tribunal to overturn the decision. Tribunals consider that organizations are entitled to deference when they employ experts to advise on topics such as reassignment, classification or grading of positions.

Such decisions involve the exercise of value judgments, and a judge will not redo the work of the specialist and conduct its own assessment. However, if a Tribunal considers that a decision-maker's conclusion is "*totally implausible or involved an obvious mathematical error*",⁵ it will be found unlawful.

This is a very high standard. However, the ILOAT found in one case that qualifying an incident as serious misconduct warranting summary dismissal could in some circumstances amount to a clearly mistaken conclusion to draw from the facts.⁶ In that case, a staff member was summarily dismissed for serious misconduct for having accused a supervisor of being a "fascist" and "a Nazi" in the organization's office, after he halted a publication on which she worked. Given several factors, including the staff member's immediate apology to the individual concerned, the Tribunal found that the disciplinary measure was so disproportionate to the unacceptable behavior that it amounted to a mistake of law.

Limitation #5: Decisions Cannot Be Based on a Misuse of Authority

A discretionary decision may also be deemed unlawful if it involved a misuse (or abuse) of authority. This means that the decision was extraneous (or not related) to an organization's interests. However, a misuse of authority may not be presumed. A staff member must substantiate the accusation with evidence and not speculation (or conjecture). For example, if in a selection process a candidate alleges that he was not selected due to the selection panel's bias against him, he must present evidence supporting this claim.⁷

As a recent example, in Judgment 4072, cons. 14, the ILOAT found that the Global Fund had abused its authority by threatening to place a staff member on a performance improvement plan because it considered that he did not meet the requirements of his new position after a restructuring. The Tribunal noted that the organization had unlawfully sought to use a tool designed to correct identified underperformance to address his potential future underperformance in a new role.

Internal Appeal Bodies May Conduct a Broader Review of Decisions

It should be noted that while a Tribunal will apply the above five principles when conducting a "limited review" of a discretionary decision, an organization's internal appeal body may

⁵ See ILOAT Judgment 4314, cons. 7.

⁶ ILOAT Judgment 1878, cons. 30.

⁷ See ILOAT Judgment 4283, cons. 9 and Judgment 4099, cons. 11.

conduct a broader review. In Judgment 3184, cons 15, 48. The ILOAT noted that internal appeal bodies are an organization’s primary trier of fact, and “*an important safeguard of staff rights and social harmony in an international organization*”. In cases concerning decision on misconduct, an appeal body is required to “*weigh the evidence*”, and not merely examine whether there were procedural flaws in the process.⁸ For that reason, internal appeal bodies are empowered to fully examine the circumstances of an appeal and make recommendations to address illegality and unfairness. Ultimately, internal appeal boards only make recommendations, which may (or may not) be accepted by an organization’s executive head.

In this regard, during a May 2023 meeting between ILOAT judges and legal practitioners, ILOAT President, Judge Michael Moore, expressed concern that some internal appeal bodies had misinterpreted their role by conducting only a “limited review” of a decision, as if they themselves were discharging the role of a tribunal. The ILOAT therefore has signaled that internal appeal boards should feel empowered to fully discharge their mandates.

Seek Legal Advice When Challenging an Organization’s Discretionary Authority

While the discussion above should help an employee understand the potentially confusing concept of discretionary powers, staff members who wish to challenge a discretionary decision should consult an attorney with experience in international civil service law. Legal advice can help a staff member determine the strongest arguments in their favor, ensure that sufficient evidence is presented and ultimately assert their rights.

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You should seek legal advice or other professional advice in relation to any particular matters you or your organization may have. The views expressed are those of the author(s) and do not necessarily reflect those of FICSA.

⁸ ILOAT Judgment 4085, para 15.