

## FICSA LEGAL ADVISOR\* TIPS AND INFORMATION NEWSLETTER

---

January – February 2010

UN Justice Reform Update/ILOAT 108<sup>th</sup> Session/Probation and Damages

---

The United Nations new justice system started operating as of 1 July 2009 which replaced the Joint Appeals Board and the United Nations Administrative Tribunal. The new system comprises a first level appeal which is heard by the United Nations Dispute Tribunal (UNDT) with registries in Geneva, New York and Nairobi. The UNDT has finally put up a website (<http://www.un.org/en/internaljustice/>) with information for filing applications, advice for litigating appeals, and copies of its statute and rules of procedure. The UNDT is acting much like a domestic trial court with detailed procedures for seeking documentary evidence and for seeking interim relief.

The website also contains the orders and judgments handed down by the various Judges. The Judge's opinions are well-written and cover points of facts and law clearly and concisely, which contrasts starkly with some of the reports and recommendations of the Joint Appeals Board in the old system. This is a very welcome change. However all is not peace and calm since for some issues that impact significantly on whether the staff member will prevail, there is a split of opinion among the Judges on how the new statute is interpreted. For transferred cases, some judges have ruled there is no grant of power in the statute for waiving time limits for cases that were not filed timely in the old system even though the Joint Appeals Board had the power to waive time limits in exceptional circumstances. This would appear to be a breach of an acquired right. There is also keen debate on the extent to which legal principles established by the now-defunct United Nations Administrative Tribunal apply to appeals in the new system. These are critical legal issues that will eventually be resolved by the new United Nations Appeals Tribunal which is the second and final appeal tribunal. In addition, cases that were pending before the old UNAT and were not decided before its abolishment are now being transferred to the UNDT for decision. This presents the new system with a logistical challenge to say the least and owing to the high number of such cases will no doubt slow down the wheels of justice in the new system – certainly an unintended consequence that will be quickly resolved.

---

*\*Laurence Fauth, FICSA's Legal Advisor, provides counsel and advice to international civil servants and staff unions. You can visit his website for more information: [www.unattorney.com](http://www.unattorney.com). The information and content contained in this newsletter is for general information only and does not constitute legal or other professional advice. You must not rely on any information or content contained in, or omitted from, this newsletter without obtaining independent legal advice.*

The ILOAT published its decisions for the 108<sup>th</sup> session. FICSA's Information Officer who attended the session was pleased to report that the success rate was some 50% of all cases decided. This represents an unprecedented winning percentage before the Tribunal and we hope it will continue in upcoming sessions.

In Judgment No. 2883 (OPCW), the Tribunal set aside a decision not to confirm a probationary appointment. The award in this case deserves close scrutiny.

The organization decided not to confirm the three-year contract since it considered that the staff member had not passed the training course on two occasions during the first six months of the probationary period, and that the staff member did not demonstrate improvement during the three month probationary period extension. The Tribunal did not find much difficulty in rejecting the organization's reasons on the evidence presented. The staff member was given a certificate signed by the executive head stating that he had successfully completed the first training course. Because his direct supervisors had reservations, the staff member was sent for a second training and failed the course just before the end of the six month probationary period. In the three-month extension period, the organization offered no other training and cited the failure on the second course as sufficient grounds warranting non-confirmation. Later on, it claimed there was no improvement during the three-month extension despite positive comments about performance during this period. The Tribunal applied its voluminous case law to the effect that an organisation owes its employees, 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.

The Tribunal awarded 35,000 euros in material damages for the "lost opportunity" to have his appointment confirmed, and 15,000 euros moral damages. The reasoning for the material damage award is not only puzzling but against settled law. The Tribunal has said in its cases that for breach of contract the staff member is entitled to the benefit of the bargain and therefore has awarded the full contract value, less any amounts earned during the contract period after separation. In Judgment No. 2529, decided in May 2006, the Tribunal held that "since the organisation was in breach of its obligation to provide him with any necessary training, guidance and support during his probationary period, his completion of his initial appointment term of three years was no longer subject to the condition that he receive certification of having given satisfactory service during probation." The Tribunal therefore awarded the staff member the amount he would have earned if he had served for the three full year term of the contract, including significant benefits, less monies earned from other employment during this period. This was a significant sum since the staff member in that case served at the P-5 level.

The Tribunal has not cited any case law justifying its apparent new rule on damages (lost opportunity) in these types of cases which has emerged in the last four years. Probationers who have had their contracts cut short on invalid grounds should strenuously argue for the correct measure of damages for breach of contract, i.e., the full value of their contract. The Tribunal's award in the current case not only fails to

compensate the probationer for the proper amount of damages, but it provides no incentive for the organization to follow the rules the next time round.