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TIP OF THE MONTH

June 2008

Hidden Sanctions

The ILO Administrative Tribunal recently provided a good lesson for determining whether a staff member has been subject to a hidden disciplinary sanction. In Judgment No. 2659, an administrative assistant to the Managing Director of UNIDO's technical division alleged that her sudden transfer to the post of assistant to a P-3 officer was a hidden sanction for her alleged involvement in drafting an anonymous letter accusing the organization's Director-General and its management of corruption and mismanagement. The staff member had been interviewed in connection with an internal investigation to determine the letter's author, however, the staff member was not advised of the outcome of the investigation and no report was ever published. She noted that the new post did not have a job description and was in fact a demotion since it entailed reduced responsibilities and duties, and that the reasons for the decision ("exigencies of service") did not in fact exist.

The Tribunal explained that a "hidden sanction is a measure which appears to be adopted in the interests of the organization and in accordance with the applicable rules, but which in reality is a disciplinary measure imposed as a penalty for a transgression, whether real or imaginary." Since the true nature of the sanction is not always apparent, the Tribunal "will examine the particular circumstances in each case".

A number of important points emerged which guided the Tribunal's analysis. First, the decision followed within 2 months after the staff member's last interview during the internal investigation. The internal appeal board found that there was no evidence of wrongdoing as a result of the investigation. Second, the staff member was given no prior notice of the decision and was denied the opportunity to express her views of the transfer in advance. Third, despite the bald assertion by the administration that the decision was in the interests of the organization ("exigencies of service"), the evidence offered by the staff member showed the opposite as her former division was without an administrative assistant for a number of months. Finally, it was relevant that there was no vacancy announcement for the new post and she was not given a job description. In this case, the internal appeal board recommended moral damages of 7,000 euros, which was paid by the organization. After she lodged her appeal with the Tribunal, the administration offered to settle for an additional payment of 8,000 euros, which she rejected. The Tribunal awarded her 22,000 euros (above the 7,000 already paid).

In the foregoing case, the hidden sanction was a transfer to a post with less status and responsibility. The sanction could take a number of other forms: denial of promotion or withholding of a salary increment or even demotion. In order to successfully prove that a hidden sanction has been applied, the first step is to review the staff regulation and rules (if any) governing the type of hidden sanction taken. For example, some organizations provide broad discretion to the executive head with regard to transfers by providing that it may be

taken in the “interests of the organization”. The executive head’s discretion in such cases, however, is limited since as we see in this case some legitimate reason for the decision must be cited. Second, the staff member should determine whether the decision was taken without any advance consultation with the staff member. The cornerstone of due process requires that the staff member concerned be given the opportunity to express their views before the decision is taken. Third, if the decision followed soon after allegations of misconduct were raised and/or investigated, but no conclusions reached, it signals that a disciplinary sanction has been applied. The alleged transgression could emanate from any number of sources – anonymous note, from a supervisor or colleague, or from some official source outside the organization. It does not necessarily require that the wrongdoing be formally investigated but in every case no adverse findings are reached. The sanction is hidden precisely because there is either no evidence or little evidence to show misconduct in the first place. Fourth, consider the effect the decision had on the staff member in terms of financial or career advancement – this will sometimes be difficult to quantify. The ILOAT requires that the staff member be given a proper post with duties and responsibilities commensurate with the classification. Finally, the staff member should assess the reasons asserted by the organization, if any, for the decision. If the administration cites a possible legitimate basis for the decision (for example, reorganization or restructuring), then the decision will be more difficult to challenge. With respect to transfers, sometimes they may be legitimately made if there is conflict between staff members in a section or with a supervisor. If the reasons cited are mere fluff or in fact false, as in this case, then the staff member has further evidence that the decision is merely a hidden sanction.