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TIP OF THE MONTH

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ILOAT 105th Session Update: Same Sex Marriage and the Return of the Fleming Principle

The ILOAT issued its rulings for the 105th session on 9 July. I am pleased to report on a few significant victories where I represented the staff members:

Judgment No. 2760 (IAEA) (Same Sex Couples)

In good news for Agency staff members seeking benefits for same sex spouses, the Tribunal ruled that the Agency must extend benefits retroactively to April 2006 to a Canadian staff member who married her same sex partner in April 2006 under Canadian law, which authorizes marriages between same sex couples. The Agency had conceded that it followed the UN policy of referring to a staff member's home country for determining personal status. However, it justified its denial of benefits on the basis of a definition of spouse as persons of the opposite sex contained in a staff Notice and a Guide to Dependency Benefits. The Tribunal recalled its settled case law that in the absence of a definition of spouse in the staff regulations and rules, the status of spouse will flow from a validly contracted marriage. The Agency's regulations and rules contained no definition of spouse, and according to the Tribunal the rights contained therein could not be restricted by the staff Notice or the Guide or by the Director General, reaffirming the principle of the hierarchy of norms. The Tribunal did not find that the decision was discriminatory since it concerned a "delicate new legal issue", but did award €10,000 for moral injury and the delay, in addition to €5,000 for legal costs.

Judgment No. 2750 (IAEA) (Flemming Principle)

The Flemming principle phoenix-like arises from the ashes in this case. The Flemming principle requires that international organizations offer staff in the general service category salary and other components of pay that are among the best in the locality without being the absolute best. The staff member was paid an end-of-service allowance discounted by some 50% for part-time employment as specified in the staff rules. She argued that this breached the Flemming principle since in Austria the allowance only takes into account continuous years of service regardless of whether the employment is part or full time, i.e., there was no discounting. On this basis, the Tribunal found that the Agency's scheme breached the Flemming principle, and that the Agency had to pay an additional allowance. Over the last 10 years the Tribunal had seemed to relegate the Flemming principle to the dustbin of history by consistently rejecting such arguments, most notably with respect to setting pay levels following general service salary surveys. In cases where a component of pay is clearly significantly less than that offered on the local job market, the Tribunal will recognize a breach of the Flemming principle. In the same case, the Tribunal also found that the staff member was not given adequate notice of non-extension of her appointment, and awarded three months' salary.

Judgment No. 2763 (CTBTO) (Breach of Tenure Rules)

The Tribunal awarded the staff member at grade P-4 one year salary and €5,000 for moral injury for failing to properly follow the revised tenure rules. The organization has a seven year service limit (tenure rule) which permits exceptions for staff members with essential expertise or memory. In order to determine whether the staff member has essential expertise or memory, and whether an extension is warranted, the organization adopted additional procedures that require advertisement of the staff member's post and comparison of the staff member with interviewed candidates, i.e., comparison with the job market. Once outside candidates are interviewed, a panel meets to compare the incumbent with the interviewees and to recommend whether or not an extension should be granted or an outside candidate appointed. In this case, the organization did not follow the procedures for advertising the incumbent's post since it did not ensure that the job description was up-to-date and that it matched the vacancy announcement. The vacancy announcement contained duties and responsibilities different from those assigned to the incumbent staff member. The organization argued that this admitted flaw was not relevant since the replacement candidate was able to assume the duties that were not advertised. The Tribunal set aside the decision for the flaw in the procedures, and also awarded €3,000 for legal costs.

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