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TIPS AND INFORMATION NEWSLETTER

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WHO at the ILOAT 105th Session

The ILOAT issued its rulings for the 105th session in July. Four cases decided by the ILOAT respecting staff members of the World Health Organization (WHO) provides a good workout for staff representatives since the issues treated were varied and the lessons given important. I did not represent the staff members with respect to these appeals.

Abolition of Post Judgment No. 2734

In this case, the staff member was informed by letter of 10 January 2006 that her post in the Sustainable Development and Healthy Environments Cluster would be abolished on 31 January 2006 and that efforts would be made to reassign her through a six-month process lasting until 30 June 2006 pursuant to Staff Rule 1050.2. She filed an appeal of the decision to abolish her post in March 2006 on the grounds among others that it was based on personal prejudice and in retaliation for her union activities. The reassignment process was not successful and she was notified by letter of 28 November 2006 that her contract would be terminated at the expiration of the second extension of the reassignment process. She filed another appeal of this decision. The Headquarters Board of Appeal recommended that the decision to abolish her post be upheld although it found that the clumsy handling of the procedures might have induced a perception of personal prejudice or incomplete consideration of the facts. Her other appeal of the decision to terminate her appointment was still pending at the time she filed her appeal to the Tribunal. Nonetheless, before the Tribunal, she added a claim for damages for the decision to terminate her contract and for failure to follow the reassignment procedures. The Tribunal initially pared down her claims to one, i.e., whether the decision to abolish her post was lawful. The decision that her contract would be terminated (of 28 November 2006) and the allegations that her health suffered from her employment conditions were legally distinct, and had not been the subject of final administrative decisions, and were therefore not receivable.

On the merits, the Tribunal rejected the allegations concerning technical breaches of the abolition of post procedures. It focused on the claim that the decision amounted to an abuse of authority based on her participation in a work stoppage of 30 November 2005 and her membership in the Staff Association. Significantly, the Tribunal accepted the allegation that the former Director-General had threatened her with dismissal before the day of the work stoppage. Nonetheless, the Tribunal held that the circumstances surrounding the abolition of post itself showed it was lawful: it had been planned well in advance by her managers and the Director-General's office had twice refused similar requests to abolish her post. The Tribunal turned one argument against the staff member when it said that the staff member's complaints

about the lack of duties confirmed that the post had little use, and that it was appropriate to abolish it! According to the Tribunal, the allegations regarding her union activities and retaliation were unsubstantiated.

Lessons: This case has lessons concerning the Tribunal's scope of review and the evidence that is required to prove that a decision was taken for improper purposes. Where the written procedures relating to abolition of post are followed, the Tribunal will not substitute its views with that of the administration. In asserting that the administration had retaliated for union activities, the Tribunal will usually reject allegations that are not supported by written evidence or undisputed testimonial evidence. In addition, where there is evidence showing the administration threatened retaliation, the Tribunal will look at all the circumstances to see if the decision was nevertheless based on other lawful factors, as in this case. Finally, this staff member in my view did not help herself by adding claims before the Tribunal that were still pending in the internal appeal process, and therefore not receivable by the Tribunal.

Competition for Vacant Posts Judgment No. 2761

This staff member (P-5) joined the Organization in 1994. In 2004 she applied for a post at the same grade in the Regional and Country Coordination Group (RCC) in the HIV/AIDS Department of the HTM Cluster. She was not selected and another candidate was appointed in July 2005. She filed an internal appeal. In August 2006, the Acting Director-General decided to follow the favorable recommendation of the HBA to set aside the selection since the procedures were tainted with bias, to order the initiation of a new selection process and to pay the staff member her legal costs. In October 2006 the complainant drew attention to the fact that no action had been taken to start the new selection process. Having received no formal reply to this letter in the two months following this first step, the staff member filed an appeal with the Tribunal requesting that the organization be ordered to implement the decision to hold a new selection process.

Thereafter, the organization provided a detailed explanation of the reasons for not holding a new selection process. The Tribunal found nothing in the file to support the view that, by opting for this solution, the Organization abused the wide discretion it is allowed in order to organize its services. The staff member's claim that the post she had wanted should be re-advertised was therefore dismissed. The staff member was also paid an indemnity of 9,000 Swiss francs by the Director-General, which matched the amount she sought before the Tribunal.

Lessons: Competition for vacant posts must accord with due process, which means the competition must follow the rules of the competition and be conducted with impartiality. In this case, the selected candidate's spouse had taken part in the restructuring and job-matching exercise prior to the advertising of the post, and thus an element of bias was improperly introduced into the process. The Organization was aware that the Tribunal would very likely find in this staff member's favor and therefore settled by agreeing to hold a new competition and paying costs. The staff member's goal was obviously to compete fairly for this post. However, the Organization then reneged on the intention to hold a new competition. The Tribunal did not consider this significant and instead accepted the administration's reasons for not holding a new competition, so at the end of the day this staff member in a manner of speaking won the battle but lost the war.

Tribunal rejects argument that a Personnel Action form constitutes an administrative decision
Judgment No. 2739

With effect on 1 March 2003 the staff member, who worked for PAHO from 1987 to 2003, was appointed to the post of External Relations Officer at WHO in Brussels. In May 2003, he received a copy of a Personnel Action form dated 1 May 2003 indicating that his dates of entry on duty with the United Nations was 1 August 1987 and with WHO 1 March 2003. Before transferring to the IAEA in early 2006, he had asked that the administration change his entry on duty with WHO to 1 August 1987. The administration argued it was too late to request a change since the PA constituted notification of a final decision respecting the entry on duty date and under the rules he had 60 days from his receipt of the PA to lodge his appeal. The HBA agreed with the administration, and he appealed to the Tribunal. The sole issue was whether the PA constituted an administrative decision triggering the time limit to file an appeal.

According to Staff Rule 1230.8.1, a staff member may not appeal against a decision until it has become final. It will be considered final when it has been taken by a duly authorized official and written notification has been received by the staff member. The Tribunal noted that the WHO Manual described the PA as “prepared for changes in . . . status or entitlements that take place in the course of their service with WHO” and the purpose was “simply to record the changes to the terms and conditions of employment upon a change in the staff member’s entitlements and is not, as asserted by WHO, central to a determination of a staff member’s conditions of employment.” In this case, the PA was a record of the contract already entered into between the staff member and WHO. The Tribunal did not find any evidence that a duly authorized official had considered whether service with PAHO had any bearing on the staff member’s entry on duty date with WHO, and therefore the PA was not the notification of a final decision on that issue. The Tribunal also noted that the administration had admitted that in this case even the technicalities, policy and legal questions had not been resolved. In an earlier appeal by this staff member, the administration had calculated the staff member’s end-of-service grant by including service with PAHO.

Lessons: Although this case seems to stand for the simple proposition that information provided in a PA does not constitute notice of a final decision triggering the 60 day time limit for filing an appeal, staff members should not ignore changes to the terms and conditions of employment which are reflected in a PA. In my view, this case is limited to its special facts, including the administration’s admission that the issue was under review. There may be other situations where it may be concluded that the PA reflects a decision that was taken after careful consideration by a duly authorized official.

Discipline and Immunity
Judgment No. 2719

This staff member, employed in SEARO from 1986 to 2005, had been in some difficulties in 1998 involving complaints of alleged fraudulent activities, and was cautioned by the Organization to remedy these problems as it was causing embarrassment to the Organization. In 2002, he was found guilty of misconduct in relation to banking transactions and issued a written reprimand. Then in 2004, he was accused by local authorities of allegedly giving a forged WHO salary certificate in support of a loan request in favour of a person with the name of the staff member save for one letter. The Organization cooperated with the police investigation. Because of this complaint, which the staff member ascribed to a conspiracy

hatched by some unscrupulous persons, the staff member was forced he said to take shelter away from the duty station for several weeks beginning on 18 November 2004. He made initial requests for annual leave and then leave without pay when he was notified his annual leave was already exhausted. He was eventually advised that his further absence constituted “a serious disciplinary issue” including the possibility of summary dismissal. He was suspended with pay, and then finally summarily dismissed since he did not return to work and his reasons for his absence were unsatisfactory.

On appeal to the Tribunal, the staff member argued that the Organization violated his immunity by assisting the local authorities in connection with the bank fraud, and demonstrated bias and bad faith. The staff member also argued breach of due process for failure to attach his appraisal report to the notice of suspension with pay, and that the sanction was disproportionate to the offense.

The Tribunal held that the events at issue concerned the staff member’s private activities, and not those conducted by him for or on behalf of the Organization. Under Staff Regulation 1.9, the privileges and immunities furnish no excuse to staff members for non-performance of their private obligations or failure to observe laws and police regulations. This was not a case of termination of appointment for unsatisfactory service so the reference to an appraisal report was irrelevant. Finally, as one might imagine, under these facts, the Tribunal did not find that the punishment did not fit the offense, especially since this was not the first time the staff member had similar troubles with local law enforcement.

Lessons: The decision by the Tribunal was not surprising, but nonetheless it raised a very important issue regarding privileges and immunity of international civil servants who often believe that their activities, at work and in private, are shielded from criminal prosecution by virtue of employment with an international organization unless expressly waived by the organization. In this case, although it is not entirely clear, upon arrest by the local police the staff member probably asserted his immunity from prosecution by virtue of his SUEPO employment. The police it appears did not request SEARO officials formally to waive immunity and obviously the Organization cooperated with the investigation. The Tribunal did not develop the facts very well but it appears that the Director-General did not make an express decision in this regard. The Tribunal was contented that no breach of due process occurred by citing the proviso in Staff Regulation 1.9 that the “privileges and immunities furnish no excuse to staff members for non-performance of their private obligations or failure to observe laws and police regulations.” The local police obviously arrested this staff member without any concern for issues of immunity. The outcome may be correct in this case given the past behavior of the staff member and it is clear that the Director-General would have waived immunity, but for those staff members who are stationed in countries where basic rights to a defense and fair trial in criminal proceedings are lacking, the short shrift given by the Tribunal to this issue should be of concern.

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