International Administrative Tribunals

CASE LAW DIGEST

Modulaw

2022

NOTE

The purpose of this digest is to provide a brief overview of what we consider to be leading or interesting cases based on the types and volume of work we undertook in 2022. We have included judgments from each of the Administrative Tribunal of the International Labour Organisation, the United Nations Appeal Tribunal and the Administrative Tribunals of multilateral development banks.

This publication would not be possible without the contributions of our consultants, Ellen Tetley and Alessandro Rosa.

We hope this is a useful resource for all readers.

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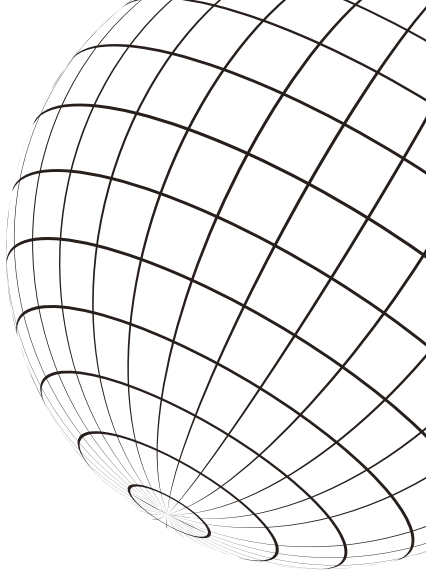
FOREWORD



Cosimo Melpignano

General Secretary
Federation of International Civil Servants' Association (FICSA)

The constant evolution of legal demands and consequent trends remains an ever-present issue of concern for FICSA.

The future of work is already with us and commands the utmost consideration as we work to protect staff by ensuring equitable employment conditions, protection of personal data, reassurance that their health and safety remains an organizational priority and, finally, the consistent application of rules, regulations, and policies.

The UN operating model is becoming more complex across the common system and requires that the norms, values and beliefs of the organisations are correctly reflected by the staff rules, regulations and policies which govern the UN workplace.

As the lack of consistency across legal regulations may affect an organisation's ability to answer new challenges and make an impact upon its global competitiveness, we, FICSA, are strongly committed to work in solidarity with our counterparts to avert such dangers and ensure that the UN, and all treaty-based international organisations, remain an employer of choice for generations to come.

Our legacy is to the next generations of international civil servants.

With this in mind, we feel our partnership with Modulaw is at a crucial crossroads, while we walk the talk, address common trials, and strengthen a shared vision.

Thank you for another well-devised edition of your case law digest!

Contents

Abbreviations

ABCC	Advisory Board on Compensation Claims
ADB	Asian Development Bank
AFDB	African Development Bank
AT	Administrative Tribunal
EBC	Ethics and Business Conduct Department of the World Bank Group
EBRD	European Bank for Reconstruction and Development
EPO	European Patent Organisation
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
ILOAT	Administrative Tribunal of the International Labour Organization
IOM	International Organization for Migration
ISA	International Seabed Authority
JAB	Joint Appeals Board
OAS	Organization of American States
OPCW	Organisation for the Prohibition of Chemical Weapons
PRS	Peer Review Services at the World Bank Group
UNAT	United Nations Appeals Tribunal
UNCTAD	United Nations Conference on Trade and Development
UNDT	United Nations Dispute Tribunal
UNISFA	United Nations Interim Security Force in Abyei
UNODC	United Nations Office on Drugs and Crime
UNRWA	United Nations Relief and Works Agency for Palestine Refugees in the Near East
WBAT	World Bank Administrative Tribunal
WHO	World Health Organization
WTO	World Trade Organization

Due process

Steven Griner v Secretary General of the OAS

Legal principle: The standard of proof for termination and serious misconduct at the OAS AT should be one of "clear and convincing evidence". The delay caused by an organisation's refusal to allow the virtual convening of disciplinary proceedings amounts to a breach of due process. An organisation must identify the cause for termination of contract.

Facts: The Appellant challenged the termination of his employment with OAS, arguing that his dismissal was motivated by unresolved allegations of "serious misconduct" against him by the Permanent Representative of the United States to the OAS. Despite the Hearing Officer's report stating that there was a lack of conclusive evidence to determine that the Appellant was the source of the disclosures, the Office of the Inspector General made a finding against the Appellant and recommended his summary dismissal. The disciplinary process was stalled due to COVID-19 and the Joint Disciplinary Committee (**JDC**) failed to hold a meeting to establish whether the allegations against the Appellant were established. The Appellant's employment was terminated before the relevant sanction could be determined or imposed.

OAS AT held: The majority found that the OAS's refusal to allow the virtual convening of the JDC amounted to a blatant denial of the Appellant's due process rights, given that other OAS organs and entities found ways to continue conducting business virtually during that time period. The violations of the Appellant's due process rights gave rise to indemnities, even though there was no finding of culpability against the Appellant and no sanction imposed. The majority found that the Appellant was dismissed as a punitive measure arising from the misconduct allegations, as opposed to the financial considerations of the OAS.

The majority also found that the manner in which the Secretary General had reached his termination decision was superficial and fundamentally flawed, and that the process around the Appellant's separation from service was imprecise, ill-informed and conclusory. The Tribunal ordered that the Appellant be reinstated, material damages in the amount of the salary he would have been paid if he had not been separated, and costs.

ADB AT Decision No. 124/2022

Legal principle: International organisations have a duty to provide staff members with the basis for all administrative decisions made in relation to them.

Facts: After ending her employment with the ADB under a confidential Settlement Agreement, the Appellant requested a review of the decision made by the Administration Committee of the Staff Retirement Plan to set her Incapacity Pension at 50% partial incapacity. The Appellant considered that 50% incapacity did not reflect the reality of her condition (Bell's Palsy) when the medical report indicated a potential range of 50-70% incapacity.

ADB AT held: The Tribunal found that the Bank's decision on the extent of the Appellant's incapacity was made with due regard to the medical evidence submitted and in accordance with its own rules and regulations. The 50-70% range of incapacity was derived from the Appellant's own neurologist. The Administration Committee's decision to appoint a specialist with the expertise and experience to assess the level of the Appellant's incapacity, and the fact that this specialist was completely independent of the Bank, was entirely appropriate.

The Tribunal considered that any moral damage the Appellant may have suffered was covered by her Settlement Agreement, and that the Appellant's five-month wait to deal with her application was reasonable. However, the Tribunal noted that the lack of a requirement to provide reasons for its decision was regrettable and should be remedied, and awarded the Appellant USD 1,000 for this violation.

Duty of care

ILOAT Judgment No. 4459/2022

Legal principle: The educational needs of a child with a disability and related family circumstances is a sufficient justification for the temporary waiver of a staff member's transfer under the IOM's rotation policy.

Facts: The Appellant challenged the decision not to defer her transfer to Sudan under IOM's rotation policy until she was able to find adequate medical and schooling facilities for her disabled daughter.

ILOAT held: The Tribunal held that the Appellant's request to delay her move to Sudan was reasonable based on the letter she had received from the Khartoum American School informing her that the school did not have the resources, program or support staff to enrol her daughter for the school year. IOM had therefore breached its duty of care by insisting that the Appellant be transferred to Sudan with three months' notice rather than postponing her move. The Director-General should have continued to temporarily waive the Appellant's transfer under the rotation policy out of consideration for her daughter's special needs until the Appellant was able to secure suitable educational facilities. The Tribunal set aside the impugned decision and awarded €10,000 in moral damages and €8,000 in costs.

Harassment and sexual harassment

ILOAT Judgment No. 4471/2022

Legal principle: Allegations of harassment must be determined in light of a careful examination of all the objective circumstances. The absence of key information, such as the preliminary investigation report, may render a Tribunal unable or unfit to examine the lawfulness of the impugned decision.
Facts: The Appellant lodged a complaint of psychological harassment against his supervisor. The Director-General initiated a preliminary investigation, which found that although there had been two instances of improper conduct, they did not amount to harassment. The Director-General therefore decided to close the case but did not disclose a copy of the investigation report to the Appellant. In the internal appeal, a Joint Committee for Disputes (**JCD**) was divided on whether harassment had been established, noting that the investigation report had not been made available to them. However, the JCD unanimously found that the situation had not been properly managed, particularly in terms of the time, that the outcome of the investigation had been communicated in a 'deficient' manner and that the Director-General's decision was not adequately motivated. The Director-General nonetheless considered the Appellant's appeal to be unfounded and dismissed it.

ILOAT held: The Tribunal agreed with the findings in the JCD report and held that the Director-General's decision to dismiss the Appellant's internal complaint was unlawful. In particular, without having access to the entire investigation report, the Tribunal was unable to determine whether the Director-General's decision demonstrated a careful examination of the objective circumstances surrounding the alleged harassment.

Given the time which had elapsed since the harassment complaint was first lodged, the Tribunal did not consider it appropriate to remit the case to Eurocontrol for a fresh examination of the facts. Instead, the Tribunal awarded the Appellant €20,000 in moral damages and €5,000 in costs.

ILOAT Judgment No. 4523/2022

Legal principle: The accumulation of repeated events of mismanagement or omissions for which there is no reasonable explanation can amount to institutional harassment, even if the decisions appear to be individually justified.

Facts: The Appellant requested a transfer due to tensions within his unit and allegations that he had been harassed by his supervisor. He was temporarily reassigned to a different unit and challenged the reassignment on the basis that it amounted to a demotion and a hidden disciplinary measure, that he had not been formally notified of the decision on his transfer request, and that he had not been formally informed of the reasons for the reassignment.

ILOAT held: The Tribunal agreed that the decision to temporarily reassign the Appellant was taken as a result of his own transfer request. By reassigning him to a position at the same

grade, IAEA had made clear efforts to remove the Appellant from a difficult working environment. Though the title of the position the Appellant was transferred to had originally been mislabelled, the Tribunal was not satisfied that this mistake was motivated in any way by bad faith or abuse of authority. The temporary reassignment was neither a demotion nor a hidden disciplinary sanction.

The Tribunal found that decisions which appear to be managerially justified *can* amount to institutional harassment when the accumulation of repeated events (for which there is no reasonable explanation) deeply and adversely affect a staff member's dignity and career objectives. In this case, the Appellant did not produce concrete evidence to establish institutional harassment. The case was dismissed.

UNAT Judgment No. 1187/2022

Legal principle: The UNDT may only reach a finding of sexual misconduct on the basis of sufficient, cogent, relevant and admissible evidence. Sexual misconduct must be shown by the evidence to have been highly probable.

Facts: The Appellant was separated from UNISFA for having exploited and/or abused or attempted to sexually exploit and abuse two cleaners working for the Mission. The Appellant appealed against his termination and this was upheld by the UNDT as it found that the Secretary-General had failed to discharge the evidentiary burden of proof (clear and convincing evidence). The UNDT ordered rescission of the termination decision and reinstatement of the Appellant. The Secretary-General appealed the judgment to the UNAT.

UNAT held: The Tribunal highlighted the seriousness of sexual harassment in the workplace and its impact on the morale and wellbeing of affected staff members. It noted that UNISFA is entitled and obliged to pursue a severe approach to sexual harassment and to implement a policy of zero tolerance.

The UNAT held that given the seriousness of a finding of sexual misconduct, the UNDT should only reach a finding of sexual misconduct on the basis of sufficient, cogent, relevant and admissible evidence. The UNAT agreed with the UNDT findings that the scope and value of UNISFA's evidence was exceedingly limited and that the organisation's failure to call witnesses made it impossible for the UNDT to assess the credibility or reliability of the relevant testimony. The limited evidence presented by the UNISFA did not provide "very solid support" for a finding of sexual exploitation or abuse. The Tribunal dismissed the appeal and affirmed the UNDT judgment.

Judgment implementation

WBAT Judgment No. 673/2022

Legal principle: The timely and correct implementation of Tribunal judgments is a fundamental right of all staff members.

Facts: The Appellant challenged the IFC's compliance with WBAT Judgment No. 629/2020. The Appellant argued that IFC's delay in implementing the WBAT decision had affected the adjustment of his Long-Term Disability payments, that IFC had failed to resolve the issues with the adjustments in a timely manner, and that IFC had omitted periods in their calculation of his retroactive salary adjustment

WBAT held: The Tribunal held that there was nothing explicit in its Statute which set a time by which its judgments had to be fully implemented. However, the Tribunal noted that, in accordance with Principle 2.1 of the Principles of Staff Employment, the World Bank Group must act with fairness and diligence when complying with Tribunal's judgments. The Tribunal considered that a reasonable time for implementation may vary based on the specific circumstances and complexities of any given case.

Despite the delays and errors, the Tribunal found that the bulk of Judgment No. 629/2020 had been fully implemented far earlier and without difficulty. Any harm to the Appellant from the difficulties in implementation of certain elements of the judgment was minimal when compared with the overall award. The WBAT held that the acknowledgment of the IFC's failures constituted a measure of satisfaction for the Appellant and dismissed the case.

Internal procedures

UNAT Judgment No. 1192/2022

Legal principle: All international organisations should have a neutral first instance process for administrative appeals and the power for the arbiters in that process to issue final and binding decisions.

Facts: The ISA separated the Appellant from service due to his continued absence from work after his sick leave had expired. The Appellant contested the separation but the JAB Panel found that the Appellant' failure to report for duty or take other necessary steps justified the separation decision on the ground of abandonment of post. The ISA Secretary-General agreed with the JAB's findings and made a decision to take no further action, which the Appellant then appealed to the UNAT. The UNAT remanded the case back to the JAB for reconsideration and decision by a neutral first instance process because the JAB report was not a decision, but an opinion or a recommendation that the Secretary-General could adopt or ignore. The new JAB dismissed the Appellant's case on its merits and affirmed the decision to separate him from service for abandonment of post.

UNAT held: In a previous judgment in this case, the Tribunal found that there was a structural issue with the JAB appeals process because it did not comply with the terms of the Special Agreement between the UN and the ISA and that there was no neutral first instance process at ISA. The Tribunal held that the JAB Board panel did not have the power to issue a binding decision and their report did not do so. The Tribunal remanded the case to the JAB to ensure compliance with the jurisdictional requirements of Article 2(10) of the UNAT Statute. To date, there have been no amendments to ISA's Staff Rules.

Misconduct, retaliation and sanctions

UNAT Judgment No. 1194/2022

Legal principle: First instance tribunals should hear the evidence of the complainant and the other material witnesses, assess the credibility and reliability of the testimony, determine the probable facts and then render a decision as to whether the onus to establish the misconduct by clear and convincing evidence has been discharged. UNAT should only intervene on these findings where a first instance tribunal has made fundamental errors of fact resulting in a manifestly unreasonable decision.

Facts: The Appellant was the former Principal at an UNRWA school. The complainant was a mother who alleged that she visited the Appellant's office to request a transfer of her younger son from a private school to the UNRWA school where her older son had already been enrolled for the last few years. In the presence of the other teachers, the Appellant refused the complainant's request. In her interview during the investigation, the complainant stated that the Appellant touched her inappropriately outside his office, as she was leaving the school building, and "addressed her with sexual connotations". The Appellant and other teachers who were present at the meeting said that the complainant had threatened "she would complain". The complainant's son was subsequently enrolled.

The investigators found the complainant's version of events to be credible. The Appellant was charged with serious misconduct in the form of sexual exploitation and abuse and sanctioned with separation from service without termination indemnity. Some time after this (date unknown), the complainant provided a written retraction stating that her complaint was false. The Appellant appealed his dismissal to the UNRWA Dispute Tribunal (**UNRWA DT**). The complainant did not testify at the hearing. The UNRWA DT held that the retraction was not credible, noting that women were in the category of people who have a most vulnerable status, and that there was potential for retaliation or pressure against the complainant. The UNRWA DT did not find the Appellant to be credible and dismissed the application.

UNAT held: The UNRWA DT erred in its assessment of credibility and its findings of fact – it found the complainant's version of events credible even though she did not attend and testify at the hearing, such that her evidence was hearsay, and despite having before it the complainant's written retraction wherein she unequivocally revoked her allegations against the Appellant and provided a motive for her making the complaint. The findings were not

based on the evidence but on speculation. As a result, the UNRWA DT erred on findings of fact that were central to its analysis of the complainant's credibility, which resulted in a manifestly unreasonable decision. UNAT allowed the appeal and remitted the matter back to the UNRWA DT for rehearing.

UNAT Judgment No. 1202/2022

Legal principle: The only measures available under the Staff Rules pending the outcome of an investigation into misconduct allegations are administrative leave or the continuation of service. A reallocation of duties pending the outcome of an investigation is permissible as an interim measure to obviate or mitigate the effects of administrative leave.

Facts: The Appellant, as the Head of UNODC in Albania, had allegedly led an active campaign lobbying senior Albanian government officials against the recruitment of an international expert at the P-4 level to expand the capacity of the UNODC program in Albania, which led the Albanian government authorities to question and object to the establishment of such a position. The Appellant argued that her temporary removal and reassignment of functions on the basis of these allegations constituted an unlawful exercise of administrative power under the Staff Rules and under UNODC's working arrangements with UNDP in Albania.

UNAT held: The use of the word "may" in Rule 10.4 of the Staff Rules is permissive and gave the Secretary-General the discretion to place a staff member on administrative leave as soon as an allegation of misconduct is received and for a period potentially as long as the duration of the disciplinary process. However, administrative leave is not a choice – the only measures available under the Staff Rules pending the outcome of the investigation are administrative leave or the continuation of service.

A reallocation of duties pending the outcome of an investigation is permissible as an interim measure in such circumstances, but not as the exercise of the general power of assignments available to the Secretary-General in Staff Regulation 1.2(c). This general power is broadly discretionary but not unlimited. A staff member's duties can be reallocated to obviate or mitigate the effects of administrative leave which would see staff members, whether on pay or unpaid, performing no duties for the duration of the period of a lengthy investigative process. In this particular case, UNDP was responsible for determining whether interim measures should be taken pending the outcome of the investigation and, if so, what measures should be engaged. UNDP declined to put the Appellant on administrative leave. Decisions on these issues made by the UNODC were therefore made without authority. The Tribunal allowed the Appellant's appeal on this basis and remanded the case to the UNDT.

WBAT Judgment No. 671/2022

Legal principle: The burden of proof to establish misconduct at the WBG is one of substantial evidence, which is higher than a mere balance of probabilities.

Facts: The Appellant was X Country Manager for a one year period. After she left the post, the entire X Country Office staff reported that the Appellant created a hostile work environment and that they were too afraid to report this while she was still in the post for fear of retaliation. The EBC investigated allegations that the Appellant had subjected staff to harassment, including verbal abuse, intimidation and abuse of authority, including repeated requests to perform personal errands. Following an investigation, the Human Resources Vice President (**HRDVP**) found that there was sufficient evidence to support a finding that the Appellant had engaged in misconduct and imposed the following sanctions upon her: (i) demotion from a managerial to a technical position at the same grade; (ii) reduction in future pay for the one year period that she was X Country Manager; and (iii) written censure to remain on her HR record for 3 years. The Appellant appealed against this determination.

WBAT held: In disciplinary decisions on misconduct, the standard of evidence must be higher than the mere balance of probabilities – there must be substantial evidence to support the finding of facts which amount to misconduct. The Tribunal was satisfied that the Bank had met this burden of proof and that there was substantial evidence to support a finding that the Appellant's conduct constituted harassment and contributed to a hostile work environment in violation of Staff Rule 3.00, Section 6.01(e).

The Tribunal did not accept the Appellant's contention that the HRDVP overstated the severity of the unauthorised use of Bank staff, given the record and costs to the staff who were exposed to the Appellant's behaviour during her three-year tenure. Having regard to the nature and persistence of the misconduct and the abuse of managerial authority which occurred, the Tribunal did not find the HRDVP's decision on sanctions to be unreasonable, nor did it find any other grounds on which the sanctions should be set aside. The HRDVP was justified in finding misconduct and imposing appropriate sanctions. The Application was dismissed.

WBAT Judgment No. 677/2022

Legal principle: To make out a case of retaliation, a staff member must show by clear and convincing evidence that the same employment action would have been taken absent the staff member's protected activity.

Facts: The Appellant was not promoted to a higher grade and requested administrative review of this decision. He also submitted a complaint to the EBC alleging victimisation, retaliation, systematic bias and discrimination. The EBC closed the matter at the preliminary inquiry phase, and despite the Appellant providing further information, the matter was again closed at intake. In the administrative review, the PRS Panel found that a fair and proper process was followed in making the non-progression decision.

WBAT held: Decisions relating to progression and promotion are discretionary decisions. The Tribunal will not overturn decisions of this kind unless it can be demonstrated that the exercise of discretion was arbitrary, improperly motivated, carried out in violation of a fair and reasonable procedure or lacked a reasonable and observable basis. The Appellant's performance reviews consistently documented areas for improvement both technically and behaviourally, so the Tribunal was satisfied that there was a reasonable and observable basis for the non-progression decision.

The Tribunal found that the Appellant failed to establish a *prima facie* case of retaliation in respect of his comments at the town hall and the decision not to nominate him for progression. The Tribunal made it clear that it is not enough for a staff member to speculate or infer retaliation from unproven incidents of disagreement or bad feelings with another person – retaliation must be proven on clear and convincing evidence. The Application was therefore dismissed.

UNRWA DT Judgment No. 17/2022

Legal principle: The Tribunal's power to review the decision to impose a disciplinary measure is limited to whether the sanction is absurd, arbitrary or tainted by extraneous reasons or bias.

Facts: Between 2012 and 2018, the Appellant was sanctioned several times for various misconduct and informed that future misconduct might lead to termination of contract. After receiving a complaint that the Appellant had engaged in misconduct and failed to comply with professional standards, the Director of the Jordan Field Office (**DUO/J**) authorised an investigation into the allegations and placed the Appellant on administrative leave. After the investigation and disciplinary process, the disciplinary measure of separation from service without termination indemnity was imposed on the Appellant.

UNRWA DT held: The Tribunal held that the Appellant's actions were in clear violation of professional standards, such as Area Staff Regulation 1.4 and Area Staff Rule 110.1(1), which required the Appellant to conduct himself in a manner befitting his status as an employee. The Tribunal cited multiple examples of the Appellant's behaviour where the Appellant had lost control over himself, hit a coffee table, crushed a plastic cup and threatened several staff members on different occasions. In addition to serious misconduct, this also amounted to improper and unwelcome conduct that might have caused offence and humiliation and qualified as harassment.

The Tribunal held that serious misconduct constituted grounds for the most severe disciplinary measures, up to and including summary dismissal. While the Tribunal's ability to review the proportionality of a disciplinary sanction is limited to whether the sanction is "absurd, arbitrary or tainted by extraneous reasons or bias", the Tribunal was satisfied that the disciplinary sanction imposed upon the Appellant reflected his extensive disciplinary and administrative record, and that disciplinary sanctions had been imposed against him progressively, having been explicitly and repeatedly warned that future misconduct might lead to termination. The Tribunal dismissed the application.

UNRWA DT Judgment No. 34/2022

Legal principle: The Tribunal will only intervene in sanctions where they are blatantly illegal, arbitrary, excessive, discriminatory or absurd in their severity, and therefore disproportionate. This is unlikely in the case of a written censure.

Facts: The Appellant received a written censure letter as a disciplinary measure for posting several comments on Facebook that there was corruption at UNRWA and corrupt people at Headquarters. The Appellant contended that his due process rights were violated during the disciplinary process because UNRWA did not take into account his and other witnesses' statements in the Investigation Report and the fact that the complaints made against him were malicious.

UNRWA DT held: The Tribunal considered UNRWA's regulatory framework to be clear that staff members must not engage in any behaviour that may adversely affect their status or their integrity, independence and impartiality. The Appellant's statements on Facebook were inappropriate as staff members should not air personal grievances or criticise their organisations in public. The Tribunal held that it was irrelevant that the Appellant subsequently deleted the posts.

Given that the decision to impose a disciplinary measure is within the discretion of the Commissioner-General, the Tribunal has limited power to interfere with or modify a sanction imposed by the Administration, unless the disciplinary measure is "blatantly illegal, arbitrary, adopted beyond the limits stated by the respective norms, excessive, abusive, discriminatory or absurd in its severity" so as to render it disproportionate. Given that the Appellant was interviewed as part of the investigation and had the opportunity to provide a written response, the Tribunal found that he was given a full and fair opportunity to respond to the allegations. The Appellant's contentions regarding malicious complaints and witnesses were irrelevant and without merit. The Tribunal dismissed the application.

Receivability

ILOAT Judgment No. 4463/2022

Legal principle: A complaint against the absence of a decision is receivable under Article VII(3) of the ILOAT Statute.

Facts: The Head Doctor of the WTO's Medical Service sent a memorandum relating to the health of the Appellant and possible changes to his working arrangements to the Director of the Human Resources Division and three members of that division without the Appellant's knowledge or permission. The Appellant contended that this was a breach of confidentiality and sought the removal of this memorandum and the deletion of all references to it from all administrative files.

ILOAT held: The Tribunal held that the "decision" being challenged was not the memorandum, but the absence of a decision following the lodging of a complaint by the Appellant. The Appellant was allowed to challenge the effects of the implied decision to reject his grievance and the proceedings retained a genuine purpose of ascertaining whether the Appellant was entitled to moral damages as a result of the breach of confidentiality. The Tribunal found that the breach of the Appellant's basic rights caused him moral injury and awarded 2,000 Swiss francs in damages and 750 francs in costs. The Tribunal refused to award interest and highlighted its inability to exempt the award from national taxation laws.

Recruitment

WBAT Judgment No. 668/2022

Legal principle: Discretionary managerial decisions in relation to recruitment will not be overturned unless the exercise of discretion is arbitrary, discriminatory or improperly motivated.

Facts: The Appellant sought review of the World Bank's decision not to select him for a Senior Operations Officer position for which he was shortlisted. PRS sent a Notice of Referral to the EBC to determine whether there was a violation of the Staff Rules in connection with the Bank's non-selection decision. EBC closed the case at the preliminary stage due to insufficient evidence and notified the Appellant. The outcome of the PRS process was that the Appellant was paid $42,982.50. The Appellant appealed this decision to the WBAT.

WBAT held: The Tribunal has consistently held that it will not overturn a discretionary managerial decision unless it demonstrated that the exercise of discretion was arbitrary, discriminatory or improperly motivated. The Tribunal concluded that the Non-Selection Decision lacked a reasonable and observable basis and that the Bank failed to follow a fair and proper process. For example, the Tribunal observed the difference in the reasons given for the non-selection of the Appellant by the Country Director (namely, his over-qualification) versus the reasons given in the Interview Report for why the Appellant was not recommended for an interview (that the references obtained were not favourable and that he had interviewed for the same role before and was not selected). The Tribunal declined to make a determination on the claim of bad faith but did consider that the Appellant had suffered harm from the convergence of individual actions taken and omissions made without good reason.

In sum, the Tribunal found that a selection process marred by so many defects would undermine the Bank's commitment to recruiting "staff of the highest calibre." The Tribunal considered that holders of high-level positions within the Bank must act and be seen to act at all times with the utmost probity and integrity. The Tribunal awarded the Appellant compensation in the amount of one and a half years' salary net of taxes (inclusive of the amount already paid by the Bank following the PRS process) and USD 20,000 in costs.

Service-incurred injuries and other medical issues

ILOAT Judgment No. 4468/2022

Legal principle: The Director-General must have recommendations of the Joint Advisory Board on Compensation Claims and a medical board report in order to make a decision on a service-incurred injury under Appendix D of the IAEA Staff Regulations and Staff Rules. Moral damages must be proven.

Facts: The Appellant suffered four service-incurred back injuries and was awarded a lump sum amount of compensation which was calculated using a 'whole person impairment' percentage (**WPI**, the percentage that estimates the impact of the impairment on the individual's overall ability to perform activities of daily living, excluding work). The Appellant submitted that based on a report from her treating physician, her WPI rating needed to be increased and that she should receive higher compensation. The Director-General rejected the Appellant's appeal on the basis of the Joint Advisory Board on Compensation Claims' recommendations without convening a medical board.

ILOAT held: The Tribunal held that the impugned decision was unlawful as it did not meet the requirements of Article 42 of the Staff Rules that the Director General ground his final decision on a report of a properly constituted medical board. The Tribunal set aside the impugned decision and referred the case back to the IAEA for a new decision to be made in compliance with Article 42. The Appellant was not awarded moral damages as she failed to specify the grounds and the amount that she was seeking, and was awarded €1,500 in costs.

ILOAT Judgment No. 4464/2022

Legal principle: The presence of a fourth doctor on a medical board which is supposed to be composed of three medical practitioners rendered the decisions of that board null and void. It is not the Tribunal's role to substitute its own assessment for that of the medical board.

Facts: The Appellant considered that he had been overloaded and the victim of mobbing at work and took sick leave. He returned to work part-time on medical grounds but was later placed on full-time sick leave by his doctor. He requested that his illness be recognised as service-incurred and to receive compensation, but this was rejected by the Director-General. In the internal appeal, a medical board was convened to provide an opinion to the Director-General, who again rejected that the Appellant was suffering from service-incurred injuries.

ILOAT held: Whereas Article 38, Annex 3 of the WTO Staff Rules requires a medical board to consist of three medical practitioners, the board that was convened to consider the Appellant's case included a fourth medical practitioner from the 'medical management board', Dr R, who attended a meeting to discuss the case. The Tribunal held that the presence of Dr R was in direct breach of the Staff Rules, that Dr R did not attend the meeting as an observer and that he was expressly involved in the discussions and formulation of findings. This

amounted to a substantial procedural flaw and was a sufficient basis to invalidate the medical board's conclusions and set aside the Director-General's final decision.

The Tribunal remitted the case to the WTO so that a properly constituted medical board of three medical practitioners could make a determination. As a result, it did not award material damages. The Tribunal awarded the Appellant 750 Swiss francs for costs and 3,000 Swiss francs in moral damages for the length of the procedure followed to determine whether his illness is "service-incurred", particularly as this procedure would be further prolonged by the remittal of the case to the WTO.

ILOAT Judgment No. 4508/2022

Legal principle: Staff members are entitled to copies of medical reports and any other documents relied upon by the ABCC in making its recommendations. Where there are lengthy proceedings, the Tribunal may step in to determine an appellant's entitlements and finally resolve the matter.

Facts: The Appellant had been trying to secure a work-related disability benefit as a result of his treatment by the OPCW during an arbitration process that had taken place during 2008 to 2009. Legal issues concerning the complainant's entitlement to a disability benefit have been addressed by the Tribunal in a multiplicity of judgments. In the present case, the ABCC had concluded that the complainant had not incurred a service-incurred disability. The Appellant also challenged the ABCC's failure to provide him with a copy of the medical report on which its recommendation was based.

ILOAT held: The Tribunal held that the illness the Appellant suffered (depression) had manifested before the arbitration period but became totally disabling during the arbitration period. The Appellant therefore became entitled to compensation because it was at this time that he became totally disabled by his illness.

It was inappropriate to remit the matter to the OPCW to enable a newly constituted ABCC to again consider the Appellant's request. The Tribunal recognised that the persistence of the litigation over the past decade without resolution reflected a clear need for the Tribunal to take an unusual course in the interests of justice of making an order determining the Appellant's entitlement. The Tribunal ordered the OPCW to take all necessary steps to secure compensation for the Appellant from the end of the arbitration period onwards, and noted that OPCW would be entitled to change this compensation if the Appellant's illness ceased to be totally disabling at some time in the future.

The Tribunal also found that the ABCC should have provided the Appellant with a copy of the medical report given its relevance to the Appellant's case and the reliance placed upon by the ABCC. This was a clear breach of the Appellant's rights and prevented him from being able to make submissions referable to the report, which may have resulted in a more favourable decision by the ABCC. The Tribunal awarded the Appellant €5,000 in moral damages and €8,000 in costs.

UNAT Judgment No. 1188/2022

Legal principle: An employee's sick leave entitlements will not continue to be calculated as one period of continuous service if there is a break in service between temporary and fixed-term appointments.

Facts: The Appellant filed an application with the UNDT challenging UNCTAD's calculation of her sick leave entitlements and the related decision to terminate her appointment for medical reasons. The UNDT found that it was lawful for the Administration to terminate the Appellant's appointment for health reasons, as she had been incapacitated for further service and was entitled to a disability benefit. The UNDT dismissed the application and also found that the Appellant's sick leave entitlements were properly calculated.

UNAT held: The duration and continuity of the Appellant's service was naturally a determining factor in calculating her sick leave entitlement. The crucial question was whether the Appellant's service on her temporary appointment could count towards the calculation of three or more years of continuous service, as required by Staff Rule 6.2(b)(iii). The Appellant's temporary appointment expired before she was granted a fixed-term appointment, which meant that the Appellant was in fact separated upon expiration of her temporary appointment. When she started a fixed-term appointment, she was re-employed.

The staff member only completed two of the three years of her fixed-term appointment and was separated from service for reasons of incapacitation. Once the staff member exhausted all her sick leave entitlements, it was lawful for UNCTAD to terminate her appointment for health reasons. The Appellant failed to establish that the UNDT made any error of law or fact. The Tribunal dismissed the appeal and affirmed the UNDT judgment.

Termination

UNAT Judgment No. 1217/2022

Legal principle: Organisations have a duty to justify a termination decision. The Tribunal's power of review is limited to assessing whether the termination decision is arbitrary, capricious or unlawful.

Facts: The Appellant's employment at IFAD was terminated for unsatisfactory performance during his probationary period. He sought review by the JAB, which found that there were no significant irregularities in the procedure and that it was within the wide discretionary powers of the President to not confirm a fixed term appointment during the 12-month probationary period. The Appellant appealed the JAB decision to the UNAT.

UNAT held: The Tribunal held that IFAD did not establish explicit measures to enable the Appellant to understand his shortcomings and satisfy IFAD's requirements, nor did it provide evidence that it gave him sufficient time, opportunity and support to meet the requirements

of the post. The Tribunal found the JAB's decision to be arbitrary and lacking compliance with the minimum requirements of a judicial decision because it failed to provide a reasoned analysis. The duty to justify a termination decision is essential for tribunals to exercise their judicial review of administrative decisions. The Tribunal granted the appeal and rescinded the decision to terminate the Appellant's appointment. As an alternative to rescission, the Tribunal gave IFAD the option to pay compensation in lieu to an amount equivalent to two years' net base salary, with interest.

EBRD AT Case No. 2022/AT/02

Legal principle: The power of international administrative tribunals to intervene in a decision not to confirm the appointment of staff members on probation is extremely limited.

Facts: The Appellant sought the annulment of a decision of the President to terminate her employment at the Bank during the probationary period. On 23 March 2021, the Appellant submitted a Request for Review regarding the decision to terminate her employment. The President referred the request to the Administrative Review Committee, which concluded that the Appellant was not afforded a fair evaluation and the decision to terminate her employment was disproportionate and unreasonable. However, the President found that the Bank had genuine and well-articulated concerns as to the Appellant's suitability for the role, and that the Appellant was provided with adequate opportunity to improve her performance and demonstrate suitability for continued employment. The President decided to confirm the termination decision. The Appellant lodged an appeal with the EBRD AT.

EBRD AT held: The decision to terminate an appointment is discretionary in nature and the Tribunal's scope to review such cases is limited, and even more so in cases of decisions not to confirm appointments of staff members on probation. In this case, the Tribunal was satisfied that the Bank had adequately identified the shortcomings in the Appellant's performance during her probationary period and subsequently brought them to her attention. The Appellant was given ample opportunity to improve her performance after her mid-probation review meeting, however, no substantial improvement was noted. The Appellant did not convincingly demonstrate that these shortcomings would not have occurred in different circumstances.

The Bank had sufficient elements on which to base its discretionary decision to determine the Appellant's suitability and to not confirm her appointment. The Bank had scrupulously followed its obligations to demonstrate a lack of suitability for continued employment and to provide a reasoned decision for termination of employment. The appeal was dismissed.

AFDB AT Judgment No. 153/2022

Legal principle: There is a difference in the procedural requirements at AFDB leading to termination for misconduct and termination for abandonment of post. If the conditions precedent for termination for abandonment of post are met, the only requirement is to give the staff member adequate notice.

Facts: After expressing serious reservations about AFDB's Leave Management Guidelines in response to the COVID-19 pandemic in an email of 7 July 2020, the Appellant left his duty station in Abidjan and travelled to Europe. The Appellant was subsequently diagnosed with post-traumatic stress syndrome and recommended two weeks' medical leave, which he forwarded to the Chief Medical Officer. On 28 July 2020, the Appellant was advised by the Head of the Bank that that his situation did not fall under any of the AFDB sick leave rules or regulations and that sick leave should have been authorised before he left Abidjan. On 31 August 2020, the Appellant was notified that he had been absent from duty without authorisation for more than ten consecutive working days and was considered to have abandoned his post. On 14 September 2020, the Appellant's employment was terminated. The Appellant appealed to the AFDB AT.

AFDB AT held: The Tribunal found that Staff Rules 33.03 and 33.04(b) on abandonment of post must be strictly complied with in accordance with three conditions precedent. The Tribunal held that absence from work or duty means absence from duty station. Whatever work the Appellant was performing could not be taken into account when determining whether he had abandoned his post because the Bank had not authorised the Appellant to work from any location outside of his appointed duty station. The Appellant was notified of his absence by a letter dated 31 August 2020 and, from this point onwards, the burden of proof shifted to him to show that his absence was authorised or justified pursuant to the relevant Staff Rules.

The Tribunal found that the Appellant's absence was not authorised because he had not applied for sick leave in accordance with the Bank's rules and processes, and rejected the Appellant's contention that his absence was justified because he was too ill to work and had been advised not to return to his duty station. The Tribunal rejected the application overall, finding that the Appellant to simply be a victim of his own disregard of the Staff Rules and Regulations which governed his employment with the Bank.

Whistleblower status

ILOAT Judgment No. 4476/2022

Legal principle: A request to be granted whistleblower status is inherently urgent and must be examined promptly, regardless of its merits. This is so that the reporting staff member can either receive protection as quickly as possible or be informed of the decision made on their request.

Facts: The Appellant reported what he considered to be unlawful behaviour by the ICC Registrar and Head of the Independent Oversight Mechanism (**IOM**), claimed whistleblower status and requested the associated protection.

The ICC accepted responsibility for two "procedural errors" relating to: the delay in providing an explicit response to the complainant's request to be granted whistleblower status; and a factual error in the reply to the Appellant. However, the ICC considered that the conduct

referred to by the Appellant was not actually wrongful and therefore did not grant his requests. The Appellant also sought compensation for the ongoing moral injury which he alleged resulted from the "uncertainty" and "feeling of abandonment" caused by the rejection of his request.

ILOAT held: The central issue was whether the Appellant fulfilled the conditions required to be recognised as a whistleblower. The Operational Mandate of the IOM provided that entitlement to whistleblower status is subject to the condition that the acts reported potentially constitute misconduct. The Tribunal found that none of the three acts referred to in the Appellant's letter could be regarded as misconduct, and therefore the Appellant had no grounds to argue that the implied decision rejecting his request was based on an error of law.

The Tribunal also found that the ICC was negligent in taking three months to provide an explicit response to the Appellant's request for whistleblower status. Even though the Appellant was not actually entitled to whistleblower status, the ICC's failure to make a decision on his request within a reasonable time warranted relief. The Tribunal awarded €2,000 in moral damages and €400 in costs, and dismissed all other claims.

CASE LAW DIGEST 2022

Modulaw

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