CASE LAW DIGEST

International Administrative Tribunals

2021

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Introduction

Welcome to Modulaw's inaugural case law digest! We were inspired by the UNAT's 2009-2019 digest and wanted to extend the concept to other tribunals to provide a variety of jurisprudence.

In our experience, the second year of the COVID-19 pandemic has seen organisations undergoing many restructuring cycles, staff adjusting to working from home or returning to work arrangements, and an expansion of patterns of behaviour that could be considered harassment.

The purpose of this digest is to provide you with a brief overview of the cases that we found to be the most important and interesting based on the types and volume of work we undertook in 2021. We have included what we consider to be relevant judgments from each of the Administrative Tribunal of the International Labour Organisation, the United Nations Appeal Tribunal and the World Bank Administrative Tribunal.

We hope this is a useful resource for all readers.

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Abbreviations

DG	Director-General
EBC	Ethics and Business Conduct Department (World Bank Group)
EPO	European Patent Office
GBA	Global Board of Appeal (World Health Organisation)
HRDVP	Human Resources Department Vice President (World Bank Group)
IBRD	International Bank for Reconstruction and Development
ICC	International Criminal Court
ILOAT	International Labour Organisation Administrative Tribunal
IOS	Internal Oversight Services (World Health Organisation)
ITLOS	International Tribunal for the Law of the Sea
ITU	International Telecommunication Union
MINUSMA	United Nations Multidimensional Integrated Stabilization Mission in Mali
MONUSCO	United Nations Organisation Stabilization Mission in the DR of Congo
OIOS	United Nations Office of Internal Oversight Services
PRS	Peer Review Services (World Bank Group)
RBA	Regional Board of Appeal (World Health Organisation)
RFR	Request for review
SG	Secretary-General
UNAT	United Nations Appeals Tribunal
UNDT	United Nations Dispute Tribunal
WBAT	World Bank Administrative Tribunal
WBG	World Bank Group
WHO	World Health Organisation

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Abolition of post

Note: the following judgments stem from a reorganisation exercise at the ICC's Registry known as the "ReVision Project". In **Judgment No. 3907/2018**, the ILOAT found that the principles and procedures applicable to decisions arising from the ReVision Project were unlawful because they were promulgated by an information circular instead of an Administrative Instruction or a Presidential Directive. This meant that all decisions taken pursuant to those principles and procedures were without legal foundation.

In both of the following cases, the complainants were given notice of the abolition of their posts, the termination of their appointments, and the option to take a separation package or apply as internal candidates for newly created positions, in which case their application would receive priority consideration.

ILOAT Judgment No. 4405/2021

Legal principle: Decisions concerning restructuring within an international organisation, including the abolition of posts, may be taken at the discretion of the executive head of the organisation and are subject to limited review only. The Tribunal will ascertain whether such decisions are taken in accordance with the relevant rules on competence, form or procedure, whether they rest upon a mistake of fact or law, or whether they constitute abuse of authority. The Tribunal will not rule on the appropriateness of a restructuring or related decisions and it will not substitute the organisation's view with its own.

Internal appeal held: The complainant was a G6 administrative assistant in the Trust Fund for Victims on a fixed term contract until 31 January 2020. In 2017, she was notified that her position was being abolished. The complainant applied as an internal candidate with priority consideration for a P2 position but was notified that she had not been selected and that her appointment had been terminated due to rejection of her application. The complainant received a termination indemnity.

The complainant requested a review of the decision to terminate her appointment, seeking the reversal of that decision and the cancellation of the outcome of the selection process for the P2 post. She also reserved her right to seek damages. It should be noted that the complainant had serious health issues and therefore did not comply with the deadlines for the RFR. The Registry rejected the RFR as being time-barred and therefore irreceivable.

The complainant filed an appeal with the Appeal Board. She also sought damages for the loss of opportunity for the failure to appoint her to the P2 position. The Appeal Board identified there were two decisions under review: the decision abolishing the complainant's post and terminating her appointment; and the decision not to select her for the P2 post. The Appeal Board said the appeal was receivable because the circumstances that delayed the complainant were out of her control. They also found that as no material error had been committed, the appeal had to be dismissed. However, they awarded €10,000 which corresponded to 50.5 days of sick leave with full pay. The Registrar accepted this recommendation.

On appeal to the ILOAT, the complainant requested that her termination be set aside and replaced with a promotion to the P2 post that she had applied for. She did not seek reinstatement. In the alternative, she sought compensation for a) loss of opportunity in the amount of 4 years' salary at P2 level; b) loss of earning from the date of her contract termination to the date it would have ended in 2020; and c) moral injuries of €150,000. The complainant died during the course of the ILOAT proceedings, which were pursued by her successor.

ILOAT held: The abolition of post was unlawful because it was based on the ReVision principles. The termination of appointment, which was based on the abolition of position, was therefore also unlawful. The Tribunal set this decision aside.

The complainant was entitled to compensation for a) a lump sum of €160,000 for the material injury caused by the decisions that were set aside (calculated on the basis of her gross salary and the allowances which she would have received until her death and the contributions which would have been paid into her pension); b) €40,000 in moral damages to account for the complainant's distressing situation after separation, which the ICC knew about (not disclosed in judgment), and for ICC's admission that it had failed in its duty of care to make every effort to explore other employment options with the complainant before her separation; and c) €5,000 in legal costs.

ILOAT Judgment No. 4374/2021

Legal principle: Time limits are fundamental to the stability of legal relations between parties and the entire legal system.

Internal appeal held: Following the "ReVision Project", the complainants were notified of the decisions to abolish their posts and terminate their appointments. They were given two options: to accept an enhanced separation package or apply as internal candidates for newly created positions with priority consideration. The complainants chose either the first or second option, but they all eventually separated from the ICC.

When the ILOAT declared the ReVision principles and procedures to be unlawful, the complainants considered that the judgment revealed new facts of decisive importance which were unknown to them when they were notified of the abolition of their posts and which they would have contested at the time. They lodged appeals with the Appeal Board and sought compensation for the moral and material harm supposedly incurred, which included allegations of conflicts of interest with the Chief of the Legal Office and the then Registrar.

All of their RFRs were rejected as being time-barred, and this was upheld by the Appeal Board on the basis that there was no exceptional reason on which the time limit could have been waived. The Registrar accepted the Board's decisions.

The complainants appealed these decisions before the ILOAT, seeking compensation for the moral and material injury they claimed to have incurred, as well as punitive damages for the delay in dealing internally with their case.

ILOAT held: The Tribunal found that there were no exceptional circumstances and that the complainants had not established "new and unforeseeable facts of decisive importance" which would permit the re-opening of the time limit to submit a RFR. Complaints dismissed.

Harassment

WBAT Judgment No. 649/2021

Legal principle: The burden of proof in misconduct cases lies with the respondent organisation and it is important to label misconduct as sexual harassment when the defined elements are present. The Tribunal will not overturn a discretionary decision unless the exercise of discretion lacked a reasonable observable basis, which would constitute an abuse of discretion and a violation of staff rights.

Internal review held: The complainants were two women in their early twenties in the role of junior professional associates at the IBRD. They lodged separate reports of repeated, unwanted, inappropriate behaviour of a sexual nature over many years by their direct manager, Mr C.

The behaviour included such things as making offensive and sexually allusive comments to the complainants, frequently offering them rides home, frequently asking them out for drinks and dinner even though they rejected the overtures, intentionally dropping items on the floor and telling them to bend over and pick them up and attempting to kiss them against their will on multiple occasions. Other women subsequently came forward saying they, too, had been harassed by Mr C.

The EBC conducted an investigation (that included interviewing over 30 witnesses) and concluded that there was "a pattern of inappropriate and unwelcome behaviour of a sexual nature directed towards young female lower-level staff with limited tenure and/or experience in the WBG" and that "Mr C's behaviour was uncomfortable to such a degree that it may have created a hostile work environment".

EBC sent its findings to the HRDVP for decision. The HRDVP determined that Mr C had engaged in misconduct by failing to observe the norms of prudent professional conduct, and that his behaviour violated the general principles of employment at IBRD. The sanction imposed on Mr C was demotion to a non-managerial position, ineligibility for promotion for three years and a written censure to remain on his personnel record. He resigned in the same month as receiving the misconduct decision and accepted an appointment as Finance Minister to a member country.

The complainants filed an application to the WBAT contesting HRDVP's decision to classify the abusive behaviour as misconduct rather than sexual harassment and argued that the disciplinary measures imposed by the Bank did not adequately protect them. They requested Mr C to be sanctioned with a) loss of future employment and contractual opportunities within the Bank; b) restrictions on access to Bank premises; c) controls on Mr C's interaction with Bank employees; and d) legal fees and costs in the amount of $64,838.00.

WBAT held: In light of the language of sexual harassment used in the Notice of Alleged Misconduct and the EBC Final Report, it was unacceptable that the HRDVP failed to make any express finding as to whether Mr C's behaviour amounted to sexual harassment or harassment. Further, HRDVP's letter gave inappropriate consideration to "mitigating factors" such as Mr C apologising and his prior employment record, such that the Tribunal considered the decision lacked a reasonable basis for the sanctions.

In relation to the security measures imposed on Mr C, the Tribunal found that the Bank had taken adequate measures by restricting his access to WBG premises and a temporary hiring ban. At the same time, the Tribunal considered that the complainants should be given notice and an opportunity to respond before a discretionary decision was made on any other security restrictions imposed on Mr C.

The Tribunal reiterated its jurisprudence that it would not micromanage the activities of EBC so long as EBC operates in good faith without infringing individual rights. Overall, the Tribunal was satisfied that

the Final Report demonstrates that EBC operated in good faith and conducted a fair investigation into the allegations.

As the applicants were successful in their claims, they were granted all of their legal costs. The Tribunal also acknowledged that the complainants showed immense courage by coming forward to report the conduct of a staff member who was situated in a position of power over their careers, and that the case brought visibility to shortcomings in the Bank's approach to accountability for sexual harassment and protection for staff.

UNAT Judgment No. 1121/2021

Legal principle: An over-zealous investigation may be detrimental to the staff member's dignity and irreparably harm their employment, reputation, and career prospects. Termination as a result of such an investigation may justify the payment of the maximum compensation available (2 years' salary). In cases where the UNDT prefers not to award reinstatement or re-employment for whatever reason, it may award compensation for harm under Article 10(5)(b) of the UNDT Statute.

UNDT held: Mr L was a security officer at MINUSMA. The complainant was a cleaner who worked for MINUSMA as an independent contractor and was about to go on a three-month break on the expiry of her contract. She met Mr L at the office and he told her that he would let her know if he heard of any job opportunities, they exchanged phone numbers and agreed to stay in touch.

The complainant sent Mr L a new year text message and a few days later, he called her and asked to see her. She agreed, and he immediately drove to her and asked her to come to his apartment. The complainant said that she agreed to go on the basis that she would know where it was if he had a work opportunity for her. The complainant alleged that at Mr L's apartment, they had sexual intercourse without her consent and Mr L verbally insulted her during intercourse. When Mr L left the bedroom, the complainant left the apartment and informed a security guard at the complex that she had been raped. She left the premises and later filed a police report accusing Mr L of rape.

The police in Mali did not pursue the charge, but OIOS conducted an investigation and found that Mr L had failed to observe the standards of conduct expected of an international civil servant and had committed sexual exploitation and abuse. The outcome of the disciplinary process was that Mr L was separated from service.

On appeal to the UNDT, the Tribunal held that sexual exploitation had not been proven – there was no clear and convincing evidence of any actual or attempted abuse of a position of vulnerability, differential power or trust for sexual purposes, or an inappropriate promise or exchange of money, employment, goods or services for sex. The sanction of separation was therefore unjustified and given that reinstatement of Mr L was not a practical option, the Tribunal ordered rescission of the contested decision, compensation equivalent to remuneration payable for the time remaining on Mr L's appointment (10 months) and moral damages for loss of salary and for proven medical difficulties that Mr. L faced during that time period (in the amount of an additional 10 months' net base salary).

The SG appealed this decision to the UNAT, arguing that the UNDT had incorrectly limited the scope of "sexual exploitation" to cases of explicit sexual exchanges and cases between a UN staff member and members of disadvantaged communities. There was no legal requirement that a person committing sexual exploitation must be in a position of formal authority over a victim.

UNAT held: the UNDT had not narrowed the scope of "sexual exploitation" or created a legal requirement that a person committing sexual exploitation had to be in a position of formal authority over a victim. Mr L was a security officer and had no workplace authority over the complainant, and despite their national and cultural differences, Mr L and the complainant were on a relatively equal footing as individuals. The UNAT found that there was no clear and convincing evidence that Mr L abused any differential power or trust for sexual purposes. There was no relationship of trust between Mr L and the Complainant that could have been abused. Mr L had neither a professional nor a supervisory relationship with the Complainant. The SG's appeal was dismissed.

The UNAT noted that Mr L had been the victim of a substantial injustice arising from an over-zealous investigation by OIOS. As a result, he lost his employment and both his reputation and future employment prospects were unjustifiably harmed. These circumstances justified payment of the maximum compensation, i.e. the equivalent of two years' net base salary.

Misconduct

ILOAT Judgment No. 4415/2021

Legal principle: The health of a staff member who is the subject of disciplinary proceedings can be a mitigating factor when determining the appropriate sanction for misconduct, even if there is no apparent or obvious connection between their health and the alleged misconduct.

Internal appeal held: The complainant was employed at the EPO and was diagnosed with a chronic illness for which his doctors prescribed him a combination of painkillers, including medicinal cannabis. Over time, the complainant's health deteriorated and he was placed on sick leave. The decision to consider his revised working arrangements was suspended but the complainant did not receive this decision and reported back to work early.

After his return to work, the complainant was notified of an investigation against him for the use of cannabis at work without medical justification, and that he had appeared at a work meeting under the heavy influence of drugs, rendering him unable to participate in meetings. Following the investigation, additional charges of unauthorised absence and concealing his failure to complete work were added.

The complainant was assessed to be incapable of returning to work, was suspended from service and banned from EPO premises. At the same time, EPO commenced disciplinary proceedings against him and recommended his dismissal. The EPO President accepted this recommendation and dismissed the complainant. The complainant appealed to the ILOAT on the basis that the President had failed to take his health into account in determining an appropriate sanction. The complainant further asked the ILOAT to reinstate him to his prior position and to remove any evidence or reference to the disciplinary proceedings from his personnel file. He also claimed reparation for the loss of career progression since his suspension, moral damages and reimbursement of legal costs.

ILOAT held: The health of a staff member who is the subject of disciplinary proceedings can be a mitigating factor, and the President should have considered this in making his decision. The complainant's recourse to medicinal cannabis was relevant to the question of the degree or extent of his culpability for attending the EPO premises under the influence of that drug. The Tribunal set aside the decision to dismiss the complainant for misconduct, ordered EPO to remove the disciplinary proceedings from the complainant's personnel file and awarded the complainant €80,000 for the loss of opportunity to continue working and €40,000 in moral damages.

Nemo iudex in causa sua

UNAT Judgment No. 1123/2021

Legal principle: Internal appeal bodies are required to issue actual decisions and not just non-binding recommendations. This is because Article 2(10) of the UNAT Statute provides that the UNAT is only competent to hear and pass judgment where the UN agency that is party to the dispute "*utilizes a neutral first instance process that includes a written record and a written decision providing reasons, fact and law*".

Internal appeal held: The complainant was a P4 Legal Officer at ITLOS and applied for a P5 post. He was included in a shortlist and invited to sit a written test and take part in an interview. This was rescheduled due to the inability of the complainant to participate.

The complainant demanded the re-establishment of the shortlist in order of priority rather than alphabetical order, and the suspension of the recruitment process. ITLOS refused and the complainant filed a RFR of this decision. The request was rejected by the Registrar on the basis that the recruitment process followed the applicable rules.

After the test was held, the Registrar informed the complainant that none of the candidates had been selected and that the P5 post would be readvertised in due course. The complainant requested a review of the Registrar's decision to cancel the recruitment procedure and to re-advertise the P5 post. His request was rejected on the ground that it was time-barred.

The complainant lodged a complaint with ITLOS' Conciliation Committee against the Registrar's decision to terminate the recruitment procedure and readvertise the P5 position. When the conciliation failed, the complainant filed an application with the Joint Appeal Board (**JAB**). The JAB concluded that there was no violation of due process and recommended the Registrar uphold his decision. The Registrar accepted the JAB's recommendation.

The complainant appealed to UNAT questioning the "suitability and competence" of the JAB to issue recommendations rather than first instance decisions. The complainant claimed that the JAB and the Registrar erred in a) considering the applicable selection criteria had been met during the recruitment process; b) failing to consider his experience and qualifications; and c) failing to find that the decision to terminate the recruitment process was not based on any legal grounds. He sought equitable compensation, moral damages and legal costs as remedies.

UNAT held: The JAB was merely advisory and could only issue recommendations to the Registrar, resulting in the ultimate decision-maker being the same person who issued the contested administrative decision. On this basis, UNAT ruled that the internal justice system at ITLOS did not comply with Article 2(10) of the UNAT Statute and the requirement for a neutral first instance process in Article 2(5) of the UN ITLOS Agreement. The Tribunal remanded the case to the ITLOS JAB, ordering it to reconsider the case using a neutral first instance process.

Parental Leave

WBAT Judgment No. 644/2021

Legal principle: It is not discriminatory for an organisation to extend the probationary period of a staff member while she is on maternity leave. An organisation has a broad discretion in relation to the decision to extend or not extend an appointment, however, such a decision must be made in accordance with due process, transparency and by providing the staff member with specific reasons for the decision.

Internal appeal held: The complainant was employed at IBRD in Delhi, India and her appointment was subject to a one year probation which could be extended for up to one additional year. Around the time her appointment began, the complainant became pregnant. With the agreement of her line manager, she began telecommuting from Geneva to avoid the environmental risks in India. When the complainant gave birth and began maternity leave, she had completed nine months of her one year probation.

The Bank decided to extend the complainant's probation period by three months in order to allow one full year of experience before concluding the probation. The complainant did not agree with the decision but did not formally contest it. She was permitted to keep telecommuting from Geneva and was afforded flexibility in her working arrangements to accommodate her family situation.

However, due to a combination of difficulties with the complainant's telecommuting, performance issues and a change in the business needs of the complainant's unit, the Bank decided not to extend the complainant's appointment. The complainant was belatedly informed that her appointment would instead be extended by the number of days necessary to provide for six months' notice.

The complainant filed a RFR of the non-extension decision with PRS, claiming that the decision was tainted by gender discrimination. She also submitted a complaint to the EBC alleging gender discrimination, bullying, harassment, abuse of power and reprisal. EBC closed the case on the basis that the claims would be more appropriately addressed through the PRS process.

The PRS Panel found that the non-extension decision was not supported by sufficient evidence and that management did not follow a fair and proper process, but there was no evidence of discrimination. The PRS Panel recommended that the complainant be awarded compensation in the amount of six months' net salary to correspond to the time she would have had to improve her skills had she been provided with sufficient notice and offered the opportunity to improve. The Bank accepted the PRS Panel's recommendation.

The complainant appealed the Bank's decision to the WBAT seeking a) a new employment contract of at least three years' duration; b) a lump sum payment in the amount of her salary and benefits; and c) additional compensation for the violations of due process, distress caused by the discrimination, impact on her personal life and financial commitments, and the long-term harm to her career trajectory and earnings.

WBAT held: The Tribunal found that it was the Bank's prerogative to identify the skill set required for a position and whether a staff member is suitable for it, and the evidence available did not call into question the Bank's decision to not extend the complainant's appointment.

The burden for establishing a *prima facie* case of discrimination will vary from case to case but the claimant must provide detailed allegations and factual support so that the Tribunal can reasonably infer discrimination from the evidence available. The Tribunal considered that the complainant's contention

that the non-extension decision was discriminatory based on her pregnancy and childcare needs was not established. It was reasonable for the Bank to extend the complainant's probation while she was on maternity leave and had been working for less than a full year, and for the Bank to require the complainant to provide more details in her home-based work requests. The Bank had otherwise approved all of the complainant's previous requests.

However, the Tribunal found that the Bank failed to provide the complainant with the specific reasons for the non-extension decision and that this constituted a breach of due process. The complainant was only given notice of the decision six months after it had been made, she was given no warning of the decision, and there were no contemporaneous documents of the Bank's decision-making process. All of this demonstrated a lack of fairness to the complainant when the Bank has an obligation to unambiguously inform its staff members of any concerns with their continued employment.

The Tribunal ordered the Bank to contribute to the complainant's legal fees and costs in the amount of $9,500.00 and dismissed all other claims.

WBAT Judgment No. 650/2021

Legal principle: An organisation may choose not to renew the appointment of a person who is pregnant or on parental leave. However, such a decision must be made fairly, in good faith and on the basis of factors which are not impacted by the staff member being pregnant or taking parental leave.

Internal appeal held: the complainant became pregnant and had a number of discussions with her manager regarding her work arrangements during her pregnancy and after her maternity leave. The complainant also had to be placed on short-term disability leave after the birth of her child.

During her pregnancy and maternity leave, the Bank conducted a budgeting and workforce planning exercise and concluded that there was a steady decline in the complainant's work program, and that there was no viable ongoing source of funding for her position. The complainant received notice of the decision to not extend her appointment at the end of its term while she was still on maternity leave. She was not provided any reasons for the decision. She filed a RFR, claiming that she was not provided with sufficient notice and that the decision was discriminatory based on her pregnancy, childbirth and associated leave.

The PRS Panel issued its report and concluded that a) the decision was based on a reasonable and observable basis as it was made in response to budget constraints and in the interest of efficient administration; b) the Bank followed the applicable procedures and a proper process in making the decision; and c) there was no evidence that the decision was discriminatory or based on any improper motive or bad faith.

However, the PRS Panel also reported that the Bank did not abide by best practices of openness and transparency by waiting for the complainant to file her RFR before sharing the reasons for the non-extension decision with her. It recommended that the Bank provide either an apology or monetary compensation, or both. The Bank accepted the PRS Panel's recommendation and sent an apology letter.

The complainant filed an application with the WBAT, challenging the decision not to extend her contract and the Bank's failure to provide sufficient notice of her termination. The Staff Association also filed an *amicus curiae* brief in support of the complainant's application.

WBAT held: The Tribunal found that there were significant budget difficulties and reduced demand that justified the Bank's decision, but that this finding had to be assessed in light of the complainant's pregnancy and maternity leave. The Bank had not taken account of the complainant's inability to travel, that the complainant had been on leave for the majority of the year in which activities had decreased, and that complainant's reduced work was due to her leave and not because of a lack of work program. The Applicant actually demonstrated a continued demand for her services through requests from clients while she was on maternity leave and by her subsequent rehiring by another unit. The Tribunal therefore found that the Bank's justifications for the non-extension decision depended on facts inextricably tied to the Applicant's pregnancy and maternity leave.

The Tribunal held that, when faced with staff reductions, the Bank may choose not to renew the appointment of a person who is pregnant or on parental leave but must make this decision fairly and in good faith on the basis of factors other than those which are linked to pregnancy or parental leave. The Bank's approach in this case indirectly and unfairly penalised pregnancy and parental leave and was thus impermissible.

Further, the Bank's failure to provide reasons for the non-extension decision constituted a due process violation. While the Bank may choose not to renew or extend the appointment of a person who is pregnant or on parental leave, the interests of fairness require that every effort be made to respect the entitlement of parental leave.

Accordingly, the Tribunal rescinded the decision not to extend the complainant's appointment and ordered the Bank to a) convert the complainant's contract to a one year appointment in the same or similar position; b) pay the complainant two years' net salary; c) pay the complainant six months' net salary for lost benefits and medical expenses; d) pay the complainant six months' net salary for the violations of due process in making the non-extension decision; and e) pay the complainant's legal fees and costs in the amount of $30,418.75.

Right to strike

ILOAT Judgment No. 4433/2021

Legal principle: All employees have the right to strike and the lawful participation of an employee in a strike does not provide a basis for disciplinary action.

Internal appeal held: The Administrative Council of EPO adopted a decision which came into force on 1 July 2013 and set out basic rules on strikes. EPO informed staff of the new legal framework and said that any industrial action which did not comply with the new rules would not be considered a strike, with the result that participation in such action was liable to be considered as an unauthorised absence. The complainant participated in a picket strike on 2 July 2013. One week later, he received a letter stating that as the industrial action did not comply with the new rules, his absence on that day would be treated as being unauthorised and a deduction would be taken from his pay. However, no disciplinary action would be taken given that the new rules had entered into force one day before the strike.

The complainant lodged a RFR on the basis that the strike had been properly called, that it had been organized before the new circular came into force and that EPO had no authority to dock his pay. The President of EPO rejected the complainant's RFR. Multiple employees had received similar letters, lodged the same appeal, received the same rejection from the President, and appealed the President's decision. The Appeal Committee consolidated all of the appeals and issued a single opinion that they

all be rejected but that each appellant be awarded €450 in moral damages for the excessive duration of the proceedings.

The complainant appealed this decision to the ILOAT and sought a declaration that the circulars on strike protocol be set aside, that there was no valid basis to deduct his pay and moral damages for the delay in the internal proceedings and deprivation of his right to strike.

ILOAT held: The Tribunal had already declared the circular invalid in other proceedings so it did not need to set it aside here. The Tribunal found that EPO was not entitled to deduct pay for two reasons. First, the complainant engaged in a lawful activity that should not have been stigmatised as an unauthorised absence from work, so the decision to make the deduction on the basis given was unlawful. Second, employees have a fundamental right to strike, so EPO could not argue that the strike itself was unlawful.

The Tribunal held that €450 in compensation for the delay in the proceedings was adequate, and that the complainant had not been deprived of his right to strike. However, the letter he received included a threat of disciplinary action, and that amounted to an attempt to stifle the exercise of his right to strike. This entitled the complainant to €4,000 in moral damages. The Tribunal further ordered the removal of the letter from the complainant's personnel file, the repayment of the salary deduction and €800 in costs.

Sick leave

UNAT Judgment 1081/2021

Legal principle: Staff members must ensure that they are aware of the provisions of their organisation's rules and regulations and ignorance of the law is no excuse. Staff members are under the obligation to provide appropriate justification for their absence from work and to support their request for sick leave with the appropriate medical documentation.

The "clear and convincing" standard of proof, which usually applies for termination of appointment due to misconduct, does not apply in cases concerning separation from service due to abandonment of post.

UNDT held: The complainant worked as an Administrative Assistant in MONUSCO. She initially went on certified sick leave which was approved by the organisation for a period of three months. She sought to extend her sick leave by submitting the same medical report with date changes only, and this was denied on the basis that the request did not explain the complainant's symptoms, why she was prevented from working and any progress updates on her treatment. The complainant did not return to work at the end of the certified sick leave.

Some six months later, the complainant notified the organisation that she had been diagnosed with sleep apnea, she required access to uninterrupted electricity supply to use the machine that assisted with sleep apnea, and that her health condition was incompatible with living conditions in Goma. She did not provide any medical reports in support. She was notified that her absence from duty was unauthorised and if she did not report within 10 days or provide supplementary sick leave certification, she would be treated as having abandoned her post.

The complainant requested transfer to another country but still did not provide any medical certificate or any other justification for her unauthorised absence. MONUSCO terminated the complainant's

appointment and she sought review through a management evaluation. The termination decision was upheld on the basis that the complainant was absent from duty, failed to perform the functions assigned to her, and that MONUSCO was obliged to separate her under its rules and procedures. On appeal to the UNDT, the Tribunal dismissed the application as the complainant had failed to furnish medical reports that met the criteria set in the administrative instruction on sick leave.

The complainant further appealed to the UNAT arguing that a) the UNDT committed an error of law by placing the onus on her to challenge the decision for denying her leave request, since, in her view, there was no requirement to dispute the decision by seeking referral to an independent practitioner or to a medical board; b) MONUSCO should have informed her of such a requirement; c) since termination was the result of an administrative action, the proper standard of proof should be "clear and convincing" and, had the UNDT applied this standard, it would have found that she had provided sufficient proof to substantiate the veracity of her claims.

UNAT held: The Tribunal noted that while the complainant provided a valid sick leave certificate for the first three months of her absence, she did not provide any medical certificate or other justification for her failure to report to work for the following 1.5 years. The Tribunal found that MONUSCO repeatedly advised the complainant of the consequences of her actions. Accordingly, the UNDT did not err in law by placing the burden of proof on the complainant to pursue dispute resolution mechanisms that were always available to the complainant. Ignorance of these mechanisms was not an excuse.

Further, the "clear and convincing" standard applies to termination for misconduct, not separation from service due to abandonment of post. In any case, the facts of the case on abandonment satisfied the preponderance of evidence standard. The Tribunal dismissed the appeal and reaffirmed the UNDT judgment.

Selection process

ILOAT Judgment No. 4408/2021

Legal principle: An organisation retains a broad discretion in assessing the performance of the candidates who take part in a selection process, even in the event of clear procedural errors.

Internal appeal held: ITU issued a vacancy notice for a Head of Accounts position. The vacancy required an advanced university degree in accountancy, finance, business administration or a related field. For internal candidates, it specified that a first degree in one of the above fields, combined with 15 years of qualifying professional experience, could be accepted in lieu of an advanced university degree.

The complainant applied for the position and was invited for a written test but was not shortlisted for interview. She wrote to the acting Chief of the HR to complain about the outcome of her application, obtain the results of her written test, and request information about the qualifications of the selected candidate. She was told that the appointment procedure was still ongoing so it was not possible to grant her requests. At the end of the recruitment, the complainant received notification that her application had been rejected.

The complainant submitted a request for reconsideration of the decision to reject her application to the SG. One month later, the Chief of HR advised the complainant that her paper had been re-evaluated by an independent external expert, who awarded her a significantly different mark. The SG had therefore

requested a third independent external evaluation. The complainant's request was ultimately rejected and she appealed to the ITU's Appeal Board.

The Appeal Board found that the procedure followed for the written test lacked rigour and that the results obtained were unreliable. They recommended that an anonymous version of the test be evaluated by a panel of three independent experts; that the Appointment and Promotion Board be reconvened if the pass mark was achieved; that the complainant be informed of the results of the new evaluation; and should a revised shortlist be established, that the SG reconsider the outcome of the procedure. The SG accepted the Appeal Board's recommendation. Upon conclusion of this new process, the SG informed the complainant that she had not achieved the pass mark required to be shortlisted and that he had decided to confirm the contested appointment.

On appeal to the ILOAT, the complainant argued that a) the successful candidate did not have the necessary qualifications; b) ITU did not comply with the requirement that the internal appeal procedure be conducted expeditiously; c) the preselection panel exceeded its power in organising a written test; and d) ITU breached the principle of equal treatment because the successful candidate had an excellent relationship with the relevant chief of the department.

ILOAT held: The ILOAT found that the complainant's claims were unfounded and dismissed the complaint. The delay in carrying out the internal appeal procedure was reasonable given that the written test for all candidates had to be re-marked by a panel of three independent experts. There was no prohibition to prevent the pre-selection panel from organising a written test. The complainant's allegations about the ITU's alleged breach of the equal treatment principle were unsubstantiated.

Standard of conduct

ILOAT Judgment No. 4406/2021

Note: This is one of three complaints lodged by the complainant as a result of an investigation in 2015 into allegations of misconduct. The complainant requested that all 3 cases be dealt with together, but the Tribunal considered they raised separate specific issues.

Legal principle: An investigation that stems from a particular incident can lead to the suspect being investigated for other totally unrelated matters because the investigating bodies have extremely broad discretion as to the scope of the investigation.

Although the national authorities of a country may decide not to proceed with criminal charges against an international civil servant, this does not absolve the staff member from their duty to comply with standards of conduct and not bring the organisation into disrepute.

Internal appeal held: A domestic worker at the complainant's house alleged that she had suffered assault and mistreatment at the hands of the complainant and his wife and that her salary had been withheld. She lodged a complaint with the local police accusing the complainant and his wife of human trafficking. The police found the worker's allegations to be unsubstantiated but informed the complainant's office (WHO) that a non-prosecution order would be issued.

IOS conducted an investigation and found that the complainant had contravened the Staff Regulations, the Fraud Prevention Policy, the Ethical Principles and Conduct of Staff, the Standards of Conduct for the International Civil Service, and Information Note 28/2011. The DG imposed the disciplinary sanction of a reduction in grade (from P6 to P5).

The complainant appealed this decision before the RBA. The Regional Director decided to reject the Complainant's appeal. The complainant appealed to the GBA, submitting that the charges of misconduct were unfounded; the IOS investigation was biased and procedurally flawed; and WHO violated its duty of care.

The GBA found that a) all the charges made against the complainant were substantiated beyond any reasonable doubt, that the complainant had not complied with the standards of conduct expected of a WHO staff member and that he had committed misconduct; b) that the IOS investigation was conducted pursuant to IOS's statutory mandate to investigate alleged misconduct; and c) WHO complied with its duty of care and there was no violation of due process. The DG accepted the GBA's recommendation and rejected the appeal.

ILOAT held: The ILOAT upheld the DG's decision based on the GBA's recommendation with no further considerations and dismissed the complaint.