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LEGAL PROTECTION FOR STAFF IN INTERNATIONAL ORGANISATIONS – A Practitioner's View

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A number of the contributing authors have commented on the dysfunction and problems of international administrative tribunals which provide the backbone of conflict resolution between international organisations and their staff. Much of the commentary has taken a theoretical approach, discussing possible merits and disadvantages of the internal legal protection systems, and potential cases where problems could arise. Part of the reason for this approach is the difficulty, particularly on the part of staff members and their counsel, in obtaining detailed information regarding the functioning of the tribunals and cases they adjudicate. In fact, one could reasonably describe the nature of these legal protection systems as being in many ways secretive. There is extremely limited judicial review of the internal mechanisms, and even more troubling, more limited access national or international courts which can be availed by litigants to address their deficiencies[1].

The Administrative Tribunal of the UN (UNAT) and the Administrative Tribunal of the International Labor Organisation (ILOAT) both publish their judgments[2], but many other similar tribunals do not. None of the tribunals set up to adjudicate the labour and other work related complaints of international civil servants permit public inspection of their files, and many of the tribunals systematically refuse to hold public/oral hearings. The tribunals also tend to rely heavily on the dispute resolution mechanism internal to the employer-organisations for evidence gathering. These internal bodies, which are advisory in nature and often lack structural independence from the administrations of the organisations, are usually even more secretive than the administrative tribunals themselves, and generally do not publish their opinions/recommendations. The reliance of the administrative tribunals on these bodies for fact finding often hides critical aspects of the subject procedure from public scrutiny.

This paper will present a short description of some of the main problems experienced by the author in the course of his practice as counsel to international civil servants. This will be followed by a brief synopsis of a number of cases histories which demonstrate problems with the legal protection mechanisms available to staff of international organizations which enjoy immunity from national courts and laws.

Some problems with the ILOAT

Some of the problems in the ILOAT that have been identified in various articles and reports[3] [4] [5] are listed below:

- The ILOAT does not recognise or apply any known fundamental/human rights standards.
- No law other than that defined by the international organisations themselves is applied by the ILOAT. This gives rise to a number of *lacuna* in the protection of fundamental staff rights (particularly in the area of freedom of association and collective bargaining, two principles ostensibly championed by the ILO when exhorting about the practices of its member states)
- The ILOAT no longer holds public hearings/oral hearings, despite the provision in its Statute which contemplates regular public/hearings/oral arguments; the last public hearing held by the ILOAT was in 1989 (despite more than 300 requests for hearings/oral argument by Complainants since then).
- The ILOAT no longer hears witnesses.
- The ILOAT does not adhere to the principle of *stare decisis*, and therefore, many of its judgments are inconsistent with its prior jurisprudence, often varying from session to session and even panel to panel.
- Certain features of the ILOAT raise questions as to its independence and impartiality:
  - The DG of the ILO (a defendant in over 5% of cases) has a controlling influence over the nomination to the Judges. Officially, it is the ILO Conference which appoints Judges to the ILOAT, however, only the Governing Body of the ILO proposes Judges to the Conference, and only the DG of the ILO proposes Judges to the Governing Body.
  - The financing of the ILOAT is not transparent and it is believed influenced by the defendant organisations (which provide the bulk of the funding for the ILOAT)[6].

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1 Reinisch, August - Accountability of International Organizations According to National Law, in: 36 Netherlands Yearbook of International Law 2005 (Im Erscheinen) - Page 35 - IV Conclusions

2 See www.ilo.org/trib and http://untreaty.un.org/UNAT/ .

3 August Reinisch and Ulf Andreas Weber, "In the shadow of Waite and Kennedy", (2004), *International Organizations Law Review*, p 89.

4 Keith J. Webb and Arthur van Neck - The Non-Compliance of the International Labour Organisation Administrative Tribunal with the Requirements of Article 6 ECHR; 3 August 2005; available at - https://www.suepo.org/rights/public/archive/ailc-suepo_article6_echrandiloat.pdf

5 Doswald-Beck Opinion, Robertson Opinion, Seiderman Opinion - all available at - http://www.ilo.org/public/english/staffun/info/iloat/index.htm

6 Immediately after the ILOAT rendered its decisions in 1998 the so-called GPA (Global Programme on Aids--WHO's predecessor organization to UNAIDS) cases (ILOAT Judgments N°. 1624-1633), which many observers believed cost the WHO $12-20 million to implement, WHO's success rate before the Tribunal for the next 3 years was significantly improved.

- Key members of the Tribunal (Registrar, Assistant Registrar, clerks and translators) are all ILO staff members, and ultimately report to the DG of the ILO.
- Many persons affected by decisions of international organisations have no standing before the ILOAT (first time job applicants, staff associations, some categories of contract staff, other third parties, e.g. medical experts, consultants, etc.). Nor can these persons bring a case in national courts due to the immunity of the organisations.
- The ILOAT depends heavily on the internal appeals boards and the administration for evidence These bodies are generally only advisory, and are clearly not independent from the administration of the organisation.

Many of these concerns were addressed by the ILOAT Reform project initiated in 2001 by the ILO Staff Union[7]. This project sought to reform the Statutes and practice of the Tribunal to bring it into line with best judicial practice reflected in many of the human rights treaties for which the UN was the repository. Following more than three years of discussion (negotiation would not be an appropriate description of the Staff Union's efforts), the proposals have gradually been reduced from 39 points to 2 which were eventually proposed to the ILO Governing Body in 2006[8]. Currently, even these 2 points have been withdrawn from the agenda of the ILO Governing Body since no agreement could be reached on their adoption.

The clear lesson drawn from the ILO Staff Union's failed attempt to "negotiate" improvements to the ILOAT is that there is limited support within the administrations of international organisations for such improvements, particularly those in which the protection of staff rights and accountability is seen as a hindrance.

While the ILOAT is arguably the most open of all its brethren tribunals in that it publishes all its decisions on its website (www.ilo.org/tribunal , where it also provides a searchable case law database), there is, however, no access provided to information other than that contained in the actual judgment itself. An assessment of the fairness of the procedure before the Tribunal is therefore rather difficult if independent researchers or observers are not allowed to compare the pleadings (and evidentiary matter contained therein) against the final judgments. Nevertheless, some general aspects of the ILOAT's deficiencies can be clearly identified.

The ILOAT does not hold hearings (since 1989)

The procedure before the ILOAT is primarily a written one: a complainant makes a complaint, the defendant organisation replies; the complainant then may file a rejoinder; and the defendant a sur-rejoinder. Rarely has the Tribunal permitted evidence to be submitted in any other form than these written submissions. The ILOAT statute does provide for oral hearings, but none have been held since 1989[9], and although it cannot be excluded that the Tribunal might change its practice in the future, the current reality is that oral hearings are systematically denied by the Tribunal to those that request them. For many cases this may be of limited consequence; however, there are large numbers of cases before the Tribunal where an oral hearing would greatly assist a complainant in demonstrating his or her case.

In its judgments, the Tribunal uses what have become standard phrases regarding oral hearings. Three common statements gleaned from the ILOAT's reported cases are:

> *"Having examined the written pleadings, the Tribunal has decided not to order hearing for which neither party has applied"*[10].
>
> *"Having examined the written submissions and disallowed the complainants' application for hearings"*[11],
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> *"Having examined the written submissions and disallowed the complainant's application for the hearing of witnesses"*.[12]

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7 Summary of the ILOAT Reform Project - available at http://www.ilo.org/public/english/staffun/info/iloat/pdf/summary_note.pdf . The author acted as an external legal consultant to the ILO Staff Union during the first two years of this project and directly participated in the first two years of "discussions" with the ILO Administration.

8 ILO GB.292/PFA/20/2 March 2005 and ILO GB.294/PFA/18/1 November 2005

9 See https://www.suepo.org/rights/public/archive/hearings_1970-2005.pdf .

10 ILO Administrative Tribunal, 12.07.2006, Judgment Nos. 2567,2566 and 2564, introductory statements, available at http://www.ilo.org/public/english/tribunal/ .

11 ILO Administrative Tribunal, 12.07.2006, Judgment Nos. 2565,2560,2542,2541 and 2525, introductory statements, available at http://www.ilo.org/public/english/tribunal/ .

12 ILO Administrative Tribunal, 12.07.2006, Judgment No. 2555, introductory statements, available at

The first of these approaches is consistent with ECHR case law since that Court has ruled that not requesting a hearing is an implicit waiver of this right[13]. The second and third are certainly not consistent with Article 6 of the ECHR[14]. There are also some judgments of the Tribunal in which no comments are made regarding whether or not a request for hearings was made-- they are simply not held.

The reasons for the reluctance of the Tribunal to hold hearings are unclear. In discussions between the ILO and the Staff Union regarding ILOAT Reform in 2001[15], a request was made to amend the Statute of the Tribunal to grant in principle, the right of an oral hearing in line with the case law of the ECHR. Following consultation with the Tribunal, the ILO came to the conclusion that no change was required and this matter should remain at the discretion of the Tribunal. In 2005, proposals were presented to the ILO Governing Body[16] which included an amendment to the provision to grant oral hearings. The proposal was withdrawn pending further consultation, and it has been proposed to amend the proposal to provide that oral hearings must be held in cases where it is agreed to by both parties Even if such a proposal were implemented it would not resolve the problem since it grants the right of veto over public hearings to the either party, a circumstance clearly inconsistent with the jurisprudence of the ECHR cited above.

In defense of the failure of the Tribunal to hold hearings, it has been argued by the EPO that: they are not needed, that it is costly; etc[17]. Of course, if cost of the parallel justice systems set up by international organizations was truly a concern or burden for such organizations, they could immediately eliminate this financial burden by allowing staff members' claims to be litigated in national courts.

Incomplete law

The law applied by the ILOAT in its decisions is largely limited to the internal regulations of the subject international organisation and the applicable employment contract, with occasional reference to "principles of international law" The Tribunal has consistently held [18] [19] [20] that it "will not review criteria laid down in any national law". The only rules it will apply are those that govern the international civil service [....]"[21].

However, the internal regulations of the organisations are rather limited. Typically, they do not contain or address fundamental rights law, criminal law, health and safety law, fire/building regulations, anti-discrimination law, or any similar law which would normally apply to an employment relationship. Given that the organisations normally enjoy immunity before national courts, the reluctance of the ILOAT to apply such law denies the staff the protection of fundamental rights contained in such law.

Regarding human rights, none of the international organisations which subscribe to the jurisdiction of the ILOAT have recognised a body of law which could be considered equivalent to either the International Covenant for Civil and Political Rights (ICCPR) or the European Convention on Human Rights (ECoHR). The ILOAT has repeatedly stated in *dicta* that it recognizes "human rights"[22], but these ethereal rights have neither been defined nor do those which the ILOAT has addressed appear to have the same peremptory character such law enjoys in (most of) the member states in which ILOAT complainants find themselves.

The resulting *lacuna* places an undue burden upon a complainant in cases before the ILOAT, since where a deficit of law exists in the internal regulations, the complainant must first establish what law is to be

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http://www.ilo.org/public/english/tribunal/.

13 ECHR - DÖRY v SWEDEN (Application no. 28394/95) JUDGMENT STRASBOURG 12 November 2002. paragraphs 37-45.

14 ECHR - MILLER v SWEDEN (Application no. 55853/00) JUDGMENT STRASBOURG February 2005 paragraphs 29-32 and 37.

15 ILO Staff Union - Reform of the ILO Administrative Tribunal - available at - http://www.ilo.org/public/english/staffun/info/iloat/pdf/summary_note.pdf.

16 ILO GB.292/PFA/20/2 Geneva, March 2005.

17 Legal Protection of Staff in the EPO - European Patent Organisation - CA/9/06 - 15 March 2006 - Administrative Council document in response to CA/8/06.

18 *Saunol v. INTERPOL*, ILO Administrative Tribunal, 26.06.1990, Judgment No. 1020, para. 11, available at http://www.ilo.org/public/english/tribunal/fulltext/1020.htm.

19 *Waghorn v. ILO*, ILO Administrative Tribunal, 12 July 1957, Judgment No. 28, available at http://www.ilo.org/public/english/tribunal/fulltext/0028.htm.

20 *Zihber v CERN*, [1980] ILOAT, 11 December 1980, Judgment No. 435, para 3, available at http://www.ilo.org/public/english/tribunal/fulltext/0435.htm.

21 *Geisler and Wenzel v. EPO*, ILO Administrative Tribunal, 30 June 1988, Judgment No 899, para. 14, available at http://www.ilo.org/public/english/tribunal/fulltext/0899.htm

22 *Supra* note 4 para. 3 2.8. page 26-27

applied. Furthermore, where internal law exists but is poorly defined, the ILOAT shows a marked reluctance to accept interpretation of other courts as to the meaning of the internal text.

More detailed analysis of the compliance of the legal protection systems provided for staff of international organisations, particularly those using the ILOAT, with fundamental rights norms, has been undertaken by others[23]. The UN justice system has been subject to similar criticism; an official report prepared by a Panel of Experts (including a sitting ILOAT Judge) found that the UN's internal system of justice was "outmoded, dysfunctional, inefficient and that it lacked independence", that it was not professional, and that it "failed to meet many basic due process standards set out in international human rights instruments".24

The above overview is intended to set a context, and to enable a better understanding of the issues raised in the case studies below. It is often difficult to translate these criticisms regarding the structure or procedure before the administrative tribunals to the real problems experienced by those seeking to protect their rights. The following five case histories[25] will hopefully assist to demonstrate that the problems are not only a matter for theoretical analysis, but that such problems often result in real violations of fundamental rights with sometimes serious consequences for the victim staff members.

Cases Histories

Mrs. S.v-K. v. WHO / ILOAT Judgment N°. 2108[26]

The complainant, a female German national, then 43 years of age, and the holder of a PhD, was hired by WHO in 1997 at the P.5 level (the highest professional grade) to develop a "health telematics" programme at the WHO Centre in Kobe (WCK), Japan. Nearly two thirds of the WHO Kobe budget was allocated to this programme. Prior to joining the WHO, the complainant worked as a special assistant to the Director-General of UNESCO.

During her first year and a half at Kobe, she was successful in her programme, and her first year performance evaluation was positive. Halfway through her second year, the then Director of the WCK retired. At the same time, the complainant left on one-month home leave that was ultimately extended for another month and a half as a result of surgery she underwent in Germany which took much longer to recover from than initially anticipated. Right up through the end of his tenure, the original WCK Director had been supportive and approving of the complainant's performance, and all written documents confirm this position.

Upon her return to WCK in February 1999, she briefly met the newly appointed WCK Director, a Japanese national named Dr. K[27]. Unknown to the complainant at the time, Dr. K recommended that her WHO contract not be renewed on account of alleged poor performance, even though he had been her nominal supervisor for a mere 9 days and had not discussed her alleged poor performance with her. The complainant later learned that another Director at WHO HQ, with operational responsibility for the WCK, had Dr. K change his decision so that her contract was to be renewed but only for an additional period of one year instead of the usual 2 year contract[28].

The complainant sought meetings with Dr. K to discuss her future work plan at WCK, and was repeatedly rebuffed. When she was finally granted such a meeting, Dr. K. remained relatively mute, staring at the ceiling or looking out the window while the complainant was speaking, and ended the meeting abruptly. This pattern was repeated at subsequent meetings. One of the only comments Dr. K made during one of these meetings was "Why aren't you with your husband in the kitchen in Germany". The complainant reported this comment to a senior human resources official[29] at WHO HQ, but was informed that "it was up to the individual as to what was appropriate and/or acceptable".

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23 *Supra* notes 1, 3, 4, and 5.

24 Report of the Reform Panel on the UN's Internal Justice System, available at http://daccessdds.un.org/doc/UNDOC/GEN/N06/449/11/PDF/N0644911.pdf?OpenElement

25 The pleadings of several of these cases will soon be available at www.lowatch.org

26 See http://www.ilo.org/public/english/tribunal/fulltext/2108.htm

27 In 1993, Dr. K had been reprimanded by the WHO External Board of Auditors for "financial improprieties" while he was serving under his friend and fellow countryman, the former DG Hiroshi Nakajima.

28 As with all other fixed term WHO complainants, the complainant had previously satisfactorily completed her required first year of probation without problem or complaint. The practice within WHO, at least at that time, was to give fixed term staff members initial two year contract terms, and to renew such contracts for additional two year terms.

29 This HR official later became responsible for representing the WHO in internal appeals, and despite her conflict of interest in the complainant's case, she refused to recuse herself, and argued vigorously in the two internal appeals lodged by the complainant that the complainant was the problem and was simply a poor performer and had not been harassed, completely ignoring the complainant's plea to her in 1999 about Dr. K's harassing behavior.

Over the next several months, the complainant was systematically excluded from all functions of the WCK and her own post. Her access to the WCK server on which her health telematics programme was lodged was terminated without warning or explanation, she was excluded from work plan meetings and e-mail distributions, and thereby prevented her from fulfilling her duties and responsibilities of her senior post for some five months.

In May 1999, the complainant was finally advised of the poor evaluation[30] given to her covering a one year period mainly prior to Dr. Ks arrival. Dr. K. had written this report despite the fact that he had been her supervisor for a mere 9 days of the period covered in the report[31].

The complainant sent two letters to the then WHO Director General, Dr. Brundtland, outlining in detail the harassment complaint and the injustice that the complainant was being subjected to, as well as the adverse effect such harassment was having on the her health. After several months, the WHO responded that as the complainant had filed an appeal against her contract truncation with the internal WHO appeals board, the WHO saw no reason to investigate her allegations and would await the outcome of the internal appeal.

During the summer of 1999, apparently realizing that something was seriously amiss with the complainant's situation in Kobe, WHO HQ arranged for a retired staff member to assess the situation and see if he could mediate a resolution to the problem. After meeting for several days with both the complainant, Dr. K and other colleagues at the WCK, the retired staff member reported back to the complainant that no resolution would be possible as Dr. K was adamant that the complainant would not remain at the WCK no matter what. Although the retired staff member drafted a report that essentially corroborated the complainant's account of the her situation at the WCK, neither the complainant, nor the internal appeals board were given access to this important evidence.

Nearing the end of the summer of 1999, the complainant was demoralized and becoming frantic, having no job functions, and being isolated in a foreign culture. Finally after multiple pleas to the then serving WHO ombudsperson, in recognition of the complainant's deteriorating situation, physically, mentally and professionally, the complainant was placed on travel status, and effectively transferred to the WHO Regional Office for the Eastern Mediterranean in Alexandria, Egypt (EMRO). She was assigned a project in EMRO which was similar to her prior health telematics mandate. After spending a year in EMRO and undergoing two performance evaluations (both of which were uniformly positive), the complainant was again transferred to WHO HQ in Geneva in September 2000.

The complainant believes her transfer to Geneva was caused in part by the fact that the WHO Internal appeals board had rendered a decision on her appeal in June 2000 and recommended that she be awarded the sum of CHF 20,000 in moral damages for the treatment she had suffered at the hand of Dr. K. The Board also recommended that the WHO undertake a formal investigation into the (other) harassment claims related to the case.

On 3 July 2000, the WHO DG rejected the majority of the Board's recommendations, but agreed with its recommendation that a formal investigation be undertaken. However, the investigation did not begin until May 2001, and continued for another two years.

The complainant appealed the DG's decision not to pay her to the compensation recommended by the Appeals Board to the ILO Administrative Tribunal.

The complainant eventually learned that the DG's decision on her first appeal and the report of the Appeals Board, which were "strictly confidential", were in fact sent by the WHO to Dr. K (her alleged harasser!) and to her future supervisor at HQ, without informing the complainant.

Upon her transfer to HQ in later 2000, the complainant was given no real terms of reference by her new

30 The WHO subsequently argued, at the internal appeal stage, that the poor evaluation was based in part on the observations of the prior WCK Director, despite the fact that all written documents in existence at the time of said former Director's departure from him commenting on the complainant's performance were all uniformly benign or positive—curiously, this Director has established a private foundation in NY which the complainant believes is funded in part by the WCK, having apparently appropriated the health telematics programme that the complainant had developed in Kobe and from which she was brusquely excluded. The foregoing calls into serious question the veracity of the prior Director's ex post facto evaluation of the complainant (which the complainant in any event rejected out of hand).

31 It had been represented to the complainant that if her alleged poor performance markedly improved (which in fact did happen, or rather, she was finally given a fair and objective performance evaluation which did differ markedly from Dr. K's 9 day evaluation), her contract would be regularized—i e., returned to the standard two year term. Predictably, despite the complainant's subsequent satisfactory performance in EMRO, the WHO ignored its promise to regularize her situation.

supervisor (an Executive Director who also happened to be the person at HQ directly responsible for the WCK, and Dr. K's first level supervisor). She was eventually given a large project to complete, but neither the resources nor support to complete such an assignment (a fact which she pointed out at the project's inception).

At an appraisal status meeting held with the Executive Director on 22 February 2001, the complainant was told by him that her performance was satisfactory. A month later, at a meeting held to discuss her responsibilities versus those of another staff member, in presence of the two other staff, her performance had suddenly, inexplicably become unsatisfactory. The complainant subsequently learned that not only had the Executive Director circulated false comments on her performance with the eight other Executive Directors (effectively precluding any chance of the complainant finding a position anywhere else in HQ), but he had also sent the comments to the ILOAT to be used in her appeal then pending there concerning her harassment by Dr. K. Not only did this action violate established WHO procedures, it also deprived the complainant of her fundamental right to defend herself against the Executive Director's allegations.

On the basis of this evaluation, the complainant learned in May 2001 that her contract, due to expire in August 2001, had been irregularly extended for a sharply reduced term of 6 months, the termination of which (Feb 2002) would coincide with the expected ruling from the ILOAT on her appeal against the DG's decision not to award her damages.

Since January 2001, the complainant had been working with a researcher in the HIV/AIDS division who had reviewed the complainant's performance three times, and each time had found not only her performance more than satisfactory, but also remarked on her ability to get along with others and her professional comportment towards colleagues.

The complainant three times personally appealed to the Director General (Dr. Brundtland) for help, but he did not respond to her or even acknowledged her requests.

On 8 November 2001, the complainant was formally advised that her contract would not be extended beyond 14 February 2002, and that she would be formally separated from service at that time. The reasons given for her termination were "lack of funding" and her overall poor performance at WHO, both of which reasons were patently false and unsupportable. The complainant's unit, HIV/AIDS was actively recruiting, and furthermore, the two allegedly unsatisfactory performance evaluations, out of the 9 in total she received while at WHO, were both under legal challenge on the grounds that they were motivated by bias and discrimination. In addition, both of her supervisors who had given her the negative evaluations were the subjects of harassment claims.

On 30 November 2001, the complainant was cursorily advised by the WHO that her accusations of harassment against Dr. K would not be investigated as his behaviour was "perfectly proper".

Over the course of the 3 years from the time the complainant was first harassed by Dr K the complainants health was suffering; she was placed on certified sick leave on account of work related stress a number of times. Ultimately, she was diagnosed as suffering from a stress induced condition (fibromyalgie) which was determined by her doctors to have been caused in all or in part by her treatment at WHO. The complainant was forced to take a medical retirement from WHO in 2003 at the age of 47, and remains today 100% disabled.

In its Judgment N° 2108, dealing with the complainant's challenge to the curtailment of her contract to one year instead of two years, the ILOAT ruled that the complainant had had the opportunity to respond to the negative reports, and that it was within the limits of discretionary authority and "was in the best interest of the Organization" to limit her contract since there were doubts regarding her performance. The Tribunal also noted that the allegation that the decision was motivated by harassment could not be determined since the internal investigation into this matter was not complete.[32]

In reaching this conclusion, the ILOAT ignored the clear evidence of harassment, a blatant failure of the organisation to address the problem in a timely manner, and the Tribunal's own case law. The ILOAT refused to order the disclosure of material evidence, in particular the report of the retired staff member who had been asked to evaluate the situation between Dr. K and the complainant in Kobe.

In several other harassment cases against WHO the Tribunal has stated that "Any organisation that is serious about deterring sexual harassment and consequential abuse of authority by a superior officer must be seen to take proper action. In particular victims of such behaviour must feel confident that it will take their allegations seriously and not let them be victimised on that account..." (*in re Mussnig*, ILOAT

32 *Dr. v.K. v. WHO*, ILO Administrative Tribunal, 30 January 2002, Judgment No. 2108, paras. 15-20, available at http://www.ilo.org/public/english/tribunal/fulltext/2108.htm.

Judgment 1376), and that "When a staff member makes charges as serious as sexual harassment an organisation must do its utmost to afford protection. But it must at the same time carry out a full and proper inquiry that respects the rights of the accused ...." (*in re Eben Moussa*, Judgment 1619).

Instead , in Dr. V K.'s case, the ILOAT blithely dismissed these arguments stating that the complainant's claims of harassment were premature. This conclusion ignores that three (3) years after the harassment was first reported, the investigation was still not complete.

The Tribunal's conclusions are also inconsistent. The Tribunal expressly acknowledged that the WHO internal appeal board had found that the SM had documented a situation that would constitute harassment if proven[33]; the Tribunal also concluded that since the harassment investigation was ongoing, it could not rule on this matter[34]. However the Tribunal also ruled that the performance evaluation was correct and this and the decisions to curtail the complainant's contract to one year should stand. Since the complainant's challenge to the performance evaluation and subsequent curtailment of her contract rested on the allegation that these acts were motivated by harassment, logically it would not be possible to dismiss this claim until such time that the conclusions of the harassment investigation were available.

The conclusion of the Tribunal that *"The renewal for one year was in the best interest of the Organization"*[35] again raises an interesting matter. The role of the Director General, in his function as final decision maker regarding conflicts between staff members and the organisation, has a quasi-judicial character. The Director General's role as the executive head of the organisation is quite different. The Tribunal appears to ignore the implicit conflict of interest that arises from this structure, but rather suggests that the interests of the organisation can suborn justice.

Sadly, on account of the complainant's ongoing and debilitating illness, all of her legal actions, both internal and external, have been put on hold. The saying that justice delayed is justice denied could not be more appropriate.

Mr. Doss Adly Doss v. WIPO / ILOAT Judgments 2288 and 2555[36]

The complainant was a fixed term employee of the World Intellectual Property Office (hereinafter "WIPO") in Geneva, Switzerland. He was also a resident of Geneva, Switzerland.

The complainant was summarily dismissed in August 2002 from his fixed term post at WIPO for alleged misconduct concerning the use of his computer. It was alleged that the complainant had transmitted "pornographic" e-mails. This summary dismissal was challenged.

In its Judgment N°. 2288, the ILOAT found that the WIPO Administration had committed procedural error in failing to properly submit the case against the complainant to the WIPO Joint Advisory Committee (JAC), and therefore set aside the complainant's summary termination, ordering WIPO to pay the complainant all salary and benefits to which he was entitled, from the date of his wrongful termination (21 August 2002) through the date WIPO took another, procedurally correct decision on the issue of the complainant's alleged misconduct. However, the Tribunal failed to address several other procedural and factual matters regarding this case.

Without conducting any further investigation, the WIPO Administration resubmitted the complainant's case to a newly constituted JAC. The evidence presented to the JAC was the same evidence upon which the DG had taken his previous decision, which was based on the report of the DG's so-called Task Force of August 2002.

Neither the complainant nor his counsel was permitted to appear before the JAC to argue his case. The JAC recommended the termination of the complainant's appointment. The WIPO Director-General accepted this recommendation and terminated the complainant's appointment on 16 March 2004.

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33 *Supra* note 33 para. 9.
34 *Supra* note 33 para. 20.
35 *Supra* note 33 para. 19.
36 See http://www.ilo.org/public/english/tribunal/fulltext/2288.htm and See http://www.ilo.org/public/english/tribunal/fulltext/2555.htm . The complainant recently filed an application with the European Court of Human Rights (Application N° 2681/07) against Switzerland arising out his denial of fundamental rights by WIPO and the ILOAT

While WIPO corrected the procedural irregularity it committed vis à vis the JAC in conformity to the ILOAT ruling, the organisation made no attempt to address the numerous other procedural and substantive defects highlighted by the complainant in his appeal which remained.

The complainant filed a second appeal to the ILOAT against his wrongful dismissal on April 2005. Incredibly, through the present date, despite his express discovery requests to the ILOAT, the complainant and/or his counsel have never been provided with copies of the alleged "pornographic" e-mails allegedly sent by the complainant, nor has an independent investigation been undertaken of the complainant's computer. Based on the evidence provided by the WIPO, the report of an independent computer expert retained by the complainant's counsel was able to demonstrate that the "proof" that WIPO had offered as the sole basis for the termination of the complainant's appointment had no scientific or evidentiary basis whatsoever.

The complainant asserted in his internal appeals that the alleged grounds for his summary dismissal were pretextual, and that his termination resulted from the malice and bias of the WIPO DG, and further, that WIPO committed numerous procedural and substantive errors in effecting his second termination.

The ILOAT dismissed the complainant's second complaint in Judgment N°. 2555, publicly announced on 12 July 2006, rejecting the complainant's express written request to the Tribunal that it hold a public hearing and that he be allowed to question designated witnesses.

The Tribunal has failed to enforce due process in this case. No attempt has been made to examine the evidence presented by WIPO, or to allow the complainant fair opportunity to do the same. The internal procedure before the JAC reversed the burden of proof, in that it failed to require that WIPO prove the alleged misconduct, rather, and it appears to have assumed that the accusations would stand unless the complainant could prove they were incorrect. Since access to key evidence was denied, there was no possibility for the complainant do so. The Tribunal relied solely on the opinion of the JAC, and therefore fails in its obligation to independently investigate the facts presented.

Mrs. R.B-M. v WHO / ILOAT Judgment No. 2484[37]

The Complainant raised an allegation of harassment against her first and second level supervisors.

On 24 October 2001, the WHO Ombudsman recommended that her first level manager should no longer supervise the complainant, and this recommendation was eventually implemented in January 2002.

On 10 January 2003, the complainant lodged a formal complaint with the WHO Grievance Panel, which is a peer-type internal body responsible for dealing with allegations of harassment which makes recommendations to the WHO DG, but which has no decision-making authority. In its report dated 18 December 2003, the Panel concluded that "in general the behaviour of her first level supervisor could be described as constituting harassment", but that the behavior of her second level supervisor constituted "unfair management rather than harassment". The Panel recommended that the Director-General take appropriate disciplinary action with respect to both staff members.

One of the Co-chairs of the Panel, when submitting the report to the Director-General, indicated in a covering letter that the Panel recommended that letters be written, on the one hand, to the complainant, recognising that she had suffered harassment, and on the other hand to her first and second level supervisors informing them that they had been found guilty of harassment and bad management, respectively.

In a letter dated 3 May 2004, the Director of the Office of the Director-General wrote to the Grievance Panel stating that three of the factual considerations contained in their advisory report were open to challenge. He enclosed some further evidence supporting this view (which the Administration had curiously not deigned to provide the Grievance Panel previously even though it was well aware of the procedure taking place, and of the existence of additional alleged evidence) and added that the Director-General would be grateful for the Panel's reaction to the additional evidence before taking a final decision.

According to the organisation this evidence included: copies of e-mails that had been sent announcing the complainant's appointment which appeared to contradict the finding of the Grievance Panel; and a letter which allegedly demonstrated that her supervisors were not responsible since the decision in

37 See http://www.ilo.org/public/english/tribunal/fulltext/2484.htm

question (the re-assignment of the first level supervisor) had been taken by the Executive Director of the Department concerned and thus could not be blamed on the latter's subordinates.

The Co-chair replied on 27 May that the Panel had considered the additional arguments and documentation submitted but found no reason to change the substance of the report, pointing out that its conclusions were also based on the testimonies of 26 witnesses. The Co-chair also indicated surprise that the said documentation had not been produced previously.

On 5 July 2004 the Director of Human Resources Services wrote separately to the complainant and her supervisors. He informed the complainant that the Director-General had asked him to convey his "final decision" to her, which was that the grievance had not been proven, contrary to the findings and recommendations of the Grievance Panel. In such letter conveying the DG's "final decision", the WHO solely relied on the arguments and evidence which it had submitted to the Grievance Panel, and which the Grievance Panel had expressly rejected. It failed to provide the complainant with any justification or rationale for its rejection of the Grievance Panel's recommendations, as required by the ILOAT jurisprudence

The staff member then filed a complaint with the ILOAT. The ILOAT dismissed the complaint as unfounded. Firstly it ruled that the Grievance Panel's role was an advisory one that the Director General had a duty to take all available evidence into account before taking his decision.

It also stated that in taking the decision the Director-General was not merely arbitrating a dispute between individual staff members but was called on to make a decision affecting the welfare of the Organization as a whole. This statement implies the Tribunal holds the view that justice can and should be expressly subordinate to needs of the Organisation, contrary to the principles of the rule of law.

The ILOAT then stated:

> *"There can be no doubt that the additional evidence relied on by the Director-General was relevant and admissible and his actions in calling it to the Panel's attention and inviting their comments were eminently correct. It is regrettable but perhaps understandable that the Panel's reaction was to retreat to a narrow view of the scope and nature of its inquiry and a defence of the conclusions already reached but that cannot affect the impugned decision itself."*

This statement is remarkable since the ILOAT was not provided with the evidence itself and could therefore only have been relying on the statements of the Director General. Further, there was no evidence presented to the ILOAT which could lead to the conclusion that the Grievance Panel had not considered the "additional evidence" impartially. Finally, the ILOAT was silent on the reprehensible behavior of the Administration in withholding from the Grievance Panel evidence that it had in its sole possession and which it presumably knew was probative, and then even more egregiously, unduly influencing the Panel to reopen its deliberations after receiving the adverse report by then communicating the withheld evidence to the Panel.

The problem with reliance on written submissions in this case is clear. The submissions of the parties rely on the opinions of the Grievance Panel and the Director General. Noting that the Grievance Panel is not a tribunal, but merely an advisory body for the Director General, and that the Director General as head of the organisation has a strong interest in the outcome of the case, it appears unreasonable to rely on such evidence, particularly where it is disputed.

The complainant has at no time been provided with copies of the "new" evidence the Office of the Director General submitted to the Grievance Panel, nor was she asked to provide her comments to the Grievance Panel on such "new evidence" before the Panel considered it. The request to the ILOAT that any such evidence be disclosed to the complainant was met with a strong rebuke from the Tribunal:

> "As he now appears to do as a matter of course, complainant's counsel makes a vast and sweeping demand for documents from the WHO. There is no showing that any of such documents exist or that there is any reason to think that any relevant material has not been produced. Counsel's assumption of bad faith on the part of the Organization is at variance with general principles of international civil service law and reflects badly on him. The request is denied as is the request for an oral hearing."

The documents sought were the very documents upon which the Director General had relied upon in reaching his decision. How the Tribunal can simultaneously rely on such evidence and criticise the complainant's counsel for not vigorously attempting to establish their existence and ascertain their contents is unclear.

Given the complexity of the case, and the disputed evidence, the summary dismissal of the request for oral hearings seems grossly inappropriate.

Romabach-Le Guludec, ILOAT Judgment No. 1581

The ILOAT has shown a strong reluctance to intervene with respect to issues relating to immunity of international organisations. Despite statements of the Tribunal that it applies human rights, it appears to take the view that these does not include provisions such as Article 14 ICCPR or Article 6 ECHR.

In the case of Rombach-Le Guludec [38], where a member of staff was allegedly battered by the President of The European Patent Office in the EPO hallway, sustaining loss of consciousness and injury requiring evacuation to hospital. Her request to lift the immunity of the President was refused by the EPO. The Munich State Prosecutor made further requests for the immunity to be lifted which was also refused by the EPO. The request was then forwarded to the German authorities who instructed their delegation to the EPO to repeat this request which was presented to the next session of the Administrative Council. The German delegation abstained from voting on the grounds of impartiality, but all other delegations voted to reject the request. Rombach-Le Guludec submitted an appeal to the ILOAT challenging the organisation's refusal to waive the immunity despite clear limitations to this immunity in the EPO's Protocol on Privileges and Immunities. The rules regarding immunity of the EPO[39] explicitly state that they are functional in nature and specific exclusions are made regarding abuse of the immunity.

The ILOAT declared itself not competent to intervene claiming that the matter was outside of the Tribunals competence "affecting as it does relations between the defendant Organisation and a member State"[40].

The ILOAT claims to protect human rights; and although the actual rights applied by the Tribunal are not defined, it would seem reasonable to assume that the right of access to a tribunal would be part of such rights. Even where the ILOAT considered the scope of the President's immunity was not within its competence, the refusal to waive immunity clearly results in a conflict with the right of access to court. The interpretation of the ILOAT clearly puts the internal law of the Organisation above human rights, thereby removing the peremptory character of human rights and undermining their very essence.

Liaci, ILOAT Judgment No. 1964

In Liaci v EPO[41], the complainant applied in April 1996 for a post of patent examiner at the Berlin Sub-office of the European Patent Office. He received a letter dated 26 November 1998 from the Head of Administration offering him the post as from 1 February 1999, subject to his complying with the Service Regulations in that he should meet the physical requirements of the post as verified by a medical examination. The complainant accepted the offer on 21 December and underwent the initial medical examination on 8 January 1999. Having received the results of the examination which had been carried out by the complainant's own doctor, the Office's medical adviser wrote to him on 21 January 1999 mentioning the "pathological nature" of his liver tests and his "considerable excess weight". The medical adviser proposed that he lose weight in order to meet the medical requirements for recruitment to the Office. The entry into service of the complainant was postponed until 1 April 1999. After the complainant had undergone a further medical examination in March 1999, the results were passed on to the EPO's medical adviser who was not able to certify him fit to perform the duties of the post. As a result of that medical opinion, on 8 April the EPO withdrew its earlier offer of employment. The complainant appealed against the decision of 8 April 1999.

The ILOAT rejected his request on the grounds that he was not (yet) a member of staff and therefore did not have standing before the Tribunal[42]. The refusal of the ILOAT to grant standing to the complainant, knowing that the complainant had no other recourse to justice, demonstrates a failure of the ILOAT to recognize the fundamental right of access to court, as set out in Article 6 ECHR.

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38 *Rombach-Le Guludec v. EPO*, ILO Administrative Tribunal, 30 01 1997, Judgment No 1581, published under: http://www.ilo.org/public/english/tribunal/fulltext/1581.htm.

39 Protocol on Privileges and Immunities of the European Patent Organisation, 5 October 1973, 1065 UNTS 199, available at http://www.european-patent-office.org/legal/epc/e/ma5.html.

40 *Supra* note 22 - Consideration 6.

41 Liaci *v. EPO*, ILO Administrative Tribunal, 12.07.2000, Judgment No. 1964, published under: http://www.ilo.org/public/english/tribunal/fulltext/1964.htm.

42 *Supra* note 25 - Consideration 4.

Conclusions

The foregoing case histories evidence, I believe, a system that is truly dysfunctional, and one, which cries out for root and branch reform. It is absolutely shameful that at the beginning of the 21st century, international civil servants are damned to endure a so-called justice system that sometimes seems to have more in common with the 17th century Star Chamber than modern day national courts.

I would also like to add a personal point of view, and it is that the causes that underlie the dysfunction of the legal protection systems for staff of international organisations are the same as those that result in other criticism currently made towards international organisations, for example, concerning financial corruption and the sexual abuse of refugees. The common factor here is a lack of independent accountability It is my view that where we continue to permit the organisations themselves to determine the accountability models (while continuing to allow such organisations to enjoy what is effectively absolute immunity), we will never achieve an effective system of accountability, and instead will have nothing but impunity. And it is clear to me that the current state of absolute immunity enjoyed by international organisations will sooner or later be vitiated by a national court or the ECHR to the great detriment of those that truly still need the protections of functional immunity in the field.

The choice is still up to international organisations—substantially and meaningfully reform their internal justice systems, or risk losing their immunity shield completely. But time is short.

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