

**Opinion regarding the problems related to the
recruitment of a legal adviser of the ILO Staff
Union**

1. This Opinion has been prepared at the request of the ILO Staff Union Committee. It examines the problems related to by the recruitment of a legal adviser of the Staff Union in the light of the principles of freedom of association set out, *inter alia*, in the relevant labour standards of the ILO and decisions adopted by the Organization's supervisory bodies.

Relevant labour standards

2. There are no labour standards that deal specifically with international civil servants, their trade union rights and the rights conferred on their organizations in order to promote and defend the interests of their members. Nevertheless, taking into account their substance and scope, the standards contained in the Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87), the Labour Relations (Public Service) Convention, 1978 (No. 151) and its accompanying Recommendation No. 159 should serve as guidelines in this analysis. To begin with, Convention No. 87, which is the fundamental standard in terms of freedom of association, applies to all workers without any distinction whatsoever, while Convention No. 151 and its accompanying Recommendation No. 159, which deal with the determination of conditions of employment in the public service, cover persons employed by the public authorities.

3. The provisions that are relevant to the matter at issue here refer specifically to:

- the right of workers' organizations to organize their administration and activities freely (Article 3, paragraph 1, of Convention No. 87);
- the enjoyment of complete independence for public employees' organizations and to adequate protection against any acts of interference by a public authority in their functioning or administration (Article 5, paragraphs 1 and 2, of Convention No. 151);
- the provision of appropriate facilities to the representatives of recognized public employees' organizations to enable them to carry out their activities promptly and efficiently (Article 6, paragraph 1, of Convention No. 151).

Specific problems related to representing international civil servants organizations

4. At the national level, most countries' legislation specifies a number of formalities that have to be completed for the establishment of occupational organizations, such as the registration of their by-laws or of the organizations themselves. These various procedures are necessary for the organizations to acquire the legal personality that they must have to sign contracts, to recruit staff, to take cases to court, etc. They also serve to ensure that third parties are informed of their establishment and that they are covered by domestic law as it pertains to collective labour relations. As the Administrative Tribunal of the ILO noted in its Judgment No. 2672, such laws

cannot apply to organizations whose membership is restricted to international civil servants.

5. Contrary to the ILO administration's contention in the case in point, registering the ILO Staff Union with national authorities, even in the host country, would pose serious problems, as it would place the Union under the supervision of the national public authorities in terms of the application of domestic law and regulations whereas, quite apart from the fact that the workers it represents are employed in a large variety of countries, they are not bound by any national legislation as far as their labour relations are concerned and they are not answerable to a national judiciary. Registration with the national authorities of the host country would therefore place the ILO Staff Union under the control of the competent Swiss institutions and would thus undermine its immunity vis-à-vis a member State – an immunity that is necessary for it to function properly.

6. This essential feature of any organization of international civil servants gives rise to a very specific problem : namely, that given the inevitable absence of registration with the national authorities and the fact that there is no provision in international public law for the recognition of legal personality for international civil servants' organizations within the United Nations system, these organizations cannot themselves enter into work contracts, but are obliged to do so through the intermediary of the international agency that recognizes them. There is no other way in which they can employ the necessary staff and have access to the necessary

facilities to function properly. This unique situation means that the facilities that the employing agencies have to make available to them take on particular importance.

Facilities made available at the ILO

7. To meet this requirement, the ILO has already made extensive facilities available to the Staff Union so that it can carry out its activities effectively (detaching staff to serve as union officials, allowing time off for union activities, providing office premises and equipment, holding meetings during working hours, detaching a full-time secretary funded by the Office, recruiting secretaries under ILO contracts financed out of the contributions of Staff Union members, etc.).

8. Financially speaking, the facilities provided by the Office for the Staff Union are thus already sufficient, and it would be unreasonable, on the basis of Convention No. 151 and its accompanying Recommendation No. 159, to expect the ILO to provide any additional material or financial resources for the functioning of the Staff Union. Certainly, the administration is under no obligation to use its own budget to recruit additional staff for the Staff Union.

The case of the Staff Union's legal adviser

9. In other words, the ILO cannot be expected to finance a post of legal adviser of the Staff Union. On the other hand, it is

undeniable that in the best interest of the staff, and with a view to ensuring harmonious labour relations within the Office, the presence of a legal expert in the Staff Union who can advise ILO officials in their disputes with the Administration is especially important, given the growing complexity of individual labour relations in United Nations agencies (multiple types of contract, constant evolution of the case law of administrative tribunals, etc.).

10. The specificity of the legal context surrounding labour relations in international agencies is such that it calls for the employment on a full-time basis and for a sufficiently long period of time of highly specialized professionals that it is impossible in practice to find among lawyers dealing with national labour laws. The use of external collaborators or law firms therefore does not meet the specific requirements of an organization of international civil servants.

11. As was pointed out above, however, international law as it stands today does not provide for organizations representing international civil servants – among which the ILO Staff Union – to acquire the juridical personality they must have to recruit salaried employees directly, inasmuch as they are not able to enter into contracts.

12. Consequently, the only way the Staff Union can have access to the services of a legal expert on permanent basis is for the person concerned to be recruited under an ILO contract – without

of course its entailing any financial commitment for the Organization in terms of remuneration and allied costs. If the ILO were to persist in its refusal to accept this solution, it would be denying the Staff Union access to the legal services that are essential to the defence of the staff's interests and would thus prevent it from functioning effectively, thereby restricting its right to organize its activities freely (Article 3, Convention No. 87).

13. It is also important from the standpoint of the principles of freedom of association that the Staff Union itself determine how it wishes to provide its members with the legal advice they need. By refusing to issue a contract for a legal expert, the ILO denies the Staff Union the possibility to act on its decision to provide this service by recruiting a full-time legal adviser specifically for the purpose. In doing so, the ILO would, at least indirectly, be interfering in the internal functioning of a trade union organization in violation of Article 5, paragraph 2, of Convention No. 151.

14. The same conclusion can be drawn from the principle cited in the *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* to the effect that, "when legislation is applied in such a manner as to prevent trade union organizations from using the services of experts who are not necessarily elected officers, such as industrial advisers, lawyers or agents able to represent them in judicial or administrative proceedings, there would be serious doubt as to the compatibility of such provisions with Article 3 of Convention

No. 87, according to which workers' organizations shall have the right, inter alia, to organize their administration and activities" (see *Digest of decisions*, fifth (revised) edition, 2006). It is in any case clear that calling into question a system of facilities that has long been accepted (i.e. the recruitment of persons financed by the Staff Union but employed under ILO contracts) would give rise to difficulties that could well hamper the proper functioning of the Staff Union. This is the line that the Committee on Freedom of Association has always taken when examining the use of such practices by employers.

15. Furthermore, it would be important for all the parties concerned (Staff Union, staff members and the ILO itself) that the status of the Staff Union's legal adviser should be that of an international civil servant, with the rights and immunities but also the duties that that implies, as defined in the Standards of Conduct for the International Civil Service and in the Staff Regulations of the ILO.

16. That said, it is without question that the recruitment by the ILO of a legal expert in the service of, and funded by, the Staff Union does pose certain problems, especially since his or her duties would among other things involve advising staff members in the context of proceedings brought against the Office. This being so, it is necessary to preserve the independence of the person employed vis-à-vis the ILO while at the same time relieving the Office of any responsibility arising from the actions of the Staff Union's legal adviser in the exercise of his or her functions.

17. The terms of employment of the Staff Union's legal adviser should therefore be defined explicitly so as to determine the incumbent's status. From this standpoint, it would be highly desirable that an appropriate memorandum of understanding be negotiated between the Administration and the Staff Union. The various modalities considered by the agreement could include:

- the recruitment of the legal adviser of the Staff Union under an ILO contract;
- the financing by the Staff Union of the remuneration and related costs arising from the recruitment of the legal adviser;
- a commitment by the administration to respect the legal adviser's independence;
- the waiving of common law provisions relating to recruitment so as to enable the competent bodies of the Staff union to select the candidates for the post;
- the exclusion of the Staff Union's legal adviser from the ILO's internal selection procedures;
- a recognition that the ILO is not in any way responsible for the actions of the Staff Union's legal adviser.

18. The negotiation of such a memorandum of understanding would evidently require a climate of trust between the Administration and the Staff Union. For such a climate to exist with respect to the problems posed by the recruitment of the legal adviser, the two parties would need to meet and agree to engage in negotiations in good faith and without delay.

19. This Opinion must naturally be considered in its entirety.

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