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**The preservation of UN staff member rights and careers vis-à-vis
unlawful administrative decisions stemming from managerial errors**

Paper submitted by the UNOG Staff Coordinating Council to SMC VIII

A worrying trend has developed since the establishment of the Internal Justice System in 2009. In cases regarding appointment, promotion or termination where the UNDT has ruled administrative decisions to be unlawful, the UN Administration has systemically chosen to overlook the possibility of rescinding its decisions – as one of the two preferred remedies provided by the Statute of the Tribunal. The Administration has, in the vast majority (if not all) cases, elected to automatically pay insignificant compensation to the concerned staff member, despite the unlawfulness of the administrative decision, without considering the possibility of reversing it and giving the staff member the possibility of preserving her/his rights and career prospects. The situation is particularly distressing in cases where, even though staff contract terminations were found unlawful, the concerned staff members were not reinstated by the Administration.

In general, the effect of administrative decisions that, for instance, sever a staff member from his or her post, or deny them the equivalent of a promotion, will have an unavoidable negative impact on a staff member's morale, job security and future career prospects. However, it becomes egregious when the staff member is forced to suffer such impact after the competent tribunal has ruled that the decision was unlawful.

Even if the current legal framework allows the Administration to opt for paying compensation instead of rescinding its decision in cases of appointment, promotion or termination, the UNDT has rightly pointed out in Nakhlawi (UNDT/2016/204) that “failure of management to give individual consideration to each case in which rescission of a termination decision is ordered, contradicts the spirit and legislative intent of the General Assembly of art. 10.5 of its Statute. By that article, the General Assembly created an expectation for staff members that in cases where the Tribunal orders rescission, for example, of a termination decision, the Administration will give due consideration to the possibility of reintegration before it considers the payment of the amount of compensation set in lieu of rescission”.

When the Administration does not make, and is seen to not make, every effort to rescind its decision before deciding to pay compensation for an unlawful decision, it can be argued that it is acting in bad faith towards the staff member, who has been found to be subject to a wrongful decision. Staff consider that, in most cases, the payment of compensation does not rectify injustice and does not lead to an improvement of managerial practices in the Organization. Not only are the rights of the aggrieved not rectified in those cases, but the Organization also bears the financial cost of the wrongful decision without preventing further violations. The UNDT in the above-mentioned case warned: “There may, thus, be cases in which the career of staff members, who dedicated their entire professional life to the Organization and its mission, is completely ruined by an act carried out by the Respondent and found to be unlawful”. The Tribunal indeed explained in the referred judgment how damage may be caused, often with irreversible effects, to a staff member who was never at fault, product of errors in judgment and procedure by managers. In an Organisation which praises human rights and the importance of fairness and equality, this untenable situation leads to a culture of impunity and should thus be urgently addressed.

The Internal Justice Council also drew attention to this problem in its 2017 report (A/72/210), by stressing that “management invariably adheres to a policy of ‘no rescission/no reinstatement’ irrespective of the strength of the winning staff member's case or the degree of manager misconduct or dereliction of duty determined by the Tribunal to have occurred”. The Council recommended to the General Assembly that

it “mandate that Tribunal judges may, in appropriate cases, order restoration/reinstatement and are not required to fix payment in lieu of such restoration in cases where the claimant has prevailed. The Assembly should also urge management to seriously consider reinstatement rather than automatically opting for the payment of compensation in lieu of restoring the staff member to his or her position”.

Most observers agree that the root of the problem lies in the systematic and sometimes impulsive approach taken by the Administration to forego an individual analysis of judgments and opt for the route of monetary compensation, regardless of the damaging effect on the staff member. Staff understand there can be warranted cases where operational and administrative obstacles may pose challenges for rescission of a decision. However, staff regrets the lack of a commitment from Management to establish measures and policies that will serve as clear guidelines for meditated decision-making on rescissions. In the absence of such guidelines, staff cannot accept the current reality that staff members will only ever receive monetary compensation and that justice will not be served in cases of appointment, promotion and termination. Clear policy guidelines are particularly urgent in cases of termination, as compensation cannot be considered fair when a long-serving staff member is wrongfully terminated and not reinstated.

Moving forward, we strongly urge Management to work with staff unions in establishing a policy framework for decision-making on cases requiring the rescission of wrongful decisions, as well as in exploring solutions to remove operational and administrative obstacles to rescinding wrongful decisions. Staff proposes creating a working group to put forward a draft policy on this matter, with concrete proposals for the Secretary-General.