ABHANDLUNGEN

Détournement de pouvoir in International Administrative Law

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Détournement de pouvoir is the French term frequently used in international administrative law to describe irregular motive, discrimination and such matters. In this broad connotation *détournement de pouvoir* is a ground for annulling decisions taken by international organizations in their relationships with staff members. This paper sets out to examine the cases decided by international administrative tribunals concerning *détournement de pouvoir* and the law pertaining thereto.

In general terms *détournement de pouvoir* requires that where powers are not exercised for the objects underlying the grant of such powers, the exercise of the powers must be declared tainted and, therefore, invalid. Where there has been such a misuse of power, tribunals have declared and are likely to declare the exercise of the power a nullity.

Détournement de pouvoir, as will be seen, covers not only malice, ill-

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Abbreviations: CJEC = Court of Justice of the European Communities; FAO = Food and Agriculture Organization of the United Nations; IAEA = International Atomic Energy Agency; ILO (AT) = International Labour Organisation (Administrative Tribunal); IPI = International Patent Institute; NATO = North Atlantic Treaty Organization; OECD = Organisation for Economic Co-operation and Development; OEEC = Organisation for European Economic Co-operation; PAHO = Pan American Health Organization; UN (AT) = United Nations (Administrative Tribunal); UNDP = United Nations Development Programme; UNESCO = United Nations Educational, Scientific and Cultural Organization; WB (AT) = World Bank (Administrative Tribunal); WHO = World Health Organization.

will and discrimination but any abuse of purpose or motive, so to speak. Also, it is not only where the written law expressly prohibits irregular motives[1] that tribunals will intervene but also where such prohibition could be implied in accordance with general principles of law. There has been no general discussion in the cases of the source of the doctrine of *détournement de pouvoir* where it has been applied in the absence of express written prohibition but it has nevertheless been held to be applicable[2] and the only reasonable conclusion appears to be that it derives from a general principle of law. Thus, arguably, the dimensions of and the limitations on the doctrine could be inferred by analogy from the form it takes in other legal systems and other areas of international law.

There are many facets to the principle of *détournement de pouvoir.* At this point it suffices to note that it is applicable not only to the exercise of administrative or executive discretionary power but also to legislative power, including the power of the organization to change conditions of employment where the organization has a discretion to do so. Thus, apart from the cases in which the legislative action of the organization or administration has actually been controlled by international administrative tribunals[3], in the *de Merode* Case the World Bank Administrative Tribunal made a general statement, in discussing the power of the organization to amend terms of employment, that where the power did exist because the terms of employment concerned were non-essential or less fundamental, such power was discretionary and such discretion was not unlimited nor absolute[4]. With particular reference to the discretionary power of amendment WBAT stated that:

> "The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing 'the highest standards of efficiency and of technical competence'. Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a

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[1] See the *Lasalle* Case, CJEC Case 15/63 (1964), p. 97.

[2] See the *de Merode* Case, WBAT Decision No. 1 (1981), at p. 22.; cf. C. F. Amerasinghe, The Implications of the *de Merode* Case for International Administrative Law, ZaöRV vol. 43 (1983), p. 1ff.

[3] See e. g. *Callewaert-Haezebrouck (No. 2),* ILOAT Judgment No. 344 (1978), *Sabbatini-Bertoni,* CJEC Case 20/71 (1972), p. 345.

[4] WBAT Decision No. 1 (1981), at p. 21.

reasonable manner seeking to avoid excessive and unnecessary harm to the staff"[5].

Much of this is no more nor less than an assertion that the doctrine of *détournement de pouvoir* applies to the power of discretionary amendment.

What was in issue in that case was the validity of amendments in the conditions of employment (rules applicable to the staff) made by the Executive Directors of the Bank, a policy-making and legislative arm of the Bank. In the outcome of the case, it was held that the discretionary power of the Bank to amend the rules relating to employment had not been abused in any way. Nevertheless, the tribunal did regard the discretionary legislative power of the Executive Directors as subject to the limitations mentioned above. Thus, it is not only to delegated legislative power exercised by the administration or management of an organization that the doctrine of *détournement de pouvoir* applies but also to the legislative powers of the highest legislative bodies of any organization. Indeed, some of the cases have annulled the exercise of discretionary power by the highest legislative organs[6].

A. Legislative Power

WBAT gave a broad description of how the doctrine of *détournement de pouvoir* would apply to legislative power in what was stated in the *de Merode* Case[7]. There were several points made in that statement in this regard. A misuse of power would occur:

(i) if there is an exercise of power for objects which do not underlie the grant of such power. This is so particularly where the reasons underlying the exercise of power are alien to the proper functioning of the organization. In the case of the World Bank the proper functioning of the organization included a duty on the part of the organization to ensure that it had a staff possessing the highest standards of efficiency and of technical competence;

(ii) if changes are not reasonably related to the objective which they are intended to achieve;

(iii) if changes are not made in good faith or are prompted by improper motives;

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[5] *Ibid.*, at p.22.

[6] See e.g. *Callewaert-Haezebrouck (No.2)*, ILOAT Judgment No.344 (1978), *Sabbatini-Bertoni*, CJEC 20/71 (1972), p.345.

[7] See above p.440.

(iv) if changes discriminate in an unjustifiable manner between individuals or groups within the staff.

These are the four components of *détournement de pouvoir* connected with legislative power described in that case. There are other requirements mentioned for a valid exercise of power but these do not relate to motive or object, as such[8].

In the *de Merode* Case itself, the point at issue was whether a change in the method of implementation of the principles of tax reimbursement which had not been changed and were basic to the operation of the Bank had been properly made. While the right of the staff members concerned to have reimbursed any taxes which they were required to pay was preserved and this was described as the basic principle of tax reimbursement, the method of calculating the actual amount of tax reimbursed (obviously over and above what the staff members were required to pay) was changed. The standard deduction method of calculation was replaced by the average deduction method. The tribunal regarded the power to change the method of calculating tax reimbursement as a discretionary power and held that there had been no misuse of power in the adoption of the change. In regard to irregular motive the tribunal, firstly, was satisfied that the objective of the Bank was not to reduce the income of a particular category of staff members by reason of their nationality (which would have amounted to discrimination) but to ensure a better functioning of the institution by a more equitable personnel policy (which was an objective germane to the proper functioning of the organization)[9]. Secondly, the tribunal found that there were no extraneous motives in the fact that the Executive Directors took into account the cost of the various systems and, after having assessed the advantages and disadvantages of each, decided to adopt the average deduction system[10]. Cost effectiveness was undoubtedly related to the efficient functioning of the organization. These two findings relate to discrimination and objectives not related to the grant of a power.

The *de Merode* Case is the only decided case in which there has been an extensive discussion of the general nature of *détournement de pouvoir* in relation to the exercise of legislative power. There have been other cases

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[8] In that context two others were mentioned, namely that (i) the changes must be based on a consideration of relevant facts (a substantive requirement), and (ii) the changes must be made in a reasonable manner so as to avoid excessive and unnecessary harm to the staff (a substantive requirement).

[9] *de Merode* Case, WBAT Decision No. 1 (1981), at p. 42.

[10] *Ibid.*, at p. 43.

decided by international administrative tribunals, however, in which the law relating to *détournement de pouvoir* as applied to legislative power has been explained and applied. But in general these cases have been concerned directly with issues of discrimination and inequality of treatment which are two particular examples of the application of the doctrine of *détournement de pouvoir.*

In *Callewaert-Haezebrouck (No.2)*[11] the applicant contested a Staff Regulation (Art.28 of Appendix IV) which opened membership of the sickness insurance scheme of the International Patent Institute to "wives" and made provision for a contribution of 25% from IPI in these circumstances. The applicant, a staff member of IPI, had applied to have her husband made a member of the insurance scheme but ultimately was compelled to pay the full costs of the insurance for her husband without a 25% contribution from IPI. The respondent contended that the text of the Staff Regulation, which had been adopted by IPI's Administrative Council applied only to wives of male staff members and not to husbands of female staff members and that therefore the applicant could not claim the benefit of the provision for her husband who was not a staff member of IPI. This provision, it was held, discriminated between male and female staff members, only the wives of male staff members being entitled to benefit from the insurance of their husbands. Such discrimination, the tribunal said, offended against the general principles of law, and particularly of the international civil service, and the application of a text which so discriminated could not be permitted.

In *Artzet*[12] the applicant claimed to be paid in pursuance of Art.13 of the Staff Regulations of the Council of Europe the allowance for heads of families and the allowance in respect of dependent children. The respondent refused her request to be treated as a head of a family because a resolution passed subsequently by the Council of Ministers of the Council of Europe had provided that whereas all male staff members who were married would be treated as heads of families, female staff members would be so treated only in three exceptional cases. The result was that even though the applicant was earning more than her husband she was not accorded the rights of a head of family. The Appeals Board of the Council of Europe held:

"In performing its function as a judicial body, the Board is obliged also to take into account the general principles which must prevail in the legal system of

[11] ILOAT Judgment No. 344 (1978).
[12] Council of Europe Appeals Board, Appeal No. 8 (1972).

international organizations. Furthermore, as an institution of the Council of Europe, the Appeals Board is also bound by the Statute of that Organization.

24. The absence of discrimination based on sex, and equal pay for workers of either sex constitute, at the present time, one of the general principles of law. Without wishing to go into the question of the national laws of member States of the Council of Europe, in particular that of the State in which the Council's headquarters are situated, the Board notes that Article 14 of the European Convention on Human Rights prohibits, in regard to the rights guaranteed by that Convention, any discrimination based on sex. Moreover, under Article 4, paragraph 3, of the European Social Charter, the Contracting Parties undertake 'to recognize the right of men and women workers to equal pay for work of equal value'.

Now both those texts were drawn up with a view to achieving the aim set forth in Article 1(b) of the Statute of the Council of Europe, one of the means of so doing being precisely the protection and development of human rights and fundamental freedoms. Again, under Article 3 of the Statute, every Member of the Council of Europe 'accepts the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms'.

The Board adds that the principle of the absence of discrimination based on sex is proclaimed both in Article 26 of the Universal Declaration of Human Rights and in Resolution 2263 (XXII) of the United Nations' General Assembly on the 'Elimination of Discrimination with regard to Women'.

25. The Board finds that the distinction of which the appellant complains constitutes a discrimination contrary to the principles set forth above. It follows that the Board cannot approve the disputed decision based on Resolution (69) 38, since that decision is compatible neither with the Statute of the Council of Europe nor with the general principles of law, whose legal weight is greater than that of the resolution in question"[13].

It is of importance that the tribunal applied general principles of law in finding the resolution objectionable and holding in favor of the applicant, although it did also refer to the Statute of the Council of Europe as a governing instrument.

In *Sabbatini-Bertoni*[14] the applicant who was awarded an expatriation allowance under Art.69 of the Staff Regulations subsequently married a person who was not an official of the European Communities. Thereupon she was informed that she would lose her right to an expatriation allowance

[13] Council of Europe Appeals Board, Appeal No. 8 (1972), at p. 88.
[14] CJEC Case 20/71 (1972), p. 345.

under a provision in the Staff Regulations which stated that "an official who marries a person who at the date of marriage does not qualify for the allowance shall forfeit the right to expatriation allowance unless the official thereby becomes a head of household". The applicant claimed that this provision was discriminatory on the basis of sex, contrary to a general principle of law and, therefore, invalid. The tribunal found that the term "head of household" referred, according to Art. 1(3) of Annex VII to the Staff Regulations, to all male officials but to female officials only in certain exceptional circumstances, in particular in cases of invalidity or serious illness of the husband. It was thus clear that the provision the validity of which was contested did in fact compel a difference of treatment as between male and female officials inasmuch as it rendered the incidence of the expatriation allowance conditional upon the acquisition of the status of head of household within the meaning of the Staff Regulations. The tribunal examined the nature of the expatriation allowance and came to the conclusion that the allowance was intended to compensate for the special expenses and disadvantages resulting from entry into service of the Communities for those officials who were thereby obliged to change their place of residence but that it was paid to married officials not only in consideration of the personal situation of the recipient but also of the family situation created by the marriage. It was held that, while the withdrawal of the allowance following the marriage of the recipient might be justified in cases in which the change in the family situation was such as to bring to an end the state of expatriation which was the justification for the benefit in question, officials could not be treated differently according to whether they were male or female, since termination of the status of expatriate must be dependent for both male and female officials on uniform criteria, irrespective of sex. Consequently, since the retention of the allowance was subject to the retention of the status of head of household as defined in the Staff Regulations, an arbitrary difference of treatment between officials had been created and the provision requiring the withdrawal of the allowance was struck down. In *Chollet-Bauduin*[15] on similar facts the Court of Justice of the European Communities came to the same conclusion.

These four cases which are the only cases in which legislative provisions have been declared invalid on the ground of discrimination were all concerned with provisions whose effect was to make arbitrary differences on the basis of sex. No case has been found in which a legislative provision has

[15] CJEC Case 32/71 (1972), p. 363.

been declared invalid on any other ground of discrimination as such. Nor are there any cases in which legislative provisions have been found tainted because of some other kind of abuse of purpose.

There are several cases in which the issue of discrimination in legislative provisions has been raised but tribunals have held that there was no discrimination. These cases give some indication of the approach taken by tribunals to the application of the concept of discrimination. They were decided by the ILO Administrative Tribunal, the Council of Europe Appeals Board and the CJEC.

In *Taylor-Ungaro*[16] the applicant, of Irish nationality, who had non-local status and was in grade G3 in the Food and Agriculture Organization married a member of the local staff and with effect from the date of her marriage was told that she had lost her non-local status and must return her commissary card and identity card in accordance with the Staff Rules. The applicant contended that the Staff Rule in question discriminated on the basis of sex and category. ILOAT held that the Staff Rule did not discriminate on the basis of sex or category. In *Tarrab*[17] the issue was whether a decision of the Governing Body of ILO raising the family allowances of General Service category officials to 2040 Swiss francs per annum at the top of the scale was valid. The applicant contended that all those in the Professional category like himself received only a fixed allowance of US$ 450 or 1147 Swiss Francs and that consequently the decision of the Governing Body discriminated against officials in the Professional category. The tribunal held that there was no discrimination by category. It explained:

> "There is a reason for the difference. G Staff are recruited largely in Switzerland or neighbouring countries. It is therefore only right that as an incentive to recruitment their pay, including family allowances, should be in line with pay scales in Switzerland. Officials in other categories, however, may come from and be required to serve anywhere in the world. For them there is no reason to follow pay scales in Switzerland, and the ILO takes as its standard of comparison the best-paid national civil service. Consequently, the allegation of unlawful discrimination fails"[18].

Thus, these cases support the proposition that reasonable differences or distinctions could be made between categories. As was stated in the *de*

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[16] ILOAT Judgment No. 167 (1970).
[17] ILOAT Judgment No. 498 (1982).
[18] ILOAT Judgment No. 498 (1982), at p. 4.

Merode Case, it is only discrimination in an unjustifiable manner between individuals or groups that can be impeached[19].

In *Seguin*[20] the applicant, a British national and a staff member of the secretariat of the Council of Europe, married a French national and became a French national automatically under the French Nationality Code. She was advised that she was no longer entitled to her expatriation allowance, because under the relevant resolution an allowance was payable to staff members in her grade only if they were nationals of a country other than France and did not have French nationality under French law. The applicant contended that the Staff Regulations were discriminatory on the basis of sex and therefore, among other things, violated a general principle of law. The Appeals Board held that the reason why she was refused the expatriation allowance lay solely in the application of a provision in the French Nationality Code in force at the time of her marriage and that therefore the regulation complained of contained no discrimination based on sex.

In *Pasetti-Bombardella*[21] the applicant who had held a post in grade A3 in the European Communities was retired with his consent under a regulation passed in 1968. By this regulation the right to certain allowances and retirement terms which were granted by Art.42 of the Staff Regulations (1956) to staff members in grades A1, A2 and A3 who were retired in the interests of the organization were taken away from a certain category of staff members in grade A3. The applicant contended that the new regulation of 1968 in so far as it did not preserve for officials in grade A3 the same retirement rights as were preserved for officials in grades A1 and A2 was discriminatory against officials in grade A3. The CJEC held that the category of officials in grade A3 who were affected could not hope to have the same rights as those granted to officials in grades A1 and A2, because the Staff Regulations of 1962 had no longer provided with regard to the former either for retirement or for the financial scheme following thereon:

> "In according different treatment to situations which were not comparable the regulation of 1968 had not introduced a discrimination. On the contrary, if the regulation had accorded to officials in Grade A3 the right claimed by the applicant it would have discriminated against officials in Grades A1 and A2, who, whilst having the same financial treatment, would have had reduced guarantees, and against other officials below Grade A3 in service before 1962 who, whilst

[19] WBAT Decision No. 1 (1981), at p. 22.
[20] Council of Europe Appeals Board, Appeal No. 32 (1974).
[21] CJEC Case 20/68 (1969), p. 235.

having the same guarantees, would have had a less favorable financial scheme"[22].

The true reason for the distinction, it was held, was that the Council had taken into account the different positions under the Staff Regulations of different categories of officials. In *Jänsch*[23] the applicant, who was an official occupying a post in the field of nuclear science calling for scientific or technical qualifications but was not paid out of appropriations in the research and investment budget claimed that he should be subject to the same procedure for promotion as those paid out of such appropriations which were in operation as a result of a provision in Art.92 of the Staff Regulations which made such officials subject to the special promotion procedure. He contended that Art.92 was discriminatory and contrary to the principle of equality between officials inasmuch as it favored those who were paid from appropriations in the research and investment budget. The Court pointed out that those paid out of the research and investment budget were on fixed term programs (five years) and the fact that the term was fixed for those programs caused a certain insecurity to the officials assigned to them; thus, it was not unfair that they should be accorded certain advantages in regard to salary and promotion; in view of the fact, therefore, that budgetary constraints, the organization of community research and the position of officials assigned to it made the difference necessary, Art.92 was based on objective criteria and was not discriminatory. In *Bellintani et al.*[24] the applicants had not been offered indefinite contracts because they had not been placed in Category B. The relevant Staff Regulation provided that only those in Category B would be entitled to indefinite contracts, those not in such category being entitled to fixed term contracts. The applicants had not been placed in Category B, because only the seven officials at the head of the list at the time the reorganization was done were placed in such category, although they were all laboratory technicians and did similar work. The applicants claimed that the Staff Regulation was discriminatory against them, since it only gave officials in Category B the right to indefinite contracts. The CJEC held that the applicants could not claim a right to appointment in Category B, although they may possibly aspire to such appointment, and that, therefore, they could not rely on the principle of non-discrimination in order to create

[22] *Ibid.*, at p. 245.
[23] CJEC Case 5/76 (1977), p. 1817.
[24] CJEC Case 116/78 (1979), p. 1585.

such a right. In *Buyl*[25] the issue of the rate of exchange for remuneration was before the CJEC. The legislature of the communities had decided that a difference should be made in this regard between pensioners and serving officials. The CJEC held that this was not discrimination because the situation of a serving official differed considerably from that of a pensioner. Identical treatment of the two categories was not essential.

In some cases the concept of inequality of treatment has been invoked as a ground for proposing the annulment of a legislative instrument. This is similar to the principle of non-discrimination. Broadly speaking, this is an argument that those in similar circumstances in fact and in law should be given the same treatment. The principle has been accepted by tribunals but there are no cases in which legislative provisions have been overturned on the basis of such an argument as opposed to discrimination, as such. There are cases, however, in which the issue has been raised and discussed and tribunals have found that there has been no inequality of treatment under the legislative provisions. These cases were decided by the UN Administrative Tribunal, ILOAT and the CJEC.

In *Mullan*[26] the applicant claimed that Staff Rule 107.5 (a) of the UN, in so far as it permitted the payment of a husband's travel expenses on home leave only if he was dependent, while the same Staff Rule enabled payment of a wife's travel expenses, whether she was dependent or not, established a distinction on the basis of sex which was contrary to the principle of equal conditions of employment enunciated in the Charter of the UN and embodied in a fundamental principle of law. The tribunal observed that the Staff Rule was based on the assumption that wives were always dependent but that changes had occurred which made this assumption not necessarily correct; thus the rule could appear to be contrary to the principle of equal conditions of employment found in the Charter and in general principles of law; however, the Staff Rule which entitled a woman staff member to payment of her husband's travel expenses only if he were dependent was not affected by the fact that the same rule enabled payment of travel expenses for a staff member's wife, whether dependent or not, because it was consistent with the Staff Regulations adopted by the General Assem-

[25] CJEC Case 817/79 (1982), p. 245. Identical cases where the decisions were the same were *Adam*, CJEC Case 828/79 (1982), p. 269, and *Battaglia*, CJEC Case 1253/79 (1982), p. 297.

[26] UNAT Judgment No. 162 (1972).

bly under Art. 101 of the Charter[27]. In *Mendez*[28] the applicant argued that the fact that language incentives which applied to regular UN staff were not applicable to UNDP staff was a violation of the general principle of equal treatment. The tribunal held that inasmuch as UNDP staff members were distinguished from regular UN staff members in their letters of appointment and under the Staff Rules as well as in regard to the formula for geographical distribution, their being distinguished also for the purpose of language incentive entitlements could not be deemed a violation of the principle of equality among staff. The tribunal recalled the dictum that:

> "The principle of equality means that those in like case should be treated alike, and that those who are not in like case should not be treated alike"[29].

In *Malic*[30] ILOAT was confronted with a situation in which the applicant who had joined the staff of IPI before January 1, 1972 had, firstly, been refused an additional bonus under the new Staff Rule 21 applicable to those who joined the staff after that date and provided for the payment of up to four seniority bonuses on recruitment. Secondly, because he had received only two bonuses, he had been refused an additional bonus also under a transitional measure which permitted the payment of a fourth bonus to staff members who had received three under the old Staff Rules but would have deserved one more if the new Staff Rule had been effective at that time. ILOAT held that both texts did not violate the principle of equality of treatment. In regard to the first contention it said:

> "The rejection of the complainant's application for an extra bonus does not violate the principle of equal treatment. That principle, which is laid down in Rule 5 of the new Staff Rules and which would be applicable even in the absence of the specific provision, is intended to ensure that persons who are in similar circumstances in fact and in law are put on the same legal footing. At the time of his recruitment and of the confirmation of his appointment, however, the complainant was subject to the former Staff Rules and was therefore in a different position from staff members recruited under the new Staff Rules after 1 January 1972. Consequently, the complainant did not suffer unequal treatment in relation to staff members appointed later because he was not in the same position as they were.
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> There is no contradiction in the fact that all staff members, whatever the date

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[27] The reasoning is not clear. This seems to be a difficult case to reconcile with reasonable principle.

[28] UNAT Judgment No. 268 (1981).

[29] UNAT Judgment No. 268 (1981), at p. 15.

[30] ILOAT Judgment No. 202 (1973). See also *Hakin (No. 2)*, ILOAT Judgment No. 217 (1973).

of their appointment, enjoy the benefits of the family allowances provided under new Staff Rule 41, even though new Staff Rule 21 is applied only to staff members appointed since 1 January 1972. To grant family allowances on the basis of Staff Rule 41 to the whole staff merely means applying that Rule normally to situations existing after it came into force. To grant the complainant an extra bonus under Staff Rule 21, on the other hand, would mean giving retroactive effect to that Rule in preference to the Rules that were applicable at the time"[31].

On the second issue the tribunal stated:

"Moreover, the Administrative Council's decision does not violate the principle of equal treatment. In the first place it is quite conceivable that a staff member who received three bonuses under the former system might have been in a position to claim a fourth had the new Rules been applicable. Secondly, this possibility was not open to staff members who, like the complainant, had not reached the upper limit of three bonuses at the time of recruitment. It follows that the aforesaid decision did not deal differently with similar situations in violation of the principle of equal treatment"[32].

In *Elsen and Elsen-Drouot*[33] the applicants, husband and wife, were both on the staff of the European Patent Organization (EPO). They received an expatriation allowance of 16% of basic salary each under the Staff Rules, whereas spouses of whom only one was on the EPO staff received 20% of basic salary under the Staff Rules. They contested the validity of the Staff Rule applicable to them on the ground that it violated the principle of equality. ILOAT held that:

"The principle of equality means that where the facts are the same the treatment is the same. Spouses who are both on the EPO staff are not in the same position as spouses of whom only one is on the EPO staff, and a difference in treatment is therefore warranted. It is clear that two allowances amounting to 16 percent of the basic salary make up for the disadvantages of expatriation just as well as a single allowance amounting to 20 percent. The plea based on unequal treatment therefore fails"[34].

In *Walsh*[35] the applicant claimed from FAO the non-resident's allowance and home leave benefits which she had been denied on the ground that the recruitment policy of FAO envisaged under the Staff Rules was contrary to the principle of equality. She had been employed before January 1, 1975

[31] ILOAT Judgment No. 202 (1973), at pp. 4–5.
[32] *Ibid.*, at p. 5.
[33] ILOAT Judgment No. 368 (1979).
[34] *Ibid.*, at p. 7.
[35] ILOAT Judgment No. 484 (1982).

but had been classified as "local staff". She complained that whereas those recruited after that date were all local staff the Staff Rules made an unfair distinction among those recruited before that date in permitting her to be classified as "local staff". The Tribunal held:

> "The rule says that a non-local staff member is a staff member in the General Service category who was recognized at January 1975 as a non-local staff member under the Staff Rules then in force and has since remained in continuous service. *A contrario*, a General Service category staff member who does not fulfil the conditions in Staff Rule 302.40631 has local status.
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> It is mistaken to argue that the FAO's recruitment policy violates the principle of equality. Staff Rule 302.40631 does, by implication, prescribe local status for all General Service category staff appointed on or after 1 February 1975, and so puts them on a par. But it is to be read together with Staff Rules 302.7111(i) and (vi) and 302.3091 and Staff Regulation 301.16, which allow for the grant of special benefits to such staff when required in order to recruit them. Thus the Staff Rules make a distinction between groups of General Service category staff members. The desirability of the distinction may be open to question, but it is enough to defeat any allegation of inequality"[36].

The CJEC decided some cases which involved allegations that legislative provisions created a condition of inequality. In *Bode et al.*[37] the applicants claimed that a Staff Regulation which did not provide for the adjustment of salaries according to the par value of the currency of the State of which they were nationals resulted in unequal treatment because the purchasing power of their salaries in their national States was less than those of staff members of other nationalities. The CJEC rejected the contention, stating that:

> "However the principle which has been invoked has been expressed in the Staff Regulations to the effect that all Community officials employed in the same place are paid in the same currency and according to a uniform scale whatever their nationality and regardless of the fact that they spend their salary in their place of work or elsewhere. No doubt, the salary may represent a different purchasing power according to where it is spent. These differences stem from a large number of economic and social circumstances which are peculiar to these different places and of which the par value of the national currency is only one of the possible factors. Therefore an automatic adjustment according to the changes in the par value of the currencies of Member States, such as is envisaged by the applicants, would, as regards other officials who have to bear the consequences of other fluctuations in purchasing power which are less obvious but

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[36] *Ibid.*, at p. 8. See also *Young*, ILOAT Judgment No. 484 (1982) for a similar decision.
[37] CJEC Cases 63 to 75/70 (1971), p. 549.

just as substantial, constitute a discriminatory advantage incompatible with the principle which has been invoked"[38].

In *Brandau*[39] what was in issue was whether a Staff Regulation which gave the administration the discretion to determine who was a dependent child for the purpose of entitlement to family allowances was in violation of the general principle of equal treatment for officials, because it implied that distinctions could be made. The CJEC held that:

"This discretion on the part of the administration, which is essential to enable it to take account of the manifold unforeseeable facts peculiar to each case, is not incompatible with the general principle, relied on by the applicant, of equal treatment for officials.

This general principle does not mean that, in applying the provision concerned, the administration must merely carry out a mechanical application of predetermined rules and criteria.

Such an interpretation would conflict with the need for evaluation of the often complicated factual considerations peculiar to each individual case"[40].

In *Hochstrass*[41] the CJEC stated that the principle of equality of treatment requires that comparable situations should not be treated differently unless such differentiation is objectively justified and held that a regulation which restricted the foreign residence allowance to certain officials on the sole basis of nationality did not result in unequal treatment of the applicant. In *Vutera*[42] similarly, a regulation which concerned the award of an expatriation allowance was upheld on the ground that there was no inequality of treatment.

These decided cases involving issues of discrimination or inequality of treatment in which the applicants have failed to upset the legislative provisions attacked show that distinctions may be made which are reasonable. It will depend on the rationale of the difference made between groups or categories whether a particular distinction is going to be accepted or rejected by an international administrative tribunal. These cases illustrate that there are many situations in which differences and distinctions can be held to be reasonable and therefore objectively justified.

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[38] CJEC Cases 63 to 75/70 (1971), at pp. 555–556.

[39] CJEC Case 46/71 (1972), p. 373.

[40] See also *Moulijn*, CJEC Case 6/74 (1974), p. 1287, where the requirements laid down in an implementing provision of the Staff Rules was held not to lead to inequality of treatment in determining who was to be treated as a dependent child for the purpose of family allowances.

[41] CJEC Case 147/79 (1980), p. 3005.

[42] CJEC Case 1322/79 (1981), p. 127.

B. Administrative Power

1. Discrimination and Inequality of Treatment

There are numerous cases in which tribunals have held that administrative decisions in the application of legislative provisions and execution of policy were discriminatory or involved inequality of treatment. These cases were decided by ILOAT, the CJEC and the Appeals Board of NATO.

In *Rabozee*[43] the issue was whether the application of the Service Regulations of Eurocontrol was legal. The case concerned an administrative decision relating to a refund for medical expenses under an insurance scheme where the sick person was the spouse of a female staff member. The organization was of the view that the applicant's husband was not entitled to the refund because he was gainfully employed, while it would have allowed the refund to the wife of a staff member in the same position. The Tribunal held that the applicant was correct in contending that her husband was entitled to the refund as her spouse. The provision, according to the general principles of law, was applicable irrespective of the sex of the official.

The Appeals Board of NATO was presented with two cases in which discrimination on the basis of nationality was alleged. In one case, *Kermabon*[44] all French nationals had their appointments terminated. The tribunal held that the NATO Civilian Personnel Regulations did not permit a discriminatory interpretation and that such a decision to terminate all the nationals of a particular nationality was invalid. In the other case, *Ferrier*[45] the issue was whether the appointment of a senior local officer could be terminated because the administration decided that the position should be held by someone possessing a different nationality. The tribunal held that this was discriminatory treatment and that the NATO Civilian Personnel Regulations did not permit such discrimination.

In *Reinarz*[46] the CJEC was faced with a similar situation as the Appeals

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[43] ILOAT Judgment No. 264 (1975).

[44] NATO Appeals Board, Decision No. 7 (1968).

[45] NATO Appeals Board, Decision No. 65(a) (1975).

[46] CJEC Case 17/68 (1969), p. 61. See also *Lasalle*, CJEC Case 15/63 (1964), p. 57, where the requirement that a candidate should have a knowledge of Italian which was included because it was intended to promote an Italian, the nationality being under-represented, at the relevant level, was held to be discriminatory and invalid. This case was

Board of NATO was in *Ferrier*. The appointment of a director was terminated during the rationalization of the administration because the administration desired to reserve a post which he could have filled for a particular nationality. The CJEC held that the Staff Regulations of the European Communities expressly prohibited the reservation of posts for members of specific nationalities and that therefore the actions of the administration were invalid. This was a case where the Staff Regulations expressly prohibited the kind of discrimination faulted. In *Ariola*[47] the CJEC was confronted with an administrative decision to deny the applicant who had acquired dual nationality by operation of law on marriage an expatriation allowance, in the application of a provision of the Staff Regulations. The Court pointed out that if the administrative decision were upheld, the application of the provision concerned would be discriminatory on the basis of sex, since under no national law did a male official automatically acquire the nationality of his wife. Hence the regulation could not be applied in this manner. It had to be interpreted so as to avoid discrimination based on sex. The concept of expatriation had to be defined by considerations which were uniform and disregarded the difference in sex. In *Van den Broeck*[48] a similar case, the applicant acquired her husband's nationality though she could have renounced it. The CJEC held that the fact that the applicant could have renounced her husband's nationality made a difference and that therefore denying her the expatriation allowance was not discriminatory. In *Newth*[49] the applicant contended that the payment of an allowance due on premature termination of service after weighting by reference to the last place in which he had worked was prejudicial to him because he intended to reside in Brussels and he had been recruited in Brussels and therefore received less than a person who had last worked in Brussels. The CJEC held that the payment of the allowance under Art.50 of the Staff Regulations had to be done in such a way as to avoid discriminatory treatment among officials whose circumstances were similar, so that the action of the administration was improper.

There are a few cases in which inequality of treatment rather than discrimination has been referred to as the basis for overturning the adminis-

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distinguished in *Serio*, CJEC Case 62/65 (1966), p. 813, on the ground that it related to promotion whereas Serio's case concerned initial appointment. For *Serio's* Case see below note 59.

[47] CJEC Case 21/74 (1975), p. 221.

[48] CJEC Case 37/74 (1975), p. 235.

[49] CJEC Case 156/78 (1979), p. 1941.

trative decision. The emphasis has been placed on achieving equality of treatment among persons in similar positions. In *Hérouan*[50] Staff Regulation 63 of the IPI provided that staff members may require that part of their remuneration be regularly transferred to a bank account in their home country. In 1972 the IPI received a circular from the Ministry of Finance of France requiring that all transactions concerning wages and salaries should in future be conducted in financial francs. After the financial franc account of the Institute was exhausted, the application of Staff Regulation 63 to French nationals was withdrawn. It was held by ILOAT that this action of the administration violated the principle of equal treatment for staff members who were on a similar legal footing in relation to the Institute. In *Hoefnagels*[51] special action which went beyond the requirements of the new Staff Regulations was taken by FAO to give certain staff members non-local status. The applicant alleged that the same action had not been taken in respect of the applicant who was in the same position as the staff members who had benefitted by the action taken. The tribunal held that the principle of equality of treatment had not been respected and that the applicant was entitled to non-local status[52]. In *Louwage*[53] the applicant was not paid a daily subsistence allowance in accordance with a directive of the administration which, however, was not a Staff Regulation or Rule. The CJEC held that the directive, although it did not have the character of a rule of law which the administration was always bound to observe, nevertheless set forth a rule of conduct indicating the practice to be followed, from which the administration could not depart without giving adequate reasons for that departure, since otherwise the principle of equality of treatment could be infringed. In *Arnback*[54] the tribunal was confronted with the interpretation, in relation to allowances payable, of the text of a report which made equal pay possible. It held that the text which permitted the payment of allowances at different rates should be interpreted in such a way as to avoid inequality of treatment between staff members whose spouses were employed by a coordinated organization and those whose spouses were gainfully employed elsewhere. An administrative decision which did not do this was subject to annulment.

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[50] ILOAT Judgment No. 220 (1973).

[51] ILOAT Judgment No. 506 (1982).

[52] See also *Connolly-Battisti (No. 4)*, ILOAT Judgment No. 294 (1977), which concerned the denial of salary increments by FAO. It was held that the regulations concerned had to be interpreted and applied so as not to cause inequality of treatment.

[53] CJEC Case 148/73 (1974), p. 81.

[54] ILOAT Judgment No. 212 (1973).

Compared to the number of cases in which administrative decisions were upset on the ground of discrimination or inequality of treatment, the cases in which no discrimination or inequality of treatment in the implementation of administrative decisions was found are numerous. ILOAT examined the issue of discrimination in *Zamudio*[55] in 1973. There the allegation was that several sanctions had been imposed on the applicant because of his nationality. The Tribunal held that the allegation had not been proved but that it was established by the documents in the dossier that the decision impugned was based on the way in which the applicant performed his duties and that it was not based on incorrect facts nor was a misuse of authority. The tribunal conceded that it would have been discrimination if the policy of the organization aimed at the exclusion of certain persons as a matter of principle on account of their nationality, race or opinion[56]. In *Foley*[57], as in *Hoefnagels,* an application was made contesting the classification of the applicant as having non-local status under the staff regulations. The staff regulations in this case gave the FAO the option of regarding re-employment as reinstatement. The applicant contended that she was not reinstated with non-local status when re-employed, while another staff member who had been re-employed earlier in 1974 had been given non-local status on the basis that she had been reinstated. The tribunal found that in the case of the latter staff member, she had been given reason to think that there were good prospects of a conversion to non-local status whereas in the case of the applicant she had been told that her re-employment would be on a local basis. It was held that the particular circumstances justified a distinction – so that the discrimination was not arbitrary and culpable. Distinctions may be made in the exercise of a discretion under a policy if there are sufficient grounds for them. In *Serio*[58] the applicant alleged that there was discrimination against him on the basis of nationality because knowledge of a particular country's national laws was made a requirement for recruitment. The CJEC held that this was not a discriminatory act of the administration because the work involved in the job for which recruitment was being made necessitated a special knowledge of the law of the country which was specified as a

[55] ILOAT Judgment No. 212 (1973).

[56] See also *Haghgou,* ILOAT Judgment No. 421 (1980), where reduction in staff was made because of the financial condition of the organization. The allegation that the applicant had been discontinued because of his nationality was held to be not proven.

[57] ILOAT Judgment No. 452 (1981).

[58] CJEC Case 115/73 (1974), p. 341.

requirement[59]. There were two cases concerned with the organization of tests in which discrimination was alleged. One alleged that the date for the examination was fixed so as to fall on a day on which the applicant was not permitted to work because of his religious convictions[60]. It was held that the date was fixed before the religious problems were brought to the attention of the administration so that this action could not be impeached. In the other case[61] it was held that the allegation that the competitions were organized, not in the interests of the service but for the purpose of advancing certain specific candidates, was not proven on the facts. It has also been held that the mere choice of a candidate on the basis of achieving geographical distribution does not mean that there has been discrimination against those not appointed[62]. Actual discrimination would have to be proved by reference to other facts in such a case. On similar grounds to those found in the cases referred to above in which knowledge of a specific national law was required for a certain position, it has been held that making the knowledge of a particular language a requirement for a particular position was not necessarily discriminatory, if the work involved in the job genuinely required the knowledge of that language[63]. In *Salerno et al.*[64] the administration refused to accept a certificate of a certain college in Europe as evidence of practical experience, although in the case of certain other candidates such a certificate had been accepted. It was held that this was not discriminatory because in the case of the other candidates other considerations were present in addition to such certificate to provide evidence of the practical experience required.

There are many cases in which administrative decisions have been contested on the basis of inequality of treatment but have been upheld on the ground that there has been no inequality of treatment. Basically the principle applied is that which has been stated earlier and which was aptly restated in *Los Cobos and Wenger,* a case decided by ILOAT:

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[59] See also *Kurrer,* CJEC Case 33/67 (1968), p. 187. In an earlier case, *Serio,* CJEC Case 62/65 (1966), p. 813, it was held that in order to secure geographical distribution a particular nationality could be selected after the examinations without the administration's action being discriminatory. This was a case of recruitment and was distinguished from *Lasalle:* see note 46 above, on the ground that the latter case was one of promotion. Hence, it would seem that the difference between the two cases lies in the fact that there was no reservation of the post for a particular nationality in *Serio.*

[60] *Prais,* CJEC Case 130/75 (1976), p. 1589.

[61] *Campogrande et al.,* CJEC Case 112, 144 and 145/73 (1974), p. 957.

[62] *Reinarz,* CJEC Case 55/70 (1971), p. 379.

[63] *Küster,* CJEC Case 79/74 (1975), p. 725, and *Küster,* CJEC Case 22/75 (1975), p. 277.

[64] CJEC Case 4, 19 and 28/78 (1978), p. 2403.

"The principle of equality means that those in like case should be treated alike, and that those who are not in like case should not be treated alike. It is not violated if officials in different circumstances are treated differently"[65].

In all the decided cases the applicants generally failed to show that they were in similar circumstances to those in relation to whom they claimed they were discriminated against.

In *Mahmoud*[66] the claim was that there had been unequal treatment based on sex or because the applicant was married to an official of UNESCO. It was held that there was no evidence of such inequality of treatment. The subsistence allowance which was in issue clearly had not been denied to the applicant on these grounds.

In *Khelifati*[67] it was alleged that while disciplinary action was taken against the applicant for drunkenness no such action had been taken against others who had also been found drunk. ILOAT held that even if this were proven, it would not violate the principle of equality of treatment because the principle did not apply to "officials against whom disciplinary action has been or may be taken for different reasons and in different circumstances"[68]. What this means is that the applicant would have had to show that the others had been placed in similar circumstances and that there were no different reasons for the action taken against him. In some cases questioning the failure to promote an applicant it has been held that the principle of equality is not absolute but must be applied to persons in similar situations only. Thus the application of different criteria to promotion may be based on administrative reasons which could result in differences in treatment[69]. In *Tarrab (No. 8)*[70] the issue was whether the requirement of a language qualification and special knowledge of social security for a particular appointment resulted in inequality of treatment. It was held that where the nature of the job makes special qualifications necessary these may be required. This case is similar to the CJEC case[71] referred to above

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[65] ILOAT Judgment No. 391 (1980), at p. 9.

[66] UNAT Judgment No. 279 (1981).

[67] ILOAT Judgment No. 207 (1973).

[68] *Ibid.*, at p. 6. In *Houghton-Wollny*, ILOAT Judgment No. 481 (1982), disciplinary action – deduction from salary – was not shown to have resulted in unequal treatment.

[69] See *Ledrut and Biggio*, ILOAT Judgment No. 300 (1977) and *Schmitter*, ILOAT Judgment No. 301 (1977). In *Tyberghien*, ILOAT Judgment No. 347 (1978), the applicant could not prove that he was of equal merit to those who had been promoted. Hence there had been no inequality of treatment.

[70] ILOAT Judgment No. 524 (1982).

[71] See note 63 above.

in which the argument was framed in terms of discrimination. In three cases[72] the issue was whether the non-payment of expenses on initial appointment resulted in unequal treatment. It was held that there was no breach of the principle of equality because those who had had their expenses paid were in a different situation. They had special skills, such as the knowledge of Chinese or Arabic, they were to do specialized work, they had been invited to join the staff and did not volunteer their services like the applicants or they received offers of employment while they were resident abroad. It has been held that those who commuted their pensions did not have to be treated in the same way as those who took a repayment of their contributions to the pension fund in regard to the reimbursement of taxation[73]. An applicant whose job required 44 hours a week but whose contract stipulated that he should work 40 hours a week so that he was paid at overtime rates for the extra four hours a week did not, when the number of hours of work for all was reduced to 40 hours a week, have a right to be treated in regard to compensatory measures like those whose contracts required them to work 44 hours a week[74]. Some categories of officials may be exempted from reductions in remuneration while others are not, if there is good reason for the distinction between categories, as where experts who were paid out of funds obtained from outside the organization, General Service category staff in the field offices whose remuneration was lower or who were in a special social situation and those who voluntarily helped to ease the financial burden of the organization were exempted from reduction in salary[75]. Distinctions and differences between categories of persons have been allowed as valid in respect of changes of salary scale resulting in a lower increment on promotion[76], in respect of compensatory measures in regard to reduced contributions to a pension fund as a result of reduced remuneration[77], in respect of the extension of education benefits[78], and in respect of the refusal to grant non-local status as a result of the non-retroactive application of a new staff rule[79].

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[72] *Alexson,* ILOAT Judgment No. 483 (1982), *Walsh,* ILOAT Judgment No. 484 (1982) and *Young,* ILOAT Judgment No. 485 (1982).

[73] See *Settino,* ILOAT Judgment No. 426 (1980) and *Alonso,* ILOAT Judgment No. 514 (1982).

[74] See *Guthapfel,* ILOAT Judgment No. 490 (1982) and *Berthet,* ILOAT Judgment No. 491 (1982).

[75] *Los Cobos and Wenger,* ILOAT Judgment No. 391 (1980).

[76] *de Gregori,* ILOAT Judgment No. 409 (1980).

[77] *Etienne,* ILOAT Judgment No. 492 (1982).

[78] *Delhomme,* ILOAT Judgment No. 518 (1982).

[79] *Clegg-Bernardi,* ILOAT Judgment No. 505 (1982).

In *Worsdale*[80] the Council of Europe Appeals Board decided that the granting of extra incremental steps within their grade only to new appointees because of proficiency in a language required for their work did not result in the unequal treatment of those who were already in service and acquired similar knowledge of a language. In *Salancon et al.*[81] the NATO Appeals Board held that the application of a reduction in expatriation allowance to certain grades of staff members in certain circumstances did not result in the violation of the principle of equality of treatment.

There have been many cases decided by the CJEC in which it has been alleged that the administration has been guilty of inequality of treatment, but the Court has decided that there was no violation of the principle of equal treatment. In *Devred*[82] which may be compared to *Ariola,* discussed earlier, the applicant argued that she had been deprived of her expatriation allowance because she had acquired another nationality on marriage. The CJEC found in this case that according to the law under which she had acquired the new nationality, she had the right to renounce that nationality, which was not the case in *Ariola,* and that, therefore, there was no inequality of treatment between the sexes in depriving an official of her expatriation allowance in the circumstances of the case. *Gillet*[83] and *Woehrling*[84] also concerned benefits or allowances. The former case involved differences in weighting the currency of payment of benefits, which depended on the living conditions in the various places of employment. The latter concerned the interpretation of a regulation which doubled the education allowance depending on the distance of the educational establishment from the residence of the official. In both cases it was held that the administrative decisions did not violate the principle of equality of treatment. There are also a few other cases decided by the CJEC concerned with procedures connected with appointments and promotions in which it was held that on the facts there had been no infringement of the principle of equality of treatment[85]. In these cases, categorization for promotion, the awarding of points for promotion, the drawing up of a list of suitable

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[80] Council of Europe Appeals Board, Appeals Nos. 48/1978 and 49/1978 (1980).

[81] NATO Appeals Board, Decision No. 80 (1977).

[82] CJEC Case 257/78 (1979), p. 3767 (*Kenny-Levick-Devred*).

[83] CJEC Case 28/74 (1975), p. 463.

[84] CJEC Case 164/78 (1979), p. 1961.

[85] See *Besnard et al.,* CJEC Case 55 to 76, 86, 87 & 95/71 (1972), p. 543, *de Wind,* CJEC Case 62/75 (1976), p. 1167, *Agneessens-Claes et al.,* CJEC Case 122/77 (1978), p. 2085, *Guglielmi,* CJEC Case 268/80 (1981), p. 2295, *Bakke d'Aloya,* CJEC Case 280/80 (1981), p. 2887.

candidates by a selection board, the method of administration of tests and the testing of shorthand skills for promotion which involved the making of differences affecting the respective applicants in each case were held to be objectively justified so that the resulting disadvantages to the applicants could not be characterized as inequality of treatment. The granting of leave on personal grounds[86], the adoption of systems of taxation[87], the adoption of particular exchange rates for the reimbursement of medical expenses[88], and the organization of administrative units[89] have also been questioned on the grounds that they resulted in inequality of treatment, but the CJEC has held that the principle of equality of treatment had not been infringed in these cases because the differences made were not unreasonable, although they placed the applicants at some disadvantage.

2. Détournement de procédure

Détournement de procédure which is a special case of *détournement de pouvoir* occurs where the organization has recourse to one procedure for taking a decision in a situation where another procedure is in law applicable, with the result that the applicant is deprived of safeguards afforded by the other procedure. The usual example is where an official is dismissed for unsatisfactory services in a situation in which the object was to punish alleged misconduct without applying the appropriate disciplinary procedure. Here the motive of the administration is to avoid recourse to a disciplinary procedure which would have given the applicant greater protection procedurally than the procedure involved in dismissal for unsatisfactory services. There is then a misapplication of procedure and this is impeachable in law.

There have been a few recent cases in which applicants have succeeded with the allegation that there has been a *détournement de procédure*. In *Nemeth*[90] the applicant was alleged to have been insubordinate but he was dismissed for unsatisfactory service. ILOAT held that the charge of insubordination required that disciplinary procedures be invoked in the case and that it was improper to use unsatisfactory service as a basis for dismissal. The decision of dismissal was therefore found to be invalid. The CJEC was

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[86] *Giry*, CJEC Case 1/74 (1974), p. 1269.
[87] *Sorasio-Allo et al.*, CJEC Case 81, 82 & 146/79 (1980), p. 3557.
[88] *Misenta*, CJEC Case 256/78 (1980), p. 219.
[89] *Bellardi-Ricci et al.*, CJEC Case 178/80 (1981), p. 3187.
[90] ILOAT Judgment No. 247 (1974).

confronted with a similar abuse of procedure in *Guillot*[91]. The applicant had been prohibited from continuing research. He was alleged to have been dishonest. The Court held that this prohibition was more than a mere temporary suspension while a disciplinary inquiry was held, because in fact the inquiry was never completed. Hence the measure taken was a disguised disciplinary sanction which had been imposed without the proper disciplinary procedure being taken. The Court gave this as one reason for quashing the decision contested. In *Gausi (No. 1)*[92] ILOAT had to deal with a termination of appointment in a situation where certain irregularities were the basic cause for the termination. Disciplinary procedures had not been invoked. It was held that the action taken was a disguised disciplinary measure without proper proceedings and the decision to terminate was quashed. The Tribunal pointed out that the decision was not based on the physical or mental inability of the applicant to carry out his duties or on his unsatisfactory performance or on the necessities of the service but that its sole purpose was to remove the applicant from his job in consequence of certain irregularities that had come to light in his service at the beginning of the year, without any serious inquiry giving all parties an opportunity of putting forward their views having been held to determine who was responsible and without any disciplinary proceedings providing proper safeguards having been undertaken[93]. In an early case, where the applicant alleged that he was dismissed because he had written an article criticizing his conditions of service which displeased the administration and that therefore his dismissal was a concealed disciplinary sanction, the CJEC supported the view that if proven the allegation should result in the quashing of the decision[94]. In a case concerning the non-renewal of a fixed term contract which coincided with a reduction of staff, the CJEC stated that such non-renewal would be a *détournement de pouvoir* if it served to disguise a disciplinary measure[95].

There have been cases in which the allegation has been made that the measure in issue was a disguised disciplinary sanction but the applicant was unable to prove that on the facts this was the case, although the basic principle was accepted by the tribunals[96]. Some of these cases provide

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[91] CJEC Case 53/72 (1974), p. 791.

[92] ILOAT Judgment No. 223.

[93] *Ibid.*, at p. 6.

[94] *Fiddelaar*, CJEC Case 44/59 (1960), p. 1077.

[95] *Bourgaux*, CJEC Case 1/56 (1956), p. 421.

[96] See e.g., *Mila*, UNAT Judgment No. 204 (1975); *Larcher*, OECD Appeals Board, Decision No. 53 (1975); *Labeyrie*, CJEC Case 16/67 (1968), p. 431, (applicant was relieved

interesting examples of the way tribunals have explained their decisions. In *Miss X*[97] the applicant had been dismissed for unsatisfactory services. She alleged that the real reason for her dismissal was her mental health and that consequently the termination of her services should have been ordered for reasons of health which would have entailed a different procedure and the award of a disability pension. She could not, however, show that she had been ill at the time at which her appointment was terminated nor that the Secretary-General was aware of her illness, and therefore lost her case. In *Kley*[98] a decision to transfer the applicant was in issue. The applicant alleged that disciplinary measures had been ordered but then the request for these measures was withdrawn on the very day on which the Director-General took the decision to transfer him. The applicant had previously opposed the plans of the Director-General for reorganizing the Centre. The CJEC held that the decision to transfer was an alternative solution adopted in the interests of the department because the Director-General could reasonably draw the conclusion that the applicant could not accept the responsibility for executing the plans he had so vehemently opposed, while the CJEC also stated as a principle of law that the decision could be tainted if on the basis of objective, relevant and concordant evidence the decision had been taken for purposes other than those indicated. In *Scuppa*[99] the decision to terminate the applicant's employment was alleged to have been taken because of the difficulties he had previously experienced with the departments of the European Commission and was, therefore, a disguised punishment. The CJEC, however, held that there was no proof of this fact because the decision was the expression of the desire of the Commission to find an honorable way out of the situation created for an official whose services and devotion to duty it repeatedly recognized even in the letter of termination. In *Mills*[100] the CJEC was confronted with the allegation that when there was a reduction of staff the applicant was dismissed because he had difficulties in his department, although he was not single nor had been most recently appointed and that this was a disguised

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of supervisory duties which action was alleged to be a concealed reprimand); *Worsdale*, Council of Europe Appeals Board, Appeal No. 41 (1975) (applicant was not appointed to post of acting head, although he was the most senior – this was not a disguised disciplinary sanction); *Borsody*, ILOAT Judgment No. 476 (1982) (applicant was asked to undergo medical examination – this was not a disguised disciplinary sanction).

97 UNAT Judgment No. 81 (1960).

98 CJEC Case 35/72 (1973), p. 679.

99 CJEC Case 4 & 30/74 (1975), p. 919.

100 CJEC Case 110/75 (1976), p. 1613.

disciplinary measure. The Court held that though the general practice was that, all other things being equal, single persons and those appointed most recently should be dismissed first, this did not preclude the merits of the staff member concerned and his conduct in the department from being primarily taken into account. This was not a disguised disciplinary measure and consequently there was no *détournement de procédure*. In *Pessus (No. 2)*[101] the applicant, a staff member of the Eurocontrol Agency, was transferred because his performance was unsatisfactory. He alleged that the real reason was a disciplinary one. ILOAT stated:

> "A clear distinction must be drawn between the quality of a staff member's work, as reflected in such things as performance reports and promotion, and specific facts or a general attitude at variance with his duties as a staff member and warranting disciplinary action.
>
> The Eurocontrol Agency regarded the complainant's performance, and particularly his qualifications for his post, as not entirely satisfactory. In transferring him to a post corresponding to his grade and better suited to his talents the Director-General did not impose any disciplinary sanction but merely exercised his right to assign his subordinates in the Agency's best interests"[102].

In *Shale*[103] the applicant alleged that UNESCO had imposed a covert disciplinary sanction in not extending his appointment because he had been demoted earlier for disciplinary reasons and this fact was taken into account in taking the decision contested. ILOAT held that:

> "A clear distinction must be drawn between imposing a covert disciplinary sanction on a staff member – which is unlawful – and taking into account, in reaching a decision of different purport, the fact that in his career the staff member has suffered a disciplinary sanction – which, save in exceptional circumstances, is lawful.
>
> It is not easy to draw a distinction between the two but it should be observed that the covert disciplinary sanction may constitute an abuse of authority and should be borne out by the documents in the dossier"[104].

In the instant case there was found to be no evidence supporting the allegation that a covert disciplinary sanction was intended.

A situation which must be distinguished is where there are facts warranting the use of procedure A which is used but there are also facts which might have required the use of procedure B which is not used. This may happen, for instance, where facts of a disciplinary nature are present but

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[101] ILOAT Judgment No. 282 (1976).
[102] *Ibid.*, pp. 3–4.
[103] ILOAT Judgment No. 354 (1978).
[104] *Ibid.*, at pp. 4–5.

the applicant is also guilty of unsatisfactory service and is dismissed for that reason without a disciplinary procedure being implemented. In this situation the organization may use either procedure without violating the law. Thus in *Nelson*[105] the applicant's appointment was terminated for unsatisfactory service. He alleged that he was dismissed because he had taken outside employment and that therefore a disciplinary procedure should have been followed. Hence his dismissal was a disguised disciplinary sanction. UNAT held that while it was true that his having taken outside employment could have been used as a reason for disciplining him, there was in addition room on the evidence for finding that the applicant's services were unsatisfactory so that in dismissing him for unsatisfactory service the organization had not been guilty of an extraneous motive. ILOAT virtually took the same position in *Robert*[106]. The OEEC Appeals Board has held that the existence of facts capable of giving rise to a disciplinary sanction is not by itself of a nature to prove the irregularity of a decision of dismissal, if it does not appear from the circumstances of the case that these facts were the true cause of the dismissal[107]. In that case the applicant's unsatisfactory services had for a long time provoked increasingly severe criticism and were the real reason for his dismissal. The facts of a disciplinary nature discovered just before his dismissal were not the true cause of his dismissal. In an earlier case[108] the OEEC Appeals Board said that a decision of dismissal, based on a genuine reduction of staff, would be vitiated if the principal reason for the decision were to deprive the applicant protection offered by the normal disciplinary procedures. While this case is difficult and would appear to conflict with the later decision of the OEEC Appeals Board referred to above it would seem that the rationale for the case lies in the fact that the primary reason for the dismissal lay in the facts of a disciplinary nature and not the unsatisfactory service. Thus, where there are two possible grounds for a decision and one of these can be proved to have been the primary one the proper procedure pertaining to that ground must be implemented; failing that there will be a *détournement de procédure*. It must be emphasized though, that it may be difficult in most cases to prove that one of two reasons is the primary reason.

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[105] UNAT Judgment No. 157 (1972). See also *Cooperman*, UNAT Judgment No. 93 (1965).

[106] ILOAT Judgment No. 56 (1981). See also *Kley*, CJEC Case 35/72 (1973), p. 679.

[107] OEEC Appeals Board, *Appeal No. 29* (1957).

[108] OEEC Appeals Board, *Appeal No. 3* (1950).

3. Abuse of Motive

Apart from abuse of procedure, other misuse of authority involving abuse of motive may occur. This is a *détournement de pouvoir* in its usual sense. An abuse of motive occurs where a power is exercised for a purpose or with an objective for which it was not intended. As was stated in *Küster:*

> "A misuse of powers is not deemed to exist unless it is proved that the authority in taking the measure in question has followed an objective other than the legal one"[109].

This goes beyond mere personal ill-will or personal prejudice against an official. The latter is a specific example of abuse of motive. It will be dealt with separately later on in this paper.

Where the constitution of the organization or the Staff Regulations or Staff Rules prohibit a particular purpose or motive in the taking of a decision, the position is fairly simple. Tribunals will apply these instruments to find an abuse of motive. Thus in some early cases ILOAT cited the constitution of UNESCO[110] in finding that in taking a decision the Director-General could not give as a reason a grand jury inquiry into the staff member's political loyalties[111], and that failure to appear before a Loyalty Board set up for the same purpose could not be given as a reason for dismissal[112] or non-renewal of a fixed term contract[113]. In some early cases UNAT found that the motives given for the decisions taken were forbidden by the Staff Regulations. In *Robinson* it was held that the respondent could not give as a reason for the non-renewal of the applicant's appointment his activity in the Staff Association[114] and in *Crawford* UNAT decided that the applicant could not be dismissed from her employment because of her political beliefs[115].

But apart from motive forbidden in constituent instruments and Staff Regulations or Staff Rules, there is no doubt that there can be other kinds of irregular motives which could vitiate decisions taken. While tribunals

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[109] CJEC Case 123/75 (1976), p. 1701.

[110] Art. VI, para. 5.

[111] *Leff,* ILOAT Judgment No. 15 (1954).

[112] *Froma,* ILOAT Judgment No. 22 (1955); *Pankey,* ILOAT Judgment No. 23 (1955); *van Gelder,* ILOAT Judgment No. 24 (1955).

[113] *Duberg,* ILOAT Judgment No. 17 (1955); *Leff,* ILOAT Judgment No. 18 (1955); *Wilcox,* ILOAT Judgment No. 19 (1955); *Bernstein,* ILOAT Judgment No. 21 (1955).

[114] UNAT Judgment No. 15 (1952).

[115] UNAT Judgment No. 18 (1953). See also for motives prohibited by written law: *Lasalle,* CJEC 15/63 (1964), p. 57.

have implicitly recognized this even in cases where they have found that there has been no abuse of motive on the facts of the case, there have been some cases in which tribunals have found the existence of irregular motives and found in favor of applicants. However, the cases in which applicants have failed are in the majority, partly because they have been unable to prove the facts on which their allegations were based.

Most of these cases in which applicants succeeded were decided by ILOAT. In *Halliwell*[116] the applicant was not appointed to a position in the Nairobi office of WHO, although there were unfilled posts for which she qualified, because she was not a Kenyan national. While not mentioning discrimination the tribunal held that it was an abuse of power to reject the preference for persons already in service because of a reservation based on nationality. In *Rosescu*[117] the IAEA refused to renew the contract of a Romanian national because his national State did not want the contract renewed. It was held that the interests of a member State could not be allowed to prevail over the Agency's interests in deciding whether the applicant's contract should be renewed. *Gale*[118] was a case brought against the European Molecular Biology Laboratory (EMBL) and concerned the non-extension of a contract of employment. Here the Tribunal found in a negative sense that no good reason had been given for the action taken and therefore the decision was invalid. The applicant was fit for employment according to the facts and it had not been proved that keeping him was contrary to the interests of EMBL. No positive reason such as structural reform or achieving savings had been given. In *Garcia and Marquez (No. 2)*[119] certain facilities had been withdrawn from the staff association of PAHO, the reasons given being costs and the fact that telex facilities were being used to communicate grievances to member governments. It was found that the real reason for the action taken was the fact of communication with member governments which had taken place only once, however, and not the use of the telex facilities. It was also found that the Director-General had tried to get rid of the staff association committee by persuasion and failed and that the decision was intended to coerce or express resentment. Thus curtailment of facilities over a whole range was not justified by the true reasons found to underly the action taken. Hence,

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[116] ILOAT Judgment No. 415 (1980).

[117] ILOAT Judgment No. 431 (1980). For a case similar to *Rosescu*, where an extraneous factor was found to be a letter sent to the organization about the applicant, see *McIntire*, ILOAT Judgment No. 14 (1954).

[118] ILOAT Judgment No. 474 (1982).

[119] ILOAT Judgment No. 496 (1982).

the irregular motives vitiated the decisions concerned. *Marenco et al.*[120] concerned the reservation of posts for a particular nationality. The CJEC held, without mentioning discrimination, that where special knowledge was not required for the job, the action taken was an abuse of motive. The object espoused was not in keeping with the objectives for which the filling of the positions was permitted. In *Giuffrida*[121] the point at issue was the organization of an internal competition. The CJEC found that there was clear evidence that the purpose of the competition was to appoint to the vacant post the candidate who was successful. One of the conditions for entry into the competition was that the candidate must have held the secretariat for meetings of the Council working parties or committees on regional policy for at least four years and the person appointed was the only person who had done this in his previous position. Thus, the purpose was improper and amounted to a misuse of authority and the decision to appoint the successful candidate was quashed.

These cases support the view that abuse of motive or purpose can occur in one of two ways. Where there is a positive purpose which is different from the purpose permitted in connection with the contested action or decision, the decision or action is vitiated. *Gale* shows, however, that the absence of the proper purpose even where no positive irregular purpose is present will also result in the decision or action being tainted.

On the analogy of the decisions in *Nelson* and OEEC *Appeal No. 3* discussed above, where there are two purposes for a prior action and one of them is justified in the circumstances, provided the irregular purpose is not the primary purpose for the action, the action will not be held to have been taken for an irregular purpose.

Cases in which an abuse of motive has been alleged but the tribunal has held against the applicants have come before UNAT, ILOAT, the NATO Appeals Board, the OEEC Appeals Board and the CJEC. These cases show that applicants may fail because they have failed on the facts to prove allegations or arguments which in law would support a misuse of power or because their allegations do not in law show that, even if true, they constitute a misuse of power. The cases which find that applicants have failed to substantiate allegations or arguments which would have supported a misuse of power contain material which illustrates what constitutes an abuse of motive. In *Pibouleau*[122] the applicant argued that he had been dismissed by

[120] CJEC Case 81 to 88/74 (1975), p. 1247.
[121] CJEC Case 105/75 (1976), p. 1395.
[122] ILOAT Judgment No. 351 (1978).

WHO because he took part in strike action. The Tribunal held that there was no evidence of this but that the termination had been made in order to make savings which was a legal purpose. In *Gatmaytan*[123] reassignment to another post which prevented the applicant from being promoted by competition was in issue. The tribunal held that the plea that the transfer was not in the interests of the organization (PAHO) could succeed, if it was shown that (i) the reassignment was a pretext or (ii) the person appointed was less qualified than the applicant or (iii) the priority given to the appointee was unfair to other candidates, but that the applicant had proved none of these things[124]. In *von Wullerstorff et Urbair*[125] the applicant contended that the post to which he had not been appointed had been reserved for a particular nationality. The CJEC held that the applicant was unable to prove his contention, which was a good one, because the person selected for the post had the necessary qualifications and was more suitable than the applicant. In *Fux*[126] the applicant contended that the reason given for his dismissal, namely abolition of post, was fictitious and that the real reason was to assign the duties of the suppressed post to an expert of German nationality who was not an official. The CJEC held that this allegation was not proven because particularly there was a need for close co-operation between the Commission and national customs administrations which justified the action taken. Where the applicant was removed from his post because of the findings of a disciplinary board against the applicant, the CJEC held that the applicant could not succeed because he had failed to show that the evaluation which led to this action bore no relation to the shortcomings established nor that the measure imposed was disproportionate to the facts found against him[127]. Where the applicant failed to show that external pressure had been brought to bear on the selection boards which did not select him for a position in order to induce them to be more severe so as to restrict the number of successful candidates and make possible a larger recruitment by external competition and it was clear that the severity of the selection boards was not due to external pressure nor to considerations alien to the proper functioning of the ser-

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[123] ILOAT Judgment No. 535 (1982).

[124] Another case in which it was held that a reassignment (to a lower grade) was in the interests of the organization (ILO) was *Rudin (No. 2)*, ILOAT Judgment No. 405 (1980).

[125] CJEC Case 7/77 (1978), p. 769. See also *Marenco*, CJEC Case 81 to 88/74 (1975), p. 1247, where the allegation failed because the selectees were required to know Italian agricultural economics.

[126] CJEC Case 26/68 (1969), p. 145.

[127] *van Eick*, CJEC Case 13/69 (1970), p. 3.

vice, the CJEC held that there was no abuse of motive[128]. An allegation that the applicant's name was omitted from a promotion list as a result of a letter sent by someone was not proven because the letter arrived after the decision to omit the applicant's name had been taken and did not influence that decision. Hence the CJEC held that there had been no abuse of motive[129]. In *Mulcahy*[130] the applicant contended that there was an abuse of motive because there was an appreciable difference between the merits of the candidate appointed and himself but the CJEC found that because the proper procedure prescribed by the staff regulations for promotion had been followed the applicant had failed to prove his contention. In *Labeyrie*[131] the applicant alleged that the measure in issue was taken to prevent the applicant's observations from succeeding in drawing the attention of the higher authorities to certain anomalies and irregularities but the CJEC held that the allegation had not been proven. Where a vacancy notice stated that the incumbent was suitably qualified but nevertheless a fair procedure for selection was applied and, therefore, obviously it could not be proved that the post was reserved for the incumbent, the applicant failed before the NATO Appeals Board[132]. In *Williame*[133] the applicant alleged before the CJEC but could not prove that the object of the Establishment Board was not to make an objective assessment of his abilities but rather to oust him from his position and then find an excuse which would give a semblance of justification. In *Gilbeau*[134] the applicant could not prove his contention that the decision not to appoint him was influenced by the opposition of certain officials to his entry into the language service. In *Küster*[135] the CJEC held that the contention that the applicant's marks in a competition for promotion were different from his marks in an earlier competition and that this reflected an improper objective was not a good one because the two competitions were different and the systems of marking for the two competitions were different. In *Mirossevich*[136] the applicant alleged that the decision not to confirm her was based on the desire of the reviser to replace her with a friend but could not prove that this was the case.

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[128] *Campogrande et al.*, CJEC Case 112, 144 & 145/73 (1974), p. 957.
[129] *Ditterich*, CJEC Case 86/77 (1978), p. 1855.
[130] CJEC Case 110/77 (1978), p. 1287.
[131] CJEC Case 16/67 (1968), p. 431.
[132] *Murzi*, NATO Appeals Board, Decision No. 124 (1980).
[133] CJEC Case 12/66 (1967), p. 199.
[134] CJEC Case 157/77 (1979), p. 1505.
[135] CJEC Case 123/75 (1976), p. 1701.
[136] CJEC Case 10/55 (1956), p. 365.

There have also been cases in which the contested reasons for the decision have been good in law and there has been no abuse of motive as a result. Thus, where the reason given for the non-renewal of a fixed term contract was the achievement of a satisfactory turnover in the staff[137], where a fixed term contract was not renewed because the post was suppressed for budgetary reasons[138], where the motive for the contested decision was that the appointee had become unable to perform his duties as chauffeur, the administration wished to transfer him to another post through the expedient of a competition and the provisions of the staff regulations pertaining to recruitment were observed[139], where adaptation of remuneration to local conditions was the reason for a change in salary[140], where there was a change in the content of periodic reports resulting in non-promotion of the applicant, because the authorities were alerted to the fact that their assessments were capable of giving rise to premature hopes and wanted to be more careful[141], and where the reason for the termination of the applicant's services was the failure of the applicant to submit his voluntary resignation in the face of unsatisfactory service[142], there was held to be no abuse of motive or misuse of powers. In *Makris-Batistatos*[143] UNAT held that if in arriving at the decision not to renew a fixed term contract the organization took into account the applicants involvement in an outside enterprise, this could not be considered an abuse of motive[144]. In *Küster*[145] the applicant contended that an internal compe-

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[137] *Rasmussen*, NATO Appeals Board, Decision No. 59(b) (1975). A similar case was *Laval*, NATO Appeals Board, Decision No. 63 (1975).

[138] *Yardas*, NATO Appeals Board, Decision No. 75 (1976).

[139] *Brasseur*, CJEC Case 88/71 (1972), p. 499.

[140] *Asmussen*, CJEC Case 50/74 (1975), p. 1003.

[141] *Küster*, CJEC Case 122/75 (1976), p. 1685.

[142] *D'Auria*, CJEC Case 99/77 (1978), p. 1267.

[143] UNAT Judgment No. 121 (1968).

[144] In several other cases no abuse of motive was found. Although there was no clear discussion of the issue, on the facts it was clear that there was no misuse of authority: see *Smith*, NATO Appeals Board, Decision No. 34 (1971) – procedure of selection applied was the proper one for the head of unit in the directorate of information; *Kocaker*, NATO Appeals Board, Decision No. 68 (1975) – non-renewal of fixed term contract; *Huybrechts*, CJEC Case 21/68 (1969), p. 85 – no excessive haste or lack of reflection in promoting another officer instead of applicant; *Macevicius-Hebrant*, CJEC Case 31/76 (1977), p. 883 – entrusting applicant with important duties while conclusions of appraisal report tended to show her inefficiency; *Ganzini*, CJEC Case 101/77 (1978), p. 915 – *Oslizlok*, CJEC Case 34/77 (1978), p. 1099 – examination of comparative merits of officials before compulsorily retiring applicant.

[145] CJEC Case 123/75 (1976), p. 1701.

tition was organized to fill the post in question without his being promoted. The CJEC held that where there was only one candidate suitable for promotion under the relevant staff regulation, the fact that the appointing authority decided to organize an internal competition without making a promotion did not of itself constitute an abuse of motive. In such a case, since the appointing authority had available for consideration only one candidate suitable for promotion, it had good reason for holding an internal competition, because it did not have a sufficiently wide choice to ensure recruitment in accordance as far as possible with the requirements of the post to be filled.

4. Prejudice or Ill-will

Improper motive in a narrow sense may be characterized as malice, ill-will or prejudice. This is generally a more personal motive than other kinds of abuse of motive. As may be conjectured, prejudice or bias is not easy to prove and there are only a few cases to be found in which applicants have succeeded in their claims that prejudice or bias has prevailed against them.

In *Fasla*[146] UNAT found that the first reporting officer assessing the applicant's performance had made adverse comments because of a violence of feeling and lack of self-control which revealed prejudice and that this had resulted in the fixed term contract of the applicant not being renewed, since the second reporting officer had merely confirmed the first reporting officer's comments without making an independent assessment.

ILOAT found in favour of the applicants in some cases brought against PAHO. In *Dicancro*[147] the applicant's appointment was not renewed. He had contested the Director in an election and lost. The applicant was accused of misconduct and told that he could not have a fruitful working relationship with management. The Director resented sharply the applicant's having contested him when he narrowly escaped defeat and had made a statement indicating his resentment after the election. The charge of misconduct was found to be preposterous and it was evident that the Director was ready to use it as a ground for dismissal even before hearing the applicant's defence. In the outcome the tribunal had no difficulty in

[146] UNAT Judgment No. 158 (1974). For a similar case in which ILOAT found that the Director-General who had relied exclusively on the opinion of the applicant's supervisor whose judgment was unreliable, volatile and biased and therefore came to a biased conclusion, see *Ghaffar*, ILOAT Judgment No. 320 (1977).

[147] ILOAT Judgment No. 427 (1980).

holding that the Director was prejudiced and unable to take a detached view and that this was the real cause for the appointment's not being renewed. In *Quinones*[148] the applicant's immediate transfer was attributed to the reorganization of the Public Information Office. It was found that she was a loyal member of the staff association and that relations between the association and the Director were strained. ILOAT found that prejudice resulting from this situation was the real reason for the lack of consideration in having the applicant transferred to a post which did not suit her. In *Olivares Silva*[149] a contract was not renewed after several renewals and the reason was given that funds were not available. The applicant was a loyal member of the staff association and the situation was the same as it was in *Quinones*. ILOAT held that the reason given was not substantiated and that bias was the probable cause of the decision. In all these cases ILOAT found in favor of the applicants.

There are numerous cases in which prejudice or ill-will has been alleged but the applicant has failed to prove his case. In *Geist*[150], for instance, the applicant alleged that he was appointed to a new post as a result of prejudice. The CJEC held that the appointment was in the interests of the service, it was not a down-grading of the applicant and the new post corresponded best to the exercise of his skills and that, therefore, there was no bias or prejudice. In *Suntharalingam*[151] the applicant was unable to prove ill-will on the part of his second-in-line supervisor in respect of a decision to terminate his appointment. The Tribunal pointed out that:

> "The facts alleged by the Applicant as evidence of harrassment and abuse suggest only the existence of some irritation and impatience between a supervisor dissatisfied with the job performance of a staff member and the staff member who has been made aware of that dissatisfaction. A reasonable basis existed for the determination that the Applicant's services were unsatisfactory, and no motive unrelated to the quality of those services has been established"[152].

Many other cases relating to appointments by transfer, non-renewal of fixed term contracts, non-extension of appointments, non-appointment to positions, non-confirmation of probation, reassignment, reclassification, non-promotion, termination of employment, failure to grant benefits and

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[148] ILOAT Judgment No. 447 (1981).
[149] ILOAT Judgment No. 495 (1982).
[150] CJEC Case 61/76 (1977), p. 1419.
[151] WBAT Decision No. 6 (1981).
[152] *Ibid.*, at p. 10.

numerous other situations have been decided against applicants on the ground that ill-will or prejudice did not exist[153].

It is important to note that, as in the case of abuse of motive in general, i.e. situations where improper objects are alleged to have influenced the decisions taken, even where ill-will or prejudice is found to be present but there is also another lawful reason which justified the decision taken, the decision will not be found tainted and quashed. There is one good case which illustrates this point. In *Chuinard*[154] ILOAT found that the applicant's differences with his chiefs in the European Organization for Nuclear Research resulting in bias was the original cause of the decision to suppress his post but that the decision was also taken in the interests of the service, because it was clear that the applicant's work had been distributed to others for some time and the situation had been tried out before the decision was taken that this post would be dispensed with. Therefore this second ground, which was lawful, justified the decision and the element of prejudice could be disregarded.

C. Proof of Abuse of Motive

As in other areas of law proof of abuse of motive or irregular motive is not an easy matter. Indeed, the cases in which applicants have failed to prove facts which would in law constitute irregular motive are numerous, especially in respect of abuse of motive in the narrowest sense, namely,

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[153] See e.g., *Sherif*, ILOAT Judgment No. 29 (1957); *Schwalder-Vrancheva*, ILOAT Judgment No. 226 (1974); *Hrdina*, ILOAT Judgment No. 229 (1974); *Meyer*, ILOAT Judgment 245 (1974); *Reda*, ILOAT Judgment No. 280 (1976); *Al-Zand*, ILOAT Judgment No. 389 (1980); *Guisset*, ILOAT Judgment No. 396 (1980); *Glorioso*, ILOAT Judgment No. 450 (1981); *Perrone*, ILOAT Judgment No. 470 (1982); *Ayyangar*, ILOAT Judgment No. 529 (1982); *Schgal*, ILOAT Judgment No. 531 (1982); *Maugain*, ILOAT Judgment No. 552 (1983); *Chiacchia*, UNAT Judgment No. 90 (1963); *Makris-Batistatos*, UNAT Judgment No. 121 (1968); *Ho*, UNAT Judgment No. 122 (1968); *El-Naggar*, UNAT Judgment No. 205 (1975); *Sandys*, UNAT Judgment No. 225 (1977); *Segerstrom*, UNAT Judgment No. 248 (1979); *Boden*, UNAT Judgment No. 261 (1980); *Adler*, UNAT Judgment No. 267 (1980); *Mahmoud*, UNAT Judgment No. 277 (1981); *Harkins*, UNAT Judgment No. 287 (1982); *Fracyon*, UNAT Judgment No. 199 (1975); *Skandera*, WBAT Decision No. 2 (1981); *Matta*, WBAT Decision No. 12 (1982); *Cauro*, OECD Appeals Board, Decision No. 34 (1961); *Harvey*, NATO Appeals Board, Decision No. 28 (1971); *Prakash*, CJEC Case 19 and 65/63 (1965), p. 717; *Gilbeau*, CJEC Case 157/77 (1979), p. 1505; *Campogrande et al.*, CJEC Case 112, 144 & 145/73 (1974), p. 957; *Scuppa*, CJEC Case 4 & 30/74 (1975), p. 919; *Ditterich*, CJEC Case 86/77 (1978), p. 1855; OEEC Appeals Board, *Decision No. 2* (1950).

[154] ILOAT Judgment No. 139.

prejudice or ill-will. In this context there are a few points that may be noted.

There are certain facts which tribunals have held are insufficient to establish prejudice or ill-will as an abuse of motive. Thus, the mere fact that relations were strained between the plaintiff and his supervisor on whose recommendation the decision was taken does not mean that the supervisor's impartiality and objectivity were affected resulting in prejudice or bias[155]. A supervisor's hostility may be easily attributed to his genuine low opinion of the applicant's work and to disagreements over methods of work[156]. The existence of a clash of personalities and the fact that in many of his dealings with the applicant a Director was unduly suspicious and evasive do not establish conclusively that the Director was biased in his judgment that led to the decision being questioned[157]. In a case in which personal prejudice and bias was alleged on the part of the Board of Inquiry and Appeal of WHO, ILOAT held that the mere protracted nature of the reclassification exercise resulting in the decision being attacked was no proof of prejudice because reclassification required careful fact gathering and evaluation which by its nature was time consuming[158]. WBAT was careful to indicate that facts which show the existence of some irritation and impatience between a supervisor dissatisfied with the job performance of a staff member and the staff member who had been made aware of that dissatisfaction did not establish prejudice or ill-will as an operative factor, particularly where there was a reasonable basis for the determination that the staff member's services were unsatisfactory[159]. A change in the evaluation of a staff member is not by itself evidence of prejudice or ill-will[160].

That a decision was taken after an event which could be evidence of bias or improper motive, if it influenced the decision in issue, had taken place does not merely for that reason mean that the decision was in fact influenced by that event. Some further evidence of causal connection is generally necessary. Thus, in several cases UNAT held that certain American officials who were dismissed after their country had expressed doubts about their loyalty had not necessarily been dismissed as a result of im-

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[155] See *Pistoj*, CJEC Case 26/63 (1964), p. 673; *Huber*, CJEC Case 78/63 (1964), p. 787.

[156] *Zimmet*, UNAT Judgment No. 52 (1954). See also *Chattopadhyay*, UNAT Judgment No. 58 (1955).

[157] *Fracyon*, UNAT Judgment No. 199 (1978), at p. 20.

[158] *Ayyangar*, ILOAT Judgment No. 529 (1982).

[159] *Suntharalingam*, WBAT Decision No. 6 (1981).

[160] *Salle*, WBAT Decision No. 10 (1982).

proper motivation, even though their services were satisfactory, because the causal connection between the dismissal and the expression of opinion by their country had not been established[161]. In *Mirossevich*[162] the CJEC found that the mere fact that after the applicant's probationary appointment had not been confirmed the reviser responsible for this decision had succeeded in having his friend appointed to the applicant's position did not mean that the reviser's motive in not having the applicant's appointment confirmed was purely to replace the applicant with a friend which would have been an improper motive. The Court found that the legal burden of proving *détournement de pouvoir* had not been discharged even though some connection did exist between the applicant's departure and the arrival of the reviser's friend and the decisions of dismissal and appointment were suggested by the same person. It would seem in this case that there was an alternative reason for the decision not to confirm the applicant's appointment which was good in law. Thus, tribunals will look very closely at the argument *"post hoc, ergo propter hoc"* to see whether there is such a connection between the questioned decision and the facts as to establish the influence of an improper motive.

UNAT has also decided that it is inadequate that a decision appears arbitrary and unfounded, if the applicant is unable to prove that an improper motive resulted in the decision. Thus, even where a decision appears on the face of the record to be arbitrary, no presumption is raised that the decision was the result of an improper motive. In *Rubin*[163] the U.N. Secretary-General had pursuant to Staff Regulation 9.1(c) dismissed the applicant in the interests of the organization without stating any reasons but it was held that improper motive could not be inferred merely for this reason. In the outcome UNAT held that improper motive had not been proved.

There are some respects in which tribunals have taken decisions on matters of proof which have affected applicants favorably. It has been held that if a *prima facie* case of irregular motive is made and if the organization refuses, on grounds of privilege, to produce a document which would throw light on the matter, then the presumption of *détournement de pouvoir* must be regarded as established. Thus in *McIntire*[164] which con-

[161] *Kaplan*, etc., UNAT Judgments Nos. 19–20, 22–23, 25 (1953).
[162] CJEC Case 10/55 (1956), p. 365.
[163] UNAT Judgment No. 21 (1953). See also *Saperstein*, UNAT Judgment No. 24 (1953).
[164] ILOAT Judgment No. 13 (1954).

cerned non-confirmation of a probationary appointment for unsatisfactory service, the facts showed that the applicant had been made chief of his section only nine days before his dismissal. There was evidence that in the meantime the Director-General of the Organization had received a letter from the U.S. authorities about the applicant which, however, he refused to communicate to the Tribunal. The Tribunal held that the respondent would have to bear the consequences of its refusal to disclose the documents and found that irregular motives had been established.

It is equally clear that where the reasons given for a decision constitute an object or purpose that is not lawful, no further proof of irregular motive is required. Annulment of the decision follows as a matter of course once the reasons for the decision are established[165].

In *Olivares Silva*[166] ILOAT dealt with the use of similar cases in relation to the proof of prejudice. It also made some general statements about proof. This was a case in which the applicant's fixed term contract was not renewed after several renewals, the reason being given that funds were not available, and it was alleged that the real reason was that the applicant was a loyal member of the staff association of PAHO and that relations were strained between the Association and the Director. ILOAT, in dealing with the questions of suspicion and inference, stated:

> "Prejudice is usually concealed and so its existence usually has to be established by inference. When the facts of a single case are sufficiently strong to establish an inference, there is no need to examine other cases. But they may be strong enough to create only a suspicion falling short of complete proof of the allegation; an example is the case of Quinones. In such a case proof of a similar suspicion in similar cases becomes relevant. Suspicion means that the facts from which the inferences were drawn may be susceptible of either a guilty or an innocent explanation. An innocent explanation which is credible in a single case may cease to be credible when it has to be applied to a number of similar cases; by this means the doubt which defeats proof in a single case may be removed. But there must be enough evidence within the case that is being judged to create a suspicion that prejudice is at work. Where there is not the slightest evidence of prejudice within the case itself, it cannot be proved by proving prejudice in other cases"[167].

This statement clearly shows that where an applicant has on the facts of his case been able to raise only a suspicion of bias, other cases including the

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[165] See *Duberg*, etc., ILOAT Judgments Nos. 17–19 and 21–24 (1955).
[166] ILOAT Judgment No. 495 (1982).
[167] ILOAT Judgment No. 495 (1982), at p. 12.

same situation may be used to convert that suspicion into a probability of bias. Furthermore, the Tribunal stated that is was necessary for similar cases to be taken into account that there be in each of the supplementary cases a precise and detailed allegation supported by the same sort of evidence as would go to prove the validity of a complaint[168]. After examining the evidence in the similar cases cited as relevant, the Tribunal found in favor of the applicant.

In the same case ILOAT also made an important statement of law about the standard of proof. It stated:

> "In this case good reasons can be found either for renewal or for non-renewal of the complainant's contract. Objectively a decision either way could be justified. In such a case it is enough for the complainant to show that it is more probable than not that a bias against him was a factor in the Director's mind when he was considering whether or not the contract should be terminated"[169].

Clearly where in such a case the evidence shows that there was insufficient ground for non-renewal of the contract proof of bias would be easier, while where the evidence showed that there were good grounds for non-renewal of the contract proof would be much more difficult.

In regard to the burden of proof in general it may be relevant to cite a statement by WBAT in a case in which the applicant argued that the respondent carried the burden of proof to establish that proper action had been taken:

> "The Tribunal does not regard the problem as one of burden of proof. It is incumbent upon both the Applicant and the Respondent to provide the Tribunal with all the available evidence in order to allow it to pass judgement upon the Applicant's allegations of non-observance of his conditions of employment; and it is for the Tribunal to determine, in the light of the evidence made available to it, whether the Applicant's conditions of employment have, or have not, been observed"[170].

This statement would support the position that in general the Tribunal must decide whether the evidence supports an inference of an abuse of motive on all the evidence presented to it by both parties.

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[168] *Ibid.*

[169] *Ibid.*, at p. 16.

[170] *Salle*, WBAT Decision No. 10 (1982), at p. 15.

D. Conclusion

This analysis of the cases decided by international administrative tribunals shows that the doctrine of *détournement de pouvoir* is firmly established in international administrative law. Tribunals have applied the doctrine convincingly and with finesse, taking pains to elaborate the rules flowing from it logically and clearly.

Discrimination and inequality of treatment are firmly established as grounds for overturning decisions taken by administrations of organizations. Most of the cases in which the charge of discrimination has been upheld have been concerned with discrimination on the grounds of sex, but tribunals have not denied that there can be other grounds such as nationality for upholding charges of discrimination. Differences can, however, be made if there is a good reason for making them. Tribunals have not been slow to recognize that reasonable differences between categories can be made.

Legislative decisions as well as administrative decisions are subject to the doctrine of *détournement de pouvoir*. However, while in *de Merode* WBAT elaborated some of the principles of the doctrine applicable to legislative decisions, no cases have applied the doctrine to legislative decisions except where discrimination and inequality of treatment have been alleged. Indeed, no cases have really alleged that legislative decisions have resulted in a misuse of authority for other reasons than that they were discriminatory or resulted in inequality of treatment.

While discrimination and inequality of treatment are regarded as examples of *détournement de pouvoir*, they are strictly not legal categories which are based on an abuse of motive necessarily. What is of relevance in these cases is that the action taken, whether it be legislative or administrative, must r e s u l t in the discrimination or inequality of treatment which is prohibited. The test is objective rather than subjective and is consecutive rather than related to purpose or objective.

There are many instances where abuse of motive has been alleged. It has emerged from these cases that not only is a positive illegal purpose capable of vitiating a decision but the mere absence of a lawful purpose could have the same effect. Furthermore, where there is more than one purpose, it is probably only when the illegal purpose is the primary purpose behind the decision that it will affect the decision adversely. A similar principle applies where a *détournement de procédure*, a special instance of misuse of authority, is alleged. Generally in cases of *détournement de procédure* where on the facts there are two procedures available to the administration it may use

one or the other procedure in taking its decision. This is, of course, subject to the principle of the primary purpose referred to above.

The cases reveal many examples of what constitutes an abuse of motive, though in many cases applicants have been unable to prove the facts to substantiate their allegations. It is clear that proof of abuse of motive is no easy matter. This applies especially to abuse of motive in its narrowest sense, namely prejudice or ill-will. Tribunals have been very concerned with the question of proof and have indicated what circumstantial evidence may not be relevant. On the other hand, they have also established guidelines for proof which may be of help to applicants in proving what often takes the form of a difficult case.

All in all, since the establishment of the first international administrative tribunal in 1927, tribunals have certainly made a significant contribution towards the development of the law relating to *détournement de pouvoir.*