

THE MOST SERIOUS LOOPHOLES

When the sheer complexity and snail-like pace of the UN internal justice system do not deter appellants, the Administration always has, and still can, evade or dispose of any unpleasant cases by falling back on six built-in and serious loopholes, which deserve a much more detailed elaboration.

FIRST, the **Secretary-General's discretionary authority**, as chief administrative officer of the Organization, allows him to make exceptions to UN staff rules, a dictatorial right which dominates the UN "internal justice" system. Unfortunately, over time this powerful personal right has long been seriously diluted, as dozens of UN staff, many at rather low levels, have been delegated this authority *de facto*. It allows them to threaten, write position papers, or take decisions in the name of the Secretary-General concerning other UN staff, up to and including threats of "summary dismissal" without any warning.

"Status, basic rights and duties of United Nations staff members", ST/SGB/2002/13 of **1 November 2002**, Staff regulation 1.2 (e) and Commentary, and

"Rule 112.2 (b), in "United Nations Staff Rules: Staff Regulations and Rules 100.1 to 112.8", Secretary-General's Bulletin, ST/SGB/2002/1, of **1 January 2002**.

Two particularly important observations in late 1995, as the UN attempted to celebrate its 50th anniversary, illustrate quite nicely the central obstacles that UN staff continue to face today in exercising their basic human rights. The first involved an impasse in staff-management negotiations:

"The joyless nature of the United Nations 50th anniversary was underlined this week by a public spat between the Staff Union and Management [on appeals of poor performance ratings] ... which could have far-reaching implications for the international civil service. ...

The [staff-management joint] agreement that the performance rating resulting from a staff member's challenge to a low evaluation would be binding, was [subsequently] changed by [management with] the addition of a proviso that it was **without prejudice to the ultimate authority of the Secretary-General** as Chief Administrative Officer.

In effect, Management could ignore a finding in favour of a staff member by invoking the Secretary-General's ultimate authority. **('You know how many people speak in the name of the Secretary-General in this house?')** says Staff Committee President Mohammed Oummih, underlining why the change is unacceptable. ...

A general meeting of staff on 10 October endorsed the [related] Staff Council resolution by a vote of 730 to 0 with one abstention."

"Staff-management spat with possible serious impact reflects a joyless 50th anniversary," International Documents Review, **16 October 1995**, pp. 1-2. [emphasis added]

The editor of the *International Documents Review* made very perceptive further comments, which **encompass the central concerns of this archive on UN management accountability**, and IO Watch therefore hopes that the reader will bear with all the "emphasis added":

"In considering ... the account above, it is worth noting that ... a critical question has been avoided: what is the rationale for increasing the vulnerability of staff to unfair and/or arbitrary judgements by administrators? The pat answer to that -- it will allow "managers to manage" -- is unconvincing because the most serious problem affecting the efficiency and effectiveness of the UN Secretariat has been bad management. ...

The Secretariat reforms proposed by the Secretary-General would do little to improve management. They would, however, remove a range of checks and balances built into the international civil service for the very obvious reason that in a multicultural, multinational context, justice must not only be done but be seen to be done. While the integrity of the rebuttal process might seem an arcane matter to outsiders, it is the only recourse for a staff member victimized by a bad manager. To weaken it would be to reduce the integrity of the entire structure ...

The United Nations will clearly [face] ... wrenching changes in the period ahead, and it would be both unfair and counterproductive to do away now with the only means staff have to hold managers accountable."

"Staff-management spat with possible serious impact reflects a joyless 50th anniversary," International Documents Review, **16 October 1995**, p. 2. [emphasis added]

However, the pivotal UN Staff Regulation 1.1 (c) does also state firmly that "The Secretary-General shall ensure that the rights and duties of staff members, as set out in the Charter and the Staff Regulations and Rules and in relevant resolutions and decisions of the General Assembly, are respected". Secretary-General's Bulletin 1998/19 makes this an explicit duty.

"Status, basic rights and duties of United Nations staff members", ST/SGB/2002/13 of **1 November 2002**, Regulation 1.1 (c) and Commentary. [emphasis added.]

Other rule provisions state that staff (including of course managers) are to be held accountable through disciplinary procedures for failure to comply with their obligations and the standards of conduct in the UN Charter, the Regulations and Rules, and all administrative instances.

"Status, basic rights and duties of United Nations staff members", ST/SGB/2002/13 of **1 November 2002**, Staff Rule 101.2 (a) and Commentary.

At least one further rule gives hope: Rule 101.2 (b) states that staff members shall follow the directions and instructions properly given by supervising officials. The Commentary notes that "properly" means that a supervisor giving improper instructions will be held accountable since the staff regulation introduces an affirmative duty on the Secretary-General to ensure that staff rights and duties are respected. This could be a very important provision in management/staff relations and abuses. One wonders if it has ever been successfully applied in any appeal action. If Manager X says "do it, now," staff member Y can only say, "Sir, I will be formally appealing it," meaning "I will seek, over the next five years, to have your action officially criticized after the fact, and perhaps long after you have left the unit if not the organisation", that is, the protection is meaningless.

"Status, basic rights and duties of United Nations staff members", ST/SGB/2002/13 of **1 November 2002**, Staff Rule 101.2 (b) and Commentary.

The updated rules also specify that, while the Secretary-General and those who speak and act for him have discretion in making decisions, this power "however cannot be tainted by prejudice, improper motive, or mistake of fact." Yet in practice, the Administration's legal officials often quite sweepingly invoke the Secretary-General's discretionary authority to cover and evade a multitude of awkward situations in staff appeal cases, with little or no effort at providing any reasoned justification.

"Status, basic rights, and duties of United Nations staff members", ST/SGB/2002/13 of **1 November 2002**, Regulation 1.1 (c) and 1.2 (e) and their commentaries.

Furthermore, the principle is further stated, and buried deep at the back of the lengthy Staff Regulations and Rules volume, under "General provisions", as:

"Exceptions to the Staff Rules may be made by the Secretary-General, provided that such exception is not inconsistent with any staff regulation or other decision of General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion of the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members."

"Rule 112.2 (b), in "United Nations Staff Rules: Staff Regulations and Rules 100.1 to 112.8", Secretary-General's Bulletin, ST/SGB/2002/1 of **1 January 2002**.

Appeals in such a system can be sabotaged from the very beginning. Lower-level Administration officials in the JAB secretariats and personnel offices determine "all the facts" of a staff member's appeal. Their version and the recommendations of the JAB largely cast the case in stone, since they are usually

endorsed by the Secretary-General (his representative) and then rubber-stamped by the OLA lawyers and the UNAT, which might award some "damages."

The "discretionary authority" thus actually resides with the lower-level JAB and personnel officials who construct the case for "the Administration" (which happens to be their bosses and the managers accused). Their reports often imperiously dismiss the appeal made, concentrate on any perceived weak points of the submission, and focus the case on one narrow decision with little regard for critical patterns of behavior or related material. They also usually ignore any and all inconvenient facts, rule citations, precedent decisions by the UNAT or ILO tribunals, or other serious rule violation issues raised by the staff appellant.

A **SECOND** grave handicap is the concept of "**administrative decisions**." An appeal must be based on a formal, written decision by the "Administration", concerning and affecting some aspect of a staff member's terms of appointment, and applying personally to him. While this very narrow focus may be adequate for routine administrative matters (say the level of an education grant), it is totally inappropriate for the new, widely-recognized workplace issues cases of mobbing/harassment, misconduct, mismanagement, abuse of authority, and accountability, which concern broader patterns of behavior over periods of time.

Wise managers have known ever since the clay tablet days that they should never put such abusive actions in writing. They similarly do not seek to (or succeed in) have them formally approved by their superiors, and sometimes -- and most insidious of all -- do not even inform the staff member concerned that they have acted.

The scope of the "administrative decision" concept is supposedly recognized as a flexible and evolving one. As noted above, the Secretary-General has emphasized that the staff rules (at least as revised in 1998) should " ... ensure that those provisions would be clearly and unambiguously stated, and would take into account current situations and needs."

"Accountability and responsibility: Report of the Secretary-General", A/55/270 of 3 August 2000, para. 8.

Yet JAB Secretariats regularly undermine appeals by merely asserting that no administrative decision is involved, or picking only one decision out of many while ignoring more grievous ones, or arguing that too much time passed since a (selected) decision,

thus seeking to "time-bar" the appeal. The fundamental irony of the administrative decision rule, ruefully recognized by many, is that a staff member can only file an appeal when he receives an administrative decision, but by then it is often too late to ever reverse it. One can only launch the multi-year appeals process to seek some monetary damages.

THIRD, the internal justice process immediately introduces "**the Administration**", a poisonous conceptual vapor or miasma which thereafter smothers the entire proceedings. There are not two clear-cut parties to a dispute, but only the poor "Appellant" and the entire amorphous bureaucracy of the UN, grouped suddenly together and arrayed against him. Since "the Administration" includes the internal justice functionaries, "the Administration" is always assessing the actions of "the Administration", and it almost always finds "the Administration's" actions to have been wise, reasonable, fair, and justified.

However, the most pernicious and damaging effect of this perfect Orwellian concept of "the Administration" is that not only does the accused manager disappear from the appeals picture, but every UN manager, and legal official, becomes in fact the Secretary-General, with his discretionary authority to dispense with the rules. This is proven by the otherwise-bizarre 1998 report comment that OHRM is "obliged" to defend managers before the appeals bodies, and its effect is to obliterate the idea of any true UN "justice" system.

In a system where there are exceptions to all UN rules, for all managers (or their, cronies, friends and protectors) to invoke as "the Administration" or "the Secretary-General", there is no rule of law and certainly no accountability (how wonderfully ironical it was that Kofi Annan opened the 2004 General Assembly preaching the need of nation-states to "observe the rule of law", something the UN continually fails to do in its dealings with its own staff members, and third parties who it injures in the course of carrying out its purported mandates).

Furthermore, the "Administration" dominates the appeals process, although it argues emphatically (but not convincingly) that this is not so. For instance, it provides the JAB Secretariats, which often dominate the proceedings, as made clear near the end of the Geneva JAB rules of procedure. (In other areas, and especially the JDC's, there are no procedures at all, and apparently each panel (or its secretariat) simply makes up its procedures as it goes.)

The Geneva JAB procedures, for instance, state that the JAB panel's report shall consist of an Introduction, Summary of facts, Summary of Contentions, Considerations, and Conclusions and Recommendations. All well and good, except that it then goes on to state that:

"The first three sections shall be drawn up by the JAB Secretariat. The last two sections shall preferably be drafted by the members of the panel. The panel's report shall be brief but comprehensive and shall refer to annexed statements of the parties, wherever appropriate."

"Rules and procedures and guidelines of the Geneva Joint Appeals Board, Geneva, May 1997, "Article 30. The Report of the Panel".

The fact that the Administration prepares and almost always dominates the internal justice process is bad enough. Many appellants are appalled when -- long after they submit their cases, are informed that the panel will meet, and then months later receive the JAB report and the Secretary-General's action thereon -- they first realize that the JAB Secretariat often rewrote their facts of the case in a very selective way, and studiously ignored all or almost all the annexed factual statements and evidence which they carefully arranged and supplied.

Even worse, however, is the statement that (only preferably) the panel shall draft the considerations and the conclusions and recommendations. A full-time and trained legal JAB staff member will clearly dominate most panels of amateur staff, briefly assembled to hear a case, but with their own full-time jobs and careers to worry about instead of a laborious drafting chore.

In an environment so rigidly dominated by a faceless and almost all-powerful "Administration", the only "person" is the hapless Appellant. He or she, by virtue of filing an appeal, quickly becomes the focus of analysis, an obvious "troublemaker" or, as best, someone who has gone astray and needs to be reasoned back to acceptance of the proper way of doing things, or who at best just might perhaps deserve some consideration for monetary damages to be awarded by a panel in order to salve his wounds.

"The Administration", most critically, has for decades focused appeals cases *ad hominem* on the behavior and situation of the person making the appeal rather than on the merits and arguments of the two parties to the case and the behavior and justifications of the decision-maker. The appellant appears prominently in the proceedings "vs. the UN Secretary-General",

but the actual decision-maker is never named. His actions and behavior are swiftly excluded, while the appellant's behavior, including not only his appeal but even his full official personnel file, are minutely examined and dissected.

FOURTH, the system provides **no real "due process"**, although the Staff Rules dutifully cite due process requirements in very general terms and with the usual admonishments that they must be observed.

"United Nations Staff Rules", Secretary-General's Bulletin ST/SGB/2002/1 of 1 **January 2002**, Staff Rule 110.4, "Due process."

However, the rules never elaborate the essential, internationally recognized principles and rights of due process: proceedings bound by rules of evidence, such as:

- mandatory "discovery" and sharing of pertinent material by both sides;
- a public hearing;
- "discovery" rights for both parties for all relevant information and documentation;
- the required appearance and examination of witnesses;
- a code of legal conduct which binds the lawyers involved;
- strict time limits on all stages of the proceedings and sanctions for delays;
- professional legal counsel for appellants and the award of attorney fees for successful cases;
- expanded access to filings and pleadings and the right to confront accusers in all misconduct investigations; and
- open conduct and reporting of all proceedings unless all parties agree otherwise.

Further, basic conflict resolution requires a binding settlement of a dispute, assigning blame to an offending person and assuring appropriate punishment or sanction; and realistic settlement procedures and efforts before adjudication. (In the United States, 90 percent of civil disputes are settled prior to going to court, but as previously noted, in the UN the formerly active grievance panels have now largely been abandoned.)

In the UN internal justice system, however, almost all these elements are flatly disregarded, or simply dismissed case by case as not necessary. Rather than honouring them, the Administration seems scarcely aware that they even exist. It settles instead for simply and aggressively asserting that "due process was followed", and blandly asserting, with little if any supporting evidence, that "the rights of the appellant were fully observed", "the Administration had no malicious intent" and, whatever may have happened, the icy and unsupported conclusion that "the Appellant suffered no harm."

FIFTH the system provides **no sanctions**. When a case ends, rarely at the JAB level but only after several years with a UNAT judgement, modest or sometimes substantial damages may be awarded to the lucky few winners. But, beyond an occasional UNAT expression of concern about managerial impunity, there seems never to be any kind of sanction or punishment actually imposed as a result of a UNAT judgement. Obviously, then, justice is not served, either by punishing the guilty or by setting a clear example to others that such behavior will not be tolerated.

SIXTH, and most depressing of all, there is **no appeal**. The JAB Panel, one must recall, is only an informal and *ad hoc* staff group making a once-over-quickly review and advisory report to the Secretary-General. The UNAT, when it becomes involved, is expected to view the case *de novo*, but when it finishes its lengthy deliberations and issues its very brief and opaque judgements, the case is finished. There is no independent review or appeals court in "the real world" that ever assesses the validity of the dubious proceedings outlined above. The internal justice system has "done its job", and the case is bottled up in a cryptic UNAT decision, published in a dusty tome sitting unread on a few shelves somewhere in the UN Secretariat, and forgotten (unlike the ILO Administrative Tribunal, which to its great credit, publishes on the web all its case decisions, the UNAT decisions are nearly impossible for appellants and their external counsel to easily access).

This defective UN internal justice process might suffice to resolve narrow administrative decisions on lesser matters. But the new cases relating to the expanded staff rules are much more demanding. The JAB and UNAT failure to address and judge the new misconduct and abuse of authority matters being submitted by staff, particularly in light of the General Assembly's endlessly-repeated calls to establish a just, fair, and proper internal justice system, are very disturbing.

In short, at present a UN staff member/Appellant initiates and prepares a formal appeal in good faith, essentially on his own as an earnest amateur. "The Administration" and its rule-massagers in personnel and in the JAB Secretariats, over a period of a year or so, can pick the appeal apart, reconstruct the facts, and then select arguments and recommend action for the JAB. This package is sent to and usually endorsed by the Secretary-General, and very often decided firmly against the Appellant.

If the Appellant wishes to spend a few more years contesting the Secretary-General's decision, he or she goes to the UNAT. This includes waiting as much as a year for an opinion from the Office of Legal Affairs, which when it arrives usually provides only minimal analysis and comments (generally taking about twenty minutes to draft and twelve months to transmit), firmly endorses the findings of the JAB, throws in a few facts to show "independent" analysis, and then rules out or flatly rejects any other issues or claims made (including citations of specific staff rules and UNAT or ILOAT precedents).

The OLA also often claims no damage done, no improper intent, no process failures, and full observance by the Administration of staff rights. It brands many arguments and pleas raised by the Applicant as "inadmissible", and may then request the UNAT "to reject each of Applicant's pleas and to reject the Application in its entirety."

The UNAT, at some time over the course of another year or so, deliberates, and then, in a few pages of cursory reasoning, rejects most or all of the appeal, sometimes even merely stating that it "rejects the Applicant's case in its entirety." At this point, the internal justice process is complete, and the case is over, forever.