

# The Protection of Legitimate Expectations in Global Administrative Law

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## I. Introduction

International organizations are generally immune from domestic law, including in employment matters. However, to benefit from that immunity, they have to implement and maintain an internal justice system that appropriately protects their civil servants.<sup>1</sup> As part of the substantive law that applies in such matters, it is now generally accepted that all international organizations are bound by a number of customary rules and general principles that transcend their statutes and internal rules.<sup>2</sup> Indeed, an author notes the ‘emergence of general principles applying to all international organizations’.<sup>3</sup>

One of these general principles is the protection of legitimate expectations, sometimes framed as the duty of international organizations to abide by the promises they make to their civil servants. While this principle has a longstanding history in both domestic law and global administrative law, it has received increasing attention recently in the realm of international organizations. However, recent cases show that the notion of legitimate expectations still lacks a coherent and harmonized definition, at least in some respects. This article tries to bridge that gap by reviewing the tenets

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<sup>1</sup> See, for instance, August Reinisch, ‘The Immunity of International Organizations and the Jurisdiction of their Administrative Tribunals’ (2008) 7 *Chinese Journal of International Law* 285, 286-89.

<sup>2</sup> See, for instance, ILOAT Judgment No. 28 (1957); OIFAT Decision No. 7 (2018) para 18; ATCE Decision No. 2018/587-588. See also the first decision of the World Bank Administrative Tribunal, Decision No. 1 (1981) 25, in which it acknowledged that a ‘source of the rights and duties of the staff of the Bank consists of certain general principles of law, the applicability of which has in fact been acknowledged by the Bank’.

<sup>3</sup> Mathias Forteau, ‘Organisations internationales et Sources du droit’ in Evelyne Lagrange and Jean-Marc Sorel (eds), *Droit des organisations internationales* (LGDJ 2013) 257.

and application of the doctrine of legitimate expectations in both domestic and global administrative law, in order to identify organizing principles that could serve to harmonize the doctrine across organizations and to provide a balanced and predictable framework for all parties involved.

In this chapter, we first review the origins and principles governing the protection of legitimate expectations in selected domestic jurisdictions, to provide some comparative context. Then, we turn to the case law of international administrative tribunals on legitimate expectations.<sup>4</sup> We explore early cases to identify the conceptual foundations that justified the emergence of that doctrine, including fairness and good faith, and we analyze its application by various tribunals, noting the inconsistency of their approaches in some respects. Lastly, we suggest that the framework developed by the International Labour Organization Administrative Tribunal should inspire other international administrative tribunals to adapt their approaches in order to tend towards a harmonized doctrine across the international public service as a whole.

## II. Legitimate expectations in domestic law

This section looks at the doctrine of legitimate expectations in the domestic context, identifying its origins, theoretical underpinnings and application in selected jurisdictions, primarily in the United Kingdom and in the European Union. It also explores the specific application of that doctrine in employment matters, in those jurisdictions and others. While this exercise is far from exhaustive, it provides some comparative context that may help in understanding the application of legitimate expectations by international administrative tribunals.

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<sup>4</sup> This article does not pretend to perform an exhaustive review of the jurisprudence of all international administrative tribunals, but focuses instead on the trends established by some of them, namely the International Labour Organization Administrative Tribunal (ILOAT), the United Nations Appeals Tribunal (UNAT), the World Bank Administrative Tribunal (WBAT), the Organisation internationale de la Francophonie Appeals Tribunal (OIFAT), the African Development Bank Administrative Tribunal (AfDBAT), the Administrative Tribunal of the Council of Europe (ATCE), the Administrative Tribunal of the North American Treaty Organization (ATNATO), the Administrative Tribunal of the Organization for Economic Co-operation and Development (ATOECD) and the Commonwealth Secretariat Arbitral Tribunal (CSAT).

## 1. *Origins and application*

### 1.1 England and the Commonwealth

The emergence in common law of the doctrine of legitimate expectations is generally traced back to *Schmidt v Secretary of State for Home Affairs*.<sup>5</sup> A Court of Appeal judgment written by Lord Denning in the late 1960s, *Schmidt* considered the Home Secretary's decision to reject – critically without hearing – two American scientology students' applications to extend their study permits. In this administrative law context, Lord Denning provides the first explicit reference to the doctrine. With reasons steeped in the earlier *Ridge v Baldwin*<sup>6</sup> case, he notes:

The speeches in *Ridge v. Baldwin* show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some *legitimate expectation*, of which it would not be fair to deprive him without hearing what he has to say (emphasis added).<sup>7</sup>

In a few words and without greater explanation, Lord Denning introduces the then controversial notion that a mere expectation could marshal procedural guarantees traditionally reserved for instances of enforceable legal rights and interests. As Hodgson writes, 'the breakthrough provided by Lord Denning's judgment was the express acknowledgment that the possession of a legitimate expectation could give rise to a right to be accorded natural justice'.<sup>8</sup> Beyond public law protections for 'existing' rights and interests, natural justice was extending safeguards to 'prospective' rights and interests.<sup>9</sup>

Shortly after *Schmidt*, Lord Denning was again involved in a decision considering the doctrine of legitimate expectations in *Breen v Amalgamated Engineering Union*.<sup>10</sup> This time, his reasons focused on the context

<sup>5</sup> [1968] EWCA Civ 1, [1969] 1 All ER 904 (*Schmidt*).

<sup>6</sup> [1964] AC 40, [1963] 2 All ER 66.

<sup>7</sup> *Schmidt* (n 5) 909.

<sup>8</sup> DC Hodgson, 'The Current Status of the Legitimate Expectation in Administrative Law' (1983) 14 Melbourne University Law Review 686, 689.

<sup>9</sup> Richard Flanagan, 'Legitimate Expectation and Applications – An Outdated and Unneeded Distinction' (2011) 17 Canterbury Law Review 283, 284.

<sup>10</sup> [1971] 2 QB 175, [1971] 1 All ER 1148 (*Breen*).

of employment in what has been described as the ‘seminal’ case in this area.<sup>11</sup> Here, the members of a trade union voted Mr. Breen to be their shop steward. As per their union rules, this election was subject to the district union committee’s approval. While Mr. Breen’s candidacy had been approved by the committee in the past, this time it was not. The committee provided reasons to Mr. Breen, but refused to grant him a hearing. On appeal, Lord Denning distinguished persons without a claim seeking a privilege – who, he suggested, ‘may be turned away without a word’ – from those with rights, interests, or a legitimate expectation – who should be entitled to some form of hearing or reasons.<sup>12</sup> Despite Lord Denning dissenting in *Breen*, his reasons have since inspired cases throughout the Commonwealth.

These two early cases focused on the procedural aspect of legitimate expectations. However, the doctrine was expanded to include the protection of substantive benefits as well. In *Baker, R (on the Application of) v Devon County Council*,<sup>13</sup> twenty years after *Breen*, Lord Simon Brown reviewed the case law on legitimate expectations and identified four categories of uses of that phrase, including those referring to procedural guarantees, but also those ‘used to denote a substantive right: an entitlement that the claimant asserts cannot be denied him’.<sup>14</sup> Lord Simon Brown further noted that substantive entitlements are generally protected ‘when there is a clear and unambiguous representation upon which it was reasonable for [the claimant] to rely [...] unless only [the] promise or undertaking as to how [the official’s] power would be exercised is inconsistent with the statutory duties imposed upon it’.<sup>15</sup>

Similarly, in *R v North and East Devon Health Authority, ex p Coughlan*,<sup>16</sup> a Court of Appeal decision recently described by the United Kingdom Supreme Court as ‘the leading case on substantive legitimate

<sup>11</sup> *Hodgson* (n 8) 711.

<sup>12</sup> *Breen* (n 10) 1154. See also Hilary Delany, ‘The Doctrine of Legitimate Expectation in Irish Law’ (1990) 12 *Dublin University Law Journal* 1, 4.

<sup>13</sup> [1992] EWCA Civ 16, [1995] 1 All ER 73 (*Baker*).

<sup>14</sup> *ibid* 86.

<sup>15</sup> *ibid* 88, citing *R v Secretary of State for the Home Department, Ex parte Asif Mahmood Khan* [1984] 1 WLR 1337; and *R v Secretary of State for the Home Department, ex p Ruddock* [1987] 1 WLR 1482, [1987] 2 All ER 518, 531.

<sup>16</sup> [2001] QB 213, [2000] 3 All ER 850 (*Coughlan*).

expectations',<sup>17</sup> Lord Woolf MR described three categories of cases of legitimate expectations, on a spectrum ranging from mere consideration, to procedural guarantees, to substantive guarantees:

(a) The court may decide that the public authority is only required to bear in mind its previous policy or other representation, giving it the weight it thinks right, but no more, before deciding whether to change course. [...] (b) On the other hand the court may decide that the promise or practice induces a legitimate expectation of, for example, being consulted before a particular decision is taken. [...] (c) Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here, once the legitimacy of the expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.<sup>18</sup>

In line with that recognition of substantive legitimate expectations, the United Kingdom Supreme Court recently reiterated that 'where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so'.<sup>19</sup> While that principle is applied most prominently in administrative public cases pertaining to areas like licensing and immigration,<sup>20</sup> it also stretches into both public and private employment law.<sup>21</sup>

## 1.2 Continental Europe

The doctrine of legitimate expectations also emerged in certain continental civilian jurisdictions, particularly Germany and the European Community.

<sup>17</sup> *Finucane, Re Application for Judicial Review (Northern Ireland)* [2019] UKSC 7 [56].

<sup>18</sup> Coughlan (n 16) 57, cited more recently in *Finucane* (n 17) 56.

<sup>19</sup> *Finucane* (n 17) [62].

<sup>20</sup> *Hodgson* (n 8) 691.

<sup>21</sup> Barry Hough and Ann Spowart-Taylor, 'Realising Partnership in Employment Relations: Some Legal Obstacles' (2002) 13 *King's College Law Journal* 149, 170.

In Germany, the protection of legitimate expectations derives from the principle of *vertrauensschutz* (literally the ‘protection of trust/confidence’), which aims to encourage confidence in public decision-makers by providing protections for those who rely on their representations.<sup>22</sup> In 1956, for instance, over a decade before Lord Denning evoked the principle of legitimate expectations in *Schmidt*, the Berlin higher administrative court (*Oberverwaltungsgericht*) applied the notion of *vertrauensschutz* to conclude that a decision-maker was bound to honour a representation concerning a welfare grant.<sup>23</sup> The expectations connected with this representation were safeguarded despite the fact that the representation itself was illegal.<sup>24</sup> Since then, Germany has codified a partial version of the principle of legitimate expectations in its Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), article 48(2) of which states that some types of unlawful administrative acts may not be withdrawn if the affected person has relied on them, unless the public interest justifies such a withdrawal.<sup>25</sup>

In European Union law, protections closely resembling legitimate expectation safeguards were discussed as early as 1966 in *Châtillon v High Authority*.<sup>26</sup> As Quinot notes, the ‘type of representations creating expectations that has come to be protected by the doctrine of legitimate expectation [...] has been protected as such in EU law at least since the *Châtillon* case of 1966’.<sup>27</sup> In the employment context, the European Court of Justice (ECJ) referenced a ‘rule of protection of [...] legitimate confidence’ in the 1973 case *Re Civil Service Salaries: E.C. Commission v E.C. Council*.<sup>28</sup> The Council decided to adjust the remuneration and pension of European

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<sup>22</sup> Paul Reynolds, ‘Legitimate Expectations and the Protection of Trust in Public Officials’ (2011) 2 *Public Law* 330, 340-41. See also Ioannis Skandalis, ‘Balancing Employer and Employee Interests: Legitimate Expectations and Proportionality under the Acquired Rights Directive’ (DPhil thesis, University of Oxford 2012) 234.

<sup>23</sup> Geo Quinot, ‘Substantive Legitimate Expectations in South African European Administrative Law’ (2004) 5 *German Law Journal* 65, 68; Christopher F. Forsyth, ‘The Provenance and Protection of Legitimate Expectations’ (1988) 47 *Cambridge Law Journal* 238, 243.

<sup>24</sup> Quinot (n 23) 68.

<sup>25</sup> *Verwaltungsverfahrensgesetz* of 25 May 1976, last amended on 18 December 2018 <<https://www.gesetze-im-internet.de/vwvfg/VwVfG.pdf>>.

<sup>26</sup> Case 54/65 [1966] ECR 185.

<sup>27</sup> Quinot (n 23) 68.

<sup>28</sup> Case 81/72 [1973] ECR 575, 584.

Community officials and servants, diverging from an existing published guideline on staff salaries. The ECJ ultimately found that ‘the Council [had] failed to found the contested regulation on grounds sufficient to justify it in departing from its prior undertakings’.<sup>29</sup> Thus, the ECJ chose to safeguard the legitimate expectations of those affected.

More recently, the ECJ reiterated the criteria applying to the protection of legitimate expectations, noting that such protection ‘presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities of the European Union’.<sup>30</sup> However, these assurances ‘cannot be relied upon against an unambiguous provision of EU law’.<sup>31</sup>

### 1.3 Theoretical underpinnings in the United Kingdom and European Union law

Though several of the above-mentioned continental cases pre-date Schmidt, the doctrine of legitimate expectations still likely originated independently in England and Europe. Forsyth draws on personal correspondence with Lord Denning who stated he was ‘sure [the principle of legitimate expectation] came out of [his] own head and not from any continental or other source’.<sup>32</sup> Rather than sharing a common legal ancestor, the doctrine of legitimate expectations in England and Europe more likely evolved separately, converging to resemble one another over time. In light of these distinct origins, several scholars and judges consider that the Commonwealth and European iterations of the doctrine rest on distinct theoretical underpinnings.

In the Commonwealth, the theory behind legitimate expectations is based on principles of natural justice and fairness. Flanagan notes that ‘in its simplest sense, the concept of legitimate expectation derives from the administrative law principle that governments and public authorities must act fairly and reasonably’.<sup>33</sup> Echoing this sentiment, Lord Bingham notes in

<sup>29</sup> *ibid* 585.

<sup>30</sup> *Eesti Pagar AS v Ettevõtlike Arendamise Sihtasutus and Majandus- ja Kommunikatsiooniministeerium*, case C-349/17 [97].

<sup>31</sup> *ibid* 104.

<sup>32</sup> Forsyth (n 23) 241.

<sup>33</sup> Flanagan (n 9) 284, referring to *New Zealand Association for Migration and Investments Inc v A-G*, [2006] NZAR 45, 52.

R v Inland Revenue Commissioners, ex p MFK Underwriting Agents Ltd that the ‘doctrine of legitimate expectation is rooted in fairness’.<sup>34</sup>

By contrast, in the continental European tradition, the doctrine of legitimate expectations has been associated more closely with the promotion of legal certainty, trust in public administration, and legality. Describing the importance of legal certainty and trust to the European conception of legitimate expectations, Forsyth writes:

The judicial motivation for seeking to protect such expectations is plain: if the executive undertakes, expressly or by past practice, to behave in a particular way the subject expects that undertaking to be complied with. That is surely fundamental to good government and it would be monstrous if the executive could freely renege on its undertakings. Public trust in the government should not be left unprotected.<sup>35</sup>

Though ‘regularity, predictability, and certainty in government’s dealing with the public’, have been acknowledged as the underpinnings of the doctrine of legitimate expectations in contexts outside of Europe,<sup>36</sup> these justifications are not as prominent as in European law.

## 2. *Legitimate expectations in employment law*

These general principles have been applied in employment matters in several jurisdictions. As with the broader administrative concept of legitimate expectations, disparities exist between jurisdictions on the doctrine’s central features, and on whether the doctrine applies exclusively to procedural rights or whether it also extends to substantive rights. While this section concentrates on jurisdictions such as England, Australia, Canada, the United States, South Africa, and New Zealand, it should be noted that the doctrine of legitimate expectations for employment matters garnered

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<sup>34</sup> [1990] 1 WLR 1545, 1569-70. See also Hilary Biehler, ‘Legitimate Expectation – An Odyssey’ (2013) 50 Irish Jurist 40, 41.

<sup>35</sup> Forsyth (n 23) 239.

<sup>36</sup> See, for instance, SA de Smith, H Woolf and J Jowell, *Judicial Review of Administrative Action* (5th edn Sweet & Maxwell 1995) 417, cited in *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 [30].



judicial recognition in jurisdictions as diverse as Nigeria,<sup>37</sup> Botswana,<sup>38</sup> and Bangladesh.<sup>39</sup>

The general acceptance of legitimate expectations in employment matters has varied between jurisdictions and within jurisdictions over time. The early promotion and appointment cases of *Paterson v Dunedin City Council*<sup>40</sup> out of New Zealand and *Hamblin v Duffy*<sup>41</sup> from Australia, for instance, were rendered the same year but show a reluctance to apply principles of natural justice in the former, and an inclination to apply natural justice based on legitimate expectations in the latter.<sup>42</sup> In New Zealand, however, this position has changed over time. Departing from a line of cases opposing legitimate expectations in redundancy and dismissal matters in the 1990s<sup>43</sup> and 2000s,<sup>44</sup> New Zealand has since enacted legislation establishing a duty of good faith in all employment matters, a statute providing natural justice protections that extend even further than those traditionally afforded to legitimate expectations in common law jurisdictions.<sup>45</sup>

## 2.1 Main features of legitimate expectations in employment matters

In the English employment context, the doctrine of legitimate expectations rests on whether the relevant authorities have made objective

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<sup>37</sup> *Ihezukwu v University of Jos* [1990] 4 NWLR (Pt. 146) 598, 609. See also David Tarh-Akong Eyongndi, 'The Nigerian Employee and the Quest for Confirmation: Examining the Quagmire of Probationary Status' (2017) 8 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 61, 65.

<sup>38</sup> *Mokokonyane v Commander of the Botswana Defence Force*, [2000] 2 BLR 102 (CA). See also Christopher F Forsyth, 'The Protection of Legitimate Expectations: Some Pitfalls for Botswana to Avoid' (2006) 3 University of Botswana Law Journal 5, 11.

<sup>39</sup> *Bangladesh Biman Corporation v Rabia Bashri and others* [2003] 55 DLR (AD) 132.

<sup>40</sup> *Paterson v Dunedin City Council* [1981] 2 NZLR 619.

<sup>41</sup> *Hamblin v Duffy (No. 2)*, [1981] 37 ALR 297.

<sup>42</sup> Hodgson (n 8) 712-13.

<sup>43</sup> *Brighouse Ltd v Bilderbeck* [1994] 2 ERNZ 243 (CA); *Aoraki Corporation Ltd v McGavin*, [1998] 3 NZLR 276 (CA). See also Gordon Anderson, 'Good Faith in the Individual Employment Relationship in New Zealand' (2011) 32 Comparative Labor Law and Policy Journal 685, 704-06.

<sup>44</sup> *New Zealand Fasteners Ltd v Thwaites* [2000] 2 NZLR 565 (CA); see also Anderson (n 43) 707.

<sup>45</sup> Anderson (n 43).

commitments.<sup>46</sup> These commitments can be established through express or implied promises, or past or regular conduct.<sup>47</sup> In making such determinations, courts have considered the language used by these authorities, as well as the manner in which representations were made.<sup>48</sup> Further, where an employee has relied on an employer's objective commitment and suffered detriment as a result of that reliance, courts will be more inclined to find a legitimate expectation and protect it.<sup>49</sup>

An important distinction between jurisdictions is whether subjective awareness or reliance are needed for legitimate expectations to be protected. At a general level, for instance, in the Australian immigration case of *Ministry for Immigration and Ethnic Affairs v Teoh*, McHugh J indicates that a 'person cannot lose an expectation that he or she does not hold',<sup>50</sup> suggesting subjective knowledge of the expectation is required. Professor Paul Daly, however, argues that neither knowledge nor reliance should be needed to justify legitimate expectation protections, because judicial enforcement can play a role in good administration even without these elements.<sup>51</sup> Similarly, in the context of European law, Skandalis suggests that while detrimental reliance can certainly increase the likelihood that a legitimate expectation will be protected, it is not a prerequisite.<sup>52</sup> Case law

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<sup>46</sup> *Council of Civil Service Unions v Minister for the Civil Service*, [1985] AC 374, 408-09. See also Muayad Kamal Hattab, 'The Doctrine of Legitimate Expectation and Proportionality: A Public Law Principle Adopted into the Private Law of Employment' (2018) 39 *Liverpool Law Review* 239, 246.

<sup>47</sup> *ibid.*

<sup>48</sup> See *National Farmers' Union and another v Secretary of State for the Environment, Food and Rural Affairs and another*, [2003] All ER (D) 55; *Attrill v Dresdner Kleinwort Ltd*, [2013] EWCA Civ 394.

<sup>49</sup> Daphne Barak-Erez, 'The Doctrine of Legitimate Expectations and the Distinction between Reliance and the Expectation Interests' (2005) 11 *European Public Law* 583, 595. See also Skandalis (n 22) 235.

<sup>50</sup> *Minister of State for Immigration and Ethnic Affairs v Teoh*, [1995] 3 LRC 1, 37 (HCA).

<sup>51</sup> Paul Daly, 'A Pluralistic Account of Deference and Legitimate Expectations: Pluralism in Action' (October 23, 2015), *Administrative Law Matters*, online: <<https://www.administrativelawmatters.com/blog/2015/10/23/a-pluralist-account-of-deference-and-legitimate-expectations-pluralism-in-action/>> [<https://perma.cc/HD7R-33LZ>].

<sup>52</sup> Skandalis (n 22) 235, 241.

from certain American states similarly indicates that legitimate expectations require neither knowledge nor reliance.<sup>53</sup>

## 2.2 Procedural and substantive protections

Another aspect where domestic law on legitimate expectations diverges between jurisdictions is whether the protection extends to procedural matters only or to substantive ones as well. While substantive legitimate expectations protect those interests in a substantive right (for instance the right of an employee to a loan at a particular interest rate outlined in an employee handbook<sup>54</sup>), procedural legitimate expectations can ensure fair procedures for the continuance or acquisition of a benefit where there is an interest in that benefit (such as giving reasons for promotion decisions), or the adherence to past or promised procedures.<sup>55</sup>

As previously described, English courts have shown a willingness to protect substantive legitimate expectations in general. This is also true in the employment context, as illustrated for instance by *French v Barclays Bank*.<sup>56</sup> Mr. French, an employee of Barclays, was due to relocate cities. An applicable staff handbook offered an interest-free bridging loan, but, following a collapse in the housing market, the employer sought to readjust the loan arrangement. While the case fell outside of traditional contract rules, the court decided to protect Mr. French's substantive legitimate expectations, holding that the bank had made a clear commitment through its prior conduct towards other employees and the applicability of the handbook provision at the time of the loan.<sup>57</sup> Rather than focus on the Bank's reasons, or Mr. French's right to a hearing regarding the decision, the judgment focused on the substantive loan itself.

In South Africa, courts have also shown a willingness to protect substantive legitimate expectations in the employment context, despite some

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<sup>53</sup> *Langdon v Saga Corp.*, 569 P.2d 524, 527 (Oklahoma CA 1977). See also Paul Berks, 'Social Change and Judicial Response: The Handbook Exception to Employment-At-Will' (2000) 4 Employee Rights and Employment Policy Journal 231, 269.

<sup>54</sup> *French v Barclays Bank plc* [1998] IRLR 646 (CA).

<sup>55</sup> Elisabeth Laing, 'Legitimate Expectation' (2013) 18 Judicial Review 153, 159.

<sup>56</sup> *French* (n 54).

<sup>57</sup> *Hattab* (n 46) 251.

initial hesitation.<sup>58</sup> Hoexter notes that in a ‘growing number of cases [...] expectations seem actually to have been enforced in a substantive manner, particularly in the area of employment, even if this has not officially or consciously been achieved by means of the legitimate expectation doctrine’.<sup>59</sup> Vettori proposes that such substantive protections in South Africa may extend to contract renewal in instances where an employee has a legitimate expectation of renewal but, for instance fears non-renewal based on HIV status.<sup>60</sup> Further, substantive legitimate expectations are embedded statutorily in South Africa’s Labour Relations Act. In defining unfair dismissal and unfair labour practices, article 186(1)(b) of this Act describes a situation in which ‘an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it’.<sup>61</sup> The remedies for unfair dismissal include a court power to order that the employer reintegrate the employee.<sup>62</sup> Further research could explore the prevalence of such statutory protections across the African continent; Zimbabwe, for instance, has similar substantive protections in its own Labour Act.<sup>63</sup>

In contrast with these positive postures, other jurisdictions have refused to protect substantive legitimate expectations. At a general level, Canadian<sup>64</sup> and Australian<sup>65</sup> courts have rejected that notion, confining the doctrine to procedural guarantees. In the employment context, Indian

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<sup>58</sup> See, for instance, Daniel Malan Pretorius, ‘Letting the Unruly Horse Gallop in the Field of Private Law: The Doctrine of Legitimate Expectation in Purely Contractual Relations’ (2001) 118 South African Law Journal 503.

<sup>59</sup> Cora Hoexter, ‘The Unruly Horse and the Gordian Knot: Legitimate Expectations in South Africa’ in Matthew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing 2017) 165, 178.

<sup>60</sup> Stella Vettori, ‘Employer Duties towards Employees Infected with HIV/AIDS’ (2007) 19 South African Mercantile Law Journal 151, 155.

<sup>61</sup> Labour Relations Act (No. 66 of 1995), s 186(1)(b) <<http://www.labour.gov.za/DOL/legislation/acts/labour-relations/read-online/document.2008-05-29.2826668274>>.

<sup>62</sup> *ibid* s 193 (1)(a).

<sup>63</sup> For instance, section 12(B)(3)(a) of the Act reads: ‘An employee is deemed to have been unfairly dismissed if, on termination of an employment contract of fixed duration, the employee had a legitimate expectation of being re-engaged’: Labour Act, Government Gazette, 1996 (Chapter 28:01).

<sup>64</sup> Halsbury’s Laws of Canada (online), *Promissory Estoppel*, ‘Nature of Estoppel: Relationship with Doctrine of Legitimate Expectations’ HES-207.

<sup>65</sup> *Attorney General for New South Wales v Quin*, [1990] 170 CLR 1, [1990] HCA 21.

courts have categorically excluded the protection of substantive legitimate expectations: In *Secretary, State of Karnataka v Umadevi*,<sup>66</sup> the question arose of whether daily, casual, or temporary workers whose terms had been repeatedly extended, had a substantive legitimate expectation of ‘regularisation’.<sup>67</sup> Chandrachud notes how the five-judge bench ‘rejected the claim’ and ‘vetoed substantive legitimate expectations claims in all comparable employment contexts’ a position subsequently confirmed in *UP Gram Panchayat v Daya Rama Saroj*.<sup>68</sup> Unwilling to expose the courts to ‘a new class of “litigious employment” jurisprudence’, the Indian Supreme Court’s decision provided a clear message to the High Courts to not allow substantive legitimate expectation cases in the employment context.<sup>69</sup>

This overview of the law governing legitimate expectations in various jurisdictions provides some comparative context and valuable insights for understanding the protection of legitimate expectations in global administrative law.

### III. Legitimate expectations in global administrative law

We turn now to the application of the doctrine of legitimate expectations by international administrative tribunals. We first explore the various ways in which these tribunals have conceptually justified the existence of that doctrine, before analyzing the criteria they use to apply it. Lastly, we briefly discuss the measure of reparation they usually afford when a legitimate expectation has been affected.

#### 1. *Conceptual foundations*

In the realm of global administrative law, the protection of legitimate expectation takes its source not in the statutes and regulations of international organizations, but rather in the less tangible pool of general principles. The question that arises, then, is whether that principle is self-standing or whether it is justified and explained by broader, already-existing principles.

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<sup>66</sup> *Secretary, State of Karnataka v Umadevi*, AIR 2006 SC 1806.

<sup>67</sup> Chintan Chandrachud, ‘The (Fictitious) Doctrine of Substantive Legitimate Expectations in India’ in Groves and Weeks (n 59) 245, 250-51.

<sup>68</sup> *ibid* 251; *UP Gram Panchayat v Daya Rama Saroj* [2007] 2 SCC 138.

<sup>69</sup> Chandrachud (n 67) 250-51.

In early cases, some administrative tribunals took the former view, invoking legitimate expectations without tying them to broader principles. As early as 1955, in a series of cases involving UNESCO employees, the ILOAT confirmed that legitimate expectations and promises had to be protected and enforced.<sup>70</sup> Within these employees, a certain Mr. Duberg was employed under a fixed-term contract. Shortly before the end of his term, he refused to answer a questionnaire from his home country about his national loyalty. The Director-General of his organization then informed him that his contract would not be renewed. Mr. Duberg challenged that decision on multiple grounds, including that the Director-General had issued a general measure in which he ‘decided that all professional staff members whose contracts expire between now and 30 June 1955 (inclusive) and who have achieved the required standards of efficiency, competence and integrity and whose services are needed, will be offered one-year renewals of their appointments.’<sup>71</sup> Mr. Duberg argued that the measure was binding and had to be upheld. The ILOAT granted Mr. Duberg’s claim, and concluded based on the general measure that ‘an official who combines all the necessary qualities has a legitimate expectancy of being offered a new appointment in the position which he occupied.’<sup>72</sup> However, the ILOAT made that statement without justifying it or describing the criteria that had to be fulfilled in order for a promise to be binding.

That early approach changed over the years, as administrative tribunals started to identify the source and scope of the notion. In subsequent cases such as *Agarwala and Gieser*, the ILOAT explained that the protection of legitimate expectations was in fact based on the broader principle of good faith, which permeates the relationship between an organization and its public servants.<sup>73</sup>

The case of *Gieser* is particularly important, and has been cited numerous times since it was issued in 1986. Mr. Gieser had been working for eleven years as a fitter when the European Molecular Biology Laboratory offered him a job, for ‘three years to begin with’. He accepted the job and his contract was renewed twice. Praising his work, his supervisors told him

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<sup>70</sup> ILOAT Judgments Nos 17 (1955); 18 (1955); 19 (1955); 21 (1955).

<sup>71</sup> ILOAT 17 (n 70).

<sup>72</sup> *ibid.*

<sup>73</sup> ILOAT Judgment No. 782 (1986). See also ILOAT Judgment No. 121 (1968).

that his contract could soon be converted to an indefinite appointment. Yet, at the end of his third contract, the EMBL Head of Personnel refused to appoint him under an indefinite contract, and also refused to renew his appointment. Mr. Gieser alleged that the non-renewal breached a binding promise made to him at the time of his appointment, that he would soon get an indefinite appointment. He also said that he had left his previous job precisely because of that promise. The ILOAT held that ‘according to the rules of good faith anyone to whom a promise is made may expect it to be kept, and that means that an international official has the right to fulfilment of a promise by the organisation that employs him.’<sup>74</sup>

More recently, the ILOAT reiterated that the protection of promises flows from the duty to act in good faith. In a case concerning the enforceability of a promise to pay damages to an employee, the tribunal said that ‘it is settled by the Tribunal’s case law that, according to the rules of good faith, anyone who was a staff member of an organisation and to whom a promise was made, may expect that promise to be kept by the organisation.’<sup>75</sup>

Other tribunals such as the Arbitral Tribunal of the Commonwealth Secretariat and the Administrative Tribunal of the Council of Europe have also identified good faith as the conceptual foundation of the protection of legitimate expectations.<sup>76</sup> However, the World Bank Administrative Tribunal seems to adopt a slightly different approach, grounding that protection in the principle of fairness rather than good faith, in a manner that reminds of English case law.<sup>77</sup> In *Lavelle*, in fact, the WBAT directly cited English jurisprudence to conclude that the principles of fairness and abuse of power could lead, in some cases, to the protection of legitimate expectations:

Where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now establishes that here too the court will in a

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<sup>74</sup> ILOAT Judgment No. 782 (1986) consid 1.

<sup>75</sup> ILOAT Judgment No. 3204 (2013) consid 9. See also ILOAT Judgment No. 3148 (2012) consid 7; ILOAT Judgment No. 3005 (2011) consid 12.

<sup>76</sup> CSAT Judgment No. 11 (2006) para 27; ATCE Decisions Nos 133-145 (1986) para 79.

<sup>77</sup> (n 33), (n 34) and accompanying text.

proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power.<sup>78</sup>

That said, the distinction between these two conceptual foundations may in fact be of little practical import. Indeed, the ILOAT has sometimes referred to fairness alongside good faith, noting that it ‘has often affirmed the principle of good faith by which international organisations are bound and their duty to treat their staff members with consideration and fairness’.<sup>79</sup> In turn, the WBAT has referred to the Bank’s ‘obligation to act in good faith’ on some occasions, albeit not in the context of the protection of legitimate expectations.<sup>80</sup> Both principles are thus part of the ecosystem of these organizations – and arguably all international organizations – and may therefore serve to justify the protection of legitimate expectations.

In any event, and no matter its conceptual foundation, the doctrine of legitimate expectations is limited to specific circumstances and its scope is delimited by various criteria, to which we now turn.

## 2. *Criteria and application*

While the wording of the specific criteria applied to determine whether a promise ought to be protected and enforced vary across international organizations, they appear to be substantially similar. The most comprehensive framework in that regard has been established by the ILOAT, which explained

that the promise should be substantive; [...] that it should come from someone who is competent or deemed competent to make it; that breach should cause injury to him who relies on it, and that the position in law should not have altered between the date of the promise and the date on which fulfilment is due. It does not matter what form the promise takes: it may be written or oral, express or implied. He who makes it is bound to keep faith, even if he made it orally, or if it is to be inferred merely from the circumstances or his behaviour.<sup>81</sup>

<sup>78</sup> WBAT Decision No. 301 (2003) 24, citing Coughlan (n 16) 57.

<sup>79</sup> ILOAT Judgment No. 1479 (1996) consid 12.

<sup>80</sup> See, for instance, WBAT Decision No. 321 (2004) para 69; WBAT Decision No. 499 (2014) para 73.

<sup>81</sup> ILOAT 782 (n 73) consid 1.



These criteria have been reiterated and applied on several occasions by the ILOAT and other administrative tribunals. Recently, the ILOAT also clarified that ‘the third element has two sub-elements. One is that the promisee has relied on the promise and the second is that this reliance has caused injury to the promisee in the event of non-fulfilment of the promise.’<sup>82</sup>

The WBAT also applies similar criteria, although not in the exact same terms. In *Bigman*, the tribunal referred to the first three criteria, and arguably did not have to refer to the fourth because it was not at issue:

The first question [...] is whether there was in fact a promise made [...] and if so the nature of the promise [...] The question that follows is whether such terms and conditions were decisive [...] [The third] question [is the promisor’s] authority to make a promise of the kind discussed above.<sup>83</sup>

The Administrative Tribunal of the North Atlantic Treaty Organization similarly described the applicable criteria as follows:

First, precise, unconditional and consistent assurances originating from authorized and reliable sources must have been given to the person concerned by the NATO body. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules.<sup>84</sup>

These criteria are broadly similar to the above-mentioned criteria developed by English courts and the ECJ, although the English courts add a final step to the test, where they assess the general fairness of the protection of a legitimate expectation, having regard to broader policy considerations.<sup>85</sup> By contrast, other organizations such as the Administrative Tribunal of the Council of Europe appear not to have adopted a specific framework to apply the doctrine of legitimate expectations.

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<sup>82</sup> ILOAT Judgment No. 3619 (2016) consid 14. See also ILOAT 3204 (n 75) consid 9.

<sup>83</sup> WBAT Decision No. 209 (1999) paras 6-9.

<sup>84</sup> ATNATO Judgment No. 2013/3 para 30. See also ATNATO Judgments Nos 2015/28 para 70; 2015/1 para 70.

<sup>85</sup> See, for instance, *Finucane* (n 17).

The following sections examine how these criteria have been applied by the ILOAT and other tribunals, and pay particular attention to the distinctions between the protection of promises and other doctrines such as the enforceability of a practice and the protection of acquired rights.

### 2.1 First criterion: a clear and effective promise

The first criterion is ‘that there must be a promise to act or not to act or to allow’.<sup>86</sup> This criterion essentially serves to determine whether the promise exists, and whether its contents are clear and effective.

#### (i) *The existence of the promise: a matter of evidence*

The existence of a promise does not depend on its form. As the ILOAT said in Gieser, ‘it does not matter what form the promise takes: it may be written or oral, express or implied. He who makes it is bound to keep faith, even if he made it orally, or if it is to be inferred merely from the circumstances or his behaviour’.<sup>87</sup> However, the form of a promise will often affect the evidence available to substantiate it which, in turn, will affect the likelihood of the complainant successfully establishing its existence.

A written promise will necessarily be easier to prove than a verbal one. In *P v EPO*, a lawyer challenged the decision not to convert her fixed-term contract into a permanent one and not to select her for a vacant permanent position. She claimed that various promises in that regard, both verbal and written, had been made to her in the course of her employment. While the ILOAT found that the written promise did exist, it held that the oral one was not sufficiently reliable to be binding, because it ‘was disputed and in any event was founded on hearsay’.<sup>88</sup> The written promise was comparatively much more compelling than the verbal one.

Similarly, in *Annabi*, the complainant requested the conversion of his fixed term contract into a continuing one, arguing that the ILO had broken a promise made to him at the time of his recruitment. The ILOAT found that the promise did exist because of a telex that the chief of Personnel Development Branch of the ILO had sent to the Director of the Personnel

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<sup>86</sup> ILOAT 782 (n 73) consid 1.

<sup>87</sup> *ibid.*

<sup>88</sup> ILOAT 3619 (n 83) consid 12. See also ILOAT Judgment No. 1667 (1997) consid 5.

Division of the FAO just before the complainant's recruitment, which said 'that the ILO would offer him a contract for two years' but also that he could 'expect to receive one without limit of time in five or six years and that the post was one of the most secure in the Organization'.<sup>89</sup> It is apparent from the ILOAT's reasons that the promise would not have been enforced had it not been put in writing.

This does not mean that an oral promise cannot be enforced, but in such circumstances it will generally be easier to prove with corroborating evidence.<sup>90</sup> That evidence may come, for instance, from other testimonies. In Gieser, the complainant relied exclusively on a verbal promise made at the time of his hiring. Three of the witnesses denied that the promise was made, but one confirmed that it had been made. The ILOAT found 'that the making of the oral promise [was] established' because 'there [was] no reason to question the impartiality' of that last witness, who '[was] still on the staff and plainly [had] no reason to oppose' the Organization.<sup>91</sup> In essence, it came down to an appreciation of credibility.

Corroborating evidence may also come from the absence of denial by the promisor. In Schmidtkunz, the complainant alleged that the Director-General had promised him a three-step increase within his grade. The Assistant Director-General denied that the promise was ever made, but the Tribunal concluded otherwise. It noted that 'while the Director-General may communicate within the Organization through others acting on his behalf, the best evidence available must be offered in proceedings before the Tribunal. In this instance, this would have been direct denial by the Director-General himself'.<sup>92</sup> Again, the credibility of the testimony adduced was central to the conclusion of the case.

Even when corroborating evidence is available, the tribunal may favor the contradicting testimonies of by other people within the organization. In Riseley, for instance, the complainant relied on her allegations and on testimony by another staff member to prove the existence of a promise. The ILOAT dismissed her claim, stating that 'there [was] no reason to accept

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<sup>89</sup> ILOAT Judgment No. 1481 (1996) consid 3.

<sup>90</sup> ILOAT Judgment No. 3362 (2014) consid 8.

<sup>91</sup> ILOAT 782 (n 73) consid 3.

<sup>92</sup> ILOAT Judgment No. 1781 (1998) consid 13.

one version rather than the other and the burden of proof [was] on the complainant'.<sup>93</sup> In *CC*, the WBAT also favoured the declaration of the person who had allegedly made the promise over that of the complainant.<sup>94</sup>

In cases where no corroborating evidence is available, it will generally be much harder to prove the existence of an oral promise. In *Colagrossi*, for instance, the complainant argued that she had accepted employment with the FAO on the strength of an assurance by her interviewer that her appointment would soon be converted into a continuing one. The ILOAT rejected her claim, concluding that there was 'no independent evidence [...] to suggest that she was given any such assurance'.<sup>95</sup> In other words, the complainant's own testimony was insufficient to establish the existence of a promise.

Similarly, in *Douglas*, the complainant alleged that his organization had promised to train him in machine translation. However, the ILOAT dismissed his claim and held that the employee had merely 'presumed on recruitment that, having found him wanting in some respects, the [organization] would be training him up'.<sup>96</sup> Such a presumption was insufficient to establish a clear and effective promise.

Lastly, where an alleged promise is contradicted by clear evidence, it will most often be rejected by the tribunal. In *Gianoli*, the complainant relied on a promise of extension that was evidenced, in his opinion, by letters from the organization confirming the previous extensions of his contract. However, the ILOAT found that 'none of the letters to him extending his appointment may be construed as a promise or commitment; in fact he was told quite plainly that the purpose of extension was to enable him to finish his work and allow a "smooth transition" for his successor'.<sup>97</sup> That statement contained in the letters presented to the ILOAT contradicted the alleged promise, which could therefore not be enforced.

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<sup>93</sup> ILOAT Judgment No. 892 (1988) consid 4.

<sup>94</sup> WBAT Decision No. 482 (2013) paras 37-39; WBAT Decision No. 316 (2004) paras 36-40.

<sup>95</sup> ILOAT Judgment No. 1044 (1990) consid 2. See also ILOAT Judgment No. 703 (1985) consid 7; ILOAT Judgment No. 445 (1981) consid 2.

<sup>96</sup> ILOAT Judgment No. 1040 (1990) consid 5.

<sup>97</sup> ILOAT Judgment No. 956 (1989) consid 5.

In the same way, in Breuckmann (No. 3), the complainant asserted pension rights based on an alleged promise of the Director of Personnel and Administration at the time of his appointment. The ILOAT rejected his claim, noting that no evidence had been adduced to that effect, and that a letter written by the complainant confirmed instead that he had ‘merely discussed the question of acquisition of pension rights in the hope that the competent bodies would take a decision in his favour’, which was far from being a clear promise.<sup>98</sup>

These cases show that absent compelling evidence that a promise was effectively made by the organization, administrative tribunals will simply dismiss a claim based on that promise, without even delving into its contents and the authority of the person who made it. The existence of a promise is thus essentially a threshold issue for any legitimate expectation claim.

*(ii) Contents of the promise: clear and effective*

The second part of the first criteria is whether the contents of the promise are sufficiently clear and effective to be binding. The effectiveness of a promise often depends on whether it is qualified or not or, in the words of the United Nations Appeals Tribunal, whether it constitutes a ‘firm commitment’ by the organization.

In Remont, for instance, the complainant was employed at the P.5 level but alleged that he had accepted a P.4 appointment on the force of a promise made to him that the position would later be upgraded to the P.5 level. The ILOAT concluded that there was no such promise, because ‘the organisation had told the complainant quite plainly from the outset that the upgrading of his post in Tunisia to P.5 would entail first completing a certain procedure [...] but it could not promise and had in fact never promised any positive outcome.’<sup>99</sup> In other words, the ‘promise’ made to the complainant was qualified by a condition precedent – the completion of a certain procedure – and was therefore not a ‘firm commitment’.

Similarly, in Waliullah, the complainant relied upon minutes to allege that a promise had been made that his appointment would be extended.

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<sup>98</sup> ILOAT Judgment No. 360 (1978) consid 4.

<sup>99</sup> ILOAT Judgment No. 228 (1974) consid 3.

The ILOAT dismissed his claim, concluding that those minutes ‘merely show[ed] the Organisation’s wish to find some means of retaining the complainant’s services after the expiry of his appointment’ and ‘contain[ed] no promise either of a further extension or of a new appointment, still less any commitment’.<sup>100</sup> In other words, the commitment was not clear enough to form a binding promise, since it was only a wish of the organization.

In *B v CDE*, the complainant relied on a letter as evidence of an agreement to extend his appointment by seconding him to another organization. However, as the ILOAT noted while dismissing his claim, he himself admitted ‘that the letter [in question did] not mention any agreement or undertaking [...] but contain[ed] only indications, and that there [was] no other document in the file to show that these indications were of such a precise and unconditional nature that they might be deemed to constitute proof of assurances to him that his contract would be renewed’.<sup>101</sup> Once again, the alleged promise was tied to a condition – that there be further discussions about the complainant’s secondment – with the result that it could not be enforced by the Tribunal.

The WBAT applies similar principles and refuses to enforce qualified promises. In *Mathew*, it found that the organization ‘did promise to convert the Applicant’s appointment into a permanent one but that the fulfillment of that promise was conditional upon the Applicant’s satisfactory performance’.<sup>102</sup> In light of the evidence, which showed that the applicant’s performance was indeed unsatisfactory and that the condition was therefore unfulfilled, the tribunal refused to enforce the promise.

Similarly, in *Zeynep Zerrin Koçlar*, the complainant relied on a statement that her contributions to the organization would ‘be an important factor in the decision on whether to extend her fixed term contract’. But as the WBAT noted, it was ‘unable to discern from this statement, or from the record adduced by the parties, a promise made by the Bank, either expressly or by unmistakable implication, which would warrant an inference by the Applicant that she had a right to the renewal of her contract’.<sup>103</sup> Indeed,

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<sup>100</sup> ILOAT Judgment No. 190 (1972).

<sup>101</sup> ILOAT 3148 (n 75) consid 8.

<sup>102</sup> WBAT Decision No. 103 (1991) paras 26-28.

<sup>103</sup> WBAT Decision No. 441 (2010) para 31.

a commitment to consider a factor was far from being an unconditional promise of extension.

These cases are examples of qualifications that were expressly made at the time of making the promise. But a qualification may also result from external circumstances that make it impossible for the promise to be effective as is. In *Gross*, for instance, the promise alleged by the complainant was a promise by the FAO that her secondment would be extended to five years and that she would be granted a three-year appointment. The ILOAT declined to enforce the alleged promise, noting that ‘to be enforceable they would have had to be agreed to by both organisations, and the complainant herself does not contend that the United Nations endorsed them.’<sup>104</sup>

In *Nasrawin*, the complainant alleged a promise of renewal based on a memorandum by the Director-General in which the latter indicated that he had decided to renew his appointment. The ILOAT dismissed the claim, noting that while the memorandum quite clearly indicated that there had been a decision from a competent authority to renew the complainant’s appointment, this ‘was not a real decision to appoint someone but an internal formality prior to such a decision’, because the administrative services were asked to secure the funds for the post and to establish the documents necessary to proceed with the appointment.<sup>105</sup> The absence of formal notification to the complainant was also a relevant fact.

The Organisation internationale de la Francophonie Appeals Tribunal follows similar principles. In two recent decisions, the complainants alleged that the provisional budget of the organization contained a promise that they would benefit from an increase in the mandatory retirement age. The tribunal dismissed that claim, noting that the budget was not effective in itself, and that a promise could not result from it unless it was followed by indications of the same nature by the competent authorities. In that case, there were no such indications, since the administrator had cautioned that the budget could be modified.<sup>106</sup>

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<sup>104</sup> ILOAT 703 (n 95) consid 7.

<sup>105</sup> ILOAT Judgment No. 2112 (2002) consid 7.

<sup>106</sup> OIFAT Judgment No. 7 (2018) para 27. See also OIFAT Judgment No. 5 (2017) paras 33-36.

In short, it will be insufficient for a complainant to show an intent, an indication or even a decision of the organization to establish a promise, if that decision is not shown to be clear and effective.

*(iii) A promise based on circumstances: implicit expectations of renewal*

Despite these stringent criteria, the mere behavior of an organization or of its official may still give rise to an enforceable promise. A question that is raised quite frequently in that regard is whether a legitimate expectation of renewal can arise simply because of an initial appointment, or because of a long period of service. In general, even if some tribunals have acknowledged that these circumstances may give rise to expectations, they have refrained from protecting them in substance and have instead concluded that they lead to heightened obligations of due process in deciding not to extend or renew an appointment.

In such circumstances, regard must be had for the specific criteria that apply to non-renewals, in addition to those governing legitimate expectations. As the ILOAT explained,

A decision not to extend a fixed-term appointment or not to convert it into an appointment of indeterminate duration falls within the [organization's] discretionary authority. Hence the Tribunal may quash it only if it was taken without authority, violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if it is tainted with misuse of authority, or if a clearly mistaken conclusion has been drawn from the facts.<sup>107</sup>

This principle was expressly adopted by other tribunals, including the Administrative Tribunal of the Organization for Economic Co-operation and Development.<sup>108</sup> Similar principles are also applied by the United Nations Appeals Tribunal, which held that

It is well established that a party to a fixed-term appointment has no expectation of renewal of that contract. In order for a staff member's claim of legitimate expectation of a renewal of appointment to be

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<sup>107</sup> See, for instance, ILOAT Judgments Nos 251 (1975); 1349 (1994); 1450 (1995); 1696 (1998).

<sup>108</sup> ATOECD Judgments Nos 73 (2014) paras 29-30 and 76 (2014) para 16.



sustained, it must not be based on mere verbal assertion, but on a firm commitment to renewal revealed by the circumstances of the case.<sup>109</sup>

Similar principles are also applied by the WBAT, which considers ‘that a restriction on the Bank arises when circumstances warrant the inference by a staff member that the Bank has indeed made the promise to extend or renew his or her appointment either expressly or by unmistakable implication’.<sup>110</sup>

In line with these principles, an expectation of renewal will usually result not only from the existence of an appointment, but rather from additional compelling circumstances. As C.F. Amerasinghe explains in his treatise on *The Law of International Civil Service*,

Expectancy is a state of mind which has been created by positive action taken by the holder of a contract coupled with specific behavior on the part of the administrative authority. The concept of legitimate expectancy has been created in spite of the fact that in general the written law of organizations explicitly excludes any expectancy of continued employment for holder of fixed-term contract. Hence as a result of the creation of the concept of expectancy, *the written laws prevail only in the absence of any countervailing circumstances, surrounding facts or behavior on the part of the authority, which could have created in the mind of the holder of the contract an expectancy of continue employment*. Where the required expectancy can be shown to exist, the holder of the contract has certain rights in respect of the renewal or conversion of his contract resulting from such expectancy (emphasis added).<sup>111</sup>

In essence, the staff member has the burden ‘to show a legitimate expectancy of renewal or that the non-renewal of his fixed-term appointment was

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<sup>109</sup> UNAT Judgment No. 2015-UNAT-522 para 24. See also UNAT Judgments Nos 2014-UNAT-411 para 26; 2017-UNAT-715 para 46; 2016-UNAT-660 para 25.

<sup>110</sup> WBAT Decision No. 506 (2015) para 59, referring to WBAT Decision No. 299 (2003) para 10. See also WBAT Decisions Nos 175 (1997) para 13; 339 (2005) paras 30-33. See also ATCE Decision No. 2013/542 and 2014/544 para 49, where the ATCE concluded that ‘the fact that the appellant was dedicated to his job and discharged functions pertaining to a higher grade does not constitute decisive evidence that the principles of legitimate trust and expectations were infringed through the termination of his employment’.

<sup>111</sup> Chittharanjan Felix Amerasinghe, *The Law of the International Civil Service* II (2nd edn Clarendon Press 1994) 93; cited by the AfDBAT in various cases including Judgments Nos 44 (2005) para 42 and 85 (2013) para 43.

arbitrary or motivated by bias, prejudice or improper motive against the staff member'.<sup>112</sup> In other words, 'the non-expectancy of renewal [can] be challenged if evidence [is] produced leading to the conclusion that an express and concrete decision, promise or commitment of renewal was communicated to a staff member, consequently raising such an expectation'.<sup>113</sup>

However, since many organizations specifically provide in their contracts of employment that fixed-term appointments do not carry any expectation of renewal, some administrative tribunals such as the tribunal of the African Development Bank have concluded that 'such situations will [...] be exceptional, given that such expectation would be contrary to the express wording of the employment contract. The evidence supporting the creation of such an expectation must therefore be compelling'.<sup>114</sup> In the words of the WBAT, those are 'unusual circumstances'.<sup>115</sup>

In that context, it is clear that the simple fact of having a contract cannot ensure its renewal.<sup>116</sup> However, the ILOAT has concluded that the expectation of renewal that results from the initial appointment imposes upon the organization the duty to examine whether the renewal is possible and, if not, to motivate and explain its decision. As the ILOAT once explained:

Inevitably, in the conditions in which the Organization carries on its work, there arises an expectation that normally a contract will be renewed. The ordinary recruit to the international civil service, starting as the complainant did at the beginning of his working life and cutting himself off from his home country, expects, if he makes good, to make a career in the service. If this expectation were not held and encouraged, the flow to the Organization of the best candidates would be diminished. If, on the other hand, every officer automatically failed to report for duty after the last day of a fixed term, the functioning of the Organization would, at least temporarily, be upset. This is the type of situation which calls for – and in practice invariably receives – a

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<sup>112</sup> UNAT Judgment No. 2015-UNAT-503.

<sup>113</sup> UNAT Judgment No. 2016-UNAT-678 para 32.

<sup>114</sup> AfDBAT Judgment No. 104 (2018) para 55.

<sup>115</sup> WBAT Decision No. 482 (2013) para 36.

<sup>116</sup> See, for instance, ATNATO 2015/1 (n 84) para 71, noting that 'the offer of a three-year contract [...] did not create a legitimate expectation [that] this contract would be renewed'.

decision taken in advance. It was not the application of abstract theory but an understanding of what was practical and necessary for the functioning of an organisation that caused the Tribunal to adopt the principle that *a contract of employment for a fixed term carries within it the expectation by the staff member of renewal and places upon the organisation the obligation to consider whether or not it is in the interests of the organisation that that expectation should be fulfilled and to make a decision accordingly* (emphasis added).<sup>117</sup>

That due process obligation is heightened when an employee has been working for an organization for several years. While that employee cannot expect his or her employment to continue indefinitely, long service gives rise to more stringent procedural obligations on the part of the organization.<sup>118</sup>

In Devaux, for instance, the Administrative Tribunal of the Council of Europe considered a case where the plaintiff had been working for seventeen years on temporary and fixed-term contracts. When her latest contract expired, the rules required her to take one year off in order to be eligible again for employment. However, her projects were still ongoing and funded, and therefore the organization exceptionally provided her with a three-month extension, on the understanding that there was no further possibility of renewal. When the organization indeed refused to further extend her contract, the plaintiff complained and asked for her reinstatement. Acknowledging that she ‘had no vested right to be offered a new temporary or other contract that would have allowed her to continue working for the Organisation’, because ‘the fact that appointments have been renewed in the past does not amount to a promise of renewal’, the Council nevertheless upheld her complaint, holding that she ‘deserved to be treated with greater respect’ due to her many years of service, and that the organization’s conduct was contrary to good faith, since its conduct in waiving the waiting period for a first time should have led to the plaintiff’s continued employment.<sup>119</sup> Despite clear rules on the renewal of fixed-term contracts and the absence of a clear promise of renewal, the procedural expectations arising from long years of service took precedence.

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<sup>117</sup> ILOAT Judgment No. 675 (1985).

<sup>118</sup> See, for instance, AfDBAT 44 (n 111) paras 58-64.

<sup>119</sup> ATCE (n 2) paras 108-109.

In case No. 73, the Administrative Tribunal of the Organization for Economic Co-operation and Development considered whether the decision not to convert the applicant's appointment from a fixed-term appointment to an open-ended one had to be upheld. The Tribunal noted that a process had been put in place by the organization in order to provide for such a conversion to all officials of the organization, and that in the applicant's case, the process had not been correctly followed. It is therefore because of that lack of process that the Tribunal overturned the decision not to provide the applicant with permanent employment. The Tribunal concluded that as part of that process, 'given his experience acquired prior to 1997 and also his long career within the Organisation in relevant functions, the Applicant had the legitimate expectation that his fixed-term contract would be converted to an open-ended contract'.<sup>120</sup>

Similarly, in *Garcin*, the ILOAT came to the conclusion that 'a lengthy period of satisfactory service' alone 'entitled [the complainant] legitimately to expect the possibility of making a career within the organisation'.<sup>121</sup> However, the ILOAT did not directly protect that expectation, but rather held that in such circumstances the decision of the Director-General not to renew *Garcin's* contract had to 'be taken only while fully respecting the provisions of the Staff Regulations and Rules in order to surround the free decision of the Director-General with the guarantees imposed in the interests both of the organisation and of the official concerned'.<sup>122</sup> In other words, the Organisation was expected to act within the strict confines of its powers and procedures in order to disregard the expectation that long years of service had created.

In *Hermann*, the ILOAT identified a similar expectation created by a long period of satisfactory service – 15 years in that case – and held that that expectation meant that the employee in question, whose position had been abolished, 'should be treated in a manner more appropriate to his situation', by providing him 'any vacant post which he is capable of filling in a competent manner, whatever may be the qualifications of the other candidates'.<sup>123</sup>

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<sup>120</sup> ATOECD, Judgment No. 73 (2014) para 44.

<sup>121</sup> ILOAT Judgment No. 32 (1958).

<sup>122</sup> *ibid.*

<sup>123</sup> ILOAT Judgment No. 133 (1969). It is worth noting, however, that the Tribunal also found support in article 109.5(b) of the Staff Rules of the organization, which provided

Again, while not binding on the organization, that implicit expectation meant that the organization was restricted in its exercise of discretion.

In such a case, the wording of the applicable rules may also play a role. Indeed, in *Hrdina*, the ILOAT refused to come to the same conclusion, holding that the ILO Staff Regulations provided in their article 4.6(d) that fixed-term appoints carried no expectation of renewal, and did not contain any provision ‘requiring the Organisation to take account of the duration of the appointment’.<sup>124</sup> It therefore refused to quash the non-renewal of an employee who had been at the service of the ILO for approximately six years. In that case however, contrary to some of the above-mentioned cases, it seems that the non-renewal process was duly followed.

Similarly, in *De Sanctis*, the ILOAT refused to quash the non-renewal of an appointment that was justified by the abolition of the employee’s post.<sup>125</sup> While the ILOAT recognized that ‘considering the length of his service the complainant might have expected to be kept on’, it held that the Director-General had not exceeded his discretionary authority in deciding not to renew the employee’s appointment.<sup>126</sup> The Tribunal also concluded that the simple fact that the complainant had ‘served the FAO for longer than the successful candidate’ to a post to which he had applied during his service for the organization, did not justify quashing that appointment, since other criteria had to be considered to make such a decision.

In short, when long service creates an expectation of renewal, the duty of the organization is primarily to follow the applicable rules strictly, in which case the decision not to renew the contract will usually not be quashed.<sup>127</sup> As the ILOAT said in *Del Valle Franco Fernandez*, ‘career prospects are not something that exist independently. If the refusal of renewal is lawful, so is the ending of the career’.<sup>128</sup>

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that reassignment in the event of the abolition of a post should be based among other things on ‘efficiency, competence and integrity and length of service’. See also ILOAT Judgment No. 1323 (1994).

<sup>124</sup> ILOAT Judgment No. 229 (1974).

<sup>125</sup> ILOAT Judgment No. 251 (1975).

<sup>126</sup> *ibid.*

<sup>127</sup> ILOAT Judgment No. 1526 (1996).

<sup>128</sup> ILOAT Judgment No. 1610 (1997) consid 24.

*(iv) Distinguishing a promise from immediate execution and from practices*

In assessing the nature and contents of a promise, it is crucial to understand the differences between promises and other undertakings that are similar in some respects, but are nonetheless governed by different sets of rules.

First, promises necessarily concern future actions or omissions, which are different from actions that are capable of immediate execution. These latter actions follow a different set of rules, under which they become enforceable as soon as they are clear and effective, and made by someone in authority. In other words, the criteria of reliance and of an unchanged set of rules have no role to play regarding decisions capable of immediate execution.

For instance, in a decision where the payment of damages to an employee was at issue, the ILOAT concluded that the ‘principles [applying to promises] are inapt to apply without qualification to a commitment capable of immediate implementation’. Noting that ‘the unequivocal commitment to pay the complainant was capable of immediate implementation’ and that the commitment was made by someone in authority, the ILOAT concluded that the organization had breached its duty to act in good faith.<sup>129</sup>

Second, promises must also be distinguished from practices. While both are enforceable in some circumstances and result from decisions made by persons acting within their sphere of authority, they present a fundamental difference. A promise is an undertaking towards one or several employees, while a practice is not a promise made to someone in particular, but rather a way of conducting the organization’s affairs that becomes accepted and binding. As the ILOAT recently explained:

Consistent precedent has it that while an international organization is obliged to apply its written rules, *it must also act in accordance with a consistent practice while that practice is in existence*. A staff member may rely on a practice that is created by an announcement, by an administrative circular or otherwise, which is evidence that in the exercise of the discretionary power the head of the organisation will follow a specified administrative procedure. Accordingly, a decision by the executive head

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<sup>129</sup> ILOAT 3204 (n 75) consid 10.

of an international organization who has created an established practice in furtherance of the exercise of discretion conferred by a written rule may be vitiated if the decision breaches the existing practice. [...] Consistent precedent also has it that the party who seeks to rely on an unwritten rule or practice bears the burden of proving its substance (emphasis added).<sup>130</sup>

As the AfDB Administrative Tribunal explains, ‘the important principle to emphasize is that the practice must be constant and consistent in order to give rise to a general rule or practice. It must be well established and accepted by the organization. The evidence establishing it must be clear and compelling to leave no doubt that the practice exists and is observed.’<sup>131</sup>

One of the important consequences of the distinction between a promise and a practice is that while a promise remains binding as long as the governing framework remains unchanged, international organizations are ‘at liberty to abandon [practices] provided that [they do] so lawfully.’<sup>132</sup> In other words, ‘there can be no doubt that the same body that [has] the authority to adopt such a practice [has] equally the authority to decide to withdraw it.’<sup>133</sup>

Another important consequence is that the individual nature of a promise – and the fact that it is generally not widely shared within the organization – may lead to accusations of discrimination amongst employees. In *Raths et al.*, for instance, the complainants alleged that the promotion of a fellow employee caused them injury because that employee, contrary to them, did not fulfill the criteria for the specified grade. The promotion had in fact been granted in fulfilment of a promise, but that fact had not been communicated within the organization, such that in ‘the unusual circumstances in which [the employee] was promoted the complainants were also right to challenge the decision.’<sup>134</sup> On the other hand, an accepted practice is by its very nature widely shared amongst the organization and will usually not lead to claims of discrimination between employees, unless the practice itself is discriminatory.

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<sup>130</sup> ILOAT Judgment No. 3680 (2016) consid 12. See also ILOAT Judgment No. 421 (1980) consid 8.

<sup>131</sup> AfDBAT Judgment No. 85 (2013) para 51.

<sup>132</sup> ILOAT Judgment No. 2632 (2007) consid 13.

<sup>133</sup> ILOAT Judgment No. 2089 (2002) consid 9.

<sup>134</sup> ILOAT Judgment No. 1804 (1999) consid 12.

## 2.2 Second criterion: authority

The second criterion is ‘that the promise must come from someone who is competent or deemed competent to make it’. This criterion is fulfilled when the person making the promise has the actual authority to do so, but also in some circumstances when the person is deemed to have that authority. The necessary authority to make a promise as to the continuity of employment usually derives from the authority either to bind the organization in general, or to hire the person concerned.

In *B v Eurocontrol*, the promise alleged by the complainant had been made by the former Director of Institute of Air Navigation Services in Luxembourg. The ILOAT dismissed the claim, noting that ‘even if there had been promises made, the complainant had failed to prove that they had been taken by the competent authority, since it [was] the Director General who ha[d] sole responsibility for employment policy of Eurocontrol’.<sup>135</sup>

Another example of a claim dismissed because of a lack of authority is *Wasmer*, in which the complainant was a long-standing employee of the ILO who had taken on additional duties when a person above his grade had left the organization. It was demonstrated that at that point, the employee’s supervisor had made him a promise that his post would soon be upgraded to reflect his new duties. However, the post was never upgraded. The ILOAT concluded that that promise did not mean that the ILOAT was at fault, because ‘all that the supervisor could do was suggest that those who were empowered to do so grant a higher grade, and indeed it seems that he did so. But the decision did not lie with him’.<sup>136</sup> Therefore, it is on the basis of a lack of authority that the ILOAT refused to enforce the promise.

Apart from actual authority, some decisions indicate that the criterion of authority may be satisfied when the person making the promise is deemed to have the required authority. In *Gieser*, the ILOAT noted that the promise in question was enforceable because, among other things, ‘it was made by someone in authority or at least by someone [the complainant] might deem to have authority’.<sup>137</sup>

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<sup>135</sup> ILOAT Judgment No. 2158 (2002) consid 5.

<sup>136</sup> ILOAT Judgment No. 629 (1984).

<sup>137</sup> ILOAT 782 (n 73) consid 7.



Similarly, in *D v EPO*, the complainant alleged that her director had promised her a permanent appointment. Dismissing that claim, the ILOAT concluded that the director ‘was neither someone with the authority nor someone deemed to have the authority to make such a promise’.<sup>138</sup> These two cases suggest that authority is not only understood as actual authority, but that this criterion can also be fulfilled when the person making the promise is deemed to have the required authority.

An example of such deemed authority is found in *B v ITU*, in which the letter on which the complainant relied to establish a promise had been produced by the Chief of the Administration and Finance Department and purported to speak on behalf of the Secretary-General. The ILOAT dismissed the organization’s argument that only the Secretary-General himself had the power to make such a promise, noting that ‘it is commonplace in international organisations for others in senior positions to speak on behalf of the organisation’s executive head’ and that the letter thus had to ‘be taken to have recorded a decision of the [organization] itself [...] in the absence of fraud or some other fundamental illegality’.<sup>139</sup> As a result, even accepting that the promisor did not have the necessary authority, the promise could reasonably be interpreted by the complainant as being made by someone in authority.

However, it is not simply because the promisee subjectively believes the promisor to be competent that this criterion will automatically be satisfied. In a case where the complainant challenged the decision not to extend his contract beyond the statutory retirement age, the ILOAT concluded that a promise was made, but that it was unenforceable for want of authority.<sup>140</sup> Although the ILOAT noted that it was sufficient for the person making the promise to be ‘deemed to be competent to make’ it, the Tribunal indicated that the evidence showed that the complainant had clearly been told that the promisor did not have the required authority. Additionally, from his long period of service, the complainant should have been aware of that lack of authority. In light of these circumstances, the complainant could not continue to believe that the promise was made by someone competent.

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<sup>138</sup> ILOAT 3005 (n 75) consid 13.

<sup>139</sup> ILOAT 3204 (n 75) consid 10.

<sup>140</sup> ILOAT Judgment No. 2779 (2009) consid 6.

Therefore, it seems that someone will be deemed to be competent only where such belief is objectively reasonable.

This acceptance of deemed authority as satisfying the criterion contrasts with the authority criterion applied by English courts, which is generally limited to effective authority. Indeed, as Lord Simon Brown expressed in *Baker*, a promise or undertaking cannot be upheld under English law if as a result the official or organization concerned would exercise its power in a manner ‘inconsistent with the statutory duties imposed upon it’.<sup>141</sup> Similarly, in EU law, promises ‘cannot be relied upon against an ambiguous provision of EU law’,<sup>142</sup> which constrains legitimate expectations to the promisor’s sphere of authority.

Lastly, it is worth noting that the subsequent implicit confirmation of a decision made by someone lacking authority will not remedy that lack of authority and validate the promise made. In a recent ILOAT case, the claimant alleged that a subsequent decision by the organization to create a permanent post corroborated the promise made to her. The ILOAT dismissed that contention, noting that

While the creation of a post may in certain circumstances corroborate the assertion that a promise was made, where the promise is alleged to have been made by a person competent to make the promise, it does not in the present case overcome the fact that the promise was not made by someone competent to make the promise.<sup>143</sup>

On the other hand, the confirmation of a promise by someone without authority to make it in the first place does not displace the initial promise when the circumstances show that it was effectively made. In *Rogatko*, the complainant had left a permanent position for a fixed-term contract with the World Health Organization. He telephoned the Chief of the Unit to explain that he was not interested in a short-term commitment, and apparently the Chief replied that the project was a long-term one and that short-term contracts were all renewed.<sup>144</sup> These statements were later confirmed in a grant application signed by the organization, and in a written statement

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<sup>141</sup> *Baker* (n 13) 88.

<sup>142</sup> *Eesti Pagar* (n 30) 104.

<sup>143</sup> ILOAT 3005 (n 75) consid 13.

<sup>144</sup> ILOAT Judgment No. 1278 (1993) consid 13.

of the Chief of Unit. The organisation challenged the authority of the Chief of Unit to make that statement and the promise, but the ILOAT determined that it was not an issue because the statement, even if made without authority, evidenced ‘the position as it was when he complainant took up duty with the organization’.<sup>145</sup>

To sum up this second criterion, the promise will only be enforceable if the person making it has the authority to do so or, at least, can objectively be deemed to have such authority.

### 2.3 Third criterion: reliance and injury

The third criterion is ‘that the breach of the promise would cause injury to the person who relies on it’. This criterion ‘has two sub-elements. One is that the promisee has relied on the promise and the second is that this reliance has caused injury to the promisee in the event of nonfulfilment of the promise’.<sup>146</sup>

The fact that a statement or other declaration is forwarded to the complainant or intended to be seen by him is often important in finding reliance. In *Annabi*, for instance, the complainant requested the conversion of his fixed term contract into a contract without limit of time, arguing that the ILO had broken a promise made to him at the time of his recruitment. He argued that a telex sent by the ILO to the FAO at the time of his recruitment, which mentioned that he ‘[could] expect to receive’ a contract without limit of time was binding on the organization. The ILOAT noted among other things that ‘the obvious intent was that he should see it and be induced thereby to accept the offer’.<sup>147</sup> The fact that the complainant had been made aware of the telex was therefore an important element in the decision.

In contrast, in *De*, the complainant claimed that his termination was irregular, among other things because of an alleged promise made in a letter sent to the Korean authorities. The ILOAT rejected his claim, notably because that letter did ‘not imply any such promise, particularly since it was

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<sup>145</sup> *ibid.*

<sup>146</sup> ILOAT 3619 (n 82) consid 14. See also ILOAT 3204 (n 75) consid 9.

<sup>147</sup> ILOAT 1481 (n 89) consid 5.

not addressed to the complainant'.<sup>148</sup> The fact that the complainant had not seen the letter at the time was thus quite important in concluding that there was no promise or, at least, that the promise was not relied upon.

The absence of reliance may also be shown by the surrounding circumstances, including the relative inaction of the employee in securing the promise. In *Baigrie*, for instance, the complainant claimed that she was not informed at the time of her appointment that her position was of limited duration, and thus challenged her termination and asked for a permanent reinstatement.<sup>149</sup> The ILOAT dismissed the claim, because it was not satisfied 'that the want of information influenced the complainant one way or the other'.<sup>150</sup> Indeed, 'since she never asked at the time the matter seems not to have troubled her'.<sup>151</sup>

Most recently, in *P v EPO*, the complainant argued, as previously discussed, that she was entitled to a permanent appointment. The ILOAT dismissed the claim on the basis that 'there [was] nothing to suggest that the complainant relied on the [...] promise, even if it was a promise'.<sup>152</sup> Additionally, the ILOAT noted that 'there [was] nothing advanced by the complainant by way of evidence, to suggest that, even if she relied on the promise, she [had] sustained an injury'.<sup>153</sup> Importantly, the ILOAT emphasized that 'the mere failure to honour [a] promise does not, of itself, constitute injury' justifying an award of damages.<sup>154</sup>

Even when someone initially relied on a clear promise, it remains possible for that person to waive the benefits of the promise. However, such a renunciation must be clear and unambiguous to be enforced. In *Nasrawin*, the organization claimed that the complainant had renounced his claim based on the alleged promise, 'because he had accepted the moratorium exceptionally extending his appointment for two months and the indemnity paid in lieu of notice'.<sup>155</sup> But the ILOAT concluded that the extension contained no

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<sup>148</sup> ILOAT Judgment No. 267 (1976) consid 1.

<sup>149</sup> ILOAT 1526 (n 127).

<sup>150</sup> *ibid* 2.

<sup>151</sup> *ibid*.

<sup>152</sup> ILOAT 3619 (n 82) consid 17.

<sup>153</sup> *ibid*.

<sup>154</sup> *ibid*.

<sup>155</sup> ILOAT 2112 (n 105) consid 6.

‘extra-judicial transaction in which the complainant [...] would by implication abandon any other claims.’<sup>156</sup> Without such clear implication, the acceptance of an extension by the complainant could not be taken as a renunciation.

Lastly, even if reliance appears to be a universally-accepted criterion amongst international administrative tribunals, we note that removing it from the applicable test would perhaps foster greater trust in the management of international organizations. As various authors have noted in relation to English and EU law, legitimate expectations could be upheld even in the absence of knowledge or reliance.<sup>157</sup> In any event, the complainant would still have to show some injury flowing from the denial of the expectation.

#### 2.4 Fourth criterion: unchanged framework

The fourth and last criterion is that ‘that the position in law should not have altered between the date of the promise and the date on which fulfilment is due’.<sup>158</sup>

This criterion stems from the sovereignty of the governing bodies of international organizations, who enjoy the prerogative of adopting the applicable statutes and regulations. Where such a sovereign body decides to alter the framework, all promises altered by the changes are necessarily discarded.

In *Berlioz* (No. 2), for instance, the complainant alleged among other things that a six-month delay imposed before his pay was aligned with the pay of other international organizations was in breach of the regulations of the organization. The ILOAT concluded that this change was valid and trumped any contrary promises:

Though an organisation must observe acquired rights and keep binding promises, it has broad discretion to amend its staff regulations either directly or by incorporating the rules of the common system. In the present economic context and if, like many others, it is in financial straits, it may want to cut costs. There is nothing wrong with the common system’s having rules that enable it to do so.<sup>159</sup>

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<sup>156</sup> *ibid.*

<sup>157</sup> (n 52) and accompanying text.

<sup>158</sup> ILOAT 782 (n 73) consid 1.

<sup>159</sup> ILOAT Judgment No. 1641 (1997) consid 7c.

This shows that a promise can only exist within and in conformity with the statutory and regulatory framework in force at the time it was made. It is clear that ‘no legitimate expectation can arise in contravention of a written rule’.<sup>160</sup>

Similarly, the Administrative Tribunal of the Organization for Economic Co-operation and Development considered in a case whether an employee placed on non-active status after taking the maximum entitlement of sick leave had rightly seen his employment terminated on his return because no vacant post was available. Although the regulations in force at that time provided for such termination, the employee attacked the decision based on general principles, including the fact that previous decisions had given him a legitimate expectation that there was a practice of granting an indemnity for loss of employment in such circumstances. The Administrative Tribunal however held that the applicable framework had changed in the meantime, and that the unclear regulation that had led to the alleged practice was now perfectly clear and could therefore not support a legitimate expectation:

The earlier lacuna in the Regulations in the case of officials on non-active status has now been at least partially filled, and it is not for the Tribunal to seek to go further in completing them by reference to ‘general principles of law’. [...] In the absence of evidence of discrimination or bad faith, an agent cannot have a legitimate expectation of being treated in a way other than that which the applicable regulations clearly and expressly envisage.<sup>161</sup>

Another cautionary note regarding the survival of legitimate expectations in a changing legal environment is the decision of the Administrative Tribunal of the Organization for Economic Co-operation and Development in cases number 85, 86, 88 and 89. These cases concerned the challenge of a decision by the organization to increase the contribution required of former employees to maintain membership in its global medical and social system, OMESYS. The tribunal dismissed the argument that the increase violated

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<sup>160</sup> ILOAT Judgment No. 3776 (2017) consid 11. The situation is similar for practices, the ILOAT having concluded that ‘a practice cannot become legally binding if it contravenes a written rule that is already in force’; ILOAT Judgments Nos 2959 (2011) consid 7; 3544 (2015) consid 14; 3601 (2016) consid 10; 3883 (2017) consid 20.

<sup>161</sup> ATOECD Judgment No. 40 (1999).

the employees' legitimate expectations, noting that 'no promise, assurance or expectation was given to former officials that the administration's tolerance would constitute a rule of law if the financial situation of the pension scheme were to deteriorate to the point of requiring a review of practices'.<sup>162</sup> In effect, the Tribunal confirmed the right of the organization to change its pension scheme, noting that 'this type of benefit [...] does not lend itself well to indefinite compliance with a practice'.<sup>163</sup>

This is where the distinction between the protection of promises and the protection of acquired rights becomes important. As we have seen, a promise will only be protected if the framework, rules and statutes within which it has been made remains unchanged. On the other hand, an acquired right exists 'when he who has it may require that it be respected notwithstanding any amendment to the rules'. The circumstances in which that may happen is when a right 'arises under an official's contract of appointment and which both parties intend should be inviolate', or when a right 'is laid down in a provision of the Staff Regulations or Staff Rules and which is of decisive importance to a candidate for appointment'.<sup>164</sup>

These criteria have been clarified in a recent decision of the ILOAT, in which it held the following:

According to the case law established for example in Judgment 61, clarified in Judgment 832 and confirmed in Judgment 986, the amendment of a provision governing an official's situation to her or his detriment without his or her consent constitutes a breach of an acquired right *only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on*. In order to decide whether there may have been a breach of an acquired right, it is therefore necessary to determine whether the altered terms of employment are fundamental and essential within the meaning of Judgment 832 (emphasis added).<sup>165</sup>

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<sup>162</sup> ATOECD Judgment No. 86/89 (2018) para 127.

<sup>163</sup> *ibid* 129.

<sup>164</sup> ILOAT Judgment No. 365 (1978).

<sup>165</sup> ILOAT Judgment No. 3944 (2018). See also ILOAT Judgments Nos 61 (1962); 832 (1987); 986 (1989); 3571 (2016); 3876 (2017).

The Administrative Tribunal of the Council of Europe similarly distinguished the notions of legitimate expectations and acquired rights in a decision in which staff members had been prevented from applying to internal competitions for positions, due to the internal rule of the organization according to which they were limited to a five-year term and could not apply for other positions:

The Tribunal also points out that a right is acquired if its holder can enforce it, regardless of any amendments to a text. *A right conferred by rule or regulation and significant enough to have induced someone to join an Organisation's staff must be deemed an acquired right.* Curtailment of that right without the holder's consent is a breach of the terms of employment which civil servants are entitled to assume will be honoured. [...] The position of staff members employed by the Organisation on the basis of fixed-term contracts was clarified by the introduction of Article 20bis of the Regulations on Appointments, which took effect from 7 July 2010 [...]. *However, bearing in mind the aforementioned principle of acquired rights the Tribunal believes that this rule could not validly be applied to the appellants' case, since they had been recruited two years previously when the content of the old Article 20 of the Regulations on Appointments gave them a legitimate expectation of being able to continue their respective professional careers with the Council of Europe, one option being that they would be able to take part in a new recruitment competition (emphasis added).*<sup>166</sup>

From this excerpt, we see that the doctrine of acquired rights has the effect of protecting legitimate expectations that are so fundamental to the employment of the staff member concerned that they cannot be changed even by an amendment of the applicable rules. Clearly, the overlap between the two notions is considerable. A right which is 'of decisive importance to a candidate for appointment' necessarily creates a legitimate expectation, which may then be protected. But the main difference between the two doctrines seems to be the difference between a 'right' and a 'promise'. While the 'right' – which is clearly inscribed in the contract of employment or in the applicable rules – may withstand the change of rules and statutes in some

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<sup>166</sup> ATCE Decision No. 2014/548-553 paras 66, 69. See also ATCE Decision No. 2011/492-497 paras 53-54.



circumstances, a ‘promise’ – which is simply made verbally, or in writing but not in a contractual or statutory document – will only be protected within the framework of rules in which it was made.

### 3. *Damages*

Lastly, we briefly turn to the measure of damages awarded in cases of legitimate expectations, which depends primarily on the type of expectation protected.

For instance, if the legitimate expectation that was not respected was to be appointed for another term, damages may reflect the expected term of renewal. However, in case where there was no direct expectation of renewal or appointment, tribunals have concluded that the only type of damages that could be awarded were damages for the loss of the expectation itself, and not the expected employment. In *Halliwell*, the ILOAT concluded that the claimant had wrongly been denied two positions, in light of the Staff Regulations which gave preference to ‘persons already in the service’ of the organization.<sup>167</sup> However, the ILOAT held that the compensation awarded could not ‘consist [...] of restitution of salary and pension rights’ since the claimant had ‘not been deprived of any contractual rights to salary or pension, but only of expectation of further employment’. The ILOAT awarded 8,000 Swiss francs, plus the reimbursement of the complainant’s costs.<sup>168</sup>

The ILOAT concluded that it is only in exceptional circumstances that the wrongful non-renewal of a contract should give rise to full compensation for the expected contract itself. In a case where the ‘expectation was very solid’ and where the complainant’s career had ‘been destroyed by an act of personal revenge’, the ILOAT held that such circumstances existed.<sup>169</sup> However, it is worth noting that in earlier decisions, the ILOAT seemed to be less reluctant to award full compensation. In *Gieser*, for instance, where no particularly shocking fact was alleged, the ILOAT concluded that the organization had to ‘grant the complainant an indefinite appointment or

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<sup>167</sup> ILOAT Judgment No. 415 (1980).

<sup>168</sup> ILOAT Judgment No. 1351 (1994).

<sup>169</sup> ILOAT Judgment No. 427 (1980) consid 19b.

pay him 150,000 Deutschmarks in damages', which corresponded approximately to the anticipated loss of earnings.<sup>170</sup>

In any event, any compensation awarded will usually be reduced by the amount of financial gains which the complainant has or could have made from other employment.<sup>171</sup> This is simply an application of the usual doctrine of mitigation of damages.

Lastly, in some cases, while no promise is effectively made out based on the available evidence, the behavior of an organization may still lead to an award of damages. In *Bourgeois*, for instance, the ILOAT concluded that no promise had been breached, but that the organization took too long to expose its position to the employee, which caused him moral injury.<sup>172</sup>

#### IV. Conclusion

Based on the jurisprudence reviewed in this article, it is clear that the legitimate expectations of employees in most domestic jurisdictions, as well as international civil servants, are protected. In the realm of international organizations, this general principle is applicable to all organizations and is justified by their duty to act in good faith and with fairness towards their employees. However, that protection is not unfettered and can only be granted when the applicable criteria are satisfied.

In that regard, while the tribunals of various international organizations do not express the criteria with the exact same wording, they apply substantially similar conditions across their organizations. Since the four criteria are cumulative, it often happens that tribunals focus on one criterion that is dispositive of the claims. In such cases, tribunals do not set out the applicable framework as clearly as the ILOAT, which does not mean, however, that they do not agree with it. In any event, it seems that the framework established by the ILOAT is the most comprehensive and representative of the state of the law, and should therefore be used across international organizations, wherever possible.

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<sup>170</sup> ILOAT 782 (n 73).

<sup>171</sup> ILOAT 427 (n 169) consid 19b.

<sup>172</sup> ILOAT Judgment No. 1090 (1991) consid 7.

Under that framework, four main elements must cumulatively be established in order for a promise to be binding: (i) a clear and effective promise, which means that it must exist and be unqualified, among other things; (ii) the actual authority of the promisor or, alternatively, the objective belief that the promisor had the required authority; (iii) the promisee's reliance on the promise, and the injury that resulted from that reliance; and (iv) the stability of the relevant applicable framework from the making of the promise until the complainant's claim.

These limitations imposed on the protection of legitimate expectation serve important purposes. The criterion of authority, for instance, protects organizations from being prejudiced by promises made at a lower level of management, without the authorization of those actually in power. The need to establish the existence of a clear and effective promise ensures predictability by limiting promises to those that were clearly made, and were not subject to any condition precedent. And the fourth criterion ensures that when an organization changes its rules, promises made within the previous framework do not subsist as acquired rights, but rather cease to exist to allow organizations to start afresh. The only criterion that could perhaps be removed from the test is the reliance of the promisee on the promise, although injury would still need to be shown.

Lastly, the concerns and rights of third parties, including other employees, should not be disregarded. As demonstrated by at least one case, promises made to some employees but not all can sometimes be considered as impermissibly favoring one over the others. This may lead, in some cases, to allegations of discrimination, which could create even more problems for international organizations than allegations of broken promises.