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UNITED NATIONS JURIDICAL YEARBOOK

1965

Part Two. Legal activities of the United Nations and related inter-governmental organizations

Chapter V. Decisions of administrative tribunals of the United Nations and related inter-governmental organizations

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Chapter V

DECISIONS OF ADMINISTRATIVE TRIBUNALS OF THE UNITED NATIONS AND RELATED INTER-GOVERNMENTAL ORGANIZATIONS

A. Decisions of the Administrative Tribunal of the United Nations [1]

1. JUDGEMENT NO. 93 (23 SEPTEMBER 1965): [2] COOPERMAN V. SECRETARY-GENERAL OF THE UNITED NATIONS

Termination of probationary appointment—Alleged lack of due process and improper motivation—Question whether a reference to the Appointment and Promotion Board is a prior condition to the termination of a probationary appointment: staff regulation 9.1 (c) and staff rule 104.13

The applicant requested the Tribunal to order the rescinding of the decision by which the Secretary-General had terminated his probationary appointment with the United Nations. He contended, in particular, that the decision was vitiated by lack of due process, that his immediate supervisor had been motivated by personal animosity and that the respondent had failed to observe staff rule 104.13 in terminating his probationary appointment without prior reference to the Appointment and Promotion Board.

Noting that the adverse remarks on the applicant's work were recorded in a periodic report which had been duly shown to him, the Tribunal found that the applicant had not been denied due process. The Tribunal also found that there was insufficient evidence to substantiate the plea that the applicant's immediate supervisor had been motivated by personal animosity. As regards the contention that the reference to the Appointment and Promotion Board was obligatory under staff rule 104.13 in all cases of termination of probationary appointment, the Tribunal ruled that the broad authority of the Secretary-General to terminate such appointments at any time under staff regulation 9.1 (*c*) was not limited or restricted by staff rule 104.13. Accordingly, the Tribunal rejected the application.

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[1] Under article 2 of its Statute, the Administrative Tribunal of the United Nations is competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. Article 14 of the Statute states that the competence of the Tribunal may be extended to any specialized agency upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. By the end of 1965, two agreements of general scope, dealing with the non-observance of contracts of employment and of terms of appointment, had been concluded, pursuant to the above provision, with two specialized agencies: The International Civil Aviation Organization; the Inter-Governmental Maritime Consultative Organization. In addition, agreements limited to applications alleging non-observance of the Regulations of the United Nations Joint Staff Pension Fund had been concluded with the International Labour Organisation, the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the International Civil Aviation Organization, the World Meteorological Organization and the International Atomic Energy Agency.

The Tribunal is open not only to any staff member, even after his employment has ceased, but also to any person who has succeeded to the staff member's rights on his death, or who can show that he is entitled to rights under any contract or terms of appointment.

[2] The Lord Crook, Vice-President, presiding; R. Venkataraman, Vice-President; H. Gros Espiell, Member.

2. JUDGEMENT NO. 94 (23 SEPTEMBER 1965):[3] PAPPAS v. SECRETARY-GENERAL OF THE UNITED NATIONS

Non-renewal of short-term appointment: staff rule 304.4

The applicant requested the Tribunal to order the rescinding of the decision by which the Secretary-General had refused to renew his short-term appointment with the United Nations. The Tribunal observed that, in accordance with the provisions of staff rule 304.4, short-term appointments do not carry any expectancy of renewal or of conversion to other types of appointment and that the applicant had been aware that his employment with the United Nations did not indicate any expectancy of a permanent contract. Since there was no evidence that extraneous motivations or prejudice had led to the separation from service of the applicant, the Tribunal dismissed the application.

3. JUDGEMENT NO. 95 (29 SEPTEMBER 1965):[4] SIKAND v. SECRETARY-GENERAL OF THE UNITED NATIONS

Procedure for terminating permanent appointment replaced by fixed-term appointment

The applicant had been the holder of a permanent appointment with the United Nations which was replaced in 1959 by a fixed-term appointment. After several renewals and extensions of that appointment, the applicant was separated from the service of the Organization in 1963. He contended that the termination of his permanent appointment had not been fully implemented in 1959 and that the appointment was still in effect in 1963 at the time of his separation from service. He also maintained that he had accepted a fixed-term appointment in 1959 on the understanding that the Office of Personnel would review the situation after some time for the purpose of determining whether his previous status should be restored. He contended that the Office of Personnel had failed to carry out the review and that, furthermore, he had been seconded in 1960 to the Technical Assistance Board without his consent and in violation of the rules governing secondment.

The Tribunal found that the applicant's permanent appointment had been effectively terminated in 1959 and was no longer in force at the time of the applicant's separation from service in 1963. It observed, however, that the correspondence between the parties and the surrounding facts and circumstances showed that the respondent had undertaken to review the applicant's work in order to determine whether his previous status should be restored. The Tribunal noted that at least on two occasions—in 1961 and again in 1962—the restoration of the applicant's previous status had been considered by the Office of Personnel. Since no specific method of review had been contemplated by the parties in 1959, the Tribunal held that the examinations of the applicant's situation by the Office of Personnel in 1961 and 1962 met the obligations resting with the respondent. The Tribunal also found that, since the applicant had accepted a fixed-term appointment with TAB in 1960, there had been no secondment in the case. Accordingly, the Tribunal rejected the application.

4. JUDGEMENT NO. 96 (29 SEPTEMBER 1965):[5] CAMARGO v. SECRETARY-GENERAL OF THE UNITED NATIONS

Withdrawal of a provisional offer of appointment—Question whether subsequent acceptance of the offer could create a contract of employment

The applicant requested the Tribunal to rule that he was the holder of a valid contract of employment with the United Nations. He had been offered a fixed-term appointment with

[3] The Lord Crook, Vice-President, presiding; R. Venkataraman, Vice-President; H. Gros Espiell, Member.

[4] Mme P. Bastid, President; R. Venkataraman, Vice-President; H. Gros Espiell, Member.

[5] Mme P. Bastid, President; R. Venkataraman, Vice-President; H. Gros Espiell, Member; L. Ignacio-Pinto, Alternate Member.

the Organization by a letter from the Director of Personnel dated 29 May 1964 addressed to his residence in Mexico City. On 4 June 1964, he orally informed the Deputy Director of the United Nations Information Centre in Mexico City that he accepted the appointment and visited a doctor for the required medical examination. On 5 June 1964 the Office of Personnel sent a cable to the applicant in Mexico City withdrawing the offer of appointment. On 6 June 1964 the applicant wrote to the Director of Personnel that he accepted the appointment offered to him. He subsequently claimed that he had never received the cable of 5 June 1964.

The Tribunal first examined a plea by the respondent that the application was not receivable under article 2.2 of the Statute of the Tribunal since the applicant had never acquired the status of a staff member of the Secretariat. It noted that the issues in the case arose out of a letter written by the Director of Personnel under an appointment procedure laid down by the Staff Regulations and Staff Rules and that they must be resolved on the basis of the rules of law which it was the Tribunal's responsibility to apply. It also noted that the question whether or not the applicant should be regarded as the holder of a contract of employment could only by decided after a substantive consideration of the case. The Tribunal, accordingly, rejected the respondent's plea and ruled that the application was receivable.

As regards substance, the Tribunal found that the applicant's oral statement on 4 June 1964 to an official having no competence in the matter and his visit to a doctor for a medical examination were not sufficient to create a contract of employment since the letter of 29 May 1964 from the Director of Personnel called for a reply by air mail. The Tribunal also found that the evidence before it showed that the cable of 5 June 1964 cancelling the offer of appointment had been duly delivered to the applicant on that day. It decided therefore that the letter of 6 June 1964 by which the applicant had informed the Director of Personnel that he was accepting the offer of appointment could not have had the legal effect attributed to it by the applicant. The Tribunal further noted that the letter of 29 May 1964 from the Director of Personnel and the documents attached to it clearly indicated the provisional nature of the offer made to the applicant. It held that, under staff rule 104.2, a unilateral act of the Administration—an authorization to begin official travel—was required for the appointment of an internationally recruited person to take place and observed that no such authorization had been issued to the applicant.

The Tribunal, accordingly, rejected the application.

5. Judgement No. 97 (4 October 1965):[6] Leak v. Secretary-General of the United Nations

Compensation for wrongful dismissal

In August 1962, the applicant, who held at the time a one-year fixed-term appointment as a Security Officer, was summarily dismissed for serious misconduct. In October 1964, after receiving the report of the Joint Appeals Board on the case, the Secretary-General rescinded the summary dismissal and ordered the payment to the applicant of the salary due for the uncompleted part of the appointment. In his application to the Tribunal, the applicant requested payment of compensation for wrongful dismissal as well as payment of full salary to the day of the judgement.

As regards competence, the respondent contended that the application did not relate to the observance of the applicant's contract of employment or terms of appointment and was, therefore, not receivable under article 2.1 of the Statute of the Tribunal. The Tribunal noted that the application raised the question whether the respondent had drawn all the necessary legal inferences from his decision to rescind the summary dismissal of the applicant and wheth-

[6] Mme P. Bastid, President; H. Gros Espiell, Member; L. Ignacio-Pinto, Member.

er he had gone as far as was required in restoring the *status quo*. Since that question was clearly within its competence, the Tribunal found that the application was receivable.

As regards substance, the Tribunal noted that after his separation from the service of the United Nations, the applicant had been recruited for a training period by the United Kingdom Prison Commission. In February 1963, however, his employment with the Commission was terminated after the receipt of information from the United Nations. The Tribunal expressed the conviction that the information supplied by the United Nations had played a decisive part in the termination of the applicant's employment. The Tribunal observed that when, subsequently, the respondent rescinded the summary dismissal of the applicant, he took no steps to restore the *status quo* in respect of the applicant's possibilities of finding other employment. Since an award of compensation was the only means of drawing the legal inferences from the obligations resulting from the rescinding of the summary dismissal, the Tribunal ordered the payment of $5,000 to the applicant. Observing that the applicant had held a fixed-term appointment, the Tribunal rejected his request for the payment of salary to the date of the judgement.

B. Decisions of the Administrative Tribunal of the International Labour Organisation[7] [8]

1. Judgement No. 80 (10 April 1965): Wasilewska v. International Telecommunication Union and Staff Superannuation and Benevolent Funds of ITU

Applicability of a pensions system which is modified during the term of a contract—Implicit acceptance by the official

The complainant, who entered the service of the International Telecommunication Union in 1949, became a member of the Pension Fund of ITU on the terms operative at that time. In 1959, the conditions of service of the staff of ITU were assimilated to those of United Nations staff. After communicating those decisions of principle to the agents of ITU, the Secretary-General informed the complainant, individually on 1 March 1960, of her classification in the new salary scales introduced on 1 January 1960 for assimilation purposes, while on 25 March 1960 she received a detailed statement of her salary, which indicated the amounts deducted as contributions to the United Nations Joint Staff Pension Fund. In September 1960, the Secretary-General published the Regulations for the Staff Superannuation and Benevolent Funds of ITU, effective 1 January 1960, which provided, *inter alia*,

[7] The Administrative Tribunal of the International Labour Organisation is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment, and of such provisions of the Staff Regulations as are applicable to the case, of officials of the International Labour Office and of officials of the international organizations that have recognized the competence of the Tribunal, namely, as at 31 December 1965, the World Health Organization, the United Nations Educational, Scientific and Cultural Organization, the International Telecommunication Union, the World Meteorological Organization, the Food and Agriculture Organization of the United Nations, the European Organization for Nuclear Research, the Interim Commission for the International Trade Organization/General Agreement on Tariffs and Trade, the International Atomic Energy Agency, the United International Bureaux for the Protection of Intellectual Property, the European Organization for the Safety of Air Navigation and the Universal Postal Union. The Tribunal is also competent to hear disputes with regard to the execution of certain contracts concluded by the International Labour Organisation and disputes relating to the application of the Regulations of the former Staff Pensions Fund of the International Labour Organisation.

The Tribunal is open to any official of the International Labour Office and of the above-mentioned organizations, even if his employment has ceased, and to any person on whom the official's rights have devolved on his death, and to any other person who can show that he is entitled to some right under the terms of appointment of a deceased official or under provisions of the Staff Regulations on which the official could rely.

[8] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Lord Devlin, Judge.

for membership of the aforementioned Joint Staff Pension Fund for officials who had belonged to the ITU Staff Superannuation and Benevolent Funds on 31 December 1959. The service of the complainant having finally terminated on 30 June 1962, the Management Board of the ITU Staff Superannuation and Benevolent Funds informed her, on 5 November 1962, that it had granted her an annual pension of 7,233 Swiss francs, plus a cost-of-living allowance. On 21 December 1962, the complainant claimed that the said decision did not respect the pension undertakings she had been given upon her appointment, and claimed an annual pension of 9,998 Swiss francs. On 6 May 1963 she was informed in reply that, in setting the amount of her pension, the Board had merely acted in strict compliance with the Regulations of the Funds which had been effective on the date of its decision. The complainant brought suit before the Tribunal and contested the validity of the decision of 6 May 1963 in so far as it was based on the Regulations for the Staff Superannuation and Benevolent Funds in effect on the date of that decision instead of those in effect on the date of her engagement.

The Tribunal dismissed the complaint. It noted that, far from citing any non-compliance with the Regulations for the Staff Superannuation and Benevolent Funds in effect on the date when her pension had become payable, the complainant asserted that the impugned decision was illegal in that it made her subject to a system which altered the balance of contractual obligations with respect to her. By itself, the impugned decision, which was simply an act of execution, merely applied previous decisions adopted with regard to the modification of the ITU staff pensions system. As those decisions had not been contested before the Tribunal within the period specified in its Statute, they had become final so far as the complainant was concerned and irrevocably modified, prior to the date on which her pension rights were settled, both the terms of her contract of employment and the regulations applicable in her case.

2. JUDGEMENT NO. 81 (10 APRIL 1965): METZLER v. INTERNATIONAL TELECOMMUNICATION UNION AND STAFF SUPERANNUATION AND BENEVOLENT FUNDS OF ITU

Applicability of a pensions system which is modified during the term of a contract—Implicit acceptance by the official—Competence of the Tribunal vis-à-vis *a person other than the official (Article II, paragraph 6 (b), of the Statute)*

In 1956, the husband of the complainant was elected Director of the International Radio Consultative Committee and, in accordance with his contract, became a member of the Pension Fund, but it was provided, by a special agreement concluded in accordance with the terms of the Regulations of the Fund, that both the amount of the entrance fee and that of the retirement pension would be reduced but that the widow's pension would not be subject to any reduction and would be fixed in accordance with the insured earnings. In 1959, the conditions of service of the staff of ITU were assimilated to those of United Nations staff; the persons affected were informed individually and the Secretary-General published the new Regulations (see Judgement No. 80) above. The husband of the complainant having died on 20 June 1963, his widow was informed on 30 July 1963 that she would receive an annual income of 19,600 Swiss francs, plus a cost-of-living allowance; this decision was confirmed by a letter dated 28 August 1963. The complainant brought suit before the Tribunal and claimed, principally, the payment of a monthly sum of 2,564.10 Swiss francs, excluding the cost-of-living allowance, and, subsidiarily, the reimbursement of the contributions paid into the Staff Superannuation and Benevolent Funds in respect of the amounts above those which had been used as a basis for calculating the pension. In support of her main demand she cited her husband's contract of engagement and the agreement concluded between him and the Pension Fund of ITU; as regards her subsidiary claim she maintained the right to recovery of payments made by mistake.

The Tribunal dismissed the complaint. It pointed out that article II, paragraph 6 (*b*), of the Statute of the Tribunal established a close link between the rights of the deceased official and the persons which it was designed to cover. However, such persons could not claim a right under a contractual or statutory clause which the official had not been entitled to invoke. Moreover, neither were they entitled to contest the validity of clauses which the official had been called upon to respect. The real aim of the complaint was to contest, not that the Regulations for the Staff Superannuation and Benevolent Funds of ITU in force at the time of death had been correctly applied, but the validity of the bases on which the amount of the widow's pension had been calculated resulting from the application of the new pension arrangement. Thus, the complainant was attempting to deduce rights from clauses to which her husband could not have had recourse, since the decisions relating to the application of the new pensions scheme had not been contested by him within the period prescribed by the Statute of the Tribunal, and those decisions, which thus became final in regard to him, had had the effect of irrevocably altering, before the date of his death, both the terms of his contract of appointment and the provisions of the Regulations applicable in his case. Similarly, the complainant could not claim the reimbursement of a part of the contributions paid by her husband into the Staff Superannuation and Benevolent Funds because, although it was true that the right to recovery of payments made by mistake was generally recognized and might, in consequence, be assimilated to a statutory right, her husband would not himself have been in a position to claim the reimbursement of the payments he had made, with full knowledge of the facts, into the Staff Superannuation and Benevolent Funds, by virtue of a decision which had been rendered final as far as he was concerned.

3. Judgement No. 82 (10 April 1965): Lindsey v. International Telecommunication Union (Failure to execute Judgement No. 61)

Immediately operative character of judgements of the Tribunal—A request to the International Court of Justice for an opinion has no suspensory effect

ITU having refused to give effect to item 7 of the operative part of Judgement No. 61 of 4 September 1962, which had awarded costs against it in the amount incurred by the complainant, the latter laid before the Tribunal a new complaint praying it to: (1) state that Judgement No. 61 had been and was immediately operative as regards its item 7; (2) direct ITU to pay to the complainant immediately the amount of the said costs, including 5 per cent interest on the sum overdue from 30 October 1962 (the date of the order of the President of the Tribunal fixing the said amount in implementation of item 7 of the operative part of the judgement); and (3) order that the costs of the new case, together with fair compensation, should be paid by ITU.

In regard to items 1 and 2 of the complainant's submissions, the Tribunal found that the aforementioned item 7 was, in itself, immediately operative and that, consequently, no explicit declaration to that effect was required. In accordance with a well-established principle of law, the Tribunal pointed out, any judgement compelling one party to pay to the other party a sum of money implies, in itself, the obligation to pay that sum without delay. It could be otherwise only in the event that the judgement expressly mentioned that this sum would be payable only at a later date and where the statutes of the court concerned make provision for the right to appeal against the judgements delivered by it and formally state that exercise of that right of appeal carries suspensory effect on execution of those judgements. In the present case, on the one hand, Judgement No. 61 did not indicate that the sum mentioned in item 7 of its operative part would be payable only at a later date. On the other hand, according to article VI, paragraph 1, of the Statute of the Tribunal, its "judgements shall be final and without appeal"; while, in fact, ITU, by virtue of article XII of the aforementioned Statute, has the option of asking the International Court of Justice for an opinion, which is binding, on the validity of judgements delivered by the Tribunal, this option, which can

moreover be used without any restriction as to time, does not affect, in the absence of any explicit provisions in the above-mentioned article XII, the immediately operative character of those judgements. With regard to the opinion which the organization may possibly request from the Court by virtue of article VII of the Agreement between the United Nations and ITU, this opinion is only of an advisory character and could not, in any event, have any influence on the execution of the judgement of the Tribunal. Secondly, the fact of the organization's giving effect to a judgement of the Administrative Tribunal could not, under any circumstances, be considered as acceptance of the said judgement and, in particular, could not divest it of its right to submit the judgement to the International Court of Justice for a statutory or advisory opinion.

In regard to item 3 of the complainant's submissions, the Tribunal held that the damage suffered by the complainant would be equitably remedied by deciding that the sum fixed by the President of the Tribunal in his order of 30 October 1962 should bear interest at the rate of 5 per cent as from the thirtieth day after notification to ITU of the said order. In addition, the costs incurred by the complainant in connexion with the new action should be borne by ITU.

4. Judgement No. 83 (10 April 1965): Jurado v. International Labour Organisation (No. 2—Appeal to the International Court of Justice)

Conditions under which the question of the validity of a decision rendered by the Tribunal may be submitted to the International Court of Justice for an advisory opinion—Article XII of the Statute of the Tribunal—Objection raised, in connexion with the further action, to the judges who delivered the contested judgement

By its Judgement No. 70 of 11 September 1964,[9] the Tribunal dismissed the complaint against the ILO in which the complainant prayed for the quashing of decisions taken by the Director-General of the International Labour Office by which he alleged that his immunity from jurisdiction in Switzerland had been illegally waived and that he had been illegally refused diplomatic protection. On 29 October 1964 the complainant requested the Director-General of the International Labour Office to place Judgement No. 70 before the Governing Body of the International Labour Office and to request the Governing Body, in accordance with article XII of the Statute of the Tribunal, to submit the said judgement to the International Court of Justice for an advisory opinion as to its validity, on the grounds that, in the opinion of the complainant, it had been vitiated by twenty-six fundamental faults in the procedure that had been followed. On 13 November 1964 the Chief of Personnel of the International Labour Office replied, on behalf of the Director-General, that none of the conditions required for invoking application of article XII of the Statute of the Administrative Tribunal had been fulfilled in this case, and that it was not possible to accede to the request. The complainant prayed the Tribunal to quash the aforesaid decision. As a first step, the complainant wished to object to the three members of the Tribunal who had delivered Judgement No. 70, on the grounds, *inter alia*, that they were interested in opposing any measure liable to lead to the invalidation of the aforementioned judgement.

The Tribunal held that there was no valid ground for the objection made as a first step. It also declared that it was not competent to consider the plea for the quashing of the decision of 13 November 1964. The Tribunal noted that, under the terms of article XII of its Statute, the possibility of submitting the question of the validity of the decision given by the Tribunal to the International Court of Justice was exclusively vested in the Governing Body of the International Labour Office or the Administrative Board of the Pensions Fund, as had been borne out by the Court itself in its advisory opinion dated 23 October 1956 (*I.C.J. Reports*,

[9] See *Juridical Yearbook*, 1964, p. 209.

1956, pp. 84-85). Such a possibility was open in the sole interest of the Organisation. Moreover, the exercise of that right must inevitably lead the Governing Body to take a stand on the validity of judgements rendered by the Administrative Tribunal. It followed that the Tribunal was not competent either to review the conditions under which, according to both its Standing Orders and its practice, the Governing Body might be requested by the Director-General to consider a proposal to submit or not to submit a specific case to the International Court of Justice, or the discretion exercised by the Governing Body in taking a decision on such a proposal.

5. JUDGEMENT NO. 84 (10 APRIL 1965): GALE v. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Termination of appointment on the ground of unsatisfactory services—Discretion of the Director-General—Authority of the Tribunal to review

The complainant was appointed as a member of the staff of UNESCO, for a period of five years beginning on 20 September 1962, subject to a period of probation of nine months, and was assigned to the duties of Principal of a Secondary Teacher Training College being established in Nigeria with the assistance of UNESCO. After he had taken up his duties, doubts were expressed as to his ability to carry out successfully the tasks of an administrative nature which appertained to his functions as Principal. It had been intimated to the complainant that, upon the expiry of his probationary period, unless he chose to resign, his appointment would be terminated. The complainant declined to resign, and, on 20 June 1963, his appointment was terminated on the grounds that his performance as Principal was not such as to warrant the maintenance of his appointment beyond the probationary period. After being granted one month's sick leave pay, the period of notice was extended from one month to three months. The complainant's appointment came to an end on 13 September 1963. In the meanwhile he had brought his case before the UNESCO Appeals Board, which, on 26 February 1964, recommended the Director-General either to offer the complainant a new appointment for which he would be suitable, or to award him an indemnity of three months' salary. The Director-General chose the second alternative. On 26 June 1964, the complainant prayed the Tribunal for the quashing of the decision to terminate his appointment and the award of an indemnity amounting to four years' salary.

The Tribunal dismissed the complaint. It pointed out that, under the terms of Regulation 9.1 of the Staff Regulations, the Director-General might terminate the appointment of a staff member at any time if his services ceased to be satisfactory, and went on to define the Director-General's discretion in the matter and the limits of its own authority to review in the following words:

> "The decision of the Director-General was therefore based upon his conclusion that the services of the complainant had ceased to be satisfactory. In arriving at this conclusion the Director-General was exercising his discretion. Therefore, while the Tribunal is competent to review this decision in so far as, on the one hand, it may have been taken by a person without authority, or in an irregular form, or if there may have been a failure to comply with recognized procedure or, on the other hand, if it may be tainted by an error of law or based on materially incorrect facts, or if essential material elements had been left out of account or if obviously wrong conclusions had been drawn from the evidence in the dossier, the Tribunal cannot substitute its own opinion for that of the Director-General. In accordance with this principle the only matters which in the circumstances of this case the Tribunal can investigate are whether there may have been a failure to comply with recognized procedure, or whether the decision may have been based upon materially incorrect facts or essential material elements left out of account."

After reviewing the reports on which the Director-General had based his decision, the Tribunal noted that it was not clear to what extent the provisions of the Staff Rules specifying that copies of reports on a staff member must be supplied to him, if they were applicable,

and the fundamental principle of the right to be heard, had been observed in the case of these reports. Therefore, without making further inquiries the Tribunal was not in a position to decide whether there might have been a failure to comply with recognized procedure. It was also possible that the Director-General had left essential matters out of account in reaching his decision, but without seeing the full text of the reports the Tribunal could not pronounce on this. If therefore the Tribunal had to decide whether or not to quash the decision of the Director-General, it would be necessary for it to demand further evidence. But the claim which it had to consider was for an improvement on the compensation which the complainant had already received. The complainant had received in all by way of compensation a sum equal to nine months' salary. In the opinion of the Tribunal, this compensation would be adequate even on the assumption that the decision to terminate the complainant's appointment was wrongful. An inquiry into whether the decision was wrongful or not was therefore without object.

6. JUDGEMENT NO. 85 (10 APRIL 1965): JURADO v. INTERNATIONAL LABOUR ORGANISATION (NO. 3—GRANT OF SICK LEAVE)

Challenge to the competence of the judges who examined the earlier actions brought by the same complainant—Inadmissibility of a plea for the quashing of a decision offering the individual concerned a choice between several courses of action

After being granted sick leave with effect from 14 January 1964, the complainant was allowed to resume work on 13 November 1964 for a trial period. In a letter dated 19 January 1965 the Chief of Personnel informed him that in the medical adviser's view his behaviour was such that his state of health could not be regarded as satisfactory and that accordingly his sick leave would be extended with effect from 21 January. In a letter dated 2 February 1965 the Chief of Personnel, in reply to protests by the complainant, informed him that he had the option of accepting an extension of his sick leave, of getting in touch with the medical adviser of the International Labour Office and requesting that his case should be examined by a medical specialist or an *ad hoc* medical panel, or of refusing to take his sick leave and resuming his duties at his own risk. The complainant brought suit before the Tribunal and, as a first step, challenged the competence of the judges who had examined his earlier complaints.[10] In substance he prayed primarily that the decision of 19 January 1965 should be rescinded, as should that of 2 February 1965 in so far as it confirmed the former.

The Tribunal held that there was no valid ground for the challenge made as a first step. As regards the substance, the Tribunal noted that the decision of 19 January 1965 had been rescinded by that of 2 February 1965 and therefore no ruling was called for on the plea for the quashing of that decision. The letter dated 2 February 1965 had given the complainant an opportunity of choosing between three courses of action; on that point the letter itself involved no decision and the plea concerning it was therefore inadmissible.

7. JUDGEMENT NO. 86 (6 NOVEMBER 1965): WIPF v. UNITED INTERNATIONAL BUREAUX FOR THE PROTECTION OF INTELLECTUAL PROPERTY

The Tribunal recorded the complainant's withdrawal of suit.

8. JUDGEMENT NO. 87 (6 NOVEMBER 1965): DI GIULIOMARIA v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Right of officials to act in defence of the interest of the staff—Conditions for dismissal without notice for serious misconduct

[10] See Judgement No. 70 of 11 September 1964 (*Juridical Yearbook*, 1964, p. 209) and Judgement No. 83 of 10 April 1965 (page 212 of this *Yearbook*).

On 18 December 1963 an Assembly of the staff association of FAO decided on the proposal of the complainant to reject the report presented to it by the Staff Council, while his proposal to dissolve the Association and reconstitute it in the form of a trade union was referred to a Committee elected by the Assembly, to which the complainant was appointed. After considering the report of that Committee, the Assembly decided to appoint a Salary Committee to aid the Staff Council in its negotiations with the administration for the improvement of General Service salaries, the complainant being elected a member of this Committee and subsequently assuming its chairmanship. A difference of opinion having arisen between the Staff Council and the Salary Committee, a Staff Assembly was convened through the agency of the Salary Committee. Prior to this Assembly, the complainant distributed to the staff as a whole a statement in which he criticized the Staff Council and proposed, *inter alia*, that the Assembly should remove all the members of the Staff Council from office and should demand that the FAO member countries form a committee to examine the relations between the Director-General and the staff. On 25 June 1964 the Staff Assembly decided to remove the members of the Staff Council. On 26 June 1964 the complainant was dismissed without notice, under article 330.251 of the FAO Administrative Manual, for "serious misconduct" as manifested in the aforementioned statement by the complainant's insubordination and impertinence, misrepresentation of facts and incitement to agitation, and by his injurious language. The complainant brought suit before the Tribunal praying that the decision to dismiss the complainant should be quashed, that he should be reinstated, and that compensation should be paid to him.

The Tribunal held the complaint to be well founded and, deeming that the rescinding of the decision impugned was inadvisable, awarded compensation in the amount of 5 million Italian lire to the complainant for the injury caused to him. The Tribunal noted, in the first place, that, whereas the Staff Council was the only body officially representing the staff in its dealings with the administration, the Staff Association, in spite of its private character, was a lawful association which had in fact been recognized by the Director-General. Hence, in submitting to an Assembly of the Association motions pertaining to the staff's demands, the complainant had merely been availing himself of the right of any member of the staff to defend his occupational interests. Subsequently, the complainant had been elected as a member of the Salary Committee and as its Chairman; from that date, he had carried on his activities as a representative of the Staff Association and it was in fact in that capacity that he had drafted the statement. In his capacity of staff representative the complainant had had responsibilities but had also enjoyed special rights, such as a considerable freedom of action and expression and the right to criticize the Staff Council and even, to some extent, the FAO authorities. The Tribunal stated, secondly, that by reason of its severity and of the fact that no formalities were prescribed for its application summary dismissal must necessarily be an exceptional measure which could be allowed only under an express provision and in accordance with the terms of such provision. In the case before the Tribunal, the applicable text was article 330.251 of the FAO Administrative Manual, which stipulated that summary dismissal might be imposed only when the misconduct of the staff member concerned was so serious that it had jeopardized or was likely to jeopardize the reputation of the Organization and its staff. The Tribunal then considered the statement on which the respondent had relied and found that that statement did not in fact manifest the characteristics which the Director-General had attributed to it; consequently, the Director-General had erred in reading into the statement the elements of "serious misconduct" within the meaning of the aforementioned article 330.251.

9. JUDGEMENT NO. 88 (6 NOVEMBER 1965): KISSAUN v. WORLD HEALTH ORGANIZATION (FIXING OF COMPENSATION)

Compensation in lieu of reinstatement—Amount of compensation to be fixed without reference to a hypothetical salary step increase—Period of time for which interest is to run—Claim for compensation for damage to health resulting from termination

In its Judgement No. 69 of 11 September 1964,[11] quashing the decision not to confirm the appointment of the complainant at the end of the probationary period on the grounds of failure to comply with the recognized procedure and infringement of the right to be heard, the Tribunal invited WHO to reopen the case, to enable the complainant to exercise his rights, and to consider whether he should be reinstated. The Organization, considering it inadvisable to reopen the case with a view to his possible reinstatement, offered to pay the complainant compensation amounting to $10,120.43, representing his salary for the period between the premature termination of his appointment and the date when his appointment would normally have ended, plus interest at 4 per cent for the period between 1 June 1963, date of the normal termination of his appointment, and 11 September 1964, date on which the abovementioned judgement had been delivered. The complainant considered this offer inadequate and brought suit before the Tribunal. He argued (1) that account should be taken, in fixing the amount of compensation, of one salary step to which he would have been entitled if he had remained in the Organization's service, and (2) that the 4 per cent interest should be computed up to the date of payment of compensation; he also claimed (3) additional compensation of $20,000 for psychological disturbance resulting from this termination.

In its judgement, the Tribunal recorded the offer of the Organization to pay the complainant a sum of $10,120.43 and rejected the complainant's three submissions. With respect to the first submission, the Tribunal noted that the complainant would not necessarily have received an increment if he had remained in the organization's service, since the organization had the option of extending the probationary period without increasing his salary. As regards the second submission, the Organization's offer, even it was slightly inadequate in respect of interest, was liberal in respect of capital and was satisfactory as a whole. With respect to the third submission, the complainant could have expected the termination of his employment at the end of its normal term, and therefore, failing quite exceptional circumstances, he had no grounds for maintaining that his dismissal had led to the deterioration of his health and to incapacity for work after that date; the existence of any such circumstances had not been established.

10. Judgement No. 89 (6 November 1965): Barakat v. the International Labour Organisation

Conduct of commercial activities by an international civil servant—Legality of the choice given to the official between voluntary resignation and the initiation of disciplinary proceedings

Complainant having requested a waiver of his immunity from jurisdiction in order to institute judicial proceedings relating to the refusal to make available a substantial financial contribution which he considered to have been pledged for the purposes of a transaction of a commercial character, the investigation of his request led to an inquiry as a result of which the defendant Organisation felt satisfied that complainant was engaging in unauthorized outside activities which, moreover, were incompatible with his status as an international civil servant. On 13 October 1964, complainant was advised that the Director-General deemed that the outside occupations in the sense of article 1.2 of the Staff Regulations in which complainant had engaged without permission constituted serious misconduct liable to the sanction of summary dismissal. However, before submitting to the Joint Committee a proposal for summary dismissal, the Director-General allowed complainant the option to resign within forty-eight hours, failing which disciplinary proceedings would be initiated. On 15 October 1964, complainant submitted a resignation without conditions or restrictions, to take effect on 15 November 1964, which resignation was accepted forthwith. After having submitted a complaint to the Director-General alleging that he had been treated in an unfair and unjusti-

[11] See *Juridical Yearbook*, 1964, p. 208.

fiable manner, and after that complaint had been rejected on 24 November 1964, complainant lodged his complaint with the Tribunal and submitted that the financial operations he had engaged in were aimed at investing his private estate, were in no way contrary to law, involved no risk of throwing the Organisation into public discredit, and were not incompatible with his status as an international civil servant; in the circumstances, the decisions of 13 and 24 November 1964, which in his view had resulted in obtaining his resignation under duress were illegitimate and arbitrary. The defendant Organisation first challenged, *in limine litis*, the competence of the Tribunal to entertain the complaint, on the ground that, in objecting to the alternative between resignation and the initiation of disciplinary proceedings which was offered to him, complainant failed to advance any violation of his terms of appointment or of any relevant provision of the Staff Regulations.

The Tribunal rejected the challenge of its competence, noting that complainant had not confined himself to alleging infringement of articles 1.2 and 12.1 of the Staff Regulations, but had also complained that undue influence had been brought to bear upon him to secure his resignation, thus implying infringement by the Director-General of a general rule of law which was equally applicable to the international civil service. The Tribunal rejected the complaint on the merits. It pointed out that the allegations against Mr. Barakat had been of such a nature as to justify initiating disciplinary proceedings. Consequently, in offering Mr. Barakat the choice between voluntary resignation and appearing before the Joint Committee, the Director-General, far from bringing any kind of pressure to bear, was simply offering him a solution which he was in no way obliged to offer. Moreover, it had been open to Mr. Barakat in the course of the proceedings, if he had so desired, to defend himself against the charges preferred against him. The choice that had lain before him had therefore been entirely free and his appointment had been terminated as a result of his own resignation, freely tendered.

11. Judgement No. 90 (6 November 1965): Prasad v. Food and Agriculture Organization of the United Nations

Termination of a staff member for unsatisfactory service—Need for notice in writing—Distinction between notice and reprimand

On 6 April 1964, the FAO Deputy Regional Representative notified the complainant, a driver-messenger in the FAO Office in New Delhi, that he had decided to terminate the complainant's appointment, effective immediately on the grounds of unsatisfactory performance of duty; he said that, in coming to that decision, he had had in mind especially the occasions of unsatisfactory service to which the complainant's attention had been drawn such as careless handling of cash entrusted to him, the careless driving of a motor-scooter belonging to the Organization, his accident record and his general attitude of non-co-operation with his supervisors and colleagues, all of which had made his job performance below the acceptable level. When the Director-General had confirmed that decision, the complainant had submitted an appeal to the Appeals Committee, which recommended that the Director-General should reconsider his decision. The latter had refused to follow that recommendation but had stated his willingness, with the agreement of the person concerned, which the Staff Regulations required in such cases, to convert the termination for unsatisfactory service into a termination in the interest of the good administration of the Organization, with consequent increase in the termination indemnities payable. Complainant declined that offer and instituted proceedings before the Tribunal, praying for the quashing of the decision to terminate his appointment.

The Tribunal reversed the decision which had been challenged, basing itself on the fact that there had been no written warning as required by the terms of the Staff Manual provision 314.221 relating to the termination of appointment for unsatisfactory service. It pointed out

that a warning was different from a reprimand. It was not enough that the employer should be able to point to several occasions in the course of a long service when a rebuke had been administered. What was contemplated by the above-mentioned provision was that the employee should be told in what respect his service as a whole had proved unsatisfactory and warned that if he did not give better service, he faced the possibility of dismissal. A reminder, for example, to drive more carefully was not a warning, the disregard of which was sufficient to justify a dismissal for unsatisfactory service.
