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Part Two. Legal activities of the United Nations and related intergovernmental organizations

Chapter V. Decisions of administrative tribunals of the United Nations and related intergovernmental organizations

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Chapter V

DECISIONS OF ADMINISTRATIVE TRIBUNALS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

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

1. JUDGEMENT NO. 139 (6 APRIL 1971): RAJAPPAN V. SECRETARY-GENERAL OF THE UNITED NATIONS [2]

Conversion of a probationary appointment into a fixed-term appointment — Rule according to which the fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment

The applicant entered the service of UNICEF on 11 September 1962 under a probationary appointment for two years. On 1 September 1964, his probationary appointment was converted into a fixed-term appointment for a period up to 10 September 1966. This appointment was successively extended to 10 Septebmer 1967, 10 September 1968 and 10 September 1969. On 22 April 1969, the Regional Director of UNICEF informed the applicant that his contract would not be renewed, the reason for this decision being the abolition of the applicant's post.

In support of his application against the non-renewal of his fixed-term appointment, the applicant contended, *inter alia*, that the conversion from a probationary to a fixed-term appointment was irregular and that UNICEF had stated, in a letter of 8 September 1961, that his probationary contract would be converted into a regular contract subject to satisfactory service and that it appeared from his periodic reports that that condition had been met.

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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 1971, 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 Telecommunication Union, 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] Mr. R. Venkataraman, President; Lord Crook, Vice-President; Mr. Z. Rossides, Member.

The Tribunal noted that the applicant's contention that the conversion of his initial probationary appointment into a fixed-term appointment was irregular had not been raised at the time when the change was made. It noted further that the conversion of the probationary appointment into a regular contract had been expressly made subject, in the relevant letter of the Administration, to the "mutual agreement" of both parties, and, accordingly, to the consent of the Administration. There was, therefore, no commitment by UNICEF to convert the probationary appointment into a regular appointment, even though the applicant's services had been acknowledged to be satisfactory. The Tribunal further recalled that the legal position of the applicant at the time of his separation from service was that of a holder of a fixed-term appointment which, according to staff rule 104.12 (*b*), does not carry "any expectancy of renewal or of conversion to any other type of appointment". Since it was established that there was no commitment by the Organization to retain the applicant or to renew his fixed-term appointment, the claim for renewal lacked substance.

Lastly, the applicant contested the reason, namely, abolition of the post, stated by the Administration for non-renewal of his fixed-term appointment. Since the applicant had not attributed "any prejudice or any other extraneous factors" to UNICEF's action, and since renewal of a fixed-term appointment, in the absence of any commitment or circumstances creating an expectancy, is within the discretion of the Secretary-General, the Tribunal found it unnecessary to pronounce on this matter.

2. JUDGEMENT NO. 140 (8 APRIL 1971): SERAPHIDES V. SECRETARY-GENERAL OF THE UNITED NATIONS [3]

A staff member holding a fixed-term contract who passes the qualifying examination for posts reserved exclusively for permanent staff members — The individual concerned is not entitled to claim appointment to such a post where he has lost his status as a staff member as a result of the expiry of his contract

The applicant had been granted a number of fixed-term appointments, the last of which was due to end on 31 August 1968. In the course of the last such appointment, she took an examination for editorial assistants which, according to an information circular from the Acting Director of Personnel dated 3 April 1968, was open to a certain category of staff members. She was subsequently informed that her name had been placed on a roster of successful candidates and that she would be assigned to a post as an editorial assistant "as a vacancy arises according to the order of merit established in the roster". The roster included 13 names and the applicant was placed fifth. In 1969, her fixed-term appointment not having been extended beyond 31 August 1968, she requested re-employment as an editorial assistant as she had passed the examination. Her request was denied on the grounds that such posts were invariably filled from within the staff of the Organization.

On taking cognizance of the application, the Tribunal considered whether, following the order of merit established in the roster mentioned above, the respondent should have offered the applicant a post as an editorial assistant at the time when the vacancy corresponding to her position on the roster occurred. It noted that the information circular of 3 April had been addressed solely to members of the staff of the Organization and that the examination which it announced had been open only to a certain category of staff members. Moreover, the circular indicated clearly that it concerned the assignment of staff members to posts as editorial assistants and that only after a period of training of at least nine months on the job

[3] Mme P. Bastid, Vice-President, presiding; Mr. F. A. Forteza, Member; Mr. V. Mutuale, Member.

could those concerned be recommended for promotion. The circular made no mention of appointments but only of assignments and promotions, which implied that only staff members were eligible for both the invitation to take the examination and assignment to a post as an editorial assistant. Although it considered that it might perhaps have been appropriate to draw attention in the circular to the fact that no one could be assigned to the posts in question who did not retain the status of a staff member of the Organization, the Tribunal held that no legal consequences could be derived from the absence of such a statement. The Tribunal also noted that the applicant held a fixed-term appointment and that according to staff rules, such appointments did not entitle the holder to any expectancy of renewal or of conversion to any other type of appointment. Furthermore, the relevant provision of the Staff Rules had been reproduced verbatim in the letter of appointment sent to the applicant.

Noting that the applicant's status as a staff member of the United Nations had ceased prior to the date on which the vacancy to which she might have been entitled according to the order of merit established in the roster had occurred, the Tribunal concluded that there was no legal commitment on the part of the respondent to apply a procedure which would eventually result in reinstatement of the applicant as a staff member of the Organization.

3. JUDGEMENT NO. 141 (8 APRIL 1971): MAJID V. UNITED NATIONS JOINT STAFF PENSION BOARD [4]

Calculation of the lump sum due to a staff member who exercises the option available under article IV, paragraph 2, of the Regulations of the Joint Staff Pension Fund — No retirement benefit can be considered as having accrued before the day following the date of the termination of service.

On 5 December 1969, in resolution 2524 (XXIV), the General Assembly of the United Nations modified the Regulations of the Joint Staff Pension Fund and, *inter alia*, decided that:

> "... with effect from 1 January 1970:
>
> "(*a*) The standard annual rate for a retirement benefit shall be obtained by multiplying the number of years of the participant's contributory service, not exceeding thirty, by 1/50 of his final average remuneration;
>
> "(*b*) The minimum annual rate for a retirement benefit shall be obtained by multiplying the number of years of the participant's contributory service, not exceeding ten, by the smaller of $180 or 1/30 of his final average remuneration;
>
> "(*c*) Benefits which accrued before 1 January 1970 shall be recalculated in accordance with (*a*) and (*b*) above and shall accrue in such recalculated amounts with effect from that date, save that no additional entitlement shall accrue in respect of any benefit, a part or the whole of which was commuted into a lump sum, except in so far as a part remains which is payable in the form of a periodic benefit, and in respect of that part in the proportion which it bears to the benefit as originally calculated;".

The applicant retired on 31 December 1969, prior to which time he had exercised the option available under article IV, paragraph 2, of the Regulations of the Fund (1967 edition) and had requested payment of one-third of the actuarial equivalent of his retirement benefit in the form of a lump sum. Being aware of the changes the General Assembly had just made in the Regulations of the Fund, he had stated that, since his pension was effective from 1 January 1970, the amount of the lump sum should also be calculated according to the new formula. The Joint Staff Pension Board nevertheless decided that benefits payable to

[4] Mme. P. Bastid, Vice-President, presiding; Mr. F. A. Forteza, Member; Mr. V. Mutuale, Member.

participants whose last day of service was 31 December 1969 should be calculated in accordance with the Regulations of the Fund in force on that date.

The Tribunal, taking cognizance of the case, pointed out that the last day of the applicant's period of service was 31 December 1969; that could not be the date on which retirement benefits accrued, since one and the same official in one and the same Organization could not be simultaneously in service and in retirement. Consequently, no retirement benefit accrued to the applicant before 1 January 1970. Accordingly, the applicant's retirement benefit entitlements, both in the form of periodic benefits and a lump sum, were governed by the aforementioned General Assembly resolution 2524 (XXIV) and by the Regulations of the United Nations Joint Staff Pension Fund which came into force on 1 January 1970. In support of the claim that a benefit payable in the form of a lump sum could not be calculated on the basis of the new rate, the respondent cited paragraph (*c*) of the text of General Assembly resolution reproduced above.

The Tribunal took the view that that provision did not apply in the case under consideration; it referred to cases involving "benefits which accrued before 1 January 1970" and "any benefit, a part or the whole of which was commuted into a lump sum". However, the applicant's retirement benefits did not accrue before 1 January 1970 and, prior to that date, the applicant did not receive either a part or the whole of a lump sum.

The respondent also cited article 51 of the Regulations of the Fund (1970 edition) whereby:

> "(*a*) The Regulations shall enter into force and supersede all previous Regulations with effect from 1 January 1970.
>
> "(*b*) No provision shall be construed as applying retroactively to participants in the Fund prior to 1 January 1970 unless expressly stated therein or specifically amended to such effect by the General Assembly with due regard to the provisions of article 50".

The Tribunal observed that there was no question of applying the provisions of the 1970 Regulations retroactively, in other words, of modifying a legal situation established previously on the basis of the 1967 Regulations. It was a question of applying a decision of the General Assembly which took effect from 1 January 1970 to a legal situation—the legal status of a recipient of a retirement pension—which had come into being precisely on 1 January 1970.

The Tribunal therefore quashed the impugned decision and decided that the lump sum representing one-third of the actuarial equivalent of the applicant's retirement benefit should be calculated on the basis of 1/50 of his final average remuneration.

4. JUDGEMENT NO. 142 (14 APRIL 1971): BHATTACHARYYA V. SECRETARY-GENERAL OF THE UNITED NATIONS [5]

Non-renewal of a fixed-term contract—The terms and conditions of employment of a staff member derive not only from his letter of appointment but also from the circumstances in which the contract was concluded—Where a post is abolished, the Administration has an obligation to take account of the seniority of the individual concerned and to endeavour in good faith to find him another post

The applicant had been seconded by the Government of Orissa (India) to enter the service of UNICEF on 2 June 1963 as an Assistant Field Representative under a fixed-term appointment for two years. His letter of appointment provided that "the fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of

[5] Mr. R. Venkataraman, President; Lord Crook, Vice-President; Mr. Z. Rossides, Member; Mme. P. Bastid, Vice-President, Alternate Member.

appointment in the Secretariat of the United Nations". Prior to the issue of that letter, however, the applicant had received a letter from the Regional Director of UNICEF, dated 30 January 1963 which contained a passage stating:

> "I would also like to add that for staff members who join us there will be opportunities after their first fixed-term contract for regular employment and for more senior posts in the Organization dependent upon their qualifications and performance."

The letter made no mention of the sentence quoted above, which appeared only subsequently in the letter of appointment.

The applicant's initial appointment was extended for successive terms, the last extending until 31 March 1969. On being informed that his contract would not be extended beyond that date because of the abolition of his post—a decision which was subsequently amended when the UNICEF Administration extended the contract until 30 June 1969—the applicant wrote to the Secretary-General and later filed an appeal with the Joint Appeals Board, which, having regard to the fact that UNICEF had paid the applicant the equivalent of five months' emoluments, recommended that if the Secretary-General considered such compensation to be equitable he should take no further action in the case.

The applicant thereupon filed an application with the Tribunal claiming a right to renewal of his contract and to continuance in post with UNICEF until he reached the age of superannuation. He based his claim on the fact that the letter of 30 January 1963 stated that, depending upon his qualifications and performance, he would have "an opportunity" for regular employment and for more senior posts in the Organization. While it recognized that as a general rule fixed-term appointments do not carry a right of renewal, the Tribunal felt that it had to consider the contracts as a whole, not only by reference to the letter of appointment but also in relation to the circumstances in which it had been concluded. In that connexion, it referred to its Judgement No. 95[6] in which it had stated:

> "The Tribunal in its jurisprudence has established that the terms and conditions of employment of a staff member with the United Nations may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances."

The Tribunal observed in the case under consideration that the antecedents to the letter of appointment, and particularly the letter of the Regional Director, were of significant relevance. According to the statements of the Administration itself, that letter was a studied and fully considered document. Furthermore, unlike certain other letters offering employment which the Tribunal had examined in previous cases, the letter of 30 January 1963 mentioned the opportunities for regular employment and for more senior posts as dependent on qualifications and performance only and not upon mutual agreement between the applicant and the Organization. Noting that a reasonable expectancy of continued employment had been created in the applicant's mind and observing that, according to the dossier, the said applicant's record of performance was of a high standard, the Tribunal found that those circumstances had created a legal expectancy on the part of the applicant of continued employment with UNICEF. It further decided that such legal expectancy created a corresponding obligation on the part of the Respondent to retain the applicant in UNICEF's service.

The Tribunal also noted that the Regional Director had found it necessary to base the decision not to renew the applicant's contract on a ground other than the expiration of his fixed-term contract, namely, the abolition of his post, and thereby acknowledged his duty to justify the decision. It found that the respondent had to take into consideration the

[6] *Judgements of the Administrative Tribunal of the United Nations*, Nos. 87 to 113 (United Nations publication, Sales No. E.68.X.1, p. 70.

seniority of the applicant and also to make a *bona fide* search for an alternative post to which to appoint the applicant within UNICEF, in accordance with the procedure prescribed in Staff Rule 109.1 (*c*). Yet the dossier contained no satisfactory proof that either the seniority of the applicant had been taken into consideration or a search for a suitable alternative post made by the respondent.

The Tribunal pointed out that the performance of an obligation undertaken was difficult in case of the non-renewal of a fixed-term contract and referred back to existing jurisprudence (Judgements Nos. 68 and 92) whereby, where specific performance was impossible, the Tribunal had held that compensation in lieu thereof might prove to be adequate and proper relief. In the case under consideration, the applicant could have anticipated continuation in service until the age of 60, in other words, for a further period of four years. In Judgement No. 132,[7] the Tribunal had held that in the absence of effective performance of duties the situation might be assimilated to a case where services were terminated immediately after the renewal of a contract. In such a situation, a staff member would be entitled to a termination indemnity of one's week salary for each month of uncompleted service. Accordingly, the applicant could expect to receive an amount approximately equivalent to one year's salary. As he had already received an indemnity equivalent to five months' salary, the Tribunal awarded him compensation equivalent to seven months' net base salary.

5. JUDGEMENT NO. 143 (15 APRIL 1971): ROY V. SECRETARY-GENERAL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION[8]

Discharge for misconduct, which led to a decision by the Tribunal to remand a case for correction of the procedure—Termination of services by mutual agreement between the applicant and the Administration—Determination of the date of termination of services

In its Judgement No. 123,[9] the Tribunal, having been seized of an application impugning a decision to effect a discharge from service as a disciplinary measure, ordered that the case should be remanded for correction of the procedure and the payment to the applicant as compensation of a sum equivalent to two months of her net base salary for the loss caused to her by delays resulting from the procedures followed.

On 22 November 1968, the applicant contested the version of the facts on the basis of which the decision had been taken to discharge her for misconduct. The Secretary-General thereupon ordered an investigation to be carried out and communicated the results to the applicant, inviting her to send him her observations. Having examined the dossier, the Secretary General decided to confirm the discharge as a disciplinary measure. The Advisory Joint Appeals Board, on hearing the case, recommended that the Secretary-General should rescind his decision to discharge her, should negotiate the termination of the applicant's services by mutual agreement and should offer her "a date of termination of . . . services and indemnities in keeping with the spirit of the Board's conclusions".

The Secretary General then proposed to the applicant that the termination of her services should be by mutual agreement and she accepted that offer. However, the parties were unable to reach agreement as to the date of termination of services, the applicant proposing 27 May 1970 and the Secretary-General 22 July 1966, the date of the decision to discharge her.

[7] See *Juridical Yearbook*, 1969, p. 194.

[8] Mme P. Bastid, Vice-President, presiding; Mr. F. T. P. Plimpton, Member; Mr. F. A. Forteza, Member; Mr. V. Mutuale, Alternate Member.

[9] See *Juridical Yearbook*, 1968, p. 171.

On hearing the case, the Tribunal found that the procedure which it had criticized in its Judgement No. 123 had been duly corrected and that the rights of the applicant had been respected. With regard to the date which was to be deemed the date of the termination of services, the Tribunal pointed out that the real date was, of course, 22 July 1966 and that if the fictitious date postulated by the applicant were accepted, it would follow that she would have a right to receive almost four years' salary for work which she had not done. The Tribunal therefore ordered that the termination of the applicant's services should be deemed to have taken place on 22 July 1966. It also decided that the amount of compensation due to the applicant under the provisions of the Service Code should be increased by interest at the rate of 6 per cent per annum from 22 July 1966 to the date of the payment, because of the long period of time which had elapsed since the beginning of the case.

The applicant also claimed an indemnity for the injury caused by a disciplinary measure which was agreed to have been unduly severe. The Tribunal, noting that the Service Code provided that in the event of termination of services by mutual agreement an additional indemnity might be paid by the Secretary-General, awarded the applicant a sum equal to 50 per cent of nine months' salary.

6. JUDGEMENT No. 144 (16 APRIL 1971): SAMAAN v. SECRETARY-GENERAL OF THE UNITED NATIONS [10]

Submission of a claim which should in the normal way have been subject to the appeal procedure available under article XXXIX of the UNEF Staff Regulations for Local Employees —Referral of the case to the Joint Appeals Board under Staff Rule 111.4 (b) *in view of the unavailability of the normal recourse procedure because of the dissolution of UNEF—Reference to an advisory body as a final recourse does not ensure the judicial or arbitral remedy to which the staff member is entitled*

The applicant was locally recruited at Cairo for service with UNEF in Gaza. Upon the withdrawal of UNEF, he was separated from the service and travelled with his wife to Piraeus. One week later, his wife went to Cairo to settle their affairs and then returned to Greece. At his request, he was reimbursed the travelling expenses incurred by his wife and himself from Gaza to Piraeus. Almost two years later, he requested the Administration to pay him the price of two tickets from Piraeus to Cairo on the grounds that, in accordance with article XVIII, paragraph 6 of the UNEF Staff Regulations for Local Employees, he should have been reimbursed his costs as far as the place where he had been recruited, in other words, Cairo.

Having failed to obtain satisfaction, he informed the Administration of his intention to bring his case before the Administrative Tribunal. He was thereupon informed that he should go first to the Joint Appeals Board, which he did. The Secretary of the Board then requested from the Director of Personnel a ruling on the question of whether, in view of the dissolution of UNEF and the unavailability of the recourse procedure provided in article XXXIX of the UNEF Staff Regulations for Local Employees, the applicant might file an appeal with the Board. The Director of Personnel stated the Administration's position in the following terms in a letter addressed to the applicant:

> "...the Secretary-General has agreed to refer this matter to the Joint Appeals Board at United Nations Headquarters under Staff Rule 111.4 (*b*). By referring this matter to the Joint Appeals Board, the Sectetary-General in no way prejudges any decision which might be taken by the Board regarding their competence to entertain or regarding the receivability of the appeal under Staff Rule 111.3."

[10] Mr. R. Venkataraman, President; Mr. F. T. P. Plimpton, Member; Mr. Z. Rossides, Member; the Lord Crook, Vice-President, Alternate Member.

The Joint Appeals Board found that the Respondent had fulfilled his obligations but recommended that the applicant should receive an *ex gratia* payment as reimbursement of the expense of the travel of his wife from Piraeus to Cairo. The Secretary-General accepted that recommendation. The applicant then filed an application with the Tribunal in which he contended that he was entitled to payment of the cost of travel to Cairo, his place of recruitment, even though the journey had not been undertaken.

The Tribunal had first to consider whether it was competent. In that connexion, it observed that article XXXIX of the UNEF Staff Regulations for Local Employees provided for an internal appeals procedure and that it had not been possible to invoke that procedure in the current case owing to the dissolution of UNEF. It noted that the dossier, and particularly the letter of the Director of Personnel referred to above, showed that the respondent acknowledged the right of the applicant to an appeal procedure and nominated the Joint Appeals Board as the forum for such an appeal in accordance with the Staff Rules. The respondent relied on the second sentence in the passage quoted above from the letter of the Director of Personnel to establish that the appeal to the Appeals Board was to provide an exclusive substitute *ad hoc* procedure for the one envisaged by the UNEF Staff Regulations. The Tribunal nevertheless rejected that restrictive interpretation of the sentence in question which, in its view, was intended merely to confirm the right of the Joint Appeals Board to determine its competence or the receivability of the appeal. The respondent further argued that since an appeal procedure comparable to the one envisaged under the UNEF Staff Regulations had been provided for the applicant, a further appeal to the Tribunal was not available to him. The Tribunal pointed out that the right of staff members of international organizations to have recourse to a judicial or arbitral remedy for settlement of their disputes had been well recognized and referred to the advisory opinion issued by the International Court of Justice on 13 July 1954, in which it was stated:

> "It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them."

From the fact that the Secretary-General agreed to refer the matter to the Joint Appeals Board *under Staff Rule 111.4* (b), the Tribunal inferred that the report of the Board was intended to be advisory in character. Reference to an advisory body as a final recourse need not ensure the judicial or arbitral remedy to which the staff member was entitled. The Tribunal therefore decided that it was competent.

As to the merits of the case, the Tribunal took the view that the applicant's claim for cost of travel from Greece to Cairo, the place where he was recruited, was based on a misreading of article XVIII, paragraph 6, of the UNEF Staff Regulations which was worded:

> "Should a staff member on separation wish to go to any place outside the area in which the UNEF office is located other than the place from which he was recruited, the travel expenses to be borne by UNEF shall not exceed the maximum amount that would have been payable on the basis of return transportation to the place of recruitment."

The applicant claimed that he was entitled to the maximum amount that would have been payable on the basis of return transporation to Cairo, the place of his recruitment, whether or not he had incurred such expenditure. If the rule had been so intended, it would have stated categorically that a staff member on separation should be paid the cost of return transportation to the place of recruitment. In fact, the words "travel expenses to be borne" would indicate that the travel costs must actually have been incurred, and there was no indication that a staff member could be paid for travel not performed. The Tribunal also noted that article XVIII, paragraph 7 of the UNEF Staff Regulations placed on the staff

member the responsibility for submitting claims for travel expenses immediately upon completion of travel. That was a clear indication that travel must be completed before it became reimbursable. Since travel to Cairo was neither performed nor intended to be performed by the applicant, the question of reimbursement did not arise. The Tribunal therefore rejected the appeal.

7. JUDGEMENT NO. 145 (23 SEPTEMBER 1971): DE BONEL V. SECRETARY-GENERAL OF THE UNITED NATIONS [11]

Appeal against a decision to withhold a termination indemnity on the expiry of a fixed-term contract

The applicant had held a fixed-term appointment of one year which had been extended by one year to 1967. On that date, she was offered a second extension but refused to accept the conditions proposed. While the negotiations were going on, her contract expired, but she nevertheless continued to work for the Organization until 30 November 1967. The period of employment from July to November was subsequently covered by a personnel action which extended her fixed-term appointment for that period.

A claim for payment of a termination indemnity having been rejected, the applicant lodged an appeal with the Joint Appeals Board and later with the Tribunal.

She contended that according to a clause contained in her contract, she was not entitled to any benefits or allowances except those provided in the United Nations conditions of service. The Field Administration Handbook, which, she contended, was binding on the Administration and the staff in the same manner as the Administrative Manual, provided that the terms of appointment of local staff should not normally permit payment of a termination indemnity, *unless the national law of the country in which the field office is established provides for the payment of such indemnity*. The labour legislation of the country in question did provide for the payment of a termination indemnity in the applicant's circumstances.

The Tribunal first pointed out that, according to Staff Rule 109.7 (b), separation as a result of the expiry of a fixed-term appointment should not be regarded as a termination within the meaning of the Staff Regulations and Rules. The applicant could not therefore claim termination indemnity under the Staff Regulations and Rules.

As to the argument based upon the sentence quoted above from the Field Administration Handbook, the Tribunal pointed out that, in its Judgement No. 15[12] it had given a ruling concerning the binding nature of the Administrative Manual by pointing out that, as provided in the Manual itself, "the Administrative Manual shall be the official medium for the issuance of administrative policies, instruction and procedures designed to implement the Staff Rules". On the other hand, the Field Administration Handbook was in the nature of a guide to the field offices and clearly did not create or give rise to any contractual obligations between the Administration and the staff.

Noting the absence of any stipulation regarding the applicability of the local law such as would create a contractual obligation between the Administration and the staff whether in the letter of appointment, in the Staff Regulations and Rules or in the pertinent administrative instructions, the Tribunal held that the applicant's claim for termination indemnity based on local laws failed.

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[11] Mr. R. Venkataraman, President; Lord Crook, Vice-President, Mr. Z. Rossides, Member.

[12] *Judgements of the Administrative Tribunal of the United Nations*, Nos. 1-70 (United Nations publication, Sales No. 58.X.1), p. 43.

8. JUDGEMENT No. 146 (1 OCTOBER 1971): TOUHAMI v. SECRETARY-GENERAL OF THE UNITED NATIONS [13]

Request for the revision of a judgement of the Tribunal

The applicant requested the revision of Judgement No. 135[14] and sought reinstatement in service at the appropriate level and reimbursement of 1,000 Dirhams, allegedly borrowed from him by a Deputy Resident Representative.

The Tribunal noted that the applicant had sought review of Judgement No. 135 under article 11 of the Statute of the Tribunal and that the Committee on Applications for Review of Administrative Tribunal Judgements had decided that there were no substantial basis for the application for review.

Referring to article 12 of its Statute, the Tribunal pointed out that the applicant had not produced in his application for revision any fact of a decisive nature which had not been before the Tribunal during its consideration of the case. The applicant's main plea had been fully considered by the Tribunal, which had rejected it in its Judgement No. 135. The Tribunal had also ruled that it had no competence to deal with the alleged borrowing of money by the Deputy Resident Representative.

The Tribunal therefore rejected the application.

9. JUDGEMENT No. 147 (6 OCTOBER 1971): THAWANI v. UNITED NATIONS JOINT STAFF PENSION BOARD [15]

Question of the validation for pension purposes of a period of service completed by a staff member before admission to the Joint Staff Pension Fund as a full participant—A request for validation granted by the Fund and subsequently withdrawn by the staff member concerned cannot be resubmitted after the expiry of the period of one year prescribed in article III, paragraph 1 of the Regulations of the Fund

The applicant had completed a first period of service with FAO from 31 January 1959 to 12 November 1963. During that period, he had been an associate participant and had become a participant as from 1 January 1963. On that date, he had requested and obtained, in accordance with the provisions of article III.1 of the Regulations of the Pension Fund, validation of his period of service from 31 January 1959 to 31 December 1962 and had undertaken to make 20 monthly payments for that purpose. On 17 October 1963, the applicant cancelled his request for validation and consequently obtained a refund of the three monthly instalments which had already been paid. He left the service of FAO on 1 November 1963 and was re-employed on 3 September 1965. On 15 February 1966, he again requested validation of his period of service from 31 January 1959 to 31 December 1962. He was thereupon informed that such validation was no longer possible because the one-year time-limit for electing to validate had expired. Having been seized of the case, the FAO Pension Committee reached the same conclusion and its Secretary pointed out that, as the applicant had become a participant on 1 January 1963, he should have exercised his option at the latest by 31 December 1963. The Joint Staff Pension Board rejected the appeal lodged by the applicant but ruled that the period of prior contributory service restored to him on his return to FAO in September 1965 should have included the period

[13] Mr. R. Venkataraman, President; Mr. F. T. P. Plimpton, Member; Mr. Z. Rossides, Member.

[14] See *Juridical Yearbook*, 1970, p. 137.

[15] Mme P. Bastid, Vice-President, presiding; Mr. F. T. P. Plimpton, Member; Mr. V. Mutuale, Member.

corresponding to the three validation instalment payments which he had made in 1963 before cancellation of his request for validation.

Taking cognizance of the case, the Tribunal took the view that the applicant had definitely surrendered entitlement to validation of the period of service from 31 January 1959 to 31 December 1962 when, having begun to pay the monies due to that end, acting on his own initiative and for personal reasons, he withdrew his request for validation and so obtained the refund of the instalments which he had already paid. Although upon re-employment the applicant obtained restoration of his contributory service as a participant from 1 January 1963 to 12 November 1963, the question of validation did not arise in connexion with that period.

The applicant invoked the fact that the respondent agreed to validate part of the period under consideration as an argument to establish his entitlement to validation of the whole of the period. The Tribunal nevertheless held that the decision to credit the applicant with contributory service corresponding to the three monthly deductions made from his salary prior to the cancellation of his request for validation could not have the implication attributed to it by the applicant. Assuming that it was partly based on the legal grounds invoked by the respondent, it could not have any effect other than that set forth in rule B.24 of the Administrative Rules of the Pension Fund, and applicable in an analogous situation. If the contrary was the case, the decision would represent en *ex gratia* measure whose effect it would not be for the Tribunal to extend.

The request for validation submitted on 15 February 1966 and again on 11 June 1968 was clearly inadmissible since it was submitted after the time-limit of one year prescribed in article III.1 of the Regulations of the Pension Fund had elapsed.

10. JUDGEMENT NO. 148 (6 OCTOBER 1971): HALILOVIC v. UNITED NATIONS JOINT STAFF PENSION BOARD [16]

The case of a staff member who had completed a first period of service as an associate participant in the Pension Fund and then, more than two years later a second period of service as a full participant—Appeal against a decision to refuse validation of the first period of service on the dual grounds that the request for validation had not been submitted within the time-limit of one year of the applicant's having become a full participant and because in any event the interval between the cessation of his associate participation and the commencement of his full participation had exceeded two years

The applicant, a technical assistance expert, had been employed by the United Nations from 13 March 1957 to 31 December 1962 and by FAO from 28 June 1965 to 15 November 1970. During the first of those periods of service, the applicant was an associate participant in the Pension Fund from 1 January 1958 to 31 December 1962. During the second period he was a full participant from 11 January 1966 to 15 November 1970, with contributory service to his credit from 28 June 1965. On 2 May 1968, the applicant requested validation of the period from 30 March 1957 to 31 December 1962. Having been informed that, under article III of the Pension Fund Regulations, such validation was impossible because the interval between his ceasing to be an associate participant and becoming a participant exceeded two years, the applicant appealed against that decision to the FAO Staff Pension Committee, which rejected the application for the reasons indicated above. Having been seized of the case, the Standing Committee of the Joint Staff Pension Board rejected the appeal for two reasons, namely, that the request for validation had not been made within

[16] Mme P. Bastid, Vice-President, presiding; Mr. F. T. P. Plimpton, Member; Mr. V. Mutuale, Member.

one year of the applicant's having become a full participant and because in any event the interval between the cessation of his associate participation and the commencement of his full participation had exceeded two years.

The Tribunal noted that article III of the Pension Fund Regulations in force at the time stated:

> "1. When an associate participant or former associate participant becomes a participant under article II, he may, subject to the conditions set forth in paragraphs 4, 5 and 6 of this article, elect within one year to have included in his contributory service:
>
> "(*a*) The period of service during which he was an associate participant, provided it was not interrupted by an interval or intervals totalling more than one year;
>
> "(*b*) Any period of service as a full-time staff member of a member organization prior to his entry into the Fund as an associate participant, during which he was not eligible under article II or II *bis* to become a particpant or an associate participant because his appointment was for less than one year or because he had less than one year of service, provided such period was not interrupted by an interval or intervals any of which exceeded thirty days,
>
> provided that the interval between his ceasing to be an associate particpant and becoming a participant does not exceed two years."

The Tribunal noted that the interval between the date on which the applicant ceased to be an associate participant, namely, 31 December 1962, and the date on which he became a participant, namely, 11 January 1966, amounted to three years and ten days and that the interval between the cessation of his associate participation and the date from which his contributory service was reckoned, namely, 28 June 1965, amounted to two years, five months and 27 days. The request therefore contravened the terms of the aforementioned article III.

The Tribunal pointed out that the applicant's real complaint was directed to the provision in the Regulations forbidding validation of a prior period of service after an interval of more than two years. However, the Tribunal was not competent to amend the Pension Fund Regulations; its role was limited to applying those Regulations as in force and passing judgement on applications alleging non-observance of them. In the case before it, there had not been any non-observance.

11. JUDGEMENT NO. 149 (6 OCTOBER 1971): MIRZA V. SECRETARY-GENERAL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION [17]

An OPAS contract terminated by the Administration before it had run its normal course, without any fault on the part of the employee concerned or non-observance of the obligations incumbent upon him—An essential requirement for termination in such circumstances is the existence of a cause—In the absence of any specific provision in the contract, the provisions of the ICAO Field Service Staff Rules are applicable, in so far as they are the basis of the "administrative practices" to which, under the terms of its article VII, an OPAS contract is subject, even though the holder of such a contract does not have the status of a staff member of the Organization

The names of the applicant and two other candidates had been proposed to the Nigerian Government for the post of OPAS[18] expert under the operational assistance agreement

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[17] Mr. R. Venkataraman, President; Mr. F. T. P. Plimpton, Member; Mr. Z. Rossides, Member.

[18] A feature of an OPAS contract is that it does not confer on its holder the status of a staff member of the Organization in question.

between ICAO and that Government. The UNDP Resident Representative in Nigeria informed ICAO that all three candidates were acceptable to the Government, which had placed the applicant in third place on its list of preference. As the two other candidates later proved to be unavailable for employment, ICAO engaged the applicant for a period of one year. The contract provided in its article IV that it might be terminated by either party upon one month of written notice and that, should the Organization so terminate the contract, it should pay to the officer an indemnity equal to one week's salary for each month of uncompleted service. In its article VII, the contract provided that while the officer did not have the status of a staff member of the Organization, any relevant matter for which no provision was made in the contract should be settled according to the administrative practices of the Organization. Some few days after the applicant's arrival in Nigeria, the Government indicated that it was not prepared to accept him for the post in question. The Organization thereupon terminated his appointment and informed him that, in addition to an amount corresponding to one month's notice, he would be paid the termination indemnity equal to one week's base salary in respect of each uncompleted month of contracted service. The Advisory Joint Appeals Board, having been seized of the case, recommended that the Secretary-General should "take all possible measures to ensure that the appellant obtain compensation equivalent to his base salary under the contract of employment for the whole period of the unfulfilled term, less the amount of indemnity already received". The Secretary-General did not accept that recommendation, whereupon the applicant lodged an appeal with the Tribunal.

The Tribunal pointed out that although the contract stipulated that no indemnity would be due if its termination was based on the misconduct of the officer or on the non-observance of the obligations incumbent upon him, it did not specify the grounds on which the Organization might terminate it. The Tribunal regarded it as an essential requirement of due process that a fixed-term appointment might be terminated before the expiry of the term for cause, but no arbitrarily by giving a month's notice. Article VII, paragraph 3 of the contract provided that:

> "While the Officer does not have the status of an official or a staff member of the Organization, any relevant matter for which no provision is made in this contract shall be settled according to the administrative practices of the Organization."

As the administrative practices of the Organization were based on the Staff Rules, the Tribunal held that the Staff Rules relating to termination were relevant to the determination of the case. The applicant had furthermore been informed that his conditions of service would be those applicable under the ICAO Field Service Staff Rules, it being understood that, as he was not an ICAO staff member, he would not be entitled to participation in the United Nations Joint Staff Pension Fund and would not be issued with a United Nations laissez-passer. From the foregoing, the Tribunal concluded that in the absence of a specific provision in the contract regarding premature termination, the provisions of the ICAO Field Service Staff Rules were applicable to the case even though the applicant did not have the status of a staff member of ICAO.

Rule 9.4 of the Field Service Staff Rules read:

> "The appointment of a staff member may be terminated by the Secretary-General prior to its expiration by the application against the staff member of the disciplinary measures of termination of appointment or of summary dismissal as provided in Part VII of these Rules, or if, in the opinion of the Secretary-General:
>
> "*(a)* The performance by the staff member of his duties and responsibilities is unsatisfactory, or
>
> "*(b)* The staff member is, for reasons of health, incapacitated for further service, or
>
> "*(c)* The necessities of the service require abolition of the post or reduction of the staff; or

"(*d*) The termination of the staff member's appointment would be in the interest of the Organization."

The termination of the applicant's contract did not fall within any of the above categories; in particular, the respondent had not contended that the termination was, in its view, in the interests of the Organization. The decision was not therefore in accordance with the administrative practices envisaged under the Rules and consequently not in accordance with the terms of the contract.

The Tribunal also noted that the Nigerian Government had never given its approval to the respondent's proposal to recruit the applicant. Nevertheless, the evidence in the dossier showed that the respondent had assured the applicant that the necessary approval had been properly secured and that the applicant's employment for the full term of the contract was assured. In view of the fact that the applicant had been unable to find other employment during what would have been the term of his contract and that the respondent had been unable to provide such employment, the Tribunal determined that the respondent should pay to the applicant compensation equivalent to what would have been his net base salary under the contract for the whole period of the unfulfilled term, less the amount of the terminal indemnity already paid.

12. JUDGEMENT NO. 150 (6 OCTOBER 1971): IRANI V. SECRETARY-GENERAL OF THE UNITED NATIONS [19]

The clause in the OPEX contract whereby the Organization establishes arbitration machinery to hear and to decide disputes between itself and the officer in which the latter asserts non-observance of the terms of the contract—The "settlement" of such disputes implies the intervention of an independent, decision-making authority—As a general rule, any decision taken by the Secretary-General on the recommendation of an advisory body is subject to appeal before the Tribunal—The contractual law applicable to OPEX officers is to a large extent analogous in substance to that applicable to staff members—The jurisprudence of the Tribunal concerning its competence with regard to persons who do not have the status of staff members of an international organization

The applicant, originally recruited as a United Nations technical assistance expert, had been transferred to the OPEX Programme. In that capacity, he received three successive one-year contracts, the last of which was due to expire on 31 December 1967. Having informed Headquarters in September 1967 that he was prepared to accept the extension of his contract until December 1968, he was informed that programme provision for his post had been made for 1967 only. In January 1968, Headquarters informed him that his contract could not be extended beyond 31 December 1967. When the applicant claimed payment of his salary, first for the month of January 1968 and then for longer periods, the Acting Secretary of the Joint Appeals Board informed him, on the instructions of the Director of Personnel, that the machinery provided for in article V of his OPEX contract would "take the form of referring the case to the Joint Appeals Board established pursuant to Staff Regulation 11.1 and Staff Rules 111.1-111.4".

The Joint Appeals Board recommended the payment to the applicant of a sum equivalent to three months' salary and the Director of Personnel accepted that recommendation.

Having been seized of the case, the Tribunal decided that it was competent to hear it. It first pointed out that the three agreements governing the applicant's juridical status—that between the United Nations and the Government, the contract between the United Nations

[19] Mme P. Bastid, Vice-President, presiding; Mr. F. T. P. Plimpton, Member; Mr. V. Mutuale, Member.

and the applicant and the contract of employment between the Government and the applicant, —all contained clauses concerning the settlement of disputes. In particular, the contract between the United Nations and the applicant contained a clause which, in the contracts of 1966 and 1967, read:

> "The Organization shall establish appropriate machinery to hear and to decide disputes between itself and the Officer in which the latter asserts non-observance of the terms of his contract."

The Tribunal pointed out that the machinery established should make it possible to hear and "decide" and dispute between the parties, which meant that the Organization undertook to provide for the intervention of an independent, decision-making body. The respondent contended that the Joint Appeals Board was designated as the settlement machinery referred to in article V of the contract. The Tribunal observed that in the communication from the Acting Secretary of the Joint Appeals Board referred to above, there was an express reference to the provisions of the Staff Regulations and Rules whereby the Board was established as a purely advisory body to advise and make recommendations to the Secretary-General. Moreover, the Board had submitted to the Secretary-General, in the usual form, a report containing "recommendations". The final decision had been taken by the Secretary-General, a party to the dispute, not by the Joint Appeals Board. That decision undoubtedly conformed to the Board's recommendations, but it was quite clear from its wording that the Secretary-General did not consider himself bound by the Board's recommendations. As a general rule, any decision taken by the Secretary-General on the advice of the Joint Appeals Board could be appealed before the Tribunal, as had been pointed out in Judgement No. 144.[20]

The respondent contended that, if the applicant was an OPEX officer in the service of a Government and subject only to the authority of that Government and was not a staff member of the Secretariat of the United Nations, the dispute concerning him could not fall within the Tribunal's competence, as defined in article 2 of its Statute.[21] The Tribunal pointed out that the situation of OPEX officers was characterized by the fact the status of official of the beneficiary State was necessarily conditioned by the existence of a contract between the person concerned and the United Nations. That contract established the officer's functions and stipulated that they might be changed only with the approval of the Organization. Furthermore, the contract listed the various benefits to be provided by the Organization, the proposed emoluments being "generally the same as those applicable to its staff members in the category of project personnel". Thirdly, the contract defined the officer's status providing that, being responsible to the Government, he enjoyed immunities which the Organization might, if necessary, waive. He must "conduct himself . . . with the fullest regard for the aims of the Organization and in a manner befitting his status under this contract". Finally, the agreement between the United Nations and the Government provided that OPEX officers should not be required "to perform any function incompatible with such special international status or with the purposes of the United Nations". Thus, there was no question but that the contractual link with the United Nations was an important, if not essential, element determining the consent of a person who agreed to become an OPEX officer. Furthermore, the length of service with the State depended on the length of the contract with the United Nations. It followed that although the applicant's contract with the Organization was not a contract of employment in the usual sense of the word, it was a contract for a specific professional activity in the civil service of the State. The contract included clauses which were found directly or by reference in the customary contracts of staff members of the Secretariat of the Organization.

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[20] See above, p. 155.

[21] See foot-note 1.

In other words, the contractual law between the Organization and the person concerned was, to a large extent, analogous in substance to the law applicable to staff members of the Secretariat and often the same texts were, in fact, applicable.

The Tribunal further noted the provisions of article II, paragraph 6, and article VII, paragraph 3, of the contract concluded between the applicant and the United Nations, which, in its view, showed clearly that the administrative situation of an OPEX officer was, in many respects, comparable to that of a staff member of the Secretariat. Accordingly, any dispute which might arise concerning the contract between the Organization and an OPEX officer related to juridical problems which must be settled by application of the body of rules applicable to the international civil service, even though in his professional work the OPEX officer came under the authority of the State.

The Tribunal pointed out that in several cases (see Judgements Nos. 96[22] and 106,[23] it had decided that it was competent to hear applications alleging non-observance of "terms of appointment" of staff members of the Secretariat of the United Nations even though the applicant had never been a staff member of the Secretariat.

The Tribunal recalled that according to the advisory opinion issued on 13 July 1954 by the International Court of Justice, judicial or arbitral remedy for the settlement of any disputes which might arise between the United Nations and its staff was enjoined by "the expressed aim of the Charter to promote freedom and justice for individuals". The right to resort to an impartial decision-making body was affirmed for the benefit of all staff members of international organizations by the Administrative Tribunal of the International Labour Organisation, specifically in its Judgement No. 122.[24]

By agreeing to submit the case to the Joint Appeals Board without extending the latter's competence beyond that laid down in the Staff Rules and Regulations, the respondent had limited the Board to its advisory role. In the circumstances, unless the Tribunal was competent in the case before it, the safeguard of some appeals procedure for the benefit of the applicant would not exist, and article V of the contract between the applicant and the Organization would not be respected. The Tribunal further pointed out that in a dispute between an OPEX officer and ICAO the parties had not contested its competence.[25]

As to the merits of the case, the Tribunal found that the applicant had been duly informed by the respondent that provision for his post had been made for 1967 only and that no authority competent to bind the respondent had entered into a commitment to renew the contract between the United Nations and the applicant, which was the necessary condition for the extension of the applicant's functions as an OPEX officer with the Government. The Tribunal therefore stated that it was unable to agree that the respondent was under an obligation to extend the applicant's contract. Considering that the applicant had been justified in thinking that his contract would be renewed with retroactive effect, the Tribunal took the view that the applicant was entitled to an indemnity and found that the amount already granted by the respondent was reasonable compensation.

13. Judgement No. 151 (14 October 1971): Iyengar v. Secretary-General of the International Civil Aviation Organization[26]

Decision to refuse validation for pension purposes of a period of service during which the applicant had been unable to participate in the Pension Fund because he was prohibited from

[22] See *Juridical Yearbook*, 1965, p. 207.

[23] See *Juridical Yearbook*, 1967, p. 303.

[24] See *Juridical Yearbook*, 1968, p. 175.

[25] See above, Judgement No. 149, p. 160.

[26] Mr. R. Venkataraman, President; Mme P. Bastid, Vice-President; Mr. F. A. Forteza, Member; Mr. Z. Rossides, Alternate Member.

doing so by his Government—Question of whether the participation of the applicant in the Fund was excluded by his conditions of employment

The applicant, an Indian official seconded by his Government, entered the service of ICAO on 30 May 1955. On 1 July 1956, he was granted a two-year appointment and would normally have become a participant in the Joint Staff Pension Fund. It appeared, however, that the Government of India had prohibited him from joining "any pension fund under the Organization". He subsequently received a number of fixed-term appointments. On 7 March 1968, he informed the Organization that the Government of India had amended its rules, by a memorandum of 5 November 1966, in order to permit Indian officials seconded for service in international organizations to join the Pension Fund as full participants, and requested it to make the necessary arrangements to enable him to join the Pension Fund with retroactive effect from 13 May 1955. The Administration replied that his participation had been excluded from 13 May 1955 to 5 November 1966 and that that period could not therefore be validated under article III.1 *in fine* of the Regulations of the Fund. The Advisory Joint Appeals Board, being seized of the case, concluded that if the provisions of the Regulations and Administrative Rules of the Joint Staff Pension Fund were applied, the appeal must fail. Considering however, that the applicant had expressed the desire to join the Fund in 1956 and in 1957 and that one staff member in similar circumstances had been given the benefit of an arrangement that was provided for in the last sentence of article XII, part III of the ICAO Service Code, the Board recommended that the Secretary-General should exercise his discretion to apply to provisions contained in the sentence in question. The Secretary-General accepted that recommendation and agreed to explore the feasibility of making other arrangements, consulting, as far as practicable, the wishes of the applicant.

The applicant's principal contentions before the Tribunal were that his participation had not been excluded under the terms of his appointment and that the prohibition stipulated by the Indian authorities was not one of the terms of his appointment. In the view of the Tribunal, however, it was clear from the dossier, and particularly from a letter in which the applicant had pointed out that he had not been able "to join the Pension Fund until now because my Government rules did not permit such action", that his participation in the Pension Fund was excluded at the time of his entering the service of ICAO. Moreover, the salary deductions were not made for the applicant's contribution to the Pension Fund and the applicant raised no objection or protest, even though the letter of appointment contained the standard clause relating to such deductions. From the correspondence and the conduct of the parties, the Tribunal concluded that the applicant's exclusion from the Joint Staff Pension Fund was mutually understood, accepted and acted upon.

The applicant further contended that on the introduction of the scheme for associate participation in the Pension Fund on 1 January 1958 he should have been enrolled as an associate participant and that the respondent, by his failure and neglect to enroll him as such, had deprived him of his subsequent right to validation of his prior non-pensionable service.

The question of whether the applicant should have been enrolled as an associate participant in 1958 again depended on whether he was excluded from participation by the terms of his employment. The Tribunal observed in that connexion that, according to the applicant, the Government of India had prohibited him "from joining *any* Pension Fund under the Organization". As the associate participation scheme was a part of the Pension Fund under the Organization it must be concluded that the prohibition applied equally to the applicant's becoming an associate participant in the Pension Fund. The Tribunal added that, contrary to what the applicant maintained, the associate participation scheme, which afforded the same rights to disability benefits and widow's or children's benefits to

associate participants as to full participants, was not merely an insurance scheme but was a pension scheme.

Considering that, under the terms of the applicable provisions, a staff member was not eligible for participation or validation if his participation in the Pension Fund had been excluded by his terms of employment, and having reached the conclusion that the applicant's participation in the Pension Fund had been excluded by his terms of employment, the Tribunal rejected the applicant's claim.

The Tribunal nevertheless recognized that the applicant's was a hard case and took note of the respondent's statement that the Secretary-General had agreed, on the recommendation of the Joint Appeals Board, "to exercise [his] discretion in the applicant's case, in the same way and from the same date as was done in October 1960 in the case of another official of the Indian Government employed in ICAO".

14. JUDGEMENT NO. 152 (16 OCTOBER 1971): ASHTON V. SECRETARY-GENERAL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION [27]

Decision to declare a request for validation for pension purposes of a period of prior service irreceivable on the grounds of its late submission—Question of whether the respondent was justified in limiting the scope of the recommendations of the Joint Appeals Board through a plea of time bar based on the non-observance of time limits

Subsequent to the issue of Judgement No. 109,[28] the applicant appealed to the United Nations Joint Staff Pension Board against the ICAO Staff Pension Committee's decision to reject his application for validation for pension purposes, pursuant to article III of the Pension Fund Regulations, of a period of service completed before he became a participant in the Pension Fund. The Joint Staff Pension Board rejected the request on the grounds that it had not been submitted within the time-limit prescribed in article III. It pointed out, however, that it had no jurisdiction to assess the liabilities of an employing organization which flowed from any action or inaction which might have caused the failure to observe the time limit. It added that a request for validation of a prior period of service on the ground that during that service the staff member should have been enrolled in the Fund pursuant to article II and that participation had been wrongfully denied by the employer, would not be a claim for validation under article III but would involve the interpretation of the contractual relationship between the staff member and the organization, to which the Pension Fund was not a party and which it had no competence to ajudicate.

The applicant thereupon requested the Secretary-General, under article XII of the ICAO Service Code and article II of the Pension Fund Regulations in force on 4 October 1952, to decide that he had become a participant in the Pension Fund on that date. When the Secretary-General declined to entertain that claim on the grounds that the applicant had failed to make it within the prescribed time-limit, the case was referred to the Advisory Joint Appeals Board, which was advised by the Secretary-General that the sole question before it was that of the time-limit. The Board recommended the Secretary-General to consider the claim as not barred by time. The Secretary-General nevertheless decided that the applicant's claim was time-barred.

Having been seized of the case, the Tribunal noted that the respondent had confined his pleadings to the preliminary issue that the applicant's main claim was barred by time.

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[27] Mr. R. Venkataraman, President; Mme P. Bastid, Vice-President; Mr. F. A. Forteza, Member; Mr. Z. Rossides, Alternate Member.

[28] See *Juridical Yearbook*, 1967, p. 297.

The Advisory Joint Appeals Board itself, deferring to the wishes of the Secretary-General, had confined its recommendations to the question of time-limits. Under article 7 of the Statute of the Tribunal, an application was not as a general rule receivable unless the staff member concerned had previously submitted the dispute to the Joint Appeals Board and the latter had communicated its opinion to the Secretary-General. By objecting to the examination of the merits of the dispute by the Advisory Joint Appeals Board, the respondent had limited the scope of an appeal to the Tribunal. The Tribunal held that the broad discretion given to the Secretary-General to waive the time-limit for the filling of an appeal might be judiciously exercised in consideration of the merits of the case and it was only after a full examination of all aspects that the Board could make useful recommendations to the Secretary-General. Consequently, the respondent was not justified in limiting the scope of the Board's recommendations through a plea of time bar based on the non-observation of the time-limit.

The respondent contended that the applicant's right of appeal had lapsed and pointed out that the latter's final contract as an expert—which had ended on 5 August 1959 and been replaced by an appointment as a regular staff member of ICAO—stated that the applicant would become a full participant in the Joint Staff Pension Fund with effect from 1 January 1958—which constituted a decision excluding him from the Fund for any period before 1 January 1958; the applicant had failed to appeal—with the consequence that, pursuant to paragraph 4 of the rules governing appeals contained in General Service Instruction—1.4.7, he had lost any right which he had to appeal. The Tribunal rejected that argument on the grounds that on 1 January 1958 the applicant had not been a member of the regular staff of ICAO and that the instruction in question did not apply to him at that time.

The respondent further contended that when the applicant became a regular staff member of ICAO—on 5 August 1959—it had been open to him to appeal under the above-mentioned instruction against his implied exclusion from participation. The Tribunal was not satisfied that the stipulation in the contract referred to above constituted a decision to exclude the applicant from participation in the Fund. Assuming, however, that it was a decision within the meaning of the instruction in question, it appeared from the text of the instruction itself that its provisions applied to any decision notified after they became applicable to a staff member. In the case before it, the alleged decision went back to some 20 months before the relevant rules had become applicable to the applicant. The respondent's argument must therefore be rejected.

The respondent argued in the third place that the applicant's claim was also time-barred pursuant to part VII, paragraph 1, of the ICAO Service Code, which had been in effect from 1 October 1958 and which read:

> "A claim arising from the employment of a staff member shall not be considered if not made in writing within one year of the date of accrual of the entitlement claimed. However, the Secretary-General may, at his discretion, consider claims made beyond that period."

The Tribunal recognized that when the applicant became a member of the regular staff of ICAO, on 5 August 1959, the Service Code became applicable to him. It pointed out that the paragraph quoted above did not specifically provide for cases where the entitlement claimed accrued before the text came into force or became applicable to a particular staff member. In its view, the aim of such a rule was to prevent belated claims and it was therefore applicable to entitlements which accrued earlier; a staff member was allowed one year, reckoned from the date on which the text came into force with respect to him. Consequently, the time-limit of one year must, with respect to the applicant, be reckoned from 5 August 1959 as regards entitlements which had accrued prior to that date.

The Tribunal pointed out in that connexion that, on 13 August 1959, the applicant had submitted to the Administration a memorandum in which he expressed a wish to validate his service prior to 1 January 1958 and asked that it should be treated as a "proper request". The respondent argued that, even assuming it to be a valid request, it had lapsed as no reply had been received from the Secretary-General within the prescribed time-limit. The Tribunal observed that the memorandum in question was not an appeal against an administrative decision but a communication submitting a claim to the Administration and that instruction GSI-1.4.7 was not therefore applicable. However, the Tribunal noted that the Secretary of the ICAO Staff Pension Committee had acknowledged the applicant's memorandum on 5 January 1960 to point out that the "only" article applicable to the applicant was article XVIII. As the applicant had not appealed against that decision under instruction GSI-1.4.7, the Tribunal ruled that his right of appeal was barred by time.

As to the question of whether the respondent failed in his obligation towards the applicant in addressing to him a general circular whose effect was to prevent him from appyting for validation within the prescribed time-limit, the Tribunal noted that the Advisory Joint Appeals Board had made no recommendation on that point and that the claim was not therefore receivable.

B. Decisions of the Administrative Tribunal of the International Labour Organisation [29] [30]

1. Judgement No. 172 (3 May 1971): Flad v. World Health Organization

Complaint seeking the quashing of a decision to terminate an appointment on grounds of misconduct

The complainant, a staff member of the WHO Regional Office at Brazzaville, was suspended from his functions after charges of theft had been brought against him by the manager of a commercial establishment at Brazzaville. The Administration of the Regional Office was instructed to carry out an administrative investigation, on which it drew up a report. On being requested to provide further explanations, the complainant asked for a report on the incident drawn up by a competent public authority. Two days later, the

[29] 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 1969, 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 world Intellectual Property Organization, 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 Office 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.

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

Regional Director informed the complainant that, in the absence of a reply refuting the charges, he had decided to terminate his appointment on the grounds of misconduct, in accordance with Staff Rule 975. After hearing the case, the Regional Board of Appeal concluded that the sanction imposed was warranted. The Headquarters Board of Inquiry and Appeal, after hearing the case in its turn, considered that the period between the date of the alleged theft and the date of the complaint to the Regional Director was unduly long (11 days). It held that the Administration of the Regional Office and the Regional Board of Appeal had apparently given weight only to the charges brought against the complainant and had failed to consider any evidence at all which might exonerate him or, conversely, establish his guilt beyond any possible doubt. It accordingly recommended that the Regional Director should reinstate the complainant. The Director-General nevertheless confirmed the Regional Director's decision.

The complainant, who had in the meantime obtained a post in FAO, filed a complaint with the Tribunal, asking it to quash the Director-General's decision. The Tribunal pointed out that the charges on the basis of which the complainant's appointment had been terminated had been brought 11 days after the incident to which they related and that the complainant had immediately denied them and given a totally different, and at first sight not improbable, version of the incident. The Administration, for its part, had merely heard the statements of the manager of the commercial establishment and three of his employees. However, further investigations would seem to have been particularly necessary since, to an impartial mind, it must have appeared strange for an official of some status, who had been employed by the World Health Organization for four years and whose wife was also employed by the Organization, should have jeopardized his relatively affluent position by stealing a few articles from a shop.

Finding that the facts leading to the imposition of the sanction were by no means proved, the Tribunal quashed the impugned decision and ordered that the Organization should pay the complainant (*a*) his salary up to the date of his appointment to FAO and (*b*) compensation in the amount of 15,000 French francs.

2. Judgement No. 173 (3 May 1971): Miele v. European Organization for Nuclear Research

Determination of the rate of an invalidity pension—The competence of the Tribunal extends, by virtue of its own Statute, to all decisions based on Staff Rules and Regulations—An organization may not file a complaint with the Tribunal

In Judgement No. 141[31] the Tribunal had ordered that an examination should be carried out by two medical experts to enable it to reach a decision on a complaint impugning a decision adopted in accordance with the Regulations of the CERN Staff Insurance Scheme following an accident which had resulted in permanent partial invalidity.

The Tribunal first pointed out that CERN had accepted its jurisdiction in accordance with article II, paragraph 5, of the Statute of the Tribunal and that, as the complaint concerned the rate of invalidity pension payable under the Regulations of the CERN Staff Insurance Scheme, provisions issued on the basis of the Staff Regulations and Rules which were regarded as forming part of them, the Tribunal was therefore competent to hear the complainant's claims. Whatever the substantive law texts in the light of which the complaint should be examined, the Tribunal's competence derived from its own Statute.

The Tribunal also found that the claims in question were irreceivable to the extent that they related to the reduction of the complainant's pension in that, having regard to article

[31] See *Juridical Yearbook*, 1969, p. 202.

II, paragraph 6, of the Statute of the Tribunal, an organization was not entitled to submit a complaint to the Tribunal, nor, consequently, to enter a claim seeking amendment of the impugned decision to the prejudice of the complainant. If an organization did not accept a staff member's complaint, the only course open to it was to propose that it be dismissed in whole or in part.

As to the right to an invalidity pension, the Tribunal pointed out that article 26 (4) of the Regulations of the Staff Insurance Scheme provided that, if the disability was obviously due, in the opinion of the Management Board, to the staff member's own fault, the pension might be reduced or cancelled. According to the experts, the complainant was consciously simulating his disability, at least for the most part. That constituted fault within the meaning of article 26 (4), for conscious simulation constituted fraud, the highest degree of fault. It was immaterial whether or not the complainant's conscious behaviour had become unconscious; even if the simulation had become to some extent involuntary it resulted from a voluntary form of deception, in other words, from a fault.

The Tribunal added that the complainant could not properly contend that by virtue of article 21 of the Agreement which the Organization had concluded with the Swiss Federal Council the former was bound to ensure, so far as possible and subject to conditions to be agreed upon, the affiliation to Swiss insurance schemes of staff members who were not covered by equivalent social protection by the Organization itself. Had it been committed to paying its staff members benefits equal to those provided for in Swiss law, the Organization would not have failed in that obligation in the present case. Neither under public nor private insurance schemes did Swiss law entitle a person practising conscious simulation to more favourable treatment than that which the complainant had received.

3. Judgement No. 174 (3 May 1971): Chiarappa v. Food and Agriculture Organization of the United Nations

Introduction of a new procedure for appointment to posts of a certain level—Question of the validity of an appointment made according to a former procedure after the introduction of a new procedure

The complainant had learned of the appointment of one of his colleagues to a grade P-5 post to which he himself aspired. The appointment had been made under a procedure whereby division directors submitted the names of candidates directly to the Director-General. Before the appointment in question, that procedure had been changed with effect from 1 January 1969, appointments to grade P-5 posts thereafter being made not by direct selection on the recommendation of the division director but on the advice of a "Senior Professional Staff Selection Committee". The complainant twice requested that the new procedure should be followed in filling the vacancy to which he aspired; he did so on the first occasion before 1 January 1969 and on a second occasion after that date, after the appointment of his colleague had been brought to his attention. He was informed that the appointment in question had been made under the old procedure and that applications for the post had been considered well in advance of the introduction of the new procedure. After requesting, without result, that the post in question should be held vacant and that applications should be submitted to a selection committee, the complainant appealed to the FAO Appeals Committee, which recommended the Director-General to reject the appeal. The decision to that effect by the Director-General was impugned before the Tribunal by the complainant who requested that it should be quashed, contending among other things that the procedure followed in filling the post had been irregular in that no provision regulating the transition from the old to the new procedure had been made and

that the new procedure should accordingly have applied to any decision taken after 1 January 1969.

The Tribunal considered that the question as to whether cases in process on 1 January 1969 should be covered by the old procedure or by the new could be regarded either as a question of law, in which case it was the duty of the Tribunal to decide the matter, or as a question which the Director-General—who unquestionably had power to decide when the new procedure should be brought into force—had power to decide. In accordance with the latter approach—which was that adopted by the Director-General—it was sufficient to note that the decision taken had been that the new procedure should not apply to cases in process. Adopting the former approach, the Tribunal held that: the decision taken must be regarded as the conclusion of a process initiated several weeks before 1 January 1969 and, accordingly, governed by the old procedure. Had the decision been taken with undue delay, the Tribunal might well have regarded such delay as dissociating the decision from the earlier process so that the former procedure would no longer have been applicable. In the event, however, the decision had been taken within a reasonable time after the beginning of the consultations. Whether the first or second approach was adopted, therefore, the result was the same and the Tribunal accordingly rejected the complaint.

4. Judgement No. 175 (3 May 1971): Zednik v. Food and Agriculture Organization of the United Nations

Assessment of the degree of incapacity resulting from an accident while on official duty

The complainant was the holder of a four-year contract which would normally have expired on 15 February 1965. On 24 March 1964, he was involved in a car accident. After undergoing a cure—whose results disappointed him—he lodged a claim for compensation with FAO and thereafter underwent a medical examination which established that the symptoms from which he was suffering were the sequel of the accident and had resulted in a degree of incapacity of between 60 and 70 per cent. Concerned to settle the complainant's case, the Organization decided to set the date of the termination of his service retroactively at 14 May 1965 and, to this end, to regard the appointment which would normally have expired on 15 February 1965 as having been extended to 14 May 1965. In December 1965, the FAO Medical Service recognized that the complainant was suffering from temporary partial incapacity of 60 per cent and recommended that he should undergo a second cure so that the final rate of incapacity could be established. The complainant was awarded compensation on the basis of that degree of temporary incapacity and then underwent the recommended cure. Having considered the report prepared following that cure by the Innsbruck University Clinic, the FAO Medical Officer reached the conclusion that the complainant's condition must thenceforth be considered stationary and reduced the assessment of the degree of incapacity to between 20 and 30 per cent. On considering the complainant's claim for compensation, the Advisory Committee on Compensation Claims recommended, after an inquiry, that the claim for annual compensation should be dismissed in the absence of any proof of loss of earning capacity and further recommended the award of a lump-sum payment in compensation for the impairment of his pulmonary function. The Director-General accepted that recommendation. The complainant then lodged an appeal with the FAO Appeals Committee, which recommended an *ex gratia* payment of $US 10,000. When the Director-General refused to act on that recommendation, the complainant lodged an appeal with the Tribunal.

The complainant contended in the first place that the Organization had drawn patently erroneous conclusions from the report of the Innsbruck University Clinic and that his

condition was by no means stationary but was deteriorating. He alleged that, because of the incapacity resulting from the accident, he had not been re-engaged by FAO up to the age of 65, as would have normally have been the case, and that it had furthermore become impossible for him to resume his original professional activity. He had received appointments after the termination of his contract with FAO solely because the Austrian Government had organized bilateral projects especially for him in which he was responsible for only theoretical work. Moreover, he had been obliged to resign the second such appointment because of the deterioration in his condition. The Organization's reduction of the rate of his compensation on the grounds that he had held appointments after his separation could not therefore be justified.

The complainant also invoked a letter from the Administration containing a passage which read: "(Your application for a post in Jordan) which we shall now submit officially to the Government will be considered favourably and accepted by the Jordanian authorities... Very much will now depend, of course, on the outcome of the medical report requested of (the Organization's Medical Officer)." The complainant argued, on the basis of that letter, that he had been reappointed by FAO and that the appointment was later cancelled. He contends that his case should accordingly have been dealt with under provision 370.391 concerning reinstatement in the event of reappointment within 30 days of the termination of the preceding appointment and that provision 342.524 concerning salary adjustments for a staff member suffering from partial incapacity who remains in the employment of the Organization but is reassigned to a post at a lower salary level.

The Tribunal noted that the dispute centred solely on the degree of permanent partial incapacity, which the Innsbruck University Clinic had assessed at between 60 and 70 per cent and the Organization's Medical Service at between 20 and 30 per cent. It observed that after the expiry of his contract with FAO, the complainant had resumed work in Tunisia—which he could not have done if the degree of incapacity had been 60 per cent. The Tribunal accordingly considered that the rate of incapacity assessed by the Medical Service of the Organization was much more consonant with the evidence in the dossier. It added that the description of the complainant's ailments justified the conclusion of the Medical Service that at least some part of them was attributable exclusively to age as opposed to being the sequel of the accident while on duty. In the circumstances, the complainant could not be considered as suffering, as a result of an injury or illness contracted while on duty, from a degree of incapacity such as would affect his earning capacity. Hence, he did not meet the conditions laid down in provision 342.525 for entitlement to the annual financial compensation provided for therein.

With regard to the claim for the application of Manual provision 370.391, the Tribunal pointed out that the complainant had no right to a new contract and had received no formal offer of appointment because the letter relating to the mission in Jordan expressly stated that a satisfactory medical report was a prerequisite for appointment. Furthermore, it was clear from the evidence in the dossier that the reason why the complainant had not finally been offered the contract for the project in Jordan had to do, not with his partial incapacity, but with his age.

As to the claim for the application of Manual provision 342.524, the Tribunal stated that the provision applied only to staff members who had remained in the service of the Organization. But the complainant could not justifiably claim that he had still been serving as a staff member in September 1965. In fact, his appointment had been due to terminate on 15 February 1965 and the Organization had decided of its own accord to extend it to 14 May 1965 and it had been because of the administrative formalities required for that purpose that the Organization had been unable to inform the complainant before November 1965 that his appointment had been extended until 14 May 1965. As a result of that voluntary

action, the complainant could be regarded as having remained in employment until 14 May 1965 but on that date all connexion between him and FAO had been definitively severed. The Tribunal therefore dismissed the complaint.

5. JUDGEMENT No. 176 (3 MAY 1971): GOYAL v. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Determination of the amount of compensation due to complainant as a result of a previous decision by the Tribunal—A tribunal cannot establish a specific ceiling in determining the amount of such compensation unless its statute contains an express provision to that effect—Need to consider all the factors involved, and not only the basic salary of the individual concerned, in order to ensure equitable compensation for injury suffered

Following Judgement No. 136,[32] whereby the Tribunal ruled that UNESCO should pay the complainant equitable compensation, a difference arose between the parties concerning the amount of such compensation. In consequence, the complainant lodged an appeal with the Tribunal requesting it to set the amount of the compensation.

The Tribunal pointed out that, by virtue of Judgement No. 136, the Organization was liable to pay compensation to the complainant, firstly, for the non-renewal of his contract and, secondly, for the moral injury caused by his suspension, i.e. for the manner of his treatment and the injury done thereby to his reputation and to his prospects of obtaining other employment. It noted that the Organization had referred to the provision in the Statute of the Administrative Tribunal of the United Nations which lays down that the compensation which the Tribunal may award shall not normally exceed the equivalent of two years' net base salary of an applicant. The Organization added that the Administrative Tribunal of the International Labour Organisation had, subject to one exception, adhered to the same maximum. As the case was one of non-renewal and not one of termination the Organization submitted that the total of 18 months' salary which it had offered was generous.

The Tribunal did not agree with that reasoning and stated that:

"The duty of this Tribunal, as of every other tribunal unless its statute otherwise provides, is to fix as compensation the sum which appears to it to be equitable in all the circumstances. If any limit be imposed upon an equitable amount, it necessarily means that the sum awarded will be less than the complainant deserves. Doubtless, the principle of limitation of liability has been accepted in many systems of law. The basis of it is that in certain spheres of operation it is considered to be in the public interest that a ceiling should be placed on the offender's liability for fault, the injured person being left, if he so desires, to insure himself against any excess. This principle has not, so far as the Tribunal is aware, been generally introduced into the relationship between an employer and his employees. It is far from clear that it governs the relations between the United Nations and its officials, since the Statute of the Administrative Tribunal of the United Nations makes provision for exceptional cases. To the extent to which it does govern such relations, it operates solely by virtue of an express provision in that Statute. Every person, before he becomes an official of the United Nations, in the same way as he can ascertain the Staff Regulations what will be the conditions of his employment, can ascertain that in the event of its termination his compensation may be limited. A tribunal without a similar provision in its statute is not entitled to impose upon an official what would amount in effect to a condition of his employment to which he has not assented. Nor can the duty of the Tribunal to fix the compensation that is just in all these circumstances of the case, neithei more or less, be discharged simply by adding up so many years or months of the complainant's salary. The rate of salary which he was enjoying is an important factor to be taken into consideration, but it is not the only factor. Another important factor is the extent to which

[32] See *Juridical Yearbook*, 1969, p. 197.

the complainant has, by obtaining other employment or otherwise, been able to diminish his loss."

Reconsidering all the circumstances of the case, the Tribunal set the total amount of compensation for non-renewal at 15,000 rupees. With regard to compensation for illegal suspension from duty, the Tribunal considered that the essence of the moral injury claimed by the complainant lay in the fact of the abrupt and summary suspension, which was not denied. It took the view that it would not be right to relate the assessment on that score exclusively to the basic salary and pointed out in that connexion that the distress and moral prejudice might be as great to a person receiving a small salary as to a person receiving a large one. The Tribunal nevertheless considered that the rate of salary afforded a guideline and that the six months' salary offered by the Organization (7,000 rupees) was approximately correct.

6. Judgement No. 177 (3 May 1971): Walther and Zimmermann v. United International Bureaux for the Protection of Intellectual Property and the World Intellectual Property Organization [33]

Complaint seeking reimbursement of taxes levied on salaries and allowances paid by the respondent Organization—Scope of the notion of "national income taxes"—Interpretation of the term "in accordance with the practice followed by other intergovernmental organizations with headquarters located in Geneva" in article 3.17 of the Staff Regulations and Rules of the respondent Organization

When the headquarters of BIRPI was transferred from Berne to Geneva, the complainants, who are Swiss nationals, established themselves in Geneva but left their families in Berne. They therefore continued to pay, in respect of their income from their employment with BIRPI, the federal tax, the cantonal tax (Canton of Berne) and the local tax (for the locality in which their families lived), to which the earnings of Swiss nationals are subject.

In 1963, new Staff Regulations and Rules came into force which contained the following article 3.17:

> "National income taxes levied on BIRPI salaries and allowances shall be reimbursed in accordance with the practice followed by other intergovernmental organizations with headquarters located in Geneva."

Basing themselves on this provision, the complainants applied to the Director of the Organization for reimbursement of the cantonal and local taxes for which they were liable in the Canton of Berne. Their application being refused, the defendants appealed to the Tribunal.

The Tribunal pointed out that the effect of article 3.17 depended on the nationality of the staff members and that:

(*a*) In accordance with the Agreement concluded between the Swiss Federal Council and the Organization (in particular, article 16 (*f*) of the Agreement of 9 December 1970), officials who were not of Swiss nationality were exempted from all federal, cantonal and local taxes on the salaries, emoluments and allowances paid by the Organization. If they were not liable for taxes levied on income in Switzerland, staff members could not obtain the benefit of article 3.17. Conversely, if in their country of origin they paid tax on the income

[33] Paragraph 1 of the considerations in the Judgement contains the following passage relating to the respondents in this case:

"The Stockholm Convention of 14 July 1967 provides for the replacement of BIRPI by WIPO. All BIRPI officials became WIPO officials, and the liabilities of BIRPI are assumed by WIPO as and when the member States of the former Organization join the new one. Consequently, BIRPI and WIPO are joint respondents in the present case."

covered by article 3.17 they were entitled to invoke that article to claim reimbursement of the sums paid by them to the taxation authorities.

(*b*) Swiss staff members were exempted from payment of direct federal taxes by the Order of 26 June 1964 of the Swiss Federal Council. A distinction had to be made in the case of cantonal and local taxes levied in Switzerland. On the one hand, under the agreement of 5 April 1957 between the Canton of Geneva and the Organization, officials of the latter enjoyed the same privileges and immunities as were granted to the staff of other international organizations, in other words, they were exempt from Geneva taxes, both cantonal and local. The other Swiss cantons, however, had not surrendered their right to levy taxes in respect of Swiss staff members within their fiscal jurisdiction, hence the liability of the complainants for the cantonal and communal taxes levied by the Canton of Berne.

The Tribunal first considered whether the cantonal and local taxes paid by the complainants were "national income taxes" within the meaning of article 3.17. Believing that the notion of national income taxes should be interpreted according to the law of the country in question, the Tribunal based itself on the terminology customary in Swiss tax law and formed the conclusion that the taxes paid by the complainants should be considered as "national income taxes" in the accepted sense of article 3.17 and that the fact that they were cantonal and communal was no bar to the application of that provision. It nevertheless observed that, instead of simply requiring the Organization to reimburse "national income taxes", article 3.17 stated that the reimbursement should be made "in accordance with the practice followed by other intergovernmental organizations with their headquarters at Geneva". There were two possibilities to be considered in interpreting that phrase. First, that staff members of the Organization might be in a situation similar to, or identical with, that of staff members of the other intergovernmental organizations referred to in the article, in which case they were entitled to reimbursement as provided to the extent that it accorded with the practice of those other organizations. Second, that the other organizations in question might have no relevant "practice" or might have adopted a "practice" in cases which were not identical with or even similar to those of staff members of the respondent Organization. In such an event, it would be equally improper, having regard to the purpose of article 3.17, systematically to grant or withhold the right of reimbursement to staff members of the respondent Organization, because to grant it would be to place such officials in a more favourable position than that which they would enjoy if they were able to rely on the "practice" of the other organizations, while to withhold it might deprive article 3.17 of all meaning. That second approach meant that a less categorical conclusion was necessary, namely, that the Organization had a duty to reimburse the taxes paid by its officials to the extent warranted by their status as international officials, particularly in the light of the obligations inherent in that status. As a general rule, an international official might be expected to reside with his family in the locality where he worked.

After making inquiries of the intergovernmental organizations situated in Geneva, the Tribunal concluded that the first of the above possibilities was not relevant. In the circumstances, and in accordance with the rule expounded in connexion with the second possibility, the complainants would be entitled to the reimbursement which they claimed only if their families' residence in Berne, and consequently their liability to taxation there, were justified for special reasons. The Tribunal found that such was not the case in the complaint before it. It pointed out that most international civil servants had no hesitation in settling with their families in the place where they worked, even if that involved more serious disadvantages than those to which the complainants were exposed. The complainants must therefore accept the consequences of a situation which had not been forced upon them.

The Tribunal therefore dismissed the complaint.

7. Judgement No. 178 (3 May 1971): Boyle v. International Telecommunication Union

Complaint seeking the quashing of a decision whereby the post held by the complainant was graded at a certain level—Limits of the Tribunal's power to interfere with such a decision

The complainant impugned a decision by the Secretary-General of ITU whereby her post was graded at the G-5 level. In that connexion, the Tribunal pointed out that it appeared from resolution No. 7 of the Plenipotentiary Conference meeting in Geneva in 1959 and resolution No. 6 adopted by the same Conference in 1965 in Montreux, as well as from regulation 2.1 of the Staff Regulations and Staff Rules, that it was for the Administrative Council and, subject to its authority, the Secretary-General of ITU, in the exercise of their discretionary powers, to determine and grade posts held by staff members. Consequently, the Administrative Tribunal, which had before it an appeal against a decision of those authorities grading a specific post, could interfere with that decision only if it had been taken without authority, was irregular in form or was tainted by procedural irrogularities or by illegality, or was based on incorrect facts, or if essential facts had not been taken into consideration, or if conclusions which were clearly false had been drawn from documents in the dossier, or if authority had been exercised for purposes foreign to the Organization's interests.

The complainant claimed in the first place that the grading of International Telecommunication Union posts had been carried out by two experts whose conclusions had been approved by the competent bodies of ITU and that the experts had defined each post on the basis of two factors: the "field of activity" and the "qualifications required". She claimed that, unlike the draft description of the "field of activities" of her post, the description of the "qualifications required" had not been communicated to her by the Administrative Council and that the Council, being unaware of the rights of the staff and not fully informed, had taken its decision on the basis of procedural irregularities. The Tribunal observed that in view of the nature of the assessment which the experts had had to make of the "qualifications required", there had been no need for them to hear the complainant or to consult her in writing. As soon as their draft description had been prepared, however, the Secretary-General had informed staff members that they could consult the section of the description dealing with "qualifications required" and had set up a special procedure to enable officials to appeal against their job descriptions and gradings. Thus, the grading procedure had given both sides an opportunity to express their views and had safeguarded the right of staff members to be heard before the grading of posts had been made final. The complainant argued that, because of successive periods of leave, she had been unable to avail herself of the remedies open to her, but it was clear from the dossier that she had on two occasions asked for a review of the grading of her post and that her requests had been rejected only after examination of their merits.

The complainant further claimed that she had accepted her post only in view of a promise that it would shortly be graded G-6. The Tribunal nevertheless pointed out that no more than a promise had been involved and that the complainant could not claim any right to have her post regraded G-6. The complainant added that, because of the duties pertaining to her post, the incumbent was required to have a knowledge of more than two languages. The Tribunal took the view that although the appropriateness of the way in which the Secretary-General and the Administrative Council had exercised their discretion was open to discussion, it did not appear from the documents before it that it was tainted by any irregularity such as would justify interference by the Tribunal. The complainant based herself thirdly on a foot-note to annex 3 of the Staff Rules and Regulations, concerning the description of G-5 posts, to the effect that: "Posts of this type necessitating, besides the

required qualifications, the practical knowledge of a third working language should normally be graded G-6." The Tribunal pointed out, however, that the competent authorities of ITU had taken the view that the complainant's post did not call for practical knowledge of a third working language and that she could not therefore properly invoke the foot-note. Finally, the Tribunal pointed out that the grading of each post was based exclusively on objective criteria and that, although the complainant had qualifications superior to those required for the post, which she had accepted on the understanding that it would be upgraded to G-6, and that it was to some extent understandable that she should consider herself to have a grievance, those circumstances afforded no legal basis for the upgrading of the post which she claimed.

The Tribunal consequently dismissed the complaint.

8. JUDGEMENT NO. 179 (8 NOVEMBER 1971): VARNET v. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Obligation of any person called upon to participate in a decision affecting the rights or duties of other persons to withdraw in cases in which his impartiality may be open to question on reasonable grounds—This obligation extends to persons taking part in an advisory capacity in the proceedings of decision-making bodies—The obligation exists in international organizations even in default of any specific text

The complainant had discovered that one of the members of the Advisory Board which had shortly before considered a matter which concerned him was related to one of his supervisors. He thereupon addressed a minute to the Director-General in which he stated that the person in question should have withdrawn and further requested that the decision taken as a result of the proceedings in the Advisory Board should be quashed. The Director-General and, subsequently, the Appeals Board of UNESCO having successively refused his request, the complainant lodged a complaint with the Tribunal.

The Tribunal pointed out that it was a general rule of law that a person called upon to take a decision affecting the rights or duties of other persons subject to his jurisdiction must withdraw in cases in which his impartiality might be open to question on reasonable grounds. It was immaterial that, subjectively, such a person might consider himself able to take an unprejudiced decision. Nor did the fact that persons affected by a decision suspected the author of prejudice constitute an obligation for him to withdraw. The Tribunal pointed out that persons taking part in an advisory capacity in the proceedings of decision-making bodies were equally subject to the above rules, as were persons required to make recommendations to decision-making bodies; both might sometimes exert a crucial influence on the decision to be taken. The Tribunal stated that, because of its purpose, which was to protect the individual against arbitrary action, that rule applied in international organizations even in default of any specific text. In the case at issue, the Tribunal found that the Advisory Board in question made recommendations in the light of which the competent body took a decision. It followed that the members of the Board were subject to the obligation to withdraw as defined above. Admittedly, the Board's rules of procedure provided for exclusion only where one of its members was required to deal with a matter concerning a staff member belonging to the same department as himself, that specific provision did not exclude the application of the general rules set forth above.

In the event, the Tribunal found that the complainant's criticism of the composition of the Advisory Board was unfounded. It pointed out that there was no direct relationship either by blood or marriage between the complainant and the member of the Board concerned and that the latter could not be regarded as the supervisor of the former in the proper

sense of the term. In the circumstances, there were no grounds for casting reasonable doubt on the impartiality of the member concerned nor, consequently, for requiring him to withdraw.

9. JUDGEMENT NO. 180 (8 NOVEMBER 1971): KOTVA V. INTERNATIONAL ATOMIC ENERGY AGENCY

Receivability of a complaint filed with the Administrative Tribunal of the International Labour Organisation after expiry of the time-limit because it had originally been lodged in error with the Administrative Tribunal of the United Nations, the relevant time-limit having been duly observed—A staff member who retires under a permanent pension scheme is not entitled to termination indemnity

Although the complainant had reached retirement age in 1967, he had received several extensions of contract to enable him to satisfy the requirements of the Austrian social security scheme regarding the number of monthly contributions needed to qualify for a premature old-age pension. On 24 September 1969, he claimed a termination indemnity. His claim having been rejected and his appeals to the Director-General and the Joint Appeals Committee having failed, he filed a complaint with the Administrative Tribunal of the United Nations, whose Executive Secretary informed him that he should address his complaint to the Administrative Tribunal of the ILO, which he did without delay.

The complainant contended before the Tribunal that the termination indemnity provided for in Staff Regulation 4.03 was due not only in case of termination of service but also in case of retirement. He further submitted that, although paragraph 3 (*g*) of annex I of the Staff Regulations and Staff Rules provided that a staff member who was retired under any permanent pension scheme in which the Agency "participates" should not be entitled to termination indemnities, that provision was not applicable in his case because he was entitled at the time to only a so-called "premature" partial old-age pension under the national pension scheme and would not be entitled to a full pension until the age of 65.

The Agency asked the Tribunal to find the complaint irreceivable because of its late submission and, consequently, that it should be rejected.

As to the question of receivability, the Tribunal found that the 90 day time-limit prescribed in article VII, paragraph 2, of its Statute must be held to have been observed if a complaint which it was competent to hear had been submitted to it after the expiry of that time-limit but had been lodged within the 90 day time-limit applicable in the case of the Administrative Tribunal of the United Nations. In support of that view, it noted in particular the fact that some staff members who in general came under its jurisdiction, were under the jurisdiction of the Administrative Tribunal of the United Nations in matters concerning their pension rights. It took the view that it was all the less justifiable to rule the complaint irreceivable inasmuch as: (*a*) it related to the consequences of retirement on reaching the age limit, a question which a person without legal experience might confuse with that of pension rights; (*b*) the complainant, when informed of his error, had immediately filed his complaint with the competent tribunal, and (*c*) there was no clear provision in any rule or regulation or, furthermore, in the impugned decision, to indicate which of the two appelate procedures was to be used.

As to the merits of the case, the Tribunal found that at the time the complainant had left the service of the Agency, he had been entitled to a pension payable by the Austrian authorities. Under paragraph 3 (*g*) of annex 1, his entitlement to that pension debarred him from claiming a termination indemnity. The conditions established in that provision had been satisfied because, in the first place, the Agency had contributed to the fund through

which the pension available to the complainant was financed, in other words, it had "participated" in the pension scheme within the meaning of the provision and, in the second place, the pension was permanent. A pension must be deemed "permanent" within the accepted meaning of the provision in question if its forfeiture depended solely on the free will of the beneficiary. The fact that forfeiture would result from engagement in gainful employment did not affect the permanent nature of the pension—nor did the fact that the pension would have been increased when the complainant reached 65 years of age.

The Tribunal accordingly dismissed the complaint.

10. JUDGEMENT NO. 181 (8 NOVEMBER 1971): PODNIESINSKI v. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Time-limit for appeals to the Tribunal—The time-limit begins on the day following notification of the impugned decision to staff members whether at Headquarters or away from Headquarters—The date to be taken into consideration in determining whether a complaint is submitted within the time-limit is the date of dispatch of the complaint—Non-observance of the time-limit in an appeal to the Director-General, if not invoked by the Director-General when giving his ruling, may not be pleaded at a latter stage in the proceedings

On 8 September 1969 the complainant submitted a claim, which was unsuccessful, for full reimbursement of transport costs and the payment of a repatriation grant in a convertible currency. The decision to refuse his claim was confirmed first on 20 November 1969 by the Assistant Director-General for Administration and later, on 10 December 1969, by the Director of the Bureau of Personnel, acting on the Director-General's instructions. The complainant then appealed to the Appeals Board. The Organization contended that the appeal was time barred. The Appeals Board held that in calculating the time-limit "allowance must be made for a reasonable additional period by the end of which it may be assumed that the communications of the Bureau of Personnel have reached the recipient" and that in default of any provision to that effect in its own statutes, it must apply by analogy the provisions of article 6, paragraph 2, of the Rules of Court of the Tribunal, according to which, "communication of a document or a notification shall be deemed to have been duly effected eight days after its dispatch to the address of the person concerned, provided it is sent by registered post and the fee paid for a certificate of delivery". The Appeals Board accordingly held that the period had started to run from 29 November 1969 and found that the number of working days between that date and 15 January 1970 (the appeal which reached the appeals Board on 23 January 1970 was dated 15 January 1970) did not exceed thirty. As the Organization had not argued the merits, the Appeals Board merely declared the appeal receivable but did not make a recommendation as to its merits. When the Director-General refused to accept the view of the Appeals Board, the complainant appealed to the Tribunal.

The Tribunal drew attention to articles 7 and 8 of the Statutes of the Organization's Appeals Board:

> "*Article 7.* A staff member who wishes to protest against any administrative decision or disciplinary action shall do so in writing within 15 working days of the date of notification of such decision or action if serving at Headquarters, and within 40 working days if serving away from Headquarters, through appropriate channels (Director of department, service or bureau and the Director of the Bureau of Personnel). The protest shall be addressed to the Director-General, who shall give a ruling within 15 working days of the date of the protest if the staff member is serving at Headquarters, or within 30 working days if he is away from Headquarters."
>
> "*Article 8.* If the staff member wishes to appeal against the ruling, or if no ruling is made within 15 working days in the case of a staff member serving at Headquarters, or within 30 days in the case of a staff member serving away from Headquarters, such staff member may request

a hearing by reporting these facts in writing to the Secretary of the Board within an additional period of 15 working days if serving at Headquarters, or within an additional period of 30 working days if serving away from Headquarters. The staff member shall briefly state the issue, indicating his grade, and his department, service or bureau."

"*Article 8* bis. When circumstances preclude observance of the time-limits set for staff members under paragraphs 7 and 8 above, the Director-General may grant an extension."

The Tribunal pointed out in the first place that no appeal against the decision of 20 November 1969 could be lodged with the Appeals Board because it was not a decision of the Director-General. The question at issue, therefore, was whether the appeal was receivable in so far as it impugned the decision of 10 December 1969.

The Tribunal found that it would not be in accordance with the sense of article 8 to set the starting point of the time-limit laid down by that article at eight days after the notification of the decision impugned. In setting a time-limit for staff members serving away from Headquarters which was twice as long as that for those at Headquarters, the article took account of the time required to transmit decisions from bodies at Headquarters to staff members in the field. It followed, in the case at issue, that the time-limit must be held to run as from and including the day after notification of the decision appealed against.

As to the date on which the time-limit began to run, the Tribunal found that the Appeals Board had been right in regarding it as the day on which the appeal had been dispatched and not that on which it had been received. In laying down that a staff member must submit his appeal in writing to the Secretary of the Appeals Board within 15 or 30 days, article 8 implied that the decisive date was that on which the appeal was dispatched. Furthermore, if the starting point was to be the day of receipt, the appellant would be at the mercy of postal delays and could never be sure of acting in time. Furthermore, unless he dispatched his appeal by registered envelope—which he was not required to do under any provision—it would be impossible for him to prove that it had been delivered before the expiry of the time-limit.

Having thus fixed the *terminus a quo* and the *terminus ad quem* of the time-limit, the Tribunal noted that the number of working days comprised between the two dates was less than 30 and consequently found that the appeal was receivable.

The Tribunal did not find it necessary to consider whether the complainant had submitted his protest to the Director-General within the time-limit of 40 days laid down in article 7 of the Statutes of the Appeals Board. If that time-limit had expired, the Director-General could indeed have refused to examine the merits of the complainant's protest. Nevertheless, the ruling given on the instructions of the Director-General made no reference to such late receipt. Furthermore, failure to observe the time-limit laid down in article 7 was not an irregularity which could be pleaded at a later stage in the proceedings. The Organization could not therefore plead non-observance of that provision before the Tribunal.

Having regard to the foregoing considerations, the Tribunal found that the decision taken by the Director-General after the Appeals Board had reached its findings should be quashed and that, as the Organization had not argued the merits of the case, the case should be referred back to the Director-General for a decision on the merits after reference to the Appeals Board.

11. JUDGEMENT NO. 182 (8 NOVEMBER 1971): GLYNN V. WORLD HEALTH ORGANIZATION

Complaint seeking the expunging of an entry from a periodic report—The purpose of periodic reports is to evaluate past performance and conduct and not to give directives for the future

The complainant prayed the Tribunal (*a*) to find that his periodic report was not formulated in accordance with Staff Rules; (*b*) to find that the report was in substance unwarranted, untrue, misleading and without foundation in fact and that by its maintenance on record he had suffered an injustice; and (*c*) to direct that the periodic report should be expunged from his performance record.

The Tribunal noted that the entry in the periodic report complained of was divisible into two parts. The first stated simply: "Work satisfactory". The complainant argued that that was an inadequate appraisal of his work. The Tribunal pointed out that, if such was the case, the remedy available to the staff member was contained in Staff Rule 430.3, which entitled him to attach a statement concerning any part of the report with which he disagreed. The complainant had therefore no ground for impugning that part of the entry. The second part of the entry read: "We hope that Dr. Glynn will use his authority to obtain the signature by the Government of Uganda of several plans of operation in accordance with the instructions drawn up in the Regional Office". The complainant contended that those words implied that he had failed to act in accordance with directives established by the Regional Office and that such a statement was without foundation and unjust to him. The Organization contended that the words were not a criticism of the past performance of the complainant and endorsed the language of the Regional Director who had written that they were intended only to stimulate the complainant to take action in the matter.

However, the Tribunal pointed out that the words complained of were contained in a periodic report designed to valuate past performance and conduct and not to give directives for the future. Moreover, the facts as they appeared in the dossier showed that there had been no act or omission on the part of the complainant such as could prompt a special directive for the future, still less a criticism of his past activities. The Tribunal stated that it should not normally entertain complaints regarding the content of periodic reports in view of the procedure whereby the observations of the staff member concerned could be incorporated in his periodic report. In the circumstances of the case, however, it felt bound to conclude that the words complained of were the result of a total misconception of the situation and found that justice required that they should be expunged. The Tribunal accordingly quashed the decision whereby the Director-General had refused to delete the words in question from the report.

12. JUDGEMENT NO. 183 (8 NOVEMBER 1971): NOWAKOWSKA V. WORLD METEOROLOGICAL ORGANIZATION

Complaint seeking the quashing of a decision to withhold an annual salary increment

Following a decision to withhold from her an annual salary increment, the complainant requested the Secretary-General to review the decision. When the decision was upheld, the complainant lodged an appeal with the Joint Appeals Committee in which she maintained that the report on the basis of which the impugned decision had been taken showed clearly that all the observations contained therein were based on the fact that she had been ill for 70 working days and that the Secretary-General's decision was tainted with prejudice and motivated by other irrelevant factors. The Committee nevertheless recommended the Secretary-General to confirm the decision and its recommendation was accepted. The Tribunal, after considering the case, rejected the complaint. It found that it had not been established that the assessment in the performance report of the complainant's attitude to her work had been influenced by the fact that she had had prolonged absences on sick leave. It was on the basis of that assessment and not because of the sick leave, which he had expressly disregarded, that the Secretary-General had taken his decision. There were therefore no grounds on which the Tribunal could interfere with it.

13. JUDGEMENT NO. 184 (8 NOVEMBER 1971): FARELL-NATALIZIA v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

The Tribunal recorded the withdrawal of suit by the complainant.

14. JUDGEMENT NO. 185 (8 NOVEMBER 1971): OZORIO v. WORLD HEALTH ORGANIZATION

Rule whereby a complaint is receivable only if the decision impugned is final, either because the complainant has tried all internal channels available to him or because he has received no reply from the Administration within a specified time-limit

In letters to the Chief of Personnel, the complainant had asked for (*a*) supplementary remuneration for assuming the responsibilities of a higher post and (*b*) reclassification of his post. When the Chief of Personnel rejected both claims as unjustified, the complainant asked whether the decision was final in the sense of rule 1030.8 (*a*) of the Staff Rules. Some weeks later, the complainant received his performance appraisal report and, according to the Organization, he then agreed that, before replying to his question, the Personnel Section should wait until he had returned his report duly signed. The Personnel Section asked for the return of the report on several occasions, but without success, and the complainant eventually lodged two complaints with the Tribunal relating to points (*a*) and (*b*) referred to above. In the proceedings before the Tribunal, the Organization contended that both complaints were irreceivable, arguing, firstly, that the complainant had agreed that the Administration should delay its reply and, secondly, that by lodging a complaint direct with the Tribunal without first trying all the internal channels the complainant had disregarded the provisions of article VII of the Statute of the Tribunal. Even if it were accepted that the absence of a reply from the Administration could be regarded as silence on its part, such silence had the effect at most of constituting refusal of the claim and the complainant ought therefore to have tried the internal channels available to him.

The Tribunal pointed out that article VII, paragraph 3, of its Statute provides that:

> "Where the Administration fails to take a decision upon any claim of an official within 60 days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision. The period of 90 days provided for by the last preceding paragraph shall run from the expiration of the 60 days allowed for the taking of the decision by the Administration."

It also pointed out that that provision should be read in conjunction with paragraph 1 which reads:

> "A complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means or resisting it as are open to him under the applicable Staff Regulations."

It followed that the provision could apply only if a complainant had exhausted all internal remedies available to him and was impugning either an explicit decision or the decision implicit in the silence with regard to his claim of the Director-General of the Organization, the final authority competent to give a ruling.

In the case under consideration, as the complainant had received no reply to his request within a reasonable time, the claim ought to have been deemed to have been refused, at which point the complainant ought to have followed the procedure prescribed in Staff Rule 1030 in order to secure a decision by the Director-General—the only decision which could be impugned before the Administrative Tribunal. As the complainant had failed to follow that procedure, his complaint was not receivable.

The Tribunal, nevertheless, pointed out that the Administration had not replied to the complainant's request because, without good reason, it had made a reply conditional upon the complainant's signature of his report. That position had misled the complainant and had, in effect, prevented him from following the procedure laid down by the Staff Rule 1030. Consequently, and having regard to the circumstances peculiar to the case, the complainant's procedural error might be excused.

The Tribunal accordingly decided to refer the complainant back to the Director-General of WHO for a ruling by the Organization on his claim in accordance with the procedure laid down in the Staff Rules.

15. Judgement No. 186 (8 November 1971): Burdon v. Food and Agriculture Organization of the United Nations

Complaint seeking the validation for pension purposes of a period of service completed by the complainant prior to enrolment in the Pension Fund

The complainant took up employment with FAO at the beginning of 1952 as a technical assistance expert on an initial appointment of one year which was extended on successive occasions. In 1953, he was informed that it would not be possible for him to subscribe to the Pension Fund. In 1957 he was given an appointment under the Expanded Programme of Technical Assistance and was informed that he would be eligible for admission, at his request, to the United Nations Joint Staff Pension Fund with effect from 1 February 1957. On raising the question of the validation of his previous service, he was informed on 13 February 1957 by the Secretary of the FAO Staff Pension Committee that he might not validate for pension purposes a period during which he had been employed under a contract of employment which specifically excluded his participation in the Pension Fund. Following that exchange of correspondence, he submitted an application for enrolment in the Joint Staff Pension Fund in March 1957, without requesting the validation of the previous service. It was not until 14 November 1961 that he asked for his pension rights to be backdated by three years or more. On 14 February 1962, the Secretary of the FAO Staff Pension Committee again informed him that his previous periods of service could not be validated. In 1967, the complainant formally requested the validation of his service prior to 1967. The FAO Joint Staff Pension Fund refused his request on the grounds that it was time-barred and unfounded, as did the United Nations Joint Staff Pension Fund. The complaint thereupon appealed to the United Nations Administrative Tribunal, impugning the decision concerning non-validation and contending further that the Organization ought to have enrolled him in the Joint Staff Pension Fund in accordance with his contracts of employment as from his first appointment. In its judgement No. 127[34] that Tribunal noted that the service performed between 1952 and 1957 had been neither on a contract basis for less than one year nor for a period of service of less than one year, so that the complainant could not avail himself of article III of the Pension Fund Regulations. Accordingly, it dismissed the complainant's pleas impugning the decision to refuse validation in respect of his previous service.

As to the question whether, from 1953 onwards, the complainant had been entitled to enrolment in the Pension Fund under the provisions of the FAO Manual and was entitled to validation and whether FAO, having failed to arrange such enrolment, had denied the complainant his rights under his contract and terms of employment, the Tribunal stated that it was not competent to take cognizance of the contentions because the point at issue was the interpretation of the successive contracts of employment of the complainant and FAO

[34] See *Juridical Yearbook*, 1969, p. 183.

Regulations, for which the Administrative Tribunal of the ILO was the competent jurisdiction in accordance with article XI of FAO Staff Regulations.

Thereafter, on 13 June 1969, the complainant requested the Director-General of FAO to take the necessary measures to backdate his membership of the Joint Staff Pension Fund to 5 January 1952. His request was rejected on the ground that it was a request for enrolment in the Fund which he had submitted for the first time to the Administrative Tribunal of the United Nations whereas, for it to be receivable, it should have been submitted several years earlier. Having appealed unsuccessfully to the FAO Appeals Committee, the complainant filed a complaint with the Administrative Tribunal of the ILO requesting it to order the Organization to register him as a participant in the Joint Staff Pension Fund as from 5 January 1953 and to backdate this participation to 5 January 1952.

The Tribunal pointed out that FAO Staff Rule 303.131 provides that:

"A staff member who wishes to lodge an appeal shall state his case in a letter to the Director-General through the department head or division director. In the case of an appeal against an administrative decision or a disciplinary action, the letter shall be dispatched to the Director-General within two weeks after receipt of the notification of the decision impugned. If the staff member wishes to make an appeal against the answer received from the Director-General, or if no reply has been received from the Director-General within two weeks of the date the letter was sent to him, the staff member may, within the two following weeks, submit his appeal in writing to the Chairman of the Appeals Committee through the Secretary of the Committee."

The Tribunal pointed out that under that provision the period within which an appeal must be submitted against any administrative decision affecting FAO's staff members began to run from the date of the notification of the decision to the persons concerned. The appointment of the complainant in 1952 under a one-year contract which made no provision for enrolment in the Joint Staff Pension Fund constituted a decision by the Director-General not to enrol him in the Fund. Although that decision had not been notified to the complainant, it had been confirmed and notified by the Director-General's informing the complainant that he would be enrolled in the Joint Staff Pension Fund only as from 1 February 1957. Finally, the complainant's claim had been rejected anew by the Secretary of the Pensions Committee on 13 February 1957.

The Tribunal accordingly found that, having regard to Staff Rule 303.131, the Organization was justified in contending that the complainant's right to appeal had lapsed and that the Director-General's decision to dismiss it was not tainted with illegality.