Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

1972

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. 153 (14 APRIL 1972): [2] JAYARAM v. UNITED NATIONS JOINT STAFF PENSION BOARD

Request for the commutation into a lump sum of a pension payable at the minimum annual rate—Interpretation of article 29 (d) *of the Pension Fund Regulations*

The applicant had been informed by the Secretary of the Joint Staff Pension Board that article 29 (*d*) of the Pension Fund Regulations did not authorize commutation into a lump sum of a part of a pension payable at the minimum annual rate.

This interpretation was upheld by the Standing Committee of the Board, and the applicant then filed an application with the Tribunal. Article 29 of the Pension Fund Regulations reads as follows:

"Article 29

"*Retirement benefit*

"(*a*) A retirement benefit shall be payable to a participant whose age on separation is sixty years or more and whose contributory service was five years or longer.

"(*b*) The benefit shall be payable either:

"(i) At the standard annual rate which is obtained by multiplying the years of the participant's contributory service, not exceeding thirty, by 1/50 of his final average remuneration, or

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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 1972, 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; Mr. Z. Rossides, Member; Sir Roger Stevens, Member.

"(ii) At the minimum annual rate which is obtained by multiplying the years of the participant's contributory service, not exceeding ten, by the smaller of 180 dollars or 1/30 of his final average remuneration, if the benefit so calculated would be greater than the amount under (i) above.

"(*c*) A benefit payable at the standard annual rate may be commuted by the participant into a lump sum:

"(i) If the rate is 300 dollars or more, to the extent of one third of its actuarial equivalent or the amount of his own contributions, whichever is greater, or

"(ii) If the rate is less than 300 dollars, to the extent of its full actuarial equivalent; if a male participant is married, the prospective benefit payable to his spouse may also be commuted at the standard annual rate of such benefit.

"(*d*) A benefit payable at the minimum annual rate may be commuted into a lump sum as in (*c*) above, if the participant elects to receive it instead at the standard annual rate."

The Tribunal felt that the terms used in clause (*d*) clearly indicated that in order to have a pension payable at the minimum annual rate commuted, the participant must elect to receive a pension at the standard annual rate instead of at the minimum annual rate. Accordingly, it rejected the application.

2. Judgement No. 154 (18 April 1972):[3] Monasterial v. Secretary-General of the United Nations

Decision to withhold payment of a special post allowance—Granting of such an allowance is a matter within the Secretary-General's discretion—Criterion applied by the defendant organization to determine whether a staff member has assumed "the full duties and responsibilities of a post at a higher level than his own"

The applicant, a staff member at the G-5 level, requested that a special post allowance should be granted to him "in recognition of [his] performance of professional functions for the last three consecutive years". He attached to the request documentation which he claimed would prove beyond a doubt that he had assumed "the full duties and responsibilities of a post at a clearly recognizable higher level than his own", in accordance with Staff Rule 103.11 (*b*).

His request was denied on the grounds that, according to the official manning table of his department, he had always occupied a G-5 post.

The matter was brought before the Tribunal, which pointed out that the granting of a special post allowance under Staff Rule 103.11 was a matter within the Secretary-General's discretion and that it was not competent to enter into the merits of such decisions. It noted, however, that according to the applicant the respondent had based his decision not on his discretionary power but on the contention that the applicant had not assumed the responsibilities of a higher-level post.

In that connexion the Tribunal recalled that in order to qualify for a special post allowance it was not enough that a staff member should have assumed the duties and responsibilities of a higher level post as stipulated in Staff Rule 103.11 (*a*); he must also have complied with the requirements of paragraph (*b*) and, in particular, he must have assumed "the full duties and responsibilities of a post at a clearly recognizable higher level than his own". The Tribunal considered that it was beyond its purview to make a factual assessment as to whether a staff member had assumed the full duties and responsibilities

[3] Mr. R. Venkataraman, President; Mrs. S. Bastid, Vice-President; Mr. Z. Rossides, Member; Sir Roger Stevens, Alternate Member.

of a post at a clearly recognizable higher level than his own. The Secretary-General was entitled to establish criteria for deciding such issues. At the Tribunal's request, the respondent gave the following explanations in that connexion:

> "... Secretary-General consistently exercises his discretion under Staff Rule 103.11 only in cases where he may effect payment of allowance with funds allocated to post at higher level authorized by official manning table approved in budget by General Assembly. Under budgetary procedure, Secretary-General cannot consider granting allowance attaching to post which does not exist in official manning table... they [Office of Personnel] are aware of no precedent where higher responsibilities for purposes of allowance were not evidenced by assignment to a post at the higher level authorized in official manning table."

In the view of the Tribunal, the criterion thus defined was a reasonable one and within the authority of the Secretary-General to prescribe. It added, however, that the litigation might have been avoided if the criterion had been made known to the staff in some official manner.

As the applicant had never been assigned to a post at the higher level on the official manning table, the Tribunal considered that he failed to meet the requirements of Staff Rule 103.11 as applied by the Respondent and accordingly rejected the application.

3. JUDGEMENT NO. 155 (19 APRIL 1972):[4] BELAINEH V. SECRETARY-GENERAL OF THE UNITED NATIONS

Decision to withhold payment of a special post allowance

The applicant, a Programming Clerk at the GS-6 level, was transferred and on 1 July 1966 his functional title was changed to Administrative Assistant. The Administration having decided to terminate his services on 30 April 1969, the applicant requested that he be paid retroactively for the work he had performed at a higher level for almost three years. When his request was denied, he appealed to the Tribunal, invoking Staff Rule 103.11 in support of his claim.

The Tribunal dismissed the request, recalling that in accordance with paragraph (*a*) of the above-mentioned rule, staff members shall be expected to assume temporarily, as a normal part of their customary work and without extra compensation, the duties and responsibilities of higher level posts. In the conditions specified in paragraphs (*b*) and (*c*), a special post allowance might be granted; the granting of that allowance was, however, entirely within the discretion of the Secretary-General, who might or might not grant it. Consequently, the Secretary-General was not legally bound to grant a special post allowance to the applicant because the latter had assumed the duties and responsibilities of a higher level post. As to the applicant's claim that the contested decision was motivated by prejudice, the Tribunal acknowledged that the length of time during which the staff member assumed those increased responsibilities and the manner in which he discharged them could legitimately be included among the criteria for determining the existence of the exceptional cases mentioned in paragraph (*b*) of Staff Rule 103.11. The Tribunal was of the opinion, however, that those factors could not on their own be considered as decisive and that in any event the applicant had not proved the existence of prejudice in the case under consideration.

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[4] Mrs. S. Bastid, Vice-President, presiding; Mr. Z. Rossides, Member; Mr. V. Mutuale, Member.

4. JUDGEMENT NO. 156 (20 APRIL 1972): [5] GARNETT V. SECRETARY-GENERAL OF THE UNITED NATIONS

Calculation of salary at promotion—according to the provisions of the relevant Staff Rule a staff member who is promoted shall receive compensation, during the first year following promotion, in the amount of one step in the new position's salary scale more than he would have received without a promotion.

On 1 September 1969, the applicant, a Professional Assistant at the G-5, step IX level, was promoted to the P-2 level and her salary rate was computed at the P-2, step I level in accordance with Staff Rule 103.9 (i), which provides, on promotion, for an increase in salary equivalent to one full step in the new level except where promotion to the lowest step of the level yields a greater amount. On 1 January 1970, there was a general increase in the salary scale for the General Service category which was not taken into account in the application of Staff Rule 103.9 to the applicant. The latter sought an adjustment of the steps in her grade on the ground that, notwithstanding Staff Rule 103.9 (i), the amount of her salary during the first year following her promotion had not been one full step more than she would have received without promotion. The claim was rejected.

The matter was brought before the Tribunal, which recalled that Staff Rule 103.9 provided as follows:

> "(i) During the first year following promotion a staff member in continuous service shall receive in salary the amount of one full step in the level to which he has been promoted more than he would have received without promotion, except where promotion to the lowest step of the level yields a greater amount. The step rate and date of salary increment in the higher salary level shall be adjusted to achieve this end."

The respondent maintained that the calculation called for by paragraph (i) should be made, at the time of promotion (i.e. at the beginning of the first year following promotion), solely on the basis of the salary scale then prevailing in the position from which the staff member was promoted and that increases in the salary scale for that position occurring thereafter during the first year following promotion should be disregarded.

The Tribunal felt that that claim was contrary to the wording of paragraph (i): the initial phrase "during the first year following promotion" clearly implied a computation continuing throughout the year and not one made solely at the beginning of the year. To disregard increases made during the year in the salary scale for the position from which the staff member was promoted would be inconsistent with the obvious purpose of the Staff Rule to ensure that the promotion should result in his receiving during the year compensation in the amount of one step in the new position's salary scale more than he would have received in the prior position during that year. No retroactivity was, involved since calculation was to be made for the entire year taking into account any changes as from their effective date.

The Tribunal accordingly rescinded the contested decision and ordered the respondent to recompute the applicant's salary in accordance with Staff Rule 103.9 (i) as construed by the Tribunal or to pay the applicant a corresponding amount in compensation.

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[5] Mrs. S. Bastid, Vice-President, presiding; Mr. F. T. P. Plimpton, Vice-President; Mr. Mutuale-Tshikantshe, Member.

5. JUDGEMENT No. 157 (26 APRIL 1972):[6] NELSON v. SECRETARY-GENERAL OF THE UNITED NATIONS

Termination of a permanent appointment—Right of the Administration, in case of plurality of grounds for termination, to rely on the ground of its choice—Requirement of a complete, fair and reasonable procedure

The applicant, who had a permanent appointment, had rebutted a periodic report where he had been rated as "on the whole an unsatisfactory staff member". After receiving advice from a panel of three senior officers of the Department, the Officer-in-Charge of the Office of General Services concluded that there was no need to amend the entries in the periodic report. One month later, the applicant was the subject of a special report by his immediate superior, where he was rated as "an unsatisfactory staff member". The applicant was then notified that the Secretary-General had decided to terminate his permanent appointment on the ground of unsatisfactory service in accordance with Staff Regulation 9.1 (*a*).

Before the Tribunal, the applicant sought the rescission of the decision to terminate his appointment. His first contention was that the real ground for termination of his appointment was an unfounded suspicion of unauthorized outside employment, that the respondent had substituted unsatisfactory services for the real ground in order to avoid reference to the Joint Disciplinary Committee and that the contested decision was therefore vitiated by extraneous motives. The Tribunal noted that in a memorandum from the applicant's immediate superior reference was made both to the applicant's having an unauthorized second job with a private concern and to his irregularity in attendance, as well as to the fact that he was unsatisfactory. The Tribunal noted that the Administration had two grounds for its decision, and it felt that the Administration could validly rely on the ground of unsatisfactory services.

The applicant's second contention was that a complete, fair and reasonable procedure had not been accorded to him prior to the termination of his appointment and that the contested decision was therefore vitiated by procedural irregularity. The Tribunal, basing itself on precedent (judgements No. 98 [7] and No. 131 [8]), felt it was necessary to consider whether the procedure followed for the termination of the applicant's appointment was complete, fair and reasonable. It observed in that connexion that the panel from which the Officer-in-Charge of the Office of General Services had taken advice had only had the limited scope of investigating the periodic report and the rebuttal by the applicant and had not considered the question as to whether or not the applicant's appointment should be terminated for unsatisfactory services. Neither in its composition, nor in the procedure followed by it, nor in its terms of reference did the panel provide the complete, fair and reasonable procedure required. The Tribunal recalled that in its judgement No. 98 it had ruled that when a case was referred to the Appointment and Promotion Board, a review by that Board or its subsidiary bodies constituted the complete, fair and reasonable procedure. It stated that where the Staff Rules did not provide for reference to the Appointment and Promotion Board, an equivalent procedure must be followed prior to the decision to terminate a permanent appointment for unsatisfactory services. It endorsed the reasoning of the Joint Appeals Board and added that the Staff Rules would lack consistency if permanent appointments could be terminated on grounds of unsatisfactory services without prior reference to a joint review body whereas probationary appointments could not.

[6] Mr. R. Venkataraman, President; Mrs. S. Bastid, Vice-President; Mr. F. T. P. Plimpton, Vice-President.

[7] See *Juridical Yearbook*, 1966, p. 213.

[8] *Ibid.*, 1969, p. 193.

The Tribunal felt that the requirement of a "complete, fair and reasonable procedure" would be adequately met if the action contemplated was subject to a fair review by a "joint body". The Tribunal did not rule that a review must necessarily be carried out by the Appointment and Promotion Board or its subsidiary bodies; what the Tribunal did rule was that a complete, fair and reasonable procedure to ensure the substantial rights granted to staff members with permanent appointments must be provided prior to the termination of such appointments, either by the Appointment and Promotion Board where the Staff Rules so provided or by a similar joint review body in the absence of such a provision. Finally, the Tribunal added that the requirement of due process had not been fulfilled by the intervention of the Joint Appeals Board, because the complete, fair and reasonable procedure should be carried out prior to the decision and not subsequently by an appellate body such as the Joint Appeals Board.

The Tribunal accordingly ruled that the case should be remanded for institution or correction of the appropriate procedure. It also ordered that the applicant be paid as compensation a sum equivalent to three months' net base salary for loss caused by the procedural delay.

6. JUDGEMENT NO. 158 (28 APRIL 1972):[9] FASLA V. SECRETARY-GENERAL OF THE UNITED NATIONS

Non-renewal of a fixed-term contract—Obligation of the respondent with regard to periodic reports—Annulment of a periodic report which was prejudiced—Commitment by the respondent to make every effort to find another assignment for the applicant—Failure to fulfil this commitment—Question of which allowances are payable in a case where an assignment for one year or more is cut short

The applicant entered the service of the Organization on 30 June 1964 under a fixed-term appointment which was extended several times. After assignments in a number of countries, he was reassigned on 15 September 1968 to the UNDP Office at Taiz (Yemen). Upon this reassignment he received an installation allowance and an assignment allowance and, as his family did not join him, his post adjustment was calculated at the New York rate. On 1 December 1968, however, his family having joined him in Taiz, his post adjustment at the New York rate was discontinued and replaced by a post adjustment at the—lower—Taiz rate. Strained relations soon developed between him and his superior. After a number of investigations into the UNDP operations in Yemen, the applicant was recalled to Headquarters, where he was informed that every effort would be made to secure another assignment for him and that if no possibilities presented themselves he would be placed on special leave with full pay until he was assigned, or until the expiry of his contract on 31 December 1969, whichever was earlier. On 20 November 1969, UNDP notified the applicant that it had not been possible to find another assignment for him and that no extension of his contract could therefore be envisaged. When that decision had been confirmed, the applicant lodged an appeal with the Joint Appeals Board.

It should be noted that the applicant's services were evaluated in three periodic reports. The first covered the period from 30 June 1964 to 30 June 1965 and rated him "a staff member who maintains only a minimum standard". The second covered the period from June to October 1966 and described him as "an efficient staff member giving complete satisfaction". The third report, covering the period from November 1966 to November 1967, described him as "a staff member who maintains only a minimum standard". Other

[9] Mrs. S. Bastid, Vice-President, presiding; Mr. R. Venkataraman, President; Mr. Mutuale-Tshikantshe, Member.

periodic reports concerning the work of the applicant were prepared upon the recommendation of the Joint Appeals Board after the applicant had left the service of the United Nations.

The Joint Appeals Board reached the conclusion that UNDP had not violated any Staff Regulations or Staff Rules or the terms and conditions of appointment of the applicant in not renewing his fixed-term appointment. Nevertheless, the Board took account of the following aspects of the case:

(1) Very difficult conditions prevailed in the UNDP Office in Yemen. Because of the circumstances in which the applicant was called upon to work, he was placed in a disadvantageous position with respect to his future assignments with UNDP or other international organizations.

(2) UNDP had not followed administrative procedures with respect to the periodic reports, since there were substantial gaps in his service not covered by reports.

(3) UNDP had not followed the required practice with regard to rebuttals of periodic reports by staff members.

(4) Complimentary assessments of the applicant's work over one particular period had not been included in his Official Status file or mentioned on the fact sheet.

(5) UNDP's efforts to assign the applicant elsewhere were inadequate, especially since the fact sheet (which had been attached to the letters to the United Nations and the specialized agencies proposing the applicant's candidacy) was incomplete.

Accordingly, the Board recommended:

(i) That UNDP should re-examine the applicant's files with a view to filling the gaps in the records and, if necessary, placing additional material on his fact sheet;

(ii) That UNDP should make further serious efforts to place the applicant in a suitable post;

(iii) That, if UNDP failed in those efforts, an *ex gratia* payment equivalent to six months' salary should be made to the applicant.

The Secretary-General decided to refer the recommendations in subparagraphs (i) and (ii) to the UNDP administration and to take no action on the recommendation in subparagraph (iii). UNDP, for its part, decided to implement the Board's first recommendation and indicated, with regard to the second recommendation, that it did not intend to offer the applicant another appointment in the future as all possible efforts had been made in that regard.

In addition to this first appeal to the Joint Appeals Board, the applicant lodged a second appeal in which he contended that he was entitled to subsistence allowance for the duration of his stay in Yemen from 15 September 1968 to 17 May 1969 and to the difference between the Yemen post adjustment and the New York post adjustment for the period from 22 May to 31 December 1959. In that connexion, the Board noted that, when the applicant had been assigned to Yemen, that assignment had been expected to last for at least one year, and it considered that his salary and allowances had been correctly determined on that basis. For the period from 23 May to 31 December 1969, the Board considered that the applicant's duty station had been changed to New York and that he should have been paid the New York post adjustment. In the absence of any guidance in the relevant rules and instructions as to whether salary and allowances should be recalculated when an assignment for one year or more is cut short, the Board decided to restrict itself to recommending an *ex gratia* payment to the applicant in the amount of any losses that he could show he had suffered as a consequence of his precipitate recall from Yemen. Accordingly, the Secretary-General advised the applicant that sympathetic consideration would

be given to such claims as he might be able to substantiate for financial losses which occurred as a result of his recall to Headquarters on short notice and that he would be paid an amount equivalent to the difference between the post adjustments for New York and Taiz for the period from 23 May to 31 December 1969.

In considering the case, the Tribunal recalled that Staff Rule 112.6 required supervisors to make reports from time to time on the service and conduct of their subordinates and that Administrative Instruction ST/AI/115 of 11 April 1956 specified that for staff serving under temporary appointments the report would be made each year. The Tribunal noted that the periodic reports were the basis for the fact sheet which the respondent used when he was required to find a suitable post for a staff member. In that connexion, the Tribunal noted that UNDP had made a formal commitment to make "every effort" to find another assignment for the applicant; that commitment, in the Tribunal's view, obviously implied an obligation to act in a correct manner and in good faith. The Tribunal further noted that, at the time when the search had been undertaken, no periodic report had been made on the applicant's service from July 1965 to May 1966 and from November 1967 to December 1969; the established procedure for the rebuttal of reports had not been observed; and, lastly, certain complimentary assessments of the applicant's service did not appear in the file. The fact sheet drawn up solely on the basis of the existing reports was thus incomplete. The Tribunal therefore considered that the commitment undertaken by the respondent had not been correctly fulfilled.

The Tribunal noted that, following the recommendations of the Joint Appeals Board, UNDP had stated its readiness to fill the gaps in the applicant's file and, if necessary, to place additional material on the applicant's fact sheet, thereby recognizing that the file in question did not conform to the established rules at the time when the search for an assignment was being made and that the fact sheet was incomplete if not inaccurate. UNDP had, however, refused to resume its effort to find a post for the applicant. In those circumstances, the Tribunal observed, the preparation of a corrected fact sheet became meaningless. Even assuming, therefore, that action to complete the file had been taken in a correct manner, it could not *per se* have any effect on the respondent's obligation to find a post for the applicant. The Tribunal nevertheless felt it necessary to consider the manner in which UNDP had acted to fill the gaps in the file. It noted that the applicant had strongly contested the actual circumstances in which additions had been made to his file and, in particular, had contended that one of the reports drawn up *a posteriori* was prejudiced. The Tribunal noted that the report in question contained comments couched in unusually strong terms. It considered that a report of that kind, written more than one year after the supervisor had relinquished his duties, testified to uncontrolled personal feelings. In addition, the Tribunal noted that the assessments of the applicant's linguistic ability in that report were much less favourable than those in previous reports. In the Tribunal's view, it was scarcely conceivable that knowledge of a language should deteriorate with practice and it should be recognized that the assessments given in that last report could not constitute a reasonable and well-considered opinion. The Tribunal accordingly concluded that the first reporting officer was guilty of prejudice. It also observed that the second reporting officer had not taken into consideration the comments from an authorized person who had been requested to make an investigation of the mission in Yemen, but had simply acknowledged that the ratings made by the first reporting officer led to the conclusion that the applicant was "on the whole, an unsatisfactory staff member". In view of the above, the Tribunal decided that the periodic report in question was invalid and must be treated as such for all appropriate purposes.

The Tribunal, having reached the conclusion that the respondent did not perform in a reasonable manner the obligation which he had undertaken to seek an assignment for the

applicant, noted that it was not possible to remedy that situation by rescinding the contested decision or by ordering performance of the obligation contracted in 1969. Accordingly, it awarded the applicant a sum equal to six months' net base salary.

Turning to the question of allowances, the Tribunal recalled that, according to Staff Rule 103.22 (*c*), "When a staff member is assigned to a duty station for less than one year, the [assignment] allowance will normally not be paid. However, appropriate subsistence payments will be made where no assignment allowance is payable". The Tribunal observed that that text left the respondent a margin of discretion with respect to the payment of an assignment allowance. In addition, the text laid down a very strict rule: the subsistence allowance was payable only where an assignment allowance had not been paid. Since the applicant had received an assignment allowance, he was not entitled to a subsistence allowance. Nevertheless, the Tribunal granted the applicant a period of two months in which to avail himself of the option given him by the respondent in offering to compensate him for any losses he had suffered as a result of his precipitate recall from Yemen.

7. Judgement No. 159 (4 October 1972):[10] Grangeon v. Secretary-General of the United Nations

Time-limit for filing of appeals before the Joint Appeals Board—Claims found unfounded or frivolous by the Board—Such claims not receivable by the Tribunal

The applicant, who had submitted various claims, was informed in a reply dated 27 May 1970 of the action which had been taken on his claims and of the recourse procedure laid down in the Staff Rules. A copious correspondence followed; on 30 September 1970, the applicant requested the Secretary-General to review the case and was informed by the Director of Personnel on 16 October 1970 that, in accordance with Staff Rule 111.3, the points raised by him had been reviewed; the results of the review in respect of each of the claims were indicated, and it was pointed out that the time-limit for appeals, as laid down by Staff Rule 111.3, had expired in respect of some of those claims.

The Joint Appeals Board, in dealing with the case, concluded that in view of the dates of the notification of the various decisions appealed against to the appellant, and particularly in view of the letter of 27 May 1970 referred to above, the request for administrative review made on 30 September 1970 was not within the time-limit of one month prescribed by Staff Rule 111.3 (*a*). The Board accordingly found that the appeal was not receivable. It added *obiter* that its consideration of the merits of the case led it to the conclusion that the claims made by the applicant, except possibly for one of them, were unfounded and, indeed, frivolous.

On the question of the receivability of the appeal by the Joint Board, the Tribunal noted that on several occasions in its letters to the applicant, the Administration had informed him that his claims would be reviewed. Subsequently, the Administration did indeed undertake such a review, specifying that, by so doing, it was acting in accordance with Staff Rule 111.3, as could be seen from its letter of 16 October 1970. The Tribunal added that in view of Staff Rule 112.2 (*b*), under which the Secretary-General might make exceptions to the Rules, the Administration had, at least in respect of certain claims, offered the applicant, and the latter had moreover exercised, the option of appealing to the Board within a time-limit which began to run from the date on which he received the letter of 16 October 1970. With regard to the claims in question, the Tribunal therefore considered that, since the appeal was made on 21 October 1970, it was within the prescribed time-limit and accordingly the Joint Appeals Board was bound to receive it.

[10] Mrs. S. Bastid, Vice-President, presiding; Mr. F. A. Forteza, Member; Mr. Mutuale-Tshikantshe, Member.

With regard to the receivability of the application by the Tribunal, the latter noted that the Joint Appeals Board had unanimously felt that the claims were unfounded or frivolous, except for one concerning an installation grant. It therefore concluded, in application of article 7.3 of its Statute, that it could receive only the claim concerning the installation grant. With regard to that claim, however, the Administration had notified applicant of its rejection of the claim on 28 July 1969. Thus, since the request for a review for the purpose of appeal was submitted to the Administration on 30 September 1970, it was clear that a review of the claim in question was not requested within the time-limit laid down in Staff Rule 111.3 (*a*). The claim was therefore not receivable.

8. JUDGEMENT NO. 160 (9 OCTOBER 1972):[11] ACINAPURA v. SECRETARY-GENERAL OF THE UNITED NATIONS

Decision refusing payment of post adjustment "at the dependency rate"—Definition of the term "child" for the purposes of the Staff Regulations and the Staff Rules

The applicant, who received post adjustment at the dependency rate on account of his daughter, asked the Office of Personnel whether his post adjustment would continue to be paid at the dependency rate after the date on which his daughter, who was attending a university, became 21 years of age. On receiving a negative reply, he filed an application before the Tribunal claiming entitlement to receive post adjustment at the "dependency rate" instead of at the "single rate".

The Tribunal noted that the claim rested on an interpretation of Staff Rule 103.7 (*b*) (i), which reads as follows:

> "(*b*) (i) The rate of post adjustment shown on the schedules for staff members with dependants shall apply to a staff member if his spouse is recognized as a dependant under Rule 103.24 or if it is recognized that the staff member provides substantial and continuing support of one or more of his children."

The applicant interpreted the above rule to mean that post adjustment at the dependency rate was payable to any staff member who provided substantial and continuing support of one or more of his children, whatever their age and dependency status.

The Tribunal pointed out that Rule 103.24 (*b*) defined the term "child" as follows:

> "For the purposes of the Staff Regulations and Staff Rules, a 'child' shall be the unmarried child of a staff member under the age of 18 years or, if the child is in full-time attendance at a school or university (or similar educational institution), under the age of 21 years. If the child is totally and permanently disabled, the requirements as to school attendance and age shall be waived."

It pointed out that since Rule 103.7 (*b*) (i) was part of the Staff Rules, and since Rule 103.24 (*b*) defined the term "child" "for the purposes of the Staff Regulations and Staff Rules", the definition in question should also apply to the words "one or more of his children" in Rule 103.7 (*b*) (i). The Tribunal added that the applicant's interpretation of Rule 103.7 (*b*) (i) would lead to an absurd result since it would allow a staff member to claim indefinitely post adjustment at the higher rate on the ground that he provided substantial and continuing support to one or more of his children. Accordingly the Tribunal rejected the application.

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[11] Mr. R. Venkataraman, President; Mr. Mutuale-Tshikantshe, Member; Sir Roger Stevens, Member.

9. Judgement No. 161 (10 October 1972):[12] Noel v. Secretary-General of the United Nations

Termination for abolition of post of a staff member holding a permanent appointment—Allegation that the Joint Appeals Board which considered the matter had been improperly constituted—Obligation of the respondent with regard to the reassignment of a locally recruited staff member.

The applicant, locally recruited and the holder of a permanent appointment, had been terminated for abolition of post after he had declined an offer of transfer and after all efforts by the Administration to reassign him had failed.

Before the Tribunal he contended, firstly, that the Joint Appeals Board which had considered his case had been improperly constituted, as the alternate elected by the staff had worked for a department in which the applicant himself had been employed and, furthermore, the member elected by the staff should have sat in the case, rather than the fourth staff-elected alternate. Secondly, he contended that in terminating his permanent appointment for abolition of post, the respondent had failed to fulfil his obligations under Staff Rule 109.1 (*c*) and that the applicant had, in fact, been the victim of a campaign designed to bring about his termination for reasons that did not appear in the file.

With regard to the composition of the Joint Appeals Board, the Tribunal noted that the applicant's objection to the participation of the fourth staff-elected alternate in the proceedings on the ground of that alternate's relation to the applicant had been overruled by the Chairman of the Board under the discretion granted to him by Staff Rule 111.2 (*e*). The applicant's contention that the member elected by the staff should have sat in the case rather than the fourth staff-elected alternate was based on a restrictive interpretation of Staff Rule 111.2 (*b*) and ignored the practical realities of a situation in which, owing to the number of appeals, recourse had to be had to all the alternates if unnecessary delays in hearings were to be avoided. The Tribunal noted that in that connexion the following words of a memorandum of the Convening Chairman:

> "The Board adopted a crash programme... Accordingly the members of the panel of Chairmen held a meeting... in the course of which they distributed all the cases pending before the Board among themselves and among the members and alternates... The staff-elected member was assigned six cases, and each alternate three or more cases, in the order in which they received votes in the election. It was considered that after having been designated to serve on a certain number of cases, the member and the alternates became unavailable, in the meaning of Staff Rule 111.2 (*b*), for serving on more cases."

It was the Tribunal's view that those dispositions represented a reasonable interpretation of Staff Rule 111.2 (*b*).

With regard to the obligations of the respondent, the Tribunal pointed out that since the applicant had been recruited locally, the provisions of Staff Rule 109.1 (*c*) (ii) (*a*), reading as follows:

> "The provisions of paragraph (i) above in so far as they relate to locally recruited staff members shall be deemed to have been satisfied if such locally recruited staff members have received consideration for suitable posts available at their duty stations",

applied in his case, so that the obligation of the respondent had been limited to ensuring that the applicant received consideration for a suitable post in New York. The Tribunal noted in that connexion that the applicant had been offered a post and had declined it, although he had been warned that the alternative to acceptance might be termination.

[12] Mr. R. Venkataraman, President; Mrs. S. Bastid, Vice-President; Sir Roger Stevens, Member.

It also recalled that the Administration had made a search for alternative posts for the applicant in good faith over a considerable period. Accordingly, the Tribunal found that the respondent had fully complied with the requirements of Staff Rule 109.1, and it rejected the application.

10. JUDGEMENT No. 162 (10 OCTOBER 1972):[13] MULLAN v. SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting a decision denying a staff member payment of her husband's travel expenses in connexion with her home leave—Any staff member who invokes non-compliance with his contract and his terms of appointment may have recourse to sources of law other than the provisions of the Staff Regulations and Rules—Under the Staff Regulations, the Organization pays the travel expenses of "dependants"—The staff rule which makes a distinction between wife and husband with regard to the payment of travel expenses in connexion with home leave is contrary to Article 8 of the Charter—The provision that entitles a female staff member to payment of her husband's travel expenses only if he is a "dependent husband" is consistent with the Statute of the Tribunal

The applicant had claimed payment of travel expenses for her husband in connexion with her forthcoming home leave to Argentina. Upon rejection of her claim, she addressed a memorandum to the Secretary-General, requesting him to review that decision; the memorandum read in part:

"... My husband is not a dependant within the meaning of Staff Rule 103.24, and under Staff Rule 107.5 a female staff member is entitled to payment of her spouse's travel expenses only if he is a 'dependent husband'.

"However, I should like to point out that under such rule, a non-dependent wife of a staff member is entitled to accompany her husband at the expense of the Organization, whereas a non-dependent husband does not benefit in the same way.

"This situation seems to be in contradiction of the fundamental principle of equality of rights as laid down in the Charter, specifically in Article 8, and in other international instruments. It also runs counter to the principle of equal remuneration and equal conditions of employment, in so far as the rule denies female staff members a benefit which can be claimed automatically by male staff members even when they are exactly in the same position as I am now, and regardless of the earning capacity of their wives.

"That is why I respectfully request you, Sir, to review and rescind the decision quoted above, as it is based on a rule which is inconsistent with those basic principles and with the policy of non-discrimination pursued and advocated by the United Nations in all fields."

The Secretary-General having refused to rescind the contested decision, the applicant lodged an appeal with the Joint Appeals Board; the Board held that the appeal, which in substance challenged not an administrative decision but a staff rule as being contrary to applicable provisions considered higher and prevalent, was beyond the powers of the Board. Accordingly, the Board made no recommendation on the appeal.

The Tribunal, when the case was brought before it, first considered the respondent's contention that the application was aimed not at ensuring the fulfilment of obligations deriving from the Staff Regulations and Rules but at invalidating Staff Rule 107.5 (*a*) and therefore did not come within the competence of the Tribunal.

The Tribunal noted that the respondent's objection alleging incompetence was based not on the pleas of the applicant but on the argument she submitted in support of them. It observed that the pleas concerned a dispute relating to the applicant's own contract of

[13] Mr. R. Venkataraman, President; Mrs. S. Bastid, Vice-President; Sir Roger Stevens, Member.

employment and that any decision on those pleas would affect only her own individual situation. Article 2.1 of the Statute of the Tribunal referred, in defining the competence of the Tribunal, to applications alleging non-observance of contracts of employment of staff members or of their terms of appointment. The words "contracts" and "terms of appointment" were stated to include all pertinent regulations and rules in force at the time, but that phraseology could not be assumed to exclude the possible application of any other sources of law, particularly the Charter, which was indeed the constitution of the United Nations and contained certain provisions relating to staff members; nor did it exclude the fundamental principles of law, especially of the law of contracts. Consequently, the Tribunal decided that the case came within its competence.

With regard to the substance of the case, the Tribunal noted that the respondent did not dispute that the provisions of the Charter might affect the legal status of staff members but contended that the latter could not rely on the Charter in order to avoid the application of a staff rule. The applicant, on the other hand, argued that in the event of a conflict between the Charter and the Staff Rules, the Charter should prevail. The Tribunal noted that there was no text comparable to Article 103 of the Charter applicable to the Staff Regulations and Rules. In the view of the Tribunal, it would be difficult to assert that a general principle of law concerning the effects of the hierarchy of legal provisions had definitely emerged from the practice of States. The Tribunal believed that in considering a specific case, the most appropriate course was to identify the source and ascertain the scope of the texts which had been relied on in the case. It asserted that Article 8 of the Charter, which it described as "a provision of great historic scope", contained a rule which was legally binding on United Nations organs. However, responsibility for its implementation fell upon those who were competent to make rules applicable to the staff, which meant primarily the General Assembly, under Article 101, paragraph 1, of the Charter. The Tribunal pointed out that in Staff Regulation 7.1* the General Assembly had laid down in principle an obligation on the part of the United Nations to pay the travel expenses of persons other than the staff member, namely his dependants, but had left the Secretary-General broad authority to implement the principle. However, the Staff Regulations also used the concept of dependency for another purpose in Regulation 3.4, which provided for dependency allowances and set their levels "for a dependent wife or dependent husband" and "for each dependent child".

The Tribunal noted that Staff Rule 103.24 defined dependency for the purpose of payment of dependency allowances without making any distinction between staff members in respect of sex and that the "conditions of equality" enunciated in Article 8 of the Charter were thereby realized. For the purpose of official travel the definition of dependants was dealt with in another rule, namely Staff Rule 107.5 (*a*). The Tribunal noted that the two parties had recognized that that provision was open to a number of interpretations. One of those interpretations, the Tribunal noted, was in keeping with the principle of conditions of equality for staff members; however, besides being open to certain logical objections, that interpretation had not prevailed in practice, and the respondent did not deny that in applying the text he distinguished between female staff members and their male colleagues.

In referring to "a wife", Staff Rule 107.5 (*a*) had probably assumed that the latter was always dependent, apparently applying a traditional sociological and economic yardstick but departing from the legal criterion used for the "dependent husband", which was established in another rule. However, there was every reason to think that social and

* Staff Regulation 7.1 reads as follows:

"Subject to conditions and definitions prescribed by the Secretary-General, the United Nations shall in appropriate cases pay the travel expenses of staff members and their dependants."

economic changes had, since the text had been drafted, led to an increase in the number of wives who were not dependent according to the definition of dependency in Staff Rule 103.24 (*a*). In any event, the distinction between wife and husband for the payment of travel expenses in connexion with home leave was a distinction by reason of sex and would appear contrary to the principle of equal conditions of employment enunciated in Article 8 of the Charter. It was the responsibility of the Secretary-General to implement that principle with regard to payment of a spouse's travel under Staff Regulation 7.1, and while he possessed a wide discretion in that respect, his discretion must be exercised in accordance with Article 8 of the Charter. However, the Tribunal observed that the part of Staff Rule 107.5 (*a*) which entitled a woman staff member to payment of her husband's travel expenses only if he was a "dependent husband" was consistent with Staff Regulation 7.1 adopted by the General Assembly under the authority granted to it by Article 101 of the Charter. The validity of that part of Staff Rule 107.5 (*a*) was not affected by the fact that another part of the same staff rule enabled payment of travel expenses for a staff member's wife, whether dependent or not. Accordingly, the Tribunal rejected the application.

11. JUDGEMENT NO. 163 (11 OCTOBER 1972):[14] TOUHAMI V. SECRETARY-GENERAL OF THE UNITED NATIONS

Application for revision of a judgement of the Tribunal—Rejection of the application on the ground of expiration of the time-limit

The applicant requested revision of judgement No. 146,[15] by which the Tribunal had rejected an application for revision of judgement No. 135[16] rendered on 26 October 1970. The Tribunal held that in substance the application was for the revision of judgement No. 135 and that the applicant was seeking reliefs which had been rejected in that judgement. It recalled that article 12 of its Statute read in part:

> "The application [for revision] must be made within thirty days of the discovery of the [new] fact and within one year of the date of the judgement."

The time-limits fixed in that provision were mandatory, and the Tribunal had no power either to extend them or to condone any delay.

Noting that the application had not been made within one year of the date of judgement No. 135, which the applicant in substance was seeking to revise, the Tribunal rejected the application.

12. JUDGEMENT NO. 164 (12 OCTOBER 1972):[17] SABILLO V. SECRETARY-GENERAL OF THE UNITED NATIONS

Application for rescission of a decision of termination

The applicant, a driver employed by the Manila office of the Technical Assistance Board/Special Fund, was injured in a traffic accident while driving a car in the performance of his official duties. An Administrative Investigating Committee was formed to investigate the circumstances leading to the accident. The Committee recommended the applicant's suspension from assignment as a United Nations driver until such time as the case was

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

[15] See *Juridical Yearbook*, 1971, p. 158.

[16] *Ibid.*, 1970, p. 137.

[17] Mr. R. Venkataraman, President; Mrs. S. Bastid, Vice-President; Mr. F. T. P. Plimpton, Vice-President.

decided in the Philippine courts. It subsequently decided that the applicant should be reinstated and agreed that his appointment should be terminated on the ground of redundancy. The applicant contested that decision and requested a copy of the rules or regulations governing his appointment with the office. He received a reply stating that his appointment was a temporary appointment governed by rules applicable to temporary employees of the Government and that there was no copy of the rules governing his appointment which could be furnished to him.

The applicant then filed with the Philippine Department of Labour a claim against the UNTAB for compensation, to which no reply was made. He therefore filed with the Philippine Workmen's Compensation Commission a complaint against the UNTAB. The Deputy Resident Representative having asserted the immunities of the United Nations from every form of legal process, the Chief Hearing Officer of the Commission dismissed the complaint, that decisions being subsequently reaffirmed by the Chairman of the Commission, who, however, added the following comments:

> "But there is a point raised by the claimant which we cannot ignore—that the immunity claimed by the respondent to evade a just liability runs counter to the lofty and humanitarian principles for which it stands for [sic]. It is believed that the respondent will not only dispel this erroneous impression but also alleviate to some measure the sufferings of the claimant if it could extend financial aid to him in any other way, by reason of the accident."

The Advisory Board on Compensation Claims, reviewing the case, reimbursed the applicant for his medical expenses and awarded him a lump-sum compensation for 20 per cent loss of function of the left arm. After numerous representations to various bodies, the applicant lodged an appeal with the Joint Appeals Board contesting the decision of termination. The Board, finding that the decision in question had been properly taken, made no recommendation in the matter. On the other hand, the Board considered that the uncertainty about the rules governing the appellant's employment and the respondent's failure to inform the appellant of the rules governing his employment or of the proper channels of appeal had unnecessarily delayed for many years the consideration of the appellant's claim for compensation and of his appeal against the termination decision. The Board therefore recommended that the respondent should make an *ex gratia* payment to the appellant in an amount equivalent to one year's salary plus a sum to cover expenses in connexion with the submission of his appeal. The Secretary-General decided to maintain the termination decision and not to accept the Board's recommendation for an *ex gratia* payment.

The Tribunal, reviewing the case, noted that the respondent, although having indicated to the applicant that the latter's employment was governed by rules applicable to temporary employees of the Philippine Government, conceded to the Tribunal that the applicant's employment was governed by the Staff Regulations and by the 100 Series of the Staff Rules. The Tribunal took the position that it had to consider the application on the basis of the Staff Regulations and Rules which were applicable to the applicant as the holder of a temporary indefinite appointment. The contested decision fell under Staff Regulation 9.1 (*c*), which provided that in the case of staff members holding temporary indefinite contracts the Secretary-General could terminate the appointment if, in his opinion, such action would be in the interest of the United Nations While characterizing the creation, composition and procedure of the Administrative Investigating Committee as objectionable, the Tribunal noted that, in view of the surplus of drivers, the Acting Resident Representative had considered the relative qualifications and length of service of all drivers and had himself concluded that the applicant's appointment was the one to be terminated. As the contested decision had been within the authority of the Secretary-General and no prejudice had been shown, the decision had to be maintained.

Nevertheless, the Tribunal ordered the respondent to pay the applicant all sums which would have been due him if the Staff Rules and Regulations had been applied in his case. It further awarded him an amount equal to one year's salary in compensation for the injury he had suffered as a result of being deprived of the status of United Nations staff member and by reason of the respondent's failure to inform him of his rights under the Staff Regulations and Rules.

13. Judgement No. 165 (20 October 1972):[18] Kahale v. Secretary-General of the United Nations

Application directed, on the one hand, against measures which allegedly imposed discriminatory conditions of service on the applicant and, on the other hand, against a decision concerning the applicant's transfer—Measures which were not administrative decisions cannot be the subject of an appeal to the Joint Appeals Board—Rule that an application shall not be receivable unless the dispute has first been submitted to the appeals body provided for in the Staff Regulations—The Secretary-General's power to relieve a staff member of his duties or invest him with other duties—The head of a unit is competent to reassign a staff member within his unit—An application for relief for injury resulting from an improper decision must be incident to an application for rescission of the decision in question

The applicant, who was Chief of the Social Defence Section, had written to the Secretary-General to complain of the conditions of service imposed on him and to request an investigation. At approximately the same time, he was informed by the Director of his Division, on 8 May 1969, that it had been decided to transfer him to a new post at the same level with the functional title of Senior Officer for Special Assignments. He requested the Secretary-General to review that decision and, having received no reply within the following month, he addressed himself to the Joint Appeals Board. A few weeks later, the Secretary-General decided that the case should be personally investigated by the Legal Counsel in collaboration with the Office of Personnel. The conclusions of the investigation report were that there was no evidence of improper motive on the part of the Director of the Division and that the applicant should be transferred to another P-5 post within the Social Development Division with the functional title of Senior Adviser to the Director and Secretary of the Commission for Social Development. Those conclusions were accepted by the Secretary-General. Throughout the whole period of the investigation ordered by the Secretary-General, the proceedings before the Joint Appeals Board had been kept in abeyance. A few months after notification and confirmation of the Secretary-General's decision based on the investigation report, the Board submitted a report indicating that the transfer decision of 8 May 1969 was valid and that it was unable to make any recommendation in support of the appeal.

The case was filed with the Tribunal, which noted that the application contained, firstly, conclusions concerning the conditions of service of the applicant and, secondly, conclusions concerning the arbitrary enforcement of a legally ineffective decision. With regard to the first group of conclusions, it noted that the applicant complained of discriminatory conditions of service allegedly imposed on him. The Tribunal recalled that under Staff Rule 111.3 (*a*) "A staff member who, under the terms of Regulation 11.1, wishes to appeal an administrative decision, shall as a first step address a letter to the Secretary-General, requesting that the administrative decision be reviewed". In the Tribunal's opinion, it did not appear from the pleadings that the applicant had observed the require-

[18] Mr. R. Venkataraman, President; Mrs. S. Bastid, Vice-President; Mr. F. T. P. Plimpton, Vice-President.

ments of Staff Rule 111.3 (*a*). While the applicant had written to the Secretary-General, many of the measures of which he complained he had been the victim had not taken the form of administrative decisions which would have been subject to appeal under Staff Regulation 11.1. In any case, the applicant had not requested review of any decisions as a first step within one month from the date of such decisions. Therefore, the alleged violations of the applicant's conditions of service were not properly raised before the Joint Appeals Board. Under article 7, paragraph 1, of the Statute of the Tribunal, an application could not be receivable unless the person concerned had previously submitted the dispute to the joint appeals body provided for in the Staff Regulations. The Tribunal accordingly found that the alleged violations of the applicant's conditions of service had not been properly raised before it.

Nevertheless, the Tribunal examined the substance of the more serious charges enumerated by the applicant during the oral proceedings. It concluded that either there was no substance in the charges or they fell within the administrative competence of the respondent and were not violations of the conditions of service of the applicant. As to the applicant's statement that the conditions of service allegedly imposed on him were "para-disciplinary action", the Tribunal noted that no charge of misconduct had been made against the applicant and that no measure of suspension from duty had been taken against him; it therefore held that it was not necessary for the respondent to follow the procedures in disciplinary matters prescribed by the Staff Regulations and Rules in respect of any of the complaints enumerated by the applicant.

With regard to the second group of conclusions, the Tribunal examined the applicant's contention that "the illegal enforcement of a legally ineffective decision of transfer constituted an infringement upon the terms of his employment". The Tribunal noted that when the Director of the Division to which the applicant belonged had decided to transfer him to a new post as Senior Officer for Special Assignments the Office of Personnel had withheld its approval of the relevant personnel action form and that the Secretary-General's decision to transfer the applicant to the post of Senior Adviser to the Director and Secretary of the Commission for Social Development had been taken only 18 months later. It appeared that there had been a *de facto* interruption of the applicant's duties as Chief of the Social Defence Section during those 18 months. The Tribunal had therefore considered whether the respondent had acted in disregard of the applicant's contractual rights and whether the Director was justified in relieving the applicant of his duties. It had concluded that the Director had had reasons to feel worried about the work of the Social Defence Section. Staff Regulation 1.2 authorized the Secretary-General to relieve a staff member of certain duties or invest the staff member with other duties according to the exigencies of the service, of which he was the sole judge, and that power could be exercised by supervisory officers in the normal course of administration. The Director had therefore been competent to relieve the applicant of certain functions.

The applicant also argued that the Director of his Division had exceeded her competence by ordering his "transfer" without the authorization of the Director of Personnel. The respondent stated that in fact the applicant had not been transferred (moved from one major organizational unit to another) but reassigned (moved within the same major organizational unit) and that a reassignment did not normally require the approval of the Director of Personnel. The Tribunal noted that this was indeed a case of reassignment of duties. While the Office of Personnel, in view of the investigation concerning the applicant ordered by the Secretary-General, had withheld the personnel action form concerning the "transfer", the initial action taken by the Director of the Division to which the applicant belonged had been within her authority.

With regard to the applicant's allegations of improper or extraneous motivation on

the part of the Director, the Tribunal held that they had not been established by positive evidence and must be rejected.

Finally, the applicant sought relief of injury caused by the enforcement of an allegedly ineffective order (the decision to transfer him to the post of Senior Officer for Special Assignments). The Tribunal recalled that, according to its Statute, the applicant could only seek rescission of the final decision and relief on ancillary matters connected therewith and that the applicant, by confining his pleas to such ancillary matters, could not oust the jurisdiction of the Tribunal to pass judgement on the substance of the case. Since it had been found that the decision in question had been justified on the merits, that it had been within the administrative competence of the Director of the Division and that it had not been motivated by extraneous considerations, the question of the payment of any compensation did not arise.

The Tribunal therefore rejected the application.

14. JUDGEMENT NO. 166 (20 OCTOBER 1972):[19] KAHALE v. SECRETARY-GENERAL OF THE UNITED NATIONS (REQUEST FOR REMAND OF CASE)

Application for the sole purpose of obtaining remand of the case for correction of procedure and denying the Tribunal an opportunity to render a decision on the merits—Non-receivability of such application—Objections to Joint Appeals Board proceedings—Concept of res judicata*—Non-receivability of appeal to Joint Appeals Boards on the ground of non-observance of the provisions of the Staff Regulations or Rules with regard to another staff member*

The applicant had been transferred from the post of Chief of the Social Defence Section to another post at the same level. A staff member was subsequently appointed to the post of Chief of the Social Defence Programmes. The applicant requested the Secretary-General to reconsider this decision. The decision was confirmed, and the applicant appealed to the Joint Appeals Board. The Board declared the appeal non-receivable because the appellant's transfer had already been reported on by a previous Board and the administrative decision concerning the said transfer had become definitive and could not be modified or rescinded unless and until the Administrative Tribunal reversed the findings of the previous Board.

The applicant then requested the Tribunal to order the remand of the case to the Board for correction of procedure. The Tribunal observed that under article 9, paragraph 2, of its Statute, if it found that the procedure prescribed in the Staff Regulations or Rules had not been observed, it might, at the request of the Secretary-General and "prior to the determination of the merits", order the case remanded for institution or correction of the required procedure; under article 18, paragraph 2, of its Rules, the Tribunal was to "decide on the substance of the case" if, on the expiry of a certain time-limit, no request for a remand had been made by the Secretary-General. It followed from the foregoing provisions that an application to the Tribunal must be such as to enable the Tribunal to proceed to a determination of the merits of the case. An application which did not comply with that requirement but merely requested a remand of the case for institution or correction of the required procedure was not contemplated under the Statute of the Tribunal. The application was therefore not receivable.

The Tribunal observed, however, that the appeal before the Joint Appeals Board was directed against a decision rejecting the applicant's claim against the appointment of a

[19] Mr. R. Venkataraman, President; Mrs. S. Bastid, Vice-President; Mr. F. T. P. Plimpton, Vice-President.

staff member to a certain post. Consequently, it had considered whether the Board had followed a regular procedure and had taken a valid decision that the appeal was not receivable.

The applicant complained that he had not been notified of the composition of the Board before it undertook consideration of his appeal. However, on examination of the file the Tribunal accepted the respondent's statement that the applicant had been orally informed of the Board's composition before the hearing. It conceded that it was good administrative practice to notify the staff member concerned in writing of the composition of the Board before it undertook consideration of an appeal, but it concluded in the case in point that since the applicant had not apparently been prejudiced or adversely affected and since he had raised no objection at the hearing, the failure to make such notification in writing had not vitiated the proceedings.

The applicant also alleged violation of Staff Rule 111.2 in the selection of members of the Joint Appeals Board. The Tribunal considered that for the reasons given in its judgement No. 161 [20] the Chairman had a wide discretion in deciding on the availability of a member, and it concluded that there was no substance in the applicant's plea that the selection of members of the Board had been in violation of Staff Rule 111.2 Nor did the Tribunal consider that it was improper for the same Board to consider related matters. In any event, in the absence of evidence that the applicant had suffered any prejudice and since he had failed to raise objections at the appropriate time, he could not question the validity of the decisions taken in this respect. The applicant also complained that the Board had disposed of his case without affording him the protection of representation by counsel. The Tribunal considered that it was for the applicant to state at the hearing that he needed the assistance of a counsel and to ask for a delay until one had been appointed. On several other points—as to whether the Board could notify its decision directly to the applicant, the delay in disposal of the case by the Board, whether the applicant had had an opportunity to meet the respondent's preliminary objection regarding the receivability of the appeal—the Tribunal concluded that the proceedings of the Board had not been vitiated in any way.

On the validity of the Board's decision declaring the appeal non-receivable, the Tribunal observed that a plea of *res judicata* must show that the same point had been decided between the same parties. It noted that the appeal brought before a previous Board related to the applicant's transfer from the post of Chief of the Social Defence Section. The present appeal challenged the appointment of another staff member to a post at a higher level with considerably wider duties. The appeal was not therefore barred by the principle of *res judicata* or any principle analogous to it. However, the Tribunal emphasized that while Staff Regulation 11.1 authorized staff members to appeal against an administrative decision by alleging the non-observance of their terms of appointment, the applicant had alleged before the Joint Appeals Board the non-observance of "pertinent regulations and rules" with regard to another staff member. The conclusion reached by the Board that the appeal was non-receivable was therefore valid.

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[20] See p. 132 of this *Yearbook*.

B. Decisions of the Administrative Tribunal of the International Labour Organisation [21,22]

1. Judgement No. 187 (15 May 1972): Jakesch v. International Atomic Energy Agency

Complaint impugning a decision made by a national court—The Tribunal is not competent to hear such a complaint

When the IAEA was admitted to the United Nations Joint Staff Pension Fund in 1958, the complainant ceased to be a member of the Austrian Pension Scheme as he had been up to then. After several approaches to the Austrian Ministry of Social Affairs and to his superiors within the Agency, he lodged a formal complaint with the IAEA on 5 March 1963 asking that he be allowed to resume compulsory membership of the Austrian Pension Scheme. His request was rejected on 9 August 1963, and the Director-General confirmed that decision on 3 October 1963.

On 18 September 1970 the complainant sued the IAEA before the Labour Court of the City of Vienna for payment of damages for interruption of his membership of the Austrian Pension Scheme. The Agency refused to waive the immunity from legal process which it enjoyed under article VIII (section 19) of the Headquarters Agreement of 11 December 1957 between the IAEA and the Austrian Government, [23] and the Labour Court of the City of Vienna accordingly held, by judgement of 8 July 1971, that it was not competent to hear the case.

The complainant then appealed to the Administrative Tribunal, stating that the decision which he impugned was the judgement of 8 July 1971. The Tribunal dismissed the complaint. It recalled that, under its own Statute and the Staff Regulations and Staff Rules of the IAEA, it could hear only complaints made against decisions of the Director-General, as a general rule after all internal remedies had been exhausted. The complaint, which was directed against a decision of the Labour Court of the City of Vienna, was lodged with a tribunal which was not competent to hear it. Even if the complainant had sought to impugn a decision of the Director-General, that decision could only be the one taken on 3 October 1963. In that event the complaint would be time-barred, not having been

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[21] 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 1972, 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, the Universal Postal Union, the International Patent Institute and the European Southern Observatory. 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.

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

[23] United Nations, *Treaty Series*, vol. 339, p. 110.

submitted within the time-limit of 90 days prescribed by article VII, paragraph 2, of the Statute of the Tribunal. It would also be irreceivable because of the complainant's failure to exhaust all the internal remedies available to him.

2. Judgement No. 188 (15 May 1972): Dutreilly v. United Nations Educational, Scientific and Cultural Organization

Complaint seeking the rescinding of a decision falling within the discretion of the Director-General—Limits of the Tribunal's authority to review such a decision

The complainant impugned a decision by which the Director-General of UNESCO had (i) decided to retain in the complainant's dossier the performance report which she (the complainant) considered to be incorrect and prejudicial to her and (ii) withheld a salary increment to which she believed she was entitled.

The Tribunal stressed that the decision in question lay within the discretion of the Director-General, and could thus not be reviewed by the Tribunal unless it was taken without authority, was irregular in form or tainted by procedural irregularities or by illegality, or was based on incorrect facts, or essential facts had not been taken into consideration, or there had been misuse of authority or, finally, conclusions which were clearly false had been drawn from the documents in the dossier. The Tribunal dismissed the complaint, considering (1) that the complainant's allegations that the decision was tainted by irregularities of procedure could not be accepted; (2) that there were no grounds for holding that the Director-General's decision, taken in the light of the complainant's performance report, was based on incorrect facts; (3) that, contrary to what the complainant implied, the fact that she had had her salary increment withheld as a result of critical comments relating to a specific period of service did not imply that a general assessment had not been made of her performance taking into account her previous service; and (4) that, in the light of the facts which emerged from the evidence in the dossier, the Director-General was justified in ordering that the performance reports made on the complainant should be maintained, and that he had not exceeded his discretion in considering the temporary withholding of a salary increment to be justified.

3. Judgement No. 189 (15 May 1972): Smith v. World Health Organization

Request that a period of absence should be regarded as sickness leave—Obligation of any staff member on sickness leave to submit to the administration such reports on his condition as the Staff Physician shall require

The complainant, whose contract of appointment was due to expire on 31 March 1970, had sent the Staff Physician of the Organization a medical certificate relating to the period 11 March-23 March and, on 26 March, a second certificate attesting his continued incapacity for work for an indeterminate period. During the weeks which followed, the Organization tried in vain to reach the complainant. On 14 April 1970, the Chief of Personnel informed the complainant that the only period which could be treated as sickness leave was 11 to 23 March and that the four working days between 24 and 31 March would be debited to his accrued annual leave. Finally, however, the Administration offered to settle the dispute amicably and to treat the four days in question as special leave with pay. The complainant replied that he would agree only if the Administration admitted that he had been on sickness leave during the four days. He met with a refusal.

The Tribunal, to which the case was submitted, recalled that Staff Rule 670.3 required that in any case of illness the staff member should submit such periodic reports on his condition as the Staff Physician might require. Whether the complainant had done all

that was reasonable to comply with his obligation under that Rule was open to doubt, and the Administration's suggested settlement was thus a sensible and reasonable one; the making of it left the claim without substance unless it could be said that some question of principle was involved. The Tribunal considered that there was no such question, and accordingly dismissed the complaint.

4. JUDGEMENT No. 190 (15 MAY 1972): WALIULLAH v. UNITED NATIONS EDUCATIONAL SCIENTIFIC AND CULTURAL ORGANIZATION

Complaint impugning a decision not to renew a fixed-term contract—Death of the complainant during the course of proceedings—The person succeeding to the rights of a decedent may not submit any claims to the Tribunal other than those which the decedent himself was entitled to present

The complainant was appointed to a P-5 post for a period of two years. At the end of those two years, he was assigned to another post, and his appointment was extended for another year. A few months before the end of this one-year period, he was informed that his post would cease to exist. He was then assigned to the Secretariat of the General Conference of the Organization, but was shortly afterwards informed—his appointment having been extended for six months in the meantime—that he could not be employed in the Secretariat after the date of expiry of his final appointment. He was accordingly informed by the Director of the Bureau of Personnel that if his application for two other posts was unsuccessful, his appointment would terminate on its normal date of expiry in accordance with Staff Rule 104.6 (*b*) relating to fixed-term appointments. The complainant then appealed to the Appeals Board. The Director-General refused to endorse the Board's recommendation, but offered the complainant a one-year appointment at grade P-4 in Bangkok. The complainant refused this offer and appealed to the Tribunal, praying it to order the renewal of his contract for a period and on terms equivalent to those of his original appointment or, failing that, the payment of compensation. The complainant having died a few months later, his widow resumed proceedings in accordance with article II, paragraph 6, of the Statute of the Tribunal, and lodged an amended statement of claims in which she prayed the Tribunal, *inter alia*, "to award additional compensation amounting to one year's salary as partial damages for the grave moral prejudice suffered by the late complainant and his family owing to his unwarranted treatment, which affected his health".

The counsel for the complainant and his widow contended that Staff Rule 104.6 (*b*), which provides that:

> "A fixed-term appointment may, at the discretion of the Director-General, be extended, or converted to an indeterminate appointment; it shall not, however, carry any expectation of, nor imply any right to, such extension or conversion and shall, unless extended or converted, expire according to its terms, without notice or indemnity"

was inapplicable to the complainant since, in view of the many transfers and reassignments which had occurred throughout the complainant's career, it was correct to hold that the complainant had not been given a single appointment, but a succession of appointments which exceeded the fixed duration of his original appointment, which had therefore reached its term without being either extended or converted as such. The matter did not therefore fall within the Director-General's discretion, and the Tribunal was fully competent to censure the irregularities committed. Besides, the Administration could not invoke Staff Rule 104.6 (*b*) even if it were applicable because of the impropriety which it had committed in appointing the complainant without having available or providing a post with precise functions for him, an action which violated Staff Regulation 4.1.

The Tribunal first considered the receivability of the complaint submitted by the complainant's widow. It recalled that article II, paragraph 6, of the Statute of the Tribunal provided that:

> "The Tribunal shall be open—
> (*a*) to the official, even if his employment has ceased, and to any person on whom the official's rights have devolved on his death;".

It followed that the widow of an official or former official could resume proceedings before the Tribunal instituted by her husband before his death, but that she could not submit any claims other than those which her husband was entitled to present, and specifically could not make a personal claim and in particular claim compensation for any injury which she alleges that she herself has suffered.

As to the legality of the decision impugned, the Tribunal considered, on the basis of the evidence in the file, that the complainant's claim that the provisions of Staff Regulation 4.1 had not been properly applied was without foundation. Secondly, in extending the complainant's original contract several times, the Director-General had acted within the authority conferred on him by Staff Rule 104.6 (*b*). Thirdly, in transferring the complainant to a series of posts, the Director-General had simply been applying the provisions of Staff Regulation 1.2; even supposing that the Organization had been gravely at fault in not employing him on the work for which he had been recruited, that circumstance would not have been such as to vitiate the impugned decision not to renew his contract. Lastly, the Tribunal observed that the offer of a P-4 post made to the complainant by the Organization did not imply any demotion, entailing as it did the conclusion of a new contract. To avoid incurring the injury for which he had claimed compensation, the complainant could have accepted that offer, which in the circumstances of the case appeared to be a reasonable one. The Tribunal accordingly dismissed the complaint.

5. Judgement No. 191 (15 May 1972): Ballo v. United Nations Educational, Scientific and Cultural Organization

Complaint seeking the rescinding of a decision not to renew a fixed-term contract—Limits of the Tribunal's authority to review such a decision—Illegality of a decision based on a partial assessment of the work of a staff member

The complainant, a Czechoslovak national, received a two-year appointment on 29 July 1968; on 4 May 1970, he was informed orally by the Permanent Delegate of the Czechoslovak Socialist Republic that he was to return to Czechoslovakia on the expiry of his appointment. In a minute dated 5 May 1970 addressed to two senior officials of UNESCO, the Director-General criticized the work being done by a team of officials which included the complainant, and added that changes were required in the team's composition. The complainant's superiors having shortly after submitted to the Director-General a proposal for a two-year extension of his appointment, the Director-General expressed serious reservations with regard to the complainant and extended his appointment for only one year. In February 1971, the complainant received a highly commendatory performance report from his superiors and, a few weeks later, the Senior Personnel Advisory Board unanimously recommended granting him a three-year extension of his appointment. In a minute dated 30 April 1971 the Director-General described this appraisal as unduly laudatory and indicated that his assessment of the complainant's services was "decidedly unfavourable". He accordingly opposed renewal of the complainant's appointment. On 18 June 1971 the Director of Personnel informed the complainant that his appointment would terminate on 31 August 1971 in accordance with Staff Rule 104.6 (*b*). The com-

plainant having fallen ill, his appointment was extended several times. Meanwhile, the acting chargé d'affaires of the Permanent Delegation of Czechoslovakia to UNESCO had, in a letter dated 11 May 1971, informed the Director-General that the Czechoslovak Government "could not agree to extension of the contract" of the complainant. The Director-General replied that an offer of extension of appointment to a member of the staff of the Organization was a matter within the Director-General's entire discretion and must be made solely on account of the official's merits or qualifications and his usefulness to the Organization; he added that those were the criteria on which he had based his decision not to extend the complainant's appointment.

The Appeals Board, to which the complainant had appealed, recommended the Director-General to reject the appeal. The complainant then submitted the case to the Tribunal, requesting it, *inter alia*, (1) to order " production by UNESCO of every document in the complainant's file, whether it concerns correspondence between the Organization and the Czechoslovak Government regarding his services or attempts by his superiors to obtain his reclassification in UNESCO and (2) to quash the Director-General's decision not to renew his appointment".

The Tribunal ordered some documents to be produced and, noting that they were of a confidential character, merely informed the complainant of the tentative conclusions it had drawn from them, namely, that, under proposals for reorganization made by the Assistant Director-General responsible and rejected by the Director-General, it would have been possible to retain the complainant in the Organization's service in another post. After further consideration, however, the Tribunal reached its decision without relying on these documents.

As to the legality of the impugned decision, the Tribunal recalled that, under Staff Rule 104.6 (*b*), the decision not to renew a fixed-term appointment lay within the discretionary authority enjoyed by the Director-General. The Tribunal added, however, that discretionary authority must not be confused with arbitrary power; it must, among other things, always be exercised lawfully, and the Tribunal, which had before it an appeal against a decision taken by virtue of that discretionary authority, must determine whether that decision was taken with authority, was in regular form, whether the correct procedure had been followed and, as regards its legality under the Organization's own rules, whether the Administration's decision was based on an error of law or fact, or whether essential facts had not been taken into consideration, or again, whether conclusions which were clearly false had been drawn from the documents in the dossier, or, finally, whether there had been a misuse of authority.

The Tribunal noted that in refusing to extend the complainant's appointment, the Director-General had based his decision solely on the fact that on every occasion on which he had personally seen the complainant at work the latter had shown himself quite inadequate for his assignments. The Director-General had thus formed a general opinion of the complainant which took account merely of a very small part of his work. While the Director-General was entitled to differ from the opinion expressed by the high-ranking officials who were the complainant's supervisors, he should have taken into account not only the complainant's attitude on the occasions on which he had "personally seen him at work", but also the quality of the complainant's general performance of his duties as attested by his immediate supervisors in highly favourable terms. The Director-General had fallen into the error of supposing that because the limited part of the complainant's work which he himself had seen was bad in his opinion, therefore the complainant's work as a whole was to be condemned. In treating as of no account the unanimous opinion of those who were familiar with the whole of the complainant's performance, he had failed to take into consideration essential facts of the case.

The Tribunal accordingly quashed the impugned decision and decided that the complainant was entitled to renewal of his appointment for three years or, failing that, the compensation amounting to 100,000 French francs as full and final settlement.

6. Judgement No. 192 (13 November 1972): Baracco v. World Health Organization

Complaint impugning a decision to terminate the appointment of a staff member during his probationary period on medical grounds—Such a decision lies within the Director-General's discretion

The complainant, who was engaged for a post in Africa under a two-year contract with a probation period of one year, fell ill during the first weeks of his appointment. Following four months' sickness leave, he was interviewed by the Medical Adviser of the WHO Medical Service, who informed the Personnel Department that it would be ill-advised to reassign the complainant to Africa before several months had elapsed. The Organization then decided to terminate the complainant's appointment under Staff Rule 960. The complainant impugned that decision, and a Medical Board was set up, consisting of the WHO Medical Adviser, the complainant's own physician and a doctor chosen by the two others. Two of the doctors found that the medical reasons invoked for not confirming the appointment were valid, and the Director-General informed the complainant that his decision stood.

The Tribunal, to which the case was submitted, recalled that under Staff Rule 960 provision was made for termination of the appointment of a staff member who, during his probationary period, proved unsuitable for his post on medical grounds. Any decision taken under that provision lay within the Director-General's discretion, and could therefore be set aside by the Tribunal only if it had been taken without authority, was irregular in form or tainted by procedural irregularities or by illegality, or was based on incorrect facts, or if essential facts had not been taken into consideration, or if there had been a misuse of authority, or if conclusions which were clearly false had been drawn from the documents in the dossier. In the first place, the complainant charged the Organization with having failed to give him a medical examination before he took up his post. The Tribunal observed, however, that that procedure was in accordance with practice, and that it did not infringe the applicable regulations; moreover, a further examination at the Organization's headquarters would in all probability not have revealed the causes of the breakdown which was the reason for the decision to terminate the complainant's appointment. The complainant further argued that he had not been seen by the Medical Board to which his case had been referred for consideration. The Tribunal considered that, under Staff Rule 1020.2, the Medical Board was authorized to carry out such examinations as it might deem necessary, and was therefore justified in making its recommendation in the light of the dossier. Lastly, the complainant contended that his breakdown was due to unsuitable working conditions, and that the Director-General should have inquired into those conditions. The Tribunal considered that the Director-General had not exceeded his discretion in failing to undertake such an inquiry: whether or not the complainant's criticisms were justified, the fact remained that he had reacted to the alleged difficulties in an abnormal manner which gave plausibility to the possibility of a relapse and appeared to justify his termination under Staff Rule 960.

The Tribunal accordingly dismissed the complaint.

7. JUDGEMENT NO. 193 (13 NOVEMBER 1972): BERGIN v. UNITED NATIONS FOOD AND AGRICULTURE ORGANIZATION

Claim submitted by a staff member for compensation for damages—Such damages can only serve as the basis for a claim for compensation before the Tribunal if they flow from an unlawful decision by the Director-General

The complainant was assigned in 1967 to a project in Iran and at that time resigned from the Agricultural Institute in Dublin, at which he had held a permanent appointment before his entry to the FAO. The Project Manager having requested his transfer (indicating that the complainant knew nothing of the action taken in his regard), and the allegations made in support of that request having been fully borne out by a headquarters official on an inspection visit, the complainant was transferred to Rome, and subsequently to a post in Jordan. Once in 1969, and again in 1970, his annual increment was withheld. The Appeals Committee, to which the case was submitted, held that the complainant's transfer had not been tainted by any irregularity and that the FAO had made proper efforts to find him another assignment. It held, however, that the complainant had not been informed of the steps taken by the Project Manager to obtain his transfer and that it had not been proved that the Project Manager had held full and frank discussions with him on the subject beforehand. Similarly, the complainant had had the second annual increment due to him withheld without first receiving an appraisal report criticizing his work performance. The Appeals Committee accordingly recommended that the complainant should receive a certificate of satisfactory service and that, if he should submit any further application for employment, it should be treated on an equal footing with those of other applicants; it further recommended that the first decision to withhold an annual increment should be quashed (the second decision had already been annulled by the Administration) since there were reasonable grounds for doubting whether the procedural requirements in respect of withholding an increment had been fully complied with. The Committee held, however, that the complainant's further claims were ill-founded. The Director-General accepted the Appeals Committee's recommendations.

Before the Tribunal, the complainant requested compensation "for the other damages inflicted", in particular, the loss of a permanent post in the Agricultural Institute in Ireland and the disruption of his children's education.

The Tribunal considered that those claims were not sustainable except as an element of damage flowing from some unlawful decision by the Director-General. The only unlawful decision alleged by the complainant was the decision which had resulted in his transfer to Rome. There had been certain irregularities in that connexion (which had been remedied by the acceptance of the Appeals Committee's recommendations), but they did not invalidate the decision to transfer; that decision had been taken following an inquiry which had been regularly conducted and after the complainant himself had been heard, and indeed it had not been contested by the complainant at the time it was made. The Tribunal accordingly dismissed the complaint.

8. JUDGEMENT NO. 194 (13 NOVEMBER 1972): VRANCHEVA v. WORLD HEALTH ORGANIZATION

Decision to terminate a probationary contract—Quashing of the decision as being based on insufficient grounds—Remittal of the case to the Director-General

The complainant was engaged on a one-year probationary contract, at the end of which her supervisor prepared a partially unfavourable report on her and recommended that her probationary period should be extended by one year. At the end of that second

year, she received a further unfavourable report and was informed that her appointment would be terminated at the end of her probationary period. The decision not to renew her appointment was confirmed shortly afterwards. Having appealed against that decision to the Director-General, and having failed in that appeal, the complainant appealed to the Tribunal, maintaining, *inter alia*, that the criticisms contained in the two appraisal reports were not supported by any specific allegation which was open to refutation; that her supervisor had failed to instruct and guide her in learning to perform her functions; and that the decision had already been taken before she had had an opportunity to submit comments in response to the criticisms of her.

The Tribunal recalled that, under WHO Staff Rule 960, if, during an initial or extended probationary period, a staff member's performance was not satisfactory, the appointment would not be confirmed but terminated. It stressed that although the reason given for the decision impugned was that the complainant's services were unsatisfactory, no real evidence had been produced to substantiate that allegation. Moreover, at no stage in the procedure, in spite of repeated requests on her part, was the complainant able to obtain clarification of the specific facts motivating the unfavourable appraisal by the chief of her branch of the manner in which she carried out her duties. In addition, the Organization, in its submission to the Tribunal itself, had not supplied any further explanations concerning the complainant's work performance. The impugned decision was thus based on insufficient grounds, and it was therefore for the Director-General to reopen the case and to consider, by such means as he might deem appropriate, whether the appraisal made by her immediate supervisor was well-founded. The Tribunal accordingly quashed the impugned decision and remitted the case to the Director-General for a new decision after a proper examination of the facts.

9. JUDGEMENT NO. 195 (13 NOVEMBER 1972): CHWALA V. WORLD HEALTH ORGANIZATION

Request for the quashing of a decision not to renew a fixed-term appointment

The complainant had first been assigned to Nepal, and later transferred to Afghanistan. His appointment was extended for several further periods and his performance reports were always satisfactory. On 22 November 1968 he was informed that his appointment would not be extended after 28 February 1969. That decision was based on the comments of the Senior Malariologist of the Regional Office who had indicated in writing that the complainant was not up to the required standard. The Regional Board of Inquiry and Appeal, to which the case was submitted, held that he had been the subject of prejudice and recommended, *inter alia*, that the Regional Director should extend the complainant's appointment from 1 March 1969. The Regional Director accepted that recommendation: he extended the complainant's contract for one year and, on 1 March 1969, the Afghan Government was informed that the complainant would shortly resume work.

On 1 June 1969 the President of the Malaria Institute of Afghanistan informed the Regional Office that the Afghan authorities did not desire the complainant's return. The Regional Office asked the other Regional Offices to try to find the complainant another post. All sent negative replies, except the Regional Office for the Western Pacific, which did have a post free, but one to which the complainant had not been appointed because of the opposition of the Senior Malariologist of the Regional Office. A further offer from the Regional Office for Africa came to nothing. On 14 November 1969 the complainant was informed that his appointment would terminate on 30 November 1969. The head-quarters Board of Inquiry and Appeal nevertheless recommended that the decision to

renew the complainant's appointment for one year from 1 March 1969 should be honoured in full and that the complainant should be paid all his entitlements under the one-year appointment.

The Tribunal, which the complainant prayed to quash the decision in question, noted that the reason given by the Organization for not renewing the complainant's contract was that the Afghan Government had expressed the wish that the Organization could arrange that the complainant should not return to Afghanistan; and that thereafter it had not been possible to find for him any other assignment. The Tribunal observed that the reason for the Regional Director's decision not to renew the complainant's contract was an assertion by the Senior Malariologist of the Regional Office that the staff member was not up to the required standard. Subsequently, the Regional Director had reversed his decision, following the advice of the Regional Board of Appeal, which had found that there had been "administrative prejudice... possibly based on personal prejudice" against the complainant. Having examined the dossier, the Tribunal considered that that finding was correct and that the Senior Malariologist had been strongly and quite unjustifiably prejudiced against the complainant.

Further, the Tribunal recalled that, when the President of the Malaria Institute of Afghanistan had expressed his wish that it should be arranged for the complainant not to return to work in Afghanistan, he had said that he considered that the complainant was below the standards required. The Tribunal noted:

(1) that that conclusion was the same as that contained in the adverse report by the Senior Malariologist;

(2) that the conclusion gave no particulars;

(3) that the conclusion ran contrary to all previous reports about the complainant's work;

(4) that the Afghan Government had not at any time previously during the four years of the complainant's service expressed any dissatisfaction with his work; and

(5) that the President of the Malaria Institute of Afghanistan had only been expressing a wish.

In those circumstances, the Organization was under a duty to the complainant to ensure that all relevant matters were brought to the attention of the Government of Afghanistan. Having examined the dossier, the Tribunal could not conclude that the Organization had satisfactorily discharged its duty as aforesaid.

The Tribunal accordingly quashed the impugned decision and awarded the complainant compensation amounting to $US 20,000 to cover both moral and material damage.

10. JUDGEMENT NO. 196 (13 NOVEMBER 1972): TEWFIK v. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Complaint seeking either reclassification of a post to a specific grade or a transfer to a post at that grade— Irreceivability of claims submitted for the first time by the complainant in his rejoinder subsequent to the expiry of the prescribed time-limit for appeals—The rule concerning exhaustion of internal appeal procedures—The rule that when an appointment is made it must be assumed that the authority making it has had the opportunity of choosing between a number of possible candidates, except in cases where a candidate has been deprived of his post after a long period of service

The complainant was appointed to a D.1 post in New Delhi; his appointment was extended twice. Having been informed on 17 March 1971 by the Director-General that

he was to be transferred to Paris to a P.5 post but that he would continue to be graded D.1 and to receive the remuneration corresponding to that grade, he appealed against that decision on 7 April 1971 and sent a request for a hearing to the secretary of the Appeals Board. On 27 April he lodged with the Appeals Board a request that his post be reclassified or that he be reassigned to his old post in New Delhi and that his appointment be renewed for six years. The Appeals Board recommended that the complainant should be authorized to submit a request for the reclassification of his post through the normal channels, despite any exceeding of the statutory time-limits, and that the remainder of his appeal should be dismissed. That recommendation was accepted by the Director-General, who granted the complainant a time-limit of one month (ending on 11 September 1971) for submission of the request for reclassification to the appropriate body. On 10 September 1971 the complainant submitted that request, and, on 8 November, appealed to the Tribunal requesting it to order the Organization (1) to reclassify his post at the D.1 grade or to transfer him to any other D.1 post compatible with his experience or qualifications and (2) to guarantee him a normal professional future. Following the Organization's reply, the complainant submitted a rejoinder in which he requested cancellation of his transfer, reinstatement in his former post and, in the event of his present post not being regraded or being abolished, transfer to a D.1 post at Headquarters.

The Tribunal, to which the case was submitted, first stressed that it could not go beyond the claims submitted to it by the complainant within the time-limit of 90 days laid down by article VII, paragraph 2, of its Statute. The claims put forward subsequently by the complainant, either in his rejoinder or in another memorandum, could thus be considered only in so far as they did not go beyond the claims submitted within the prescribed time-limit. Otherwise the purpose of the rule requiring the complainant to take action within 90 days on pain of irreceivability would be frustrated. In that connexion, the Tribunal observed that the claims submitted in the rejoinder either duplicated those in the original complaint or went beyond them: in the first case, therefore, they were superfluous, and in the second, irreceivable.

As to the receivability of the appeal before the Appeals Board, the Tribunal recognized that the approach to the Appeals Board on 7 April was in fact premature, since it was not preceded by a decision by the Director-General on a request for reconsideration. However, the Tribunal observed that the appeal addressed to the Director-General on 7 April had been dismissed on 15 April, and that the complainant could thus properly file an appeal as from 15 April: the claims he had submitted to the Appeals Board on 27 April were thus receivable.

As to the claim for reclassification, the complainant's claims were irreceivable because they were submitted contrary to the principle concerning exhaustion of internal appeal procedures. It was true that the complainant had submitted a claim to the Consultative Committee on Classification but he had not waited for the Committee to make its recommendation, for the Director-General to take a decision on that recommendation and for the Director-General's decision to be confirmed, if necessary, after an appeal to the Appeals Board, before lodging an appeal with the Tribunal. Admittedly, the request which had been submitted to the Consultative Committee on Classification had been refused, on the recommendation of that Committee, in a decision notified on 24 February 1972. However, the complaint before the Tribunal was not directed against that decision and therefore the Tribunal did not have to consider it. Moreover, as that decision had not been resisted by the internal means available, it had become final and could no longer be impugned before the Tribunal.

As the claim for transfer to a D.1 post, the Tribunal stressed that, in principle, when an appointment was made it must be assumed that the authority making it had had the opportunity of choosing between a number of possible candidates. While, therefore, the

complainant was entitled to resist the refusal to appoint him to a specific post which had been put up for competition, he could not claim to be appointed to any D.1 post without the appointing authority having had the opportunity to appraise the various candidates who might have applied. Any other procedure would have been justified only if the complainant had been deprived of his post after serving the Organization for a particularly lengthy period of time, and that did not apply in the complainant's case.

Finally, as to the claim for guarantees, the Tribunal recalled that at the date when that request had been addressed to it, no decision had yet been taken as to whether the complainant should be kept in the service of the Organization after the expiry of his current contract. The Tribunal could thus not deal with that claim. It was true that the complainant had been informed on 15 March 1972 that, failing his appointment to another post, and in the event of the proposal to abolish his unit being approved by the General Conference, his contract would be terminated on 31 December 1972. However, while that communication might be regarded as a decision, it could not be impugned before the Tribunal since the complainant had not availed himself of the internal means of resisting it which were available to him. The Tribunal accordingly dismissed the complaint.

11. JUDGEMENT NO. 197 (13 NOVEMBER 1972): STERNFIELD V. WORLD HEALTH ORGANIZATION

Termination of an appointment at the end of the probationary period—Authority competent to prepare periodic reports on a staff member—Limits of the Tribunal's authority with regard to decisions falling within the discretion of the Director-General

The complainant was granted a two-year appointment, which was subject to a minimum probation period of one year. Since the Organization decided not to confirm the appointment at the end of his probation period, the complainant lodged a complaint with the Tribunal contending (1) that he had not received the minimum probation period, the Director of his unit having in fact decided to terminate his appointment just over five months after the beginning of his appointment; (2) that, in violation of Staff Rule 430.3, his periodic report had been prepared not by his supervisor, the Assistant to the Director, but by the Director himself; (3) that his supervisors had not discussed their conclusions with him; (4) that his work was of a high professional calibre.

As the procedural arguments set out in points (1) to (3) above, the Tribunal reached the following conclusions: (1) there was no statutory provision or general rule of law that made it mandatory for the Organization to retain a staff member on probation in its service for at least a year if, before the year had expired, the competent authority had come to the conclusion that the staff member concerned was unsuitable for the post to which he had been assigned. In any event, the Tribunal added, the complainant's appointment had not in fact been terminated until one year after his appointment; (2) the principle that reports on every staff member must be made in the first place by his immediate supervisor could not be strictly applied in some units in which, because of their nature, activities or the very form of their organization, a small number of officials were associated in a specific common task. In the case at issue, all the texts published by the unit to which the complainant had been assigned had to be presented in a co-ordinated manner and in a style conforming to certain standards of uniformity and clarity for the benefit of readers of different nationalities. Hence the Director of the unit was qualified to report directly on the complainant, whose work he had been in a position to appraise on a day-by-day basis, merely consulting the complainant's immediate supervisor, as in fact he had done; (3) it was within the Director-General's discretion to decide whether, in order to establish the facts, it was necessary to give a personal hearing to the staff member. In the case at issue

the Director-General was entitled to consider, on the basis of the evidence submitted both by the complainant and by his supervisors, that it was unnecessary for him to interview the complainant.

As to substance, the Tribunal considered that, in making his appraisal of the claimant, the Director-General's decision was not tainted by illegality or based on incorrect facts, that he had not failed to take account of essential facts and that he had not drawn from the evidence conclusions that were clearly false. The Tribunal's power to review the substance of the case was limited to the foregoing four points, and it could not substitute its own judgement for that of the head of the Organization. The complaint was accordingly dismissed.