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1974

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Part Two. Legal activities 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. 181 (19 APRIL 1974):[2] NATH v. SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting a decision not to renew a fixed-term appointment

The applicant, an official seconded from the Indian Government, had completed an initial two-year period of service with UNICEF from 20 September 1966 to 20 September 1968. On 7 November 1968, an extension of his deputation until 11 September 1970 having been approved by the Indian Government, he signed a letter of appointment for a fixed term of one year from 20 September 1968 to 19 September 1969. On 3 June 1969, UNICEF offered him the following option: either to sign a contract for an additional and final year or to return to Government of India service when his current contract expired. The applicant chose the first alternative and signed a letter of appointment for a fixed term of one year, from 20 September 1969 to 19 September 1970. When that appointment expired, the applicant protested against the non-extension of his appointment and filed with the Tribunal an application in which he contended that he had accepted assignment to UNICEF, in conditions disadvantageous to him both financially and from the point of view of his career as an Indian civil servant, only on the explicit commitment on the part of UNICEF that he would be retained in the Organization at least until the normal retirement age for UNICEF staff members.

The Tribunal found that the documents on record did not support the applicant's assertion that he had a verbal commitment of continued employment. As a senior civil servant of the Government of India, he could not negotiate with UNICEF for periods of employment beyond that which had been agreed to by the Government in its secondment. Moreover, the

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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 1974, 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 and 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. F. T. P. Plimpton, Vice-President; Sir Roger Stevens, Member.

applicant had not protested when he had been offered the option referred to in the first paragraph above and, on the contrary, had opted for an additional and final year of service.

The Tribunal therefore found that the employment relationship established between the applicant and UNICEF in September 1966 had been for a fixed term of two years and no more, and that the employment commitments thereafter given the applicant were also for fixed terms, with no expectancy of renewal as provided in Staff Rule 104.12 (*b*).

2. JUDGEMENT NO. 182 (19 APRIL 1974):[3] HARPIGNIES v. SECRETARY-GENERAL OF THE UNITED NATIONS[4]

Application alleging the existence on the part of the respondent of an obligation to maintain unchanged the purchasing power of a retirement pension adversely affected by the devaluation of the dollar

The applicant, a United Nations pensioner resident in Belgium, complained that as a result of the devaluation of the dollar, used as the monetary unit in the Pension Fund Regulations, the real value of his retirement pension had diminished considerably. He had requested the Secretary-General to pay him allowances over and above his pension, basing his request on what he deemed to be the Organization's obligation to maintain the effective purchasing power of his retirement pension. Not having received satisfaction, he filed this application with the Tribunal.

The Tribunal first asserted that while the increase in the cost of living was a general phenomenon affecting to a greater or lesser extent all retired staff members, whatever their country of residence, the devaluation of the dollar had materially altered the situation in some countries. It also recalled that since 1965, the General Assembly had adopted various measures to remedy the situation of retired staff members: it referred in that regard to the work undertaken by the Joint Staff Pension Board and by the Advisory Committee on Administrative and Budgetary Questions, as well as to General Assembly resolution 2944 (XXVII) providing for the granting of additional adjustments over three years applying to the first $3,000 of pensions, and to resolution 3100 (XXVIII) providing for (1) the payment of a transitional adjustment calculated as a percentage of the basic benefit and (2) the application of a revised pension adjustment index capable of responding more rapidly to changes in the cost of living.

The Tribunal noted that the applicant was not questioning the line of conduct of the Pension Fund or its interpretation of General Assembly resolution 3100 (XXVIII); he was seeking in effect recognition that there was an obligation, on the part of the Secretary-General, to ensure the stability of the purchasing power of his pension by granting him additional compensation.

The Tribunal first determined the legal basis of the applicant's right to a pension. In that regard, it noted that the legal status of the applicant as a United Nations staff member was based on a contract which, *inter alia*, provided for his participation in the Pension Fund. Since that was a contractual provision, the respondent could not legally have abolished unilaterally the applicant's participation in the Pension Fund. But the contract itself said nothing further

[3] Mr. R. Venkataraman, President; Mme P. Bastid, Vice-President; Mr. F. T. P. Plimpton, Vice-President. Mr. F. T. P. Plimpton annexed to the judgement a statement in which he recorded while agreeing with the substance and conclusions of the judgement, his inability to concur with some of the reasoning or with some of the wording.

[4] A number of retired staff members of international organizations submitted applications for intervention. The Tribunal ruled that the applications for intervention submitted by former United Nations staff members were admissible; however, it ruled that the application for intervention submitted by a former staff member of ICAO was not admissible for the reason that the effects of a judgement against the Secretary-General of the United Nations could not extend to another intergovernmental organization as a result of an application for intervention.

with regard to such participation. It did, however, refer to the Staff Regulations and Rules as the law governing the contract, so that the practical effects of the applicant's participation in the Pension Fund derived from regulations established by the General Assembly under Article 101, paragraph 1, of the Charter.

After studying the relevant texts, the Tribunal concluded that, under the law applicable by virtue of the applicant's contract, the respondent had no financial obligations toward the applicant other than those incumbent upon him under the Pension Fund Regulations and the resolutions of the General Assembly.

The Tribunal noted further that the applicant was bound by article 48 of the Pension Fund Regulations, which read as follows:

"(*a*) Contributions under these Regulations shall be calculated and remitted to the Fund in dollars.

"(*b*) Benefits shall be calculated in dollars and shall be payable in any currency selected by the recipient, at the rate of exchange for dollars obtained by the Fund on the date of payment."

The applicant in effect was complaining against the application of that text and more particularly of the provision relating to the rate of exchange "on the date of payment". There was no doubt, however, that since the respondent had specifically recognized in the contract the applicant's right to a pension, he would be contractually liable if, through his action or omission, the applicant's participation in the Pension Fund were to lose any practical significance or if the effects of such action or omission were so contrary to general principles of law applicable to pensions as to render the very notion of pension meaningless.

Considering subsequently whether the right to a pension gave a right to the maintenance of the purchasing power of the pension which the United Nations would be required to guarantee, the Tribunal rejected the applicant's view which tended to assimilate the pension system and the salary system. The adjustment of pensions to the cost of living doubtless appeared to be a social requirement as well as a means of maintaining for the international civil service a prestige likely to encourage recruitment of high-quality staff, but it could not be regarded as a rule of law so precise as to affect the contractual responsibility of an organization. Furthermore, since 1965 the General Assembly had taken steps to increase pensions in relation to the cost of living, and it could not be claimed that the alleged inadequacy of those measures threw any liability on the respondent.

In selecting, under article 48 of the Pension Fund Regulations, the Belgian franc as the currency in which the pension would be paid, the applicant had been involved in an exchange rate which operated to his disadvantage after 1971. It is true that he found himself, because of this, in an unfavourable position in comparison with his colleagues residing in the United States, but there was no infringement upon his right to a pension for which the respondent could be held liable.

The Tribunal recognized that in the absence of a provision similar to that contained in article IV (1) of the Articles of Agreement of the International Monetary Fund (which refers to the United States dollar of the weight and fineness in effect on 1 July 1944), the devaluation of the dollar—the monetary unit which had been regarded for more than 25 years as the best suited to the needs of the general international organizations—had deeply affected international organizations and altered many existing situations, including those of retired staff members of the United Nations. It did not seem, however, that the resulting inequality of treatment, which was not attributable to the Organization, imposed any specific duty on its part towards a retired staff member.

As the applicant, while criticizing the effectiveness of the measures taken by the General Assembly and which the Tribunal was not qualified to judge, had not proved any breech of a contractual obligation incumbent on the respondent, the Tribunal rejected his application. However, it trusted that the respondent and the General Assembly would give continuing attention to pensioners' financial difficulties. Considering, finally, that the applicant had raised very important questions and that the Tribunal had received from him valuable information

for the consideration of the case, the Tribunal decided to award him the sum of $500 in lieu of costs.

3. JUDGEMENT NO. 183 (23 APRIL 1974):[5] LINDBLAD V. SECRETARY-GENERAL OF THE UNITED NATIONS

Application seeking rescission of a decision of dismissal for serious misconduct—Right of every staff member involved in disciplinary proceedings to be accorded fair procedure

The applicant, who had been working with UNTSO for two and a half years under fixed-term appointments, was dismissed for misconduct under Staff Regulation 10.2 and Staff Rule 110.3 (*b*). He was charged with purchasing at the UNTSO Service Institute of Jerusalem tax-free goods in quantities in excess of his personal requirements, in contravention of the directives regarding privileges and immunities given in the Field Administration Handbook.

The Joint Appeals Board, considering the case, was concerned to find that in spite of the decision of the Tribunal in the Zang-Atangana case,[6] no procedure equivalent to referral to the Joint Disciplinary Committee had been established for staff members serving at duty stations other than Headquarters or Geneva. In view of the absence of an examination of the case by a body such as the Joint Disciplinary Committee, the Board felt obliged to look itself into the substance of the case. While emphasizing the importance for all staff members to maintain high moral standards and while recognizing that the applicant's behaviour justified his leaving the service of the United Nations, the Board considered that in the light of the facts of the case, a less severe disciplinary measure might have been more appropriate. Consequently, it recommended that the Secretary-General should withdraw his decision of dismissal for misconduct, that a written reprimand should be placed in the applicant's file and that he should be allowed to resign from the date on which he actually left the service of the United Nations.

That recommendation was not accepted by the Secretary-General, who maintained his initial decision.

The applicant claimed before the Tribunal that the contested decision was based on an erroneous assumption that he had been guilty of disposing of tax-free goods on a number of occasions and over a prolonged period, for which, contrary to the norms of due process, he had never been called upon to answer or offer an explanation.

The Tribunal noted that the respondent had adopted the following procedure: all the various documents in the case had been sent by the Chief Administrative Officer to the Chief of the Field Operations Service under cover of a letter which stated: "These documents are self-explanatory and constitute as a whole the report on the case. I assume that nothing further will be needed". In turn, the Chief of the Field Operations Service had sent the same documents to the Office of Personnel, observing that in his opinion they constituted incontrovertible evidence of the applicant's "blatant act of wrong-doing". The Director of Personnel had recommended to the Secretary-General that the applicant should be dismissed for misconduct and that no indemnity should be paid "considering the gravity of the offence to the interests of the Organization".

The Tribunal considered first of all whether the Staff Regulations and Rules had been complied with. It concluded that the respondent had acted within the terms of the Staff Regulations and Rules, but that whenever he had discretion to opt between two courses of action he had selected that which was less favourable to the applicant, who accordingly had received the least favourable treatment, short of summary dismissal, which could be meted out to him within the Staff Regulations and Rules.

The Tribunal then sought to determine whether the applicant had been accorded fair procedure and whether he had had a proper opportunity to give his version of the facts and to give his explanation of his conduct, including extenuating circumstances. In that regard, the

[5] Mr. R. Venkataraman, President; Mme P. Bastid, Vice-President; Sir Roger Stevens, Member.

[6] See *Juridical Yearbook, 1969*, p. 187.

Tribunal first noted that the opportunity given to the applicant to give his version of the facts and to explain his conduct in pursuance of the above procedure had been confined to a statement taken from him at the time that he was apprehended and a further statement made later on the same day; there was no evidence that any written charges had been made against the applicant or that he had had any opportunity to reply in any considered way to such charges. Moreover, the evidence seemed to indicate that account had been taken, in recommending his dismissal, not only of the incident which led to the statements mentioned, but also of allegations that the applicant had repeatedly purchased excessive quantities of tax-free goods; the applicant did not appear to have been given any adequate opportunity to explain those earlier purchases, which in his application he maintained were not excessive. The Tribunal concluded that, having regard to the summary manner in which the applicant's statements had been taken and the absence of any provision for the rebuttal by him of any specific formal charges, the applicant had not been accorded a fair opportunity to give his version of all the relevant facts or to explain his conduct in its entirety.

The Tribunal added that any staff member against whom disciplinary proceedings were taken should be furnished with a specific charge and should be accorded the right to be heard before a sanction was imposed on him; that right included, *inter alia*, the opportunity to participate in the examination of the evidence. In that regard, the Tribunal considered that Personnel Directive PD/1/69, which was applicable to the case in point, did not provide adequate protection for staff members involved in disciplinary proceedings and did not establish an "equivalent procedure" to the Joint Disciplinary Committee procedure as envisaged in Judgement No. 130 (*Zang-Atangana*).

The applicant, then, had not been accorded fair procedure, and consequently the Tribunal decided to assimilate the situation to one of termination of the applicant's contract on the date of his dismissal, and to grant him the termination indemnity as provided in the Staff Regulations.

4. JUDGEMENT NO. 184 (24 APRIL 1974):[7] MILA v. SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting a decision terminating a permanent contract—Such a decision may not be taken until a complete, fair and reasonable procedure has been carried out

The applicant worked for the United Nations Office at Geneva under a permanent contract as a cleaner-mover. After having received three satisfactory periodic reports in succession, he was given a fourth report covering the period 1 April 1970–15 January 1972 rating him as a staff member who maintained only a minimum standard, and he contested the ratings in that report. On 4 May 1972 he was informed that in connexion with the five-year review of his permanent contract, a recommendation to terminate his contract would be submitted to the Appointment and Promotion Panel. That recommendation having been endorsed, the applicant was informed that it had been decided to terminate his appointment and that he would receive compensation in lieu of the notice period, as well as the termination indemnity provided for in the Staff Regulations.

The Joint Appeals Board, to which the case was appealed, found that the way in which the case had been handled revealed administrative short-comings which justified the granting of an appropriate indemnity, i.e., the equivalent of four months' salary at the grade and step of the applicant at the moment of separation.

That recommendation was not accepted by the Secretary-General, who decided to maintain the initial decision.

The Tribunal noted that there were two main issues on which the applicant and the respondent were in fundamental disagreement. The first concerned the applicant's performance of his duties up to the time of his separation from service and the nature of the personal

[7] Mme P. Bastid, Vice-President, presiding; Mr. F. A. Forteza, Member; Sir Roger Stevens, Member.

relationships existing within the group of cleaners-movers at the United Nations Office at Geneva. The second related to the procedures followed in connexion with the termination of the applicant's appointment, as well as the nature and the extent of the inquiry undertaken by the Appointment and Promotion Panel.

The Tribunal recalled that it had stated in several cases (Judgements No. 98, *Gillman*,[8] No. 131, *Restrepo*[9] and No. 157, *Nelson*[10]) that in view of the "rights given by the General Assembly to those individuals who hold permanent appointments in the United Nations Secretariat . . . such permanent appointments can be terminated only upon a decision which has been reached by means of a complete, fair and reasonable procedure which must be carried out prior to such decision". The Tribunal acknowledged that the review carried out by the Appointment and Promotion Board in connexion with a permanent appointment represented, in principle, the "complete, fair and reasonable procedure" required. However, the Tribunal considered that the termination decision might be invalid if taken on the basis of recommendations by the Panel reached in the light of inadequate or erroneous information (Judgement No. 98, *Gillman*) and that the examination of the case by the Panel must be "reasonably detailed". In order to determine whether the termination decision had been taken on the basis of a recommendation formulated by the Panel in accordance with the aforementioned requirements, the Tribunal deemed it necessary to carry out a prior over-all examination of the situation.

As regards the applicant's performance of his duties, the Tribunal came to the conclusion that there had been a progressive deterioration in relations between the team of cleaners to which the applicant belonged and their immediate supervisors during at least two years prior to January 1972 and that the attitude of the supervisors had appeared to become one of confrontation with regard to certain members of the team who were suspected of being ringleaders or troublemakers. Although it was not easy to determine whether the provocation weighed more heavily on the applicant's side or on that of his supervisors, the Tribunal considered that the Chief of the section in which the applicant was employed was either unaware of the atmosphere prevailing in relations between the cleaners and their immediate supervisors or, if he was aware of it, had chosen to regard it as solely attributable to insubordination and lack of co-operation on the part of some members of the team, which was in turn reflected in the alleged deterioration of the applicant's performance. Nevertheless, the Tribunal recognized, as it had done in the *Peynado* case (Judgement No. 138)[11] that it could not substitute its judgement for that of the Secretary-General concerning the standard of performance or efficiency of the staff member involved.

The Tribunal also drew attention to another passage from Judgement No. 138 to the effect that "where the [Appointment and Promotion] Board reached its conclusions in the light of inadequate or erroneous information and the Secretary-General relied on these conclusions for the termination of the appointment, the fact that there was a review by the Board does not secure that that Secretary-General's decision is valid".[12]

The Tribunal considered that there were three serious irregularities in the procedures followed in connexion with the termination of the applicant's appointment. The first related to the nature of the warnings given to the applicant, as to his performance and conduct. In that connexion the Tribunal noted with regret that the applicant had not received any written warning and that there had been no record in his personal file of any verbal warning. The second procedural irregularity related to the failure to observe the administrative instructions which require that where a staff member makes a written statement in explanation or rebuttal of a periodic report the Head of the Department or Service should investigate the case and

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

[9] See *Juridical Yearbook*, 1969, p. 188.

[10] See *Juridical Yearbook*, 1972, p. 126.

[11] See *Juridical Yearbook*, 1970, p. 141.

[12] *Ibid.*, p. 142.

record his appraisal of it, this report to be filed together with the periodic report and the staff member's statement; that failure to comply with the terms of the administrative instruction was the more serious in that the Appointment and Promotion Panel had had to consider the proposal to terminate the applicant's service without the benefit of a proper investigation or appraisal of the situation by the Head of the Department; the periodic report sent to the Panel was thus an incomplete document, as in the *Peynado* case. The third irregularity was that the Appointment and Promotion Panel seemed to have given inordinate weight in its hearings to the testimony of the applicant's supervisors and to have failed generally to probe in sufficient depth the deterioration in relations between the team of cleaners and their supervisors. Given the circumstances of the case, the decision to terminate the applicant's appointment reached on the recommendation of the Panel had not been preceded by a complete, fair and reasonable procedure.

In view of the foregoing considerations, the Tribunal remanded the case for correction of the procedure and granted the applicant compensation equivalent to three months' net base salary for the loss caused by the procedural delay.

5. JUDGEMENT NO. 185 (25 APRIL 1974): [13] LAWRENCE v. SECRETARY-GENERAL OF THE UNITED NATIONS

Application seeking rescission of a decision to terminate a fixed-term appointment prior to its normal expiry, and payment of an education grant for the period of service not completed

The applicant entered the service of ONUC on 11 May 1961 and held several fixed-term appointments with UNDP, the most recent covering the period 1 May 1971–30 April 1973. Following a series of administrative difficulties, and since no suitable assignment could be found for him, the applicant was placed on special leave from 26 January to 29 February 1972. On 24 February 1972 he was notified that since it had not been possible to reassign him to a suitable post, the Administration had decided to terminate his fixed-term appointment under the provisions of Staff Regulation 9.1 (*b*). The formal notice of termination in accordance with Staff Rule 109.3 (*b*) was to take effect on 29 February 1972 and the applicant would receive compensation in lieu of notice in accordance with Staff Rule 109.3 (*c*).

The Joint Appeals Board, to which the matter was submitted, felt that the decision to terminate the applicant's fixed-term appointment prior to the expiration date was not authorized under Staff Regulation 9.1 (*b*) and was therefore improper and should be rescinded. It therefore recommended that the Secretary-General rescind the decision in question and pay the applicant his full salary and emoluments up to the date of expiration of his fixed-term appointment. The Board also recommended that the Secretary-General grant the applicant an *ex-gratia* payment of nine months of base salary, which represented the amount of termination indemnity that he would have received had he held a permanent appointment for 12 years.

The Secretary-General accepted the first of these recommendations but not the second.

The applicant then filed with the Tribunal an application seeking (1) rescission of the decision terminating his fixed-term appointment; (2) reinstatement with retroactive effect to 1 March 1972; (3) payment of an education grant for his children for the period 26 January 1972–1 May 1973; (4) payment of damages in an amount equal to four years of his last salary.

With regard to the first point, the Tribunal noted that acceptance by the respondent of the first of the two recommendations of the Joint Appeals Board was equivalent to a rescission effected by the competent authority who, having expressed no reservations concerning the

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

reasons given by the Joint Appeals Board, must be assumed to have accepted the reasons derived from the irregularity of the decision of 29 February 1972. In these conditions the application with regard to this point no longer had any substance.

With regard to the second point, the Tribunal noted that the applicant's contract expired on 30 April 1973 and that retroactive reinstatement was impossible except in the form of payment and emoluments up to the date of expiry of the contract. This payment having been made, the application on that point also no longer had any substance.

With regard to the third point, the Tribunal noted that according to Staff Rule 103.20 (*b*) the payment of an education grant depended on the fact that the "duty station" of the staff member was "outside his home country". The personnel action form concerning the granting of special leave with pay (26 January–29 February 1972) contained under the heading "Official duty station" the words "New York-Awaiting reassignment". It therefore appeared that the condition laid down in Staff Rule 103.20 (*b*) had been fulfilled until 29 February 1972. The Tribunal, however, noted that the respondent had in a decision of 3 August 1972 retroactively eliminated that reference and stated that the applicant was in fact in Paris. The Tribunal felt that New York incontestably remained the applicant's duty station until the decision of 3 August 1972, which could not affect the applicant's acquired rights nor therefore have legal effect for the period of the special leave (26 January–29 February 1972). On the other hand, when the special leave was extended pursuant to the decision of 18 October 1973, following the recommendation of the Joint Appeals Board, the decision of 3 August 1972 could have effect, so that the applicant, residing in his country of origin, had no duty station and no longer fulfilled the conditions required to be entitled to receive the education grant for the period 29 February 1972–30 April 1973.

With regard to the fourth point, the Tribunal considered the question of whether by rescinding the decision terminating the applicant's fixed-term appointment, the respondent had drawn all the necessary legal inferences. In the Tribunal's opinion, although the applicant held a fixed-term contract, he could reasonably expect to remain in the service of the United Nations in view of his already lengthy service and the acknowledged quality of his services. Moreover, his age and the orientation of his career had undoubtedly made it difficult for him to find a comparable position. Considering that the applicant had sustained material injury and moral damage, the Tribunal decided to grant him compensation in the amount of $26,000.

6. Judgement No. 186 (26 April 1974): [14] Smith v. United Nations Joint Staff Pension Board

Application seeking rescission of a decision ordering the payment of a child's benefit to the child itself—Interpretation of article 37 (a) of the Pension Fund Regulations and Administrative Rule J.2 (e) of the Fund

The applicant had been awarded a disability benefit effective 31 March 1970 and had been informed that the benefit carried with it an entitlement in favour of his son to a child's benefit until he reached the age of twenty-one. The applicant subsequently claimed a child's benefit in respect of his daughter for the period from 31 March 1970 to 21 May 1972, the date on which she had reached the age of twenty-one. The Deputy Secretary of the Joint Staff Pension Board replied that the benefits were in fact payable but that, in view of the apparent existence of exceptional circumstances in the case under Administrative Rule J.2 (*e*) of the Fund, he proposed to pay the benefit directly to the daughter. A dispute ensued between the applicant and the Deputy Secretary of the Board, at the conclusion of which the matter was referred to the Standing Committee of the Board, which decided that the benefit should be paid to the

[14] Mr. Venkataraman, President; Mme P. Bastid, Vice-President; Mr. F. A. Forteza, Member; Mr. Mutuale Tshikankie, Member.

daughter in accordance with the terms of article 37 (*a*) of the Regulations of the Fund[15] and Administrative Rule J.2 (*e*) of the Fund.[16]

The Tribunal, which had before it an application for the rescission of the aforementioned decision, observed that the applicant considered himself entitled to the child's benefit in question because proof of exceptional circumstances—which he believed the Board had the onus of providing—had not been supplied. The applicant also argued that, as his daughter had been over twenty-one on the date of the decision of the Standing Committee, a strict reading of article 37 (*a*) of the Pension Fund Regulations would make the payment of the child's benefits to his daughter illegal and improper.

The Tribunal rejected that interpretation, which would have led to an absurdity, namely that regardless of age a child under twenty-one would become the recipient of the child's benefit, and to a contradiction with Administrative Rule J.2 (*e*), which prescribed payment of the benefit to the participant (and not to the child) "unless there are exceptional circumstances".

The Tribunal noted further that the Standing Committee had not given any reasons for its decision. The Pension Board's plea that the consideration by the Standing Committee of an issue submitted to it did not involve adversary proceedings did not, in the opinion of the Tribunal, absolve the Standing Committee of its duty to spell out the grounds for its decisions. However, the Tribunal observed that a letter to the applicant from the Pension Board indicated that the latter considered that it was the daughter who was entitled to the child's benefit in terms of article 37 (*a*) of the Pension Fund Regulations and that as the child in question, having attained majority and the competence to issue a valid receipt, had claimed the benefit, the benefit was legally payable to her. The Tribunal did not accept that argument. It observed that a parent might be left without reimbursement of the amounts he had spent on behalf of the child if the child, on attaining the age of twenty-one, claimed the benefit which had accrued but had not been paid to the parent. The test therefore, according to the Tribunal, was not whether the child had attained the age of twenty-one and was in a position to give a valid receipt, but whether the circumstances were normal—in which case the parent was entitled to receive the child's benefit—or whether the circumstances were exceptional, in which case the parent was not entitled to receive the benefit on behalf of the child.

Nevertheless, the Tribunal observed (1) that the Standing Committee had received full information from the two parties claiming the child's benefit—namely, the applicant and his daughter—before reaching its conclusion; (2) that the Standing Committee's reference to Administrative Rule J.2 (*e*) recognized implicitly that there were exceptional circumstances; and (3) that the material submitted to the Committee and the Tribunal demonstrated that there were exceptional circumstances. It therefore rejected the application.

7. Judgement No. 187 (26 April 1974):[17] Quemerais v. Secretary-General of the United Nations

Application for revision of a judgement of the Tribunal, under article 12 of its Statute

The applicant, a former staff member of the European Office of UNICEF, who had been terminated when his post was abolished, sought to obtain, under article 12 of the Statute of the

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[15] The article reads as follows:

"A child's benefit shall, subject to (*b*) and (*c*) below, be payable to each child of a participant who is entitled to a retirement, early retirement or disability benefit or who has died in service, while the child remains unmarried and under the age of twenty-one."

[16] This rule reads as follows:

"Benefits payable under the Regulations to the children of a participant shall, unless there are exceptional circumstances, be paid on their behalf to him and, upon his death, to the surviving parent or legal guardian of each child, in accordance, *mutatis mutandis*, with (*a*), (*b*), (*c*) and (*d*) above."

[17] Mme P. Bastid, Vice-President, presiding; Mr. R. Venkataraman, President; Mr. Mutuale Tshikankie, Member.

Tribunal, the revision of Judgement No. 172 pronounced by the Administrative Tribunal on 5 April 1973.[18] In that judgement the Tribunal had decided that the applicant had been improperly terminated, but that, as a locally recruited staff member, he was entitled to remain in service in the European Office of UNICEF only so long as the Office had its headquarters in Paris; since the Office had been transferred to Geneva on 1 October 1972, the applicant's reinstatement could not be ordered, and the Tribunal had accordingly awarded the applicant an indemnity in lieu of reinstatement.

The applicant claimed to have discovered that the Service in which he was employed had not in fact been transferred until 31 August 1973 and he added that part of the staff of the Office had been assigned to a new UNICEF Office in Paris. He concluded that, since Judgement No. 172 had been given on 5 April 1973, his reinstatement could have been ordered on that date, for the period extending up to 31 August 1973 at the very least, and that he could even still be currently employed in Paris. The application for revision therefore sought to obtain the reinstatement of the applicant or the payment of a supplementary indemnity as compensation.

The Tribunal observed, firstly, that during the discussions which preceded Judgement No. 172 the parties had noted that certain staff members of the Service in question had remained in Paris after 1 October 1972. Accordingly, no new fact had been discovered in that connexion which could serve as a basis for application for revision.

Furthermore, the Tribunal noted that the fact that certain UNICEF staff members had remained in Paris in new circumstances after the official transfer of the European Office of UNICEF to Geneva did not entitle the applicant to remain in service without his suitability for one of the posts retained in Paris being established. Accordingly, even supposing that it could be considered that the existence of a new UNICEF Office constituted a fact which was unknown to the Tribunal when it pronounced Judgement No. 172, that fact was not of such a nature as to be a decisive factor justifying a revision.

Lastly, the Tribunal observed that it could not consider that the applicant, by learning that the transfer of the Office had been carried out in stages and over a reasonable period of time in view of the practical problems involved in any transfer of that type, had discovered a new fact capable of casting doubt on the legal basis of Judgement No. 172.

Accordingly, the Tribunal rejected the application.

8. Judgement No. 188 (4 October 1974):[19] Sule v. Secretary-General of the United Nations

Application for revision of a judgement of the Tribunal under article 12 of its Statute

The applicant requested the revision of Judgement No. 170.[20] The Tribunal recalled that article 12 of its Statute permitted it to revise a prior judgement when the party claiming revision presented to the Tribunal some fact previously unknown to the Tribunal and to the party claiming revision. In the present case the applicant merely presented again his arguments as to the legal interpretation of relevant provisions of the Staff Rules and of the conditions of service for locally recruited staff members of the UNDP Office in Nigeria. Those arguments had been fully considered and passed upon by the Tribunal in its Judgement No. 170.

Accordingly, the Tribunal rejected the application.

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[18] See *Juridical Yearbook*, 1973, p. 100.

[19] Mr. R. Venkataraman, President; Mr. F. T. P. Plimpton, Vice-President; Sir Roger Stevens, Member.

[20] See *Juridical Yearbook*, 1973, p. 98.

9. JUDGEMENT NO. 189 (7 OCTOBER 1974):[21] HO V. SECRETARY-GENERAL OF THE UNITED NATIONS

Application requesting an investigation into alleged incidents of hostility towards the applicant

The applicant, a permanent staff member of Chinese nationality working in the Security Service, had submitted a rebuttal of one of his periodic reports in which he had drawn attention to a dispute which had occurred between himself and one of his colleagues. Following an investigation, the report in question had been found to be fair. The applicant had also contested two subsequent periodic reports.[22] In 1969, the applicant, following an incident at the residence of the Secretary-General, during which he was the supervisor on duty and which he had neglected to report, requested that the attitude of the above-mentioned colleague, who had since become his supervisor, should be investigated. Following that investigation, it had been concluded that the complaint of the applicant was not founded. Furthermore, the incident at the residence of the Secretary-General had led the Chief of the Security and Safety Section to criticize the behaviour of the applicant and, by a decision on 11 August 1969, to reassign him. On 1 February 1973, another incident occurred between the applicant and the colleague mentioned above. The applicant then requested that an impartial body be set up to hear the 1969 incident together with the subsequent cases of prejudice and harassment. The Assistant Secretary-General for General Services replied that (1) he had not found that there was any basis or that it would be in order for him to reopen the 1969 incident, on which a final decision had been made almost four years before by senior officials, and (2) that the applicant's complaints of prejudice against him had previously received due consideration from appropriate officials and that the most recent incident had been a minor one and should be considered closed.

The Joint Appeals Board, having considered the matter, decided that the appeal relating to the 1969 incident was not receivable because the time-limit had been exceeded and recommended an investigation of the charges of prejudice and harassment. That recommendation was not accepted by the Secretary-General.

The Tribunal first ruled on the applicant's request that the judgement be drawn up in Chinese. It rejected that request on the ground that under article 10, paragraph 4 of its Statute it was for the Tribunal and not for either of the parties to determine in which of the five official languages of the United Nations judgements should be drawn up.

On the question of the receivability of the appeal concerning the 1969 incident, the Tribunal found that the conclusions of the Joint Appeals Board were correct. It considered, however, that it would be useful to make certain observations on the substance of the administrative decision of 11 August 1969. It noted (1) that in oral evidence, the Chief of the Security and Safety Section had stated that any incident, regardless of how insignificant it might appear, which involved the Secretary-General, the members of the Secretary-General's family, or his property was certainly, as far as he was concerned, a major incident; (2) that the Secretary-General had been surprised at not being informed of the 1969 incident by the Security and Safety Section; (3) that the Chief of Security had the duty as well as the right to ensure that the principles of strict adherence to orders, consistency of interpretation and conformity in matters of discipline and judgement were followed. From the foregoing, the Tribunal drew the conclusion that the Chief of Security had been well within his rights in taking the decision contested. Furthermore, it noted that the respondent had acted with discretion and sensitivity and that moves had been made to find the applicant a permanent post which he could occupy honourably without losing salary or seniority rights. The Tribunal therefore held that the appeal would have had little chance of success even if it had been judged receivable.

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[21] Mme P. Bastid, Vice-President, presiding; Mr. F. A. Forteza, Member; Sir Roger Stevens, Member.

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

With respect to the investigation requested by the applicant, the Tribunal noted at the outset that there was some doubt as to what type of investigation was requested. It also noted that, in the words of the Assistant Secretary-General for Personnel Services, the Secretary-General was satisfied that "previous incidents [alleged by the applicant] had been fully investigated in the past and that the administration was under no obligation to investigate general allegations of prejudice unrelated to specific administrative decisions". With respect to the first part of that statement, the Tribunal concluded, on examining the dossier, that the incidents alleged, while no doubt reflecting temperamental conflicts, were in themselves minor in character and had been as fully investigated as circumstances justified.

As to the second part of the statement of the Assistant Secretary-General for Personnel Services, the Tribunal recognized that the Secretary-General had assumed a number of obligations to conduct inquiries into defined specific matters under the Staff Rules. Furthermore, in Staff Rule 111.1 (*b*) the question of prejudice or some other extraneous factor was referred to specifically as a matter within the competence of the Joint Appeals Board. Where an appeal involving a request for an inquiry reached the Tribunal, it was the responsibility of the Tribunal to determine (*a*) whether the subject-matter of the appeal fell into a category with respect to which the Secretary-General had assumed specific obligations and (*b*) whether in the case of an appeal under Staff Rule 111.1 (*b*) due process had been observed. It was not for the Tribunal to lay down under the latter head general rules as to the circumstances in which the Secretary-General should conduct investigations but it might, in cases where in the Tribunal's view due process had not been observed, award relief to the applicant.

In the present case, it was the Tribunal's view that due process had been observed and that the Secretary-General's exercise of discretion in rejecting the applicant's demand for a further investigation regarding general allegations of prejudice unrelated to specific administrative decisions was not open to challenge. The Tribunal noted that the real burden of the applicant's complaint resided not so much in the minutiae of those incidents themselves as in the belief that they were in some way the cause of his failure to obtain promotion; that was what the Joint Appeals Board had taken into consideration when it had stated that it would be unfortunate if the applicant were to retire with the impression that "his serious charges of prejudice and harassment had been evaded or lightly brushed aside".

The Tribunal stated that its view on that matter differed from that of the Joint Appeals Board. It found no evidence of discrimination systematically practised against the applicant nor of doubt being sown as to his personal integrity, for which regard had always been most marked. From his periodic reports, in the view of the Tribunal, it should be clear to the applicant that his qualities had been fully appreciated and that the respondent's assessment of his over-all performance had not been coloured by prejudice.

The Tribunal therefore rejected the applicant's demand for an investigation of any kind and did not consider that the circumstances justified financial compensation of any kind.

10. Judgement no. 190 (9 October 1974):[23] Smith v. United Nations Joint Staff Pension Board

Application for revision of a judgement of the Tribunal under article 1 of its Statute

The applicant stated that after Judgement No. 186[24] was rendered he had discovered that his daughter was a participant in the United Nations Joint Staff Pension Fund as a staff member of the World Meteorological Organization during the period when the child's benefit was payable; he claimed that as she was a *participant* she could not claim benefit as a child and that, consequently, Judgement No. 186 should be revised.

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[23] Mr. R. Venkataraman, President; Mme P. Bastid, Vice-President, presiding; Mr. F. A. Forteza, Member; Mr. Mutuale Tshikankie, Alternate Member.

[24] See p. 112 of this *Yearbook*.

In Judgement No. 186, the Tribunal had observed that the material placed before the Standing Committee of the United Nations Joint Staff Pension Board and before the Tribunal showed the existence of exceptional circumstances under Administrative Rule J.2 (*e*) of the Pension Fund. The questions raised by the applicant, namely whether a person can be both a *participant* and a *child*, or whether under the Pension Fund Regulations and Administrative Rules a participant can lay claim to a child's benefit claimed by another participant were not "decisive factors" which could affect Judgement No. 186, since in that Judgement the Tribunal had confined itself to the question of the entitlement of the applicant to the payment to him of the child's benefit.

As the issue whether the applicant's daughter, who was a participant in the Pension Fund in her own right, could lay claim to a child's benefit as beneficiary of another participant was not a "decisive factor" in determining the applicant's claim to the payment to him of the child's benefit, and as the point raised in the request was more a fresh argument than a new fact, the Tribunal held that the application did not meet the requirements of article 12 of the Statute.

11. Judgement No. 191 (11 October 1974):[25] De Olague v. Secretary-General of the Inter-governmental Maritime Consultative Organization

Application seeking, (1) payment by the respondent organization of various travel and removal expenses (2) reimbursement for overtime and (3) payment of compensation for moral and material damage said to be due to the non-renewal of a fixed-term contract

The applicant, a Spanish national, had been engaged by IMCO for a technical assistance project in Guatemala under a one-year appointment which was later renewed for a period of two months ending 1 December 1970. At the time of his repatriation, he informed the Secretary-General of IMCO that he was leaving by car for Panama, where he would stay for a few weeks before returning by air to Madrid. He added that as the Government of Panama had requested that his services be made available as an IMCO expert, he would wait in Panama until he received the Secretary-General's reply. The latter replied that there were no plans for him to work for the Government of Panama under the auspices of IMCO and that the Organization therefore had no responsibility concerning his stay in Panama. In March and again in April 1971, the applicant wrote to the Secretary-General that he was going to have a post with IMCO working for the Government of Panama. In August 1971, he asked that remedial action be taken by IMCO for damage to his prestige and reputation because of statements allegedly made by an ECLA staff member to the Government of Panama, and that a letter be sent to various Panamanian authorities to that effect. The Secretary-General replied (1) that IMCO had no plans to renew or prolong his fixed-term employment beyond the terms expressly foreseen and (2) that with regard to the issuance of a letter to various Panamanian authorities, according to practice IMCO should confine itself describing the nature of the applicant's duties and the length of his service.

In June 1972, the Ambassador of Panama to the United Kingdom wrote to the Secretary-General of IMCO requesting officially the appointment of the applicant as an IMCO expert in Panama. The Secretary-General replied that the technical co-operation projects in which IMCO participated were financed exclusively by UNDP and that the only UNDP-financed project in the maritime field in Panama of which he had knowledge was one being carried out by UNCTAD, to which the Government of Panama might wish to convey its views with respect to the applicant. Also in June 1972, the applicant submitted to IMCO a claim for reimbursement of travel and removal expenses from Guatemala to Panama and from Panama to Madrid. That claim was rejected because entitlement to return travel and removal expenses ceased if the travel had not been undertaken within six months after the date of separation from service. In October 1972 the applicant submitted to the Secretary-General of the United

[25] Mme P. Bastid, Vice-President, presiding; Mr. F. A. Forteza, Member; Sir Roger Stevens, Member.

Nations a complaint regarding his conditions of service with IMCO, as well as an appeal which the applicant had filed with the Joint Appeals Board of the United Nations. Having been informed that his appeal had been addressed to the wrong forum, he submitted his complaints against IMCO to the Secretary-General of IMCO, who informed the Executive Secretary of the Administrative Tribunal that he agreed to have the dispute submitted directly to the Tribunal in accordance with article 7 of its Statute.

The Tribunal first of all examined the applicant's claim concerning (i) his removal expenses from Panama to Madrid; (ii) the cost of air travel for his wife from Panama to Madrid; (iii) his travel expenses by road from Guatemala to Panama and (iv) his subsistence and other expenses for the duration of his journey from Guatemala to Panama and then from Panama to Madrid.

On point (i), the Tribunal observed that IMCO had duly paid to the applicant the cost of the transportation of his personal effects and household goods from Guatemala to Panama. In the light of Staff Rule 207.20 (*i*) (i), reading "Shipment shall be made in one consignment unless otherwise warranted, in the opinion of the Secretary-General, by exceptional circumstances" and inasmuch as the Secretary-General had not approved any exception to that rule, the Tribunal considered the claim unfounded.

With respect to point (ii), the Tribunal noted that as the applicant had remarried on 10 November 1970 and had left Guatemala on the 21st day of that same month, his wife did not have the six months residence in the mission area required of dependents under Staff Rule 207.9 (*a*) (ii) in order to benefit from that provision.

In connexion with point (iii), the Tribunal noted that the applicant had been authorized under Staff Rule 207.5 (*c*) to travel from Guatemala to Panama by automobile "provided no additional cost to IMCO was involved".

Lastly, with regard to point (iv), the Tribunal stated that the applicant would normally have been entitled within the limits prescribed in Staff Rule 207.5 (*c*) to the reimbursement he claimed for travel from Panama to Madrid. However, since the journey to Madrid had not been made until two and a half years after the applicant had relinquished his post, the applicable provision was Staff Rule 207.24 (*c*), which read: "Entitlement to return travel and removal expenses shall cease if travel has not commenced within six months after the date of separation from service".

The applicant also claimed payment for overtime which he alleged that he had worked. The Tribunal merely noted that staff members in the professional category were not covered by the IMCO Staff Rules relating to overtime.

The applicant also claimed (1) damages to cover the alleged gap of $14,000 between his income during his stay in Panama and the expenses incurred by him during that period and (2) compensation of $50,000 for moral and material damage which he claimed he had incurred due to defamation by IMCO, resulting *inter alia* from its failure to give him "a new post, as was its obligation".

The Tribunal noted that the applicant had been given two appointments by IMCO, for periods of one year and two months respectively, and that, in the text of each letter of appointment, it was expressly stated that "the nature of the appointment is fixed-term and does not carry any expectancy of renewal or of conversion to any other type of appointment". On seeing the file, the Tribunal determined that there was no legal basis for concluding that the applicant had acquired the right to remain in the service of IMCO or to be re-employed by that organization. Having thus established that IMCO had no legal obligation to appoint the applicant to a post either during his stay in Panama or thereafter, the Tribunal rejected the corresponding claims for compensation. With regard to the applicant's claim for compensation for defamation, the Tribunal shared the view expressed by the respondent that "there is no evidence to support the allegation that IMCO has . . . defamed the reputation and character of the applicant or in any way contributed to or assisted in such defamation by any other person". Accordingly, there was no ground for the claim.

12. JUDGEMENT NO. 192 (11 OCTOBER 1974): [26] LEVCIK V. SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting a decision refusing to renew a fixed-term appointment because of the refusal by the authorities of the applicant's country of origin to extend his secondment

The applicant, who served in the Institute of Economics of the Czechoslovak Academy of Sciences had, while in Geneva on leave of absence without pay, taken up employment on a short-term basis with the ILO. On 2 September 1968 he applied for a post with the Economic Commission for Europe (ECE). The Permanent Representative of Czechoslovakia, consulted regarding the applicant's availability, stated that the Czechoslovak Government agreed to recruitment on a temporary basis. The applicant then accepted an 11-month appointment with ECE. In March 1969 the Deputy Permanent Representative of Czechoslovakia in New York informed the Office of Personnel that his Government agreed to the extension of the applicant's secondment for two years. On 17 April 1969 the applicant accepted the offer of a fixed-term appointment for two years, in which no mention was made of secondment. Nor was there any question of secondment in the letter of appointment, or in the personnel action form relating to the appointment. On 14 August 1969 the Director of the Institute of Economics of the Czechoslovak Academy of Sciences informed the applicant that "his leave of absence would end at the originally approved term, i.e. on 31 December 1971". On 26 November 1970 the Chief of Staff Services addressed to the Chief of Staff Services in New York a memorandum on "Review of professional staff members serving under fixed-term appointments due to expire in March 1971". The memorandum stated that the Executive Secretary of ECE recommended that the applicant's appointment should be extended for a further period "of not less than three years"; the recommendation was approved by the Director of Personnel. However, the Government of Czechoslovakia did not approve the proposed extension, so that the staff member was to "return to his Government service after expiration of present contract on 31 March 1971". Representations were thereupon made to the Czechoslovak authorities to secure an extension of the applicant's secondment until the end of 1971. The representations were unsuccessful; nevertheless the applicant's contract was extended to 31 December 1971. On 20 October 1971 the applicant addressed to the Secretary-General a memorandum in which he stated that he had not been seconded from his national Civil Service and that the attempts of the Czechoslovak authorities to prevent his employment with the United Nations had nothing to do with the application of the rule of secondment but were simply an act of persecution to which the United Nations could not be a party. The Director of Personnel replied that the applicant's employment with the United Nations had taken effect, not through a "political clearance" but because the United Nations had requested and obtained secondment, and that the Secretary-General was not in a position to contest the claim of the Czechoslovak Government that the Institute of Economics was part of the government system. On 1 January 1972 the applicant's appointment was extended for a final period of three months.

The Joint Appeals Board, to which the case was submitted, concluded that the Secretary-General was within his rights in not accepting to renew the applicant's fixed-term appointment, but, considering that the conditions prevailing at the end of the applicant's fixed-term period of employment had created a legitimate expectancy of renewal of his contract, recommended the grant of an indemnity equivalent to three months' salary. The recommendation was accepted by the Secretary-General; however, the applicant rejected the compensation offered him as being "totally inadequate and proferred under unacceptable legal conditions" and filed with the Tribunal the present application.

The Tribunal noted that it was requested to rule on the compensation due to the applicant for injury sustained as a result of the decision of the respondent to separate him from the service on 31 March 1972 and to refuse, despite urgent requests from his superiors, to extend his appointment to 31 March 1974. The Tribunal also noted that the respondent considered

[26] Mr. R. Venkataraman, President; Mme P. Bastid, Vice-President; Sir Roger Stevens, Member.

himself bound to terminate the employment of a staff member seconded by the Government of a Member State when that Government refused to authorize the extension of secondment.

In order to decide on the legality of the respondent's decision, the Tribunal first of all recalled the legal principles applicable to the secondment of staff to the United Nations Secretariat. It observed that "temporary secondment" was formally recognized by Staff Rule 104.12 (*b*) and that the Training and Reference Manual of Procedure for Personnel Clerks and Secretaries instructed them, in the case of candidates seconded to the United Nations, to include in the document which must be prepared at the time of appointment a formal mention of the situation of secondment. The Tribunal recalled that in the Higgins case[27] it had declared that "secondment" occurred when the staff member was posted away from his establishment of origin but had the right to revert to employment in that establishment at the end of the period of secondment and retained his right to promotion and to retirement benefits. There were really three parties to the arrangement, namely the releasing organization, the receiving organization and the staff member concerned. Any secondment required that the situation of the official in question must be defined in writing by the competent authorities in documents specifying the conditions and particularly the duration of the secondment. Any subsequent change in the terms of the secondment initially agreed on obviously required the agreement of the three parties involved. Accordingly, if the Government which had seconded an official refused to extend the secondment, the Secretary-General was obliged to take that decision into account. Bearing in mind the provision in Article 100 of the Charter that "in the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any Government or from any other authority external to the Organization", the Tribunal considered that in the absence of a secondment agreed to by all parties concerned in conformity with the above-mentioned principles, the respondent could not legally invoke a decision of a Government to justify its own action with regard to the employment of a staff member.

The Tribunal then considered whether in fact the applicant's status had been one of secondment. It noted that *at the time of his recruitment* to ECE the applicant was working at the International Labour Organisation, and that neither the offer of employment for 11 months at ECE, nor the letter of appointment, nor the personnel action form made any mention of secondment from a national Government or institution. It noted, however, that the Executive Secretary of ECE had asked the Permanent Representative of Czechoslovakia at Geneva to state whether his Government agreed with that recruitment action. The Tribunal noted that in the Permanent Representative's positive reply, the term "secondment" did not appear, and that the Administration had used the term "clearance" to describe the procedure which had been followed. It concluded that the procedure followed in October 1968 had been designed merely to ensure that the prolonged absence of the applicant from his national territory was in order from the point of view of the Czechoslovak Government.

In relation to *the period of the appointment running from 1 April 1969 to 31 March 1971*, the Tribunal examined the circumstances to determine whether there had been a "secondment" and whether the respondent's position had any legal basis.

The Tribunal noted that although the word "secondment" had been used several times in internal administrative documents and in the correspondence exchanged between the Administration and the Deputy Permanent Representative of Czechoslovakia in New York, no mention had been made of the position taken by the Office of Personnel or by the Permanent Representative in the letter offering the applicant a two-year appointment, or in the letter of appointment itself, or in the personnel action form established on that occasion. Not until the end of 1970 had the applicant been notified for the first time of the situation which had been accepted at Headquarters according to which the applicant's retention in service was conditional on the consent of his Government.

In considering whether, on the basis of the legal principles applicable to secondment, the respondent's position was well founded, the Tribunal observed (1) that the agreement reached

[27] See *Juridical Yearbook*, 1964, p. 205.

in New York between the Government and the respondent did not specify the starting-point of the secondment, the applicant's post in his country, or the conditions relating to his return to that post; (2) that it was clear from previous correspondence between the Executive Secretary of ECE and the Permanent Representative of Czechoslovakia at Geneva that as far as the Government of Czechoslovakia was concerned, it was for the United Nations to settle the question of the contract which was to be concluded and the Government only wished to be kept informed; (3) that there were certain contradictions in the position of the Czechoslovak authorities, since while the Institute which had employed the applicant in Czechoslovakia spoke of leave of absence granted until 31 December 1971, the Deputy Permanent Representative of Czechoslovakia in New York had mentioned a secondment ending on 31 March 1971; (4) the agreement reached in New York on secondment had not been brought to the applicant's knowledge and his consent obtained.

From the foregoing the Tribunal held that there had been no valid secondment of the applicant during the period of his two-year fixed-term appointment.

With regard to the *period from 1 April 1971 to 31 March 1972*, the Tribunal noted that the applicant's appointment had been extended on three occasions despite the Government's opposition. It noted also that in connexion with the first of those extensions, the Director of Personnel had informed the Permanent Representative of Czechoslovakia in New York that that "action" was of an "exceptional nature" and had assured him that it "did not in any sense reflect a desire . . . to change the policy of close consultation with the Czechoslovak authorities, which, as in the past, continues to be our rule". In the opinion of the Tribunal, that communication referred to a system of consultation between the respondent and the Czechoslovak Government which differed both from the clearance procedure and the procedure of secondment. In view of the foregoing, the Tribunal concluded that the applicant's status during the above-mentioned period was not one of secondment.

The Tribunal therefore concluded that the applicant had at no time been on regular secondment. It then had to consider whether the applicant had a legal expectancy of continued employment until 31 March 1974. It was no doubt true that a fixed-term appointment of the kind held by the applicant did not carry any expectancy of renewal or of conversion to any other type of appointment. Having regard, however, to the exceptional commendations of his work and the efforts made by his superiors to retain his services, the applicant had a legal expectancy that his fixed-term appointment would be extended until 31 December 1974, and he was therefore entitled to compensation for the injury resulting from a decision based on an error of law. The Tribunal awarded compensation in the amount of one year's net base salary.

13. JUDGEMENT NO. 193 (16 OCTOBER 1974): [28] ADDO V. SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting a decision of the Joint Appeals Board declaring an appeal submitted after the expiry of the prescribed time-limit irreceivable

The applicant, who worked as a driver at the United Nations Information Centre in Accra (Ghana) on a regular appointment, had during a quarrel inflicted on two of his colleagues injuries which had required hospital treatment. On 18 September 1970, at the proposal of the Director of the Centre, he was suspended from his duties pending an investigation into the incident, and was informed on 19 October that he had been summarily dismissed for serious misconduct effective 15 September 1970. The local police court subsequently acquitted him of the charge of assault filed against him. The applicant contested the dismissal several times. On 26 February 1972, in his most recent approach to the administration, he reiterated his position, asserting that the respondent should have awaited the local court decision before determining to dismiss him.

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

The appeal which the applicant lodged with the Joint Appeals Board on 11 July 1972 was declared not receivable by the Board. However, the Board noted that the respondent had mistakenly made the effective date of dismissal 15 September, instead of 18 September, and that the applicant should therefore receive the salary and allowances owing to him for the 3 days concerned. The Board also noted that in the case concerned there had been no "suspension without pay" before the decision to dismiss the applicant and that the respondent could not therefore invoke the practice in accordance with which summary dismissal following a suspension from duty without pay was effective on the date of suspension.

The Board finally noted that some 10 days had elapsed between the date on which the decision had been taken and the date on which the staff member had been notified of it and expressed the view that the applicant could have been forewarned. Taking into account the foregoing, the Board recommended that the applicant should be paid his salary and allowances from 16 September 1970 through 19 October 1970. Following that recommendation, the respondent ordered the effective date of the summary dismissal to be changed from 16 September 1970 to 19 October 1970.

The Tribunal, to which the case was submitted, recalled that in accordance with Staff Rule 111.3 (d) an appeal could not be receivable by the Joint Appeals Board unless the time-limits had been met, but that the Board could waive the time-limits in exceptional circumstances. It had therefore considered whether the Board had acted correctly in deciding that none of the reasons offered by the applicant for not meeting the required time-limit amounted to exceptional circumstances. The Tribunal took the view that the applicant, who had been made acquainted with the relevant provisions of the Staff Regulations and the Staff Rules on at least two occasions and had already used appellate procedures, could not plead ignorance of the relevant provisions. Secondly, the first approach to the Secretary-General after dismissal had been made in 10 March 1971, two months after the local court had made its judgement. Thirdly, in a letter dated 8 June 1971, the respondent had drawn the attention of the applicant to the administrative channels of appeal open to him; however, the applicant had allowed eight months to go by before making further contact with the respondent and after the latter, in a letter dated 4 April 1972, had advised the applicant to proceed with his appeal before the Joint Appeals Board and to submit to the Board, in the first instance, the question of the receivability of his appeal, the applicant had taken no action for three months. The Tribunal, taking into account the foregoing, considered that the decision of the Joint Appeals Board not to waive the time-limits was fully supported by the record and accordingly rejected the application.

14. Judgement No. 194 (16 October 1974):[29] Witmer v. Secretary-General of the United Nations

Application contesting a decision not to offer employment for medical reasons

The applicant had been employed under fixed-term appointments for several periods between 12 September 1958 and 31 December 1962. In May 1962 he had contracted a serious illness, but nevertheless on 7 January 1962 had been placed in class 1 by the Medical Director following the medical examination he had to take in order to obtain a one-year fixed-term appointment as an OPEX Officer. On 13 December 1963, the Medical Director advised the Office of Personnel that on the basis of the new medical examination which the applicant had undergone in November 1963, the extension of mission in tropical and subtropical climates was medically contraindicated. The administration then changed the applicant's medical classification to class 2.

In May 1970 the applicant received from the Technical Assistance Recruitment Service an offer of employment for 12 months, subject to medical clearance. After accepting the offer and undergoing the necessary medical examination, he was asked to visit for a few days the site of

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

the project which he was to direct. However, on 28 December 1970, since the Medical Director of the United Nations considered that the applicant did not meet the United Nations medical standards, the Technical Assistance Recruitment Service informed the applicant that it could not ask him to take up the post to which he had been assigned.

The Joint Appeals Board, to which the case was submitted, found that the respondent had been negligent in offering the applicant an appointment subject to medical clearance when he knew or should have known that the applicant would not be medically cleared because of his medical record during his previous service with the Organization.

Considering that the respondent must be deemed to have entered into a valid agreement with the applicant for a one-year fixed-term appointment, the Board recommended that the applicant should be accorded, as compensation for the Organization's breech of its obligations towards him, the sum of $8,400, representing damages of $700 per month for the term of the agreement.

The respondent did not accept that recommendation but decided to pay the applicant compensation in an amount equivalent to the termination indemnity to which he would have been entitled if the appointment had in fact been made and then terminated prior to its commencement, that is five days' pay for each month of uncompleted service. The Tribunal noted that the applicant claimed that by reason of his compliance with the terms of the offer of employment made by the respondent, a legal obligation to appoint him to the post for one year arose and that the withdrawal of the appointment constituted a breach for which compensation was payable by the respondent. The respondent argued, *inter alia*, that there had been no appointment within the meaning of the Staff Rules and that therefore he was under no obligation, contractual or otherwise, to the applicant.

The Tribunal observed that the absence of a letter of appointment did not conclude the applicant's claims and that, in accordance with its jurisprudence as decided in its Judgement No. 142 (Bhattacharyya),[30] it was entitled

> "to consider the contract as a whole, not only by reference to the letter of appointment but also in relation to the circumstances in which the contract was concluded".

In that respect the Tribunal noted that it was not on the basis of the report on the medical examination undergone in 1970, which in the view of the Medical Director established that the applicant was quite healthy—but on the basis of the medical record during the period 1958–1963 that the Medical Director had refused to approve the appointment of the applicant. The Tribunal recognized the Medical Director's authority to make appropriate recommendations regarding the employment of a candidate by the United Nations on the basis of the past or present medical history or other medical data obtained from any other source and the right of the Secretary-General to act on such recommendations. There had therefore been no violation of the pertinent Staff Regulations and Rules in the case under consideration. However, the Tribunal found that in offering the appointment to the applicant with full knowledge of his past medical history, in asking him to undergo a new medical examination and in permitting him to visit the site of the project concerned, the respondent had acted as though the applicant's past medical history was of no relevance to the appointment. Thus the respondent had acted negligently in making the offer of appointment when he knew or should have known that whatever the applicant's state of health at the time the offer of appointment was made the applicant could not have been granted an appointment on account of his past medical history.

The Tribunal added that the respondent could not, by reason of the principle of equitable estoppel, be allowed to raise objections based on the applicant's past medical history, disregarding the current favourable medical report. The respondent knew the past medical history of the applicant and had taken the initiative in the appointment of the applicant, and he was therefore estopped from raising objections to the applicant's appointment based on the applicant's past medical history.

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[30] See *Juridical Yearbook*, 1971, p. 152.

The Tribunal concluded that the applicant had become entitled to the one-year fixed-term appointment offered to him and that the respondent, by withdrawing the appointment, had failed to carry out his obligations and thus became liable for the consequences of his action. It accordingly ordered the respondent to pay as compensation to the applicant the sum of $8,400 less such amount as might have been paid by the respondent as indemnity.

B. Decisions of the Administrative Tribunal of the International Labour Organisation[31,32]

1. Judgement No. 225 (6 May 1974): Lachs v. United Nations Educational, Scientific and Cultural Organization

Complaint submitted directly to the Tribunal in violation of the rule concerning the exhaustion of internal means of redress

The complainant impugned a decision pursuant to which there had been deducted from her salary a sum which the defendant Organization considered that the complainant owed to it. The defendant Organization maintained that the complaint was irreceivable because of the complainant's failure to exhaust internal means of redress.

The Tribunal stated that article VII, paragraph 1, of its Statute provided that a complaint was not receivable unless the complainant had exhausted such other means of resisting it as were open to him under the applicable Staff Regulations. Chapter XI of the UNESCO Staff Regulations and Staff Rules provided that, before being able to lodge an appeal with the Tribunal, staff members must appeal to the Appeals Board, which the complainant had not done. Although any staff member could, with the consent of the Director-General, waive the jurisdiction of the Appeals Board, such a derogation from the normal procedure was justifiable only in exceptional cases which the Director-General himself could determine. The Tribunal was not competent to waive the requirement that the complainant should first appeal to the Appeals Board.

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[31] 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 1974, the World Health Organization (including the Pan American Health Organization (PAHO)), 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, the European Southern Observatory, the Intergovernmental Council of Copper Exporting Countries, the European Free Trade Association and the Inter-Parliamentary Union. The Tribunal is also competent to hear disputes with regard to the execution of certain contracts concluded by the International Labour Office and disputes relating to the application of the Regulations of the former Staff Pensions Fund of the International Labour Organisation.

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

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

2. JUDGEMENT NO. 226 (6 MAY 1974): SCHAWALDER-VRANCHEVA v. WORLD HEALTH ORGANIZATION

Complaint impugning a decision designed, pursuant to a judgement of the Tribunal, to correct an earlier administrative decision—Limits of the Tribunal's authority to review a decision falling within the discretion of the Director-General

By Judgement No. 194 of 13 November 1972[33] the Tribunal quashed as being based on inadequate grounds the decision of the Director-General of WHO not to confirm the appointment of the complainant following her probationary period. In pursuance of that Judgement, the Director-General set up an *ad hoc* committee to examine her case and in the light of its report took a further negative decision.

The complainant contended before the Tribunal that the decision in question had not been based on any proper inquiry or adequate grounds and therefore claimed material and moral damages.

The Tribunal observed that the *ad hoc* committee had carried out a thorough inquiry and that on the basis of its report the Director-General had taken a considered decision in full knowledge of the facts. The procedural irregularity which had led to the quashing of the initial decision had thus been corrected and it was for the Tribunal to determine the merits of the complaint.

The Tribunal stated that a staff member on probation did not during the probation period enjoy the safeguards granted to permanent staff members and that the decision taken by the Director-General not to confirm the staff member's appointment was one which fell within his discretion. The Tribunal accordingly could interfere only if the decision 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, again, if conclusions which were clearly false had been drawn from the documents in the dossier, or, finally, if authority had been exercised for purposes foreign to the Organization's interests.

The Tribunal held that, although the dossier as supplemented by the report on the inquiry revealed obvious animosity towards the complainant on the part of her immediate supervisor and the criticisms of her appeared fairly mild, it did not appear from the dossier that the impugned decision with regard to a probationer had been tainted with any of the irregularities which entitled the Tribunal to interfere. Among other things it was proved that the Director-General had taken his decision on the basis of a full dossier which contained all the data required for forming a judgement and after consulting several senior officials, and in full awareness of his responsibility for the effective running of the Organization in his charge. Since the impugned decision was lawful, the complainant could not properly claim compensation on the grounds of that decision.

3. JUDGEMENT NO. 227 (6 MAY 1974): TUFTE v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Complaint requesting reinstatement lodged by an official who had previously resigned

The complainant, who had held a fixed-term appointment due to expire on 31 March 1972, had been assigned to a post in Algeria. On 30 September 1971, he informed the defendant Organization of his intention of resigning with effect from 1 November 1971 if by then he had not been offered a suitable position at headquarters. The Organization then invited him to apply for a headquarters post in the ordinary way and informed him that, unless he did so and unless he notified FAO to the contrary, his resignation would take effect on 1 November 1971 as he had asked. The complainant confirmed his resignation on 14 October 1971.

On 30 October 1971 he asked for reinstatement with FAO or, failing that, compensation. He was not given satisfaction and lodged his claim with the Tribunal.

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[33] See *Juridical Yearbook*, 1972, p. 147.

As to the claim for reinstatement, the Tribunal considered that by resigning the complainant had deprived himself of the right to reinstatement in the Organization in his former post or in any other. If he wished to return, his only course of action was to apply for a vacancy in accordance with the prescribed procedure. Any other course would be warranted only if he had acted otherwise than of his own free will, a hypothesis which was not supported by any evidence.

As to the claim for compensation, the Tribunal stated that, as it was free from illegality, the decision not to reinstate the complainant did not entitle him to any compensation.

4. JUDGEMENT NO. 228 (6 MAY 1974): REMONT v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Complaint impugning a decision refusing to upgrade a post held by an official under a fixed-term contract to the level of the post occupied by the same official under a previous contract

The complainant had held an appointment at the P.5 grade which was due to expire on 21 May 1971. On 20 April 1971 the Organization offered him a 14-month mission in Tunisia. The post there was at grade P.4. The complainant's appointment was initially extended until 30 June 1971 and it was decided that his grade should not be changed from P.5 to P.4 until 1 June 1971. It was only on the eve of his departure for Tunisia that the complainant learnt of the grade of his new post and he wrote a minute stating his reservations and agreeing to the P.4 grade pending the outcome of the procedure for upgrading the post in Tunisia to grade P.5. The steps taken to upgrade the post proved unsuccessful and the complainant left the Organization on 31 December 1971 following two successive extensions of his appointment, extensions which, the Organization explained, had been limited because his reservations about his grade still held good and doubts remained about his qualifications for his post.

The FAO Appeals Committee, having been seized with the case, (1) rejected the complainant's claim for reinstatement, (2) rejected his claim for compensation *ex aequo et bono* and (3) recommended that the Director-General consider granting him grade P.5 retroactively to cover the full period of his mission in Tunisia. By a decision of 9 February 1973, the Director-General accepted the first two conclusions and rejected the third.

The Tribunal observed that, when deciding whether to accept the offer, the complainant had been told that the appointment would be at grade P.4. He had been kept informed of the action taken to upgrade the post to P.5 and had been informed in plain terms in a letter of 7 September 1971 that his appointment would continue to be at grade P.4 and that any extension he received would be at that grade.

The Tribunal pointed out, firstly, that, as he had promised the complainant, his immediate supervisor had made earnest efforts to have the post upgraded to P.5 and that the opposition which those steps had encountered could not be criticized by the Tribunal unless it had been based on considerations foreign to the Organization's interest, which had not been proved.

The Tribunal further observed that the appointment to the post in Tunisia was a new one and quite distinct from those previously held by the complainant. His appointment at a lower grade could not be assimilated to downgrading in the absence of any special circumstances.

Thirdly, although the Organization had undertaken to take certain steps to upgrade the post, it had never promised any positive outcome. The complainant had been kept fully informed of the steps taken under the procedure and of developments, and had been treated with perfect correctness and even with helpfulness. The complainant could not therefore properly contend that the Organization had showed bad faith towards him.

Lastly, by requesting the upgrading of his post, the complainant had compelled the Organization to keep him waiting until the regrading procedure was completed and to release him following the negative outcome of the procedure.

The impugned decision therefore was not tainted with any irregularity.

5. JUDGEMENT NO. 229 (6 MAY 1974): HRDINA v. INTERNATIONAL LABOUR ORGANISATION

Complaint impugning a decision not to renew a fixed-term contract—Limits of the Tribunal's authority to review such a decision

The complainant had received a series of fixed-term contracts, the last of which covered the period from 31 December 1972 to 31 January 1973. On 12 February 1973 she submitted a written request to the Director-General to review the decision not to renew her contract. By letter of 19 March 1973 the Director-General informed her that it was not possible to reconsider the decision.

The Tribunal, in considering the case, noted that the impugned decision, having been taken by the Director-General in the exercise of his discretion, could be criticized only if it was taken without competent authority, violated a rule of form or procedure, was based on an error of fact or law, failed to take into consideration essential facts, was tainted with abuse of authority, or if conclusions which were clearly false had been drawn from the documents in the dossier. In that connexion the Tribunal noted that: (1) the Director-General's competence to confirm the termination of the complainant's appointment was beyond dispute; (2) the impugned decision, communicated in writing, was not open to any formal criticism; (3) there had been no infringement of the rules of procedure since the complainant, by writing to the Director-General, had been able to exercise her right to be heard, since she had been free to use the means of redress provided for under the Staff Regulations and since the speech of the Director-General to the staff saying that any decision to terminate the services of a staff member would be taken at least two months in advance plainly did not apply to staff members whose appointment was renewed from month to month; (4) nothing in the dossier supported the charge of the complainant that the impugned decision was based on incorrect facts; (5) taking into account article 4.6 (*d*) of the Staff Regulations, which provides for the automatic expiry of fixed-term appointments and expressly denies the right of those holding such contracts to expect renewal, the impugned decision was not based on any error of law since no provision of the Staff Regulations or of her contract required the Organization to take account of the duration of her appointments under previous contracts; (6) it had not been established that the Director-General had failed to take essential facts into consideration or that he had misused his authority; and (7) the Director-General had not drawn conclusions which were clearly false from the dossier, in view of the fact that the Organization's financial difficulties, not to speak of the reservations expressed here and there with regard to the complainant's relations with other staff members, justified the decision.

The Tribunal consequently dismissed the complaint.

6. JUDGEMENT NO. 230 (6 MAY 1974): STRACEY v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Complaint submitted by a former associate participant in the United Nations Joint Staff Pension Fund claiming that he had been deprived of a pension as a result of an administrative oversight—Extent of the Tribunal's authority with regard to the determination of the duration of the contract to be offered to a candidate for employment

The complainant, who had joined the staff of FAO in May 1964, shortly before his fifty-sixth birthday, had become an associate participant in the United Nations Joint Staff Pension Fund. His appointment had been successively extended to June 1966, June 1967 and finally to the end of December 1968. In May 1967 it had been decided to transfer him to the United Arab Republic on assignment to projects of which some were to end in 1970 and others in 1972. The transfer was not carried out as a result of the war between Israel and the United Arab Republic and the complainant was posted to Uganda until the end of February 1969 and then to various other posts until his resignation on 1 September 1972.

Upon reaching the age of 60 in May 1968, the complainant lost his status as associate participant in the Joint Staff Pension Fund, and, because on that date as a result of his reassignment due to the events in the Middle East he did not hold an appointment which would last long enough to extend his total period of employment in the United Nations to the

minimum of five continuous years, he no longer qualified to become a full participant in the Pension Fund. Through the combined effect of the Pension Fund Regulations and the circumstances of the case, the complainant found himself therefore deprived of a pension to which he believed himself to be entitled.

Having failed in his efforts to have the Organization correct the situation, he appealed to the FAO Appeals Committee, which, feeling that the complainant had been the victim of oversights on the part of the Organization, unanimously recommended that the Director-General consider as soon as possible ways of fulfilling the Organization's intention of providing a pension for the complainant.

The recommendation was not accepted by the Director-General.

The Tribunal, in considering the case, first examined the question of the receivability of the complaint. It found that the complainant had not impugned within the time-limits laid down in Staff Rule 303.131 the decision to grant him a new appointment from 1 July 1967 to 31 December 1968. In July 1968, however, immediately after he had discovered that he was no longer an associate participant in the Joint Staff Pension Fund, the complainant had pointed out this fact to the Organization. The Organization had then sought to give him the status of a full participant by replacing the above-mentioned contract with a new contract which would expire on 20 June 1970. Having replaced the contract, the Organization was implicitly estopped from arguing that the original contract had not been contested in time. Hence, in so far as that contract was relevant, the Organization could not properly rely on the non-observance of the rules on internal means of redress.

As to the merits, the Tribunal stated that the decision to grant the complainant a new contract covering the period from 1 July 1967 to 31 December 1968 had been taken in the exercise of discretion and could therefore be interfered with only if it had been taken without authority, was irregular in form or procedure, was based on errors of fact or law, failed to take into consideration essential facts, was tainted with misuse of authority, or if conclusions which were clearly false had been drawn from the documents in the dossier.

The Tribunal found that, when the complainant was reappointed, the officials in charge had not realized that they were depriving him of the chance of becoming a full participant in the Joint Staff Pension Fund. In all likelihood—and the subsequent attitude of the Organization was proof of that—they would have extended the period of the contract until at least 10 May 1969, had they realized the consequences of their decision, and so enabled the complainant to become a full participant. In the circumstances of the case under consideration, the omission to take account of the complainant's situation in respect of his membership constituted a fact which should be considered essential.

The Tribunal found, however, that the complainant had himself failed to show the diligence which could be expected from a man reaching the age of 59, an age at which a staff member who is careful of his own interests is concerned with his possible pension rights. The complainant had been free to obtain information on his position as a Fund participant on the conclusion of the new contract; by failing to clarify the matter in time, he had contributed to the loss of his rights.

The Tribunal consequently ordered the Organization to pay the complainant, from the date of his retirement, half the amount of the pension to which he would have been entitled as a full participant in the United Nations Joint Staff Pension Fund.

7. Judgement No. 231 (6 May 1974): Slethold v. General Agreement on Tariffs and Trade

Complaint submitted by a person who did not have a contractual relationship with an international organization which recognized the competence of the Tribunal

The complainant had been assigned for a period of two years to the International Trade Centre, a body jointly administered by the United Nations Conference on Trade and Development (UNCTAD) and GATT; he had been seconded to the Centre from the

Norwegian Agency for International Development (NORAD). Because his appointment to the Centre was extended for only three months instead of for 12 months, as he had expected, and because the Director of the Centre wrote a memorandum on the subject of his work which he considered to be false and libellous, he submitted the present complaint to the Tribunal.

The Tribunal recalled that according to article II, paragraph 5, of its Statute it heard complaints against organizations which had recognized its competence alleging non-observance of the terms of appointment or the provisions of Staff Regulations. The complainant had been seconded NORAD to GATT, which was one of the above-mentioned organizations and the defendant in the present case. The Tribunal was competent to hear the complaint only if the complainant had concluded a contract of appointment with GATT or was subject to the Staff Regulations of GATT.

GATT had suggested in 1966 that officials seconded to it by NORAD should have a contractual relationship with NORAD rather than be members of the staff of GATT. NORAD had accordingly itself appointed the complainant, was to pay his remuneration and had extended his secondment to GATT for three months. GATT had not directly concluded a contract with the complainant, who had not received the letter of appointment and other documents given to all GATT officials and who, unlike such officials, was not a member of the Joint Staff Pension Fund.

Finding that, notwithstanding his secondment to GATT, the complainant had not concluded a contract of appointment with it and was not subject to its Staff Regulations, the Tribunal declared that it was not competent to hear the complaint.

8. JUDGEMENT NO. 232 (6 MAY 1974): DIAZ v. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Complaint impugning a decision refusing to delete a performance report

The complainant contested the performance report made about him and, under Staff Rule 104.11 (*e*), an appeal was lodged with the Senior Personnel Advisory Board. The Advisory Board, at which the complainant was represented by an official, held that there was no call for revision of the contested performance report. The complainant then appealed to the Appeals Board claiming deletion of the report in question and the Board advised that the appeal should be dismissed but recommended that the report should be neither taken into account in deciding whether to reappoint the complainant nor communicated to any third party. The Director-General endorsed the opinion but not the accompanying recommendation and communicated his decision to the complainant.

The Tribunal, to which an appeal against that decision was submitted, considered that the contested report had been prepared in accordance with Staff Rule 104.11. With regard to the complaints made by the complainant concerning the proceedings in the Advisory Board, the Tribunal considered that (1) the Board had been set up in accordance with the Staff Rules; (2) in accordance with the relevant provisions, the Director-General was not bound to summon the Board to meet at or near the place of the complainant's residence; (3) the complainant had neither declared his intention of attending the meeting at which the Board was to examine his case nor taken steps to provide for his representation; (4) in those circumstances, the fact that he had not been told of the date of the meeting was immaterial to the propriety of the proceedings; (5) the Board was free to determine whether or not it should hear witnesses; and (6) the complainant had received all the documents in the dossier, had had every opportunity to comment, and could not properly maintain that his right to a hearing had been disregarded.

With regard to the proceedings in the Appeals Board, the Tribunal (1) rejected the allegation of the complainant that the Board was irregularly composed because its members included an official who as Chief of Personnel had previously appointed the complainant to his earlier posts; (2) dismissed the complaints of the complainant concerning the communication to the Appeals Board of documents which he had not seen beforehand, and held that those complaints lacked foundation since the documents in question had been communicated immediately to the representative of the complainant and the complainant had made no

comment; and (3) considered that the "recommendations" made by the Appeals Board had no binding force.

As to the formal propriety of the contested decision, the Tribunal declared that the allegation that the Director-General had taken the view that the complainant's performance report might be communicated to third parties had not a shred of evidence.

As to the inherent lawfulness of the impugned decision, the Tribunal recalled that, in writing or endorsing a performance report on a staff member, the Director-General exercised his discretion as the head of the Organization. It concluded from a study of the documents in the dossier and the facts of the case that the impugned decision was not tainted with any of the irregularities which entitled the Tribunal to interfere with it.

The Tribunal affirmed, lastly, that no general principle of law barred one organization from communicating to another information on its former employees, provided that such information was materially correct and related to the employees' professional qualifications and was not given with malicious intent. It appeared from the dossier that in the case in question UNESCO had done no more than exercise strictly the above-mentioned right of any international organization.

9. Judgement No. 233 (6 May 1974): Alonso v. Pan American Health Organization (World Health Organization)

Complaint impugning a decision placing a promoted official at a lower salary level than that of her former grade

Following her transfer from the General Service category (in which she had held a post at grade G-7, step X) to the Professional category (grade P-1, step X), the complainant found that her total remuneration had diminished by some $500 a year. After being informed, following her claims, that she could not be given a higher grade than P-1, step X, she appealed to the Board of Inquiry and Appeal of the Pan American Health Organization and the Board recommended that the salary scale should be extended as an exceptional measure in the complainant's case and that she should receive an *ex gratia* payment in compensation for the decrease in salary due to her promotion. That recommendation was not endorsed by the Director of the Pan American Health Organization.

The Tribunal, to which the matter was referred, recalled that Staff Rule 220.2 provides that:

> "On promotion to a higher grade, the salary of a staff member shall be fixed at the lowest step in the new grade which will provide an increase in salary no less than would have resulted from the next within grade increase in the old grade . . .".

In the opinion of the Tribunal, and contrary to what was held by the Organization, a transfer from the General Service category to the Professional category was a "promotion"; since such promotions were envisaged in the WHO Manual and were not governed by any special rule, Rule 220.2 must apply.

The language of the Rule assumed the existence of a step in the new grade which would carry with it a salary high enough for the difference between the old and new salary of the promoted staff member to be at least equal to the increase in salary he would have enjoyed if he had advanced one step in his old grade.

In the case in question, that assumption turned out to be incorrect. Did that mean that in the circumstances Rule 220.2 should be treated as ineffective or did it mean that a way must be sought of paying the increase?

In order to solve the question, the Tribunal considered the primary object of the Rule. In its view, the object was not so much to provide a way of determining the step at which the staff member was to enter the new grade but to provide a way of determining the salary increase which the staff member should enjoy following promotion. The Tribunal stressed in that respect that the Rule in question was in a section headed "Salary Determinations" and that it

dealt with movement of staff, which naturally carried with it an increase in salary; it was therefore only reasonable to see the increase in salary as the true object of the Rule.

The Tribunal added:

> "The fixing of the step must be construed as only the means by which the true object of the Rule is to be secured. The means are the servant of the end, not its master; the failure of the means prescribed cannot be allowed to defeat the object; the object must be achieved in some other appropriate way".

The Tribunal stated that Rule 220.2 itself was the authority for making the increased payment; it mattered not that there was no other Rule authorizing the payment. The fact that the payment could not be fitted into any particular niche in the framework of the regulations would doubtless cause administrative inconvenience, but administrative inconvenience did not prevent the operation of the Rule.

The Tribunal therefore ordered that the Organization pay to the complainant arrears of salary at the rate of $US 517 per annum from the date of her promotion.

10. Judgement No. 234 (6 May 1974): Chawla v. World Health Organization

Request for compensation for loss in exchange value attributable to the delay of the Organization in making a payment

By Judgement No. 195,[34] the Tribunal had ordered the Organization to pay the complainant $US 20,000 as compensation. The present complaint aimed at obtaining the payment of $US 2,000 in compensation for the loss suffered by the staff member concerned owing to the decline in the value of the dollar and to the Organization's delay complying with Judgement No. 195.

The Tribunal declared that upon well-established principles there could be no claim in respect of currency devaluation as such. But there could be a claim for compensation for the unexplained delay in making the payment of a sum due. In the circumstances of the case in question, that compensation should be assessed as the diminution in the amount of rupees eventually received by the complainant, the diminution being due to the change in the rupee/dollar rate during the period of delay. The Tribunal specified that the relevant period began on 14 December 1972, one month after Judgement No. 195 was notified, and ended on 14 March 1973, when the payment had been made, and that the amount of compensation should be ascertained by taking the difference between the rates as quoted on the international exchanges on those two dates.

11. Judgement No. 235 (6 May 1974): McCubbin v. Food and Agriculture Organization of the United Nations

Complaint seeking payment of the compensation prescribed in the statutory provisions in the event of death attributable to the performance of official duties

The complainant's husband, an FAO staff member, had been sent to Taiwan in October 1969 as a Programme Adviser. On 29 September 1970, he became ill at the office, suffering severe backache, and immediately went to a doctor. Several examinations made on 29 September, 30 September and 2 October proved inconclusive; he was unable to obtain an appointment between 2 and 6 October, and it was only on 6 October that an aortic aneurysm was diagnosed. On 7 October he suffered a severe attack; he could not be operated on because the necessary graft was unavailable and he died in the night of 7 October 1970.

The complainant, believing that a cause of her husband's death was the limited diagnostic and surgical facilities available in Taiwan and that her husband would have stood a fair chance of survival if he had been in England instead of being stationed in Taiwan, claimed, as the widow of a staff member whose death was attributable to the performance of his official duties,

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[34] See *Juridical Yearbook*, 1972, p. 148.

the compensation prescribed in the relevant provisions, in her own name and in that of her two children, who were minors at the time. Her claims were rejected despite a favourable recommendation by the FAO Appeals Committee.

The Tribunal, seized of the case, accepted the complainant's contention that what had to be proved was that the performance of official duties had been a cause of the death of her husband. It had, however, to be a cause in the legal sense, in other words, there must be a link or links of some strength between the cause and the event, sometimes expressed by saying that the cause must be "approximate", "direct" or "not too remote".

In the circumstances, the Tribunal noted that the medical evidence, put at its most favourable for the complainant, showed that her husband "would have stood a greatly increased chance of possible recovery if he had been in England", though it must remain a matter of doubt whether his life could have been saved. On that evidence, the complainant contended that a cause of the death was the absence of proper facilities and/or equipment at her husband's duty station. In the opinion of the Tribunal, there was not on those facts established a sufficiently close connexion between the death and the performance of the duties to constitute the performance as a cause of the death.

The Tribunal specified that its decision depended on the circumstances of the case, including in particular the peculiar nature of the husband's disease and the perils to life inherent in it. The decision was not to be taken as laying it down that the death of a staff member at a duty station lacking ordinary medical facilities could never be attributed to the performance of official duties.

12. Judgement No. 236 (6 May 1974): Harrod v. International Labour Organisation

Irreceivability of a complaint concerning a decision which can no longer be impugned owing to the expiry of the time-limit and conduct of the Organisation which does not constitute a decision impugnable before the Tribunal.

The complainant, holder of a fixed-term contract which had been extended on several occasions, had first worked at the International Institute for Labour Studies, and then had been notified of his transfer, by a minute of 17 November 1972, to a branch in the International Labour Office itself. His employment was terminated on 31 December 1972 by mutual consent. On 1 January 1973, an ILO staff list was published containing the names of all Institute officials, whereas previous lists had not included officials on fixed-term appointments.

The complainant requested the Tribunal, *inter alia*, to declare unlawful his transfer of 17 November 1972 and the change of status implicit in the staff list dated 1 January 1973. He also stated that the role of the Director of the Institute had been criticized in a widely read journal in his country of citizenship in a way which adversely affected the reputation of the Institute and its officials; he argued that the Organisation should have made a public statement thereon and alleged that the Organisation's silence in that respect was a "decision".

The Tribunal pointed out that the complaint had been filed on 30 March 1973. To be receivable, it must impugn a decision which ran counter to the terms of the complainant's appointment or to some provision of the Staff Regulations, and which had been notified to the complainant not before 30 December 1972.

The first decision had been a decision notified on 17 November 1972 "coupled with" a decision notified on 1 January 1973. The decision of 17 November 1972 had been the decision to transfer the complainant. If that decision were taken by itself, the complaint against it was clearly out of time. The publication on 1 January 1973 of a list of the officials of the ILO neither revived the decision of 17 November 1972 nor created any new decision. The complaint against the first decision was therefore irreceivable.

With respect to the alleged "decision" by the Organization concerning the reaction to criticisms which might have been made against the Director of the Institute, the Tribunal decided that the Organisation had not taken any decision on the matter and that in any event it would not have been a decision which affected its obligations to the complainant.

13. JUDGEMENT NO. 237 (21 OCTOBER 1974): GEORGE v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

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

The complainant, a driver with a fixed-term contract, had been dismissed for unsatisfactory service. He had been charged (1) with taking an official motor-car, of which he was the driver, without permission from the parking space where it should have remained, for a purpose of his own and returning it in a damaged condition and (2) with reporting for duty in an intoxicated condition.

On the first charge, the Tribunal, in the light of the dossier, accepted the Administration's version of the facts and concluded that in the circumstances the complainant's misconduct justified his dismissal. On the second charge, the Tribunal decided that the evidence was corroborated that the complainant smelt strongly of alcohol; it felt, however, that there was no evidence that the complainant had been unfit for duty. To come on duty smelling of alcohol was reprehensible but it did not amount to misconduct serious enough to justify dismissal. Besides, that charge was immaterial because the first had been by itself sufficient to justify the measure taken. The Tribunal therefore rejected the complaint.

14. JUDGEMENT NO. 238 (21 OCTOBER 1974): ZOGANAS v. INTERNATIONAL LABOUR ORGANISATION

Complaint seeking the quashing of the decisions relating to the results of two competitions held by the Organisation to fill some of its posts

The complainant had entered successively an internal competition and an external competition held by the International Labour Office with a view to filling certain posts. He did not, however, secure a post in either case. He then appealed to the Tribunal by requesting it, *inter alia*, to quash the Director-General's decisions relating to the results of the competitions.

The Tribunal first of all rejected the argument by the defendant Organisation that, according to the Tribunal's case law,[35] the complainant was not entitled to refer to the courts in a single complaint two different decisions which did not concern the complainant's career but rather the lawfulness of two different competitions and were not therefore sufficiently related. The Tribunal found that each of the decisions impugned affected the complainant's career in a very similar way and that the complainant might therefore refer them to the Tribunal in one and the same complaint.

With respect to the internal competition, the Tribunal pointed out that the notice of vacancy, after describing the duties attaching to the posts, set forth the qualifications required of applicants (university degree and proficiency in languages) and stated that the candidates selected by the Board of Examiners might be required to take a written examination. The complainant objected that in selecting the candidates the Board of Examiners had taken account not only of their university education and proficiency in languages, the sole qualifications set forth in the notice of vacancy, but also of their professional experience, a criterion not mentioned in the notice. The Tribunal pointed out that an internal competition, of which the main purpose was to promote existing staff members, normally entailed taking into consideration all the information available to the Organisation concerning them, and in particular information which allowed of appraising the professional experience of the candidates. In taking previous performance as one of its criteria for the classification of candidates the Board of Examiners had not exceeded its proper authority to make a general assessment of them and make a choice.

The complainant had also wrongly alleged that candidates should have taken a written examination. According to the notice of vacancy itself, it was for the Board to decide on the need for such an examination.

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[35] See Judgement No. 111, summarized in the *Juridical Yearbook*, 1967, p. 306.

Finally, the complainant had not produced a shred of real proof in support of his allegation that the impugned decision had not been taken in the interests of the Organisation.

With respect to the external competition, the complainant had contended that the Organisation had tried to exclude him by summoning him to a room other than that in which the examination was to take place. The Tribunal, however, noted that the complainant had discovered in time the room where the examination was actually being held and that he had taken the examination in the same conditions as the other candidates. In those circumstances, regrettable as the mistake might have been, therefore, it had not affected the regularity of the proceedings.

The complainant further contended that the rules of impartiality had not been respected because, among other things, the names of the candidates had been known to the Selection Board when it had come to classify them. The Tribunal, however, concluded that, according to the notice, the vacancy was to have been filled, not by a competition in the strict sense of the term, but by selection. The process of selection of civil servants should by its very nature be based not just on the results of an examination but on any other useful criteria. Account should be taken, not only of the candidate's possession of the expressly stipulated qualifications, but of their degrees and of their professional experience, which in itself constituted a criterion for selection and one of particular relevance in recruiting civil servants. In the present case, the examination results being only one of the criteria to be applied, the Selection Board had been entitled, after marking the written papers, to ask the Organisation to reveal the names of the candidates so that it could fulfil its task by assessing the general suitability of each of them for employment in the international civil service.

Thirdly, the complainant had not produced a shred of proof in support of his allegations that he had been eliminated because of his political opinions or trade union activities and that the Organisation had failed to apply the principle of equality to his case. In the light of all the documents in the dossier such allegations appeared most unlikely to be true.

The Tribunal therefore rejected the complaint.

15. JUDGEMENT NO. 239 (21 OCTOBER 1974): FOX v. INTERNATIONAL LABOUR ORGANISATION

The Tribunal recorded the withdrawal of suit by the complainant.

16. JUDGEMENT NO. 240 (21 October 1974): HOPKIRK v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

The Tribunal recorded the withdrawal of suit by the complainant.

17. JUDGEMENT NO. 241 (21 OCTOBER 1974): SANTONI v. WORLD HEALTH ORGANIZATION

Complaint seeking the quashing of a decision not to renew a fixed-term appointment

The complainant was appointed under a fixed-term contract which was renewed several times, on the last occasion until 30 September 1973. In May 1973 she was informed that her contract would not be renewed. Her internal appeals having failed, she filed a complaint with the Tribunal, maintaining that she had grounds for counting on a further extension of her appointment, that her functions had not matched her qualifications and that the decision taken on her case was based on erroneous grounds (unsatisfactory service).

The Tribunal stressed that a decision not to extend a staff member's appointment was a matter of discretion. The Tribunal could interfere with such a decision only if it was taken without authority, was irregular in form or tained by procedural irregularities, or was based on a mistake of fact or of law, or if essential facts had not been taken into consideration, or if it was tainted with abuse of authority, or if conclusions which were clearly false had been drawn from the documents in the dossier.

The complainant maintained that the impugned decision was taken on mistaken grounds. The Tribunal considered, however, that it did not appear from the dossier that the complainant was the victim of any prejudice or that her case had not received proper examination.

Moreover, the complainant had not only received a written reprimand in December 1971 and signed several annual reports criticizing her lack of interest in her work, but did not deny having received the warnings and held the conversation mentioned by the Administration.

The decision not to extend the complainant's appointment did not infringe any statutory or contractual provisions. It was indeed in accordance with the provision in Staff Rule 940 that fixed-term appointments terminate automatically on completion of the agreed period of service.

The complainant had been required to perform the duties specified in her contract of appointment. Lastly, there was no reason to suppose that the Director-General had failed to take essential facts into consideration, been guilty of abuse of authority or drawn clearly false conclusions from the documents in the dossier. Thus, the Tribunal could not interfere with the decision and the complaint was dismissed.

18. JUDGEMENT NO. 242 (21 OCTOBER 1974): STOM-GARNIER v. EUROPEAN ORGANISATION FOR THE SAFETY OF AIR NAVIGATION

The Tribunal recorded the withdrawal of suit by the complainant.

19. JUDGEMENT NO. 243 (21 OCTOBER 1974): RILEY v. INTERNATIONAL LABOUR ORGANISATION

Complaint seeking the quashing of a decision not to renew a fixed-term appointment

The complainant held a fixed-term contract which had been renewed on several occasions. In two successive periodic reports reservations concerning his work and output were expressed by his supervisor, who finally decided to assign him to other duties and to place him under his own direct supervision, giving him special assignments with stated deadlines. Some months later, the complainant was transferred to a new branch, where his work once again gave rise to unfavourable reports. His appointment was nevertheless extended for a further period of six months and then, for compassionate reasons, for two successive periods of two months.

The complainant requested the Tribunal, *inter alia*, to quash the Director-General's decision not to renew his appointment.

The Tribunal recalled that a staff member on a fixed-term appointment had no right to expect extension of that appointment, as was clear from Staff Regulation 4.6 (*d*). The question whether such an appointment might or might not be extended fell within the discretionary authority of the Director-General, whose decision on the matter could be interfered with only if it was 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 conclusions which were clearly false had been drawn from the documents in the dossier or, finally, if authority had been exercised for purposes foreign to the Organisation's interests.

The complainant's contention that his supervisor should have confined himself to exerting purely administrative control over his work, and not technical supervision, ran counter to the basic principles to be observed in the public service, where a supervisor should exercise supervision and control over all the activities of his subordinates. If a subordinate who had already served as an official for some time was having difficulties in adapting to his duties—and such was the case of the complainant, who although possessing unquestionable and unquestioned technical skills had revealed himself to be incapable of producing work regularly or of doing a particular job of work by a reasonable deadline—the head of branch had the duty to keep a close watch on him, guide him and carefully supervise his work, or even to take over himself. In the Tribunal's view, all the complainant's criticisms of his superior suggested that in fact the latter was perfectly aware of his duties as head of branch, and none of those criticisms was warranted. Besides, even under the supervision of another head of branch, the complainant proved to be no better able to adapt.

With regard to the contention that the complainant had been assigned to duties which did not match the description in his contract of appointment, the Tribunal declared that a head of branch should be free to employ his subordinates in the best interests of his branch, with due regard to their qualifications. It was not contested that, in view of the complainant's inability to perform his duties and the inadequacy of his output, his successive supervisors and the Director-General had tried to give him, in his own interests, different and varied assignments, first within the branch and later in a related branch, and that moreover those changes fell within the authority enjoyed at different levels by each of the persons concerned.

The Tribunal concluded that the impugned decision was not tainted with any of the flaws which entitled the Tribunal to interfere with it and stressed that the Organisation, instead of terminating the complainant's services as soon as it became aware of the difficulties he was having in adapting to his duties, had sought to use him in other posts, thus treating him with consideration. The Tribunal therefore dismissed the complaint.

20. JUDGEMENT NO. 244 (21 OCTOBER 1974): ELLOUZE v. INTERNATIONAL LABOUR ORGANISATION

Complaint submitted by a locally recruited staff member with a view to obtaining non-local status

The complainant, after completing several periods of employment under fixed-term contracts, first at Geneva with local status from 22 August 1967 to 27 February 1968, then in Algiers with non-local status from 1 March 1968 to 31 January 1970 and then again in Geneva with local status from 3 March 1970, was appointed on 5 December 1972 as a General Service category official under a contract of indeterminate duration which classified him as "locally recruited", thus indicating that his home was Geneva.

A few months later he requested that Sfax be regarded as his home, but his requests were dismissed.

The Tribunal, to which the case was submitted, noted that according to the Staff Regulations, the home of officials of the General Service category was deemed to be at the duty station if the official had been locally recruited. Likewise according to the Regulations, an official was classified as locally recruited in various circumstances, in particular if he had been continually living for one year within a radius of 25 kilometres from Geneva.

It had been established that at the date of his appointment of indeterminate duration the complainant had held, as a locally recruited official, successive short-term appointments covering more than one year. In accordance with the aforementioned provisions, he must be deemed a locally recruited official and his home was therefore his duty station.

The complainant contended that the contracts which he held after 3 March 1970 were tainted with illegality in that they treated him as a locally recruited official, whereas on 3 March 1970 he had been living in Geneva for less than one year. However, since the complainant had not objected to the terms of those contracts before they expired, it was no longer open to him to contest those provisions, which had become final.

The Tribunal therefore dismissed the complaint.

21. JUDGEMENT NO. 245 (21 OCTOBER 1974): MEYER v. INTERNATIONAL ATOMIC ENERGY AGENCY

Complaint seeking the quashing of a decision refusing to extend an appointment by the few days necessary to enable the person concerned to receive a pension

The complainant held a fixed-term appointment which had been extended several times. The last extension, for a period of 11 months, was accepted like the previous extensions, except that the complainant asked that its length should be reconsidered; for want of 13 days the appointment offered to him did not enable him to complete the five years' continuous service required to entitle him to a pension from the United Nations Joint Staff Pension Fund. His request having been rejected by a decision with statement of reasons of 31 August 1973, he

appealed to the Joint Appeals Committee, which held that he had no "right" to an extension of his final appointment, but nevertheless recommended that it should be extended by 13 days. By letter of 10 December 1973, the Director-General informed the complainant that he could not endorse the Committee's recommendation.

The Agency maintained that the complaint was irreceivable because the Director-General's refusal to endorse the Committee's recommendation was not an administrative decision within the meaning of Staff Regulation 12.01 and that the true decision in the case was that by which the administration had extended the complainant's appointment by 11 months. The Tribunal rejected that argument. It observed that the dismissal of the complainant's claim of 31 August 1973 indeed constituted a decision which had been correctly submitted to the internal appeals body and that in the light of that body's recommendations the Director-General had taken a further decision in the legal meaning of that term on 10 December 1973. The complaint had thus been lodged in accordance with the rules, within the time-limit and after the internal means of redress had been exhausted.

As to the merits, the Tribunal stressed that the impugned decision was a matter of discretion which could be interfered with only if it was taken without authority, was irregular in form, or tainted by procedural irregularity or by illegality, or was based on incorrect facts or if essential facts had not been taken into consideration, or if it was tainted with misuse of authority, or, again, if clearly mistaken conclusions had been drawn from the documents in the dossier.

The Tribunal first stated that the administration had not infringed its contractual obligations because all the complainant's contracts stated that fixed-term appointments carried no expectation of extension.

The complainant had undoubtedly been informed that fixed-term appointments "can be followed by fixed-term contracts depending upon the needs of the Agency's programme and work performance of the staff member concerned", but he could not infer from that statement any right to continue in the Agency's service until completion of the programme to which he had been assigned and for as long as his work performance was satisfactory. On the contrary, by using the word "can" the Agency reserved the right to terminate his appointment even if the stipulated conditions were fulfilled.

Moreover, the complainant could not properly take the Agency to task for appointing him without informing him of its general practice of not granting fixed-term appointments of more than five years' duration. It might, of course, be regrettable that he had not been informed of that restriction at the outset, as new staff members of the Agency apparently had been since. But since he should have expected his appointment to be terminated on grounds other than the completion of a programme or the inadequacy of his services, he could not found any claim on the omission which he attributed to the Agency.

The complainant also contended that the Director-General had misused his authority. The Tribunal observed that it was the Director-General's duty to safeguard the Agency's interests at all times. The question therefore arose whether the impugned decision was in accordance with those interests, on whose nature the Tribunal did not intend to substitute its own opinion for that of the highest authorities of the Agency. The latter had observed that in principle it was its practice—based on article VII.C of its Statute and approved by its General Conference and its Board of Governors—to limit the total period of appointments of staff members to four years, and to grant to only a few of them appointments of over five years. In offering to extend the complainant's total length of service to four years, 11 months and 17 days, the Director-General had no doubt intended to act in the Agency's interests viewed by its higher authorities. Hence misuse of authority could not be regarded as established.

It appeared, however, from the circumstances of the case that the Director-General had drawn unwarranted conclusions from the evidence before him. Although the complainant had not expressly put forward that argument, the Tribunal felt bound to consider it, since its jurisdiction required it to apply the law. The refusal of the complainant's request had substantial effects on the financial interests of a staff member whose services had consistently

been regarded as satisfactory. Moreover, the extension claimed covered so short a period that it was not such as to cause any prejudice whatever to the Agency. The Director-General had no doubt been prompted by the desire to avoid setting a precedent on which other staff members might later rely, but in order to avoid future claims like the complainant's, the Agency need only refrain from extending the appointment of fixed-term staff members beyond four years; furthermore, by limiting the period of the complainant's service to five years the Director-General would not have departed from the practice of regarding only appointments of more than five years as permanent.

The Tribunal therefore declared that by causing the complainant serious loss which was not justified by the need to safeguard any interest of the Agency the Director-General had drawn from the dossier conclusions which were clearly mistaken. His decision was therefore tainted by a flaw which warranted quashing it. The Agency should therefore extend the complainant's final appointment so as to bring his total period of service to five years and so entitle him to the benefits of participation in the Pension Fund. A longer extension of appointment was not warranted in the circumstances of the case, since it was not required to remedy the flaw in the decision.

22. JUDGEMENT NO. 246 (21 OCTOBER 1974): RONDUEN V. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Complaint alleging non-observance by the respondent Organization of its obligations under the Staff Regulations and Staff Rules with respect to the participation of its staff members in the United Nations Joint Staff Pension Fund

The complainant, who was born on 27 April 1907, had been appointed on 23 November 1963 under a fixed-term one-year contract which had been renewed on several occasions for periods of one year or less. He first left the service of the Organization on 31 May 1968, then was reappointed seven months later under a one-year contract, which was again extended on several occasions. On 22 December 1971, the complainant finally left the service of the Organization.

At the time of his first appointment, the complainant had been informed that he was an associate participant in the United Nations Joint Staff Pension Fund. He lost that status, and was duly informed of that fact, when he reached the age of 60. Finally, when he was reappointed, it was made clear to him that he was excluded from the Fund since he was over 60.

On applying for a pension entitlement a few months before his contract expired, he received a negative answer from the administration. The matter was then referred to the UNESCO Joint Staff Pension Committee, which upheld the administration's interpretation, then to the United Nations Joint Staff Pension Board, which arrived at the same decision.

By letter of 25 October 1972, which did not arrive at its destination until 11 April 1973, the complainant this time lodged an appeal with the Appeals Board against the "administrative decisions" on the basis of the Staff Regulations and Staff Rules. The Appeals Board declared the appeal receivable but advised dismissing it on the merits. By letter of 22 October 1973, the Director-General informed the complainant that he endorsed the Board's recommendation to dismiss the complaint but that he reserved his position on the irreceivability of the complaint.

The complainant then appealed to the Tribunal against that decision, asserting, on the basis of Staff Regulation 6.1[36] and Staff Rule 106.4,[37] that the Organization ought to have

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[36] The terms of this Regulation are as follows: "Provision shall be made for the participation of staff members in the United Nations Joint Staff Pension Fund in accordance with the Regulations of that Fund."

[37] The terms of this Rule are as follows: "A staff member who is under sixty years of age at the time of appointment shall participate in the United Nations Joint Staff Pension Fund according to his eligibility under the Regulations of the Fund, provided that his participation is not excluded by the terms of his appointment."

ensured that the nature and duration of his appointments entitled him to a retirement benefit. In his appeal, the complainant also impugned a decision of 21 December 1973 concerning the payment of a medical insurance indemnity.

The Tribunal first noted that the decision of the United Nations Joint Staff Pension Board, which might be impugned before the United Nations Administrative Tribunal, had not been referred to this Tribunal. It was not open to review by the ILO Administrative Tribunal, whose competence did not extend to disputes between an international official and the organs of the Fund.

Hence the sole question for the Tribunal to determine was whether by the alleged infringement of its obligations UNESCO had deprived the complainant of entitlements from the Pension Fund. The Tribunal pointed out first of all that the Organization was not bound to grant appointments in such terms as to confer on staff members maximum benefit from the Fund. Although it was of course required to take account of the legitimate interests of staff members on recruitment, in doing so it could not overlook its own interests. Moreover, the conclusion and extension of contracts of appointment fell within the discretionary authority of the Director-General, and the Tribunal exercised over such decisions only the restricted form of review to which discretionary decisions were subject.

The Tribunal noted that, until he reached the age of 60, the complainant had been an associate participant in the Fund and that UNESCO did not therefore ignore the question of his participation in the Fund. Once he had reached the age of 60, the complainant could not have remained a participant in the Fund—this time as a full participant—unless at the date of his sixtieth birthday he had held either a permanent appointment or an appointment which would normally lead to a permanent appointment, or an appointment bringing his total length of continuous service to at least five years. At that time, however, he had completed only a little over three years' service with UNESCO; consequently UNESCO was not even morally bound to offer him a contract which would put him in one of the three categories mentioned above. Finally, once he had passed the age of 60, the complainant could no longer become a participant in the Fund. Whatever their duration, his subsequent appointments could in no way change that fact. It was therefore pointless to consider whether or not their extension would have been warranted. The Tribunal consequently considered the conclusions of the claim to be unfounded.

Finally, the part of the claim concerning the payment of the medical insurance indemnity impugned an alleged administrative decision which might be referred to the Appeals Board. Since its submission had violated the rule stipulating that internal means of redress should first be exhausted, it was irreceivable.

23. Judgement No. 247 (21 October 1974): Nemeth v. Food and Agriculture Organization of the United Nations

Complaint against a decision to withhold annual salary increment—Concepts of "unsatisfactory service" and "unsatisfactory conduct"—Grounds of insubordination

The complainant, who held a permanent contract, had had his annual salary increment withheld as a result of his offensive attitude towards his immediate supervisor, whom he refused to acknowledge as such. In addition, his post had been abolished although he continued to be employed in the FAO secretariat.

Before the Tribunal, he contended that both the withholding of his increment and the abolition of his post as part of an experimental reorganization of his Division, which had the effect of leaving him only minor duties, were the result of intriguing by the Director of his Division to get rid of him and ruin the end of his career.

The Tribunal pointed out that a decision to withhold a within-grade increment was a discretionary decision and could therefore be impugned only if it had certain flaws and if it was based, among other things, on an error of law or a clearly mistaken conclusion on the facts. It considered that the decision in this case was based upon an error as to what constituted

unsatisfactory service within the meaning of the Staff Regulations and an erroneous appreciation of the facts which were supposed to constitute it.

The record revealed that the administration's complaint against the complainant was that he had refused to acknowledge a particular official as his superior. For his part, the complainant denied that the official in question was in fact his superior. He distinguished also between "unsatisfactory service" and "unsatisfactory conduct" and argued that "unsatisfactory conduct" was not a ground for curtailing salary. The Organization, for its part, contended that "a direct superior-subordinate relationship" had been established and that the term "unsatisfactory service" covered insubordination.

The Tribunal first considered to what extent insubordination was covered by the concept of unsatisfactory service. In that respect, it noted that the Staff Regulations distinguished between unsatisfactory conduct and unsatisfactory service. The latter was covered by Manual section 315.322 and could lead only to the withholding of increment; the Organization had therefore rightly insisted that such withholding was not a disciplinary measure. Unsatisfactory conduct, on the other hand, was a subject for disciplinary action which was covered by Manual sections 301 and 339. Eleven specific kinds of unsatisfactory conduct were set out in Manual section 330.152, of which the eighth was insubordination, such as impertinence to a superior officer or refusal to obey instructions. A formal procedure had to be followed in disciplinary cases so as to ensure that the charge was stated in writing and an opportunity given for reply.

Several of the 11 kinds of unsatisfactory conduct set out in the Manual were unlikely to affect in any way the service given. Occasional insubordination might not affect the service given; a constantly insubordinate officer, on the other hand, could not be giving satisfactory service. To bring insubordination within the concept of unsatisfactory service, it was necessary, in the opinion of the Tribunal, (1) to establish that the insubordination did in the particular case affect the quality of the officer's service (positive condition) and (2) to establish that insubordination in the particular case had not given rise to a dispute (negative condition). In the present case, neither of these conditions had been fulfilled.

As to the positive condition, the Tribunal noted that the complainant's refusal to acknowledge a certain official as his superior was the only fact specifically alleged, and it did not follow from it that the quality of his service was thereby impaired.

The negative condition was necessary to preserve the true relationship in the Staff Regulations between disciplinary and non-disciplinary measures. When an act of disobedience was alleged and disputed, the accused could not be deprived of the protection afforded by the disciplinary regulations by charging it only as an item of unsatisfactory service. In the present case the complainant was charged with an insubordinate attitude and was disputing that he owed a duty of subordination.

Accordingly, the offence, if any, of the complainant was an offence against discipline, and the Director-General had erred in dealing with it as a matter of unsatisfactory service. He had erred also in his implicit determination (the point was never dealt with expressly) that there was a duty of subordination. In the present case, if the Director of the Division to which the complainant belonged meant to delegate his authority in certain matters to one of the officers in that Division, he ought to have done what he had neglected to do, namely, use clear words which left the other officers in no doubt that one who was then considered hierarchically their equal would in future be invested with the right to command.

The Tribunal concluded that, if the Director-General had taken into account all the relevant factors, he would not have found the complainant guilty of insubordination.

The decision to withhold the annual salary increment had been taken, in the first instance, by the Director of the Division to which the complainant belonged. It had then been based on two instances of comments deemed inappropriate and offensive. The first instance could perhaps, in the opinion of the Tribunal, warrant a charge of impertinence, but one had to take into consideration, on the one hand, the fact that the two persons in question were near equals and, on the other hand, the stress being experienced by the complainant at the time of the

incident because of the threat to abolish his post. As to the second incident, the Tribunal could find no evidence at all of offensive or impertinent behaviour on the part of the complainant.

At the Director of Personnel level, the decision to withhold the annual salary increment had been based on the fact that the complainant had deliberately ignored the existence of a hierarchical relationship between himself and another officer of the Organization. In that respect the Tribunal noted that, on 7 April 1972, the officer in question had for the first time been expressly named as the complainant's supervisor. At no time after that date had the complainant questioned the existence of a hierarchical relationship. Prior to that date, the Tribunal recalled, as was stated above, that the actions of the administration had not been unambiguous.

Finally, at the Assistant Director-General level, the reason given to support the decision to withhold the annual salary increment was that the complainant had refused to recognize another officer of the Organization as his supervisor. The Organization contended that, when the officer in question had been promoted to P-5 with effect from 1 January 1972, his post had been re-allocated with a new title. It was further contended that by an oversight his title had not changed until April 1972 when it was done with retroactive effect. In the opinion of the Tribunal, these operations could hardly have been conducted without the issue of some documents. But none had been produced. According to the Administration, "the action did not call for any official announcement for general distribution". The Tribunal declared that it was at a loss to understand how the complainant could be expected to recognize the officer in question as the incumbent of an office to which his promotion had not been announced.

The Tribunal concluded:

(1) That the Director-General had erred in law in treating the complainant's attitude as if it fell within the concept of unsatisfactory service;

(2) That he had erred in law in concluding that at the material time a particular officer of the Organization was the complainant's superior or supervisor;

(3) That in concluding that the complainant was guilty of insubordination he had drawn a clearly mistaken conclusion from the facts.

The contested decision was consequently quashed.
