Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

1975

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

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

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Chapter V

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

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

1. JUDGEMENT NO. 195 (18 APRIL 1975):[2] SOOD *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application from a former staff member who was terminated before his fixed-term appointment expired but subsequently obtained the cancellation of that measure—Legal consequences of the cancellation of a decision because the requirements of due process were not fulfilled—Right of the person concerned to have his qualifications for having his fixed-term appointment converted into a permanent appointment examined as if the cancelled decision had never been taken

The applicant had been granted several fixed-term appointments. During the last but one of those appointments, an incident occurred which led to a letter of reprimand being addressed to him. At the end of that appointment, however, he was evaluated in a periodic report in which his performance was described as "satisfactory" and was granted a new one-year appointment which was to expire on 30 April 1973. Following a series of incidents, it was decided to terminate his appointment on 5 January 1973 for unsatisfactory service, in accordance with staff regulation 9.1 (*e*).

The case was referred to the Joint Appeals Board, which considered that in the examination of the charges which led to the termination decision the applicant had been denied due process; it also found the circumstances of the case did not warrant

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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 appintment 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 1975, 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 succeeded to the staff member's rights on his death or who can show that he is entitled to rights under any contract or terms of appointment.

[2] Mr. R. Venkataraman, President; Mr. Z. Rossides, Member; Sir Roger Stevens, Member.

the taking of the contested action. It therefore recommended the cancellation of the termination decision and also recommended that the Secretary-General should give consideration to the possible conversion of the applicant's fixed-term appointment to nine-month probationary appointment leading to a permanent appointment or, alternatively, should pay the applicant an *ex gratia* indemnity equivalent to six months' base salary. The Secretary-General accepted the first of those recommendations but rejected the second.

The Tribunal, to which the case was referred, noted that at the time of his termination the applicant had been eligible for consideration under the new policy described in document 262/5 dated 1 June 1972, entitled "Redefinition of Contractual Policy for Local Staff", whereby local staff members who have served not less than four one-year terms on fixed-term appointments may be recommended for a probationary appointment which may, where appropriate, lead to a permanent appointment. It was true that the document was marked "Confidential" and had not been officially brought to the knowledge of the applicant. However, since its purpose was to enunciate a new policy of providing a uniform and more equitable career prospect for local staff, and to bring about a fundamental change in the future conditions of employment of precisely that category of staff into which the applicant fell, it had created rights for staff members in that category even though they might have been unaware of its existence or of the rights thus created.

The Tribunal noted that the cancellation of the termination decision pursuant to the recommendation of the Joint Appeals Board had had the effect of reinstating the applicant until the expiry of his fixed-term appointment but that the applicant had not been considered for conversion of his fixed-term appointment in accordance with the aforementioned document.

The Tribunal observed that the respondent had accepted the recommendation of the Joint Appeals Board that the termination decision be cancelled without dissenting from the reasons on which it was based. In its Judgement No. 185, the Tribunal had observed:

> "This is thus a rescission effected by the competent authority who, having expressed no reservations concerning the reasons given by the Joint Appeals Board, must be assumed to have accepted the reasons derived from the irregularity of the decision."[3]

The reasons given by the Joint Appeals Board in support of its conclusion that the applicant had been denied due process must therefore be assumed to have been accepted by the respondent.

Without seeking to call in question the principle, invoked by the respondent, that a fixed-term appointment does not carry any expectancy of renewal or conversion to any other type of appointment, the Tribunal observed that where a termination decision had been cancelled and the reasons for such cancellation had not been challenged by the respondent, the parties should be restored to the *status quo* and due consideration should be given to the rights of the staff member as if there had been no termination decision, nor reasons for such action. In Judgement No. 185 the Tribunal had stated:

> "It is for the Tribunal to determine whether, by that decision, the Respondent drew all the necessary legal inferences from the rescission and went as far as was required in restoring the *status quo*."[4]

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[3] See *Juridical Yearbook*, 1974, p. 111.

[4] *Ibid.*, p. 112.

The record showed that the decision to terminate the applicant and the decision not to consider the possibility of converting his fixed-term appointment in accordance with the aforementioned document had been taken simultaneously and on the basis of the same allegations. Since the first of those decisions had been taken without due process, as noted above, it followed in the Tribunal's view that the second decision was likewise vitiated by lack of due process. Rather than ordering the respondent to give due consideration, on the basis of an impartial review of a fair and accurate record of the applicant's performance, to granting him a probationary appointment, the Tribunal preferred, in view of the lapse of time and the other circumstances of the case, to compensate the applicant for the injury sustained by awarding him as compensation one year's net base salary.

2. JUDGEMENT NO. 196 (18 APRIL 1975):[5] BACK *v.* SECRETARY-GENERAL OF THE UNITED NATIONS AND UNITED NATIONS JOINT STAFF PENSION BOARD

Application for compensation for financial losses linked to the devaluation of the dollar—The inequality among retired staff members of the United Nations which may result from a currency devaluation not attributable to the Organization does not impose on the latter any specific duties towards any retired staff member—Question of the date on which payments relating to retirement must be made—Granting of compensation for damage caused by undue delay in the payments of sums due in that regard

Before retiring, the applicant had expressed the desire to receive the reduced pension together with the lump sum referred to in article 29 of the Regulations of the United Nations Joint Staff Pension Fund. However, more than two and a half months were to pass between the date on which his service terminated and the payment of the lump sum and the first periodic pension benefit. Considering that that constituted an undue delay which, because of the reduction in the value of the dollar in relation to the Swiss franc, had caused him appreciable damage, the applicant requested the Tribunal to grant him, *inter alia*, a sum corresponding to the difference between the lump sum which he should have received on 29 January 1973 at the exchange rate applicable on that date and that which he had in fact received on 6 March 1973.

The Tribunal first noted that the application was directed against both the Secretary-General of the United Nations and the United Nations Joint Staff Pension Board. It noted that the two respondents had submitted a joint answer, the pleas of which were as follows:

> "The Tribunal is respectfully requested to find that Applicant has failed to establish any obligation, based on any provision of his contract of employment or terms of appointment (including the Staff and Pension Fund Regulations and Rules), on the part of either Respondent to assure him of payment on or at the rate of exchange prevailing on the date his pension entitlement vested; nor has Applicant proved fault on the part of either Respondent, not outweighed by his own lack of diligence, causing him to be paid only after an allegedly unreasonable delay from the date of such vesting."

Consequently, the Tribunal considered the facts in the case without pronouncing on their imputability to one or other of the respondents and, in particular, without determining the share of responsibility, if any, which might be apportioned to each of them.

The Tribunal recalled the conclusions it had reached in its Judgement No. 182,[6] according to which it did not seem that the inequality which the devaluation of the

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

[6] See *Juridical Yearbook*, 1974, p. 107.

dollar, which was not attributable to the Organization, might create among retired staff members of the Organization would impose on the latter any specific duties towards a retired staff member. It also referred to Judgement No. 234[7] of the Administrative Tribunal of the International Labour Organisation, which stated that "upon well-established principles there can be no claim in respect of currency devaluation as such". It therefore felt that it must consider only:

(1) Whether any statutory provision required payment on a specific date;

(2) If such was not the case, whether the date of payment must be considered as having been unduly delayed by reason of the conduct of the respondents.

Referring to section I.2 of the Administrative Rules of the Fund, which make payment of a benefit subject to certification by the Secretary of the Board "that the conditions for payment of the benefit have been fulfilled", the Tribunal rejected the applicant's argument that payment must be made on the day on which entitlement to a benefit took effect. Referring to article 48 (*b*) of the Fund Regulations, it also rejected the applicant's arguments that the rate of exchange to be applied was that in force on the date of commencement of entitlement.

However, the Tribunal considered—in particular, because the termination notification addressed to the Secretary of the Board of the Organization contained an unusual notification which should normally have provoked a request for explanation—that the delay in the payment of the sum due to the applicant demonstrated negligence in the operation of administrative services such that the resulting damages to the applicant must be made good by the respondents.

The Tribunal considered that no precise date could be fixed as being that on which payment should have been made but considered that the prejudice suffered should be calculated by taking the date on which the applicant would have been paid at the earliest and that on which he would have been paid at the latest if the administration had shown normal diligence, and taking the average of the two sums in Swiss francs that would have been paid to the applicant if the payment order had been executed in Geneva on the two dates in question.

Since the sum thus calculated constituted compensation for damages incurred and not a benefit under the pension scheme, the Tribunal considered that the respondents could not invoke article 45 of the Pension Fund Regulations (which relates to the case of a benefit due but not paid) to contest the applicant's claim for payment of interest on the sums in question, and it decided to grant interest at the rate of 6 per cent per annum.

3. JUDGEMENT NO. 197 (22 APRIL 1975):[8] OSMAN *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application for revision of a judgement—Correction of this judgement under article 12 in fine *of the Statute of the Tribunal—Rejection of the application notwithstanding the implications of the correction in question on the equity of the case—Obligation of the Tribunal, as a judicial organ, to apply existing law*

The applicant, a former associate participant in the United Nations Joint Staff Pension Fund, had filed an application with the Tribunal in 1973 in which he claimed that he had been wrongfully deprived of benefits under a provision of the Pension Fund Regulations relating to conditions for admission as a full participant. The Tri-

[7] *Ibid.*, p. 131.

[8] Mr. R. Venkataraman, President; Mme P. Bastid, Vice-President; Mr. F. A. Forteza, Member.

bunal had rejected this claim in its Judgement No. 180,[9] which contained the statement that in order to become a participant in the Pension Fund the applicant should, at the time of his last contract, have been employed for a period longer by three months and one week than the period for which he had actually been employed.

The purpose of the present application was to bring about the revision of Judgement No. 180. It was stated that the figure of three months and one week should be replaced by that of one month and one week in order to take into account the two months of the applicant's employment prior to his period of continuous service.

On this point, the Tribunal noted that its calculation had been based on the Pension Fund Regulations effective on 1 January 1967, which referred to a "continuous period of... employment" (article II, para. 2 (*b*)). The 1963 Regulations, however, did not contain the requirement that the employment be "continuous". In the opinion of the Tribunal, a strict interpretation of the Regulations did not allow the two months of employment in question to be taken into account. Acknowledging, however, that the Secretary of the Joint Staff Pension Board had recognized in a memorandum the applicant's right to inclusion of the two months of employment in his total period of service, the Tribunal decided that Judgement No. 180 should be corrected on that point.

In applying for revision of the judgement in question under article 12 of the Statute of the Tribunal, the applicant contended that, subsequent to the said judgement, he had discovered that the Administration had not provided him at the proper time with a copy of the Pension Fund Regulations which were in force from 1 January 1967. When, however, the Tribunal, in its Judgement No. 180, had stated that there had been a lapse on the part of the applicant in not bringing the matter at the relevant time to the attention of the Administration, it had clearly taken it for granted that the applicant was familiar with the said Regulations at the time in question. The problem was therefore to determine whether the applicant had in fact been aware of the relevant provisions of the Pension Fund Regulations at the appropriate time. The Tribunal noted in this regard that regardless of any short-comings in the system of transmitting amendments to the regulations and rules to staff members serving in the field, the applicant's attention had been specifically drawn, in the various letters of appointment he had received, to the possible relevance of the Pension Fund Regulations to his case. Furthermore, the applicant had been fully aware of the Pension Fund Regulations which came into effect on 1 January 1963, and, in so far as the particular point which lay at the origin of the dispute was concerned, the text adopted in 1967 had not created a different system.

Moreover, the following information was received by the Tribunal from the respondent:

> "More generally, it has never been the policy of the Organization to allow the effect of an extension of an appointment on a staff member's pension benefit to determine the duration of such extension. The Organization has always considered that the effect upon a staff member's pension benefits should be a consequence of the decision on how long to extend his contract in the light of the duties for the performance of which his services are required. Therefore, when preparing a letter of appointment to be issued to a technical assistance expert, TARS does not take into consideration, in determining the duration of the appointment, the effects of such duration on the pension rights of the expert."

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[9] See *Juridical Yearbook*, 1973, p. 111.

Without expressing an opinion on the substance of those observations, the Tribunal felt that they had no relevance to the consideration of a request for revision within the meaning of article 12 of its Statute.

The Tribunal drew the attention of the parties to Judgements No. 230[10] and No. 245[11] of the Administrative Tribunal of the International Labour Organisation in which that Tribunal had considered that, in determining the duration of a contract, the Organization could not disregard the right of the staff member concerned to a pension and that, by not granting him an appointment of appropriate duration, the Organization had failed "to take an essential fact into consideration". It added that, since those two judgements could not be regarded as a new fact the discovery of which might constitute a ground for revision under article 12 of the Statute, it was irrelevant for the differences between those cases and the present one to be considered.

Finally, the Tribunal recalled that, notwithstanding the implications of the aforementioned correction on the equity of the case, it was bound, as a judicial organ, to apply existing law, including the provisions of its Statute, and did not have the power to decide a case *ex aequo et bono*. Therefore, subject to the said correction, it rejected the application.

4. JUDGEMENT NO. 198 (23 APRIL 1975):[12] LANE *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application for rescission of a decision to terminate, in accordance with staff regulation 9.1 (c), a probationary appointment after a period of nearly two years beyond the expiry of the said appointment — Conditions to which the conversion of a probationary appointment into a permanent appointment is subject — Entitlement of a staff member anomalously kept in service beyond the maximum probationary period, owing to an administrative error, to due process for the assessment of the suitability of a staff member on probationary appointment for a permanent appointment

The applicant was granted a probationary appointment for a period of two years, which upon its normal expiration was extended for one additional year. He was then kept in service for some twenty-two months, at the end of which his appointment was terminated in accordance with staff regulation 9.1 (*c*).

In his application he requested the Tribunal to rescind the decision terminating his services, contending that, as his appointment had not been terminated at the end of his extended probationary service, his employment status must be deemed to have been that of a staff member holding a permanent appointment. He based this contention on staff rule 104.12 (*a*), which reads as follows:

> "At the end of the probationary service the holder of a probationary appointment shall be granted either a permanent or a regular appointment or be separated from the service."

The Tribunal nevertheless considered that the text thus quoted did not warrant a conclusion that probationary appointments not terminated at the end of the probationary period automatically become permanent appointments. The fact that the applicant was transferred to another post at the end of his extended probationary period and was continued in service for some twenty-two months did not indicate that he had acceded to the status of a permanent staff member or had been treated as such. Staff rule 104.13 (*a*) (i) provides as follows:

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[10] See *Juridical Yearbook*, 1974, p. 127.

[11] *Ibid.*, p. 136.

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

"The permanent appointment may be granted to staff members who are holders of a probationary appointment and who, by their qualifications, performance and conduct, have fully demonstrated their suitability as international civil servants and have shown that they meet the high standards of efficiency, competence and integrity established in the Charter."

It followed that the granting of a permanent appointment was subject to certain conditions being met and that there could be no automatic conversion of a probationary appointment into a permanent appointment. After considering the circumstances of the case, the Tribunal reached the conclusion that the applicant did not possess the status of a staff member with a permanent appointment.

In the opinion of the Tribunal, the applicant's employment status during his final twenty-two months of service was in effect a continuation, although irregular, of his probationary appointment through the default of the Administration. While recognizing the right of the Secretary-General to terminate probationary appointments under staff regulation 9.1 (*c*), the Tribunal pointed out that the applicant's probationary appointment had not been terminated during the period of probation but long after the expiry of such period. The Tribunal therefore held that the applicant, having completed his probationary period, was entitled to due process for the assessment of the suitability of a staff member on probationary appointment for a permanent appointment. The Tribunal noted in this regard that no periodic report had been prepared for the period after the expiry of the extended probationary period and that although an assessment of the applicant's case had been made by the Appointment and Promotion Committee in 1970, the termination decision was reached without the Committee having had any possibility of considering the most recent information on the applicant's performance and without the applicant being afforded an opportunity to state his case.

Taking into account the circumstances of the case, the Tribunal considered it preferable for the injury suffered by the applicant to be redressed by an award of compensation for fault of procedure rather than by a remand for correction of procedure.

The applicant, in addition, requested compensation in respect of the two periods of home leave to which, according to him, he should have been entitled during his period of service. The applicant pointed out in that regard that because of the absence from the files of any "Personnel Action" form "to establish his status as a staff member on an extended probationary appointment", his oral inquiries as to his entitlement to home leave had met with a negative reply from the Administration.

In the view of the Tribunal, it followed from the absence of a "Personnel Action" form that even if the applicant had made a formal request for home leave, the response would not have been different. The Tribunal held that the applicant had been deprived of his rights by reason of an anomalous employment situation and was therefore entitled to reimbursement of his expenses, subject to proof that such expenses had been incurred by him. Finally, on the basis of the same reasoning and subject to the same condition, the Tribunal awarded reimbursement of his removal costs.

5. JUDGEMENT NO. 199 (24 APRIL 1975):[13] FRACTON *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application for rescission of a decision not to renew a fixed-term appointment — Limits of the Tribunal's authority to review such a decision — Principle of good faith in relations between the parties

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

The applicant, who entered the service of the United Nations Information Centre at Teheran (Iran) on 7 September 1968 as an Information Assistant, received a number of fixed-term appointments. When the Organization decided not to renew his appointment, he filed with the Tribunal an application contesting this decision, which, he said, constituted a violation of his rights (having regard in particular to the establishment of a new régime under which Information Assistants could be offered regular appointments after a year or two of satisfactory service) and which, again according to him, was motivated by prejudice on the part of his superiors.

The Tribunal recalled that the decision whether or not to renew a fixed-term appointment was within the discretion of the Secretary-General and, in the absence of countervailing circumstances, non-renewal would not give rise to any rights on the part of the staff member. The particular circumstances of this case should therefore be reviewed, with special reference to the handling of the matter by the Director of the Centre, whose recommendations had led to the contested decision.

In this connexion, the Tribunal considered that in criticizing the applicant in confidential letters which were not communicated to the applicant, in failing to disclose to him the unsubstantiated charges brought against him, and in expressing the intention to make a misstatement regarding the applicability to his case of the new régime referred to in the first paragraph above, the Director of the Centre had shown a lack of candour and acted in an equivocal and dubious manner toward the applicant. Furthermore, the decision not to renew the appointment was taken on the basis of charges contained in confidential letters not disclosed to the applicant and before the relevant periodic report had been drawn up. The Tribunal found that the applicant had not been given the fair consideration required to determine whether an Information Assistant could benefit from the new régime referred to above and that the respondent had disregarded the principle of good faith in relations between the parties referred to in Judgement No. 128.[14]

With regard to the question whether the contested decision was motivated by prejudice on the part of the Director of the Centre, the Tribunal concluded, having examined the relevant material, that, while it was clear that there had been a clash of personalities and that in many of his dealings with the applicant the Director had been unduly suspicious and evasive, the evidence before it did not establish that he had been motivated by prejudice.

The Tribunal found it preferable to order the payment of compensation in lieu of specific performance on the analogy of its rulings in Judgements No. 68[15] and No. 92[16] rather than ordering remand of the case so that a proper review of the applicant's record of service and his suitability for the post of Information Assistant might be carried out. It fixed the compensation at the equivalent of six months' net base salary.

Lastly, the Tribunal ordered the removal from the applicant's official status file of the periodic report prepared after the decision not to renew the applicant's appointment as well as certain confidential letters which had not been brought to the notice of the applicant and which were likely to prejudice the applicant's prospects for employment with international organizations.

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[14] See *Juridical Yearbook*, 1969, p. 184.

[15] *Judgements of the United Nations Administrative Tribunal*, Nos. 1 to 70 (AT/DEC/1 to 70—United Nations publication, Sales No.: 58.X.1), p. 398.

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

6. JUDGEMENT NO. 200 (24 APRIL 1975):[17] DEARING *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application for rescission of a decision of the Secretary-General refusing, on the basis of a recommendation of the Advisory Board on Compensation Claims, to re-open a case concerning compensation — Broad discretionary powers of the Secretary-General with regard to the matter — Irregularity of a decision of the Secretary-General taken on the basis of a recommendation of the Advisory Board made as the result of failure to observe the requirements of due process — Failure to re-employ a recipient of compensation for a service-incurred illness cannot be treated as a termination on the ground of incapacity for further service unless the applicant can claim that he had an appointment entitling him to permanent or continuous service — Rescission of the contested decision and fixing of compensation to be paid to the applicant if the Secretary-General does not consider that further action should be taken

During a period of employment in Thailand under a fixed-term contract the applicant had contracted pulmonary tuberculosis as a result of which he submitted to the Advisory Board on Compensation Claims a claim for "compensation for the loss of livelihood in [his] normal occupation, through a disability resulting from an illness attributed to the performance of official duties on behalf of the United Nations".

The Advisory Board, noting that there was good reason to believe that his employment in Thailand would have continued had he not become ill and further noting that the claimant had been unable to obtain any employment in his country of origin and that he was barred, for medical reasons, from consideration for employment by the United Nations or the specialized agencies for a period of three years from the date of his recovery, recommended to the Secretary-General that he should be granted compensation for loss of earning capacity in an amount of £2,500 per annum for a period ending three years from the date of his recovery or until such time as he was gainfully employed, whichever period was the shorter. That recommendation was accepted by the Secretary-General.

Not being satisfied with the solution adopted, the applicant requested, on the basis of several certificates from both his own physicians and a medical board established by the competent ministry of his country of origin, that his case should be re-opened by the Advisory Board on Compensation Claims and the respondent should pay him annual compensation in accordance with article 11.2 (*d*) of Appendix D to the Staff Rules. The Advisory Board, considering that no grounds existed to warrant re-opening the case, made a recommendation to that effect to the Secretary-General, which was accepted.

The case was referred to the Tribunal, which observed that under article 9 of Appendix D to the Staff Rules, it was within the discretion of the Secretary-General to re-open a case relating to compensation under those Rules. Such discretion, however, could not be exercised unjustly or unreasonably. In its Judgement No. 103[18] the Tribunal had held as follows:

> "Article 9 gives the Respondent wide power to re-open a case and consequently to the Board to recommend that it be re-opened. Since the new decision of the Respondent is taken on the recommendation of the Board, the latter must observe the requirements of due process in arriving at that recommendation."

The Tribunal then felt that it must consider whether the recommendation of the Advisory Board mentioned above was vitiated by lack of due process. In that connexion

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

[18] See *Juridical Yearbook*, 1966, p. 216.

it noted that due process required that an authority competent to make recommendations or decisions should arrive at its conclusions without factual errors or prejudice on the matter placed before it. In the present case, the Tribunal observed, there was a difference of opinion between the Medical Director of the United Nations and the applicant's physicians over the latter's medical reports; in the circumstances, the requirements of due process involved recourse to an impartial medical examination of the applicant to ascertain the extent, if any, of his disability before recommending to the Secretary-General the rejection of the request for re-opening the case. The Tribunal therefore held that the recommendation of the Advisory Board was vitiated by lack of due process and that the Secretary-General's decision based on that recommendation suffered from the same infirmity. It therefore concluded that the case should be remanded for carrying out a proper medical examination of the applicant.

The applicant claimed that in view of the delay which would inevitably be involved in the re-opening of the case, the Tribunal should order payment to him of continuing compensation on the basis of article 11.2 (*d*) of Appendix D. The Tribunal observed, however, that the award of compensation for three years based on certain premises mentioned earlier had concluded the applicant's right to compensation for service-incurred illness, subject to the procedure for amending the award with respect to future payments defined in article 9 of Appendix D.

The applicant also contended that as the respondent had not reinstated him, he should be deemed to have been terminated as being disabled from further service and should therefore be compensated. However, the Tribunal noted that the applicant's employment status had been one of a fixed-term appointment which did not entitle him to permanent or continuous service and that accordingly no inferences of disability for further service could be drawn solely from the fact of his non-employment by the Organization. The applicant further argued that if he was not considered disabled for further service, he should have been reinstated or re-employed by the respondent. The Tribunal found that, as the Advisory Board itself had informed him, the applicant had had a legitimate expectancy of continuation in service but for his illness. However, it considered that it could draw no conclusion from that finding as long as it was not established that the applicant was incapacitated for further service by reason of his disability as contended by him.

The respondent having indicated on 22 April 1975 that he did not wish to request remand of the case (see the fifth paragraph of the present summary), the Tribunal decided to proceed to the determination of the merits of the case. It rescinded the decision of the respondent not to re-open the case as being based on a recommendation which was vitiated by lack of due process and therefore being itself vitiated, and it ordered the respondent to take action in conformity with the requirements of due process, that is to say, in this case, by adopting a procedure analogous to that provided in article 17, paragraph (*b*), of Appendix D.

The Tribunal recalled that it was required under article 9, paragraph 1, of its Statute to fix the amount of compensation to be paid to the applicant should the Secretary-General, within 30 days of the notification of the judgement, decide, in the interest of the United Nations, that the applicant should be compensated without further action. Considering the case to be an exceptional one, it fixed compensation at the equivalent of three years of net base salary.

With regard to the question of procedural delays, the Tribunal characterized as unconscionable the respondent's delays in the handling of the case. However, since both sides were at fault in this matter it decided not to grant compensation for procedural delays.

7. JUDGEMENT NO. 201 (25 APRIL 1975):[19] BRANCKAERT *v.* UNITED NATIONS JOINT STAFF PENSION BOARD

Application for rescission of a decision rejecting, on the ground of non-observance of the prescribed time-limit, a request for validation of a period of service for pension purposes

The applicant, who had entered the service of FAO on 4 April 1965, received on 1 February 1970 an appointment which extended his total service to at least five years, with the result that he became a participant in the United Nations Joint Staff Pension Fund and had the option, by virtue of article 23 of the Regulations of the Fund, of electing within one year to validate any prior service for pension purposes. On 27 February 1970, he signed the Participant's Declaration required by the Fund, at the bottom of which there appeared a notice inviting staff members who wished to validate previous service to obtain the necessary forms and advising them that they must make their applications within the time-limits provided by the Regulations. The applicant, not having exercised the option to validate his prior service within the specified time-limit, was informed, when he raised the question with the Secretary of the FAO Staff Pension Committee, that his application was time-barred.

The Tribunal, when the case was brought before it, noted that the contested decision was based on article 23 (*a*) of the Regulations, which prescribed that in certain circumstances "a participant may elect, within one year of the commencement of his participation, to validate prior service during which he was not eligible . . . for participation". Despite the inclusion of the above-mentioned notice in the Participant's Declaration, for a year and a half the applicant had made no move. He stated that he had not taken cognizance of the notice, even though it appeared on the very page where he had signed a document which was extremely important not only for his own interests but also for those of his dependants. In the view of the Tribunal, the notice in question was sufficient to inform the applicant of the existence of time-limits for the submission of requests for validation of prior service, and he was not justified in blaming the respondent for the insufficiency of information which he invoked to justify his failure to take action.

The applicant argued that, when in August 1971—i.e., after his application had already become time-barred—he had requested to be informed of the amounts still to be paid by him in order to be up to date in the payment of his contribution to the Fund, the Secretary had sent him a validation application form and invited him to return it, duly completed, as soon as possible. The applicant claimed that a logical interpretation of that correspondence had led him to believe that the period of prior service could still be validated, i.e., that the time-limits allowed for doing so were still open on 30 August 1971.

The Tribunal, however, took the view that the sending of a standard form designed to enable a staff member to submit an application could not, unless otherwise indicated by a text or relevant practice, be considered equivalent to a decision by the organ which communicated it or give rise to any expectation in the mind of the staff member.

Lastly, the applicant maintained that the sole purpose of the time-limit was to encourage the staff member to act as quickly as possible and that the time-limit, being devised for the benefit of the staff member, could not be applied against him. The Tribunal recalled the principle that time-limits must be observed, with the exception of cases in which the competent authority has the power to extend them,

[19] Mme P. Bastid, Vice-President, presiding; Mr. Z. Rossides, Member; Mr. F. A. Forteza, Member.

and noted that the time-limit in question was imperative in character and that the Regulations of the Pension Fund did not confer on the competent organs the power to extend it.

In view of the foregoing, the Tribunal rejected the application.

8. JUDGEMENT No. 202 (3 OCTOBER 1975):[20] QUEGUINER *v.* SECRETARY-GENERAL OF THE INTER-GOVERNMENTAL MARITIME CONSULTATIVE ORGANIZATION

Application for an award of compensation, on the basis of the principle of acquired rights, for reduction in the education grant received by the applicant in consequence of an amendment to the Staff Rules—Scope ratione materiae *and* ratione temporis *of the principle of acquired rights*

The applicant entered the service of the Organization on 5 May 1968 under a fixed-term contract of three years' duration, which on 5 May 1971 was extended for a duration of four years. On 29 July 1971, the Head of the Administrative Division announced that the Secretary-General had decided, with effect from the scholastic year 1971/72, to amend the staff rule relating to the education grant. As a result of this amendment, the applicant found that, instead of the flat $1,000 per year which he had received in the past, he was entitled to an amount equal to 75 per cent of the cost of attendance actually incurred by him, or approximately $650 per year. The staff rule in question was further amended in 1973, the maximum amount of the education grant being increased to $1,500. Following a complaint by the applicant that the 1971 amendment was prejudicial to him, the Secretary-General decided, after a review of the question and of the practice of other organizations of the United Nations system, to apply a transitional measure for the year 1971/72, as a result of which the applicant received a further sum of approximately $350 for that year. The applicant, however, considered that measure inadequate.

The case was brought before the Tribunal, which first of all declared admissible three applications for intervention submitted by individuals whom the Tribunal found to be *prima facie* in a situation similar to that of the applicant.

In his first plea, the applicant requested that the decision of 29 July 1971 should be rescinded as contrary to the Staff Regulations in that it prejudiced the acquired rights of the staff member. The Tribunal observed that, if such a request were granted, the judgement would have the effect of eliminating the staff rule in question in respect of all staff members, irrespective of the date on which they entered upon their duties. The plea requesting a decision with effect *erga omnes* was in contradiction with the very basis of the request, which was grounded on the contractual situation of the applicant and on respect for acquired rights. It must therefore be rejected.

The applicant also requested compensation for the years 1972/73 and 1973/74 equal to the difference between the sums he had actually received and the new maximum of $1,500 introduced in 1973.

The Tribunal recognized that it followed from staff regulation 12 that the Secretary-General's power to amend the rules could only be properly exercised if the acquired rights of staff members were respected. The question posed by the present case was thus to determine whether the applicant had an acquired right to the education grant system as established at the time when he had entered upon his duties.

The Tribunal noted in this connexion that the letter extending the applicant's initial appointment contained a number of provisions concerning the applicant

[20] Mme P. Bastid, Vice-President, presiding; Mr. Z. Rossides, Member; Mr. Mutuale Tshikankie, Member; Mr. F. A. Forteza, Alternate Member.

personally and referred to the conditions of employment and fundamental rights, and the duties and obligations, laid down in the Staff Regulations and Staff Rules, "due account being taken of any subsequent amendments to those texts".

The limitation of the right of amendment set out in staff regulation 12 obviously concerned the rights of the staff member expressly stipulated in the contract. In its Judgement No. 19,[21] the Tribunal had stated that all matters were contractual which affected "the personal status of each member—e.g., nature of his contract, salary, grade". Respect for acquired rights also meant that the benefits and advantages accruing to a staff member from services rendered before the entry into force of an amendment could not be prejudiced. An amendment could not have an adverse retroactive effect in relation to a staff member, but nothing prevented an amendment to the Staff Rules where the effects of such amendment applied only to benefits and advantages accruing through service after the adoption of such amendment (Judgement No. 82).[22]

It did not seem to the Tribunal that the decision to amend the education grant system exceeded the powers accorded to the Organization in the contract accepted by the applicant. The legality of comparable measures concerning the non-resident's allowance (Judgement No. 51[23]) and the allowances payable under the definition of dependency (Judgements Nos. 82 and 110[24]) had been recognized, and there seemed to be no valid reason for treating the education grant differently. The new system which had been introduced was not unreasonable, and the Tribunal must confine itself to noting that the respondent was not obliged in law to pay compensation for a reduction in the amount received by the applicant. The latter's claim to a flat-rate grant of $1,500 was entirely without merit, since the purpose of the 1973 amendment had not been to increase the flat rate for the education grant but to raise the maximum amount of the grant; the claim was all the less admissible in that the applicant appeared to be claiming the right to benefit by both the advantages of the system in force prior to 1971 and the increase in the maximum amount decided on in 1973.

In any event, the applicant's claim could concern only the contractual relations resulting from the contract accepted by him on 30 April 1971, i.e., the relations running until 4 May 1975. The new system did not seem to have prevented him from subsequently agreeing to the renewal of his contract, which showed clearly that, so far as the importance of that factor with respect to acceptance of the contract was concerned, the applicant's argument was unfounded.

In conclusion, the Tribunal decided that, in changing the bases for the computation of the education grant, the Secretary-General had exercised the powers accorded him by the Staff Regulations and that any reductions in the grant payable to the applicant entailed no liability on the part of the Organization.

9. JUDGEMENT NO. 203 (7 OCTOBER 1975):[25] SEHGAL *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application requesting that a decision not to renew a fixed-term appointment be declared void—Criteria for determining whether the question of the renewal of such

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[21] *Judgements of the United Nations Administrative Tribunal*, Nos. 1 to 70 (AT/DEC/1-70—United Nations publication, Sales No. 58.X.1), p. 71.

[22] *Ibid.*, Nos. 71 to 86 (AT/DEC/71-86—United Nations publication, Sales No. 63.X.1), p. 78.

[23] *Ibid.*, Nos. 1 to 70 (AT/DEC/1-70—United Nations publication, Sales No. 58.X.1), p. 247.

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

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

an appointment was duly considered and whether actions taken following a rebuttal of a periodic report constitute an appropriate investigation

The applicant had been recruited for an initial period of three months and his appointment had been renewed on several occasions—first for four months and then for two successive periods of one year. Upon assuming his duties, he had been assured that, when the time came, his case would be duly considered for an extension of his fixed-term contract or for an indefinite appointment. He was not satisfied with his first periodic report—prepared 26 months after his entry on duty—and submitted a rebuttal of it, requesting that an inquiry be held. The Resident Representative transmitted the report in question and the rebuttal to Headquarters and wrote a letter to the applicant in which he criticized his "egotism", his "scorn for the contribution of virtually all [his] colleagues" and his "immaturity", and rejected his request for an inquiry. Following a discussion which he held a few weeks later with the applicant and his immediate superiors, the Resident Representative confirmed that he did not plan to alter the periodic report in question. The applicant then asked the Chief of the Personnel Division at Headquarters to hold the inquiry which he had previously requested. The next day, the Resident Representative sent the applicant a detailed reply to his rebuttal and enclosed a copy thereof in a letter to Headquarters recommending that the applicant's contract should not be renewed. That recommendation was followed by the Headquarters departments concerned.

The case was referred to the Tribunal, which considered that it had to decide the following two issues:

(i) Whether due consideration had been given to the continued employment of the applicant in accordance with the undertaking given at the time of his entry on duty;

(ii) Whether the requisite procedures to deal with the rebuttal by the applicant of the adverse criticisms contained in his periodic report had been complied with.

As to (i), the Tribunal noted the respondent's contention that the applicant had at each renewal of his contract received the consideration contemplated. In the Tribunal's view, however, it did not follow that the respondent had been *ipso facto* absolved from all need to give due consideration to the decision not to renew when that decision had been taken.

With regard to (ii), the Tribunal considered that the key issue to be determined was not so much what particular instruction applied (a matter on which there was a conflict of view) nor whether what took place was or was not an investigation, as whether the action taken was appropriate to the particular circumstances of the case. In that connexion, the Tribunal noted that, beginning with the periodic report, the question of the investigation of the applicant's rebuttal, on the one hand, and the question of due consideration of the renewal of his contract, on the other, had become intertwined. It was therefore necessary for the Tribunal to consider at that point whether the actions of the respondent had been appropriate to an investigation of the applicant's rebuttal on the one hand and to due consideration being given to renewal (or non-renewal) of his contract on the other.

In that connexion, the Tribunal stated the following:

> "... an investigation of a rebuttal by a Head of Department or his equivalent calls for a balanced regard for the conflicting views of the staff member and his supervisors, a dispassionate approach to the issues standing between them, a search for additional evidence or opinions which may throw further light on their respective viewpoints, and a clear and reasoned determination. Due consid-

eration of renewal of contract would appear to the Tribunal to require at least that the arguments for and against renewal should be objectively weighed and in the event of an adverse decision the reasons for such decision clearly set out."

In the opinion of the Tribunal, whichever of the foregoing criteria was applied, the actions of the respondent fell short of the requirements set out above and also revealed a singular lack of objectivity which had resulted in the applicant being denied due process.

Having concluded that the applicant had not been given due consideration for further employment, contrary to the undertaking given to him, and that there had been no objective investigation of the rebuttal of his report, the Tribunal ordered that compensation equivalent to six months' net base salary be awarded to the applicant for the injury sustained by him.[26]

10. JUDGEMENT NO. 204 (8 OCTOBER 1975):[27] MILA *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application directed against a decision to terminate following a correction of procedure ordered by the Tribunal—Conclusions of the Tribunal regarding the procedure followed for the reconsideration of the case and regarding the regularity of the contested decision—Reparation of the damage sustained by the applicant because of the administrative errors committed during the period preceding his termination

In its Judgement No. 184,[28] the Tribunal had stated that the decision to terminate the applicant's appointment following the five-year review of his permanent contract had not been preceded by a complete, fair and reasonable procedure and had remanded the case for correction of the procedure. Consequently, the applicant's case had been resubmitted to the Appointment and Promotion Panel and, pursuant to the Panel's recommendations, the Secretary-General had decided to maintain the decison concerning termination.

The applicant submitted a further request for rescission to the Tribunal, which had to consider, firstly, the conditions in which the Appointment and Promotion Panel had reconsidered the applicant's case and the basis for the conclusions of its report and, secondly, the decision taken by the respondent following that new report, taking into account the provisions of the Staff Regulations and Rules relating to the five-year review of permanent contracts.

The applicant contended, in the first place, that the respondent had ignored an elementary and basic rule concerning disqualification by including in the 1974 Panel four members of the 1972 Panel, especially a member against whom the applicant's counsel had certain grievances dating back about 20 years. The Tribunal nevertheless considered that, in the absence of legal provisions, the composition of a purely administrative body whose task was to advise the Secretary-General fell within his own competence. No general legal principle compelled the Secretary-General to exclude a given person, at least in so far as the procedural defects noted were not

[26] An application for a review of Judgement No. 203 was submitted to the Committee on Applications for Review of Administrative Tribunal Judgements, established under article 11 of the Statute of the Tribunal. The Committee indicated in its report (A/AC.86/20) that it had decided without a vote that there was not a substantial basis for the application under article 11 of the Statute and that it had therefore concluded that the International Court of Justice should not be requested to give an advisory opinion.

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

[28] See *Juridical Yearbook*, 1974, p. 109.

related to the conduct of that person; in the case under consideration, the Tribunal had not attributed the short-comings which it had noted in its Judgement No. 184 to reasons peculiar to the members of the Panel. The fact that the 1974 Panel comprised four members of the 1972 Panel therefore could not affect the validity of the decision taken by the respondent pursuant to the report of the 1974 Panel.

The applicant also contended that the conduct of the Joint Appeals Board (to which the case had been submitted before being referred to the Tribunal) demonstrated prejudice against him. The Tribunal observed, however, that the applicant was not requesting that the case be remanded to the Board; in addition, it noted that, since the respondent had accepted direct recourse to the Tribunal, the question of the legality of the conduct of the Joint Appeals Board did not arise.

With regard to the errors of fact and law which the applicant contended vitiated the contested decision, the Tribunal noted that the applicant's complaints had not been based on the precise terms of the report of the 1974 Panel and had not established points on which the report in question was so inadequate as to permit the statement that the review conducted did not represent the "complete, fair and reasonable procedure which must be carried out prior to the termination of a permanent appointment". In the light of its own findings in the case and the questions it had deemed necessary to have elucidated, the Tribunal reached the conclusion that the proceedings before the 1974 Panel had enabled the Panel to carry out a thorough, searching and balanced review of the applicant's standards during the five-year review of his permanent contract.

Turning to the decision taken by the respondent consequent upon the Panel's report, the Tribunal noted that the Panel had "agreed that the staff member's performance and attitude had been less satisfactory than earlier" and had recognized that the applicant "had not, in the strict sense, met the full standards for a permanent appointment" but had, on the other hand, considered that "the administrative decision not to renew the staff member's permanent appointment, and in consequence to separate him from service, was too drastic". Notwithstanding the latter formula, the Tribunal did not find it possible to state that the contested decision contradicted the dossier, for the latter also contained the finding that the applicant had not, "in the strict sense, met the full standards for a permanent appointment". It considered that, in view of the power of evaluation which the respondent must be recognized to possess, it could not order the rescission of a decision on the basis of an equivocal formula. The applicant also claimed that the procedure of reviewing his permanent contract concealed a disciplinary measure so that it would be subject to less strict rules. In the view of the Tribunal, however, the applicant did not base his argument on any precise fact that could justify a disciplinary measure against him; it was the way in which he had performed his duties which had given rise to criticism. In those circumstances, the Tribunal considered that no misuse of procedure that could entail the rescission of the contested decision could be imputed to the respondent.

The Tribunal noted, on the other hand, that the Panel had found that there were lapses in procedure and administrative short-comings in the handling of the case prior to the 1972 review; it also found, in the light of the conclusions of the 1974 Panel's report, that the 1972 Panel's report had serious defects, as had been shown in Judgement No. 184, and did not correspond to what could normally be expected as a result of an administrative procedure of that type, so that the treatment of the applicant in the period preceding his termination had not been in conformity with the administrative rules in force or the basic principles of good administration. Nothing in the contested decision indicated that the respondent contested the views on that subject expressed by the Panel in its report.

Considering that the administrative short-comings mentioned above could not be remedied retroactively, the Tribunal awarded the applicant compensation of 15,000 Swiss francs.

11. JUDGEMENT NO. 205 (9 OCTOBER 1975):[29] EL-NAGGAR *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting a decision not to renew a fixed-term appointment—Obligations of the respondent arising from his "acceptance" of a recommendation by the Joint Appeals Board that he should seek to keep the applicant on the staff and should offer him a new and appropriate appointment

The applicant, after several periods of service at the P-5 and later the D-1 level, for which he received excellent periodic reports, was given a five-year contract extension on 1 March 1970; on 1 June 1971, he was promoted to D-2 and transferred to the United Nations Economic and Social Office in Beirut (UNESOB) as Director. On the establishment of the Economic Commission for Western Asia (ECWA), which was to consist of the States then covered by UNESOB and was to start its operations on 1 January 1974, the Secretary-General was obliged to find a new assignment for the applicant, since the Governments concerned wanted the Executive Secretary of the new Commission to be from a country belonging to the geographic scope of the Commission.

Efforts to reassign the applicant were of no avail until 13 May 1974, when he was transferred to UNCTAD for a period which was to end on the expiration date of his appointment. On 16 September 1974, the applicant requested that the decision concerning his transfer should be reviewed so that (1) he would be given an established post of such rank and responsibility as to be equal to his former post in UNESOB and (2) his assignment would be of the same duration as his former fixed-term appointment, i.e., for a period of five years.

The respondent refused this request but informed the Joint Appeals Board, to which the case had been taken, that he was trying to find a post for the applicant. The Board found that the assignment of the applicant to UNCTAD was not a violation of any staff rules or regulations or the Charter, and that he was not entitled to any compensation for damages; nevertheless, it recommended to the Secretary-General that it would be in the best interest of the United Nations to seek to keep him on the staff and to offer him a new and appropriate appointment on the expiry of his contract. This recommendation was accepted by the Secretary-General.

The Tribunal—to which the case was taken before the Secretary-General's decision to act on the recommendation of the Joint Appeals Board had been communicated to the applicant[30]—observed that the applicant had a fixed-term appointment which did not carry any expectancy of renewal or of conversion to any other type of appointment, and that the recognition of his qualifications and abilities, however high they might be, did not by itself create a legal expectancy which imposed on the respondent an obligation to renew or extend his fixed-term appointment.

However, referring to its Judgements Nos. 95[31] and 142,[32] the Tribunal proceeded to consider the applicant's contract as a whole and examine the surrounding circum-

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

[30] Under the terms of articles 7, paragraph 2 (*b*), of the Statute of the Tribunal, an application is receivable if, as in this case, the Secretary-General has failed to take any action on the joint appeals body's recommendations within the 30 days following the communication of the opinion.

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

[32] *Ibid.*, 1971, p. 152.

stances in order to ascertain whether a legal expectancy of renewal had been created in this case. The Tribunal found that the respondent had at no stage held out to the applicant any hope or promise that his contract would be renewed or extended. It also observed that (1) the applicant had accepted a fixed-term appointment and was not, therefore, entitled to argue that the fixed-term appointment was in reality a permanent appointment; (2) the contention that the respondent's failure to appoint the applicant to any of the seven D-2 vacancies that had arisen between November 1973 and February 1975 in the Department of Economic and Social Affairs of the United Nations and in UNCTAD was a breach of staff regulation 4.4[33] was not relevant, since, even if the applicant had been appointed to one of those posts, his fixed-term appointment would not thereby have been converted into a career appointment; (3) the applicants complaint that in not assigning him to a post for four months there had been a gross abuse of discretion or authority by the Secretary-General was unjustified, in view of the steps which the file showed had been taken by the respondent on behalf of the applicant; (4) while there were certain unsatisfactory features in the case, the fact that other actions had been favourable to the applicant made the contention that there had been prejudice or abuse of discretion or authority by the respondent unacceptable.

The Tribunal also considered whether acceptance of the Joint Appeals Board's recommendation by the respondent simply meant that, on finding that the steps he had taken previously were without positive results, the Secretary-General had felt that there was nothing more for him to do. The Tribunal believed that if that had been his intention the Secretary-General would have so stated categorically. On the other hand, the file showed that the Secretary-General had accepted the recommendation of the Joint Appeals Board in respect both of keeping the applicant on the staff and of offering him a new and appropriate appointment on the expiry of his contract. The Tribunal accordingly found that the respondent had undertaken to fulfil the obligations arising from the Board's recommendation and that it was for him to show that efforts had been made to keep the applicant on the staff and to place him in a suitable position after the recommendation made by the Board.

The Tribunal noted in this connexion that the applicant had been offered three technical assistance posts but had not been given any details regarding the rank and emoluments of those posts; that being so, the Tribunal held that the offer of the posts in question did not conclude the respondent's obligation arising from the recommendation of the Joint Appeals Board. It accordingly ordered the respondent to make a fair and objective attempt to place the applicant in a suitable position within three months from the date of the judgement and, should he exercise his option of deciding, in the interest of the United Nations, that the applicant should be compensated, as provided in article 9, paragraph 1, of the Statute of the Tribunal, to pay compensation equal to six months' base salary. Lastly, the Tribunal noted that part of the recommendation of the Joint Appeals Board, namely that the applicant should be kept on the staff, had not been implemented; estimating that three months would normally be necessary for making a search for a suitable post at the D-2 level, the Tribunal awarded to the applicant three months' base salary.

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[33] Staff regulation 4.4 reads as follows:

"Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations. This consideration shall also apply on a reciprocal basis to the specialized agencies brought into relationship with the United Nations."

12. JUDGEMENT No. 206 (10 OCTOBER 1975):[34] QUEGUINER *v.* SECRETARY-GENERAL OF THE INTER-GOVERNMENTAL MARITIME CONSULTATIVE ORGANIZATION

Request for reimbursement of medical expenses submitted by a staff member claiming that, owing to a fault on the part of the respondent, he had been denied the benefit of certain arrangements with respect to health insurance applicable in the European Economic Community—Allegation that the impossibility of obtaining reimbursement of the expenses in question demonstrated the inadequacy of the IMCO health insurance plan, an inadequacy for which the respondent should be held responsible

The applicant, a French national working in the United Kingdom, had incurred certain medical expenses while in France for which he sought reimbursement from the respondent, claiming that upon the accession of the United Kingdom to the European Economic Community, nationals of Community countries working for an employer in the United Kingdom had been entitled, under the British National Health Service, to free medical treatment for sickness or accident when they were staying temporarily in a Community country, and that since he had been unable to benefit from those new arrangements because he had not been advised thereof in good time by the IMCO Administration, he was justified in claiming compensation from the latter for the injury sustained.

His request having been rejected, the applicant filed with the Tribunal an application requesting it to rescind the decision rejecting reimbursement and to award him compensation equivalent to the injury sustained as a result of the failure to reimburse the aforementioned medical expenses.

The Tribunal noted that an inquiry addressed to the competent British services had revealed that IMCO staff who were not citizens of the United Kingdom and colonies or permanently resident in the United Kingdom could not benefit under the reciprocity provided for in the provisions of the Community with regard to health insurance. The Tribunal therefore considered that the Organization could not be blamed for failing to take action with regard to an entitlement which did not exist.

The applicant also contended that the health insurance coverage available to the IMCO staff was defective in that their health protection was not ensured when they were on holiday outside the United Kingdom. He therefore alleged that his inability to obtain reimbursement for the medical expenses claimed resulted from the negligence of the Secretary-General and the Administration's non-performance of its duties.

The Tribunal noted, however, that the Secretary-General had made the necessary arrangements with a private organization, the British United Provident Association (BUPA) for IMCO staff members to be covered by group medical insurance, that the Organization made a substantial contribution to the cost of that cover and that benefits under the BUPA group insurance scheme were payable for treatment for an illness during temporary visits outside the United Kingdom on the same conditions as those applying in that country. When the applicant had reached the ceiling authorized by BUPA, he undoubtedly had not been reimbursed for all his medical expenses; however, it was difficult, if not impossible, to provide 100 per cent cover for all possible risks in any social security system.

The Tribunal also noted that at the end of 1973 the Secretary-General had obtained from the IMCO Assembly the funds needed to give the staff a choice between the BUPA insurance system or another scheme. It had concluded from the fact that a sizable number of staff members had remained with BUPA that that system was not patently inadequate.

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[34] Mme P. Bastid, Vice-President, presiding; Mr. Z. Rossides, Member; Mr. F. A. Forteza, Member; Mr. Mutuale Tshikankie, Alternate Member.

Lastly, the Tribunal recalled that in its Judgement No. 182[35] it had stated that in pension matters the respondent would be contractually liable if, "through his action or omission, a staff member'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". The Tribunal considered that the same principle applied by analogy to the present case. It could not see in the refusal at issue an infringement of the applicant's right to health insurance for which the respondent could be held liable and concluded that the applicant's allegations that he had sustained injury as a result of negligence on the part of the respondent were without foundation.

13. JUDGEMENT NO. 207 (10 OCTOBER 1975):[36] SQUADRILLI *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application filed by a United States staff member who was not exempt from taxes on his United Nations salaries and emoluments owing to the reservation made by the United States to section 18 (b) *of the Convention on the Privileges and Immunities of the United Nations*[37]*—System of reimbursement established to prevent staff members in the applicant's situation from being at a disadvantage vis-à-vis their colleagues of other nationalities—Methods of calculating the amount which is reimbursable—Rejection, as purely conjectural and incompatible with the obligations flowing from the Convention on the Privileges and Immunities of the United Nations, of the respondent's allegations concerning the provisions which the United States would have taken had it not entered the aforementioned reservation*

The applicant, a United States staff member working in Switzerland had, like all his compatriots, been denied the benefits of section 18 (*b*) of the Convention on the Privileges and Immunities of the United Nations[38] owing to the reservation entered by the United States when it acceded to the Convention on 29 April 1970.[39] His entire income—including the salaries and emoluments received from the United Nations—was therefore subject to the United States income tax and he accordingly had paid the United States tax authorities a sum of approximately $22,000 for 1973. Under the system established to prevent staff members in his situation from being at a disadvantage vis-à-vis their colleagues of other nationalities, the applicant was entitled to reimbursement from the Organization of the difference between the total amount of tax calculated on the basis of his total annual income, including his United Nations earnings, and the amount of the tax which would have been payable had those earnings been excluded. The applicant had calculated the reimbursable amount for 1973 to be approximately $9,300, and the Organization had calculated the amount at approximately $6,000.

The case was brought before the Tribunal, which stated, firstly, that the purpose of the reimbursement system described above was, as provided in the relevant Administrative Circular, to place a staff member who is subject to taxation "in the position that he would be in if his Government had acceded to section 18 (*b*) of the

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[35] *Juridical Yearbook*, 1974, p. 107.

[36] Mr. R. Venkataraman, President; Mr. F. T. P. Plimpton, Vice-President; Mr. F. A. Forteza, Member.

[37] United Nations, *Treaty Series*, vol. I, p. 15.

[38] Section 18 (*b*) provides that "Officials of the United Nations shall ... be exempt from taxation on the salaries and emoluments paid to them by the United Nations".

[39] The reservation reads as follows:

"Paragraph (*b*) of section 18 regarding immunity from taxation... shall not apply with respect to United States nationals and aliens admitted for permanent residence" (United Nations, *Treaty Series*, vol. 725, p. 362, and *Juridical Yearbook*, 1970, p. 27, foot-note 3).

Convention on the Privileges and Immunities of the United Nations". The Tribunal had gone on to note that in 1971 and 1972 the applicant's income from the United Nations had been less than $25,000 and that, since that amount of income earned abroad by a *bona fide* resident abroad was excluded from United States taxable income by Internal Revenue Code section 911, he was entitled to no reimbursement from the United Nations and had applied for none. In the tax year 1973 the applicant had realized an unusually large capital gain from sources other than the United Nations and had paid United States federal income tax of nearly $22,300 on taxable income of approximately $60,000.

The applicant had the option under the United States Internal Revenue Code to compute his tax under the "income averaging method"—according to which his tax for the "computation" year was in effect based, subject to various adjustments, on an averaging of his taxable income for the "computation year" with his taxable income for the four preceding years. One might have expected the applicant to have utilized that option, since his taxable income for 1973 had greatly exceeded his taxable income for each of the base period years. However, the Tribunal noted, a taxpayer using the income averaging method was required by the Internal Revenue Code to include in the taxable income of *each* of the five years *all* the income earned by him abroad which was ordinarily excluded from taxable income by virtue of the $25,000-exclusion mentioned above. The applicant therefore had not applied the income averaging method since the total taxes he would then have had to pay for the period 1969-1973 would have exceeded the amount he had actually paid for 1973 by applying the other method.

However, in the notional tax return which he, like any staff member in his situation, was required to file—in addition to his tax return for the United States tax authorities—for purposes of calculating the amount reimbursable by the United Nations, the applicant had used the income averaging method to determine the notional income tax and had reached the conclusion that the United Nations owed him a refund of $9,300. The respondent conceded that income averaging could be used but contended that the applicant should have included United Nations income in the calculations, which the applicant had not done. The respondent's contention was based on the provisions of the Internal Revenue Code mentioned above, which provided that in income averaging there must be included, in the income of the years involved, foreign earned income, up to $25,000 a year of which was ordinarily excluded from taxable income. The Tribunal stated the following regarding this arrangement:

> "Needless to say, [the Internal Revenue Code] contains no such provision as to including income from the United Nations in the averaging process, and the Applicant's notional income averaging return was compiled in strict accordance with [the relevant] Information Circular... and in strict accordance with the Internal Revenue Code as applied to his non-United Nations income.
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> "The respondent argues in effect that the purpose of the United Nations refunding procedure is to place a United States citizen in the same position he would be in if the United States had acceded to the Immunities Convention, thereby exempting income from the United Nations from taxation, and that if the United States had so acceded it would have provided that income from the United Nations would have to be included in income averaging. This is pure conjecture, and irrelevant as regards a notional return which precisely complies with the [above-mentioned] Information Circular, prepared by the respondent and binding upon him.
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> "...
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> "If the United States were to accede to the Immunities Convention without reservation, income from the United Nations would, by treaty, be completely

exempt from United States income tax, and it would presumably be a violation of that treaty if tax exempt income were to be included in any income averaging calculation—since such inclusion would have the effect of increasing the taxpayer's tax. In point is the memorandum of the Legal Counsel of the United Nations, dated 16 October 1969, directed to the Director of the Accounts Division, Office of the Controller (*United Nations Juridical Yearbook*, 1969, p. 226), holding that a Member State which is a party to the Immunities Convention may not take income received by a United Nations staff member from the United Nations into account in establishing the rate of tax on the staff member's non-exempt income; to do so would make the exempt income part of the legal base for taxation, which would constitute taxation on United Nations salaries forbidden by the Immunities Convention. The memorandum points out that UNESCO has taken the same position and that the Court of Justice of the European Communities has held likewise with respect to the virtually identical language of the Protocol on the Privileges and Immunities of the European Coal and Steel Community.

"The respondent's conjectures as to what the United States might do if it were to adhere to the Immunities Convention without reservation are therefore not only irrelevant but contrary to what would be the legal position."

The Tribunal consequently found that the respondent was required to reimburse the applicant the disputed sum—approximately $3,300—plus interest at the rate payable under the Internal Revenue Code.

B. Decisions of the Administrative Tribunal of the International Labour Organisation[40, 41]

1. Judgement No. 248 (5 May 1975): Nowakovski *v.* World Meteorological Organization

Complaint against a decision to terminate a permanent appointment for unsatisfactory services

[40] 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 1973, 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.

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

The complaint impugned the decision of the Secretary-General of the Organization to terminate her permanent contract on the grounds of unsatisfactory services. On the grounds that a medical board had recognized that she was suffering from total disability, she maintained that the impugned decision was based on an error of judgement and of law; she also contended that the proper procedural safeguards had not been respected.

The Tribunal found that the complainant had received several warnings that if her services did not improve, the Organization would feel bound to dismiss her; she could not therefore properly maintain that she was dismissed suddenly, without warning and in ignorance of the reasons for dismissal. Moreover, she had had every opportunity to examine all the documents in her file and to submit her case, and had thus enjoyed all the formal and procedural safeguards stipulated by the terms of her appointment and general principles of law.

As for the real reason for the decision to dismiss her, the Tribunal found that it appeared clearly from the complainant's medical examinations that she was not unfit for work, as indeed she had consistently maintained until her dismissal. Furthermore, the Organization had consistently contended that the complainant had done nothing to warrant disciplinary action. On the other hand, it was clear from the file that in her successive assignments she had shown incompetence. The Organization had acted lawfully in invoking unsatisfactory services as grounds for the decision of dismissal. The Tribunal consequently dismissed the complaint.

2. JUDGEMENT NO. 249 (5 MAY 1975): NOWAKOVSKI *v.* WORLD METEOROLOGICAL ORGANIZATION

Complaint against a decision to dismiss a request for reconsideration of a claim for compensation for illness attributable to the performance of official duties— Discretionary power of the Secretary-General in his exercise of the right conferred upon him by article 9 of the Statute of the Administrative Tribunal

The complainant had made a claim for compensation for illness attributable to the performance of her official duties and that claim was rejected. She subsequently submitted a request for reconsideration of her case producing, as a "new fact" which would enable the procedure for the reopening of cases in accordance with article 9 of appendix D of the Staff Rules to be instituted, a medical report which found that her disability was attributable to the performance of her official duties at WMO. Having examined the report in question, the medical adviser of the international organizations stated that there was no new fact which warranted reopening the case and the Secretary-General dismissed the above-mentioned request.

The Tribunal noted that the decision which the complainant was seeking to have reconsidered had not been the subject of an appeal to the Administrative Tribunal within the statutory time-limits and was no longer open to appeal unless there was a petition for review and unless the Secretary-General exercised his power to reopen the case. The Tribunal found, first, that the complainant was putting forward no argument to warrant a petition for review, which was an exceptional form of legal redress, and, secondly, that, in view of the terms of article 9[42] of appendix D to the Staff Rules and of the principle that final administrative decisions might not be interfered with, the exceptional power conferred on the Secretary-General by the article in question was a

[42] That article reads as follows:

"The Secretary-General, on his own initiative or upon the request of a person entitled to or claiming to be entitled to compensation under these rules, may reopen any case under these rules, and may, where the circumstances so warrant, amend in accordance with these rules any previous award with respect to future payments."

purely discretionary power. In the case before it, the report produced as a "new fact" was based solely on the complainant's own statements and in so far as the facts on which it was based were correct they had been known when the Secretary-General took his decision. Since the impugned decision was not vitiated by any of the defects which the Tribunal is empowered to censure when it has cognizance of a decision made in exercise of the discretionary authority of its author, the Tribunal dismissed the complaint.

3. JUDGEMENT NO. 250 (5 MAY 1975): REDING *v.* UNIVERSAL POSTAL UNION

Complaint against a decision denying the applicability of the benefits provided for in appendix D of the Staff Rules to the holder of a contract containing a provision on compensation in the event of illness

The complainant, a technical assistance expert with a fixed-term appointment, had during the period of his employment suffered a myocardial infarction. His letter of appointment had stipulated that if he fell ill, he would be entitled to the compensation prescribed under the special insurance scheme applied by UPU to experts on technical assistance projects.

Before the Tribunal, the complainant maintained, first, that apart from the benefits to which he was entitled under his contract in the event of illness, he could avail himself of the provisions of appendix D of the Staff Rules and, secondly, that he should be granted further compensation because his illness had been caused by abnormal fatigue attributable to the conditions in which he had had to work.

As to his first contention, the Tribunal held that the benefits prescribed in the complainant's contract in the event of illness clearly excluded those set out in appendix D of the Staff Rules.

As to his second contention, the Tribunal noted that it was debatable whether the relevant clause of the contract applied to all cases of illness contracted during his period of service, whatever their nature or origin, or should be taken to apply only to illness directly attributable to the performance of his duties by reason of their particularly demanding nature. It found that, assuming that the latter interpretation was correct, the complainant would be entitled, apart from the benefits prescribed in his contract and in accordance with the general principles of liability in public law, to full compensation for any injury suffered by him and its direct consequences, such as permanent or temporary disability.

Assuming in the complainant's favour that the second interpretation was correct, the Tribunal noted that the heart specialist in the complainant's Administration had found that the duties performed had a bearing on his illness only in so far as his allegation that he was overworked could be proved. In the Tribunal's opinion, the documents showed that the complainant's duties, however demanding and difficult they might have been, had not in themselves required him regularly to work longer hours than might reasonably have been expected of a staff member in a managerial position. Moreover, the illness in question had left no mark on him and had not prevented him from resuming his normal work in his national Administration or, indeed, from obtaining promotion. The complainant had therefore suffered no injury which might entitle him to claim compensation over and above the expenses already defrayed by UPU.

4. JUDGEMENT NO. 251 (5 MAY 1975): DE SANCTIS *v.* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Complaint against a decision to reject the application for a permanent post of a person who had worked for the Organization for several years on fixed-term appoint-

ments—Limits of the Tribunal's power to interfere with such a decision and with a decision not to renew a fixed-term appointment

The complainant, who had worked for several years in FAO on fixed-term appointments, applied for a permanent post. Having failed to obtain it, he appealed to the Director-General against the decision to appoint someone else to the vacant post. As the decision was confirmed, the complainant appealed to the FAO Appeals Committee, which recommended that the Organization should reconsider the complainant's situation in order to determine whether he could not be given a permanent post and, failing that, that he should be paid a larger sum that the *ex gratia* payment of five months' salary already offered to him. The Director-General decided not to accept those recommendations.

The Tribunal, when the case came before it, held that, contrary to the Organization's submission, it was required to rule on both the decision not to renew the fixed-term appointment and the decision not to appoint the complainant to the permanent post for which he had applied. It noted that the internal appeal had related to both questions and that, since the internal means of redress had thus been exhausted, the complaint was receivable on both points.

The Tribunal observed that a decision not to extend a fixed-term appointment or not to convert it into an indefinite appointment fell within the Director-General's discretionary authority and could therefore be quashed only if it had been taken without authority, violated a rule of form or procedure or was based on an error of fact/or of law, or if essential facts had not been taken into consideration, if it was tainted by abuse of authority or if a clearly mistaken conclusion had been drawn from the facts. In the opinion of the Tribunal, none of those defects existed in the case in question.

A decision not to appoint a staff member to a vacant post was also discretionary and hence was not subject to interference by the Tribunal as a rule unless one of the defects mentioned in the preceding paragraph existed. The complainant's main argument was that he had served in FAO longer than the staff member who had in fact been appointed and, unlike him, had a university degree. The Tribunal observed, however, that length of service and educational qualifications were not the sole criteria; the most important one was fitness for the vacant post. The complainant's work had not always been fully satisfactory, whereas the successful candidate had been trained for the duties of the vacant post and had proved himself fully fit to perform them. In the circumstances, even though the decision might be open to question, the Director-General had not drawn any clearly false conclusions from the file.

The Tribunal therefore dismissed the complaint.

5. JUDGEMENT NO. 252 (5 MAY 1975): ROUTIER *v.* WORLD HEALTH ORGANIZATION

Complaint seeking regrading of a post at a higher level on the basis of the duties associated with the said post—Limits of the Tribunal's power to interfere with decisions in the matter made by the Director-General on the basis of the Staff Manual

The complainant, employed as a messenger at grade G-2, submitted to the Tribunal a complaint in which he maintained that he was wrongly being described and paid as a messenger when the duties assigned to him in official documents were clearly those of a door-keeper, i.e. duties to which, in accordance with the Staff Manual in force in 1973, G-3 grading was applicable.

The Tribunal observed that it was for the competent body and, ultimately, the Director-General to grade each staff member. In all cases grading a post required

close familiarity with the conditions in which the incumbent worked and therefore constituted a discretionary decision with which the Tribunal could not in general interfere unless it was tainted with clearly proven defects.

The complainant contended that as a messenger he had to perform the duties of a conference door-keeper (G-3 category) and consequently should have the same grade as the conference door-keepers. The Tribunal found, however, that among the duties assigned to the complainant under his post description, some (preparing meeting rooms and posting announcements of meetings) differed neither in nature nor in importance from the function assigned in the Staff Manual to messengers, namely, keeping meeting rooms in order. The other duties (co-ordination with other units and assisting the door-keeper in charge) were not covered by the definition in the Manual; however, in the opinion of the Tribunal, they were not sufficient to justify grading messengers at G-3, because they accounted for only a small part of a messenger's duties and, secondly, because they were performed by the messenger under the supervision of a door-keeper and therefore justified the difference in grade between the two categories of staff members.

The Tribunal concluded that not only was the complainant's argument unfounded but there was no reason to suppose that in taking the impugned decision the Director-General had exceeded or abused his discretionary authority. The Tribunal consequently dismissed the complaint.

6. JUDGEMENT NO. 253 (5 MAY 1975): JIMENEZ *v.* PAN AMERICAN HEALTH ORGANIZATION (PAHO) (WORLD HEALTH ORGANIZATION)

The Tribunal recorded the withdrawal of suit by the complainant and awarded her $520 to meet the costs of filing her complaint.

7. JUDGEMENT NO. 254 (5 MAY 1975): GLYNN *v.* WORLD HEALTH ORGANIZATION

Complaint seeking to have periodic reports declared null and void—Purpose of periodic reports under the Staff Rules—Circumstances in which the Tribunal may endorse an allegation of bias against a supervisor

The complainant asked the Tribunal, *inter alia*, to find null and void two periodic reports, one reading "work satisfactory" and the other containing the following statement: "As in previous reports, Dr. Glynn's experience and qualifications as a public health administrator are not questioned. However, Dr. Glynn's independent attitude towards the Regional Director, and his tendency to question or to criticize the instructions he is given are perturbing factors.".

The complainant asked the Tribunal to find that the reports in question had not been formulated in accordance with the Staff Rules. He argued that the statement quoted above did not conform to the requirements of Staff Rule 430.2, according to which the purpose of periodic reports was to make "a formal evaluation of [the staff member's] performance and conduct and potentialities". The Tribunal, however, held that the words complained of should not be read literally but were to be taken to mean that the supervisor, except in the two respects specified, had no fault to find. The Tribunal added that it would not normally entertain complaints about the contents of periodic reports unless they showed a total misconception of the situation, which was not so in the case in question. The entry "work satisfactory" was an appraisal, and if the complainant had considered it inadequate, he had been at liberty to attach a statement to that effect. As for the allegation by the complainant that his supervisor had failed to discuss the content of periodic reports with him, the Tribunal found that

non-compliance with the requirements on that subject did not *ipso facto* invalidate the reports.

The complainant also contended that the impugned reports had been prepared by a supervisor disqualified on the grounds of insufficient knowledge of the facts and personal prejudice. The Tribunal observed that in its Judgement No. 182 concerning the periodic report for the year 1968-1969 on the same complainant by the same supervisor,[43] it had found that there had been no act or omission by the complainant to justify the criticism made in the said report that he had failed to act in accordance with the instructions drawn up in the Regional Office. Given that misjudgement, it was possible that the supervisor had again erred in making a similar criticism in the next periodic report on the complainant, but there was nothing to show that he had not expressed his honest opinion. For the Tribunal to interfere in the case of a periodic report, it was not enough to prove the existence of a preconceived opinion in the mind of the writer of the report, it also had to be shown that he had been actuated by malice.

As to the allegation that the writer of the periodic reports had insufficient knowledge of the facts, the Tribunal found that the impugned appraisal was not necessarily irrelevant because its author had not visited the complainant's field of operations; even if that had been the case, the complainant would have been well advised to make that point in a statement attached to the report.

8. Judgement No. 255 (5 May 1975): Glynn *v.* World Health Organization

Receivability of a complaint made directly to the Tribunal under article VII, paragraph 3, of the Statute of the Tribunal

The complainant, a retired staff member, had requested a periodic report covering the last 11 months of his employment. With a covering letter dated 23 January 1974, he received a report worded "Work acceptable". In the belief that it was not a proper report, he had asked in a letter dated 20 March 1974 that his services should be evaluated by a qualified staff member who was not hostile towards him. He had received a reply that note had been taken of his letter.

The Tribunal noted that the complaint was based on article VII, paragraph 3, of the Statute of the Tribunal, which provides that where the administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the persons concerned may have recourse to the Tribunal. The Organization's contention appeared to be that a letter dated 23 January 1974 constituted a decision which the complainant should have challenged under the internal appeal procedures. But, in the view of the Tribunal, that letter was not expressed as a decision but as a letter enclosing a periodic report. The complainant had claimed what he called a proper report; he was within his rights in taking this course, and since the Director-General had failed to act upon his letter of 20 March, paragraph 3 of article VII of the Statute applied and the complaint was receivable.

The Tribunal, nevertheless, dismissed the claim on the merits. If the Staff Rule concerning periodic reports was applicable to a staff member who had retired—and that was by no means certain—there could be no relief for a breach of it except by the payment of compensation, and it could not reasonably be claimed that the statement that the complainant's work during his last 11 months was acceptable could be in any way injurious to him.

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[43] See *Juridical Yearbook*, 1971, p. 180.

9. JUDGEMENT No. 256 (5 MAY 1975): CONWAY *v.* INTERNATIONAL LABOUR ORGANISATION

Issue by the Organisation of an attestation concerning a staff member — Power of the Tribunal to decide on the legality of such an act — Obligation of the Organisation, except in special cases, to advise the staff member concerned before providing information concerning him — Categories of documents to be placed by the Organisation in the personal file of staff members — Latitude allowed to the Organisation with regard to certain confidential documents

The complainant complained that, in connexion with his divorce, the Organisation (1) issued to his former wife's lawyer an attestation containing information on his conditions of employment and his personal life, thereby violating, in his view, Staff Regulation 4.12; and (2) failed to place the said attestation in his personal file, thereby, in his view, again violating Staff Regulation 4.12. Furthermore, he objected to the establishment of confidential files concerning him.

On the first claim, the Tribunal rejected the Organisation's argument that the issue of an attestation did not constitute a decision and could not therefore be impugned before the Tribunal. It observed that the complainant had disputed the right of the Organisation to issue such an attestation and that the Organisation had rejected the complainant's claim in several successive letters, including a letter of 4 April 1974 issued on behalf of the Director-General, and had stated in a letter of 13 May 1974 that the decision was final. There was no need for the decision in question to rule on the validity of an earlier *decision*; such a requirement would limit the power of the appeals body to intervene to decisions alone, to the exclusion of all other acts of the administration, and that would run counter to commonly held opinion. It was therefore immaterial whether or not the issue of an attestation was to be regarded as a decision. What was necessary was that the complainant should have an interest which was worth safeguarding if his complaint was to be received. But such an interest did exist, first, because the result of the claim for compensation submitted to the Tribunal was linked to the propriety of issuing the attestation and, secondly, because the complainant had an interest in securing a declaration of the unlawfulness of an act which might be repeated without his knowledge and without his having had the opportunity to dispute it. The Tribunal observed that although the information contained in the attestation could be deduced from the personal file, it could also readily have been obtained from other sources, such as publications of the Organisation or public records, and was therefore not confidential within the meaning of Regulation 4.12. It was therefore not a breach of that Regulation to communicate that information to the complainant's former wife. The Tribunal nevertheless held that in failing to inform the complainant that an attestation concerning him had been requested, the Organisation had failed to perform a duty by which it was bound. In its capacity as an employer bound to safeguard the lawful interests of its staff members in so far as was compatible with its own interests and those of third parties, the Organisation was, as a rule and subject to certain exceptions (emergency, protection of overriding interests), bound to inform its staff members of requests for information about them before answering such requests, chiefly in order to enable them to prevent, if necessary, the injurious effects of the use of the information. Although that duty did not derive from any express provision, it was, as it were, the counterpart of the staff member's duty of loyalty towards the Organisation and was implicit in the Staff Regulations. In the case in question, the Organisation had all the more reason to consult the complainant in that it did not know the intended purpose of the attestation, and it should have been all the more prudent in view of its knowledge that the complainant was a party to divorce proceedings.

The fact that the attestation contained only information which was already known was not decisive: that fact would, at most, have relieved the Organisation of the duty to consult the complainant if the information sought had plainly not been of such a nature as to cause him any injury whatever, which was not the case since it involved a staff member who was a party to divorce proceedings and since in fact the attestation had given rise to certain legal expenses for the complainant.

On the second claim, the Tribunal found that the purpose of establishing personal files was not only to keep the competent ILO bodies informed on each staff member's career, but also to give staff members access at any time to information on their professional situation, in particular, to reports on their work performance; the procedure had therefore been instituted, to a certain extent, in the interests of staff members, and it was open to the complainant to allege a breach of the provisions applicable to the case. In that connexion, the Tribunal submitted that of the five categories of documents which, under Staff Regulation 4.12 should be included in the personal file, only the last was relevant to the case, i.e. "any other documents relating to measures officially taken or considered in connection with the official". The text could be very broadly interpreted (measures giving rise to rights or duties) or narrowly interpreted (any measures which might, whether closely or remotely, affect a staff member). On the basis of the purpose of the personal file described above, the Tribunal found that "documents relating to measures officially taken or considered in connection with the official" should be construed to mean documents which affected his professional situation. Accordingly, the Organisation was not bound to include the attestation in the complainant's personal file.

The Tribunal also found the claim concerning the existence of confidential files receivable, since the complainant had an interest in ensuring that all documents concerning him should be included in his personal file, to which he had free access under Regulation 4.12. However, on the merits, it found that the Organisation, like any public administration, was entitled not to put in a staff member's personal file certain documents concerning him, since the revelation of certain information could be harmful not only to the interests of the Organisation or third parties but also to those of the staff member himself. That right should, of course, be exercised only in order to safeguard interests overriding the staff member's interest in consulting confidential documents. Similarly, the Organisation could not use confidential documents as a basis for taking a decision unfavourable to its staff members, but, unless there was a specific dispute, a staff member could not claim the right to examine documents which were not placed in his personal file.

Consequently, the Tribunal (1) quashed the impugned decision in so far as it failed to acknowledge that the issue of an attestation to the complainant's former wife without consulting him beforehand constituted a breach of duty on the part of the Organisation; (2) ordered the Organisation to pay the complainant the sum of 1,000 Swiss francs; (3) dismissed the complainant's remaining claims.

10. Judgement No. 257 (5 May 1975): Grafström *v.* Food and Agriculture Organization of the United Nations

Complaint seeking an increase in a retirement pension to the level it would have reached if the recipient had not been promoted during her period of employment from the General Service to the Professional category — Interpretation of staff rule 302.2103 as protecting staff members from possible adverse effects on their pension rights of a promotion

The complainant, after completing many years of service in the General Service category, had been promoted to the Professional category at grade P-1. She had found

that the promotion had the effect of reducing her pensionable remuneration. The Administration had then regraded her retroactively at P-2 so that her promotion would produce an increase in her pensionable remuneration. In the meantime, however, General Service salaries had been increased and the complainant had realized that her pension would be much smaller than that due if she had remained in her former category. The Tribunal, when the case came before it, noted that the two categories of staff members had separate salary scales and were subject to different systems of calculation for adjustments to meet cost-of-living increases and so forth. The problems arose from the fact that there was no relationship between the two systems and were made even more difficult by the fact that there were in the Staff Rules three separate special provisions, all of which were obviously intended to deal with the situation and which were not related to each other.

The first rule (Manual provision 311.231) dealt with "salary upon promotion": it provided that when a staff member was promoted to a higher grade, he was to be treated at least as well financially as if, instead of being promoted to a new grade, he had been moved up a step in his old grade.

The Staff Rules contained another set of provisions dealing with the situation in which promotion from the General Service to the Professional category resulted in a decline in pensionable remuneration. They were as follows:

> "302.3102 When at the time of a staff member's promotion from the General Service category to the Professional category his pensionable remuneration would otherwise have been lower, special arrangements may be made to maintain the said remuneration at its previous level."
>
> "302.442 When the pensionable remuneration of a staff member is reduced as a result of his promotion from the General Service category to the Professional category, the said remuneration may, at his request, remain at its previous level (with the staff member and the Organization making their contributions accordingly) until such time as it is overtaken, through increments, by the level of his pensionable remuneration in the new category. At the time of promotion, the staff member shall be informed in writing of his right to exercise this option."

The problem in the case in question was whether the rules cited above applied only to the present, that is, to the situation arising at the date of promotion, or whether they were applicable to the future, that is, to a change in the situation arising after promotion. After the complainant's promotion the changes which occurred in salary scales and adjustments in the General Service category were more beneficial to staff than those which ocurred in the Professional category. When the complainant retired at grade P-2, step VIII, her final average pensionable remuneration was $15,157; if she had remained in her former category, the corresponding amount would have been $17,244, which would have entitled her to an annual pension $1,157 higher than that she received. If the rules were given a strict and literal interpretation, the complainant had to accept that consequence as an unexpected misfortune.

The Tribunal noted, however, that rule 302.3102 lent itself to being interpreted as applying to the future as well as to the present. Such a wide interpretation was necessary in order to give effect to what was clearly the object of such rules, namely, to ensure that a staff member did not suffer from promotion. Moreover, the comparative increase in the salaries and related benefits in the General Service category was a fairly recent development. Rules of the type under consideration had been framed to take account of that development, but it had obviously not been foreseen that it might affect the future as well as the present. It could hardly be believed that, if the scope of the development had been foreseen, the rule would not have been

framed broadly enough to cover the future as well as the present. Finally, if the rules had to be construed literally, the result would be that they both dealt with the same situation, i.e. the present, in different and conflicting ways. The conflict was avoided if one, rule 302.442, which dealt with known facts, was interpreted as dealing with the present and the other, rule 302.3103, was interpreted as dealing with the future as well as the present. If the words "at the time of" were construed as meaning "at the time of and after" and the words "at its previous level" were construed as meaning "at the level which it would otherwise have reached", the words "to maintain" could be given their full effect as relating to the future as well as to the present.

The Tribunal therefore remitted the case to the Director-General to enable him to make such special arrangements as might be appropiate to ensure that the complainant's pension was not less than it would have been if, at the time of her retirement, her pensionable remuneration had been that of her former category.

11. JUDGEMENT NO. 258 (27 SEPTEMBER 1975): CANTAL-DUPART *v.* UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Summary dismissal of a complaint submitted after the expiry of the time-limit

The Tribunal found that the complaint impugning a decision taken on 18 June 1974 had been lodged on 21 October 1974, i.e., after the expiry of the time-limit set by article VII, paragraph 2, of the Statute of the Tribunal. It therefore declared the complaint irreceivable in accordance with article 8, paragraph 3, of its Rules of Court, which provide that a complaint which is clearly irreceivable may be summarily dismissed without the respondent organization's being asked to reply on the merits.

12. JUDGEMENT NO. 259 (27 SEPTEMBER 1975): AL JOUNDI *v.* INTERNATIONAL TELECOMMUNICATION UNION

Irreceivability of a complaint impugning a decision which had become final because it had not been impugned within the prescribed period

The complainant had been informed by the Secretary-General in a letter dated 26 March 1974 that his fixed-term appointment, which was due to expire on 31 August 1974, would not be renewed. On 16 August 1974 he had sent a letter to the Secretary-General asking him for a final decision. The Secretary-General had confirmed on 19 August 1974 that the complainant had been notified of the final decision not to renew the appointment on 26 March; to a similar request dated 22 August the Secretary-General had replied to the same effect in a letter of 23 August.

The Appeal Board had found that the appeal was time-barred and added that, even if the appeal had been receivable, it would have been unfounded. On 30 September 1974 the Secretary-General had communicated the Board's conclusions to the complainant. The complainant had lodged a complaint with the Tribunal on 17 December 1974 impugning the "decision" of 30 September 1974 and asking that the "decision" of 19 August 1974 should be quashed.

The Tribunal held that the letter of 26 March 1974 had constituted a decision not to renew the appointment and had thus determined that date as the date of termination of the contractual relationship between the complainant and the Union. That decision had been detrimental to the complainant, who had had, under Staff Rule 11.1.1, a period of six weeks in which to appeal against it.

No appeal having been lodged within that period, the decision had already become final when the complainant asked for a review of his case. The Secretary-General, and subsequently the Appeal Board, had therefore acted lawfully in dismissing his request. The Appeal Board had also been right in taking the view that no exceptional circumstances existed entitling it to allow a derogation from the time-limit prescribed in the above-mentioned Staff Rule.

13. JUDGEMENT NO. 260 (27 OCTOBER 1975): MOFJELD v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Complaint seeking to quash a decision terminating the employment of the holder of a fixed-term appointment for "unsuitability for a post"

The complainant, an expert holding a fixed-term appointment, had been a member of an FAO team working on a technical assistance project in close collaboration with a government agency in the recipient country. As a result of friction, the chairman of that agency had informed the UNDP Resident Representative in the country in question that it would be better for the project if the complainant were withdrawn. He had also written to the Director of the substantive division of FAO to which the complainant was attached asking for his early recall. In view of the circumstances, the Organization had decided that the complainant should be recalled; there being no other suitable post vacant, his services had been terminated in accordance with FAO Manual provision 370.831 (v), which reads:

"Experts may be terminated:

"...

"(v) For reasons of unsuitability for a post or assignment, no appropriate reassignment being available in the programme (acceptability to a Government is a condition of suitability)."

The Appeals Committee had held that the complainant's recall and consequent termination were contrary to the Manual provisions cited and had made a number of recommendations in favour of the complainant. The Director-General had nevertheless upheld his original decision.

The Tribunal held that the complainant had been removed from his post because he had incurred the displeasure of the government official in charge of the project to which he was attached. It did not appear from the file that the complainant was to blame: the Organization itself recognized that in practice instances of conflict between staff members in the field and members of the counterpart staff of national authorities inevitably arose. The conflict might sometimes be due to circumstances beyond the control of the staff member concerned.

Under the Manual provision cited above the Organization had been entitled to terminate the complainant's appointment if he was unacceptable to the Government of the recipient country or, in general, if he was unsuitable for his post on some other ground. The first condition would have been fulfilled by a statement from the Government that he was *"persona non grata"*. In fact, there was no evidence that the official who had asked for the complainant's recall had been authorized to speak for his Government. As to the second condition, the Organization contended that the complainant's unacceptability to the national official in charge of the project had made him unsuitable for his post. The Tribunal considered that that gave too broad a meaning to the word "unsuitable", so that the second condition was also not fulfilled. It concluded that there was no justification for the termination of the complainant's appointment and quashed the impugned decision.

14. JUDGEMENT NO. 261 (27 OCTOBER 1975): REMONT v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Complaint seeking to attribute liability to the Organization for loss or deterioration of personal property and to obtain compensation for delay in the payment of sums owed by the Organization

The complainant asked the Tribunal, *inter alia*, to order the respondent Organization to pay him (1) $1,200 as compensation for loss incurred owing to the loss or

deterioration of his property, for which, in his view, the Organization should be held liable in that it had prevented him from going to the place concerned to take the necessary measures; (2) 38,000 Belgian francs as compensation for loss owing to delay in the payment of various sums by way of salary, allowances and reimbursement of expenses incurred.

As to the first claim, the Tribunal held that it did not relate to the non-observance by the Organization of the complainant's terms of appointment and consequently fell outside the Tribunal's jurisdiction. As to the second claim, the file did not show that, except in one case, the delay had been unreasonable. In the one case of undue delay, the Organization had paid interest at the rate of 10 per cent. The complainant's second claim was therefore unfounded, and the Tribunal consequently dismissed the complaint.

15. Judgement No. 262 (27 October 1975): Labadie *v.* International Patent Institute

Complaint seeking to have a promotion granted on the basis of a specific administrative rule granted on the basis of another rule more favourable to the complainant — Distinction, with respect to the Tribunal's power of review, between decisions establishing such rules and subsequent individual decisions to apply them — Interpretation of the texts in question

The complainant had joined the service of the International Patent Institute as a probationer at grade A8 on 1 September 1971; his appointment had been confirmed and he had been classified at grade A7, step 1, on 31 August 1972, with effect from 1 January 1972; with effect from the same date he had been granted an additional service benefit of 24 months which, because of the retroactive effect of his classification at grade A7, step 1, was tantamount to additional seniority of 16 months at that grade and step; by a decision of 11 November 1974 he had been promoted to grade A6, step 1, with effect from 1 September 1974. On 20 December 1974 he had requested the Director-General to review that decision with a view to having the promotion take effect from 1 January 1974, in pursuance of section 2.I.b of the criteria for promotion adopted by the Careers Committee, and not from 1 September 1974, in pursuance of section 2.I.a of those criteria.[44] Since he had not gained satisfaction, he had lodged his complaint with the Tribunal.

The Tribunal considered article 25 (1) of the Staff Regulations, which reads as follows:

> "Promotion is granted by decision of the Director-General. The staff member who is promoted is appointed to the next highest grade in the category to which he belongs. Promotion is effected solely by selection from among staff members who have a minimum seniority in their grade after a comparative review of the merits of those qualified for promotion and of reports on them."

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[44] Section 2.I.a of the criteria reads:

"Staff members who have not later than 1974 reached grade A7, step 3, and are deemed to have shown sufficient merit, i.e., to have obtained performance marks of at least 15 for each of the years 1971, 1972 and 1973 or a performance mark of at least 16 for 1973, as confirmed by their performance reports, shall be promoted to grade A6 on the date proposed by the competent committee."

According to section 2.I.b of the criteria:

"Staff members who in 1974 have 12 months' seniority at grade A7, step 2, and have obtained a performance mark of at least 15.5 in 1972 and 16.5 in 1973, as confirmed by their performance reports, shall be promoted to grade A6 on the date proposed by the competent committee."

The effect of that provision, particularly the word "selection", was that as a rule the decision whether or not to promote a staff member fell within the discretionary authority of the Director-General and was therefore subject to only limited review by the Tribunal. It had to be borne in mind, however, that, instead of granting promotion on the merits of each case, the Director-General might lay down beforehand criteria for promotion and communicate them to the staff. The formulation of such criteria was within the discretionary authority of the Director-General, and the Tribunal, if it had to determine their validity, would have only a limited power of review. Nevertheless, in applying the rules, the Director-General was bound to observe the criteria which he had established; to infringe them would accordingly be regarded by the Tribunal as a defect which warranted quashing the impugned decision. The question was, therefore, whether the impugned decision was in conformity with the criteria adopted by the Director-General.

While admitting the applicability of section 2.I.a of the criteria, the complainant claimed that he was covered also by section 2.I.b, which was more favourable to him in that it would cause his promotion to take effect from 1 January 1974. The Tribunal held that if staff members with 12 months' seniority in 1974 at grade A7, step 2, met the condition relating to seniority, so *a fortiori* did the complainant, who by 1973 had already been at that step for 12 months. Moreover, since the complainant had obtained performance marks of 16 in 1972 and 16.5 in 1973, he met the condition relating to performance. He was therefore entitled to claim the application of section 2.I.b in his favour.

The Tribunal held that, contrary to the Institute's contention, the absence of the words "not later than" in section 2.I.b did not mean that the provision applied only to staff members who had the required seniority in 1974, to the exclusion of those who had had it earlier. Whether intentional or not, the difference between the two texts did not necessarily mean that the solutions should also be different, unless that difference was based on objective reasons. The Institute contended that since section 2.I.b took account of performance as well as of seniority, to grant the complainant the benefit of that section would be to overlook the importance of performance. But the complainant had met the performance requirements of section 2.I.b in 1972 and 1973, so that there was no need to consider whether, had that section been applicable in 1973, he would have met the performance requirements during the previous two years. It was his position in 1974 which had to be determined and not the position he would have been in earlier. Furthermore, the Institute's interpretation produced the unwarranted result that the complainant would be deprived of the benefit of section 2.I.b on the grounds that on confirmation of his appointment he had received some months' service benefit too many. Clearly the appraisal of his performance which had secured the complainant such a benefit on the termination of his probation could not stand in the way of his subsequent promotion.

The Tribunal held that the complainant was justified in contending that both sections 2.I.a and 2.I.b were applicable in his case and, considering that he was entitled to rely on the provision more favourable to him, decided that he was promoted from grade A7 to grade A6 with effect from 1 January 1974 and ordered the Institute to pay him interest at the rate of 6 per cent per year on the overdue sums with effect from the dates on which they ought to have been paid.

16. JUDGEMENT NO. 263 (27 OCTOBER 1975): ANDARY *v.* INTERNATIONAL PATENT INSTITUTE

Complaint against a decision depriving staff members who have resigned of the right to promotion — Limits of the Tribunal's power of review with respect to such decisions

The complainant, whom the Careers Committee had on 20 September 1974 recommended for promotion with effect from 1 January 1974, had by letter of 30 September 1974 submitted his resignation, which had been accepted with effect from 31 December 1974. On 14 November 1974 the Director-General had distributed to all staff members of the Institute a "staff circular" giving the list of promoted staff members and stating the criteria on which promotions had been based. It was stated in the circular that the Director-General had adopted the criteria on which the Committee had based a recommendation for promoting the complainant, but the following "remark", which applied to him, had been added: "Staff members who have resigned or have been granted leave for reasons of personal convenience are not considered for promotion." For that reason the complainant had not been included in the list of staff promoted. In a letter of 26 November 1974 the complainant had asked the Director-General to promote him but that request had been refused on 4 February 1975. On 31 January 1975 he had lodged a complaint with the Tribunal.

The Tribunal found the complaint receivable in accordance with article VII, paragraph 3, of its Statute, inasmuch as the complainant had not received a reply to his letter of 26 November 1974 within the prescribed time-limit of 60 days.

As to its power of review, the Tribunal reiterated the argumentation summarized in the second paragraph of subsection 15 above. In the case before it, the laying down by the Director-General of the rule in the "remark" cited above was within his discretionary authority. The Tribunal was required to determine the validity of the rule, in other words, to decide a matter within the scope of its limited power to review. Contrary to the complainant's contention, a decision not to promote staff members who have resigned was not tainted with any defect which entitled the Tribunal to interfere. First, the recommendations of the Careers Committee were not binding on the Director-General, who could modify the criteria submitted to him by the Committee or limit their application *ratione personae*. To claim that the Director-General was bound by some sort of quasi-contractual agreement to accept the Careers Committee's recommendations was to misunderstand the nature of the relationship between the Institute's supreme executive body and a purely advisory body. Lastly, in refusing to promote staff members who had resigned, the Director-General had not drawn any clearly mistaken conclusion from the position of such officials: either the promoted staff member was given in addition to a salary increase, new duties or greater responsibilities, which in the case in question could not happen, as the estaff member who had resigned would have remained for too short a time in his new post to perform the duties expected of him, or the promoted staff member simply obtained an increase in salary, in which case the purpose of the promotion was not merely to reward the official for past and present performance but also generally to encourage him to remain in the service of his employer, so that in the latter case the refusal to promote was again justified.

17. Judgement No. 264 (27 October 1975): Rabozée *v.* European Organization for the Safety of Air Navigation

Complaint seeking reimbursement of medical expenses incurred in respect of the complainant's spouse and a dependant — Case of a household in which one spouse benefits as a staff member of the Organization from a sickness insurance scheme which is more favourable than that covering the other spouse — Identical rights of male and female staff members with respect to such benefits

The complainant, whose husband was an employee of Belgian National Railways (SNCB), had unsuccessfully sought, on the basis of article 72 of the Service Regulations, to have medical expenses incurred by her in respect of her husband and son

reimbursed, subject to the deduction of amounts already recovered from the sickness insurance scheme of SNCB staff.

The Tribunal considered article 72, paragraph 1, of the Service Regulations which reads as follows:

> "Subject to a maximum of 80 per cent of the expenses incurred and to the rules laid down by the Director-General, the staff member and his spouse, children and other dependants are covered by sickness insurance. The maximum is, however, increased from 80 to 100 per cent in the case of tuberculosis, poliomyelitis, cancer, mental illness and other illnesses recognized by the authorities competent to make such declaration as being of similar gravity. A third of the contribution towards the cost of such insurance is borne by the insured person, provided that it shall not exceed 2 per cent of his basic salary."

The Tribunal noted that under that provision a staff member's spouse was one of the persons who might be regarded as a staff member's dependant and as such was covered by sickness insurance. In its view, such an interpretation of article 72, paragraph 1, reflected the real position of spouses, who owed each other mutual assistance and who, when both were gainfully employed, might be regarded as mutually dependent. Moreover, the provision was expressed in general terms and, according to the general principles of existing law, was applicable even in the absence of express provision, irrespective of the sex of the staff member. Accordingly, if the staff member was a woman, her husband should benefit in his wife's right from sickness insurance as prescribed in article 72 cited above if he did not himself benefit in his own right from a more favourable or at least equally favourable insurance scheme.

The Tribunal consequently ordered reimbursement by the Organization to the complainant of the difference between the amount to which she was entitled in respect of her husband and the amount to which her husband was entitled as an employee of SNCB.
