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UNITED NATIONS JURIDICAL YEARBOOK

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

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

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CONTENTS *(continued)*

Chapter V[1]

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

A. Decisions of the Administrative Tribunal of the United Nations[2]

1. JUDGEMENT NO. 326 (17 MAY 1984): FISCHMAN V. SECRETARY-GENERAL OF THE UNITED NATIONS[3]

Question of change of nationality of a staff member during the period of service—Discretionary power of the Secretary-General in regard to such change under the Staff Regulations and Rules—General human rights cannot be confused with particular conditions of service which govern the employment contract

The Applicant, a staff member of the United Nations under a permanent appointment, had requested the Tribunal to order the Secretary-General to rescind his decision refusing to allow the Applicant to sign a waiver of privileges and immunities in order to acquire permanent resident status in the United States. The Applicant had claimed the right to acquire permanent residence and asserted that the Secretary-General's refusal of permission to waive privileges and immunities, as required by United States law as a pre-condition to the acquisition of that status, in effect prevents him from eventually changing his nationality, thereby violating the Universal Declaration of Human Rights which in its article 15 proclaims *inter alia* that "no one shall be ... denied the right to change his nationality".

The Tribunal recognized the importance of the principles embodied in the Universal Declaration, but found that the Applicant's reliance thereon was misplaced in this case. It noted that the conditions of employment in the United Nations did not *a priori* exclude any change in nationality during the period of service but that the Staff Regulations and Rules left it to the discretion of the Secretary-General, within the framework of such policy as might be laid down by the General Assembly, to act in a way which made a change in nationality during the time of the service possible or not. That was by no means contrary to any principle of any international instrument on human rights since every staff member might at any time resign from his post and release himself thereby from all constraints of the service. The Tribunal consequently found that the Applicant's allegation concerning the infringement of his rights under the Universal Declaration of Human Rights was unfounded and that he had "confused general human rights with particular conditions of service which govern his employment contract (Judgement No. 66: Kharkine)".[4]

For the above reasons, the Tribunal rejected the application.

2. JUDGEMENT NO. 332 (29 MAY 1984): SAN JOSE V. SECRETARY-GENERAL OF THE UNITED NATIONS[5]

Issue of G-5 visas for household employees of staff members—Distinction in treatment between General Service staff and Professional staff

The Applicant, a locally recruited General Service staff member of the Secretariat of the United Nations, had alleged that the administration had taken an arbitrary decision which had caused her to be denied a G-4 visa to enable her to bring into the United States a domestic servant from a country of which she was a national. The Applicant had appealed a decision of the Visa Committee not to consider her request for a G-4 visa for a household employee because the Committee had decided that General Service staff who had not been internationally recruited ought not be eligible to receive visas for household employees.

The Tribunal noted that the grant of a G-5 visa had been made solely in the interest of the United Nations and that no staff member had a right to any such visa, but that the Visa Committee had, in 1976, changed its previous practice and adopted a procedure which precluded consideration of requests from locally recruited General Service staff. The motivation for the new restrictive policy was that the grant of G-5 visas was more likely to lead to abuse in the case of General Service staff than of the Professional staff. The Tribunal noted that the purpose of the revised terms of reference was to counter the abuse feared by the Visa Committee, under colour of a distinction between internationally and locally recruited staff, by excluding from consideration all applications from locally recruited staff, who were almost invariably General Service staff and not Professional staff. Although the revised terms of reference did not specifically mention General Service or Professional staff, the underlying intention was apparent from all the circumstances and from the terms of the memorandum by which the Secretary of the Visa Committee had advised the Applicant of the denial of her request, which specifically mentioned the exclusion of General Service staff. The Tribunal concluded that the administration's failure to consider the Applicant's request was discrimination amounting to a denial of due process of law.

For the foregoing reasons, the Tribunal ordered the rescission of the decision not to consider, on the merits, the Applicant's request for a G-5 visa. The Tribunal further ordered that any request for a G-5 visa made by the Applicant should be submitted to the Visa Committee for consideration on its merits. Should the Secretary-General decide, in the interest of the United Nations, that the Applicant should be compensated without further action being taken in her case, the Tribunal fixed the amount of compensation to be paid to the Applicant at three months' net base salary.

3. JUDGEMENT NO. 333 (8 JUNE 1984): YAKIMETZ V. SECRETARY-GENERAL OF THE UNITED NATIONS[6]

Non-renewal of fixed-term appointment on secondment—Question whether the Applicant was given "every reasonable consideration" for career appointment pursuant to General Assembly resolution 37/126

The Applicant, a staff member of the United Nations on fixed-term appointment on secondment, whose appointment had expired some months after he had renounced all ties with the seconding State and had applied for asylum in the host State, appealed an administration decision not to extend his United Nations service. The Applicant claimed that he had a legally and morally justifiable expectancy of continued United Nations employment and a right to reasonable consideration for a career appointment.

The Tribunal confirmed that the Secretary-General's decision did not violate the staff member's rights. The Tribunal, however, expressed its dissatisfaction with the failure of the Respondent to record sufficiently early and in specific terms the fact that he had given the question of the Applicant's career appointment "every reasonable consideration" as enjoined by General Assembly resolution 37/126, the relevant part of which reads as follows: [The General Assembly] *"Decides* that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment."[7] The Tribunal was unanimous in finding that the Applicant had no expectancy of further employment and held, by majority, that the Applicant had received every reasonable consideration for a career appointment pursuant to the above-quoted General Assembly resolution.[8]

4. JUDGEMENT NO. 334 (23 OCTOBER 1984): MORIN V. SECRETARY-GENERAL OF THE UNITED NATIONS[9]

Question whether accident was "attributable to the performance of official duties on behalf of the United Nations" within the meaning of article 2 of appendix D to the Staff Rules —Question of competence to pronounce a medical opinion

The Applicant, a former technical assistance expert with UNCTAD, requested the Tribunal: *(a)* to rescind the determination by the Respondent, made on the advice of the Advisory Board on Compensation Claims (ABCC), that the Applicant was not on duty at the time of an accident in which he was injured, and was, therefore, not entitled to compensation for injury pursuant to appendix D to the Staff Rules; *(b)* to rescind the determination by the United Nations Medical Director in connection with the Applicant's fitness to return to duty after his injury; and *(c)* to appoint a medical panel to evaluate the degree of permanent disability resulting from his injury and to order compensation in respect of the Applicant's three years of inactivity after his injury.

The Tribunal regretted the failure of ABCC to explain its two recommendations to the Secretary-General and found that the Applicant was in fact on duty at the time of the accident in which he was injured. Accordingly, the Tribunal decided that the accident was "attributable to the performance of official duties on behalf of the United Nations" within the meaning of article 2 *(a)* of appendix D to the Staff Rules.

As to the Applicant's other requests, the Tribunal found those matters were not within its competence but properly to be considered by ABCC.

For the above reasons, the Tribunal rescinded the Secretary-General's decision denying the Applicant's claim for compensation. The Tribunal remanded the case to the Advisory Board on Compensation Claims for further consideration in accordance with article 16 of appendix D to the Staff Rules.

B. Decisions of the Administrative Tribunal of the International Labour Organisation[10]

1. JUDGEMENT NO. 611 (2 JUNE 1984): NIELSEN V. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION"

Copyright in work produced by a staff member for UNESCO—Staff rule 101.9

The complainant was employed by UNESCO as a manager of a UNDP project. At the end of his appointment he had drafted a final technical report on the project, the text of which subsequently was altered by UNESCO without his consent. The complainant claimed that staff rule 101.9, which provided that "all rights, including title, copyright and patent rights, in any work produced by a staff member as part of his official duties, shall be vested in the Organization" did not entitle UNESCO to tamper with his work as it pleased. He maintained that he had inalienable rights in the results of his scientific work and a vested interest, destroyed by UNESCO, in the publication of the report. Accordingly, he asked the Tribunal to quash the Director-General's decision rejecting his claims and to award him in full costs he had incurred, compensation for injury and compensation for damage to his professional interests and reputation.

The Tribunal noted that the plea of the complainant that staff rule 101.9 infringed the staff's legitimate rights failed on the following grounds: First, UNESCO had adhered to rule 101.9—invariably, it appeared—in their relations with the many staff members to whom they had given drafting work; secondly, in two of its judgements the Tribunal had already ruled on a text akin to rule 101.9 and upheld it as valid; and thirdly, fairly similar provisions were to be found in legislation in several countries.

As to the complainant's allegations that UNESCO had altered the text of the report without his consent, the Tribunal stated that the organization was fully entitled to do so by virtue of its rights under rule 101.9 and it was under no duty either to seek comments from him or to act upon any he might have made. The Tribunal observed that, though UNESCO should have treated the complainant with greater consideration as a man who had given

UNESCO years of distinguished service, the organization had not exceeded its rights under the Staff Regulations and Staff Rules. In any event, as the holder of the copyright UNESCO had discretion to alter the draft and also not to publish the draft at all.

The Tribunal noted that the complainant's claims would succeed only if UNESCO had acted unlawfully; since they did not, the complaint failed.

For the above reasons, the Tribunal dismissed the complaint.

2. JUDGEMENT NO. 615 (5 JUNE 1984): GIROUD AND BEYER V. EUROPEAN PATENT ORGANIZATION[12]

Recognition of the right to strike—Remuneration is due only for services rendered—Method of calculating salary deductions for a staff member's absence from work during strike

The complainants, members of the staff and officers of the Staff Union, took part in strikes held by the EPO staff. By a circular the President of the European Patent Office announced that deductions would be made from salary according to the number of working days not worked in the month. The complainants asked the Tribunal to quash the decisions concerning the deductions and to declare unlawful the method of calculation of those deductions prescribed in the circular. They sought repayment of the sums withheld from their salary for their having taken part in strikes and payment of a compensation as damages for interference with the right to strike.

The Tribunal observed that it was common ground between the parties that a staff member who went on strike was not entitled to payment for a period during which he had ceased to work. That was a corollary of the principle which said that remuneration was due only for services rendered. The only matter in dispute was the method of calculating the deductions. The rules on remuneration were in article 65 of the Service Regulations and it dealt also with the matter of salary deductions. The Tribunal did not concur with EPO's position that since the right to strike was not governed by the Regulations neither was the matter of salary deductions and that when there was a strike the employment relationship was suspended for the duration and rights and duties arising under it did not directly apply. The Tribunal observed that as a matter of principle a strike was lawful. Thus it did not break the contract of employment or the administrative link between an organization and its staff. Salary was withheld by virtue of one of the provisions in the Regulations on the requirement of payment for services rendered, and any provision which was not incompatible with the existence of a strike remained in force. Article 65 was therefore applicable whatever the reason for the official's absence, since it did not provide for any exception. The Tribunal stated that to accept EPO's submissions would be to allow the imposition of a covert disciplinary sanction. The EPO staff had exercised an acknowledged right and had not committed any misconduct. The impugned decisions were therefore unlawful. As to the complainants' claim to an award as damages for interference with the right to strike, the Tribunal concluded that the claim failed since a dispute over the calculation of deductions to be made in the event of a strike was not tantamount to impediment of the right to strike and observed that there would be impediment only where some act was committed that was of such gravity as to disturb the proper balance between the rights and duties of the parties.

For the above reasons, the Tribunal set aside the impugned decisions in so far as they deducted from the complainants' salaries on account of the strikes sums in excess of those authorized under article 65 of the Service Regulations, and the complainants were referred back to EPO for calculation of the sums to be refunded.

3. JUDGEMENT NO. 616 (5 JUNE 1984): KERN V. EUROPEAN PATENT ORGANIZATION[13]

Legal and factual nature of a strike—Method of calculating salary deductions for a staff member's absence from work during strike

The complainant, staff member of EPO, was absent from his usual place of work, together with other staff members, for two days. EPO took the view that he had gone on strike and made deductions from his salary for his failure to work during those days.

The complainant's main plea was that he had not been on strike, that his absence had been proper and even authorized by his supervisors and that no deductions should have been made from his salary. Besides, the complainant claimed that even supposing his absence was unauthorized, article 63 of the EPO Service Regulations should have been applied, and the method of calculating the deductions from his salary was therefore wrong.

The Tribunal concluded that the main plea failed. Any concerted work stoppage amounted to a strike. Labour law acknowledged other forms of collective stoppage, brought about by the employer. In a dispute with staff the employer might, for example, close down the work place in a lockout or declare compulsory unemployment for a while to get through a spell of financial stringency, but such tactics were unknown in international organizations.

The stoppages in question had been declared by the EPO Staff Union, which had called on the staff not to work: there had thus been a strike in the technical meaning of the term. Even on the unproven assumption that the administration had not been altogether opposed to the protest and indeed had incited it, the nature of what had happened would still be the same in law. A lockout presupposed a direct instruction or some other form of action by the competent authority to stop the staff from being at work, both in law and in fact. Where there was a strike and someone stayed at home instead of going to work it would have been an oddity to treat him as not having gone on strike on his mere assertion that he had been at his supervisor's disposal. In fact the complainant had been on strike on the days in question.

In keeping with the principles embodied in article 63 of the EPO Service Regulations and the rule that payment was due only for services rendered, a staff member who went on strike was not entitled to payment for that period of the work stoppage.

The Tribunal found that the complainant's claim relating to the method of calculating the deductions was well founded. He referred in this respect to Judgement No. 615.[14]

For the above reasons, the Tribunal set aside the impugned decision in so far as it deducted from the complainant's salary on account of the strike sums in excess of those authorized under article 65 of the EPO Service Regulations and the complainant was referred back to EPO for calculation of the sums to be refunded. The Tribunal dismissed the other claims.

4. JUDGEMENT NO. 621 (5 JUNE 1984): POULIN V. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION[15]

Contractual relationship prior to signature of letter of appointment

On 3 September 1981 the complainant applied to UNESCO for a post under a joint project with the United Nations Development Programme. By a telegram of 4 February 1982 he was told that his application had been accepted, that he should say how soon he could be free and that the letter of appointment would arrive shortly. By a telegram of 5 February he answered that he was free immediately and that he would sort out the final formalities when he arrived in Paris. He then made several arrangements for his departure (such as getting leave without pay and leasing his house) but, having received no travel instructions, on 15 February he telephoned UNESCO and sent it a telegram and a letter. On 4 March 1982 he received a telegram from UNESCO telling him to do nothing to release himself until he received the letter of appointment. Another telegram, on 11 March, informed him that recruitment had been suspended. In a letter dated 3 May, the Director of the Personnel Office offered him payment of $US 9,000 in settlement, a sum based on a notional abolition of post.

The complainant contended that a contract had arisen with UNESCO by virtue of the telegrams of 4 and 5 February 1982 and that the letter of 3 May constituted a unilateral breach of the contract. He asked the Tribunal to order the organization to pay him damages for breach of contract.

The Tribunal observed that the material issue of the case depended on whether a contractual relationship had arisen between the complainant and UNESCO from their exchange of telegrams. It was immaterial whether, as UNESCO staff regulation 4.1 and staff rule 104.3

suggested, the letter of appointment amounted to formal and essential confirmation of the contract between the organization and the official, or was just a written record of the will of the parties at the time of agreement. Even if it had been no more than the latter, no contract could conceivably have arisen unless there had been an unquestioned and unqualified concordance of will on all terms of the relationship. A contract was deemed to have been concluded only if both parties had shown contractual intent, all the essential terms had been worked out and agreed on, and all that might remain was a formality of a kind requiring no further agreement. Both parties in the case in question had showed contractual intent and all the essential terms had been agreed on by the time the complainant received UNESCO's telegram of 4 February 1982. That telegram had brought the negotiations to an end, and the complainant's reply in his telegram of 5 February must be treated as acceptance of a firm offer of a contract from the administration. It was true that on 4 February 1982 UNESCO had not resolved all of its problems with UNDP, and that the execution of the project for which the complainant was to be appointed was contingent upon UNDP's decision. However, that did not prevent the formation of a contract. The parties were to be UNESCO and the complainant, and when the latter received the telegram of 4 February he was not required to know that UNESCO was still in difficulty with UNDP.

The Tribunal found that UNESCO had acted hastily in sending the telegram of 4 February and had taken an unwarranted time—until 4 March —to answer the complainant's telegram of 5 February. Nevertheless the complainant himself had been somewhat imprudent in acting as he had after sending his telegram of 5 February instead of simply awaiting travel instructions.

The Tribunal concluded that the complainant was entitled to damages for the direct injury caused by the administration's behavior.

For the above reasons, the Tribunal awarded the complainant $US 12,000 as damages and $US 3,000 as costs.

5. JUDGEMENT NO. 630 (5 DECEMBER 1984): RUDIN V. INTERNATIONAL LABOUR ORGANISATION[16]

Right of an employee of an organization to hold a post and perform the duties pertaining thereto—Only where the staff member's behaviour makes the situation intolerable or where a staff member commits gross misconduct may the administration contemplate giving him or her no work—Responsibilities of the organization to find proper duties and responsibilities for staff members

The complainant, a staff member of ILO, invited the Tribunal to hold that she had been subject to unjustifiable and unfair treatment by a superior official; the principal claim was to fair compensation for moral injury. She alleged that in October 1981 the head of branch had informed her of his decision to give her hardly any work to do. Although she had continued to be paid her salary, from that date she had done no more than attend the office, except for a short interval of two months in 1982 during which she had been transferred to another branch.

The Tribunal observed that the rights and duties of international officials were not determined exclusively by the Staff Regulations. Custom and usage mattered as well, and indeed they did no more than apply general principles which were embodied in the law in most countries. Examples were the right to payment for services rendered, freedom of association, respect for acquired rights and equality of treatment. Another general principle was the right of the employee of an organization to a proper administrative position. What that amounted to was that the staff member should both hold a post and perform the duties pertaining thereto. The Tribunal noted that only where the staff member's behaviour made the situation intolerable or where a staff member committed gross misconduct might the administration contemplate giving her or him no work at all.

The Tribunal found that the head of branch had not tried for very long to get her to improve. However busy he was, he was wrong to mete out such cavalier treatment to a competent official who had been on the staff for many years and whose behaviour, though she was perhaps not easy to deal with, did not make the situation intolerable. He owed her at least some consideration, and his obligation was not fulfilled by devoting only one month to attempting to reach an understanding with her.

The manner in which she was deprived of her duties was sudden and discourteous. Her position had remained unaltered for some years. Further, it was not only her supervisor who had failed in his responsibility towards her, ILO as well, since she had committed no misconduct, ought to have done its utmost to find proper duties and responsibilities for her.

The Tribunal held that ILO had caused serious injury to the complainant's feelings and reputation and had been in breach of its obligations and that it should pay her compensation for moral injury.

For the above reasons, the Tribunal decided that ILO should pay the complainant 10,000 Swiss francs and SwF 3,000 as costs.

6. JUDGEMENT NO. 640 (5 DECEMBER 1984): COMPITELLI V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS[17]

Disciplinary measure will be upheld only if the alleged attempt must be taken as proven —Burden of proof

The complainant, employed for over 20 years as a carpenter at FAO headquarters in Rome, was dismissed on the ground of attempted theft of four wooden chairs from the organization.

The complainant submitted that FAO had been wrong to shift to him the burden of proving his own innocence. The organization had not proved that four chairs had ever been missing, as they should have been if they had not been validly sold. He asked the Tribunal to quash the decision; failing reinstatement, to award him three years' salary as damages.

The Tribunal observed that the disciplinary measure would be upheld only if—and this was the first issue in the case—the alleged attempt must be taken as proved. The Tribunal found that there were aspects of the case which cast doubt on the complainant's denial, and it was on those aspects that the charges against him might be based. Yet several features of the case did argue in his favour. The Tribunal concluded that, in sum, the arguments in favour and against cancelled each other out. The charge of attempted theft could not therefore be taken as proved and the impugned decision was unlawful. The Tribunal would not order the reinstatement of the complainant, who had left FAO. Instead it would award him compensation, which, because of the length of his service, it set *ex aequo et bono* at $US 8,000.

For the above reasons, the Tribunal quashed the impugned decision and decided that the organization should pay the complainant $US 8,000 in damages and $US 2,000 in costs.

7. JUDGEMENT NO. 646 (5 DECEMBER 1984): VERDRAGER V. WORLD HEALTH ORGANIZATION[18]

Procedure for review of the Tribunal's judgements—Articles II and XII of the statute of the Tribunal and the annex to the statute—Decisions under article XII and the annex fall outside the scope of the Tribunal's competence

In 1976 the Director-General of WHO terminated the appointment of the complainant, who had refused two transfers. On 21 November 1977 the Tribunal dismissed his appeal against that decision, and it also dismissed the five applications for review of its judgement. Besides submitting his unsuccessful applications to the Tribunal the complainant had invited WHO to refer his case to the International Court of Justice.

The Tribunal observed that article XII of the statute of the Tribunal provided that the Governing Body of the International Labour Office might submit, for an advisory opinion, to

the International Court of Justice "the question of the validity of the decision given by the Tribunal" in any case in which the Governing Body considered that the Tribunal had wrongly confirmed its jurisdiction or the decision had been vitiated by a fundamental fault in the procedure followed. Similar authority was conferred under the annex to the statute, article XII, on international intergovernmental organizations which had recognized the jurisdiction of the Tribunal in accordance with the procedure in article II of the statute. The Director-General had refused several times to submit the matter to the Executive Board of WHO. He had taken the view that individuals might not submit such a matter to the Board and, although he might do so on his own initiative, he had not in this instance chosen to propose putting the question on the Board's agenda.

The Tribunal noted that it had such competence as was conferred on it by article II of its statute. Decisions under article XII and the annex fell outside the scope of its competence. Although article II, paragraph 7, empowered the Tribunal to rule on its own competence, its ruling was subject to the right of the governing body of an international organization to seek review if it believed that the Tribunal had exceeded its jurisdiction or committed a fundamental error of procedure. In general the Tribunal may never determine whether any of its judgements shall be challenged before some other body.

For the above reasons, the Tribunal dismissed the application.

C. Decisions of the World Bank Administrative Tribunal[19]

1. DECISION NO. 15 (5 JUNE 1984): JUSTIN V. THE WORLD BANK[20]

Jurisdiction of the Tribunal—Article II of the Tribunal's statute—Negotiations with a potential staff member on his employment—Question whether a contract has been formed

The Applicant had been considered by the Respondent for the position of Technical Advisor for the Pakistan Water and Power Development Authority in connection with a dam project on the Indus River and there had been advanced negotiations on the terms of his employment. The Respondent had withdrawn from the negotiations due to the subsequently discovered fact that the Applicant was 75 years old and that Pakistani officials regarded him as too old to be assigned to a project with a two-year design phase and an additional five-year construction phase.

The Applicant's main contention was that there had been a meeting of the minds and consequently a valid contract between him and the Respondent based upon the Respondent's telex of 18 May 1982 inviting an offer from the Applicant, the Applicant's offer of 2 June and the Respondent's acceptance by telex on 15 October. He claimed that the Respondent had violated that contract when it failed to employ him as a Technical Advisor, on the pretext of his age and health. Even if there had been no contract of employment, the Respondent had made a promise of employment which the Respondent should reasonably have expected would induce the Applicant to ready himself for a two-year assignment in Pakistan. Consequently if the Respondent had violated a contract of employment with the Applicant, it was liable for damages for the difference between what the Applicant would have earned as Technical Advisor during the two-year contract term and what he in fact earned during that period. If, instead, the Respondent was liable under the doctrine of promissory estoppel, it must reimburse the Applicant for his losses incurred in reliance on the promise of employment, including consulting opportunities forgone and certain travel expenses.

As to the Respondent's contention that the Tribunal was without jurisdiction to hear and pass judgement upon the Applicant's claim, by virtue of article II of its statute the Tribunal indicated that the Applicant had been alleging that a contract existed and that the Respondent had failed to observe its terms. The statute therefore gave the Tribunal the power to consider

the soundness of those allegations. The Tribunal thus concluded that it had the power initially to consider the merits of the Applicant's claim of contract formation for the limited purpose of determining its own jurisdiction and that was the power commonly exercised by domestic and international tribunals.

The Tribunal observed that the substantive question as to whether a contract of employment had been formed depended on certain general principles of contract law. One such principle was that there was a binding contract if both parties manifested an intention to contract and if all the essential terms had been settled, and if any additional steps to be taken were merely formalities that required no further agreement.

The Tribunal concluded that the exchange of communications between the Applicant and the Respondent demonstrated that the Applicant had sufficiently manifested his assent to the terms of the Respondent's offer, such that there had been a meeting of the minds and the formation of a contract. The Tribunal found that there had been no demonstration that the Respondent had acted either unreasonably or in bad faith when it concluded that the Applicant's current age of 75 created a more significant health risk than was appropriate. Nevertheless, the Applicant failed to satisfy the condition of securing the full approval of the Respondent's Medical Department and as a result—although a contract had been formed—when the Applicant was officially informed that he was no longer eligible for the appointment, both parties were relieved of their duties and the contract came to an end. The Tribunal did not share the Respondent's position that the Applicant's failure to receive medical clearance had meant that the condition for further performance of the contract had not been satisfied and that the Respondent had been therefore relieved of any liability since the Respondent should reasonably have been aware of the Applicant's age several months before it informed him that he was too old to serve as Technical Advisor in Lahore. Accordingly the Tribunal concluded that the Respondent should compensate the Applicant for the expenses and the lost income that resulted from its delay in denying medical approval to the Applicant and consequently in bringing its contract liability to an end.

For the above reasons, the Tribunal decided that it had jurisdiction to entertain the application; and on the merits, that the Respondent should pay the Applicant $US 11,250.

2. DECISION NO. 17 (5 JUNE 1984): POLAK V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT[21]

Termination of employment for unsatisfactory performance—Personnel Manual Statement No. 4.01 is the principal text determining the conditions and requirements of staff evaluation—Reviewing tribunal may not substitute its own judgement for that of the management as to what constitutes satisfactory performance

The Applicant's employment with the Bank had been terminated for unsatisfactory performance subsequent to a special evaluation period provided by his supervisors pursuant to Personnel Manual Statement (PMS) No. 4.01. He contended that the carrying out of the special evaluation programme by the Respondent had been defective to an extent that amounted to a deprivation of due process of law constituting a non-observance of his contract of employment and the terms of his appointment.

The Tribunal observed that PMS 4.01 was the principal text determining the conditions and requirements of staff evaluation in general and the Applicant's special evaluation programme in particular. Annex B to PMS 4.01 stipulates under the title "Performance counselling and re-evaluation", in paragraph 5, that "immediate supervisors have the primary responsibility for giving advice aimed at improving the job performance of staff members identified as unsatisfactory. Where appropriate they should develop a special programme with the agreement of the staff member in order to improve the effectiveness of job performance to an acceptable level within six months. Supervisors should continually review the staff member's performance during this period and then evaluate performance formally at its conclusion."

The Tribunal noted that the record of the case did not substantiate the Applicant's contention that the requirements of PMS 4.01 had not been fulfilled in the development and implementation of the special programme set up for the Applicant. The Tribunal did not subscribe to the Applicant's interpretation that in carrying out the Special Evaluation Programme the Respondent had been bound not only by PMS 4.01 but also by the procedures, conditions and guidelines included in the Respondent's brochure entitled *"Managing people—guidelines for managers of the World Bank Group"*. It was true that the words "Contract of Employment" and "Terms of Appointment" included all pertinent regulations and rules at the time of the alleged non-observance, as was explicitly provided by article II of the Tribunal's statute. The Tribunal had decided, however, in its very first decision *(de Marode,* Decision No. I),[22] as follows:

> "[N]ot all the provisions of these manuals, circulars, notes and statements are included in the conditions of employment. Some of them have the character of simple statements of current policy or lay down certain practical or purely procedural methods of operation. It is, therefore, necessary to decide in this case whether the provision constitutes one of the conditions of employment."

As to the Applicant's complaint that the main responsibility for carrying out the Special Programme had been put in the hands of a senior loan officer within the division who had not been and could not be a substitute for management, the Tribunal did not find in the designation of the senior officer a violation of PMS 4.01 as long as management had continued to carry out its main responsibilities under the special evaluation process in conformity with PMS 4.01. The Tribunal also found that the final evaluation had in fact incorporated a number of positive assessments, had not overlooked the strong points of the Applicant's performance and therefore had provided a balanced appraisal.

In the light of an examination of the Applicant's anniversary evaluation reports, the Tribunal concluded that there had been sufficient grounds for the Respondent reasonably to determine that the Applicant's performance had been unsatisfactory and that the Respondent's conclusion had not been vitiated by any abuse of discretion. The Tribunal observed with reference to its previous decision *{Suntharalingam,* Decision No. 6) that it was an established rule of judicial review by it and other similar tribunals that the reviewing tribunal might not substitute its own judgement for that of the management as to what constituted satisfactory performance. As to the allegation by the Applicant that the Respondent had not acted fairly and in conformity with the requirements of due process, the Tribunal did not find the allegation to be substantiated by the record.

For the above reasons, the Tribunal rejected the application.

NOTES

[1] In view of the large number of judgements which were rendered in 1984 by Administrative Tribunals of the United Nations and related intergovernmental organizations, only those judgements which are of general interest have been summarized in the present edition of the *Yearbook.* For the integral text of the complete series of judgements rendered by the three Tribunals, namely Judgements Nos. 321 to 341 of the United Nations Administrative Tribunal, Judgements Nos. 596 to 646 of the Administrative Tribunal of the International Labour Organisation and Decisions Nos. 15 and 17 of the World Bank Administrative Tribunal, see, respectively: documents AT/DEC/321 to 341; *Judgements of 'the Administrative Tribunal of the International Labour Organisation:* 52nd and 53rd, and 54th Ordinary Sessions; and *World Bank Administrative Tribunal Reports,* 1984.

[2] Under article 2 of its statute, the Administrative Tribunal of the United Nations is competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. Article 14 of the statute states that the competence of the Tribunal may be extended to any specialized agency upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. By the end of 1984, two agreements of general scope, dealing with