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UNITED NATIONS JURIDICAL YEARBOOK

1986

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 V¹

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

A. Decisions of the Administrative Tribunal of the United Nations²

1. JUDGEMENT NO. 376 (6 NOVEMBER 1986): SHATBY V. THE SECRETARY-GENERAL OF THE UNITED NATIONS³

Applicant contended that the Respondent had incorrectly appointed him—Tribunal's Judgements Nos. 95 and 142 concerning the establishment of the terms and conditions of employment—The Administration responsible for the ambiguity that surrounded the conditions of the Applicant's work

The Applicant entered the service of UNICEF in January 1979. He was initially offered a project personnel appointment under the 200 series of the Staff Regulations and Rules for a fixed-term period of two years and assigned to Yemen as a Project Officer. It appeared from the record of the case that after his recruitment the Applicant had not properly understood the nature of his assignment and had sought guidance in that regard. In December 1980, UNICEF agreed to extend the Applicant's appointment "with the understanding that the job description would have to be revised to show clearly [the Applicant's] role in the implementation of UNICEF's water project in Yemen" for a further period of two years. When his fixed-term appointment was not renewed upon its expiration on 31 January 1983 the Applicant filed an application with the Tribunal contending that the Respondent had incorrectly appointed him, not respected his terms of appointment, not clearly described the duties and responsibilities in his job description, intentionally ruined his career and arbitrarily terminated his appointment.

The Tribunal noted that as a result of the way in which the Applicant's appointment had been processed, a situation of ambiguity had arisen, and therefore the Applicant had been placed in a position in which it became difficult to define exactly where the limits of his duties lay. The Administration had hired the Applicant under a job description that clearly fell short of what UNICEF had offered to the Government. The Tribunal held that not only did the task to be fulfilled by the Applicant appear to be much broader, but even the nature of the Applicant's status would differ substantially.

The Tribunal recalled that in its Judgement No. 142, *Bhattacharyya* (1971), and No. 95, *Sikand* (1965), it held that "the Tribunal in its jurisprudence has established that the terms and conditions of employment of a staff member with the United Nations may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances."

In the present case, and in view of the subsequent difficulties encountered by the Applicant, the Tribunal held that the letter of appointment signed by the Applicant could not be considered without taking into consideration that the Administration had earlier referred to the future tasks to be entrusted to the Applicant as something much broader and not altogether of the same nature as those set forth in the job description. As a result of that uncertain and not clearly defined situation, the Applicant could, on the one hand, be considered as a staff member implementing or designing a specific project or set of projects or, on the other hand, as an advisor working with the Government of Yemen, in accordance with a bilateral agreement.

That situation also had a bearing on the non-renewal of the Applicant's appointment since in recommending the non-renewal of the Applicant's appointment, his supervisor had based himself on one interpretation of the nature of the Applicant's duties, and for this the Applicant could not be held responsible.

Therefore, the Tribunal was of the opinion that the ambiguity that surrounded the conditions of the Applicant's work had a considerable prejudicial impact, not only during his period of service, but also when the renewal of his contract had been considered, and the Administration should be held responsible for it.

For the above reasons, the Tribunal concluded that the Applicant was entitled to compensation in the amount of three months' net base salary at the date of the expiration of his appointment. All the other Applicant's pleas were rejected.

2. JUDGEMENT NO. 377 (7 NOVEMBER 1986): JABRI v. THE SECRETARY-GENERAL OF THE UNITED NATIONS⁴

The Applicant charged with allowing himself to become an instrument of unauthorized communication between a delegation and the Secretariat and of lobbying in favour of the delegation's proposal—The basic obligations of staff members of the United Nations as set forth in Article 100, paragraph 1, of the Charter of the United Nations—A written censure as a disciplinary measure imposed on the Applicant under staff regulation 10.2 and staff rule 110.3 (b) for his actions considered as injudicious and not in keeping with the standard of conduct expected of a United Nations staff member as set forth in Article 100, paragraph 1, of the Charter—The Secretary-General's discretionary power not to accept that part of the Joint Disciplinary Committee's recommendation that the disciplinary measures should be struck from the Applicant's file after a probationary period of six months of satisfactory service—Advisory character of the Joint Disciplinary Committee and the Joint Appeals Board reports—Tribunal's Judgement No. 210, Reid (1976)

The Applicant entered the service of the United Nations in 1969. Since 1976, at the P-4 level, he had exercised the functions of Chief, Arabic and Middle East Unit, Radio and Visual Services Division, Department of Public Information.

On 1 July 1983, the Applicant was informed that the Secretary-General had imposed on him a written censure as a disciplinary measure under staff regula-

tion 10.2 and staff rule 110.3(b). The decision was based on the Secretary-General's finding that, by distributing among his colleagues an unofficial preliminary version of a governmental proposal (the so-called "Yemen plan"), omitting to mention its provenance and without prior knowledge or authorization of his superiors, the Applicant had allowed himself to become an instrument of unauthorized communication between a delegation and the Secretariat which he had sufficient grounds to believe might materially differ from the Secretary-General's proposal and had failed to subject his personal preferences, opinions and beliefs to the interests of the Secretariat spelt out by the Secretary-General, as required by staff regulations 1.1, 1.3 and 1.4.

On 29 November 1985, the Applicant filed an application in which he requested the Tribunal to rescind the written censure imposed by the Secretary-General on him and to order the payment of damages for the mistreatment which he had received as a result of the misapplication of justice and of the rules and regulations which had caused irreparable damage to his career, permanent impairment of his health and untold misery to his family as well as immeasurable and significant loss in salary and emoluments, all due to the breach and violations of his rights of employment. The Applicant maintained that the decision of the Secretary-General to censure him had been flawed and unfair because it had not been accurately based on all the relevant facts.

The Tribunal considered that the facts which prompted the disciplinary sanction had been established with the greatest care by the Panel of Investigation and the Joint Disciplinary Committee and in addition had been acknowledged by the Applicant.

The Tribunal noted that the Applicant had in fact distributed to his colleagues the preliminary version of the "Yemen plan", and that he had compared it with the drafts prepared within the Department and commented favourably upon it. The Applicant acknowledged those facts in his letter of 7 July 1982 and in his testimony before the Panel of Investigation. However, he admitted only indirectly having suggested lobbying with the missions represented in the Committee on Information. The Tribunal noted further that the facts on which the Secretary-General had based his 1 July 1983 authorization of the disciplinary measure of written censure against the Applicant had not differed appreciably from those established by the Panel of Investigation, the Joint Disciplinary Committee and, following the decision of the Secretary-General, by the Joint Appeals Board, or from those acknowledged by the Applicant. They involved the Applicant's distribution of a preliminary version of the "Yemen plan" to his colleagues without indicating its origin and without requesting the permission of his supervisors, and his promotion of a government draft that included criticisms of the report commissioned by the Organization, and had been likely to conflict with the proposals of the Secretary-General. Having recalled the basic obligations of staff members of the United Nations as set forth in Article 100, paragraph 1, of the Charter, the Tribunal determined that all those facts revealed "unsatisfactory conduct" on the part of the Applicant and permitted the Secretary-General to apply the disciplinary measures prescribed in staff regulation 10.2 and staff rule 110.3. Moreover, the Tribunal considered that the measure authorized, the least serious of those provided for by staff rule 110.3(b), as recommended by the Joint Disciplinary Committee, had been in no way arbitrary in character. The Tribunal noted that the Secretary-General had not seen fit to

accept the Committee's recommendation that the disciplinary measure should be struck from the Applicant's file after a probationary period of six months of satisfactory conduct, arguing that the Staff Regulations and Rules did not provide for the possibility of striking a disciplinary measure from a staff member's file. The Tribunal considered that the silence did not mean that the Secretary-General did not have the power to decide to strike a disciplinary measure from the file. The Tribunal decided, however, that it was not necessary for it to rule on that question. The Secretary-General's refusal to accept that recommendation of the Joint Disciplinary Committee was based on the degree of seriousness of the acts of which the Applicant was accused and for which the Secretary-General considered a more severe disciplinary measure than written censure should have been imposed. The Tribunal recalled that the Secretary-General had the power not to accept that part of the Joint Disciplinary Committee's recommendation. Furthermore, if the Applicant's conduct is satisfactory in the future, the Secretary-General has the discretionary power to reconsider the Applicant's situation and terminate the effects which the disciplinary measure authorized might have on his career. The disciplinary measure imposed on him showed that the Administration was not prepared to allow the basic obligations of international civil servants to be disregarded and constituted a warning to others. In his testimony before the Panel of Investigation, the Applicant himself expressed regret at having distributed the preliminary version of the "Yemen plan".

In conclusion, the Tribunal recalled its consistent doctrine, as set forth in Judgement No. 210, *Reid* (1976):

"The Tribunal observes that the reports of the Joint Disciplinary Committee and of the Joint Appeals Board are advisory and that the Respondent is entitled to reach a different conclusion from that of those bodies on a consideration of all the facts and circumstances of the case. However, the Tribunal is competent to review the Respondent's decision if such decision is based on a mistake of facts or is arbitrary or is motivated by prejudice or by other extraneous considerations." (para. IV).

The Tribunal stated that those rules had been fully respected in the present case by the Respondent.

For the above reasons, the Tribunal decided to reject the request for rescission of the Secretary-General's decision of 1 July 1983 and to declare irreceivable all other requests by the Applicant.

B. Decisions of the Administrative Tribunal of the International Labour Organisation⁵

1. JUDGEMENT NO. 729 (17 MARCH 1986): ILOMECHINA V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS⁶

The complainant asked the Tribunal to order his personal upgrading as compensation for the injury caused by FAO's failure to distribute the vacancy announcement properly—FAO's duty under staff rule 302.4102 to inform the staff of any vacancy covered by the rule—No conditions fulfilled to grant the

complainant personal upgrading—The complainant's right to financial compensation in damages

The complainant joined FAO in 1967. Since 1976 he had been employed in FAO's office in Accra as regional administrative officer, and held grade P-4. On 18 December 1983 FAO published in Rome an announcement of a vacant P-5 post for a senior personnel officer at headquarters, the closing date for applications being 25 January 1984. Not until 10 January was the announcement sent to the pouch service in Rome for dispatch to the field offices. The complainant went on mission on 5 February and returned to Accra on 9 February to find the text of the announcement, which had been delivered at a date which is in dispute. On 10 February he sent the Director of the Personnel Division in Rome a telex expressing interest and a letter of application. However, the Director answered by telex on 15 February that the Selection Committee had made its choice of candidate on 8 February. The complainant's appeal to the Director-General alleging a breach of staff rule 302.4102 concerning advertising of vacancies had been rejected. He submitted that he had suffered prejudice from FAO's failure to distribute the announcement properly. Accordingly, he asked the Tribunal to order his personal upgrading to P-5 as compensation for the alleged injury.

The Tribunal noted that under staff rule 302.4102 FAO had been bound to inform the staff of any vacancy covered by the rule. The phrase "it shall be advertised" imposed a duty, and "to the staff" meant that it was a duty towards all FAO officials. The Organization was not, of course, bound to ensure that the notice of a vacancy should actually reach everyone. Its duty went no further than to issue the notice by some suitable means and with suitable promptness.

The Tribunal held that FAO had not acted with proper care and therefore had failed to discharge its duty, and since the notice had not left Rome before 10 January 1984 and had reached Accra at some unknown date, the Tribunal concluded that FAO might be deemed to have been in breach of its duty.

The Tribunal pointed out that the complainant had not asked that the competition be held again but that he be granted personal upgrading to P-5, and stated that such a claim would succeed only if the complainant would have been likely to get the post had his application been lodged in time or if, at the very least, his qualifications warranted promotion to P-5. The Tribunal could not take either condition to be fulfilled: for reasons he did not question he seemed to have had little hope of obtaining the appointment, and it was not for the Tribunal to express an opinion on his qualifications. But that did not mean he had no right to compensation. First, though not great, the prospects he had been denied had not been necessarily worthless. Secondly, if a selection committee had taken up his application, he might have had a better chance of success in a future competition. Thirdly, he had suffered moral injury in being made aware that he had been improperly excluded from a competition.

The Tribunal noted that it was immaterial that the complainant had not expressly claimed financial compensation. His claim to upgrading to P-5 might be treated as in part a claim for financial compensation, and the award of a specific sum in damages therefore came within the scope of his claim.

For the above reasons, the Tribunal ordered FAO to pay the complainant \$2,000 in damages.

2. JUDGEMENT NO. 741 (17 MARCH 1986): FARINETTI, PORTA AND TUZII V. INTERNATIONAL CENTRE FOR ADVANCED TECHNICAL AND VOCATIONAL TRAINING⁷

The complainants, Italian citizens, employed on the staff of the Centre under article 17 of the Centre Staff Regulations which at the time precluded United Nations Joint Staff Pension Fund membership for Italian citizens—Italian staff had been required to join the Italian national pension scheme (INPS), whose pensions lost ground steadily in relation to pensions under the Fund—After the complainants had been allowed to join the Fund, their application for validation of prior contributory service possible only if the Board of the Fund were to authorize redemption of prior service and have each staff member pay his actuarial cost of membership for periods prior to his affiliation—Redemption cost much more than validation—Agreement between the Italian Government and the International Labour Organisation of 1980 provided that contributions which had been paid in respect of Italian insurance should be refunded by INPS—Difference of opinion between the Centre and some of its staff members over the application of the Agreement—The Tribunal's interpretation of the Agreement—The Italian Government's decision that INPS refund the contributions at nominal value and without interest—The Tribunal might not rule on such a decision by a sovereign State

The three complainants were Italian citizens employed on the staff of the Centre. When the Centre started work in 1965, Italian staff were required to join the Italian national pension scheme (INPS), one reason being that the Centre had an uncertain future and could not guarantee a long career. But the other staff were affiliated, for want of any other solution, to the United Nations Joint Staff Pension Fund (Fund). Article 17 of the Centre Staff Regulations in force at the time precluded Fund membership for Italian staff. At the outset, benefits under the two schemes were much the same, but soon the benefits payable by INPS began to look much less attractive to the Italian staff than those they would have got had they been with the Fund, as were non-Italian staff. In March 1970, new Staff Regulations were approved. Article 9.2(a) of those Regulations prescribed Fund membership for everyone unless the contract of appointment precluded it. Two of the complainants' contracts had been renewed each year until 1970, when they had been converted into permanent ones, still with the clause precluding Fund membership. The third complainant had been engaged in September 1970 on a one-year appointment, converted into a permanent one in 1971. His contracts said he would be with INPS and could not join the Fund.

The Centre had not been indifferent to the worsening situations of the complainants with regard to their pension benefits and it had considered several expedients. In the end the only one that proved possible was to negotiate the matter with the Italian Government, and at last, on 29 July 1980, a Headquarters Agreement between the International Labour Organisation and the Government of Italy concerning Social Security pensions was concluded. The Agreement came into force on 1 March 1984. Difficulties soon arose between the Centre and some members of its staff, including the three complainants, over the application of the Agreement. Article 2(2) of the Agreement provided that "contributions which have been paid in respect of Italian insurance against disability, old age and death and which have not yet conferred entitlement to benefit shall be refunded by the INPS. The INPS shall refund the sums to the Centre on behalf of

the staff members concerned in accordance with arrangements made directly between the INPS and the Director of the Centre." The Italian Government and the Centre discussed the arrangements on agreements for the repayment of the INPS contributions and the Government finally decided that INPS should pay back the contributions without interest. The staff members, dissatisfied with that decision, requested the Centre to make up the cost of redemption of the years of their past service.

In their internal complaint the three complainants expressed dissatisfaction with the decision to refund the INPS contributions only at nominal value and without interest, the sums being far too small to pay for redemption. They argued that the purpose of the Agreement was to remedy the Centre's error in affiliating them to INPS and not to the Fund. They asked the Centre to pay the full actuarial cost of their retroactive affiliation to the Fund as from the date of appointment, less the amounts refunded by INPS, and to review the arrangements for redemption in keeping with their reading of the Agreement. The decisions of the Director of 24 October 1984 rejecting the "complaints" were the ones the three complainants were impugning.

The complainants' three main pleas were that the Centre was in breach of : (a) the terms of their appointment by infringing the Agreement, which was introduced into those terms and had the effect of altering their contractual relationship with the Centre; (b) the principle of equal treatment; and (c) good faith. The complainants invited the Tribunal to quash the impugned decisions and order the Centre to pay them additional benefits—in regular payments or in a lump sum—such that the aggregate of payments from the Fund and the Centre would equal the full amount of the sums that the Fund would have paid had they been members from the date of their taking up duty at the Centre, provided that they agreed to pay the difference, plus compound interest at 3.25 per cent a year, between the amount of the contributions paid to INPS and the amount of those that would have been due to the Fund for the period of their service at the Centre during which they were barred from Fund membership; or else, with the same proviso, the actuarial cost, reckoned at the day of publication of the judgement and comprising the complainants' and the Centre's shares, of redeeming the same part of the period of their service or any other sum or, thereafter, to be accompanied by compound interest from the date of the judgement of 14 per cent a year, the rate the Centre applied for the purposes of the redemption agreement.

As to the complainants' first plea, the Tribunal pointed out that article 1 of the Agreement, which provided that staff "are subject to their own social security scheme in accordance with the Centre's Staff Regulations and are therefore not subject to Italian social security legislation", did not support the plea. According to customary methods of interpretation, any action prescribed in a text was deemed to be of immediate effect. There was no presumption of retroactive effect. Article 2 did say only that INPS should refund the contributions. But the Agreement merely laid down the general rule and left the parties to sort out the arrangements later. As things turned out, the Italian authorities refused to take account of economic changes since 1966 or even to pay interest, and the Tribunal might not rule on such a decision by a sovereign State. On the other hand, article 2 laid no obligation on the Centre to redeem. The Tribunal thus concluded that article 2 could not reasonably be construed as requiring the

Centre to ensure that Italian staff be treated as full members of the Fund as from the date on which they had taken up duty.

With regard to the complainants' second plea, the Tribunal noted that from the examination of the case it was plain that the complainants had failed to object to their membership of INPS until long after the expiry of the time-limits for challenging the decisions which, whether expressly or by implication, had settled the matter. The Tribunal held that they might not therefore at that time challenge those decisions on the grounds of breach of the principle of equality, nor might they plead that the provisions of the Agreement and the later decisions had been in breach of the principle: at the time they had not been in the same position as other staff who had all along been with the Fund.

In relation to the complainants' third plea concerning breach of good faith by the Respondent, the Tribunal noted that although the evidence did suggest that some senior officials had offered cheering forecasts that had not been borne out by events, that was not enough to support the charge of bad faith.

The Tribunal concluded that the Centre had not been in breach of any of its obligations. The matter had called for delicate negotiation and the Centre had tried to take account of the rightful interests of its staff as well as of its own interests. In any event the matter was one that could not be settled by a court of law.

For the above reasons, the Tribunal dismissed the complaints.

3. JUDGEMENT NO. 778 (12 DECEMBER 1986): PETRUC V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS⁸

Complainant's claims to payment of salary because of the Organization's refusal of a complete medical check-up meant that he was still on the staff, to compensation on the grounds of extension of appointment without prior medical clearance and to moral damages—The claim to payment of salary irreceivable since the complainant had failed to exhaust the internal means of redress—No proof that the complainant's illness was attributable to the extension of his appointment—The complainant's right to compensation for moral damages caused by inappropriate manner in which the Organization dealt with his case

From July 1966 to February 1976 the complainant, who was born in 1920, served as an FAO expert on projects of UNDP in several countries. While stationed in Senegal the complainant contracted spasmodic colitis. He spent three weeks in the hospital in Dakar in December 1973 but in June 1976 underwent a medical check-up in Rome and was put in the highest health category, 1A. On 9 January 1975, while still in Senegal, he suffered a heart attack and spent seven weeks in the hospital. On 9 June 1975, the medical service of the Organization declared him to be in health category 1B and fit to go back to work in Senegal with the comment: "No objections to his return to present post. Any transfer or extension subject to prior medical clearance." Several times the Resident Representative of UNDP in Senegal told FAO that he doubted whether the complainant could carry on there and thought he should undergo a complete check-up in Rome, but the Organization's Medical Service in its telex of 14 August 1975 considered it unnecessary. The complainant stayed on in Senegal

until 26 January 1976, when he went to Rome for the check-up—the scope of which was in dispute—and was again classified 1B. FAO found no suitable vacancy for him but at his request put him on unpaid leave from 1 February 1976 up to 31 October 1976.

Observing that the Organization's refusal of a complete medical check-up amounted to gross negligence and that he was therefore still a staff member, the complainant claimed payment of his remuneration as from 1 November 1976, the date on which his unpaid leave expired, up to the date of the formal termination of his appointment. The Tribunal concluded, however, that since the complainant had failed to exhaust the internal means of redress his claim was irreceivable under article VII (1) of the Tribunal's statute.

The complainant further maintained that it was gross negligence to keep him so long in Senegal and that the telex of 14 August 1975 overlooked the Medical Service's warning of 9 June that any extension of his appointment should be subject to "prior medical clearance" and claimed damages.

The Tribunal held that there was no need to rule on damages on the grounds of extension of appointment. However valid they might be, they did not warrant awarding him damages. There was no proof of any change in the state of his health between June or August 1975 and January 1977. Though he had been in the hospital in Paris from 2 January to 25 February 1977, there had been no evidence to suggest that his illness at the time had been attributable to the decisions taken by the Medical Service in 1975.

The Applicant's claim to moral damages rested on the plea that for 10 years the Organization had put him under relentless moral pressure. He accused it of prevarication, inaccuracy, forgery, trickery, bad faith, wiles, sharp practices and lying, all obstacles to his exercise of his rights. The Tribunal stated that, whatever FAO might say, such terms, though perhaps excessive, were not entirely unwarranted taking into account the manner in which the Organization had handled the case of the complainant's electrocardiograms and his claim to a disability benefit. The impression of carelessness that all that had conveyed was strengthened by the Organization's evasiveness over the complainant's claim to compensation for service-incurred illness.

The Tribunal noted that what made the FAO's attitude all the more reprehensible was the strong criticism expressed by the Appeals Committee in every one of its reports dealing with the complainant's case.

The Tribunal found that such an attitude on the part of the Organization had been grievously harmful to the complainant's personal interests. Having fallen ill while on duty in Senegal, he had made several claims which, whether valid or not, deserved prompt and diligent handling. Sent from pillar to post and infuriated by the Organization's silence and inertia, he was understandably distressed. The Tribunal held that for the moral injury he had suffered he was entitled to compensation set *ex aequo et bono*. The amount of the compensation took account of the fact that the complainant could have speeded up the proceedings to some extent and also himself had had an electrocardiogram done in Dakar in 1975.

For the above reasons, the Tribunal decided that FAO should pay the complainant \$20,000 in moral damages and \$5,000 in costs. The complainant's other claims were dismissed.

C. Decisions of the World Bank Administrative Tribunal⁹

DECISION NO. 28 (22 APRIL 1986): GYAMFI V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT¹⁰

Applicant removed from the position of Division Chief and reassigned to a non-managerial position at a lower grade on the basis of his personnel management shortcomings—The Tribunal's interpretation of "performance" as including various extra-technical aspects—The Tribunal's decisions Nos. 7 (Buranavanichkit) and 12 (Matta)—Principle 8.1 of the Principles of Staff Employment classifies a demotion as a disciplinary measure—The investigations leading to the Applicant's demotion fraught with procedural flaws and shortcomings of such seriousness as to warrant a finding that the decision based upon them was null and void

The Applicant joined the Bank in June 1971. After being assigned to different posts, he was appointed in July 1979 as Chief, Eastern Africa Transportation Division I. At the end of January 1984, the Applicant was given a memorandum dated 1 February 1984 from the Director of the Personnel Management Department informing him that he was being suspended from duty with pay and without prejudice effective immediately. The memorandum also notified the Applicant that the Bank was undertaking investigations into problems relating to procurement in Burundi, a country for which the Applicant was responsible as Division Chief, as well as in respect of his personnel management practices, including alleged threats of physical harm made by the Applicant to the Administrative Secretary.

As a result of the investigation into the allegations, the Applicant was reassigned to a non-managerial position with effect from 1 April 1984.

In his application the Applicant contended that the decisions of the Respondent to remove him from the position of Division Chief and reassign him to a non-managerial position at a lower grade violated his contract of employment and the terms of his appointment. He based his contention on two main grounds: (a) that the decisions had lacked substantive factual basis since the assessments of those who took them had been based on materially inaccurate information; and (b) that the Respondent's handling of the Applicant's case and the procedures followed to reach those decisions had violated the basic requirements of due process of law. The Tribunal noted that the Respondent did not question the technical competence of the Applicant nor did it underestimate the many strong points and positive aspects of his performance. Those had been systematically recorded in the Applicant's annual evaluation reports since the beginning of his career with the Respondent and up to the last evaluation report immediately preceding the decisions taken against him. The Tribunal underlined, however, that in evaluating a staff member's performance the Respondent could not be expected to limit its consideration to the narrow professional and technical aspects of that performance and recalled that the Tribunal had several times interpreted "performance" as including various extra-technical aspects relating to the personality of the staff member; his work relationship with colleagues, subordinates and superiors; and his impact on the general work atmosphere and on the general image of the institution (Decision No. 7, *Buranavanichkit* (1982), and Decision No. 12, *Matta* (1983)). The evaluation of those aspects was particu-

larly important in the case of staff members holding managerial positions. The Tribunal therefore had to examine the non-technical aspects of the Applicant's performance in order to determine whether the Respondent's decisions based upon an assessment of those aspects had been—as claimed by the Applicant—lacking any factual basis. The Tribunal's examination of the entire record regarding the different accusations against the Applicant led the Tribunal to conclude that (a) the Applicant's handling of the Burundi procurement case had revealed many shortcomings relating to his managerial style and showed failure to abide by established rules followed by the Bank in similar situations; (b) the Applicant had been responsible for failing to establish an effective system for monitoring Division telephone calls, although abuse on the part of the Applicant himself could not be found; and (c) the Applicant's relations with his subordinates, colleagues and supervisors had been strained, although the allegation of instilling fear of physical harm in some of his support staff could not be substantiated.

The Tribunal also recalled that on several previous occasions the Tribunal had decided that the evaluation of the performance of staff members was a matter of management as long as its exercise of discretion was not ill-motivated, arbitrary, discriminatory or otherwise vitiated by any other abuse of power. In determining the validity of the Respondent's decisions the Tribunal noted that they comprised two distinctive elements: (a) removal from the managerial position of Division Chief; and (b) demotion from a Level N to a Level M position. Whereas removal from the managerial position was an administrative decision of a purely organizational nature relating to the efficient operation of the institution, demotion was on the other hand a disciplinary measure which directly affected the rights of the staff member. Principle 8.1 of the Principles of Staff Employment of the Respondent enumerated demotion as a disciplinary measure; it made no mention of transfer or removal from a managerial position. It might be assumed that the finding and conclusion of the investigations in the case had convinced the Respondent that it had been in the interests of the institution to have the Applicant transferred from his managerial position of Division Chief, since his managerial performance had fallen short of the level required of a Division Chief. The transfer was not a disciplinary measure adversely affecting the rights of the Applicant under his contract of employment. The final decision in this respect rested with the Respondent as long as the exercise of discretion was not discriminatory; improperly motivated, based on error of fact or otherwise tainted by abuse of power. The Tribunal concluded that those defects had not been present in the case. On the other hand, the decision to reduce the grade of the Applicant was a demotion, classified as a disciplinary measure. It was therefore necessary for the Tribunal to determine whether the Respondent had satisfied the basic requirements of procedural due process in applying that sanction to the Applicant.

The Tribunal found that there were many serious procedural flaws in the case connected with the Applicant's suspension from duty: not revealing to him the names of his accusers; the Respondent's failure to properly inform the Applicant of accusations against him concerning personnel management; denying him the right to confront his accusers or cross-examine them; the composition of the Investigating Committee; and the assembling by the Respondent of the witnesses chosen to testify before the Appeals Committee.

The Tribunal recalled that in the previous cases it had expressed its grave concern over certain procedural irregularities and other practices that had not conformed with the requirements of due process of law. In no case, however, had it found them serious enough to warrant a finding that the substantive decisions based upon them were null or void. In the present case, however, the situation was different. The decision to demote the Applicant had been based on the conclusions of three different investigations. The most serious of the accusations investigated had been the alleged threat of physical harm by the Applicant against some of his support staff. It had been the investigation of that allegation that had been shown to be fraught with serious procedural flaws and shortcomings. The Tribunal could not be sure that, if the requirements of procedural due process had been followed, the result of the investigation would have been the same. Nor can the Tribunal be sure that without the conclusion reached on the physical threats issues the Respondent would none the less have decided to downgrade the Applicant. Having regard to the above, the Tribunal contended that the decision to downgrade the Applicant must be rescinded and the Respondent had to restore the Applicant to a position of the same grade as the one he had been occupying before he was downgraded.

For the above reasons, the Tribunal decided that (a) the decision to demote the Applicant should be quashed; (b) in the event the Respondent did not restore the Applicant to a position in the same grade it should pay him a sum equivalent to one year's net base salary; and (c) in any event the Respondent should pay the Applicant damages in the amount of \$60,000.

NOTES

¹In view of the large number of judgements which were rendered in 1986 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 Judgement Nos. 361 to 379 of the United Nations Administrative Tribunal, Judgements Nos. 721 to 799 of the Administrative Tribunal of the International Labour Organisation and Decisions Nos. 28 to 30 of the World Bank Administrative Tribunal, see, respectively: *Judgements of the United Nations Administrative Tribunal*, Numbers 301 to 370 (1983-1986) (United Nations publication, Sales No. E.91.X.1), and documents AT/DEC/371 to 379; *Judgements of the Administrative Tribunal of the International Labour Organisation*: 58th, 59th and 60th Ordinary Sessions; and *World Bank Administrative Tribunal Reports*, 1986, Decisions 28-30.

²Under 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.

The Tribunal shall be open: (a) to any staff member of the Secretariat of the United Nations even after his employment has ceased, and to any person who has succeeded to the staff member's rights on his death; and (b) to any other person who can show that he is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied.

Article 14 of the statute states that the competence of the Tribunal may be extended to any specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations upon the terms established by a special agreement to be made with each such agency by the

Secretary-General of the United Nations. Such agreements have been concluded, pursuant to the above provisions, with two specialized agencies: the International Civil Aviation Organization and the International Maritime Organization. In addition, the Tribunal is competent to hear applications alleging non-observance of the Regulations of the United Nations Joint Staff Pension Fund.

³Mr. Herbert Reis, Second Vice-President, presiding; Mr. Luis M. de Posadas Montero, Mr. Ahmed Osman, Members.

⁴Mr. Samar Sen, President; Mr. Arnold Kean, Vice-President; and Mr. Roger Pinto, Member.

⁵The 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 of officials and of the staff regulations of the International Labour Organisation and of the other international organizations that have recognized the competence of the Tribunal, namely, as at 31 December 1986, the World Health Organization (including the Pan American Health Organization), the United Nations Educational, Scientific and Cultural Organization, the International Telecommunication Union, the World Meteorological Organization, the Food and Agriculture Organization of the United Nations, the European Organization for Nuclear Research, the General Agreement on Tariffs and Trade, the International Atomic Energy Agency, the World Intellectual Property Organization, the European Organisation for the Safety of Air Navigation, the Universal Postal Union, the European Patent Organization, the European Southern Observatory, the Intergovernmental Council of Copper-Exporting Countries, the European Free Trade Association, the Inter-Parliamentary Union, the European Molecular Biology Laboratory, the World Tourism Organization, the African Training and Research Centre in Administration for Development, the Central Office for International Railway Transport, the International Center for the Registration of Serials, the International Office of Epizootics and the United Nations Industrial Development Organization. The Tribunal is also competent to hear disputes with regard to the execution of certain contracts concluded by the International Labour Organisation and disputes relating to the application of the regulations of the former Staff Pension Fund of the International Labour Organisation.

The Tribunal is open to any official of the above-mentioned organizations, even if his employment has ceased, 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 upon which the official could rely.

⁶Mr. André Grisel, President; Mr. Jacques Ducoux, Vice-President; and Lord Devlin, Judge.

⁷Mr. André Grisel, President; Mr. Jacques Ducoux Vice-President; and Lord Devlin, Judge.

⁸Mr. André Grisel, President; Mr. Jacques Ducoux, Vice-President; and Tun Mohamed Suffian, Judge.

⁹The World Bank Administrative Tribunal is competent to hear and pass judgement upon any applications alleging non-observance of the contract of employment or terms of appointment, including all pertinent regulations and rules in force at the time of the alleged non-observance, of members of the staff of the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation (referred to collectively in the statute of the Tribunal as "the Bank Group").

The Tribunal is open to any current or former member of the staff of the Bank Group, any person who is entitled to a claim upon a right of a member of the staff as a personal representative or by reason of the staff member's death and any person designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan.

¹⁰Mr. E. Jiménez de Aréchaga, President; Mr. A. K. Abul-Magd and Mr. P. Weil, Vice-Presidents; and Mr. R. A. Gorman, Mr. E. Lauterpacht, Mr. C. D. Onyeama and Tun M. Suffian, Judges.