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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

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. 551 (18 JUNE 1992): MOHAPI V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[3]

Applicant challenges disciplinary penalties—Tribunal's competence to review disciplinary cases—Concept of due process in disciplinary matters—Decisions regarding the financial discrepancies were void ab initio *as a result of a flawed disciplinary process*

The Applicant, a staff member of UNDP, challenged the decision of the Secretary-General to demote her from the G-5, step IX level, to the G-4, step I level, and recover certain monies from her, as disciplinary measures under staff rules 110.3(*b*) and 112.3.

Following an investigation, on 24 August 1987, the Resident Representative wrote a letter to Headquarters endorsing the recommendation of the Resident Representative *ad interim* that the Applicant's permanent appointment be terminated since she was responsible for the disappearance of missing funds and was unable to account for them. He also alleged that the Applicant "was offering personal loans from the cash box to those who wanted", and he also attached a copy of a note from the senior Finance Assistant, which was critical of the Applicant's performance. The Applicant was not shown those communications. Subsequently, the case was examined by the UNDP/UNFPA Disciplinary Committee, which found, *inter alia*, that she was guilty of gross negligence and not fraud. The Applicant was demoted and reassigned to duties outside the Finance Section, and approximately US$ 170 was recovered from her. The Applicant appealed to the Joint Appeals Board, which recommended that she be reimbursed the contested amount of money and that the decision to demote her to a post at a lower grade be rescinded, but the Secretary-General decided to maintain the decisions.

In consideration of the case, the Tribunal recalled its Judgement No. 300, *Sheye* (1982), in which the Tribunal established its competence to review disciplinary matters "only in certain exceptional conditions, e.g., in case of failure to accord due process to the affected staff member before reaching a decision". Furthermore, the Tribunal stated that:

> "[t]he concept of due process, in disciplinary matters, includes compliance with important procedural rules established for the protection of staff members."

The Tribunal noted that section 20902 of the UNDP Personnel Manual set out the procedures to be followed in disciplinary cases involving locally recruited staff, when misconduct was attributed to such a staff member.

The Tribunal, however, found that the Applicant's case had been considered by the Respondent without all those requirements having been fully complied with. She was not informed of her right to counsel and was simply made aware that financial discrepancies arising out of the performance of her duties were being investigated. It was the view of the Tribunal that the Respondent's failure to comply with the UNDP Personnel Manual was sufficient to vitiate the Secretary-General's consequential decision to impose a disciplinary penalty.

Moreover, the confidential note of 24 August 1987, containing comments adverse to the Applicant, forwarded by the Resident Representative to the Director of Personnel without having been shown to the Applicant, was in violation of administrative instruction ST/AI/292. In this connection, the Tribunal also observed that the note contained new allegations against the Applicant and was put before the Disciplinary Committee when it considered her case. The Tribunal considered that the failure to adhere to the provisions of the above-mentioned administrative instruction was highly prejudicial to the Applicant, bearing in mind that she had worked in the UNDP Office for 12 years without any accusations of misconduct previously having been made against her.

The Tribunal, therefore, concluded that the demotion of the Applicant must be regarded as having been void *ab initio*. Similarly, the decision to recover from the Applicant US$170, the loss of which allegedly was the consequence of the Applicant's failure to comply with the applicable financial rules, must also be regarded as having been void *ab initio* since this aspect of the decision was also a result of the flawed disciplinary process.

The Applicant's plea for relief because of the delay in the disposal of her case was not, in the Tribunal's opinion, justified by the fact that the need for a substantial investigation required time and the Applicant was being paid her salary during that period.

2. JUDGEMENT NO. 555 (26 JUNE 1992): SELAMAWIT MAKONNEN V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[4]

Abandonment of post—Basis for termination from service for abandonment of post—Special leave without pay for medical reasons is not a right but within the discretionary authority of the Secretary-General—Special circumstances of case

The Applicant had served with the Economic Commission for Africa (ECA) since 1961, reaching the level of G-7, when in May 1987 the United Nations Medical Director, upon the recommendation of the ECA Chief Medical Officer, authorized medical evacuation to Nairobi for 15 days so she could undergo a series of medical tests. On 24 August 1987, however, the Applicant left Addis Ababa for the United States for medical treatment, paying the difference in air fare herself. On 18 September 1987, the Applicant reported to the United Nations Medical Director at New York. Subsequently, sick leave was approved through 4 November 1987. Her request for a further extension was denied but ECA, for humanitarian reasons, agreed to extend the Applicant's annual leave from 5 November to 28 December 1987, with a new deadline of 20 January 1988 set for her to report to work. The Applicant did not report for work and she was terminated for abandonment of post, effective 28 December 1987.

The Tribunal, noting that termination for abandonment of post was not explicitly provided for in the Staff Rules, recalled the language in annex III, paragraph (*d*), to the Staff Regulations and staff rule 109.5(i), as well as the Tribunal's Judgement No. 174, *Dupuy* (1973), in which it was stated:

> "The prohibition against paying termination indemnity to a staff member who abandons his post would be meaningless if abandonment of post was not a distinct and independent reason for termination."

Furthermore, in its Judgement No. 380, *Alam* (1987), the Tribunal considered that abandonment of post derived from the staff member's conduct, regardless of his or her expressed or unexpressed intent, and held that abandonment of post was therefore an objective notion. The Tribunal stated that several refusals to return to work despite orders by the Administration to do so constituted abandonment of post justifying termination. In its Judgement No. 265, *Kennedy* (1980), the Tribunal held that, after having instructed the Applicant to return to work by a certain date, the Secretary-General could decide to consider the Applicant's failure to do so as a repudiation of contract. In the present case, the Applicant had been granted annual leave, retroactively, and sick leave to cover her absence from her duty station, and when further sick leave was not granted, as from 28 December 1987, her absence was unauthorized. It was also part of the record that the Applicant did not return to Addis Ababa, even after several postponements of the date she was to return and despite warnings that her continued absence would lead to her termination on the ground of abandonment of post.

In view of the foregoing, the Tribunal held that the unauthorized absence of the Applicant after numerous warnings constituted a unilateral breach of the employment contract and abandonment of post justifying termination.

The Applicant had requested special leave without pay, but no such leave was granted. The Tribunal recalled its jurisprudence in the area wherein it was established that special leave without pay for medical reasons was not a right of the staff member, but was within the discretionary authority of the Secretary-General, and found that in the circumstances of the case refusal to grant the Applicant leave was not prompted by discriminatory motives or based on considerations other than the requirements of service. However, the Tribunal did note that the decision not to grant her special leave without pay was regrettable, in view of her health and the fact that she had been employed by the Organization for 26 years, and that it appeared that the Applicant's request for such leave was based on the advice she had been given by the United Nations Medical Director at Headquarters.

While rejecting the application, the Tribunal also expressed the hope that, in view of the circumstances, should the Applicant return to Addis Ababa and submit, within 45 days of notification to her of this judgement, an application for employment for a post for which she was fully qualified, the Administration would give it favourable consideration.

3. JUDGEMENT NO. 558 (30 JUNE 1992): FARUQ V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[5]

Termination of services for misconduct—Secretary-General's competence in disciplinary matters—A staff member accused of misconduct should be ac-

corded due process—Special care should be taken to protect a staff member's rights in outlying places far from Headquarters—By virtue of the staff member's position he had to be aware of the implications of taking bribes—Broad discretion of the Secretary-General in disciplinary matters

The Applicant, who was serving as Senior Shipping Assistant at the GS-6 level with UNICEF at one of the field offices when he was separated from service for misconduct, complained that the procedures followed leading to the decision to dismiss him were flawed. The Applicant contended that the finding of the ad hoc Joint Disciplinary Committee (JDC) that it was "highly probable" that the Applicant had received bribes from suppliers did not constitute a sufficient charge on which to dismiss him. The ad hoc JDC had not recommended dismissal. The Applicant also contended that he had been denied due process in not being able to cross-examine the suppliers who had made allegations against him, and who had been interviewed by the ad hoc Committee.

The Tribunal noted that staff regulation 10.2 prescribed that the Secretary-General may impose disciplinary measures on staff members whose conduct was unsatisfactory. Staff rule 110.3 provided for "separation from service, with or without notice or compensation therefor, notwithstanding rule 109.3" as one of those measures. Under staff rule 109.3, a staff member "shall be given not less than three months' written notice of such termination". The Tribunal further noted that there were other provisions relating to the procedure to be followed in respect of staff members, i.e., due process, the composition of the Joint Disciplinary Committee and its procedure.

The Tribunal has consistently held that all administrative decisions, especially on disciplinary matters, "should be free of prejudice, personal bias and other deleterious extraneous factors and that due process should be observed". A staff member accused of wrongdoing should know precisely the charges against him, should have the right to counsel and should have all the important statements recorded and open to examination. In the present case, the Tribunal found that the Applicant was accorded due process.

As to the specific complaint of the Applicant regarding his inability to confront and cross-examine the handpump suppliers who had alleged wrongdoing on his part, the Tribunal accepted the view of the Respondent in that the ad hoc JDC was not a national court, had no right to issue subpoenas and had to be guided by such evidence as was available to it. However, the Tribunal considered that, because of the difficulty mentioned by the Respondent and the limitations of joint disciplinary bodies operating in outlying places far away from Headquarters—for example, possible lack of proper legal assistance—special care should be taken to protect all the rights of staff members.

With regard to the Applicant's contention that insofar as the ad hoc JDC concluded that it was highly probable that the Applicant had taken small sums of money without fully realizing the implications or consequences, the Respondent's decision to terminate his services was excessively severe. The Tribunal, however, did not accept the finding that the Applicant could have taken money without fully realizing the implications or consequences, considering the Applicant's position and his record of good service.

On the question of the Secretary-General's discretion in disciplinary cases, the Tribunal reiterated its view that the Respondent's authority was broad:

"If the Secretary-General concludes, after proper examination, that a staff member's conduct is unsatisfactory, as stated in staff regulation 10.2, he may impose any of the disciplinary measures prescribed in staff rule 110.3. The recommendations of the JDC and similar bodies are advisory and the Secretary-General can go beyond them if, after proper and unbiased consideration, he decides that a more severe penalty is needed either in the interest of the United Nations or for failure by a staff member 'to observe the standards of conduct expected of an international civil servant'."

In view of the above and in the light of all the facts in this case, the Tribunal concluded that, despite some minor irregularities, the Respondent examined carefully and without prejudice all the aspects of the case and exercised his discretion properly.

For the foregoing reasons, the Tribunal rejected the application.

4. JUDGEMENT NO. 560 (30 JUNE 1992): CLAXTON V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[6]

Challenge to classification of post—Tribunal's competence in that matter—Question of time limits—Issue of alleged sexual harassment

On 16 October 1986, the Applicant challenged the classification of her post of Recruitment Assistant at the G-7 level, in accordance with information circular ST/IC/84/45, submitting her review to the Classification Section beyond the deadline specified in information circular ST/IC/86/27, i.e., 16 June 1986. She claimed that the duties of her post were "substantive in nature" and would be "more appropriately in the Junior Professional, rather than the Senior General Service category". She wrote again on 31 December 1986, explaining the reason for her delay, and on 7 January 1987 the Assistant Secretary-General for personnel informed the Applicant that her communication of 16 October 1986 had been referred to the Classification Section which in turn had sent it to the New York General Service Classification Appeals and Review Committee (NYGSCARC). The Applicant wrote again on 1 May 1987, and on 18 August 1987 the Assistant Secretary-General for personnel advised the Applicant that her request for review of the classification of her post was not receivable as she had not met the deadline of 16 June 1986.

Subsequently, in a memorandum dated 12 June 1989, the Executive Officer, Department of Administration and Management, asked the Chief of the Classification Service if his office could clarify if the proportion of functions outlined in the Applicant's job description, similar to those performed by Professional officers, justified classification of her post at the Professional level. He noted that the Applicant's "case was not included in the review of inconsistencies, despite the recognition to this effect by the Department . . ." This "inconsistency review" had been conducted by a Working Group set up by the Assistant Secretary-General for personnel pursuant to information circular ST/IC/87/24 of 4 May 1987, primarily to "focus on the managerial and organizational problems that the classification exercise may have created". In response, the Classification Service informed the Applicant that the functions of the Applicant's post were not comparable in content to those of the posts cited by the Department as comparators in the review, and that there would be no change in the classified level of her post as a result of the inconsistency review.

The Tribunal noted that the Applicant, on 28 February 1990, filed her statement of appeal with the Joint Appeals Board, challenging the decision of the Administration rejecting her appeal against the classification of her post on the ground that it was time-barred, as well as challenging the decision of the Compensation and Classification Service that there was no inconsistency in the classification of the Applicant's post as compared to other allegedly similar posts. The Tribunal further noted that the Presiding Officer of the JAB, on his own authority, erroneously informed the Applicant that since her appeal had challenged the decisions of NYGSCARC and that since the Committee functioned in parallel with the JAB, its decisions should be appealed directly to the Administrative Tribunal. However, as the Tribunal pointed out, the Applicant had also challenged the decision of the Working Group created to investigate inconsistencies. The latter group was of a completely different nature from CARC and, therefore, could not be considered as being parallel to the JAB. Accordingly, its decisions could not be appealed directly to the Tribunal, except through the procedure established in article 7.1 of the Tribunal's statute.

Subsequently, on 5 June 1992, in accordance with article 18, paragraph 1, of its rules, the Tribunal informed the parties that it had found a defect in procedure that would warrant remanding the case to the Joint Appeals Board, in accordance with article 9, paragraph 2, of the Tribunal's statute, and asked the Respondent whether he desired the appeal with respect to the "inconsistency review" remanded to the JAB or whether he wished the Tribunal to decide the matter. The Tribunal, in accordance with the wishes of the Respondent, considered that the requirements of article 7.1 of its statute had been fulfilled and considered the case.

As regards the issue of time limits, the Tribunal concurred with the Respondent's view that the appeal was time-barred. The reason given by the Applicant for her delay, in connection with the decisions concerning the classification of her post, was her need to "clarify perspectives and perceptions of the overall situation with [her] superiors before taking the matter further". However, in information circular ST/IC/86/27 the only exceptions allowing for submission beyond the deadline were "exceptional cases where a staff member is absent from Headquarters". There were other appeals for which the deadline of 16 June 1986 was waived; however, the Tribunal found that the Applicant's situation was completely different from the others granted a waiver of the time limits.

With respect to the Applicant's challenge of the results of the inconsistency review on the ground that they were the consequence of procedurally defective actions taken by the Administration and that they were tainted with prejudice, chiefly as a result of the alleged sexual harassment of the Applicant by one of her superiors, the Tribunal concluded, however, that the review was conducted in an entirely fair manner and that the reasons for its conclusions on the Applicant's case were adequately explained. In this regard, the Tribunal noted that the name of the person allegedly involved in sexual harassment was not included in a list of all the United Nations officials who had played a role in any recourse submitted by the Applicant. The Tribunal, therefore, did not enter into the question of whether the alleged sexual harassment had occurred, but stated that it trusted that, "as appears to be essential, a full investigation will be

conducted with respect to the extremely disturbing allegations made by the Applicant and others".

On the subject of sexual harassment, the Tribunal further remarked that while it did not ordinarily comment on issues that were not directly before it, it noted that concerns regarding sexual harassment were of "very special importance", not only to staff members, but also to the Organization itself. In its discussion of the subject, the Tribunal pointed out that "Article 8 of the Charter of the United Nations, action by the General Assembly and the Tribunal's jurisprudence make it crystal clear that the terms of appointment of every staff member include the right to be free from invidious gender-based discrimination by any official of the Organization", and that whenever sexual harassment was alleged in a case the facts and circumstances would have to be thoroughly examined.

The Tribunal rejected the application in its entirety.

5. JUDGEMENT NO. 564 (2 JULY 1992): LAVALLE V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[7]

Applicant requests that his performance evaluation report be removed from his personnel file and that he be awarded compensation for the injury which the report caused him—A report's inaccuracy arising from questions concerning the authority of the officers signing the report is not equivalent to a finding that the report is erroneous—Terms of application of articles 11 and 12 of the Tribunal's statute

The Applicant's two cases, No. 580 and 520, followed an earlier Judgement No. 501 of the Applicant and are linked; and, therefore, the Tribunal ordered their joinder.

The application in case No. 580 raised two distinct questions: (1) whether the Applicant's performance report covering the period from 1 July 1980 to 14 February 1983 should be removed from his personnel file, and (2) whether the Applicant should be awarded compensation for the injury which the report caused him. As to the first question, the Tribunal noted that it had decided in Judgement No. 501 that although there was doubt over the accuracy of the performance report owing to questions concerning the authority of the officers signing the report, this, however, was not equivalent to a finding that the report was erroneous. The Tribunal, therefore, concluded that the performance report should remain in the Applicant's file, along with Judgement No. 501, and that the present judgement also should be placed in the file. Regarding the second question, the Tribunal noted that the Applicant had already been compensated under Judgement No. 501 for the alleged injury, and that there was no new legal basis for a further award.

The application in case No. 520 sought various corrections in the text of Judgement No. 501, dated 9 November 1990, rendered on a previous application concerning the termination of the Applicant's services.

The Tribunal noted that pursuant to article 12 of its statute, the Tribunal may correct "clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission". The Tribunal further noted that this provision must be interpreted strictly, because article 11 of the statute allowed a person in whose case a judgement had been rendered the right to contest it by applying to the Committee established by paragraph 4 of article 11,

on the grounds that the Tribunal "has exceeded its jurisdiction or competence ... has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice." Therefore, the Tribunal rejected all requests for changes in wording of previous judgements which went beyond those authorized by the language used in article 12.

In the present case, the Tribunal, while expressing some doubt about the Applicant's interest in the correction of the wording in several parts of Judgement No. 501, nevertheless, in the interest of the proper functioning of administrative justice, took account of the Applicant's requests, insofar as the corrections were compatible with the terms of article 12 of the statute. For example, the Tribunal decided to replace the words "to abolish his post" on page 4 of Judgement No. 501 with the words "to terminate his appointment", as the former represented a clerical error.

The Tribunal rejected all other requests.

6. JUDGEMENT NO. 569 (6 NOVEMBER 1992): PEARL V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[8]

Non-selection to D-1 post—Question of adverse comments on which the Applicant did not respond in writing—Campaign-type submissions from staff members subvert performance evaluation and selection processes—Tribunal's competence does not extend to comparing the merits of competing candidates—Question of a written apology

The Applicant, who was Chief of the English Interpretation Section, at the P-5 level, applied for the D-1 post of Chief, Interpretation Service, and was not selected. Subsequently, the Applicant filed an appeal, and the Joint Appeals Board concluded that the requirements of the Vacancy Management System, the appointment and promotion system in force at the time, had been complied with. However, the JAB found that "extraneous considerations tainted" the Department's decision to reject the Applicant's candidacy, in that it was influenced by a negative comment regarding the Applicant's effectiveness in working harmoniously with other staff members. That comment was contained in an evaluation sheet dated 5 November 1990, prepared by the Director, Interpretation and Meetings Division of the Department of Conference Services, which was submitted to the Appointments and Promotion Board (APB). The Joint Appeals Board considered that this comment was contrary to the Applicant's performance evaluation reports, all of which had a rating of "Very good" in the matter of "Effectiveness in maintaining harmonious working relations", and that the reports had been countersigned by the Director of the Interpretation and Meetings Division without reservation. The relief recommended by the JAB was that the Respondent apologize for the extraneous factors and that the Applicant be fully and fairly considered with other candidates for vacancies for D-1 positions for which he was qualified.

The Tribunal noted that evidence submitted to the Tribunal which was not before the JAB showed that the negative comment that the Applicant "might have a certain difficulty in maintaining harmonious relations with his colleagues in a high-stress managerial post when human relations skills are of paramount importance", in the evaluation sheet, was derived from a statement, dated

12 October 1990, opposing the Applicant's selection as Chief of the Interpretation Service, which was signed by 37 members of the Service. The statement was addressed to the Director, the author of the evaluation sheet comment, and copies were sent to two of the other three officials who participated in the final selection of the successful candidate. A copy was shown to the Applicant by the Director, but he was not given a copy of the statement and did not respond to it in writing. Senior staff members of the Interpretation Service responded with a strong supporting statement on the Applicant's behalf.

The Tribunal, while noting the apparent absence of any inquiry as to the factual basis, if any, for the adverse statements, stated that it could not be determined whether any of those submissions actually influenced the final decision not to select the Applicant for the post in question. However, the Tribunal considered that the performance evaluation system, as well as the functions of officials responsible for selections for promotions, are subverted if campaigning for or against candidates for promotion is allowed to enter into the process. It was the Tribunal's view that such campaign-type submissions by staff members should not only be discouraged, but should be returned or promptly discarded upon receipt. On the other hand, the Tribunal was of the view that if legitimate complaints against staff members existed which might be pertinent to promotion decisions, they should be promptly brought to the attention of a responsible official and of the staff member affected, for investigation and resolution, within the framework of the ongoing performance evaluation system which was designed to provide important protections to all staff members.

As to the Applicant's claim that his merits were superior to the candidate chosen for the post, the Tribunal could not enter into the comparative merits of competing candidates, and therefore was unable to conclude with certitude that, but for the procedural irregularity, the Applicant would have been selected for the post.

Nevertheless, the Tribunal stated that as the Applicant's right to fair consideration was abrogated, the responsibility of the Organization for the injury to him was engaged. With regard to the Applicant's claim that the redress recommended by the JAB consisting of a written apology was not implemented by the Respondent's letter of 25 June 1991, the Tribunal recalled a similar contention in Judgement No. 476, *Valters* (1990) in which the Tribunal, in paragraph XIV, regarded a letter in which the Respondent expressed regret "as tantamount to an apology in terms of the JAB's recommendation".

As to the irregularities discussed above, the Tribunal awarded US$35,000 in compensation for the injury sustained by the Applicant.

B. Decisions of the Administrative Tribunal of the International Labour Organization[9]

1. JUDGEMENT NO. 1143 (29 JANUARY 1992): JONES V. WORLD INTELLECTUAL PROPERTY ORGANIZATION[10]

Extension of appointment beyond retirement age under regulation 9.8(a) of the Staff Regulations and Staff Rules—Limited power of the Tribunal to review discretionary decisions—Scope of the Director General's discretion and the ratio of Judgement No. 358 (in re Landi)

The complainant, who had served both in the French civil service and within United Nations bodies, joined WIPO on 25 May 1981 and eventually became a member of the United Nations Joint Staff Pension Fund. She retired in October 1990, the month in which she reached age 60. She contended, however, that her request for a five-year extension of her appointment under staff regulation 9.8(*a*), on the ground that the pension which service at WIPO entitled her to was too small, should have been granted.

Staff regulation 9.8(*a*) provided:

> "Staff members whose appointment took effect on or after 1 November 1977 shall not be retained in service beyond the age of 60 years, provided that the Director General may authorize, in specific cases, extension of this limit up to the age of 65 years if he considers it to be in the interest of the Organization."

The Tribunal, while recalling that the determination of what were the Organization's interests was peculiarly within the Director General's discretion, noted that it had limited power of review over such decisions and would interfere with his decision:

> "only if it was taken without authority or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority."

The Tribunal noted that in his reply to her appeal the Director General cited a passage in Judgement No. 358 (in re Landi) as supporting the view that he might not exercise his authority "in the exclusive interests of the staff member." In the Tribunal's view, the Director General mistook the scope of his discretion and the ratio of Judgement No. 358 solely because he was being requested to take a staff member's financial situation into account. In this connection, the Tribunal observed from the report of the Appeal Board, not only did the Board refer to the inadequacy of the pension the complainant would receive and to her having to care for an aged mother, but also to the fact that her performance reports were good and the head of her section had strongly supported extension of her appointment for a variety of reasons.

The Tribunal concluded that the Director General erred in law because his decision was not in accordance with regulation 9.8(*a*), in that he could have taken into account the complainant's financial situation provided that that was not the exclusive factor and that the interests of the Organization were also taken into account. Therefore, the Tribunal held that such a decision could not stand, and that since the decision was a discretionary one the case must be sent back to the Organization for a new decision.

2. JUDGEMENT NO. 1158 (29 JANUARY 1992): VIANNEY V. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION[11]

Non-selection to P-5 post—Question of receivability of claims to monetary compensation not considered by the Joint Appeals Board—Application of regulations 4.2 and 3.3 of the UNIDO Staff Regulations in the selection process—Question whether the Organization might, in mid-competition for the post, alter the requirements it had already declared for the post

The post of the Chief of the Public Relations and Information Section of the Department of External Relations, Public Information, Language and Documentation Services (P-5), in Vienna, being vacant, the complainant, who was at the P-4 level, served as Officer-in-Charge from 1 August 1984 to 15 January 1989 and as such was paid a special post allowance. Subsequently, the Organization issued both an internal and external vacancy announcement for the post in January and February 1988, respectively. The complainant applied, but another individual was chosen.

At the outset, the Tribunal considered whether the complainant's claims to monetary compensation were receivable in that they were not first put to the Joint Appeals Board. The Tribunal stated that even if the other claims had not formed part of the internal appeal to the Joint Appeals Board the Tribunal would entertain them. Otherwise, if it allowed the main claim, i.e., to quash the decision to select another individual for the post in question, but declined to entertain the request for monetary compensation, its judgement would have been deprived of practical effect.

The complainant, who was already on the staff of UNIDO when he applied for the post, alleged that the selection of the other individual was a breach of UNIDO's regulation 4.2, which stated, *inter alia*, "the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the Organization." The Tribunal, while agreeing with the Respondent that under regulation 4.2, officials of other United Nations organizations were to be put on an equal footing with UNIDO officials, further stated that regulation 4.2 had to be applied within the broader context of the rules on selection, including regulation 3.3 which provided that:

> "Selection of staff shall be made without distinction as to race, sex, religion or disability, among candidates who meet the qualifications required. So far as practicable, selection shall be made on a competitive basis."

The Tribunal also observed that while UNIDO had no duty under the above regulation to hold a competition in every case, if it did it must abide by the conditions it had itself set for the competition. Otherwise, any decision taken in breach of the established rules would be flawed and could not stand. In this connection, the Tribunal noted that the vacancy announcements issued by UNIDO listed as one of the requirements for the post "fluency in English, French and German ... Knowledge of other official United Nations languages desirable". In assessing the candidates, however, the Tribunal noted that the Organization had waived the stated requirement of fluency in German, which it found that the successful candidate did not meet. In response to the complainant's objection to the waiver, the Organization had pointed out that it had applied to all candidates alike. In the Tribunal's view, the material issue was not the conditions under which the waiver was applied, but whether the Organization might, in mid-competition, alter the requirements it had itself already declared for the post, and the Tribunal considered that UNIDO was wrong to have done so. Had fluency in German not been an express requirement, the Tribunal reasoned that no doubt others might have entered the competition.

The Tribunal, therefore, concluded that UNIDO had failed to abide by its own requirements established for the post described in the vacancy announce-

ments, which made "fluency" in German a basic requirement. An essential condition for the competition was waived during such evaluation, and such waiver impaired the fairness and lawfulness of the process of selection.

The complainant had sought damages in the amount of the difference in salary and pension he would have been entitled to had he been appointed to the post. In connection with that claim, the Tribunal concluded that although the competition was flawed, it could not determine that he would have been selected if the competition was held according to the rules. The claim was therefore disallowed. For the above reasons, the Tribunal set aside the challenged decision and awarded the complainant US$3,000 in damages for the material and moral injury he sustained and US$2,000 in costs.

3. JUDGEMENT NO. 1177 (15 JULY 1992): DER HOVSEPIAN V. UNIVERSAL POSTAL UNION (INTERLOCUTORY ORDER)[12]

Non-selection to P-5 head of section post—The Director-General has wide discretion to promote staff absent an examination—A selection body ensures that applications for appointment and promotion should be examined impartially and on the merits—Report of the selection body enables the Tribunal to determine whether a decision to appoint shows any flaw—Tribunal orders UPU to supply the Tribunal with the reports of the Appointment and Promotion Committee and of the Joint Appeals Committee as they formed part of the decision and might not be withheld from the Tribunal's scrutiny

The complainant, a Lebanese national, who was at the P-4 level and had served as deputy head of the section in charge of services and transport, applied for the vacant post of head of the section, graded at the P-5 level. The Appointment and Promotion Committee recommended the complainant as the first choice for the post, but the Director-General announced the appointment of an external candidate, a citizen of Cameroon and the Committee's third choice, for the vacant post. The complainant requested the Tribunal to quash the decision.

The Director-General had explained to the complainant that he had picked the Cameroonian mainly because he felt that there were not enough Cameroonians on his staff. The complainant, feeling that Lebanon was no better represented on the staff than Cameroon, made a written request on 19 August 1991 for review of the decision. The Director-General's reply of 13 September did not refer to the lack of Cameroon citizens on the staff but said that the complainant's behaviour had for years been unsatisfactory. The complainant thereupon filed an internal appeal. The Joint Appeals Committee reported on 26 November 1991, submitting to the Tribunal only its recommendation and not its report. The Committee, holding that the decision not to appoint the complainant was tainted with errors of form, procedure and appraisal, recommended, *inter alia*, that a new appointment be made and, if this could not be done, that compensation be granted to the complainant.

As the Tribunal explained, when the Director-General's decision was not based on the results of an examination he had a wide degree of discretion in making an appointment and granting promotion. Furthermore, though he was not bound by a recommendation from an advisory body, his authority did not make referral to such a body pointless. A selection body ensured that all applications for appointment or promotion should be examined impartially and on the merits, and its report enabled the Tribunal to appraise the background to the impugned decision and determine whether it showed any flaw.

However, pleading privilege for the Appointment and Promotion Committee's deliberations, UPU refused to disclose a table showing the Committee's ratings of the complainant, and therefore the Tribunal was unable to exercise its power of review in this case. As the Tribunal stated, "an item that forms part of the decision may not be withheld from the Tribunal's scrutiny", which held good for the Joint Appeals Committee's report as well. The Tribunal, therefore, ordered that UPU supply the reports of the Appointment and Promotion Committee and of the Joint Appeals Committee. The Tribunal also ordered the Union to pay the complainant 1,000 Swiss francs for the delay in the case.

4. JUDGEMENT NO. 1182 (15 JULY 1992): MIRMAND V. EUROPEAN ORGANIZATION FOR NUCLEAR RESEARCH (CERN)[13]

Request for refund of monies withheld from the tax payable by the complainant to the French inland revenue on his salary—Tribunal is not competent to rule on relations between State and citizen—Tribunal cannot construe the headquarters agreement or text of implementing arrangements between a State and the Organization—Tribunal competent to determine if CERN was in compliance with the relevant staff regulations and rules—Principle of equal treatment of all the staff of the Organization

CERN has offices in both France and Switzerland and, according to an agreement the Organization concluded with France, its officials were exempt from payment of any direct tax in that country on their earnings from the Organization with the exception that the French Government was not bound to grant such exemption to French citizens working for CERN. However, in accordance with a written understanding the French Government paid back to CERN any tax paid by French members of its staff on their earnings. In turn, the Organization's Staff Regulations stipulated that any tax levied directly on a staff member's earnings would be refunded to him on proof of payment.

The complainant, a French citizen and a staff member of CERN, was subject to the rules described above. In the years 1987, 1988 and 1989 the amount the complainant had paid to the French inland revenue on his income was greater than the amount CERN had refunded to him, the difference being 1,122 French francs for 1987, 1,305 for 1988 and 423 for 1989. This was due to a special feature of French tax law. As the holder of transferable securities, the complainant was entitled to "tax credit" in France, which was a form of tax relief calculated to foster investment in securities and consisted in the partial refund of corporation tax to any holder of company shares or bonds. The French inland revenue subtracted from the tax due on his CERN earnings the amount of the credit he was entitled to. Every year the Organization refunded to him the amount of tax due to the French Government, but discounted the portion paid by setting his tax credit against the total figure due from him.

The complainant had written to the inland revenue requesting a detailed statement, but was refused. The Tribunal, however, would not comment since it might not rule on relations between a State and its citizen.

The complainant requested the Tribunal to order CERN to refund to him the amounts it wrongfully withheld from the tax payable by him to the French inland revenue on his CERN salary for 1987, 1988 and 1989. For its part, CERN argued that, as required by the Staff Regulations, it had refunded to the complainant the taxes he had paid on his earnings in the amount the French inland

revenue stated, and that it had not paid him the amount of his tax credit because it was irrelevant to his CERN earnings.

The Tribunal, while noting that it could not construe the headquarters agreement or the texts of implementing arrangements between the French Government and the Organization, considered the complaint in the light of whether CERN was in compliance with its own rules. In this connection, the Tribunal recalled that the relevant staff regulations and rules were clear. Once the State reckoned a staff member's tax liability the Organization refunded to the staff member any tax due on his yearly earnings from CERN. It was not the concern of CERN how the inland revenue discharged the individual's tax liability.

The Tribunal recalled that it was not an issue that the tax due from the complainant on his CERN earnings came to 28,430 French francs in 1987, 27,398 in 1988 and 29,355 francs in 1989, and that the arrangements for payment were immaterial. Part was paid directly and part by using the tax credit the French Government had allowed him for reasons extraneous to his employment at CERN. The proof of payment was found in the documents the French inland revenue had supplied. Therefore, the Tribunal determined that there had been compliance with the requirements of the Staff Regulations and Rules. In the Tribunal's opinion, any other ruling would produce an unfair result by offending against the principle that all the staff of an organization should enjoy equal treatment. The Tribunal ordered the sums wrongfully withheld from the complainant refunded, and he was also awarded 8,000 French francs in costs.

5. JUDGEMENT NO. 1191 (15 JULY 1992): BHOTLU AND MITROO V. WORLD HEALTH ORGANIZATION[14]

Complainants challenge salary increase amendment which decreased salary increase from 9.2 per cent to 8.9 per cent—Question of violation of acquired rights—Question of misapplication of methodology used in arriving at salary revision

Based on a mini-salary survey, WHO headquarters having approved the Local Salary Survey Committee's findings, its Regional Office for South East Asia (SEARO) in Delhi announced in a memorandum headed "revision 29" new scales, which provided for an average of 9.2 per cent increase in salary at grades ND.1 to ND.6, effective 1 April 1988. By a further memorandum which SEARO issued to the General Service staff on 1 February 1989, the Organization announced amended scales known as "revision 29, amendment 1", also effective 1 April 1988. Although the average increase was still 9.2 per cent, the intergrade differentials, i.e., the difference in percentage between grades, were altered. Salaries were put up by 8.9 per cent at grades ND.1 to ND.6 and by 14 to 16 per cent (subject to negative indexation) at higher grades. The number of steps in grades ND.5 to ND.8 was increased to 18. The complainants, who were at grades ND.6 and 5, respectively, challenged the amendment as unlawful.

As to the contention of the complainants that their acquired rights were violated when the 9.2 per cent salary increase was amended to reflect only an 8.9 increase, the Tribunal agreed, stating that revision 29, an unconditional salary increase of 9.2 per cent, was announced to the staff and the sums were paid. In this connection, the Tribunal recalled its Judgement No. 323 (in re Connolly-Battisti No. 5), wherein it is stated: "when the Organization has calculated a payment of salary and announced it, the officials entitled to it acquire a right which the Organization has no power to destroy".

The complainants had also complained that the Organization misapplied the methodology approved by ICSC and the CCAQ Manual in arriving at revision 29, in that each grade shall ordinarily have between 9 and 12 steps, excluding longevity steps, and that the number of steps shall not change between comprehensive surveys. Furthermore, the methodology and the Manual provided that the "inter-grade differential" should be between 15 and 35 per cent, whereas the differentials in the new scales ranged between only 10 and just over 18 per cent. Additionally, the methodology stipulated that the "inter-step differential" shall be between 3 and 5 per cent of step 1 of the grade and uniform throughout the grade, whereas the new differentials diminished in terms of percentage from step to step and were under 3 per cent in the higher steps. The Tribunal, however, did not entertain their claim to the restructuring of revision 29, which in any event was superseded by revision 29, amendment 1, stating that there was no evidence to suggest that the increase in steps from 17 to 18 in grades ND.5 and ND.6 caused the complainants any injury and that the inter-step differentials in their grades were constant throughout and were not reduced and there was no change in the inter-grade differentials for their grades.

For the above reasons, the Tribunal quashed the Director-General's decision insofar as it reduced from 9.2 to 8.9 per cent the increase in the complainants' salary and ordered that the sums due the complainants in accordance with revision 29, amendment 1, should be recalculated so as to grant them a 9.2 instead of an 8.9 per cent increase, and that each of the complainants be awarded US$250 towards costs.

6. JUDGEMENT NO. 1195 (15 JULY 1992): ZAYED (NAJIA) V. UNIVERSAL POSTAL UNION[15]

Complainant objects to recovery of the dependency benefit from her salary—General principle of law that any sum paid on a mistaken assumption of fact is recoverable—Elapse of time before the demand for recovery was made was not long enough to warrant declaring the undue payments irrecoverable—Question of bad faith on the part of UPU in demanding repayment

Since 30 September 1986, the date that the complainant's husband was dismissed from the Arabic translation service of UPU, she claimed him as her dependant and accordingly was paid her own salary at the higher rate known as the "dependency rate". Subsequently, the husband filed an appeal concerning his dismissal, and by Judgement 868 the Tribunal set aside her husband's dismissal and sent his case back to the Union for a new decison. Based on Judgement No. 922 of 8 December 1988, the Tribunal quashed a new decision by the Arab Language Group to confirm his earlier dismissal and awarded the husband the sums he would have been paid had he remained on the staff from the date of his dismissal. A settlement between the Arab translation service and the husband was concluded on 18 May 1990, which reinstated him in the service up to 30 November 1990 and paid him for the period from 9 December 1988 to 31 August 1990, and put him on unpaid leave from 1 September to 30 November 1990, when he took retirement.

As a result, the complainant was notified on 11 February 1991 that from October 1986 to May 1990 her husband had occupational earnings above the limit in regulation 3.1.3 of the UPU Staff Regulations ("step 1 of the salary attached to grade G.1 of the General Service category") and that she had there-

fore not been entitled to payment of her own salary at the dependency rate for that period and would have to repay a total of 5,940.80 Swiss francs.

The Tribunal, noting that pursuant to regulation 3.1.2 a staff member in the Professional category who had a "dependent spouse" was entitled to payment of basic salary at a higher rate known as the "dependency rate", was of the opinion that, the husband having received the award of damages and the retroactive payment of salary, the complainant's husband might not be deemed to have been her "dependent spouse" within the meaning of regulation 3.1.3 from 1 October 1986 to 30 November 1990. The Tribunal further stated that it was a general principle of law that any sum paid on a mistaken assumption of fact was recoverable. Accordingly, since the complainant received payment on the assumption that her husband was her dependant and since that assumption later proved mistaken, the sums she had received were recoverable.

The complainant objected to repaying the sums, claiming that UPU had acted in bad faith in that before the conclusion of the agreement of 18 May 1990, UPU had failed to inform her husband that it would require her to pay the sums. However, the Tribunal pointed out that the agreement between UPU and the complainant's husband was extrinsic to the relationship between UPU and the complainant and for her was *res inter alios acta.*

The complainant also objected to repayment based on the argument that because of prescription the debt had become unenforceable, as it had been a long period of time before the husband received payment of salary and allowance due him. The Tribunal stated that while there was a widely recognized principle that lapse of time might extinguish an obligation, the difficulty in the present case was that UPU's rules had set no time limit for such extinctive prescription. While the complainant had maintained that it should be after one year, citing staff circular No. 106 of 5 December 1990, which provided that no retroactive payment of dependency benefit might be made to a staff member in 1990 for any period prior to 1 January of that year, the Tribunal stated that the analogy was not a sound one, explaining that what the circular meant was that the staff member, who each year had to file his claim to dependency benefit, was required to support it with a statement of any fact that was relevant to the particular year and that he already had knowledge of. In the present case, however, there was no question of UPU's being able to demand repayment from the complainant until the publication of Judgement No. 922 and the conclusion of the agreement with the complainant's husband.

The Tribunal, however, considered whether UPU was in bad faith demanding repayment in its letter of 11 February 1991, and noted that there were two periods in question, i.e., one from 1 October 1986 to 8 December 1988, which formed the subject of Judgement 922, and the second from 9 December 1988 to 30 November 1990, which was covered by the agreement concluded on 18 May 1990. The Tribunal noted that, as to the latter period, the time between 18 May 1990 and 11 February 1991, the date of the Union's demand, was less than a year and, as to the former, the sums due to the complainant's husband under Judgement No. 922 were paid to him in January 1989, so that just over two years had elapsed before the demand was made. In the Tribunal's view, this period of time was not long enough to warrant declaring the undue payments irrecoverable. The Tribunal further noted that not only was the period of extinctive prescription much longer in most national systems of law, but also the complain-

ant had pleaded no personal difficulty or hardship in making the repayment—which would be spread over 18 months.

The Tribunal concluded that the complainant was bound to repay to UPU the amounts demanded in its letter of 11 February 1991.

7. JUDGEMENT NO. 1196 (15 JULY 1992): ANDREWS, BARTELS, DONDENNE AND MACHADO V. WORLD INTELLECTUAL PROPERTY ORGANIZATION[16]

Complainants object to repeal of "take-home pay differential" which offset any fall in the value of the United States dollar against the Swiss franc—Article 9(7) of the Convention Establishing WIPO—General principles of the international civil service

The complainants objected to WIPO's repealing of regulation 3.1 *bis* of the Organization's Staff Regulations, which granted them a "take-home pay differential" to offset any fall in the value of the United States dollar, the currency in which salary was stated, against the Swiss franc, the currency of the host country of WIPO. Specifically, the complainants pleaded that the procedure followed in amending the Staff Regulations was flawed and that there was breach of principles of the international civil service, such as the doctrine of acquired rights and the stability of their conditions of pay.

As regards the claim of a flawed procedure, the complainants had relied on article 9(7) of the Convention Establishing WIPO, which provided:

> "The conditions of employment shall be fixed by the staff regulations to be approved by the Coordination Committee on the proposal of the Director General."

The complainants had claimed that the appeal of the provision was on the Coordination Committee's initiative and therefore violated the above provision. However, the Tribunal observed that the Director General had been involved in the procedure from an early stage, but that the Director General's proposal had not been accepted by the Committee. The Tribunal noted that the Committee had not always approved the proposals of the Director General for amending the Staff Regulations and that in the circumstances of the case the Director General's right to propose was not overlooked.

As to the complainants' argument that the repeal of regulation 3.1 *bis* impaired their acquired rights and the stablity of their conditions of pay in breach of the guarantee in regulation 12.1, the Tribunal stated that a provision, such as regulation 3.1 *bis*, which served the lawful purpose of protecting against the erosion of pay by monetary trends, a factor extraneous to the contract of employment, once granted the rule-making authority could not arbitrarily do away with it.

However, after reviewing the parties' submissions, the Tribunal noted that there was objective cause to repeal regulation 3.1 *bis* in that it had entailed adjusting pay only when the dollar fell on the exchange market but not when it rose above any given point. In other words, there was the potential for an undue increase in pay constituting a negative impact on WIPO's budget—which was no more warranted than it would have been for the Organization to realize a savings if the dollar fell. The Tribunal, therefore, concluded that because of the untoward effects the old rule might have the Coordination Committee was right to repeal it. Furthermore, the repeal was not in breach of the staff's ac-

quired rights since the new rule fully safeguarded their rightful interests, i.e., by maintaining the "differential" if the dollar fell but, if it rose, making pay level off at the point reached at 1 October 1988, the date of repeal of the old rule.

As regards the complainants' argument that because of the repeal of regulation 3.1 *bis* they fared worse than local staff, whose pay, being in Swiss francs, was sheltered from the ebb and flow of exchange rates, the Tribunal stated that according to consistent precedent the distinction between international and local staff was a fundamental one inherent in the very nature of an international organization, with each category of staff offered career prospects and conditions of recruitment and pay that differed according to its own requirements. Therefore, a staff member might not plead breach of equal treatment if treated differently because he belonged to one category rather than to the other.

For the above reasons, the Tribunal dismissed the complaints.

C. Decisions of the World Bank Administrative Tribunal[17]

1. JUDGEMENT NO. 115 (13 NOVEMBER 1992): DAVID MOSES V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT[18]

Termination of the Applicant's employment for redundancy—Validity and effects of agreements between the Bank and staff members for the release of claims—Application of rule 7.01 of the World Bank's Staff Rules regarding special leave

In February 1986, the post of the Applicant, who had joined the Bank in 1975, was declared redundant and he was placed on special leave status from 18 October 1986 through 17 October 1987. While on special leave the Applicant accepted a position in the Technology Facilities Department (ITF), with the hope of finding a regular position which would enable him to remain in the service of the Bank until age 55.

In the meantime, the Applicant filed an appeal against termination of his employment for redundancy; when he was denied the enhanced separation package, which he had requested because he was not selected during round 1 of the Bank-wide reorganization, he filed a second appeal.

Subsequently, the Applicant accepted an offer of an assignment in ITF effective 17 December 1987 through 31 October 1989, at which time he would take early retirement from the Bank. This agreement contained a release clause in which the Applicant agreed to withdraw his two pending appeals and to release the Bank from all claims "arising out of circumstances occurring or decisions taken on or before the date of your acceptance of this offer or related to the terms and conditions of this offer".

By another agreement, the Applicant's early retirement was extended from 31 October 1989 to 30 June 1990 so that he would retire with 15 years of service, but the Applicant's request for the benefits of a mutually agreed separation was denied, whereupon the Applicant appealed. He took early retirement on 30 June 1990.

The Applicant first complained that he was wrongfully terminated from the service of the Bank, in that when he was declared redundant because his services no longer matched the required skills, no consideration was given to pro-

viding him with training to fill the position. Moreover, the Bank did not make good-faith efforts to find him alternative employment.

The Tribunal, noting the Respondent's argument that the Applicant's complaints had been settled and released by the agreements he had signed, stated that in previous cases it had given effect to agreements between the Bank and staff members for the release of claims. The Tribunal's acceptance of the validity and effects of these release agreements, however, have been qualified in certain respects. As stated in *Kirk*, Decision No. 29 [1986], in paragraph 37, such acceptance:

> "Does not mean that the Applicant has agreed to forego all recourse to the administrative and judicial institutions created by the Bank . . . Such a commitment, despite its broad terms, does not amount to a deprivation or denial of administrative or judicial remedies because, as shown by the present case, both the Appeals Committee and this Tribunal are and remain available to staff members to consider the interpretation and validity of release provisions in the circumstances of each case."

As regards the release agreement, dated 23 December 1987, the Tribunal upheld its effect and validity, taking into account the Applicant's complaint that he had concluded the agreement under duress and in order to continue his service in the Bank. As the Tribunal had stated in *Mr. Y*, Decision No. 25 [1985], in paragraph 33:

> "Even though the Applicant may have felt under some pressure to sign the release . . . he appears to have regarded those additional benefits as more important than the release of his claims against the Respondent. That, however, is the kind of balancing of priorities that inheres in every settlement, and it cannot properly be regarded as duress."

The Tribunal, therefore, did not examine the claims arising from the separation issue as those claims had been settled and released.

On the other hand, the claims relating to the special leave were not covered in the 1987 and 1989 agreements. The Applicant had contended that during the whole period of special leave, until December 1987, he continued working as a regular staff member in ITF and that, having accepted and benefited from his services during that period, the Respondent was estopped on equitable grounds from claiming that the Applicant was using up his entitlement to special leave. The Tribunal observed that staff rule 7.01, paragraph 13.02(*b*), provided that:

> "A staff member on special leave is not required to observe normal working hours or to perform the usual duties of employment. He may, however, be required to perform certain specific tasks for the Bank or IFC upon request of the Director, Personnel Management Department, or a designated official . . ."

In this regard, the Tribunal noted that it was an uncontested fact that the Applicant was not required merely to perform certain specific tasks during his 14 months of special leave, but rather observed normal working hours and performed the usual duties of employment. In response to the Respondent's argu-

ment that it was the Applicant's decision to spend his special leave performing tasks in ITF, the Tribunal was of the opinion that a staff member working in an office of the Bank, day after day, in regular hours, for almost 14 months, must be presumed to be carrying out his regular activities with the tacit consent of his supervisors.

The Tribunal concluded that the provisions of the above-cited staff rule, which defined the rights and obligations of a staff member on special leave, were not applied to the Applicant. Therefore, the work performed by the Applicant, between October 1986 and December 1987, could not be treated as work performed under the regime of special leave and must be paid for by the Respondent. For these reasons, the Tribunal decided to award the Applicant compensation equivalent to the salary he would have been paid during 14 months of his special leave, less the *ex gratia* payment he received upon the advice of the Appeals Committee, as well as costs in the amount of $5,000, and dismissed all other pleas.

2. JUDGEMENT NO. 118 (13 NOVEMBER 1992): JOHN BRISCOE V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT[19]

Applicant challenges Bank's rule regarding the ineligibility for expatriate benefits of staff holding United States permanent resident status or United States citizenship—Question of the Tribunal's jurisdiction—Article II, paragraph 1, of the statute of the Tribunal—A claim of non-observance of a staff member's contract or terms of appointment must be directed at a specific decision and not against the Organization's promulgation of some general rule or policy

In January 1985, the Bank had circulated a letter to all staff informing them that the Bank's policy relating to expatriate benefits was being changed: effective 29 January 1985, all "new staff who have held United States permanent resident status or United States citizenship at any time in the 12 months prior to appointment to the Bank will be ineligible for expatriate benefits." The Applicant was appointed to the staff of the Bank on 8 January 1988. He had held United States permanent resident status from 1980. His letter of appointment indicated that because he held such status he was not eligible for expatriate benefits such as home leave and education benefits. Subsequently, the Applicant challenged the Bank's rule, pointing to a written communication of the Vice President of Personnel to the Staff Association, dated 24 August 1990, stating that the Bank had decided not to change the current policy in this regard.

The Tribunal noted that article II, paragraph 1, of the statute of the World Bank Tribunal empowered the Tribunal to pass judgement "upon any application by which a member of the staff of the Bank Group alleges non-observance of the contract of employment or terms of appointment of such staff member." Furthermore, the Tribunal stated that it, along with other international administrative tribunals, had consistently held that a claim of non-observance of a staff member's contract or terms of appointment must be directed not against the organization's promulgation of some general rule or policy but rather against an application of that rule or policy that directly affected the employment rights of a staff member in an adverse manner.

In this regard, the Tribunal noted that the Applicant's application was not directed at any specific decision by the Respondent denying him expatriate benefits. Moreover, the rule regarding expatriate benefits was promulgated in 1985,

before the Applicant was hired, and was a rule of general effect. The Tribunal further noted that his letter of appointment, as accepted by the Applicant, could not be regarded as an individualized application providing a proper basis for a challenge under the Tribunal's statute. Similarly, the determination by the Vice President of Personnel in his written communication of 24 August 1990 not to recommend a change in the rule was no more than a general reiteration of the rule and did not amount to a direct application of it to any particular individual staff member.

For the above reasons, the Tribunal decided that it had no jurisdiction over the application.

NOTES

[1]In view of the large number of judgements which were rendered in 1992 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. 547 to 586 of the United Nations Administrative Tribunal, Judgements Nos. 1132 to 1195 of the Administrative Tribunal of the International Labour Organization and Decisions Nos. 106 to 126 of the World Bank Administrative Tribunal, see, respectively: documents AT/DEC/547 to 586; *Judgements of the Administrative Tribunal of the International Labour Organization*: 72nd and 73rd Ordinary Sessions; and *World Bank Administrative Tribunal Reports*, 1992.

[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.

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.

[3]Mr. Jerome Ackerman, President; Mr. Samar Sen, Member; and Mr. Hubert Thierry, Member.

[4]Mr. Jerome Ackerman, President; Mr. Mikuin Leliel Balanda, Member; and Mr. Hubert Thierry, Member.

[5]Mr. Jerome Ackerman, President; Mr. Samar Sen, Member; and Mr. Mikuin Leliel Balanda, Member.

[6]Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; and Mr. Hubert Thierry, Member.

[7]Mr. Jerome Ackerman, President; Mr. Ioan Voicu, Member; and Mr. Hubert Thierry, Member.

[8]Mr. Jerome Ackerman, President; Mr. Arnold Kean, Member; and Mr. Hubert Thierry, Member.

[9]The Administrative Tribunal of the International Labour Organization 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 Organization and of the other international organizations that have recognized the competence of the Tribunal, namely, as at 31 December 1992, 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 Organisation, the European Southern Observatory, 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 Intergovernmental Organisation for International Carriage by Rail, the International Center for the Registration of Serials, the International Office of Epizootics, the United Nations Industrial Development Organization, the International Criminal Police Organization, the International Fund for Agricultural Development and the International Union for the Protection of New Varieties of Plants. The Tribunal is also competent to hear disputes with regard to the execution of certain contracts concluded by the International Labour Organization and disputes relating to the application of the regulations of the former Staff Pension Fund of the International Labour Organization.

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.

[10]Tun Mohamed Suffian, Vice-President, presiding; Miss Mella Carroll, Judge; and the Right Honourable Sir William Douglas, Deputy Judge.

[11]Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; and Mr. José Maria Ruda, Deputy Judge.

[12]Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; and Mr. Edilbert Razafindralambo, Deputy Judge.

[13]Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; and Miss Mella Carroll, Judge.

[14]Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; and Miss Mella Carroll, Judge.

[15]Mr. Jacques Ducoux, President; Miss Mella Carroll, Judge; and Mr. José Maria Ruda, Deputy Judge.

[16]Mr. Jacques Ducoux, President; Miss Mella Carroll, Judge; and Mr. Pierre Pescatore, Deputy Judge.

[17]The 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.

[18]Prosper Weil, President; A. Kamal Abul-Magd and Elihu Lauterpacht, Vice Presidents; and Fred K. Apaloo, Robert A. Gorman, Eduardo Jiménez de Aréchaga and Tun Mohamed Suffian, Judges.

[19]Prosper Weil, President; A. Kamal Abul-Magd and Elihu Lauterpacht, Vice Presidents; and Fred K. Apaloo, Robert A. Gorman, Eduardo Jiménez de Aréchaga and Tun Mohamed Suffian, Judges.