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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. 636 (8 July 1994): Noll-Wagenfeld v. the Secretary-General of the United Nations[3]

Claim for earlier effective date for promotion to P-5 — Question of whether Respondent may consider staff member's past conduct whether or not subject of a prior Tribunal decision for promotion purposes — Discretion of Secretary-General in such cases

The applicant was appointed Senior Legal Officer, effective 1 April 1987, but was not promoted to the corresponding P-5 grade level, pursuant to information circular ST/IC/89/37 (dated 24 May 1989), the 1987 Senior Officer (P-5) Promotion Register. She instituted a recourse procedure against the non-inclusion of her name in the Register and argued, *inter alia*, that since her performance had been fully satisfactory the Appointment and Promotion Board undoubtedly had taken into account the facts of United Nations Administrative Tribunal Judgement No. 410, dated 13 May 1988, in which the Tribunal held that she was not entitled to receive her salary at the dependency rate and a dependency allowance in respect of two of her children as her husband, who was a staff member of the International Telecommunication Union, was also receiving his salary at the dependency rate in respect of their older daughter and such payment constituted duplicate payment of dependency benefits, prohibited under the United Nations Staff Regulations and Staff Rules. In her view, taking into account this Judgment amounted to a demotion, a disciplinary measure which could only be applied as a result of disciplinary proceedings.

Her recourse was unsuccessful and she, in April 1990, appealed to the Joint Appeals Board, in April 1990, which subsequently recommended that the applicant's case for promotion be considered fully and fairly under the guidelines for the 1987 promotion review. In January 1992, she was informed by the Director, Office of the Under-Secretary-General for Administration and Management, that the Secretary-General shared the Board's conclusion that her case fell within the guidelines of the 1987 promotion review, and that a full consideration did not appear to have been given in her case as one of the reasons given for rejection of her case was procedural grounds. At the same time, the Secretary-General reaffirmed to her that, in accordance with staff regulation 4.5, the paramount consideration in promotion was the necessity of securing the highest standards of efficiency, competence and integrity. Her case was remanded to the Appointment and Promotion Board for full and fair consideration of her eligibility for promotion under the 1987 review.

In July 1992, the Under-Secretary-General informed the applicant that based on the recommendation of the Appointment and Promotion Board that her promotion to P-5 not be retroactive but be closer to the date of the Board's deliberations on the case, her promotion was made effective 1 April 1992.

The applicant, however, contended that her effective date should have been 1 October 1987, the earliest possible date established in ST/IC/89/37 for promotion from the 1987 register, and that the Respondent could not lawfully take into account facts surrounding the Tribunal's Judgement No. 410 in establishing her effective date. The Tribunal noted that the information circular did not prohibit a later effective date, after 1 October 1987.

Regarding the issue of Judgement No. 410, the Tribunal held that it was proper for the Respondent to consider the facts surrounding the case, that it was neither arbitrary nor discriminatory for the Respondent to take them into account in exercising his discretion regarding the effective date of the Applicant's promotion. Those facts were not an extraneous factor that the Respondent was compelled to ignore in deciding whether and the extent to which the "highest" standards were met by the Applicant, or as to the manner in which the Respondent should exercise his discretion regarding the effective date of her promotion. The Tribunal further stated that it would have been an unwarranted intrusion for it to hold that the Respondent was required in such a context to disregard facts regarding a staff member's past conduct, whether or not that conduct happened to be involved in a prior Tribunal decision. What was said about those facts in Judgement No. 410, as well as what was said by the Applicant in her recourse, comprised material relevant to the criteria for promotion and the Respondent was entitled to appraise that material freely.

With respect to decisions involving promotions or their effective date, the Secretary-General's discretion is necessarily judgmental. So long as it is not tainted by arbitrariness, bias, discrimination, mistake of act, or other extraneous factors, it will not be overturned by the Tribunal. In this case, the Tribunal was unable to perceive the presence of any such flaws.

For the foregoing reasons, the application was rejected.

2. Judgement No. 638 (13 July 1994): Treggi v. the Secretary-General of the United Nations[4]

Claim for reimbursement of travel expenses — Question of obtaining authorization to travel on behalf of the Organization — Question of unjust enrichment on part of the Administration

The Applicant had obtained, in the absence of the Director, Programme Support Division, Department of Technical Cooperation and Development, endorsement of his travel to Moscow in conjunction with his home leave from the new Chief of Technical Assistance Recruitment and Administration Service, and a travel authorization was issued on 1 June 1991. When the Director learned of the Applicant's travel plans, he indicated in a note dated 21 June to the Chief of the Service that he would not approve the additional funds required for the Applicant's three-day stay in Moscow. On 25 June, in a memorandum purportedly copied to the Applicant the Director requested the amendment of the travel authorization, which was duly amended. The Applicant contended that when he picked up his ticket on 25 June he was informed by the United Nations Travel Agency that the Executive Office had amended his Travel Authorization and canceled the portion of his trip to Moscow. The Applicant, nevertheless, on 27 June departed Headquarters on authorized home leave to Rome, traveling to Moscow, that portion of the trip having been paid for out of his own pocket. On his three-day stopover in Moscow, he met with government officials to discuss the participation of Soviet national experts in the United Nations programme of technical assistance. On 19 August, the Applicant submitted a report

of his mission to the Under-Secretary-General, and on 11 September, he filed a claim for reimbursement for the portion of the ticket for which he paid (US$ 575.00) and daily subsistence allowance for three days in Moscow and Leningrad ($615.00), which was denied.

The Applicant appealed this decision, claiming that he had acted in good faith. He was ultimately informed by the Assistant Secretary-General for Human Resources Management that his case had been re-examined in the light of the Joint Appeals Board report, but although it was regretted that the Applicant was not informed of the decision to cancel the official travel to Moscow as soon as that decision had been taken, the Secretary-General agreed with the conclusion reached by the majority of the Panel that the Applicant was on notice that the travel authorization to Moscow had been canceled.

Upon consideration by the Tribunal, it noted staff rule 107.6 which states:

> "Before travel is undertaken it shall be authorized in writing. In exceptional cases, staff members may be authorized to travel on oral orders, but such oral authorization shall require written confirmation. A staff member shall be personally responsible for ascertaining that he or she has the proper authorization before commencing travel."

In the Tribunal's view, this rule clearly established that the onus was on the Applicant to determine whether he was authorized to travel, even thought the Tribunal was also of the view that the Respondent used poor judgment when it left it to the Travel Agency to convey to the Applicant that his travel authorization had been changed. The Applicant had alleged that he never received a copy of the memorandum of 25 June amending the travel authorization, an allegation that was not disputed by the Respondent.

The Tribunal was of the opinion that the Applicant had acted in good faith. He was acutely aware that this mission to the Soviet Union had been planned and canceled twice in the past at the last minute, and believing some administrative misunderstanding had occurred, he paid the travel costs in order to avoid another embarrassing cancellation. Nevertheless, the Applicant did have two days to verify with his supervisors whether the trip was indeed authorized; however, this omission in the Tribunal's view did not detract from the Applicant's good faith.

As regards the Applicant's claim for reimbursement of his travel expenses, on the basis of the general legal principle of the prohibition of unjust enrichment, the Tribunal was of the view that since the Administration benefited from the fruit of the Applicant's work the Applicant was therefore entitled to be reimbursed for his expenses. The Tribunal noted that had the Respondent been steadfast in his assertion that the Applicant misrepresented his presence as being on official business and rejected the product of the Applicant's undertaking in the Soviet Union, then it could have been argued that the Respondent did not gain from it.

The Respondent was, therefore, ordered to pay to the Applicant the amount of $1,190.00, corresponding to his travel expenses.

3. Judgement No. 656 (21 July 1994): Kremer & Gourdon v. the Secretary-General of the United Nations[5]

Claim for repatriation grant — Construction of the whole text and not one section alone is important principle of interpretation — Ascertaining the purpose of a provision is part of interpretation process — Interpretation leading to a reason-

able result should be selected over one leading to an unreasonable result — Question of equality of treatment — Question of stare decisis

The Tribunal considered the two applications jointly as the issues presented by the Applicants were identical, i.e., French nationals denied repatriation grant because they resided in France while working in the United Nations Office at Geneva when they separated from the Organization and relocated within France.

Upon review of the case, the Tribunal held that the Applicants were entitled to the repatriation grant. The Tribunal cited the relevant rules:

> Staff rule 109.5(i)
>
> "No payments shall be made to … any staff member who is residing at the time of separation in his or her home country while performing official duties. A staff member who, after service at a duty station outside his or her home country, has served at a duty station within that country may be paid on separation, subject to paragraph (d) above, a full or partial repatriation grant at the discretion of the Secretary-General."
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> Staff rule 109.5(d)
>
> "Payment of the repatriation grant shall be subject to the provision by the former staff member of evidence of relocation away from the country of the last duty station."
>
> Annex IV
>
> "In principle, the repatriation grant shall be payable to staff members whom the Organization is obligated to a repatriate … Staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station."

It was the Tribunal's view that an important principle of interpretation is that construction was to be made of the text as a whole, and not of one section alone, and, therefore, staff rule 109.5(i) should be construed with reference to the context and with reference to other provisions, namely, staff rule 109.5(d) and Annex IV to the United Nations Staff Regulations and Rules. In this regard, both section 109.5(d) and Annex IV specifically refer to the "duty station" which the individual must leave in order to be entitled to the repatriation grant. Leaving the country of the "duty station" is the pivotal and determining condition of eligibility; entitlement to the grant subject to any nationality condition is not mentioned. The Respondent's interpretation of staff rule 109.5(i) which uses the concept of "residence" as the condition for eligibility leads to illogical and unfair results for it does not take into account the other relevant provisions.

The Tribunal considered that the majority opinion of the Tribunal in the *Rigoulet* case (Judgement No. 408, 1987) concerning the interpretation of staff rule 109.5(i) should be regarded as concerning a staff member performing official duties in his/her home country. Otherwise, the expression "performing official duties" would be superfluous. In addition, as noted in the dissenting opinion of the case "according to a consistent rule of interpretation, the provision to be interpreted must produce a useful effect" (para. XIII).

The Tribunal further considered that it was helpful to refer to the original purpose of the grant, as one of the goals of interpretation is to discover the true intention of the original drafters. It was concluded that the true intention of the United Nations in drafting these rules was to provide staff members payment for relocation expenditures; the point of departure was the country of the duty station. Upon moving to Paris, both Applicants incurred relocation expenditures, and to deny them the repatriation grant based on its interpretation of staff rule 109.5(I), the Organization would thwart the object of these rules.

The Respondent had claimed that his position was justified by the "straightforward application" of staff rule 109.5(i), suggesting that this provision concerned staff members who performed official duties in a country other than their home country, while residing in their home country. However, in the Tribunal's view, such a literal application of a rule is possible only if the rule itself is clear and unambiguous. Furthermore, the Respondent's interpretation is inconsistent with the reading of annex IV to the Staff Regulations which stipulates in part that "staff members shall be entitled to a repatriation grant only upon relocation outside the country of the duty station." The Tribunal's view was that relocation and the consequent payment of the repatriation grant were contingent upon the location of the duty station and not the location of the staff member's residence. A person remaining in the country of the duty station was not entitled to the repatriation grant. Therefore, it was logical that staff members who relocate to a country outside the duty station were entitled to the repatriation grant. Both Applicants in question relocated to Paris.

The Tribunal recognized that the language of staff rule 109.5(i) could be subject to two interpretations, but it was of the belief that it should reject the interpretation leading to an unreasonable result and adopt the interpretation leading to a reasonable and just result, which was the interpretation adopted in the dissenting opinion of the *Rigoulet* judgement.

The Tribunal noted that this premise appeared to have been recognized and adopted by almost all the international organizations based in Geneva whose staff rules contain similar provisions. These international organizations who operated within the ambit of the common system of the United Nations pay the repatriation grant to all French staff members serving in Geneva and residing in the adjacent French territory upon their relocation to another part of France. Citing the principle of equality of treatment, the Tribunal further noted that only the United Nations and the GATT apply a different policy and refused entitlement in these cases.

Regarding the principle of *stare decisis*, the Tribunal was not convinced that it could not reverse one of its own previous findings. Indeed, there were many jurisdictions in which courts can, and do, reverse their previous decisions. The Tribunal, therefore concluded that both Applicants were entitled to the repatriation grant and ordered the payment of the grant.

4. Judgement No. 671 (4 November 1994): Grinblat v. the Secretary-General of the United Nations[6]

Non-inclusion in shortlist for promotion to P-5 — Secretary-General's bulletin ST/SGB/237 — Nature of affirmative action measures in the United Nations Secretariat — Remedy in case where Applicant not given fair consideration for promotion

The Applicant, who was at the P-4 level and assigned to the Estimates and Projections Section of the Population Division, applied for the P-5 level post of Chief, Population Trends and Structure Section, in the same Division, but ultimately

was not selected. He appealed, claiming that he was more qualified than either of the two female candidates shortlisted for the post, and the decision not to shortlist him was motivated by prejudice against his gender.

The Tribunal noted that under the express language of administrative instruction ST/AI/338 on the Vacancy Management and Staff Redeployment System (VMS), the system in effect at the time the selection for the post was conducted, the Appointment and Promotion Board (APB), in preparing a short list, was to determine who among the applicants were best qualified. APB also took into account in the selection process the Secretary-General's bulletin ST/SGB/237, of 18 March 1991, which states:

> "… the following policy shall apply in the area of assignment and promotion:
>
> "In departments and offices with less than 35 per cent women overall, and in those with less than 25 per cent women at levels P-5 and above, vacancies overall and in the latter group, respectively, shall be filled, when there are one or more female candidates whose qualifications match all the requirements for a vacant post, by one of these female candidates."

In the Respondent's view, ST/SGB237 permitted APB to exclude from a shortlist men whose qualifications were equal to those of qualified women. The Tribunal noted that with regard to the bulletin, its policies, to the extent that they were authorized by the Charter of the United Nations and the General Assembly, may be implemented by an APB in accordance with the functions of APB specified in ST/AI/338 and its addenda. That administrative instruction defines the role of the APB and has the same effect as a staff rule. However, the Tribunal considered that nothing in ST/AI/338 and its addenda instructed or authorized APB to implement a policy of excluding equally qualified male candidates from a shortlist in order to ensure that only females could be considered for promotion to a vacant post.

The Tribunal further noted that ST/SGB237 had been issued in response to the fifth report of the Steering Committee for the Improvement of the Status of Women in the Secretariat, and contained recommendations of various specific measures thought to be in keeping with the requests in General Assembly resolutions for continued improvement of the status of women in the Secretariat. The Respondent further argued that, as could be seen from the ST/SGB/237 promotion policy, in certain cases, female candidates should be promoted, if their qualifications met all the requirements for a vacant post, without regard to better qualified candidates. After consideration of relevant General Assembly resolutions (44/185 of 19 December 1989; 45/239 of 21 December 1990; and 46/100 of 16 December 1991), the Tribunal, however, concluded that the improvements in the status of women being urged through affirmative action measures were related to the principle of equal treatment for men and women, and were subject to the criterion of securing the highest standards of efficiency, competence and integrity. It followed that when APB issued the shortlist, based on the Secretary-General's bulletin, this was not in conformity with these General Assembly resolutions, to the extent that the bulletin was interpreted as purporting to authorize the promotion candidates solely on the basis of gender if they merely met the requirements of the vacant post without regard to whether there were better qualified candidates for the post.

The Tribunal recognized that there had been an unsatisfactory history with respect to the recruitment and promotion of women in the Organization that did not accord with Article 8 of the Charter of the United Nations and that, therefore, Article 8 permitted the adoption of reasonable affirmative action measures for improvement of the status of women. In evaluating the reasonableness of affirmative action measures, pertinent provisions of the Charter may not be ignored; it would be impermissible to view Article 8 as overriding Article 101(3), which states:

> "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity …"

In that regard the Tribunal considered that, as long as affirmative action was required to redress the gender imbalance with which the Secretary-General and the General Assembly had been concerned, Article 8 would permit, as a reasonable measure, preferential treatment to women candidates where their qualifications were substantially equal to the qualifications of competing male candidates.

In the present case, however, APB had concluded that the Applicant's qualifications were equal to those of the shortlisted candidates and he therefore should have been included in the short list. It would then have been for the Department to appraise the candidates and make the selection. In doing so, if it also considered the shortlisted candidates equally qualified, it would presumably then take affirmative action goals into account.

The Tribunal did not consider that, in the circumstances of this case, particularly given that all the male candidates were deemed equally qualified by the APB and that the VMS was no longer in effect, it would be appropriate to rescind the Respondent's decision and order a new selection procedure for the post. Moreover, the post had been filled for two years by the successful candidate. Furthermore, it was far certain that, if the Applicant's name had been on the shortlist, he or any other male candidate would been selected and ultimately promoted. However, the Tribunal did award compensation to the Applicant for the infringement of his right to fair consideration by the APB (US$ 2,000).

5. Judgement No. 673 (4 November 1994): Hossain v. the Secretary-General of the United Nations[7]

Complaint against disciplinary procedure which resulted in the termination of the Applicant's appointment — Choice of appropriate disciplinary measure is within discretionary authority of the Secretary-General — Question of due process rights of Applicant — Question of factual findings in case

The Applicant, who had been a Programme Officer with the UNICEF office in Dhaka, and the immediate official responsible for the equipment, was confronted by the Senior Operations Officer and the Chief of the Supply Section of the same office, on 18 May 1992, with findings of an investigation of missing equipment. He was invited to resign from UNICEF and make restitution for the losses, or alternatively to prepare a response to the charges. A Joint Disciplinary Committee (JDC) was convened on 23 August 1992 to hear the case, which ultimately found that there was "no evidence to suggest it was consciously intended to defraud the organization but was rather a knowing and wilful approval for misappropriation and misuse of UNICEF equipment…," and further recommended that the Applicant be demoted. However, the Executive Director decided that the Applicant be separated from ser-

vice as a disciplinary measure under staff rule 110.3(a), receiving three months salary, instead of the normal 30 days salary, in lieu of notice. The Applicant subsequently appealed the decision, and the issue before the Tribunal was whether the termination of the Applicant's employment on grounds of misconduct was a valid exercise of the Executive Director's authority.

The Tribunal first considered that Article 101, paragraph 3, of the Charter of the United Nations and staff regulations 4.1 and 4.2 called for the recruitment of staff members "of the highest standards of efficiency, competence and integrity," and correlatively, the authority exists to terminate appointments when these standards were no longer met. In a case of misconduct, the choice of the appropriate disciplinary measure falls within the Secretary-General's discretionary power. In that regard, the Tribunal held in Judgement No. 479, *Caine* (1990), that:

> "… the Respondent is not required to establish beyond any reasonable doubt a patent intent to commit the alleged irregularities, or that the Applicant was solely responsible for them. The Tribunal's review of such cases is limited to determining whether the Secretary-General's action was vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact." (See also Judgements No. 424, *Ying* (1988) and No. 425, *Bruzual* (1988.)

The Applicant claimed that UNICEF officials in the Dhaka Office had continually "shifted the charges" against him. The central charge made by the Investigation Committee, in its report of 22 April 1992, was the Applicant's alleged involvement "in fraudulent activities which led to the unaccounted six TVs, six VCRs and other related supply and equipment". Along with this main charge, the Applicant was accused of issuing two gate passes to persons not employed by UNICEF. Based on these charges the Applicant was asked to resign. After a response to these charges from the Applicant, the Investigation Committee submitted a second report, dated 30 June 1992, which involved only two missing TVs and one screen. This report was transmitted to UNICEF headquarters, and the subsequent report of the Joint Disciplinary Committee convened to hear the case concluded that the Applicant was responsible for only one unaccounted TV and the unauthorized issuing of gate passes. In the view of the Tribunal, the investigative process, which appeared to have resulted in a frequent modification of the alleged facts underlying the charges against the Applicant, did not adequately respect the Applicant's right to due process.

It is a fundamental right of any staff member accused of misconduct to be informed of the charges against him or her and to be given an opportunity to respond to them. In the Tribunal's opinion the manner in which the Applicant was initially informed of the charges against him, with a simultaneous demand for his "resignation," deprived the Applicant of an opportunity to respond to the charges before a determination of his culpability was made. The Tribunal noted that there was some evidence that the Applicant may have been subjected to psychological pressure at the two-hour meeting to discuss the charges against him. The Applicant was suddenly faced with these charges, without any advance notice even of the meeting. Moreover, during that meeting, the Applicant requested and was denied permission to make a telephone call.

The Tribunal noted that the Executive Director had concluded that the Applicant's actions indicated "a clear pattern of abuse of UNICEF rules and regulations," which formed the basis of his decision to separate the Applicant for miscon-

duct. However, it was the Tribunal's view that the Executive Director's conclusion was not fully supported by the evidence before the Tribunal. The Tribunal further noted, however, that the fact that the Executive Director did not follow the recommendation of the JDC to demote the Applicant and decided instead to terminate the Applicant's appointment did not violate the Applicant's rights, as recommendations of the JDC are advisory.

The Tribunal, however, was of the view that the decision to separate the Applicant must be considered in the light of the procedural irregularities which took place in the initial stages of the investigation. The Executive Director's decision to separate the Applicant for misconduct, despite JDC's recommendation for more lenient disciplinary sanctions, was apparently based on a factual finding which was not fully supported by the findings of JDC. In addition, the procedural irregularities in the conduct of the initial phase of the investigation deprived the Applicant of his right to be informed of the charges against him and to present a defense. The Tribunal, therefore, concluded that the decision to terminate the Applicant's appointment was tainted by procedural irregularities. At the same time, the Tribunal agreed with the Executive Director's conclusion that the actions and omissions of the Applicant, on which his decision to separate him were based, constituted a breach of trust and displayed a lack of honesty and trustworthiness which demonstrated that the Applicant did not meet the standard required of an international civil servant.

For the reasons set forth above, the Tribunal ordered the Respondent to pay the Applicant five months of his net base salary at the time of his separation from service.

6. Judgement No. 686 (11 November 1994): Rebizov v. the Secretary-General of the United Nations[8]

Non-extension of fixed-term appointment — Question of a valid secondment — Right to be evaluated solely on objective grounds for extension

The Applicant's claim arose from his employment as a Russian translator with the United Nations Office at Geneva from 15 January 1989 to 14 June 1990. During this period, the Applicant was erroneously considered to be on secondment from the USSR and he was wrongly separated from the Organization on 14 June 1990 when his fixed-term appointment was not renewed. It was the view of the Tribunal that all evidence clearly established that the non-extension of the Applicant's fixed-term contract past 14 June 1990 was due to the lack of consent by the authorities of the USSR.

After the Tribunal subsequently rendered Judgement No. 482, *Oiu*, *Zhou* and *Yao* (1990), the Applicant's situation was reviewed by the Administration under provisions promulgated by the Secretary-General for implementing that judgement, which discussed the standards for a valid secondment. Accordingly, the Applicant's case was subsequently submitted to a Joint Working Group at UNOG for consideration of whether he should receive a further appointment. The report of the Joint Working Group, date 22 May 1991, contained strong reservations about the Applicant's performance expressed by the Chief of the Russian Translation Section, and based on this report, the Respondent argued that even if the Applicant had not been on secondment, his appointment would not have been renewed. Upon further investigation of questions concerning the Applicant's performance by the Tribunal, it concluded that the dominate role of the Chief of the Russian Translation Section in the Joint Working Group was highly questionable and that his actions were retaliatory in nature.

In view of the above, the Tribunal found that the Applicant's separation, based on the belief that he was on secondment and required the approval of the USSR which was not forthcoming, was improper. Furthermore, his right to be evaluated solely on objective grounds for an extension of his contract was violated by the injection of extraneous considerations. The Tribunal ordered the Respondent to pay to the Applicant an indemnity equivalent to 19 months of his net base salary at the time of his separation from service.

7. Judgement No. 687 (11 November 1994): Cure v. the Secretary-General of the United Nations[9]

Complaint against the disciplinary measure to demote the Applicant — Question of the validity of ECLAC internal rules — An act of wrongdoing is not justified by a defence that it is common practice

The Applicant, Chief of the Personnel Section at the Economic Commission for Latin America and the Caribbean in Santiago, was accused of abusing the duty-free importation privileges. Both the Applicant and his wife, also an ECLAC staff member, were allowed to make comments on the accusations, and a Joint Disciplinary Committee (JDC) was eventually convened to hear the case. The JDC found that the Applicant had taken advantage of his wife's position in the Organization to infringe the internal ECLAC regulations governing the use of import privileges, and recommended that the Secretary-General issue a written censure and that the staff member be fined US$ 750. After consideration of the case, the Secretary-General decided to demote the Applicant to the first step of the prior grade, with a two-year deferment of eligibility for within-grade increment.

The Applicant appealed this decision, arguing, *inter alia*, that because internal ECLAC rules were not part of the United Nations Staff Regulations and Rules that no act of unsatisfactory conduct could have occurred as defined by staff rule 110.1. Staff rule 110.1 prescribes that a staff member is to "comply with his or her obligations under the Charter of the United Nations, the Staff Regulations and Staff Rules and other relevant administrative issuance". The Applicant contended that inasmuch as the rules promulgated by ECLAC were not formally approved by the General Assembly of the United Nations, they could not be considered as part of the Staff Regulations and Rules, and therefore the procedures for disciplinary action under chapter X of those Regulations and Rules could not be applied. The Tribunal had little doubt that the *Reglamento de Importacion* introduced by ECLAC was such a relevant issuance, irrespective of whether or not it was pursuant to an agreement between the Government of Chile and ECLAC. The Applicant could not escape the obligations imposed by the ECLAC internal regulations by arguing that they were not approved directly by the General Assembly. The Tribunal noted that subsidiary organs frequently have their own rules and regulations, which are applicable to all their staff members, provided, of course, that they are made known in advance, and there was no doubt that the Applicant in this case knew what was expected of him and did in fact generally follow the regulations; when he did not or could not or would not, he apologized or tried to explain away such lapses.

Moreover, the Tribunal noted that the Applicant could not take shelter, when accused of violating internal regulations and rules, by arguing that his actions did not violate the terms of an agreement concerning import privileges between ECLAC and the Government of Chile.

In respect of the charges brought against him, the Applicant offered some explanation for his actions. He contended that they had been guided by the common practice of "quota swapping," and of the retroactive approval of requests. Despite the evidence he submitted in support of his contentions, the Tribunal could not accept, as justification for any proven wrongdoing on the part of the Applicant, his argument that other staff members could have been equally remiss in importing duty-free goods.

As the to the Applicant's complaint that the disciplinary measures taken by the Respondent deviated from the milder recommendation of the JDC, the Tribunal, citing Judgements Nos. 479 (*Caine*), 425), (*Bruzual*) and 424 (*Ying*), found no evidence to suggest that the Secretary-General was influenced by any prejudicial or extraneous factors. Once the Secretary-General had decided, on the basis of such facts as were available to him, that the Applicant's conduct violated United Nations standards of integrity, he was free to decide what penalty under staff rule 110.3(a) would be appropriate.

B. Decisions of the Administrative Tribunal of the Internal Labour Organization[10]

1. Judgement No. 1304 (31 January 1994): Coe v. World Tourism Organization[11]

Termination of consultancy contract — Question of receivability — Complaint must be filed within 90 days of "final decision".

The complainant, who had signed a contract of appoint as a consultant with the World Tourism Organization (WTO) to be in charge of drawing up and carrying out a project for the development of tourism in Mozambique, to run from 21 October 1991 to 30 October 1993, was terminated on 24 June 1992.

After several incidents, the Secretary-General of WTO suspended the complainant from duty on 24 April 1992, in accordance with rule 29.4 of the Staff Rules pending a detailed report from him about the charges against him and his absence from duty for several weeks. The explanations he gave were found unsatisfactory and on 24 June the Secretary-General wrote to him again stating the charges and saying in conclusion that there was "no alternative but to terminate [his] contract without any notice or indemnity, as from 8 April 1992, date of [his] effective cessation of work". After further correspondence the Secretary-General wrote him a letter of 6 October 1992 confirming the decision of 24 June. The complainant appealed the decision to terminate his services.

WTO submitted that the complaint was irreceivable because the complainant had not filed it within the time limit in article VII(2) of the Tribunal's statute:

> "To be receivable, a complaint must also have been filed within ninety days after the complainant was notified of the decision impugned…"

The Organization's case was that the decision to terminate the complainant's appointment was the one of 24 June 1992 and that his complaint, not having been filed until 30 December 1992, was out of time.

The complainant, on the other hand, argued that, pursuant to article VII(1) of the statute which states that a complaint shall not be receivable unless the impugned decision is a final one, the decision of 24 June 1992 was not to be treated as final, as

was clear from the negotiations that took place from July to September 1992 between him and the Organization to seek a settlement out of court of the dispute arising under his contract.

The Tribunal disagreed with the complainant's argument. He admitted to having received the letter of 24 June 1992 on 29 June. The letter set out explicitly the background to the case, described the efforts the Organization had made to get information and explanations before reaching a "final decision" and concluded with the express decision to terminate his appointment without notice or payment of indemnity. The Tribunal considered that the further action he took and any proposals that might have been made to him did not cause the Organization at any time to go back on the final decision which it had taken, and for which indeed it had stated solid grounds. The Tribunal concluded that the material date was 29 June 1992, when he had notice of that final decision, and that is when the 90 days began. The decision of 6 October 1992 did no more than confirm the earlier one and set off no new time limit for his appeal. Since he filed his complaint out of time it was irreceivable. The Tribunal, therefore, dismissed his complaint.

2. Judgement No. 1308 (31 January 1994): Ho v. World Health Organization[12]

Downgrading of duties in context of reorganization — Question of a "final" decision before lodging an appeal

The complainant was a staff member of the Pan American Health Organization (PAHO), and was promoted to P-3 as a Finance Officer and put in charge of imprest accounts in the department of Finance and Accounts. After a reorganization, a new organization chart was issued on 24 July 1990 and the complainant was appointed supervisor of the Headquarters Services Unit, the functions of which were different from those of the Imprest Accounts Unit, and put on a post that was graded P-2.

On 31 July 1990, the complainant wrote a memorandum to the Chief of the Department expressing dissatisfaction with the new arrangement. The complainant reported to his new unit of 1 August 1990 and during that month the two parties discussed the changes orally and in writing. In a memorandum of 2 August, the Chief of the Department stated, *inter alia*, that for the time being the grade P-2 was "considered appropriate … for the duties and responsibilities assigned" to the complainant's new post, though he would continue to hold grade P-3. After further discussion the Chief of Administration confirmed in a memorandum to him of 24 August that "next summer we would re-evaluate the question" as to whether or not reclassification of his post was required, but that "in the meantime, there would be no change from its present P-3 status."

Treating the memorandum of 24 August 1990 as a final decision, the complainant appealed in December 1990 alleging, *inter alia*, "demotion of duties". The Tribunal, however, concluded that the memorandum of 24 August 1990 from the Chief of Administration informing the complainant that although there would in the meantime be no change in the grading of his new post the question would be reviewed in the summer of 1991. That made it plain that no final decision had yet been taken on grading his new post P-2. Therefore, his complaint was irreceivable under article VII(1) of the Tribunal statute because what he was challenging was not a "final" decision. The Tribunal, therefore, dismissed the complaint.

3. Judgement No. 1312 (31 January 1994): Jiang v. International Atomic Energy Agency[13]

Non-extension of fixed-term contract — Discretionary decision is subject to review — Question of United Nations official's private life — Duty to protect independence of staff member

The complainant, a citizen of China, had joined the staff of IAEA as a translator at grade P-3 on a fixed-term contract, on 27 February 1988, to expire on 26 February 1991. He went on home leave to China in June 1989 but failed to return when the leave expired on 4 September 1989. In a letter he wrote on 2 September to the Director of the Division of Personnel, he explained that he had been unable to leave China because he had failed to obtain from the Government a "special card" proving that he "didn't take part in the latest counterrevolutionary rebellion", although he protested that he had never broken Chinese laws or regulations.

The Agency was informed by the Permanent Representative of China to the United Nations office at Vienna that the reason the complainant had not been allowed to return to duty was because he had filed for divorce and could not leave the country until the case was settled. The Agency was also informed that the complainant was accused of behavior against "law and morals," which was the defense put forward by the complainant's wife in the divorce proceedings. The Agency, not fully convinced that the complainant's situation was entirely a civil matter and had nothing to do with politics as the Chinese Government had indicated, informed him on 11 July 1990 that it had extended his contract to 26 February 1992. After the complainant was still refused an exit visa, the Director of Personnel made a trip to China whereupon he concluded that the complainant was being held in China, against his will but had a job at the Chinese Nuclear Information Centre and was performing it freely. It appeared that the reasons not to let him leave the country was not his political opinions, but based on his private life, and that the decision had been taken in accordance with Chinese administrative law.

It was on the strength of the Director's report that on 14 June 1991 the Agency decided against extending the complainant's appointment beyond 26 February 1992. The Director, in the letter of 14 June to the complainant notifying the decision of the non-extension, stated that the Agency had told the Chinese Government that the charges against him did not seem, particularly in the absence of court proceedings, to "constitute sufficient grounds for preventing" him from leaving the country. But the Director went on to observe that the privileges and immunities of Agency staff were not at stake since the Government's decision related not to his work for the Agency but to his "personal conduct". Furthermore, the Agency's "long-standing practice" was to apply "a rotation policy" to its Professional category of staff, and in line with that practice the tenure of appointment for Chinese translators had varied from three to five years. Since the complainant would have completed four years' service with the Agency by the end of his current contract it would not have been renewed according to the Agency. The complainant appealed the decision not to renew his contract.

The Tribunal had consistently held that a decision to renew or not to renew a fixed-term contract was at the discretion of the international organization, but the exercise of its discretion was subject to review, for example, where the decision rests on a mistake of fact or of law. The Tribunal noted that the Agency had made laudable attempts to get a change of mind in the Chinese Government. There was merit, too, in its contention that it "had to address the competing interests of provid-

ing protection to its staff member on the one hand, and of being able to perform its functions, on the other". However, the Tribunal considered that it was plain on the evidence that the complainant was barred from returning to perform his duties in Vienna for reasons that the Agency rightly considered to be immaterial. The initiation of divorce proceedings obviously afforded no proper grounds for breach of his rights as an international official. The circumstances relating to an official's private life — even though they might prompt civil or penal proceedings — were relevant in the area of administration only insofar as the might affect his performance of official duties. But in that event only the organization that employed him would be competent to determine the issue. The Agency had the duty to safeguard its employee's right to work in full independence for his employer.

This duty was the more compelling in this case because the reasons which it held to warrant non-renewal were highly dubious. The alleged policy of rotating Professional staff was not "long-standing" in its application to translators and indeed anything but consistent. Besides, even supposing that translators received tenure for only three to five years, it was difficult to see why the Agency could not extend the complainant's appointment beyond a total of four, as there was nothing in his performance that it could have pleaded in support of so limiting his total tenure.

The Tribunal concluded that the complainant's case should be referred to the Agency so that it might reinstate him in his contractual rights pending clarification of his position. The complainant was awarded costs of 5,000 Swiss francs.

4. Judgement No. 1317 (31 January 1994): Amira v. International Telecommunication Union[14]

Non-renewal of fixed-term appointment — Expiry of a fixed-term contract is a challengeable administrative decision — Discretionary decision subject to review — Duty to indicate reasons for non-renewal — Importance of procedural safeguards — Question of appropriate remedy

The complainant, who had been employed by the International Telecommunication Union as a telecommunications engineer on fixed-term appointments since September 1982, was appointed to the post of Senior Regional Representative for Africa at the D-1 level, in Addis Ababa, on 24 August 1986, for two years with the possibility of extension by another three years. The complainant had his appointment regularly extended and, in particular, by six months from 1 January to 30 June 1990. As a result of a reorganization, it was decided that the post the complainant occupied would be abolished and that his appointment would not be renewed beyond 31 December 1993. The complainant appealed, requesting reinstatement.

At the outset, the Tribunal noted that the ruling in the present case must be in line with what proved to be an important feature of the common law of international organizations, or at least of those that define contracts by category in determining relations with their employees. Firstly, consistent precedent had it that, even where an organization's staff regulations stated that a fixed-term contract was *ipso facto* extinguished on expiry, non-renewal was to be treated as a distinct and challengeable administrative decision. Secondly, another point firmly rooted in precedent was the Tribunal must in substance respect the exercise of discretion in any decision to terminate employment on expiry of the contract, but might review the lawfulness of any such decision and in doing so will, again by virtue of clear precedent, determine from the circumstances of each case:

— Whether the rules on competence, form and procedure were observed;

— Whether the official was given reasonable notice, even if the contract did not require it;

— Whether the decision was duly substantiated and the reasons for it were conveyed to the official in such a way that he might properly defend his interests;

— Whether some material fact was overlooked or there was some obvious mistake of fact or of law; and

— Whether the decision was taken in the organization's interests or shows some abuse of authority.

In the present case, the Tribunal found two obvious flaws in the impugned decision which alone were fatal. One was ITU's disregard of the basic procedural safeguards that were calculated to protect the staff against arbitrary management, including the inadequacy of the explanation for the decision. The other flaw was the failure of due process in the internal appeal proceedings.

The Tribunal noted that the communications from headquarters to the complainant showed an unusually cavalier attitude that failed in the duty of care ITU owed its staff, especially when they were cut off in places far from where decisions were being taken. Specifically, the Tribunal noted that without affording the slightest explanation or justification the ITU had suddenly announced in its letter of 27 April 1990 that it intended to terminate the relationship of employment forged by a series of contracts under which the complainant had served well. Furthermore, the Union showed unusual haste in getting rid of the complainant; he was refused an extension although it had been granted until 30 June 1993 to other staff in the same position as he.

The Tribunal, noting that there was a strong line of precedent on the duty to explain the reasons for non-renewal, considered that the duty to state the reasons for a decision forms part of any due administrative process. While not questioning that there was an objective need for the reforms implemented by the Union, the Tribunal was of the view that ITU should have explained to the complainant why, in view of his qualifications and experience, which the Secretary-General had praised, he would or would not have fitted the requirements of the new regional representatives' job descriptions.

Regarding the flaw concerning the appeals procedure, the Tribunal noted that an internal appeal procedure that worked properly was an important safeguard of staff rights and social harmony in an international organization and, as a prerequisite of judicial review, an indispensable means of preventing dispute from going outside the organization; and, in the present case, the Board did not function properly. The process took too long and the report which the Board submitted was open to even more serious objections: it was terse and offered no reasoning on issues of fact or of law. In the opinion of the Tribunal, the union was wholly to blame for those shortcomings. The Appeal Board was set up under the Staff Regulations and the Union had a duty to keep it at all times in proper working order. Indeed, regulation 11.1 expressly lay such obligation on the Secretary-General and because, by endorsing the report without comment or qualification, in his letter of 4 June 1992, the Secretary-General too had assumed full responsibility for its contents.

For the foregoing reasons the Tribunal concluded that the impugned decision could not stand and went further to discuss an appropriate remedy.

Reinstatement was a form of *restitutio in integrum* that would afford proper redress when the holder of an indefinite appointment had been wrongfully dismissed, and in the opinion of the Tribunal might consider ordering the reinstatement even of someone who held a fixed-term appointment provided that the circumstances were exceptional. Citing prior judgements, the Tribunal stated that it might do so when an organization made a practice of granting fixed-term appointments for the performance of continuing administrative duties; or when some inadmissible administrative practice flawed the contractual relationship; or when an untimely non-renewal prevented the accrual of pension entitlements.

The Tribunal, however, found no such circumstances in the present case. At all points in his career the complainant knew full well that his contractual position was precarious. What was more, the level and nature of his duties were such that he was unusually vulnerable to changes in the Union's policy on external relations. His main claim therefore failed, since reinstating him would in the circumstance be tantamount to direct interference by the Tribunal in the structuring of the ITU secretariat. The Tribunal did award a substantial award of damages for the material and professional injury that the Union's inadmissible manner of management had caused him. Because of the uncertainty he had been in for over three years — since the termination of his appointment at the end of September 1990 up to the date of this judgement — the equivalent of three years' salary and allowances was awarded. But the Union was allowed to subtract therefrom any professional earnings he might have had in the period. He was also awarded 5,000 Swiss francs in costs.

5. Judgement No. 1321 (31 January 1994): Bernard v. European Organization for Nuclear Research[15]

Request for payment of annual leave upon termination — Regulation R II 4.09 — An unlawful act or ex gratia benefit is not precedent

The complainant had been recruited by the European Organization for Nuclear Research (CERN) on 1 April 1968 and was an electronics technician on an indefinite appointment at the time of his dismissal on 29 February 1992, on the grounds of "disability confirmed by a medical certificate" and "not incurred in the course of duty". The complainant was informed by letter of 18 December 1991 that he would have been deemed to have taken the balance of his annual leave during the period of notice of dismissal. However, by letter of 26 march 1992 the complainant claimed the payment of the 40 days' leave he said he had been unable to use because he had been on sick leave during that period, which was denied.

CERN had argued, pursuant to regulation R II 4.09, that to qualify for compensation for the balance of annual leave the staff member must have had his appointment terminated and must have been prevented from taking his annual leave "owing to the requirements of duty". The Tribunal agreed with CERN's argument, stating that the notion of "requirements of duty" was relevant only where such requirements had prevented the staff member from taking annual leave, such as a heavy burden of work. In the present case, where the reason for not taking leave was an illness that was not service-incurred the case would fail to satisfy one of the conditions in regulation R II 4.09 since the reason was not "the requirements of duty".

The complainant had cited in support of his claim CERN's practice of paying compensation to the successors of a deceased staff member for any balance of annual leave at the date of death, regardless of whether the death was not service-incurred. However, the Tribunal's view was that he could not rely on that exception, because a staff member may not rely upon an unlawful act or a benefit granted *ex gratia* to other staff in support of his own claim.

For the above reasons, the complaint was dismissed.

6. Judgement No. 1323 (31 January 1994): Morris (No. 2) v. World Health Organization[16]

Non-renewal of a fixed-term appointment — Previous Judgement No. 891 — Question of privileged information in the context of selection of candidates for a post — Long-serving and deserving staff member's right to another post — Staff regulation 4.2 and 4.4 — Question of a remedy

The complainant had been employed as a dental officer by the World Health Organization at its Regional Office for the Americas since 1975 on a string of short-term appointments and in 1982 was assigned to a project in Guyana at grade P-4 until the funding ran out in December 1984, when he was released from the Organization upon expiry of his appointment. He appealed the decision, and subsequently the Tribunal ruled, in Judgement No. 891 of 30 June 1988, that WHO apply the reduction-in-force procedure under staff rule 1050.2. The reduction-in-force committee that the WHO accordingly set up found only one post to which the procedure might be applied and concluded that the complainant failed to meet the language requirements of that post. It therefore recommended paying him an indemnity in accordance with rule 1050.4 and giving him "priority in consideration of re-employment for any vacancies which may occur during the next twelve months in preference to any external candidate", which the Director-General accepted.

Subsequently, the complainant applied for a vacancy for a dental officer at grade P-4 in WHO's Oral Health Unit at headquarters in Geneva, but ultimately was informed that "another candidate whose qualifications and experience were more suited to the job was selected". An external candidate was selected. The complainant appealed this decision with headquarters Board of Appeal. Its report, dated 14 July 1992, was submitted to the Director-General, in which was stated that the technical officer's submission to the selection committee which had made the recommendation for filling the post had not been consistent with the duties and qualifications mentioned in the vacancy notice for the P-4 post and further concluded that established selection procedures were not fully adhered to. The Board recommended that the complainant be reconsidered "without delay" for the post which by then had again fallen vacant. The Director-General disagreed with the Board's conclusion about the technical officer's appraisal, though he gave no reasons for doing so. He accepted the recommendation for reconsidering the complainant for the post, but stated that it had been "frozen" since 1 August 1991 and he would be given "due consideration alongside other qualified candidates when the post was unfrozen". The complainant appealed this decision.

The Tribunal noted that WHO had argued before the Board that though the complainant was "a highly qualified Dental Officer" he "did not meet the standards required for the position", which contradicted the Director-General's statement that the complainant would be considered for the post alongside "other qualified candidates" when the post was unfrozen.

The Union relied on regulation 4.2:

> "The paramount consideration in the appointment, transfer or promotion of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity…"

The Organization had contended that he was entitled to preference over an external candidate, not as matter of course, but only if his qualifications were just as good, and that the external candidate was better qualified than he. The Tribunal noted that WHO offered no evidence to the Board of the external candidate's qualifications and on the grounds of privilege it had vouchsafed no information on that score to the Tribunal either, pursuant to a memorandum of 28 March 1993 from the Director-General to the Chairman of the Board of Appeals. The Tribunal, however, did not accept that the disclosure of a candidate's identity and qualifications may be properly regarded as likely in any way to inhibit the free expression of views by members of selection committees or to prejudice the interests of other candidates, as the memorandum had stated. In this case, the external candidate's qualifications were of essential importance to the selection committee in making its choice and to any appeal against the appointment made. The Tribunal cited Judgement 1177 (*Der Hovsepian*), in which was held that an item that forms part of the proceedings that led to the impugned decision may not be withheld from the Tribunal's scrutiny. The Tribunal concluded that the Organization's plea under this head failed because of the utter lack of evidence to suggest that the external candidate was better qualified than the complainant.

The Tribunal considered that even on the assumption that the external candidate was better qualified, the Organization misconstrued Manual paragraph II.9370, which stated that staff members whose appointments are terminated by reduction-in-force have preference over any external candidates for vacant posts for which they are qualified for a 12 month period. The external candidate had been selected within the complainant's twelve-month period. The Tribunal noted that the principle in regulation 4.2 on which the Organization had relied in selecting the external candidate was not absolute and was subject to the following express qualifications in 4.2 in fine and in 4.4:

> "4.2 … Due regard shall be paid to the importance of recruiting and maintaining the staff on as wide a geographical basis as possible."

> "4.4 … Without prejudice to the inflow of fresh talent at the various levels, vacancies shall be filled by promotion of persons already in the service of the Organization in preference to persons from outside. This preference shall also be applied on a reciprocal basis, to the United Nations and specialized agencies brought into relationship with the United Nations."

Moreover, the particular rule in Manual paragraph II.9.370 was not in conflict with the general provision in regulation 4.2. That manual paragraph and the Director-General's decision of 22 December 1988 entitled the complainant to preference over "any" external candidates, not just over less well qualified, or equally qualified, external candidates. In this regard, the Tribunal cited from Judgement No. 133 (*Hermann*):

"… it is consonant with the spirit of the rules and regulations that a staff member who has served the Organization in a fully satisfactory manner for a particularly long period, and who might reasonably have expected to finish his career in the same Organization, should be treated in a manner more appropriate to his situation. If he loses his post, he may claim to be appointed to any vacant post which he is capable of filling in a competent manner, whatever may be the qualifications of the other candidates. Not only does this interpretation of the relevant rules take account of the legitimate expectations of staff members, but it is not prejudicial to the Organization itself, which has every interest in employing staff members who have shown themselves deserving of confidence over a long period of employment."

The Tribunal did not send the case back for the Director-General to consider whether to give the complainant an appointment. The P-4 post was, it appeared, still frozen, and it was not know when it or any other suitable post would become available. The Tribunal noted that the complainant had served ITU for only just over nine years; there had been a similar lapse of time since his post was abolished, and he did not give any information about loss of earnings since leaving the Organization. In the circumstances, the Tribunal decided, in accordance with article VIII of its statute, to award him damages for all forms of injury in the amount of US$ 30,000, and for costs of $5,000.

7. Judgement No. 1324 (31 January 1994): Rivero v. European Patent Organization[17]

Request for change of home leave designation — Question of equal treatment — Question of change of home leave designation pursuant to article 60

The complainant, a citizen both of Argentina and Italy, joined the staff of the European Patent Organization (EPO) on 2 April 1990 as a patent examiner in Directorate General 1 at The Hague, and his place of home leave was designated Rome. His appointment was made conditional on his showing that he had Italian nationality. On 14 December 1990, he married an individual also with dual citizenship from Argentina and Italy.

By circular 197 of 20 December 1990, EPO informed staff of new arrangements regarding home leave and expatriation allowance and asked any staff who thought they might be affected to submit evidence of nationality and state what they regarded as "home" within the meaning of article 60 as amended from 1 July 1990.

Article 60 reads:

"Home leave

(1) Permanent employees who are nationals of a country other than the country in which they are employed shall receive eight working days' additional leave every two years to return home. Travel expenses for such leave shall be reimbursed…

(2) For the purposes of these Regulations, the home of such permanent employee shall be the place with which he has the closest connection outside the country in which he is permanently employed. This shall be

> determined when the employee takes up his duties, taking into account the place of residence of the employee's family, where he was brought up and any place where he possesses property.

Any review of this decision may take place only after a special decision by the President of the Office upon a reasoned request by the permanent employee".

In a letter of 14 August 1991, the complainant asked the President of the Office to change his home from Rome to Buenos Aires on the grounds that he had been born and brought up in Argentina, that his family and his wife lived there and that they were both citizens of that country. His request was rejected on the basis that home leave was generally meant to be in a "Contracting State" and EPO had recruited him as a citizen of such country, Italy. The complainant however pressed the issue, maintaining that his marriage had changed his personal situation since he joined the staff and that the country he had the "closest connection" with outside that of his duty station was Argentina. Again, his request was rejected and he appealed. The Appeals Committee unanimously allowed the appeal, but the President saw no reasons for review, on the following grounds: (1) the amendment of article 60 did not affect the procedure for review of a permanent employee's designated home; and (2) the reason was that the changes that had occurred in the complainant's personal circumstances since joining the staff did not warrant any change in his designated home.

The complainant appealed this decision, arguing that the Organization had granted home leave in Argentina to a staff member who had the nationality both of Germany and of that country, and new employees who were citizens of Argentina as well as some other country and who had their true "homes" in Argentina had automatically had "home" designated there. The complainant contended that those decisions were attributable to a change in the EPO policy which came in after article 60 was amended, and that the new policy allowed staff with dual nationality to change their designated home. Here, circumstances so warranted, to a place outside the territory of EPO member States. EPO disagreed with the complainant's contentions, explaining that in all those other cases but one the President of the Office was making the original designation of home, and here the decision concerned review of the designation already made. In the other case, the President found that special circumstances allowed for a change.

In the view of the Tribunal, the impugned decision rested on a misinterpretation of the principle of equal treatment by the Organization. In Judgement No. 1194 (*Vollering*) the Tribunal stated that principle in the following terms:

> "The case law says that for there to be breach of equal treatment of staff members who are in the same position in fact and in law. In other words, equal treatment means that like facts require like treatment in law and different facts allow of different treatment. It follows that treatment may vary provided that it is a logical and reasonable outcome of the circumstances."

In this regard, the Tribunal contended that there was no difference in substance between the original designation and the review of "home". In both cases the purport of the President's decision was the same: to determine the place where the employee may take home leave, and the original designation and the review cannot properly be made according to different criteria. It would offend against the principle of equal treatment the recruit who has strong ties with the country of one or

two nationalities should get the automatic designation of a place in that country as "home", while in identical circumstances another employee is refused designation of his home in that country simply because he is seeking review of a determination already made. The Tribunal concluded that since the distinction did not hold up in law, the impugned decision could not stand.

The Tribunal considered that the next question to be addressed was whether the complainant's circumstances warranted the change in the designation of home under article 60 of the Service Regulations. According to paragraph 2 of that article "the home of such permanent employee shall be the place with which he has the closet connection outside the country in which he is permanently employed," and the Organization must take into account "the place of residence of the employee's family, where he was brought up and any place where he possesses property". The Tribunal was satisfied on the evidence before it that the country with which the complainant had the "closet connection" was Argentina. He had been born in that country and did not acquire Italian citizenship, by *ius sanguinis*, until 1986, when he was already 24 years old. He had his primary, secondary and university education in Argentina and had done only post-graduate studies in Rome. His parents, grandparents and other relatives lived there. His wife was also a citizen of Argentina as well as Italy and had spent the greater part of her life in Argentina. They had married in that country in 1990. Since coming to Europe the complainant stated he had traveled regularly to Argentina and spent seven weeks a year there.

The Tribunal, therefore, concluded that the complainant qualified for review of the determination of his home under the second paragraph of article 60(2) of the Service Regulations, and his home must be changed accordingly. He was awarded 3,000 guilders in costs.

8. Judgement No. 1326 (31 January 1994): Gautrey v. International Telecommunication Union[18]

Request for termination indemnity from ITU after obtaining employment with another organization — Question of improper composition of the Appeal Board — Question of termination because of abolition of post from ITU or transfer to ILO from ITU — Question of breach of good faith of ITU

The complainant had worked as an English editor for the International Telecommunication Union on a permanent contract since 20 April 1988, when he was informed on 23 February 1990 that his post would be abolished at the end of the year, but that the Chief of Personnel and Social Protection Department would help him find a job in another organization. He was also informed in a conversation that his entitlements, taking account of his seniority in the United Nations system, came to some 90,000 Swiss francs, including repatriation grant and termination indemnity, which the Secretary-General of the Union had decided — as regulation 9.6(d) allowed — to increase by 50 per cent. On 4 September the complainant signed a two-year contract with the International Labour Organization with effect from 2 September 1990, and at the same time wrote to the Secretary-General of the Union about his entitlement under the rules to termination indemnity, which he stated he by no means intended to waive. In reply, in a letter of 13 September 1990 ITU Chief of Personnel informed him that the Secretary-General had decided as an exceptional measure to conserve his entitlement but only for two years as from 2 September 1990. The complainant appealed this decision to the Appeal Board on 20 February 1991.

In its report of 2 August 1991, the Board took the view that he had an acquired right to the termination indemnity and that his entitlement should be safeguarded whatever might happen. But before making a final recommendation the Board sought the views of the Secretary-General, which the Board interpreted to mean that the ITU would not be liable towards the complainant beyond the two years his contract was to run at ILO. The Board sent the Secretary-General an "amendment" to its report on 28 July in which it absolved the ITU of any liability towards the complainant. The ILO extended the complainant's appointment by one year on 6 October. The complainant appealed the Secretary-General's decision of 21 October endorsing the amended report, on the grounds of (1) improper composition of the Appeal Board; (2) breach of his right to termination indemnity; and (3) the Union's failure to act in good faith.

The complainant's main objective to the make-up of the Board was that not all of the members who signed the report of 2 August 1991 took part in the review of his case on 19 October 1992. The Union had pointed out that one member had retired and had to be replaced by an alternate, and when two other members refused to sit the Union had no choice but to appoint new members. The Tribunal was of the view that in these particular circumstances, the Board's membership was in keeping with the provisions of rule 11.1.1.3 and so it would serve no purpose to ask, as the complainant did, whether the Board's conclusions would have differed if its members had been as before.

Regarding the issue of the complainant's entitlement to termination indemnity, the Tribunal was agreement with ITU that there was no substance in the complainant's contention that his leaving the Union was attributable to the abolition of his post. The correspondence shows that he left ITU on transfer to the ILO under the Inter-Organization Agreement. The Tribunal noted that his case fell under paragraph 8(a) of the Agreement, which stated that "a staff member who is transferred will cease as from the date of transfer to have any contractual relationship with the releasing organization". Furthermore, the complainant could not rely *a contrario* on the fact that his case was not mentioned among those for which regulation 9.6 (e) excluded payment of termination indemnity since — as had been stated — his was a case of transfer under the Agreement, not of termination.

The Tribunal also found no more cogent his plea that payment of indemnity may be due to him for the loss of a fundamental term of his conditions of employment, namely, the security of a permanent appointment. He received only a fixed-term appointment from ILO. The Tribunal, recognizing that there were no provisions in the Regulations for the award of indemnities in cases other than those set out 9.6, considered that security of tenure in cases of transfer came under paragraph 8 (c) of the Agreement. In that regard, it was up to the ILO as the receiving organization to ensure that the complainant would not lose the security of a permanent appointment, but the complainant had failed to request ILO to comply with the provision, even though he was fully aware by 3 July 1990 of ILO's intention of offering him only a fixed-term contract, which he accepted without qualification on 4 September 1990.

The complainant had also argued that if he had let matters drag on for four months — from September to December 1990 — he would have had no difficulty in getting the indemnity and that he went to ILO only because his post was being done away with. In the Tribunal's view that argument would be sustainable only if by the time of his transfer to ILO his post had actually been abolished.

Lastly, the complainant had pleaded breach of good faith, the gist of it being the length of the internal proceedings. It took the Secretary-General two years to give him a final reply to his request of 25 October 1990 for review. Twenty months elapsed between the lodging of his appeal with the Appeal Board and its amended report and that was 16 months over the 14 weeks that regulation 11.1.1.4(f) was allowed. The Tribunal observed first that the alleged delay was not wholly the Secretary-General's fault. The rather long time which the Board took from the lodging of the complainant's appeal to the submission of its amended report was due partly to the Staff Council's having refrained from taking part in the Board's work from December 1991 to May 1992 and partly to changes in its membership. In any event such delay, in the Tribunal's view, was not in the circumstances of the case such as to impair the lawfulness of the impugned decision or cast doubt on the Union's good faith.

For the above reasons, the complaint was dismissed.

9. Judgement No. 1339 (13 July 1994): Grant v. World Health Organization[19]

Request for paternal leave — Maternity leave not a form of discrimination against men — Adoptive parents cannot be compared to natural parents in these circumstances — Question of other organizations providing for parental leave — Staff member's right to challenge staff rules, including those in place when he accepted employment

The complainant was a staff member of the World Health Organization at grade P-5 and his wife a staff member of the Office of the United Nations High Commissioner for Refugees at grade P-3 when the wife gave birth in September 1992. While both organizations' rules prescribed 16 weeks' maternity leave, both applied to their respective organizations for the grant of "parental" leave, the sixteen weeks' leave to be made available to them as a couple. In a memorandum of 23 July the Chief of the Personnel Administration Section of UNHCR answered the complainant's wife that she was entitled to the 16 weeks' maternity leave under the staff rules and that the entitlement of her husband to paternity leave was a matter for WHO to decide.

In a memorandum of 28 July to the complainant the Chief of Contract Administration of WHO referred to staff rule 760, which provided for the 16 weeks' maternity leave for a staff member appointed for a period of one year or more, and stated that he regretted that there was no provisions for paternity leave. The complainant appealed to WHO headquarters Board of Appeal, which held that the Administration had correctly applied rule 760 as it stood, but that it was "discriminatory against male staff members, bearing in mind the objectives of WHO and the United Nations family and the discrepancy with conditions applying to adoption leave", such leave which either sex might take, and the rule therefore should be reviewed by the Administration. The Director-General accepted the Board's recommendation, except for the part that recommended that the rule should be reviewed, as he felt that the Board had gone beyond its mandate. The complainant appealed this decision.

In the opinion of the Tribunal, the grant of maternity leave was not a form of discrimination against men but mere recognition of the needs specific to a woman when she gave birth; there were both physical and psychological reasons why a woman should be relieved of work before and after the birth. Since the nature of the father's involvement was quite different, like was not being compared with like.

The comparison that the complainant drew with the grant of leave on the adoption of a child was mistaken. The requirements of adoption being different from those of confinement, arrangements pertaining to adoption need not be specifically directed at the woman. There was no discrimination in favor of adoptive and against natural parents since the circumstances were not the same.

The Tribunal also did not accept the complainant's contention that allowing only women to take "parental leave" would put them at risk of discrimination in employment opportunities, because the complainant may only plead his own case, not that of others.

The fact that the International Committee of the Red Cross granted parental leave, or some countries did, was immaterial to the present case. In the view of the Tribunal, parental leave was something to be negotiated and agreed with the employer: it may not be claimed as of right.

The Tribunal disagreed with the Organization's contention that the complainant's case was misdirected on the grounds that on taking up employment he accepted its Staff Regulations and Rules and he ought to have made us of other means, such as staff union action, of putting forward his view and securing the introduction of paternity leave. An official's acceptance of the Regulations and Rules does not preclude his arguing that some provision of them is discriminatory as it affects him.

For the above reason, the complainant was dismissed.

10. Judgement No. 1344 (13 July 1994): Angius v. European Patent Organisation[20]

Allegations of discriminatory and punitive treatment — Question of receivability — Question of improving staff member's performance or punishing him for challenging the Administration — Breach of right to fair treatment

The complainant, who had joined the staff of the European Patent Organisation (EPO) in January 1980 as a search examiner at grade A3 in The Hague Office, had received reports appraising his performance up to 1989 as "very good". In August 1991 he had become aware that a search report of his had been changed without his knowledge, and on 20 August protested in writing to the Principal Director of Search.

After exchanges of correspondence he subsequently wrote a letter on 14 September 1992 to the President of EPO alleging various forms of discriminatory and "punitive" treatment by his supervisors, applying, among other things, for a formal inquiry into the matter and saying that, if his application was refused, his letter was to be treated as lodging an internal appeal. The President referred his case to the Appeals Committee. By letter of 21 October 1992 the chairman of the Appeals Committee acknowledged receipt of his appeal and told the complainant that it would be "dealt with as soon as possible, bearing in mind the Committee's caseload and meetings timetable". No action was taken, however, and by a letter of 3 September 1993 the complainant informed the chairman of the committee that he found the delay unacceptable and if nothing was done with three weeks he would go to the Tribunal. On 6 October 1993 he did so.

The Organization pleaded first that the complaint was irreceivable because he had filed his internal appeal out of time and so had failed to exhaust the internal means of redress as article VII(1) of the Tribunal's statute required. It contended that he knew by August 1991 at the latest that an altered search report had been published in his name and it was up to him then to file an internal appeal. The Tribunal,

however, considered that amendment of the complainant's search report was only one feature of the alleged continuing unfair treatment which formed the subject of his internal appeal. The EPO had also claimed that his complaint was irreceivable under article VII(1) of the Tribunal's statute because in any event he ought to have awaited the outcome of his internal appeal, observing that the Committee took up appeals not just in the chronological order of filling but also with regard to the importance of the issues they raised. It was the Tribunal's contention, however, that the complainant's appeal did raise important issues. It noted that a primary purpose of the Service Regulations was to establish and maintain good staff relations and the investigation of charges of discriminatory and punitive treatment of a staff member was a responsibility that the Organization assumed under those Regulations. The Tribunal further noted that the complainant had filed his first internal appeal on 14 September 1992, and by 3 September 1993 the EPO had not let him have its brief in reply nor even given him any inkling as to when it was likely to do so. It was true that article VII(1) of the Statute provided that a complaint would not be receivable unless the complainant had exhausted such other means, but it was plain from the case law that the Tribunal construed that article to mean that when a complainant had done all that was required of him to get a final decision, yet the proceedings appeared unlikely to be concluded within a reasonable time he may appeal directly to the Tribunal. The Tribunal, therefore declared the complaint receivable.

As to the merits of the case, the complainant had complained that his search reports were changed and that he was not consulted about the changes. The EPO had argued that there was not enough time to consult the complainant, but the Tribunal concluded that even if EPO was short of time it was not justified in changing his reports, in not even discussing the changes with him afterwards nor giving him an opportunity to comment on any amendments, and in publishing them under his name.

The complainant had also complained about having to work under a tutor and that a study was done of his work in order to find fault with his work. The Tribunal considered that if the true purpose the study was to improve the quality of his work his supervisors had a duty to discuss the findings with him, let him comment and suggest measures for improving the quality of his work, and there was no evidence that this was done. What was clear was that none of his search reports had been amended since he protested to amendment of reports he had done in 1991. The Tribunal was satisfied that the action taken by the complainant's supervisors — ordering the study and requiring him to work with a tutor — was actuated by a desire, not to improve the quality of his work, but to punish him for challenging the amendment of his reports without consulting him.

The Tribunal concluded that the Organization had failed to ensure that the complainant's appeal was dealt with in reasonable time and had failed to act in relation to the manner in which his search reports were amended, and in treating him as described above it has further acted in breach of his right to fair treatment. The Tribunal awarded the complainant an award of damages for moral injury in the amount of 6,000 Deutsche marks.

11. Judgement No. 1366 (13 July 1994): Kigaraba (No. 3) v. Universal Postal Union[21]

Recovery of overpayment of education expenses — Question of rate of exchange — Educational expenses are paid only in part — Staff member's position as officer in charge of claims to education expenses — There is no equality in breach of law — Question of misinterpretation of rule — Time limit for recovery of overpayment

The complainant, who had joined the Universal Postal Union (UPU) in 1983 at grade P-2, and in 1986 was promoted to first secretary at grade P-3 in the Personnel Section in charge of claims to the refund of education expenses, appealed against UPU's effort to recover an overpayment in respect of education expenses for two of his children. In its report of 17 July 1992 the committee of enquiry set up to check the education expenses refunded to the complainant determined that he had been overpaid 32,222.40 francs more than his due, but that recovery might be confined to the school years 1986 to 1990 and he would then have to pay back only 27,779.55 francs.

The Tribunal noted that the nub of the dispute was the choice of the rate of exchange to be applied in reckoning the amounts due to the complainant as education expenses for the school years 1986 to 1990. As from 1 January 1984 regulation 3.10.5.C.c of the Staff Regulations was amended: the words "that which was in force at the date when the existing scale of reimbursements came into effect" were replaced with the words "that which was in force at 1 March 1983". The Administration stopped referring to this rate, which was known as the "minimum rate," when regulation 3.10.5.C.c was deleted in 1989. The complainant accepted the method of reckoning used for 1989, the "minimum rate" having then been dropped. His main objection was that after getting the committee of enquiry's report the Union applied, for the purpose of reckoning his entitlements prior to 1989, the United Nations operational exchange rate which had prevailed at the time and which was higher than the one prevailing at 1 March 1983.

The Tribunal, however, considered that it was plain from the material text that the rate prevailing at 1 March 1983 was to apply only if higher than the one that prevailed at the date of repayment. The rate of exchange of the United States dollar stood at 1 March 1983 at only 9.56 Tanzanian shillings whereas the successive rates prevailing at the dates of repayment from 1985 to 1990 ranged from 25 to 193.3 shillings. Short of mistaking the "minimum" for the "maximum" rate the complainant may not properly contend that the rate prevailing at 1 March 1983 should invariably have been used to reckon repayments to be made after 1984.

The complainant had also alleged that it was UPU practice to apply the 1983 "minimum rate" and in support he relied on the fact that senior officers of the Personnel Section checked and approved his expense sheets. The Tribunal noted that UPU had denied such a practice, but in any event the rule, that the whole common system of the United Nations abided by, is to repay education expenses only in part; however, the complainant by misreading regulation 3.10.5.C.c received more than he had had to spend. Moreover, as officer in charge of claims to education expenses he drew up his own expense sheets, and he was not free to seek refuge in the senior officers' approval or to remain silent about a discrepancy to his own advantage.

The complainant had sought to justify his behavior by pleading that other staff members had done the same, but the Tribunal noted that equality in law does not embrace equality in the breach of it. Furthermore, the Director-General had ordered the same treatment for the others as for the complainant.

The complainant also alleged that the amendments to regulation 3.10 could not be retroactive; however, the Tribunal observed that the rule against retroactivity was not at issue here since no new provision or interpretation of the rules on the method of calculation were made retroactive. The complainant must have been aware of the patent disproportion between the advances he was receiving and the education expenses he had actually incurred. He may not properly plead any mistake in interpretation now.

Finally, the complainant argued that there was a time limit for the recovery of overpayments. Though he acknowledged that this was not in UPU's rules, he argued that the Union should follow the practice of the United Nations and the common system, which he stated limited the period for which overpayments might be recovered to the two years or even to the one preceding the discovering of the mistake. The Union observed that any payment made in error might be recovered but did not challenge the rule that an obligation may lapse with time: it claimed recovery only of overpayments since 1986; it had thereby waived some of the sum due and it had not demanded interest. Under the circumstances, the Tribunal concluded that the time limit the Union had set was much to the complainant's advantage and his plea under this head therefore failed.

The Tribunal dismissed the complaint.

12. Judgement No. 1367 (13 July 1994): Ozorio (No. 4) v. World Health Organization[22]

Request for extension of time limit for removal of household effects — Question of receivability — Review of discretionary decision

The complainant, a citizen of the United States, was working at the World Health Organization headquarters in Geneva as an information officer at grade P-4 when he retired on 30 November 1988. On 14 May 1990, he requested a postponement of the time limit allowed for the removal of his household goods on repatriation, which was granted until 30 November 1990. On 12 December 1990 he applied for a further extension to be left open until his wife's retirement from employment at the office of the United Nations High Commissioner for Refugees (UNHCR) in Geneva which could have been 1991 if she took early retirement, or 1996 if she retired at 60. On 9 January 1991 the acting Director of the Division of Personnel agreed "to a final delay of one year until 30 November 1991". On 19 July 1991 the complainant wrote to the Director of Personnel asking him to take a decision in the exercise of his discretion in the light of the fact that in the United Nations system cases like his were not unusual and would become more common. He pointed out that the Organization would incur no additional cost by consenting to extension — since the costs would have been limited in effect as at 30 November 1989 under the relevant rule. The Director replied on 26 August 1991 that it was "incorrect and unacceptable that your spouse's working situation should intervene in the contractual relationship between you and the Organization" and although in one case an extension of time had been granted beyond what the current practice allowed no exception had been permitted since the Director-General had formulated the policy setting a time limit. The Director concluded:

> "… you cannot be granted an extension for the removal of your household effects beyond the third year from the date of termination of your appointment. This is a final decision."

On 26 October 1991, the complainant appealed to the Board of Appeal against "the final decision of the Administration as contained in the letter of 26 August". The Organization contended that the final decision was contained in the letter dated 9 January 1991 and, therefore, the complainant's appeal was irreceivable since the 60 days for appealing against "final action" had expired. The Tribunal noted that staff rule 1230.8.1 state:

"No staff member shall bring an appeal before a Board until all the existing administrative channels have been tried and the action complained of has become final. An action is to be considered as final when it has been taken by a duly authorized official and the staff member has received written notification of the action."

The Tribunal considered that the letter of 9 January 1991 granted a "final delay" to the complainant for the removal of his household effects. Rule 1230.3.1 required that the staff member try "all the existing administrative channels" and no time limit was set for doing so. The complainant's letter of 19 July asked for an exercise of discretion by the Director of Personnel and, if needed, "on the part of the Director-General". So it amounted to a request to try an "administrative channel". The reply of 26 August 1991 to that letter answered the complainant" argument about the retirement of his wife and concluded "this is a final decision". The Tribunal concluded that the letter of 26 August 1991 was the "final action" taken by the Organization, and that therefore the internal appeal complied with the time limit of rule 1230.8.1.

As to the merits of the case, the Tribunal noted that the report of 8 April 1993 of the Board of Appeal held that the Administration had narrowly interpreted the text of the Manual to the complainant's detriment and that the Director-General had not been well advised in the exercise of his discretion. It recommended that the Director-General reconsider the complainant's claim. The Director-General subsequently extended the time limit until 1 May 1995, which was the decision impugned in the present case. The Tribunal, noting that the decision was arbitrary, not only because it failed to state the reasons for choosing the date of 1 May 1995 as the new deadline for the refund of the costs of removal, but because it gave no consistent reply to the complainant's claim. It was a wrong exercise of discretion.

For the foregoing reasons, the Director-General's decision of 1 May 1993 was set aside and the case was sent back for a new decision by the Director-General. The complainant was awarded 4,000 Swiss francs for costs.

13. Judgement No. 1272 (13 July 1994): Malhotra v. World Health Organization[23]

Non-selection to post — Question of confidentiality of selection committee documentation — Right of review by appellate body

The complainant, who was at the ND.6 level working in the Health and Behavior Unit at the WHO Regional Office for South-East Asia in New Delhi, was not chosen for a post as assistant II at grade ND.7 in 1990. He appealed that decision, claiming that the ad hoc selection committee stretched the short list beyond the point of clustering so as to include the selected candidate, and due consideration was not given to the factor rating sheets and to the relative positions of the complainant and the selected candidate. He had 27 years service as a secretary and was ranked first on the shortlist, whereas the selected candidate had only the minimum of 5 years' service as a secretary and had come out only seventh on the shortlist. The complainant appealed first to the regional Board and then to the headquarters Board, but neither Board could adequately address his appeal since the Organization refused to hand over various background papers of the selection committee on the grounds of privilege.

To justify withholding documents sought by the Boards, the Organization relied mainly on a memorandum dated 28 March 1983 which the Director-General addressed to the Chairman of the headquarters Board of Appeal in the context of another case, which in effect stated that selection documentation was confidential in order to allow for frank views. The Tribunal observed, however, that only from examining the documents sought in this case would it have been possible to determine whether the short list had been improperly stretched to favor the successful candidate and due weight had not been given to the comparison of seniority, performance and experience as between him and the successful candidate. When the Organization declined on the grounds of privilege to disclose the information and documents called for it withheld items that formed part of the proceedings leading up to the impugned decision and prevented determination of what the headquarters Board rightly called the one central issue, namely, "the factor rating and listing procedures applied by the [ad hoc selection committee] in reaching their decision".

As the Tribunal held in Judgements No. 1177 (*Der Hovsepian*) and No. 1323 (*Morris No. 2*), an item that forms part of the proceedings that led to the impugned decision may not be withheld from scrutiny by the Tribunal or any appellate body. That rule applied equally to the views expressed by members of the ad hoc selection committee. The Tribunal considered that since there was a right of appeal against the selection based upon the committee's recommendation, both the regional and the headquarters Boards were entitled to review the reasons for the selection and for the recommendation so as to ascertain whether there had been some fatal flaw such as an error of fact or of law, personal prejudice or arbitrariness, and the failure to disclose the views expressed by those who had made the recommendation frustrated the appeal proceedings.

The Tribunal held that the regional Board and then, if need be, the headquarters Board should take up the complainant's appeal anew in the light of full records of the ad hoc selection committee's proceedings. He was awarded US$ 3,000 in damages for the moral injury caused to him and also was awarded $500 in costs.

14. Judgement No. 1376 (13 July 1994): Mussnig v. World Health Organization[24]

Non-renewal of appointment — Question of receivability — Nature of rules on internal appeals and Appeal Board's Rules of Procedure — Organization's role in deterring sexual harassment — Question of a remedy to grave damage to staff member's career

The complainant, who had entered the service of the World Health Organization in January 1987 at grade P-2, was eventually assigned as a technical officer at grade P-3 with the Organization's Global Programme on AIDS in Luanda. The WHO's team in Luanda consisted of its Representative in Angola, the technical officer and an epidemiologist. The Tribunal noted that although Luanda was a difficult duty station the complainant seemed to have worked well with those who were involved in the National Programme. In her performance appraisal report for the period from May 1989 to April 1990 her first-level supervisor, the then Representative, affirmed on 23 March 1990 that she had adjusted "successfully" to expatriation and her second-level supervisor, the Chief of National Programme Support under the GPA wrote on 19 April that her "performances have been satisfactory, particularly when the circumstances under which she had to work and start a new programme are considered".

The Tribunal further noted that relations in the office soured, however, with the arrival in Luanda in June or July 1990 of a new Representative, Dr. Emmanuel Eben-Moussi. The complainant had made serious allegations against Dr. Eben-Moussi of sexual harassment and victimization, and by a memorandum of 22 January 1991 the Chief of Administrative Support Services of GPA started action to terminate the complainant's appointment on the grounds that the Angolan Government officials had informed the Organization of their unwillingness to have the complainant stay on as technical officer.

Upon the complainant's corresponding with WHO's Ombudsman, he filed an appeal on her behalf on 7 March 1991, against the decision not to renew her contract. She lodged a second appeal on 19 September 1992 against the Organization's refusal on the ground of privilege to release to her certain texts in its possession and against its failure to make a performance appraisal report for the period 1990 to 1991. The Board met on 5 February 1993. After taking oral submissions — which it restricted to a duration of five minutes — from the complainant's representative it concluded in a report dated 12 February 1993 that neither of her appeals complied with its Rules of Procedure. It did not specify what provisions of its Rules had not been observed or why such infringement prevented it from hearing her appeals on the merits; but, it did declare the appeals time-barred and recommended rejecting them as irreceivable, the recommendation of which the Director-General accepted.

WHO had pleaded that 8 March 1991 was the starting point, with the formal appeal having been lodged on 19 September 1992, which was eighteen months after the date on which she had been asked to correct the original submission. The Tribunal considered that the complainant's first appeal was lodged on 7 March 1991 and was an appeal against the decision of 28 January 1991 not to renew her appointment. It consisted of a detailed brief which contained all the information that the Board of Appeal needed to enable it to report on the appeal. What she lodged on her 19 September 1992 was her second appeal, which was aimed at obtaining texts the Organization had refused to produce. As for the letter of 19 March 1991 from the Secretary of the Board, it simply told her to supply "the details required"; it did not specify which further details the Board required and the absence of which would prevent it from making recommendations to the Director-General. The Tribunal pointed out that according to case law, for example Judgement No. 607 (*Verron*), though the rules on internal appeals must be respected because proper administration so requires, "they are not supposed to be a trap or a means of catching out a staff member who acts in good faith". As for the Board's Rules of Procedure, their purpose is to promote the expeditious and orderly hearing of appeals, not to deprive appellants of any right of appeal conferred on them by the Staff Rules.

In accordance with rule 1230.8.3 the complainant's first appeal was lodged "within 60 calendar days". Her second appeal, lodged on 19 September 1992, challenged the Organization's decision of 26 June 1992; because of her absence from Geneva, which the Organization did not deny, that decision came to her notice on 1 August 1992; so again she had observed the 60-day time limit. The Tribunal concluded that both appeals were therefore properly before the Board.

The WHO had requested that if its objections to receivability were not upheld the Tribunal send the case back to the headquarters Board of Appeal; however, the Tribunal decided not to do so and ruled on the merits of the case.

The Tribunal noted that the Organization did not contest the complainant's account of the facts on which she founded her case. In particular, it did not seek to refute her allegations against Dr. Eben-Moussi. What did emerge from the evidence was a campaign of victimization of the complainant by the WHO Representative after she had rejected his sexual advances. He had sent headquarters a highly adverse report dated 17 January 1991 about her which both he and the Organization refused to show her. By a letter of 26 June 1992 the Organization's Legal Counsel informed her that he and the Director of Personnel had signed statements refuting the Representative's allegations. The WHO itself admitted that it should have formally stated that it regarded as "without foundation" the Angolan Government's allegations against her of unsatisfactory performance and that that view should have been communicated to all the parties concerned.

The Tribunal further noted that the complainant had difficulty in obtaining employment because of the false impressions that had been given about her performance in Luanda, and that while her career was in ruins the evidence before the Tribunal indicated that the official who was the cause of her troubles had been left unscathed. In the opinion of the Tribunal, any organization that was serious about deterring sexual harassment and consequential abuse authority by a superior officer must be seen to have taken proper action. In particular, victims of such behavior must feel confident that it would take their allegations seriously and not let them be victimized on that account, and here WHO had utterly failed to protect the complainant's rights.

In the opinion of the Tribunal, the damage caused to the complainant's career and reputation was so grave that no form of redress short of reinstatement and the grant of a further contract of employment would suffice. The Tribunal, therefore, ordered that she be put in the same position as if her contract had never been terminated and be reinstated as from the date of termination and up to the date of this judgement. She was granted a contract of employment for a period of two years from the date of this judgement. She was further given an award of damages for the moral injury she had suffered in the amount of 25,000 Swiss francs, as well as costs in the amount of 6,000 francs.

C. Decisions of the World Bank Administrative Tribunal[25]

1. Decision No. 139 (14 October 1994): Jasbir Chhabra v. International Bank for Reconstruction and Development[26]

Complaint against poor performance evaluations — Question of receivability — Allegations of harassment and prejudice must be supported by evidence — Question of a mismatch of staff member's capabilities and requirements of assigned post — Question of a remedy in a case of mismanagement of staff member's career

The Applicant, who had joined the Bank in 1972 as a Research Assistant, was graded at level 21 as a result of the 1985 job grading exercise and was subsequently given the title of Economist. Up to 1987 she had received good performance evaluations. Following the 1987 reorganization she was selected as a grade 21 Economist into the Country Operations Division of the Asia Region, Country Department II (AS2CO), and in 1990 then assigned to the Asia Region, Country Department I, Office of the Director. Her supervisor, on 25 October 1991, when evaluating her performance for the period September 1990 to September 1991, concluded that,

while she "demonstrated considerable ability" in certain fields, she "has not demonstrated the ability to function effectively as a level 21 Country or Sector Economist", but "may be better suited to a research-focused environment".

Subsequently, on 31 January 1992, the Chief of Personnel Officer for Asia offered her three options: (a) a mutually agreed separation; (b) a level 17 Administrative Assistant position entailing a reduction in salary; or (c) an additional six-month trial assignment to perform 21 Economist work, including mission travel, with the understanding that if her performance as level 21 Economist was going to prove fully satisfactory she would be placed in a level 21 Economist position on a permanent basis, but that in the event of unsatisfactory performance she would be subject to the provisions of staff rule 7.01, section 11, "Termination for unsatisfactory performance," with no severance payments. The Applicant accepted option (b).

On 7 April 1992, the Applicant filed an appeal before the Appeals Committee against her supervisor's evaluation, against her merit increases for the years 1988 to 1991 and against the alternatives presented to her in January 1992. On 24 September 1992 she filed a second appeal contesting the Respondent's two decisions relating to the administration of her salary and her merit increases for 1992 and the decision which rejected her contention that the level 17 duties assigned to her were in fact level 18 or above duties. In its report of 24 June 1993, the Appeals Committee recommended, *inter alia*, that the Applicant's level 17 position be elevated to level 18-19 in accordance with the Respondent's assessment of her capabilities and that her salary be adjusted accordingly. The Bank's administration for the most part accepted the Appeals Committee's recommendations in the case. The Applicant appealed to the Tribunal.

The Respondent first raised some issues of admissibility of the appeal. One issue concerned the question whether a request for administrative review, relating to the merit increases, had preceded the appeal to the Appeals Committee. The Tribunal noted that it appeared that neither the Respondent nor the Appeals Committee had raised the issue beforehand and that pursuant to article II, paragraph 2(i), of the statute of the Tribunal, the Respondent might waive the requirement of exhaustion of internal remedies prior to the filing of an application before the Tribunal. In the opinion of the Tribunal, such a waiver must have been deemed to have taken place when the Respondent failed to raise the matter before or at the time that the case was considered by the Appeals Committee. Another issue raised by the Respondent concerned the Applicant's request that the Respondent compensate her for damages to her health. The Respondent argued that because a similar claim had been filed by her and was currently pending before the Bank's Worker's Compensation Claims Administrator the matter was not admissible before the Tribunal. While the Tribunal concurred with the Respondent on this point, it further stated that the Applicant's claims relating to an alleged failure by the Respondent to take account of her health problems and the incidence, if any, of this alleged failure on her career were part of the present case.

As to the merits of the case, the Applicant maintained that after her assignment to AS2CO in 1987 she, *inter alia*, was subjected to harassment, prejudice and unfair treatment by her supervisors, in particular on gender and ethnic grounds; and that this hostile environment and the resulting stress had caused her serious health problems. Regarding the allegations of harassment and prejudice, the Tribunal noted that, even though the working relationship between the Applicant and her supervisors in AS2CO from 1987 onwards appeared not to have been good, the Applicant had failed to produce evidence to support such allegations.

The Tribunal noted that the Applicant had been given assignments with different economists, each of whom had evaluated her independently, and that the Appeals Committee's report had observed: "There was a problem of poor performance as documented by (her) numerous supervisor's." The Tribunal further noted that this appeared as early as in her 1989 performance evaluation report in which her supervisor had written that, although she was able to "produce a superior product" when "given time to reflect", "the particular requirements of (the) Division are not areas in which she can effectively apply her more specialized skills". He concluded that "there is … a clear mismatch between her strengths and the Division's requirements". Upon transfer to another division in 1990, her new supervisor in evaluating her performance for the period September 1990 to September 1991 reached a similar conclusion. The same supervisor in evaluating her performance covering the period July 1991 to March 1992 concluded that, while the Applicant had performed satisfactorily the 18 to 20 level tasks entrusted to her, "her work did not indicate that she could meet the standards of performance expected of a grade 21 Country or Sector Economist".

As the Tribunal pointed out, it was in the light of these concurring assessments of the Applicant's performance and her inability to meet the requirements of a level 21 Economist and with a view to bridging the "mismatch" which had appeared between her capabilities and the requirements of her job that the Respondent had taken various steps aimed at solving the problem. As mentioned above, the Applicant was assigned in 1990 to another division for a trial period. Because of her health problems, she was granted a part-time arrangement, with working hours specially adapted to her medical condition. In 1991 the Respondent undertook a search for an alternative position better suited to the Applicant's capabilities. This search was unsuccessful and in January 1992 the Respondent proposed to the Applicant the three options detailed above.

The Tribunal, while recalling that the Respondent based upon the recommendation of the Appeals Committee had agreed to restore the Applicant to level 18 and to adjust her salary accordingly, considered that the Respondent's treatment of the Applicant had been flawed from the outset by the "mismatch" which had appeared between the Applicant's capabilities and the level 21 Economist position assigned to her following the 1987 reorganization. At that time, the Respondent had clearly overestimated the Applicant's skills.

The subsequent efforts by the Respondent to remedy this "mismatch", in the opinion of the Tribunal, had ended up in offering the Applicant a choice which was such only in name. It was unfair because of her illness which, as her supervisor acknowledged, made it impracticable for her to be given a fair trial at level 21, and the other two options, of either leaving the Bank or accepting a demotion to an unreasonably low level, was no real choice at all.

The Tribunal concluded that although there was no particular decision of the Respondent to be quashed, the Respondent's behavior towards the Applicant from the reorganization onwards, taken as a whole, constituted mismanagement of the Applicant's career, which fell short of the standards of treatment required by the bank under the Principles of Staff Employment. Taking into account the Respondent's efforts to remedy the difficulties created partly by its own decisions, the Tribunal decided that the Respondent should pay the Applicant compensation in the amount of US$ 50,000 and costs of $5,000.

2. Decision No. 140 (14 October 1994): Safari O'Humay v. International Bank for Reconstruction and Development[27]

Complaint against disciplinary proceedings concerning the hiring of a domestic employee on a G-5 visa — Question of whether a personal debt of the staff member pertains to the domain of official duties and conduct — Misrepresentations to foreign consular office regarding an agreement between staff member and G-5 domestic employee — Question of the consideration of staff member's performance report in the context of disciplinary proceedings — Question of appropriateness of disciplinary measures imposed

The Applicant, a staff member of the World Bank on a G-4 visa since 1978 and working as a Financial Analyst, level 23, hired a domestic employee on a G-5 visa, "P", who according to the Applicant worked in his household from 29 June 1987 through 31 July 1989. He had filed the appropriate applications with the Visa Administrator of the Respondent and identified P as the prospective domestic employee. By letter dated 18 December 1986 to the United States Consul in Dar es Salaam, the Visa Administrator indicated that P, a Tanzanian national, would be applying for a G-5 visa to work in the household of the Applicant. In a document entitled "Final Employment Agreement (Amended)" between the Applicant and P, dated 15 March 1987, and amended on 25 March and 11 May 1987, it was stated that the parties had agreed, *inter alia*, that the duties of P were to nurse a newborn baby, oversee a 12-year-old, do laundry, cooking and general house cleaning for the weekly salary of US$ 150, or the minimum wage required, and that the employer would deduct $25 per week for lodging and meals. However, the Applicant and P had made an oral agreement that he would pay her only $50 per week with no deductions and pay all her living expenses, and it was on the basis of that agreement that the United States Embassy at Dar es Salaam had previously denied P's visa. In other words, the Applicant's written agreement was made only to comply with the requirements imposed by the United States Consul.

On 1 December 1989, P requested the assistance of the Ethics Officer in recovery from the applicant of $3,000 she had allegedly lent the Applicant and salary which had not been paid to her. After an investigation of her complaints and consultations with the Legal Department the Ethics Officer wrote a memorandum, dated 6 March 1991, to the Director of Personnel, Operations (POP), setting out the details of the matter and recommending disciplinary measures. By memorandum dated 18 September 1991 the Director of POP informed the Applicant that he had concluded that the Applicant had made misrepresentations to the United States Consul regarding the minimum wage stated in the domestic's contract; that the misrepresentations had the effect of calling the reputation and the integrity of the Bank into question; the Applicant had an outstanding debt to P in the amount of $3,000 plus back compensation owed to P; and, in failing to compensate P in accordance with local law and to meet the obligations incumbent on employees who were on a G-4 visa, the applicant had not met his personal and legal obligations as a Bank staff member.

The Director subsequently imposed the following disciplinary measures: (1) no further requests would be made by the Bank on the Applicant's behalf to obtain a domestic on a G-5 visa; (2) a written reprimand and a written warning for the future would be placed in his Personnel File; (3) failure to promptly pay his debt to P and to correct her W-2 form would lead to further disciplinary action, and possibly termination; and (4) there would be loss of any salary increase resulting from the 1992 Salary Review Exercise.

On 28 February 1992, the Applicant filed an appeal with the Appeals Committee, which in its report, dated 25 January 1993, concluded that the employment agreement presented to the United States Consul was a misrepresentation and that the Respondent had properly imposed disciplinary measures on the Applicant. The Applicant subsequently appealed to the Tribunal.

The Tribunal first made a determination of whether the nonpayment of a personal debt of the Applicant to his employee could lawfully furnish cause for disciplinary or other action by the Respondent. The Tribunal considered that there was a need to distinguish clearly between matters of a private nature and matters which pertained to the domain of official duties and conduct. In this regard, the Tribunal noted that principle of staff employment 3.3 distinguished between official conduct and private obligations. While the former was subject to immunity from civil jurisdiction, private obligations were not. Furthermore, consistent with the principle, paragraph 3.01 of staff rule 8.01 established a standard for separating private from official conduct. Private conduct came under that paragraph only if it reflected adversely upon the reputation of the Bank, which then would fall under the disciplinary jurisdiction of the Respondent, and whether a specific situation involving a personal debt may be brought under staff rule 8.01 would of course require a determination by the Respondent on a case-by-case basis. It was the opinion of the Tribunal that in the present case that the record did not provide any evidence that this debt in any way reflected adversely upon the reputation and integrity of the Bank.

Regarding the issue of the contract between the Applicant and P, the Tribunal noted that a misrepresentation had been made by the Applicant to the United States Consul. The contract of employment between the Applicant and P was amended so as to state a weekly wage which he had no intention of paying because in his view there was a prior oral argument which governed his relationship with P. This contract had been made in compliance with the requirements laid down by both the Respondent and the United States Consular Officer in Dar es Salaam in connection with the use of the privilege of obtaining a G-5 visa. In fact, a staff member wishing to make use of that privilege must obtain the appropriate forms and explanations from the Bank's Visa Office, including a sample employment contract and information on minimum wage requirements. The contract of employment negotiated on that basis was then submitted to the said Visa Office which requested the United States Consular Officer to issue a visa. That officer reviewed the contract before deciding whether to issue a visa. That review was related not only to the formal aspects of the contract but also to its substance, particularly to the observance of minimum wage regulations. All the required steps were taken in the present case. A question was raised by the Consular Officer, however, as to the appropriateness of the amount of the wages to be paid under the contract of employment. It was in that context that the question of a misrepresentation arose.

In the opinion of the Tribunal, the Applicant's conduct in regard to the granting of a G-5 visa had an impact on the Bank's interests. As also stated by principle of staff employment 3.3, privileges and immunities of staff members were established "in the interests of their Organizations". It followed that staff members must avoid any kind of abuse of their privileges. Employment with the Bank was the sole and specific legal source of the Applicant's entitlement to any of the two types of visas involved in the case, and therefore the Respondent was correct in not regarding the hiring of a domestic employee on a G-5 visa as a purely private matter.

The Tribunal further noted that the misrepresentation had been followed by the failure of the Applicant to observe the minimum wage requirements, which had

been brought to his attention in good time by both the Bank and the United States Consul. However, the Tribunal pointed out that the Bank could not become involved in the adjudication of disputes concerning unpaid salaries above and beyond the question of minimum wage requirements since that would be to substitute itself for ordinary courts of law.

The Applicant had argued that the consideration of his Performance and Planning Review Report (PRR) in the course of taking disciplinary measures was irrelevant and an invasion of privacy. The Tribunal rejected this argument, considering that it was reasonable that in a case of this complexity all relevant factors be taken into consideration and the Applicant's performance was relevant because it provided an indication of the working relationship between the staff member and the Bank. Paragraph 4.01 of staff rule 8.01 mandated that in imposing disciplinary measures the Respondent must take into account, among other aspects, "the situation of the staff member". To this end, the officers in charge of the investigation had a right to see a staff member's PRR. Nor did the Tribunal accept the argument that the Applicant's right of privacy had been compromised by the fact that his PRR was considered when disciplinary measures were taken. Performance reviews were intended to serve institutional objectives and, particularly, the improvement of performance so as to achieve the goals of the organization. In that regard, while the PRR might be protected by confidentiality, it cannot be considered a document protected by the right of privacy in the context of the Respondent's disciplinary decisions.

Regarding the disciplinary measures imposed for the Applicant's misrepresentations in connection with the visa application, his failure to pay a salary in keeping with the applicable minimum wage laws, as well as his failure accurately to file reports relating to social security taxes, the Tribunal concluded that in the circumstances of the case a warning could be regarded as a kind of censure, a measure which was indeed expressly referred to in paragraph 4.02(a). In any event, a warning certainly fell within the inherent powers of any administration as a means of dealing with the disciplinary matters. The loss of salary increase for 1992 in the circumstances of the present case was a reduction in pay within the meaning of paragraph 4.02(g), as then written. The Tribunal, therefore, had not found any incompatibility between the disciplinary measures imposed and staff rule 8.01.

The Tribunal also considered the issue of the proportionality of the disciplinary measures imposed and the Applicant's contention that they were excessively severe. The Tribunal, citing Decision No. 14, *Gregorio* (1983), as authority for its consideration of the issue, concluded that given the nature of the misrepresentation made to the United states Consul and subsequent events constituting the misconduct, and particularly the fact that there appeared to have been no malice on the part of the Applicant, the loss of salary increase was proportionate to the misconduct only insofar as its effects were strictly confined to 1992, but not to the extent that that measure would have any cumulative effect over subsequent years. This conclusion was further justified by the fact that the Applicant had settled all differences with P, paid her in full and corrected the tax reports. The other measures imposed by the Respondent could not be regarded as disproportionate. The removal of the G-5 visa privileges, a written warning about the Applicant's handling of other privileges and benefits and a written reprimand as a response to both the misrepresentation to the United States Consul and the dealings with P were proportionate measures given the various options available to the Respondent under staff rule 8.01. The same held true of the order promptly to correct the social security reportings.

The Tribunal, in addition to ordering that the deprivation of the Applicant's 1992 salary increase not have consequences going beyond that year, decided that all references and documents relating to the question of the disputed personal debt and to unpaid salaries above the applicable minimum wage requirements should be removed from the Applicant's personnel and staff records. The Tribunal awarded the Applicant US$ 1,300 in costs.

D. Judgement of the Administrative Tribunal of the International Monetary Fund[28]

1. Judgement No. 1994-1 (31 August 1994): Mr. "X" v. International Monetary Fund[29]

Request that the length of service period for Pension Fund calculation be extended from 30 September 1985 to 1 January 1986 — Jurisdiction of Tribunal — Administrative decision having later consequences

The Applicant on April 1985 had been allowed to resign from the International Monetary Fund in lieu of termination. Subsequently, the Applicant was allowed to withdraw his resignation in order to file a grievance with the Grievance Committee of IMF, which was not successful, and he was advised based on his serious misconduct he would be terminated, effective 30 September 1985. The Applicant appealed his termination on 16 September 1985 and was placed on annual leave beginning 1 October 1985, pending the Committee's recommendations and final decision by the Managing Director of IMF. It was further agreed that when his annual leave expired he would continue on leave without pay.

On 14 February 1986, the Grievance Committee issued a report and recommendation to the Managing Director in which it found that the Applicant's termination had been for just cause. It also recommended that the Applicant be given another and final opportunity to resubmit his earlier resignation, effective 30 September 1985, in lieu of termination. The Managing Director accepted the recommendation of the Committee, and the Applicant resigned from IMF as of 30 September 1985.

By letter of 20 March 1986, the International Monetary Fund confirmed his earlier resignation, effective 30 September 1985, and offered him an *ex gratia* payment of US$ 10,000 under the IMF Termination Benefit Fund. An attachment to that letter indicated that Mr. "X's" contributions to the Staff Retirement Plan after the effective date of his resignation had been credited to him. The Applicant wrote back expressing his appreciation of the terms. The Applicant was further informed, on 21 April 1986, that taking the date of his termination, he had 15 years and 3 months of eligible service under the Staff Retirement Plan. In a letter of 8 May 1986 addressed to the Managing Director, the Applicant requested that his resignation take effect on 8 January 1986 to coincide with the expiration of his accrued leave, rather than 30 September 1985, which was rejected.

The Applicant wrote to IMF in 1988, 1990, 1991 and 1992 regarding the amount of the pension to which he would in due course become entitled. All of IMF's replies to Mr. "X" treated his pensionable period of service as terminating on 30 September 1985. In anticipation of his 55th birthday on 19 November 1993, the Applicant requested information on the amounts of the pension under the options and requested a review on the ground that his entitlements had been computed on the basis of his

service ending on 30 September 1985, despite his contribution to the Staff Retirement Plan having been made in the subsequent period of his accrued leave. In a letter from IMF dated 12 May 1993, he was reminded that the pension contributions the Applicant made after 30 September 1985 had been credited to him.

The Applicant appealed, complaining that the amount of the pension was less than it should have been because the pension had been calculated on a length of service ending 30 September 1985 instead of January 1986, when his accrued leave expired. The Tribunal noted that the contributions to the pension fund made by him between those two dates were in effect reimbursed to him in the context of a financial settlement with IMF in March 1986. However, the Applicant maintained that that treatment of his contributions was unlawful pursuant to article 6, section 2(c), of the Staff Retirement Plan which, he asserted, provided that contributions were irrevocable.

The Applicant also contended that the administrative act which he challenged was the calculation of his pension in 1993 and the issuance of pension payments beginning in December 1993 which reflected a period of pensionable service which was deemed to have ended 30 September 1985 rather than in 1986 when his accrued leave had expired. He maintained that, if a decision was taken in 1986, it affected him "now"; in the alternative, he maintained that IMF did no more in 1986 and subsequently than to "threaten" to take a decision which it could always have reconsidered and corrected up to the time when it finally calculated the amount of his pension in 1993 and issued pension payments pursuant to that calculation.

The Respondent had maintained that the act complained of, the reversal in 1986 of certain pension contributions, pre-dated the commencement of the Tribunal's jurisdiction and, under generally accepted principles of international administrative law, that the application should be dismissed as untimely. The fact that the act decided upon and taken in 1986 had financial effects within the period of the Tribunal's competence did not confer jurisdiction on the Tribunal.

The Tribunal pointed out that article XX of the statute of the Tribunal provide that "the Tribunal shall not be competent to pass judgement upon any application challenging the legality or asserting the illegality of an administrative act taken before 15 October 1992…"

It was clear to the Tribunal that the administrative act at issue was the decision of IMF to treat Mr. X's period of pensionable service as terminating as of the effective date of his resignation, namely, 30 September 1985, and, consequently, to reverses pension contributions made thereafter. The Tribunal further recalled that Mr. X had been aware of this decision to take 30 September 1985 as the date as of which the period of his pensionable service terminated. Indeed, by a written communication of 8 May 1986 he had contested the decision, and moreover he had contended that the withdrawal of contributions from the Plan by IMF was "illegal". In the view of the Tribunal, there could hardly have been a plainer assertion of the illegality of an administrative act, and that assertion had been voiced in 1986, more than five years before the date for the commencement of the Tribunal's jurisdiction, 15 October 1992.

The Tribunal also did not agree with the Applicant's assertion that the administrative act complained of did not take place in 1986, but later in 1993 when his pension entitlement was finally calculated and he began to receive his pension payments. In the opinion of the Tribunal, the calculation of Mr. X's pension in 1993 was a purely arithmetical act governed by the decision of 1986 as to the extent of his

pensionable service. As was repeatedly made clear to the applicant in response to his inquiries about his pension options, the variable that remained to be factored in was the effect of cost-of-living increases. The fact that the decision of 1986 had produced consequences for the Applicant subsequently could have no effect upon the extent of the jurisdiction of the Tribunal; if it were otherwise, then the limitation on the commencement date of the Tribunal's jurisdiction would be meaningless since the effects of innumerable pre-October 1992 acts might well be felt for years after the date when the Tribunal's statute came into force.

The Tribunal dismissed the application.

NOTES

[1] In view of the large number of judgements which were rendered in 1994 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 volume of the *Yearbook*. For the integral text of the complete series of judgements rendered by the four Tribunals, namely Judgements Nos. 634 to 687 of the United Nations Administrative Tribunal, Judgement Nos. 1301 to 1376 of the Administrative Tribunal of the International Labour Organization, Decisions Nos. 136 to 140 of the World Bank Administrative Tribunal and Judgement No. 1994-1 of the Administrative Tribunal of the International Monetary Fund, see, respectively: documents AT/DEC/634 to 687; *Judgements of the Administrative Tribunal of the International Labour Organization*: 76th and 77th Ordinary Sessions; *World Bank Administrative Tribunal Reports*, 1994, and Judgement No. 1994-1 of the Administrative Tribunal of the International Monetary Fund.

[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: International Civil Aviation Organization and 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] Jerome Ackerman, Vice-President, presiding; Francis Spain and Mayer Gabay, Members.

[4] Luis de Posadas Montero, Vice-President, presiding (Statement); Mikuin Leliel Balanda and Mayer Gabay, Members.

[5] Samar Sen, President (Dissenting Opinion); Francis Spain and Mayer Gabay, Members.

[6] Samar Sen, President; Jerome Ackerman, Vice-President; and Francis Spain, Member

[7] Samar Sen, President; Francis Spain and Mayer Gabay, Members.

[8] Jerome Ackerman, Vice-President, presiding; Hubert Thierry and Francis Spain, Members.

[9] Samar Sen, President; Mikuin Leliel Balanda and Mayer Gabay, Members.

[10] The Administrative Tribunal of the International Labour Organization is competent to hear complaints alleging nonobservance, in substance or in form, of the terms of appointment of officials and of the staff regulations of the International Labour Organization (including the International Training Centre) and of the other international organizations that have recognized the competence of the Tribunal, namely, as at 31 December 1994, 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 Organization 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 Intergovernmental Organization for Internal Carriage by Rail, 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, the International Union for the Protection of New Varieties of Plants, and the Customs Cooperation Council. 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 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.

[11] Jose Maria Ruda, President; Edilbert Razafindralambo and Michel Gentot, Judges.

[12] Jose Maria Ruda, President; Pierre Pescatore and Mark Fernando, Judges.

[13] Jose Maria Ruda, President; Pierre Pescatore and Michel Gentot, Judges.

[14] Sir William Douglas, Vice-President; Pierre Pescatore and Mark Fernando, Judges.

[15] Jose Maria Ruda, President; Edilbert Razafindralambo and Michel Gentot, Judges.

[16] Jose Maria Ruda, President; Sir William Douglas, Vice-President; and Mark Fernando, Judge.

[17] Jose Maria Ruda, President; Sir William Douglas, Vice-President; and Edilbert Razafindralambo, Judge.

[18] Jose Maria Ruda, President; Edilbert Razafindralambo and Michel Gentot, Judges.

[19] Sir William Douglas, Vice-President, Mella Carroll and Mark Fernando, Judges.

[20] Ibid.

[21] Jose Maria Ruda, President; Edilbert Razafindralambo and Pierre Pescatore, Judges.

[22] Jose Maria Ruda, President; Edilbert Razafindralambo and Michel Gentot, Judges.

[23] Sir William Douglas, Vice-President; Mella Carroll and Mark Fernando, Judges.

[24] Ibid.

[25] 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 Recon-

struction 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.

[26] A. Kamal Abul-Magd, President; Elihu Lauterpacht and Robert A. Gorman, Vice-Presidents; and Fred K. Apaloo, Francisco Orrego Vicuña, Tun Mohamed Suffian and Prosper Weil, Judges.

[27] Ibid.

[28] The Administrative Tribunal of the International Monetary Fund became operational on 1 January 1994. The Tribunal is empowered to review any employment-related decision taken by the Fund on or after 15 October 1992.

[29] Stephen Schwebel, President; and Michel Gentot and Agustin Gordillo, Associate Judges.