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UNITED NATIONS JURIDICAL YEARBOOK

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

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

Chapter V[1]

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

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

1. JUDGEMENT NO. 914 (23 JULY 1999): GORDON AND PELANNE V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[3]

Failure to compensate sufficiently for the non-circulation of vacancy announcements—Waiver of a vacancy announcement in "an extraordinary emergency situation"—Respondent has burden of proof of demonstrating that staff member had received consideration for a post or promotion—Remedies for serious maladministration—Staff rule 112.3

Because the two Applicants set forth the same pleas and raised identical issues, namely, the filling of two D-1 post in the Office of Human Resources Management without first circulating vacancy announcements for the posts, the Tribunal ordered the joinder of the cases.

The Applicants had maintained that the failure to circulate vacancy announcements "violated their right to be considered fairly and objectively for the posts", and that the decision violated the relevant provisions of Secretary-General's Bulletin ST/SGB/267 of 15 November 1993 and administrative instruction ST/AI/390, also of 15 November 1993, on placements and promotion.

The Respondent had conceded that proper procedures were not followed, but argued that the reorganization of the Office required that the two D-1 posts be filled on an urgent basis, and that the Office could not afford a delay of four to six months that would have resulted from announcing these two vacancies and following the normal placement and promotion procedures.

The Joint Appeals Board (JAB) had found that the urgency alleged by the Respondent was not of sufficient magnitude to overcome the need to issue a vacancy announcement, and the Tribunal agreed. The Tribunal was satisfied that, under the standard established in Judgement No. 362, *Williamson* (1986), no "extraordinary emergency situation" existed that might have justified the suspension of proper procedures for promotion. Such situations, for example, might include peacekeeping or natural disaster relief operations. The Tribunal was of the view that the Assistant Secretary-General for Human Resources Management could have found other ways of coping with the reorganization of his department, without having to breach the procedures guaranteeing due process for the Applicants. If, as the Respondent claimed, the allegedly "urgent" circumstances could be considered an "extraordinary emergency situation", justifying a departure from the rules, such an excuse could be invoked so frequently that the rules would seldom be followed. Such a result would lead to a complete breakdown of the promotion system, would severely affect career development and would lead to wholesale favouritism.

The Tribunal, pointing out that the Respondent had the burden of proving that a staff member received consideration for a post or promotion, was in agreement with the JAB findings that the Respondent had failed to demonstrate that the Applicants had been fully considered for promotion for the posts in question (cf. Judgement No. 447, *Abbas* (1989)).

The JAB had recommended, and the Secretary-General accepted, that the Applicants are awarded compensation of two months net base salary for the irregularities; however, the Tribunal was of the view that in the light of the serious breach of procedures, the amount of compensation awarded was inadequate. The Tribunal recalled that the Board's reason for limiting its recommendation of compensation was there was no indication that the Applicants would have automatically been selected for the posts had they been given full consideration, and found this argument unpersuasive. In the Tribunal's view, as a result of the improper procedure implemented by the Respondent, the Applicants had been automatically excluded from any opportunity to compete for the posts. The Respondent's disregard of proper procedures was detrimental to the Applicants' career development, and had caused the frustration and mental anguish of not being considered for posts for which they might have been qualified. Moreover, the Tribunal could not take lightly the violation of due process by the Respondent, particularly when ST/AI/390 (superseded in 1996 by ST/AI/413), had been enacted by the Respondent in order to prevent the very practices to which he had resorted in the present case. The Tribunal found that in the light of the extraordinary circumstances described above, the Applicants were entitled to a larger amount of compensation than was recommended by the JAB and accepted by the Respondent.

The Tribunal felt compelled to add that this was such a serious case of maladministration that consideration should be given to invoking staff rule 112.3, which provided:

> "*Financial responsibility*
>
> "Any staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member's negligence or of his or her having violated any regulation, rule or administrative instruction."

Thus, the Secretary-General might decide that the officials who violated staff regulations and administrative instructions should be held personally accountable for the monetary damages occasioned by such violations. (cf. Judgements No. 358, *Sherif* (1995), and No. 887, *Ludvigsen* (1998)). Invoking staff rule 112.3 would deter staff from deliberately flouting the rules and prevent the Organization from having to pay for the intentional violation of the rules by its officials.

For the foregoing reasons, the Tribunal ordered the Respondent to pay the Applicants each compensation in the amount of 18 months of base salary.

2. JUDGEMENT NO. 923 (29 JULY 1999): MOORE V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[4]

Separation from service—Material misstatement of fact on P. 11 form—Staff regulation 9.1—Issue of a special advisory board to review termination decision—Question of improper motive or prejudice—Effect of additional information requested from staff member for deficient P. 11 form—Issue of proper recruitment process

The Applicant entered the service of the United Nations on 15 January 1995, on a two-year intermediate-term appointment under the 200 Series of the United Nations Staff Rules, as Director, United Nations International Drug Control Programme (UNDCP) country office, Myanmar, at the L-5 level. He was separated from service on 16 June 1995, on the ground that he had misrepresented himself during the recruitment process.

During the recruitment process, on 23 August 1994, the Applicant had submitted a P.11 form, certifying that his statements therein were true, complete and correct to the best of his knowledge and belief, and that he understood that any misrepresentation or any material omission made on the P.11 form or other document requested by the United Nations rendered a staff member of the Organization liable to termination or dismissal.

In the box provided to give reasons for leaving the services of his prior employer, the World Health Organization (WHO), where he had worked from April 1984 to November 1992, he wrote "Develop own consultancy practice". However, a reference check revealed that the Applicant's appointment had not been extended at WHO and that the Applicant had filed an appeal over the matter. The UNDCP offer was withdrawn, but subsequently reinstated after an explanation was given by the Applicant, in a letter dated 27 November 1994.

On 1 February 1995, the International Labour Organization Administrative Tribunal (ILOAT) rendered a judgement in the Applicant's case, finding in favour of WHO, holding, among other things, that even if the more serious charges against the Applicant had been based on hearsay, WHO had acted within its discretion in not renewing the Applicant's contract. ILOAT noted that the Applicant had been criticized in his annual performance reports, had more than once failed to follow the WHO rules, and had made public statements at odds with WHO policy.

On 12 May 1995, the Personnel Officer informed the Applicant that he was separated from service with immediate effect on the ground that the ILOAT judgement had revealed that "the real reason you left WHO was the non-renewal of your fixed-term appointment due to your performance record and WHO's assessment on various grounds that you were unfit for international service". He also stated that "according to the judgement you were aware of these facts at the time of your separation from WHO". He further noted that had the Applicant completed the P.11 form correctly so that the circumstances surrounding his separation from WHO had been known to the United Nations Office at Vienna (UNOV), the Applicant would not have been recruited. Finally, he explained that the Applicant's non-disclosure of those circumstances vitiated his employment contract and that, as a result, a valid contract had never come into being. On 19 May 1995, however, the Applicant was informed by Personnel Service, UNOV, that he would be placed on special leave with full pay with effect from 13 May 1995 until his departure from Myanmar on 16 June 1995. The Applicant appealed his separation.

The Tribunal was satisfied that the Applicant's statement on his P.11 form that he had left WHO to develop his own consultancy practice was disingenuous and grossly misleading and that it constituted a material misstatement of fact. The Tribunal also was satisfied that the Applicant's excuse that the P.11 form had not requested or allowed for the elaboration for leaving the WHO employment was without merit. The Tribunal was further satisfied that the Applicant's November letter of explanation to the Senior Personnel Officer, UNOV, was likewise disingenuous and lacking in candour. It had failed to set out the allegations that had been

made against him and that were the subject matter of his application to ILOAT. Also it had presented a misleading précis as to the recommendations of the Board of Appeal insofar as the Applicant was concerned. For example, he stated that the Board of Appeal had "found unanimously in his favour", which suggested that such finding was on the merits. However, the Board had merely found that the decision not to renew his contract was procedurally flawed, that the reasons which had been given for such decision were unclear and that his unsuitability for international service had not been substantiated. The letter also failed to address the allegations that had been made against him and the content of the Board of Appeal's report. The Tribunal fully appreciated that the Applicant had in the course of that letter expressed a reluctance to go into the facts of his dispute with WHO, on the grounds of confidentiality. However, the Tribunal was nonetheless satisfied that by the letter of 27 November 1994, the Applicant had presented his situation in a disingenuous manner and that by this letter he had not effectively "put to right" the grossly misleading picture which had arisen by virtue of the manner in which he had completed the original personal history in the P.11 form.

The Tribunal recalled staff regulation 9.1, which provided that the Secretary-General might terminate a fixed-term appointment before the normal expiration for various reasons, including "if facts anterior to the appointment of the staff member and relevant to his or her suitability come to light that, if they had been known at the time of his or her appointment, should, under the standards established in the Charter, have precluded his or her appointment". The JAB regretted that the procedures foreseen for termination under staff regulation 9.1 had not been applied in the present case since "they would have ensured a more proper and expedient decision-making process and might well have proved more cost-effective than the approach chosen, by avoiding the costs of a lengthy appeal procedure". It further noted that some of the requirements provided for in cases of termination under the Staff Rules and Regulations and the letter of appointment had de facto been met, such as one month's written notice, fulfilled by placing the Applicant on leave with full pay for one month from his termination until his departure from Myanmar, and the payment of a repatriation grant and travel costs.

The Applicant argued that the Respondent, in not invoking staff regulation 9.1 and the convening of a special advisory board, or summarily dismissing him with the possibility of a disciplinary hearing, and instead contending that there had never been a valid contract because of the material omission and representation, had denied him any chance to defend himself. With regard to the claim that the Respondent had not invoked staff regulation 9.1, the Tribunal was satisfied that the JAB was correct in its finding that, while the Respondent had not expressly invoked that regulation, he had de facto applied it to the Applicant's situation.

As to the Applicant's contention that no termination under staff regulation 9.1 should have taken place until the matter had been considered and reported on by a special advisory board, the Tribunal was satisfied that while that particular provision was applicable in relation to permanent appointments, it had no mandatory application in relation to fixed-term appointments (cf. Judgement No. 637, *Chhatwal* (1994)). The Applicant, having been the holder of a fixed-term appointment, was not entitled to have a special advisory board convened to review the termination of his appointment. Accordingly, the Applicant's rights to due process had not been violated.

Regarding the Applicant's argument that the decision had been tainted by some improper motive or prejudice, the Tribunal was satisfied that the onus of proving

such allegations by means, of cogent evidence had not been discharged. The Respondent was entitled to accept the ILOAT judgement and, in the light of its findings of fact, to have concluded that new facts had come to light which had they been known previously would have precluded the Applicant's appointment. The Tribunal would not review the findings of ILOAT or investigate or adjudicate upon the charges of misconduct or breaches of the Staff-Regulations which were alleged against the Applicant in connection with the performance by him of his duties at WHO.

The Tribunal was satisfied that, while there was a material omission or misrepresentation contained in the Applicant's answers on the P.11 form, it had to be considered in the light of the explanation the Applicant had furnished in his letter of 17 November 1994. In the view of the Tribunal, had the letter made good the deficiency in the P.11 form, the Respondent would not have been entitled to terminate the Applicant's services on the ground that the form itself was inadequate or misleading.

The Tribunal also was satisfied that the additional information provided by the letter of 27 November 1994 was not to the same degree deceptive or disingenuous as the form, and also noted that in that letter the Applicant had agreed to provide such additional information as might be sought from him in that regard. The Tribunal noted that the Respondent had not requested additional information and was further satisfied that the Respondent was remiss in appointing the Applicant without awaiting the judgement of ILOAT, which the Respondent knew was to be rendered soon, or making such further inquiries as prudence would have dictated. The Tribunal observed that the additional information contained in the ILOAT judgement contained sufficient "new facts" as would have precluded the Applicant's appointment.

The Tribunal further observed that the Respondent's conduct had induced the Applicant to believe that with the letter of explanation the Applicant had furnished full and complete information, that the original deficit was now rectified and that the question as to the circumstances under which he had left WHO was closed. The Applicant had been induced to take up his fixed-term appointment and to forgo such other business opportunities as independent consultant or otherwise as might have been available to him.

For the foregoing reasons, the Tribunal ordered the Respondent to pay to the Applicant one month's net base salary already agreed upon, and an additional amount equivalent to two months' net base salary.

3. JUDGEMENT NO. 930 (15 NOVEMBER 1999): KHAWAJA V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[5]

Non-conversion of fixed-term appointment—Staff rule 104.12 (full and fair consideration for permanent appointment)—Staff rule 109.7 (no expectation of renewal or conversion of fixed-term appointment)—Issue of secondment from government service—Staff rule 104.12 (b) (iii) (all interests of Organization should be taken into account)

The Applicant entered the service of the United Nations Children's Fund (UNICEF) on 1 November 1990 on a two-year fixed-term appointment as a Planning and Evaluation Officer, at the NO-C level, in Islamabad and, as requested by UNICEF, after he had submitted a "Letter of Secondment" from the Academy of Education Planning and Management (AEPAM), Ministry of Education of the Government of Pakistan, granting him "two years' leave extraordinary" to join UNICEF.

On 15 September 1992, UNICEF approved a two-year extension of his appointment, and AEPAM agreed to the extension.

On 3 October 1994, the UNICEF Senior Programme Planning Officer recommended that the Applicant be granted a permanent appointment, but AEPAM informed the Applicant and UNICEF that the Applicant should report back to work at AEPAM on 1 November 1994. The Applicant signed a letter of appointment for the period 1 November through 30 November 1994.

On 16 November 1994, the UNICEF Appointment and Placement Committee (APC) in Islamabad recommended that the Applicant be released from service with UNICEF so that he could "obey ... the request from the Pakistani Government", and the recommendation was approved.

Subsequently, on 6 December 1994, the Director General, AEPAM, wrote to the Applicant informing him that the Minister of Education would have no objection to giving him leave for a period of three years. However, after the Applicant had informed UNICEF of this development, the UNICEF representative told the Applicant that the non-renewal of his appointment had been accepted and encouraged him to return to the service of AEPAM. The Applicant appealed, claiming that he was entitled to conversion to a permanent appointment based on his good performance over four years and the recommendation of his supervisor, and that his contract should have been renewed as he was not on secondment from his Government.

In consideration of the matter, the Tribunal noted that staff rule 104.12, on which the Applicant appeared to have relied, did not give him the right to the "full and careful consideration" for his request to be considered for a permanent appointment before five years of service had elapsed. And since the recommendation that the Applicant should receive a permanent appointment was made prior to his having served five years, the APC, in 1994, had only to consider whether or not the Applicant should be appointed to a new fixed-term contract, and had decided against that possibility. The Tribunal further recalled that staff rule 109.7 stated that a fixed-term appointment shall expire automatically, and without prior notice, on the expiration date.

However, as the Tribunal noted, even though the APC did not have an obligation to consider the Applicant's appointment for conversion, there was clear indication that it had in fact given "full and fair consideration" to the continuation of the Applicant's service. The APC had examined extensive documentation submitted and held discussions on the matter of the Applicant's situation, after which it had agreed that the Applicant should return to his former post with the Government of Pakistan. In the view of the Tribunal, this implied that the APC had not supported the recommendation that he receive a permanent appointment. This recommendation by the APC, as pointed out by the Tribunal, need not to have been based on a formal contract of secondment, irrespective of how close to a secondment the arrangement between the three concerned parties was. The Tribunal was satisfied that the APC had simply wanted to respect the wishes of the Government of Pakistan, in view of the understanding reached by the three parties.

The Tribunal recalled that staff rule 104.12(*b*)(iii) stated that "a staff member ... will be given every reasonable consideration for a permanent appointment, taking into account all the interests of the Organization" and, naturally, prominent among those interests would be that of respecting the understanding established with the Government of Pakistan to the effect that the Applicant would return to his service of that Government, where he was a Director in AEPAM. Again, the issue was

not whether the communications exchanged and the understanding reached among UNICEF, AEPAM and the Applicant constituted a formal contract of secondment. And in the opinion of the Tribunal, the record indicated that there was a clear understanding among all the parties involved that the Applicant would return to service with the Government of Pakistan in AEPAM. The Tribunal concluded that the Applicant had been treated fairly and rejected his application in its entirety.

4. JUDGEMENT NO. 936 (15 NOVEMBER 1999): SALAMA V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[6]

Lateral transfer and non-promotion to D-1—Secretary-General has power to appoint staff members—Justified expectations raised by the Organization must be fulfilled—Cardinal principle of good faith towards staff member—Article 9 of Tribunal's statute—Staff rule 112.3—Clarification of Tribunal's jurisdiction in promotion cases

The Applicant entered the service of the United Nations on 7 September 1992 on a two-year fixed-term contract as Chief Medical Officer, at the P-5, step VI level, in the Economic Commission for Africa (ECA), Addis Ababa. His appointment was extended several times. In October 1995, an internal vacancy announcement was issued for the D-1 post of Deputy Director of the Medical Services Division at United Nations Headquarters in New York, and the Applicant applied for the post.

On 22 December 1995, the Assistant Secretary-General for Human Resources Management informed the Chairperson of the Appointments and Promotion Board (APB) that the Secretary-General had decided that the Applicant was "the candidate most suitable to serve on the ... post at his current level ... [and that] the vacancy announcement was cancelled". The D-1 post had been loaned to the Economic Commission for Latin America and the Caribbean (ECLAC).

On 29 March 1996, the Medical Director wrote to the Assistant Secretary-General for Human Resources Management, recommending that another staff member of the Medical Services Division, at the P-5 level, "be designated Acting Deputy Director of the Medical Services Division, effective 1 April 1996".

Subsequently, in November 1996, the Office of Human Resources Management appointed the Acting Deputy Medical Director as one of two Deputy Medical Directors, the other Deputy Medical Director being the Applicant. After the Medical Director expressed surprise over this turn of events, she was informed by the Assistant Secretary-General that the decision had been made out of his "high regard for the other Deputy Medical Director and your own respect for his seniority and competence". She was further informed that when the loaned D-1 post returned to Medical Services, an open competitive process for the appointment would be appropriate.

Also, in November 1996, the Applicant signed his letter of appointment, effective 7 September 1996, designating him as "Deputy Medical Director" at the P-5, step IX level, for a three-year fixed-term appointment.

In June 1997, the Applicant wrote to the Secretary-General, requesting that his functional title and level be reviewed and, subsequently, the Applicant appealed to the Administrative Tribunal contending that he had a valid appointment to the D-1 post of Deputy Medical Director and that the loaning of the D-1 post to ECLAC and the issuance of a new vacancy announcement for the post, once it had been returned to the Medical Services Division, violated the Applicant's conditions of appointment.

In consideration of the case, the Tribunal recalled that, according to Article 101 of the Charter of the United Nations, the Secretary-General had the power to appoint staff members of the Secretariat. That power had been confirmed by staff regulation 4.1. Undoubtedly, such powers were regulated so that they were exercised with due guarantees to the rights of staff members for the efficient administration of the Organization, as expressed in staff regulation 4.2. Under staff rule 104.14(*a*)(i), the Secretary-General shall establish an Appointments and Promotion Board "to give advice on the appointment, promotion and review of staff" Thus, the APB was an advisory body and its recommendations might or might not be followed by the Secretary-General. In the present case, the Secretary-General had conveyed to the APB that he had already made up his mind and he did not need its advice. He had decided to appoint the Applicant to the post of Deputy Medical Director at the P-5 level.

The Tribunal noted that the first communication the Applicant had received from the Administration was a letter from the Assistant Secretary-General for Human Resources Management, dated 23 January 1996, informing him that the Secretary-General had approved his selection for the post of Deputy Director, not mentioning that he was being appointed at the P-5 level against a D-1 post—which had been loaned outside the Medical Services—and that the vacancy announcement had been cancelled. It was not until 1 June 1996 that the Assistant Secretary-General informed the Applicant of the actual situation. As the Tribunal noted, at that time it was definitively too late to protest or reject it: he had already arranged for the shipment of his household effects, sold his cars, taken his children out of school and made all other necessary arrangements for his relocation to New York.

Clearly, the June 1996 letter had led the Applicant to arrive at certain conclusions: namely, that (*a*) the D-1 post had been temporarily loaned outside the Division, (*b*) as soon as the D-1 post was returned, he would be placed against it and eventually promoted to that level, and (*c*) he would perform the functions of Deputy Medical Director, regardless. In the Tribunal's view, it must have appeared to the Applicant that the fact that the D-1 post had to be loaned out was the only possible reason for his not being promoted at that moment and for his consequent and temporary lateral transfer. The Applicant had been posted in Addis Ababa since 7 September 1992, as Chief Medical Officer of ECA, at the P-5 level, and had ample seniority for promotion to D-1 and, in the opinion of the Tribunal, the Applicant therefore had no reason to even suspect that his appointment as Deputy Medical Director was not at the D-1 level, let alone to have thought that he was being transferred from Addis Ababa merely to fulfill a temporary need of the Division.

However, as observed by the Tribunal, none of these justified expectations of the Applicant had been fulfilled, and it was the duty of the Organization to satisfy the Applicant's expectations, as they had been raised by the Organization itself. Even though the Applicant had signed the letter of appointment whereby he accepted his appointment at the P-5 level, it was obvious that he had had no other choice, having already relocated to New York with his family. The Applicant was faced with a fait accompli and could only hope that his expectations would be met, bearing in mind that a cardinal principle of the Organization was that it should act in good faith towards its staff members.

The Tribunal noted the unacceptable hostile conduct of the Medical Director towards the Applicant upon his arrival and the fact that there did not appear to be an explanation for the conduct of the Assistant Secretary-General for Human Resources Management, who was not only directly responsible for the ominous omissions related to the appointment of the Applicant, but had condoned the humili-

ating treatment of the Applicant by the Medical Director. In addition, the Assistant Secretary-General had decided to designate two Deputy Medical Directors, within the Medical Services Division—one being the Applicant and the other the Acting Deputy Director—thus personally contributing to the general hierarchical disorder reigning in the Division.

The Tribunal also noted that, on 2 December 1996, the Assistant Secretary-General for Management and Coordination had issued a memorandum stating that when the loaned D-1 post was returned to the Medical Service, an open competitive process for the appointment would be appropriate. The Joint Appeals Board (JAB) subsequently had recommended that no vacancy announcement be issued for the post of Deputy Medical Director until the subject appeal had been decided upon, but the recommendation was rejected by the Under-Secretary-General for Management. The Tribunal further noted that, in August 1998, when the D-1 post was again advertised, the post had been given to another Senior Medical Director and not to the Applicant.

For the reasons stated above, the Tribunal found, in accordance with article 9 of its statute, that his case was exceptional. In particular: (*a*) the glaring omission by the Assistant Secretary-General for Human Resources Management to fully inform the Applicant of a fundamental condition of his appointment was at best an act of unacceptable negligence and raised the possibility that it was deliberate; (*b*) the humiliating treatment of the Applicant by the Medical Director had continued unchecked for several years; (*c*) the Respondent had failed to take steps to remedy the injustices done to the Applicant; (*d*) the Respondent's refusal to suspend action pending the outcome of the consideration of the case on the merits by the JAB precluded the possibility of correcting the situation on the part of the Respondent; (*e*) his hopes for further upward career movement had been severely diminished after the most recent filing of the D-1 post in a competition which should not even had taken place; and, finally, (*f*) the Applicant had suffered the salary difference between the P-5 and the D-1 levels (allowing credit for the US$15,000 which had been paid to him), which continued even today, and would clearly have implications for his future pension payments. As a result, the Applicant had suffered considerable financial losses, as well as immense moral injury.

In view of the above, the Tribunal held that the Applicant was entitled to compensation which, in the light of the aforementioned extraordinary circumstances the Tribunal assessed at the amount of three years of the Applicant's net base salary at the rate in effect of the date of the judgement.

In addition, the Tribunal drew the attention of the Secretary-General to staff rule 112.3, which provided:

"*Financial responsibility*

> "Any staff member may be required to reimburse the United Nations either partially or in full for any financial loss suffered by the United Nations as a result of the staff member's negligence or of his or her having violated any regulation, rule or administrative instruction."

Thus, the Tribunal noted that the Secretary-General might consider that the above rule might be invoked against such officials as he might find had deliberately violated the Applicant's rights by undermining his position and humiliating him.

Finally, the Tribunal offered a clarification regarding its jurisdiction: At its 1999 summer session, it decided to adjourn the case to the autumn session, in order

to hold oral proceedings. In the letter informing the parties of its decision, the Tribunal also urged the Respondent "to consider suspending the promotion process in order to preserve the right of all staff concerned, pending its judgement in the case". At the time, the Tribunal was unaware that the selection process for the D-1 post had already been completed.

At the oral hearing, the Respondent presented a copy of a letter from the Under-Secretary-General for Management to the Under-Secretary-General for Legal Affairs, expressing concern about the Tribunal's request "as it indicates the Tribunal's intention to assume a role that is the clear and exclusive prerogative of the Secretary-General", and emphasizing "the unacceptability of the Tribunal deciding on actual promotions".

The Tribunal explained that its intentions and expectations had evidently been misunderstood. The Tribunal was and at all times had been fully aware of the limitations on its jurisdiction. The Tribunal's letter was prompted by its belief that the Secretary-General would be interested in knowing the Tribunal's findings as to the merits of the case and, accordingly, might delay action rather than alter the status quo, making an order of specific performance impossible. As the post had been filled, the Tribunal was confronted with a fait accompli, making it futile and improper to issue such an order.

The Tribunal ordered the Respondent to pay the Applicant compensation of three years net base salary and recommended that the Respondent make every effort to find a D-1 post for the Applicant commensurate with his qualifications and experience.

5. JUDGEMENT NO. 939 (19 NOVEMBER 1999): SHAHROUR V. THE COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST[7]

Termination under Area staff regulation 9.1 and Area staff rule 109.1—Discretion in deciding to terminate in the interests of the Organization is not unlimited—Treatment of decisions imposing disciplinary measures—Question of evidence supporting a misconduct charge—Question of prejudice—Issue of disciplinary measure being disproportionate to misconduct

The Applicant entered the service of UNRWA on 2 July 1990 on a temporary indefinite appointment as a Disability Programme Officer, in the Relief and Social Services Office, UNRWA, Syrian Arab Republic. As a condition of his appointment, the Applicant had accepted in writing that he would give up his private clinic for the complete duration of his employment with the Agency.

On 9 October 1994, the Director of UNRWA Affairs convened a Board of Inquiry to investigate several allegations of improper conduct on the part of the Applicant, regarding his involvement in receipt from a non-governmental organization of money that might have been donated for the benefit of the Agency; that he had made statements to the press possibly in violation of Area staff regulations and rules; and that he still continued his medical practice in violation of his written statement to the contrary. Based on the conclusions of the Board of Inquiry, the Applicant was terminated under Area staff regulation 9.1 and Area staff rule 109.1, effective 24 November 1994. The Applicant appealed.

As the Tribunal recalled, Area staff regulation 9.1 stated that "the Commissioner-General may at any time terminate the appointment of any staff member if,

in his opinion, such action would be in the interest of the Agency". The Tribunal further recalled that there could be no doubt that under Area staff regulation 9.1, the Administration exercised a discretionary power (cf. Judgement No. 117, *van der Valk* (1998)). However, the discretion of the Agency to terminate employment in its interest was not unlimited or unfettered. Its exercise was subject to review by the Tribunal and could be declared invalid if it had been abused. The abuse might arise not only from improper motive, prejudice or improper purpose, but also from any substantive irregularity such as error of fact or mistaken conclusions, or procedural irregularity.

Moreover, the Administration clearly could not terminate a staff member's employment in the interests of the Agency without having reasons for doing so and without stating those reasons. In the view of the Tribunal, where the grounds for the dismissal were patently misconduct, as in the present case, and it was confronted with a case of imposition of disciplinary measures, the general principles of law pertaining to disciplinary measures became applicable, together with any provisions of written law.

Beginning with Judgement No. 18, *Crawford*, and No. 29, *Gordon* (1953), the Tribunal had treated decisions to impose disciplinary measures somewhat differently than other discretionary decisions because, while they were similar in some respects to decisions such as those terminating employment for unsatisfactory service, they also involved the exercise of a quasi-judicial power to impose sanctions for offences rather than the exercise of pure executive discretion (see e.g., most recently, Judgement No. 890, *Augustine* (1998)).

In that connection, the Tribunal generally explained its jurisprudence in disciplinary cases as follows: the Tribunal examined (*a*) whether the established facts on which the disciplinary measures were based had been established; (*b*) whether the established facts legally amounted to misconduct or serious misconduct; (*c*) whether there had been substantive irregularity (e.g., omission of facts or consideration of irrelevant facts); (*d*) whether there had been any procedural irregularity; (*e*) whether there was an improper motive or abuse of purpose; (*f*) whether the sanction was within the power of the Respondent; (*g*) whether the sanction imposed was disproportionate to the offence; and, (*h*) as in the case of discretionary powers in general, whether there had been arbitrariness. (Cf. Judgement No. 897, *Jhuthi* (1998).)

The Tribunal considered that the present case had raised several issues: (*a*) whether the evidence warranted the finding of misconduct upon which the decision to terminate employment had been based; (*b*) whether there was an improper motive or prejudice on the part of the Administration; and (*c*) whether the sanction of dismissal was disproportionate to the misconduct.

Regarding the first issue, the Tribunal considered that there were three grounds on which the Administration based its finding that misconduct had been proved: (*a*) the Applicant had engaged, without permission, in a private medical practice and thus had violated the Staff Regulations; (*b*) the Applicant had violated the Staff Regulations and Staff Rules by arranging without prior approval a written interview which had resulted in a publication in a local magazine, ostensibly describing voluntary activities of a local charitable organization in the Syrian Arab Republic of which he was a member but focusing to a great extent on services rendered by UNRWA without proper acknowledgement; and (*c*) the Applicant had been involved in receiving money from a NGO, which was questionable conduct and a violation of the Staff Regulations and Rules although there had been no financial loss to the Agency.

Concerning the above grounds, the Tribunal found that the conclusions upon which the decision to terminate the Applicant's employment had been based were supported by the evidence on record. Not only was there ample evidence that the Applicant was maintaining without permission, and contrary to his own written undertaking in that regard, an outside activity which was prohibited by the Staff Regulations, but also the Applicant had not denied his knowledge of wrongdoing. The claim that the Applicant's superior had been aware of the Applicant's misconduct for some time had no relevance either to the finding that he had engaged in the conduct or to the illegality of such conduct.

The Tribunal also concluded that there was sufficient evidence in the record to establish the other two grounds on which the termination decision had been based. The evidence established that the Applicant had given an unauthorized interview and that he had dealt with a NGO improperly. Both actions constituted conduct not in keeping with the status of a staff member of the Agency and violated the Staff Regulations and Rules.

The Applicant also alleged prejudice against him on the part of the Administration, based on the fact that his superior had known for some time that he was running a private clinic without permission and that other officers in UNRWA were also carrying on outside activities of a like nature. In the Tribunal's view, neither fact, if true, would conclusively establish that there was prejudice against the Applicant.

The Tribunal found that the sanction of termination of employment was not disproportionate in the light of the misconduct of which the Applicant was found guilty. As stated above, the Applicant's violation of the law by engaging in unauthorized outside activity was serious enough to warrant dismissal. The other two grounds for the sanction only served to compound the seriousness of the Applicant's offences, in the view of the Tribunal.

For the foregoing reasons, the Tribunal dismissed the application in its entirety.

6. JUDGEMENT NO. 941 (19 NOVEMBER 1999): KIWANUKA V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[8]

Termination pursuant to staff rule 110.2—Broad power of discretion regarding disciplinary matters—Judgement No. 479, Caine (1990)—Disciplinary decisions involve exercise of quasi-judicial power—Tribunal's review of such decisions—Burden of proof on Respondent to produce evidence of misconduct—Role of Joint Disciplinary Committee—Issue of suspension from duty without pay

The Applicant entered the service of the United Nations on 6 August 1993 in the Field Administration and Logistics Division, Department of Peacekeeping Operations, on a one-year fixed-term appointment at the P-3 level, as Deputy Chief Finance Officer, United Nations Peacekeeping Force in Cyprus (UNFICYP). His functional title was changed to Chief Finance Officer on 6 February 1994. He received further extensions of his fixed-term appointment, through 31 May 1997. On 1 July 1996, he was suspended without pay pending the resolution of charges of misconduct which had been brought against him. In April 1997, this was converted to suspension with pay, retroactive to 1 December 1996. He was summarily dismissed with effect from 19 July 1997.

On 2 July 1996, the Force Catering Officer (FCO) had submitted a statement alleging a fraudulent scheme involving the Applicant's certifying false invoices for

rations for the duty station. The FCO also submitted to the Force Provost Marshal of UNFICYP a taped conversation of the Applicant and the former FCO explaining the scheme and their attempted recruitment of him (the current FCO). An investigation was carried out, and on 4 December 1996 the Assistant Secretary-General for Human Resources Management informed the Applicant that he had decided to refer the matter to a Joint Disciplinary Committee (JDC) for advice. The JDC submitted its report on 22 May 1997, concluding that there was no credible evidence presented that the Applicant had participated in or received any benefits from acts of misconduct against the United Nations, and made a recommendation accordingly. However, based on additional information made available after the JDC had completed its work, including the forensic analysis of the tape submitted by the FCO, the Under-Secretary-General for Management informed the Applicant that the Secretary-General did not share the Committee's conclusions and recommendations, and that he had decided to summarily dismiss the Applicant pursuant to staff regulation 10.2 and staff rule 110.3(*a*)(viii), effective 19 July 1997.

The Applicant appealed, contending that the preliminary investigation by the Office of Internal Oversight Services had violated his rights to due process and fair treatment; his suspension without pay for over 10 months was improper; the disciplinary proceedings had been tainted by delay, improper procedure and denial of due process; and the decision to reject the findings of the JDC in order to summarily dismiss him was improper and ill-founded.

In consideration of the case, the Tribunal recalled that the Secretary-General had a broad power of discretion, and its exercise could only be questioned if due process had not been followed or if it had been tainted by prejudice or bias or other extraneous factors. In Judgement No. 479, *Caine* (1990), the Tribunal clarified and expanded this scrutiny: the Tribunal would intervene when the administrative action was "vitiated by any prejudicial or extraneous factors, by significant procedural irregularity, or by a significant mistake of fact".

Furthermore, the Tribunal recognized that, unlike other discretionary powers, such as transferring and terminating services, the Secretary-General's power of discretion was also a special exercise of quasi-judicial power. Therefore, the Administration's interest in maintaining high standards of conduct and thus protecting itself must be reconciled with the interest of staff in being assured that they were not penalized unfairly or arbitrarily.

In that regard, it was the practice of the Tribunal to determine whether the material findings of fact could be supported by the evidence without substituting its own judgement for that of the Administration (cf. Judgements No. 490, *Liu* (1990), and No. 616, *Sirakyan* (1993)); it made a judgement on whether the findings of fact were reasonably justifiable and supported by the evidence. The Tribunal also must determine whether the established facts legally amounted to misconduct or serious misconduct. In that connection, the Tribunal recalled that in Judgement No. 927, *Abdul Halim et al.* (1999), with regard to one applicant, the Tribunal had held that an error of judgement on the part of the applicant resulting in loss of confidence on the part of the Commissioner-General of UNRWA could not be characterized as misconduct.

In the present case, the Tribunal observed that, contrary to the Joint Disciplinary Committee's recommendations to exonerate the Applicant from all charges made against him, the Respondent had determined that the Applicant was guilty of the charges and had summarily dismissed him. Central to the Respondent's decision

to reject the Committee's findings was the probative weight of the tape recording evidence that implicated the Applicant. The Committee's belief that tape recordings could be easily edited, dubbed and/or altered had led to its conclusion that the tape recording might have been tampered with.

The Tribunal had held that the burden of proof rested with the Respondent to produce evidence that raised a reasonable inference that misconduct had occurred, and it was then up to the Applicant to provide a proper explanation or evidence to rebut the prima facie case. In that regard, the Tribunal found that the Applicant's explanation that the tape recording lacked credibility or authenticity and had been tampered with was merely an unsubstantiated allegation that contradicted the evidence of experts who had examined the tape.

The Tribunal emphasized further that the recommendation and conclusions of the JDC were advisory and need not be accepted by the Administration. The Respondent had the discretion to reach a different conclusion after consideration of all the facts and circumstances of the case. (cf. Judgements No. 494, *Rezene* (1990); No. 529, *Dey* (1991); No. 551, *Mohapi* (1992); No. 582, *Neuman* (1992); No. 641, *Farid* (1994); and No. 673, *Hossain* (1994)).

The Applicant also had claimed that his suspension without pay for over 10 months was unauthorized, improperly motivated and exceeded the Respondent's discretionary authority. In that connection, the Tribunal recalled that the Applicant had been suspended without pay in July 1996, pending the resolution of charges of misconduct, and on 7 April 1997 the Applicant had been informed that his suspension would be converted to suspension with pay, retroactive to 1 December 1996. The Applicant had been summarily dismissed with effect from 19 July 1997, which meant that for almost five months he was in effect suspended without pay.

The Tribunal recalled staff rule 110.2 and administration instruction ST/AI/371, which provided that a staff member should be suspended from duty during an investigation and pending completion of disciplinary proceedings with pay, unless there were "exceptional circumstances" calling for suspension without pay. The Respondent had claimed that the allegations were sufficiently serious, and the evidence substantial enough, to constitute "exceptional circumstances" in the light of the Applicant's position as Chief Finance Officer of UNFICYP. Moreover, the Respondent expected that the investigation and the subsequent JDC proceeding would have been completed sooner than they were.

However, the Tribunal held that the Respondent's decision to suspend the Applicant's salary for an extended period of time was unjustified. The qualifying factors surrounding the investigation made it clear that there were no circumstances which could be categorized as exceptional, and the Respondent had failed to take measures to resolve the matter expeditiously. The Tribunal therefore ordered the Respondent to pay the Applicant an amount equal to six months of his net base salary as compensation for the denial of due process, and rejected all other pleas.

7. JUDGEMENT NO. 942 (24 NOVEMBER 1999): MERANI V. THE UNITED NATIONS JOINT STAFF PENSION BOARD[9]

Non-application of the cost-of-living differential factor in calculation of the initial local-currency deferred retirement benefit—Provisions (of pension adjustment system) should be read together and not in isolation—Exceptions should be narrowly construed—"Natural and ordinary" meaning of words—Use of prepara-

tory work and circumstances for interpretation purposes—Vienna Convention on the Law of Treaties—Effect of practice on the interpretation process—Tribunal cannot legislate—Question of financial implications for the Organization

The Applicant, born on 31 December 1940, was employed by the International Maritime Organization (IMO) in 1964, and transferred to the United Nations on 8 January 1973. He separated from service on 26 August 1993. As a participant in the United Nations Joint Staff Pension Fund, the Applicant, who was residing in Switzerland, requested, on 30 October 1995, that he commence receiving payment of his deferred retirement benefit in the local currency as from 1 January 1996, i.e., after reaching age 55.

Subsequently, the Applicant appealed a decision by the Standing Committee of the United Nations Joint Staff Pension Board that the cost-of-living differential (COLD) factor did not apply in the calculation of the initial local-currency amount of the Applicant's deferred retirement benefit. The COLD factor was applied to those who did not defer their retirement benefit.

In considering the matter, the Tribunal understood its task as interpreting the provisions of the pension adjustment system, and recalled its rule of interpretation in Judgement No. 656, *Kremer and Gourdon*, (1994), that it must construe the relevant paragraphs in relation to the pension adjustment system as a whole.

In that regard, the Tribunal noted that the relevant provisions were paragraphs 1 to 6, 17 and 27 of the 1992 edition of the pension adjustment system. Paragraph 1 stated what the Tribunal referred to as a general principle, in that pension adjustment was intended to ensure that the pension benefit never fell below the "real" value of the United States dollar amount and to preserve its purchasing power as initially established in the currency of the recipient's country of residence. Paragraph 4 contained another guiding principle, as well as the introductory phrase that gave rise to conflicting interpretations: "*Except as otherwise* noted, the pension adjustment system applies to, deferred retirement" (emphasis added). The Respondent had argued that the rules for deferred benefits were "otherwise noted" in paragraph 27, which was a specialized provision that governed more general provisions under the rule *generalia specialibus non derogant*. The Tribunal noted that, like all exceptions, the quoted language should be narrowly construed. Moreover, the Tribunal found that paragraph 27 addressed very limited aspects of deferred benefits, specifically dates for certain calculations, without changing the basic benefits.

The Tribunal further noted that the words "adjusted dollar amount" used in the pension calculations, in paragraph 27, were undefined, and that in interpreting the text their "natural and ordinary meaning" should be employed. (Cf. Judgement No. 852, *Balogun*, (1977).) That followed general international practice, as expressed in the Vienna Convention on the Law of Treaties (article 31, paras. 1 and 4).

The Tribunal, in its interpretation of the pension adjustment system, also was of the view that another interpretation was more reasonable, and further pointed to preparatory work and the circumstances surrounding the conclusion of the text. As the Tribunal recalled, article 32 of the Vienna Convention provided for recourse to supplementary means of interpretation to confirm the ordinary meaning of the text or to determine the meaning when the usual route left the meaning "ambiguous or obscure", or led to a result which is "manifestly absurd or unreasonable". While the pension adjustment system was not a treaty, the Tribunal recognized that the Vienna Convention on the Law of Treaties was a statement of generally accepted rules for interpreting international documents. In the present case, the Tribunal was of the

opinion that there was no clear and unequivocal indication in the record before it, including the preparatory work and the circumstances surrounding the 1983 amendments to the pension adjustment system, that the General Assembly had intended to change the pension adjustment system to discriminate against those who deferred their benefits, had a reason for treating them differently or was clearly presented with the option of doing so.

The Tribunal, noting the International Court of Justice advisory opinion of 23 October 1956,[10] also considered the use of practice in its interpretation task, stating that it was customary in international statutory interpretation to do so. Furthermore, article 31, paragraph 3 (*b*) of the Vienna Convention on the Law of Treaties provided that in addition to the text any subsequent practice in the application of the treaty which established the agreement of the parties regarding its interpretation should be taken into account. However, in the present case, the Tribunal found that the practice of the Respondent in excluding the COLD factor was not representative of the intention of the General Assembly. Practice should be followed only if it was not contrary to an international document, and here the practice of the Respondent was contrary to what the Tribunal found to be the meaning and scheme of the pension adjustment system.

The Respondent had argued that the conflict in dates was proof that paragraph 27 excluded the COLD factor and that any other interpretation would be impossible to implement because of the conflicting dates. The Tribunal recognized this conflict but did not find it a ground for denying benefits that the rules provided. In this case the manner of the implementation of the pension adjustment system, given the conflicting dates, was not within the province of the Tribunal, which had the power to interpret but not to legislate. In that connection, the Tribunal cited previous judgements explaining the boundaries of its responsibilities with regard to the complexities of the pension adjustment system (cf. Judgements No. 546, *Christy et al.* (1991); No. 514, *Maneck* (1991); and No. 589, *Shousa* (1993)).

As to the possible negative financial impact of the Tribunal's interpretation of the pension adjustment system, the Tribunal noted that such a consideration could not affect its decision regarding the correct interpretation of the system. However, with regard to existing beneficiaries under the deferred benefit system, the Tribunal believed that the statute of limitations had run on similar applications.

The Tribunal decided that the COLD factor was applicable to the deferred retirement benefits of the Applicant, retroactive to the date of first payment, and rejected all other claims.

B. Decisions of the International Labour Organization Administrative Tribunal[11]

1. JUDGEMENT NO. 1787 (28 JANUARY 1999): IN RE GRAMEGNA V. INTERNATIONAL ORGANIZATION FOR MIGRATION[12]

Abolition of post and non-appointment to new post—Duty of the Organization to find alternative post—Issue of Organization giving reasons for adverse decision affecting staff member—Selection criteria must be objective and clear—Limits to exercise of discretion in selection decision

The complainant, of Chilean nationality, had been on the staff of the International Organization for Migration (IOM) since 1983, initially as chief of division at grade P.5 in the Department of Latin American Programmes, and later given responsibilities at grades P.4 and P.5. At the material time, he was serving at headquarters in Geneva as chief of division in the Department of Planning, Research and Evaluation at grade P.5.

The organization carried out a comprehensive programme of reform in 1997 and replaced the complainant's department with the new Department of Programme and Fund-raising Support. It revamped existing posts or created new posts in the Professional category and invited staff to apply. The complainant applied for the P.5 post of chief of the Programme of Support Division, as well as an additional five posts, but was not successful. Subsequently, by a letter of 16 January 1998, the Director-General informed him that he was to be chief of mission in Bangkok.

The complainant appealed the decision to select another staff member for the post of chief of the Programme of the Support Division, and the Joint Advisory Review Board found in his favour; however, the Director-General, on 12 March 1998, rejected his appeal. He appealed that decision to the Tribunal, claiming that (*a*) the organization had made mistakes of law and of fact in choosing a candidate who did not have the qualifications listed in the notice of vacancy; (*b*) the organization had acted in breach of its duty to find him another assignment after doing away with his post, and had not even told him of its abolition; and (*c*) the organization had failed to state the reasons for the impugned decision.

In consideration of the case, the Tribunal rejected the complainant's second plea, explaining that although the organization had a duty to make efforts to place him suitably, he had no right to preference for any particular post, the less so since other staff members were in the same situation as he, i.e., their posts had been abolished.

The Tribunal also rejected his third plea that the organization had failed to explain the impugned decision. As the Tribunal observed, when an administrative authority rendered a decision which was adverse to a staff member, it was obliged to reveal the reasons for it, but when a choice was made between candidates for selection to a post the reasons for the choice need not be notified at the same time as the decision.

As regards to the complainant's appeal concerning the other staff member selected for the post of chief of the Programme of Support Division, the Tribunal recalled that the relevant vacancy notice had listed as "desirable" the qualifications of an advanced university degree, preferably in political or social science or economics; at least 15 years' experience in the field of migration, assistance to refugees, project development and technical cooperation programmes; and "good knowledge" of English and French "and/or" Spanish, a "good knowledge of another European language [being] a distinct advantage". The Tribunal noted that the Joint Advisory Review Board considered that the complainant, having a doctorate in sociology, and besides Spanish, his mother tongue, a sure grasp of English and French and a knowledge of some Italian, as well as years of experience in the stated areas, should have gained the post. The Tribunal also noted that the complainant had pointed out that the individual who had been selected for the post only had a first-level Bachelor of Arts degree, and that although his mother tongue was English, he had but slight knowledge of French and no knowledge of Spanish or any other European language.

The defendant contended that the notice had described the qualifications not as "essential" or the "minimum" but merely as "desirable", an adjective intended to allow wider discretion in gauging attainments and experience.

However, the Tribunal, agreeing with the Review Board, stated that the criteria for assessing the fitness of candidates for a post must be objective and clear. And citing Judgement No. 1595 (in re *De Riemaeker No. 3*), the Tribunal further stated that while the Director-General might exercise some discretion, he could not so utterly discard this criteria as to flout the rules that ensured the proper openness and objectivity of the competition. In the present case, the organization had chosen someone wanting in listed qualifications which, though said to be only "desirable", were in fact essential. Therefore, in the Tribunal's opinion, the competition had fallen short of the standards of objectivity and openness that must govern appointment to a senior post in an international organization. The Tribunal stated that IOM must accordingly follow a new procedure to fill the post properly, and until then take steps to ensure that the unit continued to function.

For the moral injury the complainant had suffered, the Tribunal awarded compensation in the amount of 2,500 Swiss francs, and also awarded him SwF 5,000 for costs.

2. JUDGEMENT NO. 1796 (28 JANUARY 1999): IN RE DE MUNCK V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS[13]

Non-renewal of appointment—Limits to exercise of discretionary decision—Issue of disciplinary proceedings—Importance of due process safeguards

The complainant was recruited by the Food and Agriculture Organization of the United Nations (FAO) on 20 November 1989 under a fixed-term appointment for one year, serving as coordinator of a regional project in Dakar. The organization renewed his appointment several times, and promoted him to grade D-1 on 1 October 1993. His last appointment ended on 31 December 1995.

At a meeting in May 1995, the FAO Representative in Senegal orally informed the complainant that he was to be removed from the project for not keeping office hours, and that the Senegalese also had objected to the complainant's poor time-keeping and absences. At headquarters in Rome, the complainant was given the complaints in writing and he responded in writing. He was dismissed on 31 August 1995, but after lodging an appeal with the Director-General against the decision he was reinstated, but given a different assignment until the end of his appointment. The Appeals Committee concluded that the organization had the right not to renew his contract, but awarded him three months' salary in compensation for the behaviour of the representative in Senegal towards the complainant. The Director-General endorsed the Committee's recommendation, but the complainant refused the offer, claiming that FAO had denied him due process, drawn blatantly wrong conclusions from the evidence and harmed his standing and good name.

In consideration of the case, the Tribunal recalled that the strong line of precedent with regard to both transfer and renewal were at the discretion of the executing head and would ordinarily be subject to review only if the decision was *ultra vires*, or if there was a formal or procedural flaw or a mistake of law or of fact, or if a material fact was overlooked or some obviously wrong conclusion drawn from the evidence or if there was abuse of authority.

Reviewing the evidence, the Tribunal noted that contrary to the assertions of FAO, the complainant had not explicitly admitted to the charges. The assertions rested on nothing but attendance sheets that showed when vehicles entered and left the centre's premises. The Tribunal further noted the letter of the complainant, dated 27 June 1995, to the Director of the Field Operations Division, wherein he maintained that whatever hours he kept, he was working properly and efficiently as coordinator, and that gradually, with the consent of the other staff, he had adapted his hours to the changing pattern of work at the centre: in five years the number of experts on the project team had risen from two to approximately 10, all using the same telephone and fax and photocopying machines in his own office and, for a while, the services of the same secretary. Furthermore, the Tribunal noted that there was no proof that the Senegalese counterpart authority actually had made oral criticisms of the complainant.

However, as the Tribunal observed, there was no irrefutable evidence before it, and the statements by the representative and by the complainant were at odds, and it appeared that the organization's treatment of the complainant was punishment for conduct it disapproved of and for low output. In the Tribunal's opinion, disciplinary proceedings should have been implemented under the circumstances and, as the Tribunal recalled, the representative had acknowledged by implication in the memorandum which had prompted the impugned decisions that disciplinary proceedings were the right course, but suggested waiving them on the grounds that that "might lead to more drastic action".

FAO had further argued that because the project was soon to be wound up, the complainant could not have expected renewal of his appointment, and that as regional coordinator he knew that the second phase of the project would end in 1995 and that financing of the third one was far from certain. However, as pointed out by the Tribunal, the complainant had been stripped of his duties as coordinator on 31 May 1995 and had nothing to do with the start of the third phase, as the organization conceded, which came 16 months later.

The Tribunal concluded that without the safeguards of due process the complainant had suffered action which amounted to a sanction, and that his standing and good name had been harmed, and because he had served the organization long and well the decision of the Director-General must be set aside. The complainant was awarded US$ 75,000 and 20,000 French francs in costs.

3. JUDGEMENT NO. 1805 (28 JANUARY 1999): IN RE HARTIGAN V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS[14]

Denial of compensation for service-incurred total incapacity—"Essential personal needs"—Principles of interpretation—Question of a narrower interpretation—Tribunal cannot set amount of compensation

The complainant joined FAO in April 1969 as a stenographer at grade G.3, and at the material time she was a secretary and held grade G.5. On 16 November 1992, the organization terminated her appointment on the ground of total incapacity for work, and the UN Joint Staff Pension Fund had been paying her a disability pension.

On 13 November 1992, she applied to the organization for compensation for service-incurred total incapacity. She claimed an annuity under FAO Manual paragraph 342.51; "lump-sum compensation" for loss of function, under paragraph

342.53; and "additional compensation" under paragraph 342.54. On 31 October 1993, the organization granted her the annuity, and on 18 June 1996, a lump-sum compensation for 25 per cent loss of function, but refused the additional compensation. The complainant appealed.

In consideration of the case, the Tribunal noted that the dispute turned on the construction of paragraph 342.542, in particular the term "essential personal needs". The paragraph read as follows:

> "Where the injury or illness of a staff member has resulted in total incapacity of a nature that obliges him or her to depend for his or her essential personal needs on the attendance of another person either constantly or occasionally, and this attendance entails expense, additional compensation may be awarded in an amount not exceeding a reasonable cost for such attendance."

The Tribunal recalled that where a text might bear more than one meaning, construction consisted in taking the one that best served the drafter's intent, and that it was improper for a court to stretch the sense beyond what the words would bear. Moreover, the Tribunal recalled that it was a basic canon of interpretation that as far as possible each word would be given its natural and usual meaning, not some uncommon or eccentric connotation.

The Tribunal noted that it appeared on the evidence that the complainant could move her arms and hands but not use them. In other words, she was unable to grip, lift or carry anything, and could not cook or wash dishes, use public transportation unless seated, and even brushing her teeth caused her intense pain. In the opinion of the Tribunal, all those acts made up part of "essential personal needs", and help from someone else was warranted.

In that regard, the Tribunal, disagreeing with the organization's narrow construction of the term "essential personal needs", stated that the term could not in its usual and proper sense be confined to personal cleanliness and movement. The Tribunal concluded that the organization's construction amounted to a mistake of law, and that the English version of paragraph 342.542 provided that additional compensation might be paid where there was dependence on the attendance of someone else for "essential personal needs", and there were no grounds for taking a narrower interpretation.

As the Tribunal could not set the amounts of the additional compensation due the complainant, it therefore sent the case back to the Director-General for a decision on the amounts, to be made within six months of the date of delivery of the judgement. The complainant was awarded 4 million Italian lire in costs.

4. JUDGEMENT NO. 1832 (28 JANUARY 1999): IN RE DURAND-SMET (NO. 2) V. EUROPEAN PATENT ORGANISATION[15]

Non-appointment to post—Res judicata—*Question of a challengeable decision—European Patent Convention—Effect of appealing to wrong body—Rules construed using common sense*

The complainant was seconded in 1980 from service with the French Government to the secretariat of the European Patent Office, the secretariat of the European Patent Organisation (EPO). The Office had employed him since April 1983 in Directorate-General 2, in Munich, and on 1 May 1989 granted him grade A4.

In 1996, the complainant applied for an A5 post as a member of a technical board of appeal; boards of appeal were the last instance in adversarial proceedings for grants of European patents. He was informed by letter of 8 July 1996 that he had been unsuccessful and that another A4 official had gotten the post. On 11 July 1996, the complainant lodged an internal appeal to the President of the Office, who refused the claim and forwarded it to the Appeals Committee. The Appeals Committee was of the view that the claim was irreceivable because it was the Administrative Council, not the President, that made appointments to technical boards of appeal; however, since in the view of the Committee it was a decision of the President's to put names of candidates to the Council, the Committee considered whether the President had acted wrongfully in refusing to name the complainant, and it held that he had not. The President endorsed the Committee's recommendation and dismissed the appeal.

The complainant contended that the President was wrong not to have named him, and that he should be appointed to the post and awarded 250,000 German marks in damages, particularly for the moral injury he argued he had suffered "for years". In the opinion of the Tribunal, it was doubtful whether the complainant had exhausted his internal remedies as to his claim for damages. The Tribunal further stated that the claim was almost identical to the one he had made in his first complaint, which the Tribunal had disallowed in Judgement No. 1559, and that insofar as he was now seeking the damages he was claiming in that complaint, the issue was *res judicata*, and, as for any injury he might have suffered since, the Tribunal saw no reason to depart from its earlier ruling (see Judgement No. 1780 (in re *Kunstein-Hackbarth*)).

The Tribunal recalled that a decision would not be challengeable unless it directly affected a staff member's status in law by determining or altering it; no action would lie if some decision had yet to be taken which the staff member might challenge; and neither appeal nor complaint would be irreceivable if the organization's rules stated that some particular procedure must first be followed, and a staff member could not challenge just one element of a complex procedure but only the decision that was the eventual outcome (see Judgement No. 1694 (in re *Benaissa*)). In that regard, as the Tribunal pointed out, the "proposal" that the President had to make for an appointment to a technical board of appeal was obviously not such a decision. The Council did not have to pick any of the President's nominees and could have asked him to submit other names.

The Tribunal further recalled that an unsuccessful candidate might challenge both the rejection of himself and the appointment of someone else on grounds of form or of substance that touched on his own application or on that of the successful candidate. In the present case, the Tribunal noted that if the Council ruled on rejection it would be odd to let the President do so as well, and a conflict of views would be hard to resolve. The complainant was comparing himself to the official who had won the post on merit, and such a comparison must be made, where need be, by the same authority and follow the same procedure. Therefore, in the view of the Tribunal, the Council alone was competent.

According to the Tribunal, there was no substance to the complainant's arguments for declaring the President competent. Article 11(3) of the European Patent Convention was clear: for members of the technical boards of appeal it was the Council that was the appointing authority, and it was therefore wrong for the President to treat the complainant's appeal as a challenge to the refusal to name the

complainant for appointment when it was in fact an appeal against the decision to appoint someone else. The President was, however, competent to entertain the complainant's other claims, but as explained in the earlier judgement those claims could not succeed on the merits.

The Tribunal further pointed out that a staff member who appealed to the wrong body did not on that account forfeit the right of appeal. Although rules of procedure must be strictly complied with, they must be construed with common sense (see Judgement No. 1734 (in re *Kowasch*)), and any penalty for breaking such a rule must be reasonably fitting. As the Tribunal explained, when there were two authorities that might be competent, it was easy for one to forward a misdirected appeal to the other, and if the staff member filed it in time, even with the wrong authority, then it would be receivable, and that authority would simply forward it to the other one.

The Tribunal concluded that the Council was competent to entertain his appeal, and therefore the impugned decision was set aside, insofar as it related to the complainant's claims challenging the rejection of his own application and the appointment of the other staff member to the A5 post, so that the Administrative Council could reach a decision. The complainant was awarded DM 1,000 in costs.

5. JUDGEMENT NO. 1849 (8 JULY 1999): IN RE GERA V. WORLD HEALTH ORGANIZATION[16]

Recovery of an overpayment—Overpayment should be reimbursed unless unfair or unjust—Question of which United Nations body should be reimbursed—Issue of exhaustion of all internal means of redress—Overpayment precluded an award for moral damages

The complainant had been a staff member of the World Health Organization (WHO) Regional Office for South-East Asia (SEARO) from March 1980 until his retirement on reaching the age of 60 in March 1998. He also had been seconded to the United Nations Interim Force in Lebanon (UNIFIL) for the period from July 1992 to July 1996. His salary and allowances (post adjustment, mobility and hardship) were calculated, authorized and paid by the SEARO Budget and Finance Officer, verified later by the United Nations and reimbursed by the latter to WHO.

However, according to WHO, the complainant's post adjustment had been wrongly calculated by the SEARO Budget and Finance Officer, resulting in an overpayment of US$11,912.11 over the period of four years, and this was not discovered until the complainant had returned to work at SEARO. When negotiations with the complainant over a recovery plan proved unsuccessful, WHO notified the complainant, on 4 February 1997, of its intention to retain an amount due him of $4,857.91 for assignment grant and travel expenses to offset part of the debt, and to deduct $100 per month from his net salary until he retired on 31 March 1998, when he would pay the balance of $5,654.20 as a lump sum.

The Tribunal considered that, in accordance with its jurisprudence, if an official received an overpayment by mistake it should be reimbursed, but WHO should take into account any circumstances that would make it unfair or unjust to require repayment. In the present case, as the Tribunal pointed out, the payment of the complainant's monthly salary and allowances had been made by SEARO on behalf of the United Nations, which had reimbursed it in full. SEARO was therefore owed no money. The Tribunal, rejecting the arguments of WHO, including its claim of a fiduciary position vis-à-vis the United Nations, for recovering the overpayment,

concluded that WHO was not entitled to withhold the grants due or make deductions from salary under rule 380.5.2 since the complainant was not indebted to it.

With regard to the withholding of the arrears of the salary increment of $122.66, the Tribunal noted that the claim had not been made until the matter had been dealt with by the headquarters Board of Appeal, and as the complainant had failed to exhaust the internal means of redress, it was therefore irreceivable.

The Tribunal ordered the decision of 27 March 1998 quashed, with WHO paying the complainant an amount equivalent to the grants of $4,857.91 and the $100 per month retained by WHO, plus interest of 8 per cent per annum. The complainant was awarded $2,000 in costs, but was not awarded compensation for any moral damages, as the Tribunal observed that he had benefited by the overpayment.

6. JUDGEMENT NO. 1851 (8 JULY 1999): IN RE CHEVALLIER V. INTERNATIONAL TELECOMMUNICATION UNION[17]

Non-appointment to post because of age—Non-written rules/practice must be proved

The complainant joined the staff of the International Telecommunication Union (ITU) in the Radio Communication Bureau as a designer at grade G.4 under a first short-term contract covering the period from 23 June 1994 to 31 July 1994, and his contract was regularly renewed until 31 July 1997.

With a view to rationalizing its personnel policy, the Union decided that short-term appointments exceeding six months would be put up for competition. The complainant's post was accordingly announced in a vacancy notice for temporary employment in July 1997. The complainant applied for the post and his application was selected by his first-level supervisor and subsequently by the chief of the Department concerned. However, the deputy chief of the Personnel Department informed the official responsible for the selection that it was impossible to appoint the complainant because as he was 60 years old as of 6 July 1997—he had reached the age limit for employment.

The complainant appealed the decision to reject his application. He recognized that the Staff Rules Applicable to Staff Members Engaged for Conferences and Other Short-term Service did not establish any age limit; however, he also submitted that those Rules referred in their preamble to the Staff Regulations, which must therefore be read in conjunction with the Regulations, which established the age of retirement at 62 (regulation 9.9). He contended that in the absence of a specific provision of the Staff Rules applicable to short-term service, that regulation should have been applied in his case. The Union, on the other hand, contended that its position rested principally on practice.

In consideration of the case, the Tribunal recalled that it was a well-established principle that the existence of written law did not need to be proved: the presumption *juris et de jure* assumed cognizance of written-law. However, non-written rules had to be proved by those who invoked them, and in the present case the Tribunal could not find the slightest proof of the alleged practice of retiring staff at the age of 60.

The Tribunal therefore concluded that, taking into account the complainant's current age, he should instead be paid compensation for the illegal rejection of his application, in the amount of 40,000 Swiss francs, and he also was awarded SwF 4,000 in costs.

7. JUDGEMENT NO. 1854 (8 JULY 1999): IN RE GONZALEZ LIRA V. EUROPEAN SOUTHERN OBSERVATORY[18]

Suppression of post and termination—Right of international organization to restructure—Question of functions of new post being different from the former post—Issue of an alternative post

The complainant joined the European Southern Observatory (ESO) on 1 May 1969, as a local staff member. He was granted an indefinite contract as an administrative assistant at the ESO observatory at La Silla in the Chilean Andes. In 1991, the ESO Council decided to restructure its activities at La Silla in view of the development of the establishment of a Very Large Telescope (VLT) at the Paranal observatory, near the town of Antofagasta, and the restructuring resulted in the complainant's post being declared redundant, effective end of 1992. He was offered a new post of "general administrative assistant" at Antofagasta, which he accepted. At the end of 1995, the complainant was assigned to a new position of general administrative assistant at Paranal reporting to the Administrator in Chile, with certain benefits including, on an exceptional basis, a rent allowance for housing in Antofagasta. Subsequently, a disagreement between the Administrator and the complainant occurred over the rent allowance, and as a result the complainant was warned by the General Manager that he could not increase his house rental in the future without previous authorization and that his conduct had seriously eroded the organization's trust in his capacity to handle financial matters.

Further reorganization took place at Paranal in 1997 and, by letter dated 18 June 1997, the complainant was informed that his post would be suppressed as from 31 July 1997 and would be replaced with a post with functions and responsibilities substantially higher and with different service requirements. It was further stated that after careful study it had been found that there was no other post within ESO which would be suitable for him and that as a result he would be terminated. Shortly thereafter, ESO issued a vacancy notice in respect of the new post of "Paranal Administrator". The complainant appealed, contending that the duties of the new post of "Paranal Administrator" were substantially the same as those of his former post, and that there was no evidence that the question of his transfer to another post had ever been considered.

In consideration of the case, the Tribunal noted that it was not disputed that an international organization had the right to restructure its operations, suppressing posts if necessary and consequently terminating the appointments of staff members, even if they had contracts of indefinite duration. The Tribunal also noted that in such cases the organization was obliged to do its utmost, and in good time, to try to find alternative employment for them.

In reviewing the job description of the complainant's post, however, the Tribunal concluded that not only were the functions virtually identical to the new post, but also that the vacancy notice made no express mention of any need for the Paranal Administrator to have to function "autonomously" in any particular respect, as had been submitted by ESO to the Tribunal. While it was true that the complainant did not have a university degree, which was one of the requirements of the new post, that requirement in itself, in the view of the Tribunal, did not make the functions of the new post different from the old one, and it did not prove that the complainant, who had 28 years of experience with ESO, was unable to perform them. Furthermore, the Tribunal noted that when the complainant had been offered the post of

general administrative assistant in Paranal, it was contemplated that the post would not terminate at the end of the construction phase, but thereafter provide administrative and logistical support for VLT operations in Paranal. Even in 1995, it had been recognized that the complainant had the ability to perform the functions of that post at a higher level of responsibility.

The Tribunal considered that the complainant had thus shown that, prima facie, the functions of the new post were substantially similar to his post, and within his capabilities; and that one of the reasons why he was not selected for the new post was because, as the Joint Appeal Board had concluded, ESO and the Administrator wrongly thought him guilty of a breach of faith or abuse of authority in claiming an increased rent reimbursement. ESO, on the other hand, had failed to prove that the new post did have greater responsibilities; or that it was higher-in grade than the old one, or that its greater responsibilities were recognized by way of higher remuneration. In conclusion, the Tribunal held that there had been no genuine suppression of the complainant's post and that the termination of his contract had been caused mainly by an unjustified loss of confidence in him by the Administrator. Moreover, the Tribunal also held that ESO had failed to prove that it did its utmost to timely find an alternative post for the complainant (Judgement No. 1745, in re *de Roos*).

The Tribunal ordered that the impugned decision be set aside, and as for relief the Tribunal, noting that the complainant had been willing to accept compensation in lieu of reinstatement, exercised its discretion under article VIII of its statute (as in Judgement No. 1586, in re *da Costa Campos*) to allow ESO to choose either to reinstate the complainant or to pay him compensation in a sum equivalent to three times the total gross remuneration paid for the period from 31 July 1996 to 31 July 1997 (in addition to termination indemnities already offered or paid by ESO). The complainant also was entitled to interest on unpaid sums at a rate of 8 per cent per annum as from 3 July 1998, the date of the filing of the present complaint, until the date of payment. The complainant furthermore was awarded $2,000 in costs.

8. JUDGEMENT NO. 1864 (8 JULY 1999): IN RE ANDREWS (CHRISTOPHER) AND OTHERS V. EUROPEAN PATENT ORGANISATION[19]

Denial of expatriation allowance—Question of breach of principle of equality—Distinctions made between categories of staff members must be fair and reasonable—Issue of an imperfect allowance system

The 41 complainants were all employees of the European Patent Office, the secretariat of the European Patent Organisation (EPO). One of them was of German nationality and worked in The Hague; the 40 others were non-Germans and worked in Munich. All claimed the expatriation allowance provided for in article 72(1) of the Service Regulations for employees of the Office (the EPO Administrative Council decided to grant the expatriation allowance in 1990).

The complainants requested the quashing of the decisions of 10 March 1998 whereby the President of the Office, in accordance with the unanimous recommendation of the Appeals Committee, had confirmed his refusal to pay the allowance in question. They also sought payment of the expatriation allowance from the date of their appointment or, subsidiarily, from 1 July 1990, or failing that, either from 23 September 1992 or even from the date of filing of their complaints. They claimed that because article 72(1) provided for payment of the allowance only if the staff member had not already been permanently resident of a country, not of their nation-

ality, for at least three years, the article created, without valid reason, two categories of expatriate staff, and that distinction constituted unjustified discrimination.

The Tribunal, acknowledging that the complaints were partially receivable and that the complainants could challenge their last pay slips within the time limits, concluded that they had failed on the merits. Further acknowledging that the system could be improved, the Tribunal observed that it was in line with legal requirements that the applicable rules should precisely define the notion of "expatriation", and fix a length of residence in the country prior to employment beyond which an employee might not be considered to be expatriate. As the Tribunal had stated in Judgement No. 754 (in re *Metten No. 4*), for there to be breach of the principle of equality "there must be different treatment of staff members who are in the same administrative position. Where the circumstances differ, so may the treatment, provided that it is a fair, reasonable and logical outcome of the difference".

The Tribunal, while noting that the expatriation allowance was intended to take account of certain disadvantages arising from being a foreigner newly installed in a country, considered that fair and reasonable distinctions between the newly arrived employees and those employees who had resided in the host country for a long time must be based on objective criteria, and length of residence prior to employment was just such a criterion. In the present case, the Tribunal was of the opinion that a period of three years' residence beyond which the complainants might not be considered as expatriates would appear reasonable.

The Tribunal also acknowledged that although some members of the Administrative Council were far from considering the system satisfactory and pointed to several inconsistencies as well as the abuses it might engender, and while a rule rigidly establishing length of residence might create "qualification threshold" problems, nevertheless breach of the principle of equality of treatment had not been proved. The Tribunal therefore dismissed the complaints.

9. JUDGEMENT NO. 1870 (8 JULY 1999): IN RE BOIVIN V. EUROPEAN ORGANISATION FOR THE SAFETY OF AIR NAVIGATION (EUROCONTROL AGENCY)[20]

Quashing of appointment decision—Obligation to protect affected official when appointment was quashed—Questions of costs for outside legal counsel—Requirement of an expert opinion—Issue of moral damages

On 20 March 1995, the Eurocontrol Agency put up for competition the post of head of Accounts Payable at its headquarters in Brussels. Mr. Boivin was among the applicants, but was not selected for the post. Shortly afterwards, a post requiring similar skills also became available at the Institute of Air Navigation Services in Luxembourg, and since there was a reserve list of candidates from the selection process for the Brussels post, Eurocontrol did not consider it necessary to issue another notice of competition for the post. Mr. Boivin was selected for the post; however, a Mr. Bodar lodged an internal complaint against his appointment, alleging several procedural flaws, in particular the failure to issue a notice of competition. In response, the Agency set aside Mr. Boivin's appointment, but kept him temporarily on the staff of the Agency, until he was eventually reappointed, on 1 September 1996, through the new competitive procedure for the post.

Mr. Bodar also lodged an internal complaint against that decision, contending before the Tribunal that the matter had not been referred to the Joint Committee for

Disputes. In Judgement No. 1768, the Tribunal had upheld the plea and ordered the procedure to be recommenced from the time at which the breach of due process had occurred. While the case was before the Tribunal, Mr. Boivin successively consulted two different lawyers to submit evidence to the Tribunal in his capacity as an interested third party. Subsequently, on 2 September 1997, Mr. Boivin sought from Eurocontrol, pursuant to article 92, paragraph 1, of the Staff Regulations, reimbursement of his legal costs and compensation for moral injury, because he had learned that the first cancellation of his appointment had been "at the instigation of two Eurocontrol officials".

In considering the merits of the matter, the Tribunal recalled that the quashing of an official's appointment by reason of the action of another official resulted in the obligation for the organization to protect the official from any injury he might suffer from the setting aside of a decision which he had accepted in good faith (see Judgement No. 1359, in re *Cassaignau No. 4*). In the present case, the Tribunal noted that the Agency had protected the complainant against loss of income by granting him remuneration equivalent to that which he would have earned as an official confirmed in his new post, and thus he had suffered no material damage.

According to the Tribunal, the costs for legal counsel and an expert opinion incurred by the complainant as a preventive measure to defend his position in the case concerning the cancellation of his second appointment could not be claimed unless they were costs which the official had good reason to believe were for the sound defence of his case. The Tribunal agreed with the complainant in his retaining legal counsel, after the cancellation of his first appointment, as he could have serious reasons for fearing a further cancellation, despite the reasons put forward by the Agency. However, the complainant was not justified in his need to change legal counsel, as he had done. In addition, the costs incurred in consulting an expert in graphology to prove that the letter of 31 May 1996 had been received by Mr. Bodar on 3 June, and not on 8 June 1996, were found to be immaterial, in the opinion of the Tribunal. Moreover, as the Tribunal noted, when expert opinion was required it was for the Tribunal to order it on its own motion or on the application of another party (article 11 of the Rules of the Tribunal).

As regards the complainant's claim for moral damages, the Tribunal noted that where the impugned decision was not unlawful, compensation was due only in exceptional circumstances, such as where the wrong was especially grave. On the other hand, where the decision was unlawful, the injury suffered need not be especially grave for moral damages to be awarded: it was enough for it to be serious (see Judgement No. 447, in re *Quinones*). In the present case, the two flaws relating to the appointment of Mr. Boivin, in the view of the Tribunal, were imputable primarily to the negligence of the Agency: on the first occasion, the omission to publish the notice of competition, and on the second, the failure to refer the matter to the Joint Committee for Disputes.

The Tribunal therefore concluded that adequate compensation was required, as the personal interests of the complainant had clearly been harmed and there was no reason to doubt the indications provided by him concerning the stress occasioned by those decisions. The prejudice was grave in view of the duration of the uncertainty in which he had been placed concerning the stability of his employment, which had not entirely ceased since then. The Tribunal awarded the complainant 8,000 euros in moral damages, as well as 2,000 euros in costs.

10. JUDGEMENT NO. 1871 (8 JULY 1999): IN RE COATES (NOS. 1 AND 2) V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS[21]

Non-appointment to post—Limited review of selection decisions—Priority criterion in the appointment of staff—Other criteria of geographic distribution and seniority

The complainant, who was of British nationality, joined the staff of FAO in February 1987 as technical adviser for a project executed by the Fisheries Department in Papua New Guinea. His fixed-term contract was renewed on several occasions, the last one having been extended to 31 March 1997. He had been promoted to grade P.5 in 1991.

On 13 July 1995, he applied for a post as Fishery Resources Officer at grade P.4 in the Fisheries Department at FAO headquarters. From the 97 applications received for the post, the Fisheries Department submitted the names of 4 applicants, with the complainant being placed first on the list. In its report to the Director-General, the Selection Committee confirmed the choices made by the Fisheries Department, but changed the order of preference, moving the fourth-placed applicant to second on the list, with the complainant remaining at the top of the list. On 10 May 1996, when examining the Selection Committee's report, the Director-General gave his preference to the second-placed applicant on the ground that he was a national of a country which was "under-represented" on the Professional staff of FAO, while the complainant was a national of a country with "equitable representation".

The complainant appealed the Director-General's selection decision, contending that the decision was unlawful, in that it breached both the Constitution of FAO and its General Rules and Staff Regulations.

In consideration of the matter, the Tribunal recalled that the provisions of the Constitution and the General Rules and Staff Regulations, as well as case law, showed that the Director-General had discretion with regard to the appointment of staff members, which could only be subject to a limited power of review. In the present case, the Tribunal observed that the Director-General had given paramount importance to the principle of geographic distribution, which had resulted in his selecting the applicant who was second on the list recommended by the Selection Committee. In the Tribunal's view, the Director-General was mistaken in that the FAO Constitution clearly stated that "the highest standards of efficiency and of technical competence" were of paramount importance in appointing staff. Consideration of other criteria, including seniority of service and geographic distribution, was only envisaged where several candidates were equally well qualified. It was not contested that the qualifications of the complainant were considered to be more pertinent to the post than those of the other candidates, both by the Fisheries Department and the Selection Committee; moreover, the complainant alone could be considered to be an internal candidate with a certain seniority of service with the organization. The Tribunal thus concluded that the complainant had been wrongly passed over in favour of an applicant whose qualifications were less pertinent and who had no seniority in the organization. The Tribunal awarded the complainant $100,000 in compensation for the injury he suffered, and 8,000 Swiss francs in costs.

11. JUDGEMENT NO. 1872 (8 JULY 1999): IN RE BANDA V. ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS[22]

Termination for unsatisfactory service—Importance of notifying staff of reasons for termination—Staff should be properly warned in time to have opportunity for improvement of unsatisfactory performance

The complainant joined the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons on 1 August 1993 and, as head of the Personnel Branch, was awarded fixed-term contracts which were renewed until 23 May 1997, when the Preparatory Commission ceased to exist and its powers were transferred to the Organisation for the Prohibition of Chemical Weapons (OPCW), which had just been established. The complainant was awarded a three-year contract as head of the Human Resources Branch with the Organisation, which took effect on 24 May 1997.

However, on 22 July 1997, the Director-General realized that some 80 members of the staff had not signed the individual secrecy agreements to which they were obliged to adhere, and he attributed the blame for this omission to the complainant and two other staff members. The complainant was immediately suspended and a procedure was commenced for termination of employment for unsatisfactory services. His case was examined by the Special Advisory Board, which transmitted its recommendations through the Joint Advisory Board to the Director-General. On 16 October 1997, the decision was made to terminate the complainant's contract after the 60 days' notice. The complainant appealed against the decision to the Appeals Council of the Organisation, which unanimously recommended that the Director-General reverse his decision, which the Director-General declined to do.

Before examining the pleas, the Tribunal recalled that the Special Advisory Board had recommended that the Director-General should terminate the complainant's contract and the Appeals Council had recommended that he reverse his decision, as well as the more mitigated position of the Joint Advisory Board. For the Special Advisory Board, the complainant's full career showed that his performance had been unsatisfactory, including the unacceptable delays in the signing of the individual secrecy agreements, which endangered the confidentiality policy of the Organisation. The Appeals Council, on the other hand, had noted that the impugned decision to terminate the complainant's appointment could only relate to his service for the Organisation itself, that is, to the period from 24 May to 22 July 1997 inclusive. And in that regard, he had not been warned in due time that his services as head of the Human Resources Branch of the Organisation were not considered satisfactory before he was terminated. Between those two extreme opinions, the Joint Advisory Board, which was responsible for transmitting to the Director-General the opinion of the Special Advisory Board, while concurring with the opinion of the Special Advisory Board, specified that the primary consideration which should be taken into account by the Director-General was the fact that the complainant had not taken timely measures for the signing of the individual secrecy agreements, which endangered the Organisation's policy on the matter.

In view of the above, the Tribunal held that it was important to establish the real reasons for which the impugned decision had been taken, as the complainant rightly recalled that international officials had the right to be informed, from the beginning of the procedure, of the grounds which would serve as a basis for the Administration's decision, and that pursuant to the Director-General's administra-

tive directive (OPCW-TS/AD/2), it was provided that, when the Director-General decided to terminate an appointment, the staff member concerned shall be given in the notice of termination "the reasons for the Director-General's decision and the considerations, conclusions and recommendations of the special advisory board". In the present case, the Tribunal noted that the decision taken on 16 October 1997 by the Deputy Director-General, acting on behalf of the Director-General in the latter's absence, did not provide detailed reasons; it had notified the complainant of the decision to terminate his appointment, while assuring him that the decision had been taken "after careful consideration of all the facts, taking into account the recommendations of the Special Advisory Board and of the Joint Advisory Board", without mentioning that the recommendations were not entirely concordant. The Tribunal therefore concluded that the impugned decision was tainted by a flaw which could not be attenuated by the fact that the complainant had been informed on 22 July 1997 of the reasons for which the Organization had set in motion the procedure for the termination of his appointment.

The Tribunal, noting that it was the performance of the complainant from 24 May 1997 which had been taken into account by the Director-General, was of the view that since the procedure that was instigated was not a disciplinary one, but a procedure for the termination of the complainant's appointment for unsatisfactory service, the complainant needed to be informed in due time, either through a negative performance appraisal report or through precise warnings (see, for example, Judgement No. 1484 (*in re Thuillief*). In the present case, the Tribunal noted that the performance appraisal report for the period 1966-1997 had never been completed and the only criticism concerning unsatisfactory service, which related to the signing of contracts of employment and individual secrecy agreements, had been made on 22 July 1997, the very day of his suspension, which meant that there had been no opportunity for the complainant to demonstrate that he was capable of-improving his performance. The Organisation had invoked the internal memorandum sent by the Director of the Administration Division on 1 July 1997 to the complainant, but, as the Tribunal observed, while the general tone of the memorandum was critical, it did not contain any warning permitting the complainant to believe that his professional competence was being challenged less than two months after his appointment for three years.

The Tribunal concluded that the impugned decision must be set aside because it did not provide the complainant with the guarantees that were due to international officials threatened with the termination of their appointment for unsatisfactory service. The Tribunal considered that there was no reason to order the reinstatement of the complainant, nor to set aside the decision to withhold a step increment effective 1 August 1997, but instead ordered the Organisation to pay the complainant an amount equal to the salary and benefits that he would have received had he remained in service at his grade and step between the date of the termination of his appointment and 23 May 2000, the date of the expiration of his contract. He also was awarded 6,000 euros in costs.

12. JUDGEMENT NO. 1878 (8 JULY 1999): IN RE LIMAGE (NO. 3) V. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION[23]

Summary dismissal—Tribunal's review of the proportionality of a disciplinary measure—Importance of notifying staff member of precise charges of serious misconduct—Role of Joint Disciplinary Committee—Issue of previous similar

behaviour of staff member being included as grounds for dismissal—Question of behaviour rising to level of "serious misconduct"—Responsibility for shortcomings of Appeals Board

By its Judgement No. 1639 of 10 July 1997, the Tribunal set aside the decision of the Director-General of 4 October 1996 summarily dismissing the complainant, and the matter was remitted to the Director-General for a new decision in accordance with due process. There was also a further judgement: No. 1748, concerning the execution of Judgement No. 1639.

Subsequently, on 4 August 1997, the Director of the Bureau of Personnel wrote to the complainant asking her to "show cause" within seven days of receipt why an appropriate disciplinary measure should not be taken against her following her serious misconduct towards Mr. Rissom, as reflected in his "note for the record" of 19 May 1995, a copy of which was annexed, and which the Director stated had been "corroborated in its essential particulars" by his secretary. Mr. Rissom's note gave an account of events beginning on 27 April 1995, with particular emphasis on an incident on 17 May 1995 and a phoned apology that evening from the complainant. The Director added that the Director-General would take an appropriate decision upon receipt of her reply or, if none was received, within seven days.

By letter dated 9 September 1997, the Director of Personnel informed the complainant that the Director-General had taken into consideration her reply of 11 August 1997, and that he had noted that she did not deny having insulted Mr. Rissom and said the Director-General had concluded that her conduct constituted extremely serious misconduct, as she had accused her colleague of being a fascist and a Nazi. She was further informed that she was dismissed summarily with effect from 15 September 1997 or the date of receipt of the letter, whichever was earlier. On 11 September, the complainant lodged an appeal with the Appeals Board, which unanimously recommended that the Director-General reconsider his decision and, taking into account the mitigating circumstances, impose a lesser penalty. By a letter of 12 August 1998, the Director-General informed the complainant that he had decided to maintain the decision for the reasons already given in the letter of 9 September 1997 and in the Administration's detailed reply of 31 December 1997 to her appeal.

In consideration of the matter, the Tribunal recalled that the proportionality of the disciplinary measure to an offence was within the discretionary authority of the Director-General; and the Tribunal could only interfere with it if it had been taken without authority, violated a rule of form or procedure, or was based on an error of fact or of law, or if essential facts had not been taken into consideration, or if it was tainted with misuse of authority, or if a clearly mistaken conclusion had been drawn from the facts.

In the Tribunal's opinion, the Organization once again had denied due process to the complainant. The Tribunal observed that the letter of 4 August 1997 referred to her "serious misconduct" towards Mr. Rissom as reflected in his note and corroborated by his secretary. In the view of the Tribunal, it was not acceptable that a staff member accused of serious misconduct had to abstract from a narrative account the essence of the allegations against him or her.

The Tribunal further observed that the essence of the accusation was that the complainant had conducted herself towards Mr. Rissom in the incident on 17 May 1995 as described in Mr. Rissom's note and that this amounted to serious misconduct warranting summary dismissal under staff regulation 10.2, and the Director-General could not impose disciplinary measures other than censure or summary

dismissal without referring the case to a Joint Disciplinary Committee. Therefore, whether the alleged conduct amounted to serious misconduct as opposed to unsatisfactory conduct under staff regulation 110.1 was an issue to be decided, and it appeared from the letter of 4 August 1997 that, if the facts in Mr. Rissom's note were true, the question of serious misconduct had already been established in the opinion of the Director-General.

The Tribunal observed that the impugned decision of 12 August 1998, maintaining the complainant's summary dismissal, referred to the reasons already set out in the letter of 9 September 1997 and in the Administration's detailed reply to the complainant's appeal of 31 December 1997. That reply, which was summarized in the report of the Appeals Board, referred to previous incidents involving the complainant and stated it was not the first time she had behaved in such a manner. However, since her past behaviour was not mentioned in the letter of 4 August 1997, it could not be considered as partly justifying her dismissal. In the view of the Tribunal, that was a serious error and the organization had compounded it by giving an account in the reply to the present complaint.

The Tribunal, recalling that according to regulation 10.2 only serious misconduct could give rise to summary dismissal, stated that while the complainant's conduct was not such as to be expected from an international civil servant, it was not so serious as to warrant summary dismissal. Her words were intemperate, spoken in the heat of the moment to a superior, and her insulting Nazi salute, which was particularly hurtful to Mr. Rissom, a German, was unacceptable. On the other hand, an apology had been offered the same evening and again the next morning and a written acceptance had been generously given by Mr. Rissom. In the opinion of the Tribunal, qualifying the incident as serious misconduct justifying summary dismissal would be a clearly mistaken conclusion to draw from the facts. The Tribunal therefore concluded that the disciplinary measure imposed was so disproportionate as to amount to a mistake of law.

The Tribunal further considered that it was not acceptable that the organization, in its defending against the present complaint, disclaimed all responsibility for any alleged shortcomings of the Appeals Board. In that regard, the Tribunal recalled that the Director-General was obliged under regulation 11.1 to "maintain an Appeals Board to advise him", and time limits were laid down for filing and forwarding pleadings, and these could be extended by the chairperson with the agreement of the Director-General. In the Tribunal's view, if the machinery was not working smoothly a staff member's right to have an appeal dealt with in accordance with the Staff Regulation and Rules was affected.

As the complainant had made serious accusations about the conduct of the appeal procedure which could only be dealt with by inviting a response from the Board, the Tribunal decided that, rather than delay matters by postponing the present judgement to enable that to happen, it would give the complainant immediate satisfaction. It concluded that the complainant had been denied due process and that there had been a lack of proportionality in considering the incident as serious misconduct. The impugned decision was set aside, and the organization was ordered to reinstate the complainant in her former post or another post corresponding to her grade and qualifications, with retroactive effect to the date of separation from service. She would receive all pay to which she was entitled from that date and her pension rights accordingly would be restored. She also was awarded $10,000 in damages for moral injury and $4,000 for costs.

13. JUDGMENT NO. 1881 (8 JULY 1999): IN RE GOODE V. INTERNATIONAL LABOUR ORGANIZATION[24]

Non-renewal of contract—Tribunal review of discretionary decision not to renew—Issues in internal complaint which were logically inseparable should not be split—Issue of prejudicial comments made during decision-making process—Staff member must be allowed opportunity to comment on unflattering information submitted to decision-making body

The complainant was engaged as a senior research officer with the International Labour Organization with effect from 15 December 1996. In accordance with the applicable staff rule, the first two years of his appointment, which was initially for one year, were to be probationary. A probationary employee's first performance appraisal was supposed to take place after nine months. In the complainant's case, his first performance appraisal report, prepared by his first-level supervisor, took place eight and a half months after his appointment, and was extremely unfavourable. After being reviewed by the Department Director and by the Reports Board, the report reached the Director-General who, on 11 December 1997, decided that the complainant's contract, originally due to expire on 14 December 1997, instead of being renewed to allow for the completion of the normal probationary period of two years, should only be extended to 31 July 1998.

The complainant filed a complaint to the Director-General on 9 February 1998. This internal complaint was divided into two parts by the organization. The Director of Personnel told the complainant by a letter of 6 March 1998 that the Director-General was requesting the Reports Board to review both the performance report and the process leading to the original decision not to extend the complainant's contract beyond 31 July 1998, in the light of further inquiry and evaluation and consideration of other relevant material. Then, following receipt of the Board's report, the Director-General would decide whether to renew the complainant's contract until the end of the normal probation period of two years or to confirm the expiration date of 31 July 1998. The consideration of that part of the internal complaint that related to abuse of power and unfair treatment by the complainant's supervisor was deferred to the time when the report was received from the Reports Board.

The Reports Board carried out the investigation requested by Director-General. It sought and obtained a new performance appraisal report and other information regarding the complainant's work and productivity and, inter alia, received representations from the complainant and his superiors. After due deliberation it reported to the Director-General that the additional elements presented to it were not sufficient to make it alter its views and that it was not in a position to recommend an extension of the complainant's contract. The report of the Board, dated 23 April 1998, was submitted to the complainant for his comments, which were submitted, along with the report itself, to the Director-General, who confirmed the non-renewal of the complainant's appointment. The complainant appealed that decision.

The complainant asserted non-compliance by the organization with certain provisions of the Staff Regulations relating to probationary employment. He also complained of unfair treatment by his supervisor and attacked the substance both of the original performance appraisal report and of the revised performance appraisal conducted in March 1998, which formed the basis of the report by the Reports Board. The organization, for its part, took the position that the only issue was the decision not to renew the complainant's original one-year contract. Both the com-

plainant and the organization had indicated that the issue of personal prejudice of the complainant's supervisor was still under investigation.

The Tribunal, however, was of the view that even if the decision not to renew the complainant's contract for a further year was purely a matter of discretion, as contended by the organization, that decision was subject to review by the Tribunal if it was shown that it was procedurally defective or resulted from an abuse of power or from personal prejudice.

The organization contended that there was no evidence to support the complainant's position and that the language employed by the supervisor in her various communications about the complainant was generally moderate and professional in tone. In the view of the Tribunal, the evidence did not bear out this contention, recalling at least one document, a minute addressed to the Reports Board, dated 2 March 1998, which engaged in very strong language to describe the allegations of the complainant. The Tribunal remarked, however, that the issue of personal prejudice was of course likely to turn on far more than whether or not the complainant's supervisor was polite. But as the Tribunal stated, it was simply not in a position to judge the issue since neither party had pleaded it fully.

In that regard, the Tribunal observed that it was wrong for the organization to deal with the complainant's internal complaint by dividing it into two parts, which were in fact logically inseparable. Great cost and inconvenience might have resulted if the Tribunal had found itself obliged to adjourn the matter to its next session in order to have the parties complete their pleadings. However, in the present case, the Tribunal noted that the material produced included a minute of 2 March 1998 addressed by the complainant's supervisor to the Reports Board, containing very unflattering and tendentious language about the complainant.

The complainant asserted that the organization did not deny that the minute was not previously seen by him, and this, in the opinion of the Tribunal, was a clear breach of the rules of natural justice. The Tribunal further noted that the minute was dated just prior to the Reports Board undertaking a new and complete reassessment of the complainant's performance appraisal, and its resulting report was at the very foundation of the final decision reached by the Director-General, which was the decision before the Tribunal. The organization had argued that the supervisor's unflattering comments to the Reports Board had nothing to do with the quality of his work during the period being reviewed by the Board. In the Tribunal's opinion, however, even if it were true, the submission was beside the point. Prejudicial comments made to a body advising the decision maker by one of the parties to a dispute were often irrelevant to the actual substance of the dispute, but they were nonetheless prejudicial. Furthermore, if such comments were made, an opportunity must be given to the other party to respond to them, and by failing to do this the Reports Board had breached its duty of fairness.

The report of the Reports Board being vitiated, the Tribunal concluded that the decision of the Director-General, which was based upon that report, could not stand and must be quashed. The complainant was entitled to be paid his salary and benefits for the period from 1 August 1998 to 15 December 1998, the date on which his term of contract for a normal probationary period would otherwise have expired, less the amount of any occupational earnings during that same period. The Tribunal observed that the complainant was not as yet entitled to any moral damages, as the question of personal prejudice had not been decided.

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

1. DECISION NO. 205 (3 FEBRUARY 1999): H. PAUL CREVIER V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT[26]

Claim for both unreduced pension benefit and severance payments under amended pension system—Issue of linking pension entitlement with severance entitlement—Question of retroactive change of terms and conditions of employment—Question of reasonableness of conditioning receipt of unreduced pension in forgoing receipt of severance payment —Discrimination not an issue when staff members are in different situations/categories—Use of pension assets—Issue of parallelism in connection with the International Monetary Fund

The Applicant joined the Bank in 1973 and made his career in the Corporate Secretariat. His employment was made redundant with effect from 15 August 1997, at which time he received a lump-sum severance payment equivalent to 22.5 months of his net monthly pay, in accordance with staff rule 7.01. Other benefits also were explained to him, and although his pension entitlement was not specifically addressed it was understood that he would receive pension benefits under Rule of 75, the pension benefit he had selected. However, the Applicant claimed that because he had not been allowed to draw unreduced benefits from the Staff Retirement Plan, as well as severance pay under the Staff Rules, he had been discriminated against, retroactively deprived of compensation for services rendered and denied equitable treatment.

On 15 April 1998, amendments to the Staff Retirement Plan came into effect, the purpose of which was to reorient the pension system to provide for more flexibility, including not penalizing staff for early retirement and facilitating staff mobility. Rule of 50 provided that a staff member in the service of the Bank as at 14 April 1998 could elect to retire on an unreduced early retirement pension if he or she was at least 50 years old, or had at least 1,095 days of service, and had not received a severance payment from the Bank. As was usually the case with the reform of social security pension systems, staff members under an existing plan were "grandfathered" so as to retain all the benefits and rights to which they were previously entitled under the plan.

The Applicant's selection of the Rule of 75 pension resulted in a pension reduction of approximately 11 per cent, or an annual pension in the amount of $87,373, rather than the unreduced amount of $98,393. In addition, the Applicant was entitled to and accepted full severance payments in compensation for redundancy, equivalent to a maximum of 22.5 months of his final monthly net salary, or $216,881.25. Prior to his opting for the Rule of 75 and redundancy severance payments, it had been confirmed to the Applicant by management that he would not be entitled to receive an unreduced Rule of 50 pension if he also collected severance payments. The Applicant requested an administrative review of that decision, and in response the Respondent reiterated its position. The Respondent also noted that, because in its view neither the Bank management, the Appeals Board nor the Pension Benefits Administration Committee would have any discretion under the terms of the Staff Retirement Plan to grant the Applicant an unreduced pension, he could proceed directly to the Administrative Tribunal.

The Tribunal first considered whether it was an abuse of discretion for the Bank to link the pension entitlement of a staff member with his or her severance entitlement or whether such matters were entirely unrelated. As the Tribunal noted, while

it was true, as argued by the Applicant, that pensions and severance payments were governed by the different Principles of Staff Employment and that pension funds were kept and managed separately from the Bank's administrative budget—from which severance compensation was paid—it was the objective of both mechanisms to provide financial protection and assistance to staff members upon their separation from the Bank. In that respect, in the view of the Tribunal, they could rightly be regarded as complementary components of an overall employment policy. And that link was not just a matter of theory, but one found in the Staff Rules themselves, as pointed out by the Tribunal.

In addressing the question as to whether, in denying the Applicant the combination of an unreduced Rule of 50 pension and severance payments, the Bank had retroactively changed the terms and conditions of employment, the Tribunal noted that in the context of the pension reform the Bank had not reduced the existing rights of staff members, which was the basic consideration underlying the grandfathering. In that respect, every staff member continued to have every right that he or she had before 15 April 1998. In the Applicant's case, he received a pension under the Rule of 75 to which he had a right, and in addition, because of having been made redundant, he was entitled to the maximum severance payments, which he also received. No retroactive change in the Applicant's terms and conditions of employment had intervened in the present case and, consequently, no retroactive deprivation of compensation for services already rendered could be found, a situation which, if existing, would be contrary to principle 2.1(*c*) of the Principles of Staff Employment and a well-established line of decisions of the Tribunal (see *de Merode*, Decision No. 1 (1981)).

The Applicant had contended that it had been unreasonable and unfair for the Bank to make eligibility for an unreduced pension under the Rule of 50 conditional upon the non-receipt of severance payments. The Tribunal recalled that entitlement to severance payments was part of the terms and conditions of employment, and the Bank's practice up to then had been that persons made redundant were entitled to both severance payments and the same pension to which they would have been entitled as voluntary retirees. In the view of the Tribunal, to make one such element conditional upon the other could not be regarded as unreasonable per se. Every amendment to the Staff Retirement Plan over the years and every one of its benefits had been made conditional upon meeting certain requirements. In cases of redundancy similar to those of the Applicant, making the entitlement to an unreduced pension conditional on the waiver of severance reflected the fact that the unreduced pension met to a large extent the need for financial assistance to which severance pay was mainly directed. In addition, the Applicant had been given the choice of receiving either the enhanced pension or his full severance pay together with the Rule of 75 pension. Therefore, in the opinion of the Tribunal, it was not unreasonable for the Bank to have conditioned the entitlement to unreduced Rule of 50 pension benefits upon the non-receipt of severance.

The argument that the Rule of 50 entailed discrimination between groups within the staff in violation of principle 2.1 of the Principles of Staff Employment also had been made. The Applicant had asserted in that respect that even if he had opted for an unreduced pension in lieu of severance payments he would still have been required to leave the Bank involuntarily, as opposed to other staff members who could make the choice whenever it suited them. However, the Tribunal noted that discrimination was not an issue when staff members were in different situations, and thus would normally be governed by different rules, as was the case in the Staff

Retirement Plan and the Staff Rules. As the Tribunal pointed out, discrimination would occur if only some, but not all, members of a group of eligible redundant staff members were allowed to opt for an unreduced pension under the Rule of 50.

The Tribunal also did not agree with the Applicant's argument that the Bank was using Staff Retirement Plan assets for a purpose other than for the payment of retirement benefits, and that this, consequently, was an abuse of discretion and a *detournement de pouvoir* and *de procédure*. As observed by the Tribunal, firstly, the Rule of 50 was available to all staff members and not only to those made redundant, who would likely constitute only a small proportion of those leaving Bank employment. Therefore, the administrative budget would not be significantly affected by those staff members who met the requirements of the Rule and voluntarily retired. Secondly, the pension fund was used only to pay for retirement benefits and for no other purpose.

The Tribunal concluded that to the extent that existing rights were not affected, as they had not been affected in the Bank's reform, it was permissible for the Bank to provide incentives for staff mobility such as those embodied in the Rule of 50. Moreover, eligible staff members were now provided with the option of retiring under the Rule of 50 even if they had been declared redundant.

The Tribunal also examined the principle of parallelism in the light of the present case. As laid down in *von Stauffenberg* (Decision No. 38 (1987)), parallelism entailed a process of consultations with the International Monetary Fund (IMF), a business rationale for any differentiation in benefits and, if such was the case, to consider whether the Fund's decisions should be followed by the Bank. As explained by the Respondent, the first condition had been met through consultations. The last condition was inapplicable in the present case. In the view of the Tribunal, then, the question was whether there was a justification for a different business rationale on the part of the Bank, and the Tribunal found that there was such a justification. Firstly, the reform had increased the benefits available to staff members by introducing the Rule of 50, and it may be for IMF to consider the convenience of a similar benefit. Secondly, parallelism did not mean that the Bank was tied to IMF policies, but rather that it should consider them as a reference point. And thirdly, the size and mission of the Bank was now entirely different from that of IMF. As the Tribunal observed, the Bank had asserted a need to provide for mobility of its staff and that was justified, not by comparison with IMF, but in consideration of its own reality.

For the above reasons, the Tribunal unanimously decided to dismiss the application.

2. DECISION NO. 211 (14 MAY 1999): SUE C. LYSY V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT[27]

Non-confirmation of permanent appointment and termination—Internal remedies must be exhausted—Treatment of evidence by the Tribunal—Role of the Tribunal in reviewing performance reports—Question of interpersonal relationships—Performance evaluation reports should be balanced—Issue of improper motivation—Importance of first informing staff member concerned of performance evaluation—World Bank's Code of Ethics

The Applicant joined the Bank in June 1977 as a Research Assistant in the Development Economics Department. Thereafter she had a number of other positions, including that of Management Systems Analyst (levels J to 22), Projects Officer

(level 23), Financial Analyst (level 23) and Program and Budget Officer (level 24). In 1995, she held the position of Senior Financial Analyst, level 24, in the Natural Resources, Water and Environment Division. When that assignment became redundant, she began working in the Infrastructure Division of the European and Central Asia Region, Country Department 4 (EC4IN), as a Senior Financial Analyst, grade 24, in January 1996. The terms of a temporary assignment and Mutually Agreed Separation Agreement of 6 March 1996 provided that she would remain in regular work and pay status through 15 July 1997, and that she would begin 22.5 months of special leave from 16 July 1997 through 31 May 1999. The agreement would lapse if the assignment in EC4IN became permanent by 15 July 1997 by mutual agreement or if the Applicant took up a new assignment; otherwise, she would separate from the Bank. The Applicant was to be notified no later than 31 December 1996 whether her assignment in EC4IN was to be made permanent.

There was no dispute that the Applicant's work in EC4IN started off well. Her first assignment was as the lead financial analyst for the Ukraine Electricity Market Development Project, and in the performance effectiveness plan part of the Applicant's 1995 performance report, completed on 26 March 1996, the Division Chief stated that the Applicant had made an excellent start in EC4IN and that she had been able to tackle in a remarkably short time the complexity of the financial situation of several energy companies in Ukraine. The Applicant claimed that problems had arisen in October 1996, after she drew attention to concerns relating to two Bank projects in Ukraine, while the Task Manager of the project strongly disagreed with her views. Subsequently, on 7 January 1997, the Division Chief of EC4IN informed the Applicant that she would not offer her a permanent assignment in EC4IN.

The administrative review not being favourable, on 13 August 1997, the Applicant filed an appeal with the Appeals Committee, claiming that she had been given a very poor performance review and that her employment had been terminated because of her insistence upon making an honest appraisal of the Krivoy Rog Rehabilitation Project, one of the Ukrainian projects she had dealt with. The Appeals Committee issued its report on 29 May 1998 and found there was no evidence of retaliatory or improper motive behind the 1996 performance report. The Committee had accepted that to a large extent the tensions among the Krivoy Rog project team were attributable to the Task Manager of the project, but found that the Applicant was not capable of performing in the way that the Division Chief needed her to perform at that time, in that she was distracted by the hostility of the debate and demoralized by having to use figures she believed were wrong in her analysis. In her application to the Tribunal, the Applicant sought reinstatement to a permanent post.

Regarding the 7 January 1997 decision, whereby the Division Chief had informed the Applicant that she would not be offered a permanent assignment in EC4IN, the Respondent submitted that her claim should be dismissed for failure to exhaust internal remedies. It argued that she had neither sought administrative review of that decision nor appealed the decision to the Appeals Committee. The Applicant had claimed that she had pursued internal remedies, such as mediation. However, in the view of the Tribunal, those steps did not constitute a request for review and were not sufficient to meet the requirement that internal remedies be exhausted. Furthermore, the Applicant had not put forward any special reasons why the Tribunal should consider whether the decision violated the terms of her employment, and there did not appear to be any exceptional circumstances which required the Tribunal to consider that claim.

The materials annexed to her application to the Tribunal consisted of two statements which the Power Engineer and Procurement Expert of the Krivoy Rog project team and the Principal Financial Analyst in EC4IN had sent by e-mail to the Appeals Committee. The Appeals Committee had not used them; the two staff members had given oral evidence before the Committee. The Respondent had requested that those statements be stricken from the record, but the Tribunal was of the opinion that the fact that the statements had been prepared for the Appeals Committee but not used by that body did not prevent the Tribunal from referring to them. The Tribunal explained that it was not a court of appeal from the Appeals Committee. Its proceedings were entirely separate and independent from those of the Committee, and the Tribunal was the only body within the Bank that dealt with complaints judicially, and it did so only on the basis of the evidence before it (see *de Raet*, Decision No. 85 (1989)). Furthermore, the statements in question had been made by persons with appropriate expertise and with knowledge of the Applicant and her work in the Division. Moreover, neither of the staff members had claimed privilege or confidentiality in respect of their statements.

The Applicant's 1996 performance report had contained substantial criticisms of her work for the staff appraisal report on the Krivoy Rog project, and she challenged those criticisms, relying on memoranda and reports from a number of her colleagues to support her claim that her work was sound, and that the criticisms were unfair and an abuse of discretion. The Tribunal noted that while it could not form its own opinion as to the technical quality of the Applicant's work, it could refer to the views that had been expressed by independent experts on those issues, and it could consider whether there was any unfairness in the assessment amounting to an abuse of discretion. In that regard, the Tribunal observed that the most significant independent review of the Applicant's work on the Krivoy Rog project was the report of the Quality Assurance Group, which had been prepared at the request of the Vice-President of the Division, for the purposes of the Applicant's request for administrative review. The Vice-President had carried out the administrative review based on written material, including the QAG report, and, describing the Applicant's performance in 1996 as mixed, had concluded that there was no reason to change her report. It appeared to the Tribunal, however, that the administrative review seemed to dissociate the great difficulties and hostility the Applicant experienced in her dealings with the Task Manager from the actual work she was required to produce. The Tribunal further stated that it did not consider her concerns to be professional issues but rather interpersonal communication problems. The Tribunal considered that while there might have been weaknesses in the Applicant's work, there were also management failings in responding to her concerns and in regard to the Krivoy Rog project itself. That those management failings did contribute to the outcome and to the quality of the Applicant's work was explained by the QAG report, but it was not made clear in the Applicant's 1995 performance report.

The Applicant also challenged the comments in her 1996 performance report concerning her interpersonal and communications skills as being unfair and an abuse of discretion. The Tribunal noted that the Applicant had always been rated well in regard to interpersonal skills, had been with the Bank since 1977 and had a long record of competence and good relationships. The report had stated that the Applicant's emotions affected her productivity, but without indicating any underlying reasons. It did not indicate that the Applicant had raised genuine professional concerns about one particular project, or that they had been treated contemptuously and with hostility. The statements in the evaluation seemed to the Tribunal in the

light of all the circumstances to lack proper balance and to convey an incomplete picture which was unfair to the Applicant.

In the opinion of the Tribunal, a performance evaluation should deal with all relevant and significant facts and should balance positive and negative factors in a manner which was fair to the person concerned. Positive aspects needed to be given weight, and the weight given to factors must not be arbitrary or manifestly unreasonable (see *Romain (No. 2)*, Decision No. 164 (1997)).

The Applicant had further claimed that the criticisms that appeared in the performance report were improperly motivated. The Tribunal, recalling that a finding of improper motivation could not be made without clear evidence, considered that although there was a degree of inconsistency and mismanagement in the Division Chief's handling of the issues, this lack of balance in the evaluation was not motivated by a desire to retaliate.

The Applicant also claimed that her draft 1996 performance report had been put to Management Review without being shown to her or discussed. The Tribunal, while noting that the draft contained comments which were particularly damaging to the Applicant, and even though the Division Chief informed the Management Review Group that the evaluation was a draft, the failure to conduct the review process in the time specified and to ensure that the Applicant had an opportunity to comment on the draft before it was sent on was in violation of the January guidelines and was not consistent with fair treatment.

Finally, the Applicant claimed that the Respondent had violated the World Bank Group's Code of Ethics by instructing her to use an unrealistically low input price to justify a project which was otherwise not financially viable. In that regard, the Tribunal noted that the Code of Ethics provided that staff members should "provide decision makers with candid analysis", but concluded that the circumstances in the present case were not sufficiently clear to justify a finding that there had been a violation of the Code, as the problem seemed rather to have been that of mismanagement or mishandling of the problem that had arisen concerning the Krivoy Rog project.

The Tribunal concluded that the Bank had failed to treat the Applicant with fairness and impartiality and according to proper process, and unanimously decided to award compensation to her in the amount of $200,000 net of taxes, including costs.

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

1. JUDGEMENT NO. 1999-1 (12 AUGUST 1999): MR. "A" V. INTERNATIONAL MONETARY FUND[29]

Retroactive conversion to regular staff and reinstatement—Issue of receivability—Question of deciding merits of claim before examining issue of jurisdiction—Issue of exercising jurisdiction in order to prevent escaping a judicial review—Audi alteram partem—*Question of remedies*

The Applicant was hired by the Fund as a consultant under its Technical Assistance Programme for a two-year period, beginning in January 1990. His letter of appointment provided:

"You will not be a staff member of the Fund and will not be eligible for any benefits other than those specified in this letter."

It stated in addition:

"This appointment can be terminated by you or the Fund on one month's notice, or by mutual agreement."

This basic contract was renewed several times, and apart from increases in the Applicant's remuneration, the terms of his appointment remained unchanged.

In August 1998, the Applicant's department head allegedly informed him that the Fund intended to end his contractual employment, and on 26 February 1999, his final contract expired according to its terms.

The Applicant appealed, seeking, inter alia, conversion of his status to that of regular staff, as of 2 January 1993, and "reinstatement" as a regular staff member. As regards the Tribunal's jurisdiction over his complaint, the Applicant contended that the Fund's classification of him as a contractual employee was an arbitrary administrative act that ignored the facts and should not determine the exercise of the Tribunal's jurisdiction, and the argument that the Tribunal did not have jurisdiction because the Applicant was not a staff member presumed as true the very fact at issue. He further argued that the Tribunal should exercise jurisdiction over his claim because otherwise he would have no opportunity for review on the merits by an impartial adjudicatory body. Furthermore, the Applicant contended that the international administrative law doctrine *audi alterant partem*, i.e., every disputant is entitled to be heard—which was incorporated into the internal law of the Fund—required that the Tribunal exercise jurisdiction over the Applicant's claim.

In consideration of the case, the Tribunal noted that the gravamen of the Applicant's complaint was that, although he had been employed on a contractual basis, the nature and continuity of his work indicated that he should have held a staff appointment of indefinite duration. The Fund in its Motion for Summary Dismissal maintained that the Fund's Employment Guidelines of 1989, while providing that contractual appointees generally should not perform the same tasks as staff members, except on a short-term basis or where individual circumstances warranted, and whereas the Applicant had performed essentially the same functions as regular staff members for over nine years, were intended to provide guidance to the Recruitment Division and Fund departments, but that the Guidelines did not give rise to any legal entitlements on the part of individuals. Furthermore, according to the Respondent, the employment of staff and contractual employees differed with regard to a number of factors, e.g., no geographical distribution restraints on contractual staff, and those employees were not subject to a competitive appointment process as were the Fund's regular staff. Greater flexibility also was afforded to contractual employees, who were exempt from the salary structure that governed the remuneration of regular staff members. In addition, staff members and contractual employees had access to different avenues of dispute resolution: contractual employees had recourse to an arbitration procedure, while staff had access to the grievance procedure and the Administrative Tribunal.

The Tribunal further noted that allocation of personnel functions among the various categories of Fund employment had long been a matter of controversy within the Fund and was currently undergoing revision. Both the adoption of the 1989 Employment Guidelines and the revised 1999 Policy on Categories of Employment had been prompted by concerns that contractual and vendor personnel might have been performing functions for which there was a long-term need and which should

be performed by Fund staff. The Fund in its Motion for Summary Dismissal acknowledged "anomalies in the current system of contractual employment", but maintained that those difficulties must continue to be addressed on a systemic basis rather than through the litigation of individual cases.

Accordingly, the Respondent contended that the application should be dismissed as irreceivable on the grounds that, as a former contractual employee, Mr. "A" did not have standing to bring a case before the Administrative Tribunal; the Applicant was not within the Tribunal's jurisdiction *ratione personae* pursuant to article II of the Tribunal's statute. The Respondent further contended that the application should be dismissed as not falling within the Tribunal's jurisdiction *ratione materiae*, as article II of its statute also limited the Tribunal's subject-matter jurisdiction to challenges by a staff member to the legality of an administrative act adversely affecting him.

In considering the issue of jurisdiction, the Tribunal, citing articles III, IV and XIX of its statute, was mindful that international administrative tribunals were tribunals of limited jurisdiction and might not exercise powers beyond those granted by their statutes. The principal issue raised by the present case, in the opinion of the Tribunal, was whether the nature of the Applicant's allegation on the merits, i.e., that he had been illegally classified as a contractual employee when he should have been hired as a member of the staff of the Fund, required the Administrative Tribunal to exercise jurisdiction over his claim even though its jurisdiction *ratione personae* was limited to claims brought by members of the staff and its jurisdiction *ratione materiae* was limited to challenges to the legality of decisions taken in the administration of the staff. In that regard, the Applicant had requested the Tribunal to look beyond the language of his letter of appointment to determine that he was a de facto member of the staff and, furthermore, the view that the Tribunal did not have jurisdiction because the Applicant was not a staff member presumed as true the very fact at issue.

Thus the Administrative Tribunal was presented with two alternatives: to enforce the language of the contract and deny jurisdiction on the basis of the narrowly drawn wording of the statute of the Tribunal and the express language of the Applicant's letter of appointment; or to first examine the merits of the Applicant's claim, i.e., that he should be accorded the benefits of staff membership based on the nature and continuity of his work, and then decide as the result of that examination whether it might exercise jurisdiction *ratione personae* and *ratione materiae*, despite the language of the letter of appointment to the contrary.

The Tribunal, while citing World Bank Administrative Tribunal Decision No. 15, *Joel B. Justin* (1984), ILO Administrative Tribunal Judgement No. 307, in re *Labarthe* (1977), and United Nations Administrative Tribunal Judgement No. 96, *Camargo* (1965), noted that while international administrative tribunals occasionally had found it necessary to examine the merits of a case before determining whether to exercise jurisdiction, there was also support for the view that jurisdiction might be denied on the basis of the language of the Applicant's contract of employment and the applicable statutory provision. In addition, some decisions had rejected on the merits claims that contractual employees had employment rights beyond those prescribed by their contracts, and still others had come to the opposite conclusion, sometimes taking a broad view of jurisdictional prerogatives. The Tribunal, citing an array of cases of other administrative tribunals, considered that the present case fell to be decided on the basis of the particular provisions of the Tribunal's statute

and its *travaux préparatoires*, and of the specifications of the Applicant's contract, and concluded that it lacked jurisdiction, in view of the express language of that contract, which denied the Applicant staff membership, and of the explicit wording of the statute of the IMF Administrative Tribunal, granting the Tribunal jurisdiction only over complaints brought by a "member of the staff" challenging a "decision taken in the administration of the staff".

In considering the Applicant's argument that it should exercise jurisdiction in this case because otherwise his claim would escape judicial review, invoking the principle of *audi alteram partem*, the Tribunal was of the view that the Applicant's reliance on that principle, as incorporated in the internal law of the Fund, pursuant to article III of the Tribunal's statute, appeared to have been misplaced. As the Tribunal pointed out, the provision that the Tribunal "shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts", did not relate to the Tribunal's jurisdiction, but rather stated what law should be applied by the Tribunal in carrying out its judicial functions in those cases in which it had jurisdiction. Furthermore, while the principle of *audi alteram partem* might supply a standard for judging the legality of a decision of the Fund that came within the Tribunal's jurisdiction, the principle did not determine which decisions were justiciable, nor did it require that jurisdiction of the Tribunal be extended because a claim otherwise might or would escape review of an adjudicatory body. The Tribunal was not free to extend its jurisdiction—beyond its statute—on equitable grounds, however compelling they might be.

At the same time, the Tribunal expressed concern over the practice that might have left employees of the Fund without judicial recourse, a result not consonant with norms accepted and generally applied by international governmental organizations. The Tribunal noted that it was for the policy-making organs of the Fund to consider and adopt means of providing contractual employees of the Fund with appropriate avenues of judicial or arbitral resolution of disputes, such as those over whether the functions performed by a contractual employee met the criteria for a staff appointment rather than those for contractual status.

In the present case, the Tribunal noted that the Fund's Executive Board did establish a Policy on Categories of Employment, effective 20 January 1999, which had it been in place in the course of Mr. "A"'s tenure the matter at issue before the Tribunal presumably would not have arisen. Nonetheless, the Tribunal noted that the adoption of the new Policy on Categories of Employment strengthened the equitable basis of certain of his contentions, which the Fund should endeavour to respond to insofar as governing regulations and practical possibilities permitted. In that regard, the Tribunal noted that Mr. "A" had the benefit of the maintenance of group medical coverage for 18 months after the expiration of his contract, without, however, financial contribution by the Fund.

For the reasons stated above, the Tribunal unanimously decided that the Fund's Motion for Summary Dismissal be granted.

2. JUDGEMENT NO. 1999-2 (13 AUGUST 1999): MR. "V" V. INTERNATIONAL MONETARY FUND[30]

Alleged violation of a retirement agreement—Meaning of placing documents under seal—Question of creating future records of former staff member's

performance after a negotiation for deletion of performance rating from electronic database—Boundaries of a "confidential clause"—Importance of Tribunal's enforcement of negotiated settlement and release agreements—Elements of such an agreement—"Strictly confidential" versus "secret"—Lack of sensitivity does not amount to gross negligence—Question of where Fund is liable for actions of Staff Association Committee—Issue of damage to reputation—Effect of Grievance Committee's recommendation before the Tribunal—Question of costs awarded to Respondent for alleged frivolous claims brought by Applicant

The Applicant began his employment with the Fund in 1969, receiving promotions in 1979 and 1986. However, during the later course of his employment, disputes apparently arose regarding his performance and its evaluation, and in May 1996, the Applicant and the Fund entered into a retirement agreement providing for the termination of his career with the Fund, with his early retirement taking effect on 30 November 1998.

Mr. "V"'s separation leave was financed by the Fund's Separation Benefits Fund (SBF), and beginning in 1995 the Fund produced an annual report describing disbursements from the SBF. The report, in describing disbursements from the SBF, also identified characteristics of recipients, but did not state their names, and included the reasons for their separation from service. In accordance with established practice, the report was transmitted to Fund Management, the Personnel Committee, the Ombudsperson and the Chairman of the Staff Association Committee. Mr. "V" claimed that he had come across several copies of the 1996 SBF report, which had been placed on an information desk, while visiting the office of the Staff Association. It was then that he first became aware of the existence of the report and that it contained information about himself, and he filed an application contending that the Fund had breached the retirement agreement it had entered into with him.

The Applicant claimed that the Fund had breached the retirement agreement by disseminating in the 1996 SBF report information that reflected adversely on his performance, i.e., that gave as the reason for his separation from service that he was unable to produce work that met departmental standards. The Applicant argued that three specific provisions of the agreement had been breached by the Fund: (*a*) the sealing of the 1992 and 1994 performance reports and destruction of all copies thereof; (*b*) the removal of the 1992 and 1994 ratings from the "personnel database"; and (*c*) the confidentiality clause.

Regarding the issue of the 1992 and 1994 performance reports, the Tribunal noted that there was no dispute that, as provided for by the agreement, the originals of the Applicant's performance reports for 1992 and 1994 had been placed under seal in the Administration Department and all copies destroyed. The Applicant, on the other hand, explaining that "sealing a document" referred not only to the physical piece of paper but also to its contents, asserted that information contained in the sealed documents must have formed the basis for the entry about him in the 1996 SBF report. The Fund, however, argued that the information regarding the Applicant in the SBF report had been supplied independently of the sealed performance reports, contending that it was the Assistant Director of Administration, who had been involved in negotiating the retirement agreement, that had supplied the information regarding the reason for Mr. "V"'s separation as it appeared in the report.

The Tribunal concluded that paragraph 3 of the retirement agreement did not prohibit the Assistant Director of Administration from preparing an entry in the 1996 SBF report based on his knowledge of Applicant's case. The Tribunal noted

that the Fund had complied with the express requirements of paragraph 3, and further stated that in view of the Fund's rejection of the Applicant's request for "expungement" of his flawed performance reports during the negotiating process of the retirement agreement, the Fund had not undertaken to conceal or obfuscate the broader contours of Mr. "V" 's performance. The Tribunal even questioned whether a public, legally governed institution such as IMF could have properly entered into such an undertaking.

Furthermore, as recalled by the Tribunal, the Applicant did not dispute that his numerical ratings for 1992 and 1994 had been deleted from the personnel database, pursuant to paragraph 4 of the agreement, but he seemed to be under the impression that that provision might have encompassed something more than the electronic records. The Tribunal recalled the negotiating history of the retirement agreement, noting that the Fund had rejected the inclusion of a provision suggested by Applicant's counsel: "The assessment of your performance for 1992 and 1994 shall not be referred to or communicated, orally or in writing, to anyone except as provided in this paragraph." In the view of the Tribunal, that provision, if it had been accepted, might have offered some protection against the creation of future records relating to Mr. "V" 's performance, such as in the SBF report. Furthermore, the Tribunal concluded that nothing in the agreement barred the Fund from relying on knowledge of the Assistant Director of Administration or prevented it from creating, subsequent to the agreement, a report stating that inability to produce work that met department standards was the reason for the Applicant's separation from service.

In considering the issue of the confidentiality clause, the Tribunal noted that paragraph 8 of the retirement agreement provided:

> "The above terms and conditions shall remain confidential and shall not be disclosed by you, either during or after your employment with the Fund."

After reviewing the negotiating history, the Tribunal concluded that, despite disagreement over which party had sought confidentiality, its language suggested that both parties were required to keep confidential the terms of the agreement.

In examining whether that obligation of confidentiality, however, prohibited the Fund from including a comment regarding the Applicant's performance in a "strictly confidential" report of the Separation Benefits Fund, the Tribunal concluded that the confidentiality clause of the retirement agreement, which required the Fund to keep the terms of the agreement "confidential", did not prohibit the Fund from commenting critically on the Applicant's performance in the "strictly confidential" SBF report, the purpose of which was to explain the uses of the Separation Benefits Fund, and which was circulated only to those staff members with a "need to know".

Moreover, the Tribunal was unable to find sufficient support, from either the language of the Agreement or the negotiating history, for the Applicant's contention that it was the intention of the parties to "cleanse" the Applicant's performance record, and that the preparation and circulation of the 1996 SBF report entry relating to the Applicant, therefore, ran counter to that intention. In fact, the Tribunal noted that suggestions by the Applicant to allow for broader protection to his reputation had been rejected by the Fund during the negotiation of the retirement agreement.

The Administrative Tribunal, in reaching these conclusions, explained that it was mindful of the importance both to staff members and to the Fund of enforcing negotiated settlement and release agreements, in which a staff member received special compensation or benefits upon separation from service in exchange for the

release of claims against the organization. Citing World Bank Administrative Tribunal Decisions No. 25, *Mr. Y* (1985), and No. 29, *Alexander Frederick Kirk* (1986), the Tribunal observed that, in enforcing such agreements, international administrative tribunals had looked for exactly the elements present in the present case, i.e., evidence of individualized bargaining and the exchange of consideration as indications that the agreement had been entered into freely and reflected a real balancing and resolution of interests between the parties.

The Applicant complained that the Fund had acted illegally in not disclosing the SBF reporting requirements during the negotiations over the agreement. The Tribunal, citing IMF Administrative Tribunal Judgement No. 1996-1, *Mr. M. D'Aoust* (1996), concluded that, assuming that the SBF reporting requirements were relevant information in the possession of the Fund, the Fund had not deliberately misled the Applicant, misrepresented facts or engaged in irregularity of procedure by not disclosing to the Applicant those requirements during the negotiation of the retirement agreement. Rather, those officials could have reasonably believed that those requirements were not in conflict with the terms negotiated in the agreement.

As to the Applicant's claim that the Fund had violated General Accounting Office regulation (GAO) No. 35, which prescribed policies and guidelines governing the security of information in the Fund, including information classification and the handling of classified information, the Tribunal concluded that it was a reasonable act of managerial discretion for the Fund (*a*) to classify the 1996 SBF report as "strictly confidential", and (*b*) to decide that the Fund's Managing Director and others had a "need to know" this information. In the opinion of the Tribunal, the classification as "strictly confidential" appeared entirely appropriate, as that classification level was designed to protect information involving matters of strict personal privacy (e.g., medical and financial information related to benefit entitlements). Furthermore, the only level of information security higher than "strictly confidential" was "secret", a classification to be used only in exceptional circumstances, pursuant to rule 3.04.4. As for the determination as to which Fund personnel had a "need to know", the Fund had explained and documented its rationale for circulating the report to this limited group of individuals. The policy had been undertaken in the interest of promoting transparency of personnel practices and to provide Fund-wide reactions, in response to criticisms that had arisen over the years with respect to the equitable allocation of scarce resources of the SBF.

As to the Applicant's complaint that the Fund had violated the guidelines for the scope and content of the report—specifically, that the names of beneficiaries were to be disclosed only to the Managing Director—and that the report had had the effect of revealing names because the identities of recipients might be deduced from the identifying characteristics provided, the Tribunal noted that in testimony before the Grievance Committee, the Assistant Director of Administration had conceded that the entry pertaining to the Applicant was identifiable on the basis of the information given as to his nationality, departmental affiliation and age, and that, beginning with the 1997 report, in the interest of confidentiality, the annual SBF reports no longer revealed the nationalities of SBF recipients. Nonetheless, the Tribunal was unable to conclude that the possibility that some SBF recipients might have been identifiable in the report that was circulated beyond the Deputy Managing Director constituted a violation of the guidelines governing the preparation of the report.

As to the Applicant's contention that the circulation of the report containing sensitive information about himself was grossly negligent, if not intentional, the Tri-

bunal recalled Decision No. 20 (1996) of the Asian Development Bank Administrative Tribunal, in which that Tribunal had concluded that limited notification within the organization of the suspension of a staff member's dependency allowance as the result of a domestic relations matter was limited to the needs of good administration of the Bank and did not amount to negligent publicity. While in the present case, as observed by the Tribunal, the Assistant Director of Administration, who had provided the information on the reason for Mr. "V" 's separation, would have done well to consider more fully any relevant implications of the retirement agreement, any arguable lack of sensitivity on his part was not grossly negligent.

In addressing the issue of whether the Fund was liable for actions of the Staff Association Committee with respect to its handling of the 1996 SBF report, the Tribunal examined, inter alia, the legal status of the Staff Association. The Tribunal considered that the right of staff members to associate for the presentation of their views to management was guaranteed by the Fund's N rules of the Staff Regulations, but that the Staff Association was a self-governing organization, bound by its own Constitution and By-laws. And while it was true that there was a certain congruency between the interests of Fund management and that of the Staff Association with respect to the SBF report, inasmuch as both shared the twin concerns that SBF resources should be fairly apportioned and that the confidentiality interests of staff beneficiaries protected, that concordance of interests did not afford Fund authority to acts by the Staff Association Committee taken in contravention of those interests. Furthermore, it was clear from the Staff Association's constitutive documents and from its actual work that it acted independently of the Fund, and whatever complaint or remedy the Applicant might or might not have against the Staff Association Committee for its handling of the confidential 1996 SBF report, that complaint or remedy could not be pursued in the Administrative Tribunal, nor might the Tribunal entertain as part of the Applicant's complaint against the Fund all of the alleged consequences of the Fund's circulation of the 1996 SBF report.

Regarding the Applicant's argument that the distribution of the 1996 SBF report had damaged his reputation within the Fund and created conflicting official records, impairing his ability to obtain supportive references in seeking outside employment, the Tribunal noted that the Applicant had produced no evidence to that effect. Furthermore, the Tribunal pointed out that not only was that argument speculative, it also ignored the reality of the Applicant's circumstances. As the Fund had pointed out, it would have been most unlikely for a potential employer to seek references from persons other than those in the Applicant's own department with whom he had worked over the course of his extended career, and the retirement agreement did not prevent such individuals from drawing on their own recollections and evaluations of his performance. Furthermore, the suggestion that circulation of the report had damaged the Applicant's professional reputation also tended to ignore the reality, attested to by the Applicant himself, that "widespread reputational damage in the community" pre-existed the retirement agreement, and while he might have sought to repair that damage through the retirement agreement, the agreement did not serve to obscure completely the fact that, rightly or wrongly, the Applicant's performance was at issue during his career at the Fund, at any rate in its later stage.

The Applicant had raised several issues concerning the Grievance Committee's rejection of his claim. The Applicant's concern that the Tribunal might have been misled by the Grievance Committee's decision was misplaced, in the Tribunal's view. Citing IMF Administrative Tribunal Judgement No. 1996-1, *Mr. M. D'Aoust* (1996), the Tribunal noted that it had decided each case de novo, making its own

independent findings of fact and holdings of law, and had only weighed the record generated by the Grievance Committee as part of the evidence before it. Thus, it would have been difficult for the Applicant to show that he had been adversely affected either by the Grievance Committee's exercise of jurisdiction in his case or by the application of its standard of review.

In considering the Fund's request in the case for the Tribunal to award it costs for defending allegedly frivolous claims brought by the Applicant in the underlying Grievance Committee proceedings, claims which had not been made part of the application before the Tribunal, the Tribunal recalled article XV of its statute, which provided:

> "1. The Tribunal may order that reasonable compensation be made by the applicant to the Fund for all or part of the cost of defending the case, if it finds that:
>
> (*a*) The application was manifestly without foundation either in fact or under existing law, unless the applicant demonstrates that the application was based on a good faith argument for an extension, modification or reversal of existing law; or
>
> (*b*) The applicant intended to delay the resolution of the case or to harass the Fund or any of its officers or employees.
>
> "2. The amount awarded by the Tribunal shall be collected by way of deductions from payments owed by the Fund to the applicant or otherwise, determined by the Managing Director, who may, in particular cases, waive the claim of the Fund against the applicant."

However, because the Fund had not alleged that the Applicant had brought frivolous claims before the Tribunal, the Fund had failed to allege the predicate required for an award of reasonable compensation under the articles. Moreover, the Tribunal disagreed with the Fund's suggestion that article XIV, section 4, of its statute, at issue in Tribunal's Order 1997-1 (Mr. "C"), provided a basis for the relief it sought in the present case. Among other things, the statutory purpose of article XIV, section 4, was to provide for cost-shifting in favour of prevailing applicants, thereby increasing access to the Tribunal for aggrieved staff members, vis à-vis that of article XV, which penalized the bringing of frivolous claims by exacting from the offending party the cost of defending against them, thereby deterring the pursuit of cases that amounted to an abuse of the review process. Accordingly, the Tribunal concluded that there was no basis for it to award costs to the Fund for defending any frivolous claims brought by the Applicant in the Grievance Committee.

The Administrative Tribunal unanimously decided, inter alia, that the Fund had not acted illegally, either with respect to the retirement agreement it had entered into with the Applicant or with respect to any Fund rule or regulation, when it prepared and circulated the 1996 SBF report, in accordance with Fund policy.

NOTES

[1] In view of the large number of judgements which were rendered in 1999 by administrative tribunals of the United Nations and related intergovernmental organizations, only those judgements which are of general interest and/or set out a significant point of United Nations administrative law have been summarized in the present edition of the *Yearbook*. For the integral text of the complete series of judgements rendered by the four Tribunals, namely,

Judgements Nos. 913 to 944 of the United Nations Administrative Tribunal, judgements Nos. 1784 to 1890 of the International Labour Organization Administrative Tribunal and decisions Nos. 205 to 216 of the World Bank Administrative Tribunal and judgements Nos. 1999-1 and 1999-2 of the Administrative Tribunal of the International Monetary Fund, see, respectively: documents AT/DEC/913 to AT/DEC/944; Judgements of the Administrative Tribunal of the International Labour Organization: 86th and 87th Ordinary Sessions; World Bank Administrative Tribunal Reports, 1999; and Administrative Tribunal of the International Monetary Fund, Judgement Nos. 1999-1 and 1999-2.

[2] Under article 2 of its statute, the United Nations Administrative Tribunal 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, including such applications from staff members of the International Tribunal for the Law of the Sea.

[3] Hubert Thierry, President; Julio Barboza, Vice-President; and Kevin Haugh, Member.

[4] Hubert Thierry, President; and Kevin Haugh and Marsha Echols, Members.

[5] Mayer Gabay, First Vice-President, presiding; Julio Barboza, Second Vice-President; and Chittharanjan Felix Amerasinghe, Member.

[6] Hubert Thierry, President; Julio Barboza, Vice-President; and Kevin Haugh, Member.

[7] Hubert Thierry, President; and Chittharanjan Felix Amerasinghe and Kevin Haugh, Members.

[8] Mayer Gabay, Vice-President, presiding; and Chittharanjan Felix Amerasinghe and Marsha A. Echols, Members.

[9] Hubert Thierry, President; Mayer Gabay, Vice-President; and Marsha A. Echols, Members.

[10] *Judgements of the Administrative Tribunal of the ILO upon complaints made against UNESCO, Advisory Opinion of 23 October 1956, I.C.J. Reports 1956*, p. 86.

[11] The Administrative Tribunal of the International Labour Organization is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the staff regulations of the International Labour Organization and of the other international organizations that have recognized the competence of the Tribunal, namely, as at 31 December 1999, 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 World Trade Organization, the International Atomic Energy Agency, the World Intellectual Property Organization, the European Organisation for the Safety of Air Navigation, the Universal Postal Union, the European Patent Organisation, the European Southern Observatory, 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 Organisation for International Carriage by Rail, the International Center for the Registration of Serials, the International Office of Epizootics, the United Nations Industrial Development Organization, the International Criminal Police Or-

ganization, the International Fund for Agricultural Development, the International Union for the Protection of New Varieties of Plants, the Customs Cooperation Council, the Court of Justice of the European Free Trade Association, the Surveillance Authority of the European Free Trade Association, the International Service for National Agricultural Research (ISNAR) and the Energy Charter Secretariat and the International Hydrographic Bureau. The Tribunal also is competent to hear disputes with regard to the execution of certain contracts concluded by the International Labour Organization and disputes relating to the application of the regulations of the former Staff Pension Fund of the International Labour Organization.

The Tribunal is open to any official of the above-mentioned organizations, even if his employment has ceased, to any person on whom the official's rights have devolved on his death and to any other person who can show that he is entitled to some right under the terms of appointment of a deceased official or under provisions of the staff regulations upon which the official could rely.

[12] Michel Gentot, President; Jean-François Egli and Seydou Ba, Judges.

[13] Ibid.

[14] Michel Gentot, President; Julio Barberis and Jean-François Egli, Judges.

[15] Michel Gentot, President; Jean-François Egli and Seydou Ba, Judges.

[16] Michel Gentot, President; Mella Carroll, Vice-President; and James K. Hugessen, Judge.

[17] Michel Gentot, President; Julio Barberis and Seydou Ba, Judges.

[18] Michel Gentot, President; Mella Carroll, Vice-President; and Mark Fernando, Judge.

[19] Michel Gentot, President; Jean-François Egli and Seydou Ba, Judges.

[20] Ibid.

[21] Michel Gentot, President; Julio Barberis and Seydou Ba, Judges.

[22] Michel Gentot, President; Jean-François Egli and Seydou Ba, Judges.

[23] Michel Gentot, President; Mella Carroll, Vice-President; and James K. Hugessen, Judge.

[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 Reconstruction and Development, the International Development Association and the International Finance Corporation (referred to collectively in the statute of the Tribunal as "the Bank Group").

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

[26] Robert A. Gorman, President; Francisco Orrego Vicuna and Thio Su Mien, Vice-Presidents; and A. Kamal Abul-Magd, Bola A. Ajibola and Elizabeth Evatt, Judges.

[27] Francisco Orrego Vicuna (a Vice-President) as President; Bola A. Ajibola and Elizabeth Evatt, Judges.

[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 M. Schwebel, President; Nisuke Ando and Agustin Gordillo, Associate Judges.

[30] Ibid.