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UNITED NATIONS JURIDICAL YEARBOOK

2000

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

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



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Chapter V

DECISIONS OF ADMINISTRATIVE TRIBUNALS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS¹

A. Decisions of the United Nations Administrative Tribunal²

1. JUDGEMENT NO. 951 (28 JULY 2000): AL-KHATIB V. THE COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST³

Termination of services in the interest of the Agency—“Interest of the Agency” should not be narrowly construed—Staff Regulations and Rules must be invoked regarding allegation of misconduct—Question of harm against the Agency’s good image—Question of loss of confidence in staff member

The Applicant entered the service of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) on a temporary indefinite appointment on 2 January 1991, as an Area staff member in the capacity of a Sanitation Labourer. Effective 1 January 1993, he was transferred to the post of Doorkeeper/Cleaner at the North Amman area office.

In October 1996, the Applicant was arrested on a rape charge, and on 5 April 1997, the Great Criminal Court of Jordan found the Applicant innocent. However, on 3 July 1997, the Officer-in-Charge of UNRWA Operations in Jordan wrote to the Applicant and informed him of the decision to terminate his services in the interest of the Agency under Area staff regulation 9.1 and staff rule 109.1, effective that date. The Applicant appealed.

In consideration of the case, the Tribunal noted that while the Respondent enjoyed a wide discretion as to what constituted “the interest of the Agency”, it was not a discretion that was unfettered; it was a discretion which must be exercised rationally. Such a decision could not be made capriciously or arbitrarily, and furthermore, the reasons for such a decision should be apparent so that they might be reviewed by a Joint Appeals Board or another body or by the Tribunal.

The Tribunal further considered that the term “in the interest of the Agency”, should not be construed so as to embrace only the concept of the convenience of the Agency. There were other competing interests at stake, and it was in the interest of the Agency to be seen to act fairly, and would not be in the interest of the Agency to make decisions that were patently unjust and to act thereon.

In the present case, the Tribunal noted that both FAO, which had also been involved in the investigation of the incident, and the Acting Director of UNRWA Operations in Jordan had been unwilling to accept the acquittal by the Great Criminal Court at face value, and construed the “*atwa*” payment to the accusing woman’s family by the Applicant’s family as a sign of guilt. Moreover, the Acting Director

had expressed the view that it would have been impossible also for cultural reasons to reinstate the Applicant at the same area office because the staff, particularly the females, would neither understand nor accept his return. In addition, in his view, there was credible information that the Applicant had “not observed due restraint vis-à-vis female visitors to the area office”.

The Tribunal recalled that when an allegation or suspicion of misconduct was such so as to result in termination of services, the United Nations Staff Regulations and Rules pertaining to allegations of misconduct must be invoked, and a failure to do so would likely constitute an abuse of power or an abuse of procedure (cf. Judgment No. 877, *Abdulhadi* (1998)). The Tribunal, while satisfied that the Respondent was not bound by the acquittal of the Applicant on the rape charge, was equally satisfied that the Respondent was not entitled, without proper investigation or inquiry and without affording the Applicant a fair hearing, either to reach his own, different verdict in relation to that charge or to terminate the Applicant’s services in the interest of the Agency.

The Tribunal also considered the Respondent’s contention that the whole affair had harmed the Agency’s good image in Jordan, which was tantamount to saying that when an allegation had falsely been made against an innocent person and that false allegation had harmed the Agency’s good image, it could nonetheless justify termination of the services of the innocent person. In the opinion of the Tribunal, such a concept would be a defiance of legal principle, justice and common sense.

The Tribunal was furthermore not satisfied that a loss of confidence in the Applicant was sufficient to justify the termination of his services “in the interest of the Agency” unless the facts giving rise to such a loss of confidence were identified.

For the foregoing reasons, the Tribunal ordered the rescission of the decision to terminate the Applicant’s appointment, and that he be reinstated in a position with the grade and the step that he held when he was separated, with full payment of salary and emoluments from the date of his separation from service. Should the Respondent, within 30 days of the notification of the present judgement, decide, in the interest of the Agency, that the Applicant should be compensated without further action being taken in his case, the Tribunal fixed the compensation to be paid the Applicant at two years of his net base salary.

2. JUDGEMENT NO. 954 (28 JULY 2000): SAAF V. THE COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST⁴

Complaint against transfer and separation from service because of redundancy—Discretion to transfer must not be abused—Question of disguised disciplinary sanction—Issue of abolition of post being fictitious—Issue of adequate efforts made to reassign staff member—Question of procedural irregularity giving rise to moral damages

The Tribunal dealt with two applications in one judgement. The Applicant first challenged the decision to transfer him with salary protection from the post of Director of UNRWA in Jordan, which was graded D-1, to the P-5 post of Chief of the Programme Planning and Evaluation Office in Jordan.

The record showed the satisfactory nature of the Applicant's performance until the latter half of 1995, when the Jordan office of UNRWA was reorganized. On 4 September 1995, the Acting Deputy Commissioner-General wrote to the Commissioner-General, calling his attention to a "disturbing situation concerning relations between headquarters Amman and the Jordan field office, in particular vis-à-vis the Field Director", and informing him of a "series of incidents" that had taken place in which "the instructions were circumvented" and his "prerogatives ignored", creating serious problems for the Agency. On 14 September 1995, the Applicant wrote to the Commissioner-General, disagreeing with the Acting Deputy Commissioner-General's concerns. He also wrote the Commissioner-General, requesting that he be considered for the post of Field Office Director of the Syrian Arab Republic.

In a letter dated 20 October 1995 to the Applicant, the Commissioner-General expressed dissatisfaction with the Applicant's explanations regarding the contents of the 4 September letter and informed him of his decision to transfer him to the P-5 post in Jordan. The Applicant contended that the transfer was an abuse of discretion and was a disguised disciplinary sanction.

In consideration of the case, the Tribunal recalled that the established law was that, while the Administration had a discretion to transfer (cf. Judgements No. 167, *Fernandez Rodriguez* (1973), and No. 189, *Ho* (1974)), the discretion must not be abused. The discretion to transfer might have been abused, inter alia, if an appropriate procedure was not followed, or the decision had been implemented in an arbitrary manner which resulted, for example, in injury to the good name and dignity of the staff member, or if undue harm and injury was caused to the staff member. In the present case, as the Tribunal observed, the Applicant had been given ample notice of dissatisfaction with his recent performance and he had had an opportunity to comment. The decision to transfer had been taken by the Administration with full knowledge of the Applicant's views on the standard of his performance and the position to which he wished to be transferred. Beyond that the staff member had no right as such to have his interests honoured (cf. Judgement No. 241, *Furst* (1979)). Furthermore, the Tribunal noted that no convincing evidence had been adduced that the Applicant had been treated in a manner that was insulting or damaging to his reputation or that undue harm and injury had been caused him.

The Tribunal held, therefore, that the Administration had not abused its discretion by any procedurally irregular conduct or arbitrary conduct. Furthermore, in the view of the Tribunal, the Administration had not committed a substantive error in coming to the conclusion that a transfer was necessary, principally because the Applicant's performance had not been up to standard.

Regarding the second issue raised by the Applicant concerning the transfer, the Tribunal found no evidence for concluding that there had been a *détournement de procédure* because the transfer was a disguised disciplinary sanction. The Tribunal had established in a very early case that "although the Administration may not substitute one ground for another as a basis for administrative action, where there are several grounds available to it, it is not obligatory on its part to rely on all such grounds; it may choose to rely on one or more of them." (Cf. Judgements No. 157, *Nelson* (1972), and No. 386, *Cooper* (1987).) However, in the opinion of the Tribunal, there was little evidence that this was the situation in the present case. Indeed, there did not seem to be any evidence of misconduct deserving disciplinary action; rather, the issue was the Applicant's unsatisfactory performance.

The Applicant also raised several issues concerning his termination on the ground of redundancy. The Applicant had been informed on 30 July 1997 that the post he was occupying would be “disestablished as of 31 August 1997”, and that since the Commissioner-General was not willing to give him another posting as Field Director and since no other suitable post had been identified for him, he would become redundant on 31 August 1997. Thereafter, the Applicant would be placed on special leave with full pay until 31 October 1997, when he would be separated from the Agency.

As the Tribunal noted, the decision to abolish a post was discretionary and subject to review like any other discretionary power. In the instant case, the question was whether there was a real reason to abolish the Applicant’s post, or it was just “to get rid of the Applicant”. The record indicated that the Director of Administration and Human Resources was responsible in June 1997 for formulating a plan of action to reduce international staff in order to deal with the Agency’s precarious financial position, and as a consequence had decided to abolish the Applicant’s post, effective 31 August 1997. The record further indicated that there was no evidence that the abolishment had been improperly motivated, or that it could be described as fictitious. Moreover, in the view of the Tribunal, the fact that the Agency had ultimately decided to pay the Applicant in December if he became redundant rather than in August was not indicative of any wrongdoing, as the decision to abolish the post in August was based on good reasons.

Furthermore, the Tribunal observed that it was established jurisprudence of the Tribunal that upon a post being declared redundant or abolished, the Organization must make every good-faith effort to find the incumbent alternative employment (cf. Judgements No. 85, *Carson* (1962); No. 447, *Abbas* (1989); No. 679, *Fagan* (1994); and No. 910, *Soares* (1998)). In that regard, as the Tribunal noted, the Respondent had made considerable efforts to find the Applicant a suitable post, and there was no evidence in the record that such was not the case. In fact, the Tribunal further noted that when the Applicant’s post had been abolished in 1996, the Agency had found an alternate post for him. Moreover, as the Respondent pointed out, all posts of Director in UNRWA carried major responsibilities. Thus, a Director must have the full confidence of the Commissioner-General, and since the Applicant had a recent record of poor performance at the Director level, the Commissioner-General did not wish to consider the Applicant for a vacant post at that level.

The Applicant also questioned the procedure followed in abolishing his post. As the Tribunal recalled, it was a recognized general principle of law that procedural irregularity in the abolition of post was impermissible and could result in a claim of moral injury. The Tribunal, in the present case, was satisfied that there had been neither a fictitious abolition of post nor a failure to make good-faith efforts to find the Applicant an alternative post. Hence, the claim that there was a moral injury could not stand unless there was some other respect in which the Respondent had abused its discretion to abolish the Applicant’s post, and the Applicant had not adduced any evidence to that effect.

For the foregoing reasons, both applications were rejected in their entirety.

3. JUDGEMENT NO. 960 (2 AUGUST 2000): QASEM V. THE COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST⁵

Termination of services for misconduct—Question of Board of Inquiry being properly constituted—Termination in the interest of the Agency/Organization—Circumstantial evidence—Dissenting opinion regarding exceptional circumstances warranting additional compensation

The Applicant entered the service of UNRWA at the Ramallah Men's Training Centre, West Bank, on 15 December 1964 as an Area staff member in the capacity of Clerk/Typist at grade 5 level, on a temporary indefinite appointment, and was given a probationary appointment to the post of Clerk B, effective 1 January 1966. Effective 1 April 1966, he received a promotion to grade 6, and on 10 December 1993, he was promoted to the post of Deputy Field Supply and Transport Officer at grade 16.

On 16 April 1997, the Acting Director of UNRWA Operations, West Bank, convened a Board of Inquiry, to investigate the facts surrounding the interference with a fresh food tender, conducted in April 1997, by an UNRWA Teacher, who appeared to have had confidential information about the value of the lowest tender submitted by one of the bidders. The Board was requested to determine how the UNRWA Teacher had obtained his information and the possible involvement of the UNRWA supply staff in the matter. The Board concluded that several individuals had received confidential information concerning the identity of the lowest bidder, which was used to manipulate the process, and that that information must have been provided by the Applicant. Only three staff could have leaked the information—the Applicant, the Supply Control Officer and the Field Supply and Transport Officer—and the behaviour of the latter two was found not to be improper by the Board. This left the Applicant, who was found to have had improper contact with one of the individuals in receipt of the confidential information, and his demeanour was judged suspect when he gave evidence in the case.

On 23 June 1997, the Acting Director of UNRWA Operations communicated the Board's conclusions to the Applicant; the Acting Director advised him that he had accepted the conclusions and was terminating the Applicant's services for misconduct under staff regulation 10.3 and staff rule 110.1, with effect from 2 May 1997, the day he had been suspended from duty. Subsequently, however, the Commissioner-General changed the ground to termination in the interest of the Agency, in the light of the Applicant's length of service with the Agency and his relatively clean record prior to the matter. The Applicant appealed.

In response to the Applicant's complaint against the composition of the Board of Inquiry, the Tribunal noted that an improper composition of a body was in principle a procedural irregularity which would taint the exercise of a discretion (Judgement No. 172, *Quemerais* (1973)). In the instant case, the Acting Director of UNRWA Operations had initially intended that the Board should be composed of three persons and had nominated three persons, but because of the unavailability of the Assistant Public Information Officer it had carried out its investigations and issued its report as a two-person Board of Inquiry: the FAO officer, who was at the P-4 level, had been appointed and designated as the chair, and the Income Generation Officer, at the P-3 level, had been designated as secretary. The Tribunal considered that the two did not work in the same office; one was not subordinate to the other.

With respect to the Applicant's claim that a three-member Board of Inquiry was essential in examining the complex findings of fact, the Tribunal disagreed. The Tribunal was satisfied that the Legal Adviser's memorandum of 17 March 1997, while expressly stating that the Board of Inquiry should be composed of three persons "as a general rule", held that there was no legal requirement as to the number of persons to be appointed to a Board of Inquiry. What was paramount, in the view of the Tribunal, was that such investigations should be carried out fairly and that no actual or perceived injustice or denial of fair procedures should be apparent.

The Tribunal recalled that the fact that the Applicant's termination of service was on the record ultimately as "in the interest of the Agency" did not alter the fact that the dismissal was for misconduct and that the procedures followed had to comply with at least the general principles of law relating to disciplinary procedures (see Judgement No. 939, *Shahrour* (1999)) for termination in the interest of the Organization.

The Tribunal further recalled that it had been accepted by the Respondent that the case against the Applicant consisted entirely of circumstantial evidence. There was no proof that the Applicant had leaked the confidential information, nor had he made any incriminating admission. As the Tribunal noted, the finding against the Applicant was an inference drawn by the Board of Inquiry from what they found to have been "suspicious circumstances" and "a process of elimination". In that regard, the Tribunal observed that it was held in Judgement No. 934, *Abboud et al.* (1999), that "in order to find wrongdoing on the basis of circumstantial evidence it was necessary to show that the conduct established was not reasonably consistent either with an innocent explanation or with one at variance with the misconduct charged". After a review of the matter, the Tribunal formed the opinion that the conclusions of the Board of Inquiry were unsatisfactory. The Tribunal did not consider that the evidence the Applicant was responsible for the leaks in question was conclusive. While there was undoubtedly evidence which gave rise to seemingly suspicious behaviour on the part of the Applicant, in the opinion of the Tribunal, the Board's analysis of the evidence was flawed and, therefore, its findings could not be relied upon as justification for a decision to terminate the Applicant's services, either for misconduct or in the interest of the Agency.

In view of the foregoing, the Tribunal ordered the rescission of the decision to terminate the Applicant's appointment, and that he be reinstated in a position with the same grade with full payment of salary and emoluments. Should the Respondent, within 30 days of the notification of the present judgement, decide, in the interest of the Agency, that the Applicant should be compensated without further action being taken in his case, the Tribunal fixed the compensation to be paid to the Applicant at two years of his net base salary.

A dissenting opinion was expressed, disagreeing with the award of damages. In the opinion of the dissenting member of the Tribunal, there were exceptional circumstances in the case that warranted greater compensation than the two years' salary that was awarded.

4. JUDGEMENT NO. 974 (17 NOVEMBER 2000): ROBBINS V. THE SECRETARY-GENERAL OF THE UNITED NATIONS⁶

Insufficient compensation award—No right to a promotion—Question of compensation

The Applicant entered the service of the Organization on 22 May 1977, with a probationary appointment as Associate Translator at the P-2 level in the Department of Conference Services, eventually being granted a permanent appointment, and being promoted to the P-4 level in the Centre for Human Rights in Geneva, as an Administrative Officer. On 2 June 1992, she was reassigned to the position of Editor to the Official Records Editing Section, Language Services, Conference Service Division, United Nations Office at Geneva, and, on 1 January 1994, she assumed the post of Chief of the Language Services, receiving a special post allowance to the P-5 level, effective 1 April 1994.

However, she was not successful in being promoted to the P-5 level and was subsequently terminated under the 1996 Early Separation Programme, officially separating from the Organization on 22 May 1997.

The Applicant had appealed her non-promotion to the post of Chief of the Official Records Editing Section at the P-5 level, and the Joint Appeals Board had concluded that her candidature for promotion had been denied full and fair consideration. The Panel had further recommended that the Applicant should be compensated US\$ 55,000 for damages she had suffered, basing that amount on what her pension would have amounted to had she been promoted on 1 April 1994, the date on which she had been granted a special post allowance to P-5, and also taking into account a basic hypothesis followed by the United Nations Joint Staff Pension Fund, that the life expectancy of women was 86 years.

In consideration of the case, the Tribunal noted that the Joint Appeals Board had made its recommendation on an erroneous assumption on which to base the calculation of compensation. As the Tribunal recalled, the Applicant had no right to promotion and, consequently, the issue in the case was whether seven months' salary, the amount decided upon by the Respondent in lieu of the recommended \$55,000, was adequate compensation for the Respondent's unfair treatment of her—resulting from irregularities in procedure and undue delay in taking the promotion decision—which constituted an abuse of discretion. The Tribunal recalled the lack of transparency on the part of the Administration, the confusion caused by the absence of clear guidelines and the lack of clarity in the decisions by the Administration, the fact that for about two years a firm decision on promotion had not been taken and communicated to the Applicant before she accepted an agreed separation offer, and the eventual failure to fill the post for which the Applicant had applied, all indicating clearly that she had been treated in a very arbitrary and unfair manner.

In the view of the Tribunal, the seriousness of the wrong and moral injury done the Applicant warranted more than the seven months' compensation paid her by the Respondent. The Tribunal found that compensation of 10 months' salary would be appropriate in the circumstances, and ordered the Respondent to pay the Applicant an additional three months' salary. The Tribunal rejected all other pleas.

5. JUDGEMENT NO. 981 (21 NOVEMBER 2000): MASRI V. THE SECRETARY-GENERAL OF THE UNITED NATIONS⁷

Non-renewal of appointment for omitting information on the Personal History form—Staff rule 104.10(a) on employment of relatives of staff members—Staff rule 104.12(b)(ii) on no expectancy of fixed-term appointment—Non-renewal cannot be based on improper motives—Delay in Respondent’s answer to appeal

The Applicant entered the service of the United Nations Disengagement Observer Force (UNDOF) on 14 December 1992, as a Clerk/Typist at the G-3 level, on a one-month and 18-day short-term appointment. On 1 February 1993, his appointment was converted to a three-month fixed-term appointment under the 100 Series of the Staff Rules. His fixed-term appointment was extended several times until 30 November 1996, when he was separated from service because he had failed to disclose on his employment application that his brother worked for UNDOF.

The Applicant appealed, contending that the Administration had “constructive knowledge” of his brother’s employment and that, consequently, staff rule 104.10(a) did not apply. The rule provided that, “except where another person equally well qualified cannot be recruited, appointment shall not be granted to a person who bears any of the following relationships to a staff member: father, mother, son, daughter, brother or sister”. The Respondent, on his part, argued that the onus of providing complete and accurate information on his Personal History form was on the Applicant and that the Administration’s reportedly constructive knowledge of his brother’s employment did not detract from his responsibility to provide such information.

In consideration of the case, the Tribunal was of the view that the Applicant’s omission when filling out the Personal History form must be considered in conjunction with the acceptance by the Administration of the application. The implication was that the information received was satisfactory to the Administration and that, by its acceptance, it had waived the requirement of including that information. The Applicant, then, might have been justified in his belief that such information as he omitted was not relevant to his being appointed as a staff member. He had not misled the Organization, as he had not denied having a brother who was a staff member.

Furthermore, the Administration had accepted the application and then, after several renewals of the Applicant’s appointment, it had found fault with the same application. That was a contradiction, in the view of the Tribunal.

The Tribunal observed that staff rule 104.12(b)(ii) invoked by the Respondent provided that fixed-term appointments did not carry any expectancy of renewal or of conversion to any other type of appointment. The discretion of the Secretary-General to renew or not to renew a fixed-term contract was wide, but it had its limits. As the Tribunal pointed out, administrative decisions affecting a staff member must not run counter to certain concepts fundamental to the Organization. They must not be improperly motivated, they must not violate due process and they must not be arbitrary, taken in bad faith or be discriminatory.

In the present case, the Tribunal, citing Judgement No. 440, *Shankar*, found that the Administration had not proceeded in good faith: having considered the Applicant as an employee and periodically renewing his employment for four years and suddenly not renewing his employment constituted bad faith. The improper motivation and the arbitrariness of the Administration were evident from the reasons given to the Applicant for the non-renewal of his contract.

As regards the appeals process, the Tribunal noted that after a year had elapsed without a reply from the Respondent, the Joint Appeals Board (JAB) considered the case without the Respondent's reply and recommended in favour of the Applicant. The Tribunal further noted that the Under-Secretary-General for Management had remanded the appeal to the JAB for re-examination because it felt it was not in anyone's interest to have cases considered on the basis of one-sided accounts. The Tribunal, however, found that that explanation did not excuse the conduct of the Administration for its inordinate delay in responding to the appeal, but that indeed, ironically, the entire situation was the sole creation of the Administration.

In the light of the foregoing, the Tribunal ordered the Respondent to pay the Applicant 18 months' net base salary and rejected all other pleas.

6. JUDGEMENT NO. 983 (21 NOVEMBER 2000): IDRISS V. THE COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST⁸

Termination for misconduct—Disclosure of witnesses' identities—Question whether the Joint Appeals Board had sufficient information to carry out a proper and independent assessment—Dissenting opinion regarding compensation

The Applicant entered the service of UNRWA on 1 January 1985, as an Area staff member, with the title of Welfare Worker, grade 7, Tyre Office, South Lebanon, on a temporary indefinite appointment. On 1 July 1993, his post was reclassified to Social Worker, grade 9. Since his qualifications and experience did not fully meet the requirements of the reclassified post, he was promoted to grade 8. The Applicant was separated from service, effective 13 May 1997.

On 5 February 1996, the Director of UNRWA Affairs convened a Board of Inquiry and subsequently submitted a report to the Director of UNRWA Affairs. The report included a number of allegations made against the Applicant. The Board found, among other things, that the Applicant had misappropriated Agency funds and intentionally deviated from its Regulations and Rules. The Board reconvened, at the request of the Director, on 17 and 18 March 1997, to "confront accused staff members with the accusations" and to give them an opportunity to respond to the allegations. It submitted a supplementary report on 15 April 1997. In the Applicant's case, nothing new came to light and the conclusions of the original report stood, and the Director informed the Applicant that based on the findings of the Board of Inquiry he had decided to terminate the Applicant's services for misconduct pursuant to Area staff regulation 10.2, effective close of business 12 May 1997. The Applicant appealed.

After consideration of the 11 November 1996 report—an interim report—the Tribunal was fully satisfied that there was ample evidence before the Board of Inquiry to justify its conclusions covering the Applicant. The Tribunal also was satisfied that the Board's conclusion was justified as contained in its supplementary report, in which it had concluded that insofar as the Applicant was concerned no new facts had been adduced to cause it to alter its earlier opinion.

The Applicant contended that he had not been afforded an adequate opportunity to defend against the charges of misconduct before the Board of Inquiry because the nature of the charges was too unspecific and lacking in detail; he had not been provided sufficient information as to the nature of the evidence which had been given against him and the identity of a number of witnesses had been withheld.

And he had only been furnished with extracts, instead of the complete report of the Board of Inquiry. Whereas the Tribunal accepted that an amount of “detail” had been kept from the Applicant in the course of the Board’s investigation because of the Administration’s concern for the safety of witnesses and because of the unwillingness of such witnesses to have their identities revealed since they feared reprisals, the Tribunal was satisfied that that did not unreasonably deny the Applicant’s “due process”.

When substantial grounds existed for believing that the disclosure of witnesses’ identities would endanger them, the Tribunal found that it was reasonable to protect the anonymity of such witnesses, provided that in so doing, the person accused would still have sufficient information to meaningfully address the allegations made against him. As pointed out by the Tribunal, obviously there were cases in which it was essential for the accused person to know the source of the allegations against him in order for him to challenge the honesty, reputation or reliability of a witness. There were also cases in which a witness must be identified so as to afford “due process” to a person with an alibi or a similar defence. In such cases, the Tribunal was satisfied that the rights of an accused person to a fair hearing were superior to those of a person seeking anonymity. Under those circumstances, the matter should not proceed unless there was disclosure of the identity of the accuser or witness as the case might be.

The Tribunal was satisfied that no such circumstances, as outlined above, were apparent in the present case. The accused had been afforded a proper and reasonable opportunity to deal with the charges of misconduct in the course of the investigation by the Board of Inquiry, notwithstanding that certain of the names of the witnesses were withheld from him and notwithstanding that he was given limited “extracts” from testimony rather than the full unedited records.

Regarding the question whether there had been sufficient material before the Joint Appeals Board to enable it to discharge its duties and obligations in a proper manner, the Tribunal observed that there was nothing in the report of the JAB that demonstrated that it had addressed the issues which arose in the proceedings before it. The Tribunal agreed with the Applicant’s contention in so far as there was nothing in the JAB report that suggested the JAB had ever dealt with the real issues. The formulaic and arid language used in the JAB report suggested that it had failed to take cognizance of its obligations to review the matters giving rise to the appeal and to make recommendations in a rational and a transparent way.

The Tribunal concluded that the JAB had not had sufficient information to carry out a proper and independent assessment of the proceedings and findings of the Board of Inquiry. It had had before it only “extracts”, rather than the full testimonies, and those by themselves did not contain sufficient information to support all of the Board of Inquiry’s findings adverse to the Applicant.

The Tribunal was satisfied that the proceedings before the Board of Inquiry had afforded the Applicant such information as was permissible in the light of concerns expressed for the safety of witnesses and were sufficient to vindicate the Applicant’s due process rights, limited as they were by the constraints or needs for protecting the witnesses’ safety. The Tribunal was, however, not satisfied that such rights had been adequately vindicated by the Respondent or by the JAB in the course of the JAB proceedings.

Since the Respondent’s decision to terminate the Applicant’s services for misconduct had been based on the findings of the Board of Inquiry rather than on

the recommendations of the JAB (which in any event had recommended that the Respondent's decision should be upheld), the Tribunal was satisfied that that decision was made validly. Although the Tribunal found that the Applicant had not been afforded due process and fair procedures before the JAB, it considered that the shortcomings in the JAB proceedings had been fully redressed by the Tribunal's reconsideration of the entire proceedings. The Tribunal was therefore satisfied that those shortcomings had not resulted in any loss or damage to the Applicant.

In view of the foregoing, the Tribunal rejected the application in its entirety.

The dissenting member of the Tribunal agreed with the majority, but considered that the Applicant should have been awarded compensation for the violation of his right to have had a meaningful review of his appeal by the JAB. That had been rendered impossible by reason of the Administration's unwillingness to furnish to the JAB such information and documents as were necessary for a meaningful review of his case. The dissenting member would have awarded three months' net base salary.

7. JUDGEMENT NO. 987 (22 NOVEMBER 2000): EDONGO V. THE SECRETARY-GENERAL OF THE UNITED NATIONS⁹

Summary dismissal for serious misconduct—Jurisprudence regarding disciplinary decisions—Burden of proof in disciplinary cases—Staff rule 110.2(a) and (b) and ST/AI/371, article II.4, on suspension from duty

The Applicant entered the service of UNHCR on 6 November 1978 at the P-2 level, as Associate Programme Officer, eventually being promoted to the P-5 level. Effective 1 July 1993, the Applicant was assigned to Kinshasa, as Regional Representative with a special post allowance to the D-1 level, and on 1 July 1995, was promoted to the D-1 level. Effective 1 July 1997, the Applicant was promoted to the post of Deputy Director of the UNHCR Regional Bureau for Africa, based in Geneva. Headquarters audited the operational activities of the regional office in Kinshasa in August 1997, which culminated in the Johansson report. In October 1997, UNHCR conducted a special review of the Kinshasa regional office that formed the basis of the Galter report, which contained findings of misappropriation of UNHCR funds by the Applicant. Thereafter, the Applicant was placed on suspension with full pay from 27 November 1997 to 27 April 1998 and, subsequently, was summarily dismissed for serious misconduct.

In consideration of the case, the Tribunal noted that it had repeatedly held that the Secretary-General was vested with discretionary authority to make disciplinary decisions, including the determination of what constituted serious misconduct as well as the appropriate disciplinary measures. The Tribunal confirmed that the Applicant's conduct in the present case, specifically the Applicant's charging to the United Nations the expenses for the shipment of certain personal purchases, amounted to serious misconduct and was within the Secretary-General's discretion to discipline. As the Tribunal noted, the issue in the instant case was whether the Secretary-General had abused his discretionary right to dismiss the Applicant summarily. In that regard, the Tribunal recalled the body of opinions on the issue: Judgments No. 898, *Ugla* (1998), and No. 941, *Kiwanuka* (1999).

The Applicant argued that there was insufficient evidence on the record for the Respondent to conclude that the Applicant had fraudulently misappropriated funds, and that the Secretary-General had not met his burden to prove beyond a reasonable

doubt that the Applicant, by his actions or omissions, had intended to defraud the Organization. However, the Tribunal noted that the Respondent was not required to establish beyond a reasonable doubt a patent intent to commit the alleged irregularities, or that the Applicant was solely responsible for them (Judgement No. 479, *Caine* (1990)). Recently, in Judgement No. 897, *Jhuthi* (1998), the Tribunal had explained its position on the burden of proof:

“ . . . In disciplinary cases, when the Administration produces evidence that raises a reasonable inference that the Applicant is guilty of the alleged misconduct, generally termed a prima facie case of misconduct, that conclusion will stand. The exception is if the Tribunal chooses not to accept the evidence, or the Applicant provides a credible explanation or other evidence, that makes such a conclusion improbable. This is what was meant when the Tribunal stated in Judgement No. 484, *Omosola* (1990), paragraph II, that ‘once a prima facie case of misconduct is established, the staff member must provide satisfactory proof justifying the conduct in question’.”

The Respondent asserted that the Organization’s prima facie evidence of misconduct was based on the Galter report, which contained allegations of mismanagement and misappropriation of UNHCR funds by the Applicant. Specifically, the report stated that at the time of inquiry the Applicant had not paid either for his personal telephone calls which totalled \$16,891 or for the cost of the shipment of personal purchases which totalled \$3,934, which costs had been charged to UNHCR.

With respect to the charges for the Applicant’s personal telephone calls, the Tribunal recognized that due to the turmoil and instability which prevailed in the area it was clear that the collection from or payment by staff members of sums due for their personal telephone calls had been relegated to a very low priority. Evidently, only a very small percentage of the sums due for such calls had been reimbursed to the Organization, and the Applicant’s position regarding non-payment appeared to the Tribunal to have been no different than that of the vast majority of staff. The Tribunal considered that to have singled out the Applicant and to have characterized his behaviour as fraudulent was arbitrary and unwarranted.

With regard to charging the Organization for the costs for transportation of the Applicant’s personal purchases from Johannesburg to Kinshasa, the matter was quite different, in the view of the Tribunal. The Tribunal noted that the Applicant had travelled to South Africa on a shopping trip and had charged to the Organization the costs of shipping his purchases back to his duty station. The Tribunal was satisfied that there was ample evidence to support the Joint Disciplinary Committee’s finding that the transaction was fraudulent. The Applicant had never sought permission from the Organization to ship his purchases; he had never advised the Organization that he had done so; and he had never informed the Organization that those costs were attributable to him until his actions were detected and payment was demanded.

The Applicant further claimed that the Respondent’s decisions to suspend him and to twice extend the suspension period for a total of five months were procedurally irregular, since the Respondent had failed to establish the requisite grounds necessary to impose a suspension under staff rule 110.2(a) and (b) and ST/AI/371, article II.4. In connection with that rule and the administrative instruction, the Tribunal emphasized the significance of the Respondent’s providing a reason when extending the suspension for more than three months (cf. Judgement No. 4, *Howrani* (1951)). The Tribunal observed that the record did indicate that the Applicant had

been informed that the reasons for the extended suspensions were not based only on the fear that if the Applicant was at the workplace there would be a risk of evidence being destroyed or concealed, but also on the fact that additional time was required to complete the investigation. The Tribunal concluded that the Respondent had not taken excessive time in carrying out its investigation, and that it was clear that the five-month suspension of the Applicant was not undue and irregular and was warranted in the circumstances.

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

B. Decisions of the Administrative Tribunal of the International Labour Organization¹⁰

1. JUDGEMENT NO. 1897 (3 FEBRUARY 2000): IN RE CERVANTES (NO. 4), KAGERMEIER (NO. 5) AND MUNNIX (NO. 2) V. EUROPEAN PATENT ORGANISATION¹¹

Complaint against extending staff members beyond retirement age—Capacity of staff representatives to lodge an appeal—Question of equal treatment—Question of an amendment to the Staff Rules—Exceptions to the rules—Extension cannot be set aside a posteriori—Issue of imposing penalty on the Organisation

Two staff members who were members of the boards of appeal of the European Patent Organisation (EPO) were given employment contracts beyond the mandatory retirement age of 65. The President of the European Patent Office had requested the measure on an exceptional basis as the staff members did not have the requisite 10 years of service required for receiving a pension. The decision to retain them also would grant them access, after retirement, to the Organisation's health insurance scheme. EPO staff representatives appealed the decision, arguing that it was unlawful, that it breached the principle of equality of treatment and that it prejudiced other staff members participating in the pension scheme by proportionally increasing the cost to them of the pension and health insurance schemes.

The Tribunal firstly observed that in their capacity as the official representatives of the staff, the staff representatives of EPO bodies were able to act not only in their own interests, but also in the interests of the staff, at least when so permitted by the internal rules (see Judgements No. 1147, *in re Raths*, and No. 1618, *in re Baillet No. 2*).

The Tribunal recalled that the right to equal treatment was breached when, in like or comparable situations, one person enjoyed a benefit which was not granted to another. The impugned decisions allowed two staff members reaching the age of 65 years, the age of automatic retirement, to obtain an extension of their service beyond that age so that they could complete a total period of service of 10 years, thereby allowing them to obtain a retirement pension and to maintain their coverage by the health insurance scheme under favourable conditions. As noted by the Tribunal, none of the complainants claimed to be in the situation of reaching 65 years without being able to complete a period of 10 years of service with the Organisation. They could not, therefore, personally complain of inequality of treatment on that score. However, they could argue inequality of treatment with regard to the financial

impact of the measure, and its basis in law. As further noted by the Tribunal, in view of the system of sharing the costs of the retirement and health insurance schemes, the contributors as a whole might have to pay more than if the two beneficiaries had not been granted the disputed extension. The complainants did indeed contend that the challenged decision would give rise to such additional cost and EPO did not exclude the possibility of those additional costs, although it asserted that it would in any case be minimal and would have an almost insignificant impact on the amount paid by each contributor.

The complainants further argued that EPO had not submitted the issue of extending the retirement age of the staff members to the General Advisory Committee. The Tribunal agreed with EPO that the measure did not consist of the adoption or amendment of the rules, and that the impugned measure concerned two individual decisions presented as being exceptional and non-renewable. Furthermore, in view of the minor impact of those decisions on the situation of staff members and their exceptional nature, the Tribunal was of the opinion that EPO had not abused its latitude by refraining from consulting the General Advisory Committee.

In consideration of the merits of the case, the Tribunal noted that the text of article 54 of the Service Regulations clearly provided that “a permanent employee shall be retired . . . automatically, on the last day of the month during which he reaches the age of 65 years”, and that article 7 of the Pension Scheme Regulations provided that entitlement to a retirement pension could only be obtained after a period of 10 years’ service with the Organisation. The Tribunal also observed that in accordance with the principle, that administrations in their action must abide by the rules of law, an exception to a general rule was therefore possible only when it was provided for by the rules in force. The Tribunal furthermore acknowledged that there was the possibility of granting an exception based on the interpretation of a written text and, moreover, rules might have shortcomings which needed to be remedied during implementation, for example, when a new situation emerged which the “legislator” had not intended to cover and which required an appropriate solution (see Judgements No. 1679, *in re Serlooten*, and No. 1877, *in re Serlooten No. 2*).

In that regard, the Tribunal observed that EPO had not invoked any explicit rule permitting exceptions in specific cases from retirement at the age envisaged in the Service Regulations. The only reason given for granting the exception was the consideration that it would be inequitable to deprive the staff members of a retirement pension on the grounds that, having been appointed after the age of 55 years, they could not fulfil the requirement of 10 years’ service. Nor, in the Tribunal’s view, was there any evidence produced to show that there were any real shortcomings in the rules. Indeed, the rules appeared to have contemplated such a situation, which was not of an exceptional nature and which was not unforeseeable by the legislator. It was also clear at the time of their recruitment that, when they reached retirement age, they would not fulfil the conditions for entitlement to a retirement pension.

The Tribunal noted that if the rule was not satisfactory, it was for its author to change it. In that respect, EPO argued that the Administrative Council was also the legislator, or the body which was competent to adopt an amendment to the Service Regulations, and therefore to allow exceptions to its own rules. However, in the opinion of the Tribunal, a general principle had it that an authority was bound to respect the rules which it had itself set, and in keeping with the rule that similar acts required similar procedures, the modifications of a rule—including allowing an exception—must respect the same process which had been used for its adoption. This had been done in the present case.

EPO moreover also contended that, having reached the age of 65 years, the two persons concerned ceased to be employees. However, they could be engaged as contract staff, and a teleological interpretation of article 33(2)(b) of the European Patent Convention would have it that “the Council is competent to regulate all the issues relating to the conditions of service of its staff, whether or not they were permanent employees”. On those grounds, it argued that the Council was competent to convert the status of the two persons concerned from staff members to contract staff under conditions which constituted exceptions to the Service Regulations, in terms, of the duration of service and the conditions for entitlement to a retirement pension. In the opinion of the Tribunal, that argument could not stand. One of the purposes of article 33 of the Convention was to allow the Council to issue general rules, relating to the conditions of service applicable to all staff members. Under article 33, the Council was not authorized to evade the rules set out in the Convention, in the absence of a provision authorizing exceptions, by means of individual decisions which were contrary to the letter and purpose of the Service Regulations.

It followed that the Council’s decision to authorize an extension of service beyond the age of 65 years was not lawful and must be set aside.

As the Tribunal observed, the two staff members concerned had already completed the service envisaged during their extension (one of them for only five months) and the recompense due from the Organisation could not be denied to them. They had accepted the extension in good faith and EPO must protect them from any prejudice. There were therefore no grounds for setting aside a posteriori the contracts concluded for the extension of their service.

The conditions for granting compensation for moral damages had not been met, in the opinion of the Tribunal. Moreover, the request to impose a penalty on the Organisation for failing to revoke the decision was at the very least premature. In the light of that judgement, it became devoid of all object.

For the above reasons, the decision of the Administrative Council of EPO to maintain in service two members of the boards of appeal beyond the age of 65 years was set aside, and the Organisation was to pay the complainants the sum of 2,000 euros in costs.

2. JUDGEMENT NO. 1929 (3 FEBRUARY 2000): IN RE BEAUCENT V. UNIVERSAL POSTAL UNION¹²

Complaint against transfer—Tribunal’s review of discretionary decision to transfer staff member—Compulsory transfer of a disciplinary nature—Question of financial and moral damages

The complainant entered the staff of the International Bureau of the Universal Postal Union (UPU) on 26 April 1993, as assistant counsellor responsible for strategic planning at grade P.4. After being appointed to the post of Head of the Finance Section, he was promoted to Counsellor at grade P.5 on 1 June 1997. On 23 February 1998, the Deputy Director-General, as the complainant’s first-level supervisor, completed his performance appraisal and career plan report for the period 1 January 1997 to 31 December 1997. He gave him the overall rating “good”.

On 30 July 1998, external consultants, contracted at the request of the Council of Administration to carry out a study “evaluating the structuring of UPU”, submitted their report. Their recommendations included the merging of the Informatics

and Data Base Section and the Postal Technology Centre. On 28 August 1998, the Deputy Director-General informed the complainant that the above merger would take effect on 1 September. In the context of the merger, the former Head of the Informatics Section, Mr. A., was appointed Head of the Finance Section in place of the complainant. The latter was transferred to the Postal Technology Centre. The Deputy Director-General also sent him a letter the same day enumerating a number of criticisms of his performance. The complainant protested, but the decision was upheld, and he appealed.

In consideration of the case, the Tribunal observed that the right of UPU to decide upon a compulsory transfer that was in its interests, pursuant to staff regulation 1.2, paragraph 1, was rightly not contested. Precedent had it that such a decision was at the Director-General's discretion. In principle, an organization was the judge of its own interests and the Tribunal would not substitute the organization's views with its own; it would not interfere unless the decision was *ultra vires*, or there was a formal or procedural flaw or a mistake of law or of fact, or some material fact had been overlooked, or some obviously wrong conclusion drawn from the evidence, or there was misuse of authority. (See, for example, Judgements No. 1496, *in re Gusten*; No. 1757, *in re Hardy No. 4*; and No. 1862, *in re Ansorge No. 2*.)

Moreover, as the Tribunal pointed out, compulsory transfer, in the manner in which it was processed, ordered and notified, must not needlessly harm the interests of the staff member, and particularly his dignity, or cause him unnecessary hardship. And the decision must follow a proper inquiry. (See Judgements No. 1496, *in re Gusten*; No. 1726, *in re Mogensen*; No. 1779, *in re Feistauer*; and No. 1862, *in re Ansorge No. 2*.)

Furthermore, compulsory transfer of a disciplinary nature must afford the staff member the safeguards available in the case of disciplinary sanctions, that is, the right of the staff member to be heard before the sanction was ordered, with the option for him to participate in the full processing of the evidence and to make all his pleas.

In the present case, the Tribunal recalled that the Union had contended rather unconvincingly that the compulsory transfer (an administrative measure necessitated by the restructuring) was totally unrelated to the professional criticisms levelled at the staff member in the letter of 28 August 1998, which might subsequently have led to a disciplinary procedure. In fact, as noted by the Tribunal, the compulsory transfer and the letter had been communicated to the staff member on the same occasion, on 28 August 1998, during a brief interview. The fact that the Deputy Director-General had already carried out an investigation and established a file in support of those criticisms on that occasion also gave grounds for believing that they had played an important role in the Director-General's decision to proceed with the compulsory transfer.

Moreover, in a letter to the complainant dated 16 October 1998, the Deputy Director-General agreed that the criticisms made "may no longer have the same importance since your transfer to the Postal Technology Centre". The Tribunal concluded that they were to a great extent behind the decision to transfer the complainant and that they were also intended to justify that decision.

As observed by the Tribunal, the element of sanction inherent in the transfer was borne out by the brutal manner in which it had been announced and put into effect. While the concern to carry out the restructuring rapidly was easily understandable,

it was neither argued nor proven that a permanent transfer was so urgent that it prevented any consultations with the persons concerned. The sudden announcement of a transfer to a post which could be considered inferior, coming into effect a few days later, without prior notice or consultation, had therefore wounded the complainant's dignity. Taken together, the material circumstances gave grounds for considering that the impugned transfer partly constituted a hidden disciplinary sanction.

The Tribunal noted that, as it was not accompanied by the protective measures required before the imposition of disciplinary sanctions, the complainant's right to a hearing had not been respected. The opportunity which he had subsequently been granted to express his views was not sufficient to redress the consequences of that procedural flaw. The impugned decision must, in the opinion of the Tribunal, therefore be set aside and the procedure resumed from the point at which it was flawed, through the application of the relevant terms of staff regulation 10.1 to 10.3.

The Tribunal also noted that the judgement did not prevent the Director-General from taking the measures necessary to safeguard the proper functioning of the service until a final decision could be made: see Judgement No. 1771, *in re De Riemaeker No. 4*. It did not prejudice in any way the decision to be taken on the merits.

In the view of the Tribunal, the complainant's financial claims were premature, since the Tribunal could not yet rule on the merits of the decision. The unlawful nature of the impugned decision and its consequences would undoubtedly justify the granting of moral damages already at the current stage. However, as the Tribunal pointed out, the gravity of the case might be assessed differently, depending on whether or not the Union had a valid reason for carrying out the transfer. Therefore, the Tribunal sent the case back on this point as well.

The Tribunal awarded the complainant 5,000 Swiss francs for costs.

3. JUDGEMENT NO. 1961 (12 JULY 2000): IN RE CODY V. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION¹³

Abolition of post and termination of services—Assignment of duties of abolished post to other staff members—Efforts at redeployment—Question of a warning to staff member of abolition of post—Issue of a remedy for staff member terminated short of two years to early retirement

The complainant, who was born in 1942, was employed as an economist with the United Nations Industrial Development Organization (UNIDO), as from 31 July 1973. At the time of his separation, on 21 June 1996, from UNIDO he had a permanent appointment at the P-4 level. On 19 June 1996, as a part of its general staff reduction brought about by budgetary constraints, UNIDO decided to terminate the complainant's permanent appointment with effect from 28 June 1996. His internal appeal was heard by the Joint Appeals Board, which recommended on 8 December 1998 that the decision be reversed and that the complainant be reinstated but that, should reinstatement not be possible, a mutually acceptable agreement be reached with him. By a decision of 7 January 1999, the Director-General maintained the original decision to terminate the complainant's appointment and directed that efforts be made to find a mutually acceptable settlement. Efforts to reach such a settlement having failed, the complainant impugned the decision of 7 January 1999.

The complainant argued that the post he occupied at the time he was terminated had never in fact been abolished and that no proper efforts had been made to redeploy him in accordance with the priority to which his permanent appointment entitled him under the terms of rule 110.02(a). He also argued that the Administration had acted unfairly in terminating him after 23 years of service and with two years to go before he became eligible for early retirement with full pension. He also contended that he should have been warned that his position might be in danger prior to the decision being made to abolish it, so that he would have been able to take advantage of the voluntary separation programme.

The complainant's argument that his position had not really been abolished, which found favour with the Joint Appeals Board, was based upon his assertion that most or all of his former duties had been assigned to another staff member. As explained by the Tribunal, that argument confused the abolition of a post with the disappearance of the duties attached to that post. In Judgement No. 139, *in re Chouinard*, the Tribunal had made it clear that it did not consider the assignment of the duties of an abolished post to other staff members as an indication that there had been an abuse of authority, provided that the evidence showed that the number of staff members had in fact been reduced. That was the case here and it was clear from the evidence that the number of staff employed by UNIDO had been substantially reduced at the time the complainant's position was abolished.

With respect to the complainant's argument that he had not been granted the priority to which he was entitled in the efforts to redeploy him, as the Tribunal observed, the evidence showed that the complainant had been considered for a number of available positions in UNIDO but was not found to be suitable for any of them. The complainant had taken issue with the opinions expressed by various persons by whom he was interviewed for such positions, but those were essentially matters of personal judgement with which, in the absence of evidence of fraud or improper motive, the Tribunal would not interfere.

The complainant's contention that he should have been warned of the possible abolition of his post in time to allow him to take advantage of the voluntary separation programme was equally without merit, according to the Tribunal. The deadline for applying for voluntary separation was 8 January 1996, and it was clear that it had been established precisely for the purpose of allowing the employer, who was facing drastic budget cuts, to know how many members of the staff would be leaving voluntarily before it had to undertake involuntary terminations and identify the posts which would have to be abolished. As pointed out by the Tribunal, it would in fact have been impossible to tell the complainant, prior to that date, that his post was likely to be abolished.

In the opinion of the Tribunal, the complainant's case was undoubtedly a sympathetic one, and had been viewed as such by the Organization. He had served it long and faithfully and had been released with a scant two years to go before he would have been entitled to take early retirement with full pension. As noted by the Tribunal, following the impugned decision of 7 January 1999 and in accordance with the terms thereof, the Organization had made an offer to the complainant in terms which would have allowed him to take early retirement with full pension and other benefits on 31 July 1998 and with reimbursement of his contributions to the pension fund, which he had paid out of his own pocket during the period of special leave without pay from June 1996 to July 1998. Although that offer had a limitation

date on it which had now expired, the Tribunal hoped, without imposing any obligation, that the Organization would still make it available to the complainant.

The complaint was dismissed.

4. JUDGEMENT NO. 1968 (12 JULY 2000): IN RE CONCANNON V. EUROPEAN PATENT ORGANISATION¹⁴

Complaint against promotion of another staff member—Delays in Respondent's answer to appeal—Question of the other staff member being treated as an exceptional case—Limits to President's discretion to make promotions

The complainant appealed against the administrative decision of the President of his employer, the European Patent Office, which is the secretariat of the European Patent Organisation (EPO), promoting the complainant's colleague Mr. C. to grade A4 with effect from 1 December 1997. Prior to that promotion, Mr. C., like the complainant, was at grade A3. In February and March 1998, the complainant and some 200 of his colleagues filed internal appeals with the President in a timely manner. The appeals were referred by the President to the Appeals Committee in April 1998.

In March 1999, the complainant inquired of the Chairman of the Appeals Committee as to when the Committee might be prepared to make its recommendations. He received a reply to the effect that the Committee had not yet received the position paper of the Administration and the complete file. On 19 March 1999, the Director of Personnel Development wrote to the complainant stating that there was a serious backlog in the processing of internal appeals but that his service would endeavour to produce the Administration's position paper as soon as possible. The present complaint was filed on 29 July; the relief sought was either the setting aside of the decision to promote Mr. C. or moral damages.

The defendant claimed that the complaint was irreceivable on two grounds: (a) the complainant had not exhausted his internal means of redress; and (b) the decision to promote a colleague did not adversely affect the complainant. However, the Tribunal disagreed, citing its case law which stated that where the pursuit of internal remedies was unreasonably delayed the requirement of article VII(1) would have been met if, though doing everything that could be expected to get the matter concluded, the complainant could show that the internal appeal proceedings were unlikely to end within a reasonable time: see Judgements No. 1243, *in re Birendar Singh No. 2*; No. 1404, *in re Rwegellera*; No. 1433, *in re McLean*; No. 1486, *in re Wassef No. 8*; No. 1534, *in re Wassef No. 14*; and No. 1684, *in re Forte*.

In the present case, the Organisation argued that since in fact the complete file and the Administration's position paper had been sent to the Appeals Committee on 12 October 1999, it was now established that the internal appeal was going forward and that the complainant had not accordingly exhausted his internal means of redress. The Tribunal disagreed. Receivability fell to be determined at the time that a complaint was filed, not at some later date. As at 29 July 1999, the complainant had done all that could be reasonably expected of him. He had filed his appeal in time. Approximately a year later he wrote to enquire about its progress and had been informed that the Administration had done nothing but would move forward as soon as possible. He filed his complaint just over four months later having heard nothing further from the Administration. At that time almost 20 months had elapsed since the original challenged decision had been published. In the view of the Tribunal, the

Administration's plea that it had a heavy backlog of internal appeals to deal with might be a reason for the inordinate delay, but it was not an excuse. As at 29 July 1999, it was simply not reasonable to expect the complainant to wait any longer to see even the beginning of the end of the internal appeal procedure. If the Organisation was overloaded with internal appeals, it was for it to remedy the situation rather than expect the complainant to bear the consequences.

The second ground of alleged irreceivability was equally untenable. As detailed below, the gravamen of the complaint was that Mr. C. had not met the published criteria for promotion from A3 to A4. To this the Administration pleaded that it was entitled to treat Mr. C. as an exceptional case. If that was so, as pointed out by the Tribunal, then it was irrelevant that the complainant also had not met all the criteria for promotion from A3 to A4, since he too could claim that he had a right to be considered as an exceptional case and therefore had been adversely affected by the impugned decision. Both had been at the same grade, in the same career stream, and both had been entitled to expect that promotions would only be made fairly and objectively, based on merit and in accordance with law.

As to the merits of the case, the Tribunal observed that pursuant to article 49 of the Service Regulations the President of the Office had sent instructions to the Promotion Board together with relevant information relating to all the staff members who might have been eligible for promotion. The Tribunal recalled that under that article the Promotion Board could submit to the President "special cases", where the usual requirements were not fully met for promotion from A3 to A4. In the present case, both the complainant's name and that of Mr. C. appeared on the list of eligible A3 employees which were attached to the instructions; however, neither met the "normal" requirements established by the President's instructions to the Promotion Board: Mr. C. met neither the requirements for age nor those for years of reckonable service. The Tribunal further noted that Mr. C. had worked in close proximity to the President and under his direct supervision, and was clearly an outstanding employee, and that there could be no doubt that the President had formed the view, prior to any consultation process involving the Promotion Board, that Mr. C. should be promoted to grade A4. Indeed, he had written to the Promotion Board drawing the Board's attention to Mr. C.'s case and suggesting that he be treated as a "special case". However, the Board had declined to recommend the promotion of Mr. C.; the President nevertheless had made the promotion on his own authority.

The Tribunal, while recalling that it was clear that the role of the Promotion Board was essentially consultative and that the Organisation was not obliged to make promotions in accordance with its recommendations, it was equally clear that the Organisation had formally committed itself only to making promotions which had been approved and recommended by the Board. Paragraph 3 of article 49(10) clearly qualified the discretion given to the President by article 49(4) when it stated that the Board shall draw up and send to the President "for his decision" a list of eligible candidates.

The Tribunal, citing Judgement No. 1600, *in re Blimetsrieder and others*, considered that the President might only make promotions in accordance with the Board's recommendations, and since the Board had declined to recommend Mr. C. for promotion, his promotion was irregular. The Tribunal therefore set the decision to promote Mr. C. aside, and awarded the complainant 1,000 euros in costs.

5. JUDGEMENT NO. 1969 (12 JULY 2000): IN RE WACKER V. EUROPEAN PATENT ORGANISATION¹⁵

Request for change of place of home leave—Limits to discretionary decision—Review of place of home leave is an exceptional measure

The complainant, a German national born in 1947, joined the European Patent Office, the secretariat of the European Patent Organisation, in 1984. He was assigned to the Office's Directorate-General 1 in The Hague. By a letter dated 2 March 1998, the complainant requested that his place of home leave be changed from Schwabisch Gmund in Germany to Zamboanga City in the Philippines. He stated that his mother and one sister had recently passed away, most of his other relatives no longer lived in Schwabisch Gmund, and that he had closer personal relationships with members of his wife's family than with his own and he intended to retire to Zamboanga City. The request was denied and the complainant appealed.

The relevant article 60(2) of the Service Regulations read:

“... the home ... shall be the place with which the [the employee] has the closest connection outside the country in which he is permanently employed. This shall be determined when the employee takes up duties, taking into account the place of residence of the employee's family.

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

The complainant claimed that the Administration, in assessing whether there had been a radical change in his personal circumstances, had not duly considered essential facts. It had applied a strict and rigid interpretation of “home”. It had also failed to give any weight to his submission that the “spiritual and psychological” links he had with the Philippines were stronger than those he had with Germany. That aspect had not even been considered. He submitted that the assessment that his current personal circumstances did not qualify as a radical change was an erroneous conclusion resulting from a failure to give the proper weight to the facts.

Since the decision of the President under article 60(2) of the Service Regulations was a discretionary decision (see Judgement No. 525, *in re Hakiri*), the Tribunal would quash such a decision only if it had been taken without authority, or if it was tainted with a procedural or formal flaw or based on a mistake of fact or of law, or if essential facts had been overlooked, or if there was abuse of authority, or if clearly mistaken conclusions had been drawn from the evidence. If none of those grounds was established, the Tribunal might not substitute its view for that of the President. The ground put forward by the complainant was that essential facts had been overlooked in the sense that proper weight had not been given to the facts, leading to an erroneous conclusion.

As the Tribunal observed, there was no evidence to show that any fact had been overlooked. All the points put forward by the complainant had been considered. The impugned decision had been based on a consideration of all the facts. A review of a decision under article 60(2) was an exceptional measure (Judgement No. 525). It was not possible to say that clearly mistaken conclusions had been drawn from the evidence. After taking everything into account, the President had taken a different view to the one held by the complainant in his submissions. It followed that there were no grounds for setting aside the decision.

6. JUDGEMENT NO. 1983 (12 JULY 2000): IN RE GOMES PEDROSA V. UNITED NATIONS INDUSTRIAL DEVELOPMENT ORGANIZATION¹⁶

Non-renewal of short-term appointment—Questions of receivability—Reasons for non-renewal must be given within a reasonable time—Judgement No. 946, in re Fernandez-Caballero (reasons must be given in case staff member chooses to appeal)

The complainant was recruited in August 1994 as a typist by the United Nations Industrial Development Organization (UNIDO) in France. After an initial appointment of one month and 10 days, she was given a series of short-term contracts, the last of which expired on 31 December 1997. On 13 November 1997, while she was in Brazil on mission for the organization, she received a fax message dated 11 November from her first-level supervisor, the Brazilian delegate to the UNIDO Service in France, “confirming” that “by mutual agreement” her contract, due to expire on 31 December 1997, would not be renewed in 1998 and that her wish to be recruited as a technical assistant did not tally with the needs of the service. A second fax message, dated 20 November 1997, confirmed the first one and its author explained that the reference to a “mutual agreement” stemmed from the fact that a few months earlier the complainant had sought her help in finding work in Brazil where she planned to return to live. On 23 November 1997, the complainant answered the two messages. She expressed surprise at their content and stated that she had never agreed to the non-renewal of her appointment; that she had not reached a decision about returning to Brazil; and that although the duties she performed were not those of a typist but of a technical assistant, she was ready to continue performing them. She confirmed those statements in a fax message dated 28 November 1997.

On returning to Paris after taking authorized leave in Brazil, the complainant went to the UNIDO Service in Paris on 5 January 1998, but the Director of the Service reminded her that her appointment had not been renewed and asked her not to return to her former place of work. On 13 January 1998, she wrote a letter of protest to the Director in which she stated that her supervisor’s intentions were of no legal value without a letter of confirmation from the Director, as he alone was her employer. The Director wrote to her on 16 January 1998 confirming the non-renewal of her appointment. He also reminded her that her supervisor, the Brazilian delegate, had full authority over her and that the successive renewals of her appointment had always been notified to her by the serving Brazilian delegate. In a letter of 6 February 1998 to the Director-General of UNIDO, the complainant submitted a request, pursuant to staff rule 112.02, for a review of the decision contained in the letter of 16 January. She also asked, in the event of a negative response, to be allowed to come straight to the Tribunal without having to go before the Joint Appeals Board. Having received no reply, she filed the present complaint, in which she sought the quashing of the implied decision and claimed 200,000 French francs in damages, 433,600 francs in back pay for the salary to which she would have been entitled had she been paid in accordance with the duties she actually performed for 40 months, and 40,000 francs in costs.

The Organization had raised several issues of receivability to the complaint. The Tribunal agreed that her claim to back pay was irreceivable because it had been submitted directly to the Tribunal without having been made in an internal appeal. As noted by the Tribunal, contrary to what the complainant asserted in her rejoinder, it was quite separate from her claim concerning the non-renewal of her appointment, and that she was allegedly underpaid bore no relation to the injury caused by the

termination of her appointment. The claim was therefore irreceivable since she had failed to exhaust the internal remedies.

However, her claim to compensation for the injury caused by the non-renewal of her contract was receivable. The defendant cited staff rule 112.02(a), which states:

“A serving or former staff member who wishes to appeal an administrative decision under the terms of regulation 12.1 shall, as a first step, address a letter to the Director-General, requesting that the administrative decision be reviewed. Such a letter must be sent within 60 days from the date the staff member received notification of the decision in writing.”

The Organization contended that the non-renewal decision had been given in the letter of 11 November 1997, received by the complainant on 13 November, and that she therefore had until 12 January 1998 to ask the Director-General to review it. Since she submitted it on 6 February 1998 her request was out of time. In the Tribunal’s opinion, the plea failed: although the Brazilian delegate’s letter of 11 November 1997 told the complainant clearly that her contract would not be renewed, it was a personal letter referring to a “mutual agreement”, which obviously did not exist. The letter could not be regarded by the complainant as an administrative decision taken by the competent authority which could set a time limit for appeal. As the Tribunal pointed out, it was true that the complainant had been aware of the Organization’s intentions, having been informed of them several times, in particular, in a talk with the Director of the UNIDO Service in France on 6 November 1997 and by the fax messages of 11 and 20 November 1997. Nevertheless, she was right to wait for official notification of an administrative decision from the competent authorities of UNIDO before challenging the measure. Although the letter of 16 January 1998, signed by the Director of the UNIDO Service in France, appeared to be merely a letter of confirmation, it was the only official administrative decision adversely affecting the complainant. The Tribunal concluded that her letter of 6 February 1998 seeking a review of it was therefore in time.

In support of her claim, the complainant submitted that UNIDO was in breach of its duty of good faith and loyalty towards her, particularly since it had failed to inform her in good time of its intention not to renew her contract, and that the termination of her appointment had been based on wrong facts, which amounted to failure to provide reasons.

As noted by the Tribunal, the evidence showed that, being employed under a series of short-term contracts, the complainant knew that her appointment was not automatically renewable. In the absence of convincing written evidence, other than the fax messages of 11 and 20 November 1997, it could not be denied that there was tension between the complainant and the Brazilian delegate, prompted in part by the discrepancy between the tasks the complainant actually performed and the Service’s need for a real secretary—the job for which the complainant had been recruited—and not a technical assistant. Consequently, as explained by the Tribunal, the complainant might not allege that the non-renewal of her contract had come as a surprise and that she had been given no warning, which would have been contrary to the principles governing relations between an organization and its staff. As to the absence of one month’s notice, UNIDO rightly pointed out that the obligation arising from the provisions of the Staff Regulations applied to dismissal and not to non-renewal of a fixed-term appointment. Nonetheless, as the Tribunal recalled, the case law stated that an organization must always give the reasons for a decision not to renew an appointment and those reasons must be notified to the staff member within a reasonable time.

In the present case, as the Tribunal observed, there was some doubt as to the Organization's real reasons. The first fax message addressed to the complainant referred to a "mutual agreement", which clearly did not exist. The fact that she did not actually perform the duties of a secretary was undoubtedly one of the reasons for the final decision. But that situation was not new. UNIDO seemed to have accepted it and apparently issued no warnings on that score. A letter, submitted in the surrejoinder, addressed by the delegate of Brazil to the Director of the Service and dated 2 February 1999, mentioned that "she never did her work properly and refused to help Mrs. C.", which did imply that there were personal criticisms of the complainant, though the evidence included no assessment of her work. In short, the Tribunal concluded that the above elements, taken together, indicated that the explanation given for the non-renewal of the complainant's appointment was far from clear and precise reasons were lacking. As the Tribunal recalled in Judgement No. 946, *in re Fernandez-Caballero*:

"As a rule the reasons for any administrative decision must be stated. Non-renewal is plainly a decision of great consequence to a staff member and, though the Director-General is free to make his own assessment of the material facts, the staff member is entitled to know the reasons for the Director-General's conclusions so that he may, if he chooses, lodge first an appeal and then, if need be, a complaint with the Tribunal."

As the Tribunal pointed out, the impugned decision of 16 January 1997 had merely informed the complainant, without any statement of reasons, that the Brazilian delegate "has full authority . . . to choose her staff and, of course, define their duties". The reasons given by the Brazilian delegate, who had only such authority as was mandated by the general management of UNIDO, being neither clear nor established as regards the complainant's agreement to the non-renewal of her appointment, the Tribunal considered that the decision under challenge must be set aside for want of an adequate explanation. The complainant sought neither reinstatement nor a new contract, but redress for injury, which the Tribunal set at 50,000 French francs. Since the complaint had succeeded in part, she was entitled to costs, which the Tribunal set at 20,000 francs.

7. JUDGEMENT NO. 1987 (12 JULY 2000): IN RE DUNSETH AND MATTMANN V. ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS¹⁷

Refusal to reclassify posts—Director-General's competency to reclassify posts—Difference between reclassification of post and promotion to new post grade

Following a review of the classification of posts at the Organisation for the Prohibition of Chemical Weapons (OPCW), the Director-General told staff on 6 and 7 August 1998 that he had decided to "implement all the grade changes recommended in the staffing chart attached to the annexed consultant's report". The decision was to take effect on 1 January 1999. However, concerned at the budgetary implications, the member States asked the Director-General in November 1998 not to reclassify any posts pending further discussions on the Organisation's budget and work programme. Subsequently, they asked him in July 1999 to commission a new classification review after approval by the Executive Council of its terms of reference and scope. As a consequence, the reclassification of 118 posts recommended by the consultant was not implemented as announced on 6 and 7 August 1998.

The complainants, those whose posts were to be reclassified, appealed, emphasizing that the note of 7 August 1998 confirming an internal memorandum

of 6 August, addressed to the staff, presented the implementation of the changes recommended by the consultant as a decision taken by the Director-General. They submitted that the decision fell within the competence of the Director-General by virtue of regulation 2.1 of the Interim Staff Regulations and that it created rights for the staff members concerned.

In rebuttal, the Organisation recalled that the Director-General's powers must be appraised bearing in mind the authority of the Conference of the States Parties, which, according to article VIII(19) of the Chemical Weapons Convention, was "the principal organ of the Organisation" and might consider any questions "relating to the powers and functions of the Executive Council and the Technical Secretariat". Since the Director-General was the head of the Technical Secretariat, the Conference had the power to consider matters falling within his competence. Moreover, the Executive Council had responsibility for overseeing the proper functioning of the Convention, which included, if not expressly at least by implication, the need to be able to count on qualified staff. It followed, so stated the Organisation, that the Director-General could not apply measures to implement his decision of 7 August 1998 until the supreme authorities of the Organisation had approved them or decided on their financing. Accordingly, the decision of 7 August could not be regarded as final and did not create rights for the complainants, particularly as posts could be upgraded only on condition that the incumbents performed their duties satisfactorily and met the requirements for holding a higher post.

The Tribunal observed first that, whatever the general supervisory powers of the Conference of the States Parties or the Executive Council, in August 1998 there was no doubt as to the Director-General's competence for the classification of posts: regulation 2.1 of the Interim Staff Regulations in force at the time said that "the Director-General shall make appropriate provisions for the classification of posts according to the nature of the duties and responsibilities required". In the exercise of his statutory authority the Director-General, in the terms of the note of 7 August 1998, had "decided, as of 1 January 1999, to implement all the grade changes recommended" by the consultant, including those affecting the posts held by the complainants. In the view of the Tribunal, that decision, which was lawful, became final as it was not contested by the persons concerned, and it was sufficiently specific to confer on them rights which could not be challenged by a later decision to postpone implementation of the reclassification pending a further review.

As the Tribunal noted, one might legitimately wonder about the consequences of the reclassification since, as the Organisation rightly stated, the decision of 7 August drew a distinction between reclassifying posts and promoting eligible incumbents: paragraph 4.5 of the note stated that the "incumbent of each post that has been classified at a higher level than its current grade will be promoted to the higher grade, provided that his/her current performance with respect to the functions and responsibilities of the post is satisfactory and provided that the incumbent meets the qualification requirements for the higher grade". But the complainants pointed out that they drew a distinction between the right to reclassification of their posts, which must be automatic, and their promotion, which they conceded was not part of the present case. The Tribunal noted that they expressly limited their claims and it was bound to conclude that the decision of 7 August 1998 had the effect of reclassifying their posts as from 1 January 1999, there being no subsequent decision which could legally rescind the post classification.

Since their complaints succeeded, the complainants were entitled to costs, which the Tribunal set at 20,000 French francs.

8. JUDGEMENT NO. 1994 (12 JULY 2000): IN RE HEBERT V. EUROPEAN PATENT ORGANISATION¹⁸

Complaint against raising the amount of financial support provided to a dependant to qualify for dependant allowance—Effect of a national court order for maintenance on a United Nations determination of its dependant allowance

The complainant was a permanent employee at grade B3 with the European Patent Office, the secretariat of the European Patent Organisation (EPO), in Munich. Pursuant to a French court order, her husband had to contribute to the maintenance of his two children by a previous marriage who lived with their mother in France. The complainant paid for the older child until November 1997 and for the younger one until December 1998.

The complainant was entitled to claim a dependant allowance for both children under the conditions laid down in article 69(3)(a) of the Service Regulations. This provided that, for the purposes of the Regulations, a dependent child shall be:

“the legitimate, natural or adopted child of a permanent employee, or of his spouse, who is mainly and continuously supported by the permanent employee or his spouse”.

There was no definition in the article of the meaning of “mainly and continuously supported by the permanent employee”. By communiqué No. 6, dated 20 March 1996, all staff were informed of new guidelines, drawn up by the President of the Office, for determining whether a child was dependent within the meaning of article 69(3)(a) and (c). One of the changes concerned the amount of financial support a staff member had to provide for a child not in the custody of the staff member. The new guidelines, insofar as they were relevant to the complainant, provided that where a child was in the custody of a person other than the employee or spouse and was not resident with them, “the child shall be assumed to be ‘mainly and continuously supported’ by the employee or spouse” if the financial support provided by either of them equalled at least the following amounts:

“for two children: 9 per cent of the employee’s basic salary plus twice the amount of the dependant allowance”.

Prior to the introduction of the above guidelines, the relevant criteria, set out in circular 82, dated 19 February 1981, required that in order to qualify for the dependant allowance the permanent employee had to pay a minimum amount in maintenance, which included a personal contribution of a fixed amount in German marks, payable over and above the dependant allowance. In the case of the complainant, the fixed amount that exceeded the allowance was DM 50 for each dependant, the rate applicable to grades C to B4.

The amount of financial support the complainant had to pay after the coming into force of the 1996 guidelines was twice the amount of the dependant allowance, totalling DM 828.60 (DM 414.30 multiplied by 2) plus DM 566.10—representing 9 per cent of her basic salary. The complainant was so informed by a letter dated 12 June 1996.

The complainant filed an internal appeal against the new provision set out in communiqué No. 6 in June 1996. In the course of the internal appeal the Organisation said the guidelines did not limit the entitlement to the dependant allowance. It also said that the Office would review individual cases retrospectively (in accordance with Judgement No. 743, *in re Flick*), to determine whether payment of a

dependant allowance was justified even though the minimum level of support fixed in the guidelines was not being paid in full.

The Appeals Committee concluded that the claim that the provision concerning financial support should be ruled unlawful, should be dismissed, but recommended that with regard to retroactive payment the complainant's case should be reviewed. By a letter dated 6 April 1999, the Principal Director of Personnel informed the complainant of the President's decision to reject her appeal in accordance with the unanimous recommendation of the Committee. That constituted the impugned decision. The Director also stated that a review of her case had not been precluded and he indicated what further information was required from her.

The complainant claimed retrospective payment of the dependant allowance for the period from July 1996 to November 1997 for one child and from July 1996 to December 1998 for the second child plus a sum for costs.

According to the complainant, the court order had placed the financial burden of providing for the children's maintenance solely on her husband. It referred to the "contribution to maintenance" to be paid by him. The complainant submitted that the wording of the phrase "mainly and continuously supported" in article 69 indicated that the relevant criterion was whether the employee contributed more than 50 per cent of the costs of bringing up the child. It was an objective test. Costs varied in each case. In her view it followed that the President had no power to adopt an implementing regulation under which employees who paid less than the minimum fixed in the regulation were excluded from receiving the dependant allowance. If the employee fulfilled a legal obligation to bear alone the costs of bringing up the child as fixed by law or court order, he was entitled to the dependant allowance as long as the amount he was legally obliged to pay equalled or exceeded the allowance. If the implementing regulation resulted in maintenance payments over the legally set amount, that could mean that new disputes would be triggered between the divorced parties. Even if the minimum amounts payable under the guidelines did not apply in all cases, the employees would still be at the mercy of the Organisation as to what criteria would be applied and what evidence would be sufficient. There would be no legal certainty.

The Organisation argued that the method of calculating the personal contribution due for each child based on a proportion of the employee's basic salary and the number of dependent children was justified by the principle that the employee must support the child having regard to his personal resources and provide each child with the same standard of living. The *raison d'être* of the dependant allowance system was to improve the situation of the child. It was up to the Office to lay down and apply its own conditions irrespective of national laws and decisions taken by national courts. The President of the Office was under no obligation to take account of a child's rights to maintenance under national law or by court order when he set the general condition on which entitlement to a dependant allowance depended. Such rights, being defined according to different criteria in each country, did not necessarily correspond to main support. Taking them into account would be tantamount to an inconsistent application of article 69 that set out the terms of the dependant allowance. Any problems arising between the complainant and the mother of the child were of no relevance in the present case. The court order dated 26 July 1983 referred to "the contribution to maintenance" fixed for the complainant's husband; it did not say that the entire financial burden for the maintenance of the two children was to be borne by him.

In the Tribunal's view, the contribution to maintenance set by the national courts varied from country to country. Contrary to what the complainant contended, the Organisation was not limited to the amounts fixed by any court order when interpreting the meaning of "mainly and continuously supported". The President could lay down the criteria for what was meant by "mainly supported". There was nothing to suggest that the amount of the personal contribution was excessive. In any event, the new guidelines did not have the effect of doing away with the allowance, since the Organisation accepted the possibility of reviewing the personal contribution in individual cases, if circumstances so required. Therefore, the claim failed.

C. Decisions of the World Bank Administrative Tribunal¹⁹

1. DECISION NO. 217 (28 JANUARY 2000): WILLIAM L. VISSER V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT²⁰

Non-renewal of short-term contract—Question of right to renewal of short-term consultant contract—Issue of giving reasons for non-renewal—Questions regarding written terms of reference—Entitlement to fair evaluation of work performance—Questions of unfair treatment

The Applicant joined the Bank's Economic Development Institute early in 1997 as a short-term consultant. He had previously worked at the World Resources Institute as a Deputy Director and Project Director, and later as Director of International Relations, his position had been dissolved. His last pay day as a consultant was 24 October 1997.

The Applicant challenged the decision not to renew or extend his contract beyond October 1997, submitting that the decision had been made on 16 January 1998 when the Director of the Institute had denied his request for a "Manager's Review". The Respondent, relying on staff rule 7.01 and principle 7 of the Principles of Staff Employment, and on decisions in the cases of *Mr. X* (Decision No. 16 (1984)) and *Atwood* (Decision No. 128 (1993)), argued that as a holder of a short-term consultant appointment the Applicant had no right to any contractual appointment after the expiry of the contractual term.

The Tribunal observed that even where the terms of a contract provided expressly for its expiry at the end of a fixed period, there might be something in the surrounding circumstances which created a right to the renewal of a consultant appointment (*Carter*, Decision No. 175 (1997)), such as a promise by the Bank. The Applicant claimed that he had been given assurances during the recruitment period that amounted to a promise by the Bank of continued employment, should his performance prove satisfactory, which in turn had given rise to a legitimate expectation on his part that his short-term contract would be converted to a long-term multi-year contract beginning in fiscal year 1998. In support of his claim, the Applicant stated that he had had other employment prospects but had not pursued them when he was assured of a firm contract by the Institute.

As noted by the Tribunal, it was clear that the Applicant wanted to secure a long-term contract with the Bank and that he had done everything he could to bring about such a result. But he had been aware that there were uncertainties to be resolved about how to make use of his expertise, what work he was to do and

about the source of funds to pay him. Those uncertainties negated any inference of a promise or assurance giving rise to any entitlement on his part. As distinct from the *Bigman* case (Decision No. 209 (1999)), there was nothing in the facts of the present case to support a finding that a promise had been made to the Applicant about a future contract or that he had been offered anything more than the possibility of a further contract. The Tribunal concluded that the Bank retained a discretion whether or not to grant the Applicant a further contract (*Barnes*, Decision No. 176 (1997)).

The Applicant also complained that he had not been told in good time that his contract would not be renewed. His expectation was that a decision would be made about a further contract at the end of the short-term contract. He had inquired about his situation many times, but he had never received an answer. However, he must have known by August 1997 at the latest that there was little prospect that his contract would be extended or renewed, and that it was up to him to find someone in the Institute or elsewhere willing to offer him a contract. As noted by the Tribunal, he had been given time to seek other opportunities. The Bank was not required to give reasons for the non-renewal of a contract that was stated to be temporary and had a termination date set forth in it (*McKinney*, Decision No. 187 (1998); *Degiacomi*, Decision No. 213 (1999)). The Tribunal concluded that the Applicant had not established any violation of the principles of fair treatment in that respect.

The Applicant also contended that the lack of interest in and support for his work had prevented him from performing to the best of his ability and had thus precluded any possibility of a long-term contract. Specifically, the Applicant complained that the withdrawal by his Task Manager in May 1997 of most of the terms of reference provided to him in January was arbitrary and in breach of contract; he had been left with the responsibility for only half of the electronic symposium project, for which he simply did not have the technical know-how. The Tribunal observed that the Applicant had known since January that he was expected to work on the electronic symposium, and he had not previously suggested that the project was not within his competence. The Applicant's argument that his terms of reference had been withdrawn to set him up for failure was not substantiated. As the Tribunal recalled, the Bank had reserved the right to change the terms of his assignment, and the Task Manager had taken the view that the Applicant's work was not satisfactory and had sought to reorganize his work. In the opinion of the Tribunal, that assessment was not an abuse of discretion; however, fair practice suggested that he should have been given a written statement concerning the change in his terms of reference.

The Applicant also claimed that when he was reassigned to work under the supervision of the Division Chief, he was given no clear instructions in regard to his NGO assignment. The Tribunal observed that the fact that the Applicant had no written terms of reference or instructions for his assignment from the Division Chief was an omission which the Tribunal considered might have contributed to misunderstandings in the first instance: he was entitled to have a clear work programme. The Applicant was, however, a man of seniority and experience. He had discussions with the Chief and received detailed written comments from her on the draft. Even so, his work did not meet her expectations. The Tribunal could not conclude that the lack of written terms of reference was a factor in the Applicant's failure to produce a satisfactory result, though fair treatment required that he receive proper instructions.

In regard to his work on a Partnership paper, the Applicant complained that he had no clear terms of reference, no work plan and no appropriate supervision. He had asked for terms of reference on 8 August 1997 and had set out the agreed focus

for the paper on 22 September, but indicated that it might be difficult to complete the work in the remaining month as the focus had changed. He said that he had no access to the people whose assistance he needed and that information he needed had not been provided to him. He even had to pay personally to get data he required.

The Tribunal, citing Decision No. 176, *Barnes* (1997), and principles 2.1(d) and 5.1 of the principles of Staff Employment, concluded that the Applicant had been denied fair treatment in that he had no written statement concerning his terms of reference on either the NGO project or the Partnership paper. But the absence of such terms did not appear to have had any significant effect on the decision not to renew or extend his contract. The more important issue was whether the Bank's evaluation of his work was fair and whether the lack of clear terms of reference or poor supervision had contributed to this.

In that regard, the Tribunal observed that the Applicant, while not entitled to a formal assessment of his work performance pursuant to staff rule 5.03, as a short-term consultant, he was entitled to fair treatment and to an assessment which was neither an abuse of discretion, nor arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure (Decision No. 5, *Saberi* (1981)).

While the Applicant claimed that the Institute had denied him a fair evaluation of his performance, the Tribunal found no substance in the Applicant's claims that the assessment made by the Task Manager involved an abuse of discretion or that it had been made for any reason other than those related to the proper management of the Organization. In regard to the NGO assignment, although the Division Chief had not prepared a written assessment of the Applicant's work, other than her written notes on his outline, and there were, however, as the Tribunal noted, discussions in which she had conveyed her opinion to him. While the Applicant argued that he had complied with all her comments on his draft outline and that her criticisms were the result of prejudice on her part, the Tribunal did not find any prejudice or abuse of discretion. It further noted that the Division Chief had more than once commented favourably in the Applicant's other work.

Regarding the Partnership paper, the Tribunal observed that there also had been no written assessment of the Applicant's work performance. According to the Applicant, the Program Manager and the Regional Coordinator had made positive oral comments on his paper. He had been asked to carry out some revisions in regard to the data and to speak to the new Spanish consultant. The paper had never been completed, because the Applicant had taken the view that he should do no more work unless he received further payment or an extended contract. As the Tribunal observed, the Respondent's submission that the final paper was unsatisfactory to the two supervisors was not in full accord with the evidence. The Program Manager and the Regional Coordinator had testified to the Appeals Committee that they were disappointed that the Applicant had not completed the paper. The Appeals Committee had concluded that the Regional Coordinator had found his work satisfactory and was impressed by the effort that had been put into the paper. In view of the lack of written instructions and the limited time available to the Applicant, the Tribunal considered that the need for those changes might not necessarily have been due to any fault on his part.

As stated above, the Tribunal was of the view that the Applicant had no automatic entitlement to a further contract. The possibility of such a contract remained within the discretion of the Bank, but while the Applicant was not entitled to a

renewal or extension of his contract or to a written evaluation, he was entitled to fair consideration and to an acknowledgement of his work on the Partnership paper, which had been considered satisfactory. The Bank appeared to have wanted that project to be completed but had failed to consider any means of enabling the Applicant to finish it. To that extent it had denied him fair treatment.

The Applicant claimed that he had been offered a six-month consultancy, pending a longer-term agreement. However, the contract sent to him on 13 March 1997 provided for only 82 paid days, from 3 March to 30 June. By that time he had already started work. He signed the contract on 14 April, after being assured that it would be extended by 63 days to a total of 145 days. The Applicant said that he believed that the extension to 145 days would make him a “long-term consultant” entitled to certain benefits, such as health insurance, a pension plan, and sick and annual leave. However, the contract did not qualify as a contract for six months and he was denied those benefits. He complained that he had relied on the assurances given him and that as a result he had suffered financial loss.

The Respondent’s explanation was that, initially, sufficient funds could not be found for a six-month contract. Funding for 82 days had been made available. When further funds were subsequently secured, the contract had been extended by 63 days. As the Applicant accepted the short-term contract, he could not now claim any loss. As the Tribunal noted, it was clear that the Applicant expected and wanted the benefits that normally flowed from a continuous contract for six months. There was no evidence that he had been told that his expectations were false before he signed the contract. The Tribunal considered that the Bank had denied fair treatment to the Applicant by failing to ensure to him the benefits that would have flowed from a continuous contract of six months or to advise him in good time of his true position in regard to the benefits associated with such a contract. Further, as noted above, the fact that he did not receive a six-month contract denied him the right to a formal written evaluation under the Staff Rules.

The Applicant claimed US\$ 440 as out-of-pocket expenses which he incurred in order to obtain information from the Institute’s database. He alleged that he had had to pay that sum to an employee of a consultancy firm working in the Institute, when the person designated to support him did not reply to his requests for data. As the Tribunal noted, the Appeals Committee had found the incident baffling and troubling, and it was a stark indication of how isolated the Applicant must have felt. However, the Committee concluded that, as an experienced professional, the Applicant must bear some of the responsibility; he should have assessed the situation as one that he should report to management before paying the funds.

The Tribunal considered that the isolation of the Applicant, which the incident revealed, must be attributed in part to management deficiencies and indifference. It appeared that the Bank at that time had given little attention to any of the Applicant’s concerns and had failed to reply to many of his requests. In the view of the Tribunal, the Bank had denied fair treatment to the Applicant by creating conditions that were not supportive of his work and by failing to reimburse him for the payment that he incurred as a consequence.

The Applicant complained that while he was working in the front office of the Office of the Director of the Institute, he had been treated with disrespect, and he had returned from vacation to find his possessions in a box in the hall and his email account closed. On another occasion, he had found his office occupied by computer analysts, his computer disconnected and his files in disarray. He had furthermore

been kept off the staff email distribution list until near the end of his tenure, thus ensuring his near total isolation. The Tribunal understood that those matters were troubling to the Applicant at the time, and no doubt the more so as they emphasized his temporary status in the organization and his isolation. The Tribunal considered that those actions ought to have been avoided, but they did not require any separate finding of unfair treatment.

It was the Tribunal's decision that the Applicant had not established that there was a promise or assurance by the Bank to renew or extend his short-term contract upon its expiry.

The Tribunal concluded, however, that there were several irregularities in the treatment of the Applicant, resulting in unfair treatment, contrary to the Principles of Staff Employment, by:

(a) Not providing the Applicant with a written statement concerning the change in his terms of reference in May 1997 and concerning his later assignments;

(b) Failing to acknowledge the satisfactory work done by him on the Partnership paper or to consider any means of enabling the Applicant to complete the paper;

(c) Failing to ensure to the Applicant the benefits that would have flowed from a continuous contract of six months, including a formal evaluation under the Staff Rules, or to advise him of his true position in regard to those benefits;

(d) Failing to create conditions that were supportive of his work and to reimburse him for his out-of-pocket payment of \$440 to obtain data for his Partnership paper.

For the above reasons, the Tribunal ordered the Respondent to pay the Applicant compensation in the amount of \$20,000 net of taxes, and costs and expenses of \$1,500.

2. DECISION NO. 225 (28 JANUARY 2000): PAUL ZWAGA V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT²¹

Non-confirmation and termination of fixed-term contract—Probationary period—Question of abuse of discretionary decision not to confirm appointment—Question whether due process was respected: warnings, opportunity to defend oneself, adequate guidance to an external candidate—Damages for injuries actually suffered

On 2 September 1997, the Applicant joined the Bank as Head (level 23) of the Marketing Unit of the External Affairs Department, Office of the Publisher, on a four-year fixed-term contract. In accordance with World Bank policy, the Applicant's appointment was to be probationary for the first year and would normally be subject to confirmation after the first year.

On 30 June 1998, the Publisher wrote the Acting Director of the External Affairs Department and the Human Resources Officer for the Department who together with the Publisher comprised the management review group, to request approval to terminate the Applicant's employment. In making the request, the Publisher explained that the Applicant's tenure in the Bank was characterized by a history of behaviour and performance problems. Later the same day, the management review group convened to review the Applicant's performance and the Publisher's

recommendation that the Applicant's employment be terminated. After some discussion, the Publisher's recommendation was endorsed.

By a letter dated 30 June 1998, the Publisher informed the Applicant that he had recommended that the Applicant's employment be terminated. He stated that the Applicant's performance and behaviour during the past month had been a "bitter disappointment" and he enumerated a number of examples. The Vice-President of the External Affairs Department thereafter informed the Applicant by a letter of the same date that his appointment had not been confirmed and that his employment would terminate on 30 September 1998.

On 24 September 1998, the Applicant filed a Statement of Appeal with the Appeals Committee against the "non-confirmation and the termination of [his] fixed-term contract".

In its report, the Appeals Committee found that the non-confirmation decision was proper and that there was insufficient evidence that the Publisher had promised the Applicant a one-year extension of his probation. However, it further found that: (a) while the Applicant's international recruitment was part of an overall strategy to professionalize the Marketing Unit, senior management of the External Affairs Department had taken no steps to reinforce that message with the Applicant's staff; (b) there was no indication that senior management of the Department had attempted to mentor or coach the Applicant in order to help him assimilate to the Bank's culture; and (c) the Applicant's managers had not approached him promptly to provide him with a fair opportunity to address the staff complaints that had been made against him. In the light of its findings, the Committee made the following recommendations: (a) the Applicant should be awarded compensation in the amount of six months' net salary; (b) the Applicant should be compensated for the shipment to his home country of his personal and household effects; and (c) the Applicant should be paid attorney's fees.

The Bank accepted the above recommendations, but the Applicant requested an additional three months' net salary for a full release and settlement of his claims. The Bank rejected the Applicant's request and the Applicant filed an application with the Tribunal on 30 June 1999. In his application, he contested the Respondent's decision not to confirm his appointment and its alleged decision to retract its offer of a one-year extension of his probationary period.

In consideration of the case, the Tribunal observed that, pursuant to staff rule 4.02, paragraph 1.02, "the intent of the probationary period is to assess the suitability of the Bank Group and the staff member to each other". An assessment of that suitability was a matter of managerial discretion. (See, e.g., *Salle*, Decision No. 10 (1982).) Furthermore, it was for the Bank to establish the standards which the probationer should satisfy. In *Buranavanichkit*, Decision No. 7 (1982), the Tribunal had held that those standards

"may refer not only to the technical competence of the probationer but also to his or her character, personality and conduct generally in so far as they bear on ability to work harmoniously and to good effect with supervisors and other staff members".

In the present case, the Respondent had decided not to confirm the Applicant on account of: (a) his behaviour and management style; and (b) his performance. As pointed out by the Tribunal, the record was abundantly clear that the Respondent was reasonably justified in its criticisms of the Applicant's behaviour and man-

agement skills. The Applicant's poor behaviour and problematic management were evidenced by, among other things, a memorandum of the Human Resources Officer for the External Affairs Department that outlined staff complaints; notes of staff and the Director of the External Affairs Department regarding staff complaints; at least one resignation that was directly attributable to the Applicant; the Applicant's mid-term evaluation; and the correspondence pertaining to the decision to terminate the Applicant's employment. The Applicant himself had acknowledged having a harsh management style. For instance, in his interim review, the Applicant had stated that, in the future, he would demonstrate a more positive attitude.

The Tribunal noted that most of the Applicant's interpersonal problems had existed mainly before he was given adequate feedback by his managers and it recognized that interactions with his staff had seemed to improve later. However, the initial problems did adversely affect the implementation of the new marketing programme for the Bank's publications activities, the main reason for which the Applicant had been recruited.

Regarding the Applicant's professional performance, it was not possible for the Tribunal to ascertain whether certain achievements in the Applicant's work programme, such as the negotiations with Oxford University Press, the negotiations with the Stationary Office, the closing of the World Bank bookstore in Paris, certain sales increases and cost savings, were the outcome of the Applicant's contributions or of other factors as the Respondent alleged. In any event, there were instances where, according to the Publisher, the Applicant's performance had not produced the expected results. In that respect, the Tribunal would not substitute its own judgement for that of the Respondent on the staff member's suitability for employment.

Insofar as the evaluations of the Applicant and the decision made by the Respondent were based upon the unsuitability of the Applicant for Bank employment and, in the absence of bias, arbitrariness or improper motivation on the part of the Applicant's managers, the Tribunal concluded that there had been no abuse of discretion by the Respondent.

Regarding the issue of whether the Applicant had been treated fairly and in accordance with due process in the decision not to confirm him, the Tribunal recalled that it had held in *McNeill*, Decision No. 157 (1997), that probation created rights and obligations for both parties and because the institution had a wide discretionary power to determine whether the probationer should, or should not, be confirmed, that power should be balanced by its duty to meet what the Tribunal had called "the appropriate standards of justice". In *Salle*, Decision No. 10 (1982), the Tribunal had emphasized "the importance of the requirements sometimes subsumed under the phrase 'due process of law'". It added:

"The very discretion granted to the Respondent in reaching its decision at the end of probation makes it all the more imperative that the procedural guarantees ensuring the staff member of fair treatment be respected."

In connection with probation, the Tribunal had singled out "two basic Guarantees" as "essential to the observance of due process":

"First, the staff member must be given adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached. Second, the staff member must be given adequate opportunities to defend himself. (*Samuel-Thambiah*, Decision No. 133 (1993).)"

In addition, the Tribunal had held that one of the basic rights of an employee on probation was the right to receive adequate guidance and training (*Rossini*, Decision No. 31 (1987)), and that it was the Bank's duty to make sure that its obligation to provide a staff member on probation with adequate supervision and guidance had been complied with in a reasonable manner (*Salle*, Decision No. 10 (1982)). The Tribunal further noted that the Applicant was an external recruit unfamiliar with the Bank's policies and procedures, and it was to be expected that he would need a reasonable amount of coaching and supervision, at least at the outset of his assignment, to address the problems that were likely to arise during the transitional period.

In reviewing the record, the Tribunal concluded that the Bank had not provided adequate guidance and supervision to the Applicant in the way he was to manage his staff in the implementation of changes described above. In particular, the Bank had failed to deal promptly with the inappropriate behaviour about which a number of staff had complained as early as October 1997. The record indicated that the Applicant had not been formally informed of those serious allegations until mid-January 1998, some four months into his probationary period. The record further indicated that after he was properly notified, the Applicant had changed his behaviour and the complaints had stopped.

This finding of the Tribunal was particularly important since the Applicant's inability to demonstrate "the managerial and interpersonal skills required to build and engage a team effort among his staff and colleagues" was one of the principal reasons given by the Respondent for the non-confirmation of his appointment. The Appeals Committee recommended that the Respondent pay the Applicant compensation for the Bank's failure to provide him a fair opportunity to succeed in the task he was recruited to perform, a recommendation that was accepted by the Bank. The Tribunal found that that compensation was appropriate and that no additional compensation need be awarded by the Tribunal in that respect.

The Tribunal found other instances in the treatment of the Applicant by the Respondent which constituted a breach of due process. In that regard, the Tribunal observed from the record that only one and a half months after the required six months interim review, which had been carried out late, the Applicant had been informed by the Publisher that confirmation was not possible but that the Publisher would be willing to offer him an extension of the probationary period in order to give him another chance to succeed. In the opinion of the Tribunal, the period between the time the Applicant was informed at his interim review that his performance needed improvement and the time that he was informed that confirmation would be impossible (i.e., one and half months) was insufficient time for the Applicant to demonstrate improvement in his performance. A more serious procedural irregularity had occurred, in the view of the Tribunal, when the Applicant was not afforded an opportunity to defend his record. He had a right to a final evaluation of his performance prior to the management review and before any action regarding the non-confirmation of his appointment was taken.

As the Tribunal had ruled in the past, "damages were designed to provide the Applicant with adequate reparation of injury actually suffered" (*McNeill*, Decision No. 157 (1997)). In the present case, the Tribunal found that the Applicant had suffered injury because: (a) he had not been treated fairly by the Bank in that the Bank had not provided him with adequate notice and guidance to succeed in the task for which he was recruited to perform, especially at the beginning of his probationary period; and (b) of other procedural irregularities. Regarding the first ground, the Tri-

bunal found that the Applicant had been adequately compensated by the Respondent in conformity with the recommendation of the Appeals Committee and found no reason to award additional compensation. However, in the light of other procedural irregularities, the Tribunal concluded that the Applicant was entitled to additional compensation in the amount of four months' net salary and costs in the amount of \$5,000.

3. DECISION NO. 227 (18 MAY 2000): BAHRAM MAHMOUDI (NO. 2) V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT²²

Redundant post—Limited review of redundancy decision—Standard for declaring redundancy because of a redesigned post (para. 8.02(c))—Issue of underemployment and abolition of post—Appropriate remedy for serious abuse of discretion—Issue of Applicant's faulty presentation of his case

The Applicant, who held undergraduate and Master's degrees in economics, joined the Bank in 1978 under a temporary appointment. Two years later, he received a fixed-term appointment. He was made a regular staff member effective February 1981 and received a number of gradual promotions over the years.

On 20 January 1998, the two Vice-Presidents of the Africa Region addressed a Notice of Redundancy to the Applicant confirming an earlier indication from the Technical Manager, African Technical Families, Human Development 3, to the effect that his employment would become redundant effective 1 February 1998. The Notice cited staff rule 7.01, paragraph 8.02(c), without any elaboration, thus presumably confirming the rationale of the Sector Director's request. The provision dealt with instances where a post description had been revised or the application of an occupational standard had been changed, to the extent that the qualifications of the incumbent did not meet the requirements of the redesigned post.

The Applicant appealed, arguing that the decision to declare him redundant was incorrect and emphasizing the evidence of his good prior performance, as well as his own perception of his continued usefulness within his work group.

As the Tribunal recalled, the Bank must be free to evolve, and therefore to adjust to new needs in its client countries and corresponding new requirements in its activities. The fact that a staff member's skills had been beneficial to the Bank in the past did not insulate him or her from the risk that the relevant work group required a "skills mix" into which he or she did not fit. The Tribunal had ruled that redundancy decisions were "within the discretion of the Bank". Just as in Decision No. 191, *Kocic* (1998), the Tribunal, in the present case, would be unwilling to question the judgement that the Applicant's skills as a generalist had become redundant in the context of programmes which now required specialists. Those decisions were subject only to limited review by the Tribunal and, consequently, "it will not interfere with the exercise of such discretion unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, or improperly motivated" (*Montasser*, Decision No. 156 (1997); see also *Kahenzadeh*, Decision No. 166 (1997)).

The Applicant had alleged that the redundancy decision was "an abuse of power, procedure and discretion, based on a preconceived plan wrongfully designed by the Africa Regional personnel team". He had variously accused the Bank of sabotaging his work programmes, of repeatedly misrepresenting his employment record, of libelling him and of conspiracy to achieve his termination by any means,

and of harassment, discrimination and humiliation. However, none of those allegations had been proved to the Tribunal.

Nevertheless, the Tribunal did find a serious allegation at the heart of the Application. In the Tribunal's view, the Bank had not demonstrated that it had made the prior determination that would have entitled it to invoke paragraph 8.02(c) in the Applicant's case. Citing Decision No. 85, *de Raet* (1989), the Tribunal stated that to motivate a redundancy decision under paragraph 8.02(c) it was not enough to observe that a staff member was underemployed. Such a decision might have justified redundancy under paragraph 8.02(b)—abolition of post—but the fact of underemployment standing alone did not lead to an unavoidable inference that the position had been redesigned. In fact, the Tribunal did not find sufficient evidence of substantive—let alone “dramatic”—changes in the “working conditions and standards applicable to the Applicant” to sustain a redundancy decision based on paragraph 8.02(c).

In consideration of a remedy in the case, the Tribunal, while observing that a decision to declare a staff member redundant was one of great importance, and an abuse of discretion in making such a decision was a serious abuse, recalled that under article XII of its statute, compensation, in the event the Applicant was not reinstated, should “not exceed the equivalent of three years' net pay of the Applicant”. The Tribunal noted that it might, in exceptional cases, when it considered it justified, order the payment of a higher compensation.

Following its review of all the circumstances, including the context of the Applicant's initial assignment to African Region Renewal Program, as well as the consistent and plausible record of difficulties for his managers in finding a full work programme for him, the Tribunal found that the situation was one which the Bank would ultimately in all likelihood have been forced to deal with in any event by redesigning his position or proceeding under another redundancy regime. That factor must be taken into account in the determination of compensation. Accordingly, the Tribunal decided that, in the event the Bank decided not to reinstate the Applicant, damages in the amount of 18 months' net pay should be granted.

The Tribunal added that the significant relief accorded to the Applicant was granted notwithstanding the regrettably strident and confusing way in which the Applicant had pursued his claim. The Applicant's presentation of the issues had been contradictory. His citations to the evidentiary record had been misleading. His accusation of harassment, conspiracy, libel and falsification of documents had been ill-conceived. Most of the documents he had submitted to the Tribunal had been irrelevant, indeed incapable of sustaining the interpretation he had sought to put on them.

The Tribunal further remarked that the judgement in the present case had been compelled by the plain facts of the record and by the inability of the Bank to justify its action. The Tribunal had not been assisted by the arguments of the Applicant, whose submissions had often missed central points and dwelt upon numerous irrelevancies which unduly complicated the proceedings. Therefore, the Tribunal made no award of costs.

D. Decisions of the Administrative Tribunal of the International Monetary Fund²³

No decisions were taken by the Administrative Tribunal of the International Monetary Fund during 2000.

NOTES

¹In view of the large number of judgements that were rendered in 2000 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 volume of the *Yearbook*. For the integral text of the complete series of judgements rendered by the Tribunals, namely, Judgements Nos. 945 to 990 of the United Nations Administrative Tribunal, judgements Nos. 1891 to 1959 of the Administrative Tribunal of the International Labour Organization and decisions Nos. 217 to 237 of the World Bank Administrative Tribunal, see, respectively: documents AT/DEC/945 to AT/DEC/990; *Judgements of the Administrative Tribunal of the International Labour Organization: 88th and 89th Ordinary Sessions*; and *World Bank Administrative Tribunal Reports 2000*.

²Under article 2 of its statute, the Administrative Tribunal of the United Nations is competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members.

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

Article 14 of the statute states that the competence of the Tribunal may be extended to any specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. Such agreements have been concluded, pursuant to the above provisions, with two specialized agencies: 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.

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

⁴Mayer Gabay, Vice-President, presiding; and Chittharanjan Felix Amerasinghe and Kevin Haugh, Members.

⁵Julio Barboza, Vice-President, presiding; and Chittharanjan Felix Amerasinghe and Kevin Haugh, Members.

⁶Hubert Thierry, President; and Chittharanjan Felix Amerasinghe and Marsha A. Echols, Members.

⁷Julio Barboza, Vice-President, presiding; and Chittharanjan Felix Amerasinghe and Kevin Haugh, Members.

⁸Hubert Thierry, President; Julio Barboza, Vice-President; and Kevin Haugh, Member.

⁹Mayer Gabay, Vice-President, presiding; and Chittharanjan Felix Amerasinghe and Kevin Haugh, Members.

¹⁰The 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 2000: International Labour Organization, including the International Training Centre; World Health Organization, including the Pan American Health Organization;

International Telecommunication Union; United Nations Educational, Scientific and Cultural Organization; World Meteorological Organization, Food and Agriculture Organization of the United Nations; European Organization for Nuclear Research; World Trade Organization; International Atomic Energy Agency; World Intellectual Property Organization; European Organization for the Safety of Air Navigation (Eurocontrol); Universal Postal Union; European Southern Observatory; Intergovernmental Council of Copper Exporting Countries; European Free Trade Association; Inter-Parliamentary Union; European Molecular Biology Laboratory; World Tourism Organization; European Patent Organisation; African Training and Research Centre in Administration for Development; Intergovernmental Organisation for International Carriage by Rail; International Center for the Registration of Serials; International Office of Epizootics; United Nations Industrial Development Organization; International Criminal Police Organization—Interpol; International Fund for Agricultural Development; International Union for the Protection of New Varieties of Plants; Customs Cooperation Council; Court of Justice of the European Free Trade Association; Surveillance Authority of the European Free Trade Association; International Service for National Agricultural Research; International Organization for Migration; International Centre for Genetic Engineering and Biotechnology; Organisation for the Prohibition of Chemical Weapons; International Hydrographic Organization; Energy Charter Conference; International Federation of Red Cross and Red Crescent Societies; and Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization. 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 or her 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 or she is entitled to some right under the terms of appointment of a deceased official or under provisions of the staff regulations upon which the official could rely.

¹¹ Michel Gentot, President; and Jean-François Egli and Seydou Ba, Judges.

¹² Michel Gentot, President; and Julio Barberis and Jean-François Egli, Judges.

¹³ Michel Gentot, President; Mella Carroll, Vice-President; and James K. Hugessen, Judge.

¹⁴ Michel Gentot, President; Mella Carroll, Vice-President; and James K. Hugessen, Judge.

¹⁵ Michel Gentot, President; Mella Carroll, Vice-President; and James K. Hugessen, Judge.

¹⁶ Michel Gentot, President; and Jean-François Egli and Seydou Ba, Judges.

¹⁷ Michel Gentot, President; and Jean-François Egli and Seydou Ba, Judges.

¹⁸ Michel Gentot, President; Mella Carroll, Vice-President; and James K. Hugessen, Judge.

¹⁹ The World Bank Administrative Tribunal is competent to hear and pass judgement upon any applications alleging non-observance of the contract of employment or terms of appointment, including all pertinent regulations and rules in force at the time of the alleged non-observance, of members of the staff of the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation (referred to collectively in the statute of the Tribunal as "the Bank Group").

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

²⁰ Francisco Orrego Vicuna, a Vice-President as President; and A. Kamal Abul-Magd and Elizabeth Evatt, Judges.

²¹ Robert A. Gorman, President; Thio Su Mien, a Vice-President; Bola A. Ajibola and Jan Paulsson, Judges.

²² Francisco Orrego Vicuna, a Vice-President as President; and Bola A. Ajibola, Elizabeth Evatt and Jan Paulsson, Judges.

²³ 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.