

*Extract from:*

# UNITED NATIONS JURIDICAL YEARBOOK

2001

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

Chapter IV. Treaties concerning international law concluded under the auspices 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 ORGANIZATIONS<sup>1</sup>

#### A. Decisions of the United Nations Administrative Tribunal<sup>2</sup>

1. JUDGEMENT NO. 1004 (26 JULY 2001): CAPOTE V. THE SECRETARY-GENERAL OF THE UNITED NATIONS<sup>3</sup>

*Summary dismissal for serious misconduct—Question whether a personal matter fell within the disciplinary purview of UNICEF—Staff regulation 1.4—Issue of prima facie evidence of wrongdoing—Delays in JDC proceedings*

The Applicant, who held a permanent appointment as a Budget Assistant at the G-6 level in the Division of Financial and Administrative Management, UNICEF, in August 1994 agreed to assist a friend and colleague during the latter's sudden posting to Rwanda. She was given a power of attorney that gave her access to her colleague's savings and checking accounts for the purpose of managing her financial affairs. The Tribunal noted that at the least the two agreed that the Applicant would pay her colleague's rent and other bills. Subsequently, the Applicant opened two joint credit card accounts, which became substantially in arrears, having her colleague as the primary cardholder but using the Applicant's address. The Tribunal further noted that the Applicant claimed that she had been given authorization by her colleague to open the accounts, but the colleague asserted that she had only learned of the accounts when she returned from Rwanda in September 1995, and only after being contacted concerning the arrearages.

On 13 December 1996, the colleague informed the Comptroller of UNICEF of her discoveries, making a notarized statement dated 20 December 1996. On the same day the Applicant was suspended with pay pending the results of an investigation. She replied to the charges on 12 February and, based on the preliminary conclusions of the investigation, she was summarily discharged on 27 February 1997 for serious misconduct, pursuant to staff regulation 1.4, i.e., applying for and opening the two credit cards without authorization and for making false certifications on the applications for the credit cards (giving her own telephone number instead of her colleague's and the incorrect maiden name of the colleague's mother).

However, in consideration of the matter, the Tribunal found that the circumstances of the case did not fall within the disciplinary purview of UNICEF. The Tribunal considered that staff regulation 1.4 required that staff "conduct themselves at all times in a manner befitting their status as international civil servants . . . They shall avoid any action . . . which may adversely reflect on their status or on the integrity, . . . required by that status . . ." And while a personal matter that reflected adversely on the Organization might be the subject of disciplinary proceedings, the United Nations Staff Regulations principally addressed conduct related to employment.

In the view of the Tribunal, this was purely an arrangement of some kind between colleagues regarding personal activities and personal funds. As explained by the Tribunal, the Administration was not responsible for the financial affairs of the Applicant's colleague, had no interest in her funds and could not affect the personal arrangement, and therefore could not be called on to use suspension with pay to oversee the personal affairs and relationships of its employees under the particular circumstances of the case, i.e., the colleague's allegations were in dispute and not "prima facie well founded" (Judgement No. 931, *Shamsi and Abboud*, para. V (1999)). The Tribunal also concluded that this was true of the summary dismissal of the Applicant and pointed out that, when she was suspended and subsequently summarily dismissed, there was an obvious recourse to the credit card companies or to the civil, or criminal, dispute resolution procedures provided by local law.

Furthermore, the Tribunal stated that, pursuant to staff regulation 1.4, the actions of the Applicant had not affected her status as an international civil servant or adversely reflected on her status or integrity to the extent that a suspension with pay (although not a disciplinary measure) was justified. It noted in that regard that the suspension had occurred after an unsupported allegation that fell far short of prima facie evidence of wrongdoing; the oral allegation was made on 13 December and the Applicant was suspended on 18 December 1996; and it was not until early the following year that the Respondent had any other evidence of the alleged false certification.

Regarding the issue of the summary dismissal, the Tribunal, while recognizing that UNICEF had properly referred the matter to an ad hoc Joint Disciplinary Committee (JDC), as provided for in the rules, considered that the delays in the proceedings could not be justified. The Applicant had requested on 30 April 1997 a review of her summary dismissal; she was informed on 11 December 1997 of the composition of the ad hoc JDC; and the report and recommendations were issued on 7 May 1998.

For the foregoing reasons, the Tribunal found in favour of the Applicant and ordered the rescission of the decision to summarily dismiss her for serious misconduct, but should the Secretary-General decide in the interest of the Organization that the Applicant be compensated without further action being taken in her case, the Tribunal fixed the compensation to be paid to her at two years of her net base salary. The Tribunal also ordered that the Respondent pay her six months of her net base salary as compensation for the moral injury suffered.

## 2. JUDGEMENT NO. 1009 (26 JULY 2001): MAKIL V. THE SECRETARY-GENERAL OF THE UNITED NATIONS<sup>4</sup>

*Non-consensual special leave with full pay six months before retirement—Findings of fact by United Nations bodies—Basis for the altering of facts by the Tribunal—Staff regulation 5.2 and staff rule 105.2(a)(i) on special leave—Proof of an ulterior, improper motive—Urgency of situation preventing an investigation or hearing—Right to express opposing views—Right to counsel—Question of a precipitous expulsion from one's office*

The Applicant, who had joined the International Trade Centre UNCTAD/WTO (ITC) on 12 August 1968 as an Economic Affairs Officer, was subsequently promoted, on 12 June 1994, to Deputy Executive Director of ITC, at the D-2 level. On 2 December 1996, the Applicant was placed on special leave with full pay through

31 May 1997, at which time he retired. During his United Nations service, the Applicant received four performance evaluations covering the period from August 1968 to April 1981, receiving overall ratings from “very good” to an “exceptionally competent staff member of unusual merit”.

Sometime during the early fall of 1996, the Executive Director met privately with the Applicant and allegedly warned him that he needed to change his attitude towards the internal reform process instituted by the Executive Director. During the last week of October 1996, a team from the Office of Internal Oversight Services (OIOS) visited the offices of ITC in Geneva in order to review the Centre’s programme of work and administrative practices and subsequently issued a report emphasizing the Centre’s lack of delegation of authority, responsibility and accountability. By letter of 2 December 1996, the Executive Director informed the Applicant that his “lack of commitment and support in implementing the reform . . . and our increasingly divergent views and consequent difficulties to work as a management team have led me to conclude that your involvement in the process would constitute a serious impediment to the success of the overall exercise”. The Executive Director further informed the Applicant in the letter that he was placing him on special leave with full pay immediately, until the date of his retirement. The Applicant was also informed that his access to documentation was limited to his official status file, and he was requested to vacate his office by noon the following day, 5 December 1996. The Executive Director sent a memorandum to all ITC staff informing them of his decision.

The Applicant had submitted that “the hearing of the present appeal before the Tribunal was de novo, the so-called findings of the Joint Appeals Board had no legal weight or priority”. The Tribunal, disagreeing with that submission, observed that its statute did not envisage that findings of fact upon which it had reached a decision would ordinarily or usually be made following its own investigations or upon facts found by the Tribunal itself. Rather, matters before the Tribunal arrived almost invariably after a preliminary investigation by a Joint Disciplinary Committee (JDC) or a Joint Appeals Board (JAB) or like body that carried out investigations and made findings of fact and then reported thereon. As the Tribunal pointed out, the exception to this general rule arose when the parties had no dispute as to the facts and the matter could be referred to the Tribunal in the first instance on the basis of “agreed facts”, in accordance with article 7 of the statute.

Accordingly, the Tribunal would ordinarily operate on the facts found by the JDC or JAB or other primary fact-finding body, unless the Tribunal expressed reasons for not doing so, such as identifying a failure or insufficiency of evidence to justify the finding of fact allegedly made or where it identified prejudice or perversity on the part of the said fact-finding body or found that it had been influenced in making that finding of fact by some extraneous or irrelevant matter. At the same time, the Tribunal stressed that the above principles were applicable to findings of primary facts and had no bearing on the question of interpretation of documents or the drawing of inferences from primary facts, i.e., secondary facts.

In consideration of the above, the Tribunal noted that there was an issue between the Applicant and the Executive Director of ITC as to whether the latter had, prior to December 1996, verbally warned the Applicant about his belief that the Applicant was not supporting the reforms planned, or remonstrated with the Applicant concerning his attitude and commitment towards those reforms and told him that his attitude and commitment would have to change. The Applicant denied

that he had received any prior warning or expression of dissatisfaction and, as the Tribunal pointed out, it was for the JAB to resolve the credibility issue and it had done so in favour of the Executive Director. In the proceedings before the Tribunal, the Applicant had sought to persuade the Tribunal that it should alter this finding of fact on the ground that the Executive Director's evidence was not credible and was unsupported either by reference to such a meeting in the letter of December 1996 sent to the Applicant, or by a "note for the file" or by other contemporaneous record. However, in the opinion of the Tribunal, this was an issue of fact pre-eminently and properly suitable for resolution by the JAB, having considered the evidence, and the Tribunal considered that it ought to stand, as the Applicant had failed to demonstrate either that the finding was not supported by evidence or that the evidence supporting it was false or was not worthy of belief.

The Respondent invoked staff regulation 5.2 and staff rule 105.2(a)(i) as authority for placing the Applicant on special leave without pay for a period of just six months before the date of his retirement. However, as the Tribunal pointed out, the staff regulation spoke of the Secretary-General being empowered to authorize special leave in exceptional circumstances, which meant that the Secretary-General might permit or allow special leave to be taken by a staff member who desired to take it, rather than empowering him to force it upon an unwilling staff member. The Tribunal considered that a very different interpretation arose in the case of the powers of the Secretary-General under staff rule 105.2(a)(i), which spoke of a staff member being placed on special leave with full pay in exceptional cases at the initiative of the Secretary-General. And in the view of the Tribunal, it was satisfied that there was cogent and credible evidence before the JAB such as allowed it to find that the Executive Director honestly believed that the Applicant was not properly supporting or progressing the implementation of the reforms, and to believe that their increasingly diverging views and consequent difficulties in working as a management team constituted an exceptional case which warranted placing the Applicant on special leave with full pay for the six months remaining until his retirement.

As the Tribunal observed, what was being alleged and decided against the Applicant was that he was resistant to change and did not support a programme of change or reform which ITC had decided should be implemented, and not misconduct, e.g., actively or wilfully being disobedient or seeking to sabotage the programme, which could have led to disciplinary measures being taken against the Applicant. The Applicant argued that the Executive Director had some ulterior motive for his decision, such as a desire to make him a scapegoat for criticisms which had been made or which the Executive Director believed would be made, in a report from OIOS, which was then investigating ITC. The Tribunal, on the other hand, while accepting that it was always difficult for anybody to find evidence supporting this type of allegation since those who conspired to commit unlawful and vengeful acts tried not to leave a trail of evidence, noted that the Applicant had failed to offer any evidence in support of his allegation. Moreover, the circumstances of this particular relationship appeared to the Tribunal to make this allegation unlikely, as the Executive Director appeared to have been historically well disposed towards the Applicant, and the JAB was entitled to reject the Applicant's contention and to find that the Executive Director had acted in a bona fide manner and not with a base or ulterior motive.

The Applicant complained that he had not been afforded due process prior to the making and implementation of the Executive Director's decision to place

him on special leave with full pay and to exclude him from his office, in that he ought to have been afforded details of the allegations made against him, a hearing thereon and an opportunity of responding to those allegations and making his case. While the Tribunal accepted that the Applicant would have enjoyed such rights had allegations of misconduct been lodged against him, it also accepted the fact that the Applicant occupied a crucial position within ITC and his cooperation and support were considered crucial in the implementation of the reform programme. And where the Executive Director was genuinely of the opinion that the Applicant's continuing occupation of the post would have stymied or handicapped the implementation of the reform programme, the Executive Director was entitled to consider that it was expedient, and in the interests of ITC, that the Applicant should be immediately placed on special leave and in consequence removed from his duties. Time would not have permitted an investigation or a hearing, and it was probable that the Applicant would have reached retirement age before such an investigation could have been concluded. Accordingly, the Tribunal considered that the decision to place him on special leave with full pay was warranted and appropriate in the circumstances.

The Applicant referred to the Code of Conduct for International Civil Servants, citing the provision therein that dealt with the entitlement of a staff member (in particular a junior one) to express his views, and in particular such views as might be opposed to the views of his superior officer(s), and encouraged due recognition to the merits of those views. In response, the Tribunal considered that if a staff member had a sincere or heartfelt view that a legitimate or lawful programme of reform was unwise, he was entitled to express his views, but if on the other hand the staff member's intention was to try to stymie or sabotage the implementation of a programme, then that ran counter to the Code.

The Applicant also claimed that he had been denied due process in that he had been denied the right to be represented in the JAB proceedings by qualified counsel of his own choosing, and that he had been restricted to representation from the category of persons identified by staff rule 111.2(i). In particular, the Tribunal rejected the notion that counsel who were, or had been, in the employ of the Organization were so besmirched or compromised that they should be deemed incapable of acting impartially and honestly. The Tribunal was satisfied that such category of persons was sufficiently wide that it would have permitted counsel not suffering from a conflict of interest to have been retained.

With reference to the Applicant's precipitous expulsion from his office, in the view of the Tribunal, such expulsion might well be an appropriate measure where the person suspended had been accused of dishonesty and the suspension had been ordered to prevent the staff member from removing or altering possibly incriminating documents, for example. As recalled by the Tribunal, no such activity and no act of misconduct had been alleged against the Applicant. However, the Tribunal considered that, in the light of the legitimate decision of the Executive Director not to inform fellow staff members as to the reason why the Applicant had been placed on special leave with full pay, to expel him from the premises in the manner in which it was done would likely cause people to believe that his honesty was being impugned. While nominal damages may be an appropriate measure of compensation where there has been a mere technical breach of a right where no actual damage has been inflicted, in the present case the Tribunal considered that the Applicant should be awarded \$30,000 in compensation.

3. JUDGEMENT NO. 1011 (27 JULY 2001): IDDI V. THE SECRETARY-GENERAL OF THE UNITED NATIONS<sup>5</sup>

*Summary dismissal for serious misconduct—Question of receivability—Determination of serious misconduct—Choice of penalty—Discretionary power versus arbitrary power/abuse of power—Exercise of quasi-judisdictional power—Principle of equality of treatment of staff members*

The Applicant entered the service of UNDP, Dar es Salaam, in December 1983, as a Telephone Operator/Receptionist at the G-3 level. The Applicant held a permanent appointment when she was summarily dismissed, effective 10 March 1998, for serious misconduct.

In September 1997, the Applicant had submitted for reimbursement of medical expenses a signed medical insurance programme (MIP) claims form with receipts attached from two local clinics in an amount of 250,00 Tanzanian shillings (approximately US\$ 411). As other required documentation was not also submitted with the claim, an investigation was carried out which revealed discrepancies. On 7 October 1997, the Resident Representative in a letter to the Applicant informed her of the result of the investigation and reminded the Applicant that she had previously submitted an MIP form without proper documentation and had been admonished verbally by the Finance Officer for submitting unauthenticated claims. The Applicant denied any intention to cheat and denied having been warned previously.

After the Applicant was charged with serious misconduct, she submitted a written response, on 8 December 1997, admitting to a mistake or offence and requesting forgiveness since it was her first offence and because of her family situation and her age. The Applicant was dismissed from service, effective 10 March 1997, and was advised of her right to a request for a review of the decision by the Joint Disciplinary Committee (JDC). The Applicant requested a review of the decision by letter dated 14 April 1998 on the grounds that the penalty was too harsh, that she had a good previous record and that she had to support her three children. The panel convened to hear the matter unanimously concluded that the decision was justified and should be upheld, and the JDC adopted its report on 15 June 1998, and on 15 March 1999 the Administrator of UNDP transmitted to the Applicant a copy of the report and informed her that he had decided to maintain the decision of 12 February 1998 to dismiss her.

The Respondent requested the Tribunal to find the application not receivable because it was time-barred. The Tribunal, while noting that there was an unjustified year's delay between the date of the decision of the JDC and its notification to the Applicant, observed that the Applicant's final application had been sent to the Tribunal on 1 December 1999, so that it might have appeared to be time-barred. As explained by the Tribunal, the Applicant had, on 16 December 1998, sent a previous application contesting the decision to summarily dismiss her, even before the decision of the JDC had been formally notified to her, and the Tribunal regarded the first Application, even if imperfect, as having been submitted within the prescribed time limits and therefore considered the application receivable.

In consideration of the merits of the case, the Tribunal observed that the determination as to whether a staff member had met the required standard of conduct was left to the discretion of the Secretary-General (see Judgements No. 424, *Ying* (1988); No. 425, *Bruzual* (1988); No. 479, *Caine* (1990); No. 515, *Khan* (1991); and No. 542, *Pennacchi* (1991)). In particular, the discretionary power to determine when

conduct might be characterized as serious misconduct was vested in the Secretary-General (see Judgements No. 479, *Caine* (1990); No. 582, *Neuman* (1992); No. 815, *Calin* (1997); and No. 941, *Kiwanuka* (1999)).

The Tribunal further observed that the choice of penalty was also left to the discretion of the Secretary-General (see Judgements No. 424, *Ying* (1988); No. 425, *Bruzual* (1988); No. 429, *Beyele* (1988); No. 436, *Wiedl* (1988); and No. 641, *Farid* (1994)).

The Tribunal explained that discretionary power did not mean arbitrary power or abuse of power (see Judgement No. 707, *Belas-Gianou* (1995)). In that regard, the Tribunal was responsible for verifying that the facts were described correctly, as unsatisfactory conduct, misconduct or serious misconduct. The Tribunal also observed that where the United Nations administrator or a disciplinary committee took disciplinary measures, they were not only exercising their discretionary power, but also exercising a quasi-jurisdictional power, subject to the supervision of an administrative judge (see Judgements No. 897, *Jhuthi* (1998); No. 898, *Uggla* (1998); and No. 890, *Augustine* (1998)).

In the present case, the Tribunal considered that the facts were wrongly characterized as serious misconduct and that, accordingly, the summary dismissal, together with the loss of the benefits vested in the Applicant by 14 years of service with UNDP, was a disproportionate penalty. In that regard, the Tribunal noted that it had established a number of criteria that must be met in order for a disciplinary measure not to be arbitrary: (a) veracity of the facts; (b) appropriate legal description of the facts; (c) absence of substantive irregularity; (d) absence of procedural irregularity; (e) absence of abuse of discretion; (f) legality of the penalty; and (g) proportionality of the penalty. It was further pointed out by the Tribunal that if a single one of those criteria had not been met, the penalty was unjustified and should be remedied.

In the view of the Tribunal, misconduct had certainly occurred, i.e., attempted fraud by trying to obtain reimbursement for hospital bills which the Applicant had not paid, but the Tribunal was not convinced that the facts of the case allowed it to be described as serious misconduct. The Applicant stood accused of a single attempt at improper reimbursement of a sum of \$411 in 14 years of unblemished service. The Tribunal concluded that the other incident mentioned by the Administration in 1997 was not an attempt to defraud, but was rather a procedural problem concerning the submission of documents.

The Tribunal further noted that even in cases of serious misconduct, the Administration did not always proceed to summary dismissal of its guilty employees, together with the loss of terminal benefits. In that regard, the Tribunal recalled the principle of equality of treatment which should be applied to all United Nations employees in conformity with the Staff Regulations and Rules and with previous decisions of the Tribunal, and that even in cases of attempted theft, there could be an evaluation of circumstances and a scale of penalties.

The Tribunal, having weighed all aspects of the case, believed that a summary dismissal together with the loss of the benefits to which the Applicant was entitled by virtue of 14 years of service with UNDP was a disproportionate penalty and the Administration's actions against her did not fall within the necessary margin of discretion afforded to the Administration in the exercise of its disciplinary power. Accordingly, the Tribunal awarded the Applicant nine months of her net base salary.

4. JUDGEMENT NO. 1014 (20 NOVEMBER 2001): AL ANSARI, ZARRA AND KHALIL, AND ABDULHADI ET AL. V. THE COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST<sup>6</sup>

*Revision of judgement—Article 12 of the statute of the Tribunal—Disciplinary measures versus administrative measures—Revision criteria*

The Applicants were all former staff members of UNRWA, and all sought revision of a judgement based on an alleged fact “of such a nature as to be a decisive factor” in relation to the document entitled “Notes of the Commissioner-General’s Opening Remarks to the Cabinet Meeting”. In that regard, the Tribunal recalled article 12 of its statute:

“The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within thirty days of the discovery of the fact and within one year of the date of the judgement. Clerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties.”

The Respondent raised issues concerning the authenticity, accuracy and provenance of the document. While the Respondent confirmed that according to the Agency’s records the Commissioner-General had held a general cabinet meeting on or about 15 May 1996, a check of the Respondent’s records did not find a record or document corresponding with that document relied upon by the Applicants.

The Tribunal recalled that, in April 1995, the Director of UNRWA Affairs, Syrian Arab Republic, had convened a Board of Inquiry, which had subsequently found that there had been serious misconduct on the part of many of the persons employed by UNRWA to administer and implement the scheme for distribution of rations to special hardship cases and that fraudulent practices such as a failure to keep proper records, the keeping of deceased special hardship cases on the rolls, the issuing of cards in respect of deceased persons and other acts of corruption had facilitated this fraud continuing on a massive scale. The Board had further found that such officials might be divided into two categories, (a) those who actively participated in such fraudulent practices, and (b) those who were aware of what was taking place and failed to seek to stop it, which facilitated its continuance. The Board of Inquiry concluded that each of the Applicants had variously participated in the fraudulent practices or in some instances had turned a blind eye to what was going on, and described their performance as having been negligent or grossly negligent.

Insofar as the Respondent had relied upon findings of neglect of duty or failure to perform one’s duties as a ground for terminating the Applicants’ appointments either for “misconduct” or “in the interest of the Agency”, the Tribunal was satisfied that such findings as had been relied upon were findings of wilful or reckless failure to perform duties rather than findings of innate inefficiency or inability, so that it had been permissible or appropriate for the Respondent to have taken disciplinary action against them rather than administrative action appropriate to innate incapacity or inefficiency, which would have been appropriate had the neglect or failure to perform duties been of the less culpable kind. The Tribunal had further determined

that, in the case of each of the Applicants in the judgements in respect of which revision was sought in the present case, the Respondent had lawfully terminated their appointments, finding no evidence of bias, prejudice, improper motive or consideration of any extraneous matter.

In the present case, each Applicant essentially argued that the document in question confirmed their claims that there existed an “outside influential faction” which dominated or influenced the work of the Board of Inquiry and the Administration’s decision-making process. By virtue of article 12 of the statute, for an application for revision of a judgement to be admissible, the Applicant must establish four things: (a) the existence of a fact; (b) that the “fact” was unknown to the Tribunal and the party claiming revision when the judgement was given; (c) that such ignorance was not due to negligence; and (d) that the “fact” was of such a nature as to be a decisive factor in the case.

The Tribunal considered that the document established (if its authenticity was acceptable for the purpose of the argument) that there existed within the UNRWA management structure “individual fiefdoms, each jealously guarded by its management”, a seeming reference to cliques based upon management divisions, and not the “outside factions” relied upon by the Applicants. The Tribunal was further satisfied that, even accepting the authenticity of the document, the Tribunal could not consider it to be evidence of bias or prejudice on the part of the Board of Inquiry or on the part of the Respondent; such a document at face value did not purport to establish or confirm any mistake on the part of the Board of Inquiry or to indicate any matter which could have excused the various Applicants’ conduct or failures as found by the Board of Inquiry.

The Tribunal was further doubtful if the said document should even be construed as disclosing “a new fact”, let alone a fact of a decisive nature. Again conceding its authenticity for the purpose of the argument, on a proper construction thereof, it more properly recorded the Commissioner-General as having expressed his critical view in relation to a management problem rather than making an unqualified statement of fact.

In all of the circumstances, the Tribunal was satisfied that neither the Applicants nor any one of them had established a new fact of a potentially decisive nature or raised any new matter which would merit the original judgements being reviewed, and accordingly the applications were dismissed in their entirety.

5. JUDGEMENT NO. 1018 (20 NOVEMBER 2001): AL-FAHOUM V. THE SECRETARY-GENERAL OF THE UNITED NATIONS<sup>7</sup>

*Non-renewal of fixed-term appointment—As a general rule no entitlement to renewal—An inaccurate performance report—Poor working relationship with Director—Necessity of objective performance evaluation—Sexual harassment charges*

The Applicant joined UNRWA as a part-time teacher in October 1976, and after a short break in service joined UNEP in Nairobi on a one-year fixed-term appointment at the P-4 level as a Communications Officer. She was reassigned to the UNEP Regional Office in West Asia in Manama, Bahrain, effective 15 February 1994, and her functional title was changed to Regional Communication/Information Officer. Her appointment was extended for further fixed-term periods, the last appointment expiring on 31 March 1997.

The Applicant argued against the non-renewal of her appointment, claiming that she had been sexually harassed by her supervisor and that due to her rejection of his advances he carried a grudge against her and gave her a poor rating in her performance evaluation report.

In consideration of the case, the Tribunal recalled that the Administration had the discretionary power to terminate fixed-term contracts, pursuant to staff rules 104.12(b)(ii) and 109.7(a). The Tribunal also noted that while it was a general rule that there was no entitlement to the renewal of a fixed-term contract, even for exceptional employees, such entitlement was specifically conferred on deserving UNEP staff members by a memorandum dated 11 December 1996. According to the memorandum, the ratings "A", "B" and "C" conferred the right to renewal.

With regard to the contents of the Applicant's first evaluation by the new Regional Director, which in the view of the Tribunal had been carried out surprisingly, but not beyond the bounds of administrative instruction ST/AI/411 of 18 September 1995 on the performance appraisal system, soon after he arrived, the Tribunal noted that the report was completely and starkly at odds with the Applicant's previous evaluations and that she had challenged the ratings that she had been given. The Tribunal took particular note that the Applicant had submitted the ratings to the Panel on Discrimination and Other Grievances for review, and that the Administration had not awaited the Panel's report before terminating the Applicant's appointment.

Upon review of the Applicant's performance ratings, the Tribunal noted that all the ratings had been raised one level, with one notable exception: the "E" rating which was given in evaluation of the Applicant's effectiveness in maintaining harmonious work relationships with her colleagues had been upgraded by two levels, and in the view of the Tribunal this implied, at the very least, that the original evaluation was highly inaccurate. The Tribunal further noted that this point was of some importance, bearing in mind that the reason for the non-renewal of the Applicant's contract was precisely the fact that she could not work harmoniously with her supervisor.

On the basis of the corrected evaluation, the Tribunal considered that in December 1996 the Applicant was entitled to an additional year's contract, and did not accept the Joint Appeals Board's reasoning, and subsequently that of the Secretary-General, that the Applicant could not have had a "reasonable legal expectancy" that her contract would be renewed, despite the memorandum of 11 December, because she knew that her working relationship with the Regional Director was very poor. In the opinion of the Tribunal, the Administration had confused the objective entitlement to renewal of the contract, conferred by the memorandum, with the subjective fears of non-renewal that the Applicant might have felt owing to her difficult relationship with her new supervisor.

The Tribunal considered that the JAB and the Applicant were right in believing that the Administration had not shown satisfactorily that the decision not to renew the Applicant's contract was based on a rigorous and objective determination of the unsatisfactory nature of her services. The Tribunal observed that staff should be evaluated as objectively as possible and the Tribunal could not accept that, when the amended evaluation was entirely favourable and, moreover, followed on a long line of excellent evaluations before the arrival of the new supervisor, it was adequate for the Administration to invoke, without further ado, "the irreconcilable differences between you and the Regional Director" as a reason for refusing to

renew the Applicant's contract, to which the Applicant was entitled in view of the circumstances of the case.

Regarding the Applicant's allegation of sexual harassment, the Tribunal, while noting that the JAB had concluded that the accusations could not be corroborated, considered it unnecessary to determine whether or not sexual harassment had taken place, since it was always a difficult matter to prove—or to disprove—and the question was not material in deciding the case. Whether there had been incidents of sexual harassment or not, the reason given for the non-renewal of the Applicant's contract—that she did not get on with her supervisor—while she was entitled to such renewal, was not a sufficient reason if it was not founded upon observance of the established procedures.

In conclusion, the Tribunal considered that in December 1996 the Applicant had been entitled to a one-year renewal of her contract, and that it was due to improper implementation of procedures established to protect the staff that the decision not to renew her contract had been taken without waiting for the results of the review of the evaluation which prompted the decision, and that the grounds for the decision, namely, irreconcilable differences between the Applicant and her supervisor, were arbitrary. The Tribunal ordered the Respondent to pay the Applicant nine months of her net base salary.

6. JUDGEMENT NO. 1020 (20 NOVEMBER 2001): HAZAYYEN V. UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST<sup>8</sup>

*Termination for misconduct—Establishment of misconduct—Staff member stealing from another staff member was of concern to the organization—Appropriateness of penalty*

As the Tribunal pointed out, there was a large measure of agreement regarding the background facts of the application. On Saturday, 31 May 1997, the Applicant, employed at the time as a Secretary by UNRWA at Amman Training College, Education Department, took possession of an ATM card and a card bearing the PIN number required to operate same from the desk or handbag of a colleague. The Applicant took them without the knowledge or permission of the owner of these items, and by means of four transactions at a local bank withdrew the sum of 350 dinars from her colleague's account, thereby clearing it of its credit balance.

The Applicant submitted that her actions were a matter between herself and her colleague which ought not have legitimately concerned UNRWA and that her actions had not contravened any specific staff rule. The Applicant further argued that she had taken her colleague's card and PIN number "as a joke" and that she had withdrawn the money as a joke because the colleague had previously played a joke on the Applicant by hiding her handbag until the end of work one day. She maintained that she had further engaged in the exercise to give her colleague a practical demonstration or lesson as to her foolishness in leaving such items exposed on her desk, where they might be stolen. The colleague stated that it was only when she threatened to go to the police that the Applicant had admitted to such acts and promised to repay the money.

A Joint Appeals Board (JAB) was duly convened to investigate the matter, and it concluded that there was not sufficient evidence to establish fraudulent intent

on the part of the Applicant. The JAB categorized the Applicant's actions as "a mistake", and, at that, a mistake which did not justify termination for misconduct "because good intentions were the basis of her relationship with the staff member concerned". The Respondent disagreed with the JAB, claiming that the Applicant's actions could not reasonably be described as a joke. He pointed out that there had been four separate withdrawals so as to empty out the colleague's account. Observing that this had never been explained, the Respondent impliedly posed the question as to why this had been done since, if all the Applicant had intended was to perpetuate a joke or to give her colleague a salutary lesson as to the foolishness of keeping her PIN number alongside her ATM card, one withdrawal would have sufficed. The Respondent further pointed to the Applicant's failure to have volunteered her actions of the previous Saturday to her colleague when they met on the following Monday, and to the fact that it was her colleague who had confronted and accused the Applicant and threatened the police before the Applicant made the admission. In the view of the Respondent, had the Applicant truly intended her actions as a joke she would have announced her involvement before being accused and threatened with the police and she would have been then and there in sufficient funds to make immediate restitution.

The Tribunal, having carefully considered the record and submissions of both parties, was fully satisfied that the view on the facts taken by the Respondent when he determined that the Applicant's conduct amounted to misconduct was very fair, proper and reasonable. The decision was neither arbitrary, based on a mistake of fact, nor influenced by prejudice or bias. The Tribunal further rejected the JAB's observation that the matter was one between colleagues, therefore of little concern to an organization, particularly when not initiated by a complaint made by the colleague of her own initiative. Where it appeared to an organization that there was evidence which suggested that one staff member had stolen from another, it was clearly a matter properly meriting the interest of the employing organization, and if facts were found which established such theft, then a finding of misconduct was open to the Administration and termination could well be considered justifiable without the need for previous reprimands and warnings.

Although the issue was not raised by the Applicant, the Tribunal concluded that summary dismissal for the taking of 350 dinars was not disproportionate. In the circumstances all of the Applicant's claims were rejected and the application was dismissed in its entirety.

7. JUDGEMENT NO. 1031 (21 NOVEMBER 2001): KLEIN V. THE SECRETARY-GENERAL OF THE UNITED NATIONS<sup>9</sup>

*Non-selection to a higher-level post—Broad discretionary powers to promote qualified staff—Abuse of discretion—Staff regulation 4.2—ST/AI/412 (promoting gender balance)—Improper intervention in selection process*

The Applicant entered the service of the Organization on 17 February 1975 as an Associate Officer at the P-2 level in the Division of Human Rights, United Nations Office at Geneva. Following a series of promotions, on 5 March 1985 the Applicant was reassigned to the P-4 level post of Human Rights Officer, International Instruments Unit, Centre for Human Rights. Following a restructuring exercise, on 1 April 1991 the Applicant was promoted to the P-5 level position

of Chief, International Instruments Section, Centre for Human Rights. In 1993, the International Instruments Section was given Branch status, with the Applicant retaining her position as Chief. On 3 May 1996, following another restructuring exercise, the Applicant assumed the functions of Chief, ad interim, Management Unit 2, Centre for Human Rights, a D-1 level position. The Unit was renamed Support Services Branch on 30 September 1996, with the Applicant continuing as Chief, a.i.

On 29 January 1997, the Applicant applied for the D-1 level position of Chief, Support Services Branch, Centre for Human Rights. The then High Commissioner included the Applicant in his shortlist of candidates, and after conducting interviews of the four shortlisted candidates, the Appointment and Promotion Board was advised that the interview panel had unanimously concluded that the Applicant was the most qualified candidate, with another internal candidate second. On 31 July 1997, the Appointment and Promotion Board recommended the Applicant for promotion to the post.

On 12 September 1997, a new High Commissioner took office, and on 16 September the Applicant was informed that the new High Commissioner had decided to re-advertise the post “in order to be able to consider qualified applicants from a broader range of countries than was possible in the first round”. On 27 October 1997, the Applicant re-applied for the post. On 10 March 1998, the Applicant was informed that another candidate, an external male candidate, had been recommended by the Department, justifying the choice as being motivated by the need to achieve geographical balance in the Centre. The High Commissioner also stated that she did not believe that the Applicant possessed the skills needed to manage the Branch, or to take a lead role in the changed initiatives that the High Commissioner envisaged. However, the Appointment and Promotion Board stood behind its recommendation of the Applicant, when, on 4 June 1998, the Board reopened the case for further review. Subsequently, the Board recommended that the post be re-advertised a second time because it did not find the High Commissioner’s candidate qualified for the post. On 29 June 1998, however, the Respondent appointed the candidate recommended by the High Commissioner. The Applicant lodged an appeal.

In the view of the Tribunal, although the powers of the Appointment and Promotion Board were advisory and non-binding, the Respondent had failed to address the Board’s consistent rejection of the High Commissioner’s candidate and its recommendation that he was not qualified, and, in the light of the impasse, the Board was correct in recommending that the post be re-advertised. Notwithstanding the Respondent’s contentions that the letter dated 23 March 2000, addressed to the Applicant, stated that she had received full and fair consideration at every stage of the process including the final stage and that, therefore, her non-selection had not violated her rights, the JAB found nothing to indicate how the Respondent’s final decision had been reached. The Tribunal found that the Respondent had asserted no valid grounds or line of reasoning when ultimately he had made his decision not to re-advertise the post and to appoint the other candidate. Accordingly, in the opinion of the Tribunal, the Respondent’s decision-making process and final decision went against the principles of due process and violated the Applicant’s right to full and fair consideration.

In addition, the Tribunal had consistently held that the Respondent’s discretionary powers with respect to promotion were subject to staff regulation 4.2 and Article 101, paragraph 3, of the Charter of the United Nations, which states: “The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards

of efficiency, competence and integrity . . .” (see Judgement No. 828, *Shamapande* (1997)). In order to achieve this purpose, “it is indispensable that ‘full and fair consideration’ should be given to all applicants for a post” and that “the Respondent bears the burden of proof with respect to this issue” (ibid., para. VI) and, in the view of the Tribunal, the Respondent had not fully met this burden.

The Applicant contended that the High Commissioner’s decision to appoint an external male candidate was in clear violation of the Regulation and Rules, specifically the provisions of administrative instruction ST/AI/412 of 5 January 1996, which attempted to promote gender balance in the Secretariat by having 35 per cent of all Professional posts encumbered by women by 1995; 25 per cent of posts at the D-1 level and above by June 1997; and 50-50 parity between men and women by the year 2000. In that regard, the Tribunal observed that the recommendation of the Appointment and Promotion Board highlighted the Applicant’s superior qualifications juxtaposed to those of the male candidate, stating that the Applicant was the best candidate for the post given her superior qualifications and considerably greater practical and more diverse experience, as well as her consistently excellent performance record. The Appointment and Promotion Board, while noting the male candidate’s excellent credentials, further stated that the Applicant had a higher-level law degree than the male candidate, was a skilful negotiator, possessed the relevant management skills and had performed very well as Chief, a.i., of the Branch for over 18 months. Moreover, it was not clear to the Tribunal that the High Commissioner was in a position to conclude that the Applicant did not possess the skills needed to manage the Branch. The Tribunal further noted that the High Commissioner’s evaluation was completely contrary to that of the former High Commissioner.

The Tribunal agreed with the JAB that there was a lack of transparency in the final stages of the decision-making procedure, that it was improper for the High Commissioner to intervene with the Appointment and Promotion Board and that such intervention amounted to a violation of due process (see Judgement No. 988, *Mezoui* (2000)). Accordingly, the Tribunal found that the Applicant was entitled to compensation and ordered the Respondent to pay the Applicant an amount equivalent to one year’s net base salary at the D-1, step VII, level.

8. JUDGEMENT NO. 1032 (23 NOVEMBER 2001): RAHMAN V. THE SECRETARY-GENERAL OF THE UNITED NATIONS<sup>10</sup>

*Separation on grounds of misconduct—UNDP policy on sexual harassment—Question of uncorroborated testimony—Issue of prejudice or bias—Question of adequate notice*

The Applicant joined UNDP on a fixed-term appointment as a locally recruited Administrative Officer, UNDP Office, Pakistan, at the NO-B level, on 17 January 1993. Effective 1 January 1995, he was promoted to the NO-C level as Assistant Resident Representative for Administration, subsequently, for Operations. As of 9 May 1997, the Applicant assumed the responsibilities of Officer-in-Charge, Operations Division, which position he held until his separation from service, effective 12 August 1999.

On 22 December 1998, 10 UNDP female staff members lodged with the Resident Representative an official complaint of sexual harassment against the Applicant; on 11 March 1998, an eleventh staff member requested to be added to the

original complaint. The UNDP/UNFPA Grievance Panel on Sexual Harassment reviewed the complaint and, on 19 May 1998, the Panel presented its report, wherein it was found that in four of the 11 complaints there was sufficient evidence to conclude that “the sexual conduct of the Applicant created an intimidating, hostile or offensive work environment for the complaint as set forth in the Sexual Harassment Policy and Procedures for UNDP/UNFPA Staff”.

The Applicant was placed on special leave with full pay for an initial period of three months, and the findings of the Grievance Panel were referred to the UNDP/UNFPA/UNOPS Disciplinary Committee (JDC). The JDC submitted its report on 13 July 1999, concluding that the charge of harassment, which included sexual harassment was supported by evidence; that the Applicant’s pervasive and repeated acts of verbal harassment of a sexual nature against young female colleagues had created a hostile, intimidating and offensive work environment; and that therefore the Applicant’s conduct was unbecoming of an international civil servant and incompatible with continued membership of the staff. The Committee further unanimously recommended that the Applicant be separated from the service of UNDP in accordance with staff rule 110.3(viii), without notice or compensation in lieu thereof. The UNDP Administrator accepted the recommendation and duly separated the Applicant, and the Applicant subsequently appealed the decision, on both substantive and procedural grounds.

In consideration of the case, the Tribunal noted that, in May 1993, UNDP had issued administrative instruction UNDP/ADM/93/26, a policy on sexual harassment, calling it “unacceptable behaviour”. It defined the term to mean:

“conduct of a sexual nature, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment. It is particularly serious when behaviour of this kind is engaged in by an official who is in a position to influence the career or employment conditions (including hiring, assignment, contract renewal, performance evaluation, working conditions, promotion) of the recipient of such attentions.”

Procedures were included in the policy, including the creation of a Grievance Panel, whose role was investigation and fact-finding, and the possibility of referral to a JDC.

The Tribunal noted that the actions complained of had occurred between late 1996 and October 1997, and included conversations in the Applicant’s office about his unhappy situation at home and calling the women at their homes to talk about his unhappiness, while giving intimate details about himself and his wife. The complaint stated that the calls had occurred unnecessarily when it was time to renew contracts.

Regarding the Applicant’s complaints about the procedure followed by the Grievance Panel and the JDC, that the charges against him were based on the uncorroborated testimony of the women and that there were contradictions in their statements, the Tribunal observed that the similarity of the women’s experiences with the Applicant, the pattern of conduct they described in their statements and the ability of the Grievance Panel and the JDC to judge the credibility of the oral testimony of at least three of the women made it reasonable for the Panel and the JDC to conclude as they did regarding the sufficiency of the evidence.

The Applicant also claimed that the statements of the Resident Representative and the Deputy Resident Representative exculpated him but had been ignored. For example, the Resident Representative had stated that he was not aware of a hostile

work environment created by the Applicant and that the Applicant could neither approve a personal contract nor approve the reimbursement of claims for daily subsistence allowance. However, the Tribunal observed that it was unclear from the JDC report whether the Committee believed those statements, and even if the testimony were judged to be credible, it could not completely exculpate the Applicant, given the very broad definition of sexual harassment in the UNDP policy. Nor, in the view of the Tribunal, were those statements alone sufficient to undo the findings regarding hostile environment and conduct unbecoming a UNDP official.

The Applicant further claimed that there was management bias against him and a predetermined objective of punishing him to satisfy political expediencies. He cited, for example, extensions of time, the granting of counsel to the women to assist them in the preparation of their statements, the flow of confidential information from UNDP to the women, the long period of his special leave with full pay and the fact that the same person served first as counsel to the women then as counsel to UNDP, as well as local news reports about the case. While the Tribunal normally relied on the factual findings of a JDC, it would decline to accept those findings when there was evidence of prejudice or bias; however, in the present case, it did not find that the Applicant's claims had indicated a prejudice or bias against him.

The Tribunal also concluded that the record revealed that adequate notice had been provided to the Applicant, in keeping with Judgement No. 997, *Van der Graaf* (2001). The Tribunal observed that, after reviewing the complaints by the women and considering the evidence, the Grievance Panel in May 1998 had found elements constituting sexual harassment as defined in the UNDP policy; the June 1998 memorandum from the Director of the Office of Human Resources to the Applicant had provided additional notice of the scope of the issues; the Applicant had been asked to respond within approximately 30 days; and, subsequently, UNDP had notified the Applicant in February 1999 that it would refer the matter to a JDC. In the view of the Tribunal, the Applicant had clearly received adequate and timely notice, distinguishing the facts here from those in Judgement No. 744, *Eren* (1995).

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

9. JUDGEMENT NO. 1040 (30 NOVEMBER 2001): USPENSKY V. THE SECRETARY-GENERAL OF THE UNITED NATIONS<sup>11</sup>

*Non-conversion to a career appointment—Right of a staff member to be considered for a permanent post—Non-conversion based on financial position of the Organization—Discrimination based on source of funding for posts—Discrimination based on nationality—Practical remedy because of age*

The Applicant joined the United Nations as a Statistician in the Statistical Office, Department of International Economic and Social Affairs, at the P-3 level, on a two-year fixed-term appointment, on 21 June 1984. The Applicant's appointment was renewed several times and, on 22 May 1992, after a break in service, he received a one-year fixed-term appointment as an Economic Affairs Officer, Department for Economic and Social Development. He continued to be renewed, serving in several different departments, with his current appointment due to expire on 31 August 2002. On 23 July 1997, the Applicant had requested to have his appointment converted to permanent status, but this was denied, and the Applicant filed an appeal.

The Applicant requested the Tribunal to award him damages and other relief on the ground that in 1994 he had not been given “every reasonable consideration for a career appointment”, although he had 15 years of good service. He argued that this failure by the Respondent had violated his contractual rights and was a result of discrimination. He also asserted that the Respondent had failed to follow his own rules. The JAB agreed in part, and recommended that the Applicant “be given every reasonable consideration for granting of a career appointment” but declined to recommend an award of damages. The Respondent, on the other hand, was not in agreement with the JAB, claiming that the Applicant had been afforded reasonable consideration but had not been converted to permanent status for financial reasons.

In consideration of the case, the Tribunal observed that the right of the Applicant to be considered for a permanent post and the countervailing responsibilities of the Organization regarding staff matters were stated in several legal documents. Article 101, paragraph 1, of the Charter of the United Nations provided that “staff shall be appointed by the Secretary-General under regulations established by the General Assembly”. The General Assembly in its resolution 37/126 of 17 December 1982 had decided that “staff members on fixed-term contracts upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment”, and as a consequence this reasonable consideration was an implicit term in contracts of employment.

The Tribunal was of the opinion that the record showed that, at the decision-making level, the Respondent had given at best only an illusory consideration to the determination of the Applicant’s eligibility and no consideration to the request for conversion. There was no evidence of a meaningful consideration of the Applicant’s performance and length of service; the Respondent had denied the conversion because of the financial position of the Organization and nothing else had been considered.

The Respondent had asserted that, pursuant to General Assembly resolution 51/226 of 3 April 1997, the Assembly had decided that “five years of continuing service . . . do not confer the automatic right to a permanent appointment”. It had also decided in the same resolution that “other considerations, such as outstanding performance, the operational realities of the organizations and the core functions of the post, should be duly taken into account”. The Tribunal observed that while financial considerations had not been excluded, it was noteworthy that such an important factor was not expressly stated, whereas “operational” realities were listed.

The Respondent also cited Judgement No. 712, *Alba et al.* (1995), wherein the Tribunal had noted that the “financial constraints of the Organization may be one of the factors to be considered in the granting of career appointments”. The Tribunal agreed that the financial situation of the Organization might be taken into account; however, there must be a serious and formal consideration of *all* the relevant factors in order to accord the reasonable consideration that was required.

The Tribunal also noted that, pursuant to *Alba et al.*, the Administration could not discriminate against staff based on the source of funding for their posts. In *Alba et al.*, the Tribunal had found it unfair to distinguish between staff members based on the underlying source of funding for their posts, since under such a practice “long-serving staff members, whose performance was satisfactory, might not even be considered for career appointments because they were serving on extrabudgetary posts, while other staff members with considerably shorter service would be considered for permanent posts after five years because their posts were funded from the regular budget”.

The Tribunal further considered that there appeared to be some discrimination based on nationality. As the Tribunal recalled, in 1995, staff members from a country were transferred from overhead posts to established posts (i.e., were eligible for conversion) in disproportionate numbers, while many nationals of other nations were maintained in extrabudgetary posts. Since the number of available permanent posts was limited, the nationals from the other countries—like the Applicant—had been unfairly placed at a disadvantage and denied their right to be considered for career appointment. The Tribunal had found that, while the rationale for this policy was that it reduced the impact on the Tax Equalization Fund of having nationals of the first country paid from overhead accounts, the practice was extremely unfair for staff members of other nationalities.

The Tribunal agreed with the JAB that the Applicant had not, but should have, been given every reasonable consideration for a permanent post. And given the current age of the Applicant, the only practical relief available to the Tribunal was an award of compensation, because the provisions of staff rule 104.12(b)(iii) applied to staff members under the age of 53. Accordingly, the Tribunal awarded the Applicant \$22,500 compensation in damages, because the Respondent had failed to accord him the required reasonable consideration, leading to a protracted period of uncertainty, and because of the discrimination against him.

10. JUDGEMENT NO. 1041 (30 NOVEMBER 2001): CONDE ESTUA V. THE SECRETARY-GENERAL OF THE UNITED NATIONS<sup>12</sup>

*Request to be declared sole surviving spouse of deceased staff member—Payments under staff rule 109.10 only permit one surviving spouse—Choice of law—Exceptional case regarding award of costs to the losing party*

The Tribunal noted that the case involved two women, both of whom claimed to be the surviving spouse of a United Nations staff member who had died intestate in 1995, with a view to receiving certain sums of money to be paid by the Organization following his death. The Applicant was the deceased staff member's second wife, whom the deceased had divorced, in her absence and without her being notified, by act of repudiation (*talaq*), and without paying her the stipulated monetary award. On the same day, 26 November 1989, the deceased had married the Intervener in the present case, a United States national residing in Geneva, who had converted to Islam, before the Cadi (religious judge) of Djibouti. There was no dispute as to the monies paid to his three children and the Intervener, pursuant to staff rule 112.5(b).

The Tribunal, while observing that the case did not involve those benefits paid by the United Nations Joint Staff Pension Fund and, in particular, the widow's benefit due to the "surviving spouse", considered that the issue before it was who should be considered to be the surviving spouse for the purposes of staff rule 109.10, regarding benefits to be paid to the dependent children and the surviving spouse, in order to avoid a sudden loss of income and other benefits upon the death of the staff member. As the deceased's two sons were no longer dependants, only his young adopted daughter and the "surviving spouse" were at issue. The sum in question was approximately \$40,000. The Tribunal further noted that whereas the United Nations Joint Staff Pension Fund might recognize two widows, staff rule 109.10 permitted only one surviving spouse of a staff member.

The Tribunal, while noting that it was not within its competence to settle the complex issues of private international law raised in the case with respect to the determination of the validity of the Applicant's marriage and repudiation, as well as the Intervener's marriage, stated that the Organization's practice with regard to the law applicable to personal questions concerning a United Nations staff member was personal law, that is, the law of the State of which the staff member was a national, and that in the present case the law to be applied in considering the Applicant's replacement by the Intervener as the deceased's spouse in 1989 was Somali law.

The Tribunal considered that the Respondent had acted in good faith, taking note in 1989 of the Applicant's replacement by the Intervener as the deceased's spouse, referring to the certificates of repudiation and marriage issued by the authorities in Djibouti, which had been transmitted to the Respondent by the now deceased staff member. One of the determining factors, which in the Tribunal's view confirmed the correctness of the position taken by the Administration when it had treated the Intervener as the deceased's spouse from 1989 on, was that it had simultaneously treated the Applicant as the divorced spouse, and this had elicited no reaction on the Applicant's part. For example, the Applicant had lost her entitlement to the Organization's health insurance, and if she had considered at the time that she was still the deceased's official spouse, even though she knew that he was conjugally cohabiting with another woman, there was no doubt that she would have protested and insisted at that time on being considered the sole lawful spouse. The Tribunal therefore believed that there was no reason to call into question the treatment of the Intervener as the surviving spouse for the purposes of staff rule 109.10. It followed that the sums due pursuant to the staff rule should be paid to the surviving spouse who was living with the staff member at the time of his death, which was fully in keeping with the purpose of the provisions of the rule.

The Tribunal believed that, in view of the particular complexities of the case, it was appropriate to make an exception to its general practice of not granting reimbursement of legal and procedural costs, especially to the losing party, and awarded costs of \$5,000 to the losing party (see Judgements No. 237, *Powell* (1979); No. 665, *Gonzales de German et al.* (1994)). The Tribunal further declared the Intervener to be the "surviving spouse" for the purposes of staff rule 109.10.

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## **B. Decisions of the Administrative Tribunal of the International Labour Organization<sup>13</sup>**

1. JUDGEMENT NO. 2046 (27 APRIL 2001): IN RE MULLER-ENGELMANN (NO. 12) V. EUROPEAN PATENT ORGANISATION<sup>14</sup>

*Request for damages regarding unlawful determination of unauthorized absence from service—Stalemate in appointing third member of board*

In 1996, as the complainant was nearing the maximum amount of sick leave allowable under article 62 of the Service Regulations, the European Patent Office (EPO) began the procedure to convene an Invalidity Committee. One physician was

nominated by the complainant and another by EPO, and since the parties could not agree on the nomination of the third physician on the Committee there was some delay. On 11 May 1998, EPO informed the complainant and the two members of the Committee of the designation of Dr. H., a psychiatrist and neurologist, as the third physician on the Committee, following the recommendation of the Medical Advisory Board of the State of Bavaria, which had been consulted by EPO. However, the complainant appealed to the President of the Office that the constitution of the Invalidity Committee was not in conformity with the Service Regulations and she thus refused to cooperate with the Committee.

Then, on 8 June 1998, EPO declared that the complainant's absence from work would be regarded as "unauthorized" within the meaning of article 63 of the Service Regulations until she had attended the required examination. Her salary was subsequently withheld and she was informed on 16 June that besides her own contributions to the social security schemes and pension scheme she would have to pay those normally paid on her behalf by the organization. The complainant requested the President to reconsider those decisions and also requested, *inter alia*, the payment of damages. The matter was referred to the Appeals Committee.

On 9 December 1998, EPO informed the complainant of the decision to reinstate her as a participant in the social security schemes with retroactive effect, and after the complainant informed EPO that she would attend an examination by Dr. H., EPO withdrew its decisions declaring the complainant's absence as unauthorized and withholding her salary. On 18 June 1999, the Appeals Committee unanimously recommended setting aside the decisions of 8 and 16 June 1998, as it found the statement of unauthorized absence from service unlawful. It also recommended that the complainant be paid arrears of salary including interest, as well as the sums representing the Office's contributions to the social security schemes and the pension scheme, and to refund the procedure-related costs including her legal costs, but to reject the claim for damages on the grounds that the complainant had caused the Office's reactions by her refusal to undergo an examination by Dr. H. On 17 August 1999, the President endorsed the recommendations of the Committee, and the complainant appealed the decision not to award her damages.

In consideration of the case, the Tribunal noted that the case had been mishandled by EPO. Its decisions to declare her absence as "unauthorized", to withhold her salary and to demand payment of contributions to the social security schemes had been declared unlawful by EPO itself, and it had taken the necessary measures to remedy the situation. However, in the opinion of the Tribunal, the complainant was not entirely blameless. The Tribunal observed that once it was clear that there was a stalemate in the process of appointing the third member of the Invalidity Committee, it was obvious that some solution had to be found.

In that regard, the Tribunal noted that although the Service Regulations were at the material time silent on the subject, virtually all codes of arbitration, both legislative and private, contained a procedure for having a court or other impartial third party appoint a third arbitrator in the case of deadlock. Thus, in the view of the Tribunal, it was entirely reasonable for EPO to proceed by analogy to such codes, and have a third member appointed.

In view of the foregoing, the Tribunal awarded the complainant 1,000 German marks for moral damages for the unlawful actions of EPO and costs at 500 euros.

2. JUDGEMENT NO. 2052 (3 MAY 2001): IN RE HENROTTE V. EUROPEAN PATENT ORGANISATION<sup>15</sup>

*Complaint against not being allowed to spend sick leave elsewhere than at her place of residence—Discretionary decision is subjected to a limited review—Procedural error was not prejudicial—Question of substantial grounds being indicated for decision—Question of humanitarian circumstances*

The complainant, who eventually was awarded an invalidity pension, in March 2001, impugned the decision of the European Patent Office (EPO) not to grant her permission to spend her sick leave elsewhere than at her place of residence in Munich.

In consideration of the case, the Tribunal observed that, pursuant to rule 6 (iv) of circular 22:

“... The President may, after consulting a doctor appointed by the Office, authorize the person concerned to remove himself from his place of residence, as defined in article 23, in order to spend his sick leave elsewhere.”

In that regard, the Tribunal noted that neither the President of the Office nor the Administration on his behalf had consulted “a doctor appointed by the Office”, but instead had consulted the Invalidity Committee already dealing with the complainant’s case and which was composed of three doctors, one of whom had been chosen by her.

The Tribunal further noted that the decision not to give such permission was clearly discretionary in nature, and it was well established by the case law that a discretionary decision was subjected to limited review. The Tribunal recalled that, in Judgement No. 1969, *in re Wacker* (2000), it had stated that “the Tribunal will quash such a decision only if it was 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 were overlooked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence”. Although the impugned decision might have been preceded by a procedural error in that the Administration had consulted, not “a doctor appointed by the Office”, but the Invalidity Committee, that error, in the opinion of the Tribunal, was of no avail in the circumstances. One of the doctors sitting on the Invalidity Committee was in fact a doctor appointed by the Office, and there was no indication that the complainant was in any way prejudiced by the error.

The Tribunal recalled that the complainant’s main criticism was that the decision had not stated the “grounds” upon which it was based, pursuant to article 106(1) of the Service Regulations. However, as the Tribunal pointed out, the decision had stated that “the majority on the Invalidity Committee found that the necessary treatment can, in principle, also be carried out in Munich”, and since a reason was given for refusing the complainant’s wish to receive treatment other than at her place of employment, in the Tribunal’s view, there was no need for the decision to contain more elaborate reasons.

Furthermore, in the opinion of the Tribunal, there was nothing to suggest that the interests of the complainant were not weighed with those of EPO, and in that regard the Tribunal noted that the Invalidity Committee had issued nine distinct medical reports over the years and was obviously knowledgeable about the complainant’s health and personal circumstances. And while it was true that there were humanitarian circumstances that played in favour of the complainant’s position (her child, the fact that her friends, family and usual therapist were all in France), it

was also true that the organization had a genuine interest in having the complainant close by so that it might monitor properly whether she followed her treatment and progress was being made, as well as to be able to assess whether the treatment received was appropriate. It was the view of the Tribunal that the weighing of those respective considerations was properly a matter for the organization and that the complainant had not demonstrated that there was any basis upon which the Tribunal could interfere. The complaint was dismissed.

3. JUDGEMENT NO. 2092 (12 NOVEMBER 2001): IN RE SPAANS V. ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS<sup>16</sup>

*Non-renewal due to abolishment of post—Issue of changing reason for taking a decision—Test for abolishment of a post—Obligation of executive head to give a reason for rejection of appeal body’s recommendation*

The complainant was employed by the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons (OPCW) from May 1994 on a fixed-term appointment, as a travel clerk, at grade GS-4. Her contract was renewed several times, and in May 1997 she was granted a three-year appointment. On 25 June 1997, she was promoted to GS-6 as a travel assistant on a three-year contract that superseded the previous one. In a restructuring process in 1998, the branch she worked in became the Procurement and Support Services Branch and her title changed to Support Services Assistant. From October to December 1998, the complainant was on sick leave, and when she resumed work in January 1999, she worked part-time for several weeks, and in July she was transferred to the International Cooperation and Assistance Division. By letter dated 6 October 1999, the Director-General informed the complainant that her contract would not be renewed when it expired on 24 June 2000, because it was his “intention to abolish the position of Support Services Assistant in view of the restructuring of the Procurement and Support Services Branch”.

The complainant was successful before the Appeals Council, which recommended her reinstatement, but the Director-General did not accept its recommendation, and she appealed that decision before the Tribunal.

In consideration of the case, the Tribunal recalled that it was elementary that where a reason was given for taking a decision which was adverse to the interests of the staff member the Organisation was held to that reason and could not later justify its action on other grounds. The Organisation later argued that the complainant’s contract had not been renewed because her performance had been less than superlative.

The Tribunal was in agreement with the complainant that in fact her post had never been abolished. In that regard, the Tribunal noted that after she was transferred she had continued to perform a number of the duties which had previously been hers in the Procurement and Support Services Branch, and some of those functions remained in the Branch and were performed by Ms. V., who had been recruited from outside the Organisation on 28 September 1999 and started as a “Senior Support Services Clerk” at grade GS-5. In addition, other duties previously performed by the complainant had been temporarily distributed to staff of other departments but most had reabsorbed into the Branch in June 2000 after the complainant had left the Organisation. Moreover, as observed by the Tribunal, the Contract Renewal Board, upon whose advice the Organisation said the Director-General had relied in decid-

ing to abolish the complainant's post, far from recommending its abolition, instead had suggested that someone with different qualifications should be appointed to it in these terms:

"In order to better serve the needs of the Organisation and to fully meet the requirements for this post in the future, skills and knowledge other than those possessed by the incumbent are needed. Renewal of the contract should therefore not be offered."

As pointed out by the Tribunal, one of the tests which it had developed over the years to determine whether or not a post had truly been abolished was to ask whether or not the "abolition" had resulted in a reduction of the number of staff in the affected department (see, for example, Judgement No. 139, *in re Chuinard* (1969)). If it had not, the presumption was that all that had taken place was a redistribution of functions among existing posts, a normal incident of good management, and not the abolition of one or more posts, which would usually result in the loss of employment for one or more staff members. In the present case, the complainant had argued that the restructuring had led to an increased number of staff members, and the Organisation had stated that while the functions in the travel section had been distributed among a greater number of staff involving other branches, the Procurement and Support Services Branch had retained the same number of budgeted posts.

In the view of the Tribunal, since the reason given by the Director-General for the decision not to renew the complainant's contract was not true, the impugned decision was based on an obvious mistake of fact and could not stand and must be set aside.

The Tribunal also noted that when the executive head of an organization accepted and adopted the recommendations of an internal appeal body he was under no obligation to give any further reasons than those given by the appeal body itself. Where, however, as in the present case, he rejected those recommendations, his duty to give reasons was not fulfilled by simply stating that he did not agree with the appeal body.

As to a remedy, the Tribunal considered that where no abolition of post had in fact taken place the complainant could not have expected renewal for more than two years (beyond 24 June 2000), and instead of ordering reinstatement ordered a payment equal to all remuneration (salary and allowances) and all other benefits to which the complainant would have been entitled if her contract had been renewed to 24 June 2002, subject to her accounting for any net earnings from outside employment to the date of delivery of the judgement. She was entitled to an award of 10,000 euros in damages and to 5,000 euros in costs.

4. JUDGEMENT NO. 2096 (2 NOVEMBER 2001): IN RE BRUCE V. ORGANISATION FOR THE PROHIBITION OF CHEMICAL WEAPONS<sup>17</sup>

*Non-renewal of contract—Limited power of review of decision—Question of proper constitution of Contract Renewal Board—Obligation to complete performance reports—Question of remedy*

The complainant, who was employed by the Organisation for the Prohibition of Chemical Weapons (OPCW) as Head of Laboratory at grade P-4, had a three-year fixed-term contract as from 24 May 1997.

In an information circular of 23 April 1998, the Director-General informed staff members with fixed-term contracts of his intention to extend their appointments, initially granted for three years, by a further two years provided that they had fully demonstrated that they met the high standards of efficiency, competence and integrity required. On 24 August 1999, the complainant was informed orally that the Director-General was not satisfied with the performance of the laboratory, that she would be replaced by a staff member at grade P-5, and that her contract would not be renewed; she would have the choice of two posts until her contract expired. The Director-General also informed management on 31 August of the decisions he had taken for the re-organization of the laboratory. The complainant transferred, on 8 September, to the External Relations Division, mainly to coordinate the OPCW web site.

On 20 September, the Contract Renewal Board recommended that her contract should not be renewed on the grounds that her performance was below the standard required, and the Director-General accepted this recommendation. On 14 January 2000, the complainant lodged an appeal with the Appeals Council, wherein the majority recommended that she be awarded one year's salary, on the basis that OPCW had failed to give her a clear warning to allow her time to improve and that it had given her legitimate expectations that her contract would be renewed. The one dissenting member considered that OPCW could have decided to reinstate her and that the financial compensation to be granted should be equivalent to two years' salary. By a letter of 24 July 2000, the Director-General informed the complainant that he rejected the panel's recommendation and was upholding his decision not to renew her contract, and the complainant appealed to the Tribunal.

The Tribunal recalled that consistent precedent had it that an international organization had broad discretion in deciding not to renew a fixed-term contract, and that the Tribunal might exercise only a limited power of review over such a decision and would quash it only if it showed a mistake of fact or law, or a formal or procedural flaw, or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority or lack of authority by the person taking the decision (see Judgement No. 2007, *in re Diouf* (2001)).

As noted by the Tribunal, the complainant, producing the minutes of the Contract Renewal Board's meeting, had argued that the Board had not been properly constituted, in that the Director of her new division had not been present during the examination of her case, and he was the person best placed to give an appraisal of her performance. OPCW stated that her new Director had been present during the discussion of her case, and his signature did not appear on the minutes only because it was the permanent members of the Board who signed the minutes, not those who appeared during the examination of the cases of staff members under their authority. However, the Tribunal observed that that distinction had not been made in the relevant administrative directive of 20 September 1999 regarding the establishment of the Contract Renewal Board, and that OPCW, which bore the burden of proof, had not produced evidence that the Director of the division to which the complainant belonged was present during the examination of her case. The Tribunal therefore agreed with the complainant that there was a procedural flaw, as OPCW had provided no proof that the Contract Renewal Board had been properly constituted.

The complainant also claimed that the rules set out in the administrative directive of 20 September 1999 had not been met, first, because the Contract Renewal Board had not taken into account her performance appraisal report for 1999, which should have been prepared with a view to the examination of her case by the Board, and

secondly, because a recommendation by the Director of her division was not among the documents submitted to the Board. Regarding the appraisal reports, OPCW contended, *inter alia*, that even if the complainant's performance appraisal report for 1999 had been available to the Board, the outcome of its examination for her case would not have changed. The appraisal of the complainant's overall performance, which was rated as "good" in that report, was in line with the ratings "good" and "very good" in the reports for the years 1994 to 1998, but according to OPCW the determining factor when examining the possibility of renewing the complainant's contract was not her performance appraisal reports, but the malfunctioning of the laboratory, of which the Director-General had been informed by an independent source. Again, the Tribunal agreed with the complainant. In the opinion of the Tribunal, the Board was under the obligation to take into account performance appraisal reports, and failure to complete a report on her performance for 1999 and take it into account before the Board made a decision not to renew a contract was a procedural flaw (see, in particular, Judgement No. 1525, *in re Bardi Cevallos* (1996)).

The Tribunal therefore concluded that the decision was tainted by procedural flaws and must be set aside. While the complainant sought her reinstatement, the Tribunal noted that that remedy was inappropriate, particularly since the post that she had held had been abolished. It therefore awarded compensation for the material and moral prejudice arising out of the unlawful decision not to renew her fixed-term contract, and taking into consideration that the complainant was not entitled to the automatic renewal of her contract, the Tribunal awarded US\$ 40,000 to the complainant and 6,000 euros in costs.

5. JUDGEMENT NO. 2102 (6 NOVEMBER 2001): IN RE JAZAYERI V. INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT<sup>18</sup>

*Request to withdraw criminal complaint filed by organization—Competency of Tribunal to hear case—Question of receivability—Disciplinary safeguards do not apply to criminal proceedings—Question of protection of staff member's dignity and good name*

On 18 June 1997, the complainant, who at the time served IFAD as project controller for Central and West Africa, applied for special leave without pay. IFAD having refused it on 30 October 1997, he submitted his resignation on 6 November 1997, and IFAD accepted it on the same day and the complainant left the Fund on 31 December 1997. Earlier, on 30 May 1997, the complainant had set up, in association with his wife, a company which was registered in London under the name "Financial Services Associates (FSA) International Limited", whose main purpose was to provide assistance to African countries. The complainant had admitted that he should have waited until he left the Fund before registering the company, but further pointed out that it was after he had set up the company that he applied for special leave, and that he had never used his job at IFAD or any of the latter's funds to further the company's interests. The complainant claimed that he had begun consultancy work in the company in the first quarter of 1998.

In 1997, a firm of auditors brought in by IFAD found irregularities in procurement procedures, some of which were found in projects in the complainant's charge. The Fund accordingly opened an internal inquiry which, it said, revealed that three external consultants recruited by the complainant had credited large sums of money

to accounts belonging to the complainant and his wife in Jersey and Guernsey. In September 1998, IFAD filed a criminal complaint with the Italian courts accusing the complainant of abuse of office and, in particular, of having threatened to terminate contracts that some external consultants had with IFAD unless they paid him, with the result that they credited large sums of money to bank accounts in his name in tax havens. Eventually, the complainant was extradited to Italy on 10 March 2000, and on 27 April 2000, he was released under a procedure known in Italy as “*patteggiamento*”, wherein he agreed to a suspended prison sentence on the charges brought in exchange for closure of the case with no criminal record.

In a letter of 12 May 1999, the complainant had requested a review of the President’s decision to do everything “within [his] authority and influence to have [the complainant] imprisoned”. He had asked the President to withdraw the criminal complaint, to give him all the assistance he needed to recover his liberty and to grant him compensation for all the injury he had suffered. On 4 June 1999, the President had rejected his request on the grounds that it did not concern the terms and conditions of his employment and was unfounded besides. The complainant therefore appealed to the Joint Appeals Board (JAB) on 14 July 1999, reiterating his arguments and claiming payment of costs he had incurred in obtaining legal assistance, but later concluded that the Board was unlikely to take a decision within a reasonable period of time, particularly as civil proceedings to recover amounts due were pending against him in the High Court of Justice in the United Kingdom of Great Britain and Northern Ireland, and brought the matter directly to the Tribunal, filing his complaint on 8 December 2000.

In rebuttal, IFAD argued that the Tribunal was not competent to hear the complaint and that his claims were irreceivable. Regarding the competency of the Tribunal, IFAD submitted that the dispute was not about the terms and conditions of the complainant’s appointment or IFAD’s rules and regulations, and that the charges against its former employee were a matter for the national courts alone. The Tribunal observed that the argument was not without weight, particularly as the complainant had ceased being a member of the Fund’s staff as from the date on which his resignation had taken effect, which was prior to the proceedings in the Italian courts; it recalled, however, that the duty placed on international organizations to treat their staff with due consideration and not to impair their dignity might extend beyond the term of their appointment. In charging a staff member with misconduct in the performance of duty, an organization, in the opinion of the Tribunal, must observe due process; otherwise it might be held liable even after its contractual or statutory ties with the official had ceased, and the Tribunal would entertain such matters.

As to receivability, the Tribunal pointed out that evidence showed that the JAB had postponed hearing the complainant’s case on the grounds that it needed further information which the parties had apparently not submitted, and in the particular circumstances of the case, the complainant had good grounds for believing that there would be no decision within a reasonable time. In the opinion of the Tribunal, there was therefore nothing unlawful about his coming to the Tribunal without waiting for the JAB to rule.

On the merits, the Tribunal, while noting that civil servants enjoyed certain safeguards, those safeguards did not apply where criminal charges were brought against a former official for acts committed prior to the termination of his service. In the present case, the Tribunal considered that the material rules were those of the applicable code of penal procedure and not the rules on disciplinary proceedings,

and the Fund had not initiated such proceedings and could no longer do so because the complainant had resigned. Furthermore, in the view of the Tribunal, there was nothing in the evidence to support the complainant's assertion that the President had used his prerogatives for purposes other than the general interests and that he was guilty of abuse of authority because "the Italian legal authorities [were] particularly considerate towards him".

As pointed out by the Tribunal, the complainant's dignity and good name had undoubtedly been affected by the criminal complaint against him and the judicial proceedings that ensued, but once the nature of the offences had come to light, the Fund was bound to hand the matter over to the appropriate authorities and so might not be taken to task for causing its former employee undue and unnecessary injury. Consequently, the Tribunal dismissed the complaint.

6. JUDGEMENT NO. 2103 (6 NOVEMBER 2001): IN RE JAZAYERI (NO. 2) V. INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT<sup>19</sup>

*Complaint against the withholding of entitlements (including pension entitlements)—Competency of Tribunal to hear case—Question of receivability—Settlement of a staff member's indebtedness to the organization—Question of the organization refusing to send forms to UNJSPF—Question of withholding repatriation allowance*

The facts that prompted this complaint are set out in the Judgement No. 2102 above. In the present case, IFAD rebutted the complainant's claim to pension entitlements on the ground that the Tribunal was not competent to hear the complaint. It pointed out that the staff of IFAD were affiliated to the United Nations Joint Staff Pension Fund (UNJSPF) and that article 48 of the latter's Regulations conferred on the Tribunal competence for complaints concerning pension entitlements.

The Tribunal observed that the dispute was not about the scope of his pension entitlements but, as the complainant himself stated, about the Fund's decision not to send to UNJSPF documents enabling it to consider and, if appropriate, settle the claim. As explained by the Tribunal, it was of course not competent to rule on the complainant's pension entitlements, but only whether the Fund had discharged its obligations to its former employee. The fact that UNJSPF had not been given the requisite documents was immaterial to the present case, and therefore the Tribunal was competent to hear it.

IFAD contended that the complaint as a whole was in any event irreceivable because the complainant had failed to exhaust all the available internal means of redress. Its explanation for the delay in the internal procedure was that the case was an exceptional one: IFAD had been unable to defend itself openly because Italian criminal law bound it to secrecy. Moreover, the complainant had contributed to the delay by repeatedly filing appeals in Italy and the Netherlands in order to avoid imprisonment and extradition. He had also failed to provide the Joint Appeals Board with the information it had requested, and in any event IFAD stated that "there was no doubt that the Board would come to a final decision".

On receivability, the Tribunal saw no evidence that a prompt response could be expected from the Board to an appeal which had been before it since 24 November 1998. The dispute was not so exceptional as to preclude consideration within a reasonable period, and the failure by IFAD to hear the internal appeal could be justified

neither by the secrecy required during the investigation nor by the court proceedings, past or present. The Tribunal therefore concluded that the complainant had acted lawfully in coming to the Tribunal without awaiting the outcome of an internal procedure that had become bogged down.

On the merits, in rebuttal of the plea that it had failed to provide the forms needed for consideration of his pension entitlements and payment of his repatriation grant, the Fund submitted that it had been right to suspend settlement of his various terminal entitlements because the complaint had not “discharged all his debts to IFAD”. It cited a “general rule of international civil service law” set forth in a United Nations administrative instruction of 31 August 1990: on leaving service a staff member must settle all his debts towards the organization and the administration might refuse to issue the form for UNJSPF or delay issuing it until the requirement had been met.

The Tribunal did not share the Fund’s view, stating that, while it was true that an organization might try by all legal means to recover any money a staff member might owe it when he or she left service, that did not entitle it to suspend or block consideration of the staff member’s pension entitlements. The Tribunal concluded that the complainant might lawfully seek the quashing of the decision refusing to send UNJSPF the forms it needed in order to consider the complainant’s pension entitlements, but it was not for the Tribunal to order IFAD to pay the complainant the arrears of pension due to him, since the settlement of his pension rights was a matter for UNJSPF alone, and might be challenged before the Tribunal if need be.

However, with regard to his claim to payment of the repatriation allowance, the Tribunal was of the view that since the Italian criminal court had allowed the Fund’s complaint, a large amount of money was involved and IFAD had to have recourse to the High Court to seek repayment of the funds misappropriated by the complainant or, failing that, damages, IFAD was right to defer consideration of the complainant’s entitlement to a repatriation allowance.

The complainant having succeeded in part, the Tribunal awarded him costs set at 2,000 euros.

7. JUDGEMENT NO. 2111 (6 NOVEMBER 2001): IN RE CUVILLIER (NO. 4) V. INTERNATIONAL LABOUR ORGANIZATION<sup>20</sup>

*Complaint concerning the taxation of staff member’s pension by national authorities—Competency of Tribunal to review matter—Question of receivability*

The complainant, who was a resident of Switzerland, was an official of ILO from 1959 to 1987 and had been receiving a retirement pension since 1 March 1987, when she had been granted early retirement. Since then she had continued to challenge, through both the Federal and Geneva tax authorities and ILO, the right of Switzerland to tax her pension. Having never succeeded, and in particular having had appeals to the Swiss Federal Tribunal rejected on 6 December 1996 and 19 June 1997, she filed an internal complaint with the Director-General of ILO on 26 July 2000 under article 13.2 of the Staff Regulations against “unjustified treatment inconsistent with the status of an official”. In her internal complaint she alleged that ILO had allowed a situation of non-law to develop, had wrongly supported the position of the Swiss authorities and had

disregarded the fact that the “salaries, emoluments and indemnities”, exonerated from taxes under article 17(b) of the Headquarters Agreement concluded between Switzerland and ILO, also included pensions. The complainant requested the Director-General:

- To acknowledge that the note verbale of 17 December 1984 from the Permanent Mission of Switzerland addressed to the international organizations based in Geneva respecting the tax liability of retired officials in Switzerland had indeed been received by ILO;
- To provide an indication of the action he intended to take thereon, giving reasons; and
- To undertake to do what was necessary for the establishment of the tribunal envisaged in article 27 of the Headquarters Agreement.

The Director of the Office of the Director-General replied to what he described as an “internal complaint” on 5 September 2000, indicating that the complainant could not have recourse to article 13.2 as her claims were not related to treatment inconsistent with the Staff Regulations, unjustifiable treatment by a superior official or rights deriving from the duties discharged by her when she worked. The complainant was reminded that the Office had already replied to her earlier claims and that the Swiss authorities as well as the Office had made it known from the beginning that “UNJSPF periodical pension benefits [were] liable to taxation in Switzerland”. Dissatisfied with this reply, the complainant came to the Tribunal requesting that the decision contained in the letter of 5 September be set aside.

In response, ILO argued that the Tribunal was not competent to entertain the complaint, pleading irreceivability on several grounds. The Tribunal noted that the dispute concerned the dismissal of an internal complaint filed under article 13.2 of the Staff Regulations, and that, in principle, that provision only entitled an “official” who considered that she or he was entitled to do so to have an internal complaint examined according to the established procedure. However, the Tribunal acknowledged that the relationship between officials and international organizations did not come to an end when they ceased working (see, in this respect, Judgement No. 986, *in re Ayoub (No. 2)*, *Von Knorring, Perret-Nguyen (No. 2)* and *Santorelli*, 1989). Moreover, although the Tribunal’s competence was limited pursuant to article II, paragraph 1, of its statute to “complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the ILO, and of such provisions of the Staff Regulations as are applicable to the case”, that provision did not prevent the Tribunal from ruling on complaints filed by officials of international organizations who were no longer working and considered that, following their retirement, they had suffered injury to the rights and guarantees conferred upon them by their status. As noted by the Tribunal, in the present case, the complainant had reproached the organization with failing to provide the protection, to which she considered herself entitled, to establish her tax exoneration.

While the Tribunal was competent to judge whether the impugned decision was well founded, to do so the complaint still had to be receivable, and in that respect the pleas of irreceivability put forward by ILO succeeded. As the Tribunal pointed out, although the complainant was asking what action would be taken pursuant to the note verbale from the Permanent Mission of Switzerland, her real motive was to exhort the organization to contest the letter and, as further pointed out by the Tribunal, the issue had been raised in many letters addressed to ILO to

which the complainant had either explicitly or implicitly received negative replies. Moreover, the claims that ILO should be ordered to make necessary arrangements for the establishment of the tribunal envisaged in article 27 of the Headquarters Agreement were also irreceivable: they had already been rejected in earlier decisions which had not been challenged in time. Lastly, there was no evidence, in the opinion of the Tribunal, that ILO had failed in its duty of protection towards its officials and, where appropriate, its former officials. And the complainant clearly could not challenge the decision of the Swiss Federal Tribunal through ILO or through the Tribunal.

For the above reasons, the complaint was dismissed.

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### C. Decisions of the World Bank Administrative Tribunal<sup>21</sup>

1. DECISION NO. 241 (26 APRIL 2001): LEE V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT<sup>22</sup>

*Termination because of redundancy—Staff rule 7.01, paragraph 8.02(c) versus paragraph 8.02(d)—Need to allow for more than literal interpretation of Staff Rules—Duty to promote harmonious relationships—Review of business and managerial discretionary decisions—Question of transparency in the process—Issue of age discrimination—Improper handling of administrative review—Duty to assist redundant staff member in finding alternative employment*

The Applicant joined the Bank in August 1977 on a temporary assignment as a Research Assistant, and after holding a series of temporary appointments, receiving a two-year fixed-term appointment, the conversion of her appointment to regular status and two promotions, the Applicant's title was changed to that of Research Analyst in April 1991. The Applicant's most recent position was as a Research Analyst in the Macroeconomics Division, Africa Technical Families, of the East Africa Department (AFTM2). In November 1997, a new manager became Sector Manager of AFTM2, and after reorganization of the unit the Applicant was informed, in February 1998, that her position would be declared redundant.

The Applicant appealed, contending that the Bank's decision to terminate her employment for redundancy under staff rule 7.01, paragraphs 8.02(d) and 8.03, was an abuse of discretion, being improperly motivated, discriminatory and lacking in transparency. She also contended that the Bank had failed to give her request for administrative review appropriate consideration and had equally failed to assist her in finding employment within the Bank subsequent to the decision of redundancy.

Regarding the redundancy decision, the Applicant maintained that her redundancy should have been classified under staff rule 7.01, paragraph 8.02(c) (skills-mix), rather than paragraph 8.02(d) (reduction in number of positions). The Tribunal disagreed, stating that paragraph 8.02(d) provided that "employment may become redundant when the Bank Group determines in the interests of efficient administration . . . specific types or levels of positions must be reduced in number", and that is what had happened in the Applicant's case. The references to the Applicant's skills

in some of the Bank's memoranda had been made in the context of comparing her capabilities and skills to those of other Research Analysts within the department, in order to decide who among them would be declared redundant. The Tribunal observed that, as stated in Decision No. 192, *Garcia-Mujica* (1998), the mere fact that skills were part of the Respondent's consideration did not mean that the redundancy was based on a mismatch between the Applicant's skills and the skills required for a redesigned position under paragraph 8.02(c). Moreover, the Tribunal found that the four possible bases under paragraph 8.02 for deciding that a staff member's employment had become redundant were not completely separated or detached from one another, and organizational changes to meet the changing needs of the Bank must allow for more than mathematical and literal interpretation of the Staff Rules.

The Applicant also had contended that her termination was based on personal bias by the Sector Manager of AFTM2, who had targeted her for redundancy. However, after noting the three incidents the Applicant described as being the basis for this allegation, the Tribunal concluded that they did not substantiate her allegation. The Tribunal, however, noted that those incidents evidenced a strained and unfriendly relationship between the Applicant and the Sector Manager, and the record did not show that the Bank had taken this strained relationship into account while dealing with the termination of the Applicant's long-standing appointment. Nor did the record show any action taken by the Bank to promote harmonious relations between the Applicant and her superiors, a duty imposed on the Bank by principle 2.1 of the Bank's Principles of Staff Employment.

The Tribunal found that the redundancy decision was based on business and managerial considerations, and that the decision to reduce the number of Research Analysts in AFTM2, which eventually led to the redundancy decision, was part and parcel of an effort by management to implement certain policy directives. The argument put forward by the Respondent to justify its decision was that the reduction was necessary to increase efficiency and to lower costs, particularly as the more complex simulations, analysis and design were increasingly beyond the skills of the Research Analysts in AFTM2 and would have to be performed by higher-level staff. In the Tribunal's view, even if the wisdom of such a strategy were to be questioned, it remained within the discretionary power of management to choose a managerial strategy aimed at improving the quality of work and to limit the cost of such work, and the Tribunal had consistently refrained from substituting its own judgement on policy and managerial decisions for that of the Respondent. The Tribunal stated that it reviewed decisions involving managerial discretion only to ensure that they did not constitute an abuse of discretion, being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure (Decision No. 5, *Saberi* (1982), and Decision No. 185, *Ezatkah* (1998)).

The Applicant also contended that, pursuant to staff rule 7.01, paragraph 8.03, "a transparent process of evaluating all staff at the same level performing the same or similar functions" had not taken place before selecting a certain staff member for termination. In that regard, the Tribunal found that the Sector Manager and the Human Resources Officer should have kept records of their discussions with the Task Team Leaders who had worked with the three Research Analysts, in order to decide which of the three would be chosen for redundancy. Moreover, the Sector Manager had neither kept nor presented any record showing the results of the comparison of the credentials of the incumbent Research Analysts, nor had the Human Resources

Officer kept a record of any conversations with potential volunteers for redundancy. Those irregularities, though falling short of substantiating the Applicant's allegation of abuse of discretion, represented, in the view of the Tribunal, procedural flaws that could not be forgiven in the process leading to the eventual termination of the employment of a staff member who had served the Bank for almost 20 years. The Tribunal, while finding that these procedural flaws entitled the Applicant to compensation, also observed that regardless of the procedural flaws, the record supported the Bank's claim that the selection of the Applicant for redundancy had been based on an effort to identify the weakest performer among the Research Analysts vulnerable to termination for redundancy.

The Applicant had also argued that she was declared redundant due to her age, but the Tribunal could not find any evidence supporting this allegation. Moreover, such an argument in and of itself was not evidence of abuse of discretion on the part of the Bank, and, in the opinion of the Tribunal, it only emphasized the need for the Respondent to apply a higher standard of care with respect to a decision terminating the employment of a staff member who had been in the service of the Respondent for a long period of time, and who, on account of his or her age, was less likely to find employment elsewhere.

The Applicant also complained that her request for administrative review of the redundancy decision had been mishandled by the Bank, i.e., it was not seriously examined and a hasty decision was taken confirming the decision under review. The Tribunal, while noting that the facts surrounding the submission of the request for administrative review were somewhat uncertain and confused, did observe the very short time during which the Bank considered on the merits the Applicant's request, as well as the unusual brevity of the letter, dated 26 February 1999, addressed to the Applicant to inform her that her request for review had been denied. The Tribunal found that the Applicant's request had not been properly handled by the Bank, and that the Bank's categorical and unexplained refusal to explain to the Applicant the reasons justifying its decision not to reverse the redundancy decision or to grant her an extension of her administrative leave were manifestations of unsympathetic and arbitrary treatment for which the Applicant was entitled to compensation.

As to the Applicant's complaint that the Bank had failed to assist her in finding a new assignment subsequent to the termination of her employment, the Tribunal noted that the record did not substantiate this allegation. The fact that neither the efforts of the Applicant nor those of the Bank were successful did not mean that the Bank had failed in assisting the Applicant, and, as stated in Decision No. 161, *Arellano* (1997), the Bank's obligation in that respect was "to make an effort; . . . not . . . to ensure the success of such effort".

On the basis of the above, the Tribunal concluded that the Bank's decision to terminate the Applicant's employment for redundancy under staff rule 7.01 was not an abuse of discretion. However, the Tribunal also concluded that the manner in which the Applicant had been treated by the Respondent and in which her complaints had been handled, during the critical time immediately preceding and following the decision of terminating her employment, were not consistent with the right to fair treatment. The Tribunal awarded the Applicant compensation in the amount of 18 months' net salary and costs in the amount of \$7,297.22.

2. DECISION NO. 245 (23 JULY 2001): NUNBERG V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT<sup>23</sup>

*Complaint that 5 per cent increase in salary to negate gender discrimination was too low—Discretionary decisions—Proof of gender inequity—Question of 5 per cent increase being fair and reasonable—Difficulty of applying an individual regression analysis—Because of importance of issues, Tribunal awards costs*

The Applicant joined the Bank in November 1983 as a Consultant in the Public Sector Management Unit, and in October 1985 she was granted a regular appointment as a Public Sector Management Specialist, level 23. She was promoted and transferred a number of times, and gained the position of Principal Public Management Specialist, level 25, in July 1995. Her performance evaluations were very positive and those evaluations were reflected in her promotions and annual salary increases.

Between February 1992 and April 1993, a study of salaries, which had been jointly commissioned by the Bank and the Staff Association, was carried out (by Professors R. Oaxaca and M. Ransom), which concluded that in regard to grades 22 to 30, Part I women (of whom the Applicant was one) earned approximately 16 per cent less than Part I men. The Applicant received a 5 per cent increase in her salary based on the study. After reviews of this decision, she filed an application with the Tribunal, challenging the 1995 decision to grant her a 5 per cent increase, on the basis that the decision was incompatible with the principle of fairness and that it did not overcome the gender discrimination affecting her or provide her with an equitable level of compensation.

In consideration of the case, the Tribunal noted that its general approach to decisions involving the exercise of discretion was that it would not interfere or substitute its own judgement unless the decision constituted an abuse of discretion (Decision No. 1, *de Merode* (1981), and Decision No. 81, *Bertrand* (1989)).

The Tribunal noted that the Oaxaca and Ransom report had found that there were differentials between the salaries of Part I females and those of Part I males, and that on average 9.1 per cent of that differential could be attributed to gender inequity. However, as pointed out by the Tribunal, it did not follow from those findings that every Part I woman necessarily suffered pay inequity of 9.1 per cent, nor did the report establish that the Applicant's salary was in fact affected by gender inequity, let alone the extent of any such inequity.

The Tribunal further pointed out that while the Applicant had not relied solely on the statistical analysis of the report to establish her claim, contending that there were several factors which showed that her salary had been affected by gender discrimination, most of those factors did not withstand examination. For example, her argument that she was a strong performer, but had salary increases mainly in the satisfactory range, in the view of the Tribunal, was inconclusive to show discrimination without other data relevant to salary determination, such as peer comparisons and budgetary constraints. Furthermore, her submission that studies showed that equitable starting salaries were connected with inequitable salary progression was not evidence specific to her own situation. Similarly, the Applicant's submission that her salary must have been affected by inherent bias, such as stereotypical assumptions which affected the salary increases granted to women, was of a general nature and did not provide evidence of discrimination in her own case, in the opinion of the Tribunal.

However, the Tribunal observed that the findings of the 1993 Oaxaca and Ransom report and the Applicant's receiving a salary increase of 5 per cent implied that there was an inequity affecting the Applicant's salary, which was contradictory to principle 6.1 of the Principles of Staff Employment, to provide levels of compensation that were equitable internally. And although there was no evidence to show that any particular decision relating to the Applicant's salary had been affected by wrongful intent, failure to meet the obligation arising under principle 6.1 did not depend on a specific intent. In that regard, a burden fell on the Bank to show that its decision to grant an increase of 5 per cent was a fair and reasonable response to the salary inequity affecting the Applicant, and that it was in accordance with the principles of fairness and impartiality (Decision No. 81, *Bertrand* (1989)).

The Bank had argued that although it did not accept that there was discrimination against the Applicant, it claimed to have discharged any obligation it may have had towards her by the award of 5 per cent increase. Unfortunately, as pointed out by the Tribunal, the Bank had not explained how it had established that the increase of 5 per cent granted to the Applicant was appropriate to overcome inequity. On the other hand, the regression analysis requested by the Applicant, after reviewing the matter, appeared to the Tribunal as no more than a step in a complex process. According to the Tribunal, such an analysis might reveal whether the pay inequity affecting the Applicant was greater or less than the average of 9.1 per cent found by Oaxaca and Ransom to affect Part I women, and whether any such difference was statistically significant; it might indicate in a statistical sense what should be the equitable salary for a person with the observable characteristics of the Applicant if there were no gender inequity. But, in the view of the Tribunal, the outcome of that exercise could not determine finally what salary was fair and equitable for her personally.

The Tribunal, taking into account the difficulties in applying the results of an individual regression analysis to an individual salary claim and the fact that the value of other analytical methods, such as cohort analysis, had received support from expert opinion, was unable to find that the Bank's refusal to provide the material for a regression analysis was inconsistent with the principles of fairness and equity. Furthermore, the later studies, including the cohort study conducted by the Bank, did not show any salary inequity affecting the Applicant, and although the precise extent of the gender inequity which affected the Applicant's salary in 1995 remained uncertain, on the material before it, the Tribunal was unable to find that the Bank had failed to comply with the principles of fairness and equity or that the decision was an abuse of discretion.

While sharing the Applicant's concerns about possible gender discrimination in the Bank's salary structure, which the Tribunal perceived as resulting not from actual intent but in all likelihood from historical patterns, the Tribunal was also aware of the Bank's efforts to overcome any such discrimination. In the present case, the Tribunal had been unable to make a specific finding of discrimination affecting the Applicant individually, after the 5 per cent adjustment decided by the Bank, as neither the evidence specific to her situation nor the studies carried out by the Bank supported such a finding and there was no compelling case for applying the methodology proposed by the Applicant. The Tribunal dismissed the claim and, based on the importance of the legal issues raised by the Applicant, awarded costs in the amount of \$11,845.88.

## D. Decisions of the Administrative Tribunal of the International Monetary Fund<sup>24</sup>

JUDGEMENT NO. 2001-1 (30 MARCH 2001): ESTATE OF MR. “D” V. INTERNATIONAL MONETARY FUND<sup>25</sup>

*Admissibility of the application—Tribunal’s jurisdiction under article II of its statute—Exhaustion of remedies requirement of article V—Importance of timeliness—Exceptional circumstances for excusing lack of timeliness*

Mr. “D” was a retired staff member of the World Bank and was enrolled under a family policy in the Medical Benefits Plan maintained by the International Monetary Fund. In May 1998, Mr. “D”, who had begun treatment for metastasized lung cancer, travelled (with his doctor’s permission) to his home country to attend to personal business, and while there he became ill with pneumonia and had to be placed on a ventilator. Mr. “D”’s adult children, who had accompanied him on the trip, deemed conditions in the hospital “deplorable” and, in consultation with the doctors on the scene, decided to arrange for the medical evacuation of their father to the Maryland hospital in which he earlier had been receiving treatment. He was evacuated on 2 June, and died in September 1998.

Subsequently, the Estate of Mr. “D”, represented by its executrix Ms. “D” (Mr. “D”’s daughter), challenged the decision under the Medical Benefits Plan to deny reimbursement of medical evacuation expenses incurred by the decedent in May-June 1998. The Fund responded to the application in the Administrative Tribunal with a motion for summary dismissal, contending that the Applicant had not met the requirement of article V of the Tribunal’s statute that, when the Fund had established channels of administrative review for the settlement of disputes applicable to the case in question, an application might be brought in the Tribunal only after the exhaustion of all available channels of administrative review. Since a motion for summary dismissal suspended the period for answering the application until the motion had been acted on by the Tribunal, at the current stage the Tribunal was limited to the question of the admissibility of the application.

Considering the issue of whether the Tribunal, as a threshold matter, had jurisdiction *ratione personae* over the estate of Mr. “D”, the Tribunal concluded that it did have such jurisdiction over the Applicant’s claim under article II of its statute, for two reasons: (a) the commentary to the statute provided examples of those covered that were not exhaustive: “Such individuals would include . . . non-staff enrollees in the Medical Benefits Plan, for example . . .”. Other individuals in the situation, “for example” of the Applicant, could be “included”; and (b) given the intent of the statute and the structure of the Fund’s benefit programme to afford staff members in question a person who was a successor in interest to a non-staff enrollee.

In examining the issue whether the Applicant had exhausted all remedies as required by article V of the Tribunal’s statute, the Tribunal recalled the twin goals of providing opportunities for resolution of the dispute and for building a detailed record in the event of subsequent adjudication. The commentary to the statute emphasized that the Tribunal was intended as a last resort after the administration had had a full opportunity to determine whether corrective measures should be taken. As pointed out by the Tribunal, in the present case, it was not contested that the Applicant had complied with all the procedures and time limits, except for the ini-

tial requirement of section 6.03 to request administrative review by the Chief of the Staff Benefits Division within three months of the denial of the benefit.

The Tribunal further recalled that international administrative tribunals had emphasized not only the importance of the exhaustion of administrative remedies but also that the process should be pursued in a timely manner, and the timeliness of the review process was directly linked to the purpose of that review:

“Prompt exhaustion of remedies provides an early opportunity to the institution to rectify possible errors—when memories are fresh, documents are likely to be in hand, and disputed decisions are more amenable to adjustment. This purpose would be significantly undermined if the Tribunal were to condone long and inexcusable delays in the invocation of these remedies.” (Asian Development Bank Administrative Tribunal Decision No. 41, *Alcartado* (1998))

Hence, as the Tribunal noted, administrative tribunals frequently had dismissed applications for failure to meet the exhaustion requirements of their statutes when the underlying administrative review had not been timely pursued.

The Tribunal also noted that in assessing compliance with statutory requirements for the exhaustion of administrative review, international administrative tribunals sometimes considered claims of exceptional circumstances to excuse a failure to comply on a timely basis with the underlying review procedures. In that regard, the Tribunal observed that the statute of the International Monetary Fund Administrative Tribunal recognized “exceptional circumstances”.

In the present case, the Tribunal noted that the Applicant’s strongest argument for “exceptional circumstances” was that she had not been provided timely and sufficient notice of the Fund’s administrative review procedures. She further contended that, not being a staff member, she did not have access to the usual channels of information within the Fund regarding dispute resolution procedures. The Respondent had countered that the Applicant was a highly educated and adept claimant who had not made a reasonable effort to inform herself of the Fund’s administrative procedures.

As noted by the Tribunal, as a general rule, it had been held that lack of individual notification of review procedures did not excuse failure to comply with such procedures (see, for example, World Bank Administrative Tribunal (WBAT) Decision No. 174, *Guya* (1997)). However, as further noted by the Tribunal, Ms. “D” was not and had never been a staff member of the Fund, and could not be assumed to have had access to the information on dispute resolution disseminated to staff members. The Tribunal also observed that it was significant that, at each stage in which the Applicant was informed of the requisite procedures, she had conformed to the deadlines. Moreover, the Tribunal noted that the vacillation on the part of the Respondent as to whether Ms. “D” was required to follow the administrative review procedures also suggested flexibility in the application of those review procedures (see WBAT Decision No. 78, *Robinson* (1989)). The Tribunal therefore concluded that, in the present case, it was incumbent on the Fund to inform Ms. “D”, who could not be assumed to know, of the specifics of the further recourse open to her; and that, on the contrary, the Fund had given the impression to Ms. “D” that, with the report of the external medical examiner, she had exhausted all of her options.

Accordingly, the Tribunal denied the Fund’s motion for summary dismissal, and the Fund’s answer on the merits, the Applicant’s reply and the Fund’s rejoinder would follow, according to the schedule prescribed by the Staff Rules.

## NOTES

<sup>1</sup>In view of the large number of judgements that were rendered in 2001 by administrative tribunals of the United Nations and related intergovernmental organizations, only those judgements which are of general interest and/or set out a significant point of United Nations administrative law have been summarized in the present edition of the *Yearbook*. For the integral text of the complete series of judgements rendered by the tribunals, namely, Judgements Nos. 901 to 1040 of the United Nations Administrative Tribunal; Judgements Nos. 2003 to 2118 of the Administrative Tribunal of the International Labour Organization; Decisions Nos. 238 to 259 of the World Bank Administrative Tribunal; and Judgements Nos. 2001-1 and 2002-2 of the Administrative Tribunal of the International Monetary Fund, see, respectively: documents AT/DEC/901 to AT/DEC/1040; *Judgements of the Administrative Tribunal of the International Labour Organization: 90th to 92nd Ordinary Sessions*; *World Bank Administrative Tribunal Reports 2001*; and Administrative Tribunal Judgements of the International Monetary Fund 2001.

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

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

Article 14 of the statute states that the competence of the Tribunal may be extended to any specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. Such agreements have been concluded, pursuant to the above provisions, with two specialized agencies: the International Civil Aviation Organization and the International Maritime Organization. In addition, the Tribunal is competent to hear applications alleging non-observance of the Regulations of the United Nations Joint Staff Pension Fund, including those applications from staff members of the International Tribunal for the Law of the Sea.

<sup>3</sup>Mayer Gabay, President; Marsha A. Echols and Brigitte Stern, Members.

<sup>4</sup>Kevin Haugh, Vice-President, presiding; Spyridon Flogaitis and Omer Yousif Bireedo, Members.

<sup>5</sup>Mayer Gabay, President; Marsha A. Echols and Brigitte Stern, Members.

<sup>6</sup>Julio Barboza, First Vice-President, presiding; Kevin Haugh, Second Vice-President; Brigitte Stern, Member.

<sup>7</sup>Kevin Haugh, Vice-President, presiding; Omer Yousif Bireedo and Brigitte Stern, Members.

<sup>8</sup>Kevin Haugh, Second Vice-President, presiding; Marsha A. Echols and Spyridon Flogaitis, Members.

<sup>9</sup>Mayer Gabay, President; Julio Barboza, Vice-President; Spyridon Flogaitis, Member.

<sup>10</sup>Mayer Gabay, President; Marsha A. Echols and Spyridon Flogaitis, Members.

<sup>11</sup>Kevin Haugh, Vice-President, presiding; Marsha A. Echols and Omer Yousif Bireedo, Members.

<sup>12</sup>Mayer Gabay, President; Spyridon Flogaitis and Brigitte Stern, Members. See also IMF Judgement No. 2001-2 (*Mr. "P" (No. 2) v. IMF*), wherein the issue of a former spouse's claim to a staff member's pension, inter alia, was before the IMF Tribunal.

<sup>13</sup>The Administrative Tribunal of the International Labour Organization is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the staff regulations of the International Labour Organization and of the other international organizations that have recognized the competence of the Tribunal, namely, as at 31 December 2001: 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; Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization; European and Mediterranean Plant Protection Organization; and International Plant Genetic Resources Institute. 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.

<sup>14</sup> Michel Gentot, President; Mella Carroll, Vice-President; James K. Hugessen, Judge.

<sup>15</sup> Mella Carroll, Vice-President; James K. Hugessen and Florida Ruth P. Romero, Judges.

<sup>16</sup> Michel Gentot, President; Mella Carroll, Vice-President; and James K. Hugessen, Judge.

<sup>17</sup> Michel Gentot, President; Jean-François Egli and Seydou Ba, Judges.

<sup>18</sup> Michel Gentot, President; Mella Carroll, Vice-President; Jean-François Egli, Judge.

<sup>19</sup> Ibid.

<sup>20</sup> Michel Gentot, President; Mella Carroll, Vice-President; Hildegard Rondón de Sansó, Judge.

<sup>21</sup> 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 reasons of the staff member’s death and any person designed or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan.

<sup>22</sup> Francisco Orrego Vicuña (a Vice-President) as President; Thio Su Mien (a Vice-President); A. Kamal Abul-Magd and Bola A. Ajibola, Judges.

<sup>23</sup> Robert A. Gorman, President; Francisco Orrego Vicuña and Thio Su Mien, Vice-Presidents; A. Kamal Abul-Magd, Bola A. Ajibola, Elizabeth Evatt and Jan Paulsson, Judges.

<sup>24</sup> 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.

<sup>25</sup> Stephen M. Schwebel, President; Nisuke Ando and Michel Gentot, Associate Judges.