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

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

Chapter V

DECISIONS OF ADMINISTRATIVE TRIBUNALS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS[1]

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

1. Judgement No. 1043 (23 July 2002): Mink v. the Secretary-General of the United Nations[3]

Allegation of sexual harassment not appropriately responded to by the Administration—Claxton *(1992) and* Belas-Gianou *(1995) judgements—Importance of a thorough investigation—Promotion and agreed termination of accused should have been stayed during investigation—Dissemination of investigation report*

The Applicant entered the service of the Organization in May 1979, on a short-term appointment as a clerk/typist at the G-2 level. The Applicant passed the "G to P" exam in 1995 and, at the material time, had a permanent appointment and occupied the P-2-level position of Photo Caption Writer, Photo Unit, Department of Public Information. In February 1997, the Applicant complained of sexual harassment by her direct supervisor, the Officer in Charge of the Photo Unit. The Panel on Discrimination and Other Grievances and an independent Office of Human Resources Management panel investigated the Applicant's claims, before she filed an appeal before the Joint Appeals Board.

In June 1998, the Assistant Secretary-General of the Office of Human Resources Management advised the Applicant that, after considering a report of the Office's investigation panel, she had found no evidence sustaining the Applicant's allegations of sexual harassment, but that the report had exposed serious management problems in the Unit that would be addressed. After the Office refused to give the Applicant a copy of her report, she filed an appeal with the Joint Appeals Board, in October 1998. After its consideration of the case, the Board unanimously recommended that the Applicant be compensated for unfair treatment, and the Under-Secretary-General for Management accepted the recommendation to pay her three months' net base salary in compensation.

The Applicant submitted an Application to the Administrative Tribunal, contending that her rights had been violated by the failure of the Organization to act promptly, effectively and in good faith in addressing the complaints of sexual harassment she had made against her supervisor.

In consideration of the matter, the Tribunal recalled Judgement No. 560, *Claxton* (1992), in which it found that, when allegations of sexual harassment had been made, the Secretary-General was bound to conduct promptly such reasonable investigations as the situation called for. The Tribunal further recalled Judgement No. 707, *Belas-Gianou* (1995), in which it was stated that the Tribunal was sensitive to claims of sexual harassment and had made clear the responsibility of the Organization to address them promptly and effectively. In this regard, the Tribunal noted that soon after the Applicant first lodged her complaint, both informal and formal actions were taken, the last being the independent OHRM investigation. However, the Tribunal also noted that the Administration had taken 15 months to complete the procedures, and the Tribunal was of the view that this period was neither timely nor prompt. Furthermore, the Tribunal considered that, while the Administration did take a number of steps to address the Applicant's complaint, it did not take the necessary measures to contain the problem or its negative impact on the two staff members involved as well as on the work of the Department. Under the circumstances, the Tribunal found that the situation represented a denial of fair treatment of the Applicant, and that the Respondent should have reassigned either the Applicant or her supervisor to another department.

The Tribunal agreed with the Board's conclusions that the Office's investigative panel had not made a thorough investigation of the allegations, in particular that the panel had interviewed only one female staff member who had close contact with the Officer in Charge. According to the Board, a properly conducted investigation and fact-finding in such a case should have included interviews with a significant number of female staff members in an attempt to discern whether or not there was a pattern of behaviour on the part of the accused.

Moreover, in the view of the Tribunal, the accuser's promotion to the P-4 level and the subsequent grant of an agreed termination during the investigative period, thereby foreclosing any possibility of further disciplinary or administrative action against him, should have been stayed, pending the outcome of the investigation.

Regarding the contention of the Applicant that she should have been given a copy of the Office's investigative report, the Tribunal disagreed with the Respondent's view that it was important to protect the due process rights of the accused and that, in accordance with administrative instruction ST/AI/379, the Applicant was only entitled to be informed of the course of action taken in response to her complaint. However, as pointed out by the Tribunal, paragraph 12 of administrative instruction ST/AI/379

states that "[t]he alleged harasser and the aggrieved individual shall be informed promptly of the course of action decided upon by the Assistant Secretary-General for Human Resource Management". In the view of the Tribunal, this provision provided for a minimum guarantee to prompt information regarding the outcome rather than a limit on the rights to information of either party. Furthermore, in the instant case, the Tribunal observed that the Applicant's supervisor had received a copy of the report, and the report of the Grievance Panel was made available to both parties. Accordingly, the Tribunal was not convinced that the decision to deny the Applicant the Office's report was justified.

In view of the foregoing, the Tribunal ordered the Respondent to pay the Applicant compensation of six months' net base salary at the rate in effect on the date of judgement and to provide the Applicant with a copy of the report of the Office's investigation panel.

2. Judgement No. 1045 (23 July 2002): Obiny v. the Secretary-General of the United Nations[4]

Non-renewal of fixed-term contract—No expectancy of renewal—Question of time to improve work performance—Importance of initiation of disciplinary proceedings for staff member to clear name—Importance of notification to staff member of misconduct—Investigation into unauthorized outside activities must be conducted properly—Involvement in staff association led to unfair treatment of staff member

The Applicant joined the United Nations Development Programme (UNDP) in Nairobi as a Programme Assistant, Programme Support Unit, on a three-month fixed-term appointment at the GS-8 level in August 1990. His fixed-term appointment was extended several times, until 31 December 1996. Between April 1994 and May 1996, the Applicant was Chairman of the Staff Association.

On 29 November 1996, the Resident Representative informed the Applicant that, owing to his failure to meet the required standards of performance, his fixed-term appointment would not be renewed beyond its expiration date of 31 December 1996. He further advised the Applicant that he would be placed on special leave with full pay until then and that his entry into the UNDP offices would be restricted. The Applicant appealed this decision to the Joint Appeals Board. The Under-Secretary-General for Management accepted the Board's unanimous recommendation that the decision not to extend the Applicant's fixed-term contract had been arbitrary and awarded him nine months' net base salary as compensation. Subsequently, the Applicant appealed to the Administrative Tribunal, contending that the compensation was insufficient and requesting that he be reinstated.

In consideration of the matter, the Tribunal recalled that, pursuant to staff rule 104.12 (*b*) (ii), a fixed-term appointment did not carry any expectancy of renewal and, furthermore, the Tribunal had consistently reiterated

that a "fixed-term appointment normally ends on its expiration date, and prior renewals cannot create, for the staff member, a legal expectancy of renewal or conversion to any other type of appointment" (Judgements No. 578, *Hassani* (1992), and No. 440, *Shankar* (1989)). In the instant case, the Tribunal noted that the Applicant's appointment had been terminated because of deteriorating performance, unauthorized absences and misconduct, which allegedly included operating a company, Realtime Software Ltd., without the permission of the Secretary-General.

With respect to the Applicant's performance, the Tribunal noted the finding of the Board that, notwithstanding the Respondent's claim that the Applicant's performance in the last year of his contract was not satisfactory, no performance report was undertaken for the said period, which represented a serious breach of procedure and a violation of the Applicant's rights. In the view of the Tribunal, this breach was even more serious in the light of the fact that there was a specific instruction from Headquarters to issue the Applicant with a performance report reflecting the quality of his performance for this period. In this regard, the Tribunal noted that, on 2 November 1996, the Applicant's supervisor urged him to improve his performance, yet on 14 November 1996, less than two weeks later, recommended to the UNDP Resident Representative that the Applicant's fixed-term contract not be extended. In the opinion of the Tribunal, the Applicant was given neither the time nor a genuine opportunity to improve his alleged shortcomings, which indicated arbitrariness in the decision-making process.

Regarding the alleged misconduct, the Tribunal agreed with the Applicant that disciplinary proceedings to investigate allegations of misconduct and unauthorized absences should have been initiated, in order to provide the Applicant with an opportunity to clear his name. The fact that no such proceedings were initiated violated the Applicant's rights and satisfied the Tribunal that the action taken against him was arbitrary and unfair (Judgement No. 877, *Abdulhadi* (1998)). Furthermore, the Tribunal noted that the Applicant had not received a copy of the letter dated 14 November 1996 sent by his supervisor to the UNDP Resident Representative regarding alleged acts of misconduct said to have occurred over several years, which was yet another example of the Administration's violation of the principles of transparency as well as of the Applicant's rights of due process.

With regard to the Applicant's alleged outside activities, i.e. his involvement with Realtime Software, Ltd., without the consent of the Secretary-General, the Tribunal also considered that the Administration had demonstrated a lack of fairness and equity by failing to initiate the necessary inquiry. Moreover, the Tribunal expressed its concern at the action taken by the Applicant's supervisor to obtain the documentation that led him to conclude that the Applicant was involved in such outside activities, i.e. breaking into his computer. The Tribunal noted that it was not acceptable that investigations were conducted without rules and guarantees of due process and without according due respect for the inalienable rights

proclaimed by the Organization (Judgements No. 1022, *Araim* (2001), and No. 1023, *Sergienko* (2001)).

The Tribunal disagreed with the Board's conclusion regarding the issue of the Applicant's involvement with the Staff Association of UNDP, finding instead that the Applicant was vulnerable to victimization in view of his role in championing staff welfare matters and defending the interest of the staff. In this regard, the Tribunal pointed to the important and significant information outlined in the report of the Special Human Resources Review Mission to Kenya, dated 19 November 1997, as well as the minutes of the Staff Association meeting of 29 August 1997, which detailed unfair treatment which members of the Staff Association had suffered as a result of their involvement in such matters. The Tribunal also noted the findings of the Rebuttal Panel, following the Applicant's rebuttal of his 1994 performance report, in which the UNDP Resident Representative in Nairobi mentioned that one of the reasons for lowering the Applicant's rating was related to his position as Chairman of the UNDP Kenya Staff Association.

In view of the foregoing, the Tribunal ordered the Respondent to pay the Applicant compensation of 12 months' net base salary at the rate in effect on the date of his separation from service, less the amount already paid by the Secretary-General, and rejected all other pleas.

3. Judgement No. 1056 (26 July 2002): Katz v. the Secretary-General of the United Nations[5]

Non-promotion to D-1 level—ST/AI/412 on the achievement of gender equality—Article 8 of the Charter of the United Nations and need for affirmative action—Confidentiality of Appointment and Promotion Board records

The Applicant joined the Organization on a three-month fixed-term appointment as a Legal Officer at the P-3 level with the International Trade Law Branch, Office of Legal Affairs, Vienna, in June 1981. His fixed-term appointment was extended several times and, effective 1 July 1984, he was granted a permanent appointment and was promoted to the P-4 level. In November 1990, the Applicant was reassigned to the General Legal Division, Office of Legal Affairs, New York. Effective 1 May 1991, the Applicant was promoted to the P-5 level and his functional title was changed to Senior Legal Officer. In July 1997, the Applicant applied for the D-1-level post of Principal Legal Officer, General Legal Division, Office of Legal Affairs. Although the Office recommended that he be promoted as the superior candidate, a female candidate who, according to the Office, was less qualified than the Applicant was promoted to the post. In March 1998, the Appointment and Promotion Board decided to recommend the female candidate and, following a further review of the case at the request of the Under-Secretary-General for Management, the Board upheld its original recommendation on the grounds that the candidates were equally qualified and

in keeping with administrative instruction ST/AI/412 on the achievement of gender equality. The following month, the Secretary-General approved the Board's recommendation. The Applicant appealed to the Joint Appeals Board, and then brought the matter before the Administrative Tribunal.

The Applicant submitted that the Respondent had violated the principles set forth in Article 101 (3) of the Charter of the United Nations, the relevant General Assembly resolutions and staff regulation 4.2, all of which provide that, in promotion decisions, paramount consideration should be given to "the necessity of securing the highest standards of efficiency, competence and integrity". He further submitted that the achievement of gender equality, as set forth in administrative instruction ST/AI/412, was subject to this paramount consideration. The Applicant also claimed that the Joint Appeals Board based its considerations and recommendations on an incomplete and inadequate record of the proceedings of the Appointment and Promotion Board depriving him of a full consideration of his case and consequently violating his rights of due process.

The Tribunal, while noting that the Director of the General Legal Division, as well as the Legal Counsel, had evaluated the Applicant as the superior candidate, indicating that the candidates were not equally qualified and giving compelling reasons as to why the Applicant was the superior candidate, at the same time recalled its established jurisprudence that appointments and promotions were within the discretionary authority of the Secretary-General. While the Secretary-General's discretionary powers were not absolute, the Tribunal found in the instant case that the Respondent had acted within his authority in deciding to promote a "substantially equally qualified" female candidate to the D-1-level post.

In this regard, the Tribunal explained that administrative instruction ST/AI/412 provided that special measures for the achievement of gender equality within the Secretariat must be instituted with a view to achieving the goal of "50-50 parity between men and women both overall and for the positions at the D-1 level and above by the year 2000". The instruction also provided for flexibility in various promotion requirements, for example, flexibility regarding seniority. Moreover, the Tribunal recalled that it had reaffirmed, in Judgement No. 958, *Draz* (2000), that the implementation of special measures for the achievement of gender equality, in compliance with General Assembly resolutions, was fully consistent with the exercise of the Secretary-General's discretionary authority, even if such measures were at the expense of other candidates. In Judgement No. 671, *Grinblat* (1994), the Tribunal further recalled that the existence of an unsatisfactory history with respect to the recruitment and promotion of women did not accord with Article 8 of the Charter of the United Nations, and that, unless affirmative action measures were taken to ameliorate the effects of past history, they would, without doubt, be perpetuated for many years. The Tribunal found that these words were still pertinent, particularly since the goal of 50-50 parity had not yet been reached, and that, therefore, the Respondent

had acted within his discretionary authority in deciding to promote a substantially equally qualified female candidate to the D-1-level post.

Regarding the Applicant's request to gain access to the records of the Appointment and Promotion Board, the Tribunal was sympathetic to this legitimate interest in obtaining information on how his candidacy was reviewed, particularly in the light of the strong departmental recommendation to promote him and the contradictory final outcome. At the same time, the Tribunal shared the Respondent's concern that these documents should be kept beyond the reach of the parties in order to preserve the confidential nature of the Board's proceedings and to enable it to function properly and efficiently. Having said this, the Tribunal found that the Joint Appeals Board had before it all the necessary documents and information, enabling it to reach an informed conclusion.

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

4. Judgement No. 1063 (26 July 2002): Berghuys v. the United Nations Joint Staff Pension Board[6]

Domestic partner as a surviving "spouse" for pension purposes—Meaning of "spouse" under United Nations Joint Staff Pension Fund Regulations and Rules—Interpretation according to "ordinary meaning" of terms—Effect of national laws of a participant in the Fund

The Applicant was the domestic partner of a staff member of the International Labour Organization (ILO) from 1993 until the staff member's death on 29 July 1999. In June 1999, the Applicant and the deceased, both nationals of the Netherlands, had formalized their relationship by entering into a domestic partnership agreement under Dutch law. The Applicant had submitted to the United Nations Joint Staff Pension Fund (UNJSPF) a survivor's claim, in accordance with articles 34 and 35 of the UNJSPF Regulations and Rules, which was denied on the basis that the Applicant was not a legally recognized surviving spouse. Since the deceased, however, was unmarried at the time of his death and the Applicant was his designated beneficiary, he received the residual settlement, in accordance with article 38 of the UNJSPF Regulations and Rules.

In its consideration of the matter, the Tribunal noted that the Applicant was the surviving partner in a same-sex relationship recognized as a special partnership with rights under the national law of the deceased, but that, in spite of modern cultural notions of relationships and partners, the Applicant was not the surviving spouse of the deceased participant, because they were not married.

In the view of the Tribunal, the instant case turned on the meaning of the word "spouse", as set out in the UNJSPF Regulations and Rules. In this regard, the Tribunal recalled that there was no definition of the word

spouse in the Regulations, and further recalled that the Organization had been flexible in recognizing that there was no common understanding of the meaning of the word among the peoples of the world, for example, recognizing common law marriages and polygamous marriages, when such marriages were recognized under the national law of the participant.

In reaching its conclusion, the Tribunal considered that, under the Vienna Convention on the Law of Treaties, it should apply the general international practice, which referred to interpretation according to the "ordinary meaning" of the terms in their context and in the light of their object and purpose (Judgement No. 942, *Merani* (1999)), and further considered the injunction in the Convention that account should be taken of all relevant rules of international law that were applicable between the parties at the time of the interpretation (see the advisory opinion of the International Court of Justice on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)). In the instant case, the Tribunal observed that, under Article 8 of the Charter of the United Nations, the Organization "shall place no restrictions on the equality of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs". The Tribunal also looked at international agreements regarding civil rights, such as article 26 of the International Covenant on Civil and Political Rights, which concerned equality before and equal protection of the law. Moreover, the Tribunal examined dictionary meanings of the word spouse and found them to be outdated, since the national laws of several countries had recognized that a pledge of marriage may be made by persons of the same sex.

In this connection, the Tribunal recalled that the Netherlands, whose law guided the analysis of this application, was one of the countries that recognized a legal pledge of marriage made by two men, under the Same-Sex Marriage Act, which came into effect on 1 April 2001. However, the Tribunal pointed out that the deceased had died on 29 July 1999, and therefore the Applicant and the deceased benefited only from the provisions of the Dutch registered partnership law of 1 January 1998. The participants in a registered partnership were not spouses, and law and custom at that time still interpreted a spouse as being a partner in a legal marriage, whatever the nature of that marriage.

For the reasons stated above, the Tribunal denied the application in its entirety.

5. Judgement No. 1064 (26 July 2002): Paluku v. the Secretary-General of the United Nations[7]

*Abolition of post—Disguised disciplinary proceeding—Judgements Nos. 459 (*Moore-Woodroffe*) and 501 (*Lavalle*) on abolition of posts—Administrative action versus disciplinary proceeding—Issue of special post allowance*

The Applicant entered the service of UNICEF in Kinshasa, in February 1985, as a locally recruited Assistant Administrative and Finance Officer on a short-term contract at the NO-B level. After completing a series of fixed-term contracts, the Applicant served one year on a probationary contract from 1 January until 31 December 1990, and was granted a permanent appointment on 1 January 1991. From 1 August 1990 until his separation from service on 30 June 1991, the Applicant acted as Officer in Charge of the Finance and Administration Section of the Kinshasa Office of UNICEF. In late 1990, an audit was performed of the Kinshasa Office, and the resulting report indicated that the Applicant had "committed acts of mismanagement" and had been involved "in fraudulent activities". The report recommended that the Applicant be immediately suspended without pay; that the UNICEF Representative convene an ad hoc Joint Disciplinary Committee to investigate; and that the Comptroller be advised accordingly. In addition, as the Applicant was seen to "ostensibly [lack] the necessary training/knowledge to manage the section" and was "seemingly experiencing difficulties [coping] with the exigencies of the job", the report recommended that the post be converted to that of an International Project Officer.

On 20 February 1991, the Budget Programme Review Committee approved the abolition of the post occupied by the Applicant and the creation of an L-3 international Professional post of Administrative and Finance Officer. On 30 June 1991, the Applicant was separated from service with a termination indemnity of five months' salary. On 2 April 1992, the Applicant requested the payment of a special post allowance (SPA) for the period in which he acted as Officer in Charge of the Finance and Administration Section.

The Joint Appeals Panel had concluded that the circumstances of the case justified its decision to receive and consider it, and further concluded that the Applicant had been deprived of a fundamental right to due process and recommended that he be paid compensation in the amount of $5,000, which was accepted by the Under-Secretary-General for Management.

The Tribunal agreed with the Applicant that the Organization had employed an administrative action as a disguised disciplinary proceeding. In this regard, the Tribunal noted that the Administration had not convened a Joint Disciplinary Committee, as recommended by the audit report, but rather had informed the Applicant that his post was to be abolished and that he would be separated from service accordingly. In the Tribunal's view, the abolition of the national post encumbered by the Applicant in order to create an international post, which would be filled by a higher-level staff member, was not a legitimate method of terminating a staff member, even if it would have represented a simple solution to a problematic situation.

Furthermore, even if the Tribunal were to accept that this was a straightforward case of abolition of post, the Administration should have made a good-faith effort to place the staff member in an alternative post

(Judgements No. 459, *Moore-Woodroffe* (1989), and No. 501, *Lavalle* (1990)). The fact that the Administration made no such efforts in the instant case reinforced the impression of the Tribunal that the abolition of the Applicant's post was an administrative manoeuvre designed to get rid of an inconvenient staff member without following the appropriate procedures either governing abolition of post or disciplinary proceedings.

In Judgement No. 610, *Oretega et al.* (1993), the Tribunal held that administrative action, rather than disciplinary proceedings, should only be taken when it neither prejudiced nor damaged the position of the staff member; in the instant case, the Tribunal found that the Applicant had been prejudiced by the use of administrative action. The holding of disciplinary proceedings would not only have provided an appropriate forum to resolve the issues raised by the audit report, but also would have had the added benefit of providing necessary due process to the Applicant. In this regard, the Tribunal ordered the Respondent to pay the Applicant additional compensation of $5,000.

Regarding the request of the Applicant for an SPA for the period during which he acted as Officer in Charge of the Finance and Administration Section of the Office, the Tribunal recalled that, pursuant to staff regulation 103.11 (*b*), an SPA is granted in "exceptional circumstances" and at the discretion of the Administration. Furthermore, as the Tribunal recognized in Judgement No. 336, *Maqueda Sanchez* (1984), staff were often asked to render services of a character and at a level superior to those for which they had been appointed. In view of the above, the Tribunal rejected the Applicant's claim.

6. Judgement No. 1070 (26 July 2002): Flanagan v. the Secretary-General of the United Nations[8]

Request for adjustment to United States federal income tax reimbursement on grounds that lump-sum payment on retirement resulted in limitation on tax deductions—Principle of equality and ST/IC/1996/73

On 31 December 1995, the Applicant retired from service, and he opted for a one-third lump-sum commutation from the United Nations Joint Staff Pension Fund. As a United States national, he was liable to pay income tax to the United States on his United Nations salaries and emoluments and, in accordance with information circular ST/IC/1996/73, he was entitled to reimbursement of such income tax paid. In early 1996, the Applicant received a lump-sum payment of US$ 337,176 and, as a result, his United Nations–related income for 1996 exceeded the United States federal tax threshold of $117,950, thus limiting the deductions he could claim.

In April 1997, the Applicant requested a review of his federal income tax reimbursement for 1996, noting a discrepancy between his calculation and that of the United Nations Income Tax Unit. While the Unit had reimbursed the Applicant for the taxes paid on his United Nations–related

income, it had not recognized that he had paid higher taxes on his non–United Nations income as a direct result of the lump-sum payment, which caused him to exceed the threshold. The Applicant had claimed that the reimbursement he had received had not complied with the requirements of paragraph 4 of ST/IC/1996/73, as he was not placed in the same position he would have been had his emoluments not been taxed. The Respondent had argued that while the Applicant would not have reached the tax threshold had his United Nations income not existed, customary reimbursement calculations procedures, as outlined in ST/IC/1996/73, had been followed in the Applicant's case. The Joint Appeals Panel made no recommendation in support of the Applicant's appeal.

In consideration of this matter, the Tribunal recalled that, unlike staff members of other nationalities, United States nationals are obliged to pay to their Government income tax on their United Nations emoluments, whereas most Member States do not tax United Nations–related income. The United Nations, in order to comply with the principle of equality of its staff members, therefore reimburses the United States nationals the amounts they pay in taxes on their United Nations–related income. In this regard, the Tribunal pointed out that paragraph 4 of ST/IC/1996/73 clearly states that the purpose of the reimbursement system is to place United Nations staff members subject to taxation in the position they would have had if their official emoluments were not taxed. The Tribunal also was of the view that this leading principle of equality required that the amount of tax paid by the Applicant on his income that was not related to the United Nations be the same amount that the staff member would have paid on that income had there been no United Nations–related income.

In 1999, as the Tribunal noted, the Government of the United States enacted a law significantly reducing the eligibility for deductions for taxpayers with an annual income in excess of US$ 117,950. The Tribunal further noted that the facts in the instant case clearly demonstrated that the Applicant would not have exceeded that threshold had it not been for the lump sum of $337,176 that he received from the United Nations as a consequence of his retirement and that he would otherwise have benefited from a significantly higher level of permissible deductions. Therefore, in the Tribunal's opinion, the Applicant was entitled to be reimbursed for the resulting difference.

In view of the foregoing, the Tribunal ordered the Administration to pay the Applicant the sum of $5,125, plus 8 per cent interest, representing the approximate difference between the amounts which would have met the requirements of paragraph 4 of ST/IC/1996/73 and the actual amount received by the Applicant.

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

1. Judgement No. 2120 (15 July 2002): Barraclough v. International Atomic Energy Agency[10]

Non-selection for promotion—SEC/NOT/1325 on employment of spouses—Contradictory legislation—Staff rule 3.03.5 on spouses not serving in same line of authority—Discrimination based on marital status and family relationship—International Covenant on Civil and Political Rights

The complainant joined the International Atomic Energy Agency (IAEA) in May 1997, at the P-3 level, in the Safety Co-ordination Section of the Department of Nuclear Safety, and, in April 1999, he applied for a P-4-level post in the Disposable Waste Unit of the Waste Safety Section, Division of Radiation and Waste Safety in the Department of Nuclear Safety, as advertised under vacancy notice No. 99/006. His wife was also employed by IAEA, in the same department but in different sections. The post for which the complainant applied was in the same section, but in a different unit and falling under a different hierarchical structure. Those responsible for the selection process were aware of this fact and nevertheless recommended the complainant for the post. However, the complainant had correctly inferred that he had not been appointed to the post when he learned that the Agency had advertised a new competition for the same post.

The complainant requested an administrative review by the Director General of the implied rejection. On 5 September 2000, the Director General informed the complainant that he had maintained his decision not to appoint any candidate to the post advertised under vacancy notice No. 99/006 and to readvertise the post under vacancy notice No. 2000/24. The complainant appealed against this decision to the Joint Appeals Board. The Director General, in a letter of 30 March 2001, again cited the reason for his decision of 5 September 2000—that the decision not to fill the post had taken into account "various statutory and policy requirements"—and added that these requirements included the need for gender balance and adequate representation of developing countries. The complainant appealed to the Tribunal.

In its consideration of the matter, the Tribunal noted that the Joint Appeals Board had found it to be a fact that the decision not to appoint the complainant to the post had been based on the provisions of SEC/NOT/1325, which dealt with the employment of spouses in the Agency. Paragraph 2 (*c*) read: "The spouse shall normally not be employed in the same department as the staff member …". The Tribunal further found that the evidence clearly justified that finding and the Tribunal would not interfere with it. However, the Tribunal recalled that it was only in his impugned decision of 30 March 2001 that the Director General stated that the original decision

had been motivated by other factors, in particular by various statutory and policy requirements such as adequate representation of developing countries and the need for gender balance, and had not been based on SEC/NOT/1325 alone. In the opinion of the Tribunal, that assertion, coming at the very end of the internal appeal process and in the impugned decision itself, was not convincing. Furthermore, in additional submissions filed at the Tribunal's request, the Agency appeared to concede that the principal, if not the only, relevant factor was the complainant's marital relationship.

The Tribunal agreed with the complainant's main argument that the provisions of SEC/NOT/1325, being subordinate legislation, were incompatible with the corresponding provisions of the primary legislation, namely, the Staff Rules, and in particular rule 3.03.5. This rule provided that a "husband or wife of a staff member may be appointed provided that the spouse was not given any preference by virtue of the relationship to the staff member", and further that the husband or wife of a staff member should not be assigned to serve in a post which is superior or subordinate in the line of authority to the staff member. Considering these two restrictions, the Tribunal pointed out that SEC/NOT/1325 purported to go much further than the Staff Rules and to impose a specific restriction on the hiring of spouses in the same department; it did not merely implement or clarify the staff rule, but it purported to extend its reach substantially, and, therefore, could not stand.

Moreover, the Tribunal observed that paragraph 2 (*c*) of SEC/NOT/1325 was unenforceable because it was contrary to fundamental principles of law, as the provision improperly discriminated between candidates for appointment based on their marital status and family relationship. In this regard, the Tribunal noted that discrimination on such grounds was contrary to the Charter of the United Nations, general principles of law and those which governed the international civil service, as well as international instruments on human rights. The Tribunal recalled article 26 of the International Covenant on Civil and Political Rights of 1966 which, although not strictly binding on the Agency, was relevant:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The Tribunal noted that the terms of the article were not limited ("… any ground such as …") and that all forms of improper discrimination were prohibited. In the instant case, in the employment context, the fact that two staff members might be married to each other was not relevant to their competence or the capacity of either of them to fulfil his or her obligations.

As regards a remedy in the case, the Tribunal noted that the complainant's P-3 post had been reclassified to P-4 as of 1 January 2002, and that he

was being considered for appointment to that post at that level; since that was the same level as the post to which he had not been appointed owing to improper discrimination, the Tribunal considered that the complainant's main claim was no longer relevant. The Tribunal ordered the Agency to pay the complainant damages equal to the amount of the increased salary and other benefits which would have been attached to the post in the Disposable Waste Unit from 25 February 2000 (the first documented date of the original administrative decision not to appoint him) to the date of his appointment to P-4 or to the termination of his employment with the Agency, whichever should occur first. The complainant's costs, in the amount of 500 euros, were also awarded.

2. Judgement No. 2125 (15 July 2002): Lemaire v. International Atomic Energy Agency[11]

Non-extension of appointment beyond retirement age—Non-extension must be based on proper reasons—Rejuvenation of staff

The complainant, who was born in July 1940, joined the staff of IAEA on 1 May 1980 under a fixed-term contract, which was extended six times. The last renewal stipulated that his services would be terminated on 31 July 2000. On 18 October 1999, the Director of the complainant's division sent a memorandum to the Director of the Division of Personnel requesting an extension of the complainant's contract until 31 July 2001, that is, beyond the normal age of retirement which, in his case, was 60. This request was rejected and the complainant appealed.

In its consideration of the matter, the Tribunal agreed with the Agency that the Director General had discretion in departing from the rule governing the normal age of retirement; however, the Tribunal observed that the decisions that were made must be based on proper reasons. Article 4.05 of the Staff Regulations stated:

> "Staff members shall not normally be retained in service beyond the age of sixty-two years or—in the case of staff members appointed before 1 January 1990—sixty years. The Director General may, in the interest of the Agency, extend these age limits in individual cases."

A memorandum of 26 June 1998 explains that extensions beyond retirement age should not be automatic, but that they must be justified on the basis of six criteria. In this regard, the Tribunal, while observing that the Joint Appeals Board—whose recommendation was followed by the Acting Director General—considered that the request submitted by the complainant's department had not specified whether three of these criteria had been satisfied, determined that it was clear from the highly detailed report attached to the request for an extension of contract that the request was based on the complainant's experience, which was of fundamental importance at a time when the safeguards system was undergoing extensive modifications and which was particularly necessary for the training

of new inspectors during the transition period. The request also indicated that the complainant had satisfied the criteria. Thus, in the view of the Tribunal, the grounds for refusing the request for an extension appeared to be highly questionable. As noted by the Tribunal the reason presented in the Agency's reply, which explained the impugned decision, stated that it wished to "rejuvenate the Agency's team of inspectors".

In the opinion of the Tribunal, although the Director General could determine the interests of the Agency, his decisions must be based on clear and coherent reasons, and in this case the reason given—that the request for an extension contained no indication as to whether any of the criteria stipulated in the memorandum had been satisfied—was not valid, and "rejuvenation" of the staff was too general to constitute a sufficient justification for the refusal of the complainant's request.

The Tribunal considered that since no measures could be envisaged for reinstating the complainant, the Tribunal awarded him damages, in an amount equal to the salary and benefits to which he would have been entitled had he remained in service from 1 August 2000 to 31 July 2001, plus the restoration of his pension rights for the aforementioned period. Furthermore, since his claim had been successful, the Tribunal also awarded the complainant costs in the amount of 2,000 euros.

3. Judgement No. 2127 (15 July 2002): Ruggiu v. European Patent Organisation[12]

Discontinuation of orphan's pension payments—Question of whether a child was a dependant of widowed staff or whether the deceased was staff's spouse—Purpose of orphan's pension payments

The complainant joined the staff of the European Patent Office in 1979 as an examiner, currently employed at grade A5. His spouse, the mother of his two children, died on 2 July 1991 and, in accordance with article 25 (4) of the Pension Scheme Regulations, the Office paid an orphan's pension to each of his two children with effect from 1 August 1991. Following the marriage of the complainant in October 1998, the Remuneration Department informed him by a letter of 4 November that the payment of the orphan's pension would cease effective November 1998.

In consideration of the merits of the case, the Tribunal recalled articles 25 and 26 of the Pension Scheme Regulations, which read:

> *"Article 25*
>
> "Rate of pension
>
> "...
>
> "(4) The children or other dependants of a widowed staff member whose deceased spouse was not employed by one of the Organisations listed in article 1 shall each be entitled to [an orphan's] pension of twice of allowance for a dependent child

"Article 26

"Cessation of entitlement

"Entitlement to a pension under article 25 shall cease at the end of the month in which the child or other dependant ceases to qualify for the dependants' allowance under articles 69 and 70 of the Service Regulations for permanent employees of the Office."

The Tribunal further recalled rule 25.4/1 of the Implementing Rules, which read:

"i) The orphan's pension mentioned in this article (children or other dependants of a staff member who is the widower, or widow, of a spouse not a staff member of a Coordinated Organisation) shall be due only if the staff member became widowed while in service …

"ii) If the staff member remarries or leaves the Coordinated Organisations, the orphan's pension shall cease to be paid."

The Tribunal noted that the complainant had submitted that article 26 had been violated because it defined in an exhaustive manner the grounds for cessation of entitlement to an orphan's pension, and these grounds did not include remarriage of the staff member. Consequently, rule 25.4/1, which was of lesser authority than article 26, contravened that article.

However, it was the view of the Tribunal that, pursuant to article 25 (4), it was not a condition of entitlement to the pension that the deceased be one of the child's parents; indeed, the granting of the pension did not depend on the existence of a formal family relationship with the deceased, but merely on the fact that the child was a dependant of the widowed staff member of the Office. By contrast, the complainant had argued that the entitlement to the pension was subject to the condition that the deceased was his or her spouse.

The Tribunal also considered that the conditions governing entitlement to the orphan's pension also reflected its purpose, in that the entitlement had the effect of doubling the dependent child's allowance in an obvious desire to assist the widowed staff member, who could no longer rely on the help previously given by his or her spouse.

Thus, in the opinion of the Tribunal, since the orphan's pension could only be granted to children of a staff member on condition that he or she became widowed, it seemed logical to consider that this condition was no longer satisfied in the event that the latter married. Consequently, the Implementing Rules did not contravene the provisions of article 26 of the Pension Scheme Regulations. The complaint was therefore dismissed.

4. Judgement No. 2129 (15 July 2002): Adjayi and others v. World Health Organization[13]

Reduction of travel per diem rate—Difference between determination of salaries and determination of allowances granted for specific pur-

pose—Importance of basing decision on objective considerations even if legal framework was vague or non-existent—Acquired rights and travel allowance

Seventy-seven General Service staff members of the World Health Organization (WHO) recruited locally by the WHO Regional Office for Africa in Brazzaville contested the decision taken by the Organization's Director-General on 12 December 2000 rejecting their appeal against the decisions of 1998 and 1999 to reduce the rate of the travel per diem granted to them as a result of the relocation of the Regional Office to Harare and of their stay in that city.

Following the outbreak of hostilities in June 1997 in the Republic of the Congo, a decision was taken to close temporarily the Regional Office in Brazzaville and to relocate it to Harare in September 1997, initially for two years; this was subsequently extended. The complainants continued to receive their salary as if they were still assigned to Brazzaville and, since they were on travel status in Harare, they received a travel per diem: for the first 60 days the per diem was set at 100 per cent of the rate for Harare, and then reduced from the third month onwards to 75 per cent of that rate, in accordance with paragraph VII.2.43.I of the WHO Manual. Then, on 17 July 1998, the locally recruited Brazzaville General Service staff serving in Harare were informed, by information circular IC/98/22, that it had been decided that they would remain on travel status until further notice and that they would continue to receive a travel per diem, but that, in view of the extended nature of the situation, they would receive a "special" per diem rate of 50 per cent of the rate normally applicable. On 17 June 1999, information circular IC/99/21 announced, inter alia, that the locally recruited staff would receive "an ad hoc allowance" of US$ 1,000 per month, effective 1 August 1999.

On the merits, the complainants submitted five pleas: (1) the decision to modify the travel per diem rate was arbitrary and did not satisfy the criteria of stability, foreseeability and transparency established by the Tribunal's case law in order to limit the discretion of organizations in adjusting staff pay; (2) the decision contravened the principle of equal treatment; (3) it was contrary to the undertakings given by the Administration, from which the complainants were entitled to expect fair treatment; (4) it was based on errors of fact and on critical factual omissions; and (5) it breached the acquired rights of the staff members concerned.

In its consideration of the matter, the Tribunal noted that WHO claimed that the WHO Manual, paragraph VII.2.45, which stated, "if necessary, special per diem rates, which may be higher or lower than the standard rate, may be established … for regional activities, by the regional director concerned …", gave the Regional Director a discretionary power to set a reduced per diem rate in order to take into account certain objective factors. The complainants argued that this interpretation amounted to conferring a totally ar-

bitrary power on the Administration, given that the applicable provisions did not set any limits on the scope of the Administration's power to reduce the per diem and that, according to the Tribunal's case law (see Judgement No. 1821, for example), adjustments to international civil servants' salaries must satisfy objective criteria of stability, foreseeability and transparency. However, the Tribunal considered that this line of precedent—concerning the determination of staff salaries, which was necessarily governed by very strict rules—was not entirely applicable to the determination of allowances granted for a specific purpose, such as that of covering expenses incurred by staff members on travel status.

The Tribunal further considered that, even if the Administration claimed to be acting in the exercise of its discretion, and although the legal framework surrounding its action remained vague or non-existent, the Administration must base its decisions on objective considerations and avoid breaching any of the guarantees protecting the independence of international civil servants. In the instant case, if the complainants continued to receive their salaries at Brazzaville rates, and since the travel per diem was merely intended to cover the essential expenses of a staff member on duty travel, including lodging and food, a high rate of travel per diem could not be justified where duty travel, which by its nature implied that the staff member would continue to work primarily at his or her original duty station, lasted for two years or more. Although it would have been preferable to have had precise texts setting out the circumstances in which a travel per diem could be replaced by a flat-rate allowance, given the exceptional situation faced at the time by the locally recruited Brazzaville staff, who were still considered to be on travel status in Harare, the solution adopted by the defendant was not unreasonable.

Likewise, the Tribunal did not find merit in any of the other complainants' claims. Regarding the issue of a breach of acquired rights, the complainants had asserted that their fundamental conditions of employment were affected by a decision which greatly reduced their purchasing power. However, in the opinion of the Tribunal, the complainants had overlooked the fact that their basic salary was not affected, and it was perfectly obvious that the reduction of an allowance intended to cover travel expenses did not alter their fundamental conditions of service.

Since the complainants' pleas failed, the Tribunal rejected their claims in their entirety.

5. Judgement No. 2139 (15 July 2002): Underhill v. International Atomic Energy Agency[14]

Non-extension of appointment—Right of staff member to resort to all internal and jurisdictional remedies available should not prejudice staff member—Exercise of discretion required adherence to procedural safeguards

The complainant, who was born in December 1940, was recruited by IAEA on 11 March 1993. His appointment, which was initially for three years, was extended on several occasions. A letter of 23 July 1998, offering the complainant an extension until 10 March 2000, indicated that this would be the "final" extension and that the appointment would not be "extended, renewed or converted to another type of appointment". The Director of the division in which the complainant was employed indicated on 22 September 1999 that he considered it "highly desirable" for work programming reasons that the complainant's employment should continue until 31 December 2000. On 15 November 1999, the Administration granted a further extension up to that date, indicating once again that this would be the last. On 20 December 1999, the complainant requested that his appointment be extended to the date when he would have reached the retirement age applicable to him. This request was denied, and the complainant lodged an appeal, but withdrew it on learning that the Director General had offered him a further extension until 30 June 2001, while reaffirming that this would be the last. The complainant renewed his request for an extension to retirement age, but was refused. He appealed to the Joint Appeals Board, which recommended that he be extended until 31 March 2002.

Before the Tribunal, the complainant challenged the decision of the Director General not to follow the recommendation of the Board. The complainant contended that the Deputy Director General had initially been in favour of extending his appointment, but reversed his position when he learned that the complainant had appealed to the Joint Appeals Board. In this regard, he referred to a memorandum dated 27 February 2001, in which his Head of Section set out the reasons why it was essential that he should remain in service until December 2002, and said that the Deputy Director General simply returned the memorandum to the Head of Section. He added that the memorandum had not been submitted to the Board. Moreover, neither that document nor letters from representatives of member States, written in support of his request for an extension, had been brought to the attention of the Director General. The complainant concluded that the procedure followed by the Joint Appeals Board had been flawed, even though its recommendation was partially in his favour, and that the Director General's decision, taken on the basis of an incomplete file, must therefore be set aside. The Agency disputed these claims, and explained that the Agency had told the complainant on three occasions that the extensions granted to him would be final and that notice SEC/NOT/1484 in principle limited the term of service to seven years, even though this rule had been applied with some flexibility.

The Tribunal reasoned that, even though the complainant had not proved that the Director General's decision of 30 March 2001 was taken on the basis of incomplete information, it seemed clear that the Board had not been provided with the memorandum from the Head of Section, since the Deputy Director General had simply sent it back. In the view of the

Tribunal, this memorandum was essential for assessing the situation within the complainant's unit and the difficulties that might be encountered in the implementation of the work programme as a result of his departure.

The Tribunal found that the complainant's allegation that the Deputy Director General, who had initially been in favour of his extension, changed his view after learning that the complainant had gone to the Joint Appeals Board was substantiated by the written evidence and in any case was not denied by the Agency. The Tribunal emphasized that the right of international officials to resort to all internal and jurisdictional remedies available to them without detriment to their career was an essential guarantee to which it attached the greatest importance.

In the present case, the Tribunal considered that the appeal lodged by the complainant against the decision not to extend his appointment should not in any way have been prejudicial to him. The reasons which led his Head of Section to stress the need for an extension until December 2002 in the memorandum of 27 February 2001 should have been brought to the attention of the Board. Moreover, the Tribunal recognized that the Deputy Director General, who had initially been in favour of the extension, had decided to withdraw his support and, thus, the Deputy Director General, whose opinion was essential to an informed decision by the Director General, changed his mind for reasons completely alien to the interests of the service. Although the Director General had the discretionary power to waive the seven-year rule again for the complainant, in exercising that discretion he was bound to observe all the procedural safeguards granted to international civil servants and he failed to do so in the present case.

The Tribunal therefore set aside the impugned decision and ordered the Agency to restore the rights which the complainant would have enjoyed since the date on which appointment came to an end, and to reinstate him in his post until 8 December 2002. It granted him moral damages, which it set at 2,000 euros, and awarded costs at 500 euros.

6. Judgement No. 2151 (15 July 2002): Mikes, Mohn and Zhang v. Organisation for the Prohibition of Chemical Weapons[15]

Non-classification of post from P-3 to P-4—Question of classification exercise based on proper job description—Issue of experience—Importance of specifying methodology in classification exercise—Issue of intervention into case

At the material time, the complainants held posts as inspectors at grade P-3 at the Organisation for the Prohibition of Chemical Weapons (OPCW). Following a classification review of most posts in the organization, the results of which were announced on 6 August 1998, their classification at grade P-3 was maintained. The complainants appealed this decision.

In consideration of the merits of the case, the Tribunal observed that the complainants had not denied that decisions concerning the classifica-

tion of posts lay within the discretion of the Director-General, but rightly recalled that, according to the case law, such decisions must not show any procedural flaw or error of law, nor any mistake of fact leading to a mistaken conclusion by the competent authority. In the present case, they submitted that the Administration did not provide them with the job description on the basis of which their posts were maintained at grade P-3 and that the only job description supplied was incorrect on several points. They added that in classifying their posts at grade P-3 the consultant who had been employed to carry out the classification exercise followed no methodology, but merely explained that the differences in experience between P-3 and P-4 inspectors warranted the difference in grade. They claim that this procedural flaw also amounted to an error of law, since the classification of posts must be independent of the individual "particularities" of their incumbents, including their experience. Lastly, they alleged that a wrong conclusion was drawn from the facts, as there was much evidence that the duties and responsibilities of inspectors classified at grades P-3 and P-4 were similar and that the complainants mainly performed P-4-level duties.

While the Tribunal would not undertake a job classification exercise, which lay solely within the authority of the defendant, it observed that the succession of errors made in this case, as acknowledged both by the Classification Review Committee and by OPCW itself, left room for serious doubts concerning the objectivity of the rationale for the classifications that were being challenged. The complainants were entitled to be provided with the job description on which the consultant's recommendation had been based, and the evidence clearly showed that the document supplied to one of the complainants on this matter was incorrect. The Classification Review Committee admitted the error but, at the same time, indicated that the absence of specific documentation was insufficient to warrant a change in the classification. However, the Tribunal found that the complainants must not suffer any injury from the organization's inability to reconstitute the elements on which the classification had been made.

The Tribunal admitted that the complainants' assertion that they performed P-4-level duties most of the time was not in itself a reason for granting them that grade. Moreover, in the case of the inspectors, it was not out of the ordinary for posts at different levels to be differentiated by taking into account objective criteria related to the nature of the functions performed and the experience required to fulfil the respective duties.

While it was not the role of the Tribunal to determine whether the three complainants were entitled to be awarded the grade of P-4, it had to assess the effects of the errors committed and of the inability of OPCW to indicate precisely the methods followed by the consultant in his recommendation to maintain the complainants' posts at grade P-3. The organization must therefore conduct a new procedure for the classification of the posts in question and reach lawful decisions. The Tribunal also awarded costs in the amount of 2,000 euros to the complainants.

The Tribunal also considered the issue of 27 OPCW staff members applying to intervene in the instant case. In the Tribunal's view, the fact that two of the staff members filed no internal appeal did not prevent them from applying to intervene. The only issue to be resolved was whether the organization's decisions on post classification applied to them and, in this regard, the Tribunal observed that their names were not on the list of the staff members to whom the subject decision was addressed. That being so, the present judgement should be extended to them only insofar as they have an interest, on account of their de jure and de facto position regarding post classification, in benefiting from the Tribunal's decision.

C. Decisions of the World Bank Administrative Tribunal[16]

1. Decision No. 261 (24 May 2002): Syed Ghulam Mustafa Gilani v. International Bank for Reconstruction and Development[17]

Complaint against redundancy—Duty to isolate real issues of case—Importance of exhaustion of all internal procedures—Importance of timely review of decision—Limited review of redundancy decision—Issue of outdated skills—Staff rule 7.01 on redundancy—Adequate notice to staff member of his redesigned post and possible redundancy—Waiver of deadline for submission of application for post

The Applicant joined the Bank in 1983 as a librarian (Level 5, Step II) at the Resident Mission in Islamabad. His post was regraded to Level 6 in May 1990, and regraded to Level 16, as a result of a global job grading exercise. The Applicant complained, arguing that Level 16 was not indicative of his status, long meritorious service and experience of 27 years. The Applicant was subsequently placed on a six-month performance improvement plan (PIP) and he improved his performance to a satisfactory level, but he also was informed that he would be expected to further improve his communication and electronic information technology skills. In November 1999, it was recommended that an electronic library be established using the country office website as a prototype. It also was recommended that a talented and experienced librarian be hired with experience in Web development and electronic database design to run the electronic library. In February 2000, the Applicant was informed that his present position was being abolished and that he could either apply for the redesigned position, appeal to higher management, or accept mutual separation. The Applicant sent an e-mail to the President of the Bank on 24 February 2000, and applied for the redesigned post some two months after the stated deadline for submission of applications.

On 18 April 2000, the Applicant filed a statement of appeal with the Appeals Committee, raising a number of complaints. On 20 April 2000, the Applicant was sent a notice of redundancy. On 23 May 2000, the Respondent submitted to the Appeals Committee a jurisdictional challenge arguing that the only issue that had been appealed in a timely manner concerned the decision to declare the Applicant's position redundant. After its review of the matter, the Appeals Committee decided to accept jurisdiction over not only the redundancy issue but also a number of other issues raised by the Applicant.

In his application to the Tribunal, the Applicant did not contest specific decisions but requested that the decision of the Appeals Committee be reviewed in the light of the Applicant's requests before the Committee. In his reply, however, the Applicant clarified that he was contesting the termination of his employment, in addition to the pay differential which he allegedly suffered from the date (6 May 1990) on which it was acknowledged that he had been misclassified.

In its consideration of the matter, the Tribunal observed that as it had ruled in the past, the Appeals Committee was not a judicial body whose decisions could be challenged before the Tribunal (*Carter*, decision No. 175 (1997)). Rather, the Tribunal's task was to decide whether the Bank had violated the contract of employment or terms of appointment of the Applicant (*Lewin*, decision No. 152 (1996)). As the Tribunal's function was not to review the report of the Appeals Committee, the Tribunal considered that the application had been misdirected. However, the Tribunal also had ruled that it was its duty, as it was the duty of every international tribunal, to isolate the real issue in the case and to identify the object of the claim (*Nuclear Tests (Australia* v. *France), Judgement of 20 December 1974*, *I.C.J. Reports 1974*, p. 262). In doing so in the present case, the Tribunal noted that the Applicant was in effect contesting before the Tribunal the same decisions or actions of the Bank which the Applicant had already contested before the Appeals Committee. The Tribunal recalled that the Committee had declined to review the majority of those decisions on the basis that it had no jurisdiction over them, accepting jurisdiction only over decisions or actions of the Bank relating to the declaration of redundancy of the Applicant's employment, and, after examining such decisions, had recommended that the Applicant be denied the relief requested. The Vice-President of Human Resources decided, on 18 April 2001, to accept that recommendation.

In examining the jurisdictional issues of the case, the Tribunal noted the importance of the statutory exhaustion requirement. Regarding a number of issues contested by the Applicant, such as his 1989 job reclassification, the global job grading of 1997 and his 1998 PIP, the Tribunal considered that the Applicant had never requested timely review of the decisions, pursuant to staff rule 9.01 (Administrative Review), which required that the staff member, as a first step, request such review within 90 days of receipt of the written decision. Furthermore, the Applicant and the

Respondent had not agreed to submit the application directly to the Tribunal, nor had the Applicant invoked any exceptional circumstances that prevented him from requesting administrative review of these decisions in a timely manner. Therefore, the Tribunal found that those issues were inadmissible, pursuant to article II (2) (i) of its Statute.

In consideration of those claims that were admissible, the Tribunal stated that it had held in the past that the decision to declare a staff member's position redundant was within the discretion of the Bank, subject only to limited review, and that the Tribunal would not interfere with the exercise of such discretion "unless the decision constitutes an abuse of discretion, being arbitrary, discriminatory, [or] improperly motivated. …" (*Kocic*, decision No. 191 (1998), citing *Montasser*, decision No. 156 (1997).) The Tribunal, at the same time, also has held that:

> "The Bank must be free to evolve, and therefore to adjust to new needs in its client countries, and corresponding new requirements in its activities. The fact that a staff member's skills have been beneficial to the Bank in the past does not insulate him or her from the risk that the relevant work group requires a 'skills mix' … into which he or she does not fit." (*Mahmoudi (No. 2)*, decision No. 227 (2000).)

The Tribunal recalled that the Applicant claimed that the redundancy decision was a device to remove him from his position owing to his complaints about job classification in the past, and that management invited the Manager, who suggested that an electronic library be established, to submit a report that contained factual errors in order to get rid of the Applicant. The Tribunal, however, found no evidence in the record substantiating these claims. On the contrary, a review of the record and, particularly, of the report prepared by the Manager, South Asia Region Information Management Unit, showed that there was a growing need to strengthen the information technology capacity in the Islamabad office "by providing input to knowledge management, which was the Bank's competitive advantage and an increasingly important role for the organization". It was in response to this need that the new Country Director for Islamabad invited the Manager to assess the feasibility of establishing an electronic library. The record also indicated that the Applicant himself was aware of a transformation in information technology from hard copies to Web pages and that he needed to study the system adopted at headquarters to acquaint himself with the Bank's approach to information technology. Finally, the Tribunal noted that the decision to declare the Applicant's position redundant was not taken by one person alone, but only after discussions among a number of people, including the Applicant's supervisor, the Islamabad Front Office Human Resources Officer, the new Country Director for Pakistan and the Acting Vice-President, South Asia Region.

The Tribunal, in considering whether the appropriate procedure had been followed in the implementation of the Applicant's redundancy, re-

called that his position had been declared redundant pursuant to staff rule 7.01, paragraph 8.02 (*c*), which stated:

> "Employment may become redundant when the Bank Group determines in the interests of efficient administration that:
>
> " …
>
> "(*c*) A position description has been revised, or the application of an occupational standard to the job has been changed, to the extent that the qualifications of the incumbent do not meet the requirements of the redesigned position."

In the view of the Tribunal, it was indisputable from a review of both job descriptions that the occupational standards for the job of the Librarian had significantly changed. The Applicant's old job description was that of a traditional Library/Information Assistant, while the new position description had a strong focus on information technology. Here, pursuant to provision 8.02 (*c*) prescribed, the position had been so substantially redesigned that the Applicant's qualifications did not meet the requirements of the redesigned position.

In interpreting provision 8.02 (*c*) of staff rule 7.01, the Tribunal found that in the instant case the new position had been designed prior to the declaration of the redundancy, in contrast to the facts of *Mahmoudi (No. 2)* and in *Yoon (No. 2)*, decision 248 (2001), where the Tribunal found inventions of post hoc rationalizations for redundancy decisions.

The Tribunal also examined whether or not the Applicant in the instant case had been properly notified of the redesigning of his position, the possibility of his redundancy and the opportunity to compete for the new position, as required by *Garcia-Mujica*, decision No. 192 (1998). In that case, the Tribunal stated:

> "Although staff rule 7.01 does not provide for a specific advance warning about the issuance of a notice of redundancy, a basic guarantee of due process requires that the staff member affected be adequately informed with all possible anticipation of any problems concerning his career prospects, skills or other relevant aspects of his work."

As pointed out by the Tribunal, the Applicant had received a copy of the Unit Manager's report and was given the opportunity to make comments on it. While the report did not explicitly mention the possible redundancy of the Applicant's position, nevertheless, in the opinion of the Tribunal, the stated purpose of the Manager's 1999 mission in Islamabad to assess the feasibility of establishing an electronic library in the World Bank office and the recommendation to hire an Electronic Resources Librarian with experience in Web development and electronic database design to run it, as well as the description of the duties, accountabilities and selection criteria for the Electronic Resources Librarian, adequately put the Applicant on notice of the possibility of the redundancy of his position. Furthermore,

on 11 February 2000, the Human Resources Officer notified the office's staff members of the approval of the redesigned position by the Islamabad Office's Information Technology Committee. And, as acknowledged by the Applicant, on 14 February 2000, he met with the Human Resources Officer who informed him that his position would be declared redundant and that he would have, among other options, the possibility to apply for the redesigned position or to accept mutual separation.

The Tribunal recalled that the Applicant applied for the redesigned position on 17 April 2000 (three days before he was officially notified in writing of the decision to declare his position redundant), although the closing date for the vacancy for the Electronic Resources Librarian was 26 February 2000. The Bank had stated that it considered his application, nonetheless, because he was an internal candidate. The Tribunal found that the fact that the Applicant was late in applying for the redesigned position was not because the Bank had not notified him early enough in this respect.

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

2. Decision No. 272 (30 September 2002): C. v. International Bank for Reconstruction and Development[18]

*Transmission of documents to the United States Department of Justice—Staff rule 2.01 on the release of information outside the Bank Group—Specific notice versus awareness of referral of information—Documents not specifically covered by staff rule—Treatment of confidential documents in a criminal investigation—Issue of access of accused to privileged documents—*King *decision on rights of staff member accused of misconduct—Tribunal's consideration of matter during ongoing external criminal investigation—Tribunal's reservations regarding unnecessary secretive procedures—Staff rules 11.01 and 8.01 regarding claim of monies owed to staff member*

The Applicant's request for anonymity was granted by the Tribunal, pursuant to an Order of 8 February 2002. The Applicant's career in the Bank, the events leading up to his termination, the referral of documents to the United States Department of Justice, the Applicant's complaints to the Appeals Committee and the Committee's report on the matter were all discussed by the Tribunal in the jurisdiction decision, *C.*, decision No. 268 (2002). In the application before the Tribunal in the instant case, the Applicant contested the following decisions by the Respondent: (1) to refer the case to the Department of Justice of the United States for prosecution without notifying him; (2) to deny him an accounting of reimbursable monies and to withhold compensation; (3) to deny him access to relevant documents and evidence necessary to his defence; and (4) to withhold from him information in his personnel file while failing to inform him of its transfer to third parties.

In consideration of the matter, the Tribunal observed that the merits phase of the case was in essence concerned with the interpretation of staff rule 2.01 on the release of information outside the Bank Group and, particularly, whether: (1) the information in question was validly withheld from the Applicant; (2) this situation fell within the exceptions defined in the rule; and, if so, (3) it was "reasonably possible" to give the notification required by that rule.

As the Tribunal explained in its decision on jurisdiction, the disclosure requirement imposed upon the Bank by this staff rule covered both the fact of referral and the content of what was being referred. And, according to the Tribunal, it was clear from the record that the Applicant was aware of the fact of a referral being made to the Department of Justice. Even though this was not the result of specific notification to him, as explained by the Tribunal, his awareness of the referral transpired from the general context in which the Bank conducted its investigation and pursued its cooperation with the United States and Swedish authorities.

Regarding the content of the referral, the Tribunal concluded in its decision on jurisdiction that the Applicant became only partially aware on 14 May 2001 of what information had been released to the Department of Justice, his information emerging largely through communications between his attorney and the Department. The Tribunal, interpreting staff rule 2.01, stated that the Applicant's personnel record could be transmitted to the Department of Justice and, also pursuant to the staff rule, he was notified of the release "as soon as reasonably possible". Although not expressly itemized in the rule, documents involving the Applicant's travel arrangements, hotels, expenses and similar records, in the opinion of the Tribunal, related to the official business of the staff member and therefore qualified as "other personnel information". The Tribunal noted than the Applicant had not been notified of this release, but that this omission could hardly jeopardize the Applicant's defence before either the Bank or the Department of Justice, since a copy of this information must have been in the Applicant's possession as it had originated in his own submissions to the Bank. Concerning documents relating to the operational records of the Bank—and nothing in them related to the accusations against the Applicant—the Tribunal considered that they could be released and without the knowledge of the staff member.

The Tribunal recalled the World Bank Policy on Disclosure of Information of March 1994, as revised effective 2002, which established constraints on disclosure of documents that go materially beyond the "personnel" type of document envisaged under staff rule 2.01. In particular, the following constraints were relevant in the instant case: (1) documents and information provided to the Bank only "on explicit or implied understanding that they will not be disclosed outside the Bank, or that they may not be disclosed without the consent of the source; or even, occasionally, that access within the Bank will be limited" must be treated accordingly by

the Bank; (2) documents and records that are subject to the attorney-client privilege, or whose disclosure might prejudice an investigation, shall not be made publicly available; and (3) appropriate safeguards must be maintained in order to protect the personal privacy of staff members and the confidentiality of personal information about them, all in accordance with the Principles of Staff Employment.

Regarding the Applicant's bank and credit card statements, the Tribunal observed that while the staff rules did not expressly allow for the disclosure of such personal information, and they did not forbid it, the authorization given by the Applicant to make this information available to the Bank was not expressly conditioned; and this raised the issue of an implied understanding that it should not be disclosed outside the Bank pursuant to Bank policy. In examining the matter, the Tribunal considered whether the disclosed information was fully available to the Applicant himself, as it had originated in his own personal business and his ability to defend himself was not jeopardized by the disclosure, and whether the Department of Justice could in any event have subpoenaed the records in the ordinary process of discovery available in the United States legal system. The Tribunal concluded that in the light of the nature of these records their release was not precluded by the terms of the Bank's policy in the context of this kind of investigation, and although it would have been possible to notify the Applicant of disclosure sooner, here again the omission had not caused specific injury to the Applicant.

Another category of document released to the Department of Justice contained summaries of various interviews conducted in the context of the Bank's investigations, including interviews with the Applicant and other persons (inside and outside the Bank) implicated in the relevant events. In examining this issue, the Tribunal, while noting that the documents did not derive from a relationship between the Applicant and his private attorney (which would certainly be excluded from disclosure), but from a relationship between the Applicant and internal and external investigators, also noted that it was evident that the confidential status or marking of the documents would not preclude their release to a third party investigating the matter. The Tribunal, while recognizing that there was no specific rule authorizing such disclosure and there was a policy (as of 2002) constraining such disclosure, concluded that because the documents related specifically to the investigation and the constraint focused more on public disclosure than on presumably confidential disclosure to national authorities, such release was permissible.

Another issue examined by the Tribunal concerned the question whether principles of due process required the Applicant to have access to the privileged documents disclosed to the Department of Justice. In this regard, the Tribunal noted that while the other categories of document were accessible to the Applicant, he could have had no knowledge of these privileged records, not even of the records of his own interviews—which

could have had a combined effect of implicating the Applicant in serious criminal offences—and that, furthermore, the need to provide an accused staff member with substantive notice of the information proffered against him or her was demonstrated by the facts of the case.

The Tribunal further recalled the detailed standards for the handling of misconduct under staff rule 8.01 in *King*, decision No. 131 (1993), in which it assigned particular importance to the conduct of the investigation, to the right of the accused staff member to respond, and to questions of due process. The Tribunal specifically held that "the entitlement of the staff member to respond presupposes an exact knowledge of the charge made against him and extends to the right to give a properly considered answer to, or comment upon, every aspect of the case made against him". The Tribunal was not unsympathetic to the Respondent's argument that during investigations of a criminal nature there was a danger that the accused might attempt to destroy evidence, flee the jurisdiction, or harass and intimidate witnesses, thus justifying withholding information, but here the Applicant had appeared to have cooperated fully with both the Bank and the Department of Justice, and the documents concerned could not in any way be destroyed or tampered with by the Applicant as they were already in the hands of the Bank and, later, of the Department of Justice. Moreover, the Tribunal, agreeing with the Applicant that in criminal investigations the standards applied must be construed more strictly than would be the case in matters that do not as seriously affect a staff member's reputation and employment prospects, ordered that specific disclosed documents be made available to the Applicant.

Concerning the Bank's questioning of the Tribunal's consideration of administrative matters internal to the Bank while law enforcement agencies were conducting a criminal investigation of the same matter, the Tribunal observed that due process within the Bank did not necessarily prejudice national criminal investigations. On the contrary, the accused might be better able to address the questions put to him or her by national authorities if he or she had all relevant information concerning him or her and did not have to engage in guesswork—as the Tribunal noted had happened in the instant case. Furthermore, strict enforcement of due process also would likely avoid accusations of a general nature unsupported by specific evidence that could mislead the national authorities. The Tribunal had reservations with respect to unnecessarily secretive procedures, which tended to result in unfair accusations and investigations.

The Tribunal had decided in the jurisdictional phase that it could determine whether the claim for monies allegedly owed by the Bank to the Applicant should be governed by staff rule 11.01, which allowed for a three-year time period for such claims, or by staff rule 8.01, which provided for deductions or forfeitures from pay imposed as disciplinary measures. The Respondent had argued that any claim under disciplinary measures should fall under staff rule 8.01 and thus the normal 90-day period. In deciding

the issue, the Tribunal stated that it was not necessary to reach a determination on whether there was misconduct and whether the Applicant had been rightly terminated, but rather whether the monies allegedly owed to the Applicant were included within those forfeitures allowed under staff rule 8.01. If the answer was affirmative, staff rule 8.01 applied; if not, staff rule 11.01 applied.

Regarding monies related to travel for the Bank ($1,600), the Tribunal determined that this must be reimbursed, pursuant to staff rule 11.01, because these monies related to work performed by the Applicant for the Bank. The annual leave accrued by the Applicant ($25,200) must also be paid as this was part of the compensation of a staff member, in the opinion of the Tribunal. The separation grant ($20,300), however, was not part of the Applicant's compensation or an amount related to operational expenses, and could legally be withheld from the Applicant in case of termination under staff rule 8.01 ("Disciplinary measures"). As the Tribunal had observed, this claim was governed by the ordinary 90-day exhaustion rule rather than the three-year time period established by staff rule 11.01 and was therefore time-barred in the instant case.

In determining remedies, the Tribunal was of the view that there was no doubt that the Bank's withholding of certain information from the Applicant, simultaneous with the referral of such information to the Department of Justice for prosecution, had impaired the Applicant's ability to defend himself. The process was contrary to the standards of due process applicable to accusations of misconduct against staff members as laid down in the staff rules and clarified by the Tribunal on more than one occasion, and therefore the Tribunal awarded damages in the amount of $150,000 net of taxes, as well as costs in the amount of $12,000.

D. Decisions of the Administrative Tribunal of the International Monetary Fund[19]

Decision No. 2002-2 (5 March 2002): Ms. "Y" (No. 2) v. International Monetary Fund[20]

*Review of decision upholding conclusions of ad hoc discrimination review team regarding grading and subsequent abolition of post—Importance of timely review and exhaustion of administrative remedies—Question of de novo review of merits by the Tribunal—Question of Fund's discretionary authority to fashion an alternative dispute resolution mechanism—*de Merode *decision on reviewing exercise of discretionary authority—Review of informal proceedings versus formal proceedings*

The Applicant was employed as an Editorial Clerk by the International Monetary Fund on 1 July 1971, and was promoted to a Professional position as Editorial Officer in 1983. In 1987, after she appealed her job grade, she was promoted to grade A11, which grade she still held in 1995, when the position of which she was the incumbent—as Assistant Editor—was abolished.

The Applicant was advised of the options available to her under the Fund's policy governing abolition of posts and, in accordance with that policy, efforts were made over a six-month period to find her an alternative position. In addition, on an exceptional basis, arrangements were made for Ms. "Y" to be assigned to a temporary assignment position for an initial period of 10 months, later extended for an additional four-month period through the end of February 1997. In addition to the 120-day notice period and the 22 1/2-month separation leave provided by the Fund, Ms. "Y" was "bridged" to an early retirement pension and lifetime access to the Fund's health insurance, effective 31 March 1999.

In response to the Director of Administration's 28 August 1996 Memorandum to Staff, the Applicant, on 30 September 1996, requested review under the Discrimination Review Exercise (DRE) on the grounds that her Fund career had been adversely affected by discrimination based on profession, gender and age, which she contended had affected the grading of her position and culminated in the abolition of her post. DRE was a special, one-time review of cases of alleged discrimination that were filed with the Director of Administration during a narrow time frame, between 28 August and 30 September 1996. DRE had been initiated by the Fund to investigate and remedy, through an alternative dispute resolution mechanism, instances of past discrimination that had adversely affected the careers of Fund staff.

The conclusion reached by the team that had conducted the DRE review was that there was no evidence to support the allegation that the grading of the Applicant's position or the abolition of her post was influenced by factors of discrimination. Thereupon, the Applicant, by letter dated 27 January 1998, requested the Director of Administration to conduct a review of the decision. After the Director of Administration, on 8 May 1998, advised the Applicant that she fully concurred with the review team's recommendation, the Applicant brought the matter before the Fund's Grievance Committee, which subsequently concluded that the Applicant had failed to show that the findings and conclusions of the discrimination review team (and their affirmation by the Director of Administration) were arbitrary, capricious or discriminatory, or were procedurally defective in a manner that substantially affected the outcome. The Fund management accepted the Committee's recommendation that her claims be denied on 18 April 2001. However, it was the 8 May 1998 decision of the Director of Administration that was now before the Tribunal.

In its consideration of the case, the Tribunal addressed the question of the scope of its review of the case: (1) a de novo review of the merits of the Applicant's claims of discrimination, which she contended were not fully

and fairly examined under the DRE process; or (2) as the Respondent contended, a review that was limited to the fairness of the conduct of the DRE process itself. The Respondent had argued that a review of the underlying claims by the Tribunal would not be appropriate because the Applicant had failed to raise these claims in a timely manner under the appropriate administrative review procedures (General Administrative Order No. 31), but that the Fund could legitimately create an alternative review process to consider otherwise time-barred claims, such as the DRE process.

In the earlier case of Ms. "Y", Judgement No. 1998-1, the Tribunal had emphasized that the ad hoc review had not conferred new rights, and had not replicated or replaced the grievance procedure. It had squarely rejected any suggestion that because Ms. "Y" 's allegations of discrimination had been subject to DRE, they could be reviewed by the Tribunal as if they had been pursued on a timely basis through Order No. 31.

The Tribunal also recalled the value of timely administrative review to the reliability of later adjudication by the Tribunal. International administrative tribunals had emphasized the importance not only of the exhaustion of administrative remedies but also that the process be pursued in a timely manner.

At the same time, since the Applicant challenged the 8 May 1998 decision of the Director of Administration upholding the conclusion of DRE that the Applicant's career had not been adversely affected by discrimination, the Tribunal was of the view that examination of that conclusion necessarily entailed some consideration of whether the Applicant's career had suffered discrimination. That consideration, the Tribunal explained, could be distinguished from the de novo examination by the Tribunal of the underlying claims of the Applicant.

The Applicant had complained that the DRE process generally lacked many of the attributes of a formal legal proceeding, in particular, no written records of proceedings, which she contended had not resulted in a meaningful review of the DRE team's investigation of her claims. The Respondent, on the other hand, had argued that the DRE process had been designed for the benefit of staff to expedite the remedying of past discrimination, free from the constraints of formal adversary proceedings.

In considering the matter, the Tribunal examined the issue of whether it was within the Fund's discretionary authority to fashion such an alternative dispute resolution mechanism to serve the needs of the Fund and its staff. The Tribunal looked to article III of its Statute, which instructed the Tribunal to "apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts". Furthermore, the Tribunal noted that the commentary to the Statute suggested that a high degree of deference is to be accorded to the Fund's policymaking. The Tribunal also recalled World Bank Administrative Tribunal decision No. 1 (1981), *de Merode*, in which was elaborated

a standard for reviewing the exercise of the authority of an international organization to make changes to the terms or conditions of employment:

> "The Bank would abuse its discretion if it were to adopt such changes for reasons alien to the proper functioning of the organization and to its duty to ensure that it has a staff possessing 'the highest standards of efficiency and of technical competence'. Changes must be based on a proper consideration of relevant facts. They must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives. They must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff. In this respect, the care with which a reform has been studied and the conditions attached to a change are to be taken into account by the Tribunal."

Having examined all of the above, the Tribunal concluded that the record supported the conclusion that DRE was a good-faith effort on the part of the Fund, perhaps unprecedented among international organizations, to resolve lingering allegations of past discrimination and to remedy the adverse effects of discrimination on the careers of aggrieved staff members. The Tribunal noted that, according to the Fund, approximately 70 staff members availed themselves of these procedures, with half of these individuals receiving some form of relief.

While the Respondent's decision to afford alternative review procedures to aggrieved staff members (including those whose legal rights may have expired) was entitled to a high degree of deference on review, the conduct of the alternative dispute resolution mechanism as applied in individual cases was itself subject to review for abuse of discretion. In this regard, the Tribunal recalled a relevant portion of the commentary to the Tribunal's Statute:

> "… with respect to review of individual decisions involving the exercise of managerial discretion, the case law has emphasized that discretionary decisions cannot be overturned unless they are shown to be arbitrary, capricious, discriminatory, improperly motivated, based on an error of law or fact, or carried out in violation of fair and reasonable procedures."

The Tribunal further recalled that the World Bank Administrative Tribunal had stressed that the applicant carried the burden of proof in such cases (*Iona Sebastian (No. 2)* v. *IBRD*, World Bank Administrative Tribunal decision No. 57 (1988)), and, as the Tribunal observed in an earlier judgement, in reviewing a decision for abuse of discretion, "[i]nternational administrative tribunals have emphasized the importance of observance by an organization of its procedural rules. …" (*Mr. M. D'Aoust, Applicant* v. *International Monetary Fund, Respondent*, International Monetary Fund Administrative Tribunal Judgement No. 1996-1 (2 April 1996).)

In examining whether or not there had been an abuse of discretion in the Applicant's individual case, the Tribunal concluded that the essential steps for the DRE review, as set forth in the memorandums to staff of 28 August 1996 and 13 January 1997, which contained the procedures under which DRE would operate, were taken in the Applicant's case, as corroborated by the review team's confidential case report.

The Tribunal also addressed several errors made by the DRE team in examining her claims, as alleged by the Applicant. Regarding the claim that the team had failed to interview approximately two thirds of the witnesses she had suggested, the Tribunal noted the record, including the testimony of the senior Administration Department official who described the rationale for the review team's selection of persons to interview in Ms. "Y" 's case, as well as comparing the selection of witnesses in Ms. "Y" 's case with the examination of other cases under DRE. The Tribunal concluded that the procedures applied to Ms. "Y" 's case were consistent with the procedures set for DRE and with those applied by the DRE team in other cases.

The Tribunal further considered whether the conclusions of the DRE team were reasonably supported by the evidence, and not arbitrary or capricious. For example, a decision may be set aside if it rested on an error of fact or of law, or if some essential fact had been overlooked, or if clearly mistaken conclusions had been drawn from the evidence (*In re Durand-Smet (No. 4)*, International Labour Organization Administrative Tribunal Judgement No. 2040 (2000)).

Moreover, the Tribunal noted that its review was limited by the rule that it could not substitute its judgement for that of the competent organ. The Tribunal further noted that the degree of its review was necessarily dictated by the nature of the process being reviewed. In the present case, as observed by the Tribunal, the review was governed not only by its deference to those decision makers competent to take the decision, but also by the fact that the applicable procedures were quite informal and did not provide for any contemporaneous record of proceedings. Therefore, the measure of the review undertaken by the Tribunal in considering the fairness of the DRE process as applied in the case of Ms. "Y" was clearly distinguishable from the type of review that would be entertained, for example, by an appellate court reviewing trial court proceedings for error. Nonetheless, after consideration of all the evidence in the case, the Tribunal concluded that the conclusions of the DRE team (and their ratification by the Director of Administration) were reasonably supported by the evidence adduced in their investigation of Ms. "Y" 's claims.

Based on the above, the Tribunal unanimously decided that the application of Ms. "Y" should be denied.

[1] In view of the large number of judgements that were rendered in 2002 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 Tribunals, namely, judgements Nos. 1042 to 1079 of the United Nations Administrative Tribunal; judgements Nos. 2119 to 2149 of the Administrative Tribunal of the International Labour Organization; decisions Nos. 260 to 291 of the World Bank Administrative Tribunal; and judgements Nos. 2002-1 to 2002-3 of the Administrative Tribunal of the International Monetary Fund, see, respectively, documents AT/DEC/1042 to AT/DEC/1079; *Judgements of the Administrative Tribunal of the International Labour Organization: 93rd Ordinary Session*; *World Bank Administrative Tribunal Reports, 2002*; and *Administrative Tribunal of the International Monetary Fund, Judgement Nos. 2002-1 to 2002-3*.

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

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

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

[3] Mayer Gabay, President; Kevin Haugh, Vice-President; and Omer Yousif Bireedo, Member.

[4] Mayer Gabay, President; and Omer Yousif Bireedo and Brigitte Stern, Members.

[5] Mayer Gabay, President; and Marsha A. Echols and Omer Yousif Bireedo, Members.

[6] Mayer Gabay, President; and Marsha A. Echols and Brigitte Stern, Members.

[7] Julio Barboza, Vice-President; and Marsha A. Echols and Spyridon Flogaitis, Members.

[8] Ibid.

[9] The Administrative Tribunal of the International Labour Organization is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the staff regulations of the International Labour Organization and of the other international organizations that have recognized the competence of the Tribunal: International Labour Organization, including the International Training Centre; World Health Organization, including the Pan American Health Organization; United Nations Educational, Scientific and Cultural Organization; International Telecommunication Union; World Meteorological Organization; Food and Agriculture Organization of the United Na-

tions, including the World Food Programme; 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; International Plant Genetic Resources Institute; International Institute for Democracy and Electoral Assistance; International Criminal Court; International Olive Oil Council; Advisory Centre on WTO Law; and African, Caribbean and Pacific Group of States. 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.

[10] Michel Gentot, President; and James K. Hugessen and Flerida Ruth P. Romero, judges.

[11] Michel Gentot, President; and Seydou Ba and James K. Hugessen, judges.

[12] Michel Gentot, President; and Jean-François Egli and Hildegard Rondon de Sanso, judges.

[13] Michel Gentot, President; and Seydou Ba and James K. Hugessen, judges.

[14] Michel Gentot, President; and James K. Hugessen and Flerida Ruth P. Romero, judges.

[15] Michel Gentot, President; and Seydou Ba and James K. Hugessen, judges.

[16] 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 designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan.

[17] Thio Su Mien, a Vice-President as President; Bola A. Ajibola, a Vice-President; and Elizabeth Evatt and Jan Paulsson, judges

[18] Thio Su Mien and Bola A. Ajibola, Vice-Presidents; and A. Kamal Abul-Magd, Robert A. Gorman, Elizabeth Evatt and Jan Paulsson, judges.

[19] 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.

[20] Stephen M. Schwebel, President; and Nisuke Ando and Michel Gentot, associate judges.