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UNITED NATIONS JURIDICAL YEARBOOK

2003

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Chapter V[1]

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

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

1. Judgement No. 1102 (21 July 2003): Hijaz v. Commissioner-General of the United Nations Relief Works Agency for Palestine Refugees in the Near East[3]

Terms of employment—Resignation—Abandonment of post—Settlement negotiations

On 27 January 1998, the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) sent the Applicant a letter of appointment for the Grade 16 post of Personnel Officer (I) at the UNRWA International Personnel Section in Gaza. The offer was for a one-year appointment, but according to the letter the contract

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[1] In view of the large number of judgements which were rendered in 2003 by administrative tribunals of the United Nations and related intergovernmental organizations, only those judgements which are of general interest and/or set out a significant point of United Nations administrative law have been summarized in the present edition of the *Yearbook*. For the integral text of the complete series of judgements rendered by the tribunals, namely, Judgements Nos. 1101 to 1163 of the United Nations Administrative Tribunal, Judgements Nos. 2168 to 2270 of the Administrative Tribunal of the International Labour Organization, Decisions Nos. 292 to 308 of the World Bank Administrative Tribunal, and Judgements Nos. 2003–1 to 2003–2 of the International Monetary Fund Administrative Tribunal, see, respectively, documents AT/DEC/1101 to AT/DEC/1163; *Judgements of the Administrative Tribunal of the International Labour Organization: 94th and 95th Ordinary Sessions; World Bank Administrative Tribunal Reports, 2003;* and *International Monetary Fund Administrative Tribunal Reports, Judgements Nos. 2003–1 to 2003–2.*

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

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

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

[3] Kevin Haugh, Vice-President, presiding; and Omer Yousif Bireedo and Jacqueline R. Scott, Members.

would be extended for another year, subject to satisfactory performance. The letter advised the Applicant that his appointment was subject to the Area Staff Regulations and Rules. On 3 February, the Applicant accepted the offer and, on 1 March, he entered the service of UNRWA. On 19 March, however, the Applicant signed a fixed-term "Category X" letter of appointment, with effect from 1 March, which contained significantly different provisions. On 12 July, the Applicant was given an overall rating of "[a] very good performance" in his Performance Evaluation Report (PER).

On 24 July 1998, the International Criminal Tribunal for Rwanda (ICTR) advised UNRWA that it would be interested in the Applicant's services under a fixed-term appointment for an initial period of one year, on the understanding that UNRWA would release him on secondment. On 6 August, the Applicant advised ICTR that it was not UNRWA's policy to release staff members on secondment, but that he was "willing to resign" in order to take up the appointment. On 20 October, the Applicant indicated to the Deputy Commissioner-General that although he had received an offer of employment from ICTR, he would prefer to stay with UNRWA in a professional post. The Applicant requested his assistance in this regard.

On 14 January 1999, the Commissioner-General approved the restructuring of the Human Resources Division, which resulted in the abolition of the Applicant's post. On 27 January, the Applicant was advised that his fixed-term appointment would not be extended beyond its expiration on 28 February. On 31 January, the Applicant requested review of this decision.

On 4 February 1999, the Applicant advised UNRWA that ICTR had again made him an offer of employment. He requested to be released on secondment and asked for three days of annual leave. The Director of Administration and Finance, Gaza, responded on 7 February, accepting his "resignation . . . as . . . requested" but noting that secondment could not be approved because the Applicant's post was being deleted. On 8 February, the Applicant replied that he had not submitted a resignation, and requested administrative review of the decisions to terminate his appointment and to deny his request for secondment.

On 12 February 1999, the Applicant joined ICTR. On 15 February, the Director of Administration and Finance, Gaza, wrote to the Applicant, confirming "acceptance of [his] resignation" and noting that this was "definitively in [his] best interest as compared to abandonment of post." On 6 April, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

On 14 July 1999, the Applicant was offered three months' base salary in lieu of provisional redundancy and a termination indemnity, on the condition that his appeal was withdrawn. The Applicant rejected this offer.

In its report of 23 July 2000, the JAB found that the decision to consider the Applicant's request for secondment as a resignation was not well-founded. Further, it found that, in deleting the Applicant's post, UNRWA had failed to follow the provisions of Personnel Directive A/9. However, the JAB was of the opinion that in arranging to travel to Tanzania while still working for UNRWA, the Applicant had acted hastily and that he should have reported back for duty after his annual leave to prove that he did not intend to abandon his post. The JAB ultimately concluded that despite its irregularities, the Administration's decision had been taken without prejudice and recommended that the case be rejected. It noted, however, that it felt that the Applicant be compensated under staff rule 109.11. On 5 September, the Applicant was informed that the Commissioner-General had accepted

the Board's recommendation that the appeal should be dismissed. He was advised that, in abandoning his post, he had abandoned any entitlement to compensation he might have had, and that the settlement he had since refused had been at least equal to the amount he might have received under rule 109.11 had he not abandoned his post. UNRWA had thus determined that no compensation should be paid. On 11 April 2001, the Applicant filed his application with the Tribunal.

In its consideration of the case, the Tribunal held that the terms of the Applicant's appointment were indisputably those offered to him by the Agency in its letter of 27 January 1998, as those terms were the only ones in existence on 1 March when the Applicant entered into service. That letter had provided that, subject to satisfactory performance, the Applicant's appointment would be extended for a second year. As his performance had at all times been satisfactory, "the Applicant effectively acquired the right to a two-year term of employment commencing on 1 March 1998 and expiring on 28 February 2000, unless otherwise lawfully terminated." The Tribunal took note of the fact that the terms of the "Category X" letter of appointment were disadvantageous to the Applicant when compared with the those contained in the letter of 27 January, and registered its "significant doubts as to the legality or efficacy of what may have been a unilateral alteration of the original terms on which the Applicant was appointed," the Tribunal being "far from satisfied that the Applicant had voluntarily and effectively renounced or surrendered the valuable rights that he had acquired when he accepted the original offer of employment."

With respect to the decision to treat the Applicant's departure for ICTR as resignation of his position, the Tribunal accepted that UNRWA had categorized the departure as such in good faith and in what it believed to be the Applicant's best interests. Whilst the Tribunal was satisfied that the use of the term resignation had not been legally justified, it held that "it did no wrong or injustice to the Applicant, nor does it give rise to grounds that would justify an award of damages or other compensation."

However, having determined that the Applicant had, in effect, a two-year contract, the Tribunal held that UNRWA's letter of 27 January 1999 had not accurately addressed the Applicant's legal situation, as it had stated erroneously that his contract was due to expire on 28 February 1999. As that letter had spurred the Applicant into seeking employment with ICTR, the Tribunal found that the Respondent could not reasonably argue that he was in breach of his contractual obligations or guilty of abandonment of post. Indeed, the Tribunal stated its opinion that "the Applicant made an eminently sensible and proper decision in again seeking leave to take up the ICTR position on secondment, and knowing that this would be declined, in taking it notwithstanding that approval for secondment would not be forthcoming [he] did no more than fulfil his duty to mitigate his loss." Accordingly, the Tribunal rejected the Respondent's submission that the Applicant had constructively resigned, abandoned his post or otherwise breached his contract with UNRWA.

The Tribunal took note of the Respondent's settlement offer but deemed the sum offered to be insufficient compensation "for the harm inflicted on the Applicant arising from the confusion created by the terms of his employment and the error made by the Administration as to when the contract, as per the terms of the original offer of appointment, expired." As a result, the Tribunal awarded the Applicant compensation of seven months' net base salary.

The Tribunal took the opportunity to address the matter of settlement which it stated "should always be welcomed and never discouraged," having benefits for both the parties

and the United Nation's internal justice system. That said, the Tribunal declared that "for the future, it proposes to consider that settlement proposals falling short of unqualified admissions of fact are to be presumed to have been made without prejudice and should not be disclosed to JABs. . . or other such bodies or to the Tribunal, save with the expressed agreement of both parties."

2. Judgement No. 1103 (21 July 2003): Dilleyta v. Secretary-General of the United Nations[4]

Discretion of the Secretary-General in disciplinary cases—Scrutiny of the Tribunal—Effect of a prima facie *case—Burden of proof in claiming prejudice*

The Applicant entered the service of UNICEF at the GS-6 level on 1 March 1989. His contract was subsequently extended and, on 1 January 1993, he was promoted to the National Officer category. At the time of the events which gave rise to his application, he held the position of Communication Officer.

On 29 March 1999, the Applicant was informed that the preliminary findings of an audit being conducted in the UNICEF office in Djibouti suggested his involvement in serious irregularities. He was placed on suspension with pay pending the completion of the investigation.

According to the subsequent Audit Report, the Applicant had certified an invoice for 320,000 Djibouti francs (DF) for catering services obtained from a local bakery for the celebration of the Day of the Child, which took place on 22 November 1998. As the procurement action exceeded US$500, it required a purchase order: such an order was not found and, thus, the matter was investigated. The investigators met with the owner of the bakery who indicated that the invoice was false and produced a copy of the bakery's original invoice in the amount of DF38,000. The cancelled cheque had been "de-crossed" by the Applicant and endorsed to a UNICEF driver for cash. The driver admitted having cashed the cheque and indicated that he had paid the bakery DF38,000, paid another supplier for drinks, and had kept the rest of the money.

The Audit Report related another incident regarding two invoices which the Applicant had certified for payment on 26 January 1995. The first invoice, for DF330,000, was printed on Ministry of Health letterhead, but did not show the name and title of the government official requesting payment and bore neither a stamp nor a legible signature. The second invoice, for DF215,000, appeared to be computer-generated and indicated only the names of two alleged suppliers. A hand-written note requesting that the cheques be made payable "to bearer" and signed by the Applicant was found and, upon review of the cancelled cheques, it was noted that both had been cashed by the Applicant's wife.

On 9 June 1999, the Applicant was provided with a copy of the Audit Report and formally charged with:

(i) misappropriation of resources, acting recklessly in certifying payments, making false certifications and wilfully disregarding supply procedures; and

(ii) violation of procedures when instructing that two cheques, which constituted payment for services UNICEF had committed to fund and the Applicant had certified, be issued to bearer.

[4] Mayer Gabay, First Vice-President, presiding; Kevin Haugh, Second Vice-President; and Spyridon Flogaitis, Member.

The Applicant was informed that his actions represented a clear violation of the highest standards of integrity expected of international civil servants and that it constituted serious misconduct. On 11 July, the Applicant responded to the charges, asserting his innocence and requesting that his suspension with pay be lifted.

On 23 November 1999, the Applicant was informed that the Executive Director, UNICEF, had decided to summarily dismiss him. On 12 January 2000, he requested administrative review of this decision and, on 31 May, he was informed that his request had been referred to an *ad hoc* Joint Disciplinary Committee (JDC).

In its report of 10 January 2001, the JDC concluded that the Applicant "was responsible for a reckless certification, a false certification and a wilful disregard of supply procedures." The JDC noted that between 1995 and 1999, "the UNICEF Office appeared to be operating under frequently absent and poor management, with a lack of control, structure and planning that clearly impacted on the performance of the entire Office. . . . The responsibility for leaving [the Applicant] in charge, for poor management, and the lack of oversight and accountability for basic UNICEF functions surely extends upward and to others." Having concluded that misconduct charges were appropriate for both the 1995 and 1999 incidents and that due process had been regarded, the JDC nonetheless questioned whether separation from service, with or without notice or compensation in lieu of notice, was an appropriate disciplinary measure given the Applicant's length of service and the possible aggravating circumstance of the office situation, which had been beyond his responsibility. The JDC recommended that the Executive Director consider whether these aggravating circumstances contributed to the Applicant's misconduct, thus justifying a less severe disciplinary measure than summary dismissal. On 9 March, the Applicant was informed that the Executive Director, UNICEF, had decided to maintain his summary dismissal. On 10 June, the Applicant filed his application with the Tribunal.

In its consideration of the case, the Tribunal recalled its longstanding jurisprudence that the Secretary-General has broad discretion with regard to disciplinary matters, which includes the determination of what constitutes "serious misconduct" under the Staff Regulations and Rules and the proper punishment for such conduct. The Tribunal noted, however, that it has competence to review the Secretary-General's exercise of these discretionary powers. The Tribunal cited the test of scrutiny it developed in Judgement No. 941, *Kiwanuka* (1999).

The Tribunal concurred with the JDC that the Applicant's actions constituted misconduct rather than unsatisfactory performance, which it defined as "conduct ordinarily characterized as arising out of innate incapacity or inefficiency." The Tribunal accepted that the Respondent had established a *prima facie* case of misconduct before the JDC, but rejected the Respondent's contention that this shifted the burden of proof to the Applicant.

The Tribunal found that the Applicant had failed to present any convincing explanation for his actions which, in any event, could not be excused by time constraints or by lack of knowledge of the Financial Rules as "[c]ommon sense and integrity would suggest avoiding such actions." It found that the decision to summarily dismiss the Applicant was a proper exercise of the Executive Director's authority and did not violate the Applicant's rights. The Tribunal rejected the Applicant's contention that there was cultural bias implicit in the charges, stating that "whilst the environment in which the UNICEF Djibouti Office was operating indeed left something to be desired," the Applicant had failed to discharge his burden of proof and establish any bias against him.

Accordingly, the application was rejected in its entirety.

3. Judgement No. 1113 (24 July 2003): Janssen v. Secretary-General of the United Nations[5]

Discretion of the Secretary-General in promotion matters—Non-promotion—Procedural violations—Equal pay for equal work—Additional compensation for moral injury and delays

The Applicant entered the service of the United Nations Conference on Trade and Development (UNCTAD), at the G-3 level on 10 September 1973. His contract was subsequently extended and, on 1 June 1979, he received a permanent appointment. At the time of the events which gave rise to his application, he held the P-2 level position of Chief, Governmental Publications Unit, Acquisitions and Cataloguing Section, Conference Services Division (CSD)/Library, United Nations Office at Geneva.

On 25 January 1985, the classification of the post of Chief, Governmental Publications Unit, had been approved at the P-3 level, but budget approval was never received. The Applicant made a lateral move to the post at the P-2 level on 1 September 1989. On 14 July 1992, he was informed that although the post had been classified at the P-3 level, it remained budgeted at the P-2 level and that no P-3 post in the Library was available against which a special post allowance could be paid.

On 3 August 1995, the Applicant requested that "the administrative decision approving the P-3 level . . . be retroactively implemented as per 1 September 1989." On 12 April 1996, the Applicant asked the Personnel Service, United Nations Office at Geneva, for a reply to his letter of 3 August, "to enable [him], if necessary, to lodge an appeal." On 15 July, the Chief, Personnel Service, advised the Director, CSD, that an urgent solution to this problem should be identified, in order to avoid Joint Appeals Board (JAB) and/or Tribunal procedures. In his response of 27 August, the Director, CSD, advised that the Applicant's post had been abolished as of 1 January 1996 and that the Applicant had "stopped exercising his former functions."

On 14 October 1996, the Chief, Personnel Service, requested a new job description for the post, as well as for five others which had also been classified at a level higher than their budgetary level.

On 12 February 1997, the Chief, Personnel Service, urged the Office of Human Resources Management to accommodate the Applicant without further delay. The Assistant Secretary-General for Human Resources Management subsequently advised the Director, CSD, that "[a]cceptable solutions are available to provide a post for [the Applicant] at the appropriate level and such arrangements should be enacted as soon as possible." On 21 November, however, the Director, CSD, requested assistance in commencing the administrative procedures required to terminate the Applicant's contract as no solution had been found. On 19 December, the Chief, Personnel Service, replied that as the Applicant was not prepared to accept an agreed termination, a "suitable placement" had to be found for him.

On 11 August 1998, the Applicant requested permission to submit his case directly to the Tribunal. On 16 September, his request was refused on the ground that there were factual issues yet to be established in his case. Accordingly, his request was treated as one for administrative review.

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[5] Julio Barboza, President; Mayer Gabay, Vice-President; and Brigitte Stern, Member.

Effective 1 January 1999, the Applicant was promoted to the P-3 level with the functional title of Librarian. On 28 January, he lodged an appeal with the JAB.

In its report of 22 August 2000, the JAB concluded that "on the basis of the principle of equal pay for equal work the Respondent was under an obligation to regularize the. . . discrepancy between the level of classification and budget of the [Applicant's] post." The JAB recommended that he be paid "the difference in salary, allowances and other entitlements at the P-3 level, at the appropriate step, and the lower grade post he occupied, from 1 September 1989 until his promotion to the P-3 level on 31 December 1998." On 4 June 2001, the Applicant was informed that the Secretary-General had not accepted the Board's recommendation for compensation, but that he had agreed that the Administration was obligated to find a solution to the discrepancy between the level of the Applicant's functions and the budgetary level of the post in a timely manner and that, as a timely solution had not been found, the Secretary-General had decided to compensate the Applicant in the amount of three months' net base salary. On 23 July, the Applicant filed his application with the Tribunal.

In its consideration of the case, the Tribunal recalled that the broad discretionary power of the Secretary-General to promote qualified staff is governed by the strict application of procedural rules and regulations, and has been limited in cases of abuse of authority, procedural or substantive errors or irregularities or violations of due process rights. The Tribunal concluded that the Applicant was unquestionably entitled to equal pay for equal work and had sustained injury based on the commission by the Respondent of serious procedural mistakes. It found that the Respondent's decision not to promote the Applicant had violated the latter's basic rights. The Tribunal awarded the Applicant the difference in salary, allowances and other entitlements between his actual level and grade and the appropriate grade, i.e., at the P-3 level, from 1 September 1989 until 31 December 1998 as well as the actual equivalent of the loss of pension rights as of September 1989. In addition, the Tribunal awarded the Applicant compensation of six months' net base salary for the delays and moral injury he had suffered due to the Respondent's failure to properly implement the classification of his post.

4. Judgement No. 1122 (24 July 2003): Lopes Braga v. Secretary-General of the United Nations[6]

Non-promotion—Rights of due process—Prejudice and discrimination

The Applicant entered the service of the International Trade Centre (ITC) at the L-3 level on 3 September 1978. His contract was subsequently extended and, on 1 January 1991, he received a permanent appointment. At the time of the events which gave rise to his application, he held the P-4 position of Trade Promotion Officer.

On 30 December 1997, the Applicant applied for the L-5 level post of Senior Adviser on the Institutional Aspects of Trade Promotion. On 20 July 1998, he was informed that his application had not been retained. On 6 November 1998, the Applicant applied for the P-5 level post of Chief, Office for Asia-Pacific, Latin America and the Caribbean (OAPLAC). According to the vacancy announcement, the position required an "undergraduate degree preferably at the advanced level." On 29 January 1999, he applied for the P-5 level post of Chief, Trade Research and Business Intelligence, Division of Product and Market

[6] Mayer Gabay, First Vice-President; and Spyridon Flogaitis and Jacqueline R. Scott, Members.

Development, Market Analysis Section (MAS). No interviews were conducted and another staff member was assigned to the post as Officer-in-Charge for one month.

On 9 March 1999, the Review Panel short-listed five candidates, including the Applicant, for the post of Chief, OAPLAC. At its 19 March meeting, the Review Panel made recommendations for both the OAPLAC and MAS positions: for the OAPLAC post, the Panel recommended a candidate who did not possess an undergraduate degree; for the MAS post, it endorsed the staff member who had been appointed as Officer-in-Charge. The Joint Appointments and Promotion Board endorsed the Review Panel's recommendations on 24 March and, on 26 March, the Applicant was informed that his applications had not been retained.

On 24 May 1999, the Applicant requested administrative review of these decisions, alleging that a "pattern of discrimination" existed against him. Thereafter, the Applicant applied for the L-5 level post of Senior Adviser on Multilateral Trading System, Functional Advisory Services Section, Division of Trade Support Services. On 9 December 1999, he was informed that his application had not been retained.

On 9 August 2000, the Applicant lodged an appeal with the Joint Appeals Board (JAB). In its report of 17 May 2001, the JAB found that any claims regarding the decision not to promote the Applicant to the post of Senior Adviser on the Institutional Aspects of Trade Promotion were time-barred and that the decision not to promote the Applicant to the post of Senior Adviser on Multilateral Trading System had not been the subject of a request for administrative review. The JAB found that the appeal regarding the remaining two administrative decisions was receivable but "[o]n the basis of the evidence and information available to it, [it was] unable to conclude that the [Applicant] was not properly and fairly considered." On 20 June 2001, the Applicant was informed that the Secretary-General accepted the JAB's findings and conclusions. On 5 December, he filed his application with the Tribunal.

In its consideration of the case, the Tribunal agreed with the JAB's conclusion that the Applicant's claims relating to the post of Senior Advisor on Multilateral Trading System were not receivable as he had not requested administrative review of the decision and, therefore, a constitutive element of the claim was lacking.

On the merits of the case, the Tribunal noted that its task was to determine whether the Respondent's decisions were a proper exercise of his discretion in matters of appointment and promotion or whether the decisions had been vitiated by prejudice or other extraneous factors, including procedural irregularities, which amounted to the Applicant being denied full and fair consideration for the posts.

Insofar as the position of Chief, OAPLAC, was concerned, the Applicant asserted that the procedures employed in filling the post were flawed and that the successful candidate did not possess an undergraduate degree, which was listed in the vacancy announcement as a requirement of the position. The Tribunal found that "the Respondent's failure to follow its own procedures; i.e., to apply objective criteria of evaluation in a consistent manner, was a violation of the Applicant's right to be fully and fairly considered for the post and irreparably harmed [him]." It rejected the Respondent's assertion that academic qualifications were only one factor in the decision-making process, finding that "[b]y advertising the post. . . as one that required an undergraduate degree, the Respondent made the degree a pre-requisite to selection for the post and cannot now be heard to argue that the possession of the degree was but one factor in its determination. To allow otherwise harms

not only the Applicant, who was misled and not fairly considered by objective criteria for the position, but also harms all those putative applicants who did not apply because they did not possess an undergraduate degree." The Tribunal concluded that the Respondent's failure to adhere to his own rules represented a procedural irregularity amounting to a violation of the Applicant's rights of due process. Accordingly, the Tribunal awarded the Applicant compensation in the amount of six months' net base salary "for the violation of his due process rights stemming from procedural irregularities engaged in by the Respondent."

Insofar as the MAS position was concerned, the Tribunal found the Respondent's decision to temporarily fill the post with a staff member and then to permanently fill the post with the same staff member was within the purview of his authority. It held that the Applicant had "provided no evidence to support his allegation that he suffered unfair competition."

Finally, the Tribunal found that the Applicant had failed to discharge his burden of proof regarding his claims that the Respondent's decisions were motivated by prejudice, discrimination or other improper motive.

5. Judgement No. 1123 (25 July 2003): Alok v. Secretary-General of the United Nations[7]

Distinction between poor performance and misconduct—Discretion of the Secretary-General in disciplinary cases—Proportionality of sanctions—Due process

The Applicant entered the service of the United Nations Population Fund (UNFPA) at the P-5 level on 7 March 1990. His contract was subsequently extended and, on 7 March 1994, he received a permanent appointment. At the time of the events which gave rise to his application, the Applicant held the D-1 position of UNFPA Representative, Nepal.

In 1997, the Applicant experienced severe neurological problems. In early 1998, he was diagnosed as suffering from Complex Partial Seizure, thyroid deficiency and pituitary dysfunction. As a result, he sought medical treatment in New York and India. In 1998 and 1999, he repeatedly requested transfer to New York to enable him to obtain higher quality medical services than were available in Nepal, but his requests were refused. He then requested early separation. UNFPA made a formal offer of such on 30 September 1999, but the agreement was never concluded.

On 8 October 1999, a group of the Applicant's subordinates wrote to the Chief, Office of Oversight and Evaluation, UNFPA, accusing the Applicant of breaching financial regulations and rules, and of failing to comply with the procurement guidelines applicable to local construction projects. On 10 November, a special audit team was constituted "to perform auditing and forensic work on the procurement activities, including construction works and other procurement activities" undertaken by the UNFPA Office in Nepal. On 3 December, the team interviewed the Applicant and he was that same day placed on special leave with full pay, pending a full investigation. On 18 December, the Applicant was provided with a copy of the special audit team's report, which concluded that his actions "constitute[d] conclusive evidence of serious misconduct that. . . resulted in significant financial loss to the Organization and widespread morale issues in the office." The report further informed him that he was being suspended without pay.

[7] Kevin Haugh, Vice-President; and Omer Yousif Bireedo and Jacqueline R. Scott, Members.

On 10 April 2000, the Applicant was presented with a number of charges and informed that they constituted serious misconduct. The applicable sanction for such misconduct ranged from separation from service to summary dismissal, in addition to recovery of losses suffered by UNFPA. The Applicant submitted a detailed response to the charges on 25 April, reiterating previous complaints that his rights of due process had been systematically violated.

The case was referred to an Ad Hoc Disciplinary Committee (AHDC), which submitted its report on 9 May 2000. It found the Applicant guilty of a number of counts of gross negligence as well as of one count each of negligence and of committing an "injudicious act." However, the AHDC accepted that his medical condition in early 1998 and the lack of credibility of the statements made, and evidence provided, by his subordinates were mitigating factors. It recommended that he be separated from service with compensation in lieu of notice and that his period of suspension without pay be converted to suspension with pay. The AHDC also recommended "that stricter adherence to due process be observed by the Administration in future disciplinary cases to ensure that sufficient and credible evidence is obtained from all parties involved before severe administrative steps are taken." On 13 June, the Applicant was informed that the Officer-in-Charge of United Nations Development Programme (UNDP) at Headquarters had decided to separate him from service without notice or compensation in lieu thereof. In view of the mitigating circumstances, the Applicant's suspension without pay was converted to suspension with pay. On 16 March 2001, the Applicant filed his application with the Tribunal.

In its consideration of the case, the Tribunal recognized "a temporal correlation between the declining state of the Applicant's health, including the progression of his neurological symptom, and his inability and failure to perform his duties in an appropriate fashion." It criticized both the AHDC and the Respondent for failing to investigate the extent to which the Applicant's declining performance and his failure to perform his duties might have been attributable to his deteriorating health or to his long absences from his office for medical reasons. The Tribunal characterized this failure as "an extraordinary omission." In the view of the Tribunal, the Applicant's illness should have been considered not only in the context of mitigation but also "in relation to what should have been the pivotal question of whether or not the facts found ought to have been categorized as inadequate performance as a result of illness, rather than as misconduct."

The Tribunal differentiated between poor performance and misconduct, which it defined as "conduct that is either wilful or reckless or irresponsible and which deserves punishment, rather than conduct arising from innate inefficiency or incapacity." It found that if the AHDC and the Respondent had given proper consideration to the extent to which the Applicant's shortcomings might have been attributable to his illness, such shortcomings might have been categorized as performance failures rather than as misconduct. The Tribunal held that even if the Applicant was guilty of misconduct, the sanction imposed was disproportionate in the circumstances of the case.

The Tribunal recalled that it will not interfere with a disciplinary decision unless it is satisfied that it is so disproportionate or unwarranted as to amount to an injustice, but found that the dismissal of the Applicant, given his previously unblemished record and the extent to which his health was compromised, did, in fact, amount to an injustice and an abuse of the Respondent's discretion.

As the Respondent's separation offer had been shelved pending the outcome of the investigation, and as the Tribunal was satisfied that the manner in which the conclusion of misconduct had been reached by the Respondent was erroneous, the Tribunal ordered that the Applicant should receive the offered retirement package, and that his record should be amended to show retirement on the basis of health grounds rather than dismissal.

Finally, the Tribunal registered its concern about "the nature and extent of the lack of supervision, direction and guidance provided by UNFPA Headquarters to the Nepal office and the Applicant" and pointed out that immediate attention was required to rectify the situation.

6. Judgement No. 1131 (25 July 2003): Saavedra v. Secretary-General of the International Civil Aviation Organization[8]

Discretion of the Secretary-General in post-descriptions/promotions—Competence of the Tribunal

The Applicant entered the service of the International Civil Aviation Organization (ICAO), as a Travel Assistant at the G-7 level on 14 September 1981. At the time of the events which gave rise to her application, she had been transferred with her post to the Technical Assistance Bureau, Management Support Office (MGS).

On 28 August 1986, the Applicant requested that her post be re-evaluated and enclosed a list of the duties she performed. The Chief, MGS, endorsed her request the same day. Effective 15 July 1988, the Secretary-General approved the upgrading of the post to the P-2 level and agreed that the Applicant should be appointed at that level.

On 21 March 1996, as part of a larger exercise, a draft post description for the post encumbered by the Applicant was prepared and signed by the Applicant and the Director of the Bureau. The version signed by the Secretary-General on 20 March 1997 contained a number of revisions and, as the Applicant did not agree with those revisions, she refused to sign it. On 21 March, the Applicant requested a personal up-grade to the P-3 level, and on 26 March, she requested that the Secretary-General review her case. On 25 April, the Secretary-General confirmed that the post description he had signed on 20 March was the relevant one. The Applicant lodged an appeal with the Advisory Joint Appeals Board (AJAB) the same day.

In its report of 15 March 2001, the AJAB concluded that the approved Post Description signed by the Secretary-General on 20 March 1997 did not reflect an accurate description of the work performed by the Applicant and that, accordingly, it contained an error in substance. The AJAB recommended that the Applicant be awarded a special post allowance from 20 March 1997 until the date of her retirement as compensation for having been required to work under an inaccurate post description, plus the lesser of her costs or US$2,500. On 10 July 2001, the Secretary-General informed the Applicant that he had rejected the appeal. On 4 October, she filed her application with the Tribunal.

In its consideration of the case, the Tribunal affirmed that neither the AJAB nor the Tribunal itself can substitute its judgement for that of the Administration, which has a large measure of discretion with respect to post classification and job descriptions. The Tribunal noted that its only competence in such matters is to assure that there has been no violation of due process of law, arbitrariness, discrimination or other improper motivation.

[8] Julio Barboza, President; and Omer Yousif Bireedo and Brigitte Stern, Members.

The Tribunal was satisfied that the ultimate responsibility for the issuance of post descriptions belonged to the Secretary-General of ICAO and that it fell within his discretion to accept suggested revisions of the draft description. It found the procedure of revision of the post description entirely regular and not vitiated by improper motivation and concluded that the only valid description of the Applicant's post was that issued by the Secretary-General, whether or not it was to her liking or signed by her. The Tribunal was not persuaded that there had been an error in substance and found that the differences between the descriptions, in particular with regard to supervision of the Applicant's work, were too slight to have any legal significance. The Tribunal expressed its belief that the Applicant's real grievance was not the case before it but rather her belief that, in light of the approved post description, the post had less chance of being reclassified at the P-3 level. The Tribunal pointed out that even with the text the Applicant preferred, reclassification was not certain but depended on the discretion of the Secretary-General and that neither the AJAB nor the Tribunal could substitute its judgement for that of the Secretary-General in this matter.

Accordingly, the application was rejected in its entirety.

7. Judgement No. 1133 (25 July 2003): West v. Secretary-General of the United Nations[9]

Role of Tribunal in medical cases—Sick leave credit for injury or illness incurred while in service—Due process

The Applicant entered the service of the United Nations at the P-2 level on 20 July 1990. Effective 1 July 1992, he received a permanent appointment. At the time of the events which gave rise to his application, he held the P-3 position of Auditor in the Audit and Management Consulting Division, Office of Internal Oversight Services. Whilst on mission in Belize in February 1991, the Applicant was injured in a car accident. The doctor who examined him after the accident reported that he had "sustained multiple contusions, specially to the right shoulder, upper back, rib cage and neck."

The Applicant took 24 days of sick leave immediately following the accident and an additional 6.5 days of sick leave during the remainder of 1991. He thereafter submitted a claim for compensation under Appendix D of the Organization's staff rules (Appendix D) to the Advisory Board on Compensation Claims (ABCC), which recommended on 3 June that his injuries "be considered as attributable to the performance of official duties on behalf of the United Nations." The Secretary-General adopted the ABCC's recommendation the following day.

Between 1991 and 1998, the Applicant underwent physical therapy and chiropractic treatment. He took numerous days of sick leave and provided certificates for his absences. Two of these certificates, dated 29 July 1994 and 7 March 1995, respectively noted the reasons for his absences and treatments as "lower back problems" and "lumbar sprain/strain." On 11 January 1999, the Applicant went on extended sick leave. On 30 June 1999, the Applicant advised the ABCC that his extended sick leave was due to the continuous worsening of his back condition, which had resulted from the 1991 accident. The Applicant requested special sick leave credit in accordance with article 18*(a)* of Appendix D.

On 2 July, the ABCC asked the Medical Services Division (MSD) to advise whether the 1999 sick leave could be considered as being directly related to the Applicant's

[9] Kevin Haugh, Vice-President, presiding; and Spyridon Flogaitis and Jacqueline R. Scott, Members.

service-incurred injuries. MSD responded on 6 August that the sick leave period was "secondary to illness related to the accident." On 1 September, the Applicant was informed that, effective 19 April 1999, he had exhausted his 195 days of fully-paid sick leave and that, in order to maintain full-pay status, his annual leave would have to be combined with his sick leave at half-pay.

On 30 September, the ABCC recommended that the Applicant's request for special sick leave credit be granted (half days only), for a number of days to be determined by MSD. MSD subsequently determined that as the Applicant had taken no sick leave related to the injury between 1995 and January 1999, it could not conclude that the back condition was solely the result of the car accident and it recommended a special sick leave credit for half of the total sick leave period requested by the Applicant.

On 24 November 1999, the Applicant was informed that MSD had determined that he was incapacitated for further service and had recommended to the United Nations Joint Staff Pension Board that he be considered for a disability benefit. On 17 February 2000, MSD wrote to the Applicant requesting updated medical reports. On 18 February, the Applicant was informed that since he had exhausted his sick leave with half-pay as of 31 January 2000, and in accordance with the provisions of ST/AI/1999/12 of 8 November 1999, his salary would be withheld as of February 2000. The Applicant was also to be placed on special leave without pay (SLWOP) pending the outcome of his claim from the ABCC. On 29 February, the Applicant contested this decision, claiming that under the applicable provisions, he should be placed on special leave with half-pay. In response, he was advised that "the decision to withhold [his] salary temporarily was meant to encourage [him] to respond to MSD's letter." The Applicant objected that he had received the letters of 17 and 18 February almost simultaneously.

The Applicant was subsequently placed on special leave with half-pay, as he had requested. On 23 March 2000, the ABCC considered the Applicant's claim for special sick leave credit. It found that there was no medical evidence that the Applicant had suffered chronic pain between 1992 and 1999, and that the sick leave he had taken after 1991 could have been related to a non-service-incurred condition. The ABCC nevertheless recommended that he be granted special sick leave credit for the 30.5 days he had taken in 1991, which it accepted as being directly related to his service-incurred injuries. The Secretary-General adopted this recommendation on 25 April.

On 4 May 2000, the Staff Pension Committee decided not to award the Applicant a disability benefit. On 30 June, MSD determined that the Applicant was fit to return to work. The same day, the Applicant wrote to the Secretary-General, disputing this determination and requesting that a medical board be convened. On 19 July, the Applicant was informed that since he had exhausted all paid leave entitlements, he would be placed on SLWOP as of 24 July if he had not returned to work by that date. If the Medical Board determined that he was incapacitated for active duty, however, he would be retroactively reinstated on half-pay status while his case was re-considered by the Staff Pension Committee. The Applicant did not report for duty on 24 July, and he was consequently placed on SLWOP.

On 1 December 2000, the Applicant was informed that the Medical Board had been convened on 14 November and had unanimously decided that he was not totally disabled. The Board had found no medical cause for his symptoms and had suggested that he be encouraged to return to work as soon as possible. The Applicant was asked to return to work by no later than 18 December and he reported for duty on that date.

On 30 May 2001, the Applicant filed his application with the Tribunal.

On 29 November 2002, the Applicant was informed that the Staff Pension Committee had determined that he was incapacitated for further service and therefore entitled to a disability benefit. He was separated from service on 6 December.

In its consideration of the case, the Tribunal recalled that, having no medical competence, it will not seek to substitute its judgement for that of the administrative bodies charged with making medical decisions but that it can determine whether sufficient evidence exists to support the conclusions reached by those bodies. If sufficient evidence is determined not to exist, the Tribunal will find that it is obligated to set aside any decisions made.

The Tribunal found that the file did not support either the conclusion of the ABCC that there was no medical evidence that the Applicant had suffered chronic pain between 1992 and 1999, or the contention of the Respondent that the Applicant's lower back pain was not attributable to his accident. The Tribunal found that in every medical report, other than the initial one prepared immediately after the accident, injury of some sort was indicated to the Applicant's lumbar or lumbarsacral area, i.e., the lower back. The Tribunal found that the ABCC had relied on an inaccurate factual premise, i.e., that the Applicant "ha[d] no sick leave record related to the 1991 accident for several years until January 1999," when in fact he had had many days of sick leave from 1992 through 1999, at least some of which had been certified for treatment of lower-back or lumbar pain. The Tribunal further found no evidentiary support for the ABCC's conclusion that the cause of the Applicant's back symptoms was the "result of a combination of factors including his underlying psychiatric condition."

The Tribunal held that the Respondent's decision to deny special sick leave credit to the Applicant for the requested period was not supported by the evidence and amounted to an abuse of discretion. Further, it held that the Respondent had failed to follow its own procedures and had, therefore, denied the Applicant's right to due process when it improperly placed him on SLWOP. The Tribunal also condemned the Respondent's inappropriate use of the medical review process "to browbeat the Applicant and to deny him benefits to which he was entitled."

In consequence, the Tribunal ordered the Respondent to credit the Applicant with sick leave credit for the period 11 January 1999 to 4 May 2000 and with the 62.5 days of annual leave he had been forced to use when his sick leave was denied. It awarded the Applicant full pay and entitlements for the period from 22 July to 18 December 2000 as well as US$ 15,000 in compensation for the Respondent's violations of due process and abuse of discretion.

8. Judgement No. 1135 (25 July 2003): Sirois v. Secretary-General of the United Nations[10]

Non-renewal of fixed-term contract—Discretion of the Secretary-General in such matters may be vitiated—Scrutiny of the Tribunal—Due process—Time limits

The Applicant entered the service of the International Criminal Tribunal for Rwanda (ICTR) on a one-year fixed-term appointment as a Legal Translator/Interpreter at the P-4 level in September 1995.

[10] Mayer Gabay, Vice-President, presiding; and Omer Yousif Bireedo and Brigitte Stern, Members.

On 17 July 1996, the Director of Investigations prepared the Applicant's Performance Evaluation Report (PER), giving him 8 "B" and 3 "C" ratings on a scale from "A" to "E," with "A" being the highest. On 12 August, the Chief of Personnel, ICTR, indicated to the Office of Human Resources Management (OHRM) that the Tribunal did not wish to renew the Applicant's contract. The Director of Investigations advised the Chief of Administration on 27 August that this must have been a "misunderstanding," as the Office of the Prosecutor wanted the appointment renewed. On 5 September, the Deputy Prosecutor submitted the Applicant's PER to the Registrar, ICTR, and to OHRM, stating that "I insist that [the Applicant's] contract be extended."

At the request of the Chief of Administration, on 10 September 1996, the Chief of Language Services evaluated the Applicant's performance. He was critical of the Applicant's work as well as of his demeanour, and stated that the Applicant had an attitude problem. On 12 September, the Prosecutor advised the Registrar that the Director of Investigations and the Deputy Prosecutor had indicated that the Applicant's work was excellent, and urged her to petition for a renewal. The Prosecutor noted that, as she had not studied his file, she was not in a position to "comment on any shortcomings," but that "such negative considerations should be carefully weighed against his good work and our pressing needs."

The Registrar responded on 17 September, stating that "the decision not to renew [the Applicant's] contract was. . . made by me as Registrar. . . . I would have wished. . . to discuss with you what is on file and what I. . . personally know about the staff member so that you could have a fuller appreciation of the reasons why I found it difficult to justify retaining [the Applicant's] services." The following day, the Prosecutor replied that she maintained her support of the request for renewal remarking that "[t]his decision must ultimately be founded on the basis of the facts reflected in the file, which is why I did not see the need to discuss with you any matter within your personal knowledge about this staff member."

On 18 September 1996, OHRM advised that "in view of the [Applicant's] fully satisfactory service. . . [he] should be given an opportunity to continue serving the Organization." The Chief of Administration reiterated his opposition to an extension, but OHRM replied that a two-month extension should be given to allow for the completion of a proper PER, as the evaluation provided by the Chief of Language Services would not suffice. On 19 September, the Applicant signed his PER, indicating that he intended to rebut it.

On 1 October 1996, the Applicant was formally notified that his appointment would be extended for two months and that the Officer-in-Charge of Administration had been instructed to prepare a new PER for him. On 27 November, the Applicant separated from service upon the expiration of this extension.

On 5 September 1997, the Applicant requested administrative review of the decision not to renew his fixed-term appointment and the Administration's failure to commence the PER rebuttal procedure. On 8 January 1998, he lodged an appeal with the Joint Appeals Board (JAB) on these points.

In its report of 10 December 1999, the JAB concluded that the Applicant had no right to, or expectation of, renewal and that the facts of the case "offered explanations for non-renewal other than the Registrar's impropriety." As a result, the JAB was not persuaded that the decision had been motivated by prejudice or other extraneous factors. However, it determined that the Registrar and the Chief of Language Services had acted improperly in placing detrimental documents in the Applicant's personnel file without giving him

appropriate notice of such. Accordingly, the JAB recommended that ICTR be compelled to "search its files and remove all documents detrimental to the [Applicant] that were filed without notice to [him]." The JAB rejected certain other matters as being time-barred.

On 18 May 2000, the Applicant was informed that the Secretary-General was in agreement with the JAB's conclusions and recommendation and that ICTR would be requested to remove from all files, including that of the Applicant, material detrimental to him which had been filed or kept without his having been notified of such. On 22 December, the Applicant filed his application with the Tribunal regarding the decision not to renew his fixed-term appointment.

On 4 January 2001, the Rebuttal Panel issued its report on the Applicant's case. It concluded that ICTR had disregarded ST/AI/240 in accepting a PER prepared by someone other than the Applicant's supervisor and in failing to respect the time limits provided for hearing a rebuttal. The Panel recommended that three "B" ratings be raised to "A." On 11 April 2002, the newly appointed Registrar advised the Applicant that he supported the conclusions of the Panel and "sincerely regret[ted] the protracted delay."

In its consideration of the principal substantive matter before it, i.e., the non-renewal of the Applicant's contract, the Tribunal found that the Registrar did not have the necessary authority to make the decision, as authority with respect to personnel matters was not delegated to the Registrar until October 1997, more than a year after the impugned decision was taken. The Tribunal recalled that a staff member who holds a fixed-term contract is not, in general, entitled to expect an extension of his or her contract, as the Administration has the discretionary authority not to renew or extend it. The Tribunal cited Judgements No. 885, *Handelsman* (1998) and No. 1003, *Shasha'a* (2001) in reiterating that the Administration need not justify its decision but, where it does provide such reasoning, it must be supported by the facts.

The Tribunal found that the Registrar had "not only alleged poor performance by the Applicant but [had gone] further and fabricated evidence for his supposed shortcomings." It accepted the Applicant's submission on this issue, finding that "since the Prosecutor [had] wanted objective evidence if she were to agree to the non-renewal of the Applicant's contract, the Registrar, since he had no such facts in the file, had some prepared by the Chief, Language Services." The Tribunal expressed "with the utmost firmness" its condemnation for this course of events, and held that the Applicant was entitled to compensation for both this violation of his right to due process and for "the serious professional, moral and material damage he [had] suffered as a result of the malicious attitudes and arbitrary decisions of the Administration which [had given] rise to violations of his terms of service." The Tribunal concluded that the action by the Registrar was null and void, having been taken *ultra vires* and in a particularly arbitrary manner. Being satisfied that the Applicant would have otherwise been renewed, the Tribunal ordered that the Applicant should be restored to the situation he would have thereby enjoyed.

The Tribunal disagreed with the decision of the JAB that certain of the Applicant's pleas were time-barred, finding that "the circumstances of the present case are sufficiently unusual and exceptional to justify not insisting on unduly strict compliance with the time limits as that would risk depriving United Nations staff members of their rights." It proceeded to consider those pleas, upholding the Applicant's contention that his entry date had been 25 rather than 28 September 1995, and agreeing that he was entitled to home leave and "extended installation grant on the same basis used for other ICTR employees." The

Tribunal was not, however, persuaded by the Applicant's challenge that his recruitment level had been too low.

The Tribunal found that the Applicant's case had "brought to light extremely serious malfunctions in the entire process of the review, by the JAB, of administrative decision-making: these facts are sufficient grounds in themselves for considering that the Applicant was not accorded due process." It also criticised the JAB for including in its report certain defamatory passages which it was ordering removed from the Applicant's file.

In sum, the Tribunal, finding that reinstatement was not practical under the circumstances, ordered the Administration to pay the Applicant compensation in the amount of two years' salary, allowances and other entitlements, including home leave. The Tribunal further ordered that the Applicant be paid for his days of work from 25 to 27 September 1995, an extended installation grant under the same conditions as those applicable to the other staff of ICTR during the same period, and US$5,000 as compensation for the insertion of a defamatory document into his file for publication in the JAB report. The Tribunal further ordered that "all defamatory and forged documents that may be in the Applicant's personnel file be withdrawn and that all favourable items that had been removed from the file be returned to it, and orders the Administration to send written confirmation to the Applicant that it has carried out that task, giving a specific list of the documents concerned, within six months."

9. Judgement No. 1145 (17 November 2003): Tabari v. Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East[11]

Jurisdiction of the Tribunal—Receivability—Role of the Joint Appeals Board and Tribunal

The Applicant entered the service of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA), at the Grade 10, step 1 level on 1 June 1989 at the Lebanon Field Office. On 1 September 2000 the Applicant was promoted to the post of Administrative Officer, Grade 14, in the Department of Education.

On 11 March 1999, the Commissioner-General advised the Area staff members in the Lebanon Field that he had approved a revised salary scale and dependency allowance with effect from 1 March 1999. He explained that, due to a large budget deficit and ongoing austerity measures, Area staff salaries would be increased by varying percentages. On 16 March, the Chairman of the Area Staff Union wrote to the Administration, expressing dissatisfaction with the salary scale. On 1 November, the Agency met with the Inter Staff Union Conference to discuss possible amendment of the Agency's Area staff pay policy.

On 21 February 2000, the Applicant and seven colleagues wrote to the Director of UNRWA Affairs, Lebanon, seeking to appeal against "the current pay policy and results of the last salary surveys." In his response of 24 February, the Deputy Director of UNRWA Affairs, Lebanon, stated that these matters could not be usefully discussed at Field level and suggested that they ask the Area Staff Union to raise these matters with the Inter Staff Union Conference. On 1 March 2000, however, the Applicant and his colleagues submitted an appeal to the Joint Appeals Board (JAB) against the staff salary survey results and pay policy implemented by UNRWA.

[11] Kevin Haugh, Vice-President, presiding; and Spyridon Flogaitis and Jacqueline R. Scott, Members.

In its report of 22 February 2001, the JAB concluded that the appeal was not receivable as the impugned action did not constitute non-observance of the Applicant's letter of appointment within the meaning of Area staff regulation 11.1 (A). On 31 March, the Applicant was informed that the Commissioner-General agreed with the Board's determination and had dismissed the appeal. On 14 February 2002, the Applicant filed his application with the Tribunal.

In its consideration of the case, the Tribunal recalled that, under article 1 of its Statute, it is "competent to hear and pass judgement upon applications alleging non-observance of contracts of staff members" or "terms of appointment of such staff members." Article 3 of the Statute provides that in the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal.

The Tribunal commented that, "[u]nlike a Staff Association or a Staff Union, neither a JAB nor the Tribunal is a vehicle available to a staff member to be used to lobby management or to seek to persuade management to effect what the staff member would perceive to be improvements in his working conditions or the terms of his employment, unless that staff member seeks to establish that the matter of which he complains arises from the non-observance of the terms of his appointment or that it arises from the infringement or denial of some employment right." As the Tribunal found that the Applicant had failed to establish that the impugned decision breached any rights enjoyed by him as a staff member or amounted to the non-observance of the terms of his appointment, the application was rejected, in its entirety, on jurisdictional grounds.

10. Judgement No. 1151 (17 November 2003): Galindo v. Secretary-General of the United Nations[12]

Discretion of the Secretary-General in disciplinary cases—Tribunal scrutiny of disciplinary matters—Proportionality of sanctions—Burden of proof in claiming prejudice—Due process

The Applicant entered the service of the United Nations Interim Force in Lebanon (UNIFIL) at the FS-3 level on 15 June 1976. His contract was subsequently extended and, in March 1985, he received a permanent appointment. At the time of the events which gave rise to his application, he held the P-4 position of Chief, Personnel Unit, United Nations Conference on Trade and Development (UNCTAD).

According to an incident report dated 10 April 2001, "[o]n 9 April 2001, the [Applicant] was observed on CCTV cameras, at the [NATO Stabilization Force (SFOR)] PX store in Zagreb, taking a toothpaste off the shelf, walking to an isolated area of the store, removing the toothpaste from the packet, putting the tube of toothpaste in his pocket, returning the empty toothpaste packet to the shelf, and then going to the cash register, where his wife paid for other items. He left the store without paying for the toothpaste that he had concealed in his pocket." The report stated that, upon questioning by the PX Detective and SFOR Military Police, the Applicant admitted, orally and in writing, that he had removed the tube of toothpaste from the PX store without paying for it.

On 24 April 2001, following a preliminary investigation, a report was sent to the Assistant Secretary-General for Human Resources Management. On 30 April, the Applicant

[12] Mayer Gabay, Vice-President, presiding; and Brigitte Stern and Jacqueline R. Scott, Members.

was advised of the allegations against him and provided with a copy of the incident report and related documentation.

On 9 July 2001, the case was referred to the Joint Disciplinary Committee (JDC). In its report dated 14 January 2002, the JDC noted that whilst the Applicant had admitted having stolen a tube of toothpaste on 9 April 2001, he claimed to be unaware of another act of theft alleged to have occurred on 10 March 2001. The JDC was of the opinion, however, that he "was clearly involved in the former incident, and most likely also in the latter" and remarked that "the value of the stolen item was a subsidiary element[, as] what really matters is the theft per se and the prejudice caused to the Organization." It considered the Applicant's claim of stress but "made it clear that if stress and emotional problems were to be recognized, these arguments would not exonerate the staff member from his responsibilities but could only constitute mitigating factors."

The JDC found overall "a lack of honesty and integrity of the staff member, aggravated by [his] official position as Chief of Personnel of UNCTAD." The JDC determined that the Applicant had failed to comply with his obligations under the Charter of the United Nations and the Staff Regulations and Staff Rules, and to observe the standards of conduct expected of an international civil servant. It concluded that he had engaged in unsatisfactory conduct for which disciplinary measures could be imposed. The JDC recommended that he be separated from service with compensation in lieu of notice on the grounds of serious misconduct incompatible with the basic requirements to be met by a United Nations staff member. On 6 March 2002, the Applicant was informed that "[o]ut of clemency and pursuant to his discretionary authority to impose appropriate disciplinary measures," the Secretary-General had decided to demote the Applicant to the P-3 level pursuant to staff rule 110.3 (a) (vi), with no possibility of promotion, and to reassign him to an environment where he could not exercise decision-making or managerial responsibilities. On 6 June, the Applicant filed his application with the Tribunal.

In its consideration of the case, the Tribunal found it "difficult to believe" that a long-term employee with a responsible and reasonably high-level position would consciously endanger or destroy his career by stealing a tube of toothpaste. The Tribunal pointed out that such an offence "would normally warrant little more than an admonition, a slap on the wrist or a referral for psychiatric assistance." It found it reasonable to assume that the Applicant's behaviour had been the result of a temporary mental lapse or aberration to which the Respondent had overreacted in imposing "an excessive and disproportionate penalty." The Tribunal held that the penalty imposed upon him warranted reduction.

The Tribunal recalled that whilst it "assiduously guards the Secretary-General's power to discipline staff," it has also consistently held that the exercise of that power is not without limitation. It found that the Applicant had discharged his burden with respect to proving prejudice against him, and agreed that his rights of due process were violated when the JDC failed to permit him the right to rebut and comment on relevant information it had received.

The Tribunal for such reasons held that the penalty imposed on the Applicant was disproportionate and ordered that the Applicant be granted priority consideration for any position for which he applied and was qualified. As compensation, the Tribunal ordered that, until such time as the Applicant was promoted, he should receive, on a monthly basis, an amount equivalent to the reduction in remuneration which had resulted from his demotion.

11. Judgement No. 1156 (19 November 2003): Federchenko v. Secretary-General of the United Nations[13]

Non-promotion—Discretion of the Secretary-General in promotion matters—Assessment of compensation for procedural violations

The Applicant initially entered the service of the Organization at the P-2 level on 3 November 1978. After a break in service, he re-entered service at the P-4 level on 5 April 1986. His contract was subsequently extended and, on 1 December 1991, he received a permanent appointment. At the time of the events which gave rise to his application, he held the P-4 position of Editor, Editorial and Official Records Division, Department of Conference Services, United Nations Office at Geneva.

On 2 April 1992, the Applicant expressed his interest in the P-5 level post of Chief, Official Records Editing Section, United Nations Office at Geneva. The job description indicated that "university education, with preferably a graduate degree in languages and substantial previous relevant experience with documentation" was required. On 17 March 1993, the Applicant was informed that he, along with other candidates, had been recommended for the post. On 22 May 1995, the Applicant requested information on the status of his application. On 26 May, a second vacancy announcement for the post was issued, with a notation indicating that the functions of the post were being discharged by a staff member on a temporary basis. The announcement did not indicate the competencies and skills required to fill the post.

On 16 March 1998, a third vacancy announcement for the post was issued. An "[a]dvanced university degree or equivalent qualification from a university or institution of equivalent status" was listed as a requirement. On 16 November, the Applicant was notified that the Department had recommended another candidate and, on 3 December, the Appointment and Promotions Board (APB) endorsed that recommendation. In its report to the Secretary-General, the APB stated that it "did not take into account the reference made by the Departmental Panel to the fact that [the other candidate] had acted as Officer-in-Charge of the Section since this would be tantamount to giving unfair advantage to her candidacy." On 28 December, the promotion of the other candidate was approved and, on 5 January 1999, the Applicant was informed accordingly. On 8 February, the Applicant requested administrative review of this decision and, on 8 April, he lodged an appeal with the Joint Appeals Board (JAB).

In its report dated 31 July 2001, the JAB concluded that "the Secretary-General's discretionary authority in promotion matters had been abused in the present case, because the promotion exercise for the P-5 post . . . had been delayed for more than six and [a] half years apparently without legitimate organizational or administrative reasons, [which] hurt the fundamental need of the Organization to fill the P-5 post within a reasonable time and frustrated the reasonable expectation of the [Applicant] to see the Administration proceed with the promotion exercise with due diligence and in good faith." As a result, the JAB recommended that the Applicant be paid three months' net base salary as compensation for the damage caused by the undue delay in the promotion exercise. On 7 December, the Applicant was advised that the Secretary-General had decided to accept the JAB's conclusions and recommendation, and to compensate him accordingly. On 30 April 2002, the Applicant filed his application with the Tribunal.

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[13] Julio Barboza, President; Kevin Haugh, Second Vice-President; and Mr. Spyridon Flogaitis, Member.

Prior to its consideration of the case, the Tribunal recalled its practise of restricting itself in promotion cases to examining whether the decision was tainted by any element of arbitrariness, citing its jurisprudence that "[w]hen the Respondent properly exercises his discretion regarding a promotion, the Tribunal will not interfere with the decision made." (Judgement No. 1056, Katz (2002), as cited in Judgement No. 1085, Wu (2002).) The Tribunal took note of the fact that the APB had not taken the successful candidate's tenure as Officer-in-Charge into consideration and found that the selection decision was not tainted by improper factors.

However, the Tribunal concurred with the JAB's conclusion that the Administration had not followed the proper procedures in the promotion exercise, not only because the process lasted six and a half years, but also based on an examination of the selection process. The Tribunal recalled that part of this process was also the subject of Judgement No. 974, Robbins (2000), in which it determined that there were procedural irregularities in connection with the first two vacancy announcements for the post, and found that "[the] lapse of over two years without a published result in the promotion process constitute[d] undue delay and unfair treatment."

The Tribunal drew attention to that fact that it has "repeatedly expressed its dissatisfaction with practices followed by the Administration which lead to procedural irregularities in the selection process, even when ultimately [it] refrained from intervening in the substantive decision" and held that "procedures, especially in matters where the Organization's employees' career and personal work satisfaction are involved, must be thoroughly respected in order to avoid injury—substantive or moral—to its staff members. Decisions ought to be taken in a timely manner and with the necessary care, so as not to create any suspicion that procedures are tailor made." Accordingly, the Tribunal found that the Applicant was entitled to greater compensation than had been paid and awarded him additional compensation of seven months' net base salary.

12. Judgement No. 1157 (20 November 2003): Andronov v. Secretary-General of the United Nations[14]

Definition of "administrative decision" and "implied administrative decision"—Time limits for filing of applications—Inappropriate interference by Administration in Applicant's personal life

The Applicant initially entered the service of the Organization on 30 August 1968. After a lengthy break in service, he re-entered the Organization's service on 9 January 1983 as a Senior Research Officer with the Joint Inspection Unit, at the P-5 level. On 1 December 1991, he was granted a permanent appointment.

On 20 October 1994, the Applicant filed for divorce in the Russian Federation. On 7 March 1995, he provided the Administration at the United Nations Office at Geneva with a copy of the court's decision, dated 15 February and, on 14 March, a Personnel Action form was issued, changing his status to "divorced" and ending his entitlement to salary and post adjustment at the dependency rate.

Also on 14 March 1995, the Personnel Service, United Nations Office at Geneva, advised the Applicant that his ex-wife had claimed to have received no financial support from him since October 1994. The Applicant was reminded that failure to honour legally binding

[14] Julio Barboza, President; Mayer Gabay, Vice-President; and Spyridon Flogaitis, Member.

family support obligations violated the standard of conduct required of international civil servants. The Applicant was asked to provide evidence that the sum paid to him at the dependency rate had been used for its declared purpose. The Applicant responded, confirming that he had been transferring the dependency allowance to his ex-wife's bank account.

On 14 April 1995, the Applicant's divorce became final and binding in accordance with the relevant Russian law, upon its registration in the "Register of the Acts of Civil Status."

On 2 June 1995, the Applicant requested that his ex-wife's *carte de légitimation* be cancelled. He reiterated this request on 19 June, and several times thereafter.

On 26 September 1995, the Senior Legal Adviser, United Nations Office at Geneva, advised the Chief, Strategic Planning for Human Resources Management, that "as far as the legal consequences for alimony and matrimonial property are concerned, I advised [the Applicant's ex-wife] that she might wish to obtain a decision from a Swiss Court, since the Moscow Court decision remains silent on these questions." On 29 March 1996, the Applicant submitted a decision dated 25 January 1996 rendered by a French court which confirmed the validity of his Russian divorce decree. On 17 May, however, the Senior Legal Adviser informed the Applicant that his ex-wife had initiated legal action in the Swiss courts. Although this action was successful in the lower instance, on 13 November 1998 the Geneva appeals court overturned this decision.

On 6 July 1999, the Applicant responded to a request from the Senior Legal Adviser that he provide evidence of his financial support of his ex-wife, asserting that the statements made by the Senior Legal Adviser amounted to harassment. The same day, the Chief, Personnel Service, advised the Applicant that the Administration considered the case closed. On 8 July, she likewise informed the Senior Legal Adviser that the Administration's further involvement in the case would be inappropriate.

On 6 and 21 March 2000, the Applicant requested copies of several documents contained in his official status file.

On 18 May 2000, the Applicant requested the agreement of the Secretary-General to bring a direct appeal to the Tribunal but on 5 July his request was denied. On 25 July, he lodged an appeal with the Joint Appeals Board (JAB).

In its report of 20 July 2001, the JAB found that "the alleged administrative decisions against which the [Applicant had] complained consist[ed] of a series of communications sent by the Administration either to inform [him] or other concerned staff members, or to ask [him] for comments or clarifications." The JAB concluded that the appeal was not admissible as there was no administrative decision which the Applicant could have contested. Accordingly, the JAB recommended that the appeal be rejected. On 9 November, the Applicant was informed that the Secretary-General agreed with the JAB's conclusions. On 11 February 2002, the Applicant filed his application with the Tribunal, appealing the Respondent's decision accepting the unanimous recommendation of the JAB, to reject his appeal on the grounds of lack of an administrative decision.

In its Judgement, the Tribunal expressed its belief "that the legal and judicial system of the United Nations must be interpreted as a comprehensive system, without lacunae and failures, so that the final objective, which is the protection of staff members against alleged

non-observance of their contracts of employment, is guaranteed." Thus, the Tribunal established that "in cases where the Administration believes that there is no specific administrative decision to be challenged in proceedings before the JAB, the rules should be interpreted by the Administration so as to ensure that legal and judicial protection are provided."

The Tribunal defined an administrative decision as "a unilateral decision taken by the administration in a precise individual case (individual administrative act), which produces direct legal consequences to the legal order." The Tribunal distinguished this "from other administrative acts, such as those having regulatory power (which are usually referred to as rules or regulations), as well as from those not having direct legal consequences." It pointed out that such decisions need not necessarily be in writing, as unwritten decisions are "commonly referred to, within administrative law systems, as implied administrative decisions."

In its consideration of the case, the Tribunal found many implied administrative decisions, including with respect to the Administration's failure not to cancel the Applicant's ex-wife's *carte de légitimation* for an unreasonably long period of time, and its decision to provide her with legal advice on how to utilize the judicial system to her benefit in her marital dispute with the Applicant.

The Tribunal accepted the Applicant's contention that documents had been placed in his official status file which reflected adversely on his character, reputation and conduct, constituting "adverse material" within the terms of administrative instruction ST/AI/292 of 15 July 1982. The Tribunal found that the placement of such documents in his file without their being shown to the Applicant or his comments being obtained constituted another challengeable administrative decision. The Tribunal rejected the Respondent's contention that, even if there were an appealable administrative decision, the Applicant had failed to challenge the decision in a timely manner. It recalled that "the countdown for the deadlines of appeals begins only when the contested decisions and their relevant details are known to the Applicant." The Tribunal further expressed its opinion that where "a decision is not made in writing and is unknown to the staff member concerned, the point of time for starting the process is from the time the staff member knew or should have known of the said decision." As the Applicant was not aware of the adverse material in his file until March 2000 and as he initiated an appeal process in May 2000, the Tribunal was satisfied that he had acted within the prescribed time-limits.

Having found the case receivable, the Tribunal decided not to remand the matter to the JAB for consideration on the merits, as the file contained sufficient written documentation to substantiate the Applicant's claims. The Tribunal was satisfied that there was "ample written proof that the Administration [had] interfered in [his] personal affairs and in so doing violated its obligation not to get involved in the private maters of its employees," citing, specifically, various actions of the Senior Legal Officer. Accordingly, the Tribunal ordered that the Applicant be awarded compensation in an amount equivalent to three months' net base salary.

13. Judgement No. 1163 (21 November 2003): Seaforth v. Secretary-General of the United Nations[15]

Discretion of the Secretary-General in personnel matters—Non-renewal of fixed-term contract—Nature of 200 Series appointments—Burden of proof in claiming discrimination or countervailing circumstances

The Applicant entered the service of the United Nations Centre for Human Settlements (UNCHS), Nairobi, at the L-3 level on 4 January 1983. His contract was subsequently extended several times. At the time of the events which gave rise to his application, he held an L-4 position under the 200 Series of the staff rules.

In 1998, a Revitalization Team was appointed to evaluate possibilities for reorganizing UNCHS. The Team made a series of recommendations including a proposal to downsize the number of staff and discontinue a pattern of misuse of 200 Series posts for the performance of core functions. On 20 November 1998, the Applicant was advised that his appointment would not be extended beyond its expiry date of 31 December. Thereafter, his contract was renewed for a period of three months until 31 March 1999, when he separated from service. On 27 April, the Applicant requested payment of a "separation package comparable to that of staff on permanent appointment" on the basis of his 15 years of service and his above-average performance. On 3 May, his request was denied.

On 30 June 1999, the Applicant requested administrative review of the decisions not to renew his appointment and not to grant him a termination indemnity. On 5 October, he lodged an appeal with the Joint Appeals Board (JAB).

In its report of 21 February 2001, the JAB found the Applicant had "voluntarily and knowingly entered into [a] long sequence of 200 Series contracts" and could not now protest the conditions of his service. The JAB also concluded that the Applicant's contention that he had a reasonable expectancy of renewal of his contract or conversion to a 100 Series contract was without legal basis, and that he had failed to substantiate his claim that he was treated arbitrarily or that his separation was the result of an unfair process. In consequence, the JAB concluded that the Applicant had neither a claim for compensation nor for indemnity payment, and recommended that the appeal be rejected in its entirety. On 22 March 2001, the Applicant was informed that the Secretary-General accepted the JAB's finding and conclusion. On 28 February 2002, he filed his application with the Tribunal.

In its consideration of the case, the Tribunal noted that, unlike the rules of the 100 Series, the rules of the 200 Series do not provide for career appointments but merely for the granting of temporary appointments. The Tribunal recalled its longstanding jurisprudence that there is no legal expectancy to renewal of a fixed-term contract, even where the employee has demonstrated efficient or exceptional performance and/or has enjoyed a lengthy term of service, but that, where there are countervailing circumstances, which may include, e.g., abuse of discretion or a promise or agreement to renew, a reasonable expectancy of renewal may be created.

Thus, as a project personnel staff member subject to the rules of the 200 Series, barring any countervailing circumstances the Applicant was found to be subject to separation from service upon the expiration of his 200 Series contract without prior notice and without regard to his performance or attributes. The Tribunal reviewed the Applicant's contentions and employment record to determine whether any countervailing circumstances existed

[15] Julio Barboza, President; and Omer Yousif Bireedo and Jacqueline R. Scott, Members.

but found that the various factors upon which he relied (length of service, frequent renewal of contract, "very good" performance evaluations as well as various recommendations and assurances) did not, individually or together, satisfy the countervailing circumstance test as established by the Tribunal in Judgement No. 885, *Handelsman* (1998).

With respect to the Applicant's claims that the Respondent abused the staff rules by employing him under the 200 Series while assigning him core functions and that the Respondent had an obligation to convert his post to a 100 Series post, the Tribunal concluded that "[t]he fact remains that the Applicant had a 200 Series appointment, not a 100 Series appointment, and thus he was subject to the rules of the 200 Series. Thus, the Applicant is not entitled to claim status or benefits provided under the rules of the 100 Series, nor was he entitled to a conversion of his 200 Series contract to a 100 Series contract." Similarly, the Tribunal rejected the Applicant's claims for a separation package comparable to that provided to staff on permanent appointment; a termination indemnity pursuant to staff rule 209.5; or, the benefits provided to individuals whose contracts were terminated pursuant to an "agreed termination," on the respective bases that he was not the holder of a permanent appointment; had not had his contract terminated; and, did not separate from employment subject to an "agreed termination."

Insofar as the Applicant's contention that the Respondent had abolished his post was concerned, the Tribunal found no evidence that the post was abolished. It reiterated that, when a staff member's service is subject to a fixed-term contract, failure to renew the contract is not an abolition of post, and remarked that "in theory, every 200 Series post is created with the expectation that it will end at some point, either when the project it supports is finished or when the funding for such project no longer exists."

Finally, the Tribunal found that the Applicant had failed to provide evidence that the Respondent had acted discriminatorily towards him or that any decisions made by the Respondent were discriminatory or an abuse of discretion.

Accordingly, the Tribunal rejected the application in its entirety.

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

1. Judgment No. 2183 (3 February 2003): In re Diaz-Nootenboom v. European Organization for Nuclear Research[16]

Appointment—Contract of employment—De facto employment—Social insurance coverage of staff members by Organization

The Complainant challenged, *inter alia,* the decision of the European Organization for Nuclear Research (CERN) to terminate her contract of service, and CERN's alleged failure to provide her with social insurance coverage. The Complainant worked for CERN between 1965 and 1972, and for the ISOLDE Collaboration (ISOLDE) between 1982 and 1985. ISOLDE is a group which comprises several external scientific institutes as well as CERN itself, and which uses CERN's facilities. Due to changes in the rules for payment of staff, CERN in 1985 offered the Complainant a one-year contract as an unpaid associate with CERN, in light of a signed registration form indicating that the Complainant was

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

a paid employee of the Spanish Industry and Energy Ministry's nuclear energy institute (JEN).

The Complainant accepted and worked under this periodically renewed contract for fifteen years. The Complainant's salary was paid by ISOLDE, but refunded to ISOLDE by CERN, which considered it an operating expense and periodically adjusted the amount in a similar manner to that of CERN staff members. In 1998, the Complainant's work began to deteriorate because of illness and she was placed on sick leave in May 2000. On 1 September 2000, the Complainant requested, *inter alia,* that CERN treat her retroactively as an established CERN staff member from 15 October 1985.

CERN rejected this request, stating that the Complainant had falsely claimed to be an employee of JEN. CERN denied that ISOLDE's payments to her were sufficient to establish that she had been considered a CERN staff member. On 27 October 2000, the Head of CERN's Human Resources Division informed the Complainant that her contract was to be "terminated" effective 30 November 2000. The Complainant lodged claims against CERN with the Joint Advisory Appeals Board (Board) with respect to, *inter alia,* her termination and prior status. The Board held that the Complainant's claims regarding her 1982–85 status were time-barred.

The Board found, however, that the Complainant had had an employment relationship with CERN and that her situation from 1985 forward had been illegal. The Board recommended that the Complainant's request for a contract extension be rejected as certain conditions for the granting of a further unpaid associate's contract had not been satisfied. The Board nevertheless also recommended that the Complainant's *de facto* employer be legally identified, as it owed the Complainant social insurance coverage for the period of 1985 to 2000. CERN thereafter rejected all of the Complainant's claims in such respects.

In reviewing the case, the Tribunal agreed with CERN that the Complainant's status since 1985 had been illegal, but held that she was not responsible for the arrangement since her CERN supervisor had devised it. The Tribunal stated that international organizations must take responsibility for their employees' decisions, even if they subsequently condemn those decisions. The Tribunal concluded that there was no justification for the ending of the Complainant's employment relationship with CERN. The Tribunal ordered on such grounds that CERN pay the Complainant through 30 September 2001. The Tribunal, however, rejected the Complainant's claim for moral damages on the ground that there were factual doubts with respect to her allegation of false statements made by CERN regarding the authorship of the false registration form submitted by the Complainant when obtaining the CERN contract.

The Tribunal rejected the Complainant's claim for social insurance coverage, as the Complainant's signed contract did not provide for such payments and could not be re-designed by the Tribunal.

2. Judgment No. 2185 (3 February 2003): In re Moreno de Gómez (No. 3) v. United Nations Educational, Scientific and Cultural Organization[17]

Set-off by Organization against Tribunal judgments

The Complainant challenged the decision of the United Nations Educational, Scientific and Cultural Organization (UNESCO) to deduct sums allegedly owed to her by order of the Tribunal in two previous judgments. Such withheld sums were equivalent

[17] Jean-François Egli, Presiding Judge; and Seydou Ba and Hildegard Rondón de Sansó, Judges.

to the redemption value of outstanding loans taken out earlier by the Complainant from UNESCO's Staff Savings and Loan Service.

The Tribunal stated that an organization bears the onus in establishing that it has executed its obligations under Tribunal judgments. The Tribunal noted that set-off is a mechanism by which obligations are extinguished, and that a debtor may thereby declare that he or she is setting off a claim against his or her debt, even where the claim is disputed. The Tribunal further noted the general rule that in the context of a judgment's execution, the debtor's set-off can be recognized only if his or her claim is a liquid one, meaning that there is no dispute as to its existence, amount and due status. The Tribunal stated that the debt to be extinguished must not require actual payment, as this would preclude a set-off. The Tribunal held that since the Complainant had contested such matters, UNESCO's desired set-off could not be accepted by the Tribunal in the context of the Complainant's application for execution.

The Tribunal noted that the execution of a judgment, in the broad sense of the term, involves a determination as to how the judgment is to be interpreted. The Tribunal stated that the previous judgments in the Complainant's favour could not be interpreted as excluding the possibility of an overall set-off of the type normally due upon the expiry of a contract. The Tribunal noted that if it had expressly ruled on this issue in its earlier judgments in the Complainant's case, it would have acknowledged UNESCO's right to effect the set-off, subject to the above-mentioned conditions. The Tribunal stated, however, that a judgment ordering the payment of a sum of money cannot be rendered inoperative by a set-off unless the acceptance of the claim or Tribunal judgment which the debtor intends to set off carries the same guarantees as those afforded by judicial proceedings, including the ability to appeal finally to the Tribunal. The Tribunal found that UNESCO's deduction had not been decided upon in such a way that the Complainant could construe it as a decision against which she could appeal. The Tribunal further held that it could not rule on set-off claims when an application of execution was before it.

The Tribunal for such reasons referred the matter to UNESCO for its investigation and a decision respecting due process. The Tribunal stated that if UNESCO were to decide that the Complainant owed an amount equal to that of the judgment awards withheld by UNESCO, UNESCO could consider itself retroactively released from its obligations under the judgments. The Tribunal further stated that if UNESCO found it had not been released from its debt, it would be required to pay interest and penalties.

The Tribunal ordered a partial award of costs to be paid to the Complainant, and dismissed all of her other claims.

3. Judgment No. 2190 (3 February 2003): In re Zawide v. World Health Organization[18]

Investigation of on-duty accidents—Compensation for on-duty accidents—Medical assessment of injured staff member—Waiver of immunity in respect of individual staff member—Reassignment location—Relationship of Organization to national authorities—Relationship of Tribunal to Organization—Intervention in proceedings—Privileges and Immunities

The Complainant, a World Health Organization (WHO) staff member, challenged decisions taken by the WHO with respect to a February 1997 road accident in Namibia in

[18] Michel Gentot, President; and Seydou Ba and James K. Hugessen, Judges.

which two people were killed and the Complainant was severely injured. The Complainant claimed that the WHO had failed: (i) to investigate the accident; (ii) to convene a medical board to review his assessed loss of function; and (iii) to reassign him to a duty station where suitable medical care was available.

The Namibian authorities investigated the accident and in June 1997 informed the WHO that they had decided not to prosecute the driver of the vehicle, who was a WHO staff member. In September 1999, however, the Namibian authorities summoned the driver to court on a charge of culpable homicide. The WHO advised the authorities on 7 October 1999 that the driver was immune from legal process pursuant to the Convention on the Privileges and Immunities of the Specialized Agencies, but that a request for a waiver of immunity could be submitted to the WHO Director-General. In November 2000, the Namibian Ministry of Foreign Affairs informed the WHO that the decision to prosecute the driver had been maintained. The WHO reiterated its position.

Meanwhile, on 6 October 2000, the Complainant filed an internal appeal with the Headquarters Board of Appeal (Board) raising the above-mentioned claims. The Board recommended that the WHO: (i) pursue an investigation with the Namibian authorities so as to allow the Director-General to decide on the question of whether to waive the driver's immunity; (ii) provide a full explanation and relevant updates to the victims' families; and (iii) compensate the Complainant for its failure to convene a medical board within a reasonable time, its refusal to conduct an internal investigation into the accident, and its failure to treat the Complainant with due consideration and respect. On 3 July 2001, the WHO's Director-General rejected most of the Complainant's claims, but acknowledged the inordinate time taken to convene the medical board. On this basis, the WHO provided compensation, legal fees and travel costs to the Complainant.

In reviewing the Complainant's claim that the WHO had failed to conduct an investigation, the Tribunal noted that the Namibian authorities had conducted a judicial inquiry and had initially decided not to prosecute the driver. The Tribunal accepted the WHO's position that it was not in a position to decide on a waiver of the driver's immunity, as the WHO had not yet received relevant documentation from the Namibian authorities. The Tribunal found that the driver was covered by the WHO's immunity, and noted that the Organization has a discretion to assess, in the context of its relations with a Member State, whether it is appropriate to lift a staff member's immunity from legal process. The Tribunal further noted that such relations fall outside the jurisdiction of the Tribunal. The Tribunal rejected the Complainant's claims with respect to the possible disciplining of the driver by the WHO, as such proceedings were likewise to be undertaken at the WHO's discretion.

The Tribunal nevertheless held that the WHO's failure to open an independent investigation into the accident was not excused by the inquiry undertaken by the Namibian authorities. On this ground, the Tribunal awarded compensation and costs to the Complainant. The Tribunal, however, rejected the Complainant's claim regarding the calling of a medical board, as the Tribunal found no bad faith or reluctance in this respect on the WHO's part. The Tribunal likewise rejected the Complainant's request for reassignment, as his duty stations during the relevant period had provided the sophisticated medical support systems that were required for him.

The Tribunal rejected the Complainant's request for an order that disciplinary investigations be undertaken against both the Director of the Joint Medical Service, who had allegedly refused to appear before the Board, and the WHO's counsel. The Tribunal

stated that it had no jurisdiction to issue injunctions against international organizations, or to cast judgment on the means of defence used on their behalf in the context of internal appeals proceedings or litigation.

The Tribunal found non-receivable an application for intervention brought by the widow of a WHO staff member who had been killed in the accident. The Tribunal held that the intervener's situation was different in law and fact from that of the Complainant, and that the solution adopted by the Tribunal in the Complainant's case was not apt to affect the intervener's rights.

4. Judgment No. 2193 (3 February 2003): In re Alvarez-Orgaz v. United Nations Educational, Scientific and Cultural Organization[19]

Definition of "spouse"—Dependency benefits—Rights of homosexual couples—Human rights—Civil solidarity pacts

The Complainant challenged the decision of the United Nations Educational, Scientific and Cultural Organization (UNESCO) to deny him dependency benefits with respect to his male partner, with whom the Complainant had entered into a *pacte civil de solidarité* (Pact) in Paris on 30 March 2000.

On 6 June 2000, UNESCO's Office of Human Resources Management rejected the Complainant's request for a change of status with respect to dependency entitlements, on the ground that the Pact was not recognized by the United Nations common system as a formal marriage that could create any entitlement to such benefits or allowances. On 27 June 2000, the Complainant filed a formal protest, but received no reply from UNESCO's Director-General. On 31 July 2000, the Complainant filed an appeal with the Appeals Board (Board), and on 14 September 2000 filed a detailed appeal with the Board. On 4 December 2000, the Board recommended (with one member dissenting) that the Director-General allow the Complainant's claim. The Director-General did not endorse the recommendation, and on 28 June 2001 informed the Complainant that his claim was rejected.

In reviewing the case, the Tribunal noted that it could review an allegation of discrimination only when such a claim was based on precise and proven facts establishing that discrimination had occurred. The Tribunal shared UNESCO's view that the 1954 Headquarters Agreement between the French government and UNESCO could not be interpreted as obliging UNESCO to apply all statutory and regulatory provisions of the host country. The Tribunal noted that the term "spouse" was not defined by the UNESCO staff rules, and found a link in its case law between the word "spouse" and the institution of marriage, in whatever form that might take. The Tribunal further found that the Pact did not constitute a marriage under French law, as documents evidencing the latter drew a clear distinction between married spouses and partners under a Pact.

The Tribunal held on such grounds that neither the letter nor the spirit of the relevant texts or Tribunal case law enabled partners under a Pact to be considered spouses under UNESCO's staff rules. The Tribunal held that UNESCO had not discriminated against the Complainant, and stated also that it could not compel the Director-General to make an exception in the Complainant's favor, as such an option was within the Director-General's sole discretion. The Tribunal for such reasons dismissed the complaint.

[19] Jean-François Egli, Presiding Judge; and Seydou Ba, James K. Hugessen, Flerida Ruth P. Romero, Hildegard Rondón de Sansó, Judges.

In dissent, Mr. Justice Hugessen (Hugessen) agreed that a Pact partnership did not constitute a formal or *de facto* marriage. Hugessen asserted, however, that international conventions, the Universal Declaration of Human Rights, and the Tribunal's case law supported the view that the principle of non-discrimination is a fundamental principle of law that must prevail over discriminatory staff rules and regulations. Hugessen urged the use of a "similarly situated" test as developed in past cases by the Tribunal, so as to compare an alleged victim of unequal treatment with an individual not subject to the impugned rule. Hugessen concluded per this test that a finding that homosexual couples are not "similarly situated" to married or unmarried heterosexual couples rests at best on an assumption that is a fruit of stereotyping. Hugessen asserted that homosexual couples are dissimilarly situated to heterosexual couples only in that they have a different sexual orientation. Hugessen stated that such a distinction cannot be a sound or rational basis for differential treatment.

Hugessen identified in the Tribunal's case law two lines of applicable analysis for cases of alleged discrimination. The first was whether either the purpose or effect of a rule is discriminatory based on irrelevant personal characteristics. The second was whether the discriminatory rule put an affected staff member at a severe disadvantage, as seen from the point of view of the staff member rather than that of the Organization. Hugessen further proposed an inquiry as to whether there are nevertheless sound administrative reasons for the difference in treatment, or whether such treatment is a fair, reasonable and logical outcome of circumstantial differences. Hugessen urged that an inquiry into such matters focus on impact (i.e., the discriminatory effects and their severity on the complainant) rather than on constituent elements (i.e., the grounds of the distinction).

Hugessen asserted that sexual orientation constitutes an irrelevant personal characteristic, and that homosexuals are a highly vulnerable minority deserving of human rights protection. Hugessen likewise found that homosexual couples would be burdened and disadvantaged by differential treatment in respect of dependency benefits. Hugessen stated that the purpose of dependency benefits is to provide a benefit to people who are in a loving and caring relationship characterized by voluntariness, permanency, legal enforceability and mutual dependency and assistance. Hugessen found the failure of international organizations to legislate the removal of discriminatory provisions from its staff rules to be no obstacle to the Tribunal's identification of and refusal to apply such provisions. Hugessen further found there to be no possible administrative justification for the differential treatment of the Complainant, and asserted that UNESCO should be required to provide evidence in support of its differential treatment, rather than to have the Complainant be required to prove facts supporting the alleged discrimination.

Also in dissent, Judge Rondón de Sansó (Rondón de Sansó) asserted that internal organizational regulations cannot substitute for national legislation governing a country's institutions. Rondón de Sansó found that a Pact partnership is not a mere private contract, but rather a contract entered into with nationally recognized authorities. Rondón de Sansó found it impossible on such grounds to accept that the Headquarters Agreement could provide a basis for UNESCO's refusal to recognize a contract stemming from national legislation and involving public policy.

Rondón de Sansó further asserted that the term "spouse" should not be interpreted narrowly, but rather as broadly as possible. Rondón de Sansó stated that it is a rule of contemporary international law that the progressive nature of any interpretation to which the law refers is to be considered. Rondón de Sansó opined that a "spouse" should be defined as a stable partner bound to the staff member in a permanent relationship expressly

authorized and provided for by specific legislation. Rondón de Sansó asserted that the denial of spousal status to such an individual would disregard the validity of the official document evidencing the relationship as well as of the law establishing the legal relationship. Rondón de Sansó concurred with Hugessen's analysis with respect to non-discrimination and the asserted violation of human rights.

5. Judgment No. 2211 (3 February 2003): In re Müller-Engelmann (Nos. 14 and 15) v. European Patent Organisation[20]

Abuse of process—Award of costs against Complainant

The Complainant in her fourteenth and fifteenth complaints challenged the decisions of the European Patent Organisation (EPO): (i) not to reimburse her for alleged damages arising from her exclusion from the EPO's security and pension schemes; and (ii) refusing her moral damages and costs arising from an earlier appeal. The Tribunal joined the complaints as they raised identical issues.

The Tribunal found the Complainant's claims to be obviously duplicitous and their continuation a rare, flagrant and vexatious abuse of the Tribunal's process. The Tribunal noted that the Complainant had earlier been admonished for her litigiousness, and stated that the time had come for more serious measures to be taken. The Tribunal therefore ordered the Complainant to pay costs to the EPO. The Tribunal stated that the making of such an award had been foreseen in an earlier judgment (No. 1884) which had affirmed the Tribunal's inherent power to exact costs from a complainant as part of the Tribunal's necessary power to control its own process. The Tribunal noted in support of its decision the dozens of still-pending cases which the Complainant had brought against the EPO.

The Tribunal stated that it would not impose costs on every persistent litigant, as some disputes are at least arguable. The Tribunal affirmed, however, that where a litigant, like the Complainant, had found success before the Tribunal but had refused to accept the limits of such success, he or she could expect to suffer cost consequences. The Tribunal noted that this first award against the Complainant was nominal, but that this would not necessarily be the case in the future. The Tribunal permitted the EPO to recover the sum by withholding it from any amount due to the Complainant then or in the future.

[20] Michel Gentot, President; James K. Hugessen, Vice President; and Flerida Ruth P. Romero, Judge.

C. Decisions of the World Bank Administrative Tribunal [21]

1. Decision No. 304 (12 December 2003): D v. International Finance Corporation[22]

Misconduct—Investigations—Due process—Proportionality of sanctions—Scope of review in disciplinary cases—Abuse of position—Engagement in unauthorized business activities—Conflict of interest—Pornography—Administrative leave—Hearsay

The Applicant joined the International Finance Corporation (IFC or the Bank) in 1991 and was rated as an excellent performer. Between 1993 and 1996, the Applicant served as Investment Officer for two Bank loans to a company whose Managing Director was one Mr. S, whose family had known the Applicant's since the 1920's. Soon after the second loan was approved, the Applicant loaned US$50,000 to Mr. S so that he could deal with a personal emergency. The loan was undocumented, and was alleged to have been set at a 10% interest rate. While Mr. S's company timely repaid both Bank loans, Mr. S did not repay his loan to the Applicant. In 2000–01, the Applicant granted Mr. S more time to do so.

In early 2001, the Bank's newly formed Department of Institutional Integrity (INT) received word from a Bank staff member in Tanzania that the Applicant had received kickbacks. Two senior INT investigators then reviewed the Applicant's email account without informing the Applicant. Having discovered the Applicant's financial relationship with Mr. S, as well as his dealings for private companies and handling of pornographic materials, the investigators travelled to Tanzania, where they questioned at least three IFC clients and interviewed Mr. S. The investigators determined that credible evidence existed to support a charge of the Applicant's having taken money from Mr. S via the loan, but that the evidence did not support the kickback allegations. The Applicant thereafter received a Notice of Alleged Misconduct stating that an investigation was being conducted, citing the allegedly violated rules, and outlining the investigation process.

The investigators then interviewed the Applicant, and on 13 September 2001, the Applicant was placed on administrative leave and escorted from the Bank by a security guard and a Human Resources representative. The investigators thereafter conducted further interviews and provided a draft investigation report to the Applicant. The Applicant responded to this draft, and on 3 December 2001 the investigators issued their final investigation report to the Vice President for Human Resources. The investigators found that the Applicant had committed misconduct by lending money to Mr. S, taking a *de facto* interest in the IFC investment in Mr. S's companies, involving himself in outside business activities without authorization, handling pornographic and obscene materials on IFC computers, and coordinating his testimony with Mr. S.

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[21] 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 International Finance Corporation (referred to collectively in the statute of the Tribunal as "the Bank Group"). The Tribunal is open to any current or former member of the staff of the Bank Group, any person who is entitled to a claim upon a right of a member of the staff as a personal representative or by reason of the staff member's death, and any person designed or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan.

[22] Francisco Orrego Vicuña, President; Bola A. Ajibola and Elizabeth Evatt, Vice Presidents; and Robert A. Gorman, Jan Paulsson, Sarah Christie and Florentino P. Feliciano, Judges.

The Vice President thereafter informed the Applicant by memorandum that she had concluded that he had abused his position for financial gain, engaged in unauthorized outside business activities, and engaged in unauthorized use of Bank computers to receive, review and forward pornographic and obscene materials over the Internet. The Vice President stated that she had decided to terminate his employment immediately based on the first finding alone. The Vice President declined to impose further sanctions with respect to the two remaining violations.

The Bank's Appeals Committee thereafter concluded that the Vice President had abused her discretion by automatically terminating the Applicant, because while the Applicant had created an appearance of impropriety and a potential conflict of interest, there existed little or no evidence of abuse of position. The Appeals Committee also found due process violations, and recommended reconsideration of the termination and payment of damages. The Managing Director, who received the recommendations due to the Vice President's involvement in the case, did not accept these recommendations.

In considering the case, the Tribunal noted that its scope of review in disciplinary cases is broader than that with respect to purely managerial or organizational acts, and involves an examination of: (i) the existence of the facts; (ii) whether they legally amount to misconduct; (iii) whether the sanction imposed is provided for in the law of the Bank; (iv) whether the sanction is not significantly disproportionate to the offence; and (v) whether the requirements of due process were observed.

The Tribunal found that the Bank had rested its claim of misconduct warranting discharge on the mere making of a personal loan, and not upon the charging or collection of interest. The Tribunal concluded that there had been no showing under staff rule 8.01, para. 3.01*(d)*, of an abuse of position for financial gain such as a kickback, and that even if interest was to be paid, the Bank had not established that such gain would derive from an abuse of the Applicant's position as an Investment Officer overseeing the loans to Mr. S's company. The Tribunal further held that the Applicant could not be held on the basis of the loan to have engaged in the misconduct described in staff rule 3.01, para. 4.05, i.e., accepting remuneration from entities and/or persons in connection with an appointment with the World Bank Group.

The Tribunal endorsed the Bank's "zero tolerance" policy of severe discipline for abuse of position. The Tribunal found that the Applicant had committed a serious error in judgment by making the loan, and had violated a different provision, staff rule 8.01, para. 3.01(*b*), by failing to observe generally applicable norms of prudent professional conduct. The Tribunal, however, found no actual conflict of interest, and concluded that disciplinary measures substantially less severe than termination would have been appropriate. The Tribunal further determined that the Applicant's dealings with private businesses related to his family's businesses, were a technical violation at most, and warranted a proportionately modest disciplinary measure. The Tribunal found that the Applicant's regret and pledge not to deal with pornographic materials was sufficient to resolve that count of misconduct.

The Tribunal concluded that it could not uphold the Bank's contention that the Applicant's termination for violating staff rule 8.01, para. 3.01(*d*), had been mandatory under the staff rules. The Tribunal found that the Applicant's mandatory termination constituted a retroactive application of a 1997 amendment to the relevant disciplinary rule, i.e., staff rule 8.01, para. 4.01. The Tribunal further found that the Applicant had not violated staff rule 8.01, para. 3.01(*d*), at all.

The Tribunal held that the Bank had also erred in imposing disciplinary measures against the Applicant under staff rule 8.01, para. 4.03, with respect to the Applicant's violation of staff rule 8.01, para. 3.01(*b*), in that the Bank had failed to exercise its discretion by not taking account of the particular facts of the case, the frequency of the offending conduct, and most significantly the Applicant's situation. The Tribunal on this basis found termination to have been disproportionate to the Applicant's offences given their nature as well as the Applicant's positive employment history.

With respect to the Applicant's claims of denial of due process, the Tribunal concluded that the Bank had unreasonably applied its "reason to suspect" standard when beginning the investigation. The Tribunal established that the "reason to suspect" test will ordinarily require some objective corroboration except when an accusation is of a most grave and exigent nature. The Tribunal found the initial accusations against the Applicant to have been triple-hearsay, and that the Bank's scrutiny of the Applicant's email had therefore been precipitate.

The Tribunal held that the Bank did not abuse its discretion by not informing the Applicant of the preliminary inquiry, given the Bank's fears of potential evidence-tampering. The Tribunal nevertheless found that the Bank should have weighed against this concern the Applicant's reasonable interest in nipping in the bud the further spread of serious and unfounded rumours directed against him. The Tribunal determined that a staff member who is the subject of a preliminary inquiry should be informed of that fact at the earliest reasonable moment, taking into account justified concerns regarding tampering, collusion and the like. With respect to the Applicant's placement on administrative leave, the Tribunal found the circumstances of the Applicant's escort from the premises to have been unreasonable.

For such reasons, the Tribunal ordered the rescission of the termination, the payment of compensation, correction of the Applicant's personnel file, and the offer and negotiation of a mutually agreed separation package.

2. Decision No. 306 (12 December 2003): Elder v. International Bank for Reconstruction and Development[23]

Pensions and pension systems—Pension eligibility requirements—Non-Regular Staff—Détournement de pouvoir—*Validity of general rules*—Ex gratia *payments and legal obligations on part of Bank*

The Applicant challenged the decision of the International Bank for Reconstruction and Development (IBRD or the Bank) to deny him pension credit for past service as a Non-Regular Staff (NRS) due to a disqualifying break in service. Such credit had been extended in 2002 to qualifying staff members as an extension of the Bank's 1998 Human Resources Policy Reform (Reform).

The Applicant joined the Bank in 1989 as a Short-Term Consultant, and in 1990 accepted a Long-Term Consultancy that was subsequently extended until June 1996. He then obtained Short-Term Consultancies until June 1997, when he was again appointed to a Long-Term Consultancy. In 1998, he began to participate prospectively in the Staff Retirement Plan (SRP) upon the implementation of the Reform.

[23] Francisco Orrego Vicuña, President; Bola A. Ajibola and Elizabeth Evatt, Vice Presidents; and Robert A. Gorman, Jan Paulsson, Sarah Christie and Florentino P. Feliciano, Judges.

In 2002, the Bank's Executive Directors approved Schedule F to the SRP, which conferred past pension credit on NRS staff in continuous service with a pensionable appointment lasting until 1 January 2002, except for any service occurring before a break in eligible service of more than 120 consecutive calendar days prior to that date. Qualifying appointments included a Long-Term Consultancy but not a Short-Term Consultancy. The Bank on this basis concluded that the Applicant was not eligible for past pension credit due to the timing of his 1996–97 Short-Term Consultancies. As a result, his 2,125 days of service as a Long-Term Consultant from 1990–96 were disregarded, as was his 1997–98 Long-Term service, which did not last more than the required threshold of 730 days.

The Tribunal in considering the case determined that the 120-day disqualifying period and exclusion of prior service were not *per se* wrong, and that the Bank did not act in an arbitrary manner or commit a *détournement de pouvoir* in establishing reasonable limits and conditions on benefits allowed under its rules. The Tribunal found the length of the disqualifying period to be justified by business needs, and to have responded to the views expressed by the Bank's Staff Association. The Tribunal noted that all pension plans normally require continuous service and restrict the ability to "buy back" time when restoring pension service. The Tribunal held that it was not within its competence to consider whether an alternative plan would have been more effective, and that it could decide only whether the plan could be lawfully applied to the staff member in the light of his or her rights. The Tribunal found the Applicant's disqualifying changes in appointment type to have been related to the Bank's legitimate business needs and his employment interests at the time.

The Tribunal held that the Bank is not obliged to develop individualized exceptions to the rules, as these could be unfair in themselves, or could otherwise adversely and unfairly affect pension funds belonging to others. The Tribunal stated that the merit of general rules lies precisely in granting the same treatment to all staff members falling within the same category. The Tribunal further concluded that while the Bank had made *ex gratia* payouts from the administrative budget (as opposed to the SRP funds) to five pension-ineligible staff members, no exceptions had been made to the application of the Bank's rules.

For such reasons, the Tribunal dismissed the application.

3. Decision No. 300 (19 July 2003): Kwakwa v. International Finance Corporation[24]

Misconduct—Abuse of position—Investigations—Due process—Scope of review in disciplinary cases—Proportionality of sanctions

The Applicant challenged his termination for misconduct from the position of Acting Resident Representative of the International Finance Corporation (IFC or the Bank) in Accra, Ghana.

On 28 June 1994, the Applicant's United Kingdom bank account was credited with a payment of US$50,000 from one Mr. Armen Kassardjian, a businessman in Accra who had applied for two IFC loans. The Applicant served as lead Investment Officer and issuer of the final-decision memorandum in respect of these loans. The Applicant claimed that five days before the deposit was made, he had encountered Mr. Kassardjian on a flight and had

[24] Francisco Orrego Vicuña, President; and Robert A. Gorman and Jan Paulsson, Judges.

agreed that Mr. Kassardjian would remit US$50,000 to the Applicant in immediate return for an equal value of Ghanaian Cedis which Mr. Kassardjian required.

The Applicant further claimed that all written records of the agreement were lost, and that Mr. Kassardjian had actively avoided him and frustrated his attempts to provide him with Cedis. A Bank investigator later determined that the Applicant was financially unable to complete such an exchange of currency. In 1994 and 1995, meanwhile, the IFC loans were disbursed to Mr. Kassardjian, who became delinquent in repaying them. In 1996, the Applicant forwarded a check for US$49,750 to Mr. Kassardjian, who did not seek to cash the check until October 2000, after the Applicant was under investigation.

On 9 December 1999, the Applicant was called to the Bank's Country Office in Accra and informed that he was under investigation. He was advised that before he answered any questions he was entitled to be advised in writing of the allegations against him. The Applicant thereupon read a memorandum stating that he had been accused of "accepting remuneration from an IFC client while in the service of the IFC," and also that he had committed "abuse of [his] position in the Bank for financial gain." The Applicant denied all wrongdoing, but later noted the payment from Mr. Kassardjian, which he claimed was a private transaction and not remuneration. The Applicant's employment was ultimately terminated on the grounds that he had accepted outside remuneration and abused his position.

In considering the case, the Tribunal noted its earlier holdings, for example in *Courtney (No. 2),* Decision No. 153 [1996] at para. 29, that its scope of review in connection with disciplinary cases is broader than with respect to decisions of a purely managerial or organizational nature, so that the Tribunal may review the merits of the Bank's decision. The Tribunal further cited *Arefeen,* Decision No. 244 [2001] at para. 42, in noting that the threshold of proof in disciplinary decisions leading to dismissal must be higher than a mere balance of probabilities.

The Tribunal rejected the Applicant's contentions that his transaction with Mr. Kassardjian was not illegal under Ghanaian law and that he was entitled under the terms of his IFC employment to engage in independent business. The Tribunal summarily rejected the Applicant's claim of ignorance as to the relevant rules of employment, and emphatically rejected his explanation that he had not made money on the transaction. The Tribunal found that the Applicant had faced a risk of currency depreciation and that his seeking to avoid loss in such a case was plainly a form of seeking gain. The Tribunal concluded that the Applicant's termination was wholly justified.

The Tribunal considered the Applicant's claim of a disproportionate sanction to have been misconceived, and stated that termination was wholly justified for financial improprieties of the kind that had been demonstrated in the case. The Tribunal stated that such misconduct went to the heart of the ethical foundations of the IFC's work. The Tribunal stated that if the Applicant's currency operations had been his only misconduct, it might have been necessary to assess the magnitude of the offence in light of all of the circumstances, such as their legality under local law and the Applicant's length and quality of service. The Tribunal concluded, however, that such an issue was irrelevant in the circumstances of the case.

With respect to the Applicant's claim of denial of due process, the Tribunal stated that the Bank is not to be held to the full panoply of due process requirements that apply in the administration of criminal law. The Tribunal summarized its due process requirements for

the framing of misconduct investigations as being that: (i) affected staff members must be apprised of the charges being investigated with reasonable clarity; (ii) they must be given a reasonably full account of the allegations and evidence brought against them; and (iii) they must be given a reasonable opportunity to respond and explain. The Tribunal stated that the staff rules do not provide an automatic right to depose, confront or cross-examine persons who have been asked to contribute to the investigation. The Tribunal rejected all of the Applicant's allegations with respect to the investigation and disciplinary processes.

For such reasons, the Tribunal dismissed the application.

4. Decision No. 301 (19 July 2003): Lavelle v. International Bank for Reconstruction and Development[25]

Pensions and pension systems—Pension eligibility requirements—Non-Regular Staff—General rules—Differentiation among Bank staff—Parallelism—Fairness and legitimate expectation—Contractual rights—Confidentiality of pleadings

The Applicant challenged the decision of the International Bank for Reconstruction and Development (IBRD or the Bank) to deny him pension credit for past service as a Non-Regular Staff (NRS) due to a disqualifying break in service. Such credit had been extended in 2002 to qualifying staff members as an extension of the Bank's 1998 Human Resources Policy Reform (1998 Reform).

The Applicant joined the Bank as a Long-Term Consultant in 1988. He accepted a Fixed-Term appointment and began participation in the Staff Retirement Plan (SRP) in 1990. He became a Regular staff member in 1991. When the 2002 provision of past pension credit came into effect as Schedule F to the SRP, the Applicant was denied credit because his 1988–90 service amounted to 511 days and was therefore not in excess of the 730-day (i.e., two-year) threshold required by the terms of Schedule F.

The Tribunal dismissed on both jurisdictional grounds and the merits the Applicant's claim that the Bank had misled the Tribunal in two prior cases with respect to the views of the Bank's Executive Directors concerning the 1998 Reform and the granting of past pension credit for NRS. The Tribunal rejected on the basis of confidentiality the Applicant's request that the pleadings in those cases be produced.

The Tribunal found nothing to be wrong with the Bank's decision to grant benefits pursuant to certain criteria, such as the number of years served. The Tribunal stated that such is the normal approach taken in any pension system or in respect of other employment benefits. The Tribunal held that the two-year threshold established by Schedule F was not arbitrary or unlawful. The Tribunal also rejected the Applicant's contention that the 2002 plan had introduced discrimination among NRS who had previously formed an undifferentiated group. The Tribunal noted its holding in *Crevier,* Decision No. 205 [1999] at para. 25, that discrimination takes place where staff who are in basically similar situations are treated differently. The Tribunal stated that different NRS found themselves in different career-related circumstances, and so were not in the same situation with respect to past pension eligibility. The Tribunal further concluded that eligibility determinations based on the examination of individual career histories would be an administrative nightmare and would pose a much greater risk of arbitrary differentiation between staff members.

The Tribunal noted that the Bank could have adopted the approach taken by the International Monetary Fund and extended past pension credit to all NRS. The Tribunal,

[25] Francisco Orrego Vicuña, President; and Robert A. Gorman and Jan Paulsson, Judges.

however, reiterated its earlier determination in *Crevier,* Decision No. 205 [1999] at paras. 35–36, that the Bank's policy of parallelism cannot be followed blindly when circumstances do not justify doing so.

The Tribunal rejected the Applicant's claim that he had been deprived of compensation for services rendered, as the NRS pension benefit was unavailable at the time the Applicant rendered the services. The Tribunal further found that the Bank had not failed under the Principles of Staff Employment either to develop and maintain compensation conducive to high standards of performance, or to provide adequately for retirement. The Tribunal determined that while it might be mathematically true that the Applicant's existing pension would be higher if his NRS service were recognized, the 2002 provision had no bearing on his pension entitlement since it did not alter his existing rights.

While the Tribunal cautioned that it does not necessarily follow the standards of national law, it found that several English cases had summarized the applicable standard for a "fairness" analysis. The Tribunal noted that "fairness" under English law is not loosely defined but is governed by strict standards, i.e., whether a lawful promise or practice has induced a "legitimate expectation" and reliance with respect to a substantive rather than simply procedural benefit. The Tribunal cited in this respect *R v. IRC, ex parte MFK Underwriting Agencies Ltd,* [1990] 1 WLR 1545, at 1569–70, *Kruse v. Johnson,* [1898] 2 QB 91, [1895–99] All ER Rep 105, and *R v. North and East Devon Health Authority, ex parte Coughlan* [2000] 3 All ER 850, 871–2, paras. 57 and 65. The Tribunal stated that the English courts' reasoning was the same as that applied by the Tribunal in the seminal case of *Prescott,* Decision No. 253 [2001], in which the Tribunal found a violation by the Bank with respect to its failure to consider the applicant for regularization. The Tribunal held that the Bank's past pension credit policy did not frustrate any legitimate expectation by the Applicant, involve the Applicant's contractual rights, or constitute an abuse of discretion.

For such reasons, the Tribunal dismissed the application.

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

Judgment No. 2003–2 (30 September 2003): J v. International Monetary Fund[26]

Standard of review in disability cases—Fund procedures for determining whether staff member is disabled—Due process in proceedings concerning eligibility for disability pension—Relationship of Tribunal to Fund's Staff Retirement Plan Administration Committee—Nature of Administration Committee decisions—Nature of Fund retirement pensions

The Applicant challenged the decision of the Staff Retirement Plan (SRP) Administration Committee (Committee) to deny her application for disability retirement from the International Monetary Fund (the Fund) on the ground that the Applicant had failed to establish total and permanent incapacity to perform any duty that the Fund might reasonably ask her to perform. Duly authorized representatives of the Staff Association were permitted to communicate their views on the case as *amicus curiae.*

[26] Stephen M. Schwebel, President; and Nisuke Ando and Michel Gentot, Judges.

The Applicant joined the Fund in 1995 as a Verbatim Reporting Officer, for which she was required almost exclusively to use stenographic and computer keyboards. In September 1999, the Applicant suffered a repetitive-use injury for which she was evaluated by numerous medical professionals over the following years. The Applicant was also treated for related psychological problems. No precise diagnosis for her condition was reached, however. Meanwhile, the Applicant was placed on workers' compensation leave following her injury, and briefly attempted to return to work in February 2000. In May and June 2000, it was determined that the Applicant was unable to resume her functions and she was advised to apply for a disability pension since no other suitable position was available. The Applicant was informed that she could receive mandatory separation benefits only if she first pursued a disability retirement under the SRP.

On 8 June 2000, the Applicant filed a request for disability retirement with the Committee. The Committee's Medical Advisor determined that the Applicant's performance incapacity was not permanent assuming appropriate accommodations were made. A vocational rehabilitation specialist thereafter concluded that the Applicant would be restricted only to menial tasks and thus hard to place. The Medical Advisor subsequently opined that, in light of an independent psychiatric evaluation, the Applicant suffered from a psychophysiologic reaction to her work originating from her desire for more challenging and interesting tasks. The Medical Advisor concluded that the Applicant was not totally or permanently incapacitated from performing tasks which the Fund might reasonably ask of her. The Applicant disputed this conclusion. Meanwhile, the Fund's Human Resources (HR) Department stated that no suitable positions could be found for the Applicant. On 22 February 2001, however, the Committee denied the Applicant's request without providing any supporting reasons. On 18 May 2001, the Fund informed the Applicant that she would be given a medical separation effective 4 March 2002. The Applicant was also notified about means of appealing the Committee's denial.

After the Applicant filed an application with the Committee for review of the decision, the Committee engaged three physicians to examine the Applicant. The physicians differed as to whether the Applicant was disabled, but concurred that she could perform certain types of tasks. The Medical Advisor's final report to the Committee following their evaluation did not cite the Applicant's rebutting evidence and assertions, and found no total or permanent incapacity. The Fund's HR Department reiterated that no suitable positions could be found for the Applicant. After considering the evidence and relevant arguments, the Committee unanimously decided to sustain its original decision, and on 17 May 2002 provided its Decision on Review to the Applicant. The Applicant thereafter raised a number of claims with the Tribunal.

In reviewing the case, the Tribunal found that the Applicant had not attempted to exhaust her remedies in the Grievance Committee with respect to her medical separation, and had unreservedly accepted the ensuing financial benefits. The Tribunal stated that it would thus limit its review to the Applicant's challenge to the Committee's denial of her application for disability retirement. The Tribunal noted that it would use the term "standard of review" when referring to its proper role in reviewing a contested administrative act. The Tribunal further stated that its authority to make both findings of fact and conclusions of law, and therefore to review *de novo* the legality of an administrative act of the Fund, stems from the Tribunal's unique role as the sole judicial actor within the Fund's dispute resolution system. The Tribunal further noted that a decision of the Committee falls under its direct review, as its original decision constitutes the challenged administrative act.

The Tribunal found that a Committee decision was different from an act of managerial discretion because: (i) the Committee's decision is "quasi-judicial" and thus necessarily predicated upon a construction of the SRP's terms; and (ii) the Committee is vested with the authority to take decisions on behalf the SRP without review by the Managing Director and subject to direct appeal to the Tribunal following a decision on reconsideration by the Committee. The Tribunal stated that its standard of review in such a case would involve three questions: *(a)* whether the Committee had correctly interpreted the requirements of the SRP and soundly applied them to the facts of the case, or whether the Committee's decision was instead based on an error of law or fact; *(b)* whether the Committee's decision had been taken in accordance with fair and reasonable procedures; and *(c)* whether the Committee's decision had been in any respect arbitrary, capricious, discriminatory or improperly motivated.

The Tribunal concluded that in view of the Applicant's highly specialized but limited training and experience, it would not be reasonable to expect the Fund to ask her to perform the duties of certain identified positions, as these would require a significantly different background from that of the Applicant. The Tribunal noted that under the Fund's internal law a medical separation could not determine entitlement to a disability pension. The Tribunal nevertheless took the view that the factual circumstances surrounding a separation may be given weight in reviewing the soundness of the Committee's decision on an application for disability retirement. The Tribunal held on the facts that the Applicant was totally incapacitated on the ground that there was no genuine prospect that she could perform any duty which the Fund might reasonably call upon her to undertake. The Tribunal found that the Applicant's condition was permanent, but noted that in the event of partial recuperation, the disability pension could be proportionately reduced under the terms of the SRP.

The Tribunal noted that a retirement pension (for disability or otherwise) is not a mere "benefit" conferred by the Fund upon staff, but a joint insurance scheme to which both the Fund and staff members contribute. The Tribunal stated that the Applicant's stake in the outcome of the decision-making process regarding pension eligibility deserves a high level of procedural protection, and that it is in the interests of both the Fund and all SRP participants that the decision process be fair and reasonable. The Tribunal in this respect held that the Committee's initial decision was a lapse in due process since it did not provide reasons for the decision and had denied the Applicant an opportunity to respond meaningfully. The Tribunal found that the Applicant's lack of opportunity to respond to evidence before the Committee raised questions of due process, but decided that there was no need to rule upon this issue in light of its finding in the Applicant's favour on substantive grounds.

The Tribunal nevertheless recommended that: (i) the Committee enable applicants to submit observations upon medical reports and opinions in a timely manner; (ii) Committee members be entitled to view medical reports and opinions submitted to or rendered by the Medical Advisor; (iii) the Medical Advisor be replaced by a Board of Medical Advisors, as was the case at the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO); (iv) the Medical Advisor or Board's advice be confined to medical questions and not extend to ultimate conclusions as to incapacity, as such determinations should be the function of the Committee; and (v) applicants should be permitted to comment on statements by Fund officers regarding

their capacity to perform any duty which the Fund might reasonably call upon them to perform.

For such reasons, the Tribunal ordered that the Committee's denial be rescinded and that the Applicant be granted a disability pension. The Tribunal did not award separate compensation as it had found it unnecessary to adjudge the Applicant's claim of procedural unfairness. The Tribunal, however, awarded the Applicant costs as it found her claim to have been well-founded.