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UNITED NATIONS JURIDICAL YEARBOOK

2006

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Chapter V

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

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

1. *Judgement No. 1285 (28 July 2006): Applicant* v. *the Secretary-General of the United Nations*[3]

Evaluation of personal performances—Discretion of the Secretary-General in personnel matters—Due process in evaluation procedures—No right to promotion for staff members

The Applicant entered the service of the United Nations Development Fund for Women (UNIFEM) in 1982. She subsequently became a permanent staff member of the United Nations Development Programme (UNDP), and at the time of the events which gave rise to her Application, she held the D-1 post of UNDP Resident Representative in Zambia.

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[1] In view of the large number of judgements which were rendered in 2006 by the administrative tribunals of the United Nations and related intergovernmental organizations, only those judgements which address significant issues of United Nations administrative law or are otherwise of general interest have been summarized in the present edition of the *Yearbook*. For the full text of the complete series of judgements rendered by the tribunals, namely, Judgements Nos. 1282 to 1316 of the United Nations Administrative Tribunal, Judgments Nos. 2480 to 2568 of the Administrative Tribunal of the International Labour Organization, Decisions Nos. 345 to 356 of the World Bank Administrative Tribunal, and Judgments No. 2006–1 to 2006–6 of the International Monetary Fund Administrative Tribunal, see, respectively, documents AT/DEC/1282 to AT/DEC/1316; *Judgements of the Administrative Tribunal of the International Labour Organization: 100th and 101st Sessions; World Bank Administrative Tribunal Reports, 2006;* and *International Monetary Fund Administrative Tribunal Reports, Judgements No. 2006–1 to 2006–6*.

[2] The Administrative Tribunal of the United Nations is competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the United Nations Secretariat or of their terms of appointment. In addition, the Tribunal's competence extends to the United Nations Joint Staff Pension Fund (including cases from all specialized agencies that participate in the Fund and which have accepted the jurisdiction of the Tribunal in Pension Fund cases), the United Nations Programmes and Funds, such specialized agencies and related organizations that have accepted the competence of the Tribunal (the International Maritime Organization and the International Civil Aviation Organization), the staff of the Registries of the International Court of Justice, the International Tribunal for the Law of the Sea, and the staff of the International Seabed Authority. For more information about the United Nations Administrative Tribunal and the full texts of its judgements, see http://untreaty.un.org/UNAT/main_page.htm.

[3] Spyridon Flogaitis, President; and Brigitte Stern and Goh Joon Seng, Members.

On 15 March 2000, the Applicant received and signed her performance appraisal review (PAR) covering the year 1999, in which her immediate supervisor gave her the rating of "1" (Outstanding) and noted that her "promotion was long overdue". On 20 March, the Regional Bureau for Africa downgraded that rating to a "2" (Exceeds the Expectations of the Performance Plan), with explanation, and submitted it to the Senior Management Review Group (MRG). The MRG downgraded the PAR again, to a "3" (Satisfactory), explaining that, while it "recognized the importance of the staff member's contributions", it "considered it more appropriate to rate her performance as fully satisfactory in line of what is expected from a senior staff member of her level". On 20 September, the Applicant submitted a rebuttal on the downgrading of her PAR and, on 31 July 2001, the Rebuttal Panel concluded that the "1" should be reinstated because the Regional Bureau for Africa had committed a procedural irregularity by not informing her of the change it had made to the rating. On 16 November 2001, the Senior Career Review Group (CRG, formerly MRG) nevertheless decided to maintain the Applicant's "3" rating, prompting a second rebuttal from the Applicant on 15 January 2002. In this second review, the Rebuttal Panel concluded that the "3" rating given by CRG should stand, stating that it was satisfied "that the promotion review was not affected by a different outcome of the rebuttal process".

On 3 October, the Applicant requested administrative review of the decision taken by the Rebuttal Panel. On 14 February 2003, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in New York. The JAB adopted its report on 28 October 2004, concluding that the decision to maintain her "3" rating was vitiated by extraneous factors as both the CRG and the Rebuttal Panel had overlooked important performance achievements. The JAB recommended that the 1999 PAR be "properly evaluated" to reflect consistency with the Applicant's prior record, that UNDP should "make every effort to fully and fairly consider [her] in any future promotion exercise", and that she "be given priority to any suitable vacant D-2 post [. . .] taking into consideration the remaining time of service [. . .] before [she would reach] retirement age".

On 18 February 2005, the Applicant, having not received any decision from the Secretary-General regarding her appeal to the JAB, filed her Application with the Tribunal. On 14 March, the Secretary-General accepted the recommendations of the JAB that UNDP re-evaluate the Applicant's 1999 PAR, and that the Applicant's candidature for any future promotion exercise be fully and fairly considered, but did not accept that the Applicant should be given priority in promotion because the JAB had not offered a legal basis for this recommendation. On 25 October, the Rebuttal Panel issued its third report on the Applicant's 1999 PAR, finding that there was no new information regarding her performance which would justify a change in the "3" rating, and CRG decided to maintain that rating.

In its consideration of the case, the Tribunal was of the opinion that it concerned both non-promotion and due process in evaluation procedures. With respect to the Applicant's non-promotion claim, the Tribunal noted that it had "consistently held that staff members have no right to promotion: the right is to be given full and fair consideration of their candidacy". It concluded that the decision of the Secretary-General not to promote the Applicant was an "exercise of his discretion and [. . .] cannot be impugned unless it is actuated by extraneous or improper motive". The Tribunal did not accept the Applicant's argument that "bias reflected in the evaluation process imbued the promotion process" because the Secretary-General had accepted the recommendations of the JAB that the Applicant's 1999 PAR be properly evaluated and that UNDP make every effort to fully and fairly consider

the Applicant in any future promotion exercise. However, with respect to the Applicant's due process claim, the Tribunal ordered the Respondent to pay her US$ 5,000 as compensation for the irregularities she suffered in the down-grading of her PAR.

2. *Judgement No. 1289 (28 July 2005): Applicant v. the Secretary-General of the United Nations*[4]

Termination of employment for disciplinary reasons—Proportionality of disciplinary measures—Misconduct justifying termination—Fraud—Presumption of innocence—Benefit of the doubt should profit the Applicant

The Applicant entered the service of the United Nations High Commission for Refugees (UNHCR) on 19 February 1992 on a short-term P-3 contract as Logistics Officer in Kinshasa, Democratic Republic of the Congo. His contract was subsequently renewed several times. At the time of the events which gave rise to his Application, he held the post of Senior Liaison Officer and then Officer-in-Charge of the UNHCR liaison office in Brazzaville, Republic of the Congo. These events can be divided into three general categories. First, it was alleged that on 12 April 2000, on the basis of false statements and incorrect information, the Applicant improperly requested and ultimately received daily subsistence allowance (DSA) to which he was not entitled. Second, it was alleged that, on 16 October, he wrote a note verbale to the Congolese administrative authorities requesting a visa for his female companion. Despite the personal nature of this correspondence, he used UNHCR letterhead and sent it in an official envelope, giving it the appearance of official correspondence. Finally, a series of allegations of professional misconduct were made against him concerning his conduct between September 2000 and August 2001, including allegedly failing to reimburse the Organization for airline tickets; fraudulently using Organization funds to acquire an air conditioner for his personal use; putting a colleague in danger; flying business class to take unauthorized leave; and failing to pay hotel bills.

In October and November 2001, UNHCR investigated the matter and, on 15 January 2002, a report was sent to the High Commissioner. On 23 January, the Applicant was presented with allegations of misconduct and, on 4 March, he rebutted the allegations. On 3 September, the Applicant received the Secretary-General's decision to summarily dismiss him.

On 1 October, the Applicant requested that his summary dismissal be reviewed by the Joint Disciplinary Committee (JDC) in Geneva. In its report of 27 November 2003, the JDC concluded that the disciplinary measures were disproportionate to the offence. It recommended the Applicant's reinstatement or, failing that, payment of compensation equivalent to 12 months' net base salary in addition to separation allowance. On 24 April 2004, the Secretary-General decided not to follow the recommendation of the JDC. In particular, while it was never confirmed that the Applicant had actually sent the note verbale misusing UNHCR stationary for personal ends, the Secretary-General took the position that the mere possibility that the note verbale might have been sent was sufficient grounds in itself to justify termination.

[4] Spyridon Flogaitis, President; and Julio Barboza and Brigitte Stern, Members.

On 15 August 2004, the Applicant filed his Application with the Tribunal, requesting rescission of the Secretary-General's decision; compensation of two years' net base salary; and the reconstruction of his pension.

With regard to the allegation that the Applicant fraudulently requested DSA, the Tribunal upheld the JDC determination that the allegation had not been established with certainty and the Applicant "cannot be held accountable for something which has not been definitely established" and concluded that his conduct did not justify dismissal without compensation.

Concerning the Applicant's alleged misconduct between September 2000 and August 2001, the Tribunal again agreed with the JDC, concluding that the Applicant had not intended to commit fraud or evade the Administration's rules, but rather that the events were "the result of lack of attention on the Applicant's part coupled with administrative dysfunction" and that "the Applicant cannot be held accountable for the alleged incidents by the imposition of disproportionate disciplinary measures on him".

Finally, with regard to the note verbale to the Congolese authorities on UNHCR letterhead, the Tribunal was not convinced that, even if the note verbale had been sent, this act would have constituted misconduct serious enough to justify the imposition of summary dismissal, for three reasons. First, there was no conclusive evidence that the note had been sent and, "by virtue of the fundamental principle of the presumption of innocence, [. . .] the Applicant should be given the benefit of the doubt"; second, as the Applicant's companion did not even need a visa to join him, his attempt to help her attain one would not have violated the rule of law; and, third, even if the Applicant's companion had needed the visa, the Tribunal doubted that such use of the Organization's supplies could in itself constitute misconduct of such serious proportions. Such conduct would amount, at the very most, to an "act of dishonesty that did not attain the level of fraud". Therefore, "at the very worst, [the Applicant] might be guilty of a minor irregularity".

The Tribunal concluded that the decision of the JDC "in no way underestimated the seriousness of the Applicant's misconduct but, on the contrary, overestimated it at times", and that the Secretary-General should have followed the recommendation of the JDC, and recognized that termination was disproportionate in relation to the offence. It ordered reinstatement or, in the alternative, compensation in the amount of 12 months' net base salary as well as the termination indemnity he should have received at the time of his separation.

3. *Judgement No. 1290 (28 July 2006): Applicant v. the Secretary-General of the United Nations*[5]

Wrongful termination of contract—Rights of due process in termination proceedings—Termination on grounds of unsatisfactory performance requires a proper evaluation of the staff member performance—Harassment—On-payment of salary and emoluments—"No-contest" letters

The Applicant entered the service of the United Nations Office for Project Services (UNOPS) on 28 April 2000, on a special service agreement as Chief Technical Adviser of the Coffee Promotion and Cotton Improvement Project in Nairobi. At the time of the

[5] Spyridon Flogaitis, President; Dayendra Sena Wijewardane, Vice-President; and Goh Joon Seng, Member.

events which gave rise to his Application, he was in this post under a one-year fixed-term appointment at the L-5/10 level. The letter of appointment for the fixed-term contract required that he submit certain documentation which was considered essential for determining his entitlements without delay. The Applicant had some difficulty furnishing the documentation in a timely manner, but ultimately submitted all necessary information by 5 December. UNOPS withheld his salary until this date, did not pay him various emoluments due to him even after this date, and informed him by a letter dated 18 December that due to the "tardy submission of the required documentation", they were "obliged to withdraw" his fixed-term offer of appointment.

The Applicant replied on the day he received the letter, 23 December, offering multiple reasons for the delay in his submission of the documentation, arguing that in any case a delay in submitting documentation was not a valid ground for withdrawal of the offer of appointment, and asking that all outstanding payments be made to him. On 23 January 2001, the Division for Human Resources Management (DHRM) responded that "under the circumstances that prevailed subsequent to your recruitment, termination of your contract is the only workable solution to resolve the situation in the best interest of everyone involved in international development". DHRM stated that his one-year fixed-term contract was being "foreshortened to expire on 31 March 2001 close of business"; that his salary for the period July 2000 to March 2001 would be placed in his account; that he would be paid a termination indemnity of US$ 9,000; and, that he would be given a one way repatriation travel ticket. These terms, moreover, were conditional on the Applicant signing a "no-contest" letter.

On 2 February 2001, the UNOPS Country Representative informed the Applicant via e-mail that UNOPS had decided to provide him with a contract up to 31 March and that further extension of his contract would be contingent on his performance. On 9 February, the Applicant responded that he was puzzled by that message as he had a contract until 19 July, and requested clarification on whether his contract was being terminated because of late submission of documents or poor performance. He argued that because his performance had never been independently evaluated, he could not be terminated on the latter ground. He also refused to sign the "no-contest" letter.

On 20 February, the Division for Human Resources Management reiterated the decision of UNOPS that terminating the Applicant's services was "the only workable solution to resolve the situation in the best interest of everyone involved in international development". The Applicant's further attempts to resolve the matter were unsuccessful and his contract was terminated on 31 March. On 23 April, he submitted a request for administrative review and on 24 July he lodged an appeal with the Joint Appeals Board (JAB) in Nairobi.

In its report of 24 March 2003, the JAB noted that UNOPS had changed its grounds for the Applicant's termination from late submission of documents to performance-related issues, and then to an agreed termination under staff regulation 9.1. According to the JAB, the withdrawal of the offer of his fixed-term appointment was arbitrary and was a "mere pretext" for his termination. As to performance issues, the JAB emphasized that the Applicant was never apprised of his shortcomings in a timely manner in accordance with established procedures. It also noted that the Respondent did not offer any evidence for his contention that there was no further need for the kind of services provided by the Appli-

cant. The JAB thus concluded that UNOPS had no right to withdraw its offer of appointment or to terminate the agreement with the Applicant, and recommended that he be paid six weeks' net base salary indemnity, two months' net base salary as compensation for the wrongful termination of his contract, and US$ 15,300 for emoluments due to him.

On 28 August, the Under-Secretary-General for Management agreed with the recommendations of the JAB concerning termination indemnity and salary compensation. It also agreed that the Applicant should be paid emoluments due to him, but instructed UNOPS to provide a precise accounting of this amount. On 31 August 2004, the Applicant filed his application with the Tribunal, claiming compensation for wrongful termination, violation of his due process rights, harassment, and non-payment of emoluments to which he was entitled.

In its consideration of the case, the Tribunal concluded that "before a staff member is terminated on grounds of unsatisfactory performance, such performance must be properly evaluated and the staff member must be allowed a chance to improve", and that therefore the Applicant's termination on the ground of unsatisfactory performance violated his rights. It considered that the Administration's request that he sign the "no-contest" letter constituted "an oblique attempt to obtain the Applicant's agreement [on termination] as required by staff regulation 9.1", and also considered that such action raised "a serious question with regard to due process". The Tribunal agreed with the JAB that "the Administration simply used various pretexts to wriggle out of its contractual arrangement with the Applicant, resulting in a wrongful termination of the Applicant's appointment". It found that the Respondent had failed to deal with the specific allegations of harassment and concluded that the facts of the case "reveal a lack of transparency in the way the Administration dealt with the Applicant [that] clearly destabilized him in a way which the Tribunal views as harassment justifying compensation".

The Tribunal ordered that the Respondent pay the Applicant three-and-a-half months' net base salary representing the amount left on his fixed-term appointment, six months' net base salary for the violation of his due process rights, all agreed emolument amounts per a UNOPS memorandum of 13 July 2006, and an additional US$ 5,000 for the delays in paying him his entitlements. Finally, it ordered that the Respondent carry out a final audit of all outstanding claims and disputed payments and make such payments as are found due, or, in the alternative, compensate the Applicant an additional US$ 40,000.

4. Judgement No. 1293 (28 July 2006): Applicant v. the Secretary-General of the United Nations[6]

Coverage of family members by the United Nations Staff Mutual Insurance Society against Sickness and Accident (the Society)—Meaning of "organization in the United Nations family" in the statutes and internal rules of the Society

The Applicant entered the service of the United Nations, on 22 August 1971, on a P-3 post as Human Rights Officer in New York, and on 1 February 1974 he was granted a permanent appointment. He retired on 31 October 1996 after serving in the P-5 post of Acting Chief, Communications Branch, Centre for Human Rights, United Nations Office at Geneva. At the time of the Applicant's retirement, his wife was employed by the Inter-

[6] Jacqueline R. Scott, Vice-President, presiding; and Kevin Haugh and Goh Joon Seng, Members.

national Labour Organization (ILO) in Geneva, but she was later terminated pursuant to a mutual agreement which became effective on 31 May 2001. On 21 November 2000, the Applicant requested that his wife receive health insurance coverage from the United Nations Staff Mutual Insurance Society against Sickness and Accident (the Society). This request was rejected by the Executive Secretary of the Society on the basis that the Applicant's wife was not affiliated with a sickness insurance scheme of an "organization in the United Nations family", a pre-condition to the admission of former officials' spouses under paragraph 2 of Rule IV of its Statutes and Internal Rules. He considered that the ILO was not an "organization in the United Nations family" by reference to paragraph 1 of Rule II, which defines such an organization as "primarily United Nations Headquarters, the United Nations Office in Vienna, the Economic and Social Commissions and the specialized agencies whose headquarters are not located in Geneva".[7]

On 31 December 2001, the Applicant sought administrative review of the issue and direct submission of his case to the Tribunal, arguing that ILO was "an organization in the United Nations family" because the definition should be read broadly since it began with the word "primarily" ("*principalement*"). On 5 April 2002, the Secretary-General refused to consent to direct submission of the Applicant's case to the Tribunal since he did not considered his appeal to be limited to questions of law. Thus, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in Geneva on 4 May.

In its report of 30 October 2003, the JAB stated that although the definition of "an organization in the United Nations family" provided in paragraph 1 of Rule II "seems not to be exhaustive, as would indicate the word '*principalement*' at the beginning of the listing", the presence of

> "the definite article '*les*' before the group '*institutions spécialisées dont le siège ne se trouve pas à Genève*', allows the Panel to maintain without any ambiguity that *a contrario* a specialized agency whose headquarters **is** located in Geneva cannot be added to the list. In that sense, it might be that the list is not exhaustive, but given the wording of the paragraph, any adding would necessar[ily] consist of a new category".

It therefore found that the Appellant had no grounds for contesting the decision denying his wife coverage by the Society. On 27 July 2004, the Secretary-General accepted the findings and conclusions of the JAB. On 13 August, the Applicant filed his application with the Tribunal. In its consideration of the case, the Tribunal agreed with the JAB, finding that while

> "the use of the word 'principalement' or 'primarily' does lead to the conclusion that the list was not meant to be exhaustive, it cannot be interpreted to include specialized agencies whose headquarters are located in Geneva, because this would make the provision internally inconsistent. It would make no sense for the drafters of this provision to have specifically excluded specialized agencies headquartered in Geneva, if it envisioned that those agencies could be included by use of the word 'principalement' or 'primarily'".

The Tribunal therefore concluded that "the Applicant's wife clearly cannot participate in the Society's insurance scheme pursuant to Rule IV, paragraph 4".

Accordingly, the Application was rejected in its entirety.

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[7] The authentic French text reads: "*[P]rincipalement le Siège de l'Organisation des Nations Unies, l'Office des Nations Unies à Vienne, les Commissions économiques et sociales et les institutions spécialisées dont le siège ne se trouve pas à Genève*".

5. *Judgement No. 1298 (28 July 2006): Applicant v. the Secretary-General of the United Nations*[8]

Filing of adverse material in personnel records—Ban on future employment—Adequacy of amount of compensation for violation of rights

The Applicant entered the services of the United Nations Environment Programme (UNEP) in December 1987 on a short-term G-5 level appointment as a Keypunch Operator. At the time of the events which gave rise to her Application, she held a fixed-term contract with the United Nations Office at Nairobi (UNON).

In July 1999, the Applicant was interviewed for a short-term position with UNON. In August, however, the Acting Head of Staff Development informed her that she was not to be considered for further employment with the Organization because of an incident of allegedly fraudulent overtime claims in 1997. In May 2000, she was again interviewed by UNON and, on 7 June, she was identified as the most suitable candidate for a mission replacement and the Human Resources Management Services (HRMS) was asked to initiate her recruitment. When she did not hear from UNON following her interview, the Applicant met with the Acting Chief of HRMS, who reiterated concerns regarding the alleged incident in 1997 and informed her that she was not considered a suitable candidate for re-employment. On 1 August, the Applicant discovered a note dated 19 June 2000 in her Official Status file purporting to set out reasons why her previous contract had not been renewed. The document had apparently been written with a view to ensuring that the Applicant would not be re-employed and had been placed in her file without being brought to her attention. On 24 November 2000 and 7 June 2001, the Applicant requested that the note for the file be removed. On 8 January 2002, she discovered an additional memorandum in her Official Status file, dated 16 December 2000 and addressed to the Chief of Administrative Services of UNON, justifying the 19 June note, which had been annotated by him. On 26 March, the Applicant requested that the Chief of Administrative Services withdraw his decision to bar her from future employment. On 4 September, the Applicant lodged her appeal with the Joint Appeals Board (JAB) in Nairobi.

In its report of 25 May 2004, the JAB recommended that both documents, "as well as any other adverse material in connection with the aforementioned note [for] the file", be removed from the Applicant's Official Status file and that UNON either properly investigate her alleged misconduct or exonerate her. For the violation of her rights, the JAB recommended compensation of three months' net base salary.

On 14 September 2004, before receiving a response from the Secretary-General, the Applicant filed her Application with the Tribunal. On 12 January 2005, the Secretary-General agreed with the recommendation of the JAB that the adverse material be removed from her Official Status file. However, he decided not to conduct an investigation in view of the time that had elapsed since the alleged events occurred, and awarded her compensation of one month's net base salary, finding the recommendation of the JAB excessive.

In its consideration of the case, the Tribunal concluded that it was "intolerable that such documentation was placed in her file without affording her the opportunity of viewing and commenting thereon", and it was "irrefutable that this amounted to a serious viola-

[8] Jacqueline R. Scott, First Vice-President; Dayendra Sena Wijewardane, Second Vice-President; and Goh Joon Seng, Member.

tion of her rights under ST/AI/292 [of 15 July 1982, entitled 'Filing of adverse material in personnel records']". It considered that it was "not necessary for the Applicant to prove that she would have obtained a position but for the offending material". Because the Tribunal was "satisfied that the adverse material was deliberately placed in the Applicant's file with the intention of preventing her re-employment", it found it "reasonable to assume that it did impact the recruitment process".

The Tribunal increased the Applicant's compensation to six months' net base salary, considering that the officials involved should have been aware of the illegality of their acts and consequences on the Applicant's future employment prospects.

6. *Judgement No. 1299 (28 July 2006): Applicant* v. *the Secretary-General of the United Nations*[9]

Sexual harassment—hostile work environment—Secretary-General's discretion in disciplinary matters—Conduct befitting an international civil servant—Proportionality of the sanction to the violation committed

The Applicant joined the United Nations on a fixed-term appointment on 12 May 1975 as an Accounts Officer, and at the time of the events which gave rise to his application, he was working in the United Nations Population Fund (UNFPA) Office, New Delhi, India.

On 26 April 2002, a former UNFPA Accounts Clerk filed a complaint against the Applicant with the Gender Advisor alleging that he had habitually viewed, and subjected her to viewing, pornographic movies from his office computer; that he regularly used obscene language and made degrading and suggestive remarks to her; that he habitually engaged in unwelcome touching, pinching and forcing of his person on her and other women; and that he had threatened her with termination after she raised these issues at a "Gender Sensitization Workshop". On 12 September, following extensive interviews and a review of daily internet logs, the United Nations Development Programme (UNDP)/UNFPA Grievance Committee on Sexual Harassment concluded that the Applicant had subjected the complainant to sexual harassment and had created a hostile work environment. The Applicant refuted the charges, alleging that someone else had accessed his computer to view the pornographic movies; that the complainant was seeking revenge for a poor performance review; and that that he was being singled out, while others who had engaged in the same conduct were not being similarly investigated or charged. On 14 January 2003, the Applicant was charged with serious misconduct, and a Disciplinary Committee was convened.

On 7 January 2004, the Disciplinary Committee concluded that the Applicant had indeed created a hostile work environment, but rejected the complainant's charge of sexual harassment, based on conflicting and confusing evidence that the Disciplinary Committee believed indicated a more consensual relationship between the parties than the complainant alleged. It also concluded that the Applicant had been afforded appropriate due process and that there were no procedural irregularities. The Disciplinary Committee recommended that the Applicant be censured under staff rule 110.3 (a) (i).

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[9] Jacqueline R. Scott, First Vice-President, presiding; Dayendra Sena Wijewardane, Second Vice-President; and Julio Barboza, Member.

On 26 January, the UNDP Administrator rejected the Disciplinary Committee's recommendation, deciding instead that "in light of the seriousness of the conduct in question and consistent with the disciplinary sanctions imposed for misconduct of a similar nature", the Applicant was to be separated from service with UNFPA on the date he received the Administrator's letter. The letter was sent four days before the Applicant's scheduled retirement date. On 20 October 2004, the Applicant filed his Application with the Tribunal, requesting that it rescind the decision to separate him from service; restore the medical plan for him and his wife; and award him US$ 45,000 as compensation for emotional damage and embarrassment.

In its consideration of the case, the Tribunal first concluded that the two inquiry panels established by the Respondent had sufficiently established the presence of misconduct by the Applicant. It did not find credible the Applicant's allegations that someone else was accessing his computer to view the pornographic websites. While the Tribunal accepted the Disciplinary Committee's factual findings and its conclusion as to the presence of a hostile work environment, it did not agree with the Disciplinary Committee as to its finding on the lack of sexual harassment. It stated that

> "[i]t would appear that the Disciplinary Committee panel either misread or misunderstood the very specific language of the UNFPA sexual harassment policy, which defines sexual harassment to include creating a hostile work environment. Thus, by finding that the Applicant created a hostile work environment, the Disciplinary Committee necessarily should have found him also guilty of sexual harassment".

It also criticized the "inappropriate and pejorative language employed by the Disciplinary Committee in its report", such as the conclusion that "the complainant [was] being 'overly sensitive' to discussions of pornographic nature", concluding rather that "it was quite reasonable for the complainant to have objected to such conduct in the workplace and certainly did not amount to undue sensitivity on her part".

The Tribunal concluded that "[t]here can be no doubt that the viewing of pornographic movies and other media, as well as engaging in the sexually lewd and explicit behaviours exhibited by the Applicant, constituted serious violations of the Organization's rules and guidelines". It found the sanction of separation from service to be both legal and proportionate. Concerning the fact that the separation occurred within four days of the Applicant's anticipated retirement, the Tribunal noted that, with the exception of four days salary, "the Applicant generally received all monies and entitlements, including vacation pay, spousal payments and accrued pay that he would have received had he not been separated from service and instead allowed to retire as planned", and that "[g]iven the nature of his conduct, this was a small price to pay and one that was not disproportionate to his conduct".

The Tribunal concluded that there had been no substantive or procedural irregularities. It further concluded that the Respondent had not acted with improper motive, abuse of purpose or arbitrariness in sanctioning the Applicant, noting that the "burden of proof is on the Applicant where allegations of such extraneous motivation are made". Concerning the Applicant's request that the Tribunal reinstate medical insurance for him and his wife, the Tribunal found that the issue was not receivable because there was no evidence that he had sought administrative review of it.

Accordingly, the Application was rejected in its entirety.

7. *Judgement No. 1300 (28 July 2006): Applicant* v. *the Secretary-General of the United Nations*[10]

AUTHORITY OF THE SECRETARY-GENERAL TO DETERMINE STAFF MEMBER'S NATIONALITY FOR UNITED NATIONS' PURPOSES UNDER STAFF RULE 104.8—CAPACITY OF THE TRIBUNAL TO REVIEW NATIONALITY DECISIONS BY THE SECRETARY-GENERAL—SUCCESSIVE CHANGES IN NATIONALITY IN ORDER TO OBTAIN MAXIMUM BENEFITS AND ENTITLEMENTS

The Applicant entered the service of the Economic and Social Commission for Western Asia (ESCWA), Beirut, on 7 November 1977 on a three-month fixed-term appointment as a local recruit at the G-3 level. After several extensions and promotions, she received a permanent appointment on 1 October 1985. During the course of her career with ESCWA, the Agency and the Applicant relocated to Baghdad in 1981, Amman in 1991, and back to Beirut in 1997.

On 28 December 1981, the Applicant married a Lebanese national, and, as provided under Lebanese law, acquired Lebanese nationality one year later. On 3 November 1982, her nationality was changed for United Nations' purposes from Syrian to Lebanese at her request. On 14 April 1999, the Applicant requested that she again be considered a Syrian national for United Nations' purposes, stating that while her first change of United Nations nationality had been motivated by security concerns, she was now compelled to revert to her Syrian nationality for personal reasons, including the settlement of inherited property. On 20 August, the Administration rejected her request, seeing "no compelling reason for changing the previous determination that the staff member is 'most closely associated' with Lebanon, which is the only basis in the rule on which the [United Nations] recognized her Lebanese nationality", and noting that the nationality "was for [United Nations'] purposes only and that she still maintained the nationality of any other states for which she acquired that status".

On 25 February 2000, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in New York. In its report of 20 January 2003, the JAB determined that in requesting the second change of nationality, the Applicant "had the duty to demonstrate [. . .] how circumstances had changed so fundamentally that Syria had replaced Lebanon as the country with which she was most closely associated" and that she "had failed to provide the requested evidence in support of [this] request". The JAB added that it "saw no evidence that there was any need for the [Applicant] to change her nationality for [United Nations'] purposes [. . .] in order to pursue her inheritance claim in Syria, because she was still a Syrian national in the eyes of the Government of Syria". The JAB therefore made no recommendation in respect of her appeal. On 28 July, the Secretary-General agreed with the conclusions of the JAB, and on 19 November 2004, the Applicant filed her Application with the Tribunal.

In its consideration of the case, the Tribunal concluded that the reason for the Applicant's change of nationality in 1982, insofar as the Administration was concerned, was the Applicant's marriage, a legitimate reason for the Administration to accept her request, and that the Applicant had not raised security concerns at that time. Concerning the second request for a change of nationality in 1999, however, the Tribunal stated that the Applicant

[10] Dayendra Sena Wijewardane, Vice-President, presiding; and Kevin Haugh and Brigitte Stern, Members.

"may well speak of her family in Syria and her frequent visits as justification for her ties with that State, but the gist of her argument is the loss of the education grant and expatriation benefits". The Tribunal concluded that the principal reason for her nationality change in 1982 had been marriage, not security concerns, and without evidence that her marital situation had changed or that the State with which she was most closely related had changed, no further change in nationality was warranted, adding that "it is not acceptable to seek to profit by successive changes in nationality and status within the Organization in order to obtain maximum benefits from the entitlements and other advantages accorded by the Administration to internationally recruited staff".

Accordingly, the Tribunal rejected the Application in its entirety.

8. *Judgement No. 1302 (28 July 2006): Applicant* v. *the Secretary-General of the United Nations*[11]

"Special measures for the achievement of gender equality" under ST/AI/1999/9 of 21 September 1999—Modification of standard burden of proof when relevant evidence is solely in the hands of the Administration

The Applicant entered the service of the International Narcotics Control Board (INCB) in Vienna on 1 September 1990 on a one-year fixed-term appointment as a Junior Professional Officer at the L-2 level. After succeeding in the National Competitive Examination, she was appointed in September 1991 to the P-2 post of Associate Social Affairs Officer at INCB, and was granted a permanent appointment on 1 September 1993. At the time of the events which gave rise to her Application, she held the P-3 post of Drug Control Officer at INCB.

On 8 January 2002, the Applicant applied for the P-4 post of Secretariat Services Officer, Secretariat of the Commission on Narcotic Drugs, United Nations Office on Drugs and Crime (UNODC), Vienna. On 27 February, UNODC requested that she be interviewed the following day, but then cancelled this appointment later that same afternoon. The following day, however, she was informed at 11 a.m. that she would be interviewed at 11:45 a.m. She underwent this interview, but wrote to the Administration on 8 March expressing her concern about this procedure. The Vienna Appointment and Promotion Committee (APC) met twice to review the recommendation to fill the post by lateral transfer of a male candidate, but failing to achieve unanimity, referred the case to the Appointment and Promotion Board (APB) in New York for review. On 3 October, APB concurred with the recommendation of the Administration to fill the post by the lateral transfer of a male candidate and endorsed the recommendation of the Applicant as the alternate candidate.

On 22 October, the Applicant submitted an appeal to the Joint Appeals Board (JAB) in Vienna requesting suspension of the administrative action to fill the P-4 post. On 24 October, the JAB advised her that it would not support her request for suspension of action as the administrative decision had already been implemented, *i.e.* the other candidate had already been informed of his selection. That same day, the Applicant was formally notified that she had not been selected for the post. On 17 December, she requested the Secretary-General to review the administrative decision to appoint another candidate to the post. On 26 March 2003, she lodged an appeal on the merits of her case with the JAB.

[11] Spyridon Flogaitis, President; and Kevin Haugh and Brigitte Stern, Members.

In its report of 11 February 2004, the JAB determined that the Respondent had not shown how the qualifications of the selected candidate were superior to the Applicant's as required by ST/AI/1999/9 ('Special measures for the achievement of gender equality') and that therefore the Applicant should have been offered the post. It recommended that the Applicant be paid the P-4 salary she would have been entitled to if selected for the post for a duration of two years or until she was promoted to the P4 level, whichever came first, and that she be placed on the 'Galaxy roster' until offered a suitable post at the P-4 level. On 16 September, the Secretary-General disagreed with the recommendations of the JAB, concluding that it had exceeded its mandate by undertaking a comparison of the qualifications of the candidates, and emphasizing that "[t]he fact that [the Applicant was] endorsed as the alternate candidate by the [APB] does not mean that it considered [her] to be equally suitable for the post in question". With regard to the rescheduling of her interview time, he noted that this was a "frequent occurrence" and had not disadvantaged the Applicant, who had prepared for the interview the previous day in any case. He therefore concluded that no due process violation had occurred. On 1 December, the Applicant filed her Application with the Tribunal.

In its consideration of the case, the Tribunal noted that ST/AI/1999/9 required that where there are both male and female candidates with substantially equal qualifications, "the female candidate should be appointed unless the qualifications of the male candidate are in some *demonstrable* and *measurable* way superior to those of the best qualified female candidate". It concluded that although as a general principle, the party making an allegation bears the burden of proving it, "this general proposition must require modification where the relevant evidence is solely in the hands of the Administration". In this case, although the APC and APB reports on the Applicant's case were provided to her, they were redacted to protect other candidates' confidentiality, and thus it was not possible for the Applicant to assess the qualifications of the successful male candidate in order to prepare her case alleging a violation of the Organization's affirmative action policy.

The Tribunal concluded that "[i]n these circumstances, it would be improper and unprincipled to maintain that her claim must be defeated because she failed to discharge what the Respondent claims as her burden" and that "where the relevant information is in the hands of the Administration and not available to an Applicant, the onus of proof in certain matters should be viewed as neutral rather than as resting on the Applicant". In this regard, the Tribunal considered it established that the Applicant had adequate qualifications for the post because she had been named as the alternate. The Tribunal agreed with the conclusions of the JAB that "since there was no demonstrable or measurable evidence to support a conclusion that the successful male candidate enjoyed substantially superior qualifications when compared with those of the Applicant, a breach of ST/AI/1999/9 [had] been established". It rejected the Applicant's allegations of procedural irregularities in the interview process, agreeing with Secretary-General that the Applicant had not suffered any measurable disadvantage since she had been able to prepare for the interview, and further noting that there was no evidence of any *mala fides* on the part of the Administration.

Considering the Respondent's decision to reject the unanimous recommendation of the JAB, the Tribunal did "not consider that there were any adequate reasons in either principle or policy which would have justified departure from the Respondent's oft-announced policy" but it did "not consider that his decision not to accept the recommendation of the

JAB could be said to have infringed any right of the Applicant or could give rise to an entitlement to compensation".

Accordingly, the Tribunal ordered the Respondent to pay the Applicant the difference between her salary at the P-3 level and the P-4 salary that she would have received had she been appointed to the post in question, from October 2002, for the lesser of either two years or until her promotion to the P-4 level, and ordered the Respondent either to place the Applicant on the "Galaxy roster" until she secures a suitable post at the P-4 level or to pay her two months' net base salary.

9. *Judgement No. 1303 (28 July 2006): Applicant* v. *the Secretary-General of the United Nations*[12]

General service staff—Right to apply to vacancies—Movement of staff from the General Service to the professional category—Definition of "internal" and "external" candidate—Claim for special post allowance not presented previously for administrative review is not admissible

The Applicant entered the service of the United Nations on a short-term G-3 appointment as Records Clerk in August 1992. His appointment was subsequently extended and then converted to fixed-term. On 9 June 1997, he earned a *Juris Doctor* degree and was subsequently admitted to the New York Bar. At the time of the events which gave rise to his Application, he was a G-4 level Legal Clerk for the Administrative Law Unit (ALU), Office of Human Resources Management (OHRM), acting as a P-2 Associate Legal Officer, with a special post allowance (SPA).

On 10 October 2001, the Applicant applied for the P-3 post of Legal Officer as an external candidate. He was subsequently informed by the Chief, Staffing Support Section, that he could not be short-listed for consideration, his qualifications notwithstanding, because such action was prevented by "the horrible barrier between G and P". In particular, the Chief cited General Assembly resolution 33/143 of 20 December 1978, para. 1 (g), which provides:

> "Movement of staff from the General Service category to the Professional category should be limited to the P1 and P2 levels and be permitted up to 30 per cent of the total posts available for appointment at those levels and such recruitment should be conducted exclusively through competitive methods of selection from General Service staff with at least five years' experience and post secondary educational qualifications".

The communication also referenced General Assembly resolution 35/210 of 17 December 1980, which provides that "movement of staff from the General Service category [. . .] is to be regulated exclusively through competitive examination [. . .]. No exception shall be authorised."

On 18 December 2000, the Applicant requested the Secretary-General to review the administrative decision not to consider him for the position, and he also submitted an appeal to the Joint Appeals Board (JAB) in New York, requesting suspension of action of this decision. On 29 December, the JAB recommended "that the contested decision be suspended so that the [Applicant] is not excluded from the process and [. . .] could have an equal opportunity to be considered along with other candidates for the [. . .] post". On

[12] Spyridon Flogaitis, President; and Kevin Haugh and Brigitte Stern, Members.

8 March 2001, the Applicant lodged an appeal on the merits of his case with the JAB. On 15 March, according to the Applicant, the Assistant Secretary-General of OHRM, told him that in order to be considered eligible to apply for a Professional level post, he would have to resign his General Service position, but that the post would be re-advertised for three weeks in order to permit him to do this. On 30 March, the Secretary-General decided not to accept the recommendation of the JAB in his suspension of action case. On 2 April, the Applicant wrote to the Assistant Secretary-General of OHRM, requesting that, in view of the financial constraints which resigning his position would place upon him, the deadline for applications be extended. On 3 April, the Assistant Secretary-General of OHRM responded that no further delay could be permitted in the selection process but that, if he chose to resign his General Service position, he could apply for "any suitable vacancy at the Professional level".

In its report of 9 March 2004, the JAB determined that resolution 33/143 takes no position on whether General Service staff may apply for P-3 posts, and that the Applicant had "never offer[ed] a convincing argument why they should be". It also noted that, without resigning, the Applicant could not be considered an external candidate because "an external candidate is by definition *not* a staff member of the United Nations". Consequently, it made no recommendation with respect to the Applicant, and on 9 November, the Secretary-General agreed with this result.

On 20 December, the Applicant filed his Application with the Tribunal, contending that the decision not to consider him as an external candidate for the P-3 post was not supported by the Staff Regulations and Rules or any other administrative issuances in effect at the time, and was unfair, unjust, and contrary to the basic principles of international civil service.

In its consideration of the case, the Tribunal concluded that the question of whether the Applicant was an internal or external candidate was a "distraction" because it is "beyond dispute that the Applicant was a staff member in the General Service category so that, on the understanding of the Chief, Staffing Support Section, the Applicant was ineligible for appointment to the P-3 level post other than through competitive examination". The Tribunal rejected the Applicant's contention that paragraph 1 (g) of resolution 33/143 be construed as only extending to P-1 and P-2 levels, concluding that "it logically follows that promotion to a P-3 post for a staff member of the General Service category through means other than competitive examination is not possible whilst the staff member remains in the service of the Organization". In other words, the Tribunal concluded that the specific mention of P-1 and P-2 levels in the resolution has the effect of limiting promotion of General Service candidates to those levels, not opening the possibility that they apply directly for promotion to a higher level.

Concerning the Applicant's claim that such an interpretation of the resolutions would be contrary to the basic principles of the international civil service and would be unfair and unjust, the Tribunal emphasized that "it is a body created by the General Assembly[,] and that it derives its jurisdiction solely from the terms of its Statute as adopted by the General Assembly", and that "the language of the relevant General Assembly resolutions is clear and unambiguous in its intention to restrict movement of staff from the General Service category to the Professional category in the manner described".

Concerning the Applicant's claim that he receive SPA for the additional time during which he exercised the functions of Acting Associate Legal Officer in ALU, the Tribunal considered the claim inadmissible as it had not been "the subject matter of a request for administrative review and ha[d] not received consideration by a joint body prior to coming to [the] Tribunal".

Accordingly, the Tribunal rejected the Application in its entirety.

10. Judgement No. 1304 (28 July 2006): Applicant v. *the Secretary-General of the United Nations*[13]

Recruitment process—Balance between confidentiality concerns and an Applicant's due process rights—Quorum requirements of the Appointments, Promotions and Postings Committee—Use of teleconference

The Applicant entered the service of the International Trade Center (ITC) in January 1978 in a three-month short-term G-2 contract as Typist. In April 1978, she joined the United Nations High Commissioner for Refugees (UNHCR). She subsequently received an indefinite appointment. At the time of the events which gave rise to her Application, she held a G-6 level post of Human Resources Assistant of UNHCR.

On 31 October 2001, the Applicant applied for the G-7 position of Senior Human Resources Assistant, and she was interviewed, along with two other candidates, between 26 and 28 November. On 28 January 2002, she was informed that she had not been recommended for the post. On 13 February, she requested administrative review by the High Commissioner of UNHCR, and on 28 February requested conciliation. On 8 March, she requested administrative review by the Secretary-General, and on 21 May she lodged an appeal on the merits of her case with the Joint Appeals board (JAB).

In its report of 23 August 2004, the JAB found that the Appointments, Promotions and Postings Committee (APPC) had breached its rules of procedure by not having the required quorum of six members when it reviewed the G-7 candidates. The JAB therefore found the APPC recommendation null and void, concluded that the Applicant's due process rights had been violated, and recommended that she be compensated six months' net base salary. On 23 December, not having received any response from the Secretary-General, the Applicant filed her application with the Tribunal. On 17 February 2005, the Secretary-General rejected the findings of the JAB on the basis that a sixth member of APPC had participated by teleconference.

In its consideration of the case, the Tribunal first addressed the Administration's request that the summary of recommendations it produced in evidence not be released to the Applicant for confidentiality reasons, refusing to grant this request because confidentiality "must be balanced with the right of an applicant to defend him or herself. Otherwise, a violation of due process rights may occur". Concerning the issue of quorum, the Tribunal noted that it was "a recognized and well-established general principle of administrative law that [. . .] the physical presence of the members of a collegial body is required", and although "modern legislation around the world [had] tried to introduce attenuations to this traditional principle, taking advantage of modern systems of communication such as teleconferencing and videoconferencing", "there is currently no provision for attain-

[13] Spyridon Flogaitis, President; and Kevin Haugh and Brigitte Stern, Members.

ing quorum through such technical means in the APPC Rules of Procedure". Despite this finding, the Tribunal concluded that rescinding the contested decision "given the precise circumstances of this case [. . .] would [. . .] place undue burden on the Administration", noting that "were the proceedings to be quashed, the body would meet again and produce exactly the same decision". The Tribunal concluded that "despite the fact that a formality was not observed", the decision had not been "taken in disregard of the *substantive* rules of administrative law".

Accordingly, the Tribunal rejected the Application in its entirety.

In her dissenting opinion, Judge Stern concluded that the question of quorum was a substantive one and "the Tribunal should not have entered into conjecture of what would have happened had quorum been respected". Accordingly, she concluded that the Tribunal should have confirmed the decision of the JAB.

11. Judgement No. 1310 (22 November 2006): Applicants v. *the Secretary-General of the United Nations*[14]

Termination of employment on grounds of misconduct—Distinction between "misconduct" and "serious misconduct"—Proportionality of sanctions—Review of decisions of the Administration for abuse of discretion—Rights of due process

Applicant Y entered the service of the United Nations Children's Fund (UNICEF) on 7 April 1994, on a fixed-term P-5 level contract as UNICEF Representative, Niger. At the time of the events which gave rise to her Application, she was serving as Representative of the UNICEF Conakry Office in Guinea. Applicant X entered the service of UNICEF on 25 January 2000, on a fixed-term P-3 level post as Operations Officer in the UNICEF Conakry Office, the position he held at the time of the events which gave rise to his Application.

In 2000, to facilitate the availability of iodised salt in Guinea, Applicant Y promoted the involvement of the private sector in its production and distribution. In this connection, Mr. S., the owner of SELGUI, a privately owned company in Guinea, approached UNICEF with a proposal to import and distribute iodised salt. On 20 November, Applicant X advised Applicant Y that the bank had negatively assessed the project, and proposed that UNICEF provide a US$ 100,000 security on the bank's loan to Mr. S. and SELGUI. The same day, Applicant Y determined that support for SELGUI should be limited to the provision of equipment. On 21 December 2000, the bank notified UNICEF that it required its US$ 100,000 guarantee in order to carry out the loan to Mr. S. and SELGUI, and, on 20 February 2001, pursuant to oral instructions from Applicant Y, Applicant X and a colleague transferred US$ 100,000 to the bank. On 19 April, Applicant X approved the payment voucher for the transaction and recorded it as accounts receivable, attributing it to the Private Sector Division of UNICEF, but in October he adjusted this entry so as to make it appear as if it were a programme expenditure of the office rather than accounts receivable to the Private Sector Division. In May 2002, the bank informed UNICEF that Mr. S. and SELGUI had defaulted on the loan and that it was taking possession of the guarantee.

In October 2003, the Office of Internal Audit concluded that while there was no evidence of intention to defraud UNICEF, the Applicants had not followed established UNICEF procedures and their actions had exposed UNICEF to foreseeable risk. It recom-

[14] Dayendra Sena Wijewardane, Vice-President; and Kevin Haugh and Goh Joon Seng, Members.

mended that UNICEF "establish the responsibilities of the involved staff, and implement appropriate actions". On 11 March 2004, Applicant X was charged with:

> "repeatedly engag[ing] in acts of grossly negligent conduct, acting with reckless disregard for UNICEF's best financial interests, sound management of its financial resources and its related business procedures [. . . compounded by . . .] failing to put in place measures that would have safeguarded and/or provided a measure of protection against the financial loss that UNICEF suffered [. . . ;] repeatedly violat[ing] UNICEF Financial Rules [. . .] result[ing] in a significant financial loss [. . . ; and, making] false certifications in official documents and accounting records".

He was advised that his actions constituted serious misconduct; that he could be found personally and financially liable for the loss suffered by UNICEF; and, that he would remain on suspension with pay, pending the completion of disciplinary proceedings. Also on 11 March, Applicant Y received similar charges and was also suspended. On 15 April, Applicant Y responded to these charges, offering to pay UNICEF US$ 5,000, the amount which she calculated to be the Organization's actual damages.

In its separate reports on 3 September 2004, the *ad hoc* JDC unanimously concluded that the Applicants had each "failed to perform in accordance with the highest standard of efficiency and competence[,] which constitute[s] misconduct as described in [. . .] Chapter 15 of the Human Resources Policy and Procedure Manual, paragraph 15.2.3". However, noting that the Applicants "did not have criminal intentions and acted in good faith, and [. . .] the amount was fully recovered", the JDC recommended with respect to Applicant X the disciplinary measure of "[w]ritten censure by the Executive Director with a statement that the staff member's performance be closely monitored to ensure that he has learnt from this experience", and, with respect to Applicant Y, the disciplinary measure of written censure by the Executive Director and deferment of eligibility for within-grade increment for two years.

On 27 September 2004, the UNICEF Executive Director disagreed with the recommendations of the JDC, concluding that the Applicants' "actions constitute a serious violation of the highest standards of conduct and integrity expected of all international civil servants". Consequently, she decided to separate Applicant X from service with one month's compensation in lieu of notice and to separate Applicant Y from service with three months' compensation in lieu of notice. Applicants X and Y filed Applications with the Tribunal on 24 November 2004 and 28 January 2005, respectively. The Tribunal decided to consolidate the cases as they related to disciplinary measures arising from the same set of events.

In its consideration of the case, the Tribunal concluded that the JDC was well justified in concluding that each particular Applicant had been guilty of misconduct. It reasoned, therefore, that the principal question was whether the Executive Director had abused her discretion by re-characterizing the conduct as serious misconduct, subject to much harsher sanctions. The Tribunal noted that "[t]he measures adopted were undoubtedly severe and [. . .] were harsh" especially since "both Applicants acted with the most worthy and laudable of intentions without expectation or prospect of gaining any personal benefit". Nevertheless, the Tribunal concluded that the Executive-Secretary had not abused her discretion, noting that while in the vast majority of cases a conclusion of serious misconduct entailed "dishonest activity or activity designed to advance [the staff member's] situation or finan-

cial position", "the absence of such a motive does not automatically remove a case from the realm of serious misconduct". The Tribunal also rejected Applicant Y's claim that her due process rights were violated by the decision of the JDC not to grant her request for an oral hearing, emphasizing that the "decision on whether or not to conduct oral proceedings falls within the discretion of the JDC". Accordingly, the Tribunal rejected the Applicants' claims in their entirety.

In his dissenting opinion, the Vice-President considered that "serious as the Applicants' shortcomings were, they do not [. . .] add up to a 'reckless disregard' for the interests of UNICEF or 'serious misconduct' as they were later to be categorized" and consequently found the sanction imposed to be disproportionate. The Vice-President was "troubled by the way in which the JDC's findings were disregarded, and the more serious characterization and sanction imposed, without a reasoned and substantive explanation for such departure". He stated that "[i]n the circumstances of these cases of staff members with noble goals and no criminal intent, whose misconduct arose from shortcomings in their performance and not from any deliberately fraudulent activity or *mens rea* to commit harm", the sanction of separation from service is disproportionate, and the Executive Director vitiated her discretion in imposing it, noting that termination for misconduct or serious misconduct "is almost exclusively imposed upon staff members who have committed—or attempted to commit—fraud, rather than for matters of poor performance". Accordingly, the Vice-President would have rescinded the decision of the Executive Director in each of the Applicants' cases.

12. *Judgement No. 1313 (22 November 2006): Applicant* v. *the Secretary-General of the United Nations*[15]

Mobility policy—Discretion of the Secretary-General with regard to personnel decisions—Compensation for emotional stress or psychological injury

The Applicant entered the service of the United Nations on 24 August 1970 in a fixed-term G-3 level contract as a Bilingual Clerk in the Executive Office of the Secretary-General (EOSG). Her contract was subsequently extended, and on 1 August 1972 she was granted a permanent appointment. At the time of the events that gave rise to her Application, she was serving as a Telephone Operator at the G-5 level in EOSG.

On 24 August 2001, the Chef de Cabinet requested that the Assistant Secretary-General for Human Resources Management facilitate the Applicant's move to a new assignment effective 1 September, noting that the Applicant had at that time enjoyed some 31 years' experience working in EOSG, that "[t]his is a very long time for a staff member to remain in one office", and that "it is strongly felt that a change would be both desirable and in keeping with the direction in which the Organization is moving with regard to staff mobility". On 1 September, the Applicant left EOSG and began seeking other appointments. On 11 October, the Applicant requested administrative review of the Chef de Cabinet's 24 August request to transfer her. On 1 November, the Applicant reported to the Terminology and Reference Section of DGACM. On 28 December, she lodged an appeal with the JAB in New York.

[15] Jacqueline R. Scott, Vice-President; and Julio Barboza and Kevin Haugh, Members.

In its report of 24 August 2004, the JAB noted that the Applicant had not "suffer[ed] any pecuniary loss, as she received her full pay and [. . .] none of her entitlements [had] been affected". It also noted that no medical report existed attesting that she was under mental or emotional distress as a consequence of the reassignment. The JAB emphasized that, in accordance with staff rule 1.2 (c), "[s]taff members are subject to the authority of the Secretary-General and to assignment by him or her to any of the activities or offices of the United Nations". It unanimously concluded that the decision to transfer the Applicant had been taken within the discretion of the Secretary-General and had thus not violated her rights, but recommended that OHRM make every effort to place her in a post "that would allow her [. . .] further career development". On 28 January 2005, the Secretary-General agreed with the recommendations of the JAB. On 2 May, the Applicant filed her Application with the Tribunal, contending that since her removal from EOSG, she had "not been assigned any meaningful or useful work", that she had "effectively languished in the doldrums, leading a soul-destroying, demoralizing and depressing existence insofar as her career [was] concerned", and that "her future career and promotion prospects [had] been seriously impaired".

In its consideration of the case, the Tribunal noted that, while the Respondent had claimed that the transfer was carried out "in the interests of mobility", he had not offered "any evidence tending to establish that actual or useful duties were assigned to the Applicant for any substantial period since her said transfer occurred". It also observed that by basing its rejection of the Applicant's claim on the discretion of the Secretary-General, the JAB had avoided the "central issue as to whether the Applicant was ever assigned useful or suitable duties following her transfer". In the absence of contrary evidence, the Tribunal concluded that "the Applicant's evidence must be accepted on this issue and [that it] must likewise accept her evidence that she found this to be a deeply unhappy, embarrassing and soul-destroying experience".

Having found that the Applicant had been assigned little or no suitable or useful work since her transfer, it examined "the legitimacy of the Respondent's contention that the Applicant's transfer was a *bona fide* exercise of the Secretary-General's wide discretion" and "the *bona fides* of the assertion that the transfer was effected in the interests of mobility". It concluded that "when justification for a transfer such as occurred in the Applicant's case involves an assertion that it was made in the interests of mobility, there should be some surrounding circumstances which would tend to establish that the move was being made for the ultimate benefit of the Organization". Having found none, it concluded that the transfer constituted an abuse of power.

With regard to compensation, it rejected the conclusion of the JAB that no claim is warranted where no identifiable financial loss has been proved, noting that such an approach "might serve to encourage persons contemplating bringing proceedings for moral damage to unnecessarily seek medical treatment". The Tribunal concluded that because the Applicant had suffered emotional stress as a result of the Respondent's actions, she was entitled to compensation for moral injury.

Accordingly, the Tribunal ordered the Respondent to pay the Applicant compensation in the amount of six months' net base salary.

B. Decisions of the Administrative Tribunal of the International Labour Organization[16]

1. *Judgment No. 2493 (1 February 2006): Mr. G. J. M. and others* v. *European Organization for Safety of Air Navigation*[17]

Imposition of disciplinary measures—Question of compatibility between the exercise of the collective right to strike and the duty to ensure continuity of service—Legitimate competence of the director general to declare a collective action illegal—Regulation of the exercise of collective right should not deprive the substance of that right in practice—Short notice and indefinite duration of a strike not deemed to render the strike unlawful—Respect of adversarial principle in disciplinary procedure

The Complainants are, or were at the material time, employed as Clerical Assistants at the Central Flow Management Unit (CFMU) at the European Organization for Safety of

[16] The Administrative Tribunal of the International Labour Organization is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the staff regulations of the International Labour Organization and of the other international organizations that have recognized the competence of the Tribunal: International Labour Organization, including the International Training Centre; World Health Organization, including the Pan American Health Organization; United Nations Educational, Scientific and Cultural Organization; International Telecommunication Union; World Meteorological Organization; Food and Agriculture Organization of the United Nations, including the World Food Programme; European Organization for Nuclear Research; World Trade Organization; International Atomic Energy Agency; World Intellectual Property Organization; European Organization for the Safety of Air Navigation (Eurocontrol); Universal Postal Union; European Southern Observatory; Intergovernmental Council of Copper Exporting Countries; European Free Trade Association; Inter-Parliamentary Union; European Molecular Biology Laboratory; World Tourism Organization; European Patent Organisation; African Training and Research Centre in Administration for Development; Intergovernmental Organisation for International Carriage by Rail; International Center for the Registration of Serials; International Office of Epizootics; United Nations Industrial Development Organization; International Criminal Police Organization (Interpol); International Fund for Agricultural Development; International Union for the Protection of New Varieties of Plants; Customs Cooperation Council; Court of Justice of the European Free Trade Association; Surveillance Authority of the European Free Trade Association; International Service for National Agricultural Research; International Organization for Migration; International Centre for Genetic Engineering and Biotechnology; Organisation for the Prohibition of Chemical Weapons; International Hydrographic Organization; Energy Charter Conference; International Federation of Red Cross and Red Crescent Societies; Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization; European and Mediterranean Plant Protection Organization; International Plant Genetic Resources Institute; International Institute for Democracy and Electoral Assistance; International Criminal Court; International Olive Oil Council; Advisory Centre on WTO Law; African, Caribbean and Pacific Group of States; the Agency for International Trade Information and Cooperation; and the European Telecommunications Satellite Organization and the International Organization of Legal Metrology. The Tribunal is also competent to hear disputes with regard to the execution of certain contracts concluded by the International Labour Organization and disputes relating to the application of the regulations of the former Staff Pension Fund of the International Labour Organization. For more information about the Administrative Tribunal of the International Labour Organization and the full texts of its judgments, see http://www.ilo.org/public/english/tribunal/.

[17] Michel Gentot, President; Seydou Ba and Claude Rouiller, Judges.

Air Navigation (Eurocontrol Agency). They requested that the disciplinary measures taken against them following a strike held at the Agency in March 2003 be set aside.

On 29 December 2002, the FFPE-Eurocontrol, a trade union recognized by the Agency, issued a strike notice, as well as "instructions" urging officials not to apply their normal working rules. The action was however suspended after a meeting with the Director General. On 7 March 2003, the trade union reassumed the strike, this time however without any instructions, as these had been considered illegal by the Director General of CFMU. In a memorandum of 10 March 2003, the Director General stated that the action commenced the same day was illegal, and that "instructions" given to staff constituted an external interference in Eurocontrol's working procedure. The complainants ceased work on various dates between 10 and 14 March.

Later, in March 2003, the Director of Human Resources invited staff members concerned to a hearing to discuss charges made against them in connection to their participation in an "illicit strike". Fourteen of the Complainants were heard, and all twenty-two were issued a written warning for having failed to meet their legal and professional duties in participating in an unlawful industrial action. Following internal complaints, on 19 November 2003, the Director General rejected the recommendation of the Joint Committee for Disputes and decided not to withdraw the warnings.

After having deemed all the complaints receivable, the Tribunal turned to the procedural complaints. In this regard, the Tribunal found that the adversarial principle had been correctly applied, and that the charges against them and the reasons for disciplinary measures had been sufficiently precise and substantiated. The working languages of the Agency being English and French, and none of the Complainants claiming to not understand the documents in English, the Complainants were not found to have a right to have the relevant documents drafted in French as they had requested. Moreover, the allegation of discrimination against the Complainants based on the fact that some officials who had participated in the strike had not been penalized, was not found to be supported by evidence on the file.

The Tribunal then turned to the question of whether the Director General had authority to decide whether the collective action was illegal. It was recognized that the Director General has a wide discretion and independence with regard to technical, financial and personnel resources placed at his disposal. This includes the competence to take whatever measures are necessary to prevent actions deemed unlawful and lay down guidelines for the exercise of the collective rights of staff in accordance with the general principles of international civil service law, especially in the absence of any statutory provisions or collective agreement between the Agency and the staff Representatives. However, the Tribunal clarified that such measures must not have the effect of restricting the exercise of these rights in a way which would deprive them of all substance.

Further, the Tribunal rejected the reasoning of the Agency, which claimed that the action by the Complainants were in fact not a strike but a resumption of the industrial action of January 2003, the staff union having explicitly stated that the "instructions", which, had they been maintained, would undoubtedly had rendered the action unlawful, were not to be applied during the March strike.

Thus, the Tribunal had to decide if, in the circumstances of the case, a work stoppage not involving unlawful actions, the Agency could, in view of the Staff regulations whereby

an official is bound to ensure the continuity of the service and must not cease to exercise his functions without prior authorization, deem participation in the collective action by the officials in question to be unlawful, and therefore legitimately take disciplinary measures against them. The Tribunal observed that a strike by its very nature affect the continuity of service, and is lawful in principle. Therefore, to make the exercise of the right to strike conditional on obtaining a leave of absence would be clearly incompatible with the principle itself. In the absence of specific rules in that respect, the short notice and the indefinite duration of the strike were not sufficient to render the collective action unlawful, neither the fact to take part in it.

Therefore, the Tribunal found the Director General to have wrongly imposed disciplinary sanctions against the Complainants, and decided that the impugned decisions should be set aside. Further, it awarded € 1,000 to each Complainants for moral injury.

2. *Judgment No. 2524 (1 February 2006): Ms. F.V.* v. *Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization*[18]

Non-extension of contract due to unsatisfactory conduct—Harassment and mobbing claim—Harassment and mobbing do not require intent to intimidate, abuse, discriminate or humiliate—Incidents supporting the claim of harassment and mobbing shall be considered in the whole circumstances of the case and not as separate incidents—Duty to provide a safe and secure working environment to the employee—Right to due process in the administrative appeal proceedings—Disclosure of confidential material—Moral damages

The Complainant began her employment as a nuclear physicist at the Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization (CTBTO PrepCom) in May 2001 on a three-year appointment. In October 2003, she was informed that the Executive Director, after consideration by her Division Director and a Personnel Advisory Panel, had decided not to extend her appointment, due to unsatisfactory conduct. In February 2004, the Complainant lodged an appeal with a Joint Appeals Panel against that decision. She also claimed to have been victim of harassment and mobbing by her supervisor Mr. M., and in this regard, she claimed material and moral damages. In its report of September 2004, the Joint Appeals Panel considered that, since a "Note for File" submitted to the Executive Secretary along with the Panel's recommendation had not been made available to her, the Complainant had been denied due process. The Joint Appeal Panel did not found that the Complainant had been victim of mobbing or harassment, but that the recommendation of the Advisory Panel had been "tainted by an error of law". Therefore, the Appeals Panel recommended that a new decision be made. On 18 October 2004, the Complainant was informed that the said Note had been removed from her file, a new performance appraisal report would be prepared, and the Executive Secretary would convene a Personnel Advisory Panel to make a new recommendation on her case. She was further informed that action regarding the non-renewal decision was suspended until 30 November 2004.

It is this decision of 18 October 2004 that the Complainant decided to challenge before the Tribunal. Meanwhile, in December 2004, the Personnel Advisory Panel recommended

[18] Michael Gentot, President; Mary G. Gaudron and Agustín Gordillo, Judges.

not extending her employment, and on 16 December, the Executive Director decided to follow that recommendation.

With regard to admissibility, the Tribunal agreed with the claim of CTBTO that material damages for the non-extension of the Complainant's contract were referable to the later decision of 16 December 2004, which was still subject to an internal appeal. The claim in this respect was therefore dismissed by the Tribunal, whereas it decided that moral damages would be considered along with the claims of harassment and mobbing.

The Tribunal pointed out that harassment and mobbing were extreme examples of the breach of the duty of the employer to provide a safe workplace and to ensure that an employee is treated fairly and with dignity. In considering the present claim in this regard, the Tribunal noted that the Joint Appeals Panel had concentrated solely on the alleged harassment or mobbing led by Mr. M. However, the Tribunal noted that material provided in support of mobbing or harassment may disclose some lesser breach of the employer's duty, and any such breaches should also be considered. Therefore, the Tribunal stated that the present claim should be considered, not only regarding the involvement of Mr. M., but in the whole circumstances of the case.

The Tribunal observed that the Appeals Panel had committed an error when analyzing certain incidents that the Complainant relied upon, considering them as independent and isolated events without placing them in their overall context. Furthermore, the Tribunal found that the Panel had been mistaken in its position that harassment and mobbing require an intent to "intimidate, insult, harass, abuse, discriminate or humiliate a colleague" and that "bad faith or prejudice or other malicious intent" should be established. The Tribunal underlined that harassment and mobbing do not require such intent.

Regarding the facts, it was clear that problems had arisen with the Complainant and her first supervisor, Mr. D., as well as with other employees when she began her employment at CTBTO in 2001. In his first appraisal report, Mr. D. made a negative evaluation of the complainant, based on claims of shortcomings, which however had not been presented to the Complainant.

In the period 2002 to 2004, her second supervisor, Mr. M., gave a number of inconsistent and often contradictory assessments with regard to the Complainant's qualifications and performance, and later showed an attitude of open hostility towards the Complainant, as sometimes he reacted extremely negatively to her, in a way likely to cause stress and humiliation. After various incidents between the Complainant and her supervisor, she was transferred to another Section. During 2003 and 2004, the Complainant's car tires were damaged on five occasions in the office car park, and she received anonymous phone calls at home, and an anonymous internal letter at work.

These incidents were all considered by the Appeals Panel as independent events, and therefore the Appeals Panel held that they were not conclusive of any harassment or mobbing against the Complainant.

On the contrary, the Tribunal stated that, despite the negative relationships between the Complainant and other employees, there was a duty to ensure that the Complainant had a healthy working environment and that she was treated fairly and with dignity. Seen in the light of the many procedural errors and inequities that were committed during the appeal procedures, the Tribunal noted that these facts added to the merits of her claim. The Tribunal concluded that the approach of the Joint Appeals Panel to the question of

harassment and mobbing was seriously flawed and that, therefore, its decision should be set aside.

The Tribunal further noted that the Complainant had been denied due process, as her two successive supervisors were prepared to accept statements from others without investigating their accuracy, and expressed unsubstantiated opinion on her without giving the Complainant an opportunity to respond. Finally, the Tribunal stated that the disclosure of the Complainant's medical records to her supervisors during the appeals procedure entailed a serious breach of confidence.

In conclusion, the Tribunal decided that the decision of 16 October 2003 should be set aside, and awarded to the Complainant € 35,000 for material and moral damages.

3. *Judgment No. 2533 (12 July 2006): Mr. D.S. K.V. v. Organization for the Prohibition of Chemical Weapons (OPCW)*[19]

Appropriate compensation for complete and permanent disability resulting from a work-related injury—Entitlement to compensation independently of the question of negligence or fault on the part of employer—Evaluation of reasonable in-home care and appropriate method of payment—*Ex gratia* payment covers non-pecuniary loss such as pain and suffering but not the required adaptations of the Complainant's house and car—No indexation of disability pension but possible adjustment in case of high inflation—Compensation for future deterioration of the Complainant's health would require further request to the Organization

The Complainant was a former official of the Organization for the Prohibition of Chemical Weapons (OPCW), who in January 2002 was hurt when a machine fell onto his left foot. Although seemingly minor, the injury led to a rare illness which caused complete and permanent disability. OPCW provided a compensation package, which the Complainant claimed was insufficient to meet his daily needs. The compensation package, negotiated between OPCW, Van Breda International (the insurance brokers) and the insurers, included a life-long annual compensation, a lump-sum compensation for loss of function of both legs, an annual lump-sum for in-home care of €2,400 per month, and an *ex-gratia* payment of €150,000.

Before the Tribunal, the Complainant argued that he was entitled to a compensation for negligence from OPCW, as the Organization had breached its obligation to maintain a safe work environment. The Tribunal observed that the staff member was entitled to adequate compensation for his work-related injuries independently of any question of negligence or fault on the employer's part. The Tribunal therefore considered the dispute to be about quantum, not liability, and that the negligence question was irrelevant.

Another important issue raised by the Complainant related to in-home care payments, as he claimed that the monthly sum of € 2,400, negotiated by the insurers brokers, would not cover his costs in this regard, basing its claim, among other things, on the sum of €11,280 initially claimed from Van Breda on behalf of the Complainant. The Tribunal found that the Organization should not be held to this initial claimed amount and that the main disputed question was to determine what could be considered a "reasonable" cost for in-home care, as provided for in the relevant provisions of the Staff Regulations. There was

[19] Michel Gentot, President; James K. Hugessen, Vice-President; Augustín Gordillo, Judge.

also the question of the payments options, periodically against receipt or on a lump-sum basis. The Tribunal observed that, despite the complainant's desire for a lump-sum award, the only reasonable course to adequately cover all related costs would be reimbursement upon provision of receipts for in-home care. The Tribunal further observed that in-home care should include services that go well beyond house keeping, and that the assessment of the "reasonable" care should be made considering the needs of the recipient, rather than what the payer may think should be paid.

With regard to the Complainant's claims of costs for adaptations to his house and car, OPCW had denied them, considering that they had been included in the "additional costs" covered by the *ex gratia* payment. The Tribunal strongly rejected this argument and emphasized that the *ex gratia* payment must be seen as compensation for non-pecuniary loss such as pain and suffering and loss of enjoyment of life. The Tribunal also considered that such expenses were a consequence of the Complainant's service-related injury and that they should therefore be reimbursed.

The Complainant further raised the issue of the non-indexation of his "disability pension", as this could be resulting in loss of purchasing power each year. The Tribunal acknowledged the absence of an indexation clause in the OPCW Group insurance Contract. While expressing its reluctance to order indexation as a matter of routine since the feared spoliation may never occur, the Tribunal recalled the obligation of the Organization to provide the Complainant with adequate compensation, and that inflation should not have the effect of negating the very purpose of the disability pension. Therefore, exceptionally, the Tribunal provided for an adjustment mechanism of the disability pension amount in case of high inflation.

Regarding the claims relating to the future deterioration of the Complainant's health due to the progressive nature of his illness, the Tribunal observed that the Complainant would have to request further compensation from his employer. However, it also stressed that the Organization's obligation to pay the Complainant reasonable compensation for the consequences of his workplace injury was a continuing one, not affected or diminished by the terms of an insurance policy between the Organization and its insurance company, to which the Complainant was not a party.

The Tribunal concluded that OPCW should pay reasonable compensation to the complainant for the consequences of his workplace injury, including reasonable in-home care expenses to be justified by receipts, as well as the cost of past and future adaptations to the complainant's house and car without any reduction in the amount of the *ex gratia* payment.

4. *Judgment No. 2535 (5 May 2006): Mr. E. K.* v. *United Nations Industrial Development Organization (UNIDO)*[20]

Promotion with retroactive effect—Lack of budgetary provisions as justification for delaying promotion—Classification of post—Moral damages when a reasonable settlement offer has been rejected

The Complainant joined UNIDO in 1989 as an Associate Industrial Development Officer at the P-2 level. He was promoted to the P-3 level in April 1992 and to the P-4 level in January 1996. On 1 March 1999 he was, following his application thereto, assigned as

[20] Michel Gentot, President; James K. Hugessen, Vice-President and Mary G. Gaudron, Judge.

UNIDO Representative in Iran. By a memorandum of 4 October 1999, the Complainant requested to be promoted to the P-5 level, claiming that it was customary to increase the grade of staff rotating to the field, and that all UNIDO Representatives were assigned, as a minimum, at the P-5 level. By a letter dated 21 March 2000, the Complainant was informed that the conversion of his P-4 level to a P-5 level had been approved by the Director-General, with effect from 1 March 2000. On 16 April 2000, the Complainant requested by a memorandum to the Director-General that the conversion be made retroactive to the date of his assignment in Iran, 1 March 1999. Having received no reply to the memorandum, the Complainant submitted an appeal to the Joint Appeals Board on 13 July 2000, challenging the effective date of his promotion.

Independently of the appeals procedure, the Complainant was, by a decision of the Director-General of 4 July 2000, reassigned to Vienna with immediate effect. On 17 July he was asked to return to Vienna by 21 July 2000.

On 8 November 2004 the Joint Appeals Board issued a report recommending that the conversion of the Complainant's assignment to level P-5 take effect retroactively from 1 July 1999, consistent with the staff members assigned to the field around the same time. The Director-General rejected the Board's recommendation in a decision of 2 December 2004. In his decision, the Director-General indicated that he had asked the Human Resources Branch (HRM) to discuss the matter with the Complainant with a view to reaching a settlement. HRM did, on 15 December 2004, offer a settlement of US$ 3,000, corresponding to "the cost of implementing the recommendation of the [Joint Appeals Board] in monetary terms". Having received no answer from the Complainant, the Organization however withdrew its offer on 25 February 2005.

While noting that the Complainant had not requested a higher salary than level P-4 at the time of his promotion, the Tribunal stated that the issue was not whether he should have been promoted but rather when such promotion should have taken effect. The file did not reveal any uniform practice in this respect; on the contrary the cases identified by the Joint Appeals Board showed that several months often lapsed between appointment and promotion.

The post to which the Complainant was assigned was classified as P-5 as of 9 September 1999. However, apparently because the budget did not provide for funds for the post until January 2000, he was not in fact promoted until 1 March 2000. The Tribunal observed that the lack of budgetary provisions is not a reason which can be invoked by an international organization to deny a staff member a promotion to which he or she would otherwise be entitled, or to deny him or her the salary which is commensurate with the duties of the post occupied. The Tribunal hence ordered that the Organization backdate the Complainant's promotion to the date of the classification of his post to P-5, and pay him corresponding salaries and allowances from that date, together with interest.

With regard to the claim for moral damages and costs made by the Complainant, the Tribunal noted that the Organization had in fact, in December 2004, made an offer to settle the matter, which had been rejected by the Complainant. Noting that the offer made did not vary markedly from what he would have received under the present judgment, the Tribunal stated that it would make no award of moral damages or costs where a reasonable settlement offer had been rejected.

5. *Judgment No. 2549 (12 May 2006): Mrs. A.H.R.C.-J.* v. *International Labour Organization (ILO)*[21]

Recognition of the status of spouse to same-sex partner registered under national law—Entitlement to spousal dependency benefits—Secretary-General's Bulletin ST/SGB/2004/13—Personal status of staff members determined by reference to the law of their nationality—Interpretation of "spouse" under staff regulations—Differentiation between marriage and civil union—Principle of equal treatment of officials placed in comparable situations

The Complainant, a Dutch national, requested that the International Labour Organization recognize her same-sex partner as a "spouse" in the meaning of the Staff Regulations, as to allow her to receive dependency benefits for the period of her employment at the ILO Office ("the Office") in Pretoria, South Africa.

On taking up her functions on 3 January 2002, the applicant submitted a family status report and application for dependency benefits, designating her partner as her spouse, and attaching a copy of their Danish Certificate of Registered Partnership, dated 17 October 2001. However, the Office recorded her family status as "single" and denied her dependency benefits. The Complainant lodged an appeal with the Joint Panel, which undertook a thorough examination of relevant Danish law, and issued a recommendation supporting the Complainant's claim. Yet, the Director-General did not follow this recommendation and the appeal was rejected on 4 February 2005.

In the present case, the Tribunal had to consider whether the ILO Office, with due regard to applicable rules, could and should have regarded the Complainant's partner as her "spouse", especially in the absence of a clear definition of "spouse". While the rules that apply to United Nations staff members are not binding on the specialized agencies as ILO, the Tribunal recalled that the United Nations refers to the personal status of staff members as determined by reference to the law of their nationality, in order to ascertain whether a union is considered valid and qualifies them to receive entitlements provided for spouses. In this regard, it was noted that the bulletin issued by the United Nations Secretary-General on 20 January 2004,[22] stating that legally recognized domestic partnerships qualify to receive entitlements provided for family members, must be taken into account in the present case. The Tribunal recalled that this rule ensured respect for the social, religious and cultural diversity of Member States and their nationals, and was consistent with its own case law, which recognized certain *de facto* marriage situations such as "traditional" marriages, as stated in Judgement 1715.

However, the Tribunal also referred to its Judgement 2193, in which it emphasized the link between the word "spouse" and the institution of marriage, whatever form it may take, and thus rejected that "civil solidarity contract" ("PACS") partners being recognized as "spouses". It was further observed that, on the contrary, the United Nations Administrative Tribunals, in its Judgment No. 1183, had decided that PACS gave entitlement to spousal benefits.

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[21] Michel Gentot, President; James K. Hugessen, Vice-President; Seydou Ba; Mary G. Gaudron and Claude Rouiller, Judges.

[22] ST/SGB/2004/13 entitled "Personal status for purposes of United Nations entitlements".

No formal decision having been taken by the Governing Body of ILO on the interpretation of the term "spouse", the Tribunal had to decide whether the broad interpretation of the term "spouse" could include same-sex civil unions, as argued by the Complainant. The Tribunal noted that the Office had already agreed to interpret the term "spouse" in favour of same-sex marriages recognized as such by the individuals' national law despite several references to the terms "man" and "wife" in the Staff Regulations.

Thus, the Tribunal considered that it would be excessively formalistic to rely entirely on the name given to a form of union under domestic law, marriage or civil partnership, without looking at its legal significance. Such an interpretation would entail the risk of violating the principle of equal treatment of officials placed in comparable situations. Although some differences existed between marriage and registered partnership in applicable Danish law with regard to parental custody, insemination and adoption, the Tribunal recalled that it was clearly specified that "[t]he provisions of Danish law pertaining to marriage and spouses shall apply similarly to registered partnership and registered partners".

Therefore, the Tribunal concluded that the Director-General was wrong in refusing to recognize the status of "spouse" for the Complainant's partner. It also requested ILO to grant the Complainant the benefits that she had been denied during her employment, the cost of a private health insurance for her spouse, as well as any health expenses not covered by the health insurance. She was further granted CHF 10,000 in compensation for damages and the delay in providing assistance to obtain a visa for her partner.

6. *Judgment 2562 (12 July 2006): Mr. J.A.S.* v. *European Patent Organisation*[23]

Locus standi of the Chairman of the Central Staff Committee to preserve the common rights and interest of the staff—No *Locus standi* for employee who could not have been eligible for a position—Reorganization of the President's Office through reassignments of staff members—Differentiation between reassignments and creation of new posts and their respective procedure—Executive power of the President to assign staff members to different posts—No obligation to inform staff and open posts for competition outside formal vacancies—No obligation to consult the General Advisory Committee for such reorganization of office

The Complainant turned to the Tribunal both in his personal capacity as an employee at the European Patent Organization (EPO) in The Hague, and on behalf of the Central Staff Committee, in his capacity as Chairman. On 1 July 2004, the new President of EPO reorganized the unit known as the President's Office. The Complainant argued that EPO had failed to comply with its Service Regulations as the staff had not been informed of the vacancies created by the reorganization, that the posts had not been open to competition, and that staff representation had not been present on selection and promotion boards. In his individual capacity, the Complainant requested that the appointment of Mr. F. and Mr. M., as well as of subordinates be cancelled, and proper procedure be applied in the selection process for the posts. In addition, in his capacity as Chair of the Staff Committee, he requested that the General Advisory Committee (GAC) be consulted "if the establishment of the President's Office is still desired" and that the "defamatory statement" suggesting

[23] Michel Gentot, President; James K. Hugessen, Vice-President; and Mary G. Gaudron, Judge.

that the Staff Representation was working against the interests of the Office, made by Mr. M. in a President's letter of 5 August 2004, be withdrawn.

Mr. M, who held a post at grade A6 had been assigned to temporarily act as the new Head of the President's Office during the reorganization, while Mr. F., a Principle Director also at grade A6, was assigned to temporarily replace Mr. M. Both. Mr. M. and Mr. F. were to retain their respective budget posts until a new budget, drawn up by the President's predecessor, was approved and took effect on 1 January 2005. In the new budget, provisions were made for a new post at level A6.

EPO claimed that the Complaint was irreceivable as the Complainant had not exhausted internal means of redress, but the Tribunal considered that if the Complainant's appeal had not yet been considered by the Appeals Committee at the time the complaint was filed with the Tribunal, it was due to the failure of EPO to comply with its own Service Regulations. As more than two months had passed since the Complainant had filed his appeal, he was right in assuming, under article 109 (2), that his appeal had been rejected. However, the Tribunal further concluded that the Complainant lacked *locus standi* in his private capacity, since, being an employee at grade A3, he could not have been considered for an A6 position, and therefore had not suffered any prejudice. Yet, the Tribunal found that the Complainant had *locus standi* on behalf of the Central Staff Committee. As the Committee itself cannot file suits, individual members of the Committee must be allowed to do so, in order to preserve the common rights and interest of the staff.

On the merits, the Tribunal concluded that the changes occurred in the President's Office did not amount to the creation of a new structure or new posts. It was therefore unnecessary to consult GAC, which, according to article 38(3) of the Service Regulations, is only required for proposals to amend the Service Regulations, the Pension Scheme Regulations, and other proposals to implement rules, or which affect the whole staff. Nothing indicated that the use of staff "on loan" was to become a regular practice, and the changes made by the President could not be considered a "policy". The Tribunal reiterated that the head of an international organization has the "executive authority to assign staff to different posts" and "is empowered to change the duties assigned to his subordinates". As no vacancy was created, but rather some staff reassigned, there was no need to inform the staff or hold a competition for the posts in question. The Tribunal consequently dismissed the complaints.

C. Decisions of the World Bank Administrative Tribunal[24]

1. *Decision No. 348 (26 May 2006), Paula Donnelly-Roark* v. *International Bank for Reconstruction and Development*[25]

Extension of employment beyond mandatory retirement age—Staff rule 7.01 (ending employment), paragraph 4.03 (a)—Interpretation of the sentence "in the interest of the Bank Group"—Doctrine of legitimate expectations in relation to the expiry of a fixed-term contract

The Applicant retired from the Bank on 1 January 2004 upon reaching the mandatory retirement age of 62. Before her retirement, the Applicant requested an extension of her employment for a further 20 months, in order to have ten years of service, which would have qualified her for an annual pension instead of a lump sum payment. Staff Rule 7.01 (Ending Employment), paragraph 4.03 (a), provides that employment may be extended in the interests of the Bank Group, but the Bank declined her request on 12 January 2004.

The Applicant challenged the decision of the Bank to deny her request for an extension of her employment on the grounds that the Bank applied the phrase "in the interests of the Bank Group" in a narrow and arbitrary manner, that the denial of extension was unfair, and the impugned decision was tainted by improper motivation.

The Tribunal observed that the purpose of Staff Rule 7.01 (Ending Employment), paragraph 4.03 (a), was to provide explicitly for the circumstances in which a staff member may secure extension of employment upon reaching the age of retirement. The Applicant submitted that this Rule should be interpreted to mean that in taking the extension decision, the Bank must consider both the interests of the Bank as an institution and the interests of its staff members. The Bank, however, pointed out that it complied with the Human Resources guidelines in this regard (the 1999 Stern memorandum), which states that the "interests of the Bank Group" must be distinguished from and elevated above the interests of an applicant.

The Tribunal found that the interpretation by the Bank of the said Staff Rule was reasonable and having been consistently applied, it was not necessary that the Rule itself be formally amended to incorporate the guidelines. The Tribunal considered that the interpretation of the Applicant of the phrase "in the interests of the Bank Group" ran counter to the purpose of the Rule.

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[24] The World Bank Administrative Tribunal is competent to hear and pass judgement upon any applications alleging non-observance of the contract of employment or terms of appointment, including all pertinent regulations and rules in force at the time of the alleged non-observance, of members of the staff of the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation (referred to collectively in the statute of the Tribunal as "the Bank Group"). The Tribunal is open to any current or former member of the staff of the Bank Group, any person who is entitled to a claim upon a right of a member of the staff as a personal representative or by reasons of the staff member's death and any person designed or otherwise entitled to receive payment under any provision of the Staff Retirement Plan. For more information on the World Bank Administrative Tribunal and the full texts of its decisions, see http://wbln0018.worldbank.org/crn/wbt/wbtwebsite.nsf.

[25] Jan Paulsson, President; Robert A. Gorman, Francisco Orrego Vicuña, Sarah Christie and Florentino P. Feliciano, Judges.

Further, the Tribunal stated that the Applicant's submission that the Bank violated the Staff Rules when it declined to grant her an extension in spite of her talents was not persuasive. The Applicant's managers exercised lawful authority to reorganize the unit and to redefine the scope of the duties of its staff. In matters involving assessment of technical competence of staff or evaluation of staff performance, the Tribunal recalled that it would not substitute its judgment for the discretionary decisions of management. (Oraro, Decision No. 341 [2005], paras. 39, 59.)

In any event, the Applicant's submission that her satisfactory past performance should guarantee extension beyond retirement contradicted the clear language of the Staff Rule. It followed that good performance was a necessary but not sufficient condition for extension.

The Applicant also contended that she was in any event entitled to rely on the doctrine of legitimate expectations recognized in administrative law. In the past, the Tribunal had occasion to consider legitimate expectations as an aspect of fairness. In relation to the expiration of a Fixed-Term contract, the Tribunal has held that such a contract cannot be extended by operation of the doctrine of legitimate expectation unless "circumstances are shown which reasonably warrant the inference by a staff member that the Bank in fact made a promise to extend or renew his or her appointment 'either expressly or by unmistakable implication.'" (Rittner, Decision No. 339 [2005], paras. 30–33.), which had not been proven to be the case for the Applicant.

The Tribunal concluded, in light of Staff Rule 7.01, paragraph 4.03 (a), that the Bank's decision not to extend the Applicant's appointment beyond her mandatory retirement was a proper and valid exercise of the Bank's discretionary authority. No convincing evidence was tendered to support the allegations of abuse of discretion, arbitrariness, violation of procedural requirements and improper motivation.

The Tribunal hereby dismissed the application.

2. *Decision No. 349 (26 May 2006): J.* v. *International Finance Corporation*[26]

Claims for compensation of alleged work-related illness—Differentiation between a claim for payment of treatments of the alleged illness and a claim for compensation of lost wages and benefits due to this illness—Statute of limitation viewed as protecting the stability of the Bank Group's legal relationship with the staff members—Estoppel—Procedures for handling of claims followed by the Claims Administrator should be diligent and transparent—The outsourcing of the Administration of certain programs does not relieve the Bank Group from responsibility and liability in case of improper administration of the program

The Applicant challenged two decisions of the Claims Administrator dated 20 August 2001 and 26 September 2003, regarding an alleged illness suffered by the Applicant during her employment assignment in Africa between 18 June and 18 August 1988, and a related Workers' Compensation Administrative Review Panel (Review Panel) decision dated 12 May 2005 (the hyperpigmentation claim).

[26] Jan Paulsson, President; Robert A. Gorman, Francisco Orrego Vicuña, Sarah Christie and Florentino P. Feliciano, Judges.

The Applicant also raised a claim for a separate illness (the dysentery claim) that she had be diagnosed with, upon her return to the United States, after the end of her employment with the International Finance Corporation (IFC). She sought benefits from the Claims Administrator on the basis that her illness was caught while on work-related travel. The claim was held to be compensable and the Applicant received payments for treatment and temporary disability. An additional claim, filed in 1994, for alleged recurring dysentery symptoms and related temporary disability was also accepted and therefore viewed as settled by the Tribunal.

In 1994, the Applicant filed a claim concerning her skin condition, with the Bank Group's Claims Administrator, who accepted to absorb the costs of her treatments until 15 August 2001. After a second review of the Applicant's condition in 2001 concluded that her illness responded to treatment over time, the Claims Administrator decided to deny the Applicant's claim for ongoing medical treatment and other benefits, decision which the Tribunal viewed as reasonably sustained in accordance with the relevant rules.

At this point the Tribunal had to draw an important distinction between the claim for treatment and that for other benefits, such as lost wages. The Applicant's claim in 1994 concerned only the treatment of her skin condition and it was this precise benefit that the Bank Group compensated until 2001. That claim did not involve the issue of lost wages or other benefits that the Applicant had not raised before 2001, and was accordingly time-barred. Such claim could not be raised nine years later without seriously altering the stability of the Bank Group's legal relationship with the staff members, particularly in a situation where the claimed illness has faded away.

The question remained as to whether the decision to reimburse medical treatment until 2001 implied recognition on the part of the Bank Group that the claim arose out of, and in the course of employment. Except for the alleged confusion with the claim for dysentery, there did not appear to be any other connection with employment in that, as concluded above, the cause of the illness has not been convincingly related to the Applicant's IFC assignment. But even if this connection had been established, it would have no consequences for this claim. This was so, first, because the medical treatment was indeed covered and hence there could be no detriment to the Applicant in this respect, and second, because the statute of limitations applied in any event and its operation would not be altered by a late claim. The estoppel argument raised by the Applicant in this regard was accordingly rejected by the Tribunal.

The Tribunal also found that the claim for vocational rehabilitation was time-barred for the same reasons as the claim for lost wages. Even if this were not so, the claim did not meet any of the requirements laid down under Staff Rule 6.11, para. 6.01 as there was no evidence that the Applicant was unable to resume her previous job. The Tribunal agreed with the conclusion of the Review Panel that a claimant could not unilaterally undertake a course of vocational rehabilitation and later claim for the expenses.

The Tribunal found that while reasonableness and lawfulness in this case were beyond doubt, the procedures followed by the Claims Administrator were not. The Tribunal was troubled by a variety of procedural anomalies as the confusion of the Claims Administrator with respect to two separate claims made by the Applicant. Moreover, the confused discussions between the Claims Administrator and the Applicant about lost wages, that

apparently took place in 2001, fell short of diligence and transparency in the handling of claims.

The Tribunal was also concerned about the procedure followed by the Claims Administrator in connection with the role of independent medical examiners, as one could not see the Applicant personally, and another made references in his report that went beyond his medical functions and speculated as to the motives of the Applicant in an inappropriate and disrespectful manner. All this raised a question about the strict observance of appropriate procedures by the Claims Administrator. The Tribunal observed that the fact that the Bank Group outsourced the administration of certain of its programs did not relieve it from responsibility and liability if a program was improperly administered.

The Tribunal stated that the Applicant's claims on the merits were properly rejected by the Review Panel. However, it was evident that the mishandling of the claims by the Claims Administrator had caused unnecessary difficulties, uncertainties, and anxiety for the Applicant. The Tribunal accordingly concluded that the Applicant should be compensated and be paid US$ 15,000 net of taxes while all other claims were dismissed.

3. *Decision No. 350 (26 May 2006): Yaw Kwakwa (No. 2)* v. *International Finance Corporation (IFC)*[27]

Request to reopen a case—*Res judicata* rule viewed as general principle with very limited exceptions—Reopening of a case requires a new fact able to shake the very foundations of the tribunal's persuasion— "New fact" must have existed at the time of the judgement, albeit unknown by the Tribunal—Anonymity can only be granted at the outset of the proceedings

The Applicant requested that his case be reopened on the basis of new evidence. His claim originated in *Kwakwa,* Decision No. 300 [2003], in which the Applicant contested the termination of his employment at the International Finance Corporation (IFC) in 2001 due to misconduct. In 1994 the Applicant, in breach of Staff Rules, received US$ 50,000 from a businessman, Mr. Kassardijan, whose loan applications were at the time being processed by the Applicant in his capacity as staff of IFC. Despite the Applicant's argument that the transaction was part of a currency exchange, and that his intention had been to return the equivalent sum immediately to Mr. Kassardijan, the claim was denied by the Tribunal as it had been proven that the said transactions had taken place, as it has been admitted by the Applicant himself.

The Tribunal stated that the *res judicata* rule contained in Article XI of its Statute was a general principle to which very limited exceptions could be made, in accordance with Article XIII of its Statute. The Tribunal emphasized that a vigorous screening should be made to justify a disruption of this principle, and a "new fact" must "shake the very foundations of the tribunal's persuasion". Further, it was indicated that the "new fact" must have existed at the time of the judgement, albeit unknown by the Tribunal. Examples of such "new facts" could be that evidence relied upon by the Tribunal in its judgements turned out to be falsified, or that evidence could only be discovered at a later point, using new technology. The Tribunal also observed that another point to consider was wether the

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

failure to present the evidence prior to the judgement was attributable to lack of diligence on behalf of the discovering party.

With regard to the alleged new evidence provided by the Applicant in the present case, the Tribunal unhesitatingly concluded that it contained no new facts relating in any material way to the prior judgement and the findings on which it was based. Documents from court proceedings in Ghana between IFC and Mr. Kassardijan allegedly showing "the lengths to which Mr. Kassardijan will go in his efforts to escape liability" were irrelevant, as the Tribunal had in no way relied on Mr. Kassardijan's trustworthiness in its judgement. Similarly, the Tribunal found irrelevant documents allegedly proving attempts made by the Applicant to repay the amount of US $50,000 to Mr. Kassardijan in 1996. A newspaper article invoked by the Applicant to show that the investigator had been biased and that a false testimony had been solicited against him was not found to support any of these allegations. Finally, documents had been provided, which allegedly showed that the Applicant had not praised the project for which the loans from IFC were provided, and that the memorandum he had signed with regard to the loans were in fact not written by him. The Tribunal noted that these same arguments had been set forth in the first proceedings, and that these facts could therefore not possibly justify a reopening of the case.

As an alternative plea, presented in a reply to the proceedings, the Applicant requested that the first judgement be annulled. The Tribunal strongly rejected this request, and pointed out that *res judicata* applied to the first judgement which, if anything, had been reinforced by the refusal by the Tribunal to reopen the case. Furthermore, the Applicant requested anonymity as to protect his reputation. The Tribunal noted that in accordance with Tribunal Rule 28, anonymity could only be requested at the outset of the proceedings, and was therefore refused.

In conclusion, the Tribunal stated that the Applicant had failed to understand that the complaint against him was proven by his own admissions. The Tribunal consequently dismissed the application.

4. *Decision No. 352 (28 September 2006): K.* v. *International Bank for Reconstruction and Development*[28]

Disciplinary measures for misconduct relating to unjustified travel expense claims—Applicant's "gross negligence" entailed a knowledge that conduct violated a duty to obey established standards even without culpable intent––Duty to initiate a formal investigation once a pattern of possible irregularities has been revealed—Alleged mitigating factors revealed a pattern of the Applicant to see oneself above the rules—Senior staff member should stand as an example—Denial of the possibility to rationalize *post facto* disregard for rules—The evaluation of a claim of disproportionality between sanctions and economic consequences suffered by the Bank should not be viewed as only a matter of sums—Admission into the record of written declarations of a Bank's travel specialist not directly involved in the case

The Applicant, employed at the International Bank for Development and Reconstruction (the Bank), requested the Tribunal to review disciplinary measures taken against him

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

on the basis of alleged gross negligence in his travel expense claims during the period January 2000 to November 2002.

In November 2002, the Applicant's manager reviewed his Statements of Expenses (SOEs) and noticed that many of his trips involved stopovers in Montreal, where his family was residing. This was not a problem per se, but these stops had been marked as "operational" rather than "personal", leading to reimbursements for in-and-out transportation and per diem compensation to which he was not entitled. The Applicant's manager raised these concerns with the Administrative Officer for the Africa Region, who asked the Accounting Department's Travel Audit Team to undertake an audit of the Applicant's travel expenses. She also raised her concerns with the Applicant, and advised him to correctly label all his future trips. In December 2002 the Audit Team concluded its audit, and the matter was referred to the Department of Institutional Integrity (INT). INT commenced a formal investigation and issued its final report in June 2004, concluding that there was sufficient evidence to show that the Applicant was engaged in a clear and consistent pattern of misrepresentation regarding his trips to Montreal, that he had received US$ 4,239.38 to which he was not entitled, that he had made no efforts to correct the errors after being made aware of them, and that costs of additional airfares should have been borne by the Applicant. INT further investigated allegedly unjustified claims relating to trips to New York.

The final report was submitted to the Vice-President of Human Resources, Ms. Sierra, who imposed disciplinary measures. The Applicant was given a written reprimand, to be included in his Staff File for three years, downgraded by one level, declared ineligible for promotion until 1 August 2007, and his Salary Review Increase (SRI) was withheld for the period in which the misconduct took place. On 18 October 2004, the Applicant brought a challenge before the Appeals Committee, which concluded on 15 August 2005 that Ms. Sierra had not abused her discretion in finding that the Applicant had engaged in misconduct or in imposing the disciplinary measures. The Appeals Committee recommended that the Applicant's claims be dismissed, and the Managing Director of the Bank accepted its recommendation. On 20 December 2005, the Applicant petitioned to the Tribunal, claiming that Ms. Sierra's decisions were arbitrary.

With regard to the Applicant's claim that the circumstances did not warrant a formal investigation, as he had been willing to repay the incorrect sums and that there was no evidence of intent, the Tribunal agreed with the Bank that *prima facie* evidence of "intentional" misconduct was not a prerequisite to initiate a formal investigation. In fact, the apparent expense irregularities could not responsibly have been ignored by INT once the matter was referred to it.

The Tribunal further considered the Applicant's claim that the investigation had been flawed, and noted that the process had been legally sufficient and that the applicant had not raised any issues related to due process. Nevertheless, it observed that his "failure to correct" his previous errors, should not have been held against the Applicant, as it was not obvious that he should have done so while these matters were under review. Then, the Tribunal turned to the claim regarding the allegedly prejudicial statements made by INT concerning the Applicant's trips to New York despite the fact that no misconduct was found regarding these trips., The Tribunal remarked that the Applicant had failed to give an account of the purpose of his trips to New York, and of whom he had met there: INT had given an objective account of its findings, and its conclusion that his actions were not

inappropriate suggested a willingness to give him the benefit of the doubt, rather than revealing a bias against him. The Tribunal also dismissed the Applicant's argument that a finding of "gross negligence" by INT was unsustainable as no culpable intent had been proven. The Tribunal observed that "gross negligence" entailed knowledge that certain conduct violated a duty to obey established standards; this was not however the same as an intention to defraud the bank.

The Tribunal further dismissed claims by the Applicant that, as the Bank had failed to train and supervise him in using the new reporting system (SAP) after 2000, the Bank was guilty of contributory neglect. The Applicant had claimed that the system by default labeled trips as operational, that other employees had encountered similar problems, and that these elements should at least be viewed as mitigating factors to be taken into account under the question of proportionality of the disciplinary measures.

The Tribunal found that the Applicant's alleged mitigating factors as the fact that his work for the Bank was outstanding, included much traveling and high-risk operations, that he was not aware of the default setting of the SAP, and that his Montreal stopovers did not result in overall costs to the Bank as he had not claimed home leave for eight years, were, on the contrary, aggravating. The Tribunal stressed that those arguments suggested that the Applicant considered himself exempt from applicable rules, when as a senior staff member and a "distinguished engineer" he should have stood as an example. The Bank would be ungovernable if staff members could construct *post facto* rationalizations for their disregard of the rules.

Finally, the Tribunal itself noted that this case gave rise to a procedural episode which deserved mention, namely the Bank's proffer of written declarations by a Travel Specialist in the Bank's General Services Department, who had no role in the Applicant's SOEs or in the investigation. These declarations were admitted into the record, and the Applicant availed himself of the opportunity to comment on them. Yet they have had no effect on this judgment. The Bank submitted them since their thrust was that a review of microfiche printouts contradicted the Applicant's contention that the misrecording of the purpose of his Montreal stopovers was accidental. The Applicant disagreed. The Tribunal recalled that it did not take a position in this regard, having concluded that the implausibility of the innocent-error thesis was more than adequately established as of the date of the disciplinary measures.

The Tribunal remained unconvinced of the explanations given by the Applicant, and while the sanctions might seem harsh in relation to the economic consequences for the Bank, stressed that the evaluation of a claim of disproportionality was not only a matter of sums.

Consequently, all the Applicant's claims were dismissed.

D. Decisions of the Administrative Tribunal of the International Monetary Fund[29]

Judgment No. 2006–6 (29 November 2006): Ms. "M" and Dr. "M" v. *International Monetary Fund (IMF)*[30]

Challenge of the fund's denial of requests to give effect to child support orders issued by a national court—Possibility to deduct support payments from pension payments made to the retired staff member—Tribunal's jurisdiction *ratione personae* over non-staff members asserting rights under the Fund's benefit plans—Statute of limitations of the Tribunal overcome by the exceptional circumstances of the case, as non-staff members could not be assumed to have known recourse procedures of the Fund—Authorization of child support payments arising outside marital relationship–No requirement that a support order include an express reference to the Staff Retirement Plan of the Fund in order to authorize such payment from this Plan—Prospective-payment rule recognized when the order expressly specifies that past support obligations be drawn from future pension payments—Question of the existence of a *bona fide* dispute on the validity and meaning of the court orders

Applicants Ms. "M" and Dr. "M" contested decisions of the International Monetary Fund (IMF/the Fund) denying requests to give effect under section 11.3 of the Staff Retirement Plan (SRP) to a series of child support orders issued by German courts by deducting the support payments for Ms. "M" from the SRP pension payments of Mr. "N", a retired participant in SRP.

Neither Ms. "M" nor her mother, Dr. "M", were staff members of IMF. The Tribunal's jurisdiction *ratione personae* over Applicants was not disputed, as the Tribunal has held that its jurisdiction pursuant to article II, section 1 (b) of its Statute extends to non-staff members asserting rights under IMF benefit plans. Mr. "N" was invited to participate as an Intervenor in the proceedings of the Tribunal, but he declined to do so.

Applicants had made three requests to the Administration Committee of the Staff Retirement Plan of IMF, in 1999, 2002 and 2003. On each occasion, their requests were denied. The request of 1999 was denied on the ground that the court orders did not "aris[e] from a marital relationship," as required by the terms of SRP section 11.3 in effect at the time, as Dr. "M" and Mr. "N" had never been married to one another. Thereafter, in December 2001, the pension Plan was amended to authorize payments of a portion of a IMF retiree's pension for child support " . . . pursuant to a legal obligation arising from a marital relationship or pursuant to a legal obligation to make child support payments", thereby abolishing the "marital relationship" requirement.

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[29] The Administrative Tribunal of the International Monetary Fund became operational on 1 January 1994. The Tribunal is competent to pass judgment upon any application: a) by a member of the staff challenging the legality of an administrative act adversely affecting him; or b) by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant. For more information on the Administrative Tribunal of the International Monetary Fund and the full texts of its judgments, see http://www.imf.org/ external/imfat.

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

In January 2002, Applicants again filed a request with the SRP Administration Committee. That request was denied on the grounds that (a) as Ms. "M" had reached age eighteen by the time of the 2002 request and the applicable court order was for pre-majority support, the order was for "past due amounts" rather than "prospective" payments; and (b) the support order was not one which by its terms ordered payment from pension benefits. In 2003, Applicants initiated a third request under SRP, referencing their earlier requests and enclosing a new court order, which related to post-majority support for Ms. "M" as a dependent student. Applicants' third request was denied on the basis that the finality and binding nature of the order had not been established and it did not require Mr. "N" to direct that support payments be made from his pension benefits; in the view of the SRP Administration Committee, a *bona fide* dispute existed regarding the efficacy, finality and meaning of the order and therefore, pursuant to the rules of the Administration Committee under SRP section 11.3, it could not be given effect.

The Tribunal first addressed the question of the admissibility of the Applicants' challenges to the 1999 and 2002 decisions of the Fund, in light of the statute of limitations of the Tribunal. It concluded that Applicants had established "exceptional circumstances" overcoming the time bar of article VI of the statute. The Tribunal rejected the view that Applicants had made a knowing relinquishment of their right to judicial review of their claims by lobbying successfully for a legislative remedy to the "marital relationship" requirement. While emphasizing the importance of adherence to time limits, the Tribunal, in the circumstances of the case, held that Applicants as non-staff members could not be assumed to have known the recourse procedures of the International Monetary Fund and that their conduct did not demonstrate casual disregard of legal requirements.

Further, the Tribunal considered whether the "marital relationship" requirement of SRP section 11.3, later revised, was dispositive of Applicants' requests to give effect to court-ordered support for Ms. "M" relating to the time period pre-dating the revision of the Staff Retirement Plan. The Tribunal noted that the question was not one of retroactive application of the revised SRP provision but rather of the validity of the prior SRP provision, in light of Applicants' contention that it represented impermissible discrimination against children born out of wedlock. Respondent, for its part, maintained that the "marital relationship" requirement of section 11.3, which obtained until its 2001 amendment, was a reasonable exercise of the discretion of the IMF Executive Board in defining the conditions under which the Staff Retirement Plan would give effect to support orders.

The Tribunal, however, concluded that " . . . the disparate—and discriminatory—effect with respect to children born out of wedlock followed directly from the intended classification by marital status and by treating child support awards as incidental to a dissolution of marriage and payment of spousal support." (para. 130.) The Tribunal observed that a court-ordered entitlement to child support essentially rests with the child: "The governing consideration is that the child is innocent of the marital—or non-marital—relationship of his or her parents and, as an innocent human being, is entitled to the human right of being free from impermissible discrimination." (*Idem*). Citing universally accepted principles of human rights, including the Universal Declaration of Human Rights of 1948, the Tribunal concluded that " . . . the Fund's apparent failure to provide consideration to the effect of this classification on children born out of wedlock is not compatible with contemporary standards of human rights . . . ," and therefore should not debar Applicants'

support requests for the period during which the "marital relationship" requirement had governed. (paras. 132–133.)

The Tribunal turned next to the question, central to the controversy in the case, of whether the Fund had erred in requiring that a court order, to be given effect pursuant to SRP section 11.3, must specify that support be paid from the retiree's IMF pension benefits (or direct the retiree to submit a direction to the Administration Committee to that effect). The Tribunal observed that none of the court orders that Applicants had sought to have given effect under the Staff Retirement Plan of the Fund referred to Mr. "N"'s IMF pension benefits.

While IMF maintained that the SRP provision was drafted with the intent of creating a voluntary exception to the anti-alienation rule of the IMF Staff Retirement Plan that would be "akin" to the "Qualified Domestic Relations Order" exception found in United States law applicable to private employer pension plans, the Tribunal concluded that such an interpretation " . . . raise[d] an issue of treatment of IMF staff and their dependents in diverse legal systems. The rights of the child born out of wedlock who is raised in a foreign jurisdiction should not turn on the particularities of the law of the District of Columbia, Maryland or Virginia. IMF is a universal organization that in its operation must give due weight to legal principles and procedures of a variety of jurisdictions." (para. 155.) Accordingly, the Tribunal concluded, " . . . while the immediate purpose of the adoption of section 11.3 may have been to remove a particular impediment to the enforceability of family support orders arising from courts in the United States, the larger purpose of the amendment was just as clearly to give effect to a more general policy, under what the Tribunal has termed the 'public policy of its forum,' i.e. ' . . . to encourage enforcement of orders for family support and division of marital property'" (para. 143), citing its earlier Judgment in *Mr. "P" (No. 2)*.[31]

The Tribunal additionally noted that the text of section 11.3 does not clearly state any requirement that a support order include an express reference to the Staff Retirement Plan of IMF. Accordingly, the Tribunal declined to read such a requirement into the Plan provision. Rather, concluded the Tribunal: "What is important is that an alternate payee submit a valid court order entitling the applicant to support arising out of a marital or parental relationship. The precise terms in which the obligation for support is cast are not dispositive." (para. 156.)

The Tribunal next turned to the difficult question of the meaning to be ascribed, in the circumstances of the case, to the "prospective payments" rule of the SRP Administration Committee. IMF had contended that the rule barred payment from Mr. "N"'s prospective pension payments of past due support obligations. The Tribunal noted that, during the pendency of Ms. "M" and Dr. "M"'s Application in the Administrative Tribunal, Applicants had obtained an order from the District of Columbia Superior Court, which created an entitlement to monies previously owed by Mr. "N" for support of Ms. "M" prior to her reaching the age of eighteen and had ordered that his pension be garnished "prospectively," in the sense that the monies be taken from future pension payments, at the maximum rate permitted by section 11.3 of 16 2/3 percent. The Tribunal concluded that " . . . a court order, such as the 2006 Order against Mr. "N", that expressly specifies that

[31] *Mr. "P" (No. 2)* v. *International Monetary Fund,* International Monetary Fund Administrative Tribunal Judgment No. 2001–2 (November 20, 2001), paras. 151, 156.

support payments be made from future pension payments—even if the liability for that support was incurred at some period in the past—is consistent with the requirements of section 11.3." (para. 171.) At the same time, the Tribunal drew a distinction between the application of the "prospective payments" rule in the case of an order (such as the 2006 District of Columbia Order) that expressly specifies that past support obligations be drawn from future pension payments and an order (such as the German orders referred to earlier) that require only that the parent pay support to the dependent child. As to the latter type of order, the Tribunal concluded, the "prospective payments" rule would preclude support payments for any period pre-dating the filing by Applicants of the applicable request to the SRP Administration Committee.

Finally, the Tribunal turned to the question of whether, pursuant to the rules under section 11.3, Applicants' several requests should have been denied, as IMF contended, on the ground that a *bona fide* dispute existed as to the efficacy, finality or meaning of the court orders that Applicants sought to have given effect. Examining each of the orders in question and the respective arguments of the Applicants and Mr. "N", who had set out his views in the earlier proceedings of the SRP Administration Committee, the Tribunal determined that the dispute that existed between the parties as to the validity of the court orders, including as to the paternity of Mr. "N" and his assertion that the law of his domicile governed any support obligation, was not *bona fide*. Accordingly, the Tribunal concluded that the support orders were to be given effect pursuant to the terms of section 11.3 of the Staff Retirement Plan.