Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

2007

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

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

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Chapter V

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

A. Decisions of the United Nations administrative tribunal[2]

1. *Judgement No. 1320 (27 July 2007): Applicant* v. *The Secretary-General of the United Nations*[3]

Disciplinary procedure—Question whether evidence was illegally obtained—Possible application of foreign law by the Tribunal in case of lacuna in the United Nations law—Burden of proof on the Applicant to demonstrate a violation of a foreign law—Forging of documents not befitting an international civil servant—*Prima facie* case of misconduct—Proportionality of sanctions may be assessed by the Tribunal—Rights of due process of the Applicant

The Applicant entered service at the United Nations on 22 May 1973 as an Usher at the United Nations Office at Geneva (UNOG) at the G-1 level on a short-term contract.

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[1] In view of the large number of judgements which were rendered in 2007 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. 1317 to 1345 of the United Nations Administrative Tribunal, Judgments Nos. 2569 to 2666 of the Administrative Tribunal of the International Labour Organization, Decisions Nos. 357 to 377 of the World Bank Administrative Tribunal, and Judgments No. 2007–1 to 2007–8 of the International Monetary Fund Administrative Tribunal, see, respectively, documents AT/DEC/1317 to AT/DEC/1345; *Judgements of the Administrative Tribunal of the International Labour Organization: 102nd and 103rd Sessions; World Bank Administrative Tribunal Reports, 2007; and International Monetary Fund Administrative Tribunal Reports, Judgements No. 2007–1 to 2007–8*.

[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] Jacqueline R. Scott, Vice-President; Julio Barboza and Brigitte Stern, Members.

Thereafter, his contract was renewed and he received a series of promotions. At the time of the events which gave rise to his Application, he held a permanent appointment and was serving at the P-5 level, as a Security Sergeant, Security and Safety Section (SSS), UNOG.

On 22 January 1999 and 17 December 1999, two anonymous letters containing accusations of highly insulting language against United Nations officials were faxed and copied to all SSS staff. A preliminary investigation was initiated by SSS Investigators and it revealed that both anonymous letters had been faxed from a public machine of the Palais des Nations, and that the transmission fees charged to send the faxes were paid for with a Euro card and a Visa card. On 21 December 1999, an SSS Investigator obtained informal information that the Applicant was the holder of the Visa card used to pay for the anonymous fax of 17 December 1999, information that was later confirmed by the Corner Bank Card Centre.

On 6 January 2000, the Director of Administration, UNOG, informed the Applicant of his decision to suspend him with full pay for an initial period of one month, pending investigation, in accordance with paragraph 5 of ST/AI/371, entitled 'Revised Discipline Measures and Procedures'. On 17 January 2000, the Applicant admitted that he was the holder of the Visa card but produced a copy of an '*avis d'opération*' from his bank, purporting to show that he had reported the loss of his Visa card on 8 December 1999. However, he refused to produce any further information on the matter, including the original *avis d'opération*. On 4 February 2000, the Applicant was informed that his suspension with full pay would be extended for a further month. At the same time, as the preliminary investigation was not completed, the Applicant was requested once more to provide additional information concerning the alleged loss of the Visa card, and that, otherwise, the Administration would directly contact the Applicant's bank with respect to the *avis d'opération* submitted by the Applicant. On 7 March 2000, the Applicant resumed work and was reassigned outside SSS.

By letter dated 7 July 2000, the Director of Administration informed the Applicant that the investigation had been entrusted to the Office of Internal Oversight Services (OIOS). The investigation was effectively done only on 24 January 2001. The latter contacted the Applicant's bank, which confirmed that the Applicant was the holder of the Visa card and attested that he had reported the loss of his Visa card on 28 December 1999.

On 28 December 2001, the Applicant was informed that pursuant to the OIOS report, a disciplinary procedure was initiated, and on 30 July 2003, the case was transferred by OHRM to the Joint Disciplinary Committee (JDC) in Geneva. In its report dated 1 June 2004, the JDC rendered its conclusions on the charges against the Applicant, namely to have sent two anonymous insulting letters by fax to UNOG officials; and to have submitted a forged bank document. On 19 July 2004, the Under-Secretary-General for Management informed the Applicant that the Secretary-General agreed with the findings and conclusions of the JDC, and had decided to accept its unanimous recommendation to demote him by one level, with no possibility of promotion for two years, and to impose a written censure for misconduct. On 18 December 2004, the Applicant filed the present Application with the Tribunal. He contended that the Administration had relied on illegally obtained evidence concerning the ownership of credit cards in violation of Swiss and French banking laws, and thus, that such evidence and all conclusions inferred from that should be stricken from the dossier. He further claimed that the sanctions imposed on him had been

disproportionate to his alleged conduct, and were occasioned by prejudice, malice and discrimination by the Administration and some of its officials.

The Tribunal recalled that the internal laws of the United Nations should prevail and were the relevant legal basis upon which the Tribunal operated. However, where there is a lacuna in the internal laws, as in this case where the relevant legal instruments make no mention of banking secrecy or evidence obtained in such manner, the Tribunal was entitled, if not obliged, to consider general principles of law, and as such, it may take cognisance of foreign law, and grant it evidentiary value. However, the Tribunal is not obliged to have knowledge of foreign law invoked before it, and the onus is, then, on the Applicant to demonstrate that the information in question was specifically protected by the laws of France and Switzerland regarding banking secrecy and to provide detailed explanation of the laws in question. Further, the Tribunal recalled that the application of foreign law is highly complex and then no diligent Applicant would limit himself to making sweeping assertions on the nature and scope of certain concepts of foreign law and expect the Tribunal to proceed on such a fragile basis.

With respect to privacy, the Tribunal noted that the Applicant had not invoked any regulation or rule of the internal law of the United Nations and that he did not address the basic premise of whether any privacy right with respect to information printed upon a credit card was waived in the course of a credit card transaction as the merchant may have an automatic record of the cardholder's name. Therefore, the Tribunal found that the Applicant has failed to carry his burden of proving that it was illegal, *per se,* for the banks to provide the information in question.

The Tribunal observed that the Applicant himself, quite apart from the question of banking secrecy, provided sufficient evidence to justify the sanction imposed upon him. In the course of the preliminary investigation, the Applicant presented and relied upon a document which had either been altered, or erroneously issued by the bank. At the very least, the Applicant knew it was erroneous and misleading. The bank, when asked to authenticate the document, informed the Administration that there was an obvious discrepancy in the dates. Thus, the Tribunal was in no doubt that the alleged loss of the Applicant's Visa card was not communicated to the bank on 8 December, but on the 28th of that month, well after the second fax had been sent. Finally, it found suspicious that the Applicant refused to provide investigators with the original *avis d'opération* issued by the bank, which might have proven whether the document, as presented to the Organization, had been tampered with.

Thus, the Tribunal found that the Applicant's explanation of the *avis d'opération* was, at the very least, disingenuous and that he not only failed to prove his case but also committed a serious violation which was far from the conduct befitting an international civil servant. An important fact was thus established: the Applicant presented a possibly forged, or, at best, inaccurate and misleading, document in an effort to improve his situation.

The Tribunal considered that the evidence mentioned above was sufficient to constitute a *prima facie* case against the Applicant.

In Judgement No. 897, *Jhuthi* (1998), the Tribunal held:

> "In disciplinary cases, when the Administration produces evidence that raises a reasonable inference that the Applicant is guilty of the alleged misconduct, generally termed a *prima facie* case of misconduct, that conclusion will stand. The exception is if the Tribu-

> nal chooses not to accept the evidence, or the Applicant provides a credible explanation or other evidence, that makes such a conclusion improbable."

The Tribunal found likewise in the present case once the *avis d'opération* was entered into evidence in this case.

As to the proportionality of the sanction, the Tribunal recalled Judgement No. 1187, *Igwebe* (2004), in which it held:

> "Whilst the Tribunal has 'consistently taken the view that the Secretary-General has broad discretion under this regulation with regard to disciplinary matters, and this includes determinations of what constitutes serious misconduct, as well as the appropriate discipline' (Judgement No. 436, *Wiedl* (1988)), such discretion can be vitiated if the sanction imposed is found to be disproportionate."

The Tribunal found, in the instant case, that the Applicant's presentation of the forged or erroneous document in the course of the investigation was sufficiently serious to justify, by itself, the sanction applied, and considered, then, that the sanction was proportionate in the circumstances of the case.

The JDC found that the Chief of the SSS had violated the Applicant's procedural rights when he ordered a preliminary investigation without consulting his superiors and, particularly, by personally conducting the investigation when he was the party most affected by the faxes in question. However, the Tribunal stated that while deploring these breaches of the Applicant's procedural rights, it considered that his attitude and lack of cooperation during the investigation was below the standard of conduct expected from a staff member of this Organization.

The Tribunal recalled that in Judgement No. 983, *Idriss* (2000), it found that initial shortcomings in respect of due process may be "fully redressed" in later proceedings, thus not resulting in loss or damage to the staff member, and that the instant case came under that category. Hence, it declined to order compensation for violation of due process rights.

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

2. *Judgement No. 1323 (27 July 2007): Applicant* v. *The Secretary-General of the United Nations*[4]

Separation due to abolition of post—Duty of the Administration to assist a staff member whose post has been abolished to find a new position—Scope of this obligation—Sexual harassment charges—Duty of the Administration to conduct an investigation on sexual harassment charges—Tribunal not competent to review Administration's evaluation of candidates to a post

The Applicant joined the UNICEF Rabat office (Morocco), in October 1988 on a series of short-term temporary appointments and on 1 December 1996 she was promoted to Operations Assistant at the GS-5 level, and continued to receive extensions of her fixed-term appointment until 31 December 2001, when she was separated upon the abolition of her post.

On 28 May 2001, the UNICEF Representative sent a letter to the Applicant informing her that her post would be abolished effective 31 December 2001, but that the Rabat

[4] Spyridon Flogaitis, President; Julio Barboza and Goh Joon Seng. Members.

Office would assist her in finding a new position as required by Chapter 18 of the UNICEF Human Resources Policy and Procedure Manual. At the same time, 12 posts were created and reclassified, three of them being relevant to this case: 1 GS-4, 1 GS-5 and 1 GS-6, of which the Applicant chose to apply only for the GS-6.

On 28 June 2001, an external Regional Human Resources Officer held interviews and tests for the GS-6 post, following which another female internal candidate, whose post has also been abolished, was recommended for the post. Afterwards, the Applicant alleged irregularities in the selection of the final candidates for the GS-6 post as well as gender discrimination against her. The investigation on the sexual harassment charges was conducted by an external female Regional Human Resources Officer, who concluded on 7 December 2001 that the Representative's "behaviour would not constitute sexual harassment". She also found that the Applicant was "fully and fairly considered for [the] post but was not found to be the best candidate".

Thus, on 26 September 2001, the Representative informed the Applicant that she would be separated from service due to the abolition of her post and she declined the option to receive an additional 50% termination indemnity if she did not contest the separation.

On 10 February 2002, the Applicant sent a request for administrative review to the Executive Director, UNICEF, and on 13 May 2002, she lodged an appeal with the JAB in New York that adopted its report on 19 May 2004. In the said report, the JAB Panel concluded that the alleged sexual advances by the Representative did not amount to sexual harassment; the Appellant was fully and fairly considered for the post to which she had applied; and it was within UNICEF's authority to withhold the additional 50% termination indemnity.

On 4 March 2005, the Applicant filed the present Application with the Tribunal.

The Tribunal observed that two basic issues, closely connected, were at stake in this case: whether the Applicant was subjected to sexual harassment by the Representative, and whether the Administration failed to comply with established procedures governing the placement of staff on abolished posts, and failed to fully and fairly consider her for the GS-6 post to which she had applied.

On a preliminary basis, the Tribunal took note of the fact that the Applicant did not complain of harassment until 3 September 2001, few months after she has been notified that her post would be abolished and that she had not been selected for the new GS-6 post.

The Tribunal firstly considered the alleged failure on the part of the Administration to fully and fairly consider her for the GS-6 position and, generally, its failure to follow the provisions and rules relating to placement of persons whose posts have been abolished, bearing in mind that the Applicant choose to compete only for the GS-6 position, despite the Administration's suggestions that she should also consider applying to the other positions. The Tribunal noted that the Administration could not be held accountable for not respecting the wishes of a staff member and that the duty of the Administration was only to make good faith efforts to find a suitable, alternative position for a staff member whose post was being abolished, which the Applicant admitted the Administration had done. (See Judgement No. 679, *Fagan* (1994).)

The Tribunal observed that the skills, the qualifications, the strengths and the weaknesses of both candidates to the GS-6 post were evaluated in a careful, thorough, detailed

and meticulous manner, and that the selected candidate was not in a very much different situation than the Applicant as her post had also been abolished. However, having a permanent position, she had higher priority, as well as considerably more seniority (21 years against 13 for the Applicant). Thus, the Tribunal was satisfied that the objective elements of priority in this case had been completely and satisfactorily taken into account, so that any suspicion of extraneous motivation or undue process of law may be alleviated. As for the remaining issues, i.e. the comparison of the merits of different candidates or the evaluation of the standard of performance or relative efficiency of staff members, the Tribunal has repeatedly decided that it would not substitute its own judgement for that of the Administration. In Judgement No. 1108, *Asombang* (2003), it recalled that

> "[t]he Tribunal has consistently held that it will not substitute its judgement for that of the relevant bodies with regard to the performance or relative efficiency of candidates for selection to a post. Indeed, all choices are invariably subjective to some extent (see . . . *Fagan* (*ibid.*) para. XI). The Tribunal has consistently held that 'qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy' (see Judgement No. 1056, *Katz* (2000), para. IV)."

In order to complete its review of the legality of the selection, the Tribunal also considered the Applicant's allegation that she was a victim of "gender discrimination". This allegation was somehow changed into that of "sexual harassment" when the Administration ordered an investigation of that matter and the Applicant did not object to it, thus transforming the nature of the accusation. The link between the alleged "sexual harassment" and the Applicant's non-selection for the G-6 post was that the Applicant considered it "difficult to believe that, subjectively, in the interviewer's mind, he was not aware of the harassment rumours and that local management clearly did not wish [the Applicant] to remain in the organization". The simple reading of this allegation was sufficient for the Tribunal to conclude this was a fragile piece of evidence: it was a mere supposition, not based on any proven fact. Further, the Tribunal noted that the Administration took proper and rapid action to look into the Applicant's allegations of harassment. An investigation in the matter has been immediately ordered, conducted by an external female Human Resources Officer, who concluded to the absence of sexual harassment, even if some actions of the Representative were in bad taste or expressed unwanted humour. Thus, the Tribunal was satisfied that the investigation was properly conducted, and it had no cause to doubt the soundness of the Investigator's conclusions.

Regarding the undue administrative delays plea raised by the Applicant, the Tribunal recalled it has only criticized the Administration when the delays could be considered extraordinary, or inordinate, which was not the present case. Similarly, the Tribunal followed its well-established jurisprudence of denying costs unless some extraordinary circumstance intervened.

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

3. *Judgement No. 1328 (27 July 2007): Applicant* v. *The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*[5]

Pension rights—Beneficiaries of entitlements of a deceased staff member—Administration's promise to withhold entitlements pending national legal proceedings to determine the legal custodian of minor children viewed as a unilateral commitment—United Nations law should prevail to determine whether entitlements were part of the deceased's estate—Administration's obligation to ensure that entitlements were delivered to the beneficiaries designated by the staff member

The Applicant is the second wife of a deceased staff member, who was separated from the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNWRA) by early voluntary retirement in 1992 and who later died in January 1997. On 24 September 1996, the former staff had revoked previous designations of beneficiaries concerning his Provident Fund entitlements and designated as beneficiaries the Applicant, to receive US$ 10,000; his minor daughter, to receive $3,000; and, his five minor sons, who were to receive the remaining part of his entitlements in equal shares.

On 6 November 1997, a Judge of the First Instance Sharia Court decided that Mr. B.M.H., the eldest son from the deceased's first marriage, should be the provisional custodian of the six minor children, reversing an earlier decision dated 19 August 1997 by which the Applicant was designated as the legal custodian of her children. Thus, on 8 December 1997, the Applicant requested the Agency either to hold the entitlements of her minor children within the Agency until a final court decision was taken on the issue of custodianship or to pay the amounts to a Lebanese bank account, but clearly specified that they should not be transferred to a local bank account in Syria. Accordingly, on 22 December 1997, the Field Administration Officer, Syria, responded that the minors' entitlements would be retained by the Agency without any interest until a final court decision on the matter.

However, by letter dated 14 April 1998, the Ministry of Foreign Affairs of Syria requested UNRWA, pursuant to a 19 March 1998 First Instance Sharia Court Judge's Order, to deposit the Provident Fund entitlements due to the minor children at a Syrian bank, and the payment was done on 7 July 1998. The Applicant objected to the transfers on 8 July 1998 under Area staff rule 111.3.1. On 30 September 1998, Court Verdict No. 908 cancelled the previous decision by the First Instance Sharia Court which Mr. B.M.H. had been appointed provisional custodian of the minors. However, pending the legal procedure within the Syrian judicial system about the inheritance of the deceased staff, the entitlements were sequestered at the Syrian bank. On 25 June 2001, the Court of Cassation held that the Provident Fund entitlements fell into the deceased staff's estate, and thus should be distributed amongst the heirs in accordance with Sharia law, which resulted in a financial loss for the five minor sons.

On 14 February 2002, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in Amman. In its undated report, the JAB concluded that the Administration had acted within the framework of its Regulations and Rules without any prejudice or bias to the Appellant. Not having received any decision from the Commissioner-General concerning her appeal to the JAB, the Applicant filed the present application with the Tribunal on 8 March 2005.

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[5] Jacqueline R. Scott, Vice-President; Julio Barboza and Goh Joon Seng, Members.

The Tribunal noted that the present case revolved around two issues: whether or not the amounts provided by the Provident Fund were part of the deceased's estate; and, the legal custody of minors who are beneficiaries of such funds. Further, it observed that the background to both issues was the question of the applicable law.

With respect to the deceased's estate, the Tribunal observed that the applicable legal norms were those of the internal law of UNRWA, according to which the amounts in question were not part of the estate, but belonged to the beneficiaries in their entirety and should be disposed of by the Fund as agreed with the deceased staff member. It recalled that its jurisprudence in this regard is clear and that the internal laws of the United Nations prevail. (See, for example, Judgements No. 932, *Al Arid* (1999) and No. 1256 (2005).) Accordingly, UNRWA was under an obligation to ensure that sums granted by the Fund were delivered to the beneficiaries. In other words, once the Agency has ensured that the amounts in question were safely in the hands of the beneficiaries, for instance, in an account in their names at a bank of their choosing, the Agency may rest in the certainty that its obligations have been correctly complied with. If, later on, any beneficiary must comply with local law and bring such monies to the estate, it is a personal obligation on his or her part and does not involve UNRWA.

In the present case, the Tribunal observed that the Agency had in a first time acceded to the Applicant's petition about the payment of the benefits and promised to retain the monies pending a final decision on the legal custody of the minor children. However, it did not honour its commitment. Had it done so, UNRWA would have been entirely free from any other obligation even if, in the long run, the local authorities would have persuaded the legal custodian of the minor children to bring those monies into the deceased's estate. In this case, the Tribunal held that the Agency's responsibility was not satisfied by the mere formality of transferring the sums to the Syrian bank and paying the benefits contrarily to the specific instructions of the custodian; the beneficiaries being in reality unlikely to receive the amounts to which they were entitled. Acting as it did, the Agency did not comply with its internal law and did not honour the assurances made to the deceased staff member and to the Applicant. The Tribunal viewed that the argument raised by UNRWA, that doing otherwise would have amounted to assist the Applicant in evading Syrian law, as totally unconvincing, since it is the internal law of the Organization which prevails and, in fact, the Agency itself had agreed to have a different conduct than that indicated by the Syrian law.

The question of custody of the minors was also of primary importance for the Tribunal's decision. The Agency could not possibly render monies which were the property of the children unless and until the question of their legal custodianship, disputed between the Applicant and the eldest son of the deceased, had been solved. In this context, the Tribunal viewed the Applicant's petition relating to the payment of benefits as totally justified and noted that the Agency had agreed thereto when the Field Administration Officer assured her that the minors' entitlements would be retained by the Agency until a final court decision was taken on custody. The Tribunal stressed that this agreement amounted to a unilateral commitment on the part of the Agency, superimposed upon—and in conformity with—the underlying obligation it had to conform to its internal rules and the designations of the deceased. The Agency subsequently breached this commitment without cause when the Syrian Ministry of Foreign Affairs requested that the benefits be deposited in a Syrian bank. In this regard, the Tribunal noted the language of Area staff regulation 1.3, "[i]n the

performance of their duties staff members shall neither seek nor accept instructions from any government or from any other authority external to the Agency", which provision is founded upon the terms of the Charter of the United Nations. Had the Agency proceeded in accordance with its commitment, it would have avoided any responsibility and Area staff rule 112.2 would have been entirely satisfied. That, however, was not the case, and the children found themselves in the unfortunate situation of seeing the amounts that their father left to them considerably diminished.

The Tribunal was satisfied that the Agency owed the children compensation for the damage they experienced due to its actions and fixed the amount of such compensation at the actual amount of loss incurred by the five male minor children, as quantified in the JAB report, of US$ 12,867.97 each, with interest. The Tribunal rejected all the other pleas.

In a separate opinion, Judge Goh Joon Seng explained his dissenting views as to the consequences of the legal errors committed by UNRWA in the present case.

4. *Judgement No. 1331 (27 July 2007): Applicant* v. *The Secretary-General of the United Nations*[6]

Promotion exercise—Staff members do not have right to a promotion but do have a right to full and fair consideration for a post—Past performance evaluations viewed as crucial in a promotion exercise—Unacceptable procedural delay caused by respondant—Rebuttal of performance evaluations in the context of a promotion exercise—Biased performance appraisal report—Incomplete and contradictory information about the Applicant—Violation of the Applicant's rights to be given equitable consideration for promotion

The Applicant is a staff member serving on a permanent appointment as an Arabic Interpreter in the Interpretation Service, Interpretation and Meetings and Publishing Division in the Department for General Assembly and Conference Management (IMPD/DGACM). She joined the Organization in 1982 at the P-1 level and was subsequently promoted to higher levels until she got promoted to the P-4 level on 1 April 1989.

This case deals with the "non-promotion" process involving the Applicant, which took place from 2000 to 2003 and pertained to two successive promotion exercises to P-5 posts to which the Applicant has unsuccessfully applied. Considering that she did not receive full and fair consideration during either promotion exercise, especially due to numerous irregularities pertaining to her performance evaluation and performance management, the Applicant lodged two appeals with the Joint Appeal Board (JAB) in New York, on 19 November 2001 and 13 May 2003. The JAB adopted one report on both appeals on 11 March 2004, in which it concluded that the Applicant had been given full and fair consideration and the decisions not to select the Applicant had not violated any of her rights, including her right to due process. On 15 March 2005, the Applicant filed the present Application with the Tribunal.

First, the Tribunal recalled that staff members were not entitled to be promoted, and that the Administration had discretionary authority in the area of promotion. (See Judgements No. 275, *Vassiliou* (1981); No. 375, *Elle* (1986); and No. 390, *Walter* (1987).) However, in accordance with the Tribunal's consistent jurisprudence, it also stressed that the

[6] Dayendra Sena Wijewardane, Vice-President; Julio Barboza and Brigitte Stern, Members.

Administration's power was not absolute and should be exercised in such a way as to ensure that staff members were treated fairly.

In the view of the Tribunal, the promotion processes contested by the Applicant were intimately linked to the various actions she took, within the framework of the United Nations performance appraisal system, to rebut her performance evaluations. The Tribunal stressed that, in order to establish whether the promotion exercises were conducted fairly and equitably, the various performance evaluation rebuttals submitted by the Applicant should be carefully considered and, in particular, the timing of those rebuttals in relation to the promotion exercises.

The Tribunal reviewed in detail the main points of the Applicant's evaluations for each cycle, as well as the pertaining rebuttal procedures, including the rebuttal panels' reports. It noted a drastic change in the Applicant's evaluation in 1998, after which her regularly excellent performance was consistently downgraded. The Tribunal recalled that, while the first Rebuttal Panel found that the Applicant's qualifications were not adequately reflected in her rating, it only recommended that the Applicant's ratings be upgraded in future performance appraisal reports. While the Tribunal found the report to contain inherent contradictions, it noted that it nonetheless suggested to the Administration what its future action should be.

As the Administration refused to take into account the Rebuttal Panel's recommendations, the Applicant undertook a rebuttal of her two following performance evaluations, procedures that were under way when her two initial evaluations were submitted within the framework of the promotion exercise. In the view of the Tribunal, it was clear that those appraisal reports were crucial for the proper conduct of the promotion process. It also stressed that within the framework of a promotion exercise, wherever possible, the Administration should await the outcome of a Rebuttal Panel before the selection of persons for promotion began. However, the Tribunal observed that the chronology of the various procedures in the present case showed disregard for the Applicant's right to be taken into consideration in a fair and equitable way.

The Tribunal also noted that the second Rebuttal Panel submitted an extremely critical report on the way in which the Administration had conducted the evaluation of the Applicant. The Panel noted that "Some astonishing and irresponsible remarks were made by . . . the first appraising officer", and concluded that "Judging from this very biased assessment by the first appraising officer, the staff member has been obviously short-changed and was being appraised unfairly". The Tribunal therefore concluded that the Departmental Panel's first recommendation regarding the first P-5 post, which was subsequently endorsed by the Appointment and Promotion Board (APB), was made on the basis of incomplete information about the Applicant and that, as a result, she was not given fair and equitable treatment during this initial—and often decisive—stage of the promotion process. The Tribunal recalled that while it is true that the Departmental Panel simply issues recommendations, it has often been found that even procedural irregularities before an advisory body could constitute a violation of a staff member's right to due process: "The fact that the [Subsidiary Promotion Review Panel] was an advisory body and not the authority taking the final decision on promotions is also immaterial. Insofar as it gave advice, its advice was tainted by the procedural irregularity." (Judgement No. 870, *Choudhury/Ramchandani* (1998), para. VII.) It also noted that the Administration did not take the trouble to re-examine, in the light of the Rebuttal

Panel's report, the list of proposed candidates or, more importantly, the comparative table of the various candidates initially submitted to the Departmental Panel.

The Tribunal concluded that the entire procedure was vitiated, as the competent bodies did not receive complete and accurate information about the Applicant's performance appraisal on time and her right to due process with regard to promotion was therefore violated. Here, the Tribunal followed its long-standing jurisprudence, according to which it condemned the violation of an Applicant's right to have his or her file examined impartially, as it did in Judgement No. 539, *Bentaleb* (1991), para. XI:

> "In a tight competition between several candidates for a limited number of vacant posts, all evaluations, especially recent ones in favour of the staff member, ensure a fair and objective appraisal of his or her performance and provide a basis for advancement. The Applicant was unfairly deprived of this opportunity in violation of his right to fair treatment."

The Tribunal subsequently considered the second P-5 promotion exercise, which took place in 2002–2003, when the Applicant's appeal to the JAB relating to the first promotion exercise was still under way. In this regard, it noted the unusual delay in the administration of justice between the date the Applicant filed her appeal with the JAB, on 19 November 2001, and the date the Respondent answered to her contentions, on 8 August 2003, thus delaying the JAB procedure by the same length of time. The Tribunal recalled its record of special vigilance in seeing that justice was done within a reasonable period, found that the Administration had an unacceptable procedural delay. The delay was in this case especially serious as it had resulted in that the report of the JAB, relating to the first promotion exercise, was not produced before the commencement of the second promotion exercise. It was especially important to note that one of the requests made to the JAB was that it recommend that the Applicant should be given priority consideration in any future promotion to a P-5 post. If it had done so, the Applicant would certainly have been in a better position during the second P-5 promotion exercise. In any event, it was hardly to a candidate's advantage to have an outstanding appeal against a previous promotion exercise at the time when she was engaged in a new one.

The Tribunal recalled that on 12 December 2002, the APB held an initial meeting to consider the recommendation from the Department to promote Mr. X., but expressed serious doubts in this regard. The Department, however, maintained its recommendation of Mr. X., pointing out that he had had more assignments as "team leader", omitting to state that it was Mr. X. himself, as "Organizational Officer", who distributed the "team leader" assignments. Moreover, although it presented a comparative table of the academic qualifications of the various candidates—and the Applicant had better qualifications than the candidate favoured by the Department—the Department made the following surprising comment: "The relative prestige or *level of the degrees* is not relevant". (Emphasis added by the Tribunal.) Moreover, the Tribunal found that the APB was not critical of the negative and contradictory information about the Applicant given by Ms. Y, Officer-in-Charge of the Interpretation Service, particularly regarding her interest in supervisory functions and assignments to sensitive meetings. These factors were nevertheless among the criteria mentioned by the Respondent in order to justify the appointment of Mr. X. in preference to the Applicant. Thus, the Tribunal concluded that the information on which the APB based its decision was contradictory, and in parts inaccurate and, indeed, biased.

The Tribunal also noted that the Panel of Inquiry which was established to ascertain certain facts surrounding the appointment of the staff representative to the Departmental Panel which recommended Mr. X. in this second promotion exercise, had reached a delicately balanced conclusion: without condemning Mr. X., the Panel let it be understood that it would have been better for him to refrain from taking part in a meeting to select a staff representative to a body which was to decide on his promotion.

The Tribunal concluded from the foregoing that the Applicant's candidature was not given full and fair consideration in the 2002–2003 promotion exercise.

The Tribunal therefore concluded that there was a pattern of violations of the Applicant's right to be given equitable consideration for promotion which extended over a period of several years, and found that the Applicant should be compensated. For all these reasons, the Tribunal ordered the Respondent to pay to the Applicant, compensation of 6 months' net base salary.

5. *Judgement No. 1333 (27 July 2007): Applicant* v. *The Secretary-General of the United Nations*[7]

Health benefits for retirees—Re-enrolment in the dental programme after termination—Successive administrative instructions—Principle of non-retroactivity—Compensation and assessment thereof

The Applicant retired from the service of the Organization on 31 July 1986 after a career started in 1959 at the United Nations Educational, Scientific and Cultural Organization (UNESCO) and pursued later on at the United Nations. Following his retirement, the Applicant relocated to a suburb of Washington, D.C., and elected to transfer his medical insurance coverage to the United Nations After-Service Health Insurance (ASHI) plan, effective 1 January 1987. Under the ASHI plan, the Applicant was a participant both in a medical plan with Aetna and in the Group Health Dental Insurance (GHI) plan. Unfortunately, there were no dentists in the Washington D.C. area who participated in the dental plan, and the Applicant was unable to avail himself of the dental benefits for which he was continuing to pay premiums. As a result, on 19 May 1989, he wrote to the Chief, Compensation and Classification Service, who, the Applicant asserts, advised him to withdraw from the dental portion of ASHI and, instead, to seek coverage under the World Health Organization (WHO) plan, pursuant to a reciprocity agreement between the two organizations. As it was ultimately impossible to join the WHO plan, the Applicant sought additional advice from the Chief, Compensation and Classification Service, regarding alternative dental coverage. There was no alternative coverage available and, as the Applicant asserts, the Chief, Compensation and Classification Service, advised the Applicant to simply withdraw from GHI, which the Applicant did, in 1988.

Following a change in the United Nations dental plan, on 15 July 1999, the Applicant requested to be re-enrolled, but the Chief, Insurance section, replied that there was no valid basis for him to make an exception by authorizing the Applicant to be reinstated in the programme.

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[7] Spyridon Flogaitis, President; Jacqueline R. Scott, First Vice-President; and Dayendra Sena Wijewardane, Second Vice-President.

On 22 June and on 12 August 2000, the Applicant submitted his appeal to the Joint Appeal Board (JAB) in New York that adopted its report on 17 September 2003. In the said report, the JAB concluded that there was merit to the Appellant's claim. However, the Secretary-General decided to not follow the recommendations of the JAB and refused to re-enroll the Applicant in the dental plan portion of his health insurance. On 5 April 2005, the Applicant filed the present Application with the Tribunal.

The Tribunal observed that at the time of the Applicant's withdrawal from the dental portion of the plan, the rules pertaining to after-service health care were set out in administrative instruction ST/AI/172/Amend.3, which was silent as to whether a former staff member who, having withdrawn from a portion of health coverage, could be reinstated into the plan from which he or she withdrew or into another, substitute portion of that plan. As a result, the Applicant alleged that when he withdrew from GHI, he believed he could be reinstated into the plan if the circumstances changed.

On May 1994, the instruction ST/AI/172/Amend.3 had been superseded by the instruction ST/AI/394, which specifically provided that "coverage, once cancelled, cannot later be reinstated". The Tribunal noted, however, that while the Administration relied upon this instruction on to deny the Applicant's re-enrolment, the Applicant had not been advised of this change in rules relating to after-service care.

Further, the Tribunal also recalled that having engaged in a correspondence on this matter with the Chief, Insurance Section, the Applicant was informed by a letter dated 15 July 1999 that

> "had you sought reinstatement of dental coverage at that time [presumably, in 1990], such request could have been considered. However, I regret to say that I see no valid basis for making an exception in your case by authorizing reinstatement in the dental insurance programme at this stage, more than eleven years after you terminated coverage."

The Tribunal observed that under ST/AI/172/Amend.3, the Applicant was not expressly prohibited from re-entering the dental insurance scheme. Thus, it was not convinced by the Administration's argument, *ex post facto,* that even though ST/AI/172/Amend.3 was silent on the re-entry right, the policy underlying that administrative instruction was always based on the understanding that re-entry was not allowed. Indeed, the Tribunal noted that the letter from the Chief, Insurance Section, dated 15 July 1999, made it clear that under some circumstances, it might have been possible for the Applicant to re-enter the scheme. Moreover, even if, in fact, such a policy had been implicit in the language of ST/AI/172/Amend.3, as the Administration asserted, the Tribunal emphasized that it would not have looked favorably upon a policy that denied to staff members a social right as important as the one to maintain health/dental insurance without providing expressly the circumstances under which such a right would be given up or compromised.

The Tribunal stated that when the dental scheme changed in 1998, and the Applicant sought re-enrollment, he should have been allowed to re-enroll. In addition, the Administration's repeated attempts to impose the prohibition of ST/AI/394 upon the Applicant, even though the administrative instruction did not exist at the time the Applicant decided to withdraw from dental coverage, also violated the long-standing principle of law regarding non-retroactivity. It recalled that in Judgement No. 1197, *Meron* (2004), citing Judgement No. 82, *Puvrez* (1961), the Tribunal held that "[n]o amendment of the regulations may affect the benefits and advantages accruing to the staff member for services rendered

before the entry into force of the amendment. Hence, no amendment may have an adverse retroactive effect in relation to a staff member." Therefore, the Tribunal found that the Applicant was entitled to re-enroll in the current dental scheme.

When the Tribunal turned to the Applicant's claims for reimbursement of dental expenses he incurred as a result of being denied participation in the dental scheme, it first noted that the Applicant had failed to provide any necessary documentation in support of his claim for reimbursement. Second, even it the Tribunal recognized that, had the Applicant participated in the dental scheme, he might have made different choices about dental care, and bearing in mind that in this case the Applicant would have been responsible for paying premiums and deductibles to maintain the insurance, it found that it would be virtually impossible to determine with accuracy the position he would have been in had his re-enrollment not been denied.

Therefore, under these circumstances, the Tribunal ordered the Respondent to allow the Applicant to enroll in the current dental scheme and decided to compensate the Applicant only for the failure of the Administration to allow his re-enrollment in the ASHI dental insurance scheme.

6. *Judgement No. 1336 (27 July 2007): Applicant* v. *The Secretary-General of the United Nations*[8]

Recruitment on a post—No right to promotion for staff members—Staff members have a right to full and fair consideration for a post—Discretionary power of the Secretary-General to appoint staff members—Composition of Selection Panel—No evidence of discrimination in the selection process—United Nations principle of geographic diversity—Statement of Deputy Chief infringed due process rights of the Applicant

On 18 April 1995, the Applicant, a national of the Czech Republic, entered the service of the International Criminal Tribunal for the ex-Yugoslavia (ICTY) as an Investigator at the P-3 level. On 24 June 2002, he applied for the P-4 post of Investigation Team Leader for Team 4 of the Investigations Division, Office of the Prosecutor, a post for which he had already unsuccessfully applied in 2000. On 6 August 2002, the Applicant and 17 other internal candidates were interviewed by a Selection Panel. The Applicant was included in the list of the four most qualified candidates to be interviewed in a second round of interviews on 26 August. Thereafter, another candidate was recommended as the "most suitably qualified candidate", whereas the Applicant and the other candidates were considered qualified but not recommended for the post. On 2 September, the Applicant was informed by the Human Resources Section that another candidate had been selected for the post.

On 22 October 2002, the Applicant requested the Secretary-General to review the decision not to select him. On 3 February 2003, he filed an appeal with the Joint Appeal Board (JAB). In its report of 18 October 2004, the JAB noted that the decision regarding the 2002 selection of the P-4 Team Leader post was receivable, although the Applicant's attempt to challenge the earlier administrative decision regarding the 2000 selection for the same post was time-barred. It concluded that the Applicant had not adduced sufficient evidence of discrimination, while the Respondent did demonstrate that the Applicant had

[8] Jacqueline R. Scott, Vice-President; Brigitte Stern and Goh Joon Seng, Members.

been given full and fair consideration. Thus, the JAB decided to make no recommendation regarding the appeal. On 28 February 2005, the Applicant was advised that the Secretary-General had accepted the findings of the JAB and had decided to take no further action in his case. On 29 April 2005, the Applicant filed the present Application with the Tribunal.

The Tribunal recalled that the selection of a staff member for any post within the Organization was within the discretionary power vested in the Secretary-General; that it would not substitute its own judgement for that of the Secretary-General; and that the same principle applied to promotion. (See Judgements No. 554, *Fagan* (1992); No. 592, *Sue-Ting-Lin* (1993); and No. 613, *Besosa* (1993).) It stressed that staff members, however, were entitled to full and fair consideration either for selection or promotion, and that in this regard, the Applicant was assessed over two rounds of interviews with three other candidates by the Selection Panel. Thus the question was whether the process resulting in the selection of the successful candidate was based on incorrect facts, favouritism, prejudice or other extraneous motives, as contended by the Applicant, including through the constitution of the Selection Panel.

With regard to the composition of the Selection Panel complied with the ICTY Guidelines, the Tribunal noted that it had been comprised of two representatives from the Investigations Division, a trial attorney from the Prosecution Division, and a member from "from outside" the section/unit concerned. The Tribunal found that while the inclusion of a trial attorney from the Prosecution Division rather than from the Human Resources Section was irregular, it was in coherence with the Guidelines Information Circular ICTY/IC/01/38 of 19 April 2001, as he was authorized to represent the Human Resources Section. In addition, there was no evidence that this, in itself, was prejudicial to the Applicant's candidacy.

The Tribunal considered the Applicant's complaint that the Administration failed to take into account the fundamental United Nations principle of geographic diversity by favouring candidate nationals from countries that were already over-represented in the Investigation Division. It observed in this regard that the table on "Member States Representation as of 30 November 2002" showed that the Czech Republic was not under-represented. The Tribunal further noted that, in any event, this selection exercise was confined to internal candidates and would, whoever was selected, not alter the existing geographical distribution of posts among the member states at ICTY.

In the view of the Tribunal, the most serious contention made by the Applicant was his allegation of "improper interference". Indeed, the Deputy Chief of Team 4 recommended the appointment of a strong candidate from outside Team 4 in order to alleviate major differences between the Applicant and the other Senior Investigator of Team 4. The Tribunal noted that there was no evidence as to what impact this had on the outcome of the selection process, but this recommendation and the basis on which it was made, were not made known to the Applicant who thus had no opportunities to rebut them. Accordingly, it was stressed by the Tribunal that while it was unable to and should not second guess what the outcome would have been but for this interference, it was of the view that this interference was a serious breach of the Applicant's due process rights to full and fair consideration for the post.

For the foregoing reasons, the Tribunal ordered the Respondent to pay to the Applicant US$ 8,000 for the violation of his due process rights stemming from procedural irregularities and rejected all the other pleas.

7. Judgement No. 1343 (27 July 2007): Applicant v. *The Secretary-General of the United Nations*[9]

Complaint of harassment—*Res judicata*—Different claims for relief raising the same issues presented in multiple applications viewed as an abuse of process and of the internal justice system—Sufficient and appropriate compensation for procedural errors in relation to the evaluation process of the staff member—Request to correct language in a previous judgement

The Panel constituted to hear the instant Application decided, in accordance with the provisions of article 8 of the Tribunal's Statute, to refer the case for consideration by the whole Tribunal. The Tribunal thus rendered its judgement *en banc*.

In the summer of 1998, a dispute commenced between the Applicant, a staff member of the United Nations Development Programme (UNDP), and his supervisors. The Applicant contended he had suffered obstruction and harassment in the discharge of his duties, and that a post to which he had applied had been filled in an irregular manner. This had, according to the Applicant, marked the beginning of "a pattern of hostility, threat and retribution" against him. For the year 1998, the Applicant received a Performance Appraisal Review (PAR) with a performance rating of "4" ("Meets some of the expectations of the performance plan but performance needs improvement"), justified by his supervisor by reference to a number of important performance issues which had been raised and documented by the Office of Human Resources Management during 1998.

On 23 September 1999, the Applicant wrote to the Administrator, UNDP, complaining of a paralysis in the internal justice system; of recruitment problems in the Legal Section, and, that he was being hampered in his work by certain officials. He requested, *inter alia,* that "an *independent* review body be constituted" to investigate his complaints. In his reply of 7 October 1999, the Administrator advised the Applicant that the internal justice and recruitment matters were under review but that he would have to submit a formal rebuttal in order for his personal problems to be examined.

In October 1999, the Management Review Group (MRG) endorsed the supervisor's PAR rating of the Applicant. The Applicant contested his performance assessment and challenged the MRG process. He was again advised to submit the performance issues to the PAR Panel of Reference, which he did, on 22 November 1999. In June 2000, the Applicant complained that the Chairperson of the Rebuttal Panel had not been appointed in accordance with staff regulation 8 and internal procedures. On 16 November 2000, he again requested the Administrator that an "independent review" be conducted, to investigate "the paralysis of [the] UNDP internal justice system" and "interferences and manipulation by some . . . officials of the internal justice system". In his reply of 4 January 2001, the Administrator stated that the delay in review of the Applicant's 1998 PAR rebuttal was

[9] Spyridon Flogaitis, President; Jacqueline R. Scott, First Vice-President; Dayendra Sena Wijewardane, Second Vice-President; Julio Barboza, Brigitte Stern and Goh Joon Seng, Members.

"caused by the delay introduced by [the Applicant himself]", and again declined to order the requested review. On the same date, a new PAR Panel of Reference was established.

On 14 June 2001, the Applicant wrote to the Assistant Administrator, requesting him to review his claim for retroactive payment of his step increase "from 2000". On 7 August 2002, he was informed of UNDP's decision to award him his within-grade increment for the period 2000–2002.

In its report of 4 June 2004, the Joint Appeal Board (JAB) unanimously concluded that the Applicant had not suffered any irreparable harm as there was adequate evidence proving that the Organization assisted him, taking into account his particular situation. However, it recommended that he be awarded US$ 2,000 for two procedural errors committed by the Administration—namely its failure to provide the Applicant with the statutory two-month prior notice about the withholding of his within-grade salary increment and its failure to regularly appoint a Chairperson to the PAR Reference Panel established to review his 1998 PAR rebuttal—that "[could not] be corrected otherwise". On 12 January 2005, the Secretary-General accepted the recommendation of the JAB.

On 7 July 2005, the Applicant filed the present Application with the Tribunal.

The Tribunal noted that the Applicant presented two claims, namely that the compensation of US$ 2,000 paid by the Secretary-General for the procedural errors, as recommended by the JAB, was not sufficient, and that he should be paid compensation for various other professional, moral and material injuries caused by the Respondent.

The Tribunal, while concurring with the JAB and the Secretary-General on the first issue, namely that the Applicant had received sufficient satisfaction, noted that the other relief sought in this Application was, in the main, similar to that sought by the Applicant in his earlier cases (see Judgements No. 1217 (2005), No. 1271 (2006), No. 1308 (2006) and No. 1309 (2006)) where he made the same complaints of harassment. It was, thus, of the view that such complaints were *res judicata.* In so holding, the Tribunal recalled its rationale in Judgement No. 1158, *Araim* (2003), in which it noted that "even if [the Applicant claimed that the Investigation Panel had not been properly constituted] it too would be subject to *res judicata,* as the Tribunal in its previous Judgements, with the same Applicant, dealt with the same issues".

Additionally or alternatively, the Tribunal was of the view that it was an abuse of process and of the internal justice system of the United Nations for the Applicant to ground his claims for relief in multiple Applications when the issues raised in these Applications were the same and could be dealt with in one application. It recalled, in this connection, its jurisprudence on this issue, noting in particular Judgement No. 1200, *Fayache* (2004), wherein it stated,

> "The Tribunal finds that the Applicant has demonstrably abused the process of administration of justice. As it has no power to fine the Applicant, or otherwise hold him in contempt, it wishes to state for the record that it can and will impose costs against the Applicant should further frivolous or abusive Applications be filed with the Tribunal".

In the present circumstances, the Tribunal found that the Applicant had been sufficiently compensated for the procedural errors in relation to his PAR for 1998 and that his other issues were *res judicata,* and therefore, both his claims should fail.

There was, however, one additional issue that the Tribunal had been asked to consider. In a letter dated 18 May 2007, the Applicant requested that the Tribunal, "before [it] addresses [his] Application No. 1426 . . . 'by its own motion' and without any further delay and proceedings . . . rectifies [(*sic*)] what may appear as a 'slip' of language" and that it "replace the word 'against' by the word 'for' or . . . simply strike out the whole paragraph [IV] from [Judgement No. 1309 (*ibid.*)]". The paragraph in question read as follows:

> "IV. We are constrained to note that the Applicant is a familiar figure in the corridors of the Tribunal, be it as counsel for Applicants; proposed intervener; or, Applicant in his own numerous cases. The pleadings and elaborate arguments he tenders in those proceedings *in his crusade against the Organization* belie his claim for loss of earning capacity as an attorney." (Emphasis added by the Applicant.)

The Tribunal presumed that this request was made under article 12 of the Statute, the relevant part of which read as follows: "[c]lerical or arithmetical mistakes in judgements, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties". However, as the request of the Applicant did not satisfy the requirements of article 12 of the Statute, either procedurally or substantively, it was rejected.

Finally, the Tribunal noted that the Applicant had also requested "confirmation that this rectification will be made before the Tribunal addresses Application 1426" and that, "[i]f no such rectification takes place . . . the judges involved in earlier judgements (1217–1308–1309) excuse [*sic*] themselves from the consideration of Application 1426". The Tribunal found no basis for such recusal.

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

8. *Judgement No. 1348 (21 November 2007): Applicant* v. *The Secretary-General of the United Nations*[10]

Request for reclassification of a post to a higher level—Procedure to follow—Right of the Applicant to due process—Alleged agreement regarding reclassification of post—Administrative review of an implied decision—Applicant's responsibility to exercise due diligence with regard to her right to due process—Lack of communication that perpetuated Applicant's genuine, albeit mistaken, belief constituted a violation of her right to due process—Compensation due for violation of applicant's right to due process

The Applicant joined the United Nations in March 1972 as a bilingual secretary. From July 1992, she served in the position of Information Network Assistant in the Financing for Development Office (FFDO) of the Department of Economic and Social Affairs (DESA). In September 1993, the Applicant was promoted to the GS-6 level. Except for two periods of time (16 November 1999 to 16 April 2000 and 1 August 2001 to 26 July 2002) when she temporarily served against a GS-7 level post for which she was granted appropriate special post allowances (SPA), the Applicant continuously worked as a GS-6 Information Network Assistant until her separation from service on 31 July 2004. According to the Applicant, she consistently received performance evaluations stating that she worked at a higher level than her functions called for.

[10] Dayendra Sena Wijewardane, Vice-President; Brigitte Stern and Sir Bob Hepple, Members.

In 1997, 1999 and 2001, the Applicant formally requested that her post be reclassified to the G-7 level, by signing Requests for Classification, which were all counter-signed by her supervisor, and one by the Director. Yet, none were signed by the Executive Officer, and they were never forwarded to the Office for Human Resources Management (OHRM). The Applicant did not receive any notification from either the Director or the Executive Officer that her requests were not being forwarded to OHRM. The Applicant contented that there was an earlier agreement between herself and her Director that her post would be upgraded following the retirement of another GS-7 staff member within the Division in November 2002. However, in August 2002, she learnt that the GS-7 post would be maintained as such. Thus, by a memorandum dated 24 March 2003, she requested the Director of the Development Policy and Planning Office that the alleged agreement to upgrade her post be implemented. The Applicant never received a formal reply to her request, and on 27 May 2003, she requested administrative review of this implicit decision not to reclassify her post.

The Joint Appeal Board (JAB) adopted its report on 31 March 2005, in which it unanimously decided to make no recommendation in support of the appeal. On 15 December 2005, the Applicant filed the present Application with the Tribunal.

The Tribunal pointed out that there were two key issues in this case: whether the failure or refusal of representatives of the Applicant's Executive Office to sign and forward to OHRM her requests for reclassification in 1997, 1999 and 2001 constituted a violation of her right to due process; and, whether the Applicant was entitled to compensation for the failure to communicate to her the implied administrative decision not to proceed with the reclassification process.

In regard to the first issue, the Tribunal observed that it was undisputed that the Applicant formally requested that her post be reclassified in 1997, 1999 and 2001 but that none of these requests were forwarded to OHRM. It was also common ground that, on a number of occasions, the Applicant discussed the upgrading of her post with her Director. She claimed that it was during one of these discussions that the Director made it clear to her that he would help her to secure an upgrading from G-6 to G-7 on the new post when it was established. The Applicant's belief appears to have been shared by her immediate supervisor. The Director, however, informed the Executive Officer (by memoranda dated 24 June 2003 and 13 August 2004) that he had not signed the Applicant's requests for reclassification, because he did not consider that they accurately reflected the functions she performed and further, that he had not promised her that he would either promote her or upgrade her post, not only because he had doubts about the validity of the request, but also because it would not be entirely within his authority to deliver on such a promise.

The Tribunal was of the view that there was no document to substantiate the allegation made by the Applicant that there was an agreement between herself and the Director. However, the Tribunal also found that the Applicant had a genuine, albeit mistaken, belief that a post would become available for reclassification on the retirement of the GS-7 staff member. It also observed that, in any event, the decision to classify the Applicant's post at a particular level was not within the authority of her Department, but was vested in the Assistant Secretary-General, OHRM.

In the light of these facts, the Tribunal considered whether the failure or refusal of the Executive Office to forward the Applicant's requests for reclassification to OHRM constituted a violation of her rights to due process. It recalled that whilst the Tribunal "cannot

substitute its discretion for that of the Secretary-General in job classification matters" (Judgement No. 396, *Waldegrave* (1987)), it would examine the exercise of the Respondent's discretion, in determining whether it was reasonably exercised (Judgement No. 792, *Rivola* (1996).) Moreover, it would "consider whether there was a material error in procedure or substance, or some other significant flaw in the decision complained of" (See Judgement No. 541, *Ibarria* (1991) and, generally, Judgements No. 792, *Rivola* (1996); No. 1073, *Rodriguez* (2002); No. 1080, *Gebreanenea* (2002); No. 1136, *Sabet and Skeldon* (2003); and, No. 1325 (2007)).

The Tribunal noted that the administrative instruction regarding posts reclassification in force in 1997 appeared to place an obligation on the executive officer to forward the matter to OHRM in the event of disagreement. Although there was a breach of this obligation, the Applicant did not at the time seek an administrative review, and indicated her knowledge that the request had not been forwarded by submitting fresh requests in 1999 and 2001. The 1998 administrative instruction clearly gave the right to submit a request directly to OHRM for consideration, however the Applicant chose not to do so and failed to utilize the remedy which was available to her. The Tribunal recalled that it was well settled in the jurisprudence of the Tribunal that staff members must exercise due diligence in pursuing their claims. As the Tribunal held in Judgement No. 1325 (*ibid.*), "whilst staff members enjoy rights of due process, and the Respondent has the duty to protect same, a staff member may not neglect to take reasonable steps to protect his or her own interests in a timely fashion" (See also Judgements No. 232, *Dias* (1978) and No. 953, *Ya'coub* (2000)). Under these circumstances, the Tribunal found that there has been no violation of the Applicant's right to due process in this respect.

The Tribunal was noted that the Applicant believed that the Director had received her request "sympathetically", and was unaware of his doubts or his rejection. The Tribunal was further persuaded that the Applicant was under the genuine belief that a post would become available for reclassification in due course. It was only when she realized that the functions of the vacant post were not being changed to accommodate her that she recognized that she should have taken her request directly to OHRM. Although it was the Applicant's responsibility to exercise due diligence in her case, it was obvious to the Tribunal that the failure of the Director to communicate his implied decision not to forward her request, or to disabuse her of the above-mentioned belief, of which he was aware, played a significant contributory part in her decision not to exercise her right to make her request to OHRM. The Applicant was either induced to operate under misguided or mistaken beliefs or, at the very least, permitted to continue to operate thereunder despite the knowledge of the Director that she was so doing. The Tribunal concluded that this failure of communication constituted a violation of her right to due process.

In view of the foregoing, the Tribunal ordered the Respondent to pay to the Applicant, by way of reparation, compensation of US$ 10,000, and rejected all other pleas.

9. *Judgement No. 1352 (21 November 2007): Applicant* v. *The Secretary-General of the United Nations*[11]

Challenge of a promotion exercise—Application procedure—Alleged delayed application—Reasonable interpretation of an ambiguous administrative instruction—Burden of proof of allegation of discrimination rests on the Applicant—Adequate compensation for harm suffered

The Applicant entered the service of the Organization on 16 August 1977, as an English Language Clerk-Typist at the G-2 level on a short-term appointment. In August 1979, she was granted a permanent appointment. After completing a law degree, the Applicant was successful in the 1992 "G to P" exam and was promoted to the P-2 level position of Associate Legal Officer, Codification Division, Office of Legal Affairs (OLA), in July 1993. Effective 1 July 1999, she was promoted to the P-3 position of Legal Officer.

On 24 May 2002, the Applicant applied for the P-4 post of Legal Officer, Administrative Law Unit (ALU), Office of Human Resources Management (OHRM). The Applicant was one of three candidates interviewed for the position, but was not successful. On 4 September 2002, she applied to a P-4 post of Legal Officer within her Division, a few days after the 30-day mark. However at the 30-day mark, OHRM had released three applications to OLA, and the Director of the Codification Division reviewed the applications and interviewed the three candidates whose applications had been transferred to him. The successful candidate was subsequently selected for the position.

On 23 February 2003, the Applicant requested the Secretary-General to review the administrative decision not to promote her in either promotion exercise. On 5 April 2003, she lodged an appeal with the Joint Appeal Board (JAB) in New York. The JAB adopted its report on 17 March 2005, in which it found that the Applicant had denied a full and fair consideration for the post at OLA, recommended that the Applicant be awarded 18 months' net base salary as compensation. In his decision of 11 July 2005, the Secretary-General accepted the JAB's recommendation, with the change that the Applicant was awarded as compensation 9 months' net base salary.

On 24 July 2005, the Applicant lodged the present application with the Tribunal. She retired from service on 30 November 2005.

The Tribunal recalled that the JAB has found that, with respect to the OHRM post, the Applicant had been "accorded full and fair consideration for the post" and that she had failed to discharge the burden of proving her allegations of prejudice in the exercise, but "found them, nevertheless, disturbing". Further, the JAB has also found "disturbing elements" in the Applicant's claims concerning the Codification Division and that without entering further into consideration of these allegations, it has found that the promotion review was procedurally flawed: despite the ambiguous drafting of paragraph 6.2 of ST/AI/2002/4 relating to the 30-day mark procedure, the reasonable interpretation was that the Applicant was entitled to have her application considered, and she was, therefore, deprived of full and fair consideration for promotion.

First, the Tribunal observed that ultimately, the Applicant alleged that all these events indicated that she suffered discrimination in her career with the Organization. It also

[11] Spyridon Flogaitis, President; Jacqueline R. Scott, Vice-President and Goh Joon Seng, Member.

noted that the Applicant deserved commendation, as she had indeed proven an outstanding determination to change her life, pursuing her legal studies whilst working full-time as a General Service employee of the Organization. However, the Tribunal emphasized that the academic and professional qualifications the Applicant received were no guarantee of a legal career in the Organization. It further recalled that in personnel matters, it has consistently respected the broad degree of discretion afforded to the Secretary-General, albeit preserving its own role in assessing the administrative processes underpinning his decision-making and that all applicants for a post be given full and fair consideration. In its Judgement No. 1112, *Suresh* (2003), the Tribunal concluded that,

> "In the instant case—as in any case where arbitrariness, discrimination or other such improper motivation is alleged—the *onus probandi,* or burden of proof, rests upon the Applicant. (See Judgements No. 639, *Leung-Ki* (1994); *Knowles, ibid.;* and, No. 870, *Choudhury and Ramchandani* (1998).)"

In the present case, the Tribunal found that there was no evidence that the Applicant was not given full and fair consideration when she applied for the ALU post. With respect to the OLA post, the JAB has found—and the Secretary-General has agreed—that the Applicant was deprived of full and fair consideration for promotion because of the ambiguity of the pertinent rules of the Organization. However, the Secretary-General relied upon the fact that there was no certainty that the Applicant would have been promoted, even had she applied within the 30-day mark, to decide to only compensate her with nine months' net base salary. Under the circumstances of this case, the Tribunal held that it could not but accept the conclusions of the Secretary-General and found that the compensation paid was entirely adequate to the harm suffered. (See, generally, Judgement No. 1105, *Kingham* (2003).)

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

10. Judgement No. 1358 (21 November 2007): Applicant v. *The Secretary-General of the United Nations*[12]

Compensation claim for service—Related injury—Allegation of workplace harassment—Recommendation to be made by the Advisory Board on Compensation Claims (ABCC) and failure of the Respondent to reply and provide adequate information—Obligation of ABCC to make a recommendation in view of the available evidence—Failure to make a recommendation viewed as a violation of Applicant's right to due process—Inordinate delay entirely the fault of the Respondent—Compensation for violation of right to due process—Exceptional decision to award costs

The Applicant entered the service of the Organization on 1 May 1980, as a local hire with the United Nations Development Fund (UNDP). Between 1980 and 1997, the Applicant was promoted several times and by 1997, she was finally promoted to the G-6 level. On 26 June 1995, the Applicant fell while at work and suffered an injury. She alleged that the injury was service-incurred, that it left lasting physical impairment, and that her physical symptoms worsened over time and were aggravated by the "extremely hostile working environment" to which she was subjected. In 1999, she was diagnosed with severe depres-

[12] Jacqueline R. Scott, Vice-President; Goh Joon Seng and Sir Bob Hepple, Members.

sion, which she also attributed to the performance of her duties at UNDP, allegedly as a result of workplace harassment.

Following her diagnosis of depression, the Applicant was placed on sick leave from April to October 1999. Upon her return, at the recommendation of her doctors and the Medical Service, she was relieved of any functions other than routine tasks. On 17 April 2000, she was granted Special Leave With Full Pay, and when it expired in January 2001, she was placed on annual leave until it expired on 12 June 2001. The Applicant continued in full-pay status through 6 December 2001, when the Pension Board Committee determined that she was incapacitated for further service and entitled to a disability benefit under the Regulations of the Fund.

On 5 April 2002, the Applicant sent a letter to the Secretary of the Advisory Board on Compensation Claims (ABCC), requesting compensation under article 11.1 (c) and 11.3 of Appendix D of the Staff Rules, contending that both her 1995 injury and her 1999 diagnosis of depression were service-incurred. She filed a formal claim on 4 May 2002.

On 25 June 2003, ABCC determined that while the Applicant's 1995 injury was indeed service-incurred, there was no evidence to link that injury with her 1999 diagnosis of depression. For that reason, it decided to treat separately the issue of whether the depression was service-incurred, and that the consideration of her depression would be deferred "pending receipt of additional information from UNDP" that had been requested. However, UNDP did not provide a satisfactory response and, on 15 October 2004, the Applicant's counsel requested that a date be set for consideration of the Applicant's claim. He reiterated his request on 2 December 2004 requested that, in the absence of additional material from UNDP, the ABCC consider the Applicant's claim on the basis of the record before it. Finally, on 4 March 2005, ABCC issued its recommendation in which it noted that, despite its repeated requests, UNDP had failed to provide the information/documentation that was critical to the Board's deliberation of the case. As a result, ABCC determined that it was "unable to make a recommendation to the Secretary-General as to whether or not the [Applicant's] illness (severe chronic depression) could be considered attributable to the performance of her official duties on behalf of the United Nations". Thereafter, the Secretary-General, following the position of ABCC, decided to take no action on the Applicant's claim for compensation. On 23 September 2005, the Applicant filed the present Application with the Tribunal.

The Tribunal first considered the claim by the Respondent that the Applicant's claims before the ABCC were time-barred and therefore non-receivable. As this issued had not been raised by the ABCC, but instead considered the case on its merits, and as the Secretary-General accepted the report of ABCC, the Tribunal found the Applicant's claims to be receivable.

The Tribunal subsequently addressed the failure of ABCC to make a recommendation as to whether the Applicant's depression was service-incurred, such that she might be entitled to compensation under Appendix D of the Staff Rules. It noted that ABCC is the advisory board established for the purpose of reviewing claims made by staff members for compensation and disability for service-incurred injury and illness. As such, it is tasked with finding the facts in order to make such a determination. In order to do that, ABCC must obtain relevant information from various staff members, departments, agencies, funds or programmes of the Organization. Failing to obtain such information, ABCC must then

consider the evidence in the record and make a recommendation, based on whatever is before it. In the opinion of the Tribunal, in the event, as in this case, that the only evidence in the record is that provided by the Applicant, where the Organization fails to provide any or sufficient evidence to rebut the allegations of the Applicant, ABCC must decide in the Applicant's favour and not ignore its obligation to make a recommendation. To allow such a result would make a mockery of the procedural safeguards provided to staff members under the Staff Regulations and Rules. This is especially true in the case where the failure of procedure is at the hands of a quasi-judicial body, such as the ABCC. (See Judgement No. 1325 (2007).) The Tribunal has repeatedly "reiterate[d] the importance it attaches to complying with procedural rules, as they are of utmost importance for ensuring the well functioning of the Organization". (See Judgement No. 1106, *Iqbal* (2003).)

Moreover, the Tribunal stressed that the Respondent mischaracterized the language of the ABCC report and wrongly concluded that, because the ABCC failed to find *in the Applicant's favour,* the Applicant's claim was, therefore, unfounded. ABCC did not simply fail to find in the Applicant's favour; it failed to reach any decision, one way or the other, as the sole result of the failure of UNDP to submit rebuttal evidence. Rather than making a recommendation based on the evidence in the record, as it should have, ABCC simply refused to make any recommendation. This was compounded by the Secretary-General's subsequent acquiescence in this failure. The Tribunal held that the Secretary-General should have remanded the issue to ABCC, demanding that a recommendation be made. Consequently, the Applicant was denied the right to have her medical issues adjudicated in accordance with the rules of procedure guaranteed to her. In the view of the Tribunal such a denial violated her rights to due process, for which she was entitled to compensation.

The Tribunal next turned to the corollary issue of the failure of UNDP to address in an appropriate manner the request from ABCC to provide specific information relating to the Applicant's claim. While the Applicant did provide very specific allegations about the nature of the alleged workplace harassment, UNDP failed to respond, despite the repeated requests of ABCC. While the failure of UNDP to respond was not in itself a violation of the Applicant's rights, as ABCC had to decide the matter with the evidence in the record, the Tribunal looked with disfavour upon the complete disregard of UNDP for the authority of ABCC. It also expressed its hope that the senior management of UNDP would review this matter.

Further, the Tribunal considered the issue of the inordinate period of the three-year delay between the filing of the claim with ABCC and the decision not to make any recommendation, to be entirely the fault of UNDP. It noted that this delay reasonably might have exacerbated the Applicant's depression, and thus awarded her compensation for the violation of her rights in this regard.

While the Tribunal recalled its general policy of not awarding costs, in view of the complexities of this case, taken together with the rather egregious failure of ABCC to carry out its mandate and the failure of UNDP to respond, it found appropriate to make an exception to the general rule.

Therefore, in view of the foregoing, the Tribunal ordered the Respondent to pay to the Applicant for violation of her due process rights, including for inordinate delay, the sum of US$ 25,000; and for costs, the sum of US$ 5,000.

11. *Judgement No. 1360 (21 November 2007): Applicant* v. *The* Commissioner-General *of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)*[13]

Time limit to file an Application with the Tribunal—Notification to the Applicant of the decision viewed as the relevant date for the beginning of the ninety-day period—Obligation of the Respondent to take a timely decision on the recommendations of the Joint Appeals Board—The broad discretion of the Commissioner-General for appointments—Applicant's right to be fully and fairly considered for a post—Appointment and promotion decisions should be premised upon the criteria set out in the vacancy announcement

The Applicant, a staff member of UNRWA, applied for the Grade 12 post of Senior Vocational Training Instructor on 1 July 2002. He sat for a written test and, subsequently, was one of three people interviewed. It appears from the file that he ranked third in both the written exam and the interview. The successful candidate was appointed to the position on 9 October 2002. On 21 December, the Applicant requested administrative review of this decision. Thereafter, on 6 February 2003, he lodged an appeal with the Area Staff Joint Appeal Board (JAB) in Gaza. In its report, submitted to the Commissioner-General on 9 May 2004, the JAB recommended that the impugned decision be upheld, concluding that "the Administration . . . acted within the framework [of the] Rules and Regulations without any prejudice or bias". The Applicant was not provided with a copy of the JAB report until 17 October 2004. He first attempted to file an application with the Tribunal on 11 January 2005; his final, corrected Application was filed on 6 September 2005.

The Tribunal considered first whether or not this Application was receivable, *ratione temporis*. In this regard, the Tribunal recalled its *rationale* in Judgement No. 1046, *Diaz de Wessely* (2002):

> "In the Tribunal's view, it is of the utmost importance that time limits should be respected because they have been established to protect the United Nations administration from tardy, unforeseeable requests that would otherwise hang like the sword of Damocles over the efficient operation of international organizations. Any other approach would endanger the mission of the international organizations, as the Tribunal has pointed out in the past . . . (see Judgement No. 579, *Tarjouman* (1992), para. XVII)".

The parties in this case contested the date on which the relevant ninety-day period to file an application with the Tribunal commenced to run: the Respondent believed that the date in question was that of the communication to the Commissioner-General of the report of the JAB, whereas the Applicant maintained the date in question was that on which he received the report. The Tribunal found that the Applicant's interpretation of the Statute was the correct one, as in law, no period of time, at the end of which the rights of a person expire, may commence without that person having been notified.

On 9 May 2004, the report of the JAB was sent to the Commissioner-General. Later, the Applicant made several enquiries about his appeal and after having been informed on 5 July that the JAB had adopted his report and had sent it to the Commissioner-General for a decision, he asked for a copy of the Commissioner-General's decision. He was advised, on 28 August, that the Commissioner-General had not made a final decision, but that

[13] Jacqueline R. Scott, Vice-President; Julio Barboza and Sir Bob Hepple, Members.

he could proceed directly to the Tribunal. It was only on 17 October 2004, after another request, that the Applicant received a copy of the report. The Tribunal found that it was the obligation of the JAB to communicate its report to the concerned staff member, and that such duty was not met by merely informing him that its report had been sent to the Respondent. In this case, from 9 June 2004 onwards, the Applicant was entitled to receive this report, and his repeated enquiries to the JAB secretariat should have prompted them to provide him with a copy. Thus, the Tribunal was satisfied, that 17 October 2004, the date on which the JAB report was communicated to the Applicant, was the relevant date from which the ninety-day period must be reckoned, and then, that the Application was receivable *ratione temporis*.

The Tribunal also stressed that the Commissioner-General omitted to observe his elementary duty of making a decision pursuant to the JAB's recommendations and that it was disappointed to be presented with another case in which an Applicant was denied a decision (see also Judgement No. 1328 (2007)). Thus, the Tribunal reminded the Respondent that a timely decision on the JAB's recommendations was imperative.

Regarding the claim itself, the Tribunal recalled that, in personnel matters, the discretion of the Commissioner-General was broad, and that it was not for the Tribunal to assess the relative merits of the candidates for the position in question. This was so even in cases where an Applicant presents a compelling case for his own superiority over the successful candidate. In Judgement No. 834, *Kumar* (1997), the Tribunal held:

> "The Tribunal is sympathetic to the fact that the Applicant sincerely believes himself deserving of this post. It has noted that the Applicant's performance evaluation reports have consistently assessed his performance as 'very good' or 'good' and that he has received a number of complimentary letters for a job well done. Nonetheless, the Tribunal may not substitute its judgement for that of the Secretary-General, in the absence of evidence showing bias, prejudice, improper motivation or extraneous factors, which the Tribunal has not found in this case."

It recalled also that the discretion of the Respondent was not, of course, absolute, as he was obliged to give all candidates full and fair consideration for appointment. In Judgement No. 828, *Shamapande* (1997), the Tribunal recalled that it "has held repeatedly that, in order to effect the foregoing purpose, it is indispensable that 'full and fair consideration' should be given to all applicants for a post".

The Tribunal stressed it was its longstanding position that transparency and due process in appointment and promotion decisions demand that the decision be premised upon the criteria set out in the vacancy announcement. In Judgement No. 1122, *Lopes Braga* (2003), the Tribunal held that

> "By advertising the post . . . as one that required an undergraduate degree, the Respondent made the degree a pre-requisite to selection for the post and cannot now be heard to argue that the possession of the degree was but one factor in its determination. To allow otherwise harms not only the Applicant, who was misled and not fairly considered by objective criteria for the position, but also harms all those putative applicants who did not apply because they did not possess an undergraduate degree."

In the present case, the vacancy announcement for the challenged position of Senior Vocational Training Instructor required "A minimum of one year experience as Technical Instructor 'A' or four years experience as a fully qualified Trades Instructor 'A'. However, it

was apparent that the successful candidate did not have such qualifications or experience as a Note for the Record concerning the filling of the vacancy, noted that the appointment of the successful candidate would require prior approval from the Department of Administration and Human Resources "as he lacks the required one year instructor training course and years of experience as instructor".

Thus, by his own admission, "the Respondent did not apply his own objective criteria of evaluation, as required by the rules and regulations governing the promotion exercise". (See Judgement No. 1326 (2007), citing *Lopes Braga* (*ibid.*).) This amounted to "a violation of the Applicant's right to be fully and fairly considered for the post and irreparably harmed the Applicant". (See *Lopes Braga* (*ibid.*).)

In view of the foregoing, the Tribunal ordered the Respondent to pay to the Applicant, by way of reparation, compensation of four months' net base salary.

12. Judgement No. 1370 (21 November 2007): Applicant v. *The Secretary-General of the United Nations*[14]

Promotion exercise—Legal vacuum regarding the procedure to fill a D-2 post—The failure of the Administration to follow its own procedure was a violation of the Applicant's right to full and fair consideration for the post—The Applicant's reassignment to a position where he had nothing to do was humiliating treatment causing moral injury

The Applicant entered service at the United Nations on 26 May 1967, as a Professional Trainee in the Offices of the Secretary-General, Office of Personnel, Economic and Social Organization in Beirut at the P-1 level. At the time of the events that gave rise to his Application, the Applicant held the D-1 level position of Chief, Commodities Branch, Division on International Trade in Goods and Services and Commodities (DITC), United Nations Conference on Trade and Development (UNCTAD).

He was appointed Officer-in-charge of DITC on 16 August 2001 and applied to the position of DITC Director at the D-2 level on 4 December 2001. On 21 October 2002, staff members of UNCTAD were informed of the appointment of the new DITC Director, who was one external woman candidate. On 17 December 2002, the Applicant requested an administrative review of the decision. He lodged an appeal with the Joint Appeal Board (JAB) on 25 April 2003 and resigned on 10 October 2003. The JAB adopted its report on 30 May 2005, in which it concluded that the decision not to promote the Appellant to the post of Director has indeed been tainted by a lack of due process. It concluded that as there was a violation of the Appellant's right to a full and fair consideration of his candidature, compensation should be granted and the Appellant should be paid six months' net base salary.

On 7 October 2005, the Applicant, having not received any decision from the Secretary-General regarding his appeal to the JAB, filed the present Application with the Tribunal. On 25 January 2006, the Applicant was advised that the Secretary-General had accepted the findings and conclusion of the JAB as well as its unanimous recommendation to pay him six months' net base salary.

[14] Dayendra Sena Wijewardane, Vice-President; Julio Barboza and Sir Bob Hepple, Members.

Concurring with the JAB, the Tribunal found that the Applicant did not receive full and fair consideration by the authorities because of "procedural flaws in the evaluation process of the candidates". Despite the legal vacuum regarding the applicable procedures for the filling of D-2 posts, the Tribunal noted that the paramount consideration in assessing the legality of the Administration's conduct in promotion matters should be the compliance with Article 101 of the Charter and staff regulation 4.2.

The Tribunal recalled that the JAB had examined the procedure employed for the selection of candidates: OHRM sent a list of screened candidates to the Deputy Secretary-General of UNCTAD, who selected nine and sent a short-list to an *ad hoc* panel he had established to provide advice on the candidates; and that the JAB has been struck by the lack of transparency of this panel. Moreover, it appeared that the criteria applied to rank the candidates were not those stated in the vacancy announcement. The Tribunal found this fact decisively against the Respondent. Indeed, the vacancy announcement called for an "[a]dvanced university degree in economics or related disciplines with specialization in international trade and development" and required "[t]wenty years of progressively responsible experience at the national and international levels dealing with issues relating to trade and development, with particular reference to trade negotiations". The successful candidate, however, had a master's degree in history, and her undergraduate education was in the same discipline. UNCTAD had nevertheless indicated that the successful candidate was the only candidate to have "fully" met all the requirements of the post, the Applicant having been considered to meet only "most" of the requirements. Thus, the Tribunal agreed with the JAB that, "on the contrary . . . [,] the successful candidate was not meeting this important formal requirement of the post".

The Tribunal recalled its jurisprudence in Judgement No. 1122, *Lopes Braga* (2003), in which it held that "the Respondent's failure to follow [his] own procedures; i.e., to apply objective criteria of evaluation in a consistent manner, was a violation of the Applicant's right to be fully and fairly considered for the post and irreparably harmed the Applicant".

The Tribunal was also in general accord with the remarks of the JAB about other irregularities in the procedure. In particular, the Tribunal found that the JAB's expressed disapproval of the fact that UNCTAD interviewed only two candidates, considered to be the best-placed candidates, was well-founded. In conclusion, the Tribunal agreed that the Applicant did not receive full and fair consideration for the position. It found that the compensation of six months' net base salary, recommended by the JAB and paid by the Secretary-General, was adequate.

The Tribunal turned next to the issue of the reassignment of the Applicant, after the promotion procedure, to the post of Senior Inter-Regional Adviser in the Office of the Secretary-General at the D-1 level, which amounted, in the Applicant's view to a humiliating and degrading treatment. The Tribunal observed that the Applicant had no right to be placed in a post of the same level as the one he had been temporarily occupying. However, it stressed that it was not satisfied that the Administration, after having violated the Applicant's rights in the promotion exercise, assigned him to a position in which he had literally nothing to do, was left without a secretary, was not invited to events in which he would normally have participated, and, in short, indicated, in the most direct and brutal way, that the Applicant was no longer necessary to the Organization.

In this regard, the Tribunal recalled its jurisprudence in Judgement No. 1313 (2006):

> "The Tribunal can readily accept that many persons would suffer deep unhappiness and upset at being required to daily attend an office for no useful purpose; for being denied the dignity and satisfaction of doing one's work; and, for the humiliation attendant on such a pointless way of passing time. The Tribunal accepts that the Applicant has suffered in the manner described by her in her Application and that she is, in the circumstances, entitled to compensation for moral injury. (See Judgements No. 997, *van der Graaf* (2001); No. 1008, *Loh* (2001); No. 1009, *Makil* (2001); and, No. 1290 (2006).)"

Likewise, it found the Applicant in the instant case deserved compensation under this heading, in addition to the compensation he was paid for the denial of his rights in the promotion exercise.

In view of the foregoing, the Tribunal ordered the Respondent to pay to the Applicant, by way of compensation for the moral injury he suffered, four months' net base salary.

B. Decisions of the Administrative Tribunal of the International Labour Organization[15]

1. *Judgment No. 2582 (7 February 2007): Mr. F. L.* v. *the International Olive Oil Council (IOOC)*[16]

Request for repatriation benefits—Implicit decision resulting from defendant's failure to respond to complainant's request—Obligation of the Organization to deliver a reasoned decision on the merits of the request—Receivability of the complaint—Right of former officials to appeal directly to the Tribunal

The Complainant, Executive Director of IOOC from 1987 to 2002, on detachment from the European Commission, challenged the implicit decision rejecting his request of payment of all the "end-of-service benefits" to which he considered himself entitled under the Staff Regulations and Rules. Thus, he asked the Tribunal to order the payment of such benefits and also claimed compensation for moral injury and costs.

[15] 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; the International Organization of Legal Metrology; the International Organisation of Vine and Wine; the Centre for the Development of Enterprise; the Permanent Court of Arbitration and the South Centre. 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/.

[16] Mr. Michel Gentot, President; Mr Seydou Ba, Vice-President; Mr Claude Rouiller, Judge.

Following an audit report on the budget of IOOC, which revealed serious irregularities, the competent department of the European Commission decided to terminate the detachment of the Complainant, and waive his immunity to enable the authorities of the Host Country, Spain, to conduct full investigation into the facts and bring charges before the Spanish criminal courts. The Complainant requested to retire with immediate effect on 1 January 2003 and his demand was accepted.

The Complainant submitted his request for payment of his repatriation benefits as well as travel and removal expenses on 27 January 2003. On 19 December 2003, the Complainant was informed that the Heads of Delegation, meeting at the IOOC's 89th session, had expressed the view that his requests were unfounded. Following a repeated request by the Complainant, the Executive Director informed him on 12 January 2004 that his request had been referred to an external legal adviser, and that he would be informed in due course of the decision ultimately taken. The Complainant repeated his requests regularly in view of the silence of the Organisation, until he wrote a last letter asking for a final decision on 23 August 2005. Having received no reply two months later, the Complainant filed a complaint before the Tribunal.

The Tribunal first considered the two objections raised by the Defendant as to the receivability of the complaint. While the Tribunal noted that it was true that the Complainant had not appealed to the IOOC's Joint Committee, as provided for in the Staff Regulations, it found that the Complainant did have the right to appeal directly to the Tribunal, as former officials have no access to internal remedies. Further, with regard to the claim that the complaint was time-barred, the Tribunal found that the decision of 19 December 2003 could not be considered final, as it had implicitly been revoked by the letter of 12 January 2004. Further, the failure by the Defendant to reply to the request, explained by its desire not to have any communication with the Complainant during the pending criminal investigation, constituted an implicit final decision to reject the Complainant's request, as the silence of the Organisation could not indefinitely paralyse the exercise of the Complainant's right to appeal to the Tribunal.

IOOC stated that it expressly recognised the competence of the Tribunal to hear this case despite some uncertainty as to whether it had actually recognised the competence of the Tribunal at the time the dispute had arisen.

On the merits, the Tribunal considered that, even though the Complainant had an obligation to supply IOOC with the necessary evidence of his repatriation to his home country and of the incurred expenses, it was up to the Administration to decide whether or not he was entitled to those benefits, and to deliver a reasoned decision on the merits of his request. The Defendant's prolonged failure to reply prevented the Complainant to exercise his rights, and constituted a breach of the commitments that were made, which was unlawful and could not be maintained.

The Tribunal decided to set aside the implicit negative decision and to send the matter back to IOOC, which has to respond after having considered the merits of the Complainant's request in accordance with the applicable rules and information supplied. Further, it awarded the Complainant 1000 euros in compensation for moral injury caused by the

uncertainty in which the Complainant was kept regarding the outcome of his request, as well as 2000 euros for the costs.

2. *Judgment No. 2635 (11 July 2007): Mrs. D. K.* v. *the International Telecommunication Union (ITU)*[17]

Reassignment of staff member following secondment—Discretionary decision by the executive head to reassign a staff member—Reassignment to be made in the interests of the organization—Limited review of a discretionary decision—Decision based in part on allegations to which the Complainant could not respond is considered to be flawed

The Complainant joined the ITU in 1988 as a Training and Support Programmer at grade P-2 in the Computer Department. After having been promoted to grade P-3 in 1991, in 2003 she was seconded for two years to the World Meteorological Organization where she held a grade P-4. Upon her return from her secondment, the Complainant was reassigned to the Information Services Department at grade P-3. On 1 November 2005, the Complainant requested that the Secretary-General reconsider the decision to reassign her to a P-3 post. The Secretary-General responded on 12 December 2005 that he had decided to maintain his decision. The Complainant filed an appeal to the Appeal Board against that decision on 21 February 2006. In its report of 26 April 2006, the Appeal Board concluded that the decision of the Secretary-General had been well founded and involved no breach of due process. By a memorandum of 15 May 2006, the Complainant was informed that the Secretary-General had decided to uphold the Board's recommendation.

The Complainant argued that the decision to reassign her to the said post was improperly motivated and based on allegations concerning her relational issues, to which she had not had have the opportunity to respond. She further argued that the new position violated her dignity and constituted a breach of her right to be given work in accordance with her skills, training and expertise and that it was indeed a hidden disciplinary measure.

The Tribunal recalled that decisions to transfer staff members were at the discretion of the executive head of the Organization and thus subject to limited review. The Tribunal could only assess that the impugned decision had not been taken *ultra vires,* did not have procedural flaw or mistake of fact or law, or was not taken in misuse of authority.

It further noted that in a transfer, the head of the Organization shall take into account the interests of the Organization and the interests and abilities of the staff member and in cases where the two are at odds, greater weight may be accorded to the interests of the Organization. It is also well established in the case law that the preservation of harmony and good relations in a working environment were legitimate interests, and the decision to transfer a staff member could not be considered to be invalid if taken in that purpose.

Despite the denial of the ITU, the Tribunal held that it was evident from the statements made by the *ad interim* Chief of Personal during the proceedings, that the issue of the Complainant's relational difficulties was material with regard to her assignment and her request of promotion. Thus, the Tribunal concluded that the decision by the Secretary-General, being based on the recommendation coming from staff members, itself based

[17] Mr. Michel Gentot, President; Ms Mary G. Gaudron, and Ms Dolores M. Hansen, Judges.

in part on information adverse to the Complainant to which she had no opportunity to respond, was flawed and the decision to reject her appeal should be set aside.

In view of the above, the Tribunal also decided that ITU should pay the Complainant 10,000 Swiss francs in moral damages and 5,000 francs in costs.

3. Judgment No. 2636 (11 July 2007): Mr. B. F. v. *the World Intellectual Property Organization (WIPO)*[18]

Freedom of association—Freedom of discussion and debates about Staff Association matters—Interest of the Organization to have a stable and functioning Staff Association—Providing facilities for discussion and debate among the Staff Association not considered to constitute an interference in the Staff Association affairs—Jurisdiction of the Tribunal—Applicable law to international civil servants—No jurisdiction to order sanctions or apologies—Investigation of claims of aggression—Duty of the Organization to investigate claims properly and promptly

The Complainant has been a staff member of WIPO since 1991 and held at the material time a P-3 post. Since January 2001 he was President of the Staff Council, until, on 28 June 2005, he resigned in troubled circumstances. The circumstances leading to the resignation of the complainant as President of the Staff Council involved a former President, who, at the relevant time held a D-2 post. In the summer of 2004, the former President sent a long email to some members of the Staff Council, but not to the Complainant, indicating that the Complainant had been consulted by the Administration in relation to a matter that eventually was the subject of Judgment 2288. A copy was also sent to the Director of HRMD. Following serious dissension of views between the Staff Council and other members of the Staff Association, an Emergency General Assembly (EGA) was requested by way of petition, and was held on 13 June 2005. The Assembly decided that a new election for the Staff Council would take place. On 20 June 2005, two members of the Staff Council resigned.

On 28 June 2005, the Complainant and the remaining members of the Council announced that they too resigned. On the same day, prior to that announcement, one member reported to the Director General that she had been approached in the cafeteria of four of the co-signatories of the petition, and that two of them had spoken to her aggressively. The Complainant also sent an e-mail to the Director General in which he indicated that he had been verbally aggressed and insulted by the same four co-signatories in his office. On 14 July 2005 the Complainant was placed on sick leave by his doctor.

On 29 July 2005, a lawyer acting for the complainant sent a letter to the Director General demanding that sanctions be taken against three of the alleged aggressors as well as the former Staff Council President. By a letter of 7 September 2005, the Complainant's lawyer was informed that the claims had been rejected.

On 21 October 2005 the Complainant lodged an appeal with the Appeal Board. In its report dated 25 November 2005, the Board held that it was not competent to deal with matters relating to the EGA of the Staff Association. Regarding the allegations of "harassment and physical attacks", it recommended that the Director General "consider the right forum or body within WIPO to deal with the appeal in this regard". The other claims raised by the Complainant were rejected. By a letter of 13 December 2005, the Director General

[18] Mr. Michel Gentot, President; Ms Mary G. Gaudron and Mr Agustín Gordillo, Judges.

confirmed the Appeals Board's recommendations, and informed the Complainant that he had decided to instruct the Internal Audit and Oversight Division to conduct an inquiry into his allegations of harassment and physical attacks.

The Complainant asked the Tribunal that sanctions be imposed against the former President of the Staff Council and against three persons closely associated to the events, including the aggression in his office on 28 June 2005, as well as an official apology from the Administration. He also requested that the election of the new Staff Council held on 11 August 2005 be invalidated, and he claimed costs and damages for moral injuries and injuries to his reputation as President of the Staff Council.

The Tribunal noted that it had no jurisdiction to issue injunctions requiring an organization to sanction staff members. In this context, it noted that the staff members concerned had filed applications to intervene but that none of the applicants were in the same position, in fact or law, as the complainant. Furthermore their applications were not considered to challenge a final administrative decision by WIPO, and must therefore be refused.

The Tribunal recalled that Article II of the Statute of the Tribunal dictate that various claims by the Applicant must derive from the Staff Regulations and those general legal principles recognized by the Tribunal as applicable law to international civil servants. The claim that the Tribunal make appropriate orders to enable investigation of the allegations by the Swiss authorities was therefore not receivable. The Tribunal further observed that by Article VIII of its Statute, the it was empowered to rescind impugned decisions, to order the performance of obligations and to award compensation, but not to order apologies, nor to require undertakings as to performance of obligations in the future, as claimed by the Complainant when he asked the Tribunal to order WIPO that Staff members of the Staff Council would not be subject of future discrimination. The latter requests by the Complainant were therefore dismissed.

The Tribunal finally considered the Complainant's claim for damages and costs. This claim was, according to the Tribunal, based on two distinct obligations: the obligation not to interfere in the freedom of association of staff members which, in turn, involves a duty not to interfere in the internal affairs of their representative bodies; and the duty to provide a safe and secure workplace environment, which, in turn, involves the duty to protect against workplace harassment and aggression.

The Tribunal recalled that freedom of association carried with it freedom of discussion and debate in relation to the Staff Association matters, which in the circumstances of the case, extended to the communications of the former President with the Director, the Complainant or other staff members. Further, the Tribunal held that is was in the interests of the Organization to facilitate discussion on outstanding issues among the members of the Staff Association, in the hope of restoring stability and a functioning Staff Council. Thus, the simple fact that WIPO provided facilities to the staff members of the Staff Association dissenting with the Staff Council could not support the Complainant's contentions of complicity and interference in the Staff Association affairs.

With regard to the claim made by the Complainant that he has been aggressed in his office by other staff members on 28 June 2005, the Tribunal held that no proper and prompt

investigation was made by WIPO. It observed that it was the Appeal Board's erroneous belief that the claims were not within the scope of its jurisdiction, which led the Director General to decide to transfer the investigation to the Internal Audit and Oversight Division.

The Tribunal decided that the decision to transfer the investigation of the claims of aggression to the Internal Audit and Oversight Division should be set aside and the Complainant should be paid 5,000 Swiss francs by way of moral damages plus 2,000 francs in costs. All other claims by the Complainant were dismissed.

4. *Judgment No. 2637 (11 July 2007): Mrs. C. H.-P.* v. *the World Trade Organization (WTO)*[19]

Nationality—Recognition of only one nationality for staff with dual nationality—Home country considered to be the country with which the staff member maintains the closest ties—Discretion of the Director-General to assess the various factors in this regard—Children of international civil servants—Entitlement to benefits for internationally recruited staff members—Benefits such as home leave and education grant not viewed as simple financial benefits—Principle of equality of treatment of staff members—Difference in treatment of different situations viewed as appropriate

The Complainant was born in 1961 in Switzerland and was a French national at birth. She was the daughter of a French and a British international civil servants working in Switzerland, where she was raised for 20 years. She obtained the Swiss nationality by naturalization in 1985, and the material time held both French and Swiss citizenship. After having worked in the United Kingdom, Luxembourg and Geneva, she was recruited locally for a Professional position in 1991 for a fixed-term contract at the Interim Commission for the International Trade Organization/General Agreement on Tariff and Trade, the predecessor of the WTO.

On 19 January 2005, a Notice to the Staff was issued, informing staff members that the Administration had decided to review the recruitment status of fixed-term and regular staff members who believed that their recruitment status had been erroneously determined at the time of their first appointment. The Complainant successfully requested an international status and her status was changed accordingly on 1 August 2005. However, when the Complainant enquired about her entitlement to benefits, including home leave and education grant, she was answered that as a Swiss national who was working in her recognised home country, she was not eligible for education grant or home leave. On 12 August the Complainant requested that the Director-General review the decision, but was however on 12 September informed that the decision had been upheld.

On 5 October 2005, the Complainant filed an appeal with the Joint Appeals Board. In its report of 20 December 2005, the Board Recommended that the Administration ascertain all the facts that existed at the time of the Complainant's recruitment, taking into account the new information provided by the Complainant during the appeal proceedings. The Complainant subsequently provided, upon the request of the Director-General, additional information. On 22 March 2006 she was informed that the Director-General had

[19] Mr. Michel Gentot, President; Ms Mary G. Gaudron and Mr Agustín Gordillo, Judges.

decided that, for the purposes of the Staff Regulations and Rules, she was a Swiss national, and that her "recognized home country" was Switzerland.

The Complainant argued that the decision to recognize Switzerland as her home country was arbitrary since it was according more weight to her Swiss nationality over her French nationality. Moreover, she argued that while home country is normally the state of nationality of the staff member, in exceptional and compelling circumstances, the Director-General could recognize another home country, when the staff member had maintained a normal residence for a prolonged period of time in the said country. Thus, she claimed that her recognized home country should have been the United Kingdom, or at least France.

The Tribunal recalled that so long as the Director-General considered all material facts and did not have regard to irrelevant considerations, it was for the Director-General to assess what weight to give to each particular factors. In the present case, the Tribunal found that nothing could suggest that he had exceeded his discretion in this regard. Indeed, the burden of proof being on the Complainant, the Tribunal held that she had not brought any compelling proof that she maintained her normal residency in the United Kingdom prior her appointment, the omission of which would have constituted an error by the Director-General.

Further, the Complainant argued that the decision not to recognize her as a French national having her home in the United Kingdom was discriminatory against children of international civil servants. In this regard, the Tribunal recalled that the main justification for granting benefits, such as home leave and education grant, was not to confer a financial benefit or to make monetary concession to the beneficiaries. Benefits are to enable staff members who, owing to their work, spend a number of years away from their country with which they have the closest personal material ties, to return there in order to maintain those connections, and to enable them to teach their mother tongue to a dependent child attending a local school in which the instruction is given in a language other than his of her. Therefore, the Tribunal observed that children of international civil servants were in some cases likely to develop closer ties with the country in which their parents worked and where they were brought up rather that their parents' country of origin. In the view of the purposes of the benefits, the Tribunal rejected the argument of discrimination.

The Complainant has identified other staff members who, although being nationals of Switzerland and another country, were recruited as nationals of that other country, and thus she claimed a breach in the principle of equality of treatment of staff members. The Tribunal noted that the principle of equality should not lead to treat in an identical manner different situations when a difference in treatment was appropriate and adapted, as it was the case in the situations she presented, as none of the other staff members were actually in the same situation than the Complainant, in fact or in law.

In view of the above, the Tribunal dismissed the Complaint.

5. *Judgment No. 2656 (11 July 2007): Mr. J. M.R.* v. *the International Atomic Energy Agency*[20]

Dismissal for serious misconduct—False allegations considered to constitute serious misconduct—Proportionality of a disciplinary decision—Discretionary nature of disciplinary decisions—Lack of proportionality to be treated as an error of law—Findings in a previous judgment cannot be controverted

The background facts to the claims made by the Complainant are set out in Judgment 2604. The Complainant was suspended without pay pending an investigation by the Office of Internal Oversight Services (OIOS) into a complaint made by his Director. During the course of the investigation, the Complainant made serious allegations which are at the centre of this matter. Following the investigation, four allegations of misconduct were referred to the Joint Disciplinary Board. With respect to one of the allegations, namely that the Complainant had deliberately made false allegations of misconduct against other staff members, the Board recommended that the Complainant be dismissed for serious misconduct. The Director General accepted that recommendation, and the Complainant's appointment was terminated with effect from 3 March 2006.

The Complainant challenged before the Tribunal the decision of 3 March 2006 by which his appointment was terminated.

The Tribunal noted that it may be appropriate to consider the nature of the allegations made by the Complainant, which had been to the effect that one staff member had had a "comet like career" as a result of a sexual relationship with a senior staff member and that a third staff member had been promoted despite his poor performance because he was blackmailing the other two.

The Tribunal subsequently observed that the main argument put forward by the Complainant was that the disciplinary measure to dismiss him lacked proportionality. In this regard, the Tribunal, recalled that lack of proportionality should be treated as an error of law warranting the setting aside of the disciplinary measure, even if such decision is discretionary in nature. It further added that in determining the proportionality between a disciplinary action and an offence, both objective and subjective features should be taken into account and, in the case of a dismissal, the closest scrutiny is necessary.

The Tribunal held that the allegations were indeed serious and which, in the absence of cogent evidence, should never have been made. Responding to the claim that the Joint Disciplinary Board had erred when it equated reckless indifference with deliberate falsehood, the Tribunal found that in the present case, given the nature of the allegations, there was little, if any, room for difference is the consequent sanction. The Complainant had, according to the Tribunal, showed a callous disregard for the feelings of the persons concerned and a lack of judgement that was wholly incompatible with the standards of conduct required of an international civil servant. Given the circumstance, the Tribunal concluded that the disciplinary action taken had not been disproportionate to the conduct in question.

The Complainant had further argued that the decision to dismiss him constituted an abuse of power as some of the matters upon which were based the original complaint

[20] Mr. Michel Gentot, President; Ms. Mary G. Gaudron and Mr. Giuseppe Barbagallo, Judges.

against him and his subsequent suspension, were not reported at the time they allegedly occurred and were not substantiated by the OIOS investigation. Further, he contended that he had no opportunity to answer those matters and was not informed of the reasons for his suspension for several weeks; that his suspension lasted in excess of 14 months and the matters on which it was originally based were not the matters relied upon for his dismissal. The Tribunal however recalled that in its Judgment 2604, dealing with the suspension of the Complainant, it had found that there was *prima facie* evidence entitling the Director General to suspend him and that proper procedures had been observed with respect to the OIOS investigation. It therefore concluded that those findings of the previous Judgment could not be controverted now and that there was no basis for a conclusion that the impugned decision involved an abuse of power.

The Tribunal dismissed the Complaint.

6. *Judgment No. 2657 (11 July 2007): Mr. R. K* v. *the European Patent Organisation (EPO)*[21]

Jurisdiction of the Tribunal—Competence limited by its Statute to complaints by present or past employees—Absence of jurisdiction for complaints on recruitment matters by external candidates—Physical requirements of the post—waiver of immunity—Legal vacuum

The Complainant, who had lost his left hand, his left eye and part of the fingers in the right hand and suffered injuries to his left ear following an accident when he was 18, asked the Tribunal to quash the decision to reject his application for a post of examiner on the grounds that his disabilities prevented him to meet the physical requirements for the post. He also requested the Tribunal to declare unlawful the decision to refuse his request to lodge an internal appeal as amounting to a denial of justice, or to order the EPO to waive its immunity and the medical examiner's immunity, so that he could bring an action before a German court.

Having applied to a post of examiner in 2005, the Complainant was informed by telephone that he had successfully passed the technical and linguistic tests as well as the interview over the phone. However, he was told that he would have to undergo the medical examination required by the Service Regulation to determine whether he met the physical requirements for the post. Following the medical examination on 23 June 2005, he was informed that he could not be appointed as a permanent employee in view of the serious likelihood of the deterioration of his condition in the near future.

The Complainant first contested the conclusions of the medical examiners as pure speculation and discriminatory against disabled persons. Further, he challenged the decision to refuse his internal appeal of this decision, as the internal appeal mechanisms are only available to permanent employees and former employees. In this regard, he made reference to the Court of First Instance of the European Communities that has implicitly recognized their jurisdiction to examine appeals of external candidates on recruitment matters.

The Tribunal recalled that it was well-established in its jurisprudence that it has only a limited jurisdiction. It was bound to apply the mandatory provision governing its competence and therefore it was not competent to hear complaints from external applicants regarding their non recruitment, except in cases where, even in the absence of a contract

[21] Mr. Michel Gentot, President; Mr Seydou Ba, Vice-President; Mr Claude Rouiller, Judge.

signed by the parties, the commitments were equivalent to a contract. However, the Tribunal noted that in the present circumstances, while proposals regarding and appointment were unquestionably made to the Complainant, the Defendant was not bound by them until it had established that the conditions governing appointments laid down in the regulations were met, including the physical requirements. The Tribunal also held that it had not authority to order that EPO waive its immunity.

While noting that the present judgment created a legal vacuum and that it was highly desirable that EPO sought a solution affording the Complainant access to a court, either by waiving its immunity or submitting the dispute to arbitration, the Tribunal dismissed the Complaint as irreceivable.

C. Decisions of the World Bank Administrative Tribunal[22]

1. *Decision No. 358 (3 February 2007): Aida Shekib* v. *the International Bank for Reconstruction and Development*[23]

Pension benefits—Relationship between decisions issued by national courts and the internal law of the Bank—Laws of member State do not govern the Bank or an organ within it—Guardianship order by a national court—Competence of the Bank to determine the capacity of the recipient

The Application was filed by the court-appointed guardian of the widow of a deceased staff member. The Applicant challenged a decision of the Bank's Pension Benefits Administration Committee (PBAC) to make payment of pension benefits directly to the widow of the staff member, Mrs. Naseem, rather than to the Applicant. The central issue was whether the PBAC abused its discretion in declining to give "full faith and credit" to guardianship order issued by an Illinois court and in deciding instead to pay the disputed pension benefits to Mrs. Naseem. The principal question for the Tribunal was whether PBAC was, as a matter of law, entitled to make its own determination of Mrs. Naseem's competence to manage her pension moneys, independent of the guardianship order issued in 2001 by the State Court of Illinois.

The Illinois State Court order in question stated, among other things, that Mrs. Naseem "lacks some but not all of the capacity" specified in Illinois statutory law. The State Trial Court took the view that this finding provided the foundation for the appointment of a "plenary guardian of the estate". The Applicant was so appointed. The Applicant argued that the Bank should not disregard the guardianship order of the Illinois court, and should

[22] 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://www.worldbank.org/tribunal.

[23] Jan Paulsson, President; Robert A. Gorman and Sarah Christie, Judges.

pay Mrs. Naseem's pension benefits to the Applicant as the guardian of Mrs. Naseem's estate, as dictated by the fundamental principle of "full faith and credit" embodied in the Constitution of the United States (U.S.). If Mrs. Naseem wished to revoke or undo the guardianship order, she should have petitioned the Illinois court, but she had not done so. The Applicant also argued that the Illinois court appointed the Applicant as the guardian of the estate upon a finding that Mrs. Naseem was unable to handle her financial affairs, and that no valid reasons existed for disregarding that guardianship order.

The Tribunal stated as follows:

"26. Article IV, Section 1, of the U.S. Constitution provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State." Technically, this clause is altogether inapplicable to the case at hand. Designed to eliminate the prospect of repeated and evasive litigation within a nation composed of many states with separate court systems, the clause by its terms applies only when one state in the U.S. is asked to enforce or to ignore the laws or judgments of the courts of another state. Obviously, the World Bank, and the PBAC, are not a 'state.'

27. Beyond that, there is a more fundamental reason why the Full Faith and Credit Clause is not controlling. The Tribunal recently noted: "The Tribunal . . . has often declared that the laws of a member state within the Bank, whether statutory or judicial, do not govern the Bank or an organ within it such as the PBAC (de Merode, Decision No. 1 [1981], para. 36; Mould, Decision No. 210 [1999], paras. 23–24; Cissé, Decision No. 242 [2001], para. 23)." Rodriguez-Sawyer, Decision No. 330 [2005], para. 14. Otherwise, the Bank's operations could be encumbered by entanglements in the domestic laws and judgments of scores of its member nations.

28. In Rodriguez-Sawyer, a case also arising under the Bank's SRP . . . the Tribunal concluded that PBAC policies of ease of administration and insulation from uncertain and conflicting state laws within the U.S. could reasonably be given priority over the state divorce decree.

29. The situation in the present case is quite similar. A family member is contending that Mrs. Naseem, who would otherwise clearly succeed under the SRP to the pension rights of her deceased husband, should be deprived of the full enjoyment of those rights by virtue of a state-court decree creating a new relationship of guardian and ward. The Tribunal concludes here, as well, that the PBAC has articulated significant substantive policies that favor the designated pension beneficiary, and that it has not abused its discretion in giving those policies higher status than the guardianship order of the Illinois court.

The Tribunal found that the Bank's Staff Retirement Plan (SRP) articulated a policy that favoured full pension payments to the widow or widower of a deceased staff member; that disfavors the diversion of any part of those payments to another; and that allows for such diversion only in the extraordinary circumstance of the surviving spouse being "unable to care for his [or her] own affairs." The PBAC concluded that Mrs. Naseem should be clearly favored under these provisions, and that the Illinois guardianship proceedings of some three years before—especially when viewed in the light of a new and thorough medical examination, and of her *bona fide* relocation to Saudi Arabia—no longer provided a satisfactory basis for depriving her of the SRP benefits to which she would otherwise be entitled.

The Tribunal found that such treatment of the Illinois judgment is strongly supported by several decisions of U.S. courts which uphold the discretion of various federal agencies to

pay benefits to persons who would otherwise be ineligible by virtue of state-court guardianship orders (*In the Matter of the Guardianship of Blunt,* 358 F. Supp. 2d 882 (D.N.D. 2005), *Nelson* v. *Colegrove,* 267 Ill. App. 317 (1932), *See, e.g.*, *In the Matter of the Will of Mural W. Barnes,* 30 Interior Board of Indian Appeals (IBIA) 7 (1996). The Tribunal stated that

> these cases nonetheless support the principle that deference to state judicial decrees is not obligatory when there are significant substantive policies to be served as may be articulated by the U.S. Congress and implementing agencies. The Tribunal also believes this to be the case when such policies are articulated by an international organization such as the World Bank for the distribution of pension benefits to its staff members and their survivors.

The Tribunal thus rejected the Applicant's contention that principles of "full faith and credit" apply when the initial forum is a United States state court and the second "forum" is the World Bank and its PBAC.

The Tribunal proceeded to rule that the PBAC was free to make its own determination whether Mrs. Naseem was competent to manage her business affairs and in particular her pension payments, without treating the Applicant as Mrs. Naseem's guardian to whom those payments must continue to be made, and that the principal factual finding of the PBAC, i.e., that Mrs. Naseem was "capable of managing her own financial affairs," was supported by probative and credible evidence and was altogether reasonable.

2. Decision No. 373 (14 December 2007): S. v. *the International Bank for Reconstruction and Development*[24]

Termination of service—Mandatory disciplinary measure for conviction of felonious criminal offense—Discretion of President to make exception when felony in one jurisdiction is not punishable in most others, according to Staff Rule 3.02—Decision to impose disciplinary measures made on case-by-case basis, according to Staff Rule 3.01—Assessment of the particular circumstances of the case by the Tribunal—Award of costs

In this case, the Applicant challenged the Bank's decision to terminate his employment after he pleaded guilty to, and was convicted of, a felony count of structuring financial transactions to evade reporting requirements (Structuring) before the United States (U.S.) District Court for the District of Columbia (the U.S. District Court). Under the U.S. law, financial institutions are required to file a Currency Transaction Report with the Secretary of the Treasury for all cash transactions exceeding $10,000. Structuring is the division of a cash transaction exceeding $10,000 into multiple transactions of smaller amounts for the purpose of evading federal reporting requirements. The Applicant had engaged in structuring on the instructions or at the request of his older cousin and former guardian. Under the Bank's Staff Rules, the mandatory disciplinary measure in cases where a staff member is convicted of a felonious criminal offence is termination of service. Staff Rule 3.02 also states that the President of the Bank—or his designee—"retains the full and sole discretion to determine otherwise based on particular circumstances—i.e., where an act is a felony in one jurisdiction but not in most others . . ." The Applicant contended, *inter alia,*

[24] Jan Paulsson, President; Francisco Orrego Vicuña, Sarah Christie, Florentino P. Feliciano, Zia Mody, Stephen M. Schwebel, and Francis M. Ssekandi, Judges.

that the Bank's Vice-President for Human Resources did not properly exercise his discretion in deciding to terminate his employment. The Bank Group's Staff Association filed an *amicus curiae* brief in which it argued, *inter alia,* that the Staff Rules were designed to ensure that the employment of staff members stationed in over 100 country offices around the world is not terminated when they are convicted of a felony, such as structuring, which, as a matter of record, was not a crime in most other jurisdictions.

In its judgment, the Tribunal recalled its earlier jurisprudence regarding its authority in disciplinary cases, and confirmed that

> When reviewing disciplinary cases, the Tribunal examines (i) the existence of the facts, (ii) whether they legally amount to misconduct, (iii) whether the sanction imposed is provided in the law of the Bank, (iv) whether the sanction is not significantly disproportionate to the offense, and (v) whether the requirements of due process have been observed.

It noted Staff Rule 3.01, according to which any decision by the Bank to impose disciplinary measures is to be made on a case-by-case basis taking into account such factors as the seriousness of the matter, the extenuating circumstances, the situation of the staff member, the interests of the Bank and the frequency of conduct for which disciplinary measures may be imposed.

Regarding the "seriousness of the matter", the Tribunal found that "since the Bank is actively involved in the prevention of money laundering, it was not unreasonable for it to conclude that structuring is a serious financial crime", and noted that the Applicant had engaged in structuring over a period of three years. Regarding "extenuating circumstances", it had been argued that in the Applicant's native culture, to question a request from an older family member who is a much-loved father figure like his cousin would be unthinkable. The Bank found that the Applicant's claims of innocent explanations for his actions were implausible, and that deference to his cousin requests on the basis of cultural expectations was "not an acceptable argument from someone of the Applicant's background and seniority". Regarding the "situation of the staff member", the Tribunal found, in accordance with its established jurisprudence, that good performance ratings were not sufficient to overcome the consequences of financial impropriety by the staff member. Regarding the "interests of the Bank Group", the Applicant and the Staff Association had argued that it would be in the Bank interests not to terminate the Applicant's employment, but the Tribunal recalled its consistent jurisprudence to the effect that deference would be accorded to the evaluation of the Bank's management which is responsible for maintaining the ethical standards of the Bank. Regarding the last factor, namely "frequency of the conduct", it was noted that the Applicant engaged in structuring more than once.

The Tribunal found that

> The core factor favoring the Bank is that the Applicant's felony conviction involved a financial crime. Structuring is often linked with corruption and money laundering. The Bank has in recent years devoted significant resources to combating corruption and money laundering. It would be discordant for the Tribunal now to compel the Bank to retain a staff member convicted of the felony of structuring.

Furthermore, regarding the argument based on Staff Rule 3.02, that structuring was not a felony in most other jurisdictions, the Tribunal stated that

> Numerous factors might justify clemency in other cases, but do not apply to the Applicant. Acts deemed to be criminal under the unusual laws of a particular country may have

> nothing to do with the work of the Bank. Or the penal legislation itself may be odious, such as the criminalization of religious, political, or artistic expression. The staff member may be a recent arrival in the country where his or her conduct triggers unexpected national penal sanctions. Indeed, he or she may be on a temporary assignment in a country where, for example, presence at a private gathering where alcohol is consumed—even if only by others—is a criminal offense. Or the staff member may be a clerical worker or driver whose lack of awareness and punctiliousness in respect of laws regulating financial transactions cannot be said to bring the Bank into disrepute. In this case, the Applicant was a Senior Operations Officer who had moved to the U.S. at age 17 and had made his adult and professional life there without interruption. His insensitivity to local law is not readily excusable, particularly with respect to the rather obvious warning lights that he plainly should have perceived when asked to make ostensibly pointless transactions in and out of his bank account—which moreover is the account of a World Bank staff member exempt from U.S. income tax and therefore less subject to IRS audits.

The Tribunal thus concluded that it found no basis for rescinding the decision to terminate the Applicant's employment.

Even though the Tribunal dismissed all of the Applicant's other pleas, it stated, regarding the award of costs, that:

> Given that the text of paragraph 3.02 has not previously been examined by the Tribunal, that its full implications are not self-evident, and that the Applicant's case was not frivolous when viewed as a matter of his employment status as opposed to the characterization of his conduct under U.S. federal criminal law, the Tribunal considers it appropriate to award him $24,000 as a contribution to his costs.

D. Decisions of the Administrative Tribunal of the International Monetary Fund[25]

1. *Judgment No. 2007–1 (24 January 2007): Daseking-Frank* et al.*, Applicants* v. *the International Monetary Fund (IMF), Respondent*[26]

Determination of staff salaries—Extent of the competence of the Fund to amend the methodology of determination—Principle of "international competitiveness" possesses an essential and fundamental character—International competitiveness of salaries considered to be a legal obligation—Assessment of the Fund's exercise of discretion in revising the compensation system—Allegations of abuse of discretion and improperly motivated decision

The Application has been brought by five staff members, members of the governing board of the Staff Association, to challenge, as contrary to the internal law of the Fund and

[25] 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.

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

general principles of international administrative law, the 14 April 2006 decision of the IMF Executive Board to revise the methodology by which staff salaries are determined, as well as the implementation of that amended system in the 2006 compensation round.

The Tribunal observed at the outset that the case presented it with the question of what constraints operate to circumscribe the " . . . broad, although not unlimited, power of the organization to amend the terms and conditions of employment." (Report of the Executive Board to the Board of Governors on the Establishment of an Administrative Tribunal for the International Monetary Fund, p. 17.) Drawing upon the seminal case of the World Bank Administrative Tribunal, *de Merode,* Decision No. 1 (1981), a decision upon which Applicants and the Fund both had relied in support of their respective positions and which had influenced the drafting of the Statute of the IMF Administrative Tribunal, the Tribunal distinguished between "fundamental and essential" elements of the conditions of staff employment, which cannot lawfully be amended on a unilateral basis by the organization, and elements that are less fundamental or essential and, accordingly, are open to amendment, subject to review for abuse of discretion.

The Tribunal first considered the question of whether the 14 April 2006 decision of the Executive Board had violated any of the fundamental conditions of Applicants' employment. Applicants maintained that the decision contravened the principles of maintaining the "international competitiveness" of Fund salaries and of ensuring a "rules-based" compensation system.

As to the principle of "international competitiveness," the Tribunal concluded that it was clear from the record that a principal aim of the Fund's compensation system, at least since 1979, has been to maintain international competitiveness. Moreover, concluded the Tribunal, "[i]t may be maintained that 'there is evidence that [this practice] is followed by the organization in the conviction that it reflects a legal obligation' (*de Merode,* para. 23) . . .". In the view of the Tribunal, the conclusion that international competitiveness of Fund salaries is, or has become, a fundamental condition of staff employment flows from two sources: "First, the principle has, by dint of interpretation, been found to inhere in Article XII, Section 4 (d) of the Articles of Agreement. Second, the Fund consistently and expressly has incorporated the principle of international competitiveness in its methodology for adjusting staff salaries."

Addressing the question of whether the revised compensation system indeed met the essential element of international competitiveness, the Tribunal observed that it is a matter of judgment how that standard is to be achieved: "What characterizes the practice of the IMF in giving effect to international competitiveness is that (i) comparators are drawn from selected markets in which the Fund competes for talent, and (ii) these comparisons are updated from time to time to reflect changes in those markets and in the Fund's needs for staffing." At the same time, "[j]udgments as to which particular markets to target, in what countries, and what weight shall be attached to public v. private sectors, as well as the weight to accord the various comparators, are complex policy decisions which, when reasonably based, are beyond the competence of the Tribunal to reconsider."

The Tribunal also affirmed that another principle governing the Fund's compensation system since 1979 is that it is to be "rules-based." The Tribunal cited favorably the statement in *de Merode,* para. 43 that "'[s]ometimes it will be the principle itself of a condition of employment which possesses an essential and fundamental character, while its imple-

mentation will possess a less fundamental and less essential character . . . '". The Tribunal observed that it was clear from the history of the Fund's compensation system that it had been far from static. The Tribunal concluded that " . . . the Fund has always been, and remains, entitled to reconsider and re-shape the rules-based system for adjustment of staff salaries that it instituted in 1979."

The Tribunal next turned to the question of whether any of the challenged provisions of the revised compensation system were themselves "fundamental or essential" conditions of employment and concluded that they were not: "Indeed, the contested provisions reflect elements of the system that have been subject, not infrequently, to amendment in the past. Changes to the sector weights and market pitch have been implemented on a number of occasions during the course of the Fund's history. . . . Accordingly, . . . these provisions are 'not sacrosanct and could be modified from time to time.'"

As to Applicants' particular challenge to the expansion of the Executive Board's discretion to adjust the Fund's payline when it falls within (as well as outside of) the testing range, the Tribunal observed that the discretion at issue is subject to constraints that are themselves based upon considerations of international competitiveness. Accordingly, it rejected the view that this expansion of authority was tantamount to an abuse of discretion on the part of the Executive Board. The Tribunal noted that "[i]nternational administrative tribunals have recognized that provision for the exercise of discretion within a system does not invalidate the system, and that the exercise of that discretion within its governing parameters leads to solutions no less legally valid than another."

The Tribunal next weighed whether the Executive Board had abused its discretion in the process of enacting the amendments, as by failing to take proper account of the relevant facts or by adopting a decision that was not reasonably related to the objectives that it sought to achieve or was improperly motivated. Examining the process of the Executive Board's enactment and the relevant jurisprudence, the Tribunal noted that " . . . the structure of the compensation system adopted in 2006 reflect[ed] consultation with all pertinent stakeholders, the Board's drawing upon the information before it in taking its decision, and the compromises that characterize a legislative process." Furthermore, noted the Tribunal, "[t]his Tribunal has held that the fact that one decision is recommended to a decision-making authority and a different decision ultimately is taken does not of itself vitiate the reasonableness of that decision." In addition, " . . . the Fund's policy-making discretion extends to making choices between more than one reasonable alternative." In the light of these precedents, the Tribunal concluded that the Fund's Executive Board acted within its authority in its consideration of the relevant facts bearing upon the revised compensation system.

As to Applicants' claim that the decision was improperly motivated to reduce the benefits of staff members, the Tribunal answered that contention as follows:

> "107. In the view of the Tribunal, that the amendment of the system for setting staff salaries may have 'weakened' their competitiveness is not tantamount to a failure to adhere to the principle of 'international competitiveness,' especially where, as here, there is clear evidence in the record that the amendment was taken as a result of studied consideration leading to the conclusion that the Fund's payline had been 'misaligned' with comparator markets, resulting in its being 'overcompetitive' at particular grade levels. . . ."

The Tribunal observed that international administrative tribunals, in considering challenges to the amendment of terms of employment, have upheld revisions that resulted in lower staff compensation when they likewise were motivated by such legitimate concerns: "Similarly here, the Fund over time made an assessment that the compensation system was no longer fulfilling its objectives in the optimum fashion."

Finally, the Tribunal rejected Applicants' contention that the Executive Board had abused its discretion by its subsequent decision of 17 April 2006, applying the revised system of adjusting staff salaries to the 2006 compensation round. In the view of the Tribunal, having reviewed the record, that decision was not taken in disregard of the relevant facts and did not constitute an abuse of the Executive Board's discretion.

Accordingly, the Applications of Daseking-Frank *et al.* were denied.

2. *Judgment No. 2007–3 (22 May 2007): Mr. M. D'Aoust (No. 2), Applicant* v. *the International Monetary Fund, Respondent*[27]

Selection process to fill a vacancy—Principles of international administrative law—In selection decisions, the Tribunal may not substitute its own assessment for that of the competent Fund officials—Contention that shortlisted candidates did not meet qualifications set out in vacancy announcement—Fund's regulation and practice—Contention of "reverse discrimination" by promoting diversity—Statistics alone cannot establish discrimination—Review of the Fund's exercise of discretion in assessing the candidates

The Applicant, a staff member of the Fund, challenged the process by which the Fund filled a Deputy Division Chief vacancy, for which he had been an unsuccessful candidate. The Applicant contended that the selection process was affected by procedural deficiencies that contravened Fund rules and substantially affected its outcome. Additionally, he maintained that the Fund improperly took account of the "diversity profiles" of candidates, allegedly resulting in impermissible discrimination against him on the basis of his gender, race, nationality and age.

The Tribunal reviewed the process undertaken to fill the Deputy Division Chief vacancy in the light of Applicant's challenges to it. The Tribunal cautioned that " . . . in reviewing selection decisions, the Tribunal may not substitute its own assessment of candidates' merits for that of the competent Fund officials." At the same time, however, the " . . . organization is bound to observe the vacancy announcement and the elements of its internal law governing selection decisions, as well as applicable principles of international administrative law."

The Applicant contended that the three candidates who were shortlisted for the vacancy did not meet its qualifications as set out in the Vacancy Announcement and Job Standard, and that, accordingly, their applications should have been rejected at the initial screening stage. In the Applicant's view, this error was repeated by the Selection Panel, the Head of the hiring Department who endorsed the Selection Panel's rankings, and the Review Committee which reviewed the Department's selection process.

The Tribunal first considered whether the Fund abused its discretion in its initial screening of candidates. In the Tribunal's view, the evidence revealed that an assessment

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

of "minimum qualifications" constituted the basis for the initial screening and that such an approach was consistent with the Fund's regulations and practices. The Tribunal next considered whether there was any abuse of discretion in the Selection Panel's assessment of the candidates. In particular, the Tribunal considered whether the selection instruments, namely a blindly scored written test and interviews by the Selection Panel, were reasonably calculated to test the competencies required for the position as set out in the Job Standard and Vacancy Announcement, and it confirmed that they were. The Tribunal also rejected as unsubstantiated Applicant's contention that the Head of the hiring Department, in endorsing the Selection Panel's evaluation of the candidates, failed to discharge his duties in an impartial manner. Nor was it an abuse of discretion, concluded the Tribunal, for the Department Head, in assessing candidates' qualifications, to take into account his direct work experience with them. Likewise, the Tribunal found no merit to Applicant's claim that the Review Committee abused its discretion in reviewing and endorsing the decision of the hiring Department. In the view of the Tribunal, the Committee's review was "thorough and fully consistent with its responsibilities pursuant to the Fund's regulations."

The Tribunal next turned to the question of whether, as the Applicant contended, the process of filling the vacancy had been improperly motivated by "diversity" considerations, resulting in impermissible discrimination against Applicant on the basis of his gender, race, nationality and age. The Applicant put forward three arguments in support of this claim: (1) the process itself was defective, suggesting that it was pretextual; (2) the outcome of the process, resulting in the shortlisting of three candidates who fit a particular "diversity profile" further demonstrated that the process was discriminatory; and (3) the Fund's policies promoting "diversity" in the workplace provided circumstantial evidence of discriminatory motive in his case. The Tribunal rejected each of these contentions.

The Tribunal denied Applicant's contention that the process of filling the vacancy reflected flaws suggesting that it was "orchestrated" to produce a particular result: "Having concluded that there was no procedural irregularity in the filling of the contested vacancy, the Tribunal accordingly finds no merit to Applicant's contention that the Fund's explanation for the shortlisting and selection decisions was 'merely a pretext for reverse discrimination.'"

The Tribunal also rejected Applicant's view that an inference of discrimination should be drawn from the outcome of the competition, in particular that the three shortlisted candidates were female, nationals of countries underrepresented on the Fund staff, and were among the youngest candidates. Noting that in recent Judgments it has rejected the view that statistics alone might establish discrimination, the Tribunal confirmed that " . . . in view of its conclusion in this case that the process of filling the vacancy was itself sound, the Tribunal is unable to draw any inference of discrimination from the outcome of that process."

As to Applicant's allegation of age discrimination, the Tribunal observed that this claim was expressly linked to Applicant's view, rejected earlier by the Tribunal, that the selecting officials improperly discounted what he considered to be the most relevant qualifications for the job: "As the Tribunal has concluded above, however, it was within the Fund's discretion to fashion a selection process that gave greater weight to attributes such as 'strategic vision' than to specialized knowledge or long-term experience in the field of

recruitment. Accordingly, the Fund's approach to assessing suitability for the position cannot be said to evidence age discrimination."

Applicant additionally cited the Fund's policies promoting "diversity" in the workplace in support of his claim that the selection process was impermissibly affected by a discriminatory motive. The Tribunal observed that the Fund, from its inception, has recognized the importance to a global institution of maintaining a nondiscriminatory and inclusive workplace, goals that are "subject to the paramount importance of securing the highest standards of efficiency and of technical competence." (Rule N-1 and Article XII, section 4 (d) of articles of Agreement.) Accordingly, stated the Tribunal, "[m]erit-based selection is the paramount, governing principle."

Reviewing the relevant policies and the evidence in the case, the Tribunal emphasized that " . . . the Tribunal in the case brought by [the Applicant] has not been called upon to consider a situation where diversity may have been taken into account in selecting among candidates whose qualifications were deemed substantially equal." To the contrary, "[a]11 three shortlisted candidates showed themselves, in respect of the testing criteria used by the Selection Panel, to be discernibly more qualified than those, such as Applicant, who, however estimable their records of Fund service were, did not emerge from that process as contenders on the shortlist."

The Tribunal concluded: " . . . on the facts of this case, in light of the soundness of the process itself, including the blind reading of test results, Applicant has not established impermissible discrimination against him. He has shown neither pretext nor improper motive. The Tribunal has not been convinced that there is reason to doubt the *bona fides* of the Fund's position in this case." At the same time, the Tribunal cautioned that " . . . there are disquieting indications that the Fund's management, in its laudable pursuit of the objectives of a more diverse staff, is skating close to the line on the other side of which would be clear violation of the fundamentals of Fund law debarring discrimination in the promotion of staff. . . . In the view of the Tribunal, the Fund is chargeable with assuring that, in fact as well as form, no member of the Fund staff shall suffer from 'reverse discrimination,'" and that performance-based promotion not be compromised in the interest of promoting diversity.

Accordingly, the Application of the Applicant was denied.

3. *Judgment No. 2007–7 (16 November 2007): Mr. "N", Applicant* v. *the International Monetary Fund, Respondent (Admissibility of the Application)*[28]

To contest a notification of implementation viewed as a challenge to the validity of the judgment itself—Obligation for the Fund to implement Tribunal's judgments—Judgments by Tribunal are final and without appeal—Principle of *res judicata*—Motion for summary dismissal

The Applicant, a retiree of the Fund, contested the decision notified to him as follows: " . . . as required by the Administrative Tribunal's Judgment No. 2006–6, November 29, 2006, a $16^{2/3}$ percent deduction shall be made from your monthly pension payments, with effect from the January 2007 payment." In *Ms. "M" and Dr. "M", Applicants v. International Monetary Fund, Respondent,* IMFAT Judgment No. 2006–6 (29 November 2006),

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

the Administrative Tribunal had required the Fund, pursuant to section 11.3 of the Staff Retirement Plan, to give effect to a series of past child support orders by making deductions from Mr. "N"'s prospective pension payments, at the maximum percentage prescribed by section 11.3, until such payments have been fulfilled.

The Fund responded to Mr. "N"'s Application by filing a Motion for Summary Dismissal, maintaining that the Application was "clearly inadmissible" because neither the Tribunal's Judgment in *Ms. "M" and Dr. "M",* nor the Fund's implementation of that Judgment in compliance with the Tribunal's ruling, was an "administrative act" subject to review under article II of the Tribunal's Statute. As a Motion for Summary Dismissal suspends the period for answering an Application on the merits, the Tribunal's consideration of the case was confined to the issue of its admissibility.

The Tribunal observed that Mr. "N"'s challenge to the Fund's notification of him of its intention and means of giving effect to the Judgment (and its subsequent acts of deduction from his pension payments of the requisite portion of those payments as specified by the Tribunal's Judgment in *Ms. "M" and Dr. "M")* was tantamount to a challenge to the validity of the Judgment itself. The Tribunal concluded that in view of the provision of its Statute that Judgments are "final . . . and without appeal" (Statute, article XII, section 2), a challenge to the validity of a Judgment of the Tribunal is inadmissible. That statutory provision codifies and applies to the Judgments of the Administrative Tribunal the universally recognized principle of *res judicata,* barring the relitigation of claims already adjudicated, thereby promoting judicial economy and certainty among the parties. As a party to the Tribunal's Judgment, the Fund was bound to implement it. The Tribunal further observed: "That the Fund does not have discretion to decline to implement the Tribunal's Judgments indicates that such implementation is not an 'administrative act' of the Fund as contemplated by article II of the Tribunal's Statute."

The Tribunal also considered that the history of the litigation showed that Mr. "N" deliberately had elected to retain non-party status vis-à-vis the proceedings in the Administrative Tribunal. Mr. "N"'s knowing relinquishment of the opportunity to participate as an Intervenor in the case of *Ms. "M" and Dr. "M"* had been noted by the Tribunal in that Judgment. Additionally, the Tribunal had observed that, in the context of the administrative review proceedings leading up to the Tribunal's consideration of the case, Mr. "N" had had a "full measure of opportunity to present his views." (*Ms. "M" and Dr. "M",* para. 98.) In the opinion of the Tribunal, the fact that Mr. "N" was not a party to the Tribunal's Judgment, and deliberately chose not to be, did not mean that he could escape its legal effects upon his entitlements in the Staff Retirement Plan.

The Tribunal concluded that Mr. "N"'s challenge to the implementation of the Tribunal's Judgment in *Ms. "M" and Dr. "M"* failed on two grounds: "The first is that Applicant does not challenge an 'administrative act' of the Fund, as that term is employed in the Statute of the Tribunal. The second and more fundamental ground is that the thrust of Applicant's challenge is to the legal force of a Judgment of the Administrative Tribunal. It is a challenge not only to the legality of the particular Judgment but to the character of any Judgment of this Tribunal as 'final . . . and without appeal.'"

Accordingly, the Application of Mr. "N" was summarily dismissed.