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UNITED NATIONS JURIDICAL YEARBOOK

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

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

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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. 1382 (9 May 2008): Applicant* v. *The Secretary-General of the United Nations*[3]

Receivability of appeal—Abolition of post—Expiration of contract—Agreement to not contest abolition of post—Claim for termination indemnity—Distinction to be made between substance of agreement and its application

The Applicant joined the United Nations Environmental Programme (UNEP) on a series of short-term contracts in August 1981. From 1982 she was employed on a series of fixed-term appointments for a period of approximately 20 years. On 16 November 2001, the Applicant was informed that, as a result of a general restructuring of the office, her post would be abolished on 31 December 2001. On an exceptional basis, however, her contract was extended for five months on the condition that she signed an agreement stating that

[1] In view of the large number of judgements which were rendered in 2008 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. 1372 to 1433 of the United Nations Administrative Tribunal, Judgments Nos. 2667 to 2765 of the Administrative Tribunal of the International Labour Organization, Decisions Nos. 378 to 388 of the World Bank Administrative Tribunal, and Judgment No. 2008–1 of the International Monetary Fund Administrative Tribunal, see, respectively, documents AT/DEC/1372 to AT/DEC/1433; *Judgements of the Administrative Tribunal of the International Labour Organization: 104th and 105th Sessions; World Bank Administrative Tribunal Reports, 2008;* and *International Monetary Fund Administrative Tribunal Reports, Judgement No. 2008–1.*

[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 and the International Tribunal for the Law of the Sea, and the staff of the International Seabed Authority. For more information about the United Nations Administrative Tribunal and the full texts of its judgements, see http://untreaty.un.org/UNAT/main_page.htm.

[3] Spyridon Flogaitis, President; Jacqueline R. Scott, Vice-President; and Brigitte Stern, Member.

she would not appeal against the decision to abolish her post. On 13 December 2001, the Applicant signed the official letter notifying her of the abolition of her post and stipulating that she would not appeal against that decision.

On 6 May 2002, the Applicant addressed a letter to Human Resources Management Service (HRMS), requesting a termination indemnity, to which she believed she was entitled under relevant staff regulations and rules. On 13 May 2002, the Applicant received an e-mail from HRMS, stating that she was not entitled to the payment of a termination indemnity because UNEP had not terminated her contract before it was due to expire. Subsequently in June, the Applicant requested a review of the decision of 13 May. While she received a confirmation that her letter had been received on 2 July 2002, the Secretary-General did not respond to her within the two-month limit. The Applicant consequently submitted an appeal to the Joint Appeals Board (JAB) on 25 September 2002.

The JAB adopted its report on 5 April 2005, in which it rejected the appeal as non-receivable. The JAB first found that the decision of which the Applicant was requesting review was the decision of 16 November 2001, notifying her of the abolition of her post, and that the appeal thus was time-barred. Furthermore, since the Applicant had signed the agreement waiving her right to contest the abolition of the post, her appeal was non-receivable *ratione materiae*.

In a letter dated 15 July 2005, the Secretary-General informed the Applicant that he had accepted the findings set out in the JAB's report and that he had decided to take no further action on her appeal. On 28 December 2005, the Applicant filed an appeal with the Tribunal.

The Tribunal assessed the report of the JAB and concluded that the it had been mistaken in its failure to distinguish between the two decisions at hand, namely the first decision of 16 November 2001, announcing the abolition of the Applicant's post, and the second decision of 13 May 2002, stipulating that the Applicant was not entitled to a termination indemnity. This mistake had impacted upon both grounds of non-receivability. The Tribunal stated that, as it was in fact the decision of 13 May 2002 which the Applicant had appealed, her appeal had been filed within the two-month time limit.

The Tribunal further addressed the scope of the no-contest agreement. The Tribunal registered its concern about such a practice, which might, depending on the circumstances, be regarded as duress of such magnitude as to render the no-contest agreement null and void and, consequently, to preclude its consideration by the Tribunal. The Tribunal noted that such a question could be posed in the present case, although the Applicant had not contested the agreement on this point. The Tribunal continued to point out that, in any event, the agreement did not have the scope attributed to it by the JAB or the Respondent. In the view of the Tribunal, the agreement of 13 December 2001 clearly dealt only with the decision to abolish the post. The Applicant had not waived her right to appeal against the decision of 13 May 2002 denying her a termination indemnity.

The Tribunal recalled Judgment No. 955 which also involved a no-contest agreement, where the Tribunal had stated that the question of interest on the sums owed to the Applicant by the Administration concerned not the substance of the agreement but its application, which did not fall within the scope of the no-contest agreement. Similarly, in the present case, the distinction should be drawn between the substance of the agreement,

i.e., the abolition of the post, and its application, *i.e.,* the non-payment of a termination indemnity.

The Tribunal took the view that remanding the case to the JAB would serve little purpose; besides neither the Applicant nor the Respondent had requested it to do so. Thus, the Tribunal proceeded to order the parties to submit their arguments on the merits of the case by 1 June 2008 at the latest.

2. *Judgement No. 1387 (8 October 2008): Applicant* v. *The Secretary-General of the United Nations*[4]

Classification of post—Right of applicant to be given fair and full consideration in promotion exercise—Interventions by persons having a right which might be affected by the judgement to be given by the Tribunal—Broad discretion enjoyed by the Secretary-General in personnel matters—Organization should not conceal from staff members pertinent information concerning their future nor behave in such a manner as to render staff members entirely demoralised and disillusioned—Cumulative effect of the facts of the case reveal a lack of transparency which had demoralized the Applicant in a way amounting to harassment

The Applicant entered the service of United Nations Population Fund (UNFPA) in January 1987 as a Junior Professional Officer at the L-2 level. At the time of the events which gave rise to his application, he held a permanent appointment at the P-4 level. In January 1998, the Applicant was reassigned to an unclassified post while keeping his personal level of P-4. The post was classified in June 2000 at the P-5 level. The Applicant was not formally notified of the decision in 2000, but learned of it in April 2001.

The Applicant initiated in 1999 and 2002 recourse proceedings as he had not been considered for promotion in two promotion exercises. With regard to the first promotion exercise, the Appointment and Promotion Board (APB) found on 13 October 1999 that it could not recommend a promotion as, at the time of the promotion exercise, there had not been a P-5 position available. With regard to the second promotion exercise, the Applicant was informed on 12 September 2002 that he had been unsuccessful for performance reasons.

In January 2003, the Applicant was assigned to a non-core position as a Finance Specialist, which had been classified at the L-4 level; and he would hold a general lien against a P-4 post. This reassignment was confirmed on 5 March 2003, and on 30 April he requested administrative review of this decision. The Applicant lodged an appeal with the Joint Appeals Board (JAB) on 30 June 2003, and the JAB delivered its report on 6 January 2005. While the JAB concluded that the Applicant had in fact received full and fair consideration in the two promotion exercises and that he had failed to prove that he had been the victim of prejudice and discrimination, it found that UNFPA had violated his rights in failing to inform him of the classification of the post to the P-5 level.

On 25 May 2005, the Applicant was informed that the Secretary-General had decided to accept the JAB's recommendation. On the same day, he lodged the present application before the Tribunal.

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

The Tribunal first addressed the receivability of the number applications for intervention which it had received. As none of the applicants appeared to have a right which might be affected by the judgement to be given by the Tribunal, the applications were dismissed. Nevertheless, the Tribunal called them as witnesses in the oral hearings since they might be in a position to provide valuable evidence in the Applicant's case.

As to the substance of the case, the Tribunal recalled its consistent jurisprudence recognizing the broad discretion enjoyed by the Secretary-General in matters of personnel. It noted, however, that this discretion was not unfettered, and that the Tribunal had clearly determined the control standards it exercised in promotion cases. It recalled Judgment Nos. 362 (1986), 828 (1997) and 1231 (2005) in which it had stated that "it is indispensable that 'full and fair consideration' should be given to all applicants for a post," and that "the Administration must be able to make at least a minimal showing that the staff member's statutory right was honoured in good faith in that the Administration gave its 'fullest consideration' to it [the application]." In Judgment No. 834 (1997) it held that 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*" (emphasis added).

The Tribunal noted that the Applicant claimed that his non-promotion to the P-5 level was the result of prejudice and discrimination; and, in more general terms, he and the interveners allege a reigning atmosphere of prejudice at UNFPA. The Tribunal recalled that the Applicant was a staff member holding a permanent appointment, who considered himself worthy of a P-5 position, and who wished for such a promotion. As to the first promotion exercise, the Tribunal found the justification given for non-promotion, namely that at the time no post existed at P-5 level, to be entirely reasonable. However, the Tribunal was not persuaded by the newly-founded concerns regarding the Applicant's performance, which were given as reasons following the second promotion exercise. It was not clear to the Tribunal what performance issues—if any—had arisen between the two promotion exercises, and the Tribunal found that no adequate explanation had been provided on this matter.

The Tribunal further underlined that it is in the interest of the Administration to treat staff members with the respect they deserve, as they are the ones who give their competencies and lives to enable the Organization to achieve its goals. The Administration should neither conceal from staff members pertinent information concerning their future nor behave in such a manner as to render staff members entirely demoralised and disillusioned with the Organization. The Tribunal expressed its deep concern at the number of long-serving staff members whose testimony in this case had indicated a lack of confidence in their employer.

The Tribunal recalled its Judgement No. 1290 (2006) in which it had decided that "[t] he cumulative effect of the facts in the case, reveal a lack of transparency in the way the Administration dealt with the Applicant and clearly destabilized him in a way which the Tribunal views as harassment justifying compensation." It found that the Applicant had suffered the same fate in the present case, and awarded him compensation in the amount of three months' net base salary.

3. *Judgement No. 1388 (8 October 2008): Applicant* v. *The Secretary-General of the United Nations*[5]

Compensation to beneficiaries following the death of a staff member—Compensation under appendix D of the Staff Rules and under the Malicious Act Insurance Policy (MAIP)—Duty of good faith owed by the organization—Duty to conduct an adequate investigation of the death of a staff member—Duty to pursue Applicant's claim under MAIP fairly, effectively and efficiently in her best interest—Compensation under appendix D of the Staff Rules clearly not "reasonable compensation" as required by staff regulation 6.2

The Applicant was the spouse of Dr. C, a staff member of the United Nations Development Programme (UNDP) who died in 2000 on an official mission to Kisangani in the Democratic Republic of the Congo. On 18 August 2000, Dr. C was found hanged in his hotel room. Following his death, the United Nations Mission in the Democratic Republic of the Congo (MONUC) and the United Nations Security Coordinator (UNSECOORD) conducted investigations regarding his death. These investigations did not, however, lead to a clear conclusion. Upon the Applicant's request for compensation under appendix D to the staff rules, the Advisory Board on Compensation Claims (ABCC) recommended to the Secretary-General that the death be recognized as attributable to the performance of official duties, and that the Applicant be compensated accordingly. On 3 January 2002, the Secretary-General decided to follow the ABCC recommendation, and awarded the Applicant compensation.

The Applicant subsequently requested that a claim be submitted for compensation under the Malicious Act Insurance Policy (MAIP), which was administered by UNSECOORD and reviewed and determined by the insurance carrier. The Applicant also requested to receive copies of the documents submitted by UNSECOORD to the insurer and the broker. This request was rejected by UNDP, as staff members were not parties to the policy. On 2 December 2002, the Applicant was informed by UNDP that the underwriters of the MAIP had concluded that there had been no evidence that Dr. C. had died as a result of an insured contingency covered in the policy, and that UNDP therefore had decided not to make a payment under the MAIP. On 4 February 2003, UNDP informed the Applicant's lawyer of the decision to consider the case closed unless further evidence was provided which could establish that Dr. C. died under circumstances covered by MAIP.

The Applicant requested administrative review of this decision and, on 6 June 2003, lodged an appeal with the Joint Appeals Board (JAB). In its report, the JAB found that UNSECOORD had acted in compliance with relevant laws and concluded that the Applicant had no grounds for contesting the decision. However, the JAB urged the Secretary-General to take necessary actions to update the obsolete calculation methods for compensation and to increase the monthly amount awarded to the Applicant to a more appropriate level. Nevertheless, the Secretary-General rejected this recommendation on the grounds that there was no legal basis for it. The Applicant subsequently filed the application with the Tribunal.

The Tribunal noted that the current dispute had arisen because of the uncertainty as to how and by whose hand Dr. C had died, and that unfortunately this central issue was highly

[5] Spyridon Flogaitis, President; Dayendra Sena Wijewardane, Vice-President; and Sir Bob Hepple, Member.

unlikely to be solved after some eight years. The Tribunal observed that its Statute did not envisage the possibility of the Tribunal's conducting fact findings. It thus took as the starting point the Secretary-General's acceptance of the ABCC recommendation according to which, while it was not be possible to conclude whether Dr. C had died from suicide or homicide, his death should be recognized as attributable to the performance of official duties.

The Tribunal observed that a claim could only be made where there had been a breach of an express or implied contractual duty owed to Dr. C or to those whom he had named as beneficiaries under the MAIP. Thus, the fact that the Applicant was herself a United Nations Volunteer staff did not grant her a cause of action under MAIP; however, she did have rights as a beneficiary under her husband's terms of appointment.

The Tribunal noted that the relevant contractual duty of the Organization, as the assured and the administrator of claims made by staff members who are Insured Persons and their beneficiaries, may be variously described as a duty to act fairly and in good faith, as a duty not to undermine trust and confidence as between the Organization and its staff members and their beneficiaries, or as a duty of mutual co-operation to achieve the objectives of the contract. In the context of this case, the specific duties of the Organization were, first, to conduct an adequate investigation of the death or verify that one had been conducted; and second, to pursue the Applicant's claim under MAIP fairly, effectively and efficiently in her best interests.

First, UNSECOORD failed to discharge its responsibility under the guidelines on "Actions required in case of death of staff members under suspicious or unclear circumstances," issued in 1994. According to the facts, there had been no real criminal investigation in Kisangani immediately following the death of Dr. C, as serious problems existed with regard to matters such as securing the crime scene, local police involvement, treatment of witnesses, evidence, etc. Such circumstances made it incumbent on UNSECOORD to conduct a thorough investigation of its own and to be cautious about its findings in view of the absence of a proper investigation by local police and MONUC. UNSECOORD report was seriously defective in a number of important respects, including undue weight attached to Dr. C's state of depression, the absence of adequate explanations for rejecting the autopsy report which had concluded that the injuries suggested a homicide, the lack of reference to evidence which might point to assault, etc. As a whole, the investigation report was superficial and made no reference to difficulties with the local police or MONUC inquiries, which rendered its definite and unqualified conclusion that Dr. C. had committed suicide far too strong.

Second, the submission of the claim under MAIP seriously failed to present a fair and impartial description of the circumstances, as it had highlighted the weaknesses of the claim. The Tribunal considered that the claim must have been prejudiced by the construction which favoured the suicide theory, the inaccurate account of the ABCC balanced reasoning, the disorder of the documentation, and an inter-office memorandum which had suggested the insurer to reject the claim if they saw fit. The Tribunal also pointed out failures of due process by the Organization. Provided in the standard UNSECOORD procedure, a committee should have been convened to review the claim under the MAIP before it went to the underwriters: there was no evidence that such a meeting had taken place, which constituted a serious irregularity. A further failure of due process had been the lack of transparency by the Organization in its dealings with the Applicant. The duty

of good faith required UNSECOORD to share all the facts relevant to the claim with the Applicant, not only because of the contractual duty, but also in light of the Applicant's moral interest in knowing the full circumstances of her husband's death.

Accordingly, the Tribunal found that the Applicant had established that the MAIP claim had been seriously mishandled by the Organization, for which the she was entitled to compensation. The Tribunal considered that, had the claim been properly handled, it was not unlikely that the insurer would have felt obliged to negotiate a settlement of the claim in order to avoid litigation. In light of all the circumstances, the Tribunal assessed the compensation due to the Applicant at USD 250,000, which exceeded the compensation cap but was justified by the reckless and callous treatment by the Organization.

As to the level of compensation granted the Applicant under appendix D, the Tribunal was convinced by the fact that this appendix no longer provided a scheme for "reasonable compensation" concerning the death of a staff member, as required by staff regulation 6.2. The Tribunal noted that the fact that a negative entitlement was reached after the pension deduction indicated that the cap was outdated, as the pension benefit had been updated while the appendix D caps had not.

With regard to *ex gratia* payments, the Tribunal agreed that it was not an appropriate method for offsetting inadequacies in entitlements under appendix D; rather, it was intended to cover only the situation where a person was ineligible to claim benefits under appendix D. The Tribunal stated that it had no power to invalidate or amend the specific caps in appendix D; however, it strongly urged the Secretary-General to review and revise them.

Finally, the Tribunal addressed the Applicant's claims for compensation for the alleged failure to safeguard Dr. C's personal safety and to take good care of his health and welfare. The Tribunal found that these claims were irreceivable, as the Applicant had never requested administrative review of that question, and as it was not sufficiently linked to the contested administrative decision of UNDP.

The Tribunal finally addressed two ancillary matters. First, the Tribunal could not accept, and would not abide by, the condition imposed by the Respondent that the documents submitted be reviewed in confidentiality. Second, the Tribunal rejected the Applicant's application for costs, as it was not satisfied that the Applicant had been obliged to incur unreasonable costs in the present case.

4. *Judgement No. 1389 (8 October 2008): Applicant* v. *The Secretary-General of the United Nations*[6]

Implementation of the decision to abolish post—Abolition of post coinciding with expiration of contract—Claim for amount equivalent to termination indemnity—Right to three months notice—Agreement to not contest separation from service—Obligation of good faith owed by international organizations—Principle of equality of treatment due to all staff members

The Applicant was a former staff member of the Untied Nations Environment Programme (UNEP). On 2 May 2008, the Tribunal rendered Judgement No. 1382,[7] in which

[6] Jacqueline R. Scott, Vice-President; Brigitte Stern and Augustín Gordillo, Members.

[7] See section 1 of this chapter.

the receivability of the application was addressed. Pursuant to the Tribunal's order, both parties submitted their arguments on the merits of the case.

In its former Judgement No. 1382, the Tribunal had noted that the Applicant had clearly stated that she was not contesting the abolition of her post but was alleging a violation of her rights. The Tribunal found it appropriate to emphasize that what the Applicant wanted was to not be separated from the United Nations after twenty years of service without some financial compensation. In this regard, the Applicant was not claiming a termination indemnity *stricto sensu* but an amount equivalent to termination indemnity of twelve months' net-base salary. The Tribunal stated that it would consider the application in its entirety, but would rule only on the alleged violations connected with the circumstances surrounding the implementation of the abolition decision that might affect the Applicant's entitlement to financial compensation at the time of her separation.

The Tribunal first considered the way in which the Applicant had been treated by the Administration at the time of her separation from service. It was well-established in the Tribunal's case-law that the normal expiration of a fixed-term contract which occurred independently of the abolition of a post did not give rise to termination indemnity. Further, staff rule 109.7 clearly provided that a temporary appointment for a fixed term should expire automatically and without prior notice on the expiration date, and separation as a result of such expiration should not be regarded as a termination within the meaning of the Staff Regulations and Rules. The applicability of this rule was not contested. Thus, as the Applicant's contract was allowed to run until the end of its term, the Tribunal agreed with the Respondent's claim that the Applicant was not entitled to a termination indemnity according to the Staff Regulations and Rules.

Nevertheless, the Tribunal emphasized the unfairness of situations such as that of the Applicant, in which a staff member who had served the Administration for many years received no compensation at the end of his or her service. The Tribunal noted that the strict enforcement of staff rule 109.7 might, in some cases, produce unfair consequences as regards the practice of using continuous, sequential fixed-term contracts throughout a career. However, the Tribunal recalled that it was neither a political organ that could take staff-management decisions, nor an adjudicating organ with the power to redress unsatisfactory situations on the basis of a sense of equity. The above opinions were expressed in respect of very specific situations and in no way called into question the use of fixed-term appointments in general. In this case, the Tribunal could therefore only apply the rule, however unsatisfactory it might turn out to be in certain situations.

The Tribunal subsequently moved on to determine whether the implementation of the decision to abolish the Applicant's post was carried out in such a way as to constitute a violation of the Applicant's rights.

The Tribunal noted that making the date of abolition of the post, which conferred entitlement to an indemnity if it interrupted a contract, coincide with the expiration of the Applicant's fixed-term appointment, which did not confer entitlement to an indemnity, created at least the appearance of a lack of good faith and also made it all the more difficult to determine the Applicant's rights. The Administration had thus precluded the Applicant from the possibility of obtaining a termination indemnity, by characterizing her situation as the normal expiration of a fixed-term contract.

The Tribunal recalled that the Administration was bound by certain fundamental obligations towards all staff members, whether or not they had a permanent appointment. It was thus beyond question that the Administration must observe the principle of good faith in managing its staff, and the principle was particularly important upon the abolition of a post.

The Tribunal noted the Administration's total disregard of its obligations under staff rule 109.1 (c) (i), which required it to make efforts to place the staff member concerned on a new post when a post was abolished, provided that there were posts available that matched his or her profile. The Tribunal recalled that, when it was questionable whether a staff member had been given every reasonable consideration, the burden of proof of having done so was on the Administration. Yet, it appeared that the Administration had made absolutely no attempt to place the Applicant on another post.

The Tribunal observed that, as the UNEP Administration regarded the Applicant's situation as the expiration of her fixed-term contract as far as the financial consequences were concerned, UNEP should have followed the procedural rules provided for in its memorandum of 31 May 1999. By its own initiative, UNEP issued the memorandum extending the practice of providing three months notice upon expiration of a contract to that of a fixed-term contract. By not applying that rule to this case, UNEP did not observe the principle of equality of treatment due to all staff members.

With regard to the argument put forth by the Respondent that the Applicant could not benefit from the aforementioned practice because, under her no-contest agreement, she had been given six months' notice and a five-month contract extension, the Tribunal stated that the extension could not, in any way, be considered as constituting three months notice. The Tribunal rejected the reasoning of the Respondent as the additional months were solely in return for the waiver of the Applicant's right to contest the abolition of her post. The Tribunal therefore concluded that the Administration had violated the Applicant's right to benefit from the 1999 memorandum on which staff members should be able to rely so as to receive three months' notice or, in the absence of such notice, suitable compensation.

In conclusion, the Tribunal declared that the decision to abolish the Applicant's post had been implemented in a way that had violated her right to fair and equitable treatment, and ordered the Respondent to pay the Applicant an amount equivalent to nine months' net-base salary.

5. *Judgement No. 1390 (8 October 2008): Applicant* v. *The Secretary-General of the United Nations*[8]

Completion of performance evaluation without participation of staff member—Right to full and fair consideration in promotion exercises—Staff member not afforded opportunity to rebut negative comments in performance evaluation—Consistent and unfailing respect of due process of law by the Administration is the first and foremost part of any successful and satisfactory system of administrative justice

The Applicant was a permanent staff member of the Untied Nations at the relevant time. On 14 November 1996, her performance was evaluated and a report was prepared

[8] Spyridon Flogaitis, President; Jacqueline R. Scott, Vice-President; and Agustín Gordillo, Member.

for the period from January 1994 to 31 March 1996. The report rated her performance for the period as "very good."

In 2000 and 2001, respectively, the Applicant applied for several P-4 posts and also sought assistance of Office of Human Resource Management in connection with a significant gap in her performance evaluation records. In 2001, the Applicant's Performance Appraisal System (PAS) report for the period from April 1996 to March 1999 was completed without her participation, and was placed in her official status file without her signature. In late 2001, the Applicant discovered the unsigned PAS report and immediately requested a suspension of action and other measures. In 2002, the Applicant received an apology from the Administration and was offered two options—either to sign the report and avail herself of the rebuttal process, or to remove the report and any reference to it without a formal rebuttal procedure. The Applicant requested the report be removed and a note to be included in her file, and lodged an appeal with the Joint Appeals Board (JAB). In 2005, the Secretary-General decided that the contested PAS report be declared null and void, be removed from the file and a note be inserted stating that the performance had been fully satisfactory. The Applicant subsequently filed an application with the Tribunal.

The Tribunal was of the view that the performance evaluation for the period in question had been prepared in flagrant violation of the rules by denying the Applicant the right to participate in the evaluation process and preventing her from rebutting the appraisal. The Tribunal considered that the Respondent had failed to fulfil its responsibility for a timely execution of the PAS. Moreover, the placement and use of the contested PAS evaluation in her official status file while was being considered for posts might well have damaged her career development. Negative comments in the report must have been taken into account when she was considered for the posts for which she had applied, thus decreasing her chances for promotion. While the Applicant might or might not be selected for promotion and the rebuttal might or might not have been successful, the Tribunal concluded that she had been deprived of her rights.

The Tribunal considered that the Respondent had not satisfied its burden of proof to show that "full and fair consideration" had been given in the promotion exercises. The Respondent could not produce any evidence that it had acted in accordance with the appropriate personnel evaluation procedures. Instead, the Respondent merely attempted to rely on the fact that the offensive document was removed, that it had apologized and that no harm had been done to her since the evaluation gave her a "fully meets expectations" overall rating. However, the Tribunal found this argument disingenuous. The Tribunal was convinced that any reasonable promotion panel would have been seriously concerned about the negative comments in the report. Further, the Applicant was not afforded any opportunity to rebut or possibly correct the negative comments, and the removal of the tainted evaluation did nothing to ameliorate the damage done to her. Thus, the Tribunal concluded that the Applicant deserved to be compensated for the violations of her due process rights.

In addition, the Tribunal noted that the whole administrative process had a diminished value when a staff member was substantially deprived of due process. The consistent and unfailing respect of due process of law by the Administration was the first and foremost part of any successful and satisfactory system of administrative justice. Thus, the

Tribunal underscored the importance of adherence by the Respondent to the PAS system and to the basic principles of due process of law in general.

The Tribunal ordered the Respondent to pay compensation in the amount of six months' net-base salary.

6. *Judgement No. 1396 (8 October 2008): Applicant* v. *The Secretary-General of the United Nations*[9]

Recognition of same-sex marriage—Application of national law in determining the personal status of staff members—The practice followed by the Organization does not result in discrimination based on nationality

The Applicant was a citizen of the United States of America and joined the Office for Coordination of Humanitarian Affairs (OCHA) in 1998. In 2000, she contracted a same-sex union with a Danish citizen, Ms. C, in Denmark. In 2001, the Applicant applied to the Administration for formal recognition of her union. Since the practice at that time within the Organization was to refer to the law of a staff member's home country in order to determine his or her marital status, the Office of Legal Affairs (OLA) consulted with the United States Government, which confirmed that under U.S. federal law, unions between persons of the same sex did not fall within the definition of "marriage" nor a partner of the same sex within the definition of "spouse." Accordingly, the Office of Human Resource Management (OHRM) rejected the Applicant's request in 2002. The Applicant sent a request to the Secretary-General for review of the administrative decision, which was later upheld by the Secretary-General.

In 2003, the Applicant appealed the decision before the Joint Appeals Board (JAB). The JAB concluded that the Administration had applied the law correctly by referring to national law. Meanwhile, Ms. C entered the United Nations service. The Applicant's status as the spouse of Ms. C was thus acknowledged, since Danish law recognized the same-sex union however, Ms. C was still not acknowledged as the spouse of the Applicant. In 2006, the Applicant filed the application to the Tribunal.

In 2007, after reviewing the Organization's practice with regard to personal relationships between staff members which were recognized by the national law of only one of the staff members, the Assistant-Secretary-General for Human Resources Management required to discontinue the situation and to recognize both staff members as "married and related." Accordingly, OHRM amended the status of the Applicant to "married and related" with retroactive effect to 1 February 2004.

The Tribunal first considered the claim that Ms. C be entitled to the Applicant's pension rights in case of her death. The Tribunal stated, first, that this claim did not fall within its jurisdiction *ratione materiae* inasmuch as it had not been submitted to the JAB; second, the request was moot at the time of the Tribunal's consideration, as the issuance of the memorandum by OHRM in 2007 had changed the Applicant's status to "married and related," thus enabling Ms. C to be entitled to the Applicant's pension rights.

In consideration of the Applicant's request for compensation, the Tribunal pointed out that the Applicant had received benefits as of the time when she requested them. Since

[9] Jacqueline R. Scott, Vice-President; Brigitte Stern and Sir Bob Hepple, Members.

these benefits could not be awarded retroactively, the Applicant had no right to compensation for any previous period.

Finally, the Tribunal turned to the Applicant's request that the Tribunal should order the United Nations to recognize same-sex partnership under a neutral set of criteria. The Tribunal emphasized that it was neither the General Assembly nor the Secretary-General, which were the only two authorities that were competent to settle personnel questions. Recalling its previous Judgements Nos. 722 (1995) and 1145 (2003), the Tribunal stated that it was a part of the justice system whose primary objective was to right employment wrongs and to provide remedies to staff members, rather than a vehicle available to staff members to lobby management for what they perceived as their improvements.

Nonetheless, the Tribunal wished to make some brief comments on this request. First, it recalled that the United Nations was not a body for determining the societal choices of the various communities existing throughout the world; rather, it was a forum of tolerance where States with conflicting conceptions regarding family relations learned to coexist.

The Tribunal recognized that the notion of "marriage" and "couple" were by definition evolutionary and noted that the United Nations was not insensitive to this evolutionary nature. While taking this evolution into account, the Tribunal stated that, in the absence of an internationally agreed or customary definition of "couple," the principle of referring to national law was the most satisfactory means of deciding and avoiding clashes between the political and cultural conceptions of different States. Further, the Tribunal noted that this principle was consistent with the decisions of the International Labour Organization Administrative Tribunal and General Comment 19 of the United Nations Human Rights Committee.

The Tribunal added that the practice followed by the Organization did not result in discrimination based on nationality. If there was any difference in treatment, it resulted from the national legislation and not from the Staff Regulations and Rules of the United Nations. Further, such practice had no effect on the conditions under which particular benefits were granted, because the rules extended substantive rights to all partners bound to a staff member by a legally recognized union, and not to partners of any particular nationality.

7. Judgement No. 1402 (8 October 2008): Applicant v. *The Secretary-General of the United Nations*[10]

ESTOPPEL WITH REGARD TO RECEIVABILITY OF THE CLAIM—LEGAL EXPECTATION OF RENEWAL OF CONTRACT—COMPENSATION IN CASES WHERE PROCEDURAL IRREGULARITIES DURING THE PERFORMANCE EVALUATION VIOLATE DUE PROCESS RIGHTS

The Applicant joined the International Civil Aviation Organization (ICAO) in 2002 on a three-year fix-term appointment. He received two performance appraisals in 2003 and 2004, both of which were rated as "Good." In the second appraisal, the regional director recommended the renewal of his appointment. However, the chief of the Regional Affairs Office expressed his concern that the "reflection of the Applicant's performance was not positive at all." In 2005, the regional director submitted a confidential report containing

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

negative comments on the Applicant's performance to the Secretary-General. As a result, the Secretary-General offered the Applicant an extension for a period of six months only, and advised that his contract would not be extended thereafter.

The Applicant wrote to the Secretary-General requesting to appeal against the decision to separate him from service and further requesting that an Advisory Joint Appeals Board (AJAB) be set up to review his case. The AJAB advised both the Applicant and the Secretary-General that this request was being treated as a request for review and neither party protested this decision. In its report, the AJAB found that, though it was unable to conclude that the Applicant had a legitimate expectation of renewal of his contract, there was a certain degree of arbitrariness and inconsistency on the part of the Administration. The AJAB rejected the Applicant's plea not to be separated from service but recommended that he be awarded compensation. The Secretary-General accepted the rejection but refused to pay compensation. The Applicant filed an application with the Tribunal.

Addressing the issue of receivability, the Tribunal noted that the Applicant had not requested administrative review of the decision before appealing to the AJAB. However, the AJAB accepted the receivability on the grounds that the Applicant had combined his request for administrative review into his appeal. The Tribunal observed that the Secretary-General appeared to have conceded this argument in partially accepting the findings and recommendation of the AJAB. Thus, the Tribunal considered that, by reason of its conduct, the Organization was estopped from objecting to the receivability of the application.

The Tribunal subsequently turned to the substance of the case. It noted that it was usual that an appointment did not carry with it an expectation of renewal or conversion to another type of appointment, and would generally terminate upon its expiry. Thus, the Applicant had no right to the renewal of his fixed-term appointment. However, the decision-maker must exercise its discretion on whether or not to extend the service in a transparent and unbiased manner. Referring to Judgement No. 885 (1995), the Tribunal found that, when no express promises had been made to the Applicant, it still had to review whether any abuse of discretion on the part of the Respondent could be established.

The Applicant claimed that he had a legitimate expectation that his contract be renewed for a period of two years. He relied on several factors, including ICAO general administrative practice of extending for a two-year period the fixed-term contracts when performance proved satisfactory; his encumbrance of a budgeted post; his good performance evaluations; the regional director's recommendation of extension, etc. The Tribunal found that none of the aforementioned factors would by itself give rise to a legal expectation. However, the cumulative effect of these factors was that the Applicant—who had every reason to believe his performance to be not only satisfactory but good, who was aware of his supervisor's recommendation, and who knew that his post was not subject to budgetary concerns—was entitled to rely upon the practice of the renewal and therefore had a legal expectation of renewal of his contract.

Referring to the confidential communication within the Administration, the Tribunal emphasized its disapproval of such unofficial evaluation which bypassed the formal evaluation process, preventing staff members from exercising their rights of participation and rebuttal, and resulted in a violation of due process rights. The Tribunal stated that it was apparent that the decision on the renewal of the Applicant's contract was inextricably linked to his performance evaluation. In light of the flawed process of evaluation, it could

be implied that, had a correct evaluation been made, the Applicant's contract might or would have been extended.

Finally, having concluded that the Applicant had a legal expectation of renewal of contract which had been frustrated by a lack of due process, the Tribunal held that the Respondent had improperly exercised its discretion in the decision-making process, and that the Applicant was therefore entitled to compensation. In computing the compensation due to the staff member, the Tribunal was mindful of both the violation of the staff member's rights and of the probable consequences of such a violation on his or her career. In those situations where there had been serious and manifest violations of the staff member's rights and also where the likelihood of renewal was particularly strong in the absence of such violations, the staff member was entitled either to renewal or to compensation *in lieu* thereof. In the present case, the Tribunal considered that the above principle should apply, and, as the Applicant had once been given a six-month extension, awarded the Applicant compensation in the amount of another eighteen months' net-base salary.

8. *Judgement No. 1404 (8 October 2008): Applicant* v. *The Secretary-General of the United Nations*[11]

Issuance of written reprimands is subject to the same principles of fairness and due process that apply to disciplinary measures—Allegations of sexual exploitation and abuse—Violation of basic standards of fact-finding—Failure of the Organization to observe standard of care due to staff members

The Applicant was a staff member of the United Nations and was deployed to the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) at the time of the event in question. In 2000–2001, allegations of sexual exploitation and abuse against refugee women by United Nations peacekeepers and humanitarian aid workers in West Africa surfaced. As a result, in 2003, the Secretary-General adopted "Special measures for protection from exploitation and sexual abuse" (SEA policy).

On 12–13 October 2004, at midnight, two officers of the MONUC Military Police (MPs) arrived at a roadside scene where the Applicant was attempting to break up a dispute between his two female guests, and two other women. The Applicant exchanged angry words with the MPs, apparently attempting to obtain their help in dealing with the dispute. A MONUC Security officer was called to the scene and an investigator was tasked with investigating the event. After three months, the investigator submitted her report which stated that one of the women was a known prostitute and the Applicant smelled of alcohol and acted abnormally. She concluded that he had been disrespectful to MONUC security personnel. A SEA investigation report was also submitted, which concluded that there was sufficient evidence to substantiate the allegations of the misconduct and recommended administrative and disciplinary action.

On 1 March 2005, the Applicant was formally charged with misconduct, including offering housing and other remuneration in exchange for sexual favours from two women, in violation of the SEA policy. The Applicant was subsequently suspended and the case was referred to the Joint Disciplinary Committee (JDC). However, the JDC found that the Administration had not presented a *prima facie* case and therefore recommended that no

[11] Jacqueline R. Scott, Vice-President; Sir Bob Hepple and Agustín Gordillo, Members,

disciplinary measure be taken but a written reprimand. The majority of the panel also recommended compensation of one-month net-base salary. The Secretary-General later gave the Applicant a written reprimand but rejected the recommendation for compensation. The Applicant subsequently filed the application with the Tribunal in 2006.

The Tribunal first considered whether that the Applicant's due process rights had been violated. The Tribunal stated that, although a written reprimand was not regarded as a disciplinary measure, it could have legal consequences to the detriment of the staff member, particularly when the reprimand was placed and kept on his file. Thus, the issuance of reprimands was subject to the same principles of fairness and due process that applied to disciplinary measures. In the present case, the Tribunal found that the JDC recommendation had been based on significant inconsistencies and was disproportionate to its findings of fact which, to some extent, suggested the Applicant's innocence. The JDC error had been compounded by the misinterpretation of the recommendation by the Secretary-General, whose wording wrongly implied that the Applicant was guilty. In the context of the wholly unfounded allegations made against him in the SEA report, the written reprimand could be construed by outside observers as implying that the Applicant had been engaged in wrongful conducts. Accordingly, the written reprimand must be rescinded, and all adverse material dealing with this matter should be removed from his official status file.

The Tribunal moved on to conclude that the Applicant had not been adequately compensated. In the view of the Tribunal, the JDC correctly found that the basic standards of fact-finding in the investigation had been violated, and that they were also right to be extremely critical of the decision to suspend the Applicant without pay for seven months with no justification. In such case, the Tribunal found the compensation of one-month salary decided by the majority inconsistent with the JDC own findings. A one-month salary was nowhere near far enough to recognize the serious intrusion into the Applicant's private life, the damage to his reputation and the gross violation of his rights. The Applicant appeared to have been the innocent victim of an over-zealous application of the new SEA policy, conducted in the glare of media publicity, when the Organization seemed to have been in a state of moral panic. In such circumstances, the Tribunal concluded, the Administration negligently failed to observe the standard of care due to any staff member. Therefore, the Tribunal ordered compensation in the amount of one-year net-base salary.

Finally, the Tribunal awarded a sum of USD 5,000 by way of costs, as the disciplinary charges should have never been brought against the Applicant who had reasonably incurred legal expenses.

9. *Judgement No. 1412 (8 October 2008): Applicant* v. *The Secretary-General of the United Nations*[12]

Status under special service agreement (SSA)—Request that period served under SSA be validated for pension purposes—Person appointed under SSA not a staff member under United Nations Staff Regulations—Application irreceivable *ratione materiae*

The Applicant joined the Committee on Missing Persons in Cyprus (UNFICYP) in 1985 on a six-month special service agreement (SSA), which was continuously extended

[12] Dayendra Sena Wijewardane, Vice-President; Brigitte Stern and Goh Joon Seng Members,

thereafter for periods of six months. In 1998, he received a fixed-term appointment which was continuously extended until he retired in 2006.

In 1999, the Applicant requested the United Nations Joint Staff Pension Fund (UNJSPF) that his service between 1985 and 1998 be validated for pension purposes. On 29 July 1999, UNJSPF informed the Applicant that it could not accept his application because participation in the Fund expressly excluded periods served under SSA. Subsequently, from 2000 to 2003, the Applicant communicated with several offices of the United Nations requesting retroactive affiliation to the Fund or a fair and final settlement of his personal situation for the period he had served under SSAs. On 27 October 2003, the Organization reiterated the information cited in the Fund's letter of 29 July 1999, most notably that the Applicant was on SSA contract during the contested period. As such, he was not considered a staff member of the United Nations and his participation in the UNJSPF was excluded.

In November 2003, the Applicant wrote to the Secretary-General requesting administrative review of the decision of 27 October 2003. Later, he was informed that the claims regarding the Fund were not within the purview of requests for review as the UNJSPF had its own appeal procedures, and also that the request was time-barred as he had not filed it within two months of the communication of 29 July 1999. In 2004, the Applicant lodged an appeal with the JAB. The JAB found the claim to be irreceivable as it related to the timeframe when the Applicant was not a staff member and as it was time-barred. In 2006, the Applicant filed the application with the Tribunal, challenging the Secretary-General's decision by which he had accepted the JAB findings and conclusions.

The Tribunal considered that the main issues involved in the present case were: (1) whether the Tribunal was competent to consider the application; (2) whether the JAB had correctly decided that it had no jurisdiction to review the Applicant's case; and (3) whether the Applicant's case was time-barred.

As stipulated in article 2.1 of the Statute of the Tribunal, the Tribunal should be competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members. As the Applicant was a staff member when he filed the application, the Tribunal had jurisdiction *ratione personae*. However, what the Applicant was actually seeking was a revision of the terms and conditions under which he had served prior to his fixed-term appointment, when his contractual status was based on SSAs and not on a letter of appointment subject to the regulations of the Organization. The Tribunal examined the Applicant's SSA and noted that the contract specified that individuals engaged under an SSA were neither staff members under the Staff Regulations of the United Nations nor officials. Accordingly, the threshold requirements of article 2.1 of the Statute of the Tribunal were not satisfied. Thus, the application was not receivable *ratione materiae*.

As the Applicant's SSA provided for arbitration in the event of dispute, the Tribunal stated that the only recourse available to the Applicant for the period of his SSA service would have been binding arbitration. The applicant was thus not entitled to raise now a dispute in the internal justice system under the guise of a new claim against the Administration.

As to the question whether the claim was time-barred, the Tribunal noted that the Staff Rules prescribed that a staff member wishing to appeal an administrative decision should first address a letter to the Secretary-General within two months from the date

on which the staff member received notification of the decision in writing. The Tribunal could not accept the argument by the Respondent that the administrative decision in question was that conveyed to the Applicant by UNJSPF on 29 July 1999. If the decision under appeal had been a decision by UNJSPF rather than the Administration, the Applicant would have had to bring a case against UNJSPF in accordance with the regulations of UNJSPF, and the JAB would have had no jurisdiction over the dispute. The Tribunal found that the decision in question was that taken by the Organization on 27 October 2003, and that, consequently, the appeal was not time-barred.

Finally, the Tribunal took the opportunity to review the Organization's use of SSAs. The Tribunal states that it was disquieted by the inherent contradiction involved in repeatedly engaging personnel on SSAs, which provided for contractor status without the safeguard of staff rights. The Tribunal, mindful that it might not act *ex aequo et bono*, however, noticed that personnel on SSAs enjoyed additional remuneration and compensatory benefits, which staff members of the United Nations did not enjoy. It was also aware of the fact that the Applicant entered freely and willingly into each and every one of these agreements and thus contributed to the creation and renewal of the situation. Therefore, the Tribunal decided not to seek to undo such agreements for the time being.

10. Judgment No. 1413 (8 October 2008): Applicant v. *The Secretary-General of the United Nations*[13]

Standing of third party before the tribunal—Conclusion of an agreement—Reimbursement of reasonable legal fees—Terms of the agreement—Applicant initially assisted in investigation, but later faced disciplinary charges—Amendment to agreement

The Applicant joined the Organization in 1965 and was appointed Under-Secretary-General and Executive Director of the United Nations Office of the Iraq Programme (OIP) in 1997. He served in that capacity until the end of the OIP in 2003 and assisted with the closing down of the Programme. The second Applicant in this case was the law firm, Baach Robinson & Lewis PLLC, who had represented the Applicant in an investigation involving him, which had given rise to the current dispute.

In April 2004, the Secretary-General appointed the Independent Inquiry Committee (IIC) to investigate the administration and management of OIP. The Applicant made a request that he be allowed legal representation and that the Organization pay the legal expenses he would incur in his participation in the investigation. In September 2004, the Applicant was advised that his counsel could be present, and, according to the Applicant's submission, the Chef de Cabinet gave him a verbal undertaking that the Organization would cover the expenses of his legal representation. Pursuant to the Interim Report of IIC, the Applicant was suspended from duty pending disciplinary proceedings on 3 February 2005.

On 23 February 2005, the newly appointed Chef de Cabinet informed the Applicant that the Organization would only cover the costs of his representation incurred up to 3 February 2005. However, on 31 March 2005, the Applicant was informed that in the light of the

[13] Spyridon Flogaitis, President; Jacqueline R. Scott, First Vice-President; Dayendra Sena Wijewardane, Second Vice-President; Brigitte Stern, Goh Joon Seng, Sir Bob Hepple and Agustín Gordillo, Members.

findings of IIC, the United Nations did not consider it appropriate to reimburse him. The Applicant's subsequent request for reconsideration was rejected. The Applicant requested administrative review of this decision and lodged an appeal with the Joint Appeals Board (JAB) on 13 July 2005. In its report of 6 February 2006, the JAB held that a binding agreement had been concluded by the Respondent and the Applicant, whereby the Respondent had agreed to pay the legal fees; and that later an amendment had been made to the agreement to which both parties had agreed. Therefore, the JAB recommended that the Applicant's legal expenses be reimbursed up to 3 February 2005. The Secretary-General, however, rejected the JAB findings and recommendation. On 5 April 2006, the Applicant submitted the application to the Tribunal, as did the second Applicant.

The first issue that the Tribunal considered was whether the second Applicant had any standing before the JAB or the Tribunal. The Tribunal noted that the agreement on reimbursement was concluded between the Organization and the Applicant. Without an effective assignment, it conferred no right of action or interest enforceable by the second Applicant against the Organization. Hence, the Tribunal concluded that the second Applicant had no standing under article 2 (b) of the Statute of the Tribunal.

The Tribunal went on to determine whether there had been an enforceable agreement to reimburse the Applicant the legal fees incurred by him in the IIC inquiry and, if so, for what period of time.

First, the Tribunal was satisfied that the Chef de Cabinet had the authority to make such an undertaking. It noted that Article 97 of the Charter conferred on the Secretary-General the powers of chief administrator of the Organization. It also noted that the commitment to pay legal expenses in this case was made by the Chef de Cabinet on behalf of the Secretary-General and that it was clearly deemed as "in the interest of the Organization." The Tribunal then stated that it was thus a promise on behalf of the Respondent by a person who had actual or at least ostensible authority to make such a promise which became legally binding.

Second, the Tribunal found that the Applicant had a reasonable expectation resulting from that promise. Though the undertaking had not been put in writing, the Respondent acknowledged the existence of such an oral agreement in the letter of 23 February 2005 to the Applicant, albeit restricting the payment to "reasonable legal fees" incurred up to 3 February 2005. Therefore, the Tribunal concluded, a valid and binding agreement between the parties existed and an expectation was justified.

Third, the Tribunal was of the view that this entitlement could not be unilaterally taken away by the Respondent in the absence of an express reservation. The Respondent contended that the undertaking was subject to a presumption of no wrongdoing of the Applicant. However, the Tribunal was not satisfied with that reasoning as the letter of 23 February 2005 had been issued after the IIC interim report and the Applicant's suspension. Moreover, such presumption contradicted the fact that the Applicant was required to participate in the IIC investigation precisely because of allegations of impropriety against him. The Tribunal, therefore, concluded that the agreement by the Organization to pay legal fees incurred by the Applicant for assisting IIC was not subject to any such reservation.

Having concluded the existence of a legally binding agreement between the parties, the Tribunal moved on to discuss whether the Applicant was entitled to payment of legal

fees beyond 3 February 2005. The Tribunal took note of the fact that the situation had changed from one in which the Applicant was assisting the IIC investigation to one in which he was facing disciplinary charges. In the Tribunal's opinion, the change of circumstance warranted the amendment made in the letter of 23 February 2005. As amended, the Applicant was not entitled to payment beyond 3 February 2005.

Finally, the Tribunal considered what legal fees should be reimbursed. It first noticed that there was no evidence on record that the Applicant had actually made any payments to his counsel. Second, the Respondent indicated that only "reasonable legal fees" for services in connection only with the Applicant's appearance before the IIC would be paid to him, without specifying what such "reasonable fees" would be. Based on the undertaking, the Tribunal was of the view that the Respondent should pay to the Applicant all reasonable legal fees incurred by him up to 3 February 2005, and in order to ascertain the reasonableness of the fees billed, an independent audit of the law firm's invoice would be required. The Tribunal so ordered.

Mr. Agustín Gordillo concurred with the majority decision but partially dissented with its reasoning as to why it admitted part of the complaint. In a separate opinion, he stated that, in his view, a legally binding agreement had not come into existence. He noted that, had the Organization been a private company, it might reasonably be held liable for its alleged promise. However, as an international organization, he believed that the theory and practice of government or public sector contracts should be applied. He observed, *inter alia,* that the normal rules of procurement procedures had not been applied, no budgetary provisions had been made or invoked, no formal written contract had been entered into, and no specific or general rule or regulation authorizing such reimbursement had been invoked. Thus, according to the statutory norms of the Organization, no legally binding promise or agreement had been entered into.

11. Judgment No. 1414 (30 January 2009): Applicant v. *The Secretary-General of the United Nations*[14]

Allegation of misconduct—Procurement rules 9.002 and 9.0016—Financial rules 110.18 and 110.21—Obligation of "absolute impartiality" towards all bidders in procurement process—Allegations must be sufficiently specific and certain—Denial of due process if disciplinary measures are imposed on the basis of charges not previously notified to staff member—Proportionality of disciplinary measure—Compensation for damage and moral injury

The Applicant joined the United Nations in 1980. During the time of the alleged misconduct, he was serving as Chief of the Sanctions Branch and Deputy-Director of the Security Council Affairs Division, Department of Political Affairs, in which capacity he supported the Iraq Sanctions Committee and worked closely with the Steering Committee set up by the Secretary-General to establish the Oil-for-Food Programme (OFP).

In 1996, a competitive bidding process was initiated to select a company to conduct inspections of Programme-financed humanitarian goods that would enter Iraq. The Brit-

[14] Spyridon Flogaitis, President; Jacqueline R. Scott, First Vice-President; Dayendra Sena Wijewardane, Second Vice-President; Brigitte Stern, Goh Joon Seng, Sir Bob Hepple and Agustín Gordillo, Members.

ish company Lloyd's Register Inspection Ltd. (Lloyd's) and the French company Bureau Veritas (Veritas) both participated in the bidding and Veritas gave the lowest bid while Lloyd's was the second lowest. The Procurement Division recommended awarding the contract to Veritas but the Applicant did not agree. Prior to the Steering Committee's meetings to consider the matter, the Applicant told an official of the United Kingdom Mission that Veritas' bid would be approved because of the extremely large price discrepancy between Veritas and Lloyd's bids. He also described how much lower the Lloyd's bid needed to be in order to compete with Veritas. Later, Lloyd's lowered its bid bringing it much closer to Veritas,' and finally won the contract.

On 3 February 2005, the Applicant was advised that based on the interim report of the Independent Inquiry Committee (IIC) which had been tasked with investigating into the allegations against the OFP, he had been suspended from duty with full pay. On the same day, the Secretary-General issued a letter to all staff, in which he pointed out the Applicant's name and the allegations against him. The next day, in the letter to the Assistant Secretary-General for the Human Resources Management, the Applicant contended that he had not been charged with any act of misconduct and that the suspension decision was procedurally flawed and prejudicial to his right of due process.

On 8 February 2005, the Applicant received a letter charging him with misconduct, "specifically with tainting, and actively participating in prejudicing and preempting the procurement process for the award of the humanitarian goods inspections contract" in violation of financial rules 110.18 and 110.21, and procurement rules 9.002 and 9.0016. He was also charged with failing to cooperate with IIC. On 23 February 2005 the Applicant denied all the charges against him and on 25 February he requested a review of the decision.

On 31 May 2005, the Office in Charge of the Department of Management informed the Applicant that the Respondent had decided that he should be summarily dismissed for serious misconduct. On 6 June 2005, the Applicant filed a formal request for review by the Joint Disciplinary Committee (JDC). The JDC issued its report on 14 October 2005, in which it found that the Applicant's conduct had been legal as the relevant information had moved into the public domain before he transmitted them to the U.K. Mission. In November 2005, the Applicant was informed that the Secretary-General remained of the view that he had violated the procurement rules that required him to act with "absolute impartiality." The Secretary-General, however, rescinded the decision to summarily dismiss the Applicant and instead imposed a written censure. The Applicant subsequently filed an application with the Tribunal.

As to the question whether the Applicant's rights of due process had been violated, the Tribunal first noted that the Charter of the United Nations and the Staff Regulations both regulated the conduct of United Nations staff members. As expressed in the case-law of the Tribunal, the Staff Regulations vested the Secretary-General with authority to determine whether a staff member had met the required standards of conduct and may impose disciplinary measures on staff whose conduct was unsatisfactory. However, the Secretary-General's powers were not absolute, and subject to review by the Tribunal. The Tribunal stated that allegations of misconduct must be sufficiently specific and certain to enable a staff member to understand exactly which conduct was called into question and precisely which staff regulation or rule was alleged to have been violated. In the present

case, according to the facts, the Tribunal found that the charges were sufficiently clear and that the Applicant was fully aware of the precise misconduct with which he was charged.

The Tribunal further considered whether the written censure had been imposed on the Applicant on different grounds than those upon which he had originally been charged. The Tribunal recalled Judgement No. 744 (1995) in which it had found that a disciplinary measure imposed on the basis of charges not previously notified to the staff member constituted a violation of due process. In the present case, however, the Tribunal found that the requirement to remain impartial in the tender process was one element of the original charges against him; consequently, there had not been a shift in grounds between the original charge and the sanction of the written censure.

The Tribunal observed that, according to the JDC's findings and the Applicant's own admission, there was little dispute as to the material fact underpinning the Applicant's written censure, that he had made contact with the United Kingdom Mission in regard to the award of the contract. Thus, it was obvious that the Applicant had a full opportunity to respond to this admitted fact. As the Tribunal accepted the JDC's finding that the Applicant had discussed the details of the bid with the U.K. Mission, it found that there was sufficient evidence to establish that the charges had been well-founded.

The Tribunal turned to find whether the facts as established constituted misconduct. Albeit the JDC's findings, the Tribunal concluded that even if the information was already in the public domain before it was conveyed to the United Kingdom Mission, this did not exonerate the Applicant from the charge that he had breached the Procurement Rules in respect of "absolute impartiality." The wording of procurement rules 9.002 and 9.0016 was very specific. Providing information prior to the award to any person who was not an official of the Untied Nations was a breach of the rules; thus, it was entirely reasonable for the Respondent to decide that it constituted misconduct.

The Tribunal subsequently addressed the clam by the Applicant that the Respondent had acted in breach of staff rule 110.4, which limits the Secretary-General's discretion in that no staff member should be subject to disciplinary measures until it had been referred to the JDC, unless there was a waiver by mutual agreement or the seriousness of the misconduct so warranted. However, the Tribunal was of the view that the wording of staff rule 110.4 was wide enough and that the Secretary-General, having had the benefit of a consideration of the matter by the JDC, was entitled to a broad discretion to make a final decision irrespective of how the JDC came to seize the matter.

The Tribunal found that the sanction of written censure was proportionate because the Applicant's breach of the procurement rules was not merely a technical breach but a substantial one.

The Tribunal finally discussed the problem of compensation and costs. It stated that it considered the humiliation, moral harm and reputational damage incurred to be of utmost relevance. It found itself wholeheartedly in agreement with the conclusion of the JDC that summary dismissal was disproportionate under the circumstances of this case. Further, the rescission of the summary dismissal and imposition of a written censure could not be construed as repairing the damage to the Applicant's reputation. Thus, the Tribunal agreed that the Applicant deserved compensation for such damage and for the moral injury and humiliation he suffered. With respect to the costs, the Tribunal was not satisfied that the

Applicant had been obliged to incur unavoidable costs and the plea for costs was therefore rejected.

Mr. Spyridon Flogaitis issued a separate opinion in which he argued that the due process rights of the Applicant had indeed been violated. He stated that, while the final decision of the Secretary-General relied on procurement rules which were cited in his initial letter of charges, and therefore was not a clear case of "shift in grounds," it had led to the same result as a shift in charges, namely that the Applicant had not been clearly accused and had been left unable to defend himself.

Mr. Flogaitis pointed out that the general principles of law demanded absolute and detailed certainty in charges as a direct consequence of the need for due process. Though it could not be considered that a staff member's rights were automatically violated if there was a difference in wording between the charges and the ultimate findings, the nexus between the initial charges and the findings must be apparent and narrowly construed.

Mr. Agustín Gordillo also issued a separate opinion, in which he concurred with Mr. Flogaitis in that the Applicant's rights of due process had been violated. Further, in his opinion, this case presented similarity with Judgment No. 1404 where the Tribunal had been confronted with what amounted to a trial by the press, where an individual staff member had been officially singled out for public reproach, only for the authorities to later discover that the accusations against him were groundless; and so as an attempted face-saving gesture a written reprimand was imposed on the applicant. In that case, the Tribunal had ordered the rescission of the written reprimand and awarded compensation. For reasons of congruence, Mr. Gordillo believed that the present case ought to have been approached in the same way.

12. Judgement No. 1426 (30 January 2009): Applicant v. *The Secretary-General of the United Nations*[15]

Compensation for service-incurred injury—Compensation under appendix D of the Staff Rules and under the Malicious Acts Insurance Policy (MAIP)—Breach of Applicant's rights and legitimate expectation that a medical board be constituted to consider her claim—Subsequent injury not treated as separate claim—Prerequisite that claim be submitted for administrative review and consideration by Joint Appeals Board (JAB) prior to consideration by Tribunal

The Applicant entered the United Nations in 1985 and was serving as personal assistant to the Special Representative of the Secretary-General in Baghdad, Iraq, at the material time. In 2003, the United Nations offices in the Canal Hotel in Baghdad were attacked and damaged by a car bomb. The Applicant suffered multiple injuries including loss of vision in her left eye, for which she received intensive medical care.

In 2003, the Applicant filed a claim with the Advisory Board for Compensation Claims (ABCC) under appendix D of the Staff Rules. She was then informed that her multiple injuries were treated as service-incurred and therefore all medical expenses would be reimbursed by the Organization. On 23 April 2004, the Applicant wrote to the Secretary-General requesting compensation for her injuries. In February 2005, she filed a claim

[15] Spyridon Flogaitis, President; Dayendra Sena Wijewardane, Vice-President; and Sir Bob Hepple, Member.

with the ABCC for compensation. In March 2005, the Applicant's physician informed the Administration that the Applicant had re-injured her left eye which caused her service-incurred injury to become more severe. In May, the Applicant was informed that the ABCC made its initial determination to award her compensation of USD 63,300 under appendix D. In addition, she was granted an award of USD 45,000 under the Malicious Acts Insurance Policy (MAIP).

On 16 June 2005, the Applicant's counsel wrote to the Secretary-General requesting reconsideration of the initial award in light of her new injury, that a medical board be constituted by the ABCC to consider her request, and that the award granted under the MAIP be reconsidered. In addition, the Applicant requested that the Respondent agree to submit any further appeals to the United Nations Administrative Tribunal without any recourse to the Joint Appeals Body (JAB).

The Applicant was informed that it would be premature to discuss whether submissions could be made directly to the Tribunal. In May 2006, the ABCC informed the Applicant that it would reconsider her case. It subsequently increased the level of the Applicant's loss of function from 27 per cent to 38 per cent and recommended that the award be increased to USD 89,090. The Applicant was informed that the Secretary-General had accepted this recommendation, and did not appeal the decision nor make a request for a constitution of a medical board. In July 2006, she submitted a request for reconsideration of the award granted under the MAIP, and she was subsequently informed that her payment was increased to a total of USD 120,000. In August, she filed the application with the Tribunal.

The Tribunal first considered whether the Applicant's claim for higher compensation under appendix D was receivable. The Respondent contended that the Applicant's new claim was based on her subsequent injury rather than constituting a challenge of the ABCC's previous findings. The Tribunal found this contention unfounded. First, the letter of 16 June 2005 and the Applicant's statement attached thereto did not request further compensation in respect of a new injury. Second, as the Administration was made aware of the subsequent injury on 11 March 2005, the determination of 23 March must therefore be presumed to have been made with the knowledge of this new injury. After examining a statement written by the Applicant's counsel, the Tribunal concluded that the Applicant had not presented the new injury as a new claim but rather as proof that the original injury had caused permanent loss of vision.

The Tribunal noted that the Applicant had not received any response to this request until a year later, on 20 June 2006. The ABCC totally disregarded her request for a medical board which was mandated under appendix D. That was a flagrant breach of the Applicant's rights and her legitimate expectation that a medical board would reconsider her case in the light of all evidence. Since the Tribunal had neither the power nor the competence to reassess the type and degree of disability, and as only the ABCC could make such an assessment, the Tribunal deemed proper to remand the matter back to the ABCC for correction of the required procedure. The Tribunal stated that, though five years had passed since the Applicant's injury, and three years since the request for a medical board was first made, it would not be futile to convene a medical board to consider whether the type or degree of disability was more severe than it was at the time of the assessment on 18 May 2006. As the procedural mistake of the ABCC had obviously caused a substantial delay

in the settlement of the Applicant's claim, the Tribunal awarded compensation of three months' net-base salary.

The Tribunal went on to consider whether the Applicant's claim in respect of the MAIP and her claim based on breach of statutory duty and/or gross negligence were receivable. The Tribunal viewed the latter claim as being for alleged non-observance on the part of the Organization of the Applicant's contract of employment. The main evidence produced in support of these allegations was the finding in the report of the Independent Panel on the Safety and Security of United Nations Personnel in Iraq that the United Nations security management system failed to provide adequate security.

With respect to both claims, the Tribunal observed that, according to the Staff Rules and the Statute of the Tribunal, it was an essential prerequisite for a claim that the Applicant must have submitted the matter for administrative review first and then for consideration by a JAB before coming to the Tribunal, unless there was an agreement on direct submission to the Tribunal. Though the Applicant had requested the Secretary-General to agree to direct submission to the Tribunal, an agreement had never been reached on the issue. Having considering the Applicant's request to the ABCC to reconsider her claims on 16 June 2005, the Tribunal nevertheless decided to construe the Applicant's request as a claim for administrative review. The Respondent's position that such a claim was premature permitted the Applicant to operate under the impression that the ABCC would consider both of her medical and administrative claims. Though it did not amount to a violation of due process, the Tribunal found that the Respondent could not rely on its own actions or omissions to prevent the Applicant from exercising her claims before the JAB. Accordingly, the Tribunal remanded the administrative pleas to the JAB, and in view of the time already elapsed, the Tribunal requested the JAB to expedite the case.

13. Judgement No. 1429 (30 January 2009): Applicant v. *The Secretary-General of the Untied Nations*[16]

Denial of renewal of contract—Procedural flaws in the performance evaluation process—Judicial review over the exercise of the discretion of the Secretary-General—Assessment of compensation under the circumstances of procedural flaws

The Applicant was initially recruited by the World Food Programme (WFP) in 1999 and was granted a fixed-term contract at the G-6 level under a United Nations Development Programme (UNDP) appointment in 2000. Her contract was subsequently extended once and expired on 7 January 2002.

In June 2001, the Applicant's performance for the period 1 February 2000—1 January 2001 was evaluated, in which she was encouraged to improve her performance in a number of areas. The Applicant protested the assessment. However, the Career Review Group (CRG) indicated that she must show improvement in the questioned areas by the end of the next assessment period. The Applicant unsuccessfully attempted to rebut this evaluation. In the evaluation of the Applicant's Management and Appraisal of Performance (MAP) for the year 2001, which was completed on 29 November 2001, her performance was

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

rated as "unsatisfactory." The CRG recorded "critical incidents" wherein the Applicant's performance had caused serious problems for WFP, and complaints about her. Again, the Applicant unsuccessfully attempted to rebut this evaluation.

In December 2001, the Applicant was informed that her fixed-term contract would not be renewed. She requested the Inspector-General to conduct an investigation into alleged psychological harassment and abuse of authority on the part of her supervisors, but was informed that, upon reviewing her documents, there was no need for further action in her case. On 12 March 2002, a rebuttal panel was constituted to consider the Applicant's rebuttal of her 2001 MAP, which found that none of the new elements introduced warranted a change in the MAP. On 27 June 2002, the Applicant appealed the decision not to renew her contract to the WFP Executive Director. By a letter dated 2 July 2002, the Executive Director informed her that it was her finding that the contract had not been extended as a result of her unsatisfactory performance rather than any harassment.

In October 2002, the Applicant attempted to file an application with the Tribunal but was advised that her case was premature. By a letter of 19 May 2003, she was advised by UNDP that her case could not be considered by the Joint Appeals Boards (JAB), as she had not requested an administrative review of the decision not to renew her contract and that, moreover, her claim was time-barred. UNDP later advised her that the 19 May 2003 letter constituted the Administration's formal response which was appealable to the Joint Appeals Board. Accordingly, the Applicant lodged an appeal with the JAB which accepted her application on the basis of exceptional circumstances beyond her control, and her repeated efforts to appeal which demonstrated an active intent to contest the decision. The JAB determined that there had been a series of violations of her rights of due process, and recommended compensation of four months' net-base salary. The Secretary-General accepted this recommendation. The Applicant filed an application with the Tribunal, claiming, *inter alia*, rescission of the decision, reinstatement and damages.

The Tribunal first took note of the fact that the case was very similar to that considered in its Judgment No. 1237. In that case, the Tribunal held that, where an inadequate performance had been the reason for the decision and the process of evaluation had been seriously flawed, an implication arose that, whilst the Applicant did not have a right to extension, had a correct evaluation been made, the Applicant's contract might have been extended. When reasons are given for decisions made in the name of the Secretary-General, those reasons must be true, and they must be examined by the Tribunal for their truthfulness and consistency with the evidence. Having evaluated the reasons given for the decision not to renew the Applicant's contract, the Tribunal concluded that they were not well supported by sufficient evidence. It agreed with the JAB finding that there was a lack of transparency in the documentation of the Applicant's performance, and that as the Applicant's performance assessment was fundamentally flawed, it could not form the basis for a decision regarding her future employment.

The Tribunal recalled its Judgment No. 1238, in which it had observed that it must be self-evident that, where the reason invoked as justifying the making of a discretionary decision transpired to be false or disingenuous, the decision itself might be rendered invalid. However, where there was no right, the giving of a wrong reason could not create such a right nor place an applicant in a position where she should be treated as if such a right existed.

Therefore, in the present case, the Tribunal concluded that the Applicant ought to be compensated but not reinstated in service, as she had no right to the extension of her contract.

Next, the Tribunal commented on the timing of the impugned decision. According to the facts, the Applicant's evaluation for 2001 was completed on 29 November 2001 and she was informed of her "unsatisfactory" rating on 1 December. On 4 December, she was informed that her fixed-term contract, which was scheduled to expire on 7 January 2002, would not be renewed. However, the rebuttal panel was not constituted to consider her case until 12 March 2002. Recalling Judgment No. 1237, the Tribunal expressed its doubts as to why no consideration had been given to approving a limited extension of the Applicant's appointment, and as to why no steps had been taken to have the rebuttal procedure swiftly concluded. It was unacceptable that the decision as to her future employment had been taken before the rebuttal procedure was finalized. The institutional indifference to the Applicant's situation was demonstrated by the Administration's failure to make an effort to get the process on track, and this appeared to have aggravated the consequences of the flawed process.

As to the question of appropriate compensation, the Tribunal recalled its Judgment No. 1237, in which it had held that the possibility of the renewal of the contract, had the procedure not been flawed, should be taken into account for the purposes of assessing compensation for denial of due process. It had also held, in that case, that the fact that the Applicant had only served a short time was irrelevant because he had unfairly lost an opportunity to increase the length of service. For the same reason, the Tribunal concluded that the appropriate compensation in the instant case would be one year's net-base salary.

B. Decisions of the Administrative Tribunal of the International Labour Organization[17]

1. Judgment No. 2685 (6 February 2008): A.E.-R v. International Telecommunication Union (IUT)[18]

Removal of staff member from appointment and promotion board—Legitimate interest of each staff member to be a staff representative, deriving directly from terms of employment—Breach of freedom of association and freedom of expression—When a specific procedure exists for the appointment of a staff representative, a corresponding procedure for removal is implied—Staff representative's duty to attend and participate fully in meetings of the appointment and promotion board

[17] 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; European Telecommunications Satellite Organization; International Organization of Legal Metrology; International Organisation of Vine and Wine; Centre for the Development of Enterprise; Permanent Court of Arbitration; South Centre; International Organization for the Development of Fisheries in Central and Eastern Europe; Technical Centre for Agricultural and Rural Cooperation ACP-EU; International Bureau of Weights and Measures; ITER International Fusion Energy Organization; and Global Fund to Fight AIDS, Tuberculosis and Malaria. 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/.

[18] Mary G. Gaudron, Vice-President; Giuseppe Barbagallo and Patrick Frydman, Judges.

The Complainant was at the material time a staff representative on the Appointment and Promotion Board (the "Board"), which advises the Secretary-General in all cases where a vacancy is advertised.

In April 2005, the Board met to draw up a shortlist of applicants for the post of Head of the Study Group Assistant Unit in the Radiocommunication Bureau, at grade G-7. The Complainant and the other staff representative on the Board refused to examine the list of pre-selected candidates, on the ground that the qualifications required for the advertised post were not in conformity with the Common General Service Job Classification Standard for Geneva, and walked out of the meeting.

The remaining Board members decided to continue the procedure and drew up a shortlist of candidates which was submitted to the Secretary-General without the signatures of the two staff representatives. The Secretary-General found that the Classification Standard had been applied and asked that the Board, composed of the same members, meet again and re-examine the list of pre-selected candidates. The Board met on 8 June 2005 but was unable to reach a consensus on a shortlist of candidates. The staff representatives refused to sign the shortlist drawn up by the other members of the Board because the name of a candidate they had asked to be removed appeared on that list. During the meeting, a heated argument ensued between the Complainant and Mr. S, the representative of the Radiocommunication Bureau on the Board.

By memoranda dated 9 June 2005 and of 21 June 2005, the two staff representatives on the Board and the Staff Council, respectively, informed the Secretary-General that during the meeting of 8 June 2005 Mr. S. had made false allegations against the Complainant, had insulted her and threatened to take reprisals against her, and that the Complainant had been "physically approached" during the aforementioned meeting.

On 7 July 2005, Mr. S. asked the Staff Council, through a memorandum that was also sent to the Office of the Secretary-General, to relieve the Complainant of all her duties related to staff representation on the Board, on the ground that she had acted in breach of the Board's code of conduct and practices by deliberately obstructing the Board's proceedings, by manipulating the Board's members and by providing incorrect information concerning certain candidatures. The Office of the Secretary-General requested all the members of the Board to provide their comments on these allegations, and the Chairman of the Staff Council replied by expressing support for the Complainant and pointing out that she had represented the staff on the Board since 1990 without facing any criticism. The Chairman added that the Council had decided to reject Mr. S's request, and that that the Complainant had the Staff Council's support.

By memorandum of 24 November 2005, the Secretary-General informed the Complainant that her behaviour was incompatible with the role of a staff representative, which, in his view, was to defend the interests of all staff members. He therefore decided to release her from all her duties related to staff representation on the Board, and requested the Staff Council to propose another staff representative to replace her. On 28 November 2006, the Chairman of the Staff Council replied that the Staff Council had decided unanimously that the Complainant should remain a staff representative on the Board.

On 15 December 2005, the Secretary-General issued Decision No. 12542 on the composition of the Board, which no longer included the Complainant as a staff representative. Only one staff representative was identified. On 26 January 2006, the Complainant

requested a review of that decision, and, as her request was turned down on 3 March, she filed an appeal with the Appeal Board on 15 May 2006. The Appeal Board recommended that Decision No. 12542 be set aside. By a letter of 23 October 2006, which is the impugned decision, the Secretary-General informed the Complainant that he had decided to uphold Decision No. 12542.

The Tribunal considered unfounded ITU argument that the complaint was irreceivable on the ground that the Complainant had no individual right to be a member of the Board. It noted that it was clear that each staff member has an individual and legitimate interest in being a member of the Board or any other board or committee as a staff representative; therefore, each staff member, if appointed, had an individual legitimate right in not being removed. This right derived directly from a staff member's terms of employment and was therefore challengeable.

In response to the Complainant's plea regarding the misuse of authority and violation of the Staff Regulation and Staff Rules in the appointment of the staff representative members of the Board, the Tribunal noted, contrary to the Appeal Board's conclusion, that the decision was not a disguised disciplinary sanction. The Tribunal noted, however, that the Secretary-General's interference in the nomination of the staff representatives of the Board constituted a misuse of authority, and that the principles of freedom of association and freedom of expression had been breached when the Secretary-General substituted the Complainant's opinion and method of defending staff interests with his own.

In response to ITU plea alleging that the Secretary-General's decision had been taken with a view to ensuring the smooth running of the work of the Board and that he had the authority to designate its members by virtue of Staff Regulation 4.9, the Tribunal found that the Secretary-General should have respected the Staff Council's position to restate its full confidence in the Complainant instead of insisting on her replacement. The Tribunal considered the fact that the Secretary-General designated the staff representatives on the Appointment and Promotion Board from a list of names proposed by the Staff Council as enough to support the view that the Administration should hold consultations with the Staff Council and seek an agreement prior to removing a staff representative from the Board. The Tribunal further noted that, as there was a specific procedure to be followed in the appointment of a staff representative, that implied that there was a corresponding procedure for the removal of a staff representative. Consequently, a duly-appointed staff representative should not be dismissed by the Secretary-General without his inviting the participation of the Staff Council in the procedure. There was no such procedure in this case, and the Tribunal therefore decided that the impugned decision must be set aside.

For the above reasons, the Tribunal decided to award the Complainant 20,000 CHF in moral damages for the injury, distress and anxiety suffered. The Tribunal, however, pointed out that the Complainant's withdrawal from an official meeting because she did not agree with the majority opinion was inappropriate behaviour. As an appointed staff representative, she had a duty to attend and participate fully in the meetings of the Appointment and Promotion Board. Therefore, the Tribunal stated that the Complainant was not entitled to any other compensation. It observed that the request for an apology from Mr. S must be dismissed as it was not for the Tribunal to issue an injunction where the claim involved someone who was not party to the complaint. The Tribunal further

decided that ITU should pay the Complainant 5,000 CHF in costs, and that all other claims were dismissed.

2. *Judgment No. 2691 (6 February 2008): A. H.* v. *International Organization for Migration (IOM)*[19]

DECISION TO TRANSFER STAFF MEMBER TAINTED WITH PROCEDURAL ERROR—IMPUGNED DECISION IN FACT AN ATTEMPT TO IMPLEMENT BY A DIFFERENT ROUTE A PREVIOUSLY ANNULLED DECISION—EXHAUSTION OF ALL INTERNAL REMEDIES NOT NECESSARY WHEN FILING AN APPLICATION FOR EXECUTION—REINSTATEMENT AS AN IMMEDIATE AND INEVITABLE CONSEQUENCE OF THE ANNULMENT OF A TRANSFER DECISION—SECOND DECISION TO TRANSFER STAFF MEMBER DECLARED NULL AND VOID *AB INITIO*

The Complainant held a D-1 post in Vienna from January 1998 until 1 July 2006, when he was transferred to Berlin to another D-1 post. The facts relevant to this case are set out in Judgment No. 2575, delivered on 7 February 2007, in which the Tribunal ruled that the decision to transfer him to Berlin was tainted with procedural error insofar as the standard rotation procedure had not been followed, and for this reason annulled it.

Following the delivery of Judgment No. 2575, the Complainant indicated in an e-mail of 13 February 2007 to the Administration that he considered himself to be "automatically again assigned to Vienna," and to that end requested that the "relevant Personnel Action transferring [him] to Vienna [. . .] be issued effective 8 February 2007." He also acknowledged that a *de facto* interim arrangement had existed since 8 February 2007 and that, for practical reasons, it might be necessary to prolong it for a limited period. Consequently, he requested that he be put on travel status and paid a daily subsistence allowance as of 8 February.

On the same day, the Director-General informed him that the Administration understood the Tribunal's findings in the sense that the Complainant was "subject to rotation" and that even if his own previous decision was procedurally flawed, the Tribunal had not ordered the Complainant's "reinstatement to Vienna where [he was] posted from 1998 to 2006." The Director-General decided, in accordance with the authority conferred on him by Staff Rule 8.111.12, to transfer the Complainant within-grade to Berlin with immediate effect. This is the impugned decision.

The Tribunal rejected IOM argument that the impugned decision was a new decision and that the request of the Complainant should therefore be considered as the review of a new decision and not an application for execution. The Tribunal noted that the decision concerned the same person (the Complainant), the same subject matter (the transfer to Berlin) and the same cause (implementation of Staff Rule 8.11) as in the decision which was annulled by Judgment No. 2575. The Tribunal added that the impugned "decision" was no more than an attempt to implement, by a different route, the very decision annulled by Judgment No. 2575. Therefore, the Complainant was entitled to apply for the execution of that judgment since "[t]he case law has it that the exhaustion of all internal remedies is not necessary before filing an application for execution".[20]

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[19] Ms. Mary G. Gaudron, President, Mr. Augustin Gordillo and Mr. Giuseppe Barbagallo, Judges.

[20] See Judgment No. 1978, under 3.

The Tribunal considered that, by annulling the transfer decision, it had placed the Complainant in the same legal position that he was in before the decision was taken. The Complainant's reinstatement was, according to the Tribunal, an immediate and inevitable consequence of Judgment No. 2575, and the Organization must therefore implement the Judgment by taking the consequent, material measures.

In view of the above, the Tribunal decided that the impugned decision dated 13 February 2007 must be declared null and void *ab initio* and that the Complainant must immediately be reinstated, at least administratively, in his former post in Vienna and must be placed on travel status for the period from 8 February 2007 until his reinstatement. The Tribunal also ordered the reinstatement through the school year 2007–2008 of the Complainant's entitlement to an education grant in respect of the cost of his son's education in Vienna, and awarded the Complainant to 3,000 EUR in costs.

3. *Judgment No. 2704 (6 February 2008): A. G. S.* v. *United Nations Industrial Development Organization (UNIDO)*[21]

Staff member not subject to performance appraisals or supervision as a result of release to perform functions as President of Staff Council—Merit promotions—Administrative Instruction No. 16 did not cover the Complainant's case—Effect of Administrative Instruction was to deny the Complainant a valuable opportunity—Complainant subject to detriment or disability due to his role as President of Staff Council—Discrimination occurs when persons in the same situation in fact and in law are treated differently—Dissimilar situations must be governed by rules that take account of the dissimilarity—Principle of equality infringed if the rules that govern dissimilarity are not appropriate and adapted to the dissimilarity—If the rules and procedures of international organizations do not ensure adherence to the principle of equality, it is their duty to initiate procedures that do—Not the function of the tribunal to proscribe a procedure

The Complainant joined the Organization in 1981 and was elected President of the UNIDO Staff Council in 1997. Upon taking up his functions as President, the Complainant was granted release from his duties on a 75 per cent basis, and from May 1999 he was granted full-time release. As a result, he was not subject to performance appraisals or supervision.

On 1 January 2003, the Director-General issued Administrative Instruction No. 16, which allowed for merit promotions for persons "whose performance over a number of years ha[d] consistently exceeded expectations, ha[d] been rated as very good or outstanding, and who ha[d] been at least seven years in the same grade." The Instruction required that "[p]roposals for merit promotions should be made by programme managers (directors and supervisors)," that they be considered by a Performance Review Committee and that, thereafter, the Committee's recommendations be submitted to the Director-General for approval. The Complainant's name was included on a preliminary list of staff members eligible for promotion. Following proposals by the programme managers, candidates were consideration by a Performance Review Committee. The Complainant was not recommended for promotion by his Management Director of the Division of Administration, under whose authority he fell for administrative purposes. Thus, when the names of those

[21] Seydou Ba, President; Mary G. Gaudron and Agustín Gordillo, Judges.

staff members whose promotion had been approved were announced on 17 July 2003, the Complainant was not amongst them.

On 13 February 2004 the Complainant lodged an appeal with the Joint Appeals Board, which in its report of 21 June 2006 concluded that the Organizations had correctly followed the procedures stipulated in Administrative Instruction No. 16. This recommendation was endorsed by the Director-General by a memorandum of 4 July 2006. That is the impugned decision.

The Tribunal first considered the Complainant's argument that the failure by the Performance Review Committee to consider his performance had been a fundamental breach of procedures. The Tribunal, however, rejected this argument, as the Complainant was in fact ineligible for consideration by the Committee as Administrative Instruction No. 16 clearly provided that "[p]roposals should be made by programme managers (directors and supervisors) and be submitted for review to the Performance Review Committee". Therefore, in the absence of a proposal, for whatever reason, the Committee had no power to make any evaluation, much less a recommendation with respect to the granting of a merit promotion.

The Tribunal noted that Administrative Instruction No. 16 did not cover the Complainant's case. Indeed its effect was to deny the Complainant a valuable opportunity that was available to all other staff members who had served seven years in the same grade. The Tribunal further observed that if the Complainant had not had a supervisor and could not have his work appraised, it was due to the fact that he had been granted full-time release only on the account that he was the President of the Staff Council. He was therefore, according to the Tribunal, subject to a detriment or disability because of his role as President of the Staff Council.

The Tribunal noted that the principle of freedom of association was infringed if a person was subject to a detriment or disability, or was discriminated against because of his or her activities within a staff association or, as here, within the Staff Council. It recalled that discrimination occurred when persons who were in the same situation in fact and law were treated differently. The principle of equality not only requires that "situations which are the same or similar be governed by the same rules," but also that "dissimilar situations be governed by rules that take account of the dissimilarity" (Judgement No. 2194). However, the Tribunal further recalled, the principle of equality may be infringed if the rules that govern dissimilarity are not appropriate and adapted to the dissimilarity (Judgement No. 2313). The Tribunal concluded that Administrative Action No. 16 had a disproportionate and discriminatory impact on the Complainant, and that discrimination had taken place.

The Tribunal observed that there was no rule to cover the Complainant's situation, and that it was of no consequence that he did not request an opportunity to have his case considered until after the Performance Review Committee had made its recommendations with respect to merit promotion for other staff. In this regard, the Tribunal recalled its Judgment No. 2313 in which it had stated that "if [the] rules and procedures [of international organisations] [did] not ensure adherence to [the] principle [of equality] [. . .], it [was] their duty to initiate procedures that [did], whether by way of general rule or some specific procedure for the particular case." That duty had been breached in the present case. However, the Tribunal did not consider it its function to proscribe a procedure or order UNIDO to consider the question of merit promotion for the Complainant. Moreover, the

Complainant retired from the Organization on 30 September 2007. In the circumstances, the proper course was, according to the Tribunal, to award 20,000 EUR in compensation for the wrongful denial of a valuable opportunity.

The Complainant further presented a number of claims regarding irregularities in the internal appeal proceedings. He contended a breach of due process as the composition of the Joint Appeals Board was changed in the course of the proceedings without him being notified, hence depriving him of his right to object to proposed membership. The Tribunal did not accept the argument, presented by UNIDO, that the allegations concerned the same clerical error as that for which the Complainant was awarded moral damages by Judgment No. 2662. While the two mistakes were closely related, in the sense that one led to the other, the Tribunal agreed that there were in fact two mistakes, and that they had both interfered with the Complainant's right to challenge the composition of the Board.

With regard to the delays in the proceedings, the Tribunal found that no part of the delay was referable to the Complainant who filed his rejoinder before he was advised of the composition of the Board and well before it commenced its deliberations. As in Judgment No. 2662, the Complainant was awarded moral damages in the amount of 5,000 EUR for the delay and other irregularities involved in his internal appeal.

4. *Judgment No. 2706 (6 February 2008): C. C.* v. *World Intellectual Property Organization (WIPO)*[22]

Transfer of staff member following sexual harassment against her—Organization's reaction not consonant with the duties of an international organization towards its staff—Duty of an organization to provide a safe and adequate environment for its staff—Sanction imposed in response to sexual harassment clearly not commensurate with seriousness of the misconduct—Disparity between complainant's grade and her actual duties—If the rules and procedures do not ensure adherence to the principle of equality, the Organization has a duty to take remedial steps, whether by way of a general rule or specific procedure in the particular case—The Tribunal should not substitute its own assessment for that of the Organization with regard to the reclassification of posts

The Complainant joined WIPO in March 1995 as a clerk at grade G-2 on a short-term contract. In November 1996, she was given a fixed-term contract at grade G-3 and, on 1 November 2000, she was promoted to grade G-4. As from September 2001, she was transferred at the same grade to the Expenditures Section of the Finance Division.

On 8 November 2002, the Complainant reported to the Organization's Ombudsperson, then on 6 March 2003 to the President of the Staff Council, that she had been sexually harassed by her supervisor, and also complained about another official's behaviour. The case was subsequently brought before the Director-General. At a meeting held on 10 March 2003, disciplinary action was taken against the two officials, who both received a verbal reprimand, which was recorded by placing a note in their respective personal file.

By a decision of 11 March 2003, the Complainant was transferred to the Knowledge Management Center and e-Library. In May 2004, the Complainant's new supervisor recommended her promotion, without success. On 8 June 2005, he wrote an internal memo-

[22] Seydou Ba, President; Claude Rouiller and Patrick Frydman, Judges.

randum in which he proposed that she be promoted to grade G-5 on the basis of the work she was actually performing. On 26 January 2006, after the Complainant had also applied for promotion, she was provided with a job description which she refused to sign, as she considered that it did not reflect her true responsibilities.

On 6 March 2006, the Complainant sent a letter to the Director-General in which she asserted that she had been treated in an unfair and discriminatory manner. Having received no reply, she lodged an appeal with the Appeal Board on 20 April 2006. In its opinion of 2 June 2006, the members of the Board unanimously found that the Complainant been subjected to sexual harassment and had been treated unfairly by the Organization. The Board considered that she had been "twice victimised" in that her career had been stymied after the incidents of sexual harassment, and recommended that the dispute should be resolved amicably. The Board thus proposed that the Organization should award the Complainant compensation in the amount of 30,000 CHF, ensure that she obtained promotion to grade G-5 and that, subject to certain conditions, it should consider promoting her to grade G-6. Failing amicable resolution on those bases, the Appeal Board recommended that the Complainant should receive a promotion to grade G-6, backdated at least six months.

By a decision of 11 August 2006 the Director-General announced that he wanted the matter to be resolved amicably, in accordance with the Appeal Board's recommendation. However, the Organization merely offered the Complainant financial compensation, but refused to grant her a promotion as part of the settlement. The Complainant challenged before the Tribunal the above-mentioned decision of 11 August 2006.

With regard to the receivability of the complaint, the Tribunal rejected the contention of the Organization that the claims therein were time-barred. In particular, the fact that the Complainant had not challenged each and every unfavourable decision concerning her as from her transfer on 11 March 2003 should not prevent her from seeking compensation for the injury she claimed to have suffered and to challenge the decision to deny her the promotion she had requested. Moreover, it was, according to the Tribunal, clear that the Complainant had repeatedly objected to the situation in which she had been since her transfer in March 2003, in particular that her grade did not tally with the actual level of her responsibilities.

The Tribunal observed, based on the evidence on the file, that the acts of sexual harassment which the Complainant had denounced had in fact taken place, contrary to the assertions of the Organization. The Tribunal considered that, in imposing a disciplinary sanction on the Complainant's supervisor, the Organization had necessarily acknowledged that they the acts of sexual harassment had occurred. It could therefore not dispute the merits of the Complainant's accusations during the proceedings, without contradicting itself and casting major doubts on whether its decisions regarding staff were taken in a responsible manner in such a sensitive area as that of discipline.

Given the nature and seriousness of the acts in question, the Tribunal noted that the Organization's reaction to the Complainant after she had denounced the sexual harassment was not consonant with the duties of any international organization towards is staff. The Tribunal emphasized that an international organisation has a duty to provide a safe and adequate environment for its staff, and is liable for all injuries caused to a staff member caused by their supervisor acting in the course of his or her duties (see Judgments Nos.

2524, 1609 and 1875). The Tribunal expressed its astonishment at the administrative action taken by the Organization in response to the denunciation of these acts, and found that the sanction imposed on her supervisor was clearly not commensurate with the seriousness of his misconduct. The fact that the supervisor's performance appraisal covering the period during which he was subject to disciplinary action was favourable in all respects indicated, in the view of the Tribunal, little regard for the duty of care that the Organization owed to the victim.

While acknowledging the argument put forward by the Organization that compensation for injuries should not take the form of a promotion, the Tribunal noted that the question in the present case was whether the Complainant had been unduly prevented from applying for promotion under the relevant procedures.

As far as the level of her responsibilities was concerned, the post held by the Complainant was at the time of the Judgment classified at G-4 level. The file, however, showed that in practice, owing in particular to the departure of colleagues whose work she took over, the Complainant had long been performing the duties of a library "assistant" or "technician" which go far beyond the content of the post as it was initially designed. This was confirmed in a detailed internal memorandum written by her supervisor on 8 June 2005, in which the disparity between the Complainant's present grade and the level of her duties was particularly stressed.

As for the possibility of promotion on merit, the Tribunal observed that it emerged from the Complainant's performance reports after her transfer to this post and from various internal notes concerning her work that her performance was praised. It further noted that the request for promotion of the Complainant, who had not received a promotion for seven years, in a manner which was hard to justify, encountered administrative obstacles which had prevented its proper examination by the competent bodies. The Tribunal considered that the Organization's dilatory attitude to the request for promotion submitted must be deemed improper because, if this promotion would have been justified on account of the classification of the post held, the situation thus created would result in unequal treatment to the detriment of the Complainant.

The Tribunal recalled its Judgment No. 2313, in which it emphasized that it was the duty of international organisations to abide by the principle of equality, and in particular to comply with its requirement that there be equal pay for work of equal value. As stated in the same Judgment, if their rules and procedures do not ensure adherence to those requirements in respect of their staff, it is the duty of an international organization to take remedial steps, whether by way of some general rule or by some specific procedure for the particular case.

The Tribunal stressed that WIPO could not legitimately rely on the procedural and time constraints inherent in its internal rules governing the reclassification of posts and the consideration of requests for promotion in order to justify the fact that, several years later, it had still not reached a decision on the Complainant's claims in this respect. The Tribunal added that the fact that the Complainant had been the victim of sexual harassment did not imply that her application for promotion had to receive preferential treatment. However, given the exceptional circumstances of her transfer, the Organization should have taken great care to ensure that she was treated correctly.

Thus, the Tribunal found that the Director-General's impugned decision must be set aside, and that the Organization's mishandling of the Complainant's application for promotion caused her moral injury calling for compensation in addition to that for any other injuries she had suffered.

With regard to the promotion, the Tribunal reiterated its past practice, recalling in particular Judgments Nos. 929, 1647 and 1874, according to which the grading of a post is a discretionary decision which should be taken by persons with particular training and experience in the matter. While the Tribunal may set aside a decision of reclassification on grounds of form or substance, it should not substitute its own assessment for that of the Organization. The case was therefore sent back to the Organization for it to reach a decision on this request in compliance with a number of conditions, and requested that the Organization review the classification of the Complainant's post and her application for promotion within six months of the date of the delivery of the present judgment. Furthermore, the Complainant was awarded 40,000 CHF in compensation for all the injuries suffered, and her costs in the amount of 7,000 CHF.

5. *Judgment No. 2709 (6 February 2008): S. V.* v. *European Patent Organization (EPO)*[23]

Calculation of reckonable experience after acquisition of the required level of education—Recognition of substantial equivalence of accredited engineering programmes—The Washington Accord, while not binding, should be taken into consideration by the Organization—Although the Organization is not bound by member State practice, it has a duty to explain an apparent inconsistency in its approach

The Complainant joined EPO on 1 November 2003 as an examiner at the European Patent Office, after he had received by fax of 11 October 2003 a copy of the offer of appointment. He responded to the offer by letter of 22 October 2003. Attached to the offer was a calculation of his reckonable experience for purposes of recruitment and promotion. This calculation showed that the Office would take into account as reckonable experience his period of employment from 24 May 2000 to 31 October 2003 and on that basis would assign him grade A-1, step 3.

Two months later, the Complainant informed the Office that there was an error in the preliminary calculation of his reckonable experience and that he would submit a request for recalculation once he had received all relevant documents from his former employers. Therefore, by a letter to the Personnel Administration Department dated 15 January 2004, he requested that his reckonable experience be recalculated to take into account his professional experience during the period from 15 May 1994, when he received his Bachelor of Science (BSc) degree in Electrical Engineering, to 24 May 2000, when he obtained his Master of Science (MSc) degree in Electrical and Computer Engineering, and that accordingly he should be assigned grade A-2, step 4. The Complainant argued that this experience had been gained "after acquisition of the level of education required under the minimum qualifications of the job description for the post in question," as required by Circular No. 271, given that his BSc degree was a "diploma of completed studies at university level" which would be the minimum qualification for the post of examiner.

[23] Seydou Ba, President; Mary G. Gaudron and Giuseppe Barbagallo, Judges.

By a letter of 11 June 2004, the Recruitment Department informed the Complainant that his request could not be granted based on the application of document CI/376/77 of 8 September 1977 that specified which diplomas applicants for posts as examiners were required to hold in the various member States. The document held that for degrees acquired in non-member States, EPO had decided that only a Master's or similar degree would be considered as equivalent to "an average European level of completed university education." On 1 July, the Complainant confirmed that his letter of 15 January should be considered as an internal appeal. Meanwhile, on 13 August 2004, the Personnel Legal Affairs Department sent a note to the Director of Recruitment indicating that the EPO minimum requirement for A-grade posts was a Master's degree for both member and non-member states, with the exception of Ireland and the United Kingdom for which a three-year degree was considered sufficient.

In its opinion of 24 April 2006, the Internal Appeals Committee unanimously recommended that the appeal be dismissed as devoid of merit, but that the Office should credit the Complainant with all or at least part of the experience he gained in the period between his Bachelor's and his Master's degrees, as an *ex gratia* settlement in view of the special circumstances of his case. By letter of 23 June 2006 the Complainant was informed that the President of the Office had decided to reject his appeal as unfounded and not to offer him an *ex gratia* settlement. That is the impugned decision.

With regard to the Complainant's university diploma, the Tribunal was of the opinion that a United States ABET-accredited BSc degree must be considered a "diploma of completed studies at university level." It considered as unsatisfactory the explanation given by the Organisation, namely that the Office had a certain "discretionary leeway" in deciding whether and when a diploma of completed studies at university level existed within the meaning of the job description.

In response to the Organization's argument that it was not bound by the Washington Accord, the Tribunal stated that the Washington Accord, while not binding, should be taken into consideration. Under the terms of the Washington Accord, which is an international agreement for the recognition of the substantial equivalence of accredited engineering degree programmes, an ABET-accredited United States BSc degree is equivalent to the United Kingdom BEng (Honours) degree, which is recognised by the Organisation. Therefore, logically, the Organisation should have no difficulty in recognising the Complainant's BSc degree as fulfilling the minimum education requirement. While the Washington Accord is not legally binding on EPO, it derived from a sound technical evaluation and the Organisation had a responsibility at least to consider it when making a choice based on the same technical evaluation. Furthermore, given that the United Kingdom recognised the ABET-accredited United States BSc degree as being equivalent to its own BEng (Honours), although it was not bound by the practice of member States, the Tribunal considered that the Organization had a duty to explain the apparent inconsistency of its approach.

The Tribunal recalled its Judgment No. 851, in which it considered that "some differences will have to be allowed in the content and standard of engineering degrees until there is international standardisation. For an international organization, the only fair and practical approach is to demand for an examiner's post the qualifications required for equivalent duties in the applicant's home country." In the same vein, the Tribunal recalled its Judgment No. 895, in which it ruled that "[f]or appointment as an examiner of patents

with the Organization the Complainant is required to have the qualifications he would need for appointment as an examiner in the patent office of his own country." The Tribunal noted that there had been a move towards international standardisation with the coming into force of the Washington Accord. As the Complainant's BSc degree would make him eligible to work as an examiner in his home country, the United States, according to the Tribunal's rulings in the two Judgments listed above, he should also be deemed eligible to work as an examiner for the Organization.

With regard to EPO refusal to recognize United States bachelor's degrees on principle, regardless of which member state's nationality the applicant held, the Tribunal noted that this statement was contrary to the considerations in Judgments Nos. 851 and 895. In addition, the Tribunal found EPO arguments to be contradictory, as the Organizations also claimed that "[i]t would be difficult for the member States to comprehend why the requirements for an examiner's post at the defendant [O]rganisation should be disregarded or made stricter than for national authorities." Since the United Kingdom national authorities recognized the ABET-accredited United States BSc degree as being equivalent to the United Kingdom BEng (Honours) and would therefore consider the applicant eligible for the post of examiner, the Organization should also find it reasonable to recognize that degree when recruiting and hiring employees. The Tribunal noted that the Organization's blanket disregard for United States BSc degrees appeared to be discriminatory.

In accordance with these considerations, the Tribunal concluded that the Complainant's ABET-accredited United States BSc degree must be considered a "diploma of completed studies at university level" and that the decision to deny his request for recalculation of his reckonable experience from the date of his United States BSc degree must be set aside. The Tribunal decided that the Complainant's reckonable experience and salary had to be calculated in accordance with the Organization's Service Regulations and Circular No. 271, from the date of receipt of his completed BSc degree, and that he must receive all consequential salary adjustments. The Tribunal requested the Organization to pay the Complainant 3,000 EUR in costs, and although there was no clear demonstration of bad faith on the part of the Organization, the Tribunal awarded the Complainant moral damages in the amount of 4,000 EUR to take account of the extended period during which he was retained in the wrong grade.

6. *Judgment No. 2720 (9 July 2008): D. J. G.* v. *International Telecommunication Union (ITU)*[24]

Circulation to all staff members of a letter presenting the organization's position with regard to a judgment of the Tribunal—Defamatory nature of statements—Right of reply—Outside the jurisdiction of the Tribunal to decide on alleged prejudice that the Tribunal itself may have suffered—Principle of *res judicata*—Obligation for international organizations to refrain from any type of conduct that may harm the dignity or reputation of their staff members—Exemplary damages for breach of obligation

The facts relevant to this case are to be found in Judgment No. 2540, delivered on 12 July 2006, concerning the Complainant's first five complaints. The Complainant had

[24] Mary G. Gaudron, Vice-President; Giuseppe Barbagallo and Patrick Frydman, Judges.

challenged before the Tribunal, *inter alia*, the decisions whereby he had been temporarily detached and subsequently transferred from the post of Chief of the Personnel and Social Protection Department ("Chief of Personnel"), and the Administration's decision to advertise that post. In Judgment No. 2540, the Tribunal set aside the expressed and implied decisions rejecting the Complainant's appeals with respect to his detachment, transfer and dismissal from the post of Chief of Personnel.

On 26 July 2006 a journalist for a Swiss daily newspaper informed the Complainant that he was going to publish an article on the ITU and Judgment No. 2540 the following day. After the ITU Head of Corporate Communication had been contacted by the journalist to obtain the ITU version of the facts, he sent an e-mail to all staff members of the Union containing the letter presenting ITU position with regard to the Judgment in question, and a summary of the facts of the case to the journalist.

The Complainant, considering these documents to be defamatory, requested the Secretary-General, on 1 September 2006, on the one hand to review the decision to circulate them to all staff members, and on the other hand to withdraw them officially through an e- mail to all staff, to present him with a formal apology, to give him the right of reply and to award him damages. On 16 October, the Secretary-General informed the Complainant of his decision not to withdraw the e-mail.

On 3 November 2006 the Complainant filed an appeal with the Appeal Board, which dismissed the Complainant's claims in its report of 9 January 2007, noting, in particular, that he had the opportunity of exercising his right of reply. This request had, however, already been denied by the Secretary-General in his decision of 16 October, and that position was confirmed following the delivery of the Appeal Board's opinion. That implicit decision was impugned in the present complaint.

The Complainant submitted that the content of the documents sent by e-mail on 26 July 2006 was defamatory, seriously infringed the obligations owed by international organizations to their staff members and violated the principle of *res judicata* and the respect due to the Tribunal.

The Tribunal decided not to respond to the arguments presented in the complaint regarding the prejudice that the Tribunal itself had allegedly suffered as a result of the circulation of the disputed message. The Tribunal considered that the issue raised in this regard, which had no direct bearing on the dispute between the Complainant and ITU regarding compliance with obligations arising from their contractual relationship, fell outside the Tribunal's jurisdiction, as restrictively defined in article II of its Statute. The Tribunal further considered that it could not rule on such arguments without breaching its duty of impartiality.

However, the Tribunal was of the view that it must, of course, rule on the Complainant's claim concerning harm done to his own interests, and stated in this regard that the circulation of the disputed message to the entire ITU staff was an extremely improper action that caused him serious harm. The Tribunal considered that the defamatory nature of the statements was compounded by the fact that they were based on a highly tendentious presentation of the facts, and found that the Secretary-General could not lawfully circulate a message to the staff expressing his view in the terms employed. The Tribunal added that, even if it were established that the complainant could have responded to the disputed state-

ments by circulating another message in the same form, these statements would in any case be no less defamatory on that account.

The Tribunal recalled, as it had consistently held, for instance in Judgments Nos. 396, 1875, 2371 and 2475, that international organisations were bound to refrain from any type of conduct that may harm the dignity or reputation of their staff members. The Tribunal added that this duty, which flowed from the general principles governing the international civil service, was also applicable as a matter of course to former staff members of an organisation, and therefore to the Complainant who had now retired. By its very nature, the act of circulating to all ITU staff, on the Union's own initiative, a message containing defamatory statements concerning the Complainant constituted a particularly serious breach of that duty. Moreover, the Tribunal considered that the breach was all the more reprehensible in the present case because it followed a pattern of vindictive action against him.

While the Tribunal did not deny that ITU had every right to circulate comments that were critical to the judicial ruling, it observed that the decision to pursue that route was taken in reaction to plans to publish a newspaper article and was not a spontaneous initiative.

Furthermore, and as contended by the Complainant, the Tribunal considered that ITU was not entitled, while circulating comments on the judicial ruling, to challenge the findings of fact made in the judgement, which had *res judicata* authority.

In view of the above, the Tribunal decided that the decision whereby the Secretary-General refused to remedy the consequences of the circulation of the e-mail of 26 July 2006 must be set aside. The Tribunal considered that the circulation of the e-mail to all staff clearly damaged the Complainant's dignity and reputation, and therefore decided that the Union should pay him damages in the amount of 20,000 CHF. In addition, the Tribunal decided that, for having acted in breach of the obligations incumbent upon the Organisation in its relations with its staff members, ITU should pay the Complainant exemplary damages in the sum of 10,000 CHF.

The Tribunal further granted the Complainant's request that ITU send a new e-mail to all staff retracting the content of the e-mail circulated on 26 July 2006. The Tribunal considered that the circulation of such an e-mail appeared to be the only way of ensuring that the present Judgment fully served the purpose of safeguarding the Complainant's honour and reputation *vis-à-vis* the ITU staff.

*7. Judgment No. 2742 (9 July 2008): M.d.R.C.e S.d.*V. v. *World Meteorological Organization (WMO)*[25]

Investigation of suspected case of fraud by staff member—Reorganization by the Secretary-General of Internal Audit and Investigation Services (IAIS)—Allegations of harassment in connection with fraud investigation—Allegation of harassment to be determined following a thorough investigation—Facts inconsistent with claim by Complainant of improper motive—Reassignment to a post which significantly diminished duties, responsibilities and status of staff member—Necessary power of an international organization to restructure some or all of its units, including by abolition of posts, the creation of new posts and

[25] Seydou Ba, President; Mary G. Gaudron and Dolores M. Hansen, Judges.

THE DEPLOYMENT OF STAFF—SUCH POWER IMPLIED EVEN IF NOT EXPRESSLY CONFERRED BY THE RELEVANT REGULATIONS—INCONSISTENCY WHEN RESTRUCTURING INVOLVES THE ABOLITION OF WHAT IS INTENDED TO BE STRENGTHENED—EXISTENCE OF IAIS MANDATED BY FINANCIAL REGULATIONS—ABOLISHMENT OF IAIS DONE WITHOUT LAWFUL AUTHORITY AND CONTRARY TO THE FINANCIAL REGULATIONS

The Complainant is a former official of WMO. She joined WMO on 1 June 2003 as Chief of the Internal Audit and Investigation Service (IAIS) at grade P-5, reporting directly to the Secretary-General. Her initial two-year fixed term contract was in due course renewed for a further period of two years.

Shortly after taking up her functions the Complainant was asked to investigate a suspected case of fraud involving at least one staff member. In light of her initial findings, the Organization decided, in November 2003, to refer the matter to the Swiss authorities so that criminal proceedings could be initiated. Meanwhile, the main perpetrator succeeded in escaping to Egypt. When the current Secretary-General took office in early 2004, he instructed the Complainant to pursue her internal investigation, focusing in particular on the role that other staff members might have played in the fraud. He also took a number of measures designed to strengthen the Organization's internal controls, including the establishment of an Audit Committee, to which the Complainant submitted a number of investigating reports. After having been informed that WMO senior legal advisor had made a telephone call to the main perpetrator the same day that he escaped to Egypt, the Complainant suggested that the senior legal advisor be kept aside from the internal investigation pending clarification of these facts. The Secretary-General asked the Complainant to remove her recommendations concerning the senior legal advisor from her reports before they were submitted to the Audit Committee on the grounds that her findings were unsubstantiated. However, the Complainant refused to do so. Following the submission by the Complainant of her final report to the Executive Council in June 2005, the Executive Council decided, upon a recommendation of the Audit Committee, that the internal investigation be closed, and that it should be reopened only if additional, substantial information became available.

During the second half of 2005, upon a recommendation by the Audit Committee in October 2004, steps were taken to reorganise the IAIS. Although various options were envisaged, including a proposal by the Complainant, the Secretary-General decided that IAIS be replaced with a new Internal Oversight Office (IOO) and that three new posts, one at grade D-1 and two at grade P-5, be created.

The vacancy note for the D-1 post indicated that the official in question would "[f]ulfil the function designated in the Financial Regulations for the Chief of [IAIS]." The Complainant applied for the post but was not selected. On 10 January 2006, she was notified of the decision to separate her from her functions as Chief of IAIS and to reassign her, with effect from 1 February 2006, to the grade P-5 post of Chief of the new Internal Audit Service (IAS) in which she would report to the Director of IOO. By memorandum of 20 January 2006, the Complainant requested that the Secretary-General reconsider this decision, arguing that it was contrary to the Financial Regulations. She further alleged that she was being harassed by senior management in connection with her investigation.

In an e-mail of 31 January 2006 addressed to the members of the Audit Committee, the Complainant stated that it was her duty to inform them of the Secretary-General's

decision to "abolish" the IAIS and that she would shortly send them a report on the matter. Having been reminded by the Secretary-General that communications with the Audit Committee should be channelled through him, she sent him the report in question on 8 February, asking that it be forwarded to the members of the Committee. The Secretary-General replied that the Complainant had a "clear and serious conflict of interest", and that she was therefore to "refrain from any further involvement in all internal audit functions regarding the reorganization of the internal audit services." On 23 February, she sent a message from her private e-mail address to the members of the Audit Committee, copying it to several representatives of the United States Department of State, in which she called into question the legality of restructuring the internal audit function, and attached a copy of the report she had submitted to the Secretary-General in February. She further asserted that, despite her recommendations, the Secretary-General had chosen not to lift the immunity of certain senior officials to enable them to be investigated by the Swiss judge.

On 14 March 2006, the Complainant lodged an appeal with the Joint Appeals Board contending that the reorganization of IAIS was unlawful, that her reassignment was "invalid," and that she had suffered harassment in connection with her investigation. In its report dated 21 September 2006, the Board recommended that the appeal be rejected as devoid of merit. By a memorandum of 4 October 2006, the Secretary-General dismissed the appeal in accordance with the recommendations of the Board. This is the impugned decision. On 3 November 2006, the Complainant was dismissed. The Complainant made a formal complaint of harassment to the Joint Grievance Panel and presented written submissions to it in March 2007. The report of the Panel was submitted to the Joint Appeals Board, and a final decision to close the case of harassment was made by the Secretary-General on 28 September 2007.

The Tribunal noted that the decision by the Secretary-General of 28 September 2007 was the subject of three further complaints to the Tribunal. A preliminary question arose with respect to the claim of harassment, as a general principle dictates that a person cannot litigate the same issue in separate or concurrent proceedings. The Tribunal pointed out that a final decision on the issue had nonetheless been taken by the Secretary-General, and that as the claim was before the Tribunal, it must be determined. However, it would be undesirable that the claim be determined in the absence of a thorough consideration of all the circumstances on which the Complainant relied. It was therefore decided that final determination of the harassment claim should await consideration of the various complaints filed in relation to the Secretary-General's decision of 28 September 2007.

The Tribunal observed that, whatever may be said of the events prior to mid-February 2005, the relationship between the Complainant and the Secretary-General underwent a marked change after the Complainant reported that the WMO senior legal advisor be "kept aside from the process temporarily, until the situation [. . .] is clarified." It further noted that the events following the Complainant's report referring to the senior legal advisor indicated a disregard for her role and responsibilities as internal auditor and a lack of respect for her dignity. However, even when considered in the context of other events on which the Complainant relied, they did not establish that the impugned decision was motivated by a desire to harm or injure the Complainant.

The Tribunal found that the facts were inconsistent with the type of improper motive claimed by the Complainant in relation to her reassignment. Firstly, there was nothing to

indicate that the appointment process to the D-1 post was flawed. Secondly, the idea of creating a D-1 post had been conceived as early as February 2005, well before the events developed with respect to the Complainant's reports referring to the senior legal advisor. Finally, as the internal investigation of fraud had been effectively closed in June 2005, it would be wrong to view the impugned decision as some form of retaliation for the Complainant having prevented the Secretary-General from corrupting the investigation process.

With regard to the reorganization of the internal oversight, the Tribunal recalled its Judgment No. 2510 in which it had stated that "an international organisation necessarily has power to restructure some or all of its units, including by abolition of posts, the creation of new posts and the redeployment of staff". The Tribunal noted that the word "necessarily" in that statement indicated that that power would be implied even if it was not expressly conferred by the relevant regulations. However, that power could not be implied if it was contrary to the regulations. At the relevant time, regulation 13.7 of the WMO Financial Regulations provided:

> "Under the broader scheme of internal oversight which would include the programme evaluation mechanism, the Secretary-General shall establish an Internal Audit and Investigation Service (IAIS)"

The Financial Regulations were amended by the WMO Congress in May 2007 to provide for the creation of IOO to replace IAIS and for the appointment of a Director of IOO with substantially the same powers, duties and responsibilities as those formerly reposed in the Chief of IAIS. These amendments took effect on 1 January 2008.

The Tribunal observed that the Executive Council had resolved in June 2005 that the Secretary-General should "strengthen the internal audit service on an urgent basis." It considered that there was no inevitable inconsistency between "strengthening" a service and restructuring it. However, there was an inconsistency when restructuring involved the abolition of what is intended to be strengthened. The legal effect of the WMO Congress resolution of May 2007 was to abolish the IAIS and replace it with the IOO. The same abolition occurred, *de facto*, when the Secretary-General appointed the Director of IOO with effect from 1 February 2006 and reassigned the complainant to the new post of Chief of IAS.

The Tribunal considered that the Executive Council resolution of June 2005 could not be construed as authorising the abolition of the IAIS, the existence of which was mandated by the Financial Regulations. The whole tenor of those Regulations was not only that the Secretary-General should establish the IAIS but also that he should maintain it until it was lawfully decided otherwise. Accordingly, any restructuring involving the abolition of the IAIS was contrary to the WMO Financial Regulations, as they stood until January 2008, and was until then beyond the power of the Secretary-General. Thus, the Secretary-General had acted without authority in abolishing IAIS and replacing it with IOO on 1 February 2006, and, inextricably, the reassignment of the Complainant from the same date had been likewise an act done without lawful authority.

Notwithstanding the Executive Council's subsequent confirmation of the Secretary-General's action, the Joint Appeals Board erred in holding that the Complainant's reassignment had been taken with lawful authority. The Secretary-General's decision dismissing the Complainant's internal appeal was therefore set aside. However, this did not, according to the Tribunal, mean that the Complainant should be reinstated in her former post, as

it had lawfully been abolished when the Financial Regulations were amended with effect from 1 January 2008.

The Tribunal subsequently turned to the claim made by the Defendant, referring to a number of press articles and television broadcasts, and legal proceedings initiated by the Complainant in national jurisdictions, that the complaint be dismissed as an abuse of process. The Tribunal found that, whatever the motives of the Complainant, she had a good cause of action and was entitled to have the matter determined. The Tribunal likewise rejected the argument made by the Defendant that the Complainant was estopped from bringing the present complaint, as she could not possibly be seen to have acquiesced in the abolition of her post as Chief of IAIS in applying to the D-1 post, the bare minimum necessary for an argument based on an estoppel.

The Tribunal concluded that the Complainant was entitled to substantial damages in consequence of the unlawful decision to reassign her to the post of Chief of IAS, which significantly diminished her duties, responsibilities and status, necessarily resulting in harm to her professional reputation. She had been put in a position where she could do nothing to prevent or correct what she had rightly perceived as an unlawful decision. Further, it must have been tolerably clear to her after June 2006 that it was unlikely that her situation could or would be reversed. The Complainant was consequently awarded 50,000 CHF in material damages, 20,000 CHF in moral damages, and costs.

8. *Judgment No. 2757 (9 July 2008): C. P.* v. *the International Criminal Court (ICC)*[26]

Summary dismissal—Serious misconduct—Reasonable threshold for a *prima facie* case—Reasonable grounds for belief and erroneous belief—Sexual assault—Due process and impartiality—Falsity of a statement—Bad faith or malice—Legitimate purpose of an internal complaint—Legitimate interest in the protection of the standing of the organization

The Complainant was employed by the ICC in the Office of the Prosecutor from 6 June 2004 until 13 April 2007 when a decision by the Prosecutor to dismiss him took effect.

The decision to dismiss the Complainant summarily had its origins in a complaint filed by him with the Presidency of the Court on 20 October 2006, in which he alleged, *inter alia*, that the Prosecutor had:

> "committed serious misconduct, either in the course of his official duties, which is incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court; or of a grave nature outside the course of his official duties that causes or is likely to cause serious harm to the standing of the Court, by committing the crime of rape, or sexual assault, or sexual coercion, or sexual abuse against [a named individual] and that for this reason he should be removed from Office by the Assembly of States Parties."

The internal complaint was accompanied by an audio tape which included a record of a telephone conversation between the alleged victim of the Prosecutor's conduct and a colleague of the Complainant. The alleged victim sounded distressed and denied that she had been forced to have sexual intercourse but did not deny that she had consented in order

[26] Ms. Mary G. Gaudron, Vice-President; Ms. Dolores M. Hansen and Mr. Patrick Frydman, judges.

to regain possession of her keys. A panel of three ICC judges was appointed in accordance with regulations 120 of the Regulations of the Court in order to determine whether the complaint was manifestly unfounded. They established contact with the alleged victim and interviewed her and the Prosecutor separately. By memorandum of 8 December, the Presidency, acting on the unanimous recommendation of the panel of judges, informed the Complainant of its decision to set aside the complaint as manifestly unfounded. It later emerged that this finding had been based on "unambiguous denials of the allegation [. . .] both by the person [. . .] alleged to be the victim and the [P]rosecutor."

On 23 January 2007, the Complainant was suspended from duty pending enquiries into the charges brought against him by the Office of the Prosecutor. Later, the Complainant was informed by letter of 16 March 2007 that the Prosecutor was "contemplating the possibility of dismissing [him] summarily for serious misconduct" pursuant to rule 110.7 of the Staff Rules.

The dismissal became effective on 13 April 2007, when the Complainant received the letter dated 11 April 2007 by which the Chief of the Human Resources Section informed him of the Prosecutor's decision. The Complainant submitted on 1 May 2007 a request for review of summary dismissal to the Disciplinary Advisory Board pursuant to staff rule 110.2 (c). On 18 June 2007, the Board issued a report in which it unanimously considered that the decision to summarily dismiss the Complainant was procedurally flawed. In the Board's view, the Prosecutor should not have participated personally in the decision-making process. By a letter dated 13 July 2007, the Prosecutor informed the Complainant that he had decided not to follow the Board's recommendation, and that he confirmed, by the same letter, his decision to dismiss him. This was the impugned decision.

The Tribunal considered that in the context of "serious misconduct," the question whether a statement was made falsely is not simply whether the statement is true or false. A statement made innocently, which turned out to be false, did not constitute serious misconduct. A statement was made innocently if the person concerned honestly believed on reasonable grounds that the statement was true. Conversely, for the purposes of serious misconduct, a statement was falsely made if it was both untrue and the person concerned did not believe on reasonable grounds that it was true. In the present case, there was nothing to suggest that the Complainant did not believe in the truth of what he wrote in his internal complaint. Thus, the only question was whether he had reasonable grounds for that belief.

The Tribunal added that, in determining whether a statement was objectively true or false, and when deciding whether the person who made the statement believed on reasonable grounds that it was true, the whole statement must be taken into account. The charge of serious misconduct was based on a single word in the internal complaint filed against the Prosecutor, namely, "rape." Doubtless, it was for this reason that the Disciplinary Advisory Board considered that the absence of confirmation by the alleged victim that force was used was vital to the question of reasonable belief. However, a proper reading of the internal complaint made it clear that there was no allegation of force. Rather, the allegation was that the alleged victim had consented to sexual intercourse in order to regain possession of her keys. Thus, for example, the Complainant stated that the alleged victim was "apparently under the erroneous belief" that, because there was no physical force, there was no rape or sexual assault. Moreover, the Tribunal observed that the Complainant did

not categorically assert that rape had occurred. Rather, he characterised the Prosecutor's alleged conduct as "rape, or sexual assault, or sexual coercion or sexual abuse" which, given differing national laws, is tolerably accurate. Under the circumstances, the Tribunal found that there was no basis for concluding that the Complainant did not believe on reasonable grounds the truth of what he had put in his internal complaint.

In response to the ICC consideration of what malice inferred, the Tribunal stated that malice is generally described either as the absence of good faith or as acting from improper motive. Frequently, the absence of a belief on reasonable grounds is sufficient to base an inference of malice. So, too, is the communication of information that is defamatory of a person to those who do not have a legitimate interest in obtaining that information. In this case, however, it was not established that the Complainant did not believe on reasonable grounds that what he had put in his internal complaint against the Prosecutor was true. In the absence of either of those considerations, it was necessary to point to some act or circumstance that positively indicated bad faith or improper purpose, such as personal animosity, revenge or the desire to obtain some personal or collateral advantage. The Tribunal specified that, as a finding of malice was a finding as to a state of mind or motive of the person whose conduct was in question, it was irrelevant that three judges and the President found the internal complaint against the Prosecutor to be "manifestly unfounded." According to the Tribunal, what was relevant was whether the person concerned believed on reasonable grounds that what he had said was true. The protection of the standing of the ICC and ensuring the observance of the law were legitimate purposes of an internal complaint, and it was therefore not relevant that the Complainant was neither the alleged victim nor her relative.

In response to the Complainant's argument that the decision to dismiss him summarily had been taken by way of reprisal for his lodging an internal complaint, the Tribunal considered that it was clear that the charge leading to the complainant's summary dismissal was made on the advice of an "external legal consultant," and that in these circumstances, it had not been established that that charge and the subsequent course of action constituted a form of reprisal.

With regard to the Complainant's argument that the Prosecutor should not have participated in the decision-making process in this case, the Tribunal recalled that it was a fundamental aspect of due process that a person should not take a decision in a matter in which he or she has a personal interest. The Prosecutor had a direct personal interest in establishing that the internal complaint against him had been made falsely and maliciously. The Tribunal had clarified that, in some circumstances, necessity will direct that a decision be taken by a person with a direct personal interest in the outcome. However, the fact that the Prosecutor had authority over the management and administration of the Office of the Prosecutor and was specifically empowered to dismiss staff members of the Office did not constitute necessity. As pointed out by the Disciplinary Advisory Board, he could have delegated that power in the present case.

As to other claims made by the Complainant with respect to due process, it was sufficient to state that there was no discernible error in the analysis of those arguments by the Board. The breach of due process that had occurred constituted a serious infringement of his rights and was compounded by the Prosecutor's action in maintaining his decision in the face of the internal memorandum from the Presidency indicating that there had been

no finding of bad faith or malice, and contrary to the recommendation of the Disciplinary Advisory Board.

For the above reasons, the Tribunal decided that the impugned decision must be set aside, as must the earlier decision to dismiss the Complainant summarily. The Tribunal further found that it was unnecessary to consider other issues raised by the Complainant, and that subject to the Complainant giving credit for any earnings from employment during the period, he was entitled to be paid his net base salary and post adjustment from 13 April until 30 June 2007, when his contract would otherwise have expired, plus repatriation grant and other benefits he would have received if his contract had then expired. All such sums should bear interest at the rate claimed by the Complainant, namely, 5 per cent per annum from due dates until the date of payment.

As the Complainant's summary dismissal for serious misconduct must inevitably have harmed his professional reputation and employment prospects, he was awarded material damages which the Tribunal set in an amount equivalent to two years' net base salary and allowances. The Tribunal furthermore decided to award the sum of 25,000 EUR for moral damages, and costs.

C. Decisions of the World Bank Administrative Tribunal[27]

1. *Decision No. 378 (18 March 2008): V.* v. *International Bank for Reconstruction and Development*[28]

Misconduct—Outside interests—Termination of employment—Discretion to reject tender of resignation—Inferences in the absence of direct evidence of wrongdoing—Proportionality of imposed disciplinary measure—Due process—Conduct of investigation

The Applicant joined the International Bank for Reconstruction and Development (the Bank) in October 1991 as a Financial Analyst in the Bank's Africa Region. On 11 September 2003, he was provided a Notice of Alleged Misconduct from the Director, Department of Institutional Integrity (INT), concerning substantial remuneration from a bank in Rwanda for services ostensibly rendered by a business entity owned by his wife while he was working for the Bank on projects in the country. The INT investigation began in 2003 and was completed in 2005, when its final report was sent to the Vice-President of Human Resources.

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[27] The World Bank Administrative Tribunal is competent to hear and pass judgment 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://lnweb90.worldbank.org/crn/wbt/wbtwebsite.nsf.

[28] Jan Paulsson, President; Stephen M. Schwebel and Francis M. Ssekandi, Judges.

The Vice-President for Human Resources concluded that there was substantial evidence in the report to show that the Applicant had engaged in the alleged misconduct, and subsequently terminated the Applicant's appointment on 21 September 2005 to be effective on 23 September. By letter of 21 September 2005, the Applicant also tendered his resignation to have immediate effect. The Bank refused to accept the Applicant's resignation in consideration that his contract had been terminated on grounds of misconduct. The Applicant thus sought to challenge the Bank's decision to reject his tendered resignation and its decision to terminate his employment for cause.

In particular, the Applicant challenged the INT Report which, he argued, had not been properly tested and thus could not constitute an adjudication of his guilt or innocence. The Applicant also challenged as arbitrary the decision to terminate his employment rather than to accept his resignation. Finally, the Applicant contended that termination was a disproportionate sanction, as his only proven offence was a failure to report to the Outside Interests Committee the contract for consulting services between his wife and the CEO of the bank in Rwanda.

The Tribunal considered that, while the Applicant bore no burden to prove his innocence, it was clear that the documentary evidence compiled by INT and the evidence provided by witnesses disproved his assertions that he was not guilty of misconduct. The Tribunal opined that evidence which, by unambiguous circumstances, reasonably leads to the conclusion of guilt was sometimes the best evidence available and was entitled to decisive weight. In this regard, the Tribunal considered that there was evidence from which the Bank could have reasonably drawn the inference that the Applicant had carried out concurrent outside employment while still a Bank official and had been paid for it. Accordingly, the Tribunal rejected the Applicant's contention that the Bank erred in finding him guilty of misconduct in the absence of direct evidence pointing to his receiving remuneration from the bank in Rwanda.

The Tribunal considered that the Applicant's knowing and intentional violation of the Bank's rules, and his attempt to conceal those violations, was a serious case of misconduct. Termination of employment in such a case could not be considered disproportionate. The Tribunal concluded that the Bank had every reason to reject the Applicant's attempts to resign to avoid the clear sanction befitting his misconduct.

Considering the Applicant's complaint that INT's investigatory process was flawed, the Tribunal confirmed that even where staff members were guilty of misconduct, and even though INT investigations were not to be equated with criminal investigations that could lead to penal sanctions, staff members were entitled to due process. The Tribunal observed that the concerns for due process at the investigatory stage related to the establishment of a fair and full record of facts, and to the conduct of the investigation in a fair and impartial manner. The Tribunal stated that those requirements did not necessarily demand conformity with all the requirements of judicial proceedings, and found that the value and weight of the testimony obtained by INT were not diminished solely because witnesses did not testify under oath and their testimonies were not transcribed verbatim.

The Tribunal addressed the Applicant's contention that he had not had the opportunity to discuss or even respond to the Bank's decision to choose termination rather than to accept his resignation, and that had only been allowed to comment on the INT report, but had not been able to participate in proceeding before a misconduct panel, as the pro-

cedure prescribes at the United Nations. The Tribunal was satisfied that the Staff Rules, which permitted staff members to make written and oral representations to the investigator, provided the opportunity to staff members to comment on the findings made in the Investigative Report and provided for such representations and comments to be appended thereto, had afforded the Applicant adequate protection and met the due process standard requirements. The Tribunal therefore found no basis for the Applicant's complaints that his rights of due process had been violated and that the final decision had been arbitrary.

Finally, the Tribunal considered the Applicant's challenge to the Bank's decision to restrict his access to the Bank's premises. The Tribunal was not persuaded by the Applicant's claims that he had a right, like "any other citizen," to have access to the Bank's premises without limitation. The Tribunal affirmed that it was a reasonable exercise of discretion, in circumstances such as those of the case at hand, to deny or restrict access of a staff member to the Bank's buildings or to a specific office.

For such reasons, the Tribunal dismissed the application.

2. *Decision No. 379 (18 March 2008): L. (No. 2)* v. *International Bank for Reconstruction and Development*[29]

Jurisdictional objection—Due process in misconduct investigatons—Due process—General scope of review by the Tribunal in disciplinary cases

The Applicant was a staff member of the International Bank for Reconstruction and Development ("the Bank") from 1988 to 2005. The Bank's Department of Institutional Integrity (INT) conducted two investigations into the Applicant's alleged misconduct during his tenure at the Bank. The two investigations lasted from 2005 to 2007 and resulted in two decisions of January 2007 and 17 April 2007 respectively, finding that the Applicant had engaged in misconduct and permanently barring him from future Bank employment and from access to Bank premises.

Over the course of the INT investigations, the press and media had published articles mentioning the Applicant's name in reference to the ongoing investigations. The Applicant claimed that he had asked the Bank at least seven times to investigate the source of the leaks to the news sources. He asserted that his requests had been ignored by INT; that the Bank thus had failed to protect his rights to privacy and confidentiality; and that in so failing it had violated his due process rights.

Following the disciplinary hearings against him, the Applicant sought the Bank's consent to file an application directly with the Tribunal pursuant to article II, paragraph 2, of the Statute of the Tribunal. The Bank agreed to his request but stated that its agreement was limited to the misconduct decisions only and did not include any other allegations that could be made by the Applicant. The Applicant accordingly filed his application with the Tribunal challenging the two misconduct decisions, including the Bank's alleged failure to protect his confidential personnel information and due process rights.

The Bank brought a jurisdictional objection to the Applicant's challenge on grounds that the application raised two additional claims, namely that the Bank had breached the confidentiality of his personnel information by disclosing such information to the media

[29] Jan Paulsson, President; Stephen M. Schwebel and Francis M. Ssekandi, Judges.

and press, and that INT failed to investigate these disclosures. The Bank argued that the Applicant had not requested the Bank to allow him to proceed directly to the Tribunal, nor had he exhausted internal remedies with regard to those two claims. It argued that the Applicant could not bring his untimely claims before the Tribunal through the back door by labelling them as "due process" claims and connecting them to his challenge of the misconduct findings and disciplinary measures, and that they were separate claims from those concerning the decisions on misconduct.

The Tribunal recalled that in accordance with its jurisprudence, articulated in *Cissé*, Decision No. 242 [2001], the scope of review in disciplinary cases was broader than with respect to decisions of a purely managerial or organizational nature. The Tribunal thus found that it had jurisdiction over the breach of confidentiality claim and could examine on the merits whether the Bank indeed had violated the Complainant's due process rights in this respect.

The Tribunal thus concluded that it would examine the alleged breach of confidentiality only in the context of the Applicant's due process claim. The Tribunal stressed, however, that it was not permitting the Applicant to "tack" separate, old and time-barred claims onto timely claims before the Tribunal.

For such reasons, the Tribunal rejected the Bank's jurisdictional objection.

3. *Decision No. 380 (18 March 2008): Z.* v. *International Bank for Reconstruction and Development*[30]

Termination of employment due to fraud—Necessity to show from the facts and circumstances that the Applicant had the requisite intent—Duty of investigators to seek both inculpatory and exculpatory evidence—Misconduct

The Applicant joined the International Bank for Reconstruction and Development (the Bank) General Services Department (GSD) as a temporary employee in 1998. She received an open-ended appointment in 2001, and in July 2004 she was promoted to the position of Contract Coordinator at Level E. In 2005, a Senior Auditor of the Bank conducted an audit of the Bank Purchasing Card (PCard) usage in GSD. The PCard was designed for payment of business expenses, not for travel or training costs. Business expenses charged to the PCard were paid directly by the Bank through the PCard program, whereas staff member's official travel expenses were paid either with a personal credit card or Bank-issued Diners Club card, and then reimbursed by the Bank through a Statement of Expenses (SOE). The Senior Auditor found two travel-related expenses charged to the Applicant's PCard in 2004 which had been paid by the Bank directly and for which she nevertheless also had submitted SOEs for reimbursement.

The Department of Institutional Integrity (INT) initiated a preliminary inquiry in June 2005, and determined that the Applicant had submitted SOEs for the amount of $333.08 after she had charged them to her PCard. On 19 July 2005, Human Resources sent the Applicant a letter in which it offered her the option to resign with a bar to re-hire, rather than that INT conduct a formal investigation. The Applicant declined that offer, and the INT commenced a formal investigation. On 21 September 2005, the INT presented her with a formal notice of alleged misconduct. On the same day, the Applicant explained in an

[30] Jan Paulsson, President; Stephen M. Schwebel and Francis M. Ssekandi, Judges.

interview that she had mistaken the PCard for her personal visa card, and that she in both instances had believed that she had paid with her personal credit card. The INT submitted its final report to the Vice President of Human Resources on 11 April 2006. In a letter dated 27 June 2006, the Vice President informed the Applicant that her appointment would be terminated, as she willingly had defrauded the Bank. The Applicant challenged that decision on 8 September 2006 before the Appeals Committee, which in its report of 25 April 2007 concluded that the Applicant's claims should be dismissed. The Managing Director of the Bank accepted this recommendation. This is the impugned decision.

The Tribunal recalled United Nation Administrative Tribunal Judgment No. 1244 (2005), and considered that, in deciding whether a staff member is guilty of fraud, a determination of intent must be made, and that it was intent that separates mistake from fraud, the accidental from the purposive. It noted that it was necessary to first determine whether the Bank had properly established that the Applicant had intended to defraud the Bank. On this basis, the Tribunal found that intent to defraud cannot be automatically inferred simply because some documentary evidence contradicts the accused staff member's version of events. A fuller examination of the facts and circumstances of the case must precede a determination about the presence of intent to defraud.

The Tribunal stated that, although it was convinced that the Applicant's conduct constituted misconduct, it had to consider with great care the issue whether the documentary evidence presented by the Bank was so decisive that it must conclude that she had the intent to defraud. Fraud is never presumed. The Tribunal stated that INT had to show from the facts and circumstances of the case that the Applicant had the requisite intent. The Tribunal thus turned to consider whether in determining the question of intent to defraud INT had been diligent in seeking both culpatory and exculpatory evidence in giving them proper weight.

In this regard, the Tribunal considered that the INT Report and the testimony of the Vice President for Human Resources did not suggest a careful examination of the question whether the Applicant's mistakes were so unusual that they compelled findings of knowledge and deliberation. The Tribunal observed that a thorough investigation alert to inculpatory as well as exculpatory factors might have noted this relevant factor and would have given it proper weight.

Furthermore, in considering whether INT failed to give proper weight to some exculpatory factors, the Tribunal opined that the existence of a pattern is an important factor (if not always essential) in determining intent to defraud. An isolated act is more plausibly fraudulent if it concerns substantial amounts. But, even with small amounts, where the staff member persisted in and showed a pattern of abuse, the Respondent is entitled to take a serious view of the staff member's misconduct. In cases where intent to defraud is not so evident, it is relevant to ask whether the acts are repetitive. The Tribunal considered that INT appeared to have given insufficient weight to this exculpatory evidence.

The Tribunal considered that INT should have sought other evidence so as to assess the Applicant's reputation for truth and integrity in transactional dealings in the Bank. The testimony of the Applicant's co-workers, particularly her managers, would have been useful in this respect. In this regard, the Tribunal noted that there must certainly be cases where the documentary evidence is so compelling that interviewing other individuals would be unnecessary, but this case required a determination as to intent to defraud if

mandatory termination was to be justified. Thus, the Tribunal considered that documentary evidence had to be compelling with respect to the Applicant's intent, and did not find the documentary evidence before it decisive to such a degree.

The Tribunal also considered the inability of the Vice President for Human Resources' to satisfactorily distinguish between the facts of the present case and those of a precedent in which it had been decided that the intent to defraud was unsatisfactory.

Considering all the circumstances, the Tribunal ruled that the record did not contain sufficient evidence to conclude that the Applicant had had intent to defraud, and consequently set aside the decision that the Applicant had committed fraud.

For such reasons the Tribunal ordered that the decision to terminate the Applicant's employment be rescinded, but noted that the Bank could, however, impose other disciplinary measures against the Applicant.

4. *Decision No. 384 (18 July 2008) A. A.* v. *International Bank for Reconstruction and Development*[31]

External service of staff to resolve potential conflict of interest—Interpretation of agreement between the Bank and the Applicant—*Contra proferentem* rule not to be applied to the present case—Applicant's secondment to other institutions was clearly and essentially contingent upon the tenure of the Bank's President—Duty of the Bank to establish appropriate safeguards to ensure that confidential personnel information pertaining to a staff member remained confidential

The Applicant joined the International Bank for Reconstruction and Development ("the Bank") in 1997 and was assigned to the Middle East & North Africa Region ("MNA"). After a number of promotions, she served as Acting Manager, External Relations and Outreach, MNA from 2002 to 2005.

In June 2005, a new President joined the Bank. Before assuming his functions, he made disclosure of a personal relationship with the Applicant. This circumstance created a potential conflict of interest under the Bank's rules, and was referred to the Ethics Committee of the Board of Executive Directors. The Ethics Committee decided that the best way to resolve the conflict of interest would be to place the Applicant on external service with pay ("external service"). The Ethics Committee concluded that the potential disruption to the Applicant's career should be taken into account, and raised the possibility of granting her a promotion to level H upon the commencement of her external service, since she would need to withdraw as a candidate for a level H position for which she had applied.

On 1 September 2006, the Applicant and the Vice President of Human Resources signed an agreement defining the terms of her external service. The Applicant was initially assigned to the U.S. Department of State to give effect to her external service. After one month, however, the Chairman of a newly founded foundation (the Foundation) wrote to an advisor to the Bank's President requesting the transfer of the Applicant from the State Department to the Foundation subject to the same arrangement agreed with the State

[31] Mr. Jan Paulsson, President; Mr. Francisco Orrego Vicuña, Ms. Sarah Christie, Mr. Stephen M. Schwebel and Mr. Francis M. Ssekandi, Judges.

Department. In the meantime, the terms of the Applicant's external service were leaked to the media, creating a controversy. In May 2007, the President announced that he would resign effective 30 June 2007.

Following the President's resignation, the Bank wrote to the Applicant explaining that the reasons for her external service had come to an end, and, after consulting the Foundation, informed the Applicant that her external service would end on 31 December 2007. The Applicant presented a claim to the Tribunal on the basis that the Bank had breached the contractual agreement of 1 September 2006, and that it had failed to safeguard her personnel data and protect her reputation, thereby causing her humiliation and harm.

Commencing its analysis of the agreement of 1 September 2006, the Tribunal observed that it had been an unprecedented solution to avoid a conflict of interest stemming from the Applicant's personal relationship with the President of the Bank, and that the external service had been contemplated for a five-year period, with a possibility of a five-year extension. The Tribunal further observed that the text of the agreement had been inadequately drafted. Considering its context and the fact that both parties had more than adequate opportunity to seek advice (and obvious reason to do so given the sensitivity of the matter), the Tribunal decided to not apply the *contra proferentem* rule against the Bank on the grounds that it drafted the agreement. Instead, the Tribunal applied that rule in its at least equally legitimate sense to the effect that ambiguities were resolved, if necessary, against the party seeking to rely on the text.

The Applicant sought to rely on the final paragraph of the agreement, which provided that its "terms and conditions" would endure "regardless of changes in the management or staff at the Bank." The Tribunal was, however, unable to accept her argument that this included also the resignation of the President on 30 June 2007.

The Tribunal noted that the arrangements between the Bank and the Applicant thus created considerable ambiguity. However, considering the terms and the context of the Letter of Agreement and all the circumstances of which it is aware, the Tribunal did not find the termination of external service to be unlawful or unreasonable. Her secondment to other institutions was clearly and essentially contingent upon the tenure of the Bank's President.

The Tribunal rejected the Applicant's claims that she would return to a hostile working environment, and that the Bank had failed to give her a position that would make full use of her professional qualifications.

With regard to the Applicant's argument that the Bank was liable for the action of the staff member who had disclosed her personnel information, the Tribunal emphasized that the Bank must establish and maintain appropriate safeguards to ensure that confidential personnel information pertaining to a staff member remained confidential, and to take reasonable remedial action in the event confidentiality is breached. In the present case, the disclosure of the personnel information was not in any manner approved or condoned by the Bank's management, nor had the Applicant identified safeguards which the management neglected. The Tribunal noted that neither the Applicant nor the Bank could identify the individual who leaked the information. In response to the disclosure, the Bank had examined whether it was possible to identify the source of the leak, and explained that there were at least 88 individuals who, in the normal course of their duties, could have accessed the Applicant's personnel data, but had not been able to single out anyone. The

Bank could, according to the Tribunal, thus not be made liable for its inability to take action against the individual who had disclosed the information.

In conclusion, the Tribunal found no wrongdoing on part of the Bank.

D. Decisions of the Administrative Tribunal of the International Monetary Fund[32]

Judgment No. 2008–1 (January 7, 2008): Mr. M. D'A. (No. 3), Applicant v. *International Monetary Fund, Respondent*

Candidacy for election to the governing board of the Staff Association—Transfer to a different post in same department at the same salary and grade level in case of election—Conflict of interest—Right to association—Alleged intimidation and harassment—Right of the staff to be represented by elected representatives rather than right of each staff member to represent the staff—Recognized discretionary authority to determine on a case-by-case basis the risk of conflict of interest—Abuse of discretionary authority—Requirement to weigh carefully any potential incompatibility between job functions

The Applicant was a staff member who served in the Compensation and Benefits Policy Division of the Human Resources Department (HRD). On 12 January 2006, the Senior Personnel Manager (SPM) of the Human Resources Department circulated to all staff members within the Department an email notification advising that, because they were engaged in advisory and policy work on staffing and organizational issues and/or had access to privileged knowledge and information in these areas, running for election to the Staff Association Committee (SAC) was considered a conflict of interest and consequently not permitted for HRD staff. On the following day, the roster of candidates to the SAC was announced, among which was the Applicant's name. On 17 January 2007, the Division Chief told the Applicant that he was not barred from running for the SAC, but that because in his view the Applicant's functions involved matters that were the subject of consultation between SAC and HRD, his election would pose a conflict of interest. Accordingly, Applicant was informed that in the event that he were elected, he would be reassigned to another position within HRD that would not pose a conflict of interest.

The SAC election took place as scheduled on 25 and 26 January 2006. As the Applicant was not elected, no further action was taken in respect of his candidacy or his job assignment.

With regard to the admissibility of the claim, the Tribunal considered whether the Applicant could be considered to have been "adversely affected" by the administrative action of the Fund, and whether he challenged a "regulatory decision." The Tribunal found

[32] 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/index.htm.

that the Applicant's challenge was not a hypothetical one, nor did the Applicant seek merely an advisory opinion. Rather, he sought damages for a decision that in his view unfairly put him to a choice between his job assignment and the opportunity to serve in a representative role with the Staff Association, a decision that he alleged wrongfully infringed upon his right to association. The Tribunal recalled that a regulatory decision was defined as "any rule concerning the terms and conditions of staff employment, including the General Administrative Orders and the Staff Retirement Plan, but excluding any resolutions adopted by the Board of Governors of the Fund" (Statute, article II, 2.b). The Tribunal found that it did not have to decide on whether the decision was regulatory, as it had already concluded that it had adversely affected the Applicant. The decision was therefore subject to review by the Tribunal.

The Tribunal recalled that the right of staff members to associate for the presentation of their views to Fund management is set out in rule N-14 of the Fund's Rules and Regulations. The Tribunal noted that the Staff Association's "primary purpose is to act as representative of staff (vs. management) interests." (quoting Mr. "V," Applicant *v.* International Monetary Fund, Respondent, IMFAT Judgment No. 1999–2 (August 13, 1999), para. 113.) In the view of the Tribunal, the Rule referred to the right of the staff to be represented by elected representatives rather than to a right of each staff member to represent the staff by serving as a member of the Staff Association's governing board. That interpretation was consistent both with the text of the rule and with the concept underlying the right to association, which looked to the channelling of staff interests through representatives for the mutual benefit of individual staff members and for the orderly presentation of views to the organization.

The Tribunal next addressed the question of whether the Fund had abused its discretion in applying the general principle of avoiding a conflict. The Tribunal cautioned that the significance of the right to association, which underlies the language of rule N-14, required that the Fund weigh carefully any potential incompatibility between job functions and service as a SAC official so as not to restrict unduly the right to association. While it was within management's discretionary authority to transfer staff members, that authority, explained the Tribunal, was subject to review for abuse of discretion, for example, as being improperly motivated or discriminating impermissibly among staff members or, as alleged by the Applicant, for contravening a staff member's right to association. The Tribunal emphasized that whether or not the right to association, which has been given expression in the Fund's internal law through rule N-14, was regarded as a 'fundamental human right,' it was indisputably a right, like the right to non-discrimination, that imposed a substantive limit on the exercise of the Fund's discretionary authority.

After reviewing the jurisprudence of other international administrative tribunals, the Tribunal concluded that the Fund had preserved the staff member's right to serve in a representative capacity by transferring him to a post not presenting a conflict of interest to a SAC official. Any possible adverse consequence to his career was outweighed by the principle of protecting against conflict of interest, an objective that serves both staff and management interests. The Tribunal additionally noted that the Fund had stated that the transfer would have been only for the duration of Applicant's tenure on the SAC and would not have involved any diminution in salary or grade level. The Tribunal concluded that such a practice, in general terms, cannot be said to violate the right to association.

The Tribunal weighed whether the discretion at issue was reasonably exercised in the Applicant's case. The Applicant did not dispute that his job responsibilities in HRD at the time that he sought election to the SAC involved matters relating to the Employment, Compensation and Benefits Review. The prominent role played by the SAC in the consultative process relating to those issues, resulting in revision by the Executive Board of the system of staff compensation, had been recognized in the Tribunal's Judgment in Daseking-Frank *et al.*, Applicants *v.* International Monetary Fund, Respondent, IMFAT Judgment No. 2007–1 (January 24, 2007).

The Tribunal concluded that the Fund had not abused its discretion in taking the said measures in respect of the Applicant, a staff member whose job functions may reasonably be said to have presented a conflict of interest with membership on the governing board of the Staff Association. At the same time, the Tribunal cautioned that in order to protect the right to association embodied in the Fund's internal law, such measures must be supported by evidence and be narrowly tailored to serve the objective of protecting against conflict of interest. The Tribunal was unable to find that the Fund's decision was either improperly motivated or discriminated impermissibly among members of the staff. The Applicant's claims that the Fund's actions had constituted harassment and intimidation were similarly rejected.