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UNITED NATIONS JURIDICAL YEARBOOK

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

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Chapter V

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

A. United Nations Dispute Tribunal

By resolution 61/261 of 4 April 2007, entitled "Administration of Justice at the United Nations", the General Assembly agreed that the new formal system of administration of justice should comprise two tiers, consisting of a first instance, the United Nations Dispute Tribunal, and an appellate instance, the United Nations Appeals Tribunal, rendering binding decisions and ordering appropriate remedies. It further decided that a decentralized United Nations Dispute Tribunal shall replace existing advisory bodies within the current system of administration of justice, including the joint appeals boards, joint disciplinary committees and other bodies as appropriate.

By resolution 62/228 of 22 December 2007, entitled "Administration of Justice at the United Nations", the General Assembly decided to establish a two-tier formal system of administration of justice, comprising a first instance, the United Nations Dispute Tribunal and an appellate instance, the United Nations Appeals Tribunal. It further decided that the United Nations Dispute Tribunal initially should be composed of three full-time judges, to be located in New York, Geneva and Nairobi, and two half-time judges.

By resolution 63/253 of 24 December 2008, entitled "Administration of Justice at the United Nations", the General Assembly adopted the statutes of the United Nations Dispute Tribunal and United Nations Appeals Tribunal. It also decided that the United Nations Dispute Tribunal and the United Nations Appeals Tribunal shall be operational as of 1 July 2009, and it abolished, as of the same date, the joint appeals boards, the joint disciplinary

[1] In view of the large number of judgments which were rendered in 2010 by the administrative tribunals of the United Nations and related intergovernmental organizations, only those judgments 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 judgments rendered by the tribunals, namely, Judgments Nos. UNDT/2010/1 to UNDT/2010/218 of the United Nations Dispute Tribunal, Judgments Nos. UNAT/2010/1 to UNAT/2010/100 of the United Nations Appeals Tribunal, Judgments Nos. 2862 to 2953 of the Administrative Tribunal of the International Labour Organization, Decisions Nos. 427 to 446 of the World Bank Administrative Tribunal, and Judgment Nos. 2010–1 to 2010–4 of the International Monetary Fund Administrative Tribunal, see, respectively, documents UNDT/2010/1 to UNDT/2010/218; UNAT/2010/1 to UNAT/2010/100 ; *Judgments of the Administrative Tribunal of the International Labour Organization: 108th and 109th Sessions; World Bank Administrative Tribunal Reports, 2010; and International Monetary Fund Administrative Tribunal Reports, Judgment No. 2010–1 to 2010–4.*

committees and the disciplinary committees of the separately administered funds and programmes.

By resolution 64/119 of 6 December 2009, the General Assembly approved the rules of procedure of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, as established by the respective Tribunals on 26 June 2009.

In 2010, the United Nations Dispute Tribunal in New York, Geneva and Nairobi issued a total of 218 judgments. A selection of 11 judgments is printed below.

1. *Judgment No. UNDT/2010/019 (29 January 2010): Samardzic* et al. v. *Secretary-General of the United Nations*[2]

Binding nature of time limits for contesting administrative decisions—Exceptions to the prescribed time limits—"Exceptional cases" foreseen in article 8.3 of the United Nations Dispute Tribunal (UNDT) Statute—Personal circumstances—Ignorance of the time limits

The Applicants entered the service of the United Nations between May 1992 and July 2002, as local staff members in various parts of the former Yugoslavia. The Applicants held fixed-term appointments, which were continuously renewed for periods ranging from three months to one year. Each time their appointments were extended, they signed new letters of appointment, which specified their acceptance to the conditions laid down in the Staff Regulations and in the Staff Rules. By letters dated 8 April 2009, the Applicants were informed that the Secretary-General had decided to terminate, with effect from 10 April 2009, their fixed-term term appointments, which were due to expire on 30 April 2009, in accordance with staff regulation 9.1.

The Applicants sent a joint request for administrative review dated 21 July 2009 to the Assistant Secretary-General for Human Resources Management and a request for management evaluation dated 15 September 2009 to the Secretary-General. By letter dated 6 November 2009, the Management Evaluation Unit of the United Nations Secretariat informed the Applicants that their requests were not receivable because the time limit for their filing had expired. On 29 November 2009, the Applicants filed an application before the Tribunal, to appeal the decision dated 8 April 2009 to terminate their fixed-term term appointments.

The Applicants contended that they had not been aware of the time limits for requesting administrative review of the contested decision and that they had never received any termination notice telling them that they had two months to appeal from the date of the receipt. The Respondent moved the Tribunal to make a "preliminary determination" into the issue of receivability of the applications.

On 14 January 2010, the Tribunal determined that summary judgment was appropriate since the crucial question in this case, whether the applications were time-barred, was not a matter of fact but a matter of law. In its judgment on the merits, the Tribunal explained that time limits for contesting administrative decisions are well known and widespread instruments imposed by the legislator in order to ensure the stability of a legal situation resulting from an administrative decision. This concern for stability explained

[2] Judge Thomas Laker (Geneva).

why, in administrative law, time limits for contesting such decision are, on the one hand, fairly short and, on the other hand, applied with rigour. The Tribunal observed that the time limits in the United Nations justice system are neither unique nor exceptionally restrictive. Sixty calendar days to request administrative review and 90 calendar days to file an appeal before the Tribunal remained within a reasonable frame. With regard to the contested decisions dated 8 April 2009, the Tribunal noted that the two-month time limit specified in staff rule 11.2 (a) had ended in June 2009.

The Tribunal then noted that, pursuant to the article 8, paragraph 3, of the United Nations Dispute Tribunal (UNDT) Statute, the Tribunal may suspend or waive the deadlines to file an application only in "exceptional cases", which, as specified in article 7, paragraph 5, of the rules of procedure of the Tribunal, are justified by "exceptional circumstances". The Tribunal observed that exceptions to the prescribed time limits must be related to the individual conditions and circumstances of the person seeking legal remedy, not to the characteristics of the applications. Factors like the prospects of success on the merits and the importance of the case were extraneous to the requirement to submit an application within the prescribed time limits. As the former United Nations Administrative Tribunal had argued in Judgement No. 372, *Kayigamba* (1986), Judgement No. 913, *Midaya* (1999) and Judgement No. 1054, *Obuyu* (2002), exceptional cases arise from exceptional personal circumstances, which are those circumstances "beyond the control of the Appellant". The Tribunal further specified that since it was the Applicant's interest to obtain a suspension, waiver or extension of time limits, the burden of proof to show "exceptional circumstances" was on the Applicant.

In the present case, the Tribunal found that the Applicants' ignorance of the time limits did not constitute an "exceptional circumstance". It found that the Applicants, by signing their letters of appointment, had certified that they had been made acquainted with the Staff Regulations and Rules and, in addition, that a copy of the Regulations and Rules had been transmitted to them with the letter of appointment.

For these reasons, the Tribunal rejected the applications.

2. *Judgment No. UNDT/2010/044 (19 March 2010): D'Hooge* v. *Secretary-General of the United Nations*[3]

Termination of contract—Special leave with full pay—Due process in preliminary investigations and administrative review—Good faith and fair dealing—Misrepresentation of facts does not render an employment contract void—The Organization can only end an employment contract through the procedures for termination and dismissal—Delegation—Authority to terminate a contract resides solely with the Secretary-General—"Highest standards of integrity" and "efficiency" inadequate test for termination—Relationship between misconduct procedures and termination—Misconduct involves moral turpitude and requires application of provisions on disciplinary measures

In August 2005, the Applicant applied for a vacancy in the Department of Safety and Security (DSS) through the United Nations Galaxy system. His personal history profile (PHP) did not mention that the Applicant had served at the International Criminal Tribu-

[3] Judge Adams (New York).

nal for the former Yugoslavia (ICTY) from September 1995 to November 1997, where he had been reprimanded in writing for "insubordination" and a "serious error of judgment". Additionally the University Degree window of the PHP contained a reference to the Applicant's Police Diploma, which was not, in fact, a university degree.

The Applicant was selected for the post and entered service on 7 January 2007. His letter of appointment specified that the appointment was offered on the basis of his certification of the accuracy of the information provided by him on the PHP. On 6 September 2007, the Office of the Under-Secretary-General, DSS (USG/DSS), received an anonymous letter alleging that the Applicant had misrepresented his education qualifications and his prior employment history when applying for a position in DSS. Subsequently, the USG/DSS directed the Internal Affairs Unit (IAU) of DSS to conduct a preliminary investigation. On 14 September 2007, the Applicant was notified in writing by the Officer-in-Charge (OIC) of the Office of Human Resources Management (OHRM) that he was being placed on special leave with full pay pending the outcome of the investigation. The IAU interviewed the Applicant in October 2007 and January 2008 and submitted its report on 20 February 2008. On 28 April 2008, the Applicant's employment was terminated on the authority of the Assistant Secretary-General, OHRM (ASG/ORHM), based on articles 9.1(b) and 9.1(a) (ii) of the Staff Regulations then in effect, which specified that the Secretary-General could terminate the appointment of a staff member "[i]f facts anterior to the appointment of the staff member . . . had [they] been known at the time of his or her appointment, should . . . have precluded his or her appointment".

On 14 May 2008, the Applicant requested an administrative review of the decision to terminate his appointment. Despite several requests, the Applicant was not given a copy of the investigation report until after the decision to terminate the Applicant was confirmed by letter from OHRM dated 21 June 2008. Subsequently, the Applicant filed his case with the Tribunal, arguing that his due process rights had been violated and that the ASG/OHRM did not have the delegated authority to terminate his appointment or to place him on special leave, but that such authority was solely with the Secretary-General.

In considering the due process rights of the Applicant, the Tribunal noted that the right to due process and the corresponding obligation of the Administration are based upon the contractual requirements of good faith and fair dealing. When allegations are made against a staff member, due administration requires that any resulting decision must be based upon an adequate inquiry. According to the Tribunal, this involves seeking information from the staff member both as to the allegations and the findings or recommendations affecting him or her. In the present case, the Tribunal found that Applicant's due process rights had been disregarded during the preliminary investigation and in the administrative review. The Applicant should have been provided with an opportunity to respond to any adverse findings of fact and recommendations, before the decision to terminate his appointment was made. Without the report, the Applicant was at an insuperable and unfair disadvantage in his ability to criticize its findings and justify his claim for review. Consequently, the Tribunal found that the Administration had failed to undertake a genuine review in accordance with the requirements of former rule 111.2(a) and with the obligations of good faith towards the Applicant. Furthermore, the Tribunal found that the Administration had failed to apply the facts alleged in the notification of termination to the grounds for termination specified in regulation 9.1.

With regard to the termination, the Secretary-General argued that where a staff member procured an appointment by misrepresentation, the appointment would be considered void from the outset and could be cancelled independent of a termination pursuant to staff regulation 9.1(b). The Tribunal rejected this argument. It noted, primarily relying on common law principles but not excluding the relevance of civil law notions, that misrepresentations as to material fact would almost invariably render the contract voidable but not void, especially, as in the present case, where the contract had been partly performed in accordance with its terms and the parties could not be returned to their original positions. The Tribunal did not accept the allegation by the Secretary-General that the misrepresentations were fraudulent and that the Applicant had deliberately concealed matters that he knew to be relevant for the purpose of obtaining the appointment. Accordingly, the Tribunal determined that the making of misrepresentations did not permit the Respondent to depart from the established procedures of termination and dismissal. The Tribunal concluded that the regulations and rules of the Organization did not leave open the possibility of ending a contract otherwise than under regulation 9.1, save by dismissal for misconduct pursuant to disciplinary proceedings.

In assessing the test for termination, the Tribunal observed the requirement that staff meet the highest standards of integrity and efficiency, as stated by the Article 101(3) of the Charter of the United Nations, was lacking in utility and could be impossible to applied meaningfully. In the present case, the Tribunal found no information as to how matters identified reflected on the Applicant's integrity, since no dishonesty was alleged or implied.

As to the authority to terminate the Applicant's contract, the Tribunal noted (and the Respondent later conceded) that the authority to terminate the Applicant's contract resided solely in the Secretary-General. The Tribunal highlighted that if a decision was made pursuant to a delegation, the decision-maker must state that it was so made and identify the person who gave the delegation. It emphasized that a decision that was made by a person authorized by the Staff Rules and Regulations, who was not the Secretary-General, was not made by the Secretary-General. Similarly, the Tribunal found that the decision to place the Applicant on special leave had not been made by the Secretary-General, in violation of staff rule 105.2.

The Tribunal then turned to analyze the relationship between misconduct proceedings and termination. It noted that in cases of misconduct, namely acts involving moral turpitude, disciplinary measures under chapter X had to be taken, rather than the termination procedures under regulation 9.1. However, the Tribunal questioned whether, in cases where the conduct relied on to terminate under regulation 9.1 also constituted misconduct, it was necessary to proceed under chapter X of the Staff Rules relating to disciplinary measures, which provided more safeguards to staff members than regulation 9.1. In the circumstances of the case, the Tribunal found no need to decide this point. It noted that ASG's decision not to proceed with the disciplinary process supported the conclusion that the termination here could not be legally justified on the grounds amounting to misconduct.

For these reasons, the Tribunal concluded that the Respondent failed to comply with the requirements of staff regulation 9.1 when terminating the Applicant's appointment, which was unlawful and in breach of his contract of employment. The placement of the

Applicant on special leave was also unlawful. The parties were ordered to file additional submissions on the scope of the compensation hearing.

3. *Judgment No. 052/2010 (31 March 2010): Lutta* v. *Secretary-General of the United Nations*[4]

Disciplinary measure—Initiation of disciplinary proceedings—Standard of evidence to satisfy that a report of misconduct is well founded—Reasonable suspicion standard—International norms of fairness in investigations—International standards determining "sobriety status"

On 11 November 2007, the Applicant had been involved in a major traffic accident in Abidjan, Côte d'Ivoire, while driving an official United Nations vehicle. The Special Investigation Unit (SIU) of the United Nations Operations in Côte d'Ivoire (UNOCI) conducted an investigation into this incident. In its report of 19 November 2007, SIU concluded that the Applicant had been operating the United Nations vehicle while under the influence of alcohol. The Applicant held that, as a diabetic, he was not drunk, but rather in shock.

On 29 November 2007, the Applicant's driving permit and privileges were suspended. Additionally, the Mission Administration deducted US$939.49 from his Mission Subsistence Allowance (MSA) for the damages caused to the United Nations vehicle. The Office of Human Resources Management (OHRM) decided to file charges against the Applicant and referred the case to a Joint Disciplinary Committee (JDC) for advice as to what disciplinary measures, if any, should be taken in connection with the case. On 16 June 2009, the JDC concluded there was no adequate evidence that the Applicant had been driving under the influence of alcohol and recommended that all charges against the Applicant be dropped. On 24 June 2009, the Secretary-General accepted the JDC's recommendation and decided not to take further action with respect to this matter.

On 24 September 2009 the Applicant filed an application with the Tribunal requesting (i) reimbursement of the amount deducted from his MSA; (ii) compensation for transportation allowance since he had been wrongfully deprived of the use of a United Nations vehicle and (iii) compensation for the impediment to his career advancement, as well as moral and professional damage.

The Tribunal first considered the process of initiating disciplinary proceedings. It noted that it is the responsibility of a head of office or a responsible officer to initiate a preliminary investigation where there is reason to believe that a staff member has engaged in unsatisfactory conduct. If the investigation appears to indicate that the report of misconduct is "well founded", the matter should be immediately reported to Assistant Secretary-General, OHRM (ASG/OHRM). The ASG/OHRM must then decide whether the matter should be pursued on the basis of the evidence presented. The Tribunal observed that the relevant officers and the ASG/OHRM are vested with a wide discretion that should be exercised judiciously. According to the Tribunal, they should apply a "reasonable suspicion standard", in line with the finding of the European Court of Human Rights that "having

[4] Judge Vinod Boolell (Nairobi).

reasonable suspicion presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence".[5]

The Tribunal then moved to analyze what the Respondent referred to as "internationally accepted standards for law enforcement agents to determine sobriety status". The Respondent had filed the Standard Operating Procedures of SIU (SOPs), which had been used by the investigators at the time of the preparation of the report as the basis for determining and/or observing indicia of alcohol. The Tribunal noted that pursuant to the SOPs, in cases of driving under the influence of alcohol a breath test and a blood test were to be carried out. In the Tribunal's view, in addition to a breathalyzer test, other tests such as a blood analysis test, urine analysis and overall behaviour could be utilized, provided that in the latter case those behaviours tested complied with international standards. In the present case, no doctor was called to examine the Applicant on his drunken condition, contrary to well-established practice of the United Nations. The Tribunal further noted that since the Applicant was under shock and was diabetic, it would have been appropriate to test his behaviour in the light of that health condition. Furthermore, the Tribunal observed that a smell of alcohol by itself cannot establish in an irrefutable way that a person is under the influence of alcohol. Finally, the Tribunal noted with concern that the investigators had allowed the Applicant to drive to the police station in spite of his alleged drunken condition. By their actions, the investigators acted in blatant breach of the SOPs and undermined their own impression that the Applicant was drunk.

For these reasons, the Tribunal determined that the Respondent failed to comply with the international standards for determining sobriety status. Further, the Tribunal found that the SIU investigation did not meet any of the well-recognized international norms of fairness in investigations, which require the gathering of all relevant facts whether incriminating or exculpatory. Finally, the Tribunal held that the Applicant was not responsible for causing the accident and that the disciplinary measures imposed were, therefore, unjustified and disproportionate.

The parties were directed to provide written submissions as to the appropriate relief that should be ordered.

4. *Judgment No. 057/2010 (7 April 2010): Ianelli* v. *Secretary-General of the United Nations*[6]

Claim for assignment and relocation expenses—Right to assignment and relocation grant depends on whether staff member is locally or internationally recruited and whether he is settled in the duty station—Different entitlements for contracts for less than a year

The Applicant was employed by the United Nations Office for Project Services (UNOPS) Middle East Office (MEO), in Dubai, as Head of Operations from October 2004, initially on the terms of a Special Services Agreement (SSA) and later on a Consultancy Agreement (CA). On 23 November 2007, the Applicant commenced a 100 series fixed-term appointment at the same duty station. His letter of appointment stated Dubai as the place

[5] *Fox, Campbell and Hartley* v. *United Kingdom, (1990) European Human Rights Reports*, vol. 13, p. 157, para. 32.

[6] Judge Nkemdilim Izuako (Nairobi).

of recruitment and Rome, Italy, as permanent residential address and as the place of home leave. According to UNOPS, the Applicant was not eligible to the assignment grant and other entitlements afforded to internationally recruited staff members under the former 100-series of the Staff Rules, based on his settled nature in the country of the post. Further, UNOPS stated that, since he was recruited from Dubai, the Applicant would not have been eligible for the entitlements if he had travelled back to his place of permanent residence, and from there back to Dubai, following the conclusion of his CA.

On 15 September 2008, the Applicant contested the UNOPS decision before the Joint Appeals Board (JAB). On 1 July 2009, his appeal was transferred to the Tribunal. The Applicant argued that he was entitled to the assignment and relocations grants afforded to internationally recruited staff. In reply, the Respondent submitted that the Applicant had been locally recruited and that he had "settled" at the duty station, since he had been living and working there since 2004.

In considering the assignment grant, the Tribunal noted that, in line with the provisions of administrative instruction ST/AI/2000/17 and staff rule 107.20, this entitlement ordinarily envisaged movement from one place to another, but may also be paid where no travel had been undertaken. In the Tribunal's view, only a resident national of the country in which the duty station is located, or a permanent resident of that country, can rightly be assumed to have established a household there and is thus not entitled to the grant.

Regarding the relocation grant, the Tribunal explained that such grant was designed to enable or assist a staff member to bear costs associated with the relocation of personal effects and household goods. It pointed out that the use of this grant is left entirely up to the discretion of the staff member, and the Organization required no proof on how the grant was utilized.

As to the question of who is entitled to these grants, the Tribunal first examined the definition of an "internationally recruited" staff member in accordance with the provision of staff rules 104.6, 104.7 and appendix B of the Staff Rules. In the Tribunal's view, one is appropriately considered internationally recruited unless one has taken up permanent residence status in the country of the duty station. The Tribunal observed that contracts for less than a year carried a different set of entitlements. However, it highlighted that when a staff member is recruited for a period of less than a year and the appointment is subsequently extended to one year or more at the same duty station, the staff member should receive the balance of what would have been paid had the initial appointment been for one year or longer.

Contrary to the Respondent's contention, the Tribunal found that the concept of being "settled" did not depend on how long a staff member had been in the country of his or her duty station. In the present case, the Tribunal noted that in spite of the fact that the Applicant had been in Dubai for a cumulative period of three years at the time of his appointment, it did not necessarily follow that he must have had a household there.

The Tribunal found that the Applicant satisfied the criteria for being internationally recruited and that he was therefore entitled to receive the assignment and relocation grants as per the provisions of staff rule 107.20 (i). Moreover, the Tribunal noted that the Applicant had been entitled to travel to Rome, Italy, at the end of the contract immediately preceding his fixed-term appointment at the expense of the Organization, since this would

have constituted appointment related travel. However, the trip to Rome would have made no difference to his entitlements on recruitment.

5. *Judgment No. UNDT/2010/085 (6 May 2010): Ishak* v. *Secretary-General of the United Nations*[7]

Preparatory decisions—Receivability—Definition of administrative decisions—Abuse of proceedings

The Applicant was a member of the Office of the United Nations High Commissioner for Refugees (UNHCR) since 1984. From August 1991 to October 1998 he served as Chairperson of the UNHCR Staff Council. Following a number of missions and assignments, the Applicant was again elected as Chairperson of the UNHCR Staff Council and was released from his duties from 15 June 2007 to 30 June 2008.

From 16 to 21 March 2009 the UNCHR annual promotions session for 2008 took place, but the Applicant was not among the persons promoted. On 16 June 2009, the Applicant submitted to the Secretary-General a request for review of certain decisions that allegedly prevented his being promoted. On the same day, the Applicant submitted to the Geneva Joint Appeals Board (JAB) a request for suspension of the decision to convene the 2008 recourse session on 22 June 2009. By decisions dated 22 June 2009 and 31 July 2009, the JAB and the Deputy High Commissioner (DHC), respectively, rejected the requests on the ground of inadmissibility *ratione materiae*, as the decisions in question were not considered "administrative decisions". The DHC further noted that in the interim, the Applicant had been promoted to P-5 level on 28 July 2009. After being granted an extension for submission, the Applicant submitted an application to the Tribunal contesting the JAB and the DHC decisions on 30 November 2009.

The Tribunal first ruled on the Applicant's request that his case be heard elsewhere than in Geneva. The request was based on allegations of bias and conduct detrimental to the Applicant made against the Geneva Registrar. The Tribunal rejected these allegations, since all of that officer's acts were carried out under the control and sole responsibility of the judge. The Tribunal noted that, while it is every staff member's right to submit applications, that right does not entail the right to include in submissions abusive or defamatory remarks about those whose work is to assist in the proper functioning of the Organization's internal justice system.

Turning to the question of receivability, the Tribunal referred to article 8.1(c) of the Statute of the United Nations Dispute Tribunal (UNDT) which provides that an application is only receivable if the contested administrative decision has previously been submitted for management evaluation. The Tribunal decided to take into account only the decisions contested in the applicant's request for review dated 16 June 2009 and declared irreceivable all the other petitions.

The Tribunal then considered whether the contested decisions were "administrative decisions" pursuant to article 2.1 of the UNDT Statute. The Tribunal referred to Judgment No. 1157 (*Andronov*, 2003) of the United Nations Administrative Tribunal, where an "administrative decision" was defined as "a unilateral decision taken by the adminis-

[7] Judge Jean-François Cousin (Geneva).

tration in a precise individual case, which produces direct legal consequences to the legal order". The Tribunal noted that the decisions at hand were all preparatory decisions connected with the promotions sessions and their legality could only be disputed in the light of the final decision as to a staff member's promotion, a decision within the competence of the High Commissioner. Such preparatory decisions were not in themselves capable of adversely affecting the Applicant's legal situation, since they modified neither the scope nor the extent of his rights.

Moreover, the Tribunal noted that even if the Applicant had only obtained a promotion to P-5 as a result of the recourse session, he had no further interest at the time when he submitted his application to the Tribunal in contesting a procedure that had led to his being promoted. In view of the foregoing, The Tribunal considered the application irreceivable. Thus, it decided there was no need to rule on any of the Applicant's other petitions in the present proceedings.

Finally, the Tribunal analyzed whether to grant the Respondent's request for costs pursuant to article 10.6 of the UNDT Statute. The Tribunal determined that in asking for the case to be heard elsewhere than at Geneva, the Applicant committed a manifest abuse of proceedings, the terms used to justify the request being "clearly outrageous". Furthermore, the Applicant had been promoted and therefore had no interest in contesting the procedure. The Tribunal ordered the Applicant to pay UNHCR costs in the amount of 2,000 Swiss francs (CHF) corresponding to part of the salaries paid to the UNHCR legal officers during the period devoted to responding to the abusive application. The Tribunal authorized UNHCR to deduct this sum directly from the Applicant's salary.

6. *Judgment No. UNDT/156/2010 (31 August 2010): Shkurtaj* v. *Secretary-General of the United Nations*[8]

Enforcement of ethics policy in case of protection for retaliation—Adequate and objective examination of complaint—Secretary-General's bulletins not applicable to separately administered organs and programmes unless otherwise stated—Due process rights—Investigative panel must make staff member aware of adverse findings and provide staff member with an opportunity to comment and explain—Compensation for breach of due process rights, damage to career, reputation and emotional distress

On January 2005, the Applicant joined the United Nations Development Programme (UNDP) country office in the Democratic People's Republic of Korea (DPRK) on a Special Services Agreement (SSA). In 2005 and 2006, the Applicant raised concerns and allegations with respect to some financial and administrative aspects of UNDP's operations in DPRK. On 5 June 2007, after the expiration of his last consultancy contract, the applicant contacted the Ethics Office, requesting protection from retaliation as a result of the concerns he had raised. Although the Ethics Office did not have jurisdiction to examine this case, the Director of the Ethics Office (DEO) reviewed the matter in August 2007 and found that there was a *prima facie* case of retaliation. In light of this finding, on 11 September 2007, UNDP announced the establishment of an *ad hoc* investigative body, the External Independent Investigative Review Panel (EIIRP), to examine the allegations con-

[8] Judge Memooda Ebrahim-Carstens (New York).

cerning the operations of the UNDP office in DPRK, including the Applicant's claims of retaliation. The EIIRP issued its final report on 31 May 2008, concluding that UNDP had not retaliated against the Applicant. It also noted that it had "serious reservations about [the Applicant's] credibility and trustworthiness", since the Applicant had not been able to provide promised documentary evidence to back up his allegations. The report was publicly released and made available on the website of the UNDP. On 27 June 2008, after reviewing the report, the DEO concurred with the EIIRP's findings and did not recommend any additional investigation. However, he did find that the Applicant had not been given a chance to reply to the adverse findings concerning his credibility and trustworthiness and recommended compensation.

On 26 November 2007, the Applicant submitted two statements of appeal with the Joint Appeals Board, against UNDP and the Secretary-General, in relation to the contested administrative decisions. On 5 December 2008, the JAB rejected the claims, finding that they were not receivable because the Applicant was not a staff member at the relevant time, but had instead been engaged as a consultant under an SSA. The Secretary-General decided to accept the findings and recommendations of the JAB. Shortly thereafter, by letter dated 29 January 2009, UNDP informed the Applicant that no further action would be taken in his case.

The Applicant filed two separate appeals with the Tribunal, contesting (i) the Respondent's refusal to subject the Applicant's request for protection from retaliation to review under the ethics policy as set out under ST/SGB/2005/21; and (ii) the decision of the Secretary-General not to implement the Ethics Office recommendation of compensation. The Tribunal decided to examine both matters jointly and to deal with them in one judgment.

The Tribunal first considered whether the Applicant had standing to file the applications. The Respondent submitted that the appeals were not receivable because the Applicant was not a staff member when he raised his allegations. The Tribunal pointed out that it could not be the case that the Applicant was a potential subject of retaliation during the periods of July 2005 to June 2006 and September 2006 to March 2007, when he was on an SSA, but somehow ceased to be such between June and September 2006, when he was a staff member on appointment of limited duration. Therefore, the Tribunal found that the Applicant had demonstrated a sufficient nexus between the time period he worked as a staff member, the allegations he raised with respect to the operations of the UNDP office in DPRK, and his allegations of retaliation to find his appeal receivable.

With regard to the ethics policy issue, the Tribunal first examined whether the Applicant's retaliation allegation was adequately and objectively reviewed. Pursuant to paragraph 3.4 of ST/SGB/1997/1, Secretary-General's bulletins are not applicable to separately administered organs and programmes of the United Nations unless otherwise stated therein. Secretary-General's bulletin ST/SGB/2005/21 did not contain a provision extending its application to UNDP and was thus not part of the Applicant's contract with the Organization. However, the Tribunal considered that the Organization was still required to act fairly towards the Applicant, which meant that UNDP had to examine the concerns and allegations raised by the Applicant. The Tribunal found that the EIIRP investigation and the review by the DEO effectively constituted reasonable safeguards. It therefore dismissed the ethics policy complaint.

As to the compensation issue, the Respondent submitted that there was no procedural violation in this case because the Applicant had ample opportunity to meet with the EIIRP and provide relevant information and evidence. However, the Tribunal noted that the opportunity to be interviewed and to provide information and evidence to assist investigators is wholly distinct from being made aware of significant adverse findings against the whistleblower himself and him being given an opportunity to reply to them. As a staff member, the requirements of good faith and fair dealing applied to the Applicant and he was entitled to be treated fairly, honestly and in accordance with the obligations of due process.

The Tribunal concluded that the Ethics Office had correctly determined that the Applicant had not been provided with the opportunity to comment on the adverse findings made by the EIIRP. This failure resulted in a violation of the Applicant's due process rights, damaged his career prospects and professional reputation, and caused him emotional distress. The Tribunal ordered the Respondent to pay fourteen months' net base salary as compensation for this procedural violation and the resulting harm. In addition, the Respondent was ordered to compensate the Applicant for the delay in considering the Ethics Office's recommendation.

7. Judgment No. UNDT/2010/169 (24 September 2010): Yapa v. *Secretary-General of the United Nations* [9]

Standard of review for disciplinary cases—Regularity of disciplinary procedure—Due process—Cooperation during administrative investigation—Disciplinary measure not foreseen in the Staff Rules—No punishment without a written rule foreseeing it

On 7 December 2006, the Applicant took a French written examination for the recruitment/promotion of security officers. After the candidates had been asked to put away all materials, the exam invigilator noticed that the Applicant had kept a sheet of paper on his desk with samples of briefings in French. After having the Applicant sign the sheet in question, the invigilator took it and invited him to continue the examination process.

On 14 March 2007, the Chief of the Human Resources Management Services, Geneva, informed the Assistant Secretary-General, Office for Human Resources Management (ASG/OHRM), New York, of the alleged misconduct and proposed that the case be submitted to the Joint Disciplinary Committee (JDC) for advice. The Applicant was contacted but refused to cooperate with the preliminary investigation. On 28 February 2008, the JDC submitted its report to the Secretary-General with a recommendation that no disciplinary measure be imposed, but that a written reprimand be issued according to staff rule 110.3(b)(i). On 10 April 2008, the Secretary-General rejected the JDC recommendation and imposed a written censure on the Applicant pursuant to rule 110.3(a)(i) of the Staff Rules in force at the time and demoted him by one grade under rule 110.3(1)(vi), with no possibility of promotion for two years.

By application dated 12 December 2008, the Applicant appealed the above-mentioned decision to the former United Nations Administrative Tribunal. On 1 January 2010 the case was transferred to the United Nations Dispute Tribunal (UNDT).

[9] Judge Jean-François Cousin (Geneva).

With regard to the merits, the Tribunal noted that when an application contesting the legality of a sanction imposed on a staff member is at issue, it must examine, first, whether there were any procedural irregularities; second, whether the alleged facts had been established; third, whether the facts constituted misconduct; and finally, whether the sanction imposed was proportionate to the misconduct.

With regard to the regularity of the procedure, the Applicant claimed that he had not been informed of the charges against him by the person conducting the preliminary investigation, nor that his refusal to cooperate could constitute misconduct. The Tribunal observed that, in accordance with administrative instruction ST/AI/371 of 2 August 1991, the Administration must inform a staff member in writing only when the ASG/OHRM has decided that disciplinary proceedings should be instituted. It is this notification that marks the start date of disciplinary proceedings. On the other hand, pursuant to staff rule 104.4(e) a staff member must cooperate with the Administration in a preliminary investigation if so requested. Accordingly, the Tribunal determined that the Applicant did not have a right to refuse to cooperate with the preliminary investigation. The Tribunal emphasized that staff members must respect obligations stemming from their status without the Administration being bound to remind them thereof.

Next, the Applicant contested the JDC's decision to reject his request to recuse a member of the panel constituted to examine his case. The Tribunal determined that the statements of a general nature that the panel member reportedly made as to the value for the JDC of oral hearings and the examination of witnesses were not such that a bias against the Applicant might have been established. The Tribunal also noted that the fact that one of the witnesses heard by the JDC, namely the exam invigilator, was a colleague of certain members of the JDC did not remove the value of her testimony, given that she was the main witness of the facts of which the Applicant stood accused.

The Applicant further alleged that a paragraph had been added to the JDC report by one of the panel members with the help of the JDC Secretary, but failed to provide any corroboration of these accusations. The Tribunal condemned the malicious nature of the Applicant's defamatory allegations and reminded the Applicant in the strongest possible terms that the right of a staff member to submit an application and develop his or her arguments does not give him or her the right to make false accusations against staff members who are not a party to the dispute. In conclusion, the Tribunal found that the Applicant failed to establish the irregularity of the disciplinary procedure.

Turning to the facts of the case, the Tribunal found that an attempt to cheat and a refusal to cooperate with the Administration had been established. Given that, by virtue of staff regulations 1.2 (b) and 1.3, staff members are expected to maintain the highest standards of integrity, the Tribunal considered that an attempt by a security officer to cheat on an exam and to impede an investigation constituted misconduct, even if the results of the exam were not of great importance for the staff member.

Finally, as to the type of the sanctions that could be legally imposed, the Tribunal observed that there was no text providing that a demotion may be combined with a ban on promotion for a specific duration. Pursuant to the general principle that there can be no punishment without a written rule foreseeing it, the Tribunal declared the accessory punishment of a two-year ban illegal. The Tribunal further determined that the written censure and demotion imposed were not disproportionate to the misconduct, given that

an attempt to cheat on an exam points to a certain lack of integrity, especially for a security officer, and can only be severely punished.

In conclusion, the Tribunal refused to compensate the Applicant for any moral damages, but it ordered the Administration to pay him the sum of CHF1,000 as material damages suffered from the unlawful ban on promotion for a specific duration. All other requests were rejected.

8. *Judgment No. UNDT/179/2010 (14 October 2010): Vangelova* v. *Secretary-General of the United Nations*[10]

Standard of review for non-promotion decisions—Receivability—United Nations Dispute Tribunal Statute superior to Staff Rules—Discretionary nature of promotion decisions—Similar acts require similar rules—Moral damages

The Applicant had been working for the United Nations High Commissioner for Refugees (UNHCR) since 1992. In March 2009, the UNCHR Appointments, Postings and Promotions Board (APPB) convened for the 2008 promotion session, but decided not to recommend the Applicant for promotion. The Applicant contested this decision by email dated 26 May. The APPB reviewed the request but did not change its recommendation. By letter dated 25 September 2009, the Applicant submitted a request to the Deputy High Commissioner for management evaluation. On 21 October 2009, the Applicant was informed that it would not be possible to respond to her request for management evaluation within the stipulated time limit, but that the absence of a response did not impact on the time within which she could file an application to the Tribunal. On 4 December 2009, the Deputy High Commissioner sent the Applicant the memorandum containing the results of the management evaluation, which explained that the decision not to promote her to the P-4 level had been taken in accordance with the Organization's rules and procedures. The Applicant received the results on 8 December 2009.

On 4 March 2010, the Applicant filed an application before the Tribunal. The Tribunal informed the parties that it intended to raise on its own motion the issue of the legality of the 2008 promotion session.

The Tribunal first analyzed whether the application had been timely filed in accordance with article 8, paragraph 1, of the United Nations Dispute Tribunal (UNDT) Statute. It noted that the Statute and the Staff Rules were contradictory and decided that the Statute was superior to the Staff Rules. Although the Statute required staff members to file their application with the Tribunal within 90 days of the response period of 45 days for the management evaluation if no response to the request was provided, when the management evaluation was received after the deadline of 45 days but before the expiry of the next deadline of 90 days, the receipt of the management evaluation would result in setting a new deadline of 90 days for challenging it before the Tribunal. Therefore, in the present case, the application was declared timely.

The Tribunal reaffirmed that, given the discretionary nature of promotion decisions, it could only assess the regularity of the procedure followed and the factual errors in the review of the staff member's career.

[10] Judge Jean-François Cousin (Geneva).

The Tribunal then turned to its own motion, namely to ascertain whether the High Commissioner was in a position to accept a proposal of the Joint Advisory Committee (JAC) to fix 31 December 2008 as the cut-off date to determine the seniority and eligibility of staff members, in contravention to the APPB Rules of Procedure and Procedural Guidelines, which fixed such deadline for October. The Tribunal noted that the APPB rules and guidelines had been established by the High Commissioner upon advice of the JAC, and that a later legal text adopted by a similar procedure could legally modify the preceding one. The decision of the High Commission was thus not illegal.

The Tribunal found that the Applicant had not provided specific facts establishing that the legal instruments guiding the selection of staff for promotion had not been followed. Accordingly, it rejected her claim that the promotions procedure had not been transparent. The fact that the Administration was late in forwarding the 2008 promotions methodology to staff members did not constitute a procedural flaw, as no legal instrument stipulated a deadline for this communication. The recommendation of the former Joint Appeals Board, to communicate the methodology to staff one year in advance of the promotion session, was not binding upon the Administration. The Tribunal pointed out that, although the Procedural Guidelines specified that seniority shall be considered in recommending staff members for promotion, they did not specifically require that the number of rotations and functional diversity be taken into account.

On the other hand, the Tribunal determined that the Applicant was correct in asserting that the High Commissioner may not promote a staff member if his or her situation had not been examined previously by the APPB. From the review of the file, the Tribunal found that the High Commissioner had promoted a non-eligible staff member who, because he or she was not eligible, had not been considered by the APPB. Since there were a limited number of promotion slots, the Tribunal rescinded the decision not to promote the Applicant. Pursuant to article 10.5 of the UNDT Statute, the Tribunal gave the Respondent the option to carry out the order to rescind the decision or to pay the Applicant the sum of CHF8,000.

With regard to the Applicant's request for moral damage, the Tribunal considered whether the Applicant would have had a real chance of being promoted if the Administration had applied the existing rules. Given the fact that for the last two years the Applicant had not been recommended for promotion by her supervisors, the Tribunal considered that her chances for promotion were close to zero and that there was no need to compensate her for any moral damage.

9. *Judgment No. UNDT/191/2010 (25 October 2010): García* v. *Secretary-General of the United Nations*[11]

Cancellation of appointment—Document creating legally binding obligations between the Organization and its staff need not be called "letter of appointment"—Contracts may have a future date of commencement—Averment in pleadings does not constitute evidence

While engaged under a Special Service Agreement (SSA), the Applicant successfully participated in a competitive selection process for an L-5 position with the United Nations

[11] Judge Memooda Ebrahim-Carstens (New York).

Development Programme (UNDP). On 24 August 2007, the Applicant, still under the SSA, accepted an offer of appointment for a one-year contract, commencing on 1 October 2007, subject to "a number of clearances" and "formalities".

On 9 September 2007, UNDP was informed by the authorities of the United Kingdom that the Applicant was suspected of conspiring with a consultancy firm to ensure the award of a contract with UNDP to a pharmaceutical company. On 21 September 2007, the same date on which the Applicant was issued a United Nations laissez-passer, UNDP advised him about the "cancellation of his appointment". The Applicant was allowed to keep USD19,822 that had already been transferred to him as a relocation grant.

The Applicant sought administrative review of the decision to cancel his appointment and subsequently filed an appeal with the Joint Appeals Board (JAB). Based on the findings and recommendations of the JAB, the Secretary-General decided to reject the Applicant's appeal. The Applicant then filed an application with the Tribunal contesting the decision of the Secretary-General and seeking reinstatement and financial compensation. The Respondent replied that the Applicant was not a staff member at the time of the contested decision as the contract had not been effected and therefore his request was not receivable.

The Tribunal observed that the main legal issue in the case was whether the Respondent's offer of appointment and the Applicant's acceptance thereof resulted in a binding contract. Under staff regulation 4.1, upon appointment each staff member shall receive a letter of appointment. The Tribunal explained that this did not mean that the only document capable of creating legally binding obligations between the Organization and its staff had to be called a "letter of appointment". In the present case, the offer of appointment accepted by the Applicant and the communications between the parties contained the necessary material terms for the formation of a binding contract, including those stipulated in the provision of Annex II to the Staff Regulations, such as the nature and the period of employment, the category and level of the appointment, the details concerning salary, the acceptance and receipt of the Staff Rules and Regulations, and other conditions of employment. Therefore, the Tribunal determined that the offer and acceptance produced a legally binding contract and that there was no basis for supposing that the parties intended any subsequent letter of appointment to vary or add to the terms of appointment in any significant respect. The Tribunal specifically distinguished this case from its findings in Judgment No. 072 (*Adrian*, 2010), Judgment 098, (*Gabaldon*, 2010) and those of the United Nations Appeals Tribunal in Judgment No. 029 (*El-Khatib*, 2010), as well as from the jurisprudence of the former United Nations Administrative Tribunal in view of the unique language of the offer of appointment, the surrounding circumstances, and the legal relationship created between the parties.

The Tribunal then turned to discuss the effect of the conditions, if any, included in the offer of appointment. The Respondent submitted that the offer was subject to some conditions being met, including clearances concerning technical and competency requirements. The Tribunal found the reference to competencies and UNDP's core values in this context misguided, as it was clear from the UNDP's recruitment guidelines that the verification of technical and competency requirements took place during the selection exercise. There was no evidence to suggest that such requirements had to be checked again after the completion of the selection process, and more importantly that the Applicant failed or would have

failed them. The Tribunal agreed with the Applicant's view that the conditions encompassed routine medical and security clearances, which he already had due to the previous relationship between the parties. In this regard, the Tribunal further noted that since the Applicant took steps to relocate to Cairo, the Respondent should have understood that he believed that all clearances and formalities had been finalized. There was no evidence to support the Respondent's averment that the Applicant had failed to satisfy any clearances and formalities. The Tribunal specified that an averment in pleadings does not constitute evidence. Further, the Tribunal considered the Respondent's payment of a relocation grant to the Applicant an admission of liability for some loss and damages and that it rendered unsustainable the Respondent's position that there was no contract between the parties.

Moreover, the Tribunal noted that nothing precluded the Applicant from performing duties under his SSA, while at the same time being in a binding agreement with the Organization. In the Tribunal's view, there was no reason why parties could not enter into a binding contract on a particular date with a future date for commencement of duties.

In conclusion, the Tribunal found the application receivable as there was a binding contract between the parties. The Respondent's refusal to execute the employment relationship was held to be in breach of the contract and further submissions were requested to determine the appropriate relief.

10. Judgment No. UNDT/2010/203 (22 November 2010): O'Neill v. *Secretary-General of the United Nations*[12]

Non-selection claim—Tribunal's *ex officio* duty to examine receivability—Request for administrative review or management evaluation is a mandatory first step in any appeal process before the Tribunal—Applicant must identify clearly appealed decision for an application to be receivable—Specific performance under article 10.5 of the Tribunal's Statute does not include specific performance of a recommendation of the Joint Appeals Board, which is advisory only and does not constitute a contestable administrative decision

On 17 September 2005, the Applicant applied to a vacant P-5 post of Section Chief, Peacekeeping Audit Service, Internal Audit Division (IAD), Office of Internal Oversight Services (OIOS). The Applicant was not selected for this position. By letter dated 24 July 2006 to the Secretary-General, the Applicant requested an administrative review of the decision. On 24 August 2006, the Administrative Law Unit refused the Applicant's request. On 18 September 2006, the Applicant filed an appeal before the Joint Appeals Board (JAB).

On 26 June 2006, the Applicant sent a privileged and confidential letter ("confidential letter") to the Under-Secretary-General for OIOS (USG), expressing concern regarding the Applicant's non-selection for several posts within OIOS. On 11 October 2006, the USG forwarded the confidential letter to four staff members. According to the Applicant, this 11 October 2006 communication constituted a prohibited release of confidential information about the Applicant, who was in the midst of the JAB appeal process. The JAB *sua sponte* addressed this issue and found that the Respondent owed the Applicant an apology

[12] Judge Marilyn J. Kaman (New York).

for forwarding the confidential letter to staff members. However, it dismissed the non-selection claim.

On 25 January 2008, the Deputy Secretary-General (DSG) rejected the issuance of an apology regarding the confidential letter, instead referring the Applicant for "any recourse" to the former United Nations Administrative Tribunal ("Administrative Tribunal"). Thereafter, the Applicant filed an appeal before the Administrative Tribunal. On 1 January 2010 the case was transferred from the Administrative Tribunal to the United Nations Dispute Tribunal for it to rule on issues concerning both the receivability and the merits of the relief of the appeal against the USG's decision to forward the confidential letter.

First, the Tribunal examined *ex officio* the question of receivability. Pursuant to article 2 of the United Nations Dispute Tribunal (UNDT) Statute, if an appeal has not undergone a "management evaluation", or an "administrative review" as it was referred to under the former staff rule 111.2 (a), the appeal is irreceivable. The Tribunal found that the Applicant had not identified the appealed decision as being the non-selection claim. Therefore, the only decision purportedly before the Tribunal was the confidential letter, an issue that had never been the subject of administrative review and that had not been formally preserved for appeal. The Tribunal observed that the confidential letter was not mentioned in the 24 July 2006 request for the administrative review of the non-selection decision, and that the confidential letter was only released on 11 October 2006, approximately three months after the request for administrative review. The issue of the USG releasing the confidential letter was not mentioned at all, until it was referred to in the JAB report of 8 September 2007. Thus, the Tribunal determined that the application was not receivable under article 8.1(a) of the UNDT Statute.

The Tribunal then turned to analyze *ex officio* whether the DSG's statement that "any recourse" should be directed to the Administrative Tribunal, constituted an acceptance by the Respondent of the JAB *sua sponte* decision and a waiver or an exception from the requirement of administrative review under former staff rule 112.2.(b). The Tribunal found that such a broad interpretation could not be made. First, the decision to distribute the confidential letter stood on its own. That is, it would need to be determined whether the confidential letter was indeed a privileged and confidential communication and, if so, whether it was improper for the USG to have forwarded the confidential letter. Neither the parties nor the JAB addressed these issues. Second, the assessment of these issues bore nothing in common with the non-selection decision or whether an apology was an appropriate remedy. Third, nothing in the DSG's letter indicated that the Respondent had ever considered making an exception.

In this regard, the Tribunal further held that even if the "any recourse" language in the DSG's 25 January 2008 letter was misleading, faulty or interpreted as a waiver from the requirement of administrative review, the Applicant's appeal would already have been time-barred. Under former staff rule 111.2(a) the Applicant would have been required to submit his request for administrative review no later than two months after being notified in writing of the USG's release of the confidential letter. No information existed in the case about when this occurred, but it must have been before the release of the JAB report on 8 November 2007. The Tribunal noted that the latest possible deadline for the Applicant to request an administrative review would have been 8 January 2008. Therefore, any defects regarding receivability could not be made attributable to the DSG's letter.

Finally, the Tribunal observed that even if the Applicant's appeal were considered to be receivable, he did not substantiate the harm suffered from the distribution of the confidential letter, since a mere reference to harm to career and reputation was not sufficient. As for the apology, the Tribunal noted that it was not authorized to take action against the Respondent for not issuing it. Although the Tribunal may order specific performance to a contested decision under article 10.5 of the UNDT Statute, this provision does not include specific performance of a JAB recommendation, which was advisory only and did not constitute a contestable administrative decision. In applying these criteria, the Tribunal noted that its findings regarding an apology were not to be interpreted as the Tribunal either approving or rejecting that the Tribunal was authorized to issue an apology as an appropriate remedy under the UNDT Statute.

The Applicant's appeal was dismissed as not receivable.

11. Judgment No. 214/2010 (16 December 2010): Kamunyi v. *Secretary-General of the United Nations*[13]

Policy of the Organization with regard to the possession and carrying of firearms by staff members—Under the former Staff Rules and Regulations, suspension requires a charge of misconduct and a decision of the Secretary-General or his delegate—Distinction between special leave with full pay and suspension with pay—"Exceptional cases" for special leave with full pay do not include disciplinary measures—Removal of grounds pass only lawful in case of suspension—Procedures to be taken by the Organization with respect to the handling of a request to waive the privileges and immunities for the arrest of a staff member—Insubordination requires proof of refusal of a lawful and reasonable instruction—Transfer of position at the discretion of the Secretary-General

On 16 May 2006, the Applicant, a Security Officer who was attached to the Security and Safety Service at the United Nations Office at Nairobi (UNON/SSS), was involved in a roadside incident in the Kasarani area of Nairobi that resulted in the disappearance of his personal firearm. On 19 May 2006, the Acting Director-General of UNON received an anonymous e-mail which contained details of an alleged plot to kill her. The e-mail referred to the removal of a weapon and ammunition from UNON/SSS. On 24 May 2006, the Kenya Police reported that a Glock pistol registered to the UNON/SSS had been found in the Kasarani area of Nairobi. It was subsequently identified by UNON security officers as a pistol missing from the UNON/SSS armoury. The Kenya Police suspected that the Applicant could have been in possession of both his own and the UNON firearm on the same night and they wished to interview him about this.

On 26 May 2006, the Chief, UNON/SSS, called the Applicant to a meeting, at which he requested the surrender of the Applicant's private weapon. The Applicant refused and, as a result, he was ordered out of the UNON grounds and to hand in his grounds pass. Moreover, the Chief, UNON/SSS, verbally suspended Applicant "indefinitely". In a recorded statement, the Applicant explained that according to Kenyan firearms legislation he could only give his firearm to a licensing official or other authorized person; his concern about the safety of unloading a firearm inside a closed room; and his belief that there were

[13] Judge Coral Shaw (Nairobi).

no restrictions on United Nations staff members carrying weapons in the UNON complex. During the meeting, the Applicant aired those concerns but was not answered except for the unequivocal order to comply.

On 29 May 2006, the Applicant was informed that he had been placed on special leave with full pay ("special leave") "until further notice". On the same date, the Kenya Diplomatic Police wrote to the Chief, UNON/SSS, seeking a waiver of the Applicant's privileges and immunities as a United Nations staff member so he could be questioned about the theft of the missing UNON firearm. Following a meeting between the Police Commissioner and the Chief, UNON/SSS, the Applicant was arrested and confined by the Kenya Police from 9 June to 12 June 2006. The Kenya Police reported to UNON on 5 December 2006 that they did not have anything tangible to incriminate the Applicant.

The Investigations Division, Office of Internal Oversight Services (ID/OIOS) then conducted two internal investigations on the incidents. The investigations lasted more than two years, during which the Applicant remained on special leave. On 24 January 2008, the Office of Human Resources Management (OHRM) advised the applicant that the special leave would be converted into suspension with pay due to the nature and gravity of the allegations against him. Based on the findings of the ID/OIOS report, the Applicant was not charged in relation to the theft of the UNON firearm or the death threat, but faced one formal charge for insubordination. He was suspended from duty with pay on 4 February 2008. On 16 July 2008, the Applicant was advised by the Officer-in-Charge, OHRM, that his suspension had come to an end and that she had decided not to pursue the case as a disciplinary matter. Instead, the Applicant was reprimanded for his refusal to hand over his personal firearm to his supervisor. He was also told that he was to be transferred from UNON/SSS to UNON Conference Services.

Following these actions, the Applicant submitted two separate appeals to the Joint Appeals Board (JAB). The appeals were consolidated by the JAB and transferred to the Tribunal on 1 July 2009.

The Tribunal first examined whether the Applicant had been suspended or put on special leave on 26 May 2006 and whether this had been lawful. Pursuant to the Tribunal's reading of former staff rule 110.2 and of administrative instruction ST/AI/371, if a suspension was to occur it had to follow two events, namely a charge of misconduct and a decision of the Secretary-General or his delegate, the Assistant Secretary-General (OHRM). It noted that the requirement of misconduct for suspension had changed with the introduction of staff rule 10.4, dated 2 September 2010, which contemplates administrative leave pending investigation and the disciplinary process. In the present case, the Tribunal determined that the Applicant had been verbally suspended by the Chief UNON/SSS without a charge of misconduct. Additionally, the Applicant was not given a written statement of the reasons and duration for the suspension. For these reasons, the suspension was considered in breach of the former Staff Rules.

The second issue of the case was whether the Applicant had been lawfully placed on special leave on 29 May 2006. The Tribunal noted that former staff rule 105.2 conferred a general power on the Secretary-General to grant special leave in exceptional cases. The Tribunal concluded that the words "exceptional cases" related to situations that did not include or refer to disciplinary measures, since the staff rules on disciplinary measures had their own provisions for suspension. The Applicant had been placed on special leave

pending an investigation into grave allegations. However, no disciplinary proceedings had been initiated against him. Therefore, the Tribunal considered the invocation of the discretion under staff rule 105.2 to be in breach of the Staff Rules. Furthermore, the Tribunal noted that the continuation of the special leave for over one and a half years amounted to gross delay. On the other hand, the Tribunal found that the suspension of the Applicant, once the charges of misconduct had been made, was lawful, as it met all the preconditions required by staff rule 110.2.

The Tribunal then turned to analyze whether UNON had followed proper the procedures with respect to the handling of the request for waiver and the arrest of the Applicant by the Kenya Police. The Applicant submitted that the Chief UNON/SSS had exercised powers he did not have and did not act to safeguard his privileges and immunities. The Respondent contended that the arrest and detention was a unilateral and independent action by the Kenya Police and that no officer of the United Nations had acceded to the request for waiver. Further, the Respondent contested that the Applicant enjoyed immunity from arrest, since the Applicant had not reported the roadside incident to the United Nations, nor did it happen in the course of the discharge of his duties. In this regard, the Tribunal considered that, although the Applicant was locally recruited, he was not paid an hourly rate and therefore was covered by articles V and VII of the Convention on the Privileges and Immunities of the United Nations of 13 February 1946.[14]

Relying partly on the expert opinion of a Senior Legal Adviser of UNON (SLA) as to the procedures to be taken by the Organization when, prior to interview or arrest, it is asked by a host country to waive the privileges and immunities of a staff member for a particular purpose, the Tribunal determined that the procedures in the relevant United Nations legal provisions had not been followed. It found that the Chief, UNON/SSS, had said enough to the police commissioner to give him the impression that waiver of immunity had been granted. According to the Tribunal, a letter of request should come from the Ministry of Foreign Affairs of the host country. Only the signatures of the Head of State, the Prime Minister and the Minister of Foreign Affairs are recognized for this purpose. Additionally, the letter should be addressed to the head of the United Nations at the duty station. In the present case, although the Chief, UNON/SSS, had advised the Director-General and the SLA of the requests for waiver, he had not received the advice or support expected from those charged with making the complex legal and diplomatic decision. Moreover, the request for a waiver was under the letterhead of the Office of the President, but was not written on behalf of the President. It was signed in the name of the head of the Diplomatic Police Unit.

The Tribunal further explained that an inquiry is to be undertaken at the duty station to ascertain the background of the request. This information is then transmitted to the Office of Legal Affairs, New York, and may be accompanied by a recommendation from the duty station. It is exclusively for the Secretary-General to determine the distinction between acts performed in an official or private capacity for the purpose of assessing a request from a host country to waive the privileges and immunities of an official of the United Nations. However, the decision is made on behalf of the Secretary-General by the Under-Secretary-General for Legal Affairs ("the Legal Counsel") and sent to the

[14] United Nations, Treaty Series, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1). See General Assembly resolution 76(1).

Director-General and the SLA at the duty station. If the waiver is granted it will usually have conditions attached, such as the specific purpose of the waiver, the duration of the interview or detention and the place of the interrogation. Further, when an arrest is made without a waiver or the knowledge of the Secretary-General, United Nations Headquarters should be immediately informed so a protest can be raised and to ensure that the staff member's rights are guarded. In the Applicant's case, no formal decision was made at the United Nations Headquarters about an official response. The Tribunal found that the United Nations made no formal protest or communication to the Kenya Ministry of Foreign Affairs over the arrest.

Regarding the Respondent's decision to reprimand the Applicant due to refusal to hand over his fireman to his supervisor, the Tribunal found that the Applicant's behaviour at the 26 May 2006 meeting fell short of insubordination. A reprimand was therefore unsubstantiated and unjustified. The Tribunal noted that insubordination requires not only proof of a refusal of an instruction given by a superior, but also evidence that the instruction is lawful and reasonable. It observed that the Applicant's refusal was not unconditional. He wanted to be satisfied that he was receiving a lawful instruction and the Chief, UNON/SSS, did nothing to reassure the Applicant of the lawfulness of his request. As to the Respondent's allegation that the Applicant posed a security threat that needed urgent action, the Tribunal considered it was undermined by the Applicant's willingness to sit to give a rational explanation for his actions. The Tribunal concluded that the basis for the suspicions about the Applicant's involvement in the disappearance of the UNON firearm was weak and that the order of the Chief, UNON/SSS, to hand over the private firearm had dubious legal foundation and was unreasonable. On the other hand, the Tribunal determined that there was no breach of due process in relation to the charge of insubordination, since even though the charges were laid long after the event, the Applicant had been fairly and properly advised of the charge and had been given an opportunity to respond.

With regard to the lawfulness of Applicant's transfer from his position of Security Officer to UNON Conference Services, the Tribunal determined that the transfer was a lawful exercise of the discretion of the Secretary-General contemplated in staff regulation 1.2(c). While it would have been fairer if the Applicant had been consulted and given the rationale for the decision before it was finalized, it was prudent management to avoid the almost inevitable conflict that would have occurred if the Applicant had resumed his previous employment as if nothing had happened.

In conclusion, the Tribunal ordered the rescission of the unlawful decision to suspend the Applicant, to place him on special leave and to reprimand him for insubordination. The Respondent was ordered to pay the Applicant compensation for the negative effects of the breaches and the failures of procedure in accordance with the provisions of article 10(5) of the Statute.

B. Decisions of the United Nations Appeals Tribunal

By resolution 61/261 of 4 April 2007, entitled "Administration of Justice at the United Nations", the General Assembly agreed that the new formal system of administration of justice should comprise two tiers, consisting of a first instance, the United Nations Dispute

Tribunal, and an appellate instance, the United Nations Appeals Tribunal, rendering binding decisions and ordering appropriate remedies.

By resolution 62/228 of 22 December 2007, entitled "Administration of Justice at the United Nations", the General Assembly decided to establish a two-tier formal system of administration of justice, comprising a first instance United Nations Dispute Tribunal and an appellate instance United Nations Appeals Tribunal. It further decided that the United Nations Appeals Tribunal shall be composed of seven members who will sit in panels of at least three.

By resolution 63/253 of 24 December 2008, entitled "Administration of Justice at the United Nations", the General Assembly adopted the statutes of the United Nations Dispute Tribunal and United Nations Appeals Tribunal. It also decided that the United Nations Dispute Tribunal and the United Nations Appeals Tribunal shall be operational as of 1 July 2009.

By resolution 64/119 of 6 December 2009, the General Assembly approved the rules of procedure of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, as established by the respective Tribunals on 26 June 2009.

The United Nations Appeals Tribunal held its first session from 15 March to 1 April 2010. It held two more sessions in 2010, from 21 June to 1 July and from 18 to 29 October, and rendered a total of 100 decisions that year.

1. *Judgment No. 2010-UNAT-001 (30 March 2010): Campos* v. *Secretary-General of the United Nations*[15]

Staff nominations—Operation of the Staff Management Coordinating Committee—Appointment of judges to the United Nations Dispute Tribunal and the United Nations Appeals Tribunal—Request for arbitration—Request for an oral hearing—Weight of vote by staff association—Management interference in union affairs—Freedom of association—Conflict of interest—Recusal of judges—Professional relationship—Dissolution of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal

The Appellant, a Senior Interpreter at the United Nations Office at Geneva, had been nominated by three staff associations, representing the majority of United Nations staff, for a position on the Internal Justice Council (IJC). The purpose of the IJC was, *inter alia*, to assist in the recruitment of suitable judicial candidates for appointment by the General Assembly as judges to two newly established tribunals, the United Nations Dispute Tribunal (UNDT) and the United Nations Appeals Tribunal (UNAT).

After the Staff Management Coordinating Committee (SMCC) selected another candidate, Ms. J. Clift, who had been nominated by ten other staff associations, the Appellant filed several appeals to the Joint Appeals Board, challenging the appointment of Ms. Clift to the IJC and contesting all decisions taken by the IJC, which he alleged had been illegally constituted. When these cases were transferred to the newly established UNDT, the Appellant filed several motions requesting the judges of the UNDT and the UNAT to recuse themselves. The Appellant argued that all judges faced a conflict of interest, since they had been recruited and recommended for judicial appointment by the IJC, with the

[15] Judge Rose Boyko, Presiding, Judge Mark P. Painter and Judge Kamaljit Singh Garewal.

involvement of Clift. He also requested a blanket removal of all judges appointed by the General Assembly.

Prior to the UNDT hearing, the Appellant brought an interlocutory motion, objecting to a hearing by the UNDT, and requesting that this application be referred to arbitration under the UNCITRAL rules instead. After the Appellant found out that the IJC members had been notified of the proceedings, he filed another interlocutory motion repeating his request. The UNDT rejected both motions in two decisions dated 12 August 2009.[16] On 17 September 2009, the UNDT rejected Campos' challenges to the appointment of Ms. Clift and to the legality of all IJC decisions. Campos appealed all three judgments at the UNAT.

The Tribunal rejected a request from Campos for an oral hearing, since he had the opportunity to make a full written argument on all issues and had not provided the Tribunal with an adequate reason for an oral hearing. The Tribunal found that the SMCC had respected its own procedures in appointing IJC members. The SMCC had made clear that all staff associations would have an equal vote, regardless of the number of staff members they represented. Accordingly, Campos had received three votes, whereas Clift had received ten endorsements. The Tribunal noted that the Secretary-General, not the SMCC, had ultimately appointed Clift. As a result, the Tribunal agreed with the UNDT to reject Campos' challenge to the legality of the appointment of Clift and to all decisions of the IJC. It further rejected Campos' claim that Clift's appointment to the IJC was based on management interference of union affairs, which Campos argued restricted his freedom of association. Furthermore, the Tribunal found it unnecessary to entertain Campos's challenge to the validity of United Nations General Assembly decisions taken on recommendation of the IJC, and it rejected Campos' request for arbitration of his case.

With regard to Campos' request for the recusal of the judges of the UNDT and UNAT and the dissolution of the entire bench on the grounds of conflict of interest, the Tribunal rejected the claim that the alleged management interference in the IJC nomination process had tainted the independence and the impartiality of the new United Nations justice system. The Tribunal noted the limited role of the IJC in judicial appointments, stressing that it merely recommended candidates to the General Assembly, which ultimately appoints. The Tribunal upheld the findings of the UNDT that the nomination of judges by the IJC, with the involvement of Clift, did not constitute a professional relationship between Clift and the judges, and that no meritorious grounds existed for the allegation of appearance of bias, deference or conflict of interest. Finally, the Tribunal agreed with the UNDT that the UNDT President does not have the jurisdiction to dissolve the entire UNDT, as he lacks the statutory authority to dissolve a body created by the General Assembly. For the same reasons, the Tribunal rejected Campos' motion for recusal and dissolution of the UNAT bench.

In conclusion, the Tribunal affirmed the three UNDT judgments on appeal before it and dismissed all of Campos' appeals and his motion for recusal and dissolution of UNAT.

[16] UNDT/2009/005 and UNDT/2009/010, respectively.

2. *Judgment No. 2010-UNAT-005 (30 March 2010): Tadonki* v. *Secretary-General of the United Nations*[17]

Extension of contract—Suspension of action—Receivability of interlocutory appeal—Only appeals against final judgments are generally receivable—United Nations Dispute Tribunal exceeded its authority by ordering the suspension of a decision beyond the deadline for management evaluation

The Respondent (Applicant in first instance), who had worked at the Office for the Coordination of Humanitarian Affairs (OCHA) as head of its office in Harare, Zimbabwe, from 24 March 2008 to 3 September 2009, had filed several suspension of action requests in opposition to a decision not to extend his contract. Eventually, the United Nations Dispute Tribunal (UNDT) ordered the suspension of the decision not to renew his employment.[18] Moreover, it ordered as an interim measure that the Respondent be paid half his salary until the final determination of the case. The Secretary-General appealed this order.

The Tribunal found that, while its Statute does not clarify whether the Tribunal may review appeals against interlocutory decisions, to ensure timely judgment only appeals against final judgments will generally be receivable. However, the Tribunal could hear appeals against decisions by the UNDT that exceeded its authority. In the present case, the Tribunal determined that the UNDT had no authority under article 2(2) of its Statute to order a suspension of the contested decision beyond the deadline for management evaluation. As a consequence, UNDT had exceeded its authority and the Tribunal annulled the UNDT order.

The Tribunal emphasized that its decision in this and two other cases[19] should not be interpreted to mean that all preliminary matters were receivable, as almost none would be. Only when it was clear that the UNDT had exceeded its jurisdiction would a preliminary matter be receivable.

3. *Judgment No. 2010-UNAT-010 (30 March 2010): Tadonki* v. *Secretary-General of the United Nations*[20]

Receivability of an appeal of an interpretation of judgment—Definition of "judgment"—"Judgment" in article 2(1) of the Statute of the United Nations Appeals Tribunal does not include interpretation of judgments—Interpretation of judgment not an avenue for review

On 1 September 2009, the United Nations Dispute Tribunal (UNDT) issued Judgment No. 2009/016 in the case of *Tadonki* v. *Secretary-General of the United Nations* (Tadonki 1).

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[17] Judge Mark P. Painter, Presiding, Judge Inés Weinberg de Roca and Judge Jean Courtial.

[18] *Tadonki* v. *Secretary-General of the United Nations*, Order on an application for suspension of action, UNDT/2009/016 (1 September 2009).

[19] In *Onana* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008 (30 March 2010), the Tribunal stressed that exceptions to the general principle of the right of appeal should be interpreted narrowly and that these exceptions only apply to jurisdictional matters of a decision ordering the suspension of an administrative decision pending a management evaluation. The Tribunal applied the same reasoning in *Kasmani* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011 (30 March 2010).

[20] Judge Sophia Adinyira, Presiding, Judge Jean Courtial and Judge Mark P. Painter.

Both parties filed requests for interpretation of the judgment Tadonki 1, and on 16 October 2009, the Organization filed an appeal against the judgment. On 30 October 2009, the UNDT issued its interpretation of judgment Tadonki 1, "UNDT Judgment No. 2009/058", confirming its interim orders. This judgment was subsequently appealed by the Organization, which raised the same errors of law that it had raised in its appeal against the judgment Tadonki 1.

The Tribunal took judicial notice of the fact that it had given judgment on the appeal against the judgment Tadonki 1, whereby it had set that judgment aside. Accordingly, the present appeal was moot. Moreover, as a preliminary matter, the Tribunal noted that the word "judgment" in article 2(1) of the Tribunal's Statute did not include interpretations of judgments. It considered UNDT's "Judgment No. 2009/058" to be merely an explanation of its judgment Tadonki 1, not a fresh decision or judgment within the meaning of article 2(1) of UNAT's Statute. The classification of the interpretation as "Judgment No. 2009/058" by the UNDT Registry was a "misnomer". The Tribunal held that the exercise of interpretation under article 30 of the UNDT Rules of Procedure is not an avenue for review or a basis for fresh judgment on appeal. Accordingly, the appeal to an interpretation of judgment was not receivable.

4. *Judgment No. 2010-UNAT-013 (30 March 2010): Schook* v. *Secretary-General of the United Nations*[21]

Decision not to extend an appointment—Absence of written notification—Receivability of appeal—Necessity of a notification of an administrative decision in writing in order to correctly calculate time limits—Suspension or waiver of time limits in exceptional cases under a transitional arrangement

The Appellant was appointed Principal Deputy to the Special Representative of the Secretary-General of the United Nations Mission in Kosovo, at the rank of Assistant Secretary-General, on 26 April 2006. On 15 December 2007, he received a telephone call from the Under-Secretary-General, DPKO, informing him that his contract would not be extended beyond 31 December 2007. No written administrative decision was communicated to the Appellant.

While serving as Assistant Secretary-General, the Appellant had faced investigations by three separate entities for misconduct, but none of the investigations found any misconduct by him. The Appellant addressed a complaint to the Secretary-General on 14 July 2008, to which he received a reply from the Administrative Law Unit on 6 January 2009. The Appellant then presented his appeal to the Joint Appeals Board (JAB) on 5 February 2009. The UNDT, which took over the case after the dissolution of the JAB, adopted 5 February 2009 as the date of the main appeal. It subsequently held that the appeal was not receivable, as it has not been filed within two months from the date of the decision, 15 December 2007.

The Tribunal considered that, in order to correctly calculate the time-limits, the Appellant should have received a notification of the administrative decision in writing, as required by staff rule 111.2(a). Since the Appellant had never received such a notification

[21] Judge Kamaljit Singh Garewal, Presiding, Judge Sophia Adinyira and Judge Rose Boyko.

in writing, the Tribunal reversed the UNDT judgment and remanded the case back for a fresh decision on the merits.

The Tribunal also noted that the case could have been decided under a transitional arrangement in the UNDT Statute, which allowed the UNDT to suspend or waive deadlines in exceptional cases that were transferred to it from the JAB.

5. *Judgment No. 2010-UNAT-018 (30 March 2010): Mahdi* v. *Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*[22]

Standard of review in disciplinary cases—Totality of evidence

The Appellant was a Communications Technical Assistant (CTA) on a fixed-term appointment, stationed at the Gaza Field Office of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA). UNRWA summarily dismissed the Appellant on 27 July 2003, after a Board of Inquiry investigation reported that the Appellant had committed telephone system fraud by enabling people outside the Gaza Field Office to access the UNRWA telephone extension for international calls; by altering records in the UNRWA billing system; and by failing to bring these issues to the attention of the UNRWA administration.

The Appellant appealed the summary dismissal at the UNRWA Area Staff Joint Appeals Board (JAB) on 8 September 2003. On 16 April 2008, the JAB recommended the Commissioner-General to review the summary dismissal. The JAB noted, *inter alia*, that there had been no clear policy instructions preventing the Appellant from sharing his authorization code for the Direct Inward System Access (DISA) facility with a colleague and that the Appellant had not personally benefited from reducing an invoice. The Commissioner-General rejected the recommendation and upheld the decision of summary dismissal.

On 23 September 2008, the Appellant appealed this decision at the United Nations Administrative Tribunal. Upon the abolition of this tribunal on 31 December 2009, the case was transferred to the United Nations Appeals Tribunal ("the Tribunal").

The Tribunal noted that, in reviewing disciplinary cases, it had to examine: 1) whether the facts on which the disciplinary measure was based had been established; 2) whether the established facts legally amounted to misconduct under the Regulations and Rules; and 3) whether the disciplinary measure applied was proportionate to the offence.

The Tribunal noted that the JAB had confirmed that the facts amounted to misconduct, but that, when making its recommendation, it had failed to assess the totality of evidence. The Tribunal found that, while there was no clear policy or instruction preventing the Appellant from authorizing a colleague to use the DISA facility, the Appellant had violated clear policy by failing to inform his supervisors that he had shared the access code.

The Tribunal concluded that the Commissioner-General had not erred. It consequently dismissed the appeal.

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[22] Judge Inés Weinberg de Roca, Presiding, Judge Sophia Adinyira and Judge Luis María Simón.

6. *Judgment No. 2010-UNAT-019 (30 March 2010): Carranza* v. *United Nations Joint Staff Pension Board*[23]

ARTICLE 24 OF THE REGULATIONS OF THE UNITED NATIONS JOINT STAFF PENSION FUND—RESTORATION OF PRIOR CONTRIBUTORY SERVICE—ARTICLE 24 DOES NOT APPLY TO FAILED ATTEMPTS TO RESTORE PRIOR CONTRIBUTORY SERVICE

The Appellant, a staff member with the United Nations High Commissioner for Refugees (UNHCR), had participated in the United Nations Joint Staff Pension Fund (UNJSPF) from 31 October 1988 through 20 September 1990. At the end of that period, he had opted for a withdrawal settlement as his pension benefit. About seven months later, on 6 May 1991, the Appellant re-entered the UNJSPF, again as a UNHCR staff member. Although he had been eligible to restore his prior period of contributory service, he applied too late and his application was refused.

On 22 December 2006, the General Assembly approved a change to article 24 of UNJSPF's Regulations governing the restoration of prior contributory service. It provided that a participant re-entering the Fund on or after 1 April 2007, who previously had not, or could not have, opted for a periodic retirement benefit following his or her separation from service, could, within one year of the recommencement of participation, elect to restore his or her most recent period of prior contributory service. Any participant in active service who re-entered the Fund before 1 April 2007 and had previously been ineligible to elect to restore prior contributory service owing to the length of such prior service, could do so by an election to that effect made before 1 April 2008.

On the basis of this amendment, the Appellant requested the restoration of his prior period of contributory service. The UNJSPF rejected the request, on the grounds that the amendment was not intended to give a second chance to participants who could have but previously failed to restore prior contributory service. The Appellant appealed this decision at the United Nations Administrative Tribunal. Upon its abolition, the case was referred to the United Nations Appeals Tribunal.

The Tribunal concurred with the reasoning by the Fund and affirmed the decision by the UNJSPF not to restore the Appellant's prior contributory service.

7. *Judgment No. 2010-UNAT-022 (30 March 2010): Abu Hamda* v. *Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*[24]

STANDARD OF REVIEW OF DISCIPLINARY CASES—DISCRETION AND AUTHORITY OF ADMINISTRATIVE BODIES—ADMINISTRATIVE BODIES AND ADMINISTRATIVE OFFICIALS SHALL ACT FAIRLY AND REASONABLY AND COMPLY WITH THE REQUIREMENTS IMPOSED ON THEM BY LAW—NON-INTERFERENCE BY COURTS AND TRIBUNALS IN THE EXERCISE OF DISCRETIONARY AUTHORITY UNLESS THERE IS EVIDENCE OF ILLEGALITY, IRRATIONALITY OR PROCEDURAL IMPROPRIETY—DISPROPORTIONALITY

The Appellant served as Deputy Field Pharmacist in the Syria Field Office of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)

[23] Judge Rose Boyko, Presiding, Judge Mark P. Painter and Judge Kamaljit Singh Garewal.

[24] Judge Sophia Adinyira, Presiding, Judge Jean Courtial and Judge Kamaljit Singh Garewal.

when, on 15 July 2002, he learned that four boxes of hormonal contraceptive pills had disappeared from the stock. By letters dated 21 July 2002 and 1 December 2003, the Appellant urged the Field Pharmacist to look into the matter. He informed the Chief of the Field Health Programme about the missing stock on 25 April 2004. A subsequent Board of Inquiry (BoI) investigation found that the Appellant had failed to report the loss in a timely fashion; had failed to reprimand subordinate staff and to inform his supervisor; and had submitted a false trimester report to cover up the missing quantity. Another investigation by the Audit and Inspection Department found that the Field Pharmacist, the Appellant's supervisor, had been responsible for the misappropriation. On 16 February 2005, after the Appellant had responded to the allegations, he was removed from his post and demoted to Librarian at the Damascus Training Centre.

The Appellant appealed his demotion to the Joint Appeals Board (JAB). The majority of two Board members found that there was "sufficient and cogent evidence" to support the demotion decision. The third member, however, recommended reconsideration of the decision, or in the alternative, granting the Appellant salary protection in his current post as Librarian. On 12 September 2008, the Commissioner-General decided to uphold the demotion decision, a ruling that the Appellant appealed at the United Nations Administrative Tribunal on 22 November 2008. Upon the abolition of the Administrative Tribunal on 31 December 2009, the case was transferred to the United Nations Appeals Tribunal ("the Tribunal").

As in *Mahdi*,[25] the Tribunal noted that, in reviewing disciplinary cases, it had to examine: 1) whether the facts on which the disciplinary measure was based had been established; 2) whether the established facts legally amounted to misconduct under the Regulations and Rules; and 3) whether the disciplinary measure applied was proportionate to the offence.

The Tribunal found that the facts demonstrated misconduct. As to the proportionality of the decision, the Tribunal noted that disciplinary matters were within the discretion and authority of the Commissioner-General of UNRWA. However, the Tribunal found that it was a general principle of administrative justice that administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed on them by law. As a normal rule, courts and tribunals would not interfere in the exercise of a discretionary authority unless there was evidence of illegality, irrationality and procedural impropriety. In the present case, UNRWA had not taken into consideration that the missing stock was misappropriated by the Appellant's immediate supervisor and that the latter had intimidated his subordinates during the BoI investigation. Furthermore, the Appellant had never been made aware of the applicable guidelines.

In conclusion, the Tribunal found the disciplinary measure of demotion with loss of salary and transfer disproportionate to the offence. It substituted this decision with a written censure, to be placed in the Appellant's file, and ordered the Commissioner-General of UNRWA to refund to the Appellant all loss of salary that he had suffered.

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[25] *Mahdi* v. *Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East,* Judgment No. 2010-UNAT-018 (30 March 2010), see above.

8. *Judgment No. 2010-UNAT-023 (30 March 2010): Nock* v. *United Nations Joint Staff Pension Board*[26]

ARTICLE 24 OF THE REGULATIONS OF THE UNITED NATIONS JOINT STAFF PENSION FUND—RESTORATION OF PRIOR CONTRIBUTORY SERVICE—ONLY THE MOST RECENT PERIOD OF CONTRIBUTORY SERVICE CAN BE RESTORED

The Appellant had participated in the United Nations Joint Staff Pension Fund (UNJSPF or "Fund") from 1976 to 1984, 1985 to 1987 and in 1988. When she left the Fund in 1984, she had opted for a partial deferred retirement benefit and had commuted part of her benefit into a lump sum one-time payment. Upon leaving in 1988, she had accepted a lump-sum withdrawal settlement.

The Appellant re-entered the fund for a third time in 1998 and was due to retire in July 2010. She had validated a service period from 1997 to 1998, during which she had not been eligible for UNJSPF participation, under article 23 of the Fund's Regulations, and had restored her second participation period from 1985 to 1987.

On 22 December 2006, the General Assembly approved a change to article 24 of UNJSPF's Regulations governing the restoration of prior contributory service. It provided that a participant re-entering the Fund on or after 1 April 2007, who previously had not, or could not have, opted for a periodic retirement benefit following his or her separation from service, could, within one year of the recommencement of participation, elect to restore his or her most recent period of prior contributory service. Any participant in active service who re-entered the Fund before 1 April 2007 and was previously ineligible to elect to restore prior contributory service owing to the length of such prior service, could do so by an election to that effect made before 1 April 2008.

On the basis of this amendment, the Appellant requested the restoration of her first participatory period from 1976 to 1984. The Fund refused her request, arguing that her first participation period was not her "most recent period of contributory service". The Appellant challenged this decision, advancing humanitarian considerations, at the United Nations Administrative Tribunal, which, upon its abolition, transferred the case to the United Nations Appeals Tribunal ("the Tribunal").

The Tribunal found that restoration was an exceptional benefit and that it could not be extended by analogy. Since the Appellant had not provided legal reasoning for her request, and since granting the appeal would be in violation of UNJSPF's Regulations, the Tribunal dismissed the appeal and upheld the ruling by the Fund.

9. *Judgment No. 2010-UNAT-024 (30 March 2010): Haniya* v. *Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*[27]

TERMINATION OF SERVICE CONNECTED TO ANY TYPE OF INVESTIGATION OF THE STAFF MEMBER'S MISCONDUCT MUST BE REVIEWED AS A DISCIPLINARY MEASURE—STANDARD OF REVIEW FOR DISCIPLINARY MEASURES—PROPORTIONALITY—POSITION OF TRUST OF A GUARD

At the relevant time, the Appellant served as a guard at the Microfinance and Microenterprise Programme of the United Nations Relief and Works Agency for Palestine Refu-

[26] Judge Luis María Simón, Presiding, Judge Inés Weinberg de Roca and Judge Sophia Adinyira.

[27] Judge Luis María Simón, Presiding, Judge Inés Weinberg de Roca and Judge Sophia Adinyira.

gees in the Near East (UNRWA) in Gaza. On 28 February 2006, the Appellant was separated "in the interest of the Agency", after he had confessed to have made a large number of private international telephone calls using a UNRWA telephone line. After an unsuccessful request for review of the decision and a failed appeal to the UNRWA Area Staff Joint Appeals Board (JAB), the Appellant appealed to the United Nations Administrative Tribunal on 14 September 2008. Upon the abolition of the tribunal on 31 December 2009, the case was transferred to the United Nations Appeals Tribunal ("the Tribunal").

The Tribunal considered that when a termination of service was connected to any type of investigation of a staff member's possible misconduct, it should be reviewed as a disciplinary measure. Accordingly, the Tribunal applied the standard of review applicable to a disciplinary measure, by examining: 1) whether the facts on which the sanction was based had been established; 2) whether the established facts qualified as misconduct; and 3) whether the sanction was proportionate to the offence.

The Tribunal was not persuaded that the Appellant's "family problems" should justify his acts and found that misconduct had occurred. With regard to proportionality, the Tribunal noted that, as a guard, the Appellant had failed to respect his position of trust. Accordingly, it considered the sanction imposed not disproportionate to the offence and dismissed the appeal.

10. Judgment No. 2010-UNAT-025 (30 March 2010): Doleh v. *Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East*[28]

Termination of service—Need to verify facts before raising a plea that an appeal is time-barred—Judicial review of administrative acts on grounds of illegality, irrationality or procedural impropriety—Proportionality—Reinstatement—Compensation

At the relevant time, the Appellant was employed by the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) as a Medical Officer at the Marka Camp Health Centre. On 22 June 2006, the UNRWA Director ordered a termination of service of the Appellant, after reports that she had been involved in forging information and changing data on ante-natal and maternal health records of a patient that had subsequently died.

While the Appellant's request for review was dismissed on 5 July 2006, the UNRWA Area Staff Joint Appeals Board (JAB) considered the decision to terminate Appellant's service to be disproportionate. The Commissioner-General rejected the recommendation of the JAB, upon which the Appellant filed an appeal at the United Nations Administrative Tribunal. Upon the abolition of the tribunal on 31 December 2009, the case was transferred to the United Nations Appeals Tribunal (the Tribunal).

The Tribunal first observed that it was fairly common for the Administration to raise pleas of appeals being time-barred without verifying the facts, for example whether an extension had been granted. This practice, the Tribunal noted, deserved to be deprecated in the strongest possible terms.

[28] Judge Kamaljit Singh Garewal, Presiding, Judge Sophia Adinyira and Judge Rose Boyko.

On the merits, the Tribunal determined that it was fully empowered to undertake judicial review of an administrative act. While it considered the principal grounds for judicial review to be illegality, irrationality and procedural impropriety, it noted that in exceptional cases the doctrine of proportionality should be invoked. The Tribunal found that the Appellant had never been involved with the treatment of the deceased, but that she had merely made some changes to the records that were unrelated to the patient's death.

In conclusion, the Tribunal allowed the appeal and set aside the decision to terminate the Appellant's service as disproportionate. It ruled that the Appellant had to be re-instated and had to be warned to be careful in the future. In the alternative, UNRWA could elect to pay the Appellant compensation equivalent to two years' net base pay.

11. Judgment No. 2010-UNAT-031 (30 March 2010): Jarvis v. *Secretary-General of the United Nations*[29]

Admissibility of appeal—Home-leave travel—Lump-sum payment—Negotiability of rules—Forfeiture of right to appeal

The Appellant, a staff member of the International Criminal Tribunal for the former Yugoslavia (ICTY), challenged the determination by the ICTY administration of the lump-sum amount for her home-leave travel to Adelaide, Australia. Together with two colleagues, she had accepted the lump-sum while explicitly reserving her right to appeal. The United Nations Dispute Tribunal (UNDT) rejected her appeal as inadmissible, arguing that the application of the rules by the administration was non-negotiable and that the Appellant had forfeited her right to appeal by accepting the lump-sum payment.

The Tribunal noted that the administration had recognized that the lump-sum payment was an estimate and not a final calculation. It also found no document in the case record which provided a detailed calculation of the lump-sum or how the travel unit had arrived at that amount. Moreover, the applicable staff rules did not define what constituted a "full economy-class fare by the least costly scheduled air carrier". As a consequence, the Tribunal determined that the parties had not been in a situation governed by rules in which the administration could only apply them and the staff member could only accept or reject the lump-sum payment proposed. Accordingly, the Appellant had not forfeited any right of appeal by accepting the lump-sum payment.

In conclusion, the Tribunal annulled the UNDT decision and remanded the case to the UNDT for a fresh judgment on the merits.

12. Judgment No. 2010-UNAT-032 (30 March 2010): Calvani v. *Secretary-General of the United Nations*[30]

Administrative leave without pay—Suspension of execution—Production of evidence—Measures of inquiry are not receivable for appeal

Following a critical audit report, the Respondent (Applicant in first instance), the Director of the United Nations Interregional Crime and Justice Research Institute, was informed by the Under-Secretary-General for Management that the Secretary-General had decided to

[29] Judge Inés Weinberg de Roca, Presiding, Judge Jean Courtial and Judge Mark P. Painter.

[30] Judge Jean Courtial, Presiding, Judge Inés Weinberg de Roca and Judge Mark P. Painter.

place him on administrative leave without pay. The Respondent requested that this decision be submitted to a management evaluation and filed an application with the United Nations Dispute Tribunal, requesting for a suspension of execution of the decision.

Following an oral hearing, the Dispute Tribunal in Geneva ordered the Administration to submit a signed confirmation from the Secretary-General that he had made the decision to place the Respondent on administrative leave without pay. The Secretary-General appealed this order, arguing that the Dispute Tribunal, in considering that no evidence had been submitted establishing the authority for the contested decision, despite a letter signed by the Deputy Secretary-General to that extent, disregarded General Assembly resolution 52/12 B, setting out the responsibilities of the Deputy Secretary-General in the management of the Secretariat.

The United Nations Appeals Tribunal found that, in the present case, the Dispute Tribunal had exercised its discretionary authority to decide on a measure of inquiry, the necessity of which it had sole authority to assess. The Tribunal did not see any basis in the internal system of justice of the Organization, or that it was in the interest of that system of justice, for considering an appeal against a simple measure of inquiry receivable. Consequently, the Tribunal rejected the appeal.

13. Judgment No. 2010-UNAT-035 (1 July 2010): Crichlow v. *Secretary-General of the United Nations*[31]

Appeal must demonstrate error in law or fact of United Nations Dispute Tribunal—By paying the judgment award, the Secretary-General accepts the judgment of the United Nations Dispute Tribunal and can no longer appeal the judgment

The Appellant (Respondent on Cross-Appeal) had been a staff member of the United Nations Population Fund (UNFPA). She had requested administrative review of a decision to reassign her to another post, and later appealed that decision at the United Nations Dispute Tribunal (UNDT). The Appellant further complained that she had been treated negatively by her former supervisor. According to her, the reassignment constituted a retaliation for a past incident, in which the Appellant had refused to record as present a staff member that had been allowed by her supervisor to unofficially use his excess leave days.

The UNDT limited the Appellant's claim to the decision to reassign her, as the other complaints had not been part of her initial request for administrative review. While the Dispute Tribunal dismissed the application, it found that the Appellant had been aggrieved in her work place. By way of compensation, it awarded her an amount of one month's net base salary. Subsequently, the Appellant and the Secretary-General filed an appeal and cross-appeal, respectively.

The Secretary-General argued that the compensation awarded constituted exemplary or punitive damages, which were explicitly prohibited by the UNDT Statute. While the Statute allowed for moral damages, the Secretary-General challenged the basis on which the damages had been awarded in this case. He also maintained that UNFPA had already

[31] Judge Inés Weinberg de Roca, Presiding, Judge Mark P. Painter and Judge Kamaljit Singh Garewal.

corrected its own failure, by providing administrative review of the decision and by providing a full explanation of the reasons for the reassignment.

The Appeals Tribunal dismissed the Appellant's appeal. It found that the Appellant had not demonstrated that the UNDT had erred in law or fact. The Tribunal emphasized that the appeals procedure was of a corrective nature and that it was not an opportunity for a party to reargue his or her case.

On cross-appeal, the Tribunal noted that the Secretary-General had already paid the damages, thereby accepting the UNDT judgment. The cross-appeal was therefore moot.

In conclusion, the Tribunal dismissed both the appeal and the cross-appeal.

14. Judgment No. 2010-UNAT-059 (1 July 2010): Warren v. *Secretary-General of the United Nations*[32]

Jurisdiction to award interest—Purpose of compensation—Absence of express power not decisive—Relevance of legislative history—Interest at U.S. Prime Rate

In *Warren*, Judgment No. UNDT/2010/015 dated 27 January 2010, the United Nations Dispute Tribunal (UNDT) had concluded that the amount paid to the Respondent (Applicant in first instance) as his lump sum for home leave travel was incorrectly calculated. The UNDT had ordered the Secretary-General to pay the Respondent the difference between the amount of the lump-sum entitlement as determined by the UNDT and the amount already paid pursuant to the Organization's calculation. The UNDT had also ordered the Secretary-General to pay the Respondent interest on the difference at the rate of 8 per cent per year, from 25 March 2008 (the due date) to the date of payment.

The Secretary-General appealed this decision, submitting that the UNDT erred in law by implicitly finding that it had the power to award interest in the normal course of ordering compensation. The Secretary-General pointed out that article 10 of the UNDT Statute was silent on the power to award interest, and that its legislative history demonstrated that, while an explicit grant of power to award interest had been considered by the General Assembly, it had not been included in the final Statute. The Secretary-General also noted that the UNDT's predecessor, the United Nations Administrative Tribunal, had awarded pre-judgment interest only in exceptional cases.

The United Nations Appeals Tribunal (UNAT) deemed the absence of an express power to award interest in the UNDT Statute not decisive and considered the legislative history irrelevant in the face of the words of the Statute. It reasoned that the very purpose of compensation was to place a staff member in the same position he or she would have been in had the Organization complied with its contractual obligations. Accordingly, the Tribunal found that, to ensure proper compensation, the UNDT and UNAT should have the jurisdiction to award interest.

With regard to the rate of interest, the Tribunal noted that the UNDT had not adopted a uniform approach. The Tribunal decided to award interest at the U.S. Prime Rate applicable at the due date of the entitlement (5.25 per cent in the case at hand). The interest should be calculated from the date of the entitlement to the date of payment of the compensation

[32] Judge Inés Weinberg de Roca, Judge Jean Courtial, Judge Sophia Adinyira, Judge Mark P. Painter, Judge Kamaljit Singh Garewal, Judge Rose Boyko and Judge Luís María Simón.

awarded by the UNDT. The Tribunal held that if the judgment was not executed within 60 days, 5 per cent should be added to the U.S. Prime Rate from the date of expiry of the 60-day period to the date of payment of the compensation.

The Tribunal concluded that the UNDT had not erred in finding that it had the power to order the payment of interest, but that it had erred in its determination of the applicable interest rate. Judge Boyko appended a dissenting opinion, finding that the power to impose interest had been deliberately and specifically excluded from the UNDT draft statute. Accordingly, she found that the UNDT and the UNAT lacked the power to award interest.

15. Judgment No. 2010-UNAT-062 (1 July 2010): Bertucci v. *Secretary-General of the United Nations*[33]

Jurisdiction to receive interlocutory appeals—Only appeals against final judgment are generally receivable—Appeals against orders are moot after the court of first instance has given final judgment—Production of documents—Privilege—Interest of justice to shorten time and page limits for interlocutory appeals

The Respondent (Applicant in first instance) had challenged his non-selection for the post of Assistant Secretary-General in the Department of Economic and Social Affairs (ASG/DESA) and a decision to withhold USD 13,839 in entitlements upon his retirement from the United Nations in 2008, pending the conclusion of disciplinary proceedings against him. The cases were jointly considered by the United Nations Dispute Tribunal (UNDT).

On 17 September 2009, Judge Adams ordered the Secretary-General to produce documents relating to the appointment of the ASG/DESA.[34] The Secretary-General declined to disclose the documents on the grounds that the issue was non-justiciable, confidential and immune from disclosure on the grounds of privilege. The judge re-ordered the Secretary-General to produce the documents on 3 March 2010[35] and on 8 March 2010.[36] On 8 March 2010, Judge Adams decided that the Secretary-General, in light of his disobedience, was not entitled to appear before him in the matter. On 9 March 2010, the judge rejected a request by the Secretary-General for an adjournment of the hearing and ordered the officer who made the decision not to comply with Order No. 40 to appear before him the next morning. When the Secretary-General notified the UNDT that the officer would not appear before the Dispute Tribunal, the judge directed the Secretary-General to supply within 24 hours the name and contact details of the relevant officer.[37]

On 24 March 2010, the Secretary-General applied to the United Nations Appeals Tribunal (UNAT) for an extension of the time-limit to 26 April 2010 and for leave to file a 50-page consolidated appeal against the five orders. The Appeals Tribunal denied the request for the extension of the time-limit, and set the page length of the appeal and

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[33] Judge Inés Weinberg de Roca, Judge Jean Courtial, Judge Sophia Adinyira, Judge Mark P. Painter, Judge Kamaljit Singh Garewal, Judge Rose Boyko and Judge Luís María Simón.

[34] Order No. 124 (17 September 2009).

[35] Order No. 40 (NY/2010) (3 March 2010): Ruling on Production of Documents.

[36] Order No. 42 (NY/2010) (8 March 2010): Ruling on Disobediance [*sic*] of Order.

[37] Order No. 46 (NY/2010) (10 March 2010).

answer to five pages in each case. The Secretary-General subsequently appealed all orders on 12 April 2010.

In considering whether the appeals against the orders were receivable, the Tribunal reiterated its earlier findings that most interlocutory decisions were not receivable, except in cases where the UNDT had clearly exceeded its jurisdiction on competence.[38] The Tribunal stated that it would not interfere lightly with the broad discretion of the UNDT, as court of first instance, in the management of the cases. The possibility of interlocutory appeal would prevent the UNDT from rendering timely judgments, which was one of the goals of the new system of administration of justice. In this light, the Tribunal considered that it had been in the interest of justice to shorten the time and page limits for filing appeals against interlocutory decisions.

In the case under review, the Tribunal did not see any reason to depart from the general rule that only appeals against final judgments were receivable. As the UNDT had rendered its final judgments,[39] the appeals against the orders had become moot. For this reason, the Appeals Tribunal declined to entertain the question of privilege and noted that any claims regarding the Orders could be raised by the Secretary-General in an appeal against the final judgments.

In conclusion, the Tribunal held the interlocutory appeals not receivable and dismissed the appeal. Judge Boyko appended a dissenting opinion, in which she argued that privilege, if claimed, is a threshold issue and must be determined before the trial may proceed. Judge Boyko noted that the production of truly privileged evidence could not be ordered without destroying the privilege. Moreover, she found that a trial judge would err in drawing an adverse inference against the non-production of privileged material.

16. Judgment No. 2010-UNAT-087 (27 October 2010): Liyanarachchige v. *Secretary-General of the United Nations*[40]

Summary dismissal—Use of anonymous witness statements—Requirements of adversarial proceedings and due process—Presumption of innocence—Disciplinary measures may not be based solely on anonymous witness statements

In February 2007, the Appellant, an official with the United Nations Operation in Côte d'Ivoire (UNOCI), had been identified as a client by two presumed victims of human trafficking and forced prostitution, V01 and V03, who remained anonymous. Based on a subsequent report of the Office of Internal Oversight Services (OIOS), the Appellant was

[38] See *Tadonki* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-005 (30 March 2010);*Onana* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-008 (30 March 2010); *Kasmani* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-011 (30 March 2010); and *Calvani* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-032 (30 March 2010). The Tribunal further applied the finding in *Bertucci* in *Wasserstrom* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-060 (1 July 2010), where it reiterated the general rule that only appeals against final judgments are receivable. In particular, the Tribunal found that questions requiring adjudication on the merits could not be subject to interlocutory appeal.

[39] *Bertucci* v. *Secretary-General of the United Nations,* Judgment No. UNDT/2010/080 (3 May 2010); *Bertucci* v. *Secretary-General of the United Nations,* Judgment No. UNDT/2010/094 (14 May 2010); *Bertucci* v. *Secretary-General of the United Nations,* Judgment No. UNDT/2010/117 (30 June 2010).

[40] Judge Jean Courtial, Presiding, Judge Kamaljit Singh Garewal, Judge Rose Boyko.

charged with sexual exploitation; abuse of Organization property; and conduct incompatible with the obligations of all officials of the United Nations and the norms of conduct expected of an international civil servant. Upon receipt of the Appellant's written observations, the Secretary-General summarily dismissed the Appellant on 8 May 2009.

The Appellant challenged his summary dismissal at a hearing of the United Nations Dispute Tribunal (UNDT) in Nairobi. Five witnesses were called upon to testify. V01 and V03 did not appear, as they had been repatriated to their home country. On 9 March 2010, the UNDT found that the identification of the Appellant by V01 and V03, through the use of several photographs collected by an OIOS investigator, had been sufficient, despite some inconsistencies in the testimony of the witnesses regarding the physique of the Appellant. It upheld the summary dismissal as appropriate.

On appeal, the Tribunal determined that the UNDT had erred in law by violating the requirements of adversarial proceedings and due process, and emphasized that the presumption of innocence must be respected in a system of administration of justice. It held that, while the use of anonymous witness statements should not be excluded from disciplinary matters on principle, the imposition of a disciplinary measure may not be based solely on anonymous witness statements, even in exceptional cases or when in the interest of combating reprehensible behaviour.

In conclusion, the Tribunal quashed the judgment of the UNDT and annulled the summary dismissal by the Secretary-General. It set an amount equivalent to 12 months of net base salary as compensation, which the Secretary-General could choose to pay instead of re-instating the Appellant.

Judge Boyko appended a separate and concurring opinion to the judgment, emphasizing the importance of the ability of a staff member to challenge the evidence against him or her.

17. Judgment No. 2010-UNAT-092 (29 October 2010): Mmata v. *Secretary-General of the United Nations*[41]

Separation of service—Exceptional circumstances—Compensation exceeding two years' net base salary—Article 10(5)(b) of the United Nations Dispute Tribunal does not require a formulaic articulation of aggravating factors—Evidence of aggravating factors warrants increased compensation—The United Nations Dispute Tribunal has authority to award interest—The applicable interest rate is the U.S. Prime Rate

The Respondent (Applicant in first instance) served as an Operation Manager at the office of the United Nations Children's Fund (UNICEF) in Windhoek, Namibia, after having worked for 13 years at the UNICEF office in Nairobi. After his transfer in 2003, he and his wife had visited the United Nations Office in Nairobi (UNON) 11 times using their UNON identity cards, even though Kenya was no longer his duty station.

In 2009, UNICEF sought the voluntary resignation of the Respondent due to poor performance of the Windhoek office. When the Respondent refused to resign, he was charged with abuse of privileges and immunities and with abuse of authority, for the unau-

[41] Judge Rose Boyko, Presiding, Judge Sohpia Adinyira and Judge Luis María Simón.

thorized use of UNON identity cards. He was subsequently separated from service on 1 September 2009.

The Respondent challenged the disciplinary measure and the United Nations Dispute Tribunal (UNDT) found that the Secretary-General had unfairly dismissed him.[42] The UNDT noted that the identity card incident had been used to force the Respondent to resign and ordered the Respondent's reinstatement. In the event that reinstatement would not be possible, the UNDT ordered the Secretary-General, "in the exceptional circumstances of this case", to compensate the Respondent for loss of earnings from the date of his separation from service to the date of the judgment and an additional two years' net base salary, both with 8 per cent interest.

On appeal, the Secretary-General argued that the UNDT had failed to specify the exceptional circumstances, required by article 10(5)(b) of the UNDT Statute, for ordering compensation beyond two years' net base salary. Moreover, the Secretary-General challenged the finding that exceptional circumstances existed in the case, and contended that the UNDT had exceeded its competence by awarding interest.

The Appeals Tribunal held that article 10(5)(b) did not require a formulaic articulation of exceptional circumstances, but rather that it demanded evidence of aggravating factors that warranted higher compensation. It found that the UNDT's findings of fact demonstrated a blatant harassment and an accumulation of aggravating factors, which warranted an increased award. Accordingly, the Tribunal upheld the determination of the compensation by the UNDT.

With regard to the interest, the Tribunal reiterated its conclusion in *Warren*,[43] namely that the UNDT had the authority to award interest, but only at the U.S. Prime Rate, with an extra five per cent if the judgment was not executed within 60 days of its issuance.

In conclusion, the Tribunal dismissed the appeal as to the compensation and set the applicable interest rate to the U.S. Prime Rate.

18. Judgment No. 2010-UNAT-100 (29 December 2010): Abboud v. *Secretary-General of the United Nations*[44]

Instigation of disciplinary charges against a staff member is a privilege of the Organization—Lack of economic loss or harm—An award of damages requires reasons, facts and law on which it is based

On 8 July 2008, the Respondent (Applicant in first instance) had been interviewed for a P-5 position in the Department for General Assembly and Conference Management (DGACM) by a five-member panel, including the Special Assistant (SA) of the Under-Secretary-General for DGACM. The Respondent subsequently complained about alleged inappropriate conduct by the SA during the interview, including inappropriate language, sarcastic observations and maintaining an intimidating posture, and requested an investigation. When he was informed that no preliminary investigation would be undertaken, the

[42] *Mmata* v. *Secretary-General of the United Nations*, Judgment No. UNDT/2010/53 (31 March 2010).

[43] *Warren* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-059 (1 July 2010).

[44] Judge Inés Weinberg de Roca, Presiding, Judge Jean Courtial and Judge Mark P. Painter.

Respondent unsuccessfully requested a suspension of action and an administrative review of the decision not to undertake a preliminary investigation. The Respondent then filed an application with the Joint Appeals Board (JAB). Upon abolition of the JAB, the case was transferred to the United Nations Dispute Tribunal (UNDT).

The UNDT found that a preliminary investigation should have taken place. While acknowledging that the Respondent had not suffered any economic loss, the UNDT determined that the violation of the Respondent's rights to a fair consideration of his request for an investigation entitled him to compensation in the amount of USD20,000.[45] The Secretary-General appealed this decision, arguing that the UNDT had erred in law and in fact and had exceeded its competence by going beyond the appropriate scope of judicial review applicable to a review of the Secretary-General's discretionary authority in disciplinary matters.

On appeal, the Tribunal found that, as a general principle, the instigation of disciplinary charges against a staff member was the privilege of the Organization itself, and that it was not legally possible to compel the Administration to do so. However, the Tribunal found that several provisions in the Bulletins and Administrative Instructions of the Secretary-General established an obligation on the Administration to investigate allegations of unsatisfactory conduct by staff members. No concrete action had been taken in order to comply with these provisions. Accordingly, the Tribunal ruled that the UNDT had not exceeded its competence in the present case and upheld the UNDT's findings on the merits.

With respect to the alleged errors in fact, the Tribunal noted that the Secretary-General presented evidence which had not been part of the case record of the UNDT. As the Secretary-General had not requested leave to have it admitted on appeal, nor had demonstrated, in line with article 10(2) of the Tribunal's Statute, exceptional circumstances warranting the admission of additional evidence on appeal, the Tribunal refused to consider this evidence and solely relied on the factual findings of the UNDT.

With regard to the damages, the Tribunal observed that no economic loss or actual damage had occurred. Accordingly, it determined that the UNDT had awarded damages—a relief not requested by the Respondent—without stating the facts and law underlying its decision, in violation of article 11 of the UNDT Statute. As a result, it vacated the award of damages.

In conclusion, the Tribunal granted the appeal in part and rescinded the UNDT judgment to the extent that it awarded damages to the Respondent.

[45] *Abboud* v. *Secretary-General of the United Nations*, Judgment No. UNDT/2010/001 (6 January 2010).

C. Decisions of the Administrative Tribunal of the International Labour Organization[46]

1. *Judgment No. 2867 (3 February 2010): A.T.S.G.* v. *International Fund for Agricultural Development (IFAD)*[47]

Status of staff of an organ established under an international convention and hosted by an international organization pursuant to a memorandum of understanding—Jurisdiction of the Tribunal

The Global Mechanism, established by the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification,

[46] 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 following 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 Organisation 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; Global Fund to Fight AIDS, Tuberculosis and Malaria; and the International Centre for the Study of the Preservation and Restoration of Cultural Property. 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/index.htm.

[47] Ms. Mary G. Gaudron, President, Mr. Seydou Ba, Vice-President, Mr. Giuseppe Barbagallo, Ms. Dolores M. Hansen and Mr. Patrick Frydman, Judges.

Particularly in Africa, and the International Fund for Agricultural Development ("the Fund") had concluded a Memorandum of Understanding on 26 November 1999, by which Fund undertook "to house the Global Mechanism for the administrative operations of such Mechanism". A dispute arose over the status of the staff of the Global Mechanism.

The Tribunal found that personnel of the Global Mechanism were staff members of the Fund and that the decisions of the Managing Director of the Global Mechanism in relation to them were, in law, decisions of the Fund. Administrative decisions giving rise to grievances were therefore subject to internal review and appeal in the same manner and for the same reasons as the decisions concerning other staff members of the Fund. Such grievances could also be brought before the Tribunal in the same way and for the same reasons as the decisions concerning other staff members of the Fund.

The decision was subsequently submitted to the International Court of Justice for an advisory opinion under article XII of the Statute of the Tribunal.[48] By the end of 2010, the case remained pending.

2. *Judgment No. 2893 (3 February 2010): F.A.M.L.* v. *European Organisation for the Safety of Air Navigation (Eurocontrol Agency)*[49]

Right to be heard—Complainants should be free to present their case, either in writing or orally—Appeal bodies are not required to offer complainants the possibility to present their cases both in writing and orally

The Complainant had filed a claim over statutory compensation denied to him. On appeal, he contended that, as he had not been informed of the date of the Eurocontrol Joint Dispute Committee meeting at which his internal appeal was examined, he had not been given an opportunity to put his case himself or to present oral submissions through counsel, and that he had thus been denied his right to be heard.

The Tribunal rejected that argument. Neither the legal provisions governing the Eurocontrol Joint Dispute Committee, nor any general principle applicable to such an appeal body required that a Complainant be given an opportunity to present oral submissions in person or through a representative. As the Tribunal had already had occasion to state,[50] all that the right to a hearing required was that the Complainant should be free to put his case, either in writing or orally; the appeal body was not obliged to offer him both possibilities.

As the Committee had considered that it had gleaned sufficient information about the case from the parties' written submissions and documentary evidence, it was under no obligation to invite the Complainant to put his case orally, or indeed to accede to any request to that effect. Accordingly, the Tribunal dismissed the complaint.

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[48] Adopted by the International Labour Conference on 9 October 1946 and amended by the Conference on 29 June 1949, 17 June 1986, 19 June 1992, 16 June 1998 and 11 June 2008. Available from http://www.ilo.org/public/english/tribunal/about/statute.htm.

[49] Mr. Seydou Ba, Vice-President, Mr. Claude Rouiller and Mr. Patrick Frydman, Judges.

[50] See, for example, In re *Thadani,* Judgment No. 623 (5 June 1984).

3. *Judgment No. 2899 (3 February 2010): N.W.* v. *European Free Trade Association (EFTA)*[51]

Right to be heard—Right to jurisdictional appeal—Undue payments are subject to recovery—Relevant circumstances must be taken into account when the Organization requests reimbursement of an undue payment

The Complainant had received written censure, a disciplinary action issued because of the improper receipt of allowances, which the Complainant had later paid back. The Secretary-General considered that this reimbursement had settled the dispute and refused to hear the Complainant's internal appeal.

On appeal, the Tribunal quashed the decision by the Secretary-General, finding a major procedural flaw. The Tribunal held that staff members of international organizations were guaranteed both the right to be heard and the right of appeal to a judicial authority. A staff member should not in principle be denied the possibility of having a contested decision reviewed by the competent appeals body, unless the individual concerned had waived the right of internal appeal.[52]

With regard to the recovery of undue payments, the Tribunal recalled that, by virtue of a general principle of law, any sum paid in error was subject to recovery, save where such recovery was time-barred.[53] Nevertheless, an international organization, having mistakenly paid out a sum to a staff member, must take into consideration any circumstance that would make the request for reimbursement of the amount in question, or of less than the full amount, inequitable or unfair. Among the relevant circumstances in this regard were the good or bad faith of the individual, the nature of the error, the respective responsibilities of the organization and the staff member in causing the error, and the inconvenience caused to the staff member by the recovery demanded as a result of an error attributable to the organization.[54]

4. *Judgment No. 2900 (3 February 2010): D.Q. and D.M.W.* v. *European Telecommunications Satellite Organization (EUTELSAT)*[55]

Jurisdiction of the Administrative Tribunal—The Tribunal alone can determine whether it is competent to hear a dispute—The Tribunal may only hear disputes between officials and the international organizations employing them

In 1990, EUTELSAT had established a limited liability company under French law, Eutelsat S.A. In 2001, the rights and obligations arising from the pension scheme for

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[51] Ms. Mary G. Gaudron, President, Mr. Seydou Ba, Vice-President and Mr. Patrick Frydman, Judge.

[52] See *C.T.* v. *Agency for International Trade Information and Cooperation (AITIC)*, Judgment No. 2781 (4 February 2009), paragraph 15 of the considerations.

[53] See In re *Zayed (Najia)*, Judgment No. 1195 (15 July 1992), paragraph 3 of the considerations; *H.B.* v. *Customs Co-operation Council (CCC)*, Judgment No. 2565 (12 July 2006), paragraph 7(a) of the considerations.

[54] See In re *Durand*, Judgment No. 1111 (3 July 1991), paragraph 2 of the considerations; and In re *Gera*, Judgment No. 1849 (8 July 1999), paragraph 16 and 18 of the considerations.

[55] Mr. Seydou Ba, Vice-President, Mr. Claude Rouiller and Mr. Patrick Frydman, Judges.

EUTELSAT staff members had been transferred to Eutelsat S.A. The present case arose when Complainants contested the new method for the adjustment of pensions.

EUTELSAT refused to rule on the substance of the Complainants' request for review and invited them to file a complaint directly with the Tribunal, promising not to challenge the Tribunal's jurisdiction. The Tribunal ruled, however, that it alone could determine whether it was competent to hear a dispute, and that it was by no means bound in this respect by the opinions expressed by the parties in the course of the proceedings. In accordance with article II, paragraph 5, of its Statute, the Tribunal could hear only disputes between officials and the international organizations employing them. In the case at hand, the Tribunal found that the dispute in question was not between the Complainants and the international organization EUTELSAT, but between them and the French company Eutelsat S.A. As a result, the Tribunal concluded that the dispute did not fall under its jurisdiction and it dismissed the complaints.

5. *Judgment No. 2915 (8 July 2010): H.L.* v. *World Intellectual Property Organization (WIPO)*[56]

Compulsory retirement age—Vested rights—Principle of equal treatment—Distinction on the basis of entry into service—An obligation corresponding to a vested right can be implemented without requiring continuing consent—Lack of choice in choosing one's retirement age is not discriminatory if others cannot choose their retirement age either, even if different age limits apply

The Complainant had entered into service of WIPO prior to 1990. In November 1990, the compulsory retirement age was raised from 60 to 62 for WIPO staff who entered the Organization after that time. In 2006, the Complainant sought to extend her compulsory retirement age from 60 to 62, but the Organization refused to do so. The Complainant considered the relevant staff regulation to be inherently discriminatory and filed several grievances, including the complaint that the differentiation between staff members on the basis of the time of entry into service violated a vested right of retirement and the principle of equal treatment.

The Complainant contended that a vested right is a "right complete and consummated and of such a character that it cannot be divested without the consent of the person to whom it belongs". Accordingly, she argued that continuing consent was necessary to support a compulsory retirement age of 60 for staff members who entered into service prior to 1 November 1990. The Complainant argued that those staff members "should have the choice of either retaining their vested right [to retire at 60] or [. . .] availing themselves of the [right to retire at] 62". The Tribunal rejected this argument. It considered that while a vested right could not be divested without the consent of the person to whom it belongs, a corresponding condition or obligation (in this case, the condition or obligation to retire at 60) can be implemented without requiring continuing consent.

With regard to the principle of equal treatment, the Complainant argued, in line with earlier case law,[57] that the date of entry into service was not a relevant difference warrant-

[56] Ms. Mary G. Gaudron, President, Mr. Guiseppe Barbagallo and Ms. Dolores M. Hansen, Judges.

[57] See *Z.P.* v. *World Health Organization*, Judgment No. 2313 (4 February 2004).

ing different treatment. For this reason, she maintained that she should have had the choice to retire either at 60 or 62. The Tribunal considered that the inability to choose her retirement age did not constitute inequality, because staff members who entered into service after 1990 had no more ability to make that choice than staff members joining before 1990. It therefore rejected both claims.

6. *Judgment No. 2916 (8 July 2010): R.R.J.* v. *International Telecommunication Union (ITU)*[58]

Non-renewal of contract for reasons of poor performance—A notification of non-renewal constitutes a decision that may be challenged before the Tribunal—A decision of non-renewal is a discretionary decision that may only be reviewed on limited grounds—In cases of non-renewal for poor performance, the Tribunal will not substitute its own assessment for that of the organization concerned—An organization may not in good faith end an appointment for poor performance without warning the staff member to do better—An organization in good faith must observe its performance appraisal rules in order to rely on poor performance for a decision that adversely affects a staff member

The Complainant contested a decision not to renew her fixed-term appointment for reasons of poor performance. The Tribunal recalled relevant case law, which indicated, *inter alia*, that a notification of non-renewal of a contract was a decision that could be challenged before the Tribunal.[59] At the same time, the Tribunal found that a decision not to renew a contract was a discretionary decision that could only be reviewed on limited grounds, namely "that it was taken without authority, or in breach of a rule of form or of procedure, [. . .] or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority".[60] The Tribunal further recalled that where the ground for non-renewal is unsatisfactory performance, the Tribunal would not substitute its own assessment for that of the organization concerned.[61] At the same time, an organization could not in good faith end an appointment for poor performance without first warning the staff member and giving him or her an opportunity to do better.[62] The Tribunal held that the duty of good faith required that an organization observe its rules with respect to performance appraisal if it wished to rely on unsatisfactory performance for any decision that was adverse to a staff member.[63]

Although the decision not to extend the Complainant's appointment involved procedural and other errors, the Tribunal considered that it did not follow that her fixed-term contract would have been renewed if those errors had not occurred. Accordingly, it ruled that reinstatement was not an appropriate remedy. On the other hand, the Tribunal consid-

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[58] Ms. Mary G. Gaudron, President, Mr. Seydou Ba, Vice-President, and Mr. Claude Rouiller, Judge.

[59] See *F.S.W.* v. *International Criminal Court*, Judgment No. 2573 (7 February 2007), paragraph 10 of the considerations; In re *Amira*, Judgment No.1317 (31 January 1994), paragraph 23 of the considerations.

[60] See In re *Scherer Saavedra*, Judgment No. 1262 (14 July 1993), paragraph 4 of the considerations.

[61] *Ibid*.

[62] See In re *Ricart Nouel*, Judgment No. 1583 (30 January 1997), paragraph 6 of the considerations.

[63] See *A.E.L.* v. *International Telecommunication Union (ITU)*, Judgment No. 2414 (2 February 2005), paragraphs 23 and 24 of the considerations.

ered that the Complainant was entitled to compensation in respect of material and moral damages, on the basis that she had lost a valuable chance of having her contract renewed had proper procedures been observed.

7. Judgment No. 2919 (8 July 2010): E.C.D., E.H. and H.S. v. *European Patent Organisation (EPO)*[64]

Standing of Staff Committee members to challenge general decisions and decisions relating to external contractors—Consultation of the General Advisory Committee (GAC) of the European Patent Organisation—Prevalent practice of hiring external contractors constitutes an informal policy that requires consultation of the GAC

Three members of the Staff Committee of the European Patent Organisation (EPO) filed a complaint concerning the practice of the Principal Directorate IT Infrastructure and Services to assign duties to external contractors, outside the employment relationships specified in the Service Regulations, which were the same as or similar to those performed by permanent employees. They argued that by employing external contractors under "inferior working conditions", the Organisation was violating the right to equal treatment of these external contractors. Furthermore, the Complainants held that the recruitment procedure for external contractors excluded the staff representation from the selection process, thereby violating the rights of staff representatives. The Complainants requested the Tribunal to quash the President's decision to rely on temporary employment contracts without consulting the General Advisory Committee (GAC).

In reviewing its jurisprudence, the Tribunal observed that members of the Staff Committee could challenge a general decision that was not implemented at the individual level and that affected all staff.[65] It reiterated that it was often more efficient to have the members of the Staff Committee bring those types of matters forward.[66] The Complainants argued that case law recognized the standing of Staff Committee members to represent external contractors before the Tribunal.[67] However, the Tribunal observed that the Complainants had taken the relevant statement out of context. It held that, absent a connection flowing from a contract or deriving from employment status, the Tribunal would not be competent to entertain the complaint.

With regard to the GAC consultation, the Tribunal acknowledged that an internal regulation required the GAC to be consulted on any proposals that concerned the whole or part of the staff. The Tribunal, recalling its jurisprudence,[68] noted that in the present case no formal policy was in place. However, it inferred the existence of an informal policy

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[64] Ms. Mary G. Gaudron, President, Mr. Giuseppe Barbagallo and Ms. Dolores M. Hansen, Judges.

[65] See In re *Baillet (No. 2), Boeker, Bousquet, Cervantes (No. 2), Criqui, Kagermeier (No. 3) and Raths (No. 3)*, Judgment No. 1618 (30 January 1997), paragraphs 4, 5 and 6 of the considerations.

[66] See In re *Hamouda, Kigaraba (No. 5), Mjidou, Ranaivoson (No. 2), Sebakunzi, Suprapto (No. 2) and Tallon (No. 2)*, Judgment 1451 (6 July 1995), paragraph 18 of the considerations.

[67] See *F.B.P.M.B.* v. *European Patent Organisation*, Judgment No. 2649 (11 July 2007), paragraph 7 of the considerations.

[68] See In re *Baillet (No. 2), Boeker, Bousquet, Cervantes (No. 2), Criqui, Kagermeier (No. 3) and Raths (No. 3)*, Judgment No. 1618 (30 January 1997); and *J.A.S.* v. *European Patent Organisation (EPO)*, Judgment 2562 (12 July 2006).

from the prevalent practice of hiring external contractors. For this reason, the Tribunal concluded that the EPO must consult the GAC on the issue of outsourcing.

8. *Judgment No. 2920 (8 July 2010): H.S. and E.H.* v. *European Patent Organisation*[69]

Transfer of Appointments—Participation of Staff Committee in the staff selection process—Service Regulations do not apply to the transfer process—Vacancy announcements must be sufficiently detailed

The Complainants, acting in their capacities as Chairperson and Vice-Chairperson of the Staff Committee of the European Patent Organisation, disputed two transfer appointments (without competition) to two posts for which vacancy notices had been published. The Complainants claimed that this decision violated the right of the Staff Committee to participate in the selection process.

The Tribunal relied on its prior jurisprudence in finding that, as the Service Regulations did not explicitly deal with staff representation in the transfer process, the purposive interpretation of the Service Regulations taken by the Complainants was not valid.[70] The Tribunal thus rejected the claim on that point.

On the other hand, the Tribunal revoked one of the two appointments because of irregularities in the relevant vacancy announcement, finding that it had not been sufficiently detailed.

9. *Judgment No. 2926 (8 July 2010): N.L.* v. *International Labour Organization (ILO)*[71]

Status of an official of the Organization—Jurisdiction of the Tribunal—Status as an "official" can only be granted by a formal administrative document—The Tribunal only has jurisdiction over cases filed by officials of an organization

The complaint concerned the determination by the Tribunal whether the Complainant, who had worked for the Staff Union of the International Labour Organization for several years under an external collaboration contract, short term contracts and even without a formal contract, had the status of an official of the Organization.

The Tribunal found that the Complainant had not been granted the status of official by any formal administrative document. Accordingly, when he filed the complaint with the Tribunal, the Complainant was not in a position to invoke the status of an official bound to the Organization. It followed that the Complainant had no access to the Tribunal. The Tribunal declined jurisdiction and dismissed the complaint.

With regard to the argument that the Organization was legally responsible for the actions of the Chairperson of the Staff Union Committee, who maintained the Complainant's employment relationship without concluding any kind of contract with him, the Tribunal considered that those actions were grossly unlawful and therefore could not bind the Organization.

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[69] Ms. Mary G. Gaudron, President, Mr. Giuseppe Barbagallo and Ms. Dolores M. Hansen, Judges.

[70] *H.S.* v. *European Patent Organisation (EPO)*, Judgment No. 2792 (4 February 2009), paragraphs 8, 9 and 10 of the considerations.

[71] Mr. Seydou Ba, Vice-President, Mr. Claude Rouiller and Mr. Patrick Frydman, Judges.

10. Judgment No. 2933 (8 July 2010): B.D. v. World Health Organization (WHO)[72]

Restructuring of an international organization's services—Acquired rights—Reassignment procedure—Discretion of the executive head in the restructuring of an international organization's services—The amendment of a staff rule or regulation to an official's detriment amounts to a breach of an acquired right only when the structure of the contract of appointment is disturbed or if there is impairment of any fundamental term of employment in consideration of which the official accepted appointment—Appointment of reassignment committee members by the Director-General does not undermine the independence and impartiality required of the persons concerned

In the context of a dispute concerning the non-renewal of a contract subsequent to the abolition of a post, the Tribunal recalled its jurisprudence on the subjects of restructuring and acquired rights. It rejected the argument that the reassignment process, coordinated by a committee established by the Director-General of the World Health Organization, was incompatible with the transparent operation of the reassignment process.

The Tribunal reiterated that decisions concerning the restructuring of an international organization's services, such as a decision to abolish a post, may be taken at the discretion of its executive head and are consequently subject only to limited review.[73] The Tribunal also drew attention to the principle, set forth in case law,[74] that the amendment of a staff rule or regulation to an official's detriment amounts to a breach of an acquired right only when the structure of the contract of appointment is disturbed or if there is impairment of any fundamental term of employment in consideration of which the official accepted appointment.

Concerning the complaint that the reassignment process was flawed in that the Chair and certain members of reassignment committees are appointed by the Director-General, the Tribunal considered that this fact in no way undermined the independence and impartiality required of the persons concerned. Furthermore, the fact that the Staff Association provisionally withdrew from those committees did not in itself prove that the reassignment process was flawed.

11. Judgment No. 2944 (8 July 2010): C.C. v. United Nations Educational, Scientific and Cultural Organization (UNESCO)[75]

Termination without notice—Failure to abide by local laws and the public policy of the host State—Standards of Conduct for the International Civil Service constitute a general reference to all the professional and ethical

[72] Ms. Mary G. Gaudron, President, Mr. Seydou Ba, Vice-President and Mr. Patrick Frydman, Judge.

[73] See, for example, *F.M.L. v. United Nations Educational, Scientific and Cultural Organization (UNESCO)*, Judgment No. 1131 (3 July 1991), paragraph 5 of the considerations; and *W.G. v. International Telecommunication Union (ITU)*, Judgment No. 2510 (1 February 2006), paragraph 10 of the considerations.

[74] See *Robert V. Lindsey v. International Telecommunication Union (ITU)*, Judgment No. 61 (4 September 1962), In re *Ayoub, Lucal, Monat, Perret-Nguyen and Samson*, Judgment No. 832 (5 June 1987) and In re *Bangasser, Dunand, Marguet-Cusack and Sherran (No. 2)*, Judgment No. 1330 (31 January 1994).

[75] Mr. Seydou Ba, Vice-President, Mr. Claude Rouiller and Mr. Patrick Frydman, Judges.

OBLIGATIONS APPLICABLE TO CIVIL SERVANTS OWING TO THE REQUIREMENTS OF THEIR STATUS—PROPORTIONALITY

The Complainant, who had been with the Organization for almost 30 years, contested a disciplinary measure of termination without notice for reasons of unsatisfactory conduct. The measure had been imposed on her for failure to abide by local law and to respect the public policy of the host State; for compromising the reputation and image of the Organization; and for breaches of the Standards of Conduct for the International Civil Service. The Complainant had left arrears in her rent unpaid despite several orders from a domestic court requiring her to meet her obligations and despite numerous notices and reminders from the Organization, which had been contacted by the Ministry of Foreign Affairs of the host State about the matter.

The Tribunal found that the Complainant had indeed failed to respect local laws and institutions as well as public policy of the host State, and that the disciplinary measure of termination without notice was justified.

With regard to the Complainant's contention that the Standards of Conduct for the International Civil Service did not apply to her because they were issued after the acts with which she was charged, the Tribunal considered that the Standards should be construed as a general reference to all the professional and ethical obligations applicable to civil servants owing to the requirements of their status, and not as a specific reference to a given text codifying these obligations. Furthermore, in similar cases the Tribunal had observed that breaches of private financial obligations on the part of international civil servants were incompatible with the rules of conduct by which they must abide.[76]

As to the Complainant's contention that the disciplinary measure was disproportionate, the Tribunal pointed out that, according to firm precedent[77] and given the seriousness of the acts in question, notwithstanding the Complainant's length of service with UNESCO, the choice of the measure of termination was not manifestly out of proportion.

[76] See In re *Wakley*, Judgment No. 53 (6 October 1961), paragraph 7 of the considerations; In re *Gill*, Judgment No. 1480 (1 February 1996), paragraph 3 of the considerations; and In re *Souilah,* Judgment No. 1584 (30 January 1997), paragraph 9 of the considerations.

[77] In re *Khelifati*, Judgment No. 207 (14 May 1973); In re *van Walstijn*, Judgment No. 1984 (12 July 2000); and *S.N-S.* v. *Food and Agriculture Organization of the United Nations (FAO)*, Judgment No. 2773 (4 February 2009).

D. Decisions of the World Bank Administrative Tribunal[78]

1. *Decision Nos. 430 and 431 (23 March 2010): BF* v. *International Bank for Reconstruction and Development; and AY* v. *International Bank for Reconstruction and Development*[79]

Managerial Discretion—Due process requirements—"Accountability Review"—Reassignment—Supplemental Performance Evaluations

The Tribunal considered two applications brought by Bank staff members who had been reassigned following their involvement in a Bank project in Albania, which was perceived as being linked to Government demolitions of dwellings in the project area and its surroundings. Applicant A was Country Director for Central/South Europe and the Baltic Countries. Applicant B was the Task Team Leader for the project, with direct responsibility for the submission of the project documents to the Bank's Board.

Following the demolitions, the Bank's Inspection Panel undertook an investigation into the allegations that they had occurred as a result of the project and concluded that a series of serious errors had been committed during the project preparation, the Board presentation and the project implementation. The Inspection Panel's report was accompanied by a memorandum from the Panel's Chairperson which criticized the difficult investigation process and deliberate misinformation, including misrepresentation of facts by staff, reluctance to provide information and lack of transparency on project-related information.

The Bank's management then prepared a Management Report and Recommendation in Response to the Inspection Panel Report, the purpose of which was to identify mistakes made so as to draw the appropriate lessons, and not to ascertain individual accountability. Some of the staff members involved with the project, including Applicant B, were asked to assist in providing information for the purposes of this report. The Management Report and Recommendation detailed a series of errors committed during the project design, presentation to the Board and project supervision, as well as during the Inspection Panel proceedings. The report also identified failures by the project team.

The President of the Bank also tasked the Department of Institutional Integrity (INT) with leading an "Accountability Review" into the alleged misrepresentation by Bank staff to the Inspection Panel and internal events surrounding the project preparation, Board presentation and project supervision, to enable him to take corrective action. The Appli-

[78] 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.

[79] Jan Paulsson, President, and Judges Florentino P. Feliciano, Zia Mody, Stephen M. Schwebel, Francis M. Ssekandi and Mónica Pinto.

cants were interviewed by INT as persons "who may be able to assist it in determining some of the facts and circumstances", and were not notified of any specific charges against them. INT presented a draft report of its Accountability Review and preliminary inquiry to the Managing Director. In this draft, INT stated that it had found evidence to indicate that at least eight staff members and managers, including the Applicants, had engaged in actions or inactions which were indicative of varying degrees of poor performance. INT suggested a range of remedial actions that it considered to be proportionate to the degree of poor performance. However, INT stated that it had not at that stage found any evidence of ill-motive, or a wilful or conscious intent to mislead, on the part of staff, but identified some performance concerns that might be sufficiently egregious to constitute possible misconduct, and expressed its intent to look further into these matters.

In light of the preliminary findings of INT's Accountability Review and preliminary inquiry, as well as the shortcomings identified in the Management Report, the Bank's senior management decided to take measures. As a result, six individuals, including the Applicants, were reassigned to technical or non-managerial positions. In addition to the reassignment, Supplementary Performance Evaluations were undertaken for eight individuals, including the Applicants, "to amend their performance records for the period concerned regarding their performance on the Project".

The Applicants challenged the Bank's decision to reassign them to different positions and to undertake the Supplementary Performance Evaluations. In particular, the Applicants argued that their reassignments amounted to a *de facto* disciplinary action; that they were denied due process; and that the Bank's decisions were unfair and arbitrary. In response, the Bank argued that the decision to reassign them was not equivalent to a disciplinary sanction, but that it constituted a legitimate exercise of managerial discretion; that the Applicants were afforded due process; and that the Supplementary Performance Evaluations reflected a fair appraisal of their performance.

In considering the merits, the Tribunal recognized that the demolition carried out, and the perception of its link to the project, were serious matters with the evident potential of harming the Bank's reputation. Nevertheless, the Tribunal stressed that the attribution of individual responsibility must be carried out with respect for the principles of due process, transparency and fairness, to guarantee that any effects on individuals were justified by facts as assessed by legitimate standards. In addressing the claim that the reassignment decisions amounted to *de facto* disciplinary sanctions, the Tribunal held that by mandating INT to undertake an "accountability review", it was not clear whether the steps taken by the Bank had been administrative or disciplinary in nature. The Tribunal found that there was a basis for inferring that the decisions had been disciplinary in nature and that there had been several significant deficiencies in the steps taken by the Bank. The impugned decisions, which apparently related to performance issues, had been taken on the basis of preliminary findings in a draft report, before INT had concluded its investigation and before it had determined that there was insufficient basis for a misconduct investigation. The Bank had also failed to take account of all relevant factors by giving considerable weight to the alleged failures in the project and very little weight to the prior and subsequent positive evaluations of the Applicants' performance. The Tribunal expressed its discomfort with the ambiguities of the Bank's posture vis-à-vis the Applicants, which, it stated, bespoke haste and a lack of confident understanding of the Staff Rules. The Tribunal also reviewed whether the Bank had respected the requirements of due process in these

cases. The Tribunal concluded that the Applicants had not been given adequate notice of the performance concerns and a meaningful opportunity to defend themselves in respect of the Inspection Panel investigation and report, the investigation by INT and the preparation of its draft report, and in the context of the Supplemental Evaluation process.

The Tribunal noted that the consequences of the failure to secure an explicit agreement from the Government to respect a moratorium on demolitions had not been shown to be directly attributable to Applicant A. It stated that, as a consequence of the diffuseness of responsibility that seemed to have characterized the Bank's performance, individual accountability had been diluted, in some instances to the vanishing point. According to the Tribunal, this was a recurrent issue of organization for which the Bank's central management bore responsibility. Nevertheless, the Tribunal considered that Applicant A, as an officer of the Bank operating on the basis of confidence in her ability to oversee significant operations as Director for a number of countries in the region, should face the reality of being to some extent held accountable for the setbacks in her domain, irrespective of the lack of conclusive proof of fault and causation. Accordingly, the Tribunal decided not to order rescission of the decision to reassign her. The Tribunal did, however, order rescission of the Supplementary Performance Evaluation, and awarded Applicant A USD120,000, net of taxes, for the flaws in the process by which her performance was found deficient. The Tribunal considered that this amount reflected the fact that she had neither been dismissed, demoted nor had suffered direct financial prejudice.

With respect to Applicant B, the Tribunal stated that it could not overlook certain circumstances that were established by the Applicant's own statements. In particular, the Tribunal noted that, by her own admission, the Applicant gave a presentation to the Board which included a statement she knew to be inaccurate. Furthermore, Applicant B continued to refer to an agreement to a moratorium which she knew did not exist and allowed reports to be issued that repeated this inaccuracy. The Tribunal held, however, that the Applicant was entitled to a fair and serious assessment that complied with the Staff Rules and provided her the full opportunity to disprove the Bank's adverse conclusions regarding her performance and to explain the account of relevant events contained in her own statements. The Tribunal thus rescinded the Supplementary Performance Evaluation. The Tribunal allowed the reassignment decision to stand, but stated that it should be overturned or confirmed by the Bank according to the outcome of a new assessment of her performance.

Furthermore, as both Applicants had succeeded in demonstrating that the Bank committed a series of errors, and thereby violated their rights in virtually every step it took to assess and evaluate their performance, they were awarded costs.

2. *Decision No. 444 (29 December 2010): BK* v. *International Bank for Reconstruction and Development*[80]

Short-listing process—Failure to comply with guidelines—Career mismanagement

The Applicant joined the Bank in 1986 and received a number of promotions, reaching the GG level in 1996. The Applicant was nominated for promotion to the next level,

[80] Stephen M. Schwebel, President, and Judges Francis M. Ssekandi and Monica Pinto.

but his promotion was not approved "given his lack of multi-regional experience". In 2008, the Applicant applied for several GH level positions, including three positions which were the subject-matter of his application before the Tribunal. The shortlisting committees convened for each of the positions decided not to include the Applicant on the shortlists.

The Applicant contended that the Bank's decisions not to include him on the shortlists for the three positions had been unfair, made in violation of the Bank's Principles of Staff Employment, and were borne out of an improper procedure. He contended that, first, there was no observable and reasonable basis for the Bank's decisions not to include him on the short-lists; second, the decisions were unfair and discriminatory; and third, the Bank did not follow its "Shortlisting Guidelines". He also claimed that he should be compensated for the mismanagement of his career by the Bank. In response, the Bank argued that the selection of a staff member for a particular position involves the exercise of managerial discretion, which was properly exercised in respect of the three positions in question.

Recalling its precedents with regard to the exercise of managerial discretion in selecting staff members for positions, the Tribunal reviewed the contested decisions so as to consider whether the Bank had a reasonable basis for its decisions and whether the procedure in making these decisions was properly followed.

The evidence before the Tribunal included the testimony provided by members of the shortlisting committees convened for each position and the hiring managers. The Tribunal concluded that the evidence showed a reasonable basis for the decisions of each of the shortlisting committees, and that the shortlisting committees assessed each candidate's suitability against the selection criteria listed in the vacancy announcement. The Tribunal also recalled its decision in *Garcia-Mujica*, Decision No. 192 [1998] in which it stated "[t]he identification and definition of specializations is a matter that comes within the managerial discretion of the Bank as does the evaluation of the corresponding skills to perform these tasks". The Tribunal was not persuaded that the Bank's decisions in this regard were unfair or discriminatory.

In reviewing the process followed by the Bank in arriving at the shortlist, the Tribunal recalled, *inter alia*, the Bank's Shortlisting Guidelines which stated that the shortlisting process should be guided by principles including "objectivity", "transparency", "rigor" and "diversity". The Shortlisting Guidelines also stated that the objective is to "create a shortlist of candidates considered to be the best qualified to put forward for interviews. . . . A Hiring Manager will typically convene a shortlisting committee of up to 4 people, with at least one from outside the hiring unit. Shortlisting results must be documented". The Tribunal found that the procedure was appropriately followed in respect of the third position, but found procedural deficiencies in respect of the first and second positions.

Regarding the first position, the Tribunal noted that the shortlisting committee was composed of the Hiring Manager, a Senior Human Resources Officer, and one other staff member from within the same hiring unit. The Tribunal concluded that the participation of the Hiring Manager in the shortlisting process was not contrary to the Shortlisting Guidelines. The Tribunal found nothing unusual about the practice, employed in some units of the Bank, whereby hiring managers would participate in the shortlisting stage as part of the shortlisting committee. The Tribunal held, however, that the Human Resources Officer cannot be considered as "staff from a different unit", as she testified that she participated in the shortlisting process "as an external witness . . . for the process to be followed

. . ".. Accordingly, the Tribunal noted that, contrary to the Guidelines, there were in reality only two persons, both of whom were from within the hiring unit, on the shortlisting committee.

With regard to the second position, the Tribunal noted that the shortlisting committee was composed of two individuals only, a manager from the hiring unit and a Senior Human Resources Officer. The Tribunal found that this shortlisting committee fell short of the requirements in the Bank's Shortlisting Guidelines. The Tribunal was unpersuaded by the argument that the shortlisting was done in accordance with the prevailing practice in the department at the time. The Tribunal held that the fact that a hiring unit has pursued a deficient practice was no justification for the continued application of that practice. The unit's repetition of a deficient practice does not cure the deficiency, especially where the deficiency is contrary to the Bank's own guidelines.

The Tribunal observed that the Bank did not follow a consistent and uniform practice with respect to the shortlisting of candidates. It opined that uniformity and consistency in the shortlisting process, clear guidelines, and diversity in the composition of shortlisting committees would enable the Bank to achieve its own declared recruitment objectives. The Tribunal further observed that staff members' confidence in the shortlisting process would be enhanced by proper and contemporaneous documentation of the deliberations of shortlisting committees in as much detail as practicable.

The Tribunal concluded that the shortcomings in the process, while not amounting to mismanagement of the Applicant's career and not requiring rescission of the decisions, were sufficiently significant to warrant compensation for the Applicant. In determining the quantum of damages, the Tribunal was mindful that it was possible, but not certain, that the Applicant might not have brought the Application had the process not been deficient. The Tribunal similarly could not conclude that, but for these shortcomings in the process, there was a high likelihood that the Applicant would have been recruited for any of the positions in question. The Applicant was awarded compensation in the amount of nine months' salary, net of taxes, and costs.

3. *Decision No. 445 (29 October 2010): BI* v. *International Bank for Reconstruction and Development*[81]

Performance evaluations—Taking into account positive and negative factors—Failure to comply with the Tribunal's order

The Applicant challenged the ratings in her Overall Performance Evaluations, and the corresponding Salary Review Increases, for 2007 and 2008. During the 2007 evaluation period, the Applicant had worked in a department of the Human Resources Vice Presidency. The Applicant's supervisor in this department (Mr. A) was replaced, seven months into the review period, by a new manager (Mr. B). The Applicant and Mr. B appeared to have had a number of disagreements leading to a difficult working relationship. The Applicant met with Mr. B in order to review her performance for the 2007 evaluation period. Mr. B rated the Applicant as "Fully Satisfactory" in three areas of her Results Assessment, and "Partially Successful" for her Resource Management responsibilities. The Applicant was

[81] Jan Paulsson, acting Vice-President as President, and Judges Florentino P. Feliciano and Mónica Pinto.

also rated "Partially Successful" in three out of four areas in her Behavioral Assessment. These ratings were in contrast to her previous OPEs for 2004, 2005 and 2006 in which the Applicant primarily received "Superior" ratings, and never received a rating below "Fully Satisfactory". It also appears that the Applicant's initial supervisor, Mr. A, had provided Mr. B with written feedback on the Applicant's performance for the first seven months of the review period, in which her performance was described as "generally positive". The Applicant refused to sign this performance evaluation.

The Applicant was transferred to another department in Human Resources where she was managed by Mr. C. Mr. C gave evidence that he had attempted to intervene between the Applicant and Mr. B as an "informal mediator" so that her 2007 performance evaluation might be finalized. As a result of this process, Mr. B agreed to raise three ratings in the Applicant's Behavioral Assessment but refused to raised the Partially Successful rating in the Results Assessment section of her evaluation. The Applicant and Mr. C signed her 2007 performance evaluation thereafter. The Applicant and Mr. C later signed her 2008 performance evaluation, in which she was rated "Fully Successful" in all areas.

In considering the application, the Tribunal considered whether there was a reasonable and observable basis for the ratings assigned in the Applicant's performance evaluations for the two periods under review. In so doing, the Tribunal recalled its jurisprudence, particularly *Prudencio*, Decision No. 377 [2007], in which it made clear that it was not its role to undertake a microscopic review of the Applicant's performance and to substitute its own judgment about her performance for the Bank's. The Tribunal also recalled the difficulties it faced in reviewing positive evaluations, such as the "Fully Successful" ratings challenged by the Applicant. The Tribunal recalled its decision in *Yoon (No. 5)*, Decision No. 332 [2005] in which it noted "[o]f course, staff members who are convinced that their performance has been undilutedly superlative may be legitimately irritated if their evaluation contains inexplicable and unsubstantiated reservations, or even suggestions for improvement. Managers have a duty to carry out meaningful evaluations, and staff members have a corresponding entitlement. The problem is rather that with respect to *satisfactory* performance: (a) the prejudice arising from below-superlative assessment is incomparably less manifest than in cases of termination; and (b) the feedback underlying such assessments is likely to be more subjective than instances of objective non-fulfillment of precise tasks." The Tribunal thus considered it faced similar difficulties in the present case. It noted that, while the Applicant had received good performance evaluations in the past, the Tribunal was unable to conclude that the "Fully Successful" ratings in her 2007 and 2008 performance evaluations were unwarranted or too low.

The Tribunal thus turned to consider the basis upon which the Bank arrived at the "Partially Successful" rating in the Applicant's 2007 performance evaluation. The Tribunal ordered the Bank to provide "any documents that have a bearing on the 'Partially Successful' rating in respect of Resource Management in the Applicant's 2007 OPE," and "irrespective of the existence of such documents . . . called upon the Bank to provide such explanation for the 'Partially Successful' rating as it can." In response, the Bank presented feedback submitted at the time by the Chief Administrative Officer in the Applicant's department to Mr. B for the purposes of preparing the 2007 OPE. That feedback included specific comments in which limitations of the Applicant's performance on Resource Management matters were identified and some examples were provided. The Chief Administrative Officer's feedback was reflected, almost verbatim, in Mr. B's comments in the draft

OPE. The Bank was not able to present an explanation from Mr. B himself as to how he arrived at the adverse rating in view of both the negative feedback he received from the Chief Administrative Officer and the positive feedback from Mr. A. On this issue, the Tribunal stated that "[t]he Tribunal considers that sound management dictates that a supervisor should make him or herself reasonably available to explain the basis upon which he or she arrived at an evaluation of a staff member's performance, especially when called upon to do so by the Tribunal." It found that Mr. B's failure to provide an explanation, and the Bank's apparent inability to bring Mr. B. to comply with the Tribunal's order, amounted to a failure to respect the Tribunal's role or, at best, a lack of understanding of the function of this Tribunal. This generated considerable concern on the part of the Tribunal, as it indirectly affected the ability of all staff members to seek meaningful recourse before it and aggravated the perception of unfairness by a staff member who has taken the required steps to pursue his or her claim.

The Tribunal upheld the performance evaluations, but ordered that the Applicant be paid a sum of USD45,000, net of taxes, for the Bank's failure to provide an explanation as to how Mr. B arrived at the adverse performance rating.

E. Decisions of the Administrative Tribunal of the International Monetary Fund[82]

Judgment No. 2010–4 (3 December 2010): Ms. "EE" v. *International Monetary Fund (IMF)*[83]

Sexual harassment—Preliminary inquiry—Administrative leave with pay—Escort by security—Due process—Allegations of false accusation and bias—Authority of the human resources department director to place a staff member on administrative leave with pay—Inconsistency in governing rules—Written regulations should provide effective and accurate notice of the governing requirements—The principle of *audi alterem partem* constitutes a general principle of international administrative law—Escorts should be conducted in a manner least embarrassing to a staff member—No time limit on administrative leave with pay—Right to pursue a timely complaint of sexual harassment is not extinguished by the termination of employment of the alleged perpetrator—Tribunal's remedial authority to provide relief for procedural irregularity

The Applicant, a staff member of the International Monetary Fund (IMF or "the Fund"), had been engaged in a sexual relationship with her then manager, Mr. X, from December 2004 to May 2007. The relationship had ended in November 2007, when Mr. X

[82] 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.

[83] Stephen M. Schwebel, President, Catherine M. O'Regan and Andrés Rigo Sureda, Judges.

had provided a non-favourable Annual Performance Review (APR) to the Applicant, which put her at risk of mandatory separation. Throughout the period of his intimate relationship with the Applicant, Mr. X had another extramarital relationship with another Fund staff member, Ms. Y. In April 2008, the Applicant's counsel notified the Human Resources Department (HRD) Director that the Applicant intended to bring a complaint against the Fund and specifically against her supervisor, Mr. X, on the ground of sexual harassment at the workplace. Since Mr. X was retiring from the Fund a few days later, the Ethics Office orally advised the Applicant to drop the matter and not to pursue her grievance. The Applicant subsequently initiated a grievance challenging her performance rating and alleging harassment by Mr. X, which the Grievance Committee dismissed as untimely.

Thereafter, the Applicant left an angry phone message on Mr. X's home voicemail, threatening to reveal their past affair to his wife and to Ms. Y. She then emailed several offensive messages to Ms. Y through personal and IMF email accounts and mailed erotic pictures of her and Mr. X to Ms. Y's home address. On 9 June 2008, Ms. Y contacted the Ethics Officer about the Applicant's harassment at work and expressed concern about her safety on the Fund premises. The Ethics Officer conducted a preliminary inquiry, during which the Officer conducted interviews with a Senior Administrative Assistant, the Department Director and Mr. X, and sought advice from an external risk assessment firm. The latter suggested putting the Applicant on administrative leave. The Ethics Officer recommended this course of action to the HRD Director, who decided, under the Terms of Reference for the Ethics Officer (General Administrative Order (GAO) No. 33) and the Procedural Guidelines for Conducting Inquiries Related to Allegations of Misconduct (the Procedural Guidelines), to place the Applicant on administrative leave with pay while the investigation of misconduct was on its way, pursuant to GAO No. 13, Section 9.01.

Immediately after her last meeting with the Ethics Officer, who provided her with two memoranda ("Notice of Investigation into Allegations of Inappropriate Conduct by a Fund Staff Member" and "Administrative Leave with Pay Pending Investigation of Misconduct"), the Applicant was escorted by the Fund security personnel to her office to collect personal belongings and to the nearest subway station. The procedure of escorting by the Fund security, while not reflected in any internal Fund rules, had been initiated by the Chief Security Officer's recommendation many years ago and had been implemented ever since.

During six months of administrative leave, the Fund denied the Applicant's request for a copy of the documents evidencing the Ethics Officer's recommendation and the HRD Director's decision. On December 15, 2008, one month following the submission of the Ethics Officer's Report of Investigation, the acting HRD Director issued a formal charge of misconduct against the Applicant. Following the Applicant's thorough response to the official charge, the Acting HRD Director imposed, on 10 February 2009, the following disciplinary sanctions on the Applicant: (1) a written reprimand, to remain in her confidential personnel record for three years; (2) ineligibility for a salary increase in 2009; and (3) "strict instructions not to contact Ms. Y". The decision further notified the Applicant that her disciplinary process had been concluded and that she was requested to return to active status.

On 25 November 2008, while the misconduct proceedings were still ongoing and before she had been charged with misconduct, the Applicant filed a grievance with the Fund's Grievance Committee challenging the administrative leave decision of 26 August

2008. On 2 September 2009, the Grievance Committee rejected her application and issued its Recommendation and Report, concluding that the decision challenged represented a legitimate exercise of discretionary authority. On 30 November 2009, the Applicant filed her application with the IMF Administrative Tribunal.

In her application, the Applicant contested the Fund's decision to place her on administrative leave. She asserted that the proceedings against her were based upon false accusations brought by another staff member; that the Ethics Officer had acted with bias in examining those accusations; and that the HRD Director had failed to exercise independent judgment in taking the contested decision to place her on administrative leave pending the outcome of the misconduct proceedings. The Applicant also contended that the Fund had violated due process and the Fund's own regulations, by placing her on administrative leave with pay without first seeking her account of the events at issue. Furthermore, the Applicant claimed that the investigation of misconduct had been substantially concluded before the administrative leave decision was taken; accordingly, she questioned the timing of that decision and the duration of the leave. The Applicant further complained about the embarrassment of being escorted off the Fund premises by security. The Applicant sought compensation in the amount of USD350,000 for six months of suffering on leave and for the humiliation of the escort.

The Fund maintained that the decision to place the Applicant on administrative leave with pay, pending the investigation of misconduct, represented a proper exercise of discretionary authority, which had been carried out in accordance with the applicable rules. The Fund also maintained its position that the contested decision had been taken free from any bias, animus or other improper motive, and that the leave had been necessary and not of excessive duration. The Applicant had been given the opportunity to respond to the allegations against her during the period of the administrative leave, and she had been escorted from the building in accordance with standard Fund procedures in such cases.

In examining the application, the Tribunal noted that the Applicant did not challenge the finding of misconduct or the disciplinary sanctions, but that her application was restricted to a claim of due process violations and a challenge to the evidentiary basis of the decision to put her on administrative leave. The Tribunal concluded that the Applicant's assertion that the administrative leave decision lacked an adequate evidentiary basis as being based upon "false accusations" was largely undermined by the fact that she had not brought a legal challenge to the ultimate finding of misconduct against her. The Tribunal also noted that the HRD Director had authority to place a staff member on administrative leave with pay "on the sole grounds that an inquiry into alleged misconduct by that staff member is ongoing." Additionally, the Tribunal concluded that, at the time of the decision, there was *prima facie* evidence warranting an ongoing investigation into alleged misconduct by the Applicant and that there had been a tenable basis to decide that the Applicant's continued presence in the workplace during the misconduct proceedings posed a risk of future harm. However, the Tribunal concluded that the Ethics Officer, in failing to interview the Applicant prior to completing the preliminary inquiry, had not complied with the terms of the Procedural Guidelines.

The Tribunal observed inconsistencies among the governing rules, in particular among the Procedural Guidelines, on the one hand, and GAO No. 13, section 9.01 and GAO No. 33, section 10, which predated the Guidelines, on the other. The Procedural

Guidelines referred neither to "interim measures" nor to "administrative leave", while GAO No. 13 and 33 did not refer to the stages of the Ethics Officer's "preliminary inquiry" and "formal investigation", as set out in the Procedural Guidelines. The Tribunal determined that section 10 of GAO No. 33 continued to govern the timing of an administrative leave decision, and noted the importance of the Fund's written regulations in providing effective and accurate notice of the governing requirements. It found that a staff member should be provided with the texts of the relevant staff rules when he or she is notified that he or she is under investigation and when he or she is charged with having violated a particular substantive standard. The Tribunal found no indication that the Applicant had been provided with the relevant Procedural Guidelines and GAOs at the time that she was informed of the initiation of the misconduct proceedings against her and when she was placed on administrative leave.

The Tribunal found no clear answer in the Fund's written law to the question whether the HRD Director would have been required, prior to deciding to place the Applicant on paid administrative leave, to afford the Applicant the opportunity to present her own version of the events at issue. However, the Tribunal considered that the principle of *audi alterem partem* constituted a general principle of international administrative law. Accordingly, the Director should have provided the Applicant with the opportunity to present her account of the events at issue before taking the decision to put her on administrative leave with pay. With regard to alleged bias of the Ethics Officer and other staff members, the Tribunal found no evidence for the alleged conspiracy by Mr. X, Ms. Y, the Senior Administrative Assistant and the Ethics Officer.

In response to the manner of removing the Applicant from the Fund's premises, the Tribunal considered that, although the record indicated no abusive act during the escort, the Fund should seek ways to minimize the public embarrassment to a staff member. Suggestions by the Tribunal included escorting a staff member at the end of the workday, or disabling a staff member's security pass and instructing him or her not to report the next day.

With regard to the length of the administrative leave, the Tribunal found that the Fund's rules did not impose a time limit on the disciplinary process.

Furthermore, the Tribunal questioned the Fund's inactivity to launch a formal investigation into Mr. X's misconduct, allegedly due to fact that, when his conduct came to light, he had already retired. The Tribunal reaffirmed that the disciplinary process is not the only avenue of recourse when a staff member believes that he or she has been the object of impermissible workplace harassment. Regardless of whether Mr. X remained subject to the Fund's misconduct procedures following his retirement, the Applicant's right to pursue a timely complaint of sexual harassment was not extinguished by the termination of Mr. X's employment as a staff member of the Fund.

Finally, while sustaining the Fund's decision to place the Applicant on paid administrative leave pending the investigation of misconduct, the Tribunal held that it had remedial authority to provide relief for procedural irregularity. It found the Fund liable for procedural irregularities. The Fund's failure to seek from the Applicant an account of her version of the facts before taking the administrative decision violated the Fund's written internal law and fair procedure. For that breach of due process, the Tribunal granted the Applicant compensation in the amount of USD45,000.