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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 67/241 of 24 December 2012, entitled "Administration of justice at the United Nations", the General Assembly took note of the reports of the Secretary-General on administration of justice at the United Nations, on amendments to the rules of procedure of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal and on the activities of the United Nations Ombudsman and Mediation Services, and endorsed the conclusions and recommendations contained in the report of the Advisory Committee on Administrative and Budgetary Questions. The General Assembly also requested that the rules of procedure of the Dispute Tribunal and the Appeals Tribunal be amended accordingly whenever a decision of the Assembly entailed a change. In this regard, the Assembly recalled paragraph 35 of its resolution 66/237, in which it had addressed the execution of judgments of the Dispute Tribunal imposing financial obligations on the Organization pending an appeal with the Appeals Tribunal, and noted that corresponding changes to the rules of procedure of the Dispute Tribunal and the Appeals Tribunal had not yet been made.

In 2012, the United Nations Dispute Tribunal in New York, Geneva and Nairobi issued a total of 208 judgments. Summaries of nine selected judgments are reproduced below.

[1] In view of the large number of judgments which were rendered in 2012 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/2012/001 to UNDT/2012/208 of the United Nations Dispute Tribunal, Judgments Nos. 2012-UNAT-189 to 2012-UNAT-279 of the United Nations Appeals Tribunal, Judgments Nos. 3051 to 3151 of the Administrative Tribunal of the International Labour Organization, Decisions Nos. 461 to 469 of the World Bank Administrative Tribunal, and Judgment Nos. 2012–1 to 2012–3 of the International Monetary Fund Administrative Tribunal, see, respectively, documents UNDT/2012/001 to UNDT/2012/208; 2012-UNAT-189 to 2012-UNAT-279; *Judgments of the Administrative Tribunal of the International Labour Organization: 112th and 113th Sessions; World Bank Administrative Tribunal Reports, 2012; and International Monetary Fund Administrative Tribunal Reports, Judgment No. 2012–1 to 2012–3.*

1. *Judgment No. UNDT/2012/027 (16 February 2012) Servas* v. *Secretary-General of the United Nations*[2]

Implementation of settlement agreement reached through mediation—Competence of Tribunal under article 8, paragraph 2 of its Statute—Request to review performance appraisal and retroactively change title and grade of Applicant—Compensation not appropriate when damage not substantiated

On 27 October 2011, the Applicant, a former staff member of the International Trade Centre ("ITC"), filed an application pursuant to article 8, paragraph 2 of the Tribunal's Statute to enforce the implementation of a settlement agreement reached through mediation. The Applicant maintained that by failing to change the functional title on her performance appraisal under the Performance Appraisal System from G-5 Programme Assistant to P-2 Associate Advisor and demonstrating bad faith and negligence in the payment of the P-2 salary retroactively owed to her, the ITC did not comply with its obligations under the agreement.

The said agreement, which was signed by the parties on 29 June 2011, provided in relevant part that: "The International Trade Centre shall retroactively separate and reappoint [the Applicant] to the P-2 level, step I as from June 1st 2010 until the expiration of [the Applicant's] current appointment on July 18th 2011." By a letter dated 11 July 2011, the Applicant requested that her performance appraisal for the period from 1 June to 31 December 2010 be changed, with the title of P-2 Associate Programme Officer replacing that of G-5 Programme Assistant. The Applicant's temporary contract was renewed through 18 July 2011, at which time she left the employ of the ITC. That same day, she received an amended letter of appointment from ITC which retroactively covered the period from 1 June 2010 to 18 July 2011 and bore the title of P-2 Associate Adviser. By a letter dated 21 July 2011, the ITC held that it had met all conditions of the settlement agreement and rejected the Applicant's request to change her title as given on her performance appraisal. Subsequently, the Applicant filed her application to the Tribunal.

In considering the Applicant's claims, the Tribunal first determined that when requested to exercise its jurisdiction under article 8, paragraph 2 of its Statute, its competence was limited to verifying whether the agreement reached through mediation had been implemented. Applying this rule to the facts of the case, the Tribunal found that the settlement agreement signed by the parties on 29 June 2011 necessarily involved retroactively placing the Applicant as of 1 June 2010 in the administrative situation she would have been if she had been appointed to a P-2 post. Therefore, it required the revision of the Applicant's performance appraisal for the period from 1 June 2010 to 31 December 2010. Since the ITC had rejected the Applicant's request to change her title as given on her performance appraisal, the Tribunal ordered the ITC to transmit to the Applicant a revised performance appraisal indicating that the Applicant was evaluated as a P-2 Associate Adviser.

With regard to the Applicant's request for compensation, the Tribunal found that she had not substantiated any damage caused by the ITC's failure to make the correction to her performance appraisal, and that it would not therefore be appropriate to grant her compensation.

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

2. *Judgment No. UNDT/2012/056 (19 April 2012) Fagundes* v. *Secretary-General of the United Nations*[3]

Formation of employment contract—Definition of contract, offer and acceptance—Standard essential terms of employment contract—Annex II of Staff Regulations—Unconditional acceptance by a candidate of the conditions of an offer of appointment before the issuance of a letter of appointment can form a valid contract—Lack of jurisdiction of the Tribunal—Applicant not a staff member

In or about September 2006, the Applicant applied as an external candidate for the advertised P-3 level position of Public Information Officer with the United Nations Stabilization Mission in Haiti ("MINUSTAH"), Department of Peacekeeping Operations ("DPKO"). She was interviewed on 4 October 2006. On 27 September 2006, she received an email from MINUSTAH, which stated:

> I am pleased to inform you that you have been selected to serve with the United Nations Stabilization Mission in Haiti (MINUSTAH) as Public Information Officer.
>
> You will be contacted in the next coming week by the Personnel Management & Support Service, Office of Mission Support in the Department of Peacekeeping Operations with all the details of your recruitment and we look forward [to] welcoming you to MINUSTAH in the very near future.

On the same day, the Applicant replied: "Many thanks for the excellent news! I look forward to joining MINUSTAH". She also took steps to prepare herself for deployment, including by selling her car, subletting her apartment and disconnecting her mobile phone.

On 11 October 2006, MINUSTAH provided the Applicant's name as the selected candidate to the Integrated Human Resources Management Team of Personnel Management and Support Services ("PMSS"), DPKO, for evaluation. In or around November 2006, PMSS made the decision not to select the Applicant for the post based on her previous employment history. The Applicant was informed of this decision on 13 December 2006. Subsequently, she sought an administrative review within the allowed time and the matter was eventually dealt with by the Joint Appeals Board, following which the Applicant filed an application with the former United Nations Administrative Tribunal. After the abolishment of the Administrative Tribunal, the case was transferred to the Dispute Tribunal effective 1 January 2010.

For the purposes of determining its competence to hear and pass judgment on the application pursuant to article 3, paragraph 1 of its Statute, the Tribunal focused its analysis on whether the Applicant and the Organization had entered into a contract. It defined a contract as an agreement giving rise to obligations which are enforced or recognised by law. In the employment context, the Tribunal asserted that a contract is generally formed upon unconditional acceptance of an offer containing the essential terms of the agreement. An offer existed where there was an expression of willingness to enter into a contract on specified terms, made with the intention that it is to become binding as soon as it is accepted by the person to whom it is addressed. An acceptance represented the final and unqualified expression of assent to the terms of an offer. The Tribunal also stated that whether a binding contract had been concluded would be established by making an objective assess-

[3] Judge Carol Shaw (New York).

ment of what the parties said and did at the time of the transaction. What the parties later said they intended to do was secondary to the evidence of their contemporaneous acts.

In examining past decisions, the Tribunal noted that in *El-Khatib* 2010-UNAT-029, the United Nations Appeals Tribunal ("UNAT") had held that a contract by which an individual acquires staff member status can only be concluded validly on the date at which an official of the Organization signs the staff member's letter of appointment. In *Gabaldon* 2011-UNAT-120, however, UNAT had held that this did not mean that an offer of employment and its acceptance never produced any legal effects. The Tribunal recognized that under staff regulation 4.1, upon appointment each staff member shall receive a letter of appointment in accordance with the provisions of annex II to the Staff Regulations (Letters of appointment). In the Tribunal's estimation, however, this did not mean that the only document capable of creating legally binding obligations between the Organization and its staff has to be called a "letter of appointment". The Tribunal noted that the unconditional acceptance by a candidate of the conditions of an offer of appointment before the issuance of a letter of appointment could form a valid contract provided the candidate had satisfied all of the conditions. Recalling the decision of the Administrative Tribunal of the International Labour Organisation in Judgment No. 307, *In re* Labarthe (1977), the Tribunal observed that what mattered was the substance.

In the United Nations context, the Tribunal acknowledged that pursuant to former staff rule 104.1, a letter of appointment contains "all the terms and conditions of employment". Annex II to the Staff Regulations provides a list of terms that shall be included in a standard letter of appointment. They include, *inter alia*, the nature and the period of employment, the category and the level of the appointment, and details concerning salary and other conditions of employment (see annex II to ST/SGB/2006/1). The Tribunal accepted that not all of the terms and conditions specified in Annex II were necessarily essential components of a binding contract, but it held that at the very least a contract of employment should include, as standard essential terms, the date of commencement of work, its duration, and remuneration for the work performed.

Applying this standard to the present case, the Tribunal determined that the email of 4 October from MINUSTAH to the Applicant was missing the date at which the Applicant was required to enter upon her duties; the period of her appointment; and the step with the P-3 level as well as the commensurate rate of salary. The Tribunal also noted that subsequent communications between MINUSTAH and the Applicant did not provide this essential information.

Based on its analysis the Tribunal found that no contract of employment was concluded by the Applicant and the Organization. Furthermore, the Tribunal held that the Applicant was not a staff member at the time the decision was made not to select her for the vacancy, and therefore the Tribunal did not have jurisdiction over the case.

3. *Judgment No. UNDT/2012/067 (9 May 2012) Mokbel* v. *Secretary-General of the United Nations*[4]

Judgment on relief—Emotional harm as a result of incorrectly imposing disciplinary charges and delay in dismissing the charges—Degree of emotional harm attributable to Respondent—Compensatory nature of award—Scale of severity of harm—Compensation

On 1 May 2012, the Tribunal issued a judgment on liability (*Mokbel* UNDT/2012/061), which concerned allegations by the Applicant about the manner in which he was treated, including the lengthy delay before the disciplinary charges against him were dismissed. Subsequently, on 7 May 2012, the Tribunal held a hearing to give the Applicant the opportunity to explain and justify the basis upon which he claimed compensation for what he referred to as mental anguish and distress and issued this judgment on relief.

The Tribunal first determined that under article 10, paragraph 5 (b) of its Statute, it may order compensation to an aggrieved party. That the Applicant may receive compensation for emotional harm, such as distress and anxiety, followed, in the Tribunal's opinion, from the jurisprudence of the United Nations Appeals Tribunal (see, for instance, *Wu* 2010-UNAT-042 and *Antaki* 2010-UNAT-095). The Tribunal noted, however, that it was clear from a number of authorities that, before the Tribunal awarded compensation for emotional harm, there must be evidence of injury or damage (*Antaki* 2010-UNAT-095). Furthermore, in accordance with article 10, paragraph 7 of the Tribunal's Statute, such compensation may not amount to an award of punitive or exemplary damages designed to punish the Organization and deter future wrongdoing (see *Wu* 2010-UNAT-042 and *Kasynov* 2010-UNAT-76).

The Applicant's claim was solely for compensation in respect of the emotional harm he suffered as a result of the manner in which he was treated, including the delay of three years before the disciplinary charges against him were dismissed. The Tribunal noted that while it was the case that the manner in which the investigation and the disciplinary proceedings were conducted did cause the Applicant distress and anxiety, it was the degree to which such emotional harm could be attributed to the conduct of the Respondent that had to be considered. It further recognized that it was difficult to arrive at a precise sum to reflect the extent of damage suffered by a particular staff member in a given set of circumstances and that this was not an issue which lent itself to scientific quantification or certainty. The Tribunal determined that it must use its judgment to arrive at an assessment, which was fair and proper and did not diminish confidence in the ability of the system to provide, in appropriate cases, compensation that was neither paltry nor excessive. Above all, the Tribunal acknowledged that the award had to be truly compensatory.

The Tribunal sought to categorize the harm suffered by the Applicant in terms of a scale of severity. It assessed whether the Applicant was minimally, moderately, or extremely distressed by the manner in which he was treated. After analyzing the facts, the Tribunal determined that the Applicant's distress and anxiety fell somewhere between the two extremes, but below the midpoint of the scale.

Accordingly, in its judgment on relief the Tribunal ruled that the Respondent failed to compensate the Applicant for having incorrectly imposed disciplinary charges against

[4] Judge Goolam Meeran (New York).

him, including for bribery, and for the lengthy disciplinary process of three years. The Tribunal set the amount of compensation at USD 10,000 and ordered the Respondent to pay the Applicant within 60 days from the date of the judgment.

4. *Judgment No. UNDT/2012/114 (31 July 2012): Applicant* v. *Secretary-General of the United Nations*[5]

Expiration of fixed-term appointment—Notice of non-renewal—Request for management evaluation and suspension of action—Accountability motion—Meaning of contempt in administrative proceedings—Willful disobedience of Tribunal's orders—Compliance with interlocutory orders—Referral to Secretary-General pursuant to article 10, paragraph 8 of the Statute of the Tribunal—Responsibility of supervisor for actions of subordinate

The Applicant joined the Joint Medical Services at the United Nations Office at Nairobi ("UNON") on 8 June 2010 pursuant to an Agreement between UNON and the members of the United Nations Country Team Somalia dated 5 March 2010. Her fixed-term appointment was subsequently renewed up to 6 June 2012. At approximately 4:30 p.m. on 6 June 2012 she was informed that her appointment would not be renewed. She filed a request for management evaluation and a suspension of action application, which was granted by the Tribunal in an oral judgment issued on 12 June 2012. After the judgment the Applicant attempted to resume her functions, but was informed by UNON officials that she was not authorized to return to work. On 14 June 2012, the Applicant filed a Motion titled "Motion for directions, referral for accountability" ("accountability motion") requesting the Tribunal to clarify its suspension of action orders by confirming that it intended that UNON immediately undertake all reasonable steps to suspend the effect of the non-renewal of the Applicant's employment contract and that UNON's managers be referred to the Secretary-General pursuant to article 10, paragraph 8 of the Tribunal's Statute for the enforcement of accountability.

In considering the accountability motion, the Tribunal first examined the meaning of contempt in administrative (civil) proceedings, arising out of the refusal by UNON officials to implement the Tribunal's order to suspend the Applicant's personnel action pending a management evaluation. It concluded that in the context of the United Nations, the inherent jurisdiction of the Tribunal confers upon it the power to deal with contemptuous conduct, which is necessary to safeguard its judicial functions. It also determined that this power need not be defined in the Tribunal's Statute or in its Rules of Procedure, but rather that it was necessarily inherent. Willful disobedience of its orders, the Tribunal reasoned, is contempt and it represented a direct attack upon the jurisdiction of the Tribunal and its power to undertake the responsibilities with which it has been entrusted in its Statute by the General Assembly. When faced with willful disobedience of its orders, the Tribunal asserted that it must vindicate the integrity of its jurisdiction by exercising its necessarily inherent power.

With regard to the referral of the matter to the Secretary-General pursuant to article 10, paragraph 8 of the Tribunal's Statute, the Tribunal determined that it had discretion in determining whether to proceed. The fundamental issue was whether the matter was so

[5] Judge Nkemdilim Izuako (Nairobi).

serious or potentially serious as to require the personal attention of the Secretary-General. In the present case, the Tribunal concluded that UNON management had refused to obey the orders of the Tribunal and had continued to adopt every means to alter the *status quo ante*. These actions disregarded the established jurisprudence of the Tribunal as articulated in *Villamoran* 2011-UNAT-160 on the duty of parties to comply with interlocutory orders even where an appeal had been filed. Furthermore, the Tribunal reasoned that UNON officials by their actions in this case had engaged in strong arm tactics and acted as if they made their own laws in a way that no decent organization could be proud of, least of all the United Nations Secretariat. As a global organization that, among other things, had set up at least a unit whose mandate is the promotion of the rule of law worldwide, the Tribunal determined that the Secretary-General's attention needed to be called to the actions of those of his officials who trampled on the enduring principle of the rule of law and thereby enthroned and elevated impunity.

The Tribunal also addressed an argument put forth on behalf of UNON that it did not have a legal duty to comply with the Tribunal's orders because, in the opinion of the Legal Counsel of UNON, in making an order suspending the impugned decision the Tribunal had exceeded its jurisdiction. The Tribunal admonished that it was trite law that even if counsel should believe that a court order is incorrect he/she must still comply promptly or risk the imposition of sanction. In this case, the Tribunal found that the UNON Legal Counsel did not bother to maintain the *status quo* before advising disobedience of the Tribunal's Order. In addition, the Tribunal dismissed as farfetched the argument that counsel was intending to appeal and therefore could alter the *status quo*. It stated that a court order can only be reversed by an appellate court, and that counsel cannot take the law into their own hands and settle the clients rights according to his/her notion of what is right. Accordingly, the Tribunal rejected this line of argument as a justification for the actions of UNON.

Regarding the responsibility of the Director-General of UNON, the Tribunal stated that she had overall authority in all decisions and actions taken by the UNON management. This meant that, among other things, she was accountable for the unprofessional conduct and high-handedness exhibited in this case by the Legal Counsel of UNON under her watch. Moreover, the Tribunal reasoned that the choice to comply with the legal advice of a legal officer without proper and sufficient briefing on the facts and issues, as it emerged during the Director-General's testimony at the Tribunal, over and against the orders of the Tribunal, was a matter for which the Director-General must bear responsibility.

Therefore, on the issue of the accountability motion, the Tribunal decided to refer the case to the Secretary-General under article 10, paragraph 8 of the Tribunal's Statute for the purpose of considering: (i) what action should be taken in respect of the conduct of the Director-General of UNON in dealing with the complaints made by the Applicant and disregarding the Tribunal's orders and (ii) what action should be taken in respect of the conduct of the UNON's Legal Adviser in advising disobedience of the Tribunal's orders.

5. *Judgment No. UNDT/2012/123 (10 August 2012): Neault* v. *Secretary-General of the United Nations*[6]

Challenge of non-selection decision due to apparent conflict of interest—Receivability of application *ratione temporis* under article 8, paragraph 1 of the Statute of the Tribunal—Interpretation of ST/AI/2006/3/Rev.1 and the Guidelines for programme case officers on building vacancy announcements and evaluation criteria—Rejection of claim for material damage—Compensation for moral damage

The Applicant, a former staff member of the International Criminal Tribunal for the former Yugoslavia, challenged the decision not to select her for a post of Judges' Assistant in Chambers at the G-5 level on the grounds that she had an apparent conflict of interest due to her former association with the Office of the Prosecutor. In her application she claimed compensation in the amount of two years' salary and benefits at the G-5 level for the material and moral injury she suffered, the violation of her due process rights and the Administration's bad faith.

The first issue to be determined by the Tribunal was whether the application was receivable *ratione temporis*. In article 8, paragraph 1, the Tribunal's Statute provides that an application before the Tribunal must be filed within 90 days following receipt of the Administration's response to the request for management evaluation. If the Administration replies after the response period for the management evaluation but before the expiry of the 90-day period, the 90-day period to file an application before the Tribunal starts running again from the date the response is given. In the present case, the Applicant received a response to her request for management evaluation after the expiry of the response period and she filed her application within 78 days from the receipt of this late response. Accordingly, the Tribunal determined that the Applicant had met the 90 day deadline, and that her application was receivable.

With regard to the merits of the claim, the Tribunal applied administrative instruction ST/AI/2006/3/Rev.1, which governed the matter at the time the job opening was issued. In relevant part, ST/AI/2006/3/Rev.1 and the Guidelines for programme case officers on building vacancy announcements and evaluation criteria under ST/AI/2006/3/Rev.1 made apparent that the criteria to be used in evaluating candidates must be clearly stated in the vacancy announcement. In this case, the record indicated that the Administration had failed to mention that the appearance of a conflict of interest would be among the evaluation criteria. Accordingly, the Tribunal found that the Administration's selection basis and resulting non-selection decision were flawed.

The Tribunal rejected the Applicant's claim for material damage because it considered it highly speculative that the Applicant would have been selected had the selection process been properly conducted. The Tribunal did find that the irregularities in the selection process caused the Application distress, and on this basis awarded her EUR 2,000 as compensation for her moral damage.

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[6] Judge Thomas Laker (Geneva).

6. *Judgment No. UNDT/2012/135 (11 September 2012): Manco* v. *Secretary-General of the United Nations*[7]

Conflict with provisional staff rule 1.5 (c), 4.3 and 4.5 (d)—No obligation for staff member to renounce permanent residence status or apply for citizenship upon employment with the Organization—Obligation of staff member to inform the Secretary-General of any intent to change his or her nationality or permanent resident status—Hierarchy of sources—Fifth Committee report does not carry the same legal force as General Assembly resolutions—Code of conduct for the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal—Rescission of policy—Moral damages

The Applicant contested a policy which would have required him to either renounce his permanent residence status in New Zealand or apply for citizenship there, should he wish to take up a promotion with the Office of Internal Oversight Services in Nairobi.

On 12 March 2010, the Applicant was offered a P-4 Investigator position in Nairobi. He received an email on 22 March 2010 from the Human Resources Management Services of the United Nations Office at Nairobi ("HRMS/UNON") stating:

> As you may be aware, [a candidate] selected for appointment in the Professional category and above, holding permanent residence in a country other than his or her country of nationality and who is granted a fixed term appointment of one year or longer, under the Staff Rules will have to renounce the permanent resident status or provide proof of application for citizenship prior to the appointment. Before we can proceed with processing the 2 year appointment, we would appreciate to receive satisfactory proof that you have either applied for citizenship or have renounced the permanent resident status in New Zealand.

This policy was reiterated to the Applicant by HRMS/UNON during a phone call on 26 March 2010. He was advised by HRMS/UNON that a mistake had been made in the original Offer of Appointment which did not contain the same policy as the email of 22 March 2010. On 29 March 2010, the Applicant applied for New Zealand citizenship at a cost of NZD 460. Subsequently, on 3 November 2010, the Office of Staff Legal Assistance wrote a letter on behalf of the Applicant to the Chief of HRMS/UNON requesting reimbursement of NZD 460 and the discontinuance of the policy, both with regard to the Applicant and in general. The request went unreturned. On 17 January 2011, the Applicant requested a management evaluation of the HRMS/UNON decision in regard to apply the policy and its refusal to reimburse the expenses incurred for his citizenship application. The Management Evaluation Unit responded to the Applicant on 3 March 2011, stating that he would be reimbursed NZD 460 by UNON, but that his request regarding the legality of the disputed policy was not receivable. The Applicant submitted his application to the Tribunal on 9 May 2011.

With regard to the legality of the disputed policy, in its judgment the Tribunal recalled that under the Staff Regulations, staff members' employment and contractual relationships are defined by a letter of appointment subject to regulations promulgated by the General Assembly pursuant to Article 101, paragraph 1 of the Charter of the United Nations. The Tribunal then undertook a careful review of the Provisional Staff Rules in force at the

[7] Judge Vinod Boolell (Nairobi).

relevant time. It found that the statement of practice contained in the email of 22 March 2010 to the Applicant conflicted with rule 1.5 (c), 4.3 and 4.5 (d). In particular, under those rules, the Tribunal determined that there is not and should not be any obligation on a staff member to renounce permanent residence status or apply for citizenship in that country upon employment with the Organization. The Tribunal stated that these rules impose only the obligation for a staff member to inform the Secretary-General of any intent to change his or her nationality or permanent resident status, and an obligation to renounce the latter upon employment cannot be logically inferred.

In closing submissions, Counsel for the Respondent made reference to the 25th Advisory Council on Administrative and Budgetary Questions report, which supported the disputed policy and was later confirmed by the Fifth Committee in its report A/2615. The Tribunal held that the reports of the Fifth Committee do not carry the same legal force as General Assembly resolutions. In this connection, the Tribunal recalled the hierarchy of sources as laid out in *Villamoran* UNDT/2011/126, which did not include administrative practices, administrative policies and reports of the Fifth Committee. Further, the Secretary-General was not mandated, in the absence of an express statutory provision, to incorporate into a staff member's terms of employment any policy or recommendation from a Committee. The Tribunal also stated that to condone such a practice would be tantamount to giving both the General Assembly and the Secretary-General an absolute license to impose or incorporate into terms of employment any item or matter that is not part of the Staff Regulations or Rules.

More generally, the Tribunal, referencing the General Assembly resolution containing the Code of Conduct for Judges (General Assembly resolution 66/106), stated that in the context of the modern law of employment and human rights, it would be inconceivable to countenance a situation where an individual should be sanctioned in his employment opportunities or tenure because he holds one nationality yet resides in another country.

The Tribunal held that the disputed policy was unlawful and illegitimate. It found no basis whatsoever in any of the norms of the Organization to justify its imposition. The Tribunal ordered the rescission of the policy in relation to the Applicant and awarded him moral damages of three months' net base salary to allay the uncertainty that the policy had created with regard to both his professional and personal life.

7. Judgment No. UNDT/2012/141 (24 September 2012): Cranfield v. *Secretary-General of the United Nations*[8]

Challenge to revocation of letter of appointment—Withdrawal of decision creating rights—Staff rule 11.2—Time limit for revocation of unlawful decisions by the Administration—Moral damages

In October 2011, the Applicant was informed that her fixed-term appointment had been converted retroactively into an indefinite appointment; she then signed her new letter of appointment. However, in January 2012, the Administration notified her that the letter of appointment could not be considered legally valid and it accordingly decided to revoke it. Before the Tribunal, the Applicant challenged the Administration's revocation of its prior decision.

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

According to the Appeals Tribunal's case law, a decision creating rights cannot in principle be withdrawn by the Administration. Taking this into account, the Tribunal first examined whether provisions of the organization's internal legislation allowed the Administration to reverse decisions that it had taken, when, upon re-examination, it deemed the decision unlawful, even though the decision conferred rights upon a staff member. It determined that while the Staff Regulations and Rules contained no general provisions on reversal of individual decisions that confer rights on staff members, staff rule 11.2, which governs the management evaluation process, did envisage this circumstance. Under that provision, the Administration was obliged to withdraw an administrative decision that it deemed unlawful where such decision was challenged by a staff member. The Tribunal determined that it was not appropriate to distinguish between the situation where the Administration finds of its own accord that an administrative decision is unlawful and the situation where it finds so following a request for management evaluation. Furthermore, it determined that the same time limits should apply to both situations. Accordingly, applying the time limits prescribed under staff rule 11.2, the Tribunal held that when the Administration finds of its own accord that a decision which created rights is unlawful, it was entitled to withdraw this decision within 90 days from the date on which the staff member received notification thereof.

In the present case, the Tribunal observed that the October 2011 letter of appointment conferred rights on the Applicant and that her good faith was not called into question. After a period of more than 90 days, in January 2012, the Administration then attempted to retract its decision. Even assuming that the October 2011 decision to grant the Applicant an indefinite appointment was unlawful, the Tribunal found that the Administration could not withdraw its October 2011 decision beyond the 90-day time limit. It consequently decided to rescind the January 2012 decision. As the effect of this decision was to return the Applicant to the position she was in before the revocation of the October 2011 decision, the Tribunal determined that she had suffered no material damage. The Tribunal did find, however, that the Applicant had suffered disappointment with the Administration's unlawful retraction of a decision that was favourable to her, and for this it awarded her moral damages in the amount of EUR 1,000.

8. *Judgment No. UNDT/2012/178 (16 November 2012): Korotina* v. *Secretary-General of the United Nations*[9]

Challenge of decision to disregard Applicant's work experience obtained prior to receipt of Master's degree—Receivability of claim—Standard of judicial review in non-selection cases—Hierarchy of the Organization's internal legislation—Guidelines on the determination of eligibility—Relevant professional experience—ST/AI/2006/3—Impropriety of review of eligibility after completion of the selection process—Compensation for pecuniary loss

The Applicant, a former staff member of the United Nations Secretariat in New York, contested the decision finding her ineligible for an appointment to a temporary position at the P-3 level based on the determination that, at the time of the selection process, she did not possess the necessary years of experience. The Applicant had been assured of her eligi-

[9] Judge Ebrahim-Carstens (New York).

bility, short-listed, interviewed, recommended for the position, and copied on subsequent communications, following which the Administration decided that she was not eligible.

On 28 October 2009, the Applicant had applied for a temporary vacancy at the P-3 level in the Peacekeeping Procurement Management Section. The vacancy announcement required the following:

> Experience: A minimum of five years of progressively responsible experience in procurement or administration in an international organization, of which at least two years should be directly related to firsthand procurement experience at the international level.
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> Education: Advanced university degree (Master's degree or equivalent) in Business Administration, Public Administration, Commerce, Engineering, Law or other related field. A first level university degree with a relevant combination of academic qualifications and experience may be accepted in lieu of the advanced university degree.

The Applicant interviewed for the position in November 2009 and on 16 November 2009 she was recommended for recruitment. Thereafter, on 16 December 2009, the Office of Human Resources Management ("OHRM") sent an email to the Executive Office, Department of Management stating that based on the review of the Applicant's work experience, OHRM had determined that the total work experience of the Applicant was 3 years and 9 months. OHRM had arrived at this number because it had determined that it could not start counting the Applicant's work experience until after she had obtained her Master's Degree in June 2005. On 18 December 2009, the Executive Office informed the Applicant that she was ineligible for the P-3 position, but that she would be reappointed, with retroactive effect to 15 September 2008, at the P-2 level. On 28 January 2010, the Applicant submitted a request for management evaluation of the decision finding her ineligible for the temporary P-3 level position. She was informed by a letter dated 25 February 2010 that the Management Evaluation Unit had concluded that the contested decision was lawful. On 30 May 2010, the Applicant filed the present application.

The Tribunal first considered whether the claim was receivable, and noted that under article 2, paragraph 1 (a) of its Statute, it was competent to hear and pass judgment on an application appealing an administrative decision that is alleged to be in non-compliance with the terms of appointment or contract of employment. In the present case, the Tribunal found that the administrative decision at issue could not be described as merely preparatory, but rather signified the end of the Applicant's participation in the selection process. Therefore, the claim was receivable under the terms of the Tribunal's Statute.

With regard to judicial review of non-selection cases, the Tribunal noted that the Secretary-General enjoyed broad discretion in matters of appointment and promotion and it was not the role of Tribunal to substitute its own decision for that of the Secretary-General (*Abbassi* 2011-UNAT-110). The Tribunal asserted, however, that the exercise of managerial prerogative was not absolute, and that it may examine whether the selection procedures were properly followed or were carried out in an improper, irregular or otherwise flawed manner, as well as assess whether the resulting decision was tainted by undue considerations or was manifestly unreasonable. On this point, the Tribunal recalled a number of relevant decisions (*Krioutchkov* UNDT/2010/065, *Liarski* UNDT/2010/134, *Abbassi* 2012-UNAT-242).

The Respondent had submitted that the contested decision was in line with the Guidelines on the determination of eligibility ("Guidelines"), first approved 30 July 2004 and

revised in 2009 and 2010. On this point, the Tribunal clarified the hierarchy of the Organization's internal legislation (*Villamoran* UNDT/2011/126). At the top of the hierarchy was the Charter of the United Nations, followed by resolutions of the General Assembly, Staff Regulations, Staff Rules, Secretary-General's bulletins, and administrative instructions. The Tribunal noted that information circulars, office guidelines, manuals, and memoranda were at the very bottom of this hierarchy and lacked the legal authority vested in properly promulgated administrative issuances. The Tribunal stated that while circulars, guidelines, manuals, and other similar documents may, in appropriate situations, set standards and procedures for the guidance of both management and staff, this was only the case where they were consistent with the instruments of higher authority and other general obligations that applied in an employment relationship.

On the central issue of counting years of experience, and disregarding experience prior to a Master's degree, the Tribunal held that by not having specified that the five years of work experience had to be completed *after* the Master's degree, in the absence of properly promulgated issuances stating otherwise, the Respondent was bound by the terms of the vacancy announcement, which did not include any such requirement. The Tribunal reasoned that it was a contractual right of every staff member to receive full and fair consideration for job openings to which they apply. Even if the Guidelines contained a provision that only experience obtained after a Master's degree should be counted, the Tribunal determined that the lawfulness of such a provision would be questionable, as it would appear to be manifestly unreasonable and impose unwarranted limitations on qualification requirements. Further, the Tribunal found that the adopted unwritten practice of not counting the experience obtained prior to the Master's degree was not supported by any rules or regulations forming part of the staff member's contract and lent itself to being arbitrary and manifestly unreasonable. In the Tribunal's estimation, such a provision may constitute an unfair restriction on eligibility of a group of staff members for appointment and promotion without any basis in any of the properly promulgated administrative issuances.

Moreover, the Tribunal found that it followed from the Guidelines that "relevant professional experience" was generally any work experience after the first university degree that contributes to professional competencies/skills and prepares a candidate to perform the functions of the post, and that such experience should be counted towards the requirement of five years. The expression found in the Guidelines that "in most cases, [professional experience] will be experience gained after the first level university degree", indicated that there is no absolute or hard and fast proscription or bar, and that there was room for discretion in determining what constituted "relevant professional experience".

The Tribunal also examined the effect of the Administration's representations to the Applicant during the selection process. While not material given the Tribunal's other findings, the Tribunal did note that having informed the Applicant on several occasions that she was eligible to apply for a temporary P-3 vacancy, then having considered her for the post pursuant to such confirmations, and having short-listed, interviewed and recommended her for the post, then having included the Applicant in post-selection communications, the Respondent created an expectation that the Applicant was eligible and selected or highly-likely to be selected. The Tribunal found that, in accordance with ST/AI/2006/3, a selection process goes through separate stages, of which the review of eligibility was one of the first. Specifically, sec. 7.5 of ST/AI/2006/3 states that interviews or written tests are to be conducted *after* the candidates have been "identified as meeting all or most of the require-

ments of the post". Therefore, the Tribunal considered that in the circumstances of this case, and on the assurances given to the Applicant regarding her eligibility with respect to the temporary P-3 level vacancy, it was improper for the Administration to revisit issues of eligibility after going through the entire selection process.

Regarding compensation, the Tribunal recalled the decision of the United Nations Appeals Tribunal in *Antaki* 2010-UNAT-095, where the UNAT stated that not every violation will necessarily lead to an award of compensation and that compensation may only be awarded if it has been established that the staff member actually suffered harm. While rejecting the Applicant's claim for non-pecuniary loss for the substantial and unwarranted irregularities in the selection process, the Tribunal did find that, if not for the unlawful contested decision, the Applicant would have been appointed to the contested post. Accordingly, it concluded that the Applicant had suffered pecuniary loss equivalent to the difference between her salary and the salary she would have earned at the P-3 level during the relevant period.

In conclusion, the Tribunal found that the decision to disregard part of the Applicant's work experience because it was obtained prior to her Master's degree was unlawful. The determination that the Applicant was ineligible for the P-3 level temporary appointment was also unlawful. The Tribunal further found that, through representations made to the Applicant prior to and during the selection process, the Respondent created an expectation, in line with the standard selection procedures, that the Applicant was cleared and selected for the post. The Tribunal awarded the Applicant the amount of USD 8,496.76, with interest, as compensation for the pecuniary loss suffered.

9. *Judgment No. UNDT/2012/200 (19 December 2012): Finniss* v. *Secretary-General of the United Nations*[10]

Appeal of non-selection decision on grounds of bias—Evaluation of candidates against pre-approved criteria in accordance with paragraph 9 of ST/AI/2006/3—Test for determining the existence of bias—Presumption of regularity in selection decisions is a rebuttable presumption—Minimal standard to prove regularity of selection decision—Award of damages—Referral of case to Secretary-General to enforce accountability of responsible staff members

The Applicant appealed the decision not to select him for the post of Senior Investigator, P-5 level with the Investigations Division, Office of Internal Oversight Services (ID/OIOS) in New York, a vacancy for which he had applied and believed he was qualified. He challenged the decision arguing that it was tainted by the bias of the Program Case Officer (PCO), as well as irregularity in the interview, selection and evaluation process. This case had previously been decided by the Tribunal in favor of the Applicant on 31 March 2011 (*Finniss* UNDT/2011/060). Subsequently, the Secretary-General had filed an appeal with the United Nations Administrative Tribunal ("UNAT"). In its decision of 16 March 2012, the UNAT had remanded the matter for "fresh decision by a different judge" (*Finniss* 2012-UNAT-210) and the Applications came before the Tribunal again in September 2012.

The Tribunal analyzed evidence directed towards the Applicant's allegation of bias by the PCO of the interview panel, which was tasked with evaluating candidates and rec-

[10] Judge Carol Shaw (Nairobi).

ommending them to the decision-maker who was to make the selection decision for the post. Substantial evidence indicating a difficult professional and inter-personal relationship between the PCO and the Applicant was presented and analyzed by the Tribunal.

At the relevant time, the controlling administrative instruction for staff selection was ST/AI/2006/3. The guidelines in paragraph 9 of ST/AI/2006/3 provided that the evaluation of candidates was to be against the pre-approved evaluation criteria. From this stipulation and as a matter of fair process, the Tribunal determined that there was no room for extraneous considerations such as bias, prejudice and discrimination. The Tribunal then reasoned that, in the legal sense, bias may be actual or apparent but that either way it must be assessed objectively. If actual and conscious bias was proven as a matter of fact, then it would automatically disqualify a decision maker. The test applied by the Tribunal for determining the existence of bias was whether the fair-minded observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Based on the evidence that it reviewed, the Tribunal had no hesitation in finding that there was a very real possibility that the PCO could be perceived to be biased against the Applicant.

The Tribunal then considered whether the PCO bias had an effect on the results accorded to the Applicant by the interview panel. The Tribunal found that there were anomalies in the evaluation and scores given to the Applicant which, in the absence of any other explanation by the Respondent, could only be explained by the bias or personal animus against him held by the PCO. It concluded that, given the presence and influence of the PCO on the interview panel members, as well as the illogical and incorrect scoring of the Applicant, it was highly probable that his evaluation was affected by bias and personal animus.

The Tribunal accepted the Respondent's submission that the Secretary-General had broad discretion in selecting candidates; however, it held that this did not make the exercise of discretion immune from review. The Tribunal asserted that any discretion must be exercised in a regular manner, in accordance with the rules and policies of the Organization, and that it must be free of improper motive and based on correct facts and evidence.

In this connection, the Tribunal recalled the principle from *Rolland* 2011-UNAT-122, where UNAT had stated:

> There is always a presumption that official acts have been regularly performed. This is called the presumption of regularity, but it is a rebuttable presumption. If the management is able to even minimally show that the appellant's candidature was given a full and fair consideration, then the presumption of law is satisfied. Thereafter the burden of proof shifts to the appellant who must be able to show through clear and convincing evidence that she was denied a fair chance of promotion.

Accordingly, the Tribunal reasoned that the Respondent bears the evidential burden of making at least a minimal showing of regularity. This was particularly so where, as in the present case, a decision was seriously called into question.

The Tribunal stated that the minimal showing of regularity and evidentiary burden is satisfied where the Respondent provides the Applicant and the Tribunal with information about the decision being challenged. This information should include the findings of fact material to the decision; the evidence on which the findings of fact were based; the reasons

for the decision and all of the documentation in the possession and control of the decision maker which is relevant to the review of the decision.

In this case, the Tribunal found that the Applicant had raised substantial questions about the regularity of the selection decision, including whether and to what degree it was influenced by the interview panel's evaluation of the Applicant. When challenged, the Respondent was unable to produce enough evidence to meet the minimal standard to prove that the selection decision was made in accordance with the rules and regulations. Therefore, the presumption of regularity was rebutted.

On the foregoing bases, the Tribunal held that the role of the PCO was vitiated by bias towards the Applicant, the evaluation of the Applicant was not objective, the selection exercise was unlawful and the Organization failed to discharge the burden of presumption of regularity. The Tribunal awarded the Applicant the difference in salary, plus interest, between the P-5 post to which he should have been appointed on 21 October 2008 and the P-4 salary, which he received up until his promotion to a separate P-5 position in January 2010. It also awarded him USD 50,000 in moral damages for the significant stress and humiliation that was caused not only by his non-selection for a post to which he was legally and actually entitled, but also by the stress and humiliation caused by the PCO in the selection process. In accordance with article 10, paragraph 8 of its Statute, the Tribunal also referred the case to the Secretary-General for appropriate action to be taken to enforce the accountability of those staff members who were responsible for the biased assessment and unlawful non-selection of the Applicant, including the members of the interview panel and the ultimate decision maker.

B. Decisions of the United Nations Appeals Tribunal

The United Nations Appeals Tribunal (UNAT) held its first session in 2012 from 5 to 16 March in New York. It held its second session in 2012 in Geneva from 18 to 29 June. Its third session was held in New York from 22 October to 2 November. The Appeals Tribunal issued a total of 91 judgments in 2012. The summaries of five of those judgments are reproduced below.

1. *Judgment No. 2012-UNAT-201 (16 March 2012): Obdeijn* v. *Secretary-General of the United Nations*[11]

Non-renewal of fixed-term appointment—Obligation of the Secretary-General to state the reasons for an administrative decision—Refusal to disclose reasons—Burden of proof—Moral damage—Compensation

The Respondent (Applicant in the first instance) entered the service of the United Nations Population Fund ("UNFPA") on a two-year fixed-term appointment ("FTA"), effective 3 October 2005. His appointment was extended twice, for periods of one year and six months, respectively.

On 13 February 2009, the Respondent was notified that his FTA would expire on 2 April. He requested the reasons for his non-renewal but was reminded that an FTA "does not carry any expectancy of renewal . . . [as it] . . . expires automatically and without prior

[11] Judge Sophia Adinyira, Presiding, Judge Inés Weinberg de Roca and Judge Jean Courtial.

notice on the expiration date specified in the letter of appointment". On 9 March, the Respondent requested administrative review of the decision not to renew his FTA. In his response of 27 March, the Executive Director, UNFPA, replied:

> Given that you have been serving with UNFPA for a period of less than five years . . . the Administration of UNFPA was permitted, in accordance with section 5.2 of the policy and the established jurisprudence of the [former Administrative] Tribunal, not to renew your appointment, *without having to justify that administrative decision* (emphasis in original).

The Respondent's appeal to the former Joint Appeals Board was transferred to the United Nations Dispute Tribunal on 1 July 2009.

On 10 February 2011, the Tribunal issued Judgment No. UNDT/2011/032. The UNDT found that the Administration had breached its obligation to disclose the reasons for its decision not to extend the Respondent's appointment, particularly in response to his requests, in violation of the requirements of good faith and fair dealing: "[l]ike any other administrative decision, a decision not to renew a staff member's contract must be reasoned, as a decision taken without reasons would be arbitrary, capricious, and therefore unlawful". The UNDT explained that reasons, in sufficient detail to enable the staff member to decide whether to proceed with a formal appeal, should be disclosed at the time of the notification of the decision and must be disclosed upon request. The UNDT ordered damages of six months' net base salary for actual economic loss suffered and USD 8,000 for emotional distress. The Secretary-General appealed the Judgment.

The Appeals Tribunal recalled, first, that the jurisprudence of the former Administrative Tribunal, whilst of persuasive value, did not bind the new Tribunals.[12] The Appeals Tribunal found that the non-renewal of an FTA was a distinct administrative decision, subject to review and appeal. When a request for the reasons underlying an impugned decision was made as part of a formal review process, the Administration's failure to provide them hampered or precluded the staff member, the Management Evaluation Unit and the Tribunals from reviewing the decision, thus compromising the Tribunals' ability to perform their judicial duty.

Accordingly, the Tribunal pointed out that the obligation for the Secretary-General to state the reasons for an administrative decision does not stem from any Staff Regulation or Rule, but is inherent to the Tribunals' power to review the validity of such a decision, the functioning of the system of administration of justice . . . and the principle of accountability of managers.

The Tribunal held that the Administration "cannot legally refuse to state the reasons for a decision that creates adverse effects on the staff member, such as a decision not to renew an FTA, where the staff member requests it or, *a fortiori*, the Tribunal orders it"; that the refusal to disclose the reasons for a contested decision shifts the burden of proof so that it is for the Administration to establish that its decision was neither arbitrary nor tainted by improper motives; and that the Tribunal is entitled to draw an adverse inference from the refusal.

In view of the foregoing, the Appeals Tribunal upheld the decision of the UNDT that, in refusing to disclose the reasons for the contested administrative decision and failing

[12] See *Sanwidi* 2010-UNAT-084, para. 37.

to discharge its burden of proving that its decision was neither arbitrary nor tainted by improper motives, the Administration's decision was unlawful. With respect to the compensation awarded by the UNDT, the Appeals Tribunal recalled that "[c]ompensation may only be awarded if it has been established that the staff member actually suffered damage". It found that the Respondent had, indeed, suffered moral damage for which he deserved compensation but that, as he had not established economic loss, that aspect of the UNDT award should be set aside. Accordingly, the Appeals Tribunal dismissed the Secretary-General's appeal and affirmed the UNDT Judgment, subject to variation of compensation.

2. *Judgment No. 2012-UNAT-231 (29 June 2012): Ortiz* v. *Secretary-General of the International Civil Aviation Organization*[13]

Termination of appointment upon completion of probationary period—Jurisdiction over International Civil Aviation Organization staff members—Article XI of the International Civil Aviation Organization Service Code—Requirement of staff regulation 4.11 to obtain written approval for termination during the probationary period—Statutory one-month notice period—Decision by Secretary-General not to follow recommendations of the Advisory Joint Appeals Board—Rescission of termination—Compensation

The Appellant entered the service of the International Civil Aviation Organization (ICAO) on 1 October 2009, on a three-year contract. His appointment was subject to the satisfactory completion of a one-year probationary period. In August 2010, he was notified that, in view of his probationary performance, his appointment was being terminated.

Having sought reconsideration by the Secretary-General of ICAO of the decision to terminate his appointment to no avail, the Appellant lodged an appeal with the ICAO Advisory Joint Appeals Board (AJAB) on 23 September 2010. The AJAB delivered its conclusions on 3 May 2011, finding that the Appellant's rights had been breached and recommending compensation of nine months' net base salary. The Secretary-General of ICAO decided not follow the AJAB recommendations but, "in the spirit of compromise", to pay the Appellant three months' net base salary. The Appellant appealed this decision to the Appeals Tribunal.

The Appeals Tribunal recalled that it had jurisdiction over ICAO staff member appeals in respect of employment or contract conditions, pursuant to article XI of the ICAO Service Code. The appeal was submitted against the final decision taken by the Secretary-General of ICAO following completion of the advisory first instance process:

Insofar as the merits of the appeal are concerned, the Appeals Tribunal found that, whilst staff regulation 4.11 required the Secretary-General to obtain written approval from the President of the ICAO Council for termination of an appointment during the probationary period, which, the Secretary-General conceded he had failed to do, the Secretary-General did obtain the approval of the President prior to the actual date of termination. Accordingly, the Appeals Tribunal found that the President's belated approval "ratified the initially flawed termination decision". However, the statutory one-month notice period to which the Appellant was entitled should have commenced only upon such ratification and

[13] Judge Jean Courtial, Presiding, Judge Luis María Simón and Judge Inés Weinberg de Roca.

he was, thus, entitled to compensation for the Secretary-General's failure to observe the termination process.

The Appeals Tribunal proceeded to affirm the AJAB finding that the Appellant was dismissed without having had the opportunity to submit comments on the Organization's characterization of his performance. Citing the International Labour Organization Administrative Tribunal in its Judgment No. 152 (1970), the Appeals Tribunal found that ICAO had not observed the Appellant's rights and that the decision was tainted with irregularity. Furthermore, noting the repeated flaws identified by the AJAB in the establishment of the Appellant's work objectives and the appraisal of his performance, the Appeals Tribunal held that it was not convinced by the grounds asserted by the Secretary-General in deciding not to follow the conclusions and recommendations of the AJAB. Accordingly, the Tribunal held that the impugned decision, as well as the decision to terminate the Appellant, should be rescinded or, in the alternative, that he should be paid compensation in the amount of nine months' net base salary, plus interest.

3. *Judgment No. 2012-UNAT-240 (29 June 2012): Johnson* v. *Secretary-General of the United Nations*[14]

Request for reimbursement of United States income taxes—Utilization of foreign tax credits amounts to payment method for discharging future tax liability—Section 18, article V, of the Convention on the Privileges and Immunities of the United Nations—United States reservation to the Convention in respect of taxation of its nationals and permanent residents—Relief from double taxation effects—Tax Equalization Fund

The Respondent (Applicant in the first instance), a national of the United States of America, was recruited by the Office of the United Nations High Commissioner for Refugees in Geneva in June 2006. In calculating her United States taxes for 2009, the Respondent used foreign tax credits of USD 15,239 to meet her income tax liability on her United Nations earnings. She had accrued these foreign tax credits under the United States Internal Revenue Service (IRS) Code in respect of an earlier period of private employment in Switzerland, during which she paid both Swiss and United States taxes. Her request for reimbursement was denied by the Income Tax Unit on the basis that, as the utilization of her foreign tax credits had reduced her tax liability to zero, she had not paid any taxes on income earned at the United Nations in 2009. The Respondent requested management evaluation of the decision not to reimburse her for the staff assessment on her salary and other emoluments earned in 2009 and, thereafter, appealed to the United Nations Dispute Tribunal (UNDT) in Geneva on 27 September 2010.

On 17 August 2011, the UNDT issued Judgment No. UNDT/2011/144. The UNDT ruled in favour of the Respondent, finding that the reason given by the Income Tax Unit for refusing to refund her was incorrect:

> Publication 514 of the [IRS], concerning foreign tax credits granted to individuals, clearly shows that these credits are a payment method like others and [she] must therefore be regarded both as having been subject to United States taxation on income received from the Organization, and as having discharged that tax obligation.

[14] Judge Jean Courtial, Presiding, Judge Sophia Adinyira and Judge Inés Weinberg de Roca.

The UNDT ordered the Secretary-General to refund the Respondent the amount of the staff assessment on her salaries and emoluments for 2009, with interest. The Secretary-General appealed this Judgment.

The Appeals Tribunal recalled that, whilst section 18, article V, of the Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly on 13 February 1946,[15] provides "[o]fficials of the United Nations shall . . . be exempt from taxation on the salaries and emoluments paid to them by the United Nations", the United States of America acceded to the Convention subject to a reservation in respect of taxation of its nationals and permanent residents. In order to ensure equality of treatment and equity among Member States, the Organization created a Tax Equalization Fund to which assessments on staff members' salaries and emoluments are credited in the accounts of the respective Member State's assessment, in lieu of a national income tax. When a staff member is subject to both staff assessment and national income tax on salaries and emoluments earned at the United Nations, he is reimbursed for the national tax paid in order to relieve the effect of double taxation. The refund is deducted from the account of the Member State that has levied the tax.[16]

The Appeals Tribunal found that the United States of America grants foreign tax credits in respect of income tax paid by one of its nationals or permanent residents to another State in order to relieve the effects of double taxation. The tax credits amount to a payment method for discharging future tax liability and, as such, the UNDT did not err on questions of law or fact.

The Tribunal found that exclusion of such credits as payment would "[n]ot only contravene the principle of equality of treatment among staff members if staff members from the United States were deprived of the benefit of reimbursement for using such tax credits . . . , but also the principle of equity among Member States irrespective of whether they choose to grant, or not to grant, an income tax exemption to their nationals, as these two principles form the basis for the staff assessment system in respect of taxation."

The Tribunal therefore dismissed the Secretary-General's appeal and affirmed the UNDT Judgment.

4. *Judgment No. 2012-UNAT-252 (29 June 2012): Khambatta* v. *Secretary-General of the United Nations*[17]

Service of application for suspension of action—Opportunity for Secretary-General to respond—Article 13 of the United Nations Dispute Tribunal Rules of Procedure—Articles 2(2) and 10(2) of the United Nations Dispute Tribunal statute—Non-receivability of appeals against decisions taken in the course of United Nations Dispute Tribunal—Exception for cases where the United Nations Dispute Tribunal has "clearly exceeded its competence"

The Respondent (Applicant in the first instance) held a series of temporary appointments with the Office of the United Nations Stabilization Mission in Haiti (MINUSTAH),

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[15] United Nations, *Treaty Series*, vol. 1, p. 15, and vol. 90, p. 327 (corrigendum to vol. 1).

[16] This system was discussed at length by the former United Nations Administrative Tribunal (UNAT) in its Judgment No. 237, *Powell*.

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

with effect from 2 June 2011. On 10 April 2012, she was informed that her temporary appointment would not be extended beyond 1 May. She sought management evaluation of the decision not to extend her temporary appointment and, on 24 April, filed an application with the United Nations Dispute Tribunal (UNDT) for suspension of action.

The Secretary-General was served with the application by the UNDT Registry the following day, and advised that no response was required as judgment would be rendered on the basis of the papers already before the Tribunal. In *Khambatta* UNDT/2012/058, issued on 26 April 2012, the UNDT ordered suspension of the decision not to extend the Respondent's contract, pending the outcome of management evaluation. The UNDT indicated that article 13 of its Rules of Procedure required it to serve the application for suspension of action on the Secretary-General, but did not oblige it to require a reply prior to ruling. The Secretary-General appealed this judgment.

The Appeals Tribunal held that, as the UNDT "enjoys wide powers of appreciation in all matters relating to case management, [the Appeals Tribunal] must not interfere lightly in the exercise of the jurisdictional powers conferred on the tribunal of first instance to enable cases to be judged fairly and expeditiously and for dispensation of justice". Accordingly, and pursuant to articles 2(2) and 10(2) of the UNDT Statute as well as the consistent jurisprudence of the Appeals Tribunal,[18] appeals against decisions taken in the course of UNDT proceedings are not receivable, "save in the exceptional cases where the UNDT has clearly exceeded its competence". This principle holds even if the judge has committed an error of law or fact. The Appeals Tribunal clarified that the UNDT would exceed its competence were it to take a decision on matters beyond its statutory jurisdiction or "the competence inherent in any tribunal called upon to dispense justice in a system of administration of justice governed by law and respect for the rights of those within its jurisdiction".

The Appeals Tribunal took note of the Secretary-General's contention that the UNDT violated his rights of defence in the instant case in judging on the application for suspension of action without permitting him to respond, but found that the UNDT had not "clearly exceeded its competence". Accordingly, the Secretary-General's appeal was declared non-receivable and dismissed.

5. *Judgment No. 2012-UNAT-276 (1 November 2012): Valimaki-Erk* v. *Secretary-General of the United Nations*[19]

Requirement to change permanent residency status as a condition for appointment—Report of the Fifth Committee (A/2615)—Information Circular ST/AFS/SER.A/238—Secretary-General has no discretion to impose unwritten regulations and rules that are prejudicial to staff members

The Respondent (Applicant in the first instance) was a national of Finland and had been a permanent resident of Australia since February 2002. In July 2004, she was offered

[18] See, for example, *Bertucci* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-062 (full bench, Judge Boyko dissenting); *Rawat* v. *Secretary-General of the United Nations*, Judgment No. 2012-UNAT-223; *Tetova* v. *Secretary-General of the United Nations*, Judgment No. 2012-UNAT-229; *Hersh* v. *Secretary-General of the United Nations*, Judgment No. 2012-UNAT-243; and *Bali* v. *Secretary-General of the United Nations*, Judgment No. 2012-UNAT-244.

[19] Judge Sophia Adinyira, Presiding, Judge Mary Faherty and Judge Rosalyn Chapman.

a one-year appointment with the Organization and advised that, in view of the temporary nature of the appointment, she would be allowed to retain her permanent resident status in Australia, but that "[s]hould [she] be offered a long-term appointment in the future, the personnel policy under the Staff Regulations and Rules in respect of [her] resident status in Australia would then be applied". She was given no information about this "personnel policy". The Respondent subsequently applied and was selected for a two-year appointment. She was advised, however, that the offer was conditional upon her either applying for Australian citizenship or renouncing her permanent resident status in Australia. As she was not able to do the former or willing to do the latter, she was not placed against the post.

The Respondent appealed this decision to the former Joint Appeals Board (JAB) in 2005. In its report of May 2007, the JAB found that the condition placed by the Organization lacked a reasonable basis and recommended that she should not be required to renounce her Australian permanent resident status in order to accept the two-year appointment. The Secretary-General rejected this recommendation.

The Respondent subsequently submitted an application to the former Administrative Tribunal, which was transferred to the United Nations Dispute Tribunal ("UNDT") on 1 January 2010. In *Valimaki-Erk* UNDT/2012/004, issued on 6 January 2012, the UNDT concluded that the requirement that she renounce her Australian permanent resident status as a condition for appointment lacked legal basis, as there was no such requirement in the Staff Regulations and Rules or General Assembly resolutions. Accordingly, the UNDT found that the Secretary-General was acting *ultra vires*. Whilst it rejected the Respondent's claims for financial damages, the UNDT awarded her three months' net base salary for "some moral injury" and "significant upheaval in her life". The Secretary-General appealed this Judgment.

The Appeals Tribunal took note of the report of the Fifth Committee at the eighth session of the General Assembly in 1953, document A/2615, in which it was recorded that some delegations considered permanent residence status to weaken ties with the country of nationality and not to be in the interest of the Organization. There were also tax consequences taken into consideration. However, paragraph 73 of A/2615 provides "[i] t was the understanding of the Committee that these decisions should be recorded in its report to the General Assembly for the guidance of the Secretary-General in giving effect to the policies thus approved through appropriate amendments to the Staff Rules". Over almost 60 years, no such amendments were made. Indeed, whilst Information Circular ST/AFS/SER.A/238, of 19 January 1954, specifically addressed change of permanent resident status by an existing staff member and permanent resident status in the country of a staff member's duty station, it did not require international staff to renounce their permanent residence status in a country not of their nationality prior to recruitment.

In view of the foregoing, the Appeals Tribunal found that the Secretary-General could not rely on ST/AFS/SER.A/238, or the jurisprudence of the former Administrative Tribunal that he cited.[20] Not only were those decisions not binding on the Appeals Tribunal, but the factual and legal circumstances of the cases also differed in substance from the instant case.

[20] UNAT Judgments No. 66, *Khavkine* and No. 326, *Fischman*.

As the contested policy was "not reflected in any administrative issuance", the Appeals Tribunal concluded that the Secretary-General had not fully complied with the requirements set by the Fifth Committee for its implementation and, therefore, it had no legal basis. Moreover, it agreed with the Respondent in finding that "although the Secretary-General has discretion in the appointment of staff, he has no discretion to impose unwritten regulations and rules that are prejudicial to staff members".

Furthermore, the Appeals Tribunal held that the policy could not be justified "under the pretext of ensuring geographical distribution of staff members", who are permitted more than one nationality albeit the Organization recognizing only one, and stated that "[b]earing in mind the human rights principles and the modern law of employment, [it had] no place in a modern international organization". The Tribunal dismissed the Secretary-General's appeal and affirmed the UNDT Judgment.

C. Decisions of the Administrative Tribunal of the International Labour Organization[21] [22]

1. *Judgment No. 3051 (8 February 2012): Daintith (No. 3), Hardon (No. 8) and Senfl (No. 7)* v. *European Patent Organization (EPO)*[23]

[21] 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.

[22] The Tribunal rendered a total of 101 judgments in 2012 (54 in its 112th session and 47 in its 113th session). Summaries of a selection of twelve judgments are reproduced herein.

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

STATUS OF CONSULTANTS RECRUITED BY ORGANIZATIONS THROUGH SERVICE CONTRACTS—QUESTION OF RECEIVABILITY REQUIRED CONSIDERATION OF WHETHER COMPLAINANT WAS IN AN EMPLOYMENT OR *DE FACTO* EMPLOYMENT RELATIONSHIP WITH EPO—ARTICLE II, PARAGRAPH 5, OF THE STATUTE OF THE TRIBUNAL—LACK OF JURISDICTION OF THE TRIBUNAL

The complainants filed complaints in their capacity as members of the Munich Staff Committee. The complaints arose from the refusal of the President of the European Patent Office (the Office) to act on the complainants' request to terminate Mr. B.'s employment with EPO.

Mr. B., a managing director of a consultancy firm retained by EPO, had been working for the Office since 2000. The complainants alleged that certain aspects of his work at EPO, including the number of hours he worked, his relationship with EPO management hierarchy, his level of integration into the Office infrastructure and the fact that his assigned tasks were operational in nature and not project related, showed that he was in substance an employee of EPO.

The complainants contended that, properly construed, the consultancy contracts under which he provided his services to the Office were an attempt by EPO to circumvent standard recruitment procedures as prescribed by the Service Regulations. As a result, the complainants had been deprived of their right as staff representatives [members of the selection panel appointed by the Staff Committee] to be involved in the recruitment process. They also contended that Mr. B.'s remuneration was higher than that of regular staff members who were carrying out the same duties, which constituted a breach of the right of equal treatment.

The Tribunal considered that as the claimed right was limited to the recruitment of permanent employees, the question of receivability required a consideration of whether Mr. B. was in an employment or *de facto* employment relationship with EPO.

Given that Mr. B. did not have a direct contractual relationship with EPO, the contract under which he performed his services was between a consultancy firm and EPO, and as he was paid for his services by that firm and not the Office, it was clear that he was not in an employment relationship with EPO. However, the question remained whether Mr. B. was a *de facto* employee, as the complainants alleged.

The complainants maintained that Mr. B was integrated into the Office infrastructure. Although EPO provided him with a user identification number, access to the Office computer system, a listing in the internal telephone directory and an office with his name on the door, and although he worked under the supervision of an EPO manager, it was not disputed that his listing in the internal telephone directory and his user identification number clearly indicated that he was not an employee of EPO. Nor did the complainants challenge the Internal Appeals Committee's finding that it was standard practice to give external staff such technical and organizational support as was necessary to permit them to do the work for which they were retained.

During the material time, Mr. B. also worked as a consultant for several other agencies and corporations. As well, between 2000 and 2005, he averaged only 70 work days per year at the Office and in only one of those years did he slightly exceed 100 work days, in contrast with 220 days minus annual leave and public holidays for an EPO employee. Lastly, the contracts under which Mr. B.'s services were provided to EPO specified that they were governed by German law.

Having regard to those factors, the Tribunal determined that it could not be said that Mr. B. was in any sense an employee of EPO and it followed that the Service Regulations did not apply to him. Accordingly, the Staff Committee's claimed right under the Service Regulations was not engaged. Article II, paragraph 5, of the Statute of the Tribunal provided that the Tribunal was competent to hear "complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations". The Tribunal therefore considered that the complaints were beyond its jurisdiction.

2. *Judgment No. 3061, Application for interpretation of Judgment No. 2092 (8 February 2012): Antonakakis (No. 3)* v. *United Nations Industrial Development Organization (UNIDO)*[24]

Request for retroactive extension of appointment and payment of entitlements—Delay in implementation of judgement—Failure to provide banking particulars for payment—Payment date for the purpose of interest calculation

In Judgment No. 2902, the Tribunal ordered, in part:

> "[. . .] UNIDO shall pay the complainant the salary and allowances he would have received had his appointment been renewed until 30 June 2006 [. . .]"[25]

In the complainant's view, that meant that his appointment should have been extended retroactively and that he was therefore entitled to all the benefits he would have enjoyed had he remained in service until 30 June 2006. At the time of implementation of the judgment, UNIDO had not paid his pension entitlements, his health insurance coverage, or his annual leave or other entitlements for the period 1 January to 30 June 2006.

Relying on the Tribunal's interpretation of Judgment No. 2902,[26] the complainant sought to have all the above-mentioned entitlements restored. UNIDO disputed his interpretation of the Tribunal's decision and asked the Tribunal to dismiss the complaint.

The Tribunal considered that the interpretation of phrases such as "full salary", "salary and related emoluments" and "salary and allowances" was well settled in the Tribunal's case law.[27] Had it been its intent, the Tribunal would have specifically ordered the payment of the entitlements claimed by the complainant. For those same reasons, the Tribunal rejected the complainant's interpretation in the case.

UNIDO pointed out that it had been in a position on 11 March 2010 to make full payment to the complainant, in accordance with the terms of the judgment. However, implementation of the judgment had been delayed due to the complainant's failure to provide UNIDO with the particulars of the bank account to which payment should be made, and the filing of the complaint. Therefore, UNIDO asked the Tribunal, should it dismiss the complainant's application, to confirm that UNIDO might treat the date of payment for the purpose of interest calculation as 11 March 2010. As the complainant did not dispute his

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

[25] See Judgment No. 2902 (3 February 2010).

[26] *Ibid*.

[27] See Judgment No. 2718 (9 July 2008); and Judgment No. 2621 (11 July 2007).

failure to provide banking particulars, the Tribunal set the date of payment for the purpose of interest calculation was as 11 March 2010.

3. Judgment No. 3065 (8 February 2012): Meyer (No. 4) v. *International Labour Organization (ILO)*[28]

Accusation of harassment—Failure to apprise complainant of testimony amounting to breach of duty of care and of good governance—Award of damages for moral injury—Costs

On 15 May 2009, an official was appointed, with the complainant's agreement, to conduct an in-depth investigation into certain allegations of harassment. The official issued a report on 8 December 2009 in which he concluded that "[t]he facts as established from the written evidence and interviews [did] not lead to a finding of harassment in this case". In the light of this report, by a letter of 15 January 2010 the Director-General notified the complainant of his decision to dismiss her allegations of harassment. The complainant impugned the decision and asked the Tribunal to set it aside, to order redress for the injury which she allegedly suffered and to award her costs in the amount of 3,000 Swiss francs.[29]

The Tribunal considered that, even if an investigator could not invite a complainant to attend all the witness interviews, the complainant ought to have been apprised of the content of the testimonies in order to be able to challenge them. Since that was not the case, the Tribunal found that the adversarial principle had not been respected. It followed therefore that the Organization had acted in breach of its duty of care towards the complainant and its duty of good governance, thereby depriving the complainant of her right to be given an opportunity to prove her allegations.[30]

The Tribunal recalled that according to its case law, an accusation of harassment required that "an international organization both investigate the matter thoroughly and accord full due process and protection to the person accused". Furthermore, the Tribunal underlined that "[i]ts duty to a person who makes a claim of harassment requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context [. . .], that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed not be stigmatised or victimised on that account."[31]

The Tribunal considered that the Organization's attitude had therefore caused an injury which had to be redressed by an award of damages for moral injury in the amount of 20,000 Swiss francs. The Tribunal further decided that the complainant was entitled to the sum of 2,000 Swiss francs in costs.

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[28] Mr. Seydou Ba, President, Mr. Claude Rouiller and Mr. Patrick Frydman, Judges.

[29] See Judgment No. 3064 (8 February 2012).

[30] See Judgment No. 2654 (7 February 2007), paragraph 7 of the considerations.

[31] See Judgment No. 2973 (2 February 2011), paragraph 16 of the considerations, and the case law cited therein.

4. Judgment No. 3076 (8 February 2012): Laperrière (No. 3) v. *World Health Organization (WHO)*[32]

Leave without pay granted for pension purposes extended the status as a staff member of the Organization—Complaint irreceivable for failure to exhaust internal means of redress

In July 2009, the complainant concluded a separation agreement with WHO, which provided for a period of leave without pay, to enable the complainant to continue making contributions to the United Nations Joint Staff Pension Fund:

> "As from 1 August 2009 until 30 November 2011, you will be on leave without pay for pension and staff health insurance purposes only [. . .] for a period of 28 months, ending on 30 November 2011."

Considering that the separation agreement had been breached, the complainant filed a complaint directly with the Tribunal on 14 May 2010, when he was on leave without pay. The Organization contended that the complaint was irreceivable because all internal remedies had not been exhausted. To demonstrate the receivability of his complaint, the complainant sought to demonstrate that, being on leave without pay, he was no longer a staff member of WHO and that he did not have recourse to the internal appeal process.

The Tribunal rejected the complainant's arguments on receivability. Regardless of the various references to the separation clearance process, the separation agreement was unambiguous with respect to the complainant's date of separation from service and his employment status. Paragraph 1 of the agreement provided that "[his] appointment as a WHO *staff member* will come to an end on 30 November 2011" (emphasis added). As that language was clear, the general rule that ambiguities would be construed against the drafter of an instrument had no application.[33]

Regarding the complainant's argument based on staff rule 655.3,[34] which in part allowed the Director-General to authorize leave without pay for pension purposes, the Tribunal noted that the purpose of the leave period was to permit continued participation in the United Nations Joint Staff Pension Fund. Participation in the Fund was contingent on having staff member status. The Tribunal further highlighted that termination of salary and benefits was a normal feature of leave without pay and reflected the fact that the staff member was not performing his or her employment functions.

The Tribunal observed that as a staff member, the complainant was required to exhaust the internal means of redress before bringing his complaint to the Tribunal. Consequently, as the complainant had failed to exhaust the internal means of redress, the Tribunal decided the complaint was irreceivable.

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

[33] See for example, Judgment No. 2292 (4 February 2004), paragraph 10 of the considerations.

[34] "The Director-General may authorize leave without pay for pension purposes for staff who are within two years of reaching age 55 and 25 years of contributory service, or who are over that age and within two years of reaching 25 years of contributory service."

5. *Judgment No. 3078 (8 February 2012): Andrevet* et al. v. *Eurocontrol*[35]

Challenge of pension contribution rates—Joinder of claims—Decisions that have recurring effects are time-barred—Dismissal of application for costs

The 11 complainants filed identical complaints in which they challenged their pension contribution rates as contained in their payslips for February, March and April 2009, on the basis that actuarial studies performed since 2005 were not valid. The Joint Committee for Disputes considered that the internal appeals were time-barred and covered by the principle of *res judicata*, as the Tribunal had previously ruled on the matter in Judgment 2633 of 11 July 2007.[36]

The complainants impugned the Director General's decision of 1 October 2009, which endorsed the unanimous opinion of the Joint Committee for Disputes and rejected their internal appeals as inadmissible and legally unfounded. The Tribunal decided that since the complaints raised the same issues of fact and law and seek the same redress, they should be joined to form the subject of a single judgment.

The Tribunal held that decisions that had recurring effects were time-barred. It considered that the complainants were attacking a decision from 2005 which had changed their pension contribution rate. While it was true that the change was reflected in their February, March and April 2009 payslips, it was also true that the claim was based entirely on alleged flaws in the previous authoritative decision, and that the change had been reflected in each of their payslips since the original decision had been made to change the pension scheme in 2005. Therefore, the Tribunal considered that the basis for the current complaints was the 2005 decision and that unless the complaints were based on a new fact they were time-barred and therefore irreceivable.[37] The Tribunal also decided to dismiss the Agency's application for costs.

6. *Judgment No. 3090 (8 February 2012): Rockwell* v. *World Intellectual Property Organization (WIPO)*[38]

Long succession of short-term contracts may give rise to a legal relationship equivalent to that applicable to permanent staff members of an organization—Error of law—Discriminatory treatment giving rise to compensation *ex aequo et bono*

The complainant joined WIPO in January 2002. She worked there as a clerk at the G3 level, under 24 successive short-term contracts, until December 2008. The Tribunal had always refused to redefine short-term contracts as career contracts.[39] On 19 December

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[35] Mr. Seydou Ba, President, Ms. Mary G. Gaudron, Vice-President and Giuseppe Barbagallo, Judge.

[36] See also Judgment No. 295 (8 July 2010); *In re Kunstein-Hackbarth* Judgment No. 1780 (9 July 1998); and *In re Meyler* Judgment No. 978 (27 June 1989).

[37] See Judgment No. 3078 (8 February 2012), paragraph 7 of the considerations.

[38] Mr. Seydou Ba, President, Ms. Mary G. Gaudron, Vice-President, Mr. Claude Rouiller, Mr. Giuseppe Barbagallo and Mr. Patrick Frydman, Judges (Geneva).

[39] See *inter alia*, Judgment No. 2850 (8 July 2009); Judgment No. 2821 (8 July 2009); Judgment No. 2708 (6 February 2008); Judgment No. 2362 (14 July 2004); Judgment No. 2198 (3 February 2003); *In re Ndedi* Judgment No. 1560 (11 July 1996); and *In re Kock, N'Diaye and Silberreiss* Judgment No. 1450 (6 July 1995).

2008, the Organization offered her another short-term contract for the period 22 December 2008 to 20 March 2009, which stipulated in its "Special Conditions" section the following:

"This contract shall not be renewed beyond 20 March 2009."

The complainant alleged that, having been employed under a long succession of short-term contracts, she was in the same situation as staff members appointed for an unlimited duration.

The Tribunal found that the short-term contracts had been systematically renewed without any notable breaks, with the result that, as from the age of 27, the complainant had pursued a career in the Organization for more than seven years, until the expiry of the disputed contract. That long succession of short-term contracts gave rise to a legal relationship between the complainant and WIPO equivalent to that applicable to permanent staff members of an organization.

In considering that the complainant belonged to the category of temporary employees to whom the Staff Rules and Staff Regulations did not apply and who did not enjoy legal protection comparable to that enjoyed by other staff members, the Tribunal considered that the defendant had failed to recognize the real nature of its legal relationship with the complainant. In so doing, it had committed an error of law and misused the regulations governing temporary contracts.

The Tribunal therefore decided to set aside the impugned decision. In view of all the circumstances of the case, the Tribunal did not remit the case to the Organization to consider the possibility of restoring the complainant's employment relationship, which had ended more than two years earlier.

The Tribunal observed that the defendant's erroneous legal assessment had resulted in the complainant being kept in a precarious employment situation throughout her service, although her work had not been designed to meet any specific and particular needs, but consisted in the performance of duties similar to those assigned in principle to permanent staff members. The complainant had therefore been treated in a discriminatory manner.

In view of all those circumstances, the Tribunal held that it was justifiable to set *ex aequo et bono* the damages due to the complainant under all heads at 60,000 Swiss francs.

7. Judgment No. 3013 (8 February 2012): Taverdyan (Nos. 1 and 2) v. *International Labour Organization (ILO)*[40]

Participation in Young Professionals Career Entrance Programme on fixed-term basis does not give rise to legitimate expectation of future employment—Article 4.6 paragraph (d) of International Labour Organization Staff Regulations—In the absence of an internal rule on pregnancy during employment, the Organization has no obligation to extend the employment relationship to cover the pregnancy period—Right to protection from dismissal for a reason connected to maternity

The complainant joined the International Labour Office in January 2001 within the framework of the fixed-term Young Professionals Career Entrance Programme (YPCEP).

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

The complainant was notified on 29 February 2008 that, due to budgetary constraints, her contract would not be renewed upon its expiry on 30 April 2008. The complainant contested, *inter alia*, the non-renewal of her contract.

The complainant contended that she had a legitimate expectation of pursuing a career in the Organization due to her participation in the YPCEP, and that her participation in that programme could somehow be considered a guarantee of future employment by the Organization. The Tribunal found that that contention was unfounded. The contractual terms which the complainant agreed to when entering the programme and again with each contract renewal were clear in that they were for fixed-term periods and created no expectation of renewal.

The Tribunal also noted that the complainant's argument that her notification of termination during pregnancy had violated Swiss employment law was mistaken. The complainant was on a fixed-term contract, the expiry date of which was set at the time of appointment and at each renewal thereafter. Moreover, the Tribunal observed that the offer of appointment specifically referred to article 4.6 paragraph (d) of the Staff Regulations which stated, in relevant part, that "[w]hile a fixed-term appointment may be renewed, it shall carry no expectation of renewal or of conversion to another type of appointment, and shall terminate without prior notice on the termination date fixed in the contract of employment".

According to the Tribunal, the fact that the complainant was notified of the Organization's decision not to renew her contract upon its set expiry on 30 April 2008, and then shortly thereafter informed the Human Resources Department that she was pregnant, was not in breach of any rules. The applicable rules in the case were those of the Organization and, as the Joint Advisory Appeals Board had pointed out, ILO Staff Regulations made no provision relevant to that issue. In those circumstances, the Tribunal found that the Organization was correct in stating that the fact

> "that there is no published policy (rule, regulation or office procedure) concerning the non-renewal of fixed-term officials whose contracts are due to expire during pregnancy, affirms that termination or non-renewal during pregnancy is only permitted for reasons completely unrelated to the pregnancy. When the contract of a fixed-term official is due to expire during pregnancy or maternity leave, it is consistent practice for the Organization to honor the contract period in full. However, the Organization does not extend the contract period for the sole purpose of continuing the period of employment to cover the pregnancy and maternity leave".

In the Tribunal's view, that position was not inconsistent with Swiss employment law. In particular, the provision of the Swiss Code of Obligations which the complainant cited referred specifically to the termination of employment during the contract term, notified during protected periods (pregnancy, post delivery, etc.) and did not refer to the natural expiry of a fixed-term contract. The Tribunal further noted that the relevant provision of the Swiss Code of Obligations was fully in line with the general principle according to which everyone should have the right to protection from dismissal for a reason connected with maternity found in article 33(2) of the Charter

of Fundamental Rights of the European Union[41] and article 8 of the ILO Maternity Protection Convention, 2000 (No. 183).[42]

8. *Judgment No. 3106 (4 July 2012): Spina (No. 5)* v. *United Nations Industrial Development Organization (UNIDO)*[43]

Res judicata does not operate in the case of a prior judgment on the irreceivability of a complaint—Principle of freedom of association—Non-interference of the Organization in the affairs of its staff union or the organs of its staff union—Freedom of discussion and debate—Law of defamation—Duty of care to provide a safe and secure workplace and duty to protect the complainant's dignity and reputation—Material and moral damages

Following a dispute within the Staff Union between the complainant, a former president of the Union and a Union member, the latter sent an e-mail to the complainant, with all UNIDO staff copied. A subsequent complaint against the Organization for failure to intervene in the dispute was held irreceivable by the Tribunal in Judgment No. 2538.[44]

Several months after the delivery of the judgment on 12 July 2006, the complainant learned that a copy of the e-mail in question was on a bulletin board on the Organization's Intranet system. He requested the Director of the Human Resource Management Branch to submit his complaint against the author of the e-mail to the Joint Disciplinary Committee. In her response, the Director declined to take action. The complainant then sought review of the decision and asked that the e-mail be removed immediately from the Intranet bulletin board, that its author "be instructed to write [. . .] an open letter of apology" and that the Organization pay him compensation in the sum of 25,000 euros for the "continued injury to [his] reputation and dignity". He was informed that the e-mail in question was no longer publicly available and that his request was also refused.

The Organization argued that the internal appeal was irreceivable based on the principle of *res judicata*, as the issues raised in the internal appeal had been dealt with in Judgment No. 2538. However, the Tribunal noted that, while the complaint had been dismissed as irreceivable,[45] there had been no judgment on the merits, and thus, the complaint was not barred by *res judicata*.

The Tribunal considered that there were two aspects to the complaint. The first concerned the Organization's failure to take action against the author of the e-mail. The second aspect concerned the presence of the e-mail on the intranet bulletin board. In that regard, the complainant sought to hold the Organization liable for the allegedly defamatory content of the e-mail.

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[41] Available from http://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed on 31 December 2012).

[42] United Nations, *Treaty Series*, vol. 2181, p. 253.

[43] Ms. Mary. G. Gaurdron, Vice-President, Mr. Giuseppe Barbagallo and Ms. Dolores M. Hansen, Judges.

[44] Judgment No. 2538 (12 July 2006).

[45] *Ibid*.

The Tribunal considered the question whether the Organization had been under a duty to protect the complainant from the actions of the author of the e-mail in the light of the principle of freedom of association.

In the Tribunal's view, the principle had two important aspects. The first was that it precluded interference by an organization in the affairs of its staff union or the organs of its staff union.[46] The Tribunal considered that a staff union should be free to conduct its own affairs, to regulate its own activities and, also, to regulate the conduct of its members in relation to those affairs and activities.[47] The Tribunal further noted that an organization should remain neutral when differences of opinion emerged within a staff union: "it must not favour one group or one point of view over another". Nor did an organization have any legitimate interest in the actions of staff members in their dealings with their staff union and/or other staff union members with respect to the affairs and activities of the union.

The second aspect of freedom of association that, in the Tribunal's view, was relevant to the case was that it necessarily involved freedom of discussion and debate. The Tribunal had acknowledged that the freedom of discussion and debate was not absolute and that there could be cases in which an organization could intervene if, for example, there was "gross abuse of the right to freedom of expression or lack of protection of the individual interests of persons affected by remarks that are ill-intentioned, defamatory or which concern their private lives."[48]

Within that context, the Tribunal considered the allegedly defamatory nature of the e-mail in question. According to the Tribunal, the law of defamation was not concerned solely with the question whether a statement was defamatory in the sense that it injured a person's reputation or tarnished his or her good name. It was also concerned with the question whether the statement was made in circumstances that afforded a defence. As a general rule, a statement, even if defamatory in the sense indicated, would not result in liability in defamation if it was made in response to criticism by the person claiming to have been defamed or if it was made in the course of the discussion of a matter of legitimate interest to those to whom the statement was published and, in either case, the Tribunal considered that the extent of the publication was reasonable in the circumstances.

In view of the circumstances, the Tribunal decided that the circulation of the e-mail by its author had not involved any abuse of the freedom of speech which necessarily attended freedom of association. Thus, UNIDO could not have investigated the actions of the author of the e-mail in question nor taken any other action against him without interfering in Staff Union affairs. The Tribunal therefore dismissed the claim that UNIDO breached its duty to the complainant by failing to take action against the author of the e-mail in question.

With regard to the second posting of the e-mail on the Organization's Intranet, the Tribunal stated that any re-publication of the e-mail amounted to excessive publication and, thus, was not entitled to the same protection that attached to the original e-mail.

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[46] See *In re Guastavi (No. 2)* Judgment No. 2100 (30 January 2002), paragraph 15 of the considerations.

[47] See *In re Connolly-Battisti (No. 2)* Judgment No. 274 (12 April 1976), paragraph 22 of the considerations.

[48] See Judgment No. 2227 (16 July 2003), paragraph 7 of the considerations.

Notwithstanding, the Tribunal observed that there was no evidence to suggest that the e-mail on the bulletin board had been widely read. Nor was there any evidence to suggest that its presence on the bulletin board had been the result of ill will or any intentional act that could be attributed to the Organization.

The Tribunal noted that an organization had a duty of care to ensure that material that injured the reputation or dignity of its staff members did not find its way into any of its authorized channels of communication. The complainant was entitled to file a claim against the Organization for its breach of that duty, even though the offending material had been removed from the bulletin board before he lodged his internal appeal. In those circumstances, the Tribunal decided that the complainant was entitled to material and moral damages. Given that the evidence did not permit a finding that the e-mail had been widely read on the bulletin board and, in the absence of evidence of any actual damage to the complainant's reputation by reason of its presence on the board, the Tribunal assessed those damages at 1,000 euros.

9. Judgment No. 3130 (4 July 2012): Madanpotra v. *World Health Organization (WHO)*[49]

Complaint for violations of Selection Guidelines—Flaws in selection process—Required number of panel members—Absence of inordinate delays meriting an award of damages

The complainant applied for the post of National Professional Officer (Planning & Monitoring) at WHO Country Office for India, and was notified of his non-selection on 22 April 2008. He appealed that decision before the Regional Board of Appeal which recommended that his appeal should be dismissed and the Regional Director endorsed that recommendation in a letter dated 12 February 2009. The complainant appealed that decision before the Headquarters Board of Appeal (HBA), which recommended to maintain the selection but award compensation and costs because the selection process had been flawed. The Board further recommended that the complainant's other claims should be dismissed and that the Selection Guidelines should be reviewed and updated, and applied in a consistent manner throughout the Organization. In a letter dated 7 April 2010 the Director-General notified the complainant of her decision to accept those recommendations. That complainant impugned the decision before the Tribunal.

The complainant alleged several violations of the Selection Guidelines. In particular, he contended that the Interview Panel was comprised of four members instead of three and that the written test was administered by the Country Office for India and not by a Personnel Officer of the Regional Office. He also asserted that the successful candidate did not fulfil the educational requirements of the post as listed in the vacancy notice.

The Tribunal agreed with the HBA findings that the directives contained in the Selection Guidelines regarding the required number of panel members are specific and that these directives were not followed. According to the Tribunal, the Organization's assertion that the Selection Guidelines merely constitute recommended practices, rather than binding rules, was mistaken. The Tribunal observed that while an interview panel could consist of only two members when necessary, there was no provision stipulating that members could be added to the three prescribed by the Selection Guidelines.

[49] Mr. Seydou Ba, President, Mr. Giuseppe Barbagallo Ms. Dolores M. Hansen, Judges (Geneva).

The Tribunal found that the successful candidate did satisfy the educational requirements of the post and did not find any evidence of bias on the part of the Administration since it considered that a procedural flaw did not automatically imply bias or prejudice.

The complainant requested an award of USD 10,000 in damages for unreasonable delays in internal appeal proceedings. However, considering that the two appeals took less than two years to complete, the Tribunal observed that the complainant could not be considered to have suffered from inordinate delays meriting an award of damages.

The Tribunal highlighted that an organisation should be careful to abide by the rules on selection and warned that when the process proves to be flawed, the Tribunal would quash any resulting appointment, albeit on the understanding that the organisation should "shield" the successful candidate from any injury.

In light of the above, the Tribunal set aside the impugned decision and the decision of 2 April 2008 to approve the appointment of the successful candidate. The Tribunal found that the complainant had already been awarded fair compensation, and thus, no further award was made. The Tribunal decided the complainant was entitled to costs in the total amount of USD 1,000.

10. Judgment No. 3135 (4 July 2012): Senou v. *Technical Centre for Agricultural and Rural Cooperation*[50]

Non renewal of contract on grounds of unsatisfactory performance—Grounds to determine compensation in lieu of period of notice—Overview of case law on vested rights—Criteria for determining breach of a vested right—Counterclaim for costs dismissed

The contract of the complainant, who had been employed by the organization since 1987, was not renewed on the grounds of unsatisfactory performance. The non-renewal decision specified that, in line with the Technical Centre for Agricultural and Rural Cooperation ("Centre") Staff Regulations adopted in a decision of 2006, the complainant would receive compensation in lieu of notice equivalent to nine months' remuneration. The provisions in question stated that, "[t]he length of the period of notice shall be one month for each completed year of service, subject to a minimum of three months and a maximum of nine months".

The complainant submitted a complaint to the Director, in which she emphasized that her contract had been signed in February 2005 under the Centre's previous Staff Regulations laid down in 1992. The complainant therefore contended that she was entitled to compensation calculated on the more favourable basis provided in the previous regulations, which corresponded to 20.7 months' notice. The Director rejected the complaint on the grounds that the fact that the complainant's contract had been signed while the previous Staff Regulations were still in force did not prevent the application of the new Staff Regulations to the matter in dispute.

The Tribunal first observed that the terms of employment of staff members of international organizations might vary according to amendments of the existing Staff Regula-

[50] Mr. Seydou Ba, President, Mr. Claude Rouiller and Mr. Patrick Frydman, Judges (Geneva).

tions or Staff Rules, notwithstanding any references to the original provisions as might be contained in their employment contracts.

The Tribunal reiterated that a provision was retroactive only if it effected some change in a person's existing legal status, rights, liabilities or interests from a date prior to its proclamation, but not if it merely altered the effects of that status or of those rights, liabilities or interests in the future.[51] The Tribunal considered that the new provision did not alter the compensation in lieu of notice already paid to the complainant, but only introduced a new rule on the subject, which was subsequently applied to her.

The Tribunal considered that the complainant would have had grounds for relying on the more favourable provisions of the 1992 Staff Regulations if she had gained a vested right to their continued application. However, according to the Tribunal's case law, as established, *inter alia*, in Judgment No. 61, clarified in Judgment No. 832 and confirmed in Judgment No. 986, in order for there to be a breach of a vested right, the amendment to the applicable text must relate to a fundamental and essential term of employment within the meaning of Judgment No. 832.

In applying the three criteria that had been identified by the Tribunal in Judgment No. 832 to determine whether a breach of acquired rights had occurred, namely the nature of the altered term of employment, the reason for the change, and the consequence of recognizing or not recognizing a vested right, the Tribunal confirmed that there had been no such breach in the instant case. The Tribunal observed that the nature of the altered term of employment stemmed from a clause of the complainant's employment contract, which could normally have been an indication that a right had been vested. However, that clause only reflected the existing provisions of article 35 of the 1992 Staff Regulations with the result that it actually stemmed from those provisions themselves. The Tribunal highlighted that unlike individual decisions or the specific terms of a staff member's contract, the provisions of staff regulations or staff rules rarely gave rise to vested rights.

The Tribunal found that the reasons for the disputed change rested on legitimate grounds and that the fact that the amendment of the term of employment was prompted by financial considerations did not in itself make it unlawful. In addition, the Tribunal considered that the reduction in the compensation in lieu of notice was not so substantial that it upset her contractual arrangements, since, *inter alia*, the 9 months' notice was still a very substantial benefit, and that length of time was still appreciably better than that generally established by national laws.

With regard to the Centre's request for costs, the Tribunal observed that it made such an order only in exceptional circumstances and that "it was essential that international civil servants should have open access to the Tribunal without facing the dissuasive or chilling consequences that such an order might have". The Tribunal decided that although the complaint had to be dismissed, it should not be regarded as vexatious and it therefore dismissed the Centre's counterclaims.

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[51] See, *inter alia,* Judgment No. 2315 (4 February 2004), paragraph 23 of the considerations; and see also Judgment No. 2986 (2 February 2011), paragraph 14 of the consideration.

11. Judgment No. 3138 (4 July 2012): Bahr (Nos. 2 and 3) v. *International Telecommunication Union (ITU)*[52]

Compensation request for excessive length of suspension—Moral injury—Suspension should not be ordered except in cases of serious misconduct—Right to be heard—Accessing a staff member's e-mail account in his or her absence—Duty of care of the Union—National taxes paid on sums awarded by the Tribunal are not refundable in the absence of cause of action

The complainant neglected to forward some important e-mails to her supervisors, although that was part of her job description. During an administrative investigation launched by the Secretary-General to ascertain what had become of those e-mails, her professional e-mail account was accessed while she was on leave. The investigator concluded that the e-mails in question had been deleted after having been read and that they could only have been deleted by the complainant herself or by a person who knew her password.

The Chief of the Department of Administration and Finance informed the complainant that the Secretary-General was contemplating disciplinary action against her and invited her to submit any comments she might have. Pending receipt thereof and any additional investigation to which they might give rise, the complainant was immediately suspended from duty, with pay.

The complainant submitted her comments. On the same day, she also requested a further review of the decision to suspend her from duty; that request was denied. The complainant lodged an appeal with the Appeal Board, which recommended that the Secretary-General should acknowledge that the suspension had been unjustified and should award her compensation in the amount of 5,000 Swiss francs for the moral injury suffered. The Secretary-General informed the complainant that he had decided not to follow those recommendations. That was the decision impugned before the Tribunal in the third complaint.

In the meantime, the complainant had been informed that her contract had been extended "as an interim precautionary measure" and that the Secretary-General had decided not to pursue disciplinary proceedings and not to renew her contract when it expired.

Later, the complainant requested, *inter alia,* compensation for the injury resulting from the inordinate length of her suspension. As she received no reply, she requested a further review of what she considered to be an implied rejection of her claims. The Chief of the Department of Administration and Finance informed her that, since "after the initial period of suspension . . . [she had] not been sent any decision informing [her] of the steps undertaken by the Administration to find her another post", that situation might have caused her moral injury for which the Secretary-General was "prepared to grant compensation" of up to 5,000 Swiss francs. The complainant impugned that decision in her second complaint.

The Tribunal considered that the suspension of a staff member, even if it was only an interim measure, could undermine that person's esteem within the employing organization and might affect the person's health. It observed that even if suspension was not neces-

[52] Mr. Seydou Ba, President, Mr. Claude Rouiller and Mr. Patrick Frydman, Judges.

sarily predictive of the substantive decision to be taken regarding a disciplinary measure, it was manifestly a decision that adversely affected the person concerned and one that must be legally founded, justified by the requirements of the Organization and in accordance with the principle of proportionality. The Tribunal further reiterated that suspension should not be ordered except in cases of serious misconduct.[53]

The complainant submitted in her third complaint that her right of defence had been breached, because she had not been heard before the decision was taken to suspend her from duty, and that decision had been based on an investigation report resting on information obtained after her professional e-mail account was "hacked".

The Tribunal observed that ITU Staff Rules did not make any provision for the staff member concerned to be heard before the suspension decision was announced since suspension was an interim precautionary measure which should be adopted urgently. However, the Tribunal noted that the person's right to be heard should be exercised before the substantive decision was taken to impose a disciplinary measure.[54] The Tribunal found no reason to depart from that case law, given that after being suspended from her duties the complainant had been able to submit her comments.

The Tribunal found it was regrettable that the complainant's professional e-mail account had been consulted in her absence. However, it observed that the evidence showed that she had been informed that such a technical review was imminent and had to be carried out urgently. The Tribunal considered that none of the circumstances on which she relied proved that, if indeed she was not able to be present, she could not have been represented.

The complainant also argued that the conditions laid down in the Staff Rules for ordering a suspension had not been met in her case, because she had not committed serious misconduct and her continuance in office was not prejudicial to the service. The Tribunal noted that four important and apparently urgent e-mails from national authorities had been received in the inbox of the Conferences and Event Organization Division, that the complainant had a duty to forward them to her supervisors, and that they had been deleted without having been forwarded. The Tribunal considered that the complainant's omission could have constituted serious misconduct.

The Tribunal observed that according to the Staff Rules, suspension should normally not exceed three months while in the instant case, it lasted for more than seven months. Therefore, the Tribunal found that the Union had breached its duty of care towards the complainant leaving her in a state of uncertainty as to the possible adoption of a disciplinary measure and by not informing her of the solutions it was considering for her professional future. The Tribunal considered that compensation of 5,000 Swiss francs offered to the complainant was insufficient relief for that injury and that the amount should be raised to 12,000 Swiss francs.

The Tribunal dismissed the complainant's request to rule that, if the sums awarded were to be subject to national taxation, she would be entitled to claim a refund of the tax paid from the Organization.

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[53] See Judgment No. 2698 (6 February 2008), paragraph 9 of the considerations.

[54] See Judgment No. 2365 (14 July 2004), paragraph 4(a) of the considerations.

12. *Judgment No. 3141 (4 July 2012): Touré* v. *World Health Organization (WHO)*[55]

Recruitment of local staff staying illegally in Switzerland—Article VII, paragraph 4, of the Statute of the Tribunal—Non-suspensive effect of a complaint—Form of an administrative decision—Failure of an international organization to ensure compliance of its officials status with the laws of the host State governing the residence of aliens upon recruitment—Directives of the Permanent Mission of Switzerland, 1987—Duty of protection and assistance—Article VIII of the Statute of the Tribunal—Tribunal's power to order performance of an obligation not fulfilled by an international organization

The complainant, an Ivorian national, was first employed by WHO on 4 December 2006. At the time of the events giving rise to the dispute, he was employed at the G.3 level, on another temporary appointment covering the period from 1 January to 30 June 2008. When he was recruited by WHO, the complainant, who had arrived in Switzerland in February 2001 on a tourist visa that had expired, did not hold a residence permit from the Swiss authorities.

In June 2007, while he was on his third contract, the complainant submitted his first application for a *carte de légitimation* (identification card for international civil servants) to the WHO Administration. In support of that application, instead of the residence permit which was normally required, he produced a power of attorney with the letterhead of the trade union organization UNIA. WHO then forwarded the file to the Permanent Mission of Switzerland, which was responsible for delivering the *cartes de légitimation* issued by the Federal Department of Foreign Affairs. The *carte de légitimation* was never delivered.

On 10 April 2008, the complainant was summoned to the *Office cantonal de la population* (immigration office) in Geneva for an interview to clarify his status under the laws governing the right of residence in Switzerland. At that interview, which took place on 29 April, he was informed that no *carte de légitimation* could be issued to a person who was unlawfully present in Switzerland and that he had to leave the national territory by 15 May at the latest. He was also informed that the only means of regularizing his stay was for him to return to Côte d'Ivoire and apply for an entry visa at the Swiss embassy in that country, supporting his application with a copy of his WHO contract.

At a meeting, after the complainant had announced that he had decided to comply with the Swiss authorities' order by returning to Côte d'Ivoire on 16 May, his supervisors assured him that his contract would be honoured until its normal expiry date of 30 June 2008. On account of developments just before his departure, which indicated that his appointment had been suddenly terminated without him being informed, he decided to cancel his trip to Côte d'Ivoire and remain in Switzerland.

On 8 July, the complainant lodged an appeal with the Headquarters Board of Appeal against what he considered to be the Organization's decision of 15 May to terminate his appointment early. By decision of 7 April 2010, the Director-General rejected the complainant's appeal. The complainant impugned that decision before the Tribunal.

As a preliminary request, the complainant had asked that his complaint should be granted suspensive effect as protection against possible expulsion by the Swiss authorities. However, the Tribunal decided the preliminary request was irreceivable since article

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

VII, paragraph 4, of its Statute specified that "[t]he filing of a complaint shall not involve suspension of the execution of the decision impugned".[56]

The principal submission of WHO was that the complainant's appointment had not in fact been terminated on 15 May 2008 and that his appeal to the Headquarters Board of Appeal and subsequent complaint before the Tribunal had both been irreceivable, because they had not been directed against a decision taken by a duly authorized official of the Organization. The Tribunal recalled that it established in its case law that an administrative decision might take any form and that, even if it was not put in writing, its existence might be inferred from a factual context demonstrating that it had indeed been taken by an officer of the Organization.[57]

The Tribunal then turned to the main question of whether the Organization had really decided to terminate the complainant's contract on 15 May 2008. The Tribunal noted, that in its first memorandum to the Headquarters Board of Appeal of 16 July 2008, WHO had explained that, on learning from the Permanent Mission of Switzerland that the complainant would be ordered to leave Swiss territory, it had decided to terminate his contract on 15 May 2008 in order to "regularize the matter with the Swiss authorities". According to the Tribunal, that memorandum showed that it was only when the Organization realized that it had itself committed a fault, by not properly checking whether the complainant had a right of residence when he was recruited, that the decision was finally taken to honour the contract until 30 June 2008, but solely to allow for the payment of the complainant's remuneration.

In the Tribunal's view, the complainant's awareness of the disputed termination of his appointment and the failure to inform him immediately of the decision to rescind it certainly played a role in his decision to cancel his trip to Côte d'Ivoire. The Tribunal considered that the complainant had good reason to fear that if the Swiss embassy in Côte d'Ivoire were to consult the Organization about the expiry date of his appointment he would certainly have been refused an entry visa.

The Tribunal observed that on the merits, the decision of the Director-General of 7 April 2010 and the disputed termination of the complainant's appointment were not based on any of the allowable grounds for termination and were therefore declared unlawful and set aside by the Tribunal

The Tribunal emphasized that the manner in which WHO handled the case amounted to serious wrongdoing. The Tribunal observed that when recruiting its officials, an international organization should ensure that their status complied with the laws of the host State governing the residence of aliens, failing which it might be held responsible for abuses of the privileges and immunities conferred upon it and upon its staff members. The Tribunal noted that by forwarding his application for a *carte de légitimation*, WHO had given the complainant reason to believe that his presence in Switzerland would be regularized by virtue of his employment in the Organization. The Tribunal further observed that according to the Directives of the Permanent Mission of Switzerland, 1987[58] with which

[56] See *In re Souilah* Judgment No. 1584 (30 January 1997), paragraph 6 of the considerations.

[57] See, *inter alia*, Judgment No. 2573 (7 February 2007), paragraph 8 of the considerations or Judgment No. 2629 (11 July 2007), paragraph 6 of the considerations.

[58] Available from: http://www.eda.admin.ch (accessed on 31 December 2012).

international organizations headquartered in Geneva were deemed to be familiar, no *carte de légitimation* could be issued in any case whatsoever to a person who was unlawfully present in the country at the time of his or her recruitment by one of those organizations.

The Tribunal noted that, although that issue was not raised anywhere in the submissions, it was a moot point whether, in the circumstances of the case, it was not up to WHO to grant the complainant the benefit of the duty of protection and assistance which every international organization owed to its staff members under a general principle of international civil service law established by the International Court of Justice in an advisory opinion of 11 April 1949[59] and confirmed by the Tribunal in one of its earliest cases.[60] Absent any submissions on the matter, the Tribunal decided not to determine the issue.

The Tribunal decided that it could not condone the complainant's remaining in Switzerland up until that point, given that, as he had not challenged the decision of the *Office cantonal de la population* through the appropriate legal channels, he was bound to comply with it and that, after the expiry of his appointment on 30 June 2008, he could no longer rely on the immunity bestowed on an international civil servant.

The Tribunal determined that WHO should be held responsible for depriving the complainant of the possibility of regularizing his stay in Switzerland and thereafter possibly continuing in service in the Organization. The Tribunal decided that within one month of delivery of the judgment, WHO should offer the complainant a six-month temporary appointment on the same terms of employment in all respects as that of 3 January 2008. Performance of that contract would, however, be subject to the prior regularization of the complainant's situation in respect of the right to temporary residence in Switzerland, either through the granting of an entry visa by the Swiss embassy in his country of origin, or, if appropriate, through the issue of a residence permit by the *Office cantonal de la population*. The Tribunal also found that pursuant to article VIII of the Statute of the Tribunal, provided that the complainant regularized his stay in Switzerland, there were grounds for ordering the Organization to request that he should be issued a *carte de légitimation* according to the normal procedure.[61]

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[59] *Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Reports, 1949,* p. 174.

[60] See *In re Jurado* Judgment No. 70 (11 September 1964).

[61] See Judgment No. 2720 (9 July 2008), paragraph 17 of the considerations.

D. Decisions of the World Bank Administrative Tribunal[62]

1. *Decision No. 467 (27 June 2012): BW* v. *International Bank for Reconstruction and Development*[63]

Jurisdictional challenge—Binding nature of mutually agreed separation agreements—Burden of proof lies on the party seeking invalidation of the agreement—Staff member's obligation to be familiar with staff rules affecting terms of employment—Timeliness of an application—Computation of the critical date

The Applicant challenged the validity of a Mutually Agreed Separation agreement ("MAS") she signed in March 2002 as a result of which she was precluded from receiving early unreduced pension at the age of 50 as is permitted under certain provisions of the Bank's Staff Retirement Plan. The Applicant's principal claim was that the MAS was invalid because it was improperly administered without due process. She claimed that she was harassed and unduly influenced to sign the MAS and was given no explicit instruction about the MAS and its effects on her future livelihood. The Applicant added that she had been informed by various members of Bank's Human Resources and Pension departments that she could receive an unreduced pension if she retired at 50. Additionally, the Applicant argued that the date of the occurrence of the event giving rise to the Application should be computed from the date she became aware of the effect of the MAS on her pension, namely, August 2011, rather than March 2002 when she signed it.

The Bank filed a preliminary objection to the admissibility of the Application. According to the Bank, the Application was inadmissible as time-barred and due to the fact that the Applicant had failed to exhaust internal remedies as required by article II(2) of the Tribunal's Statute. The Bank argued that the MAS should not be subject to litigation "ten years after the fact" and stated that the Applicant had not alleged any exceptional circumstances which would justify the Tribunal granting her relief from or suspension of the requirements for admissibility under article II(2). Similarly, the Bank contended that there were no hidden clauses in the MAS. According to the Bank, the Applicant received a severance payment under the terms of the MAS and the Bank's pension rules in existence in 2002 made it clear that "severance payments must be waived by staff to maintain eligibility for any applicable pension or reappointment." The Bank argued that as the Applicant

[62] 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, the Multilateral Investment Guarantee Agency and the International Centre for the Settlement of Investment Disputes (collectively "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 designated or otherwise entitled to receive payment under any provision of the Staff Retirement Plan. For more information on the World Bank Administrative Tribunal and full texts of its decisions, see http://www.worldbank.org/tribunal (accessed on 31 December 2012).

[63] The judgment was rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Florentino P. Feliciano (Vice-President), Mónica Pinto (Vice-President), Jan Paulsson, Francis M. Ssekandi, and Ahmed El-Kosheri.

did not waive the severance payment, she was not entitled to receive an unreduced pension at the age of 50.

In addressing the timeliness of the Application, the Tribunal observed that article II(2) required that an Application was filed, in the absence of exceptional circumstances, within 120 days after the latest of the following: (a) the occurrence of the event giving rise to the application; (b) receipt of notice, after the applicant had exhausted internal remedies, that the requested relief would not be granted; or (c) receipt of notice that the requested relief would be granted, if such relief was not granted within 30 days after the receipt of such notice. The Tribunal accepted the Bank's argument that the Applicant's claims regarding the validity of the MAS on grounds of due process, duress, harassment or undue influence were time-barred and she had not demonstrated any basis on which those claims could be considered timely.

The Tribunal addressed the Applicant's argument that the date of the occurrence of the event giving rise to the Application should be computed from the date she became aware of the effect of the MAS on her pension. The question therefore was when did the Applicant become aware, or should reasonably have been aware, of the effect of the MAS on her pension rights. The Tribunal held that a compelling case must be presented by the party asking for the invalidation of the MAS, and that the burden is higher in cases where a challenge is lodged more than ten years after the MAS was signed. In this case, the Tribunal found that the burden had not been discharged by the Applicant and held that in view of the seriousness of her situation in 2002 as she perceived and had described it, it was her responsibility to keep track of the effect of important documents she signed. The Applicant was unable to produce any evidence of alleged conversations or email correspondence assuring her that she would be able to receive an unreduced pension if she retired at age 50. The Tribunal further noted that it is the responsibility of staff members to familiarize themselves with applicable rules governing their employment, including the Staff Retirement Plan.

The Tribunal recalled that it had consistently given effect to the terms of agreements such as that in the present case explaining that "if such agreements were not binding upon the affected staff member, there would be little incentive for the Bank to enter into compromise agreements [. . .] It is therefore in the interest not only of the Bank but also of the staff that effect should be given to such settlements."[64] Nevertheless, the Tribunal stressed that settlement agreements presented by the Bank to staff members could be more explicit regarding their impact on the retirement benefits of staff members signing such agreements, thereby leaving no doubt that staff members are on notice of important consequences that may not otherwise be apparent on the face of the agreement. The Tribunal considered that such non-disclosure could be considered actionable in certain circumstances. As such circumstances were not present in this case, the Application was dismissed.

[64] *Mr. Y* v. *International Finance Corporation*, Decision No. 25 (4 September 1985), para. 26.

2. *Decision No. 466 (27 June 2012): BV* v. *International Bank for Reconstruction and Development*[65]

Breach of memorandum of understanding—Binding nature of MOU on both staff and the organization—Staff rule 9.01, paragraph 4.12—Effect of the Organization's untimely compliance with MOU—Failure to justify breach—Discretion to reassign staff subject to pre-existing MOU—Payment of compensation for violation of right to fair treatment

The Applicant challenged: (i) the Bank's failure to reinstate him in a timely manner to his former position as required by a Memorandum of Understanding of 31 August 2009 ("MOU"); and (ii) the Bank's decision to reassign him until 1 May 2012. The Applicant had a career dispute with the Bank which resulted in his demotion; however, the dispute was resolved in his favor with the signing of the MOU. According to the terms of the agreement, management would re-instate the Applicant effective 1 September 2009. Due to an accident which resulted in restrictions on his mobility, the Applicant was unable to resume work immediately. He was placed on the Bank's short-term disability programme and temporarily assigned to another unit. The temporary assignment was extended and a proposal to convert the assignment to a permanent position was offered to the Applicant, which he rejected. Three Independent Medical Evaluations (IME) were conducted subsequently, first in November 2010 and then on 16 February 2011 and 8 August 2011. These confirmed that the Applicant was fit to return to his original position on a full-time basis, although he would be wheelchair-bound. One of the IMEs recommended that the Bank "accommodate his working environment to fit with what his functional capacity can meet". However, the Applicant's supervisor continued to press for a permanent reassignment of the Applicant, while he sought to be reinstated to his former position. The Applicant was reassigned permanently pursuant to staff rule 5.01, paragraph 2.04, and on 8 June 2011, the Bank posted a vacancy announcement for the Applicant's former position. The Applicant initially attempted to resolve the dispute over his right to his former position informally. When mediation attempts did not prove successful, the Applicant filed an Application with the Tribunal on 28 October 2011. The parties sought the extension of applicable deadlines for filing pleadings to explore possibilities of settling the case. On 29 April 2012, shortly before the end of written proceedings before the Tribunal, the Applicant's manager informed him that he was being reinstated to his former position.

Before the Tribunal, the Bank contended that the Application was inadmissible because his claims were moot. According to the Bank, it had employed a cautious approach to ensure that reasonable accommodations had been made to take into account the Applicant's mobility restrictions and ensure his workplace safety. Additionally, its decision to reassign the Applicant permanently was guided by the work program needs including the urgent business need for the Applicant's former position to be filled. The Applicant, on the other hand, argued that the last-minute decision to reinstate him neither rendered the case moot nor cured the damage inflicted on him.

The Tribunal found that as the Bank had eventually complied with its main obligations under the MOU to reinstate the Applicant, the contested decisions (i.e. failure to

[65] The judgment was rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Florentino P. Feliciano (Vice-President), Monica Pinto (Vice-President), Jan Paulsson, Francis M. Ssekandi, and Ahmed El-Kosheri.

reinstate the Applicant and the decision to reassign him) were moot. Nevertheless, the facts surrounding the belated implementation of the main term of the MOU and the earlier reassignment of the Applicant to a different unit necessitated a review of the Bank's actions to ascertain whether they resulted in unfair treatment of the Applicant for which he may deserve compensation. The Tribunal recalled past decisions in which it upheld the Bank's discretion to reassign staff on the basis of its evolving business needs but noted that the binding nature of MOUs is recognized in staff rule 9.01, paragraph 4.12 which provides that "[a] signed MOU represents a binding commitment for the parties." In addition the Tribunal's jurisprudence had recognised the binding nature of settlements.[66]

The Tribunal further noted that the Bank should have examined, prior to reassignment of the staff member, whether there was a specific agreement that would prevent such a reassignment. The Tribunal held that such an agreement existed in the present case and the Bank had an obligation to observe the term of the MOU which provided that the Applicant would be reinstated effective September 1, 2009. Any amendment of the terms of the MOU, and particularly the term relating to the Applicant's reinstatement, required the assent of the Applicant especially because such terms constituted an essential condition in the employment relationship of the Applicant with the Bank.

The Tribunal reviewed the Bank's explanations for its breach of the MOU, but noted that there was no sound justification for its actions. For these reasons, the Applicant's right to fair treatment was held to have been violated by the Bank's failure to implement the MOU in a timely fashion causing prejudice to the Applicant. The Bank was ordered to pay the Applicant compensation in the amount of three months' salary net of taxes, and attorney fees.

E. Decision of the Administrative Tribunal of the International Monetary Fund[67]

Judgment No. 2012–1 (6 March 2012): Sachdev v. *International Monetary Fund*

Abuse of discretion—Standard of review in the exercise of managerial discretion—Abolition of position and subsequent separation of staff member consistent with internal law and fair and reasonable procedures—Notice—Equal treatment—Failure to fulfil obligation of fundamental fairness—Compensation—Legal fees and costs

[66] See for example, *Eugene Nyambal (No. 2)* v. *International Bank for Reconstruction and Development and International Finance Coorporation,* Decision No. 395 (25 March 2009), para. 21 and *Sylvie Brebion* v. *International Bank for Reconstruction and Development*, Decision No. 159 (11 April 1997), paras. 29–30.

[67] 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 (accessed on 31 December 2012).

The Applicant challenged the Fund's decision (1) not to select her for the position of Assistant Secretary for Conferences in the Bank-Fund Conferences Office ("BFCO") at Grade B2, and, subsequently, (2) to abolish her position as Advisor for Conferences in the BFCO at Grade B1 as part of the 2008 Fund-wide downsizing exercise. As to the first decision, the Applicant contended that her non-selection violated her legitimate expectations and was not taken consistently with Fund rules and fair procedures. As to the second decision, the Applicant alleged that the abolition of her post was pretextual and improperly motivated to deprive her of her Fund employment. She additionally contended that the Fund failed: (a) to give her reasonable notice of the abolition decision; (b) to afford her fair and equal treatment in denying her requests to defer the effective date of the position abolition, to provide her with increased separation benefits, and to exhaust accrued annual leave; and (c) to meet its obligations under general administrative order (GAO) No. 16, rev. 6, section 12.02 (Job Search and Retraining) to assist her in finding an alternative position. As relief, the Applicant sought to be returned to service with the Fund in a B-level or A14/15 position with retroactive pay. She also sought substantial monetary compensation for loss of career opportunities, as well as compensation for unused annual leave. She additionally requested legal fees and costs in accordance with article XIV, section 4, of the Statute of the Tribunal.

The Tribunal first addressed the standard of review in cases involving the individual decisions taken in the exercise of managerial discretion. Referring to the Commentary on its Statute, as well as its past decisions, the Tribunal recognized that selection of a staff member to fill a vacancy, like other decisions that involve weighing the suitability of a staff member to perform particular functions within the organization was the province of the decision-making officials. Accordingly, the Tribunal could not substitute its own assessment of candidates' merits for that of competent Fund officials. At the same time, the Tribunal recognized that the Fund was bound to observe the elements of its internal law governing selection decisions, as well as applicable principles of international administrative law.

Applying this standard of review to the present case, and after a careful review of the internal law applicable to the case, as well as the relevant principles of international administrative law, the Tribunal rejected the Applicant's specific challenges to the fairness of the selection procedures. It concluded that the Applicant was not wrongfully denied appointment as Assistant Secretary for Conference Services in the BFCO or that her position as Advisor for Conference Services was wrongfully abolished as part of the Fund's downsizing in 2008. Accordingly, the Tribunal determined that the Applicant was not entitled to rescission of either of those decisions.

Nevertheless, the Tribunal reached the conclusion that the Applicant's non-selection for the Assistant Secretary position was marked by serious failures of due process, and that these failures were compounded in the ensuing year, after Applicant's own position was abolished, by a serious breach of the Fund's obligations GAO No. 16, Rev. 6, section 12.02, to assist the Applicant in seeking reassignment to a suitable position. In the Tribunal's view, the Fund's actions toward the Applicant fell significantly short of the fair treatment to which staff members are entitled. In particular, the Tribunals findings revealed an accumulation of failures of requisite managerial pro-activeness, which in the Tribunal's view evidenced a degree of indifference to the Applicant that was inconsistent with the obligation of fundamental fairness owed by the Fund to its staff members.

On the issue of compensation, the Tribunal noted that in its prior decisions it had interpreted its remedial powers to include the "authority to reject an Application challenging the legality of an individual decision while finding the Fund nevertheless to be liable in part, as by procedural irregularity in reaching an otherwise sustainable decision".[68] Applying this interpretation to the present case, and taking into account the Fund's failure to proactively assist the Applicant in seeking reassignment following the abolition of her Advisor position, the Tribunal concluded that the Applicant was entitled to compensation in the amount of USD 75,000. The Tribunal also decided to award the Applicant seventy-five percent of her legal fees and costs incurred.

[68] *Ms. "C", Applicant* v. *International Monetary Fund,* Judgment No. 1997–1, 22 August 1997, para. 44.