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UNITED NATIONS JURIDICAL YEARBOOK

2013

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 68/254 of 27 December 2013, entitled "Administration of justice at the United Nations", the General Assembly took note of the reports of the Secretary-General 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. In this regard, the Assembly recalled paragraph 20 of the report of the Advisory Committee and requested the Secretary-General to submit for consideration at its sixty-ninth session a revised proposal for conducting an interim independent assessment of the system of administration of justice. The Assembly also requested the Internal Justice Council to report on the impact of the request contained in paragraph 22 of resolution 67/241, taking into account the view of all relevant stakeholders, and the Secretary General to propose amendments to the statute of the Appeals Tribunal, taking into account the recommendation of the Internal Justice Council.

In 2013, the United Nations Dispute Tribunal in New York, Geneva and Nairobi issued a total of 181 judgments. Summaries of five selected judgments are reproduced below.

[1] In view of the large number of judgments which were rendered in 2013 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/2013/001 to UNDT/2013/181 of the United Nations Dispute Tribunal, Judgments Nos. 2013-UNAT-280 to 2013-UNAT-367 of the United Nations Appeals Tribunal, Judgments Nos. 3152 to 3244 of the Administrative Tribunal of the International Labour Organization, Decisions Nos. 470 to 485 of the World Bank Administrative Tribunal, and Judgment Nos. 2013–1 to 2013–4 of the International Monetary Fund Administrative Tribunal, see, respectively, documents UNDT/2013/001 to UNDT/2013/181; 2013-UNAT-280 to 2013-UNAT-367; Judgments of the Administrative Tribunal of the International Labour Organization: 114th and 115th sessions; World Bank Administrative Tribunal Report, 2013; and International Monetary Fund Administrative Tribunal Reports, Judgment No. 2013–1 to 2013–4.

1. *Judgment No. UNDT/2013/090 (26 June 2013): Candusso* v. *Secretary-General of the United Nations*[2]

LEGAL STANDING TO BRING A CLAIM—PAYSLIPS CONSTITUTE ADMINISTRATIVE DECISIONS THAT MAY BE APPEALED—STAFF MEMBERS ARE NOT REQUIRED TO EXHAUST CONSULTATIVE OR NEGOTIATION MECHANISMS PRIOR TO FILING AN APPLICATION WITH THE TRIBUNAL—VARIATION OF CONTRACT—ACQUIRED RIGHTS—ACQUIESCENCE TO A VARIATION—WAIVER OF A RIGHT—LEGITIMATE EXPECTATION

The Applicant, a General Service level staff member in the Department of Management of the United Nations Secretariat, contested the decision of the Secretary-General rejecting his request for compensation for lack of cafeteria facilities in the building to which he was relocated in connection with the renovation of the United Nations Headquarters Complex in New York. The Applicant submitted that the cost of a cafeteria meal was a factor in determining the salary scale of General Service level staff members and was thus part of his contract of employment. He claimed that the lack of cafeteria services amounted to a unilateral change in the terms and conditions of his appointment, affecting his contractual right to a full salary. The Applicant submitted that the benefit attributable to the provision of cafeteria services, although not necessarily an express statutory or contractual right, constituted an essential component in assessing the level of his salary, thus giving him an "implied or acquired right" over time, or at the very least, a factual basis for a legitimate expectation.

The Tribunal first considered the issue of the Applicants' standing, as it appeared that he filed his claim both in relation to his own rights as well as in his capacity as a staff representative. The Tribunal stated that, to have standing before the Tribunal, a staff member must show that the contested administrative decision affects her or his legal rights. The Tribunal found that, under article 2.1(*a*) of its Statute, the Applicant did not have standing to intercede in a contractual relationship that exists between other staff members and the Organization by filing applications on their behalf. However, the Tribunal found that the Applicant had standing to contest the alleged breach of his own rights.

The Tribunal dismissed the Respondent's claim that the application was not receivable because the contested decision applied generally and not only to the Applicant. The Tribunal found that, for the purposes of legal standing, it was irrelevant whether the decision applied to other staff members and not just the Applicant. The only relevant question was whether the application concerned an administrative decision "alleged to be in non-compliance with the terms of appointment or the contract of employment" of the Applicant (article 2.1 of the Statute). The Tribunal found that the Applicant's claim satisfied the requirements of article 2.1 of the Statute.

The Tribunal also dismissed the Respondent's claim that the decision was time-barred as the Applicant's request for management evaluation was filed almost two years after relocation to the new building. The Tribunal found that, for the purpose of claims regarding incorrect calculation of salary, pay slips constituted administrative decisions that may be appealed. The question of how far back in time the Applicant would be able to go in seeking recovery payments would be an issue that would arise in the determination of appropriate relief in the event he prevails on the merits.

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

The Tribunal further dismissed the Respondent's claim that the Applicant should have first exhausted consultation and negotiation mechanisms available through the staff association machinery. The Tribunal found that the issue raised by the Applicant was a legal issue that concerned his contractual rights, and he was not required to first engage in consultative or review mechanisms through the staff association.

Having found the application receivable, the Tribunal turned to the merits of the Applicant's claims. Dealing with the claim that the contested decision was in breach of the Applicant's acquired rights, the Tribunal took note that the general principle of acquired rights was incorporated into staff regulation 12.1, which states that "[t]he present Regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of staff members". The Tribunal noted that the concept of acquired rights had been dealt with by various international tribunals, including the former United Nations Administrative Tribunal Judgment, the World Bank Administrative Tribunal, and the Administrative Tribunal of the International Labour Organization. The Tribunal stated that it was unclear whether the Applicant used the term "acquired right" in his application in the same sense given to it by various tribunals.

The Tribunal indicated that the concept of acquired rights pertained to fundamental and essential terms of employment without which the staff member would not have accepted his job with the Organization and the modification of which would entail "extremely grave consequences for [him], more serious than mere prejudice to his … financial interests". Based on the aforementioned test, the Tribunal was unconvinced that the access to a subsidized cafeteria constituted such a fundamental and essential term of employment that would have given rise to an acquired right. Therefore, the Tribunal was not persuaded that the concept of acquired rights was applicable in this case.

The Tribunal was also not persuaded that the variables associated with cafeteria services were indeed part of the formula used for the calculation of the salary of General Service staff. However, the Tribunal found that, even taking the Applicant's case at its highest—that is, accepting that a certain financial value relating to cafeteria services was indeed presently included as a component in his salary—the Applicant's claim could not succeed for the following reasons.

The Tribunal found that, having waited for approximately one year and a half to raise claims regarding the alleged lack of access to the United Nations cafeteria facilities, the Applicant acquiesced to the arrangements put in place by the Respondent in view of the renovation-related requirements. With respect to the doctrine of acquiescence, the Tribunal stated that, generally, once the parties to a contract of employment have agreed to its terms, neither party may unilaterally amend them unless the original contract provides for agreed variations. However, there may be situations where an employee consents to the variation, including through a waiver of a right. If not expressly waived, a right may be impliedly waived by acquiescence or conduct that is inconsistent with the enforcement of the right. A party to a contract may also be deemed to have waived his rights if it does not act within a reasonable time.

The Tribunal has also considered whether the Respondent put in place sufficient measures to compensate the Applicant for the loss that resulted from the move to the new building. The Tribunal stated that legitimate expectation can be created either through the application of a regular practice or through an express promise. Legitimate expectations

may result in the creation of an enforceable legal right, although the application of the doctrine is subject to a number of qualifications. Not only must the expectation be "legitimate" or have some reasonable basis, the fulfilment of the expectation must lie within the powers of the person or body creating the expectation. Furthermore, a decision that has the effect of taking away such an expectation must be shown to have been unfair, not merely adverse to the interests of the individual, and considerations of public policy could override an individual's legitimate expectations in appropriate circumstances. The Tribunal found that, in view of the requirements that necessitated the move to the new building, the Respondent put in place alternative remedial measures, namely a complimentary shuttle service that allowed affected staff members to use the cafeteria services in the United Nations Headquarters building. This remedial measure was neither unreasonable nor unfair. The Tribunal dismissed the application.

2. *Judgment No. UNDT/2013/102 (12 August 2013): Galbraith* v. *Secretary-General of the United Nations*[3]

Termination in the interest of the Organization—Secretary-General's authority to terminate appointment of an Assistant-Secretary-General—Types of separation from service—Requirement to disclose reasons for termination—Interests of a peacekeeping mission are interests of the Organization—Secretary-General's discretion in determining interest of the Organization

The Applicant, a former Deputy Special Representative of the Secretary-General (Deputy "SRSG") for the United Nations Assistance Mission in Afghanistan ("UNAMA") employed at the Assistant Secretary-General ("ASG") level, contested the termination of his fixed-term contract in "the interest of the Organization". The Applicant was appointed as a Deputy SRSG in June 2009. His letter of appointment included, as a possible reason for separation, termination "in the interest of the Organization as determined by the Secretary-General".

Shortly after his arrival, the Applicant began to raise concerns regarding the conduct of the presidential elections held in Afghanistan in 2009. Following a number of news reports and meetings of senior officials, on 30 September 2009, the Secretary-General's spokesperson announced in a press statement that the Secretary-General had decided to end the Applicant's appointment "in the best interest of the mission". On 12 October 2009, the Applicant received a letter from the Assistant Secretary General for Human Resources Management, stating that the Secretary-General had decided to terminate the Applicant's appointment in accordance with its terms.

The Tribunal determined that the issues before it were: (i) whether the contested decision was taken by the Secretary-General; (ii) whether reason for termination was provided to the Applicant; (iii) whether the termination was in the interest of the Organization; (iv) whether the Applicant's due process rights were breached.

With respect to the first issue, the Tribunal found that the decision to end the Applicant's appointment as the Deputy SRSG in Afghanistan was taken by the Secretary-General and not by the Assistant Secretary-General for Human Resources Management, as was claimed by the Applicant.

[3] Judge Alessandra Greceanu (New York).

Turning to the second issue, the Tribunal examined the various types of separation, noting that there were five groups of reasons for separation from service: (i) separation *ope legis* (including expiration of contract); (ii) separation by parties' agreement prior to the expiration of the contract (staff regulation 9.3(*a*)(vi) and staff rule 9.6(*c*)(vi)); (iii) separation initiated by the staff member; (iv) separation initiated by the Secretary-General; (v) termination "in the interest of the Organization as determined by the Secretary-General", as expressed in the Applicant's letter of appointment.

The Tribunal thereafter considered whether the Applicant had been informed of the reason for the termination of his appointment. The Tribunal reiterated that staff members have a right to be informed of the reasons for termination, giving rise to the Secretary-General's correlative obligation to give the reasons. The Tribunal found that the Applicant had been given the reason for the contested decision, namely that it was "in the interest of the mission". Since UNAMA is part of the Organization, the decision was made in the interest of the Organization.

The Tribunal then turned to the third issue, namely whether the Applicant's appointment was terminated in the interest of the Organization. The Tribunal held that the Secretary-General was responsible both for the implementation of the political and diplomatic mandate of UNAMA and for its good administration. The Tribunal held that the implementation of the UNAMA mandate was under the authority of the SRSG, who is the head of the mission and is accountable to the Secretary-General. The Tribunal found that, in view of the disagreements that existed between the Applicant and the Special Representative of the Secretary-General, reconciliation between them was not possible.

The Tribunal found that the decision under appeal was taken as a result of the Secretary-General's discretionary power. The Tribunal found that the decision to terminate the Applicant's appointment was not based on any improper reason prohibited by relevant international instruments and that it was not abusive or arbitrary.

Having considered the fourth issue, namely, whether the Applicant's rights to due process were breached, the Tribunal found that his due process rights were respected because the decision was based on proper reasons and he was informed of the reason for it. The Tribunal further held that the Applicant's right to appeal was thus respected as the Applicant was able to file the application in an exhaustive manner. Having rejected the Applicants' claims, the Tribunal dismissed the application.

3. *Judgment No. UNDT/2013/109 (26 August 2013): Saffir* v. *Secretary-General of the United Nations*[4]

Staff Union elections—Judicial review of claims relating to Staff Union elections—Staff Union Arbitration Committee has the authority to issue binding ruling on Staff Union matters—International labour standards require non-interference by management into Staff Union elections—Secretary-General has no legal basis with the rulings of the Staff Union Arbitration Committee or the format or conduct of elections—Certain Staff Union-related matters that may constitute misconduct under the Organization's Regulations and Rules, may give rise to initiation of appropriate procedures

The Applicant, a staff member of the Department for General Assembly and Conference Management ("DGACM"), filed an application contesting the Secretary-General's refusal to conduct an investigation into the alleged irregularities surrounding the 7–9 June 2011 elections of the United Nations Staff Union ("UNSU"). The Applicant requested an independent investigation overseen by the Dispute Tribunal to determine whether the election results were compromised and, if so, for new elections to be held.

The Tribunal first considered the scope of the case before it, finding that it is empowered to deal with administrative decisions including alleged action or inaction by the Secretary-General, but that it has no general jurisdiction to supervise internal union affairs, including regarding any challenges to union elections. Accordingly, the Tribunal concluded that the Applicant's claims regarding the Staff Union elections and, in particular, his claims for relief, were not properly before it. The Tribunal stated that an aggrieved person, under the terms of the Staff Union Statute, may approach the Staff Union's Arbitration Committee, which issues rulings that are binding on all bodies of the Staff Union. The Arbitration Committee was established to review alleged violations of the Statute of the Staff Union and decide on sanctions where warranted as well as to deal with issues of interpretation of the Statute, its Regulations or any policy.

The Tribunal found that the Applicant's application with respect to the Secretary-General's refusal to carry out the requested investigation was receivable. Turning to the merits of the Applicant's claims, the Tribunal held that international labour standards provide for non-interference by management in union elections. The Tribunal found that there was no evidence that the Secretary-General hindered the electoral process or frustrated organizational rights in any manner. To actively direct the conduct and manner of elections would not be in conformity with the independent status of the Staff Union and the applicable law. The Tribunal observed, however, that it was conceivable that there may be situations that may constitute misconduct under the Organization's regulations and rules, which may give rise to the initiation of appropriate procedures against individual members engaged in misconduct. However, the Applicant did not pursue the matter as a matter of individual misconduct. Rather, as was correctly assessed by the Secretary-General, the issues raised were internal Staff Union matters. The Tribunal noted that the Arbitration Committee had already examined and rendered a binding adjudication upon the issues that the Applicant describes as "irregularities" in connection with the June 2011 elections. The Tribunal further held that there was no legal basis in the legal framework regulating

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

the Staff Union and its Arbitration Committee allowing the Secretary-General to interfere with the Committee's rulings or the format or conduct of elections. The Tribunal concluded that the Secretary-General's refusal to initiate investigation of the Staff Union elections of June 2011 was lawful. The Tribunal dismissed the application.

4. *Judgment No. UNDT/2013/155 (2 December 2013): A-Ali et al* v. *Secretary-General of the United Nations*[5]

Receivability—Time limits for seeking management evaluation and filing an application with the Dispute Tribunal—Applicant's responsibility to pursue his or her own case—Applicants are not absolved of errors or oversight by counsel regarding the applicable time limits—Test for abuse of process—Costs

A group of forty-six Applicants working in the Department for General Assembly and Conference Management of the United Nations Secretariat ("DGACM") contested the decision to initiate recruitment of 19 candidates for the future operation of their section and DGACM's intention to abolish 59 posts.

On 6 June 2011, the Secretary-General submitted his budget for 2012–2013 to the General Assembly in which he proposed to abolish a number of posts within the Publishing Section. In December 2011, the Change Management Team submitted recommendations to the Secretary-General for the realization of his organizational reforms. In April 2012, the General Assembly requested the Secretary-General to submit for its consideration and approval proposals related to the implementation of these recommendations. During the course of 2012, staff representatives and management of DGACM held discussions regarding the future of the Publishing Section in view of its goal to reduce its staffing and budgetary levels as part of its move to a digital operation. On 4 February 2013, the staff of the Publishing Section adopted a resolution rejecting the abolition of 59 posts within the Publishing Section, and expressed their concern that management had failed to retrain staff for new functions developed since 2009.

On 10 February 2013, DGACM announced that a total of 19 posts would be advertised through the United Nations online recruitment system in view of disruption and equipment damage suffered by the Publishing Section following super-storm Sandy. On 19 March 2013, 42 Applicants filed individual requests for management evaluation of the 10 February 2013 decision. Each of the Applicants was represented by the same law firm with the same contact information.

On 25 March 2013, another staff member of DGACM filed a separate application with the Tribunal contesting the 10 February 2013 decision. He was represented by the same law firm as the Applicants in the present case. He also filed an application for interim relief seeking the suspension of the implementation of the contested decision pending a resolution of the proceedings on the merits. On 27 March 2013, the Tribunal, by Order No. 77 (NY/2013), directed the Respondent to suspend the implementation of the 10 February 2013 decision to conduct the said recruitment exercise.

On 5 April 2013, the Acting Head of DGACM held a town hall meeting whereby he announced that the contested decision of 10 February 2013 to initiate recruitment of 19 candidates for the future operation of the Publishing Section had been rescinded.

[5] Judge Goolam Meeran (New York).

On 9 April 2013, the Management Evaluation Unit e-mailed the Counsel for the Applicants, carbon copying all the Applicants, informing them that their requests for management evaluation were rendered moot by the 5 April 2013 announcement and their files would be closed.

On 11 April 2013, four additional requests for management evaluation were filed by Counsel on behalf for applicants wishing to contest the 10 February decision. Accordingly, on 17 July 2013 an application was filed with the Dispute Tribunal on behalf of 46 Applicants, 42 contesting the decision of 10 February on 19 March 2013 and 4 contesting the decision on 9 April 2013.

A preliminary issue arose as to whether the applications were receivable. The Respondent submitted that the applications before the Tribunal were filed out of time. The Respondent submitted that the 42 initial Applicants were informed of the outcome of their request on 9 April 2013 *via* e-mail. According to article 8 (1)(*d*) of the Statute of the Dispute Tribunal, the 42 initial Applicants had 90 calendar days to file their applications, but failed to do so.

With respect to the 42 initial Applicants, the Tribunal found that the Applicants' legal representatives knew, or should have known, that the requests for management evaluation were completed and closed on 11 April 2013. Accordingly, the Tribunal found that the 42 initial Applicants did not preserve their rights to file applications under article 8 of the Statute of the Dispute Tribunal. In any event, under staff rule 11.2(*d*), the Management Evaluation Unit was only required to communicate the outcome of the requests for management evaluation to the Applicants in writing, which they did.

The Tribunal later turned to the remaining four Applicants who attempted to attach their request for management evaluation after the 42 earlier cases had been closed on 11 April 2013. The Tribunal noted that the situation was significantly different for these four staff members. In their case, the Management Evaluation Unit did not consider their applications to be properly filed and receivable, and requested that, should they so wish, new separate applications should be filed. At no time did these four staff members file new separate requests. Accordingly, the Tribunal found that their application was not receivable because they had failed to comply with article 8.1(*c*) of the Statute of the Dispute Tribunal. Furthermore, it was a mandatory requirement for these four staff members to request management evaluation within 60 days of the contested decision and they failed to do so.

The Tribunal stated that it cannot be accepted that, whilst claiming that they have abandoned all responsibility regarding the conduct of their cases to their legal representatives, the Applicants would at the same time be absolved of the consequences of the acts of the said legal representatives. Legal representatives act at the behest of their clients and not the other way around. The Tribunal reiterated that it is an applicant's responsibility to pursue her or his case and when the said applicant is represented by counsel he or she cannot be absolved of any error or oversight by counsel regarding the applicable time limits.

In conclusion, the Tribunal further considered whether there has been any abuse of process and, if so, whether the Applicants should be ordered to pay costs incurred as a result of default on the part of their representatives. The Tribunal found that the test for "abuse of process" was stringent and imported an element of contumelious conduct or deliberate and callous disregard for the Tribunal's proceedings. This was not the case here,

and no costs were ordered. Having rejected the Applicants' claims, the Tribunal dismissed the application.

5. *Judgment No. UNDT/2013/176 (20 December 2013): Nguyen-Kropp and Postica* v. *Secretary-General of the United Nations*[6]

STANDARDS THAT APPLY WITH RESPECT TO PRELIMINARY INVESTIGATIONS—TEST FOR REASON TO BELIEVE THAT MISCONDUCT MAY HAVE OCCURRED—RETALIATION—TEST FOR ESTABLISHING WHETHER RETALIATION TOOK PLACE—BURDEN OF PROOF IN CASES OF ALLEGED RETALIATION—PRINCIPLES FOR DETERMINING COMPENSATION—LEGAL COSTS (ATTORNEY FEES) AS COMPENSABLE ECONOMIC LOSS—MEDIAN COMPENSATION FOR NON-PECUNIARY HARM AS A REFERENCE POINT IN ASSESSING COMPENSATION

Two Applicants, investigators with the Investigations Division of the Office of Internal Oversight Services ("OIOS") of the United Nations Secretariat, appealed the decision to investigate them. Applicant 1 was a P-3 level investigator and Applicant 2 was her supervisor, a P-5 level investigator. They alleged that the decision to investigate them was retaliatory because they had made certain allegations of impropriety on the part of their supervisor, the Acting Director (Officer-in-Charge) of the Investigations Division.

In January 2009, the Acting Director of the Investigations Division received a complaint from a staff member suggesting serious misconduct in the Medical Services Division. The complainant provided the Acting Director with a number of e-mails and photographs. The complaint was assigned for investigation to the two Applicants, who found that the complainant was not credible. In March 2009, Applicant 2 submitted a draft case closure report to the Professional Practice Section (PPS) of the Investigations Division, which is a unit in the Investigations Division responsible for clearing investigation reports before review by the Acting Director.

In view of the Applicants' findings, a separation case was opened in May 2009 into the complainant's possible malicious complaint. Applicant 2 then also raised a concern that the Acting Director of the Investigations Division may not have provided the two Applicants with all the information provided to him by the complainant. In the period of June to October 2009, the Acting Director and Applicant 2 exchanged further e-mails regarding the evidence provided by the complainant. On 29 October 2009, Applicant 2 signed a note, co-authored with Applicant 1, alleging that the Acting Director mishandled the complainant's evidence.

In December 2009, the Under-Secretary-General for OIOS ("USG/OIOS") forwarded the Applicants' note of 29 October 2009 to PPS, asking for its review and assessment. PPS reviewed the matter and sought comments from the Acting Director, but not those from Applicant 2. In January 2010, Applicant 2 moved to another non-UN Secretariat job in Europe, with the European Anti-Fraud Office ("OLAF"). Several days later, on instruction from the Acting Director, Applicant 1 was asked to vacate her desk in an office and move to a cubicle.

PPS completed its review on 22 January 2010, finding that there was a misunderstanding as to the exact nature and number of photographs that the complainant had initially sent to the Acting Director in January 2009, but that the latter did not have any

[6] Judge Goolam Meeran (New York).

ill-motivated purpose. The PPS report then criticized the Applicants for various anomalies found in different versions of the interview records. The PPS report was forwarded to the USG/OIOS, who, in March 2010, instructed PPS to send the report to Applicant 2 for his comments. However, this was not done as PPS viewed the instruction of the USG/OIOS as optional.

On 25 March 2010, PPS sent to the USG/OIOS two further notes on the outcome of its review of the complaint of 29 October 2009, clearing the Acting Director of allegations of misconduct and instead alleging possible misconduct by the two Applicants and recommending referring the matter to an external consultant for an independent fact-finding inquiry.

On 9 April 2010, the USG/OIOS sent a note to the Under-Secretary-General, Department of Management ("USG/DM") requesting it to arrange for an investigation of a report of possible misconduct against the Applicants using an external independent expert. The USG/OIOS advised against approaching OLAF because of Applicant 2's recent employment with it. The USG/OIOS thereafter informed Applicant 2 that his complaint of 29 October 2009 had been reviewed and found unsubstantiated. She, however, made no mention that there would be an investigation against the two Applicants.

In May 2010, the Office of the USG/DM started to arrange for an independent investigation of the allegations by an outside entity. It contacted several outside entities, including OLAF (despite the advice of the USG/OIOS), the Inter-American Development Bank, the United Nations Development Fund, the European Bank for Reconstruction and Development (EBRD), and the International Criminal Tribunal for the former Yugoslavia ("ICTY"). These entities were provided with a copy of the PPS note of 25 March 2010.

On 30 December 2010, the Applicants were informed by the USG/DM that an investigation into alleged irregularities set out in PPS note dated 25 March 2010 would be undertaken by an investigator from ICTY. The investigation report was finalized in May 2011 and was then provided to the new USG/OIOS, who had assumed her functions in September 2010. The new USG/OIOS then verbally informed the Applicants that they were cleared of any misconduct and that the investigation should never have taken place. This was confirmed to them formally in November 2011.

The Tribunal first identified the issues before it, which were:

(i) whether the USG/OIOS had sufficient reason to believe that the Applicants had engaged in unsatisfactory conduct for which a disciplinary measure may be imposed;

(ii) whether the decision to investigate the Applicants' conduct was proper or tainted by improper motives, namely retaliation or the intent to taint their reputation;

(iii) whether the manner in which the Office of the USG/DM sought the services of external investigators cause the Applicants reputational damage, and, if so, what the extent of this damage was;

(iv) whether there was a disparity and inconsistency in the manner in which the allegations against the Acting Director of the Investigations Division were treated compared to the allegations against the Applicants; and

(v) whether the Applicants were accorded due process.

As a preliminary matter, the Tribunal had to determine which version of the administrative instruction on revised disciplinary measures and procedures was applicable in

the current case: ST/AI/371, or its amended version ST/AI/371/Amend.1. The distinction was relevant as ST/AI/371/Amend.1, which entered into force on 11 May 2010 (i.e., after the complaint against the Applicants was made but before the investigation by an external entity was initiated), removed the need for the head of office to conduct a preliminary investigation prior to requesting a full-fledged investigation. On this issue, the Tribunal found ST/AI/371 to be the applicable version that was in force at the time the allegations against the Applicants were made by PPS (i.e., 25 March 2010).

The Tribunal noted that paragraph 2 of ST/AI/371 required that, where there was reason to believe that a staff member had engaged in unsatisfactory conduct for which a disciplinary measure may be imposed, the head of office or responsible officer was required to undertake a preliminary investigation. The Tribunal referred to *Abboud* UNDT/2010/011 in finding that the test for establishing whether there was "reason to believe" that misconduct may have occurred was whether, in the circumstances, such a conclusion would be reached by an objective and reasonable decision-maker. The Tribunal found that the decision that there was "reason to believe" that the Applicants may have committed misconduct was manifestly unreasonable, arrived at in breach of due process, and was thus unlawful.

The Tribunal then turned to whether the Applicants' due process rights were respected during the preliminary investigation. The Tribunal noted that, although the due process rights envisaged by ST/AI/371 apply in full following the formal disciplinary charges, this did not mean that, during the preliminary investigation stage, staff members were not entitled to basic, fundamental due process rights and guarantees. The Tribunal referred to the OIOS Investigations Division's Investigations Manual (dated March 2009), which mentioned the following standards that apply during preliminary investigations: confidentiality, objectivity, impartiality, fairness, and avoidance of conflicts of interest.

The Tribunal found that the Applicants' rights were not respected during the preliminary investigation and that the preliminary investigation was flawed in several respects. The Applicants were subjected to an investigation even though, on the facts, an objective and reasonable decision-maker should not have reached the conclusion that there was "reason to believe" that misconduct may have occurred. Further, the manner in which the preliminary investigation was solicited, unbeknownst to the Applicants, among the same professional circles in which the Applicants worked, resulted in a wide dissemination among several international offices of harmful and prejudicial material concerning them.

The Tribunal further found that the decision to initiate the preliminary investigation was marred by a fundamental irregularity, namely, retaliatory intent. The Tribunal stated that retaliation has three essential elements: (i) participation in a protected activity, (ii) being subject to a detriment, and (iii) a causal connection between the protected activity and the detriment suffered. Once the complainant has made out a *prima facie* case of retaliation, the burden of proof shifts to the Administration, which must prove by clear and convincing evidence that it would have taken the same action absent the protected activity. The Tribunal found that the Applicants had engaged in a protected activity, namely, reporting of a complaint of evidence tampering by the Acting Director of OIOS. The Tribunal found that adverse actions were taken against them, including initiation of an investigation, and that the Respondent failed to demonstrate by clear and convincing

evidence that the actions taken against the Applicants would have been the same absent the protected activity.

Turning to the issue of compensation, the Tribunal reiterated that the applicable principle in determining entitlement to compensation was that the applicant be placed, as far as money can do so, in the same position she or he would have been had the contractual obligation been complied with. Compensation cannot be awarded where no harm has been suffered. It is for the Applicants to prove that the breaches of contract caused loss or injury. With regard to pecuniary damage, the Tribunal found that, as a result of the breach of their rights, the Applicants incurred direct economic loss in the form of attorney fees. In this respect, the Tribunal found it appropriate to make an order that each Applicant be paid USD 10,000 as a contribution towards the legal costs necessarily incurred by them. The Tribunal explained that this was a compensatory award that came within the meaning of article 10.5(*b*) of its Statute, in which costs were necessarily incurred by the Applicants as a result of the unlawful manner they were dealt with.

The Tribunal further found that the Applicants suffered non-pecuniary loss in the form of emotional distress and harm to professional reputation. The Tribunal stated that compensation for non-pecuniary loss should not be linked to the staff member's grade or status and that a principled approach should be adopted in that an assessment should first be made of the extent of the damage suffered, then a monetary value should be placed on the harm without regard to the status of the individual. The Tribunal noted that the median amount of compensation for non-pecuniary harm in final judgments of the Dispute Tribunal and the Appeals Tribunal in the period of 1 July 2009 to 31 December 2012 was USD 17,000. The Tribunal found that both Applicants suffered non-pecuniary loss of a high order, far in excess of the median sum of USD 17,000. Having taken into account a number of aggravating factors and having compared the matter with other cases that attracted higher awards, the Tribunal found that the award of USD 40,000 to each Applicant was the appropriate sum of compensation for the non-pecuniary loss suffered.

The Tribunal thus ordered compensation to each Applicant in the amount of USD 10,000 for economic loss in the form of legal costs (under article 10.5 of the Tribunal's Statute) and USD 40,000 for non-pecuniary (moral) damages.

B. Decisions of the United Nations Appeals Tribunal

The United Nations Appeals Tribunal ("UNAT") held three sessions in 2013 in New York: a spring session (18 to 28 March 2013), a summer session (17 to 28 June 2013) and a fall session (7 to 18 October 2013). The Appeals Tribunal issued a total of 115 judgments in 2013. The summaries of six of those judgments are reproduced below.

1. Judgment No. 2013-UNAT-303 (28 March 2013): O'Hanlon v. *Secretary-General of the United Nations*[7]

Conversion of fixed-term appointment into permanent appointment—Criteria for conversion to a permanent appointment—Five years of continuous service under fixed-term appointments—Status of UNRWA staff member and Secretariat staff members—Fixed-term appointment under the 100 series of the Staff Rules

The Appellant was employed by the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA") from 4 March 2000 until 19 November 2005, when he was transferred under the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations Applying the United Nations Common System of Salaries and Allowances ("Inter-Organization Agreement") to the United Nations Secretariat in New York. On 1 July 2008, the Appellant was again transferred, this time to the United Nations Office at Vienna ("UNOV").

Pursuant to ST/SGB/2009/10 of 23 June 2009 entitled "Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009" (hereinafter referred to as "the Bulletin"), the Human Resources Management Service ("HRMS") at UNOV advised UNOV staff members, on 29 April 2010, of a forthcoming one-time review for possible conversion to permanent appointment and invited staff members who believed they met the criteria for conversion to contact HRMS. The criteria in question were set out in Section 1 of the Bulletin, where staff members had to have completed five years of continuous service on fixed-term appointments under the 100 series of the Staff Rules by 30 June 2009 and be under the age of 53 on the completion of such qualifying service. The Appellant contacted HRMS on several occasions. He was ultimately advised that he was not eligible for conversion on the basis that, as of 30 June 2009, he had not served the required five years on a 100 series appointment.

Following an unsuccessful request for management evaluation, the Appellant filed an application with the United Nations Dispute Tribunal ("UNDT"). On 29 February 2012, the UNDT issued Judgment No. UNDT/2012/031. The UNDT found, *inter alia*, that whilst the provisions of the Inter-Organization Agreement meant that the Appellant's service in UNRWA counted towards the minimum period of five years of employment under fixed-term contracts required for conversion to permanent appointment, the UNRWA Staff Rules and Regulations did not mention 100 series of appointments. Accordingly, the UNDT agreed with the Secretary-General that the Appellant "[d]id not meet one of the eligibility criteria" and rejected his application. On 26 June 2012, the Appellant appealed this Judgment to the UNAT, arguing that the UNDT erred in law in its interpretation of ST/SGB/2009/10 and erred in fact by stating that UNRWA staff members are not staff members of the Secretariat.

[7] Judge Inés Weinberg de Roca, Presiding, Judge Sophia Adinyira and Judge Richard Lussick.

The Appeals Tribunal ruled in favour of the Appellant, noting that the Inter-Organization Agreement states that, "[i]n the case of a transferred or seconded staff member, service in the releasing organization will be counted *for all purposes*, including credit towards within-grade increments, as if it had been made in the receiving organization at the duty stations where the staff member actually served" (emphasis added in judgment). Finding that the principles of the UNRWA International Staff Rules are similar to those in the United Nations Staff Regulations and Rules, the Appeals Tribunal determined that the UNDT erred in deciding that the Appellant lacked the requisite five years on a 100 series contract: "When the Rules are similar but have a different name, according to the Inter-Organization Agreement, the service is counted as service in the receiving organization".

The Appeals Tribunal concluded that the Appellant was eligible for consideration for conversion on the basis of five years' continuous service and remanded the case to the Administration to review whether he met the remaining criteria for conversion to a permanent appointment.

2. *Judgment No. 2013-UNAT-343 (21 June 2013): Larghi* v. *United Nations Joint Staff Pension Board*[8]

Application of the consumer price index (CPI) to the Pension Adjustment System (PAS)—Purchasing power of a recipient's benefit—Protection of pension against inflation—Conversion of the United States dollar pension amount into local currency—Unjust and aberrant results under paragraph 26 of the PAS

The Appellant, a retired Pan American Health Organization/World Health Organization staff member who participated in the United Nations Joint Staff Pension Fund ("UNJSPF") from 1966 to 1985, took early retirement at age 55. Whilst initially he received his monthly pension benefit in US dollars, he opted to switch to a "local track" pension in Argentina some years later.

In 2009, the Appellant began communicating with the UNJSPF over the Argentinian consumer price index ("CPI") data and, in October 2011, he formally requested that the UNJSPF "discontinue" the "local track", in application of paragraph 26(*c*) of the Pension Adjustment System ("PAS"). On 4 November 2011, the Chief Executive Officer of the Fund responded that he was "fully aware of the concerns being expressed with respect to the movement of the CPI as published by the Government of Argentina" and, indeed, the UNJSPF awaited the outcome of an International Monetary Fund study on the quality of Argentina's CPI data, but asserted that the UNJSPF was obligated to use officially published CPI data, where it existed.

On 16 November 2011, the Appellant appealed this decision to the Standing Committee of the UNJSPB, arguing that the application of the official Argentinian CPI data resulted in an "unjust and aberrant" outcome, supporting its suspension under paragraph 26(*c*) of the PAS. At its 194 meeting on 9 July 2012, the Standing Committee rejected his claim, noting that "under paragraph 14 of the [PAS], the Fund is required to use the official CPI rates for each country as published in the United Nations Monthly Bulletin of Statistics". On 27 September 2012, the Appellant appealed this decision to the Appeals Tribunal.

[8] Judge Mary Faherty, Presiding, Judge Inés Weinberg de Roca and Judge Richard Lussick.

The Appeals Tribunal reviewed the relevant provisions of the PAS, in particular paragraphs 14 and 26. Paragraph 14 provides: "For measuring changes in the CPI for the United States and for a particular country of residence, the index used *is the official* CPI for the country as a whole issued by the national Government and published in the United Nations Monthly Bulletin of Statistics…" (emphasis added in judgment).

However, paragraph 26 provides, *inter alia*:

> (*a*) For countries where the application of the local-currency track would lead to aberrant results, with wide fluctuations depending on the precise commencement date of the underlying benefit entitlement, establishment of a local currency base amount in accordance with section C may be discontinued by the Chief Executive Officer of the Pension Fund. …
>
> …
>
> (*c*) For countries where up-to-date CPI data is not available, after examining possible alternative sources of cost-of-living data and taking into account the particular circumstances of the beneficiaries residing in those countries, the application of the local currency track may be suspended; such suspensions shall apply only prospectively, with due notice given to the beneficiaries concerned.

The Appeals Tribunal found that the Standing Committee failed to properly exercise the jurisdiction with which it is vested, pursuant to paragraph 26 of the PAS, when it fettered its discretion by relying to an undue extent on paragraph 14. Rejecting the UNJSPB argument that the mere existence of official CPI data for Argentina "rendered the Standing Committee impotent", the Appeals Tribunal recalled that "[t]he very purpose of paragraph 26 is to address the issue of whether the application of official CPI data results in 'aberrant results' or the situation where no up-to-date CPI data is available".

Accordingly, the Appeals Tribunal held that the Standing Committee erred in law and fact with regard to the powers vested in the Pension Fund under paragraph 26 of the PAS. The Appeals Tribunal vacated the impugned decision and remanded the Appellant's case to the Standing Committee.[9]

3. Judgment No. 2013-UNAT-357 (17 October 2013): Malmström et al. v. Secretary-General of the United Nations[10]

Conversion of ICTY staff members appointment into permanent appointment—Finite mandate of ICTY staff member—Discretionary authority in matters of permanent appointment—Consequences of the rescission of a decision—Staff members' right to be considered for conversion

This Judgment was one of four Judgments which, collectively, disposed of sixteen related appeals; three filed by the Secretary-General and thirteen filed by current or former staff members of the International Criminal Tribunal for the former Yugoslavia ("ICTY").[11]

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[9] The same rationale was applied in *Pio* v. *United Nations Joint Staff Pension Board*, Judgment No. 2013-UNAT-344.

[10] Judge Mary Faherty, Presiding, Judge Sophia Adinyira, Judge Luis María Simón, Judge Richard Lussick and Judge Rosalyn Chapman.

[11] See *Ademagic et al.* v. *Secretary-General of the United Nations*, Judgment No. 2013-UNAT-359; *Longone* v. *Secretary-General of the United Nations*, Judgment No. 2013-UNAT-358; and *McIlwraith et*

In Order No. 139 (2013), the President of the Appeals Tribunal noted that the cases raised "a significant question of law", warranting consideration by the Appeals Tribunal as a whole pursuant to article 10(2) of its Statute. Accordingly, the cases were referred to the full bench for consideration.

The Appellants were staff members of the ICTY who were recruited specifically for service with the ICTY, as reflected in their letters of appointment which provided: "This appointment is strictly limited to service with [the ICTY]". The Acting Registrar of the ICTY was granted delegated authority to appoint staff up to the D-1 level by memorandum dated 20 May 1994 from the Under-Secretary-General for Administration and Management.

On 23 June 2009, the Secretary-General issued ST/SGB/2009/10 on "Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009" and, thereafter, "Guidelines on consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered as of 30 June 2009" were approved by the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") and transmitted to all Heads of Department and Office, including the ICTY. The Heads of Departments and Offices were asked to review staff members to make a preliminary determination on their eligibility for conversion and, subsequently, to submit recommendations to the ASG/OHRM on the suitability of eligible staff members.

Following debate as to whether the ICTY staff members were eligible for conversion to permanent appointment in view of the finite nature of the ICTY, the Under-Secretary-General for Management confirmed that they could be considered for conversion but that "when managers and human resources officers in ICTY are considering candidacies of staff members for permanent appointments they have to keep in mind the operational realities of … ICTY, including its finite mandate".

In May 2010, the ICTY transmitted a list of staff eligible for conversion to OHRM and, in August 2010, the ICTY Registrar forwarded the names of 448 eligible staff members who had been found suitable for conversion by ICTY and who were "jointly recommended by the Acting Chief of Human Resources Section" and the Registrar. OHRM disagreed with the ICTY recommendations, however, asserting it could not endorse the Registrar's recommendations to convert ICTY staff members, on the basis that the ICTY was a "downsizing entity". OHRM submitted the matter for review to the New York Central Review bodies, which concurred with the OHRM position.

On 6 October 2011, the ICTY Registrar informed each of the recommended ICTY staff members that the ASG/OHRM had decided not to grant them permanent appointments, "taking into account all the interests of the Organization and … based on the operational realities of the Organization, particularly the downsizing of ICTY". Following unsuccessful requests for management evaluation, a series of cases was then filed with the United Nations Dispute Tribunal (UNDT) in Geneva.

The UNDT issued three related Judgments, of which Judgment No. UNDT/2012/129 disposed of the Malmström *et al.* cases.[12] It found that the delegated authority granted

al. v. *Secretary-General of the United Nations*, Judgment No. 2013-UNAT-360.

[12] The other UNDT Judgments were Judgment No. UNDT/2012/130, *Longone* v. *Secretary-General of the United Nations*, and Judgment No. UNDT/2012/131, *Ademagic et al.* v. *Secretary-General of the United Nations*.

to the ICTY Registrar in personnel matters included the authority to grant permanent appointments and, therefore, "the contested decisions were tainted by a substantive procedural flaw" as the ASG/OHRM was not the competent decision-maker. Accordingly, the UNDT rescinded the decisions not to grant the affected staff members permanent appointments, specifying: "The rescission of the decisions … does not mean the[y] should have been granted permanent appointments, but that a new conversion procedure should be carried out." Recalling "the nature of the irregularity which led to the rescission, that is, a procedural irregularity as opposed to a substantive one" and the fact that "staff members eligible for conversion have no right to the granting of a permanent appointment but only that to be considered for conversion", the UNDT ordered compensation in lieu of specific performance, pursuant to article 10(5)(*a*) of the Statute of the Dispute Tribunal, in the amount of EUR 2,000 per Applicant.

The UNDT Judgment was appealed by the Secretary-General, as well as the Appellants. The former argued that the UNDT erred in law in concluding that the authority to grant appointments that was delegated to the ICTY Registrar included the authority to grant permanent appointments. The latter argued, *inter alia*, that the UNDT erred in law when it determined that it was required to order compensation as an alternative to specific performance, and that the UNDT also erred in fact and in law in denying their request for compensation for non-pecuniary damages.

With respect to the Secretary-General's appeal, the Appeals Tribunal vacated the UNDT decision that the ICTY Registrar had discretionary authority in matters of permanent appointment, holding that any legal instrument delegating authority must be read restrictively and that, in the instant matter, the memorandum in question made no mention of permanent appointments and, indeed, had other inherent and specific limitations. Although the Appeals Tribunal concluded that the decision-making authority was properly vested in the ASG/OHRM, it found that her adoption of a blanket policy of denial of permanent appointments to ICTY staff members failed to give effect to each candidate's lawful entitlement to an "individual and a considered assessment before a permanent appointment could be granted or denied". The Appeals Tribunal found that the staff members were discriminated against and the impugned decision was legally void, being tainted by arbitrariness and by the violation of the staff members' rights of due process. The Appeals Tribunal rescinded the impugned decision and remanded the matter to the ASG/OHRM for consideration of retroactive conversion.

Insofar as the appeals filed by Malmström *et al.* were concerned, their pleas with respect to compensation ordered by the UNDT in lieu of specific performance were rendered moot, as the Appeals Tribunal had vacated the UNDT Judgment. The Appeals Tribunal awarded them compensation in the amount of EUR 3,000 each for moral damages, in view of the substantive due process breaches it had identified in the impugned decision-making process.

4. *Judgment No. 2013-UNAT-368 (17 October 2013): Roig* v. *Secretary-General of the United Nations*[13]

Deadline to request management evaluation—Time bar—Commencement date of the time limit—Discretion to waive the deadline for management evaluation or administrative review—Irreceivability of the application *ratione temporis*

On 1 July 2009, the Appellant applied for a P-4 level post in the Migration Section, Population Division, Department of Economic and Social Affairs ("DESA"). She was interviewed for the position in early 2010 but, on 29 October 2010, the Executive Officer of DESA informed her that she had not been selected. She had, however, been endorsed by the Central Review Board and was placed on a roster of candidates for future, similar vacancies.

On 17 December 2010, the Appellant became aware of the identity of the selected candidate, and, on 11 February 2011, she requested management evaluation of the selection on the grounds that the selected candidate did not meet the eligibility requirements listed in the vacancy announcement, thereby resulting in a breach of her rights as the selection process had not respected the applicable selection rules and procedures. On 23 March 2011, the Under-Secretary-General for Management advised the Appellant that, following management evaluation, the Secretary-General had decided to uphold the contested decision and, moreover, that her candidacy had been fully and fairly evaluated and that the selected candidate did indeed possess the required experience.

On 8 April 2011, the Appellant subsequently filed an application with the United Nations Dispute Tribunal ("UNDT"). In Judgment No. UNDT/2012/146, the UNDT agreed with the Secretary-General's submission that the Appellant's application was not receivable *ratione temporis*. The UNDT held that the impugned decision was that of 29 October 2010, when the Appellant learned she had not been successful; the fact that she learned the identity of the selected candidate some time later did not constitute a new administrative decision and did not re-start her deadline to request management evaluation. As such, the Appellant's 60-day time limit had actually expired when she submitted her request for management evaluation on 11 February 2011 and she did not have the requisite extension of time from the Secretary-General pursuant to staff rule 11.2(*c*). Accordingly, the UNDT concluded "seeing that the initial request for management evaluation was time-barred it has no legal effect and the application before the [UNDT] is therefore not receivable", pursuant to article 8 of the Statute of the Dispute Tribunal.

The Appellant appealed the Judgment of the UNDT to the Appeals Tribunal, arguing that the decisive date for the commencement of her time limit to seek management evaluation was the date on which she was informed of the identity of the selected candidate, i.e., 17 December 2010. The Appellant argued therefore that her request for management evaluation was timely and her application to the UNDT was receivable. She submitted that she was not contesting her non-selection but, rather, the fact that the successful candidate did not meet the minimum requirements for the post.

The Appeals Tribunal dismissed the Appellant's appeal. It held that there was no second administrative decision which reset the time limit; rather, the Appellant learning the identity of the selected candidate was a consequence of the administrative decision not to

[13] Judge Inés Weinberg de Roca, Presiding, Judge Sophia Adinyira and Judge Richard Lussick.

appoint her, of which she was notified on 29 October 2010. The Appellant did not submit a timely request for management evaluation of that decision. The Appeals Tribunal recalled that it "has been strictly enforcing, and will continue to strictly enforce, the various time limits"[14] and that, pursuant to article 8(3) of its Statute, the UNDT has no discretion to waive the deadline for management evaluation or administrative review.

5. *Judgment No. 2013-UNAT-370 (17 October 2013): Bi Bea* v. *Secretary-General of the United Nations*[15]

Separation from service due to the abolition of the post—Compensation for the non-renewal of the appointment—Compensation for moral injuries—Execution of the JAB's recommendations—Limits of the UNDT's power to award costs—Improper use of the proceedings of the court

The Respondent (Applicant in the first instance) was a GL-7 level staff member of the Office of the United Nations High Commissioner for Refugees ("UNHCR") from 4 February 1991 until 30 June 2004, when he was separated from service due to the abolition of his post. He subsequently served on a temporary assistance appointment in November and December 2004.

On 3 March 2005, UNHCR informed the Respondent that an investigation had been conducted concerning allegations against him, but that it had established no evidence of misconduct or criminal activity on his part. He had not previously been notified of such investigation. Thereafter, the Respondent sought reinstatement with UNHCR and, ultimately, appealed to the former Joint Appeals Board ("JAB"). In its report dated 13 May 2008, the JAB found that there appeared to be a link between the non-renewal of the Respondent's appointment and the investigation, which had taken some fourteen months to conclude, and recommended compensation equivalent to six month's net salary for the non-renewal of his appointment as well as three months net salary for moral injury.

On 8 September 2008, having received no response from the Secretary-General to the JAB report, the Respondent applied to the former United Nations Administrative Tribunal seeking the "execution" of the JAB's recommendations. On 24 October 2008, however, the Secretary-General accepted the JAB's findings and awarded him nine months' net base salary. As a result, the Secretary-General submitted before the former Administrative Tribunal that the application was moot. The Respondent then filed additional observations in which he requested an additional six months' salary in compensation, as well as costs.

The Respondent's case was subsequently transferred to the United Nations Dispute Tribunal ("UNDT") which, in Judgment No. UNDT/2012/150, denied his request for additional compensation on the grounds that the amount of compensation recommended by the JAB had been correctly paid, but awarded him interest for the Administration's delay in implementing the JAB's recommendations, as well as costs in the amount of CHF 5,000, for the Secretary-General's "manifest abuse of the JAB proceedings". This Judgment was appealed by the Secretary-General.

The Appeals Tribunal recalled that the UNDT's power to award costs is limited by article 10(6) of the UNDT Statute to situations in which it determines that "a party has

[14] See *Mezoui* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-043, para. 21.

[15] Judge Richard Lussick, Presiding, Judge Inés Weinberg de Roca and Judge Rosalyn Chapman.

manifestly abused the proceedings before it" and that, in the absence of such abuse, each party bears its own costs.

The Appeals Tribunal rejected the Secretary-General's argument that the UNDT erred in awarding costs for a manifest abuse of proceedings before the JAB as the Statute of the Dispute Tribunal (i.e., article 10(6) of the Statute) only provided authority to award costs for a manifest abuse of proceedings before the UNDT. The Appeals Tribunal rejected this argument, referring to the transitional provisions provided by way of article 2(7) of the Statute of the Dispute Tribunal.

The Appeals Tribunal concluded, however, that the UNDT erred in finding that the Secretary-General's delay in responding to the JAB report constituted manifest abuse. On this issue, the Appeals Tribunal held that the delay between the transmission of the JAB report to the Secretary-General and his responding to it was not inordinate. Noting that a delay, in and of itself, was not a manifest abuse of proceedings, the Appeals Tribunal found that the UNDT had failed to determine on the evidence that the delay was "clearly and unmistakably a wrong or improper use of the proceedings of the court" and thus erred in law in making the impugned order for costs.

6. *Judgment No. 2013-UNAT-379 (17 October 2013): Andersson* v. *Secretary-General of the United Nations*[16]

PROMOTION—FAILURE TO COMPLY WITH THE PROCEDURE FOR COMPLETION OF THE PROMOTION EXERCISE—VICTIM OF A PROCEDURAL VIOLATION—RESCISSION OF THE DECISION NOT TO PROMOTE—ALTERNATIVE COMPENSATION—EVIDENCE OF MORAL HARM—CLAIM FOR MORAL DAMAGES

The Respondent (Applicant in the first instance) was a P-2 level staff member of the Office of the United Nations High Commissioner for Refugees ("UNHCR") from November 2002 until November 2005 and was re-recruited in February 2006.

In July 2010, UNHCR staff members were advised of the promotions methodology applicable to the forthcoming 2009 annual promotions session, as established by the Appointments, Postings and Promotions Board ("APPB"). 35 slots were available for promotion from P-2 to P-3.

On 1 March 2011, the Respondent learned that he had not been promoted. He unsuccessfully introduced a recourse before the APPB and, following an equally unsuccessful request for management evaluation, he filed an application with the United Nations Dispute Tribunal ("UNDT").

In Judgment No. UNDT/2012/164, the UNDT found that UNHCR had failed to adhere to the relevant procedure in completing the promotion exercise and that, if the relevant procedure had been followed, the Respondent would have had very high chances of being promoted. The UNDT thus ordered rescission of the decision not to promote him or, in the alternative, payment of CHF 10,000 "for the remuneration lost as a consequence of [his] non-promotion". In addition, the UNDT awarded the Respondent CHF 4,000 for moral damages.

[16] Judge Richard Lussick, Presiding, Judge Inés Weinberg de Roca and Judge Rosalyn Chapman.

The Secretary-General appealed the UNDT's award of moral damages to the Appeals Tribunal, on the basis that the UNDT erred in justifying both its award of alternative compensation of CHF 10,000 as well as its award of CHF 4,000 for moral damages on the same high likelihood of the Respondent's promotion. The Appeals Tribunal rejected the Secretary-General's argument, finding that the UNDT ordered moral damages for the reparation of an injury which was not compensated by the sum ordered in lieu of rescission of the impugned decision.

Insofar as the Secretary-General's claim that no evidence of moral harm had been demonstrated before the UNDT was concerned, the Respondent replied that he gave oral evidence to the UNDT of the harm to his professional reputation, injury to his dignity and moral harm suffered as a result of the impugned procedure. The Appeals Tribunal heard a recording of the UNDT oral hearing which, albeit of poor quality, left "no question that the Respondent gave evidence on the issue of moral damages". Moreover, the Appeals Tribunal was persuaded that "the particular circumstances of the case support the conclusion that the Respondent was the victim of a fundamental procedural violation which of itself [could have given] rise to an award of moral damages".

Holding that the UNDT was in the best position to conclude whether a claim for moral damages was established and that its award was moderate and within its discretion, the Appeals Tribunal affirmed the UNDT Judgment and dismissed the Secretary-General's appeal.

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

The Tribunal rendered a total of 93 judgments in 2013 (43 in its 114th session and 50 in its 115th session). Summaries of a selection of fifteen judgments are reproduced herein.

[17] The Administrative Tribunal of the International Labour Organization is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the staff regulations of the 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 (IPU); 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;

1. *Judgment No. 3152 (6 February 2013): International Fund for Agricultural Development (IFAD)* v. *A.T.S.G.*[18]

A request for the advisory opinion from the ICJ does not imply the suspension of the execution of a judgment—Judgments of the Tribunal are final and without appeal—Compensation for the moral injury caused by the protracted failure to execute the judgments—Imposition of a penalty for flagrant lack of goodwill to honour obligations

The Applicant was assigned to the Global Mechanism established within the framework of the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification when her contract was not renewed, due to the abolishment of the post. In the first instance, by Judgment No. 2867, the Tribunal ordered the International Fund for Agriculture Development ("IFAD") to pay the Applicant moral and material damages because the abolition was illegal.

In that context, the Tribunal confirmed its jurisdiction over the case, challenged by the IFAD on the grounds that the Global Mechanism, although housed by the IFAD, had its own separate legal identity. The IFAD decided to contest that judgment by availing itself of the option offered to international organisations by the provisions of article XII of the Statute of the Tribunal, which provided for the submission of an application to the International Court of Justice ("ICJ") for an advisory opinion as to the validity of a decision of the Tribunal.

According to the Fund, there were several points on which the judgment could be impugned, either because it ruled on matters outside the Tribunal's jurisdiction, or because it was tainted with fundamental faults in the procedure followed.

On 4 May 2010, relying on the fact that the case had thus been referred to the ICJ and that article XII conferred binding force on the latter's advisory opinion, the IFAD submitted to the Tribunal an application "for the suspension of the execution of Judgment No. 2867", by which it sought to be exempted from paying the sums awarded against it pending delivery of the judgment of the ICJ.

In Judgment No. 3003, delivered on 6 July 2011, the Tribunal dismissed this application, affirming that the request for an advisory opinion from the ICJ did not imply a

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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/.

[18] Mr. Seydou Ba, President, Ms. Dolores M. Hansen and Mr. Patrick Frydman, Judges.

suspension of the judgment. It consequently ordered IFAD to pay the defendant costs in the amount of EUR 4,000. Notwithstanding that ruling, IFAD did not pay the sums awarded in both judgments. Instead, it asked the Applicant to provide, as a precondition for any payment, a bank guarantee against the risk of failure to reimburse those amounts were the ICJ to declare Judgment No. 2867 invalid.

These circumstances led the Applicant to file an application for the execution of both judgments with the Tribunal on 11 November 2011. In the meanwhile, in its advisory opinion rendered on 1 February 2012, the ICJ found that the Tribunal was indeed competent to hear the complaint filed against IFAD and that the decision given in Judgment No. 2867 was valid. On 9 February 2012, following the issuance of the ICJ opinion, IFAD paid the sums awarded in Judgments 2867 and 3003.

The Tribunal firstly affirmed that its sentences were "final and without appeal" and they were therefore "immediately operative".[19] The Tribunal subsequently noted that the principle that its judgments are immediately operative is also a corollary of their *res judicata* authority.[20] Furthermore, it pointed out that no provision in the Statute or the Rules of the Tribunal indicated that notwithstanding these principles the request for the ICJ's advisory opinion had the effect to suspend the execution of the impugned judgment pending the rendering of that opinion.

The Tribunal noted that the Applicant suffered objective injury on account of the late payment, without interest, of the moral damages and costs previously recognized. The Tribunal qualified the IFAD's unlawful conduct as extremely serious when, notwithstanding the dismissal of its application by the Tribunal in Judgment 3003, the Fund still refused to pay the various sums due to the complainant, behaving towards the latter with bad faith, until the Court had delivered its advisory opinion, thus flouting the *res judicata* authority of both Judgment 2867 and Judgment 3003 itself. It therefore awarded her that interest on the sums in question at a rate of 8 per cent per annum. As the Tribunal has often had occasion to state, international organisations have a period of 30 days, as from the notification of a judgment, to pay a sum awarded to a complainant where the amount of the award is specified by the Tribunal in its decision (see, for example, Judgments 1338, under 11, 1812, under 4, or 2692, under 6). As the latter condition was met with respect to the sums in question here, interest must run as from the day after the expiry of that period, i.e. 7 March 2010 for Judgment 2867 and 7 August 2011 for Judgment 3003, until the date of their payment, i.e. 9 February 2012. It also decided that the Applicant was entitled to compensation for the moral injury caused by the protracted failure to execute the judgments in the amount of EUR 50,000 , having regard to the particularly serious nature of the moral injury. In addition, the flagrant lack of goodwill demonstrated by IFAD to honour its obligation justified the imposition of a penalty of EUR 25,000 for each month's delay in the settlement of the awards. The Applicant received also EUR 3,000 for attorney's fees.

[19] See Judgment No. 82 (10 April 1965), paragraph 6 of the considerations; Judgment No. 553 (30 March 1983), paragraph 1 of the considerations; Judgment No. 1328 (31 January 1994), paragraph 12 of the considerations.

[20] See Judgment No. 553 (30 March 1983), paragraph 1 of the considerations; and Judgment No. 1328 (31 January 1994), paragraph 12 of the considerations.

2. *Judgment No. 3156 (6 February 2013): A.B. and C.S.* v. *International Telecommunication Union (ITU)*[21]

Bodies responsible for defending interests of international organizations' staff members before the administration enjoy broad freedom of speech and freedom of communication—Rights to freedom of speech and to freedom of communication do not encompass action that impairs the dignity of the international civil service—Lawfulness of a mechanism for the prior authorisation of messages

In 2009 the Applicants were elected to the International Telecommunication Union ("ITU") Staff Council, the body responsible for representing the interests of the staff before the Secretary-General and his representatives. From September 2009 to May 2010, the Staff Council circulated to all ITU's staff members two messages in which it criticised the Administration's decision to suspend, and later to dismiss, a grade G-5 staff member. The Chief of the Administration and Finance Department, having previously communicated a decision to suspend the ability of the Staff Council to send e-mails to all staff, given that, in his view, this communiqué breached the requisite confidentiality of the administrative investigation which had been opened in order to decide what action was to be taken, considered these initiatives an abuse by the Council of its freedom of expression, and, consequently, he informed the ITU's personnel by an e-mail of 7 May 2010 that he had decided "to again suspend [its] ability to send e-mails to all staff". This decision led most of the members of the Staff Council, including the two complainants, to resign in protest and, as a result, in a new e-mail of 21 May 2010, the Chief of the Administration and Finance Department informed the staff that there was no point in continuing the investigation and that he had decided to reinstate the e-mail "privilege" of the remaining Staff Council members.

On 18 June 2010 the two Applicants submitted a claim for compensation to the Secretary General for the injuries they suffered as a result of the decisions to censor the Council's messages to staff members, violating the right of staff representation. This was rejected a first time on 3 September 2010 and, after the failure of the review procedure, a second time on 25 November 2010. Having retired on 30 September 2010, the Applicants impugned the decisions directly before the Tribunal, given that under the ITU's Staff Regulations and Staff Rules they no longer had access to the internal appeal procedures, as affirmed in Judgment No. 2892.[22] The Tribunal joined the two applications because they were based upon identical submissions.

Turning to the merits of the case, the Tribunal referred to its previous case-law,[23] which showed that bodies of any kind which are responsible for defending the interests of international organisations' staff must enjoy broad freedom of speech and, consequently, freedom of communication. This principle, in the view of the Tribunal, was pertinent also

[21] Mr. Seydou Ba, President, Ms. Dolores M. Hansen and Mr. Patrick Frydman, Judges.

[22] See, in this connection, Judgment No. 2840 (8 July 2009), paragraph 21 of the considerations; Judgment No. 3074 (8 February 2012), paragraph 13 of the considerations.

[23] See Judgment No. 496 (3 June 1982), paragraph 37 of the considerations; Judgment No. 911 (30 June 1988), paragraph 8 of the considerations; Judgment No. 1061 (29 January 1991), paragraph 3 of the considerations. See, with regard to staff unions or associations, Judgment No. 1547 (11 July 1996), paragraph 8 of the considerations, and, with regard to a staff committee, Judgment No. 2228 (16 July 2003), paragraph 11 of the considerations.

to the Staff Council of the ITU as the authority responsible to represent the interests of the staff before the administration.[24]

However, it pointed out that these liberties are subject to reservations aimed to avoid prejudices to the dignity of the international civil service and, in particular, damage to the individual interests through allusions that are malicious, defamatory or which concern private lives. Accordingly, the Tribunal's case law allowed the setting-up of a mechanism for the prior authorisation of messages circulated by bodies representing the staff. An organisation acts unlawfully only if the conditions for implementing this mechanism in practice lead to a breach of that right, for example, by an unjustified refusal to circulate a particular message.

Applying this interpretation to the instant case, the Tribunal concluded that the decisions to censor the Council's messages to staff members could not be deemed unlawful in themselves. Indeed, the written submissions did not refer to any actual refusal to distribute other Staff Council documents during the period in which the restrictions were in force. Further, the messages had a malicious character because they were brought to the attention of all the staff members without the persons concerned being able to refute them. The Tribunal dismissed the applications.

3. *Judgment No. 3159 (6 February 2013): M.F.* v. *World Health Organization (WHO)*[25]

Obligations of the organization towards staff members following the abolition of the post—The Organization's duty to use reasonable efforts to reassign a staff member applies only in case of fixed term appointment—Clear evidence is required to demonstrate that short-term contracts are adopted as device to deny staff members the protection of an otherwise applicable rule

Since 1992, the Applicant had been employed with the World Health Organization ("WHO") Regional Office for Europe ("EURO") through a series of short-term appointments. Following a previous communication to the Applicant from his first level supervisor and the Administration, by a letter dated 22 September 2008, the Director of the Division of Country Health Systems notified him of the abolition of his post. Subsequently, before the end of his service, he was encouraged to apply for any other positions he felt matched his qualifications.

Against this decision, the Applicant filed a notice of intention to appeal firstly with the Regional Board of Appeal ("RBA") on 19 November 2008 and then with the Headquarters Board of Appeal ("HBA") on 6 October 2009. He alleged personal prejudice, incomplete consideration of the facts and failure by the Administration to observe or apply correctly the provisions of the Staff Regulations or Staff Rules. Although the HBA found that EURO acted within its authority in deciding to abolish the post, it stated that the Administration could have included the Applicant in a reassignment process at its discretion. Further, the

[24] This case law, which was originally established with regard to staff unions or staff associations and their officials (see Judgments 496, under 37, 911, under 8, or 1061, under 3), also applies to bodies like the Staff Council of the ITU which are responsible for representing the interests of the staff before the administration of the organisation (See Judgment No. 2227 (16 July 2003), paragraph 7 of the considerations).

[25] Mr. Seydou Ba, President, Ms. Dolores M. Hansen and Mr. Michael F. Moore, Judges.

HBA was of the opinion that the use of short breaks of only one or two weeks between periods of service was insufficient to set the short-term contracts apart from a fixed term appointment in terms of continuity.

By a letter of 24 May 2010, the Director General informed the Applicant that he agreed with the HBA findings solely concerning the legality of the abolition of post. On the contrary, he did not share the remaining HBA conclusions and suggested the Applicant dismiss the appeal in order to receive a sum equal to the cost of the travel to present the case before the HBA. The Applicant appealed this decision to the Tribunal.

The Tribunal firstly determined that the wording of staff rule 1050.2 was clear enough to conclude that the duty to use reasonable efforts to reassign a staff member after the abolition of his post applied only in the case of a fixed term appointment, where the concerned staff member had served for a "continuous and uninterrupted" period of five years.

Further, the Tribunal observed that there was no evidence to support the HBA's conclusions that the Organization adopted the short-term contracts as a device to deny the Applicant the protection of an otherwise applicable rule.[26] There was nothing in the history of the Applicant's earlier employment on short-term contracts to suggest that the arrangement was anything other than a manifestation of the intention of the parties, or that they did not constitute agreements freely entered into by them. In summation, the Tribunal reached the conclusion that the WHO was not under a duty to take reasonable steps to reassign the Applicant. Accordingly, the application was dismissed.

4. *Judgment No. 3163 (6 February 2013): M.Z.* v. *International Organization for Migration (IOM)*[27]

Power not to renew a fixed-term contract represents a legitimate exercise of the administration's discretionary authority—Abolition of position for lack of funding does not involve an error of law—Notice to the employee about the non-renewal of the fixed-term contract—Compensation for loss of opportunity

The Applicant was employed by the International Organization for Migration ("IOM") in 2004 in a grade P-2 position as an Associate Expert/Programme Officer. Her position was funded by the Italian Government up until January 2007. In early 2009, she requested that her fixed-term contract be converted into a "regular" contract under IOM Staff Regulations and Staff Rules. As the Staff Regulations and Staff Rules required one year of funding for a "regular" contract, the Applicant was informed by an e-mail that her request was not possible. However, the author of the e-mail added that "as soon as the funding is warranted for the whole year, we will process the regular contract". In October 2009, the Applicant was informed that her post would not be renewed and that the position would be abolished for lack of funding.

In late 2009, the Applicant applied to two positions in IOM where vacancy notices were issued: one at grade G-6 and the other at grade P-2. She was not shortlisted for the grade G-6 position and was informed by the Regional Resource Management Office that "as advised by HQ it is not considered to be a good practice to have P staff applying to

[26] See also Judgment No. 1385 (1 February 1995).

[27] Mr. Seydou Ba, President, Mr. Giuseppe Barbagallo and Mr. Michael F. Moore, Judges.

G staff positions". With respect to the grade P-2 position, the Applicant was shortlisted and interviewed but was eventually unsuccessful.

In January 2010, the Applicant requested a review of: (i) the decision to abolish her post, (ii) the decision not to shortlist her for the grade G-6 position, and (iii) the decision to "put on hold" the awarding of a regular contract. Having received no reply within the 30-day period stipulated in Annex D to the Staff Rules, the Applicant lodged an appeal with the Joint Administrative Review Board ("JARB"). The JARB subsequently concluded that the non-renewal of her contract and the refusal to grant her a regular appointment were lawful. However, the JARB considered that her rights might have been prejudiced as the grade G-6 position "appeared to have been under-graded and her candidature ought not to have been excluded on the grounds that she was overqualified". Accordingly, the JARB recommended that the Applicant be awarded three months' salary at grade G-6 level in compensation. The Director General approved the JARB's recommendation on 31 August 2010. The Applicant impugned the decision before the Tribunal.

The Applicant contended that the decision not to renew her contract was tainted with error of fact and error of law, insofar as, respectively, there was no real lack of funding and the Administration did not take into account any alternative sources of funding. According to the Applicant, there were also procedural irregularities, since she was not given the required three-month notice, and ambiguities in the selection of the G-6 position, since the vacancy was deliberately downgraded to render her ineligible for it.

Firstly, the Tribunal pointed out that the power not to renew a fixed-term contract represented a legitimate exercise of the Administration's discretionary authority. Therefore, it observed that "it is unnecessary to descend into greater detail about whether funds were or were not available to fund the complainant's position beyond the beginning of 2010". On the contrary, the Applicant should have demonstrated that the competent body acted on some wrong principle, breached procedural rules, overlooked some material fact or reached a clearly wrong conclusion in order to challenge its discretionary powers.[28] Similarly, the Tribunal found that the Applicant's argument, according to which there was a "dubious interpretation of accepted standards for abolitions of posts on budgetary grounds", did not involve an error of law.

The Tribunal then observed that the period of notice given to the Applicant was reasonable, considering also the extension of the Applicant's contract until 31 January 2010. Regarding the claim against the improper classification of the G-6 position and the rejection of the complainant's candidature for that post, the Tribunal was of the opinion that the decision not to nullify the selection was correct, considering that the position had been filled. It also considered that the amount of compensation awarded for the loss of the opportunity was reasonable. For the above reasons, the application was dismissed.

[28] See Judgment No. 1044 (26 June 1990), paragraph 3 of the considerations; Judgment No. 1262 (14 July 1993), paragraph 4 of the considerations; and Judgment No. 2975 (2 February 2011), paragraph 15 of the considerations.

5. *Judgment No. 3182 (6 February 2013): M.H.* v. *International Labour Organization (ILO)*[29]

Discretionary power of the Director-General to make appointments—Technical panels provide the foundation for objective assessment—Principles of equality, impartiality and transparency—Priority given to applications of transfer over claims to promotion applies only where the qualifications of the applicants are equal—Anti-union discrimination

Since 2001, the Applicant had been working as Legal Officer at grade P-3 in the International Labour Standards Department ("NORMES"), serving also as General Secretary of the Staff Union Committee from December 2008. In October 2009, she successfully passed the examinations for the position of grade P-4 in the conditions of Work and Employment Programme. In particular, the technical panel unanimously ranked the Applicant first, among three candidates, and consequently recommended her appointment to the Director-General.

In November 2009, the Director-General decided instead to appoint an internal candidate who was ranked third by the panel, and who already held a grade P-4. On 30 November, the Applicant was informed that she had not been selected.

On 12 February 2010, the Applicant submitted a grievance to the Joint Advisory Appeals Board alleging that the Director-General's decision was tainted, *inter alia*, with errors of fact and law as well as misuse of authority. In its report dated 10 May 2010, the Board found that the Director-General had complied with the requirements of the Staff Regulations and accordingly dismissed the Applicant's grievance. By a letter dated 12 July 2010, the Applicant was informed of the Director-General's decision to dismiss her grievance as unfounded, in accordance with the Board's recommendation.

The Applicant impugned that decision before the Tribunal, alleging that the Director-General's decision to appoint the third-ranked candidate was an error of law as she was ranked as the best qualified candidate and should therefore have been appointed in accordance with article 4.2(*a*)(*i*) of the Staff Regulations. The Applicant further argued that the decision was based on an erroneous application of article 4.2(*g*) of the Staff Regulations, submitting that the priority established by that article applied only if the third-ranked candidate possessed qualifications that were at least equal to those of another internal candidate seeking a promotion. Lastly, she claimed that she was the victim of anti-union discrimination and that the Director-General misused his authority in appointing the third-ranked candidate.

The Tribunal firstly held that the Director's reassessment of the candidates and the consequent change of the conclusions reached by the technical panel were not consistent with the proper procedure for the filling of the vacancies. According to its case-law,[30] "technical panels provide for the safeguards of the complete transparency and impartiality and provide the foundation for objective assessment". Therefore, any exception to this rule should have been clearly expressed. The Tribunal concluded that the generic provisions of

[29] Mr. Giuseppe Barbagallo, President, Ms. Dolores M. Hansen and Mr. Michael F. Moore, Judges.

[30] Judgment No. 2083 (30 January 2002), paragraphs 9 and 10 of the considerations.

priority given to applications of transfer over claims to promotion applied only where the qualifications of the applicants were equal.[31]

The Tribunal found that no persuasive evidence was produced by the Applicant on the alleged discrimination carried out by the Administration against her due to her involvement in the Staff Union Committee. In the light of the above, the Tribunal set aside the impugned decision and cancelled the disputed appointment. It awarded moral damages in the amount of EUR 5,000 and costs in the amount of EUR 700 to the Applicant. It further required the ILO to shield the third-ranked candidate from any injury which might result from the cancellation of the appointment. The case was remitted to the Director-General for a new decisions in accordance with the considerations in the judgment.

6. *Judgment No. 3188 (6 February 2013): H.S.* v. *International Atomic Energy Agency (IAEA)*[32]

Failure to provide in a timely manner an updated job description represents a breach of the Applicant's rights to be compensated—In the absence of clear evidence suggesting that the recruitment panel was led into factual error the selection process cannot be reviewed—Breach of the duty of care occasioned by egregious delays in addressing the internal appeals

Since 1984, the Applicant had been employed with the International Atomic Energy Agency ("IAEA") as a Clerk/Typist at level G-4 within the Division of Operations C, in the Department of Safeguards ("SGOC"). In the period from September 2001 to March 2008, she served as a Senior Office Clerk at grade G-5 under the supervision of the Director of the Division of Concepts and Planning ("SGCP"). The Applicant had made several formal requests for an updated job description since March 2004, and only received the revised job description in December 2008. The Applicant contended that the egregious delays in providing her with an updated job description lost her an opportunity for promotion during that period, including her unsuccessful application for the grade G-6 position of Administrative Assistant in the Section for Safeguards Programme and Resources (SG-CPR).

On being informed of not being selected for the G-6 post, the Applicant requested an immediate transfer, possibly at the same grade, anywhere in the SG-CPR but outside the SGCP. In parallel, the Applicant filed two consecutive appeals with the Joint Advisors Appeals Board ("JAB"), alleging procedural irregularities and challenging the IAEA's failure to update her job description in a reasonable period of time. Following the Director's decision to transfer the Applicant from a G-5 position to a G-4 position in April 2008, she filed a third application with the JAB. Since the JAB recommended confirming the three challenged decisions, the Applicant brought an application before the Tribunal against the Director General's decision to endorse the JAB's findings.

The Applicant argued firstly that the substantial delays in providing her with an updated job description implied a loss of opportunity for promotion during that period. The

[31] Judgment No. 1871 (8 July 1999), paragraph 10 of the considerations; Judgment No. 2833 (8 July 2009), paragraph 6 of the considerations; and Judgment No. 3032 (6 July 2011), paragraph 14 of the considerations.

[32] Mr. Giuseppe Barbagallo, President, Ms. Dolores M. Hansen and Mr. Michael F. Moore, Judges.

Applicant stated that the selection panel could not have made a fair evaluation of her qualifications because it was based upon duties and responsibilities she no longer performed. She also contended that the transfer was taken *ultra vires*, because it was not authorized as per Staff Regulation 10.2 by the competent body (i.e. the Director), arguing also that this was implemented as retaliation for her appeals with the JAB.

Accordingly, she asked for moral and material damages due to the IAEA's breach of duties of care, good faith and mutual trust, considering also that the internal proceedings to reply to her requests were conducted with considerable delays and without the required due diligence. She also contested the selection choices to consider candidates who did not meet the minimum requirements and to accept late applications. In this regard, she requested the disclosure of the documents relating to the recruitment process.

The Tribunal initially found that "egregious delay in responding to a reasonable request might involve a breach of the obligation to deal with the staff member in good faith". Therefore, the IAEA's failure to provide the Applicant with an updated job description over several years represented a breach of her rights to be compensated. Reaching the same conclusions concerning the IAEA's delays in the internal proceedings, the Tribunal pointed out how the Organization had not, in any substantial way, even sought to justify such delays.[33]

With reference to the Applicant's claim to review the selection process, the Tribunal confirmed its restrained approach in this respect, arguing that:

> "[I]n the absence of any evidence which suggests that the recruitment panel or subsequently the JAB was led into factual error by a dated job description, it would be inappropriate to view the selection decision as compromised in the way the complainant suggests. This is particularly so given that she was interviewed for the position and does not now contend she was asked questions or engaged in dialogue which manifested a misunderstanding on the part of the recruitment panel of the work she was then doing or her skills and attributes."

Turning to the Applicant's challenge on the transfer decision, the Tribunal noted that it was made to meet the Applicant's request and steps were being taken to ensure that the position had the characteristics of a G-5 grade. Finally, in dealing with the disclosure request, the Tribunal found that the Applicant was unable to provide any evidence suggesting that such documentation might be probative for the case. Ultimately, the Tribunal awarded EUR 5,000 for the delays in the internal review and for the IAEA's failure to update the Applicant's job description in a reasonable period of time. It also awarded EUR 2,000 in costs while dismissing the remaining arguments.

[33] Judgment No. 2522 (1 February 2006), paragraph 7 of the considerations.

7. Judgment No. 3192 (6 February 2013): E.P.-M. v. *World Health Organization (WHO)*[34]

Implied rejection under article VII, paragraph 3, of the Tribunal's Statute—Forwarding of the claim to the advisory appeal body constitutes a decision upon the claim under article VII, paragraph 3, of the Tribunal's Statute—Failure to exhaust the internal appeal procedure—Charge of harassment must be supported by specific facts—Burden of proving harassment falls on the Applicant

Since 1996, the Applicant had been employed with the World Health Organization ("WHO"). Following a successful application, she began her functions as Advisor, Human Resources for Health, in the Systems Strengthening for HIV ("SSH") Unit of the HIV/AIDS Department, at the WHO Headquarters. Referring to various incidents, in October 2008 she reported to her first level supervisor (Mr. P.) that she felt "attacked and harassed" by the Team Leader of the Integrated Management of Adult and Adolescent Illness in HIV (Ms. G.).

As a result of restructuring, she was informed, at a meeting held in September 2009, that her post would be abolished with effect from March 2010 on the grounds that human resources planning was no longer a priority within the HIV/AIDS Department. In this regard, she filed an application with the Headquarters Board of Appeal ("HBA"). In October 2009, she also submitted a formal complaint of harassment against both Mr. P and Ms. G. to the Headquarters of Grievance Panel. In its report dated 16 March 2010, the Grievance Panel concluded that none of the Applicant's allegations could be upheld. By letter dated 16 April 2010, the Director-General informed the Applicant about her decision to follow the Panel's recommendations as "no evidence of harassment was found". The Applicant appealed this decision before the Tribunal.

Considering that the Applicant's complaint with the HBA was still pending at the time of her appeal with the Tribunal, she asked to join the two applications. In her view, since no action had been taken by the Administration on her claim regarding the abolition of the post, it would be possible to consider the internal appeal before the HBA implicitly rejected under article VII, paragraph 3, of the Tribunal's Statute, which provided that:

> "[W]here the Administration fails to take a decision upon any claim of an official within sixty days from the notification of the claim to it, the person concerned may have recourse to the Tribunal and his complaint shall be receivable in the same manner as a complaint against a final decision. The period of ninety days provided for by the last preceding paragraph shall run from the expiration of the sixty days allowed for the taking of the decision by the Administration."

The Tribunal, however, concluded that all claims regarding the abolition of the post were irreceivable because, as stated in Judgment No. 2948, "the forwarding of the claim to the advisory appeal body constitutes a 'decision upon [the] claim' within the meaning of these provisions, which is sufficient to forestall an implied rejection".[35]

Turning to the allegation of harassment, the Tribunal held that the Applicant did not provide any factual evidence to counter the Grievance Panel findings. With respect to this

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[34] Mr. Giuseppe Barbagallo, President, Ms. Dolores M. Hansen and Mr. Michael F. Moore, Judges.

[35] Judgment No. 532 (18 November 1982); Judgment No. 762 (12 June 1986); Judgment No. 786 (12 December 1986); Judgment No. 2681 (6 February 2008); and Judgment No. 2946 (8 July 2010), paragraph 7 of its considerations..

issue, the Tribunal had consistently affirmed that any allegation of harassment should be supported by specific facts and the burden of proving the contested conduct falls on the Applicant.[36] Similarly, the Tribunal noted that "consistent case law holds that harassment and mobbing do not require malice or intent, but that behaviour cannot be considered as harassment or mobbing if there is a reasonable explanation for it".[37]

The Applicant also challenged the Grievance Panel's refusal to consider her written comments on the replies of Mr. P and Ms. G. and the report of her treating physician. The Tribunal noted that there were no reasons to accept such a report once the proceedings had been closed. The Applicant submitted her harassment application with annexes and added, at a later stage, two letters, which were both accepted by the Grievance Panel. The Tribunal held that allowing continuous additional submissions from either party would only serve to slow down and confuse the appeal process.

Concerning the Applicant's contention that the legal advisor coordinating the Panel was biased by his alignment with the Organization, the Tribunal observed that this was not supported by any proof. The Tribunal applied to the case the conclusions of consistent case-law,[38] where it held that:

> "[A]lthough evidence of personal prejudice is often concealed and such prejudice must be inferred from surrounding circumstances, that does not relieve the complainant, who has the burden of proving his allegations, from introducing evidence of sufficient quality and weight to persuade the Tribunal. Mere suspicion and unsupported allegations are clearly not enough, the less so where … the actions of the Organization which are alleged to have been tainted by personal prejudice are shown to have a verifiable objective justification."

Regarding the allegations that the Mr. P. harassed the Applicant insofar as he ordered her to perform tasks and criticised her work in public, the Tribunal found that the role of a supervisor included the responsibility to direct her work, request work-related actions and/or to comment on what she was working on, and there was no evidence that this was done in a humiliating manner. In view of the foregoing, the Tribunal dismissed the application.

8. *Judgment No. 3200 (4 July 2013): A.A.* v. *Food and Agriculture Organization of the United Nations (FAO)*[39]

Investigation on abuse of authority and on harassment conducts—Egregious delays in the investigation and in addressing the internal proceedings represent a violation of the Organization's duty of care—Staff member's right of due process to know the name of the accuser and the allegations—Conflict of interest during the investigation

The Applicant was recruited by the World Food Programme ("WFP") in 1989 under a fixed-term appointment at grade G-2. After a series of promotions, she reached the level

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[36] See Judgment No. 2370 (14 July 2004), paragraph 9 of the considerations and the case-law cited therein.

[37] See Judgment No. 2524 (1 February 2006), paragraph 25 of the considerations; and Judgment No. 2587 (7 February 2007), paragraph 8 of the considerations.

[38] See Judgment No. 1775 (9 July 1998), paragraph 7 of the considerations.

[39] Mr. Giuseppe Barbagallo, President Ms. Dolores M. Hansen and Mr. Michael F. Moore, Judges.

P-3 and in 2004 she was reassigned to the WFP's Country Office for Somalia as a Finance Officer at the same grade. Following a harassment complaint made by a former staff member in early 2007, she was subject to an investigation by the Office of Inspections and Investigations ("OSDI"). The OSDI found that the Applicant had abused her authority and had violated the WFP's policy on the Prevention of Harassment.

By a memorandum of 26 January 2009, the Director of the Human Resources Division informed the Applicant that, having reviewed the comments on the OSDI's report, the Administration had decided to impose the disciplinary measure of demotion to grade P-2, with no possibility of promotion for one year. Against this decision, the Applicant filed an appeal with the Appeals Committee of the FAO. The Applicant alleged conflict of interests on the part of the Chief of the OSDI, requesting relief from the investigation as well as additional damages for physiological and emotional harm due to delay in the internal proceedings and to breach of confidentiality during the OSDI's investigation.

The Appeals Committee recommended reversal of the demotion decision with retroactive effect from 1 March 2009, payment to the Applicant of the resulting difference in salary and allowances, and removal of the harassment complaint from her personnel file, while rejecting her remaining claims. The Director General of the FAO decided not to accept the Committee's recommendations and rejected the Applicant's complaints. In particular, he noted that, in examining the conduct of the investigation, the Committee erred in law by making recommendations on claims that the Applicant had not raised during the Appeal. The Applicant appealed this decision before the Tribunal.

The Tribunal initially found that, "although the case was complex and detailed, and the subject matter sensitive, the time taken to complete the proceedings was indeed excessive". The Tribunal noted in particular that it took OSDI ten months to bring the investigation to a conclusion following the interviews, and it took the Director-General seven months to reject the appeal after receiving the Appeals Committee Report. It concluded that the total length of the proceedings could not be considered reasonable and thus, the Organization did not respect the need for expeditious proceedings and violated its duty of care towards the Applicant.

The Tribunal then turned to the Applicant's arguments that the investigation procedure was unlawful because she was not informed before the interview about either the allegations against her or about the name of the accuser. It observed that, although paragraph 5.2 of the OSDI Quality Assurance Manual contemplated that the release of such information might be inappropriate if it compromised the integrity of the investigation, there was no suggestion in the present complaint that this was the case. The tribunal found that the standard of process applicable in the case at the investigation stage was flawed thereby tainting the process leading to the ultimate decision.

Lastly, with reference to the allegation of conflict of interest against the Chief of the OSDI, the Tribunal considered that his appointment as the Applicant's supervisor could not have affected a decision which was taken before this point and in any event the supervisor was not responsible for the decisions taken. On this issue, the Tribunal dismissed the Applicant's claim on the merits.

Considering the above, the Tribunal set aside the decision to demote the Applicant with effect from 1 March 2009 and it ordered FAO to pay the Applicant the difference in all relevant salaries and entitlements retroactively to 1 March 2009, with an interest rate

of 5 per cent per annum. It awarded the Applicant EUR 4,000 for moral damages for the inordinate delays in the investigation and internal appeal proceedings, and for the flawed investigation process and an additional EUR 4,000 for attorney's fees.

9. Judgment No. 3203 (4 July 2013): A.J.H.B. v. *International Telecommunication Union (ITU)*[40]

Staff members are not entitled to employment benefits on the basis of a spousal relationship with same-sex marriage under Staff Regulations and Rules—Same-sex recognition is a matter not justiciable before the Tribunal—The ITU Council is free to decide whether to amend Regulations and Rules

The Applicant was recruited by the International Telecommunication Union ("ITU") in 2001. Before the termination of his employment on his initiative in October 2009, he had been asking the ITU to recognise his Civil Solidarity Contract under French Law, for the purposes of the various employment benefits, as well as same-sex relationships more generally. The Applicant pursued these objectives through two different applications, leading towards Judgment No. 2643 and Judgment No. 2826, respectively.

In Judgment No. 2643, the Tribunal concluded that the Applicant was not entitled to the benefits he claimed under the Staff Regulations and Staff Rules in force. However, on the basis of the Appeal Board's report, it referred the case back to the ITU's Council for a reasoned decision on the action to be taken in order to amend the pertinent Staff Regulations and Staff Rules on domestic partnerships' recognition. In application of the principle of *res judicata*, the Tribunal dismissed also the complaints set out in Judgment No. 2826, observing that Judgment No. 2643 had been already executed by the Secretary-General through the referral of the matter to the ITU's Council. In April 2010, the ITU's Council decided not to amend the relevant Staff Regulations and Staff Rules. This was the decision that the Applicant appealed before the Tribunal.

The Tribunal firstly held that the matter of same-sex marriage recognition was not justiciable before it. In particular, the ITU's Council was free to decide whether to amend the Staff Rules and Regulations and the Tribunal had no authority to compel a different action.[41] Secondly, it observed that, although dissenting opinions filed by individual judges had in the past supported the idea that staff rules denying access to dependency benefits to same-sex partners were unenforceable because they violated fundamental principles of law,[42] the Applicant's attempt to assert such rights were finally rejected by the Tribunal in Judgment No. 2643. Therefore, the application was dismissed.

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[40] Mr. Giuseppe Barbagallo, President, Ms. Dolores M. Hansen and Mr. Michael F. Moore, Judges.

[41] Judgment No. 1118 (3 July 1991), paragraph 10 of the considerations.

[42] See, for example, Judgment No. 2193 (3 February 2003), dissenting opinion of Mr. James K. Hugessen, Judge.

10. Judgment No. 3206 (4 July 2013): A.M.K. v. *World Intellectual Property Organization (WIPO)*[43]

Cancellation of a position—Cause of action in seeking the setting aside of the decision to give a post to another candidate—The complaint is not moot if the decision has been implemented and produced legal effects—Recruitment based upon competition—Exceptions to the principle of recruitment based upon competition are allowed only in specific cases and with a proper justification

The Applicant joined the World Intellectual Property Organization ("WIPO") in April 1998 at grade P-5, as Deputy Director of the Cooperation for Development Bureau for Arab Countries. In 2005, he unsuccessfully applied for a position of Director of the Economic Development Bureau for Arab Countries at grade D-1. Following two consecutive applications, he obtained from the Tribunal[44] the cancellation of the contested appointment because the selected external candidate (Mrs. H.) did not meet one of the conditions stipulated in the vacancy announcement. The Tribunal required also the WIPO to hold a new application procedure, specifying that Mrs. H., who accepted the appointment in good faith, had to be shielded from any injury which might result from its cancellation.

In order to give effect to the judgment, Mrs. H. was firstly appointed to a grade D-1 position in the Office of the Deputy Director General, and then to a grade D-2 as Senior Project Director in the Coordination Sector for External Relations, Industry, Communications and Public Outreach, in both cases without a competitive process of application. Considering the appointment to a D-2 position unlawful, the Applicant challenged this second outcome through the internal appeal procedures provided for in Chapter XI of the Staff Regulations and Rules.

Endorsing the recommendations of the Appeal Board by a decision dated 2 December 2010, while admitting that the Mrs. H's transfer from a D-1 grade to a D-2 grade was unlawful, the Director-General indicated that such statement did not have any effect on Mrs. H's administrative and legal situation. The Applicant challenged this decision, alleging in particular that the assignment of Mrs. H. to a D-2 position constituted a misuse of authority and contravened the Tribunal's case law.

In response to the WIPO's objections regarding the irreceivability of the complaint, because the Applicant had no cause in the action and because the claims had become moot since Mrs. H. separated from WIPO, the Tribunal held that "any staff member who is eligible to occupy a post has a cause of action in seeking the setting aside of the decision to give that post to another person".[45] It also found that Mrs. H's separation from WIPO—based upon her successful application to the WIPO's voluntary separation programme—did not render moot the complaint because the decision had nonetheless been implemented and produced legal effects. Only a withdrawal from her appointment might have rendered such a challenge moot.[46]

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

[44] Judgment No. 2712 (6 February 2008).

[45] Judgment No. 1272 (14 July 1993), paragraph 12 of the considerations; Judgment No. 2832 (8 July 2009), paragraph 8 of the considerations; and Judgment No. 2959 (2 February 2011), paragraph 3 of the considerations.

[46] Judgment No. 1680 (29 January 1998), paragraph 3 of the considerations; and Judgment No. 2287 (4 February 2004), paragraph 6 of the considerations.

On the merits, the Tribunal pointed out that the departure from the general principle of recruitment through competition could be allowed only in exceptional cases and with a proper justification.[47] Therefore, while Mrs. H's appointment to a grade D-1 was acceptable in the light of the WIPO's duty under Judgment No. 2712 to shield her from any injury which might result from the cancellation of her initial appointment, there was no valid reason to assign Mr. H. to a higher position following the same procedure. As a consequence, the Tribunal set aside the contested decision. It then dismissed the Applicant's complaints to reconsider Mrs. H. salaries and benefits, observing that he had no cause of action on this aspect, as these measures would have no bearing on his own situation.[48]

11. Judgment No. 3214 (4 July 2013): J.H.V.M. v. *European Patent Organisation (EPO)*[49]

The Organization enjoys broad discretion when deciding upon re-appointment requests—The President of the Office is competent to decide whether to propose the re-appointment—The administrative authority must base itself on the provisions in force at the time it takes the decision—The Organization is not under a duty to provide information of its own accord—Interest of the service—Preference to fill positions with new staff members

The Applicant joined the European Patent Organisation ("EPO") in 1990 as a member of the Board of Appeal. More than two and a half years before reaching the retirement age, the Applicant requested to continue working until the age of 68, in application of the provisions of article 54 of the Service Regulations for Permanent Employees of the EPO. The article, as amended on 1 January 2008, allowed particular staff members to work until that age if "the appointing authority considers it justified in the interest of the service". As per its paragraph 1(*b*), such an option was also open to members of the Board of Appeals, "provided that the Administrative Council, on a proposal of the President Office, appoints the member concerned" under the same conditions as those governing the initial appointment.

Once the procedure for examining the request of the member of the Board of Appeals was approved by means of Communication 2/08 of 11 July 2008, the Applicant was interviewed by the selection board established under that communication. Following the committee's findings, by letter dated 13 April 2010, the President of the Office ultimately informed the Applicant that his reappointment would not be proposed to the Administrative Council. The Applicant appealed this decision before the Tribunal.

The Applicant initially challenged the lawfulness of article 54, on the grounds that the condition of re-appointment was solely based upon the will of the EPO. Accordingly, the phrase "in the interest of the organisation" turned into an "oppressive clause" that should be regarded as null and void. In this respect, the Tribunal pointed out that article 54 gave a broad discretion to the authority deciding on the re-appointment request which is subject to only limited review by the Tribunal. Thus, it would interfere only if such a "decision was taken without authority, if a rule of form or procedure was breached, if it was based on a

[47] Judgment No. 2620 (11 July 2007), paragraphs 9–11 of the considerations; and Judgment No. 2959 (2 February 2011), paragraph 3 of the considerations.

[48] Judgment No. 2281 (4 February 2004), paragraph 4(a) and (b) of the considerations..

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

mistake of fact or law, if an essential fact was overlooked, if a clearly mistaken conclusion was drawn from the facts or if there was an abuse of authority".[50]

The Tribunal then turned to the Applicant's complaints that the decision was unlawful because it was not taken by the competent "appointing authority", as per article 11(3) of the EPO Convention, and because it was based upon a procedure not in force when the request was submitted. In the Tribunal's view, the President of the Office was, based on a long line of precedent, competent to decide whether to propose the Applicant's reappointment in application of article 54(1)(*b*).[51] Relying on its previous case law,[52] it also affirmed that "an administrative authority, when dealing with a claim, must generally base itself on the provisions in force at the time it takes its decision, and not on those in force at the time the claim was submitted".

Contrary to the Applicant's argument, the Tribunal also noted that the EPO was under no obligation to forward the document to the Applicant of its own accord[53] about the conditions in which individual decisions were adopted with respect to other employees. The Applicant had the right of access to all evidence on which the competent authority based its decision but he did not ask for any of the documents in question.

Against the Applicant's argument, the Tribunal finally observed that it was in the interest of the service to recruit new members to fill the positions of the chairperson and members of the board, taking also into account that no particular factor would, in this case, have warranted an exception being made to the general preference to bring in new staff. Accordingly, the Tribunal dismissed the complaints entirely.

12. Judgment No. 3222 (4 July 2013): A.R.B.B. v. United Nations Industrial Development Organization (UNIDO)[54]

Procedures for the prosecution of internal appeals—The internal remedies are not exhausted if the claims are briefly analysed—Request for disclosure of documents—Right to obtain the requested documents in a timely manner

The Applicant joined the United Nations Industrial Development Organization ("UNIDO") in 1995 as Head of the Agro-based Industries Branch at the D-1 level. He fell ill in March 2007 and never returned to work thereafter. Following a medical examination, the United Nations Joint Staff Pension Fund ("UNJSPF") endorsed the findings of the Staff Pension Committee according to which the Applicant should have received disability benefits as per his Appendix D claim. However, in December 2008, the Secretary (Ms. N.) of the Advisory Board on Compensation Claims ("ABCC") informed the Applicant about the Board's recommendation to dismiss his Appendix D claim and

[50] Judgment No. 2969 (2 February 2011), paragraph 10 of the considerations; Judgment No. 2377 (2 February 2005), paragraph 4 of the considerations; Judgment No. 2669 (6 February 2008), paragraph 8 of the considerations; and Judgment No. 2845 (8 July 2009), paragraph 5 of the considerations.

[51] Judgment No. 585 (20 December 1983), paragraph 5 of the considerations.

[52] Judgment No. 2459 (6 July 2005), paragraph 9 of the considerations; Judgment No. 2986 (2 February 2011), paragraph 32 of the considerations; and Judgment No. 3034 (6 July 2011), paragraph 33 of the considerations.

[53] Judgment No. 2944 (8 July 2010), paragraph 42 of the considerations.

[54] Mr. Giuseppe Barbagallo, President, Ms. Dolores M. Hansen and Mr. Michael F. Moore, Judges.

about the approval of this recommendation by the Managing Director of the Programme Support and General Management Division—acting under the delegation of authority from the Director-General.

In order to prepare an appeal against this decision, the Applicant requested firstly to Ms. N. and subsequently to the Director-General for copies of all the pertinent documents concerning his case. Acting on behalf of the Director General, the Director of the Human Resources Management Branch ("PSM/HRM") informed the Applicant that his request was rejected because, according to the Regulations, Rules and Pension Adjustment System of the UNJSPF, records and correspondence of the SPC were confidential. The Applicant challenged this decision before the Joint Appeals Board ("JAB"), asking for the release of the said documentation and for the award of EUR 3,700 in costs. In his rejoinder, he also requested compensation for breach of the applicable procedure, conflict of interests and breach of confidentiality.

On 19 October 2010, the Director-General decided to modify his initial decision and to endorse the Applicant's Appendix D claim, considering the illness attributable to service. In contrast, in December 2010, the Director-General decided not to endorse the JAB's recommendations (which provided for the disclosure of all the relevant documents) on the grounds that the request for disclosure was governed by the Regulations, Rules and Pension Adjustment System of the UNJSPF and consequently the JAB was not competent to review that appeal. This was the decision that the Applicant appealed before the Tribunal.

In considering the request for compensation, the Tribunal determined that the Applicant's claims (insofar as they concerned matters other than the disclosure of the documents) were not receivable because the internal appeals were not exhausted as required by article VII (1) of the Tribunal's Statute. In fact, the claims related to the Applicant's rejoinder, which expanded the scope of the application in the internal appeals, were briefly addressed by the JAB. Consequently, it would not be possible to consider such analysis as complete enough to exhaust the internal appeal procedures. Although previous case-law[55] indicated that article VII (1) should be interpreted with some flexibility, the Tribunal pointed out that "these procedures demand more than the mere consideration of the issue at a late stage in the internal appeal process".

The Tribunal then reached the conclusion that the Applicant was provided with the documents he was entitled to see and he was unable to show sufficient evidence to support the opposite argument. However, it noted that there was no reason why the UNIDO did not provide the said documents at the Applicant's first request. For this reason, the Tribunal awarded the Applicant modest moral damages in an amount equal to EUR 2,000 and EUR 1,000 in attorney's fees. The complaint was otherwise dismissed.

13. Judgment No. 3225 (4 July 2013): S.N. v. *World Intellectual Property Organization (WIPO)*[56]

Conversion of short-term contracts into fixed-term contracts—Rights of short-term employees to impugn a decision before the Tribunal—The Tribunal has competence over cases involving misuse of the rules govern-

[55] Judgment No. 2360 (14 July 2004); and Judgment No. 2457 (6 July 2005).

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

ING SHORT-TERM CONTRACTS—TIME-LIMIT TO FILE AN APPLICATION WITH THE TRIBUNAL—A LONG SUCCESSION OF SHORT-TERM CONTRACTS GIVES RISE TO A LEGAL RELATIONSHIP EQUIVALENT TO THAT ON WHICH PERMANENT STAFF MEMBERS MAY RELY ON

The Applicant was hired by the World Intellectual Property Organization ("WIPO") in 1999 at grade G-2. She served the Organization for many years under a series of short-term contracts, being promoted up to the G-4 grade. In August 2010, she sent a letter to the Director General asking for a retroactive conversion of her contracts into fixed-term contracts. Following the rejection of this request on 25 November 2010, she filed a complaint before the Appeal Board on 21 January 2011 and then she challenged the decision before the Tribunal on 19 February 2011.

In parallel, on 4 February 2011, she signed another short-term contract which she asked to be converted a few days later. On 16 May 2011, the Director-General informed the Applicant that her contract—together with those of 50 other short-term employees—had been brought in line with that of staff members and she would be placed in grade G-5 as from 1 June 2011. Since she sought the award of a G-5 grade, the Tribunal initially found that on this point the complaint had become moot.

Before turning to the merits of the case, the Tribunal analysed the WIPO's observations relating to the receivability of the claim. First, the Organization contended that the Tribunal lacked competence because the Applicant was not a staff member under the Staff Rules and Regulations and also because the complaint concerned a general WIPO policy regarding staff members' contracts. Second, the complaint was time-barred because it took more than one year (starting from the date of the notification of the contract for the period from 15 February to 31 December 2010) for the submittal of the application, while the time-limit was ninety days. Third, the Applicant breached article 6, paragraph 1, of the Rules of the Tribunal insofar as she did not file her submissions at the same time she lodged the complaint.

The Tribunal noted that, as a short-term employee of WIPO, the Applicant undeniably had a right to impugn the decision as clearly recognised by its case-law.[57] It also affirmed its competence over the case (pursuant to article II, paragraph 5, of its Statute) insofar as the Organization had committed an error of law and had misused the rules governing short-term contracts. The Tribunal also determined that the complaint was filed within the time limit specified in article VII, paragraph 2, of its Statute, although the Applicant did not attach the required supporting evidence. The correction of the complaint was made within the time limit set by the Registrar of the Tribunal as set forth in paragraph 2 of article VII.

On the merits of the case, the Tribunal applied the conclusions of its previous case-law,[58] finding that a long succession of short-term contracts had given rise to a legal relationship between the complainant and the Organization equivalent to that on which permanent staff members might rely on. In the instant case, the Applicant was given short term contracts, without any significant break, for a period of 13 years. Accordingly, it set aside the impugned decision and ordered WIPO to reclassify the Applicant's employment relationship as if she had received a fixed-term contract as from the date on which her second contract took effect , namely 14 May 1999. It awarded compensation in the amount

[57] Judgment No. 3185 (6 February 2013), paragraph 4 of the considerations.

[58] Judgment No. 3090 (8 February 2012), paragraph 7 of the considerations.

of EUR 3,000 for moral injuries due to the Applicant's precarious situation and EUR 3,000 in costs. WIPO was also ordered to examine the Applicant's rights in relation to material injury suffered in relation to any additional salary and financial benefits accrued as from 14 May 1999. Any sums due were to bear interest at the rate of 5 per cent per annum from their due dates until date of payment.

14. Judgment No. 3238 (4 July 2013): M.-J.C., P.D., M.F., C.G. and D.K. v. *Centre for the Development of Enterprise (CDE)*[59]

Abolition of post in case of restructuring—Greater efficiency and budgetary savings as legitimate cause for restructuring—Lack of competence—Duty to find alternative employments before terminating the appointment—Duty to inform staff members about the abolition of the post—Burden of proof—Right to be heard before any unfavourable decision is taken—Material damages for the unlawful removal of the post

The Applicants were recruited between 1978 and 1993 by the Centre for the Development of Industry, which subsequently became the Centre for the Development of Enterprise ("CDE"). By 1 March 2008, their contracts were converted into contracts for an indefinite period of time. On 2 December 2008, as a consequence of the CDE's restructuring, they were informed by the Director of the CDE about the abolition of their posts and their subsequent dismissals (following the results of the Executive Board meeting held on the same date), as well as about the compensation and exemptions they were entitled to accordingly.

The Applicants jointly submitted an internal complaint under article 66(2) of the CDE Staff Regulations, which were rejected by the Director ad interim on 26 March 2010. Following the unsuccessful outcome of the conciliation procedure opened under article 67(1), each of the Applicants filed a complaint before the Tribunal. They asked to be reinstated in the CDE or, as a secondary alternative, that the Centre be ordered to pay the total amount of the salary and other financial benefits until they reached the retirement age. Since the complaints were for the most part identical, they were joined to obtain a single judgment.

The Tribunal firstly noted that, even if international organisations were entitled to carry out restructuring when this was required to achieve greater efficiency or undertake budgetary savings,[60] individual decisions must respect all the relevant legal rules, in particular those concerning the fundamental rights of the staff members involved.[61]

The Tribunal then turned to the question of whether the decisions were taken by the competent authority. In compliance with article 3(1) of the CDE Staff Regulations, it emphasized that the Executive Board (the sole responsible authority to approve the termination of the contracts on proposal from the Director) endorsed the list of staff leaving the CDE, as shown by the minutes of the meeting held on 2 December 2009.

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

[60] Judgment No. 2156 (15 July 2002), paragraph 8 of the considerations; and Judgment No. 2510 (1 February 2006), paragraph 10 of the considerations.

[61] Judgment No. 1614 (30 January 1997), paragraph 3 of the considerations; and Judgment No. 2907 (3 February 2010), paragraph 13 of the considerations.

However, in the view of the Tribunal, the fact that the decision was taken during a single meeting supported the Applicants' other plea, namely that the Organization did not undertake all suitable steps to find them alternative employment before termination of their appointments.[62] It also underlined that the CDE did not practically inform all the staff members concerned about its intention to dismiss them.[63] The revised budget proposal for 2009 and explanatory note available at that time were not indeed precise enough either to clearly identify the specific posts to be abolished or to represent a direct communication from the CDE to the Applicants about their dismissals.

In the light of the above, the Tribunal set aside the contested decisions (of 26 March 2010 and of 2 December 2009) and ordered the CDE to reinstate the Applicants as from the date on which their dismissal took effect. The Tribunal noted that, should the CDE consider itself unable to reinstate the complainants in view of its staff complement and budgetary resources, it shall pay them material damages for their unlawful removal from their posts. In this respect, it affirmed that these contracts did not guarantee an appointment until the end of their careers, having regard to the CDE's very difficult financial situation. CDE was nevertheless ordered to pay the Applicants the equivalent of salary and allowances of all kinds which they would have been entitled for a period of five years as of 4 December 2009 or upon reaching retirement age, if earlier, together with contributions to pensions, all with interest at the rate of 5 per cent per annum as from the date on which they fell due until date of payment. It awarded also each Applicant EUR 7,500 for moral damages and EUR 2,000 in attorney's fees.

15. Judgment No. 3239 (4 July 2013): B.G.G. v. *Centre for the Development of Enterprise (CDE)*[64]

Corruption and fraud—Release of information concerning fraudulent practices—Assessment report—Dismissal for unsatisfactory performance—Non-receivability of appeals against final decision—Time bar—Exhaustion of internal appeals—Assessment presupposes information about the objectives—Objectivity of the assessment—Role of the second-level supervisor in the assessment

The Applicant was recruited as a secretary in 1994 by the Centre for the Development of Industry, which later became the Centre for the Development of the Enterprise (CDE). On 1 March 2006, she was appointed Principal Assistant at level 3-A, and subsequently obtained a contract for an indefinite period of time with effect from 1 March 2007. In her duties as a member of the Staff Committee, she forwarded to the European Commission information regarding possible fraudulent practices carried out by the Director of the CDE (Mr. S.) and by the Deputy Director (Mr. C.).

Following inquiries that culminated in two consecutive reports, the European Anti-Fraud Office ("OLAF") concluded that there was proof of a conflict of interest, passive corruption and fraud on the part of Mr. S. (who in the meantime resigned from his post)

[62] Judgment No. 269 (12 April 1976), paragraph 2 of the considerations; Judgment No. 1745 (9 July 1998), paragraph 7 of the considerations; and Judgment No. 2207 (3 February 2003), paragraph 9 of the considerations.

[63] Judgment No. 1082 (29 January 1991), paragraph 18 of the considerations; and Judgment No. 1484 (1 February 1996), paragraph 8 of the considerations.

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

while Mr. C. was discharged from any allegation. In parallel, the Applicant's performance deteriorated considerably (according to the CDE's assessment reports for 2006, 2007 and 2008) to the point that on 25 May 2009 the CDE's Executive Board decided to dismiss the Applicant, as subsequently communicated to her by the Director's letter of 2 December 2009.

After the Director's decision to reject the Applicant's internal complaint and after the unsuccessful outcome of the conciliation procedure provided for in article 67(1) of the CDE's Staff Regulations, on 31 March 2010 the Applicant filed a complaint before the Tribunal. She asked for the decisions of 2 December 2009 and of 31 March 2010 to be set aside, as well as the assessment reports for 2006, 2007 and 2008, while requesting the award of damages and costs.

Concerning the assessment reports, the Tribunal noted that the internal complaint filed by the Applicant contesting the report for 2006 was irreceivable because internal means of redress had not been exhausted as required by article VII of the Statute of the Tribunal, nor did it comply with the time-limit laid down in article 4 of annex IV to the CDE's regulations. However, the Tribunal held that the claim pertaining to the assessment reports for 2007 and 2008 were still receivable because the CDE had failed to correctly notify the Applicant of them. In this regard, the Tribunal specified that the placement of a document in a staff member's file could not be regarded as an act of notification in due and proper form.

On the merits, the Tribunal found that the assessment reports for 2007 and 2008 were unlawful because the CDE did not set the Applicant clear work objectives and because the required objectivity was not guaranteed during the evaluation. On the first point, the Tribunal determined that "a proper assessment of a staff member's professional merit […] presupposes that she or he has been duly informed of the objectives forming the yardstick by which his or her performance will be judged".[65] On the second point, the Tribunal pointed out that the fact that Mr. C. was targeted by OLAF investigations based upon the information provided by the Applicant did not represent an impediment for her to take part in the Applicant's assessment. However, in order to ensure the required objectivity, the competent second-level supervisor should have overseen the two reports in question.[66] Instead, the new Director of the CDE simply signed them, without a genuine review of the draft submitted.

For these reasons, the Tribunal set aside the assessment reports for 2007 and 2008 and the above-mentioned decisions. It acceded to the Applicant's request to receive in compensation a sum equivalent to five years of her last salary allowances and other financial benefits of all kinds which the Applicant would have received had the contract continued, at the same level of emoluments, for the material injury she suffered on the account of the unlawful removal. Having regard to the damage to the Applicant's professional reputation and the humiliating manner by which she was notified of the dismissal, the Tribunal also

[65] Judgment No. 2414 (2 February 2005), paragraph 23 of the considerations; Judgment No. 2990 (2 February 2011), paragraph 3 of the considerations; and Judgment No. 3148 (4 July 2012), paragraph 25 of the considerations.

[66] Judgment No. 320 (21 November 1977), paragraphs 12, 13 and 17 of the considerations; Judgment No. 2917 (8 July 2010), paragraph 9 of the considerations; and Judgment No. 3171 (6 February 2013), paragraph 22 and 23 of the considerations.

awarded her EUR 10,000 in compensation. The Applicant was also entitled to EUR 5,000 in costs. Given that there was nothing on file to support the Applicant's submission that CDE's treatment constituted harassment, the tribunal found that the irregularities occasioned and the other factors relied upon did not constitute harassment and no additional compensation on this basis was awarded.

D. Decisions of the World Bank Administrative Tribunal[67]

1. *Decision No. 473 (13 February 2013): Ramesh Bhatia* v. *International Bank for Reconstruction and Development*[68]

Commencement date to challenge a policy—Tribunal's jurisdiction over a policy that directly affects the employment rights of a staff member—Mandatory enrolment in medical insurance plan for retirees—Allegations of discrimination—Principle of parallelism does not bind international organizations

Once retired from the Bank in 2011, the Applicant enrolled in Medicare Part B under the Retiree Medical Insurance Plan (RMIP). This enrolment became thereafter mandatory for all retirees pursuant to the RMIP reform. Following the refusal of a physician to accept the Applicant as a patient, he challenged the policy of mandatory enrolment before the Tribunal in January 2012 on the grounds that it was discriminatory, arbitrary and inconsistent with the principle of parallelism.[69] After obtaining approval from the Tribunal for a stay of proceedings until the completion of a comprehensive review of the RMIP, the Bank filed preliminary objections arguing that the Applicant failed to file the application within a timely manner (120 days from his enrolment) and that he was contesting a general policy over which the Tribunal lacked jurisdiction.

The Bank raised preliminary objections to the admissibility of the Application, arguing that the Applicant had not filed his application in a timely manner and that he

[67] 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 (IFC), 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 designed or otherwise entitled to receive payment under any provision of the Staff Retirement Plan. For more information on the World Bank Administrative Tribunal and full texts of its decisions, see http://web.worldbank.org/external/default/main?pagePK=7333373&contentMDK=22956391 (accessed on 31 December 2013).

[68] 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.

[69] As laid down in Decision No. 38 (27 October 1987), at paragraph 35, the principle of parallelism "entails a process of consultations with the IMF, a business rationale for any differentiation in benefits and, if that is the case, to consider whether the IMF's decisions should be followed by the [World] Bank". This decision had been subsequently cited in Decision No. 205 (3 February 1999) as well as in the current decision.

was contesting a policy that was "uniformly and equitably" applied to him. The Tribunal dismissed the Bank's preliminary objections, noting that the commencement date to challenge the policy in question began when the Applicant was detrimentally affected by its application. Further, it observed that the complaint was not directed at a general policy of the Bank, but rather against the application of the policy which the Applicant believed violated his rights.

With respect to the merits of the case, the Tribunal recalled that the scope of its review is limited when a policy of this kind is challenged, noting that its role is to examine whether there had been non-observance of the contract of employment or terms of appointment of the Applicant. The Tribunal further recalled that "[s]o long as the Bank's resolution and policy formulation is not arbitrary, discriminatory, improperly motivated or reached without fair procedure, there is no violation of the contract of employment or of the terms of appointment of the staff member".

The Tribunal first examined the Applicant's claim that the policy as applied to him was discriminatory. The Tribunal found that the Bank required all eligible US retirees over the age of 65 to enrol in Medicare, and that there was no discriminatory treatment among retirees in similar situations to the Applicant. The Tribunal also rejected the Applicant's argument that the Bank's policy was inconsistent with the principle of parallelism because enrolment in Medicare Part B was voluntary at the International Monetary Fund ("IMF"). The Tribunal found, citing *Oinas*, Decision No. 391 (2009), paragraph 42, that the principle of parallelism does not bind the Bank to adopt the policies of the IMF or for that matter any other international organization.

Finally, the Tribunal concluded that the application of the challenged policy had not resulted in violation of any guaranteed rights of the Applicant. The Tribunal acknowledged that some retirees in the Applicant's situation might face challenges because of the fact that an increasing number of medical specialists did not accept Medicare patients. The Tribunal noted the Bank's undertaking that it would review its policy of mandatory enrolment if and when "limitations on access to medical specialists become more pervasive." The Tribunal found that this undertaking addressed the Applicant's concerns and should be taken seriously by the Bank. Though the Application was dismissed on the merits, the Tribunal ordered the Bank to contribute to the Applicant's attorneys' fees in the amount of USD 5,000 for the preliminary objections phase of proceedings, in which the Applicant had prevailed.

2. *Decision No. 476 (13 February 2013): CB* v. *International Bank for Reconstruction and Development*[70]

Misconduct—Tribunal's scope of review of a disciplinary case—Reckless failure to observe generally applicable norms of prudent professional conduct—Harassment contributing to a hostile work environment—Definition of harassment does not require hostile or abusive conduct—Abuse of discretion

The Applicant joined the Bank in 1996 as a Consultant. Following a series of promotions, in 2011 he was appointed Country Representative at the level GG. In February 2012,

[70] 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.

he was subject to an investigation by the Office of Ethics and Business Conduct ("EBC") for repeatedly sending unsolicited or unwelcome personal e-mails to a colleague. Based on the EBC investigation, the Vice President of Human Resources ("HRSVP") took the decision to impose disciplinary measures on him for misconduct under staff rule 3.00, paragraph 6.01(*b*) (reckless failure to observe generally applicable norms of prudent professional conduct) and paragraph 6.01(*e*) (harassment contributing to a hostile work environment). The decision, which resulted into a written censure in his personnel file for five years and reassignment to a non-managerial position at the same grade level, was contested by the Applicant before the Tribunal.

The Tribunal observed that its scope of review of disciplinary cases was not limited to a mere determination of whether there had been an abuse of discretion, but rather extended to an examination of (i) the existence of the facts; (ii) whether they legally amounted to misconduct; (iii) whether the sanction imposed was provided for in the law of the Bank; (iv) whether the sanction was not significantly disproportionate to the offence; and (v) whether the requirements of due process were observed.[71] The Tribunal noted that it was undisputed that the Applicant sent his colleague several e-mail messages of a personal nature, pointing out that he had conceded that his conduct amounted to misconduct under staff rule 3.00. It then found that the sanctions imposed by the HRSVP were provided for in the Staff Rules and were not disproportionate to the misconduct of a "reckless failure to observe generally applicable norms of prudent professional conduct". The Tribunal further determined that the Applicant was held to a higher standard due to his managerial position, and the HRSVP's decision to reassign him to a non-managerial position at the same pay grade did not constitute an abuse of discretion. The Tribunal was satisfied that exculpatory factors were taken into consideration in determining the appropriate sanction, and the duration of the censure did not violate the principle of proportionality.

Finally, the Tribunal addressed the Applicant's contentions regarding the definition of harassment. According to the Applicant, to meet the standards of "harassment" or "hostile work environment" there should have been a demonstration that the Applicant's conduct was hostile or abusive, and that it was disruptive or intimidating to the Complainant. The Applicant stressed that the majority of the communications between the Applicant and the Complainant was by e-mail and that the element of intimidation was not present. The Tribunal referred to the World Bank Group Code of Conduct which defined harassment as "any unwelcome verbal or physical behavior that interferes with work or creates an intimidating, hostile, or offensive work environment." In addition, the Code of Conduct provided that "impact—not intent—is the key factor. If conduct is reasonably perceived to be offensive or intimidating—whether or not it was intended to be so—it should be stopped." The Tribunal held that the definition of harassment did not require conduct to be hostile or abusive, while emphasizing that it was possible that attempts to forge a "benign friendship" could constitute harassment if these were unwelcome and had the result of interfering with work or creating an intimidating, hostile or offensive work environment. The Tribunal determined that whether any act or series of acts amounts to harassment depends on the circumstances of each case. The Application was dismissed.

[71] Decision No. 381 (18 March 2008), paragraph 53; Decision No. 207 (14 May 1999), paragraph 17; and Decision No. 142 (19 May 1995), paragraph 32.

3. *Decision No. 478 (3 October 2013): David Tanner* v. *International Bank for Reconstruction and Development*[72]

Termination of employment for abandonment of office—Failure, without acceptable excuse, to perform official duties for a continuous period of time—E-mail correspondence and adequate method of communication—Requirement of a reasonable notice of period—Timeliness of an application

In November 2009, the Applicant was appointed by the Bank on a term contract as a Senior Forensic Accountant. In October 2012, he was notified by the Bank of the decision to terminate the employment for abandonment of office pursuant to staff rule 7.01, paragraph 9.02, since he failed to resume his duties in Washington, D.C., as requested. Against this decision, the Applicant filed his complaint before the Tribunal on 1 November 2012, seeking, *inter alia*, the remainder of the income for his term contract plus Bank contribution for retirement, compensation for the wrongful dismissal and reimbursement of his legal fees. He argued that this wrongful dismissal was the culmination of a series of unjustified actions by the Bank. The Bank responded that its decision to terminate the Applicant's employment for abandonment of office was proper and not an abuse of discretion.

The Tribunal held that it was satisfied the Bank complied with the procedures in staff rule 7.01. It observed that following the decision to terminate the Applicant's Telecommuting Arrangement, he was provided with ample notice that his refusal to return to his duty station in Washington, D.C. would be treated as abandonment of office. Addressing the adequacy of e-mail correspondence as a means of providing the requisite notice, the Tribunal held that e-mail was undoubtedly the routine and familiar form of communication between the Applicant and his manager, and one which the Applicant utilized on a regular basis in the course of his employment at the Bank. It was through e-mail that the Applicant provided his supervisor with notice of his decision not to return to Washington, D.C., and his willingness to consider a mutually agreed separation. The Tribunal found that the e-mail messages from the Applicant's manager warning him of the adverse implications of his failure to resume his duties in Washington, D.C. constituted adequate notice that the employment contract would be terminated on the grounds of abandonment of office.

The Tribunal further held that the Applicant failed, without excuse acceptable to his manager, to make himself available to perform official duties for a continuous period of 20 working days. The Tribunal noted that while staff rule 7.01 provided no express notice period, the Bank respected the Applicant's right to receive the notice within a reasonable period before the termination of the employment. The Tribunal further observed that while the Applicant argued that he was always available to perform his official duties, it was insufficient for him to state that he could have performed his duties in Auckland, New Zealand. That option was not available to him once the Telecommuting Agreement was terminated. The Applicant raised other grievances which the Tribunal ruled to be inadmissible as they were not filed in a timely manner. The Tribunal reiterated the importance

[72] 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, Ahmed El-Kosheri, Andrew Burgess and Abdul G. Koroma.

of staff filing applications in a timely manner and exhausting internal remedies prior to seeking recourse at the Tribunal.

Finally the Tribunal addressed the Applicant's contention that the Bank exercised its discretion in a prejudicial manner by withholding his Overall Performance Evaluation ("OPE") and Salary Review Increase ("SRI") pending completion of a review into his conduct by the Office of Ethics and Business Conduct. The Tribunal observed that the Applicant failed to discharge his burden of proof and did not demonstrate how the Bank's decisions were arbitrary, discriminatory, improperly motivated, carried out in violation of a fair and reasonable procedure or lacked an observable and reasonable basis. The Tribunal held that while a decision to delay completion of a staff member's OPE and withhold his SRI was never one which should be taken lightly, there was no abuse of process in the circumstances of this case. The Applicant's manager provided an observable and reasonable basis for these decisions. The application was dismissed.

4. Decision No. 484 (3 October 2013): Daniel Lecuona v. *International Bank for Reconstruction and Development*[73]

Requirements prior to approving spousal support claims on staff member's pension—Section 5.1(c) of the Staff Retirement Plan—Effect of national court orders—Finality of national court order creating an immediate legal obligation

After having retired from the Bank in 1987, the Applicant separated from his spouse under Argentinian law on the basis of a September 2000 Court Order. After unsuccessful motions to collect the spousal support payments, the Applicant's wife requested the Bank to deduct the pertinent amount from the Applicant's monthly pension and pay it directly to her. Pursuant to section 5.1(*c*) of the Staff Retirement Plan ("SRP" or "Plan"), the Pension Benefits Administrator ("PBA") demands evidence of two requirements prior to approval of the claim: (i) the legal separation or divorce of the parties; and (ii) a legal obligation of the participant or retired participant to pay spousal support from his or her pension benefits under the SRP. Endorsing the PBA's decision, the Pension Benefits Administration Committee ("PBAC") decided that section 5.1(*c*) of the SRP had been satisfied and quantified the deduction of spousal support payments as USD 1500 from the Applicant's monthly pension.

The Applicant first contended that section 5.1(*c*) required a formal decree of legal separation applying the right provisions of a country's domestic law, and that a court order that merely directed the couple to live in separate domiciles was insufficient. The Tribunal rejected such a rigid and formalistic approach. The Tribunal observed that the Pension Benefits Administrator needs only to determine whether a 'decree of legal separation' or its functional equivalent had been presented for the purposes of section 5.1(*c*). If the Administrator has a reasonable and objective basis to conclude that the decree at issue meets the terms of section 5.1(*c*), the Tribunal would not set aside such a finding. The Tribunal concluded that "it was not unreasonable for the Administrator and PBAC to conclude that a court order that establishes the separation of a couple that has endured for

[73] 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, Ahmed El-Kosheri, Andrew Burgess and Abdul G. Koroma.

more than 12 years satisfies the requirement that there be a 'decree of legal separation' for the purposes of section 5(1)(*c*)".

The Applicant also argued that he had filed an appeal against the court orders on which his separated wife relied to demonstrate his legal obligation to pay spousal support. He contended that until the appeal process was complete, the court's orders were not final, and therefore, the requirement of section 5.1(*c*) had not been met. The Tribunal again rejected this argument. The Tribunal noted that the "ordinary meaning or usage of the term 'final' is not necessarily 'non-appealable', and it is not necessarily the case that an order becomes final only after an appeal process is completed." The Tribunal held that this conclusion is reinforced by a purposive interpretation of section 5.1(*c*) and stated that in appropriate cases, in addition to the textual interpretation, the Tribunal may have regard to the object and purpose of the rule.[74]

The Tribunal found that it was reasonable to define the term 'final order' in the sense that it is final in the particular court in which it was pronounced even though the order might be the subject of appeal. The Tribunal further noted that "interpreting 'final order' to mean 'unappealable order' could frustrate the object of section 5.1(*c*) because, in some legal systems, a retiree could delay implementation of a court order by repeatedly filing appeals against it." The Tribunal agreed with PBAC and the Administrator that in this case the court orders at issue were final, despite the appeal, because they were final in the court that issued them and entered into law in the applicable jurisdiction so as to be enforceable and legally binding. The PBAC decision was affirmed and all other pleas were dismissed.

E. Decisions of the Administrative Tribunal of the International Monetary Fund[75]

1. *Judgment No. 2013–2 (13 March 2013): Mr. B. Tosko Bello* v. *International Monetary Fund*[76]

Policy against re-hiring of former staff members who voluntarily separated under a downsizing exercise—Meaning of a regulatory decision—Time limit to challenge a regulatory decision—Extent of the employer discretionary authority—Value of the individual decision taken on the basis of a void regulatory decision—Rescission of policy—Rescission of individual decision—Compensation

The Applicant began his employment with the International Monetary Fund ("IMF") on 1 March 2001. Following his successful request to volunteer for separation under the

[74] Decision No. 242 (26 April 2001), paragraph 23.

[75] 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/ (accessed on 31 December 2013).

[76] Ms. Catherine M. O'Regan, President, Ms. Edith Brown Wiess and Mr. Fancisco Orrego Vicuña, Judges.

2008 Fund-wide downsizing exercise, on 1 January 2012 he inquired to the Director of the Fund's Human Resources Department ("HRD") about his eligibility to compete for a contractual position in the IMF. On 12 January 2012, the Director informed the Applicant that he was ineligible for that position, in application of the Fund's policy against the re-hiring of former staff members who had separated voluntarily under the terms of the said exercise. On 12 January 2012, the Applicant filed a complaint with the Tribunal, seeking as relief rescission of the policy against re-hiring, rescission of the Director's decision, and monetary compensation in the amount of one-year's salary.

In considering whether the Applicant challenged a "regulatory decision" within the meaning of article II of the Statute, the Tribunal took note of its jurisprudence[77] indicating that the limited circulation of a decision may be relevant to that question. The Tribunal concluded that the lack of formal announcement of the re-hiring ban, however, did not preclude the Applicant's challenge to it as a "regulatory decision", given that the decision was "taken at the highest levels of Fund Management", that it was communicated to Senior Personnel Managers ("SPMs") within the Fund's departments, and that it reversed a policy that itself had been widely communicated to staff *via* the Exploring Your Options (EYO) intranet website.

The Tribunal next considered how the lack of general announcement of the decision affected the interpretation of the statutory provision that a "regulatory decision" may be contested directly within three months of the later of its "announcement or effective date". The Tribunal determined that the restricted manner in which the IMF communicated the re-hiring ban could not be permitted to shield that "regulatory decision" from direct challenge before the Tribunal within three months of its notification to the Applicant. "To conclude otherwise", held the Tribunal, "would be to create an incentive for the Fund to withhold the prompt circulation of regulatory decisions, a practice that is consistent neither with sound human resources practices nor with the responsibility of this Tribunal to determine whether a decision transgressed the applicable law of the Fund." Accordingly, in the unusual circumstances of the case, the "individual decision" of the HRD Director was functionally equivalent to the "announcement" (within the meaning of article VI, section 2) to the Applicant of the regulatory decision upon which that individual decision was based. Thus, the Tribunal reached the conclusion that the Applicant had challenged directly the "regulatory decision" and not only in the context of contesting the "individual decision".

Turning to the merits of the dispute, the Tribunal was of the view that the IMF's website communication that there was no rule barring the future re-employment of the said staff members had constrained its discretionary authority to adopt a policy reversing the contents of such information. Accordingly, that advice was deemed part of the "ensemble" of the Applicant's conditions of separation from the Fund. Accordingly, the Tribunal annulled the regulatory decision in question and considered null and void the "individual decision" of January 12, 2012, based upon it. It also awarded the Applicant USD 20,000 in moral damages for the intangible injury he incurred in being wrongfully denied the opportunity to compete for the contractual vacancy in his former department. The Tribunal

[77] Judgment No. 1996–1 (2 April 1996): *Mr. M. D'Aoust* v. *International Monetary Fund*; Judgment No. 2004–1 (10 December 2004): *Mr. "R" (No. 2)* v. *International Monetary Fund*; and Judgment No. 2008–1 (7 January 2008): *Mr. M. D'Aoust (No. 3)* v. *International Monetary Fund*.

also decided that the Applicant was entitled to USD 16,281 for the reasonable costs of his legal representation.

2. *Judgment No. 2013–4 (9 October 2013): Mr. "HH"* v. *International Monetary Fund*[78]

Request for anonymity—Conversion of a fixed-term appointment into an open-ended appointment—Abuse of discretionary power—Managerial discretion to evaluate staff performance—Legitimate expectations before the decision on conversion—Violation of the IMF internal rules—Value of the consent to transfer—Compensable harms as a result of a decision to transfer—Rescission of the non-conversion decision

On 1 October 2007, the Applicant was appointed by the International Monetary Fund ("IMF") on a three-year fixed term appointment at Grade B2 in "Department 1". In order to reverse the results of the evaluation made on his job competencies and to obtain the conversion of his contract into an open-ended status, he was transferred on his request to "Department 2" under the same contractual terms. In anticipation of the decision to convert, by Memorandum of April 2010, the "Department 2" Assistant Director communicated to the Human Resources Department ("HRD") Deputy Director his negative assessment on the Applicant's work performance. Subsequently in April 2010, the Fund's Director took the decision not to convert the Applicant's fixed-term contract to an open-ended status. Following a partial acceptance of the Applicant's request by the Fund's Grievance Committee,[79] on 16 May the Applicant filed a complaint with the Tribunal, asking in particular for the rescission of the non-conversion decision. The Applicant also demanded that his request for anonymity pursuant to Rule XXII be decided in advance of the Tribunal's Judgment on the merits of the application.

As a preliminary matter, the Tribunal concluded that the Applicant had met Rule XXII's requirement of showing "good cause" for anonymity. The Tribunal observed that "useful performance reviews were built on candor on the part of the reviewer" and that if it were not to grant Applicant's anonymity request, the process of performance reviews going forward would be affected by the perceived risk of disclosure in future cases.[80]

Turning to the merits of the Application, the Tribunal held that the Applicant's transfer to a different Fund department during the course of his fixed-term contract, without the renewal of that appointment for another three-year period, violated the Fund's Fixed-Term Monitoring Guidelines (the "Guidelines"). In particular, the Tribunal noted that the fixed-term appointee should remain in the same position and in the same department for the duration of the fixed term, except in those special circumstances specified in the "mobility" provision of the Guidelines when, namely: (i) the transfer is "clearly in the Fund's

[78] Ms. Catherine M. O'Regan, President, Mr. Andrés Rigo Sureda and Mr. Jan Paulsson, Judges.

[79] The Fund's Grievance Committee recommended that Applicant be granted a monetary award and full reimbursement of the costs of his legal representation on the basis that the transfer to Department 2 without the benefit of a new fixed term appointment violated the mobility provision of the Fixed-Term Monitoring Guidelines.

[80] In paragraph 13 of the judgment, the Tribunal affirmed that a case-by-case approach to deciding whether a decision on anonymity should be issued will better allow it to form a principled basis for its decision on anonymity, as "anonymity of applicants remains the exception and not the rule" in the Tribunal's judgments.

interest"; (ii) the staff member and both relevant departments agree; (iii) the staff member is offered a new fixed-term appointment for three years in the position to which he or she is to be transferred; and (iv) the transfer is endorsed by the HRD. Accordingly, in the view of the Tribunal, because those narrow conditions were not met in the instant case, the transfer was not taken in compliance with the Fund's internal law.

In considering whether that inconsistency rendered the non-conversion decision an abuse of discretion, the Tribunal found that the "purpose underlying the decision to offer the Applicant a transfer was not inconsistent with the spirit of the Fixed-Term Monitoring Guidelines, although the transfer was inconsistent with the letter of those Guidelines. The purpose," observed the Tribunal, "was to give the Applicant an opportunity to be supervised by a 'second pair of eyes' in a different department to show that he was able to perform at a level which would result in his conversion to an open-ended appointment." Had the Fund applied its internal law in this case, emphasized the Tribunal, the "Applicant would not have been given a second opportunity to establish his suitability for career employment, and, on the record before the Tribunal, would almost certainly not have had his fixed-term appointment converted to an open-ended appointment." It therefore reached the conclusion that the IMF's choice, with Applicant's acquiescence, to give him a second opportunity by means of his interdepartmental transfer could not be said to be unfair or unreasonable to a point that it vitiated the non-conversion decision. It followed from the foregoing that the application was dismissed.