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UNITED NATIONS JURIDICAL YEARBOOK

2015

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

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

Chapter V

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

A. United Nations Dispute Tribunal

By resolution 70/112 of 14 December 2015, entitled "Administration of justice at the United Nations", the General Assembly took note of the relevant reports of the Secretary-General and other bodies[2] and endorsed the conclusions and recommendations contained in the report of the Advisory Committee on Administrative and Budgetary Questions.[3] The General Assembly decided to extend the three ad litem judge positions for one year, from 1 January to 31 December 2016. It also welcomed the establishment of the panel of experts on the administration of justice and the United Nations and trusted that its recommendations and related comments of the Secretary-General would cover all major aspects of the system. Furthermore, it welcomed the recommendations to address systemic and cross-cutting issues contained in the report of the Secretary-General on the activities of the Office of the United Nations Ombudsman and Mediation Services.[4] Moreover, the General Assembly approved amendments to the statutes of the United Nations Dispute and Appeal Tribunal, proposed by the Secretary-General, and decided to adopt a mechanism for addressing complaints regarding alleged misconduct or incapacity of the judges of the United Nations Dispute Tribunal and the United Nations Appeals Tribunal, which was annexed to the resolution.

In 2015, the United Nations Dispute Tribunal in New York, Geneva and Nairobi issued a total of 126 judgments. Summaries of eight selected judgments as well as one order are reproduced below.[5]

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[1] In view of the large number of judgments which were rendered in 2015 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.

[2] See the reports of the Secretary-General on the administration of justice at the United Nations (A/70/187); on the activities of the Office of the United Nations Ombudsman and Mediation Services (A/70/151); and on amendment to the rules of procedure of the United Nations Appeals Tribunal (A/70/189), as well as the report of the Internal Justice Council on the administration of justice at the United Nations (A/70/188).

[3] A/70/420.

[4] A/70/151.

[5] The summaries provided are for illustrative purposes only and are not authoritative, representative or exhaustive. Some UNDT judgments summarized may have been overturned on appeal by UNAT.

1. *Judgment No. UNDT/2015/048 (11 June 2015): Maiga* v. *Secretary-General of the United Nations*[6]

Non-promotion—Retaliation against a whistle-blower—Interview panel materially tainted—Duties of counsel—Counsel as officer of the court—Counsel to contribute to the fair administration of justice and the promotion of the Rule of Law

The Applicant became the Country Programme Manager (CPM) at the P-4 level in Côte d'Ivoire on 1 April 2010. In 2012, the CPM post was upgraded to the P-5 level and advertised. The Applicant applied and was not selected, resulting in her separation. She contested the decision not to select her for the P-5 job opening and contended that the selection decision was tainted by bias, improper consideration of performance appraisals and procedural error.

Beginning in May 2010, the Applicant reported orally and in writing to the Director and Deputy Director of the West Africa Regional Office (WARO) that another staff member seemed to have been involved in inappropriate transactions with non-governmental organizations (NGOs) that were recipients of United Nations Women funds and had actually recovered such funds from the said NGOs. The Applicant made similar reports to United Nations Women in New York and to the UNDP Office of Audit and Investigations (OAI) which commenced a joint investigation with the United Nations Populations Fund (UNFPA).

The Tribunal considered whether the Applicant was given full and fair consideration and whether there was bias or retaliation against the Applicant in the selection process. The Tribunal found that the interview panel for the reclassified post was materially tainted with regard to the Applicant's application and that there were procedural irregularities in the selection process. Having heard oral testimony, ordered production of the investigation report and considered the parties' written submissions, the Tribunal found that the Applicant's superiors at WARO had tried to cover up WARO's involvement in the irregular handling of project funds. The Tribunal also found that the Applicant had acted properly and ethically in blowing the whistle on the misuse of project funding.

The Tribunal concluded that the Applicant had discharged her burden of proof to show that her non-selection for the upgraded post and subsequent separation from the Organization were motivated by bias, procedural breaches and retaliation for whistleblowing. The Tribunal referred the WARO Director to the Secretary-General for accountability under article 10.8 of its Statute.

The Tribunal also stated that counsel for the Respondent had sought deliberately to mislead the Tribunal by presenting the case as if the OAI investigation report did not exist and, when ordered to produce the report, providing an incomplete report. The Tribunal observed that in prosecuting a case, counsel were first and foremost officers of the court. They had at all times to be beyond reproach and should not place themselves in a position where they stood or fell with their clients. The Tribunal cited judgment 2015-UNAT-531 wherein UNAT stated that it was the self-evident duty of all counsel appearing before the Tribunals to contribute to the fair administration of justice and the promotion of the rule of law.[7]

For the full list of judgments by the UNDT and the latest developments, consult the website of the Office of the Administration of Justice at https://www.un.org/en/internaljustice/.

[6] Judge Nkemdilim Izuako (Nairobi).

[7] Judgment No. 2015-UNAT-531 (26 February 2015): *Rangel* v. *Registrar of the International Court of Justice.*

The Tribunal ordered rescission of the contested decision and ordered the Respondent to reinstate the Applicant and deploy her in the next P-5 country representative position available, or a similar post, together with payment of salary at the upgraded P-5 level since the time of her separation. In the alternative, the Applicant was awarded two years net base salary. The Applicant was also awarded a total of 6 months net base salary as compensation for the substantive and procedural irregularities occasioned by the failure of the Administration to follow its own guidelines, rules and procedures.

2. *Judgment No. UNDT/2015/066 (24 July 2015): Laca Diaz* v. *Secretary-General of the United Nations*[8]

Compensation for permanent loss of function as a result of service-incurred injury—Compensation to be based on pensionable remuneration scales in effect on the date of maximum medical improvement, rather than date of injury—Duty of counsel to file precise pleadings and annexes.

The Applicant contested the decision, based on a recommendation of the Advisory Board on Compensation Claims, to award him compensation for permanent loss of function based on pensionable remuneration scales in effect at the date of a service-incurred injury in October 1991. He submitted that compensation should be computed based on pensionable remuneration scales in effect at the date of payment and no later than the date of maximum medical improvement (MMI) in July 2012, rather than the date of the injury.

After the Applicant and the Respondent filed a joint statement of facts in the early stages of the proceedings, the Applicant filed a motion for summary judgment, which the Tribunal denied. While claims normally had to be filed within four months from an injury, the Tribunal considered that the Applicant's case was exceptional and was accepted by the Secretary-General over two decades after the injury.

The Tribunal examined Appendix D (Rules governing compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of the United Nations) to the Staff Rules. It considered that article 11.3(*c*), which sets out a schedule of awards for lump sum compensation for service-incurred injury or illness, is ambiguous in its reference to "twice the annual amount of the pensionable remuneration at grade P-4, step V". The Tribunal noted that pensionable remuneration scales are adjusted regularly and there is no explicit statement or guidance in Appendix D to indicate the relevant or operative date for assessing the pensionable remuneration at grade P-4, step V in any given case.

The Tribunal further noted that article 11.3 of Appendix D required an assessment of the permanent loss of function as a percentage of the function of the whole individual. The parties agreed that these determinations—*i.e.* whether the loss of function was permanent and, if so, what percentage of the whole individual was affected—could only be carried out when the staff member had reached MMI. MMI was the point at which an injured worker's medical condition had stabilized and further improvement was unlikely, even with continued medical treatment or rehabilitation. Assessment of the date of MMI was a medical determination.

[8] Judge Ebrahim-Carstens, New York.

Having considered the legislative history of Appendix D, principles of statutory interpretation, and other legal and policy issues, the Tribunal found that, given the facts of the case, the logical and reasonable conclusion was that compensation should be calculated based on the pensionable remuneration scales in effect at the date of MMI, at which point the Applicant's claim had crystallized and he was entitled to payment.

The Tribunal ordered the Respondent to pay to the Applicant the difference between the compensation already paid and the amount to which he was entitled under pensionable remuneration scales in effect at the date of MMI, plus interest on this amount at the US prime rate from the date of MMI to the date the difference amount was paid, and interest on an amount of USD 1,494.80 already paid on the difference between the 1 July and 1 November 1990 pay scales for staff at the P-4 step V level.

The Tribunal also stated that it was the professional and ethical duty of counsel to assist the Tribunal by filing precise pleadings and annexes.

3. *Judgment No. UNDT/2015/089 (24 September 2015): Al Abani* v. *Secretary-General of the United Nations*[9]

Determination of personal status by reference to the laws of the country in which the status was established—Non-retroactivity of dependency benefits—Right to enter into marriage to be distinguished from its recognition by the Organization

The Applicant contested the decision to deny him dependency benefits for his wife and stepdaughter retroactively to the date of his marriage. The Applicant was a Lebanese national and had married a Malaysian national in a religious ceremony in Vienna on 22 June 2007. The Islamic Association of Vienna had issued the marriage certificate, which did not refer to any domestic law. Malaysian authorities registered and recognized the certificate. In line with ST/SGB/2004/13, which provided that the personal status of staff members for the purpose of entitlements was determined by reference to the law of nationality of the concerned staff member, the Organization requested confirmation from the Lebanese Permanent Mission to the United Nations in Vienna whether Lebanon recognized the marriage. The Mission initially declined, since only civil marriages contracted elsewhere could be registered in Lebanon. Subsequently, the Mission advised that, to be registered in Lebanon, the marriage had to be confirmed by the competent Lebanese Islamic Authorities. The Lebanese Permanent Mission did not respond to the United Nations Office on Drugs and Crime's (UNODC) subsequent request for verification of whether confirmation had been sought from the Islamic Authorities. UNODC also asked the Office of Human Resources Management for an exception from ST/SGB/2014/13 by considering the Applicant's partner as a spouse under her domestic law, but this was not granted. The Applicant subsequently requested management evaluation of "the decision not to recognize his marital status for the purpose of United Nations entitlements."

In the Tribunal's view, the management evaluation request was appropriately rejected given the lack of response by the Lebanese authorities, since no final decision had been made by the Administration on the Applicant's personal status.

In June 2014, ST/SGB/2004/13 was revised to determine staff members' personal status by reference to the domestic law of the competent authority under which the personal

[9] Judge Rowan Downing (Geneva).

status had been established. As a result, the Applicant's personal status was changed by the Organization to "married and related" and he was granted dependency benefits for his wife and stepdaughter as of the date of the decision, based on the recognition of the marriage by Malaysia.

However, the Applicant was not granted dependency benefits retroactive to 22 June 2007, a decision which he contested. The Applicant asserted that the Organization had violated his human rights by using discriminatory national laws to deny him benefits. The Tribunal noted that it had no jurisdiction to deal with potential breaches of the Universal Declaration of Human Rights by the legislation of a sovereign Member State. Therefore, it could not verify whether a domestic law was in fact discriminatory. The Tribunal noted that the United Nations Appeals Tribunal had confirmed the validity of the Organization's choice to refer to the staff member's domestic law as a way to respect the various cultural and religious sensibilities. This did not violate any higher norms in the Organization's legislation. The Applicant could have contracted a civil marriage in Austria and have it recognized in Lebanon; it was his responsibility to be informed of the Organization's internal rules and organize his affairs accordingly. He had not been precluded from marrying his wife; the right to enter into a marriage had to be distinguished from its recognition by the Organization.

According to the general principle of law against retrospective application of laws, and since the Applicant's religious marriage as well as the failure by the Lebanese authorities to recognise it occurred before the revised bulletin was promulgated, it was legally correct not to apply the latter. In the result, the Tribunal rejected the application.

4. *Judgment No. UNDT/2015/110 (11 November 2015): Nguyen-Kropp and Postica* v. *Secretary-General of the United Nations*[10]

Decision of the Ethics Office on retaliation claims constitutes *de facto* final decision of the Organization—Independence of Ethics Office—Ethics Office decisions not final administrative decisions according to Appeals Tribunal—Binding force of Appeals Tribunal decisions—Reference to the Secretary-General for further consideration—Retaliation policy should clearly state that Ethics Office determinations are not subject to judicial review

Two investigators from the Office of Internal Oversight Services had filed applications contesting: (*a*) the Ethics' Office's determination that retaliation against them had not been established; (*b*) the expertise, selection process and terms of reference of an alternative investigating panel ("AIP") set up by the Ethics Office to investigate their complaints of retaliation; and (*c*) the decision not to provide the Applicants with a copy of the full AIP report or reasonably specific information as to the AIP's findings on each of their allegations.

Both Applicants requested the redaction of their names from the published judgment. The Tribunal rejected this request.

The Applicants had not filed requests for management evaluation as the Management Evaluation Unit had informed them that the acts they wished to challenge were outside the scope of management evaluation and they could directly submit a request for review to the Tribunal. With regard to the decisions of the Ethics Office, the Respondent submitted that the Ethics Office was independent from the Secretary-General and, accordingly,

[10] Judge Goolam Meeran (New York).

its actions or omissions could not be attributed to the Organization and did not constitute administrative decisions. The Respondent relied in particular on the judgment of the United Nations Appeals Tribunal ("UNAT") majority in *Wasserstrom,*[11] in which the majority had held that acts of the Ethics Office were not subject to judicial review.

The Tribunal considered it difficult to reconcile the finding of UNAT in *Wasserstrom* that the Ethics Office was limited to making recommendations to the Administration with the nature of the independent assessment and conclusion reached by the Office in these cases. The Tribunal also considered the Ethics Office's decision-making powers accorded under sections 5.2(*c*) and 5.8 of ST/SGB/2005/21, and the Organization's own reference to the Ethics Office making "final determination[s]" on the website of the Ethics Office. It held that the Ethics Office was not limited to making recommendations to the Administration, but that it also had a decision-making role in that it made the final determination regarding the occurrence of retaliation. In such cases, in the view of the Tribunal, its determination amounted to making a final administrative decision affecting the rights of the Applicants under their terms of appointment and contract of employment, and which was binding on the Administration in that it was the Organization's final decision on the matter.

The Tribunal noted, however, that as a first instance tribunal it was bound by the decisions of UNAT. Given the UNAT jurisprudence in *Wasserstrom* and *Nartey,*[12] the Tribunal decided that the matters contested in the applications were not administrative decisions subject to judicial review. In the end, the Tribunal, after much hesitation, dismissed the applications as not receivable.

The Tribunal appended a section with observations to the judgment, in which the Tribunal referred the issues raised in its judgment to the Secretary-General for further consideration. The Tribunal reiterated that if a final decision by the Ethics Office determining that retaliation had not occurred in a particular case was to remain immune from judicial review and scrutiny, the United Nations' policy on retaliation should clearly state this. The Tribunal invited Member States and the Secretary-General to make their intentions clear in this regard in considering any amendments to ST/SGB/2005/21.

5. *Judgment No. UNDT/2015/116 (17 December 2015): Sutherland, Reid, Marcussen Goy, Jarvis, Baig, Edgerton and Nicholls* v. *Secretary-General of the United Nations*[13]

Non-conversion of fixed appointment into permanent appointments—Distinction between eligibility and suitability for permanent appointment—Interest of the Organization an ancillary consideration in suitability determination—Retroactive conversion decisions not to take into account new circumstances—No meaningful individual consideration—Limitation of service of fixed term appointment no obstacle to permanent appointments—Finite mandate cannot be the exclusive ground for non-conversion

[11] Judgment No. 2014-UNAT-457 (27 June 2014): *Wasserstrom* v. *Secretary-General of the United Nations.*

[12] Judgment No. 2015-UNAT-544 (2 July 2015): *Nartey* v. *Secretary-General of the United Nations.*

[13] Judge Thomas Laker (Geneva).

DECISIONS—AMENDMENTS TO TRIBUNAL STATUTES APPLY FROM THE MOMENT OF THEIR PUBLICATION, RATHER THAN THEIR ADOPTION BY THE GENERAL ASSEMBLY—MORAL DAMAGES

Eight staff members and former staff members of the International Criminal Tribunal for the former Yugoslavia ("ICTY") contested decisions made by the Assistant-Secretary-General for Human Resources Management ("ASG/OHRM") denying them conversion of their respective fixed-term appointments into permanent appointments. The Applicants requested that they receive retroactive permanent appointments or, in the alternative, compensation calculated on the basis of termination indemnity applicable to a permanent appointment in the Applicants' cases, and moral damages in the sum of EUR 27,000 each.

The contested decisions arose from a re-consideration exercise ordered by the United Nations Appeals Tribunal ("UNAT") in its judgment in *Baig et al.*.[14] In that judgment, UNAT rescinded the non-conversion decisions issued in an initial round of a one-time Secretariat-wide review for conversion to permanent appointment and gave specific directions for the re-considerations of the decisions. Following the judgment, the ASG/OHRM took fresh decisions with regard to all Applicants.

The Tribunal noted that its task was to ascertain whether the impugned decisions were made in conformity with the directions given by UNAT. It also found that OHRM was competent to review the Applicants' candidature for conversion, even though that office had not been specifically delegated the task.

The Tribunal analysed ST/SGB/2009/10 (Consideration for conversion to permanent appointment of staff members of the Secretariat eligible to be considered by 30 June 2009) and found that it distinguished between eligibility and suitability for a permanent appointment. To be eligible, a staff member had to have completed five years of continuous service on fixed term appointments before the age of 53. Suitability depended on the qualifications, performance and conduct of staff members, together with their demonstrated ability to meet the highest standards of efficiency, competence and integrity. The Tribunal further stated that in considering conversion, the interest of the Organization was a legitimate, but ancillary consideration, when assessing suitability.

It also opined that to meet UNAT's direction to afford the Applicants retroactive consideration, it was not sufficient to implement retrospectively the decisions resulting from the re-consideration exercise. The exercise should have appraised the circumstances as they stood at the time of the first impugned refusal to convert the appointments, and not take into account new circumstances that were only known when the new decisions had been reached.

The Tribunal held that the Administration, contrary to the instructions by UNAT had considered the eligibility of the Applicants for conversion to a permanent appointment, rather than their suitability. Moreover, the Tribunal found that the Applicants had not been afforded meaningful individual consideration in light of their proficiencies, qualifications, competencies, conduct and transferable skills.

Rather, the impugned decision had been based on the limitation of the Applicants' appointment to service with the ICTY and the finite nature of the ICTY mandate. With regard to the first issue, the Tribunal held that the limitation of a staff member's fixed term appointment

[14] See Judgment No. 2013-UNAT-357 (17 October 2013): *Baig, Malmström, Jarvis, Goy, Nicholls, Marcussen, Reid, Edgerton, Dygeus, Sutherland* v. *Secretary-General of the United Nations.*

to serve with the ICTY did not require the Administration to limit a permanent appointment in the same way. As a result, it did not see the limitation of service as an obstacle to conversion.

Second, the Tribunal agreed that the Administration had broad discretion in conversion decisions and could validly weigh the operational realities of the ICTY, including its finite mandate, in its consideration thereof. However, UNAT had explicitly indicated that the Administration could not rely exclusively on this circumstance. The Tribunal concluded that, against these instructions, the finite mandate of the ICTY had been the only reason for the contested decision.

For these reasons, the Tribunal ruled that the impugned decisions were unlawful. It rescinded the decisions and remanded them back to the ASG/OHRM for individualized consideration, ordering the Administration to notify the Applications of the final decision within 90 days of the issuance of the judgment.

The Tribunal noted that the applications had been filed after the General Assembly had amended the Tribunal's Statute to exclude moral damages, but before the resolution that promulgated the amendment had been published. In line with the principle of non-retroactivity, the Tribunal found the amendment not applicable to the Applicants. UNAT had already found that moral damages were merited. In considering the quantum, the Tribunal only considered compensation for the harm resulting directly from the decisions under review, not harm suffered prior thereto since the commencement of the conversion process. It awarded each Applicant moral damages in the amount of EUR 3,000.

6. *Judgment No. UNDT/2015/120 (22 December 2015): Nyekan* v. *Secretary-General of the United Nations*[15]

Disciplinary measures—Conduct of investigations—Second investigation of claims found to be unsubstantiated constitutes improper exercise of discretion—Egregious procedural irregularities tainting disciplinary process

The Applicant, a former United Nations High Commissioner for Refugees ("UNHCR") staff member at the D-1 level in Kigali, Rwanda, contested the decision by UNHCR to impose on her the disciplinary measures of a written censure as per staff rule 10.2(*a*)(i) and a fine of one-month net base salary as per staff rule 10.2(*a*)(v) for misconduct. The Applicant alleged that she had been subjected to "double jeopardy" during the investigation process because an Investigation Team was established to investigate the same allegations that an Inspection Mission had found to be unsubstantiated. She also alleged that her due process rights had not been respected during the investigation and subsequent disciplinary processes.

The primary issue was whether the Administration exercised its discretion properly by establishing two investigations to examine the same allegations. The Respondent submitted that the terms of reference and focus of the Inspection Mission and Investigation Team were different.

The Tribunal concluded that the *ad hoc* Inspection Mission, which was established by UNHCR's Inspector General's Office and focused on the overall management of the UNHCR operation in Rwanda and the internal management of the Kigali office, was an

[15] Judge Vinod Boolell (Nairobi).

investigation and a fact-finding exercise as set out in paragraph 1 of ST/AI/371/Amend.1. The Mission concluded that there was an absence of evidence to support any of the allegations made against the Applicant. The Tribunal held that the Respondent's next step should have been to follow the procedure set out in paragraph 2 of ST/AI/371/Amend.1 by forwarding the matter to the Director of Human Resources Management if he believed there was sufficient evidence indicating that the Applicant had engaged in wrongdoing that could amount to misconduct.

Shortly thereafter, UNHCR established an Investigation Team to investigate allegations of harassment and abuse of authority contained in two complaints received by UNHCR with regard to the Applicant. The Team concluded in its report that the Applicant had harassed a number of staff under her supervision and that she had abused her authority based on a number of factors. Subsequently, the Applicant was asked for comments on the allegations and the Investigation Team report and eight months later UNHCR imposed the aforesaid disciplinary measures.

The Tribunal found that it was an improper exercise of discretion by UNHCR to establish a Team to investigate basically the same complaints that had been investigated and reported on by the Inspection Mission. The Tribunal concluded however that to the extent that the Inspection Mission had investigated the same allegations as the Investigation Team and found nothing adverse against the Applicant, there was no "reason to believe" that the Applicant had engaged in unsatisfactory conduct as is required by ST/AI/371/Amend.1.

The Tribunal also concluded that the Investigation Team committed a number of procedural irregularities by failing to inform the Applicant of the precise allegations against her, by putting words in the mouth of witnesses, by asking highly leading questions, by coming to conclusions in the absence of evidence, by failing to provide her with all the documentary evidence, by ignoring the testimony and comments of the Applicant, and by sitting on appeal on the findings of the Inspection Mission to justify their conclusions based on the same set of facts.

The Tribunal held that since the investigation process was flawed, the disciplinary process was tainted. Due to the egregious nature of the procedural irregularities, the Tribunal did not examine whether the facts on which the disciplinary measures were based had been established and whether the established facts legally amounted to misconduct. The Tribunal concluded that the Applicant's due process rights had not been respected and ordered the Respondent to remove the written censure from the Applicant's official status file and to reimburse the fine.

7. Judgment No. UNDT/2015/124 (31 December 2015): Lemonnier v. *Secretary-General of the United Nations*[16]

Receivability—Deadlines for filing requests for management evaluation and applications to Tribunal—Multiple re-filings as manifest abuse of proceedings—Presumption that counsel acts on instruction of applicant—Costs

The Applicant, a former staff member of the United Nations Stabilization Mission in Haiti ("MINUSTAH"), filed five applications relating to two administrative decisions to

[16] Judge Goolam Meeran (New York).

separate him from service and not to select him for position of Chief, Integrated Support Service with MINUSTAH. The Tribunal addressed the applications in one judgment.

With respect to the applications concerning his separation, the Applicant failed to file them within the statutory period of 90 days from the date of expiration of time for a response to his management evaluation request. The Tribunal found, relying on *Neault*,[17] that receipt of a management evaluation response after the expiration of the 90-day period for the filing of an application with the Tribunal did not re-set the 90-day deadline.

With respect to the applications concerning his non-selection, the Tribunal found that the Applicant failed to file a timely management evaluation request of the contested decision and his claims were not receivable. The Tribunal considered alternative dates suggested by the Applicant for the purpose of calculation of the time limits, and found that even if it were to apply those dates his claims would still be time-barred.

The Tribunal concluded that the five applications were not receivable due to the Applicant's failure to comply with the relevant statutory requirements. All five applications were dismissed by the Tribunal.

Considering costs, the Tribunal found that the applications had fundamental procedural flaws which the Applicant attempted to cure by multiple re-filings of the same claims, making concurrent and inconsistent submissions regarding receivability and dates. The Tribunal found that this constituted a manifest abuse of proceedings. The Tribunal found that the Office of Staff Legal Assistance, as counsel of record, was presumed to have acted on the Applicant's instructions, in the absence of any indications to the contrary. The Tribunal further found that, in the absence of power to order costs against a representative, costs were properly ordered against the Applicant and awarded costs in the sum of USD 1,000.

The Tribunal included observations regarding what it considered to be a failure of the Management Evaluation Unit ("MEU") to have due regard to the deadlines for completion of management evaluation responses. The Tribunal observed that the MEU continued to engage in correspondence with staff members having filed management evaluation requests well beyond the prescribed time limits, blurring the lines between formal and informal procedures.

8. *Judgment No. UNDT/2015/125 (31 December 2015): Wilson* v. *Secretary-General of the United Nations*[18]

Staff selection—Exception to rules and policy—Exercise of discretion—Standard for consideration of request for exception—Request to be considered on case-by-case basis—Compensation for loss of chance of promotion

The Applicant, a Senior Investigator at the P-5 level wishing to apply for a D-2 post, contested a decision by the Assistant Secretary-General for Human Resources not to grant him an exception to section 6.1 of ST/AI/2010/3 (Staff selection system), which provides that staff members are "not eligible to apply for positions more than one level higher than their personal grade". The decision stated that making an exception would be prejudicial to the interests of other similarly situated staff members or groups of staff members with

[17] Judgment No. 2013-UNAT-345 (28 June 2013): *Neault* v. *Secretary-General of the United Nations.*

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

respect to positions in the same and other categories advertised across the Secretariat and who did not apply for the posts.

The Tribunal found that although staff rule 12.3(*b*) refers to exceptions to the Staff Rules, the same rule applies to legal instruments of subsidiary nature, including administrative instructions. The Tribunal examined the meaning of the phrase "prejudicial to the interests [of other staff]" in the context of staff rule 12.3(*b*). The Tribunal found that the word "prejudicial" is equivalent to "harmful". The Tribunal further found that the Staff Regulations and Rules use the terms "interest" and "interests" in a broader context as compared to "right" or "rights". The Tribunal concluded that the term "interests" of staff is broader than "rights" of staff, and that the choice of the term "interests" in staff rule 12.3(*b*) was not accidental.

The Tribunal also considered that an exception, by its nature, is a deviation from the rule, as it treats the staff member in whose favour it is being made differently from the rest of staff. To find that an exception is not possible due to the mere fact that it would result in differential treatment of a staff member, in comparison to other staff members, was considered to be a logical fallacy by the Tribunal because it faults the instrument of exception precisely for what it is. The Tribunal found that consideration of a request for an exception is, in and of itself, an administrative decision and every administrative decision entails a reasoned determination after consideration of relevant facts, since there is a duty on institutions to act fairly, transparently and justly in their dealings with staff. Each request for an exception has to be considered on its particular circumstances. To make a proper finding that the granting of an exception would be "prejudicial" (harmful) to the "interests" of other staff, the decision-maker must make a reasoned case-by-case assessment of the circumstances in each particular case, determine identifiable and sufficiently comparable interests of other staff that might be prejudiced by the exception, and make his or her decision bearing in mind the right of staff to have their requests for exception properly considered.

The Tribunal concluded that the Applicant's request was not properly considered in that some irrelevant factors were taken into consideration while some relevant factors were not. In particular, no proper consideration was given to the individual circumstances and attributes that may have warranted a legitimate exception. The Tribunal found that no reasonable explanation was provided to the Applicant as to why the granting of this exception would have been prejudicial to other staff. The Tribunal awarded the Applicant the sum of USD 3,000 as compensation for loss of chance of promotion.

9. Order No. 99 (GVA/2015) (5 May 2015): Kompass v. *Secretary-General of the United Nations*[19]

Request for suspension of action pending management evaluation—Valid delegation of authority—Relationship between OHCHR and UNOG—Standard for placing staff member on administrative leave pending investigation

The Applicant, a Director, Field Operations and Technical Cooperation Division (D-2), Office of the High Commissioner for Human Rights ("OHCHR"), requested suspension of action, pending management evaluation, of the decision taken by the Acting Director-General, United Nations Office at Geneva ("UNOG") to place him on administrative leave

[19] Judge Thomas Laker (Geneva).

with pay pending the outcome of an investigation into allegations of misconduct. The contested decision stated that "[i]n the context of the investigation, it [was] considered to be in the interest of the Organization to place [the Applicant] on administrative leave in order to preserve all evidence and to avoid any interference with the investigation. The reasons for your placement on administrative leave also include an assessment that your redeployment would not be feasible in the current circumstances".

The Tribunal held that there were serious and reasonable doubts that the Director-General, UNOG, had delegated authority to place the Applicant on administrative leave pursuant to staff rule 10.4. Having considered, *inter alia*, section 2 of ST/SGB/2000/4 (Organization of the United Nations Office at Geneva) and the Memorandum of Understanding between UNOG and OHCHR dated 1 June 2010, the Tribunal concluded that it appeared that OHCHR is a mere client of and is administered by UNOG, but is not part of its organizational structure. As such, Geneva-based staff members of OHCHR do not fall under the delegation of authority provided for under annex V of ST/SGB/234/Rev.1 (Administration of the staff regulations and staff rules) to UNOG "with respect of [its] staff". The fact that the Assistant Secretary-General for Human Resources was copied on the contested decision, and that she confirmed by e-mail that it was her understanding that the Director-General of UNOG had the delegated authority to take such decision did not correct the irregularity.

The Tribunal also found that the reasons set out in paragraph 4 of ST/AI/371/Amend.1 (Revised disciplinary measures and procedures) for placing a staff member on administrative leave pending investigation—namely that "the conduct in question might pose a danger to other staff members or to the Organization, or if there is a risk of evidence being destroyed or concealed"—are exhaustive and that there were serious and reasonable doubts that the contested decision was justified by any of these reasons. In particular, the Tribunal held that administrative leave did not serve the purpose of avoiding a risk of evidence being destroyed or concealed as the Applicant did not contest the main facts under investigation, would have had ample opportunity to destroy or conceal evidence prior to being placed on administrative leave given the one-month period taken to place him on leave, and there was no indication that he might have had any intention to do so.

The Tribunal concluded that the contested decision was *prima facie* unlawful and that the criteria of "urgency" and "irreparable damage" were satisfied, and ordered that the decision placing the Applicant on administrative leave be suspended pending management evaluation.

B. Decisions of the United Nations Appeals Tribunal

The United Nations Appeals Tribunal ("UNAT") held its first session in 2015 from 16 to 27 February in New York. It held its second session in Geneva from 22 June to 3 July. Its third session was held in New York from 19 to 30 October. The Appeals Tribunal issued a total of 114 judgments in 2015. The summaries of eleven of those judgments are reproduced below.

1. *Judgment No. 2015-UNAT-496 (26 February 2015): Asariotis* v. *Secretary-General of the United Nations*[20]

Promulgation of rules and procedures for staff selection—Administrative Instruction ST/AI/2010/3 on staff selection system—Legal force of the instruction manual for the hiring manager on the staff selection system—Employees' right to be informed of identity of interview panel in selection exercise

The Respondent was a P-5 level staff member and the Chief of the Policy and Legislation Section of the Trade and Logistics Branch, Division on Technology and Logistics (DTL), when she interviewed for a newly vacant position as the Head of the DTL. She continued to participate in a series of interviews and application procedures for the position, until another candidate was selected. When the Geneva Central Review Board declined to recommend the selected candidate because of flawed selection procedures, the position was re-advertised. The Respondent applied for the position again, and upon being selected for an interview, specifically requested not to be interviewed by the same panel of interviewers. The Human Resources Office declined to change the composition of the panel, which it said was properly constituted, and only responded by adding one Human Resources Officer to sit on the panel *ex officio*. The United Nations Dispute Tribunal ("UNDT") agreed that the Respondent was due the opportunity to contest the panel and awarded her alternative compensation of USD 8,000 for material damages and USD 6,000 for moral damages.

The Appeals Tribunal held that the Respondent's interview process was governed by Section 7.5 of the Administrative Instruction, which does not impose an obligation on the Administration to inform the staff member of the composition of the interview panel before the scheduled interview.[21] Section 7.5 provides only that "shortlisted candidates shall be assessed to determine whether they meet the technical requirements and competencies of the job opening."[22]

To address the UNDT holding that the "*Instruction Manual for the Hiring Manager on the Staff Selection System*" ("the Manual") required the Administration to inform interview candidates of the identities of persons on the interview panel, the Tribunal held that the UNDT was wrong to determine that the Administrative Instruction ST/AI/2010/3 (Staff Selection System) gave the Manual any binding legal force. Despite the recommendations in the Manual regarding hiring procedures, a candidate for an advertised post was not, based on the provisions of Section 9.5 of the Manual alone, entitled to be apprised of the composition of the interview panel prior to the interview. To this point, the Tribunal referenced a previous decision which clarified that "[r]ules, policies or procedures intended for general application may only be established by duly promulgated Secretary-General's bulletins and administrative issuances".[23]

The Appeals Tribunal concluded, however, that by pointing out that she had been previously interviewed for the post and that there were ongoing proceedings before the UNDT with regard to her challenge to a prior selection exercise, the Respondent had put

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[20] Judge Mary Faherty (Presiding), Judge Rosalyn Chapman, and Judge Deborah Thomas-Felix (Geneva).

[21] ST/AI/2010/3.

[22] Judgment No. 2015-UNAT-496, para. 23.

[23] *Charles* v. *Secretary-General of the United Nations*, Judgment No. 2013-UNAT-286, para. 23.

the Administration on notice of the importance she attached to the panel's composition. Under these specific circumstances, the UNDT did not err in concluding that had the Respondent been informed of the composition of the panel, she would have requested the replacement of the panel members and the Administration's failures with regard to the composition and notice of composition of the panel vitiated the entire process. The Appeals Tribunal therefore confirmed the UNDT's award of material damages of USD 8,000 for lack of full and fair consideration and moral damages of USD 6,000 for the distress the Respondent suffered due to the irregularities.

2. *Judgment No. 2015-UNAT-505 (26 February 2015): Benfield-Laporte* v. *Secretary of the United Nations*[24]

Abuse of authority—Procedures for responding to employee complaints—Refusal to conduct a fact-finding investigation—Scope of fact-finding investigation—Reasonable time to respond to employee complaints

The staff member[25] worked as a Personal Assistant/Administrative Assistant for the former Director-General, United Nations Office at Geneva ("UNOG") for many years. After the former Director-General left his post, the staff member continued in the same position for the new Director-General until he informed her on 3 November 2011 that she needed to immediately fill a position at the Staff Development and Learning Section (SDLS), effective 8 November 2011. On 6 June 2012, the staff member filed a complaint alleging abuse of authority on the basis of the manner in which her reassignment came about, but the Assistant Secretary-General for Human Resources Management ("ASG/OHRM") refused to initiate a formal fact-finding investigation. Before making this decision the ASG/OHRM contacted the Director-General responsible for the transfer to request his comments on the matter.

The Appeals Tribunal affirmed the UNDT judgment, which found that the ASG/OHRM did not err in deciding that the staff member's complaint against her former supervisor did not provide sufficient grounds to warrant a formal fact-finding investigation. Indeed, it found that "it is not legally possible to compel the Administration to take disciplinary action."[26] The Appeals Tribunal also emphasized that sections 5.14 and 5.15 of ST/SGB/2008/5 regarding complaints of abuse of authority allows the ASG/OHRM some discretion in how to conduct a review and assessment of a complaint, and that it is "good practice" to hear each party's version of events, as long as there is no risk of undermining the investigation.

The Appeals Tribunal concluded, however, that a period of six months to communicate the decision not to open a formal fact-finding investigation was far from prompt, and affirmed the UNDT's award of compensation in the amount of USD 3,000 for emotional distress and anxiety caused by the six-month delay in deciding the Applicant's complaint. While noting that not every violation of due process rights leads to monetary damages, the Appeals Tribunal found the damages award proper, highlighting the non-punitive nature of the compensation.

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[24] Judge Inés Weinberg de Roca (Presiding), Judge Luis María Simón, and Judge Deborah Thomas-Felix (Geneva).

[25] Designated Respondent/Appellant. The Secretary-General of the United Nations was designated Appellant/Respondent.

[26] *Abboud* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-100, para. 34.

3. *Judgment No. 2015-UNAT-518 (26 February 2015): Oummih* v. *Secretary-General of the United Nations*[27]

Director's discretion to conduct investigation and consult relevant parties—Right of parties to be informed of complaints against them—Establishment of investigation panel—Protocol to hire investigation panel members from within the Organization—Necessity of having properly trained investigation panel members

The Respondent was a P-3 Legal Officer at the Office for Staff Legal Assistance ("OSLA") who had received negative performance reviews and a reprimand by her Chief, which she had challenged with some success. She had filed a complaint with the Deputy Secretary-General against her Chief, as well as against one of her former colleagues at OSLA for, *inter alia*, discrimination and abuse of authority, retaliation through performance appraisals, defamation, and preferential treatment of another staff member.[28] After receiving comments from the persons against whom the Respondent had filed a complaint, the Executive Director of the Office of the Administration of Justice determined that a fact-finding investigation would only take place with regard to some of the allegations made against the Chief of OSLA.

The persons appointed to the fact-finding review panel were not on the relevant roster of the Office of Human Resources Management and had not received internal United Nations training on investigating complaints filed under ST/SGB/2008/5. Although the Respondent complained about this, the investigation went forward with the panel, as constituted. The Executive Director eventually decided, at the behest of the panel, that no further action should be taken regarding the complaint against the Chief. The Respondent filed a claim with the UNDT challenging the decision.

The Appeals Tribunal found that the UNDT erred in determining that the refusal by the Executive Director of the Office of Administration of Justice to open an investigation into all of the allegations of harassment and abuse of authority raised by the Respondent against her supervisor and another former colleague violated ST/SGB/2008/5 ("ST/SGB") (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority). The Appeals Tribunal held that there is a degree of discretion as to how to conduct a review and assessment of a complaint and decide whether to undertake a fact-finding investigation regarding some or all of the allegations. Moreover, the Appeals Tribunal held, contrary to the UNDT finding, that the Executive Director acted in accordance with sections 5.14 and 5.15 of ST/SGB when she asked for comments from the alleged offenders before making the assessment of the claims. This action by the Executive Director did not undermine any part of the investigation, but added transparency to the procedure. In this vein, the Appeals Tribunal emphasized that alleged offenders have to be notified of any complaint against him/her, at least by the beginning of the investigation, if not earlier.

The Appeals Tribunal affirmed the UNDT's conclusion that the Executive Director did not follow the ST/SGB protocol by hiring two consultants from outside the Organization to conduct the investigation. Under the ST/SGB, the responsible official must entrust the fact-finding investigation to a panel of two persons from the department who are trained

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[27] Judge Inés Weinberg de Roca (Presiding), Judge Richard Lussick, and Judge Sophia Adinyira (Geneva).

[28] ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority).

for that purpose or, if that is not possible, appoint two persons from the roster maintained for that purpose by OHRM. The Appeals Tribunal remanded the matter to the Executive Director to establish a new fact-finding panel in accordance with ST/SGB.

The Appeals Tribunal concluded that the Respondent had not experienced any inordinate delay with regard to the handling of her complaint which would merit the award of damages and therefore vacated the UNDT's award of CHF 8,000 in moral damages.

4. *Judgment No. 2015-UNAT-542 (2 July 2015): Nielsen* v. *Secretary-General of the United Nations*[29]

Suitability for summary Judgment—Receivability of premature complaints—Role of the Appeals Tribunal *vis a vis* other administrative processes and/or the UNDT

The Appellant had accepted a one-year temporary appointment to the Procurement Services Branch ("PSB") of the United Nations Population Fund ("UNFPA") in Copenhagen, Denmark. Due to tensions with her colleagues and supervisors, the Appellant was placed on Special Leave with Full Pay ("SLWFP"). During this time, the Appellant's personal e-mail account was also blocked in an effort to prevent her from continuously sending non-work-related e-mails to office colleagues. The Appellant's challenge to her placement on SLWFP was denied. She was later notified that her temporary appointment would not be renewed, and upon expiration of her contract she was separated from UNFPA.

The Appellant continued to apply for other appointments within the United Nations, including for a post with the World Health Organization ("WHO"), which required her to come to the United Nations City building ("UN City") to undergo a written assessment. Upon arrival for the assessment, the Appellant was denied access to the UN City building. She was subsequently assured by the Director of the Department of Human Resources, UNFPA, that if she was invited by another Agency, she would be granted access. However, the WHO told the Appellant that it had decided to deny her access so as to avoid "harbour[ing] unfriendly relations with any other UN agency […] housed in UN City".

The Appellant challenged the blocking of her e-mail account and denial of access to UN City Copenhagen, as well as to her rebuttal process and the UNFPA Rebuttal Policy as such. The Appeals Tribunal agreed with the UNDT that the complaint regarding the Appellant's rebuttal procedures was premature and not receivable. The Appeals Tribunal explained that an application can be considered not receivable when it "fail[s] to identify any appealable decision", meaning that there was no final decision rendered nor was there a reason not to proceed with the rebuttal process.[30] It also emphasized that administrative processes or UNDT proceedings must be allowed to run their proper course before being challenged before the UNDT or the Appeals Tribunal.[31]Moreover, the Appeals Tribunal also held not receivable the challenge to the UNFPA Rebuttal Policy, as it concerned a regulatory framework rather than an administrative decision.

With respect to the restriction of the Appellant's access to her emails and to the UN City Building in Copenhagen, the Appeals Tribunal determined that the contested

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[29] Judge Mary Faherty (Presiding), Judge Luis María Simón, and Judge Deborah Thomas-Felix (Geneva).

[30] *Gehr* v. *Secretary-General of the United Nations*, Judgment No. 2013-UNAT-313, paras. 18–19.

[31] See also *Staedtler* v. *Secretary-General of the United Nations*, Judgment No. 2015-UNAT-560, para. 27.

questions could not have been determined on summary judgment. It held that the UNDT erred when it determined a question of law without assessing the underlying factual matrix. The question of whether the contested decisions were not in compliance with the Appellant's terms of appointment required a factual enquiry, necessitating the Respondent's reply to her specific complaints. The Appeals Tribunal therefore remanded the matter back to the UNDT for a *de novo* consideration on these specific issues.

Overall, the Appeals Tribunal concluded that, except for the procedural issues regarding the UNDT's decision on the blocking issues, the Appellant's claims did not require an appellate judgment based on the criteria in Article 2(1) of the Appeals Tribunal Statute.

5. *Judgment No. 2015-UNAT-555 (2 July 2015): Pedicelli* v. *Secretary-General of the United Nations*[32]

Administrative Instruction ST/AI/1998/9 regarding the System for Classification of Posts—ICSC decisions regarding salary binding on the Organization—Receivability of a challenge to an administrative decision implementing a ICSC decision—Standing—Decision implementing an ICSC decision as an appealable decision as an administrative decision

The Appellant was a G-7 level staff member at the Secretariat of the Convention on Biological Diversity ("SCBD") in Montreal. In March 2010, the International Civil Service Commission ("ICSC") promulgated a new seven-level job classification standard for General Services ("GS") and related categories within the United Nations Common System ("UN Common System"). Subsequently, the SCBD had renumbered staff member posts to align the office with the new system. Due to the restructuring, G-7 level positions, including the Appellants, were renumbered as G-6 level positions, resulting in a reduction of the Appellant's salary. The Appellant challenged the decision and on the grounds that it amounted to a downgrade sought reinstatement to her G-7 level position.

The Appeals Tribunal agreed with the UNDT that the Secretary-General had no discretionary authority not to implement the ICSC's decisions with regard to salary. Indeed, by resolution 67/241 the General Assembly had affirmed that the ICSC decisions are binding on the Organization.[33] To this point, the Appeals Tribunal emphasized that it had upheld several ICSC decisions against challenges, which it determined were not receivable.

However, the Appeals Tribunal considered that certain decisions regarding appointments can be challenged as "administrative decisions" under Article 2(1) of the Statute of the Dispute Tribunal, if there is a "direct impact" on the staff member's contract or terms of appointment.[34] The Appeals Tribunal noted that this was not only a facet of its own jurisprudence, but is also an "undisputed principle of international labour law."[35] Here, because the Appellant's salary was reduced after the renumbering, the Appeals Tribunal found that, contrary to the UNDT ruling, the Appellant was adversely affected by the renumbering.

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[32] Judge Sophia Adinyira (Presiding), Judge Richard Lussick, and Judge Mary Faherty (Nairobi).

[33] A/RES/67/241.

[34] *Andati-Amwayi* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-58, paras. 17–19; see also *Lee* v. *Secretary-General of the United Nations*, Judgment No. 2014-UNAT-481, para. 49.

[35] Judgment No. 2015-UNAT-555, para. 29.

The Appeals Tribunal concluded that because the UNDT failed to consider the Appellant's salary reduction in determining that the Appellant's claims were not receivable, it erred as a matter of fact and as a matter of law. The Appeals Tribunal therefore remanded to the UNDT for *de novo* review.

6. *Judgment No. 2015-UNAT-574 (30 October 2015): Couquet* v. *Secretary-General of the United Nations*[36]

Series 100 employee eligibility for after-service health insurance—Date of recruitment for the purpose of determining eligibility for after-service health insurance—Relationship between Administrative Instruction ST/AI/2007/3 regarding after-service health insurance and staff rule 4.17 regarding staff re-employments versus staff reinstatements

The Respondent had worked as a series 100 staff member under the auspices of the United Nations, first as a Translator with the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and later with the United Nations Assistance to the Khmer Rouge Trials ("UNAKRT"). Both positions were granted on the basis of fixed-term appointments, the first of which was extended a number of times until the Respondent had to resign for personal reasons. The second appointment was also extended a number of times until the Respondent's mandatory retirement from service at age 62. Before completing her post with the UNAKRT on 30 November 2013, the Respondent applied for the after-service health insurance ("ASHI") programme, but was deemed ineligible because she did not meet the programme's 5 or 10-year threshold. The administration agreed that the Respondent had worked a total of 7.2 years, but deemed that, for the purposes of determining eligibility for ASHI, her start date was the first day of her post with UNAKRT, namely 15 October 2009.

The Appeals Tribunal re-emphasized that section 2 of ST/AI/2007/3 sets out the eligibility criteria to receive ASHI which, in the case of a series 100 employee, requires either five[37] or ten[38] years' participation in a contributory health insurance plan in the case of staff members recruited before 1 July 2007. Contrary to the UNDT, the Appeals Tribunal denied that section 2.2 of the same administrative instruction[39] controls the legal question of when a would-be ASHI participants employment began for the purposes of program eligibility. In its view, section 2.2[40] "is limited to defining the meaning of 'participation in a contributory health insurance plan of the United Nations'".[41]

The Appeals Tribunal thus found that the UNDT erred in concluding that the Respondent's eligibility for ASHI should be determined based on the date of her recruitment to the ICTY in October 2006, instead of her appointment to the UNAKRT in October 2009. Under staff rule 4.17 the date of recruitment that is relevant for determining the

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[36] Judge Richard Lussick (Presiding), Judge Rosalyn Chapman, and Judge Luis María Simón (New York).

[37] ST/AI/2007/3, section 2.1(*b*)(ii).

[38] *Ibid.*, section 2.1(*a*)(ii).

[39] ST/AI/2007/3.

[40] *Ibid.*

[41] Judgment No. 2015-UNAT-574, para. 38.

terms of appointment of a former staff member who receives a new appointment after separating from the Organization is the date of the new appointment. In the Respondent's case, her new appointment with UNAKRT was a re-employment under staff rule 4.17 and not a reinstatement. The Respondent's eligibility for ASHI was therefore properly determined by reference to the date of her recruitment to UNAKRT in October 2009.

The Appeals Tribunal concluded that the Respondent's arguments in support of the UNDT judgment were without merit. It refused to hear the Respondent's argument that she was entitled to ASHI as a matter of equitable right since the Respondent had not raised that issue before the UNDT. The Appeals Tribunal determined, for all of the foregoing reasons, that the appeal succeeded.

7. Judgment No. 2015-UNAT-575 (30 October 2015): Gomez v. *United Nations Joint Staff Pension Board*[42]

Base amount deductible for alimony payments—Net versus gross pension benefits—Compulsory and statutory deductions from pension benefits versus voluntary deductions for purposes of determining base for alimony

The Appellant had been a participant in the United Nations Joint Staff Pension Board ("UNJSPF") as a staff member of the International Atomic Energy Agency ("IAEA"). The Appellant and his former spouse had signed a divorce notary deed which stated that the Appellant would pay 50 per cent of his net base pension to his spouse after he retired.

The Appellant had requested UNJSPF to deduct his After Service Health Insurance ("ASHI") premium in the calculation of his net base pension. UNJSPF determined that the ASHI was unrelated to the Appellant's benefits under the Fund's Regulations and Administrative rules and could not be considered when determining the net base pension. The Appellant had requested a review by UNJSPF's Standing Committee, which had upheld the decision.

The Appeals Tribunal noted that gross pension was the full pension before deductions, while the net base pension, was the "sum which is left after compulsory/statutory deductions."[43] The Appeals Tribunal found that the ASHI premium did not constitute a compulsory or statutory deduction, but was a voluntary payment. It held that adjusting the base for the alimony payment on the basis of the ASHI premium would effectively make former spouse contribute to the ASHI. The Appeals Tribunal upheld the decision of the Standing Committee and dismissed the appeal.

[42] Judge Deborah Thomas-Felix (Presiding), Judge Mary Faherty, Judge Richard Lussick.

[43] Judgment No. 2015-UNAT-575, para. 22.

8. *Judgment No. 2015-UNAT-576 (30 October 2015): Harrich* v. *Secretary-General*[44]

Receivability *ratione materiae* and *ratione temporis*—Abuse of process—Impact of application for correction of judgment on time limit to appeal judgment on merits—Extension or waiver of time limit to appeal only in exceptional circumstances

The Appellant was a staff member of the Preparatory Commission for the Comprehensive Nuclear Test Ban Treaty Organization ("CTBTO") in Vienna, Austria. He had filed an application with the UNDT concerning an administrative decision not to grant him a repatriation grant and a lump sum shipping allowance upon his separation from the Executive Office, Office for the Coordination of Humanitarian Affairs ("OCHA"). The Appellant further requested compensation for moral damages. The UNDT determined that the application was receivable *ratione temporis*, but declared the Appellant's claims without merit and dismissed the application.

The Appellant had filed, among others, two motions for correction of judgment in an effort to re-litigate the same issues already adjudicated by the UNDT. Appellant then brought an appeal against the UNDT judgment, and later filed a motion to submit an amended appeal brief as well as an unsolicited reply to the Secretary-General's answer to his appeal, which additional pleading for which he did not request or receive permission. The Secretary-General objected to the filing of this additional pleading.

The Appeals Tribunal permitted the reply. It found that the Appellant satisfied the standard set by article 31(3) of the Rules, section II.A.3 of Practice Direction No. 1, as well as the Tribunal's jurisprudence. Since the Appellant's appeal brief only discussed the merits of his claim, while the Secretary-General's answer addressed receivability issues, the reply offered the only chance to the Appellant to address this key issue.

Nonetheless, The Appeals Tribunal rejected the appeal as not receivable *ratione temporis*. Per article 7(1)(*c*) of the Statute and General Assembly resolution 66/237, appeals must be filed within 60 days of receipt of the UNDT judgment. The Appeals Tribunal held that the language of article 7(1)(*c*) is unambiguous, and clearly does not provide for the Applicant's argument that the 60-day period began at the filing of his second motion for correction of judgment. The Appeals Tribunal did acknowledge the right to waive or extend the period in exceptional circumstances, but held that no such circumstances existed here; and, in any case, that a motion for such waiver or extension would have had to be made before the appeal was filed.[45] The Appellant had not followed this procedure.

The Appeals Tribunal further held that the appeal was not receivable *ratione materiae*. In Gehr, the Appeals Tribunal held that an appeal of a UNDT judgment denying a post-judgment application for interpretation of a UNDT judgment is not receivable[46] because an "interpretation of a judgment 'is not a fresh decision or judgment'".[47] The Appeals Tribunal considered that

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[44] Judge Rosalyn Chapman (Presiding), Judge Deborah Thomas-Felix, and Judge Luis María Simón (New York).

[45] *Thiam* v. *Secretary-General of the United Nations*, Judgment No. 2011-UNAT-144, para. 18. See also *Czaran* v. *Secretary-General of the United Nations*, Judgment No. 2013-UNAT-373, para. 26; *Cooke* v. *Secretary-General of the United Nations*, Judgment No. 2012-UNAT-275, paras. 29–30.

[46] Judgment No. 2015-UNAT-576, para. 30.

[47] *Gehr* v. *Secretary-General of the United Nations*, Judgment No. 2013-UNAT-333, paras. 13–14 and footnote 10 (quoting from *Tadonki* v. *Secretary-General of the United Nations*, Judgment No. 2010-UNAT-010).

the same reasoning applied in the case of an appeal regarding the denial of a post-judgment application for correction of a UNDT judgment. The Appeals Tribunal concluded that any issues with a UNDT judgment should be raised as a substantive appeal of the decision.[48]

9. *Judgment No. 2015-UNAT-600 (30 October 2015): James* v. *Secretary-General*[49]

Requirement to submit request for management evaluation as the first step to challenge an administrative decision—Effect of consideration by technical bodies on requirement to submit management evaluation requests

The Appellant had worked on a fixed-term appointment as a Civil Affairs Officer at the NO-B level in the United Nations Mission in Liberia ("UNMIL"). While in service, he was diagnosed with a mature cataract and he subsequently underwent surgery at a hospital in Ghana, followed by another procedure due to a complication after the first surgery. The Appellant sought early retirement from his position because he believed the continual computer work he completed for his job would exacerbate the condition. The Appellant requested compensation for loss of one eye and diminishing vision in the other by filing a claim under appendix D of the Staff Rules of the Advisory Board on Compensation Claims ("ABCC"). The ABCC forwarded the claim to the Director of the Medical Services Division ("MSD") for review, and the MSD convened a medical review board in Ghana to assess the Appellant's condition. The review board could not definitively link the damage to computer usage at work and did not make a finding regarding damages.

The Appellant requested special consideration from the Assistant Secretary-General ("ASG") of the Office of Human Resources Management ("OHRM") for compensation as well as separation from UNMIL for the reason of health disability. When this was denied, the Appellant brought a challenge at the UNDT and asserted negligence on part of the UNMIL for "referring him to a sub-standard medical facility for cataract surgery". The Appellant requested a statement that UNMIL was responsible for the failed surgery which caused his vision loss; a decision that he was entitled to full benefits for the loss of his eye, and a decision that he was entitled to compensation in the form of USD 2.25 million for his physical injuries, the loss of his career and emotional damages based on the injury as well as the refusal of the Organization to accept responsibility for such injury. The UNDT determined that none of the Appellant's claims were receivable.

The Appeals Tribunal affirmed the UNDT's finding that the Appellant's claims were not receivable. The Appellant was required to request management evaluation of these claims under article 8(1)(*c*) of the UNDT Statute and staff rule 11.2(*a*) as a first step in contesting the administrative decision, but had failed to do so. The Appeals Tribunal reiterated that the initial, timely request for a management evaluation was a mandatory step and, if not taken, an appeal to the UNDT was not possible.[50]

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[48] Judgment No. 2015-UNAT-576, para. 30.

[49] Judge Sophia Adinyira (Presiding), Judge Rosalyn Chapman, Judge Richard Lussick (Nairobi).

[50] *El-Shobaky* v. *Commissioner-General of the United Nations Relief and Works Agency for Palestine Refuges in the Near East*, Judgment No. 2015-UNAT-564, para. 23, citing *Amany* v. *Secretary-General of the United Nations*, Judgment No. 2015-UNAT-521; *Wamalala* v. *Secretary-General of the United Nations*, Judgment No. 2013-UNAT-300; and *Gehr* v. *Secretary-General of the United Nations*, Judgment No. 2013-UNAT-299.

The Appeals Tribunal similarly rejected the Appellant's contention that the impugned decisions were based on the advice of technical bodies, namely the ABCC, the MSD and the medical board, and that he was therefore not required to request management evaluation under staff rule 11.2(*b*). The Appeals Tribunal noted that a claim of gross negligence against the Administration is a separate action which cannot be included in a claim made by a staff member under Appendix D. The Appellant was therefore required to submit a request for management evaluation of these decisions before proceeding with an application to the UNDT. The Appeals Tribunal rejected the Appellant's submission that his request to the ASG/OHRM fulfilled the requirement of submitting the request for management evaluation; Staff Rule 11.2 determined that such request must be sent to the Secretary-General.[51]

10. Judgment No. 2015-UNAT-604 (30 October 2015): Ocokoru v. *Secretary-General of the United Nations*[52]

60-Day time limit to appeal a judgment—Date of service of UNDT judgment—Actual and Legal knowledge of a UNDT judgment—Requirement to send written notice to the Appeals Tribunal in order to have an extension of the time limit to appeal

The Respondent was a National Professional Officer ("NPO"), Grade NO-B/2 for the United Nations Mission in Sudan ("UNMIS"). In July 2011, UNMIS' mandate expired and the General Assembly approved a budget for a new United Nations Mission in the Republic of South Sudan ("UNMISS"). The Respondent was reassigned, receiving a one-year fixed-term appointment, to UNMISS. In January 2012, the Respondent was notified that her post would not continue after the end of the one-year period. The Respondent filed a request for management evaluation of the decision to end her post with UNMISS, and when that was not successful she filed a claim with the UNDT. The UNDT ordered rescission of the administrative decision not to renew the Respondent's service as well as reinstatement of her position. Alternatively, the UNDT ordered that the Respondent be paid compensation equivalent to two years' net base salary plus compensation of three months' net base salary for each of the discovered procedural and substantive irregularities that occurred with regard to the provided for procedures for dealing with reports of misconduct. The Secretary-General appealed the decision.

The Appeals Tribunal held that the Secretary-General's appeal was not receivable because it was not filed within 60 days of the receipt of the UNDT judgment. The issue for determination by the Appeals Tribunal was whether the relevant date for the filing of the Secretary-General's appeal ran from the date on which the Administrative Law Unit in ("ALU") of the Office of Human Resources Management ("OHRM") received the judgment in its capacity as counsel of record for the Secretary-General before the UNDT or the date on which the judgment was received by the Office of Legal Affairs ("OLA"), the Secretary-General's counsel of record before the Appeals Tribunal . The Appeals Tribunal found the latter argument to be legally and factually untenable. The prior receipt by the Secretary-General's counsel of the decision, and the fact that the ALU had begun working on a brief to OLA indicated that the Secretary-General had actual and legal knowledge of the decision.

[51] ST/SGB/2010/9.

[52] Judge Mary Faherty (Presiding), Judge Rosalyn Chapman, and Judge Luis María Simón (Nairobi).

Further, in the absence of any published UNDT rule or practice direction which decreed that transmission of UNDT judgments be made to OLA, it was not permissible for the Secretary-General to seek to rely on the date when the judgment was received by OLA. The Appeals Tribunal did not consider whether this constituted an exceptional circumstance warranting extension of the time line, because the Secretary-General never filed a request for such extension.[53]

Consequently, the appeal was found to be time-barred and the UNDT judgment awarding compensation of two years and six months net base salary was not disturbed. Upon rejection of the appeal, the Appeals Tribunal deemed moot a motion by the Respondent for monetary and other relief relating to the suspension from her position pending the appeal.

11. Judgment No. 2015-UNAT-607 (30 October 2015): Zakharov v. *United Nations Joint Staff Pension Board*[54]

Receivability of appeal—UNAT's jurisdiction over the UNJSPF—Employee's right to appeal under UNJSPF Rules and Regulations—Denial of rightful appeal constitutes denial of employee's due process rights

The Appellant served as a Human Settlements Officer—on secondment from the Government of the former Union of Soviet Socialist Republics ("USSR")—in the United Nations Centre for Human Settlements in Nairobi, Kenya as of 2 May 1980. His appointment was for a two-year fixed term and at the outset of his service he would be eligible to participate in the United Nations Joint Staff Pension Fund ("Fund" or "UNJSPF"). The Appellant's contract was renewed and ended on 3 August 1985. On 2 August 1985, the Appellant filled out a form so that his pension rights would be transferred to the USSR Bank for Foreign Trade, pursuant to an earlier transfer agreement between the Fund and the Government of the USSR. On 5 November 1985, he signed an application form alerting the Fund's Secretary that he wanted the terms of the Transfer Agreement to be applied to his case. The Secretary of the Fund then transferred USD 37,917 out of the Fund to the Social Security Fund of the USSR, and sent a letter to the Ministry of Social Security of the USSR advising that the funds were being transferred because of the Appellant's separation from the United Nations and his decision to transfer the funds.

On 28 September 1990, the Appellant joined the United Nations Economic Commission for Africa. In 1991, he sent a letter requesting that the Fund reinstate his prior contributory service from his previous post. The Fund responded that the funds could not be restored, since they had already been transferred at the Appellant's request, and that there was no provision in the transfer agreement to return the funds. The Appellant subsequently sent two more letters reiterating the same request, and both times, the Fund responded that the Appellant could not have his contributory funds restored since his contributory service was for a period longer than five years.

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[53] Article 7(3) of the United Nations Appeals Tribunal Statute; Article 7(2) of the United Nations Appeals Tribunal Rules of Procedure; *Thiam* v. *Secretary-General of the United Nations*, Judgment No. 2011-UNAT-144, paras. 14–18.

[54] Judge Richard Lussick (Presiding), Judge Rosalyn Chapman, and Deborah Thomas-Felix.

The Appellant separated from the Organization on 31 May 1998. In 2014, he sent two further communications to the Fund appealing the earlier decision not to reinstate his contributory service from his first post with the United Nations. Specifically, he requested that the Standing Committee restore his service pursuant to article 30 of the UNJSPF Regulations. The Fund responded that the Appellant's request was time-barred and that any questions related to the funds should be submitted to the Russian Federation (which has succeeded the USSR under the United Nations Charter). In response to further communication from the Appellant, the Fund advised him that all decisions were in compliance with the Fund' Rules and Regulations and that the Fund was unable to submit the case to the Standing Committee.

The Appeals Tribunal found that the decision of the UNJSPF not to submit the Appellant's appeal to the Standing Committee contravened his rights under the UNJSPF Rules and Regulations by depriving him of access to the appeals process. This was a serious violation of his due process rights. However, the Appeals Tribunal held that the appeal was not receivable because its jurisdiction is limited to hearing appeals of decisions of the Standing Committee and since the Applicant's case had not been reviewed by the Standing Committee, the Appeals Tribunal had no jurisdiction to hear the appeal. The Appeals Tribunal remanded the Appellant's case to the Standing Committee acting on behalf of the UNJSPF.

C. Decisions of the Administrative Tribunal of the International Labour Organization[55]

The Administrative Tribunal of the International Labour Organization adopted in 2015 a total of 167 judgments at its 119th and 120th sessions.[56]

[55] The Administrative Tribunal of the International Labour Organization is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the staff regulations of the following international organizations that have recognized the competence of the Tribunal: International Labour Organization, including the International Training Centre; World Health Organization, including the Pan American Health Organization; United Nations Educational, Scientific and Cultural Organization; International Telecommunication Union; World Meteorological Organization; Food and Agriculture Organization of the United Nations, including the World Food Programme; European Organization for Nuclear Research; World Trade Organization; International Atomic Energy Agency; World Intellectual Property Organization; European Organisation for the Safety of Air Navigation (Eurocontrol); Universal Postal Union; European Southern Observatory; Intergovernmental Council of Copper Exporting Countries; European Free Trade Association; Inter-Parliamentary Union; European Molecular Biology Laboratory; World Tourism Organization; European Patent Organisation; African Training and Research Centre in Administration for Development; Intergovernmental Organisation for International Carriage by Rail; International Centre for the Registration of Serials; International Office of Epizootics; United Nations Industrial Development Organization; International Criminal Police Organization (Interpol); International Fund for Agricultural Development; International Union for the Protection of New Varieties of Plants; Customs Cooperation Council; Court of Justice of the European Free Trade Association; Surveillance Authority of the European Free Trade Association; International Service for National Agricultural Research; International Organization for Migration; International Centre for Genetic Engineering and Biotechnology; Organisation for the Prohibition of Chemical Weapons; International Hydrographic Organization; Energy Charter Conference; International Federation of Red Cross and Red Crescent Societies; Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization; European and Mediterranean Plant Protection Organization; International Plant Genetic Resources Institute; International Institute for Democracy and Electoral Assistance; International Criminal Court; International Olive Oil Council; Advisory Centre on WTO Law; African, Caribbean and Pacific Group of States; the Agency for International Trade Information and Cooperation; European Telecommunications Satellite Organization; International Organization of Legal Metrology; International Organisation of Vine and Wine; Centre for the Development of Enterprise; Permanent Court of Arbitration; South Centre; International Organization for the Development of Fisheries in Central and Eastern Europe; Technical Centre for Agricultural and Rural Cooperation ACP-EU; International Bureau of Weights and Measures; ITER International Fusion Energy Organization; Global Fund to Fight AIDS, Tuberculosis and Malaria; and the International Centre for the Study of the Preservation and Restoration of Cultural Property. The Tribunal is also competent to hear disputes with regard to the execution of certain contracts concluded by the International Labour Organization and disputes relating to the application of the regulations of the former Staff Pension Fund of the International Labour Organization. For more information about the Administrative Tribunal of the International Labour Organization and the full texts of its judgments, see http://www.ilo.org/public/english/tribunal/.

[56] See http://www.ilo.org/dyn/triblex/triblexmain.showList?p_lang=en&p_session_id=119 and http://www.ilo.org/dyn/triblex/triblexmain.showList?p_lang=en&p_session_id=120, respectively.

D. Decisions of the World Bank Administrative Tribunal[57]

1. *Decision No. 506 (29 May 2015): CP* v. *International Bank for Reconstruction and Development*[58]

Non-extension of contract—Awareness of express contractual terms—Detrimental reliance—Materiality of reliance—Right of contract renewal—Abuse of discretion in selection process—Impropriety of *post hoc* justification in selection process

The Applicant was hired by the Global Partnership for Education ("GPE") in 2012 as an Extended Term Consultant ("ETC") for 12 months, with the possibility—but not the obligation—of extension. When she initially expressed interest in the vacancy announcements for the two advertised ETC positions, the Country Support Team Coordinator and hiring manager, Ms. SB, indicated in an email to the Applicant that the vacant posts "will start as TWO-YEAR (not one-year as advertised) External Term Contract positions that we anticipate converting to term positions at some point in the coming 18 months" (emphasis in original). The Applicant signed a letter of employment six month later and started working soon after that. However, at the end of the one-year term, the Applicant's position was not renewed.

The Applicant filed an Application with the Tribunal alleging that the Bank's failure to extend her appointment was a breach of specific promises given to her in writing which she relied upon to her detriment when she accepted the position. The Bank responded that Ms. SB's statements or other attendant circumstances did not constitute a right of renewal. The Bank asserted that the subsequent written letter of appointment was the governing instrument of the Applicant's legal relationship with the Bank and that its terms superseded any types of promises that Ms. SB might have made.

The Tribunal noted that a fixed-term appointment does not carry a right for a renewal, but a promise of renewal made expressly or by unmistakable implication by a Bank official with an apparent authority may create such a right. In this case, the Tribunal found that Ms. SB was "an official who had at least the apparent authority to negotiate on employment matters on behalf of the unit." The Tribunal found that Ms. SB had, in fact, made an unequivocal and unambiguous promise to the Applicant. Ms. SB expressly stated in her e-mail that the post will be two-year long, used the word "will" rather than "may," and emphasized

[57] The World Bank Administrative Tribunal is competent to hear and pass judgment upon any applications alleging non-observance of the contract of employment or terms of appointment, including all pertinent regulations and rules in force at the time of the alleged non-observance, of members of the staff of the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation, the Multilateral Investment Guarantee Agency and the International Centre for the Settlement of Investment Disputes (collectively "the Bank Group"). The Tribunal is open to any current or former member of the staff of the Bank Group, any person who is entitled to a claim upon a right of a member of the staff as a personal representative or by reasons of the staff member's death and any person 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 https://tribunal.worldbank.org (accessed on 31 December 2013).

[58] The judgment was rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Mónica Pinto (Vice-President), Ahmed El-Kosheri, Andrew Burgess, Abdul G. Koroma, Mahnoush H. Arsanjani, and Marielle Cohen-Branche.

the point by using capital letters and acknowledging that it was advertised as one year. The Tribunal held that "it was reasonable for the Applicant to rely on the emphatic assurances of Ms. SB['s] … email." The Tribunal rejected the Bank's assertion that the Applicant's reliance was unreasonable because she was aware of the terms of the letter of appointment.

The Tribunal found that the promise of a position of at least two years had a material effect on the Applicant's decision to work at the Bank since, prior to that e-mail, the Applicant was not inclined to accept the Bank's offer. Ms. SB had asked the Applicant to disregard the fact that the position was advertised for one year. The Applicant was persuaded to sign the letter of appointment on the basis of those express assurances which thus made them essential elements of the Applicant's employment relationship with the Bank. Finally, the Tribunal noted that, contrary to the Bank's claims, there was evidence of detrimental reliance on a promise, and the Applicant suffered material injury. This is because it was "abundantly clear" that the Applicant relied on assurances given by Ms. SB and gave up another better paid offer of employment. The Tribunal awarded the Applicant compensation in the amount of one year's salary net of taxes.

The Applicant also challenged the Bank's failure to automatically convert her position from an Extended Term Consultancy to a Term Appointment. The Tribunal reviewed Ms. SB's language in her emails and held that there were no express or unambiguous promises regarding the automatic conversion of the Applicant's contract to a Term Appointment. Instead, the email used words like "anticipate" and "almost certainly" that allowed room for the possibility that expectations may not materialize and that promises may not be met depending on circumstances.

Finally, the Applicant claimed that her non-selection to an advertised vacancy was unfair and an abuse of discretion. The Tribunal reviewed the Bank's decision for "objectivity, transparency, rigor, diversity and fairness in the selection process." The contemporaneous communications on record of the interview panel revealed that the assessment of the Applicant changed between the initial interview report (candidates' assessment matrix) and the last interview report. The Tribunal found that the interview panel initially placed the Applicant on the list of "suitable" candidates but then, without any discussions, lowered her assessment score and moved her to the list of "not suitable" candidates. The Tribunal also found that the panel changed their overall comments on the Applicant's assessment in an attempt to justify their decision *post hoc*. It had also been decided that candidates who were deemed "not suitable" for selection would also not be suitable for renewal. Thus, the *post hoc* characterization of the Applicant as "not suitable" also resulted in her appointment being terminated. Given the deficiencies in the process, the Tribunal found that a compensation award of three months' salary net of taxes was warranted.

In addition to the award of compensation, the Tribunal ordered the Bank to pay the Applicant's attorney fees in an amount of US dollar 15,008.53.

2. *Decision No. 507 (29 May 2015): Andres Pizarro* v. *International Bank for Reconstruction and Development*[59]

PUBLICITY SURROUNDING INTERNAL INVESTIGATIONS—DUTY OF CARE TO STAFF MEMBERS—REPUTATIONAL DAMAGE—EMOTIONAL DISTRESS—CONFIDENTIALITY OF ONGOING INVESTIGATIONS—PRESUMPTION OF INNOCENCE—CAUSATION

The Applicant, a former staff member, challenged the Bank's decisions concerning the publication of allegations, published between May and August 2012, in the Argentine newspaper, *La Nación*. The articles alleged that the Bank was involved in wrongdoing and corruption in a Bank-financed transportation project in Argentina, and named the Applicant personally in several of the articles.

The Bank immediately issued a statement to *La Nación* explaining its policies, sharing the Bank's concerns, and informing them that the Bank had commenced an internal investigation into the matter. At the same time, the Applicant sought to clear his name of the allegations, but the Bank instructed him not to speak with the press, reminded him of his obligation of confidentiality to the Bank, and started a World Bank Integrity Vice Presidency ("INT") investigation into allegations that the Applicant may have engaged in collusion or corruption, or otherwise had a financial interest in the outcome of the procurement of the Bank-financed transportation project. In January 2013, INT concluded an exhaustive investigation and did not find any evidence of misconduct against the Applicant. INT nevertheless told the Applicant that he was not permitted to share the result of the investigation with prospective employers or exonerate himself in the media. The Bank refused the Applicant's repeated requests to assist him in clearing his name and in commencing legal action against *La Nación*. Only in February 2014 did the Bank inform the Applicant that he could "disclose, without restriction, the outcome of the World Bank's administrative inquiry into allegations of misconduct on [his] part that was conducted by the Integrity Vice Presidency (INT)."

In August 2014, the Applicant filed an application before the Tribunal contending that Bank failed to protect him and prevented him from defending himself by instructing him to maintain confidentiality—even after the INT inquiry was concluded. The Applicant sought damages for loss of earnings, emotional distress and reputational harm. He also sought to enforce his requests made to the Bank: the cost of a defamation lawsuit against *La Nación*, and specific performance by the Bank in the form of a public statement and a letter to Argentine officials stating that he was completely cleared of any wrongdoing in connection with the project in question.

The Staff Association filed an *amicus curiae* brief for this case. It noted that the Principles of Staff Employment instruct the Bank to "ensure that a staff member who is accused publicly but exonerated privately is provided … with the support necessary to minimize [the resulting] dire consequences." The Bank should have countered the assumption of guilt in the news; instead, its announcement of the internal investigation might have been equated with guilt in the public eye.

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[59] The judgment was rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Mónica Pinto (Vice-President), Ahmed El-Kosheri, Andrew Burgess, Abdul G. Koroma, Mahnoush H. Arsanjani, and Marielle Cohen-Branche.

The Tribunal first considered whether the Bank's decisions and handling of the allegations and the INT investigation were fair to the Applicant. It reinforced that international organizations have a recognised duty of care towards their employees and former employees. This duty of care stems from the terms of the contract of employment and all pertinent regulations and rules in force at the time of the alleged non-observance. The Tribunal found that the Bank's delays and inaction had violated that duty. The Bank disregarded its duty to the interests and due process rights of the Applicant when it failed to act with sensitivity towards the Applicant, or to take into consideration the impact the undenied allegations and ensuing INT inquiry would have had on the Applicant, as well as the ongoing damage to his reputation to which those uncontested allegations gave rise. In view of the fact that the Bank's response or lack of response to the articles published by *La Nación* would have a direct impact on the Applicant's reputation, the Bank was obliged to ensure that, in accordance with the duty of care owed to current and former staff members, its approach to the media allegations was implemented in a manner which was fair to the Applicant. At a minimum, the Bank's treatment of media accusations should, insofar as possible, neither cause nor contribute to the Applicant suffering harm. The Bank's decisions of unresponsiveness and inaction while denying the Applicant the possibility of his publicly rebutting accusations against him, were unfair. The inexplicable delay to allow the Applicant to disclose the INT's preliminary investigation was inexcusable. Although the case was sensitive, this delay was excessively long and the Bank failed to respect the need to address the matter expeditiously.

The Tribunal recalled that it had previously admonished the Bank for not protecting the reputation of staff members who were confronted with publicity concerning misconduct investigations. Here, it reasoned that the Bank could have affirmed the presumption of innocence principle, noted the Applicant's previously unblemished record of service, corrected the newspaper's explanation of the procurement process, or shared the findings of the INT inquiry with the newspaper—all without harming its own interests. These decisions had impacted the Applicant's reputation. In addition to failing to support him, the Bank may have prejudiced his situation by informing *La Nación* that an investigation by the Bank was in progress without providing clarifications as to the project, the staff rules, or the ongoing investigation.

The Tribunal recognized the need for individual members of staff not to speak out publicly on allegations of wrongdoing. Confidentiality restrictions notwithstanding, the Bank should have taken reasonable steps to protect the staff member's interests and reputational harm when accused of impropriety in the course of their duties. The Tribunal recalled that, under its jurisprudence, the Bank owed due process rights to even a party guilty of misconduct, and that a passivity to offer explanations or counter damaging publications against Bank staff members was disturbing.

On the question of whether the Bank's decisions caused or contributed to the damage suffered by the Applicant, the Tribunal found that there were steps the Bank could have taken in accordance with its duty of care towards the Applicant which would have mitigated the reputational damage the Applicant suffered, but which it failed to take. In apparently focusing solely on its perception of its organizational interests, the Bank unjustifiably contributed to the Applicant's economic and other harm.

In determining the quantum of damages, the Tribunal took note of the actual known economic losses suffered by the Applicant as well as non-pecuniary harm such as emotional

distress and harm to the Applicant's reputation. The Tribunal awarded the Applicant compensation of US dollar 350,000, plus attorney's fees in the amount of US dollar 21,749.38.

3. *Decision No. 525 (13 November 2015): DC* v. *International Bank for Reconstruction and Development*[60] *(Preliminary Objections)*

MEMORANDUM OF AGREEMENT—WAIVER OF ADMINISTRATIVE AND LEGAL ACTION—MUTUALLY AGREED SEPARATION—SCOPE OF WAIVER CLAUSE—*CONTRA PROFERENTEM* RULE OF CONTRACT CONSTRUCTION

The Applicant was given an unsatisfactory Overall Performance Evaluation ("OPE") and a low Salary Review Increase ("SRI") rating by a new supervisor, who also placed him on an Opportunity to Improve Unsatisfactory Performance Plan ("OTI"). The Applicant contested the OPE and SRI through mediation, and when that was unsuccessful, requested a review of the decision by Peer Review Services ("PRS"). This was filed as PRS Request for Review No. 186.

Pending the findings and recommendation of the PRS Panel, the Applicant was told that his performance was still unsatisfactory and that he was being recommended for termination. The Applicant was informed that management intended to terminate his contract unless he accepted a Mutually Agreed Separation ("MAS") and agreed to withdraw his PRS Request for Review No. 186. The Applicant refused to "mutually agree" to what he considered a disrespectful way of terminating his employment.

Subsequently, the Bank issued a Notice of Termination for Unsatisfactory Performance. The Applicant initiated mediation with the Bank on the Notice of Termination. Eventually, the Applicant and management concluded a Memorandum of Understanding on the Applicant's ending employment and the parties' post-employment understandings. If the Applicant would resign and agree to release all claims connected to the issues and refrain from future legal or administrative actions related to such actions, the Bank would give the Applicant a single payment of US dollar 25,000 and limit the access to his OPE, SRI, and OTI files. A day before the conclusion of the Memorandum of Understanding ("MOU"), the report of the PRS Panel was completed. Following conclusion of the MOU, the Bank refused to provide a copy of the PRS Panel report to the Applicant on the grounds that he had waived his rights to PRS Case No. 186.

The Applicant filed this Application with the Tribunal asking to reinstate PRS Case No. 186, or, in the alternative, to adjudicate the issues therein. The Bank filed a preliminary objection challenging the admissibility of the Applicant's claims on the grounds that he waived them in the MOU. The Applicant also challenged the Bank's failure to provide him with information about his separation benefits. The Bank contended that this claim should be deemed inadmissible as the Applicant should have "exhausted prior remedies, including PRS," in accordance with Article II of the Tribunal's Statute.

This Judgment addressed the Bank's preliminary objections. The Tribunal upheld the validity of the MOU and found that the waiver clause did not apply to the PRS Request for Review No. 186 and claims which preceded the notice of termination of the Applicant's employment. Upon a review of the MOU, the Tribunal held that the scope of the MOU

[60] The judgment was rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Mónica Pinto (Vice-President), Ahmed El-Kosheri, Andrew Burgess, Abdul G. Koroma, Mahnoush H. Arsanjani, and Marielle Cohen-Branche.

was limited to any "future" claims relating to the Applicant's ending employment with the World Bank Group and post-employment benefits, commitments and understandings.

In assessing whether the claims reviewed in PRS Request for Review No. 186 were claims "connected to the issues" in the MOU, the Tribunal held that the subject of the MOU, the decision that the Applicant's OTI was unsuccessful resulting in termination, was separate and distinct from the decision to give him a poor OPE, a low SRI and even the decision to place him on an OTI. The Tribunal reviewed the Bank's practice in drafting MOUs and, applying the *contra proferentem* rule against the Bank, found that the MOU waiver clause did not operate in the manner asserted by the Bank. With respect to the Applicant's claims concerning his separation benefits, the Tribunal found these claims to be admissible. The Bank's preliminary objections were dismissed. The Request for Review No. 186 was reinstated. The claim on the Applicant's separation benefits was admitted, and the Applicant was awarded attorney's fees.

4. *Decision No. 510 (29 May 2015): AI (No. 4)* v. *International Bank for Reconstruction and Development*[61]

Finality of Tribunal's decisions—Article XIII of Tribunal's Statute—Review of final decisions—Discovery of a new fact—Materiality of omissions—*Res judicata*

In 2008, the Applicant filed an application with the Tribunal for a breach of promise to promote him and make him the Global Manager of the International Comparison Programme ("ICP"); for discrimination against him because of his race, and; for retaliation against him because he filed an appeal with the Appeals Committee. In 2010, the Tribunal dismissed all of the Applicant's claims. In 2009, the Applicant filed a second application challenging the Bank's decision to terminate his employment for unsatisfactory performance. In 2010, the Tribunal concluded that the Bank's decision was an abuse of discretion, and awarded the Applicant three years' salary—almost half a million dollars. In his second application, the Applicant also requested the Tribunal to "revisit" his "discrimination case." The Tribunal noted that the allegations were "irreceivable under the principle of *res judicata*."

The Applicant filed for a review of his past cases under article XIII of the Tribunal's Statute, which provides for a reconsideration of the Tribunal's judgment upon the discovery of new evidence. He claimed that the Bank informed him through an email message that it will restore deleted parts of his Overall Performance Evaluation ("OPE") without any explanation why these parts of his OPE were deleted and why the Respondent failed to restore it during the Tribunal's proceedings. The Applicant averred that the Bank submitted a different, incomplete personnel record to the Tribunal during his earlier applications, and that this record denied the Applicant's managerial experience. The Bank denied hiding any OPE files or sending any new emails about restoring deleted files. The Tribunal was requested by the Bank to dismiss the Application based on lack of jurisdiction.

The Tribunal first recalled its jurisprudence on the finality of judgments, where it held that no party to a dispute before the Tribunal may "bring his case back to the Tribunal for

[61] The judgment was rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Mónica Pinto (Vice-President), Ahmed El-Kosheri, Andrew Burgess, Abdul G. Koroma, Mahnoush H. Arsanjani, and Marielle Cohen-Branche.

a second round of litigation, no matter how dissatisfied he may be with the pronouncement of the Tribunal or its considerations." The Tribunal noted that article XIII provides the sole exception to this principle of finality, where a party may request the Tribunal to revise its judgment within six months of the decision, in the event of the "discovery of a fact which by its nature might have had a decisive influence on the judgment of the Tribunal and which at the time the judgment was delivered was unknown both to the Tribunal and to that party…." The Tribunal stated that article XIII has a very rigorous standard to safeguard *res judicata*, and its requirements are fulfilled only in exceptional circumstances where the newly discovered facts are potentially decisive [and] shake the very foundations of the Tribunal's persuasion; "if we had known that, the judges must say, '[W]e might have reached the opposite result.'"

On the facts, the Applicant suggested that the Bank's email to him proved that the Tribunal did not have a full record of his 2002 OPE, and instead had documents that "reflected false evidence" which the Bank had submitted. The Tribunal found that the complete record of the Applicant's 2002 OPE had already been before the Tribunal, and was in fact submitted by the Applicant himself. This document was accompanied by detailed submissions on the Applicant's managerial role. The Tribunal found that there were no new decisive facts warranting a revision of the prior judgments under article XIII.

Finally, the Tribunal noted that the Applicant sought a revision also on the ground that the Tribunal's prior judgments contain "material omissions and errors." The Tribunal held that these were not new assertions. These repeated claims have no factual or legal basis to warrant a revision under article XIII and were dismissed.

5. *Decision No. 520 (13 November 2015): Alrayes* v. *International Finance Corporation*[62] *(Preliminary Objection)*

G-4 visa cancellation—Municipal investigation into staff member's allegations of terrorism—Family separation—Exceptional circumstances to allow delayed filing

The Applicant, a Saudi Arabian national, joined the International Finance Corporation ("IFC") in 2007, on a Term Appointment. He worked in the Washington, DC office, retained a G-4 visa for the United States, and travelled abroad on numerous missions on behalf of the IFC. In January 2010, he left for a two-week mission to the Gulf States. At the end of this mission, he attempted to board a flight at Dubai airport, to return to the United States; however, he was informed by airline personnel that his G-4 visa had been cancelled and that he could not travel to the United States.

Over the following months, as the visa issue remained unresolved, the Applicant sought the assistance of numerous colleagues at the IFC and the World Bank, stressing the difficulties he was facing in being separated from his children. In November 2010, the IFC agreed to pay the travel costs for the Applicant's family to visit him in Dubai. However, the IFC refused the Applicant's request that it seek a mandamus order from a US court.

During this time, the Applicant worked from the Dubai office. Eventually, the IFC proposed that the Applicant be formally appointed to work from Dubai and not

[62] The judgment was rendered by the Tribunal in plenary session, with the participation of Judges Stephen M. Schwebel (President), Mónica Pinto (Vice-President), Ahmed El-Kosheri, Andrew Burgess, Abdul G. Koroma, Mahnoush H. Arsanjani, and Marielle Cohen-Branche.

Washington, DC. In February 2011, the Applicant signed a short term Assignment ("STA") agreement. This was later extended for a further six months, until January 2012. In December 2011 the Applicant signed a Memorandum of Understanding ("MOU") relating to the completion of his employment with IFC, and his status with IFC pending resolution of his visa issues. His resignation was to become effective 5 January 2013. On 8 January 2013, the Applicant was informed that IFC would not contribute more than US dollar 25,000 towards his legal fees.

Also in February 2011, the Applicant was formally notified by the US Government that he had been found ineligible for a G-4 visa because of alleged terrorist activities. He was interviewed by the FBI in July 2011, and again in December 2012. Shortly after the second set of interviews he was told that he had received clearance. The Applicant later submitted claims for US dollar 40,000 in legal fees.

In July 2014, the Applicant finally received a visitor's visa for the United States. On returning, he sought to close any outstanding issues with the IFC, including the reimbursement of legal fees. The parties initiated mediation in October 2014, but the mediation proved to be unsuccessful. Shortly after mediation ended in January 2015, the Applicant filed a number of claims with PRS. All were rejected by the PRS for lack of jurisdiction.

In his Application with the Tribunal, the Applicant: requested payment of the visa-related legal fees; requested payment of costs incurred in arranging for his children to visit him; challenged his placement on a two-year STA; challenged his lack of salary increases while in Dubai; requested various separation payments; challenged the IFC's failure to seek a writ of mandamus; and challenged the validity of the MOU entered into in December 2011. The IFC contended that the Applicant's claims were time-barred, and that he failed to show exceptional circumstances to excuse the delays in filing. The Applicant accepted that some of his claims were filed after the applicable 120-day period, but argued that he satisfied the test for "exceptional circumstances" under the Statute.

The Tribunal considered the admissibility of the Applicant's various claims in turn. It found that his claim relating to separation payments was filed in a timely manner, and was admissible. All other claims were filed late, and could only be admissible to the extent that exceptional circumstances existed to justify the delays in filing.

Noting the confluence of factors which the Applicant encountered from January 2010 to July 2014, particularly the stresses associated with being unexpectedly separated from his children for an extended period, the Tribunal concluded that "exceptional circumstances" existed up to the point when the Applicant returned to the United States in July 2014. Taking into account the various circumstances of the case, including the mediation entered into by the parties and the effect this had on the time frame for filing claims, the Tribunal concluded that the following claims were admissible: the Applicant's claim for payment of the agreed US dollar 25,000 in legal fees; his claim for legal fees beyond this amount; his claim associated with the travel of his children to visit him; his challenge to being placed on a two-year STA; and his claim regarding the lack of salary increases while in Dubai.

Conversely, the Applicant's challenge to the validity of the MOU was found to be inadmissible because the Applicant filed this claim six months after he arrived to the United States, which was two months too late even taking into account his circumstances. The IFC's decision not to seek a writ of mandamus was also found to be inadmissible because this decision was not of a type which could be brought directly to the Tribunal, and the

Applicant had failed to raise this claim before PRS and exhaust internal remedies prior to raising the claim before the Tribunal.

The Tribunal ordered the IFC to pay the Applicant's attorney's fees arising from the preliminary objections phase of the proceedings.

E. Decisions of the Administrative Tribunal of the International Monetary Fund[63]

Judgment No. 2015–3 (29 December 2015): Ms. "GG" (No. 2) v. *International Monetary Fund*[64]

Unfair treatment—Hostile work environment—Sexual harassment—Gender discrimination—Pattern of prohibited conduct—Failure of the Fund effectively to respond—Admissibility of challenge to non-selection and Annual Performance Review (APR) decisions—Abuse of discretion in APR assessment—Abuse of discretion in adopting revised promotion policy and applying it to applicant—Failure of due process—Material impairment of the record—Compensation for intangible injury—No compensation for time spent on self-representation

The Applicant, Ms. "GG", alleged (*a*) that she had been subject to a pattern of retaliation, harassment, gender discrimination and a hostile work environment to which the Fund had failed effectively to respond; (*b*) that her non-selection for B-level positions in 2009, 2010 and 2011, as well as her Annual Performance Review ("APR") decisions for FY2009 and FY2010 had been improperly motivated by retaliation, harassment, and discrimination and formed part of a pattern of prohibited conduct; (*c*) that the Fund had abused its discretion in adopting its revised B1/B2 promotion policy of July 2011 and applying it to the Applicant; and (*d*) that elements of the administrative review and Grievance Committee processes constituted failures of due process or materially impaired the record of the case.

Invoking its earlier case law,[65] the Tribunal upheld the admissibility of the first claim since the contested acts, even if they could not have been individually challenged, constituted a pattern of conduct prohibited by the Fund's policies barring workplace discrimination and harassment. The Tribunal observed that even mildly offensive words or behaviour could rise to the level of prohibited conduct when they were repeated and form a pattern, the cumulative effect of which was to deprive the individual of fair and impartial treatment

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[63] 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).

[64] Catherine M. O'Regan (President) Jan Paulsson and Edith Brown Weiss (Judges).

[65] *Mr. "F", Applicant* v. *International Monetary Fund*, Judgment No. 2005–1, 18 March 2005, para. 90–91; *Ms. "W", Applicant* v. *International Monetary Fund*, Judgment No. 2005–2, 17 November 2005; *Mr. "O", Applicant* v. *International Monetary Fund*, Judgment No. 2006–1, 15 February 2006.

or to impede career advancement. On the merits, the Tribunal found that alleged comments by the Department Director, namely that the Applicant should seek to advance her career by using "charm, humour and personal appeal to him", constituted harassment. According to the Tribunal, the Applicant could have reasonably perceived the comments, made by a male supervisor to a female subordinate, to have impermissible gendered implications, whatever precisely their intent might have been. This finding was supported by reactions of similarly situated staff members to whom the Applicant had relayed the comments, and by the context in which they were made, *i.e.* while the Applicant had been seeking performance feedback. The Tribunal noted that gender stereotyping played a subtle, yet powerful, role in denying equal treatment. It found, however, that the comments did not constitute sexual harassment as they were not necessarily sexual in nature. Overall, the Tribunal held that at three key junctures the Applicant's Department Director had engaged in actions having an unfair and adverse effect on her conditions of employment. The Tribunal noted that the Fund was to be held accountable for abuse by its senior managerial authority and had failed to respond effectively to the resulting hostile work environment. An Ethics investigation undertaken by the Fund after the Applicant had raised a formal complaint could not shield it from responsibility before the Tribunal.

With regard to her second claim, the Tribunal found that the Applicant had failed to raise admissible challenges to a number of the decisions that she alleged formed part of the pattern. The failure of a selection panel to select the Applicant for appointment to a B-level position in 2009 did not constitute an "administrative act" since the vacancy had subsequently been cancelled. The Applicant also lacked standing to challenge non-selection decisions in 2010 and 2011 because she had applied for the vacancies in question. Moreover, the Applicant had not launched a timely challenge to her FY2009 APR decision and exceptional circumstances did not excuse her late filing. Turning to the Applicant's FY2010 APR challenge, the Tribunal found that the Applicant had not established that the Department Director had influenced the Applicant's Division Chief, either directly or indirectly, in appraising her performance. Because an allegation of improper motive called into question the impartiality of the decision-making process, the Tribunal also gave particular scrutiny to the question whether there had been a "reasonable and observable basis" for the contested APR rating and concluded that such basis was found in the record.

Third, the Tribunal found that unifying the criteria for B1/B2 promotions across career streams (by increasing the time-in-grade ("TIG") required for economist staff to reach eligibility for promotion and decreasing the TIG required for other staff) was neither arbitrary nor discriminatory against economists. The evidence showed that the decision had been based on a proper consideration of relevant facts in consultation with key stakeholders and was reasonably related to the objectives it sought to advance. Furthermore, the differential effect on economist *vis-à-vis* specialized career stream staff members was directly related to the purpose of the policy revision. The Applicant did succeed, however, in her contention that the revised promotion policy should not have been applied in the circumstances of her case. In implementing a transitional measure designed to protect the expectations of staff members who had been promoted to B1 before the change in policy in July 2011, the Fund had arbitrarily excluded the Applicant because her promotion to B1 became effective in the period 1 May–1 July 2011. In the view of the Tribunal, the transitional measure drew an unsupportable distinction between categories of staff.

Fourth, the Tribunal addressed the Applicant's contention that elements of the administrative review and Grievance Committee procedures in her case constituted failures of due process and materially impaired the evidentiary record of the case. The Tribunal observed that the integrity of the underlying review procedures had a direct bearing on the Tribunal's own work, as it drew upon the record assembled through those procedures in reaching its own findings and conclusions. The Tribunal reaffirmed that the Grievance Committee's decisions as to the admissibility of evidence and production of documents in its forum did not constitute "administrative acts" subject to review by the Tribunal. At the same time, the Tribunal confirmed that it could weigh, and even discount, the record generated by the Grievance Committee as an element of the evidence before it. However, the Tribunal found no ground to give the records of the review procedures any less than their usual weight. Insofar as the Applicant's challenges raised systemic issues relating to the Fund's dispute resolution system, the Tribunal observed that it was the province of the policy-making organs of the Fund to ensure its robustness and integrity.

Turning to remedies, the Tribunal affirmed its ability to provide compensation for intangible injury. In quantifying the compensation, the Tribunal took into account the legitimate expectation of staff members that the Fund would act in accordance with the rule of law, as well as the nature of the particular obligations breached. It noted that breach of fundamental principles of workplace fairness would necessarily constitute a serious injury. In light of all salient factors, the Tribunal set the compensation to correct the effects of the Fund's failure to respond effectively to a pattern of unfair treatment constituting a hostile work environment adversely affecting the Applicant at US dollar 60,000. With regard to the Applicant's successful claim that the implementation of the B1/B2 promotion policy had unfairly affected her, the Tribunal rescinded the individual decision that no exception would be made to the application of the revised promotion policy in the circumstances of the Applicant's case. It set the compensation for the Fund's failure to afford the Applicant the benefit of the transitional measure included in the B1/B2 policy revision at US dollar 10,000. The Tribunal further observed that it could not take into account the potential tax consequences in various jurisdictions of its monetary award. Accordingly, it denied the Applicant's request that it prescribe that any monetary relief be made on a net-of-tax basis. Finally, the Tribunal refused to compensate the Applicant for the imputed cost of her time spent representing herself in the proceedings, since she had not established that any out-of-pocket expenses had been incurred.