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UNITED NATIONS JURIDICAL YEARBOOK

2016

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Chapter V

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

A. United Nations Dispute Tribunal

In 2016, the United Nations Dispute Tribunal ("UNDT" or "Tribunal") in New York, Geneva and Nairobi issued a total of 221 judgments. Summaries of six selected judgments are reproduced below.[2]

1. *Judgment No. UNDT/2016/020 (14 March 2016): Nyasulu* v. *Secretary-General of the United Nations*[3]

Non-reassignment of the applicant to new post created from his old post—No review of the suitability of the applicant for reassignment—Lack of transparency and credibility—Reinstatement or monetary compensation—Compensation for the substantive and procedural irregularities

The Applicant challenged the decision of the United Nations Mission in Liberia ("UNMIL") not to renew his fixed-term contract and to separate him from service on 9 August 2013. At the time, the Applicant was Chief Judicial Affairs Officer at the D-1 level heading the Legal and Judicial Systems Support Division ("LJSS"). He was also a rostered candidate for the D-1 position of Chief, Rule of Law.

On September 2012, the Special Representative of the Secretary-General ("SRSG") decided that the UNMIL undertake a comprehensive review of its civilian staff in line with Security Council resolution 2066 (2012) and General Assembly resolution 66/264 with a view to aligning the UNMIL's staffing structure to support the requirements of the UNMIL's mandate.

The report of the Secretary-General on the proposed restructuring of the UNMIL was reflected in the 2013/14 budget in February 2013 and submitted to the General Assembly.

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[1] For general information on the administration of justice at the United Nations, see chapter III, part A, section 16 (*n*) of this publication. In view of the large number of judgments rendered 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] 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. 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/.

[3] Judge Nkemdilim Izuako (Nairobi).

The report included a proposal to dissolve the LJSS Division and restructure the Rule of Law component of the UNMIL according to three thematic areas: access to justice and security, training and mentoring, and legal and policy reforms. The report proposed the creation of a Director, Rule of Law post in the Office of the Deputy SRSG, to be accommodated through the reassignment of the Applicant's post from the LJSS Division. The report further proposed the reassignment of two P-5 posts in LJSS and the redeployment of 32 posts under the proposed structure.

The Advisory Committee on Budgetary and Administrative Questions endorsed the budget proposal in April 2013. In anticipation of General Assembly approval of the budget, the UNMIL reassigned the two P-5's and the 32 other staff members and proceeded to not renew the Applicant's contract by communication of 22 May 2013 to him. The UNMIL also issued a vacancy announcement for the new D-1 Principal Rule of Law Officer. The Applicant requested management evaluation of the non-renewal decision on 20 June 2013. On 9 August 2013, the Under-Secretary-General, Department of Management informed the Applicant of his decision to uphold the decision.

The Tribunal determined that the Applicant's former post of Chief Judicial Affairs Officer effectively did not cease to exist but was reassigned to fund the new D-1 position in the office of the Deputy SRSG, Rule of Law. A comparison of the functions of the new D-1 position with the functions performed by the Applicant as Chief of the LJSS Division and taken together with the functions of the generic position of Chief Rule of Law and Security Institutions Support Office in Peacekeeping missions for which the Applicant was rostered, showed that there was a significant degree of similarity.

In the view of the Tribunal, the Respondent failed to show why he made no effort to consider reassigning the Applicant to the new position, given the latter's relevant prior professional experience as Chief of the LJSS Division and given that all other staff from his Division had been reassigned or redeployed. Neither the Applicant nor the LJSS Division which he headed posed any obstacle to any changes and reforms aimed at greater integration in the Rule of Law pillar. In fact, evidence showed that the Applicant had actively worked towards integration of the thematic issues. No comparative review or any review at all was conducted to determine the suitability of the Applicant or any of the incumbents of the reassigned posts for new positions. The Guidelines from the Field Personnel Division of the Department of Field Support which the Respondent's witnesses claimed were used to conduct the review were not produced and the Tribunal concluded they do not exist.

In the view of the Tribunal, the evidence indicated that a promise by the SRSG to conduct a fair and objective review process did not include the Applicant. There was a lack of transparency and credibility in the non-renewal decision. The UNMIL acted contrary to the Secretary-General's report attached to the 2013/2014 budget approved by the General Assembly when it ignored the intention expressed therein to leverage existing expertise, to meet priorities through existing resources and to maintain experienced staff during the transition process. The decision to not reassign the Applicant to the new position created from his old post was unlawful.

The UNDT ordered rescission of the contested decision and ordered the Respondent to reinstate the Applicant and deploy him to the next similar position as at the time of his separation. Should the Secretary-General decide, in the interest of the Organization, not to reinstate the Applicant, the UNDT set compensation in the amount of USD 74,559,

consisting of four months' net base salary at the D-1 level, and the difference, for eight months, between the Applicant's D-1 salary and his salary as a prosecutor in his home country. The UNDT also awarded the Applicant two months' net base salary of compensation for the substantive and procedural irregularities occasioned by the failure of the UNMIL to conduct a comparative review to determine his suitability for reassignment to a new position.

The judgment was appealed by the Respondent in 2016. The UNDT judgment was upheld by UNAT in Judgment 2016-UNAT-698, with the exception of the method of calculating the compensation in lieu of rescission of the non-renewal decision.[4] This element was remanded to the UNDT in order to state its reasons and relevant law for the calculation.

2. *Judgment No. UNDT/2016/030 (14 April 2016): Rodriguez-Viquez* v. *Secretary-General of the United Nations*[5]

Legality of the Promotions Policy—Fair, transparent and non-discriminatory application of the Promotions Policy—Criterion extraneous to the Promotions Policy—Unsubstantiated and irrelevant information led to bias and nepotism—Flawed ranking methodology—Procedural errors concretely impacted the results—No retroactive promotion—Compensation for the lost chance of promotion

The Applicant challenged the decision of the United Nations High Commissioner for Refugees ("UNHCR") not to promote him from P-4 to P-5 during the 2013 UNHCR Promotions Session (Session). The Applicant joined UNHCR as a general service staff member in 1990. After moves to several posts at GS, FS and P-levels with UNHCR, the Applicant was promoted to the P-4 level in 2007 and served as a Senior Investigation Officer, P-4, and as a Senior Resources Manager, P-5, with his personal grade being P-4. In April 2014 the Applicant was informed that he was eligible to be considered for promotion to the P-5 level during the 2013 Session and he participated in it.

UNHCR's Policy and Procedures for the Promotion of International Professional Staff Members (UNHCR/HCP/2014/2) ("Promotions Policy"), promulgated on 5 February 2014, provides that the High Commissioner is to make available a number of promotions slots to the P-4, P-5 and D-1 levels, and to award them to the most meritorious staff members based on recommendations made by a panel ("Panel") composed of senior UNHCR staff members. The Panel's recommendations are the result of three rounds of evaluations of all eligible staff members.

The Applicant passed the First Round, but his comparative ranking in the Second Round was not sufficient for him to advance to the Third Round. In October 2014 UNHCR published a list of promoted staff members, which did not include the Applicant. Upon his request for a review of his candidacy, the Division of Human Resources Management ("DHRM") provided the Applicant with a copy of his fact sheet as reviewed by the Panel, and a reiteration of the steps of the Session. The Applicant's request for recourse by the Panel was unsuccessful, and the Applicant requested management evaluation of his

[4] Judgment No. 2016-UNAT-698 (28 October 2016): *Nyasulu* v. *Secretary-General of the United Nations*.

[5] Rowan Downing (Geneva).

non-promotion in May 2015. The response by the Deputy High Commissioner provided in August 2015 upheld the decision.

The Tribunal rejected the Applicant's challenge to the legality of the Promotions Policy absent any allegation that it does not comply with a higher norm. It was not its role to examine whether a policy adopted by the Organization is well founded or appropriate. The focus of the Tribunal's review was the implementation of the Promotions Policy. To pass the First Round, a candidate must satisfy at least three out of five evaluation criteria; language proficiency, number of rotations, service in D, E or U duty stations, functional diversity and performance records. The Second Round entails a comparative assessment of candidates by the Panel members based on performance, managerial accountability and exemplary leadership qualities. The Third Round focuses on a collective review of the substantially equally meritorious candidates by the Panel based on the Second Round criteria.

The Tribunal clarified that the standard of review for whether an Organization's decision is legal is essentially the same for appointments and promotions as it is for downsizing exercises. The Tribunal determined that it had to examine whether the applicable rules were followed and applied in a fair, transparent and non-discriminatory manner. The Tribunal determined that the separate consideration of male and female candidates, allocating an equal number of slots to female and male candidates, contradicted the terms of the Promotions Policy even though it was legitimate to seek gender parity. The Promotions Policy referred to consideration of a single pool of candidates only, but made no reference to gender considerations until the very end of the process, where it is required that "[a]t grade levels where gender parity has not yet been achieved, at least 50% of the promotion slots … be awarded to substantially equally meritorious female staff".

The Tribunal noted that DHRM did not provide the Panel members with a complete version of the candidates' performance evaluations ("e-PADs") by removing the ratings provided by the supervisors, which it considered "unreliable". In the view of the Tribunal, this violated the Promotions Policy as it required that the Panel consider the candidate's e-PAD's and not an edited version of them. The Tribunal further determined that in advising the Panel members to take into account the suitability of the candidates for appointment to positions at a higher level, DHRM introduced a criterion extraneous to the Promotions Policy for consideration during the Second Round. This criterion had the potential to subvert the entire promotion exercise, introducing an operational criterion into a merit-based exercise.

In the Tribunal's view, by advising the Panel members to take into account additional information they may know about the candidates but not reflected in the documents for their review, DHRM practically invited Panel members to take into account information which might be unsubstantiated or irrelevant, and opened the door to bias and nepotism. Taking into account such information was not foreseen in the Promotions Policy which provided that the Panel members would base their assessment on the candidates' fact sheets and e-PAD's and specifically excluded unsubstantiated information.

The Tribunal found that DHRM introduced a ranking methodology that permitted the allocation of the same rank to more than one candidate, without any administrative issuance and any consideration of the impact on the candidates' consolidated rankings. This led some Panel members to engage in a *de facto* grouping exercise rather than a comparative one, without any consideration of the impact of such different methodology on

the candidates' overall rankings. Numerous and significant errors in the rankings by some Panel members were also identified. In the Tribunal's view, this raised a concern as to the reliability of the rankings and the underlying methodology of some Panel members. The Tribunal also noted excessive divergence in the rankings provided by some Panel members with regard to the same candidates. These discrepancies suggested that procedural errors concretely impacted the results, or that the comparative and ranking exercise was overall not suitable to review and assess the large number of candidates properly on the basis of the information provided and within the short time frame given.

The Tribunal found that the contested decision was unlawful and that the Applicant was deprived of a significant and real chance for promotion as a result. The Tribunal rejected his request for retroactive promotion and his claim for material and moral damages. The Tribunal also rejected his request for his candidacy to be remanded to the Organization with specific instructions for a fresh selection exercise as the Tribunal did not have the authority to make operational amendments to the Promotions Policy. The Tribunal rescinded the non-promotion decision and awarded compensation in lieu of rescission in the amount of CHF 6,000 for the lost chance of promotion.

3. *Judgment No. UNDT/2016/094 (30 June 2016): Dalgamouni* v. *Secretary-General of the United Nations*[6]

Non-renewal of appointment on the ground of unsatisfactory performance—Hostile work environment—Improper use of a position of influence, power or authority—Breach of the fundamental rights of the employee—Monetary compensation for health damage—Referral of the Chief to Secretary-General for accountability

The Applicant challenged a decision of the Chief of the Regional Service Centre Entebbe ("RSCE") dated 5 May 2014 to not renew her fixed-term appointment on the grounds of unsatisfactory performance. The Chief also directed the Applicant to no longer act in her professional capacity on behalf of the RSCE. Pending the rebuttal of her performance evaluation, the Applicant's contract was extended on a month-to-month basis.

In August 2014 the Chief requested the discontinuation of the Applicant's access to the UMOJA Enterprise Resource Planning ("ERP") system. In response, the Chief was informed by the UMOJA team and the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo ("MONUSCO") Supervisor of Technology Operations that this required the Applicant's signature. In October 2014, the Applicant filed a complaint for abuse of authority against the Chief to the Under-Secretary-General for the Department of Field Support ("DFS"). On 1 April 2015, the United Nations Dispute Tribunal issued an order referring the matter to the Office of the Ombudsman and Mediation Services ("UNOMS") for mediation. On 22 June 2015, the Rebuttal Panel took the decision to set the Applicant's performance rating to "meets performance expectations" and on 15 July 2015 the Applicant's appointment was extended for one year. A few days later UNOMS reported that the parties were unable to resolve the matter informally. Subsequently the parties filed further submissions up until March 2016. In her final submission, the Applicant requested compensation in the amount of two years' net base salary.

[6] Judge Vinod Boolel (Nairobi).

Based on the documents before it and the hearing on the merits, the Tribunal concluded that the Applicant began experiencing professional challenges when she refused to comply with a request from her First Reporting Officer ("FRO"), the Chief, to sign a document which, in her view, she had no authority to sign. Her refusal led to the imposition of a Performance Improvement Plan ("PIP") only three months after she took up her post at the RSCE. The Applicant's Second Reporting Officer was neither involved in nor aware of the PIP. The Tribunal found that the Applicant was gradually deprived of the staff assigned to her and of her own functions and responsibilities. The Chief ceased to communicate with her. Between May and October 2014, the Applicant received only one email from the Chief. This was in stark contrast to the approximately 70 emails per month she used to receive. The evidence also indicated that the Applicant was physically isolated in a building half a kilometre away from the rest of the team and was excluded from work-related developments, meetings, and training opportunities that directly related to her responsibilities by the Chief.

The Tribunal noted that the Respondent initially submitted that the application was not receivable on grounds that it was time-barred, especially since the Applicant could not specifically identify when she was stripped of her functional responsibilities. On the merits, the Respondent's case was that the Applicant had provided no evidence to substantiate her claim that the Administration had been taking steps to "constructively dismiss her" from the Organization.

The UNDT further noted that following DFS's referral of the matter to the Office of Human Resources Management ("OHRM") for disciplinary action against the Chief, the Respondent conceded liability for the unlawful actions of the Chief harming the Applicant. This concession did not result in a meaningful settlement of the dispute between the parties. In the view of the Tribunal, the case record indicated repeated violations of the Tribunal's orders by the Respondent. Additionally, the actions of the Chief were not only condoned, but repeatedly defended as being in the interest of the Organization. The Tribunal concluded that had the Respondent exercised more diligence and circumspection, the case would not have come to litigation.

The Tribunal held that the Chief's actions towards the Applicant amounted to a clear breach of authority within the definition contained in ST/SGB/2008/5 which is "the improper use of a position of influence, power or authority against another person". The Tribunal also found that the Chief either deliberately or negligently ignored the principles governing the role of a manager or supervisor contained in the 2014 Standards of Conduct for the International Civil Service.

Having found that the Applicant's fundamental rights as an employee of the United Nations had been breached and that the breach was of such a fundamental nature as to cause considerable damage to the Applicant's health, the Tribunal awarded compensation in the amount of 20 months' net base salary. The Tribunal also referred the Chief to the Secretary-General for accountability pursuant to article 10.8 of the Statute of the Tribunal.

4. *Judgment No. UNDT/2016/181 (7 October 2016): Hassanin* v. *Secretary-General of The United Nations*[7]

Legal authority of the Secretary-General to terminate permanent appointments—Primary responsibility for finding alternative employment should rest with the Organization—Permanent staff on abolished posts should be assigned to a suitable post on a priority basis—Proper consideration of the Applicant's status as a representative to the Staff Council—Rescission of the decision to terminate or monetary compensation—Compensation for emotional distress

The Applicant challenged the decision to abolish his G-4 post effective 1 January 2014 and the decision of Department of General Assembly Conferences Management ("DGACM") to terminate his permanent appointment as a result. The post was abolished based on a decision of the General Assembly approving the abolition of 59 posts in the Publishing Section of the Meeting and Publishing Division of DGACM, including the Applicant's post. The Applicant received a permanent appointment in 1995. He was active in the Staff Association and some time before his post was abolished, he had been elected First Vice-President of the 45th Staff Council. On 6 January 2014, the Applicant received a letter from the DGACM notifying him of the termination of his appointment and encouraging him to apply for available positions for which he believed he had the required competencies and skills.

The Applicant applied for four positions. The Applicant was informed that his applications for two positions were submitted post deadline. His application for the third position was rejected as he was not eligible for temporary positions more than one level above his grade. With regard to the fourth position, he was informed within 48 hours after applying that based on the overall review of the applications received his application would not be considered. The Applicant argued that the impugned decisions breached General Assembly resolution 54/249, which emphasized that "the introduction of new technology should lead neither to the involuntary separation of staff nor necessarily to a reduction of staff". He further argued that the Secretary-General lacked authority to terminate his permanent appointment prior to his separation. He also took the view that the Organization breached the obligations of good faith and fair dealing by shifting the responsibility for finding alternative employment onto him contrary to staff rules 13.1(*d*) and (*e*). The Applicant also argued that he was targeted for termination because of his history of advocacy on behalf of staff against the Administration.

The Tribunal found that there was no breach of resolution 54/249 as it was limited to the biennium 2000–2001. In the view of the Tribunal, the Secretary-General has the legal authority to terminate permanent appointments per staff regulation 9.3(*a*)(i), staff rule 13.1(*a*), and staff rule 13.1(*d*) provided it is lawfully done, *i.e.*, that relevant conditions concerning preferential retention are satisfied. Under the framework envisaged by staff rules 9.6 and 13.1, it is incumbent upon the Organization to review all possible suitable posts vacant or likely to be vacant in the future, and to assign affected staff members with a permanent contract on a priority basis.

In assessing whether this was complied with, the Tribunal considered that the termination letter sent to the Applicant indicated that the Administration viewed the primary

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

responsibility for finding alternative employment as resting with the Applicant. Requiring the Applicant to apply competitively for vacant positions, let alone compete for them with non-permanent staff, was a breach of staff rule 13.1. Permanent staff on abolished posts, if they are suitable for vacant posts, should only be compared against other permanent staff, but less senior and non-permanent staff members were placed or retained in preference to the Applicant. The Tribunal therefore concluded that the Organization committed material irregularities and failed to act fully in compliance with the requirements of staff rule 13.1(*d*) and (*e*) and 9(6)(*e*).

The Tribunal found further that the Organization failed to give proper consideration to the Applicant's status as a newly elected representative to the Staff Council. The Applicant's termination was also unlawful because he did not receive proper consideration as an elected high-level official of the Staff Union. The Tribunal did not find sufficient evidence to support the claim that the Applicant's termination was influenced by any animus against him. The Tribunal ordered the rescission of the decision to terminate his permanent appointment or, alternatively, the Organization was ordered to compensate him in the amount of three years' net base salary, minus any termination indemnity paid to him upon separation. The Applicant was further awarded USD 20,000 as compensation for emotional distress.

5. *Judgment No. UNDT/2016/183 (11 October 2016): Tiefenbacher* v. *Secretary-General of the United Nations*[8]

Challenge to the decision not to select permanent staff member for alternative post—Obligation to make good faith efforts to retain permanent staff members whose posts are abolished—Non-compliance with the rules on retention of permanent staff members—Compensation for pecuniary losses

The Applicant, a former Chief of Staff and Chief of Directorate, Bureau of Management at the D-1 level on a permanent appointment, challenged the decision of the United Nations Development Programme ("UNDP") not to select him for the post of Directorate Manager, Bureau of Programme and Policy Support at UNDP. The Applicant's former post had been abolished as a result of a structural change exercise at UNDP. The Applicant had been considered for a number of vacant posts at the D-1 level as part of the exercise. UNDP conducted a desk review with regard to the contested post. No test or interviews were conducted and another person was recommended for the post. Shortly after being appointed to the post, the other person left for another position and as a result the post became vacant again. UNDP advertised the vacancy on 1 April 2015 as a regular vacancy open to internal and external applicants with a deadline of 15 April 2015.

In June 2015, the vacancy was reopened upon request of the hiring manager so as to increase the pool of candidates. The new deadline was 9 June 2015. In August, one of the three short-listed candidates withdrew from the process, leaving only the Applicant and a female candidate short-listed. The female candidate indicated to UNDP that she was considering withdrawing from the process. In August, the hiring manager requested UNDP's office of human resources management to accept two applications which were submitted late in order to have at least three candidates available for interviews. The additional female candidate was permitted to submit her application while the additional male candidate withdrew his

[8] Judge Alexander W. Hunter, Jr. (New York).

application. The other female candidate, who had indicated earlier that she might withdraw, withdrew. That left the Applicant and the one female candidate, newly added, in the running.

The Applicant and the female candidate were interviewed in late August 2015. The female candidate was recommended, and the Applicant was not. The female candidate was selected. The Applicant was informed of the decision that he was not selected in September 2015. After several temporary extensions the Applicant's permanent appointment was terminated at the end of July 2016.

The Tribunal considered whether UNDP had complied with the staff rules on retention of permanent staff. It determined that consistent with the requirements of Staff Rule 13.1(*d*) on permanent appointments, one of the purposes of a structural change exercise is finding alternative employment for staff on permanent appointments whose posts had been abolished or otherwise become unavailable. If a permanent staff member remains displaced after an exercise, UNDP was still obliged to make good faith efforts to retain the staff member. UNDP was fully aware that the Applicant was a displaced permanent staff member in need of a post; there was an available post and UNDP should have considered his suitability without opening the process to external candidates and conducting a full-scale selection exercise.

The Tribunal found that an exercise to retain a permanent staff member on a matching post under staff rule 13.1(*d*) was distinct from a regular competitive selection process open to external candidates. Staff rule 13.1(*d*) envisaged a matching exercise taking into account relevant factors (contract status, suitability, length of service, *etc*.), a process different from a competency-based interview. The Tribunal concluded that UNDP had not complied with the rules on retention of permanent staff. With regard to the allegation of bias against the Applicant, the Tribunal concluded that there was insufficient evidence to establish that the process was tainted and that the Applicant was not afforded proper priority consideration for the post under the framework established by staff rules 9.6(*e*) and 13.1(*d*) for staff members on permanent appointments whose posts are abolished.

As compensation for his pecuniary losses, the Tribunal looked at any effects of the non-selection decision and awarded the Applicant seven months' net base salary. The Tribunal took into consideration that the Applicant had lost a 50 per cent chance of being selected for the post and that, if selected, it would be reasonable to expect him to occupy the post for two years. As the Applicant did not dispute the abolition of his post and the decision to terminate his appointment, the Tribunal did not take the termination indemnity paid to the Applicant into account in determining the amount of compensation.

The Tribunal also took into account that the Applicant had suffered no pecuniary loss for the nine months he remained employed with UNDP before his termination. Given the Applicant's experience, skills, excellent performance record, relatively young age and continued efforts to find alternative employment, the Tribunal expected that he would be gainfully employed at some point in the future. The Tribunal denied a request by the Applicant for pre-judgment interest on his pecuniary damages, with interest accruing from the date each salary payment would have been made, compounded semi-annually on the grounds that his pecuniary loss pertained almost entirely to future earnings. The Tribunal found no basis for awarding the Applicant compensation for non-pecuniary damages as no evidence was adduced to substantiate the Applicant's claim of moral injury.

6. *Judgment No. UNDT/2016/204 (11 November 2016): Nakhlawi* v. *Secretary-General of the United Nations*[9]

Abolition of mandate of the post did not provide for the possibility to terminate a permanent appointment—No approval for abolishing the post—Failure to make reasonable and good faith efforts to find the Applicant an alternative post—Reinstatement of the Applicant or compensation in lieu—Award of moral damages

The application challenged the decision to terminate the Applicant's permanent appointment with the United Nations Secretariat on the basis of the alleged abolition of her post and the inability to identify another position for her.

The Applicant joined the Organization in 2001 as a general service staff member and passed the G-to-P examination in Finance in 2008. In 2009, the Applicant was granted a permanent appointment with the United Nations Secretariat. Her letter of appointment did not contain a limitation of her appointment to any particular office or department. In December 2009, the Applicant was transferred to a P-2 post as Finance Officer in the Department of Field Support. She was assigned in August 2011 to a P-3 post as Finance and Budget Officer in the Department of Management, and also placed on the rosters for "Finance and Budget Officer" and for "Program Management Officer" at the P-3 level.

Thereafter, the United Nations Interregional Crime and Justice Research Institute ("UNICRI") approached the Applicant for selection from the roster for a post of "Expert (Grant Management)" for a project at UNICRI. In response to her question whether her assignment to the project post would affect her permanent staff member status, the Applicant was advised by the Administration in July 2012 that "upon reassignment, your permanent appointment will remain unchanged" and that the post was available for a number of years and she should not worry about its duration.

The Applicant accepted the offer and assumed the functions of the post in September 2012. As the UNICRI project progressed, the Applicant was informed in July and October 2014 by the United Nations Office at Vienna ("UNOV") of the intent to abolish her post at UNICRI by the end of December 2014. In early December 2014, UNOV advised the Applicant that as the abolition of her post was imminent, it would proceed to separate her by 31 December, unless she would request Special Leave Without Pay. Shortly thereafter, UNOV informed the Applicant that her permanent appointment was not going to be terminated as neither UNOV nor UNICRI had authority to do so.

UNICRI and UNOV, which administers UNICRI, made efforts to find a suitable post for the Applicant within UNICRI and UNOV given that she held a permanent appointment. The Office for Human Resources Management ("OHRM"), which had been alerted about the Applicant's situation by both UNICRI and UNOV, made no effort to find an alternative post for the Applicant within the United Nations Secretariat at large. Instead, OHRM had informed the hiring managers of four posts for which the Applicant had applied that "due consideration" should be given to her as a permanent contract holder on a post due to be abolished.

On 5 and 22 December 2014, the Applicant requested management evaluation of what she considered the decision by UNOV to terminate her permanent appointment and

[9] Judge Rowan Downing, Presiding, Judge Teresa Bravo and Judge Goolam Meeran (Geneva).

by UNICRI not to reassign her to another function. The Management Evaluation Unit ("MEU") deemed both requests not receivable as no effective administrative decision to terminate her appointment had been taken. On 2 March 2015, OHRM submitted UNICRI's request to terminate the Applicant's permanent appointment effective 31 January 2015, based on staff regulation 9.3(*a*)(i) ("If the necessities of service require abolition of the post or reduction of the staff") to the Under-Secretary-General for Management (USG/DM) for approval. USG/DM approved the termination on 6 March 2015. Before approving the termination, USG/DM had been informed by OHRM that considerable efforts had been made to secure another appointment for the Applicant, within UNICRI or within the United Nations system, but they had been unsuccessful.

On 9 March 2015, UNOV notified the Applicant as per staff rules 9.7(*a*) (notice of termination) and 13.1(*a*) (permanent appointment) that her permanent appointment would be terminated. The Applicant's request for management evaluation of the decision was rejected by the Chef de Cabinet on 8 April 2015.

In the Tribunal's view, the Applicant's post had not been abolished as per staff rule 13.1(*d*) (abolition of post in case of permanent appointment). The UNICRI project required functions distinct from the Applicant's, which the Tribunal considered to be an abolition of mandate of the post rather than of the post. As a result, the termination did not comply with staff rule 13.1(*c*) which did not provide for the possibility to terminate a permanent appointment under such circumstances. Staff rule 13.1(*d*) on abolition of post was not applicable.

The Tribunal found that even if the ground for the termination of the Applicant's permanent appointment had legitimately been the abolition of her post, abolition required the approval of the UNICRI Board of Trustees, which had not been obtained. Absent an official document delegating the authority to abolish a post from the Board of Trustees to the Director of UNICRI, the Director acted *ultra vires* in deciding to abolish the Applicant's post. The Tribunal found that the Administration failed to discharge its obligation to make reasonable and good faith efforts under staff rules 9.6(*e*) and 13.1(*d*) to find the Applicant an alternative post within the United Nations Secretariat and misinformed the USG/DM in this regard when requesting approval for the termination.

The Tribunal also referred to its judgment UNDT/2016/102 with regard to the wide scope of the Organization's obligation to make good faith efforts to find an alternate function for a permanent staff member whose post is slated for abolition.

The Tribunal ordered the rescission of the termination decision and reinstatement of the Applicant or, alternatively, payment of three years' net base salary plus the corresponding contributions to the United Nations Joint Staff Pension Fund ("UNJSPF") as compensation in lieu. The Tribunal also awarded the Applicant USD 20,000 as moral damages for stress and anxiety over the termination and disappointment and sorrow over how she was treated. Since the Applicant's loss of employment was the result of the Organization's failure to comply with its duty to secure alternative employment for her, it was justified to award compensation in excess of the two-year limitation.

B. Decisions of the United Nations Appeals Tribunal

The United Nations Appeals Tribunal ("UNAT" or "Appeals Tribunal") issued a total of 101 judgments in 2016. The summaries of five of those judgments are reproduced below.[10]

1. *Judgment No. 2016-UNAT-618 (24 March 2016): Subramanian et al.* v. *Secretary-General of the United Nations*[11]

Appeal relating to a salary survey—UNDT wrongfully converted the request for an extension of time into an application—Violation of the staff member's statutory rights—UNDT judgment vacated

The Appeals Tribunal considered an appeal relating to a Comprehensive Local Salary Survey which was conducted in New Delhi, India, in June 2013. The Appeals Tribunal found that the United Nations Dispute Tribunal ("UNDT") exceeded its competence and jurisdiction and made procedural errors when it, on its own motion, converted the staff members' request for an extension of time into an application and summarily dismissed it as not receivable. By equating the request for extension of time with an application, which the applicants were not ready to file without having obtained more information, the UNDT violated the staff members' statutory rights to file an application and to have access to justice as well as their right to due process of law. Accordingly, the Appeals Tribunal vacated the UNDT judgment and remanded the matter to the UNDT with instructions to permit the staff members to file an application.[12]

2. *Judgment No. 2016-UNAT-622 (24 March 2016): Aly et al.* v. *Secretary-General of the United Nations*[13]

Protracted classification review process—Right to request reclassification—Second remand of the case to the Administration unviable and unfair—Award of monetary compensation

The Appeals Tribunal considered an appeal against a judgment in which the UNDT rescinded a decision of the Assistant Secretary-General for the Office of Human Resources Management (ASG/OHRM) and remanded the case to the Administration. In the context of a protracted classification review process spanning over 20 years, the ASG/OHRM, based on the recommendation of the New York General Service Classification Appeals Committee following the remand pursuant to a previous UNDT judgment, had decided to maintain the classification of the posts of staff members who undisputedly performed functions exceeding their original job descriptions during that period.

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[10] The summaries provided are for illustrative purposes only and are not authoritative, representative or exhaustive. For the full list of judgments by the UNAT and the latest developments, consult the website of the Office of the Administration of Justice at https://www.un.org/en/internaljustice/.

[11] Judge Mary Faherty, Presiding, Judge Rosalyn Chapman and Judge Richard Lussick.

[12] See *Taneja et al.* v. *Secretary-General of the United Nations,* Judgment no 2016-UNAT-628; See also *Prasad et al* v. *Secretary-General of the United Nations*, Judgment no 2016-UNAT-629; *Bhatia et al.* v. *Secretary-General of the United Nations,* Judgment no 2016-UNAT-630; *Thomas et al.* v. *Secretary-General of the United Nations,* Judgment no 2016-UNAT-631; *Jaishankar* v. *Secretary-General of the United Nations*, Judgment no 2016-UNAT-632; *Bharati* v. *Secretary-General of the United Nations*, Judgment no 2016-UNAT-633.

[13] Judge Sophie Adinyira, Presiding, Judge Mary Faherty and Judge Rosalyn Chapman.

The Appeals Tribunal affirmed the rescission by the UNDT of the decision to maintain the classification, reaffirming the right of staff members to request reclassification when the duties and responsibilities of their posts change substantially as a result of a restructuring within their office. However, the Appeals Tribunal reversed the UNDT's order to remand the case to the Administration, stating that a second remand was unviable and unfair having regard to the fact that the protracted classification review process was mainly due to the reluctance and failure of management to follow their own rules, regulations and administrative instructions. Furthermore, the majority of the applicants had already retired so a remand could not offer an effective remedy. Instead, the Appeals Tribunal awarded each appellant compensation equivalent to three years' net base salary. In light of the particularly egregious circumstances of the case and the accumulation of aggravating factors, the Appeals Tribunal found that the increased award, exceptionally exceeding the equivalent of two years' net base salary pursuant to article 9(1)(*b*) of the UNAT Statute, was justified.

3. *Judgment No. 2016-UNAT-641 (24 March 2016): Chemingui* v. *Secretary-General of the United Nations*[14]

Challenge to decision on lateral reassignment—Decision on lateral reassignment did not constitute a case of appointment, promotion, or termination—No basis for interlocutory appeal

The staff member filed an application before the UNDT challenging the decision to laterally reassign him and requested a suspension of action. The UNDT issued an order granting his request for suspension of action pending resolution of the matter. The Secretary-General filed an interlocutory appeal of the order. The Appeals Tribunal found that the UNDT did not "clearly exceed its competence or jurisdiction" when it temporarily suspended the administrative decision to laterally reassign the staff member as that decision did not constitute a case of "appointment, promotion, or termination" excluded from interim relief under Article 10(2) of the UNDT Statute. Accordingly, since there was no basis for an interlocutory appeal, it was dismissed as not receivable.

4. *Judgment No. 2016-UNAT-661 (30 June 2016): Kalashnik* v. *Secretary-General of the United Nations*[15]

Request for management evaluation—Administrative response to a request for management evaluation is not judicially reviewable—Opportunity to resolve the matter without litigation

The Appeals Tribunal affirmed the UNDT finding that the staff member's application was not receivable *ratione materiae* because a response of the Management Evaluation Unit ("MEU") to a request for management evaluation was not a judicially reviewable administrative decision. The UNDT correctly held that the MEU response did not produce direct legal consequences on the staff member's terms and conditions of appointment. Considering "the nature of the decision, the legal framework under which the decision was made, and [its] consequences", the Appeals Tribunal found that the response to a request

[14] Judge Rosalyn Chapman, Presiding, Judge Inés Weinberg de Roca and Judge Mary Faherty.

[15] Judge Rosalyn Chapman, Presiding, Judge Deborah Thomas-Felix and Judge Richard Lussick.

for management evaluation was an opportunity for the Administration to resolve a staff member's grievance without litigation and not a fresh decision.

5. *Judgment No. 2016-UNAT-706 (28 October 2016): Gallo* v. *Secretary-General of the United Nations*[16]

Non-disciplinary measure in connection with a former staff member's conduct while employed—Non-disciplinary measure was not predicated upon and limited to the existence of an ongoing employment contract—UNDT judgment partially vacated

The Appeals Tribunal held that the UNDT erred in finding that it was unlawful for the Secretary-General to issue a written reprimand in connection with a former staff member's conduct while employed. It stated that there was no requirement in the Staff Regulations or Rules providing that the Secretary-General's discretionary authority to issue a written reprimand as a non-disciplinary measure pursuant to staff rule 10.2(*b*)(i) was predicated upon and limited to the existence of an ongoing employment contract. To hold otherwise would render baseless those standards of conduct that survive active service. In addition, from a practical perspective, it would stymie the Secretary-General's ability and discretionary authority to properly manage investigations and discipline staff. The Secretary-General's authority to administer the Organization's records, including those of former staff members, and to ensure they reflect the staff member's performance and conduct during his or her period of employment, did not lapse upon the staff member's separation from service. Therefore, the Appeals Tribunal granted the appeal and vacated the UNDT judgment in part with respect to this holding and the UNDT's order to remove the reprimand from the former staff member's Official Status File.

[16] Judge Deborah Thomas-Felix, Presiding, Judge Richard Lussick and Judge Martha Halfeld.

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

The Administrative Tribunal of the International Labour Organization adopted in 2016 a total of 157 judgments at its 121st and 122nd sessions.[18] The summaries of seven of those judgments are reproduced below.

1. *Judgment No. 3575 (3 February 2016): C.* v. *International Organization for Migration (IOM)*

Discharge from service for possession of unauthorized Firearm—Disciplinary measure not based upon any rule prohibiting firearms—Possession of unauthorized firearm clearly represented a risk to the safety—Complaint dismissed

At the material time, the complainant was Deputy Chief of Mission of IOM in Kabul, Afghanistan. In the course of an investigation, it was discovered that he was in possession of an unauthorized firearm. In May 2012, the IOM Director General notified the complainant that he had decided to discharge him from service with due notice. He considered that the complainant had shown extremely poor judgement and disregard for staff security and for IOM's reputation in buying a firearm on the streets in Kabul and keeping it in his quarters in the IOM compound, which the complainant did not deny. The complainant's internal appeal was rejected and the Director General maintained the disciplinary measure. This final decision was impugned before the Tribunal.

The complainant argued, inter alia, that IOM failed to prove the content and existence of a rule or law prohibiting the purchase and possession of a firearm in the IOM compound. The Tribunal found that, as IOM did not base its dismissal decision on the breach of a specific rule or law, the proof of the existence and content of either was not required. Although there had been reference to United Nations Department for Safety and Security ("UNDSS")'s advice, its security standards and the United Nations Field Security Handbook ("UNFSH"), the Tribunal found that they were not relied upon by IOM as grounds for the disciplinary measure.

The Tribunal fully endorsed IOM's conclusion that there was sufficient evidence to establish beyond a reasonable doubt that the complainant had purchased and was in *de facto* possession of a firearm within the IOM compound. The Tribunal also found that:

> "the Director General's conclusion that the complainant exhibited extremely poor judgment which jeopardized the safety of staff members and put at risk the reputation

[17] The Administrative Tribunal of the International Labour Organization is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the staff regulations of international organizations that have recognized the competence of the Tribunal. For a list of those organizations, see http://www.ilo.org/tribunal/membership/lang--en/index.htm. 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/tribunal/lang--en/index.htm.

[18] See http://www.ilo.org/dyn/triblex/triblexmain.showList?p_lang=en&p_session_id=121 and http://www.ilo.org/dyn/triblex/triblexmain.showList?p_lang=en&p_session_id=122.

of IOM [was] well founded on the evidence. The possession of a firearm within the IOM compound clearly represented a risk to the safety of the complainant, Ms. L. and all other individuals who may have been exposed to the firearm. As correctly noted by the Director General […], the firearm could have killed or seriously injured someone if intentionally or unintentionally discharged. This is particularly true when one considers the firearm was made available to Ms. L., who had little to no firearms training outside the occasional visit to the shooting range. Furthermore, and despite the complainant's submissions to the contrary, the purchase of the firearm on the streets of Kabul risked jeopardizing the IOM's reputation. As noted by the Director General […], IOM provides humanitarian assistance and maintains a peaceful mandate in Kabul. The purchase of a firearm, on the streets, by a senior official represents a public contradiction to the broad ideals of IOM and puts its reputation at risk."

In conclusion, the Tribunal dismissed the complaint in its entirety.

2. *Judgment No. 3582 (3 February 2016): D.* v. *World Health Organization (WHO)*

Termination of appointment due to abolition of post—Unreasonable delay in internal appeal proceedings—Compensation for moral damages—Amount of damages depends on the length of the delay and its consequences—Abolition of the post must be based on objective grounds—Reasonable and timely notice of the non-renewal of a fixed-term appointment

The complainant, who held a fixed-term appointment with WHO, was informed in November 2010 that, for purely programmatic and financial reasons, her position would be abolished and that, consequently, her appointment would not be extended. Following an internal appeal, the WHO Director General decided to maintain the initial decision but to award the complainant USD 6,000 for moral injury, USD 2,000 for the excessive length of the internal appeal proceedings and a maximum of USD 3,000 in respect of the procedural costs she had incurred. She impugned that decision in the Tribunal.

The Tribunal first examined the issue of the length of the internal procedure and found that:

"… it is obvious from the circumstances of the case that the length of the internal appeal proceedings was unreasonable in light of the Tribunal's consistent case law, since there is no indication that its protracted nature was due to wrongful procedural conduct on the part of the complainant, and the appeal body's workload on which WHO relies certainly does not justify keeping a staff member in a state of uncertainty for almost three years as to the outcome of an appeal filed with the competent body and in accordance with the applicable rules. The complainant is therefore entitled to moral damages for the defendant organization's breach of its duties of due diligence and care (see, in particular, Judgments 2522, under 7, 3160, under 16, and 3188, under 25)."

The Tribunal than dealt with the issue of the amount of the compensation for such a delay, stating that:

"4. According to the Tribunal's case law, the amount of damages awarded for the injury caused by an unreasonable delay in processing an internal appeal depends on the length of the delay and its consequences (see Judgment 3530, under 5).

Whatever the extent of the delay, its consequences naturally vary depending on the subject matter of the dispute. A delay in resolving a matter of limited seriousness in its

impact on the appellant will ordinarily be less injurious than a delay in resolving a matter which has a severe impact (see Judgment 3160, under 17).

It was particularly important that the appeal against the decision not to extend the appointment of the complainant, who was then approaching 40 years of age and who had been in the service of WHO for almost nine years, should be processed quickly, so that she might know at the earliest possible opportunity what her chances were of remaining in the Organization's service. This was essential for the next stage in her career. Without dwelling on the question of whether, as she alleges, the appeal proceedings hampered her search for a new job, the Tribunal considers that, having regard to all the circumstances of the case, the compensation of 2,000 dollars awarded under the impugned decision is not sufficient to redress the injury caused by the unusually long internal appeal proceedings. The amount of that compensation should, in fairness, be increased to 4,000 dollars. This amount compensates the complainant for all the injury resulting from the excessive length of the proceedings and from the fact that the impugned decision did not award her sufficient redress under that head."

Regarding the restructuring of the organization and the abolition of a post, the Tribunal made some general remarks:

"According to firm precedent, a decision concerning the restructuring of an international organization's services, which leads to the abolition of a post, may be taken at the discretion of its executive head and is subject to only limited review by the Tribunal. The latter must therefore confine itself to ascertaining whether the decision was taken in accordance with the rules on competence, form or procedure, whether it involves a mistake of fact or of law, whether it constituted abuse of authority, whether it failed to take account of material facts, or whether it draws clearly mistaken conclusions from the evidence. The Tribunal may not, however, supplant an organization's view with its own (see, for example, Judgments 1131, under 5, 2510, under 10, and 2933, under 10). Nevertheless, any decision to abolish a post must be based on objective grounds and its purpose may never be to remove a member of staff regarded as unwanted. Disguising such purposes as a restructuring measure would constitute abuse of authority (see Judgments 1231, under 26, 1729, under 11, and 3353, under 17)."

In the specific case before it, the Tribunal concluded that "the restructuring of the complainant's unit […] had nothing to do with the complainant's personality and was prompted solely by objective considerations related to the policy on budgetary savings and rationalization which the Organization had been forced to adopt, since maintaining the complainant's post no longer appeared to be essential for the proper functioning of the unit."

The Tribunal examined the conditions under which the termination occurred. Regarding the termination notice, the Tribunal recalled its case law "which requires international organizations to give reasonable notice of the non-renewal of a fixed-term appointment (see Judgments 2104, under 6, and 3448, under 8). This case law takes account of international organizations' specific needs and of the legitimate interests of the staff member concerned who, even if she or he in principle has no right to the renewal of her or his appointment, must be apprised of the employer's intentions early enough to be able to start looking for other employment in a timely manner (see Judgment 1617, under 2)."

The Tribunal rejected an argument according to which the failure of an organization to give timely notice results in the automatic renewal of a contract for the period of its current duration. The Tribunal explained that:

> "the protection of the legitimate interests of the staff member concerned does not mean that failure to comply with the prescribed period of notice entails the employer's loss of its right to alter a legal relationship by ending an appointment on its expiry and the tacit renewal of the appointment for a further fixed term. The aim of the [.. .] case law is achieved when the appointment is extended by the length of time needed to give the official a full period of notice (see, in particular, Judgments 2162, under 2, and 3444, under 3). Non-compliance with the notice period established by the Staff Rules will result in a tacit extension of the appointment for a further fixed term only if the Staff Rules or the contract expressly provide for this contingency or if the official concerned has received assurances to that effect from the employer in circumstances where the principle of good faith requires that they be honoured."

Another issue considered by the Tribunal was whether the complainant was entitled to a reassignment pursuant to WHO rules. The respective positions of WHO and the complainant differed on this point based on the text of the applicable rule. The Tribunal found that there was a difference between the English and the French versions of the rule and recalled that it has consistently held that "any ambiguity in the regulations or rules established by an international organisation should, in principle, be construed in favour of the staff and not of the organisation (see Judgment 3369, under 12)."

The Tribunal awarded the complainant USD 4,000 for the delay in internal procedure and for wrongly being denied the right to benefit from the provisions of the Staff Rules providing for a reassignment procedure (although the Tribunal noted that WHO did not abide by the relevant Rule, it undertook the necessary searches for another post in its service which it could propose to the complainant. The Tribunal concluded that "[t]he purpose of these provisions, which is to enable the staff member's reassignment whenever possible, was therefore served.") The Tribunal also awarded the complainant costs in the amount of USD 1,500.

3. *Judgment No. 3602 (3 February 2016): A.* v. *World Trade Organization (WTO)*

Summary dismissal for unlawful possession of weapon—Conduct in a private capacity may lead to disciplinary proceedings—Imposition of internal disciplinary sanction is independent of any related domestic proceedings—Principle of proportionality—Duty of care of the organization to seek further medical advice—remittance of the matter to the WTO for reconsideration—Award of moral damages

The complainant, a former employee of the WTO, contested the Director-General's decision to summarily dismiss him for serious misconduct. This disciplinary measure resulted from an incident which occurred on 1 December 2011. The complainant, who at that time enjoyed diplomatic status by virtue of the level of his post, was stopped by security agents at Geneva airport as he attempted to board a flight carrying items prohibited under Swiss law, namely a plastic dagger strapped to his leg, a pepper spray with no identification label tucked inside a martial arts tool and a round of rifle ammunition. The prohibited items were confiscated and he was allowed to board a later flight that same day. The WTO was notified of the incident by the Swiss authorities, who formally requested that the complainant's immunity from jurisdiction and execution be waived in view of initiating criminal proceedings. The complainant was later charged with unlawful possession of a prohibited weapon. In February 2012 he was hospitalized and subsequently submitted two medical certificates certifying that he was unfit to work. While on sick leave, the complainant was notified of

the Director-General's decision to summarily dismiss him with immediate effect for serious misconduct. When the Joint Appeals Board found that this decision was vitiated because the WTO had failed to notify the complainant of the proposed disciplinary measure and give him an opportunity to comment prior to its imposition, the Director-General accepted that recommendation, but, after having received comments from the complainant's counsel, issued a new decision applying the measure of summary dismissal.

The Tribunal rejected several grounds on which the complainant challenged the impugned decision. It rejected, inter alia, the complainant's claim that the misconduct was not proven beyond a reasonable doubt as well as his contention that the incident should not have attracted disciplinary proceedings against him because it occurred in his private capacity and was therefore not relevant to the terms of his employment with the WTO. On this point, the Tribunal found that:

> "notwithstanding that the complainant was travelling in a private capacity, his behaviour was incompatible with the rules of conduct by which an international civil servant must abide. That behaviour involved the breach of airline travel security in a manner that was incompatible with his office and duty to the WTO and that risked WTO's relationship with the Swiss authorities and its esteem and standing as an international organization. That behaviour could properly have attracted liability by way of disciplinary proceedings (see Judgment 2944, under 44–49, for example)."

The Tribunal also rejected the argument that the disciplinary sanction should not have been imposed before any level of responsibility had been determined by the Swiss judicial authorities. The complainant insisted that the case was *sub judice* and no conviction had been rendered as well as that the WTO had acted prematurely when it instituted disciplinary proceedings against him for summary dismissal, which requires proof beyond reasonable doubt, without awaiting the outcome of his trial, as no such proof existed until he was convicted. The Tribunal rejected this argument: "The imposition of an internal disciplinary sanction falls within the ambit of the Staff Regulations and Staff Rules of the WTO and is independent of any related domestic proceedings against a complainant. The disciplinary process did not have to await the outcome of the domestic judicial process."

However, the Tribunal accepted that the disciplinary sanction violated the principle of proportionality. The Tribunal recalled that in Judgment 210 it ruled that even in a case in which serious misconduct is alleged, staff rules provide a wide range of penalties and it is therefore necessary to apply the principle of proportionality to ensure that the extreme penalty of summary dismissal is applied only in the gravest cases. In that judgement, the Tribunal found that:

> "[W]hen these mitigating factors are put into the scale together with the lack of any corrupt motive and the complainant's previous good record, they cause the sentence of summary dismissal to appear out of all proportion to the degree of misbehaviour in this case."

Although the Tribunal observed that the Director-General carried out the exercise to determine proportionality by weighing all of the facts and circumstances of the alleged misconduct against the mitigating factors in favour of the complainant, the Tribunal concluded that in that exercise the complainant's health condition, as it may have impacted the complainant's behaviour on the date of the incident, was not properly considered and assessed. The Tribunal was particularly concerned with the Director-General's statement

in the impugned decision that the complainant had not established that his illness was responsible for his behaviour on that day. The Tribunal noted the following:

> "The record shows that on 10 May 2012 the complainant's physician certified that the complainant had been treated for a serious medical condition since 27 June 2011. This was before the incident of 1 December 2011. The physician confirmed this and certified that the complainant was still in May 2012 undergoing treatment but that his condition had significantly improved. The physician confirmed that diagnosis in another medical certificate of 30 July 2012. This information was provided to the Administration before the Director-General informed the complainant, by the letter of 30 November 2012, that the decision of 7 March 2012 was withdrawn and proposed again to subject him to the disciplinary measure of summary dismissal. That information was also available in the internal appeal proceedings.
>
> The Tribunal considers that in the particular circumstances the WTO had a duty of care towards the complainant that went beyond the mere statement that he had not established that his illness was responsible for his behaviour. That duty required the WTO to seek further medical advice concerning the complainant's medical condition that would have assisted it to have made a more informed assessment of a possible causal connection and consequential decision in the matter. This assessment should also have been weighed in determining proportionality. Having not done so, the impugned decision was unlawful […]. Since the WTO also did not meet its duty of care to seek further medical advice and to consider it in determining proportionality, [this] ground of the complaint is also well founded."

In the result, the impugned decision was set aside to the extent that it found that summary dismissal was a proportionate sanction. The matter was remitted to the WTO for reconsideration, and the complainant was awarded EUR 12,000 in moral damages and EUR 4,000 in costs.

4. Judgment No. 3610 (3 February 2016):
A. v. *Global Fund to Fight AIDS, Tuberculosis and Malaria*

Lawfulness of separation agreement—A waiver of the right to contest the separation agreement does not stop the Tribunal from examining the validity of that agreement—Separation agreement signed under duress—Award of material damages and moral damages

On 29 March 2012 the complainant, a former employee of the Global Fund signed the separation agreement that was given to her during a meeting eight days earlier. She added seven conditions to the standard separation agreement, which the Global Fund accepted. She separated from service on 30 April 2012. In May 2012 she started raising concerns with the Administration at the lawfulness of the separation agreement. An appeals process followed, and at the end of that process, the Global Fund's General Manager decided not to endorse conclusions of the Appeal Board favourable to the complainant. He recalled that the complainant had waived her right to contest any matters related to her separation and therefore concluded that the appeal was irreceivable. The complainant impugned this decision before the Tribunal.

The Tribunal recalled events which preceded the conclusion of the separation agreement as follows:

> "Prior to her separation, the Global Fund underwent a significant restructuring in which several employees (including the complainant) were allegedly identified as requiring support with regard to their abilities to meet the requirements expected pursuant to the Global Fund's new objectives. These employees were offered two options: continue working in the same role while agreeing to participate in a work program aimed at ensuring success in their new position (a Performance Improvement Plan or PIP); or accept a separation agreement. The complainant decided against undergoing the proposed PIP and after eight days of consideration and negotiations, she signed the separation agreement and was put on special leave with pay until the end of April 2012 when her separation came into effect."

The Tribunal then dealt with the Global Fund's objection to receivability of the complaint, which was based on the argument that the complainant had, by signing the separation agreement, waived her right to challenge either the validity or the content thereof. The Tribunal rejected this argument stating that such a waiver "does not stop the Tribunal from examining the validity of that agreement as if it is not valid, none of the clauses can be upheld."

On the substance, the Tribunal noted the options given to the complainant: "The first was to continue in her position as Senior Program Officer while agreeing to participate in a PIP designed to ensure her success in accordance with increased expectations following the restructuring. The second was to choose to leave the organization under an enhanced separation agreement." The Tribunal found that:

> "[t]he complainant was not eligible to be put on a PIP as she had consistently met the expected levels of performance. As participation in a PIP was not an available option for the complainant under the regulations, it should not have been offered as an alternative to signing a separation agreement. In doing this, the Global Fund created undue pressure on the complainant. Consequently, the separation agreement signed by the complainant on 29 March 2012 is not valid and must be set aside on the grounds that the complainant signed it under duress."

The Tribunal further explained that:

> "This is particularly so as the PIP could result in the complainant's separation from service […]. The Global Fund objects that as the complainant could challenge the decision to place her on a PIP, it cannot be considered that she signed the separation agreement under duress. The objection is not convincing. Every unlawful action vitiating consent, by its very nature, can be challenged, but even if it is not challenged this does not exclude the possibility that the consent may be vitiated. It must be noted that the lawfulness of the decision to offer the PIP was not considered to be settled but was a fundamental element of the process which led to the separation agreement. The complainant's consent was vitiated by the fact that if she did not sign the separation agreement, she would have had to go through the PIP for which she was not eligible. Therefore, the Tribunal considers that the Global Fund imposed undue pressure which persuaded the complainant to consent to the separation agreement."

Furthermore:

> "The Tribunal recognizes that international organizations have the discretion to manage their performance management objectives but highlights that they must do so using the tools they have in the manner in which they are designed. In the present case, the Global Fund used a tool (the PIP) which is explicitly designed to correct identified

underperformance, to address an issue of potential future underperformance. The Tribunal finds the misuse of the PIP to be an abuse of authority which rendered the process non-transparent and arbitrary, as according to the defendant's allegations the option of going through the PIP could be offered indistinctly to each employee."

Based on the above reasoning, the Tribunal decided to set aside the separation agreement and the impugned decision as well as that the complainant should keep the sums paid to her in accordance with the separation agreement (approximately CHF185,000) and that, in addition, she should be paid material damages for the loss of income and loss of career opportunity in the amount equivalent to three months' gross salary in accordance with the rate of her last salary payment. For the abuse of power and the violation of the Global Fund's duty of care stemming from the unlawful acts leading to the complainant's separation, the Tribunal awarded the complainant moral damages in the amount of CHF 50,000. The complainant was also entitled to costs in the amount of CHF 1,000.

5. Judgment No. 3652 (6 July 2016): *P. (Nos. 1 and 2)* v. *Food and Agriculture Organization of the United Nations (FAO)*

Nationality criteria in selection process—Nationality is only to be taken into account when candidates are equally well qualified—Lack of transparency in the early stages of the selection process—Award of material damages and moral damages

The complainant, a French national, held a fixed-term appointment with FAO. In June 2010 the FAO issued a vacancy announcement at grade P-4. The complainant applied for this post. Although she was initially selected for an interview, she was then told that she would not be interviewed because of her nationality. As she protested, she was later interviewed, but was not selected for the post. She applied to another P-4 vacancy issued in December 2010, but was not invited to an interview. The complainant appealed internally both final decisions on the selection in those two vacancies. The appeals were heard by the Appeals Committee, which found that the first selection was flawed because it had been disturbed by the criterion of geographic distribution, and that in the second, the complainant should be compensated as she was excluded from consideration from the start of the selection process due to her nationality. The Director-General rejected both appeals in their entirety. The complainant impugned these decisions before the Tribunal by two separate complaints that were joined by the Tribunal.

The Tribunal first recalled that:

"The Tribunal's case law has it that a staff appointment by an international organisation is a decision that lies within the discretion of its executive head. Such a decision is subject to only limited review and may be set aside only if it was taken without authority or in breach of a rule of form or of procedure, or if it was based on a mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a clearly wrong conclusion was drawn from the evidence (see Judgment 3537, under 10). Nevertheless, anyone who applies for a post to be filled by some process of selection is entitled to have her or his application considered in good faith and in keeping with the basic rules of fair and open competition. That is a right which every applicant must enjoy, whatever her or his hope of success may be (see, inter alia, Judgment 2163, under 1, and the case law cited therein, and Judgment 3209, under 11). It was also stated that an organisation must abide by the rules on selection and, when the process proves to be flawed, the Tribunal can quash any resulting appointment, albeit on the understanding that the

organisation must ensure that the successful candidate is shielded from any injury which may result from the cancellation of her or his appointment, which she or he accepted in good faith (see, for example, Judgment 3130, under 10 and 11)."

Having quoted relevant FAO provisions, the Tribunal determined that "the Director-General's discretion to appoint staff members must be exercised in accordance with [those] provisions and the general principles of law governing the international civil service, as discretion must be exercised within the bounds of legality."

The Tribunal then stated that:

"12. The [relevant] provisions of the Constitution, which has paramount force, and the Tribunal's case law on these provisions mandate that the overriding consideration for appointment to professional posts is whether a candidate meets the criteria set out for the post as advertised and her or his appointment is meritorious in a manner that secures the highest standards of efficiency, competence and integrity. The [Professional Staff Selection Committee] may however recommend the waiver of an essential qualification but must state the compensating grounds on which the candidate is recommended. The authority to grant the waiver, which may include the waiver of academic qualifications, country membership, experience and language, among others, is retained by the Director-General. Where candidates are equally well qualified, preference should be given to an internal candidate, and, reciprocally, to applicants from the United Nations or from other specialized agencies which are brought into relationship with the FAO. This, as well as nationality and geographic distribution, gender and such preferences or considerations would be taken into account only where candidates were 'equally well qualified' or 'evenly matched' on experience and qualifications, as the advertised post requires. They are not taken into consideration where there is 'a significant and relevant difference between the candidates.'"

The Tribunal also recalled its Judgments 2712, under 5 and 6, and 2392, under 9, in which it determined that the criteria of geographical distribution, nationality or gender, can be taken into consideration only if the candidates are "of equal merit" or "equally matched".

The Tribunal reconfirmed that "[t]he stated principle is that the nationality of a country that was non-represented or under-represented in the geographic distribution of staff members is only to be taken into account when candidates are equally well qualified. It was in error that qualifications, nationality and geographic distribution were accorded equal weight at that early stage of the process … ."

Furthermore, the Tribunal shared the concern expressed by the Appeals Committee regarding the lack of transparency in the selection process because records of the scores from the interviews were not available.

"This, in the Tribunal's view, reflects a serious flaw in the early stages of the selection process. The scores from the interview stage of the selection process were critically important to assist in the determination whether the paramount consideration for selection secured the highest standards of efficiency, technical competence and integrity. They were also necessary to assist in the determination whether the candidates were equally well qualified, so that as an internal candidate, the complainant should have benefitted from that or the gender preference. With the reports from the subsequent stages of the selection process, those scores could have assisted to explain why the complainant was placed second in the two preliminary submissions and why that changed to third in the final submission that was transmitted to the PSSC [Professional Staff Selection

> Committee] […]. They could also have assisted to explain to the PSSC that paramount consideration was accorded to the qualifications required in the vacancy announcement; whether the candidates were equally well qualified or otherwise, and, ultimately, whether the complainant should have had the benefit of any preference. They could also have assisted to confirm these same matters for the Appeals Committee in the internal appeal, and for the Tribunal on this complaint."

The Tribunal, in relation to both complaints determined that the complainant was not entitled to damages for loss of salary and allowances at the P-4 grade, as there were other candidates for the post and what she had was an expectation that she might be selected. The Tribunal ordered that the FAO pay the complainant a total of EUR 30,000 for material damages for both complaints, EUR 30,000 in moral damages and a total of EUR 2,000 in costs.

6. Judgment No. 3671 (6 July 2016): D. (No. 2) v. *International Telecommunication Union (ITU)*

Cause of action before the Tribunal to challenge the Service Orders—Service Orders were adopted by an unlawful procedure due to failure to consult with the staff association—no entitlement to moral damages as the complainant acted in the capacity of staff representative

The complainant, acting in her capacity as a "staff member, elected member of a staff association and member of the Staff Council", challenged internally two Service Orders that the ITU published in January 2013. The first of these service orders informed the staff of a number of amendments to the Staff Rules. In particular, the new staff rule 8.3.1(*a*), concerning associations and clubs of staff members, provided that "any official contacts and discussions concerning questions [relating to staff welfare and administration and policy on salaries and related allowances] shall be effected solely by the Staff Council, which shall be the sole representative body recognized for that purpose". The second Service Order was entitled "Criteria and conditions for the recognition of staff associations and clubs, granting of resources and facilities to such associations and clubs". Her internal appeal was rejected by the Secretary-General and the complainant impugned before the Tribunal not only the decision to reject the appeal but also the two Service Orders.

The ITU argued that the challenge to the first Service Order was out of time since that text merely reaffirmed a "long-standing principle embodied in the Staff Regulations and Staff Rules", and was hence irreceivable before the Tribunal. The Tribunal found the ITU's plea based on an alleged time bar unfounded for the following reasons:

> "As indicated by its title, 'Amendments to the Staff Rules', this service order informed the staff of the adoption of new provisions which had been incorporated into the Staff Rules. The ITU can therefore hardly contend that they merely reaffirmed rules which were already in force. Indeed it is hard to see why the ITU should have felt the need to introduce such amendments if they contained no new provisions. Moreover, the Tribunal notes that the service order expressly stated that these new provisions would enter into force on the date of their publication, thus confirming that they amended the existing law."

The ITU further argued that the complainant did not have a present cause of action enabling her to challenge the second Service Order. The Tribunal rejected that argument also by saying that:

> "the Tribunal's case law establishes that insofar as an official alleges a failure to respect the prerogatives of a body of which she or he was a member, she or he has a cause of action which gives her or him standing to bring a complaint (see, for example, Judgment 3546, under 6). In the instant case, the complainant is a member of the Staff Council and she submits that the latter was not consulted before Service Order […] was published. In accordance with the case law, the complainant therefore has a cause of action before the Tribunal, even though this service order constitutes a regulatory measure which may ordinarily be challenged only indirectly in the context of an appeal lodged against an individual decision based on it. The complaint is therefore also receivable … ."

The complainant submitted that the Staff Council was not consulted on the Service Orders before they were published. She noted that staff rule 8.1.1(*c*), in the version applicable at that time, provided that "[e]xcept in cases of emergency, general service orders concerning questions [relating to staff welfare and administration and policy on salaries and related allowances] shall be transmitted in advance to the Staff Council for consideration and comment before taking effect". The ITU argued that this submission should be dismissed, because two members of the Staff Council participated in the working group set up to draft these Service Orders and thus the Staff Council was able to make any comments it thought fit.

The Tribunal rejected the argument of the ITU, recalling that:

> "in keeping with the principle *tu patere legem quam ipse fecisti,* when a text provides for the consultation of a body representing the staff before the adoption of a decision, the competent authority must follow that procedure, otherwise its decision will be unlawful (see, for example, Judgment 1488, under 10). It is ascertained that the ITU did not consult the Staff Council on the matter of the disputed service orders. The fact relied upon by the ITU, that two members of the Council took part in the above-mentioned working group, is not a valid substitute for the consultation of the Council. The complainant is therefore right in contending that Service Orders […] were adopted by an unlawful procedure, and they must be set aside for this reason, without there being any need to examine the complainant's remaining pleas."

Although the complainant's challenge of the Service Orders had been successful, the Tribunal decided, referring to its Judgments 3258, under 5, and 3522, under 6, that she was not entitled to moral damages as she was acting in her capacity as a staff representative. She was, however, entitled to costs in the amount of EUR 3,000.

7. *Judgment No. 3688 (6 July 2016): P.-M (No. 2)* v. *World Health Organization (WHO)*

Abolition of post for financial reasons—Unreasonable delay in internal proceedings—Absence of genuine financial reasons to abolish the post—Breach of due process—No exceptional circumstances for ordering reinstatement—Award of moral and material damages

The complainant's complaint against WHO challenged the decision to abolish her post and to separate her from service.

The Tribunal dealt first with the claim that there was an undue delay in the internal proceedings, for which the complainant should be compensated. The Tribunal noted that forty-five months had elapsed between the filing of the Notification of Intention to Appeal against the formal decision to abolish the complainant's post, and the date on

which the Director-General issued the impugned decision. Analysing the different stages of the proceedings, the Tribunal found that WHO was not responsible for a delay of some ten months occurring after the process had commenced, which was due to discussions between the complainant and the Human Resources Management Department on her possible continued employment. However, the Tribunal noted that this was followed by an eight month period of inactivity on the complainant's internal appeal, caused by WHO's request that the Headquarters Board of Appeal ("HBA") suspend the proceedings pending the Tribunal's decision on the complainant's first complaint. Although the HBA informed WHO of its intention to pursue the review of the appeal, the Tribunal considered that it was unnecessary to suspend the proceedings for the reasons which WHO gave, as the two matters raised separate issues for determination notwithstanding the overlapping information and arguments, and that the HBA correctly decided to pursue its review to determine the lawfulness of the abolition of the complainant's post. After that, the Tribunal found that the two-year period that it took for the HBA to issue its report and recommendations was excessive. The Tribunal also noted the Director-General issued the impugned decision outside of the sixty calendar days within which the applicable staff rule mandates the Director-General to inform the complainant of her decision on the HBA's report. The Tribunal concluded that:

> "The delays in the HBA proceedings were unreasonable and were not caused by wrongful procedural conduct on the part of the complainant and there is no indication that the HBA's workload justified it. The delay before the HBA was mainly caused by the necessity to request information and documents from WHO, which should have been provided early in the process.
>
> The delay entitles the complainant to an award of moral damages for the defendant's breach of its duties of due diligence and care (see Judgments 2522, under 7, 3160, under 16, and 3188, under 25)."

The Tribunal recalled what was stated in its Judgment 3582, consideration 4, that the amount of damages awarded for the injury caused by an unreasonable delay in processing an internal appeal depends on the length of the delay and its consequences. The consequences vary depending on the subject matter of the dispute so that a delay in resolving a matter of limited seriousness in its impact on the appellant will ordinarily be less injurious than a delay in resolving a matter which has a severe impact. In the present case, the Tribunal determined that the consequences were injurious to the complainant in that the matter concerned the abolition of her post and her separation from WHO and she was in a state of uncertainty for the period of about three years.

On the substance, WHO argued that the complainant's post was abolished for programmatic and financial reasons. The complainant, however, contended that the reasons which WHO gave for the abolition of the post were baseless and that the restructuring was not a genuine one. Both parties offered various arguments to support their positions. The Tribunal concluded that:

> "Whether the post was abolished for financial reasons is a question of fact. Those facts were within the knowledge of WHO and it must show that when it advanced financial reasons as a ground for the abolition of the complainant's post this was genuine. It has not done so. In the absence of that evidence, it is determined that the complainant's post was unlawfully abolished and the claim on this ground is well founded. The result is that the impugned decision will be set be aside and the complainant will be

awarded material damages for the loss of a valuable opportunity to have her employment continued."

The Tribunal also concluded that "[i]n addition to the fact that WHO [had] presented insufficient evidence to support its assertion that the complainant's post was abolished for financial reasons, it is also evident that it failed to care for the complainant's dignity or to guard her against unnecessary personal distress and disappointment where it could have been avoided." The Tribunal explained that: "There is no reason why the complainant was informed […] in the presence of others that her post was to be abolished while she was at a meeting with the Ombudsman to explore her secondment to another department." The Tribunal found that that action was insensitive and inappropriate and that it entitled the complainant to an award of moral damages. Moreover, the Tribunal found "as the HBA correctly did, that WHO breached its duty of care to the complainant by abolishing her post while at the same time recruiting someone to fill the P-4 position the duties of which the complainant was qualified to undertake."

Furthermore, the Tribunal found that WHO failed to disclose the relevant documents to the complainant in the internal appeal proceedings and thus breached "the adversarial principle or the principle of equality of arms, which constitutes a breach of due process entitling the complainant to moral damages."

Finally, although the impugned decision was set aside and the complainant had sought to be reinstated to her post which was unlawfully abolished, the Tribunal did not order the reinstatement. Having recalled that the reinstatement of a person on a fixed-term contract can be ordered in only exceptional cases, the Tribunal found that the circumstances in the present case were not of an exceptional character. However, the Tribunal awarded the complainant EUR 90,000 in material damages for the loss of a valuable opportunity to have her contract renewed, the loss of career opportunity as a result of the unlawful abolition of her post, and for WHO's failure to make reasonable efforts to reassign her under applicable Staff Rules, and EUR 70,000 in moral damages for the affront to her dignity, the breaches of due process and of WHO's duty of care to her, and for the unreasonable delay in the internal appeal proceedings.

The Tribunal also ordered that these sums be paid within 30 days of the date of delivery of the Judgment, failing which they should bear interest at the rate of 5 per cent per annum from that date until the date of payment. The Tribunal also awarded EUR 7,000 in costs.

D. Decisions of the Administrative Tribunal of the International Monetary Fund[19]

The summaries of five judgments issued by the Administrative Tribunal of the International Monetary Fund (IMF) in 2016 are reproduced below as representing significant developments in the jurisprudence of the Tribunal.

1. *Judgment No. 2016-1 (15 March 2016): Mr. J. Prader* v. *International Monetary Fund*

Request to revoke currency election of pension payment—Currency election is irrevocable under the Local Currency Rules—Significant differences between section 16.3 of the Staff Retirement Plan and the Local Currency Rules as to currency election—Staff Retirement Plan should govern—Rescission of the decision—Retroactive pension payment

The Tribunal rendered a judgment on an application brought by a retired participant in the Fund's Staff Retirement Plan ("SRP" or "Plan"). The Applicant challenged the decision of the SRP Administration Committee ("Committee") denying his request to revoke his election that part of his pension be paid in the currency of the country of which he is a national and to which he repatriated following retirement.

SRP section 16.3 (Election of Other Currency for Pensions) provides an exception to the general rule that payments from the SRP shall be made in US dollars. Under circumstances specified in that Plan provision, a pension may be paid in full or in part in the local currency of the country to which the participant retires, as a national or as a permanent resident.

On 22 October 2014, the Applicant submitted a Pension Election Form, in which he designated that 75 per cent of his pension be paid in the currency of the country to which he would be repatriating (*i.e.*, in Euros) and 25 per cent in US dollars. The Applicant's pension became effective on 1 November 2014.

On 24 November 2014, the Applicant made a formal request to the Committee to void that currency election and to substitute an election of 75 per cent US dollars and 25 per cent Euros. Thereafter, on 28 November 2014, the Applicant's first pension payment was made in accordance with his currency election of 22 October 2014. On 29 November 2014, the Applicant repatriated to his home country.

The Committee denied the Applicant's request to revoke his 22 October 2014, election on the ground that the Local Currency Rules, adopted by the Committee, provide that a currency election is irrevocable except in circumstances which it held were not applicable to his case. On review, the Committee again denied the Applicant's request, stating that his currency election of 22 October 2014, had become irrevocable as of his pension effective date of 1 November 2014.

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[19] 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. The complete jurisprudence of the IMF Administrative Tribunal may be accessed electronically at http://www.imf.org/tribunal/.

In his Application to the Administrative Tribunal, the Applicant contended that his election of 22 October 2014 was "untimely, premature, not (yet) valid, and at best preliminary and revocable." (para. 45.) Applying the standard of review applicable to challenges to decisions of the SRP Administration Committee, the Tribunal considered whether the Committee had correctly interpreted the provisions of the Plan and soundly applied them to the facts of the case.

The Tribunal noted that SRP section 16.3 and the Local Currency Rules differ in significant respects, including as to the permissible time period for making a currency election and the conditions prerequisite to such an election. The Tribunal emphasized that there is a "clear hierarchy of norms in relation to the SRP and the Local Currency Rules," given that SRP section 7.2(*c*) provides that rules promulgated by the Committee "… shall not be contrary to the provisions" of the Plan. (para. 65.) "Thus, when there is a conflict between a Plan provision and a rule promulgated by the Committee," said the Tribunal, "the Plan provision must govern." (*Id.*) The Tribunal held that the consequence of this hierarchy of norms is that the Committee should start by considering the provisions of the Plan and assessing whether the relevant election was made in accordance with those provisions. In the view of the Tribunal, the Committee did "… not appear to have approached the question in this manner and, in failing to do so, failed to interpret correctly—or interpret at all—Section 16.3 and soundly apply it to the facts of [the] Applicant's case." (para. 69.)

The Tribunal emphasized that it had not been called upon to pass on the validity of the Local Currency Rules but rather to decide whether the Committee erred in holding irrevocable the Applicant's currency election in the circumstances of his case. The Tribunal identified the core issue raised by the Application as whether the Committee acted "contrary to the provisions" of the Plan by permitting the Applicant to make a currency election prior to meeting the criteria prescribed by SRP section 16.3(*a*) and then treating that election as irrevocable when the Applicant sought to cancel it following his pension effective date.

The Tribunal noted that SRP section 16.3(*b*) provides that an election "under subsection (*a*)" shall be irrevocable. Accordingly, in deciding whether the Committee erred in refusing the Applicant's request to revoke his currency election, the Tribunal first sought to determine whether the election of 22 October 2014 was an election in terms of SRP Section 16.3(*a*), that is: (*a*) whether the election was made by a retiree; (*b*) within 90 days after the pension effective date; and (*c*) whether the retiree was both a national and a resident of the country of the specified local currency or a permanent resident of that country at the time the election was made.

It was not disputed, said the Tribunal, that when the Applicant made the election of 22 October 2014, he had not yet retired; nor had he repatriated to his home country. In the circumstances, and on a plain reading of section 16.3(*a*), the Tribunal concluded that the Applicant's election of 22 October 2014, was not an election within the contemplation of that Plan provision.

In the light of its conclusion that the Applicant's currency election of 22 October 2014, was not an election made in accordance with section 16.3(*a*), the Tribunal next considered whether there was any other ground for finding the election irrevocable. The Tribunal rejected the Fund's assertion that a currency election becomes irrevocable as of the pension

effective date. Rather, the Plan establishes the pension effective date as the starting point for making a currency election.

Because a currency election becomes irrevocable under section 16.3(*b*) of the Plan only when a valid election has been made under Section 16.3(*a*), and the Fund had identified no other ground on which to hold the Applicant's currency election irrevocable, the Tribunal concluded that the Committee erred in denying the Applicant's request to revoke his currency election of 22 October 2014. The Tribunal accordingly rescinded the Committee's decision. In order to correct the effects of the rescinded decision, the Tribunal ordered that the Applicant's pension be paid 75 per cent in US dollars and 25 per cent in Euros, retroactively from his pension effective date of 1 November 2014. Additional complaints raised by the Applicant were not sustained.

2. *Judgment No. 2016-2 (21 September 2016): Mr. "KK"* v. *International Monetary Fund*

Alleged abuse of discretion in performance review decisions—Difficult supervisor-supervisee relationship—Reasonable and observable basis for the contested decisions—Fair and balanced evaluation—Work schedule modified in response to a medical restriction—Oral proceedings

The Tribunal rendered a Judgment on an Application brought by Mr. "KK", a staff member of the Fund. The Applicant's chief complaint was that his Annual Performance Review ("APR") decisions for Fiscal Year 2012 ("FY2012") and 2013 ("FY2013") represented an abuse of discretion, in particular, that they were improperly motivated by harassment and retaliation on the part of his Division Chief, hostility that the Applicant further alleged was abetted by the Deputy Division Chief and Senior Personnel Manager ("SPM").

According to the Applicant, the Division Chief engaged in physically threatening actions and yelling toward him. Although denying that he had physically threatened the Applicant, the Division Chief referred in his Grievance Committee testimony to "bad chemistry" between the two of them. Given the evidence in the record of a "particularly difficult" (para. 108) supervisor-supervisee relationship, the Tribunal scrutinized both the role that the Division Chief played in the contested APR decisions and the cogency of the evidence that supported those decisions.

In particular, the Tribunal asked whether the Applicant had established a "causal link" between the Division Chief's alleged hostility to him and the contested APR decisions. Having reviewed the record of the case, the Tribunal found that the APRs (particularly the FY2013 APR) were "not principally the work of the Division Chief but rather were the collaborative undertakings of multiple decision makers" (para. 114) and did not result from inappropriate influence by him. These facts, said the Tribunal, undercut the Applicant's assertion that his APR decisions could be attributed to ill will on the part of the Division Chief. Furthermore, the Tribunal found in the documentation of the case "cogent evidence of a reasonable and observable basis for the contested APR decisions. What is persuasive," said the Tribunal, "is the consistency of the assessments, the deliberative process by which they were undertaken, and that the ratings and comments were drawn from multiple reviewers." (para. 154.)

The Tribunal also rejected the Applicant's contention that his work was not evaluated in a fair and balanced manner, including that he was held to unreasonable standards and that the type of work to which he was assigned, and in which he had expertise,

was disfavoured by his managers. As to the contention that the Applicant was unfairly held to a standard of "absolute perfection," the Tribunal observed that the nature of the Applicant's responsibilities may have made the accuracy of his work products more salient to the evaluation of his performance than it was to the evaluation of the performance of some other staff members. "This difference," said the Tribunal, "does not mean that he was rated unfairly. The tailoring of assessment criteria to the nature of the work performed is a core responsibility of managers." (para. 138.)

The Tribunal also did not sustain the Applicant's assertion that his APR ratings were unfairly affected by the application of the Fund's policy limiting performance ratings above the "Effective" level to not more than 30 per cent of staff per department. The record showed that the process for assigning APR ratings in the Applicant's Department tracked a prescribed framework and the Applicant had not brought to light any procedural defect in the application of this process to him.

The Tribunal additionally considered the question whether the Fund failed to fulfil any duty arising from a recommendation by the Bank-Fund Health Services Department ("HSD") that the Applicant's work schedule be modified, *i.e.*, limited to 40 hours per week, in response to a health condition. The Applicant contended that his managers overworked him, notwithstanding the medical restriction, and that his APR decisions suffered as a result.

Having reviewed the evidence in the record, the Tribunal found that the Applicant's managers had taken steps to lighten his workload even before HSD advised that he was to work to a 40-hour week. Once that restriction was put in place, managers communicated amongst themselves and with the Applicant as to how to implement the medical restriction in the context of the Applicant's multiple work responsibilities and reporting relationships. In the view of the Tribunal, given the nature of the Applicant's responsibilities and the Fund's flexible work arrangements, it was reasonable for managers to respond to the limitation on the Applicant's working hours by making adjustments to his workload. The Applicant did not demonstrate that managers failed to honour the limitation on his hours or that he had raised with them any substantial deviation from it. Accordingly, the Tribunal concluded that the Applicant had not substantiated his claim that the Fund failed to fulfil a duty arising from HSD's restriction on his hours of work.

It followed, said the Tribunal, that it could not sustain the Applicant's contention that a failure by supervisors to manage his time in a sustainable way, notwithstanding the medical restriction, wrongfully affected his APR decisions. In the view of the Tribunal, the Applicant did not show that either an excessive workload or a diminution in his workload due to the medical restriction wrongfully affected the appreciation of his performance. In so concluding, the Tribunal referred to its finding of cogent evidence in the record of a reasonable and observable basis for the contested APR decisions; the Tribunal was not persuaded that those decisions would have been different in the absence of the workload-related issues that the Applicant sought to raise.

The Tribunal observed that the parties disputed how responsibility should properly be apportioned for ensuring that the medical restriction was given effect. The Fund submitted that the notification from HSD triggered an unwritten policy of giving reasonable accommodation to medical needs. Noting the value of written policies to avoid arbitrariness and promote transparent understanding of rights and responsibilities, the Tribunal commented that it was "troubled that the Fund has not identified any written protocol for

handling restrictions advised by HSD on working hours (or for other forms of reasonable workplace modifications) when a staff member's health condition requires." (para. 199.) The Tribunal emphasized that the "precise contours of the respective responsibilities of staff and managers in relation to the reasonable accommodation of health conditions is a matter for the policy-making organs of the Fund to consider in the first instance, consistent with general principles of fair treatment in the workplace." (para. 201.)

Notably, Mr. "KK" was the first case in which the IMF Administrative Tribunal convened oral proceedings, which it may hold when it "deems such proceedings useful." (Rule XIII, para. 1.) The Applicant requested both witness testimony and oral argument on the legal issues. The Tribunal denied the Applicant's request for witness testimony. The Tribunal observed: "Given the structure of the Fund's dispute resolution system and the exhaustion requirement of Article V, Section 1, of the Tribunal's Statute, it will be rare for the Tribunal to admit witness testimony in cases arising through the Grievance Committee, in the absence of a showing that such testimony would be useful to clarify a material point at issue before the Tribunal." (para. 42.) The Applicant in this case had not made such a showing. The Tribunal accordingly granted the Applicant's request for oral proceedings, limited to the legal arguments of the parties' counsel. (See Rule XIII, para. 6.) In its Judgment, the Tribunal commented that it had found the oral proceedings useful both in "clarifying the legal issues" and in "providing an opportunity to probe disputes of fact so as to enhance the legal appreciation of the record of the case." (para. 44.)

3. Judgment No. 2016-3 (31 October 2016): Ms. "M" and Dr. "M" (No. 2) v. *International Monetary Fund (Interpretation of Judgment No. 2006-6)*

Reimbursement of bank fees related to child support payments resulting from an earlier judgement—Admissibility of the request for interpretation pursuant to article XVII of the Tribunal's Statute—No basis for invoking a source of law other than the Fund's rules—Section 11.3 of the Staff Retirement Plan—Application denied

The Tribunal rendered a Judgment on an Application brought by Ms. "M" and Dr. "M", who sought to raise before the Tribunal a controversy arising out of the implementation of its earlier Judgment in Ms. "M" and Dr. "M", *Applicants v. International Monetary Fund*, Respondent, IMFAT Judgment No. 2006-6 (29 November 2006). In that Judgment, the Tribunal ordered the Fund, in accordance with section 11.3 of the Staff Retirement Plan ("SRP" or "Plan"), to make a 16⅔ per cent deduction from the prospective monthly pension payments of a Fund retiree Mr. "N" and to pay those amounts over to the Applicants in order to discharge a sum owing to them pursuant to child support orders against Mr. "N".

The Applicants contended that the payments they had received fell short of the amount due to them under the Tribunal's Judgment. They argued that although the full amount stated in the Judgment was deducted from Mr. "N"'s pension, the Applicants' German bank account was not credited with that full amount because the Applicants incurred bank fees associated with the monthly transactions paying over these sums to them. The Applicants contended that Mr. "N"'s obligation had not been fully discharged as required by the Tribunal's Judgment No. 2006-6 and that the Fund was responsible for the difference. The Fund had advised the Applicants that it was not responsible for any bank fees incurred; the Applicants sought to contest that decision.

The Tribunal addressed at the outset the Fund's contention that the Application should be dismissed as inadmissible on the grounds that the Applicants had neither challenged the legality of an "administrative act" of the Fund in terms of article II of the Tribunal's Statute nor raised an admissible request for interpretation of a judgment in terms of article XVII.

The Tribunal agreed that the implementation of a judgment is not an "administrative act" within the meaning of the Statute and that "[i]ndividual and regulatory decisions taken by the Fund in order to implement a judgment of this Tribunal do not fall within the contemplation of Article II." (para. 27.) The reason for this, said the Tribunal, is that the Tribunal's judgments are final and binding on the Fund, consistent with the universally recognized principle of *res judicata*. Furthermore, the Tribunal held, when a party to a judgment seeks to challenge as inconsistent with the essential terms of that judgment the manner in which it has been implemented, that challenge ordinarily will not be to an "administrative act" of the Fund. The Tribunal therefore concluded that the Application was not admissible in terms of article II of the Statute.

The Tribunal did conclude, however, that the Applicants had raised an admissible request for interpretation of a judgment in terms of article XVII. That provision permits the Tribunal to "interpret or correct any judgment whose terms appear obscure or incomplete, or which contains a typographical or arithmetical error." Although the Fund maintained that there was no ambiguity in the Judgment, the Tribunal observed that the gravamen of the Applicants' complaint was that implicit in Judgment No. 2006-6 was a requirement that the Fund reimburse the Applicants for bank fees incurred in crediting to their German bank account the sums deducted from Mr. "N"'s pension payments: "Inasmuch as the kernel of the controversy in this case is whether the Fund has failed to implement Judgment No. 2006-6 consistent with its terms, the Applicants seek an interpretation of that Judgment." (para. 33.) The Tribunal observed that if it were "… not able to respond when a party believes that the operative terms of a judgment are 'obscure or incomplete,' it would not be able to ensure that its judgments are given effect consistently with the Tribunal's intent. This is the essential purpose of article XVII." (para. 34.) Concluding that the Applicants had stated with sufficient particularity in what respect the operative provisions of the judgment appeared obscure or incomplete (Rule XX, para. 2), the Tribunal held that they had raised an admissible request for interpretation of Judgment No. 2006-6 in terms of article XVII.

Turning to the merits of the controversy, the Tribunal considered the Applicants' contention that implicit in Judgment No. 2006-6 was a requirement that the Fund reimburse the Applicants for bank fees associated with the crediting of monies from Mr. "N"'s pension payments to their German bank account. The Applicants raised a variety of arguments in support of this view, including that if Mr. "N" had paid the support orders (which originated under German law) directly as he should have, then he would bear responsibility for any associated transaction costs.

The Tribunal rejected this approach, noting that the facts of the case were that Mr. "N" had not paid the support orders directly. Rather, the Tribunal had ordered that they be given effect through the mechanism provided by SRP section 11.3 and the rules governing its administration. "[I]n giving effect to orders for child support and division of marital property pursuant to SRP section 11.3," the Tribunal emphasized, "it does not apply the

law of any nation but rather the internal law of the Fund." (para. 39.) The Tribunal accordingly found no basis for the Applicants to invoke a source of law other than the Fund's rules to decide the issue: "Should there be any question as to the meaning of the Tribunal's Judgment, that doubt must be resolved in favour of the Fund's internal law." (para. 41.)

The "Rules of the SRP Administration Committee under section 11.3 of the Staff Retirement Plan" deal with the question of responsibility for transfer fees: "Payment shall be effected by direct deposit in an account of the former spouse in a bank in the Washington locality or, *at the expense of such person*, to another account by wire transfer." (Emphasis added). In this case, the Applicants had directed that the payments be made to a foreign bank account. In the view of the Tribunal, it was reasonable to assimilate this provision to the circumstance of the child support orders at issue in Judgment No. 2006-6; the Tribunal had interpreted and applied elements of those same Rules in requiring that the orders be given effect through the SRP.

The Tribunal accordingly concluded that Judgment No. 2006-6 did not require that the Fund reimburse the Applicants for bank fees incurred in crediting to their German bank account the sum deducted from Mr. "N"'s pension payments. The Applicants' claim that the Fund had failed to implement Judgment No. 2006-6 consistently with its operative terms was therefore not sustained. Accordingly, the Application of Ms. "M" and Dr. "M" was denied.

4. Judgment No. 2016-4 (1 November 2016): Mr. P. Nogueira Batista, Jr. v. *International Monetary Fund*

Request for retroactive contribution to the Staff Retirement Plan—Interpretation and application of Staff Retirement Plan section 2.2(*c*)—No administrative failure to notify the Applicant of enrolment in the Plan at the time of appointment—Application denied

The Tribunal rendered a Judgment on an Application brought by a retired participant in the Fund's Staff Retirement Plan ("SRP" or "Plan") and former member of the IMF Executive Board, challenging the decision of the SRP Administration Committee ("Committee") denying his request to be permitted to contribute retroactively to the SRP from the time he first became eligible to elect participation in the Plan, that is, at the time of his initial appointment to the Executive Board in 2007.

SRP section 2.2(*c*) governs Plan participation by Executive Directors and permits them to elect enrolment within the three-month period following an appointment. It was not disputed that the Applicant did not enrol in the Plan until 2010, when he again became eligible to make such election by virtue of a second appointment to the Executive Board.

The Tribunal addressed at the outset the Applicant's request that the Tribunal "arrange an independent technical examination to verify the authenticity" of documents. The Fund opposed the request, maintaining that evidence of the enrolment eligibility notifications sent to the Applicant was "clear and credible on its face, and the Fund should not be required to prove, without any predicate, that it has not falsified documents submitted as evidence to the Tribunal." (para. 13.) The Tribunal observed that neither party had addressed the question of the Tribunal's authority under its Statute and Rules of Procedure to grant such a request but concluded that it was not necessary for it to address that question in this case: "Even if the Tribunal does have that authority, it would not be exercised unless it would be necessary for the disposition of a case." (para. 20.) In the light of the

Tribunal's assessment of the merits of the Application, it concluded that an "independent technical examination" would not be dispositive of the issues of the case and accordingly denied the Applicant's request.

Turning to the merits of the dispute, the Tribunal considered whether the Committee had correctly interpreted SRP section 2.2(*c*) and soundly applied it to the facts of the Applicant's case. It was not disputed that the Applicant had failed to meet the requirement of SRP section 2.2(*c*) to elect Plan participation within three months of his 2007 appointment; the question was whether the Committee erred in denying the Applicant's request for exception to that provision.

The Tribunal noted that the Committee had adopted a "Rule to Permit Acts to Be Performed Beyond Time Limit Under Certain Circumstances." That rule grants the Committee discretion to waive a time limit that has not been complied with "… as a result of any failure by the Employer or the Committee to notify a participant or retired participant of such time limit that the Employer or Committee is obligated to give notice of … ." The Fund maintained that only in cases of such administrative error have exceptions been granted to the three-month time limit of SRP section 2.2(*c*), a limit which serves to protect the Plan against adverse selection.

At the heart of the controversy was the Applicant's assertion that he "[did] not recall" having been given notice of the option to enrol in the Plan within three months of his appointment as Executive Director in 2007. The Fund, for its part, produced the following documentation: (*a*) Appointment Checklist, 9 April 2007; (*b*) initial enrolment notification email, 11 April 2007; (*c*) 30th-day reminder email, 9 May 2007; and (*d*) an "Enrolment Email Notification Log," listing 60th-day reminder email, 8 June 2007, and 90th-day reminder email, 1 July 2007, along with the terms "Read" and "Received" in relation to the latter reminder. As noted, the Applicant disputed the authenticity of some of this documentation.

The Tribunal observed that although Applicant asserted that he did not recall having received email notifications about SRP enrolment when he joined the Fund in 2007, he did not squarely claim that the Fund had failed to notify him of the option. Moreover, despite the Applicant's assertion that the Fund had not "establish[ed] clearly" (para. 63) that he had been notified, the Tribunal noted that it is always the applicant's burden to show error in a challenged decision.

Accordingly, the Tribunal considered whether the Applicant had met his burden of showing that he was not notified of his eligibility to enrol in the Plan when he first joined the Fund in 2007. The Tribunal took note of the following: (*a*) the Applicant did not deny receiving an Appointment Checklist in 2007 bearing his name and date of appointment which stated clearly that Executive Directors are eligible to join the Plan and must make an election to do so within three months of their appointment; (*b*) the Applicant had not drawn to the Tribunal's attention any basis to doubt the authenticity of the email documentation produced by the Fund other than his own asserted lack of recall and the fact that the Committee initially had informed him that it could not find any of the four emails but later asserted that it had retrieved two of the four; and (*c*) that it must be accepted that the Applicant became aware of the option to enrol in the Plan at the latest when he joined the Fund as an Executive Director for a second time in 2010; there was no evidence that the Applicant raised at that time the question of his not having been notified in 2007 of

his eligibility to elect Plan participation or the question whether he could be permitted retroactive participation.

All of these facts, said the Tribunal, supported the conclusion that the Committee did not err when it decided that there had been no administrative error in terms of a failure to notify the Applicant of his option to enrol in the Plan at the time of his 2007 appointment that would justify granting his request for retroactive participation.

Having concluded that the Applicant had not established administrative error on the part of the Fund, the Tribunal considered whether the Applicant had presented any other basis to find error in the Committee's decision denying his request for retroactive Plan participation. The Applicant sought to invoke SRP section 3.2 and SRP section 5.1, which he contended dealt with circumstances "analogous" to his own. In the view of the Tribunal, however, the issues of the case were governed solely by SRP section 2.2(*c*) and it was clear that the Applicant's case did not fall within the additional provisions he had cited.

The Tribunal accordingly concluded that the Committee correctly interpreted the provisions of SRP section 2.2(*c*) and soundly applied them to the facts of the Applicant's case. The Application was therefore denied.

5. *Judgment No. 2016-5 (4 November 2016):* *Mr. E. Verreydt* v. *International Monetary Fund*

Deduction from separation payment of the home leave benefit—Interpretation and application of the home leave policy—Prohibition of the use of credit card rewards points to acquire home leave airline tickets—Failure to afford timely notice of the rejection of home leave certification and an effective opportunity to remedy non-compliance with the home leave policy—Rescission of the Fund's decision

The Tribunal rendered a Judgment on an Application brought by a retiree of the Fund, challenging the decision to deduct from the separation payment he received upon his retirement in 2014 the amount of the home leave benefit paid to him for 2011. That decision was taken on the ground that the Applicant had failed to comply with the Fund's home leave policy by using Bank-Fund Staff Federal Credit Union ("BFSFCU") Member Rewards Program points to acquire the airline tickets for his home leave travel. The Applicant contended that the challenged decision was either: (*a*) inconsistent with the Fund's home leave policy; (*b*) consistent with the home leave policy, but that the policy itself represented an abuse of discretion; or (*c*) in the circumstances of the Applicant's case, the decision to recover the amount of his home leave benefit for 2011 was vitiated by the Fund's failure to afford him a timely opportunity to remedy his alleged non-compliance with that policy.

The Tribunal initially considered whether the Fund had erred in interpreting the home leave policy to prohibit Applicant's use of BFSFCU points to acquire home leave airline tickets. The Applicant contended that GAO No. 17, Rev. 9, section 7.04, which states that "travel to the home leave destination using a ticket provided under a frequent flyer program, or an airline employee or similar discount program, will not qualify as home leave travel," did not preclude his use of BFSFCU points. The Applicant further argued that Staff Bulletin No. 99/19 (Usage of Points Earned from Airline, Credit Card, Hotel, and Other Similar Reward Programs) (18 August 1999) should be interpreted in the light of GAO No. 17. That Staff Bulletin states: "Awards earned through reward programs cannot be used as proof of payment for any portion of business or benefit travel for which the

Fund provides either a lump sum allowance or a standard cost entitlement payment." It defines "reward programs" to include "coupons, vouchers, points (including frequent flyer miles awarded by hotels, credit cards, or airlines), or other similar reward programs, and applies to awards earned through either personal or business-related transactions." The Fund maintained that the GAO and the Staff Bulletin should be read together, with the Staff Bulletin providing a "fuller explanation" (para. 68) of the Fund's policy on the use of benefits earned through reward programs to pay for Fund business and benefit travel.

The Tribunal resolved the dispute as to the interpretation of the written law as follows: "When presented with a question of interpretation of the Fund's internal law, the Tribunal will seek to interpret the various rules of the Fund in a manner that ensures they are consistent with one another." (para. 70.) "However," noted the Tribunal, "an interpretation cannot be placed on a rule if its text cannot reasonably be read to achieve consistency. In that case, a question will arise of which rule should take precedence." (Id.) In the view of the Tribunal, that problem did not arise in the instant case because GAO No. 17, Rev. 9, section 7.04 and Staff Bulletin No. 99/19 could reasonably be read to be consistent with one another. The Tribunal noted that Staff Bulletin No. 99/19, by its terms, "clarifies the Fund's policy on the use of benefits earned through reward programs to pay for Fund business or benefit travel" and held that, when read together, GAO No. 17 and the Staff Bulletin may reasonably be understood to disallow the Applicant's use of BFSFCU points. Accordingly, the Tribunal concluded that the Fund did not err in interpreting the home leave policy to prohibit the Applicant's use of BFSFCU points to acquire his home leave airline tickets.

The Tribunal further observed that many of the arguments that the Applicant had marshalled in support of his view that the Fund improperly interpreted and applied the home leave policy in his case were arguments more appropriately considered as part of a challenge to the rule itself. In assessing whether that rule represented an abuse of discretion, the Tribunal emphasized that its deference to the Fund's decision-making authority is at its height when it reviews regulatory decisions (as contrasted with individual decisions), especially policy decisions taken by the Fund's Executive Board. The Tribunal noted that the Applicant did not raise a challenge to a decision of the Executive Board; rather, he asserted that the management of the Fund, in promulgating further regulations, had exercised its discretion arbitrarily.

The Tribunal accordingly considered whether there was a rational relationship between the rule prohibiting the use of credit card rewards points for the purchase of home leave air travel and the objectives sought to be achieved by the revised home leave policy adopted by the Executive Board in 1993.

Having perused the legislative history, the Tribunal identified several objectives of the revised home leave policy. Those objectives included avoiding the fostering of tensions between United States and expatriate staff members. To achieve that goal, the Fund maintained, it sought to ensure that the home leave travel benefit was proportionate to the disadvantages that expatriate staff encounter. The Tribunal noted the Fund's position that if expatriate staff members were to be permitted both to purchase home leave air tickets with frequent flyer miles or other similar awards, and still receive the full cash home leave benefit, this might be seen as a disproportionate benefit. The Tribunal found support for the Fund's approach in the legislative history of the Executive Board decision.

The Tribunal further observed that the Fund's policy-making discretion extends to making choices among reasonable alternatives and that the "management of the Fund should be given leeway to determine how best to achieve its goals and objectives in the formulation of its rules and policies." (para. 88.) The question, said the Tribunal, is whether the policy bears a rational relationship to the various objectives to which it is directed. The policy prohibiting the use of BFSFCU points for the acquisition of home leave airline tickets, concluded the Tribunal, was rationally related to the objectives of the Fund that appeared on the record before the Tribunal. Moreover, the Tribunal could not sustain the Applicant's argument that the decision implemented by GAO No. 17, Rev. 9, in conjunction with Staff Bulletin No. 99/19, ran counter to the 1993 decision of the Executive Board.

Having concluded that the Fund did not err in interpreting the home leave policy to prohibit the Applicant's use of BFSFCU points to acquire home leave airline tickets, and that the policy itself did not represent an abuse of discretion, the Tribunal turned to an alternative claim for relief urged by the Applicant, namely, that the decision to recover the amount of his home leave benefit for 2011 was vitiated by the Fund's failure to afford him a timely opportunity to remedy his non-compliance with the policy.

The facts of the case were that the Applicant was first notified just before his retirement in 2014 that his home leave travel corresponding to his 2011 benefit was not in compliance with Fund policy because he had used BFSFCU points to acquire the air tickets. The record showed that the Applicant had disclosed his use of the BFSFCU points when he made the requisite certification of that travel in 2012. Furthermore, it was not disputed that the same certification had failed an audit of January 2013 but that the Applicant received no notification of that failure; the audit came to light in the course of the Grievance Committee's consideration of the case. Nor was it disputed that the Fund did not take any action to recover the amount of the 2011 benefit until the Applicant advised a staff member of the Finance Department of his use of BFSFCU points in connection with that allowance during his exit interview in July 2014 when the Fund raised with the Applicant the same issue in relation to his 2013 benefit.

On 15 July 2014, the Applicant was advised that he had three options by which to "remediate this situation": (*a*) the 2011 and 2013 home leave payments could be deducted from his separation payment; (*b*) he could submit documentation from another trip to the home leave destination for which he had "fully paid"; or (*c*) he and his spouse could travel again to the home leave destination and submit a certification for that trip prior to his upcoming separation date, which was just two weeks hence.

The Fund's rules at GAO No. 17, Rev. 9, section 12.05, provide in part: "If any discrepancies are found between the certified statements and either the supporting documentation, the staff member's Application for Home Leave Benefits or the requirements of this Order, the Treasurer's Department *shall seek to resolve such discrepancies with the staff member, e.g., through the submission of additional travel documentation*." (Emphasis added). The Tribunal noted that nearly two years passed between the time the Applicant submitted his certification showing that he had used BFSFCU points to acquire his home leave airline tickets and the time when the Fund advised him that his certification was not in compliance with GAO No. 17. It was also pertinent, said the Tribunal, that the Applicant did not conceal the fact of his use of BFSFCU points at the time of his August

2012 certification. Moreover, it was the Applicant himself who brought the same fact to the Fund's attention when the issue of his 2013 benefit was raised in his exit interview of July 2014.

In the view of the Tribunal, the Fund failed in its obligation to notify the Applicant in a timely manner of the rejection of his 2011 home leave certification and to "seek to resolve … discrepancies with the staff member," GAO No. 17, rev. 9, section 12.05, as to his compliance with the home leave travel requirements. "The consequence of the Fund's failure in this case was a material one," said the Tribunal, "which was effectively to deprive [the] Applicant of the options he would have had under the governing rules to comply with the home leave policy. This consequence was particularly acute, given that [the] Applicant was on the cusp of his retirement date when he was notified of his non-compliance." (para. 99.)

Accordingly, the Tribunal concluded that the Applicant had prevailed on his contention that the Fund failed to afford him timely notice of the rejection of his 2011 home leave certification and an effective opportunity to remedy his non-compliance with the home leave policy. On that ground, the Tribunal rescinded the Fund's decision to recover the home leave benefit paid to the Applicant in 2011 and ordered that it pay him the amount deducted from his separation payment, *i.e.*, USD 17,774, to correct the effects of that decision. Additional complaints raised by the Applicant were not sustained.