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

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

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Chapter V

DECISIONS OF ADMINISTRATIVE TRIBUNALS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS

A. Decisions of the Administrative Tribunal of the United Nations [1]

1. JUDGEMENT NO. 135 (26 OCTOBER 1970): [2] TOUHAMI V. SECRETARY-GENERAL OF THE UNITED NATIONS

A fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment—Obligation to provide every staff member with a letter of appointment defining the terms and conditions of his appointment

The applicant, a Moroccan national, entered the service of the UNDP Office at Rabat on 1 September 1966 for a trial period of three months as a finance clerk at level 5, step II of the local salary scale (12,840 dirhams per annum). Just prior to his recruitment by UNDP he had been employed for five years by the United States Embassy at Rabat. On 23 November 1966 he expressed his willingness to continue in service with UNDP after the expiration of his initial appointment provided his salary was increased to 1,500 dirhams per month. Effective 1 December 1966 the appointment was apparently converted into a fixed-term appointment of one year at the same salary level, although no letter of appointment was issued. In January 1967 a revised salary scale for the local staff of the Rabat Office was issued with retroactive effect from 1 September 1966. The applicant was then reclassified to level 5, step I of the revised scale, his salary being thus fixed at 16,000 dirhams per annum. On 25 October 1967 he was informed that his appointment would not be renewed upon its expiration on 30 November 1967 and that, since his leave credit stood at ten and a half days, his last working day would be 16 November 1967. In March 1968 the applicant appealed to the Joint Appeals Board asking to be reinstated with an indefinite

[1] Under article 2 of its Statute, the Administrative Tribunal of the United Nations is competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. Article 14 of the Statute states that the competence of the Tribunal may be extended to any specialized agency upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. By the end of 1970, two agreements of general scope, dealing with the non-observance of contracts of employment and of terms of appointment, had been concluded, pursuant to the above provision, with two specialized agencies: the International Civil Aviation Organization; the Inter-Governmental Maritime Consultative Organization. In addition, agreements limited to applications alleging non-observance of the Regulations of the United Nations Joint Staff Pension Fund had been concluded with the International Labour Organisation, the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization, the World Health Organization, the International Civil Aviation Organization, the World Meteorological Organization and the International Atomic Energy Agency.

The Tribunal is open not only to any staff member, even after his employment has ceased, but also to any person who has succeeded to the staff member's rights on his death, or who can show that he is entitled to rights under any contract or terms of appointment.

[2] Mr. R. Venkataraman, President; Mr. F. T. P. Plimpton, Member; Mr. Z. Rossides, Member.

appointment and raising the subsidiary questions of (1) his salary level and (2) the number of days of accrued annual leave and cash payment for the amount due him from the Administration for such leave.

The Board considered that the appellant had been separated from the UNDP Office upon expiration of his fixed-term appointment and that he had no legally valid claim to an extension of his fixed-term appointment. With respect to the question of salary level, the Board was of the opinion that the appellant's grade at level 5, step II was binding upon the appellant as well as the Administration; it indicated that, as a matter of principle, a general revision of salary scales should not entail any downward adjustment of a staff member's grade, and that the action was particularly unjustifiable in the case in point since it was applied to the appellant in a discriminatory manner. On the question of accrued annual leave the Board indicated that it did not consider it to be consonant with the relevant provisions of the Staff Regulations and Rules for the UNDP Office to put the appellant on compulsory annual leave. It therefore recommended that the appellant should be paid for the ten and a half days of accrued annual leave in accordance with Staff Rule 109.8 (*a*). Finally, viewing the case as a whole, the Board indicated that sound administrative practice did not appear to have been followed in regard to the appellant. It mentioned, in that connexion, the fact that (1) the appellant had been led to forsake his former post by encouraging him in the belief that his appointment would be a long term proposition and that (2) there had been no letter of appointment for the last twelve months of the appellant's employment. Inasmuch as the appellant had suffered considerable hardship because of the administrative negligence, the Board recommended that he should be compensated by an *ex gratia* payment of an amount equivalent to his last month's salary.

The Secretary-General accepted the recommendations of the Joint Appeals Board.

The Tribunal, having examined the case, pointed out that the initial three-month appointment and the one-year appointment from 1 December 1966 should be regarded as fixed-term appointments coming under Staff Rule 104.12 (*b*) which reads in part:

> "The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment."

It also observed that the letter of appointment, signed by the applicant, referred specifically to the Staff Regulations and Rules, stating:

> "This fixed-term appointment does not carry any expectancy of renewal."

The Tribunal also noted that the applicant's initial fixed-term appointment for the trial period of three months, followed by the fixed-term appointment of one year, conformed to the UNDP practice, as evidenced by the UNDP Field Manual provisions. The Tribunal observed, however, that the applicant's fixed-term appointment for one year had not been followed by a written letter of appointment and that that omission might have led the applicant to believe that he had been accorded an indefinite contract. The Tribunal noted that, taking that circumstance into account, the Joint Appeals Board had recommended, and the Administration accepted, an *ex gratia* payment. On the question of the applicant's level, the Tribunal noted that the evidence produced by the applicant in support of his claim for grant of salary level 5, step VI showed clearly that he had made a strong claim but did not prove that the claim had been accepted. The Tribunal recognized that the reclassification of the applicant to a lower step than that at which he had been recruited was incorrect, but pointed out that the necessary corrective action had been taken in accordance with the recommendation of the Joint Appeals Board. The Tribunal therefore rejected the application.

2. JUDGEMENT NO. 136 (29 OCTOBER 1970):[3] DETIERE v. SECRETARY-GENERAL OF THE CIVIL AVIATION ORGANIZATION

Obligation, when transferring a staff member, to ascertain that the positions are comparable and to have due regard to the personal interest of the staff member concerned—The fact that the two positions are of the same grade is not sufficient to ensure fulfilment of the comparability requirement

The applicant had been Secretary of the European Civil Aviation Conference (ECAC)—an organ associated with ICAO and whose secretariat services were provided by ICAO—for about ten years. His appointment was explicitly subject to the provisions of the ICAO Service Code and specified that the applicant's first assignment would be to the Paris Regional Office of the Air Navigation Bureau. On 16 October 1968, the Secretary-General informed the applicant that he had decided to transfer him to the Air Transport Bureau at Montreal for certain statistical work requested by a recent resolution of the Assembly and that the transfer would take place between 1 January and 1 March 1969. On the same day, the Director of the Air Transport Bureau had addressed to the Secretary-General a memorandum in which he indicated *inter alia* that he would certainly have to write adverse reports about the applicant if the latter was not transferred, and that advantage should be taken of the Assembly resolution because it provided a good opportunity to take a measure that was not too punitive. On the applicant's request the transfer was deferred but was later irrevocably set for 1 December 1969. The latter was referred to the ICAO Advisory Joint Appeals Board which recommended to the Secretary-General that the transfer decision be rescinded. The Secretary-General rejected the recommendation. The applicant then filed his application with the Tribunal.

The Tribunal observed that the applicant's various letters of appointment, including the letter of appointment to permanent employment, expressly stated that the appointment was to the staff of ICAO, that the first assignment was to the Paris Regional Office of the Air Transport Bureau and that the appointment was subject to the provisions of the ICAO Service Code and subsequent amendments. It concluded from its examination of the applicant's administrative situation that he could not cite any special commitment by ICAO subordinating the Secretary-General's right to transfer an ICAO staff member to special requirements and that no specific obligation on that score rested with the respondent.

While recognizing the importance for the proper functioning of the Organization of the right to transfer staff, the Tribunal emphasized that in exercising that prerogative the respondent should, in order to transfer a staff member, ascertain that the positions were comparable and pay due regard to the personal interest of the staff member concerned. Furthermore, since those requirements had to be met in order for the Secretary-General to take his decision, it was clear that the regularity of the decision could not be justified simply by citing any action which was subsequent and which the respondent considered sufficient to meet those requirements. Before deciding the transfer, the Secretary-General should have notified his intention to the staff member concerned, informed him of the position to which he was to be assigned and told him how he intended to pay regard to his interests.

The Tribunal noted that, in the opinion of the respondent, the comparability of positions was assured if the staff member was transferred to a position of the same grade. The Tribunal recognized that that was one requirement but that the concept of "comparability" of positions was more complex. It observed that GSI 1.7.3, paragraphs 3 (*b*) and 8 (*b*),

[3] Mme P. Bastid, Vice-President, presiding; Mr. F. A. Forteza, Member; Mr. V. Mutuale, Member; Mr. F. T. P. Plimpton, Alternate Member.

concerned transfers to a vacancy "of the same character". Besides, it was only at the request of the Advisory Joint Appeals Board that a draft description of the post to which the applicant was transferred was prepared and it was only after the respondent had rejected the Board's recommendations that a final post description was prepared and a true assessment could be made of the comparability of the positions. By that time, however, the decision to transfer the applicant was already an established fact and it had been taken and confirmed without a reasonable procedure whereby the requirement of comparability of positions laid down in part III, article IV.7 of the Service Code could be met.

The Tribunal also observed that nothing in the decision notified on 16 October 1968 revealed an effort to pay "due regard to the personal interest of the staff member concerned", that the applicant was given no means of submitting, for the consideration of the Secretary-General, what he considered to be his personal interest and that under part III, article IV.7, interest did not merely mean "professional" interest. Consequently, the Tribunal considered that the requirements of article IV.7 had not been met and that the transfer decision was therefore irregular.

The applicant maintained that the transfer decision constituted a misuse of power, on the ground that its real purpose was the exercise of disciplinary power against him. The Tribunal noted in this connexion that the applicant's superior had referred in the periodic report for 1967 to a relationship which he had had with the applicant before the latter's entry on duty and that in the above-mentioned memorandum to the Secretary-General he had stated that he intended in the future to make unfavourable evaluations in the applicant's periodic reports. The Tribunal observed that such attitudes were contrary to sound administrative practice. In addition, it observed that the applicant had solemnly affirmed that he had not been informed of the criticisms made of his services. The Tribunal considered that such a situation was particularly unfortunate in view of the special nature of the applicant's duties in ECAC and made it even more necessary, at the time of the transfer decision, to follow a procedure enabling the Secretary-General to observe the requirement laid down in the Service Code. Having reached the conclusion that the transfer decision was irregular, it considered that no ruling was required on the complaint of misuse of power or on the complaint of abuse of right.

The Tribunal rescinded the contested decision. It decided that the respondent should either reinstate the applicant in his previous position or compensate him for the material damage he had suffered and the damage to his career.

3. Judgement No. 137 (30 October 1970): [4] Khederian v. Secretary-General of the United Nations

Requirements that must be met if the Tribunal is to revise a judgement according to its Statute—A request for interpretation of a judgement shall be receivable only if its object is to obtain clarification of the meaning and scope of what the Tribunal decided with binding force

The applicant requested that Judgement No. 120, rendered on 25 October 1968, [5] be revised under article 12 of the Statute of the Administrative Tribunal, on the ground that on 18 October 1969 she had discovered facts of such nature as to be a decisive factor in the revision of the Judgement namely, an aggravation of the conditions for which she had

[4] Mme P. Bastid, Vice-President, presiding; Mr. R. Venkataraman, President; Mr. Z. Rossides, Member.

[5] See *Juridical Yearbook*, 1968, p. 170.

applied for compensation. She contended that in Judgement No. 12) the Tribunal had failed to fix the compensation which should have been payable to her u ıder article 11.2 (*d*) of Appendix D to the Staff Rules, as read with article 11.1 (*c*) of Appenc ix D. She claimed that the provisions of article 9 of the Tribunal's Statute were intended o apply to cases of termination and were not intended as an alternative to the award o ' compensation for disability. The Tribunal should have itself assessed the degree of disa)lement on the evidence contained in the Medical Board's report dated 1 December 19)6. The applicant, therefore, requested that the Tribunal revise Judgement No. 120; sh e further requested that it (*a*) give all such necessary directions to give effect to the intentio ıs of its Judgement No. 120; (*b*) assess the compensation to be paid to the applicant under ar ticle 11.2 of Appendix D to the Staff Rules, and (*c*) direct the Secretary-General to pay a ll such moneys and compensation to which the applicant might be entitled under article 1 .2 of Appendix D.

The Tribunal recalled that, according to its Statute, it could re ise a judgement if (*a*) some fact, unknown to the Tribunal and the party claiming revis on at the time the judgement was given, was subsequently discovered, (*b*) such fact was a decisive factor and (*c*) the ignorance of such fact was not due to the negligence of the party claiming revision. The Tribunal emphasized that its powers of revision were strictly limite d by its Statute and could not be enlarged or abridged by it in the exercise of its jurisdict ion.

The Tribunal noted that assuming that the deterioration of the applicant's medical condition constituted a new fact, it was not alleged that that fact exis ted before the date when the Judgement was given and consequently, it could not be the b sis for a revision of the Judgement under article 12 of the Statute of the Tribunal. The Tribunal therefore rejected the request for revision.

Concerning the applicant's request that the Tribunal should give dir ctions and elaborations of Judgement No. 120 so as to give effect to the Judgement, the Tr bunal had observed in Judgement No. 61 [6] that a request for interpretation of a judgement was receivable only if its object was to obtain clarification of the meaning and scope of wh at the Tribunal had decided with binding force and not to obtain an answer to questions not s o decided, and that, in addition, it was necessary that there should exist a dispute as to the meaning or scope of the decision. The Tribunal pointed out that what had been decided with binding force was the amount of compensation. It noted that the decision had bee n implemented and that no difficulty of interpretation had arisen in ascertaining the amou nt of compensation. In view of the fact that the questions raised by the applicant were rel ated either to issues which had not been submitted previously to the Tribunal, or to the gr ounds on which the Tribunal's Judgement was based and that, in effect, the applicant wish d to appeal against the Judgement not to obtain an interpretation of what had been decide c with binding force, the Tribunal rejected the application.

4. Judgement No. 138 (30 October 1970): [7] Peynado v. Se cretary-General of the United Nations

Request for the rescission of a decision to terminate a probationary appointment—Such a decision is within the Tribunal's power, to the extent that it is vitiate c by an error in fact or in law—Obligation of the administration to conduct an investigation when a staff member rebuts allegations contained in his periodic report

The applicant, who had a probationary contract, was recommended, at the end of his probationary period, for a permanent appointment by his superv sors and the Office

[6] *Judgements of the United Nations Administrative Tribunal*, Numbers 1 to 70, 1950-1957 (United Nations publication, Sales No.: 58.X.1), p. 331.

[7] Mr. R. Venkataraman, President; Mme P. Bastid, Vice-President; Mr. F A. Forteza, Member.

of Personnel. The Appointment and Promotion Committee took note of the recommendation and passed it on to the Appointment and Promotion Board, which in turn took note of it. The recommendation was approved by the Secretary-General on 1 July 1967 but it appeared that the applicant was not informed. On 4 August 1967 the Chief of his Department informed the applicant that he could not maintain his recommendation for a permanent appointment and had proposed to the Director of Personnel, who had been in agreement, that the recommendation should be changed to a recommendation that the probationary period be extended for one year. The matter was referred to the Appointment and Promotion Committee, which reported to the Appointment and Promotion Board its endorsement of the Office of Personnel's recommendation, made with prior approval of the Secretary-General, that the applicant's probationary appointment be extended for one year. The Appointment and Promotion Board in turn made a recommendation to the Secretary-General, who accepted it. The applicant then submitted his case to the Joint Appeals Board, stating that the measure taken against him was based not on reasons related to the service but on personal vengeance for reasons which were foreign to it. Later he withdrew his appeal. At the end of his third year of probation the applicant was given a third periodic report in which he was rated as "a staff member who maintains only a minimum standard". The Office of Personnel transmitted to the Chairman of the Appointment and Promotion Committee a recommendation that the applicant's probationary appointment be terminated. The Committee approved the recommendation in a report endorsed by the Appointment and Promotion Board. The applicant then referred the matter to the Joint Appeals Board, which decided to make no recommendation in support of the appeal. The Secretary-General, having taken note of the decision and of the separate opinion of one of the members of the Board, maintained the decision terminating the appointment.

The applicant then applied to the Tribunal, requesting the rescission of the termination decision which, he said, had been taken following a procedure vitiated by many errors in fact and in law.

The Tribunal recalled that it had consistently upheld the discretionary power of the Secretary-General to terminate all appointments other than permanent or fixed-term appointments if, in his opinion, such action would be in the interest of the United Nations. It emphasized that such discretionary power should, however, be exercised without improper motive so that there should be no misuse of authority and referred in that connexion to Judgement No. 54.[8] It recalled that procedures were prescribed for a proper assessment of the suitability of staff members on probation for the grant of permanent or regular appointments. They included, in the absence of a favourable recommendation agreed between the Office of Personnel and the Department concerned, the possibility of intervention by the Appointment and Promotion Board. The respondent contended that the applicant's case had been referred to the Appointment and Promotion Board, that the applicant had been afforded an opportunity to present his views and that, as the Board had come to a conclusion regarding the applicant's standard of performance, there had been no lack of due process or improper exercise of discretion in the case of the staff member concerned. However, where the Board reached its conclusions in the light of inadequate or erroneous information and the Secretary-General relied on those conclusions for the termination of the appointment, the fact that there had been a review by the Board did not secure that the Secretary-General's decision was valid.

Although the applicant had rebutted some of the assessments of his performance when he signed the periodic report for his third year of probation, the Chief of his Department had not made the investigation required in such cases under Administrative Instruc-

[8] *Judgements of the United Nations Administrative Tribunal*, Numbers 1 to 70, 1950-1957, p. 266.

tion ST/AI/115. Yet the Appointment and Promotion Committee has explicitly based its report recommending termination on the assessments in question. In this particular case, an investigation would have been all the more necessary since antagonism existed between the applicant and his Chief of Department.

The Tribunal therefore held that the applicant had been deprived of a fair and reasonable procedure, that the recommendation of the Appointment and Promotion Board was therefore unsustainable and that the decision of the Secretary-General based on the recommendation of the Board, suffered the same defect.

The Tribunal said it was disturbed by a number of unsatisfactory features of the case. It observed that that was the only case in the last five years where, after a favourable recommendation had been made and approved by the Secretary-General, the recommendation had been changed and the case referred to the Appointment and Promotion Board. In such an extraordinary case, the applicant should have been afforded an opportunity for oral rebuttal of the case made against him.

It further noted that in spite of two favourable periodic reports, one of which had been signed by the same officer who subsequently changed his mind, the Office of Personnel had eventually made a recommendation at variance with those reports. Such retroactive reappraisal of earlier performance properly evaluated in periodic reports might affect prejudicially the protection which staff members were entitled to.

On the merits of the case, considering that the applicant had been denied the protection afforded by Administrative Instruction ST/AI/115 the Tribunal declared that the application was well founded. Noting, however, that rescinding the decision terminating the applicant's appointment would provide no relief to the applicant as the period of probation had expired and that there was on the part of the respondent no obligation whose specific performance might be invoked, the Tribunal, referring to the precedents set in Judgements Nos. 68 [9] and 92, [10] ordered that compensation be made for the injury caused to the applicant by procedural defects.

B. Decisions of the Administrative Tribunal of the International Labour Organisation [11]

1. Judgement No. 144 (26 May 1970): [12] Tarrab v. International Labour Organisation

The Tribunal recorded the fact that the complainant's suit had been withdrawn.

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[9] *Ibid.*, p. 398.

[10] *Ibid.*, Numbers 87 to 113, 1963-1967 (United Nations publication, Sales No.: E.68.X.1), p. 41.

[11] The Administrative Tribunal of the International Labour Organisation is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment, and of such provisions of the Staff Regulations as are applicable to the case, of officials of the International Labour Office and of officials of the international organizations that have recognized the competence of the Tribunal, namely, as at 31 December 1970, the World Health Organization the United Nations Educational, Scientific and Cultural Organization, the International Telecommunication Union, the World Meteorological Organization, the Food and Agriculture Organization of the United Nations, the European Organization for Nuelear Research, the Interim-Commission for the International Trade Organization/General Agreement on Tariffs and Trade, the International Atomic Energy Agency, the United International Bureaux for the Protection of Intellectual Property, the European Organization for the Safety of Air Navigation and the Universal Postal Union. The Tribunal is also competent to hear disputes with regard to the execution of certain contracts con-

2. JUDGEMENT NO. 145 (26 MAY 1970): [13] DHAWAN v. WORLD HEALTH ORGANIZATION

A note written in the margin of a routing slip does not constitute a decision which may be appealed against before the Tribunal

The complainant, considering that a marginal note by one of his superiors on a routing slip he had filled in was insulting, and having been unable to obtain reparation of the wrong he felt had been done him, stated his intention of appealing to the WHO Regional Board of Appeal. He requested, and obtained, an extension of the time-limit allowed for that purpose. The day after the expiration of the extended time-limit he requested a further extension. He was then informed that his complaint was time-barred. He appealed to the Tribunal which, without pronouncing on the Organization's conclusions concerning the non-receivability of the complaint as being time-barred, found that the contested note did not constitute a decision and that, furthermore, since it had in no way been made public, it was not of a nature to cause the complainant any damage entitling him to any kind of reparation. The Tribunal therefore dismissed the complaint.

3. JUDGEMENT NO. 146 (26 MAY 1970): [14] MCMULLAN v. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Unless authorized to do so by the respondent organization, the Tribunal may not hear a complaint until the internal appeal procedure has been exhausted

The complainant's appointment, which was to terminate on 31 December 1968, was, in fact, terminated before that date for health reasons. The complainant then appealed directly to the Tribunal without going through the UNESCO Appeals Board, although the Organization had warned him repeatedly that such a procedure was irregular. In his complaint he asked the Tribunal to rescind the decision to terminate his appointment and to order the renewal of his contract or payment of compensation. Three months later, on 24 June 1969, UNESCO informed him that the decision to terminate his appointment had been reversed and that he would therefore receive his full salary until the date on which his contract would normally have expired, namely, until 31 December 1968. It further informed him that his contract would not be renewed beyond that date.

With regard to the rescinding of the decision to terminate the complainant's appointment, the Tribunal noted that the complaint had been deprived of all substance.

With regard to the decision not to renew his contract, UNESCO maintained that the complainant's claims had only become relevant after the decision of 24 June 1969 and that

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cluded by the International Labour Office and disputes relating to the application of the Regulations of the former Staff Pensions Fund of the International Labour Organisation.

The Tribunal is open to any official of the International Labour Office and of the above mentioned organizations, even if his employment has ceased, and to any person on whom the official's rights have devolved on his death, and to any other person who can show that he is entitled to some right under the terms of appointment of a deceased official or under provisions of the Staff Regulations on which the official could rely.

[12] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

[13] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

[14] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

he should have appealed against the second decision in accordance with the procedure laid down in the Staff Regulations and Rules, namely, by laying the matter before the UNESCO Appeals Board. He had failed to do so although he had at no time and in no way either requested or received authorization to appeal directly to the Tribunal. The complainant replied that the Director-General had been wrong to take the decision of 24 June 1969 since at that date he was no longer a UNESCO official and his case was pending before the Tribunal.

The Tribunal recalled that under article VII, paragraph 1 of its Statute an official's complaint was not receivable unless the person concerned had exhausted such other means of resisting the decision impugned as were open to him under the applicable Staff Regulations. Chapter XI of the UNESCO Staff Regulations and Rules provided that, before appealing to the Administrative Tribunal, officials of the Organization must submit an appeal to the UNESCO Appeals Board. Since the complainant had not submitted any such appeal before filing a complaint with the Administrative Tribunal, he had failed to exhaust the internal procedure available to him. Moreover, the written evidence showed that the Director-General had not authorized him to appeal directly to the Tribunal. The complaint was therefore deemed not receivable.

4. JUDGEMENT NO. 147 (26 MAY 1970):[15] SCHUSTER v. WORLD METEOROLOGICAL ORGANIZATION

Non-receivability of a complaint filed directly with the Tribunal in violation of the rule that the internal appeal procedure must first be exhausted—Concept of "exceptional circumstance" justifying the waiver of rules concerning the time-limit for appealing to internal appeals bodies

The complainant, whose appointment was terminated "in the interest of the Organization" before the expiration of his contract, was informed, at his request, of the rule concerning the procedure available to him to resist the decision to terminate his appointment (United Nations Staff Rule 111.3), which provided that the staff member concerned must first request the Secretary-General to review his decision, and if the decision was confirmed, must submit an appeal to the Secretary of the Joint Appeals Board within two weeks from the date of receipt of the Secretary-General's answer.

The complainant nevertheless filed a complaint directly with the Tribunal without first appealing to the Joint Appeals Board. As the Secretary-General concluded that the appeal was not receivable because the internal appeal procedure had not been exhausted, the complainant requested the President of the Tribunal to suspend the proceedings before the Tribunal so that he might take his case before the Joint Appeals Board. The Board recommended the Secretary-General to inform the complainant that his complaint was time-barred since no exceptional circumstances seemed to justify waiving the rule. The complainant then reopened the proceedings before the Tribunal.

Referring to article VII, paragraph 1, of its Statute and the aforementioned United Nations Staff Rule 111.3, the Tribunal declared that the complaint was not receivable. Concerning the decision that the complaint was time-barred, the Tribunal noted that the complainant had been duly informed of the procedure available to him Even if the complainant had addressed himself directly to the Tribunal as a result of a mistake committed

[15] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

in good faith, the Joint Appeals Board could validly consider that that did not constitute an exceptional circumstance. The decision to declare the appeal time-barred, taken on the recommendation of the Joint Appeals Board, was accordingly in order and the Tribunal therefore dismissed the complaint.

5. JUDGEMENT NO. 148 (26 MAY 1970):[16] GODINACHE v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Complaint seeking a compensation annuity for total incapacity for work—Concept of "total incapacity for work"—Even if the incapacity for work attributable to the performance of official duties is only partial, the person concerned may nevertheless be entitled to claim a compensation annuity for total incapacity for work

As a result of an accident, the complainant was suffering from incapacity for work which was regarded by the Organization as being attributable to the extent of 30 per cent to his employment. He was awarded compensation for partial service-incurred disability calculated on that basis. He maintained that his total incapacity for work was a direct result of the 30 per cent disability attributable to the accident and therefore requested that FAO should pay him until his death the compensation provided for in FAO Manual section 342.513, that is to say, two thirds of his final remuneration. The Organization, on the other hand, took the view that the disability attributable to the accident was not the direct and sole cause of the complainant's total incapacity.

The Tribunal pointed out that under FAO Manual sections 342.511 and 342.513 the award of annual compensation payments equivalent to two thirds of the final remuneration was subject to two conditions: (*a*) total incapacity for work and, (*b*) a causal relation between the performance of official duties and the incapacity.

(*a*) In the Tribunal's view total incapacity for work must be taken to mean the inability of a staff member to perform duties corresponding to his training and qualifications. Noting that the medical board set up by the parties, the Advisory Committee on Compensation Claims and the Organization itself all acknowledged that the complainant was wholly incapable of exercising his profession, the Tribunal felt that the complainant must be regarded as totally incapacitated for work within the meaning of the applicable provisions.

(*b*) The Organization maintained that the complainant's condition was due to the accident only to the extent of 30 per cent, as the medical board had assessed the post-traumatic impairment at that figure. The Tribunal felt that even if the injury would normally result in incapacity of only 30 per cent, it did not follow that the complainant's claim for compensation for total incapacity was unfounded. On the contrary, he would be entitled to such compensation if no factor other than the accident appeared to have caused the recognized disability.

On the basis of those facts the Tribunal considered that although the complainant's post-traumatic impairment was assessed at only 30 per cent by the medical board, his total incapacity for work was entirely attributable to the accident. The complainant was therefore entitled to the annual compensation payments laid down by Manual section 342.513. The Tribunal added that, as the medical board did not rule out the possibility that the complainant might be able to resume some kind of work in the future, the Organization must retain the right to review the complainant's case from time to time and to adjust the compensation due to him in the light of any changes.

[16] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Lord Devlin, Judge.

6. JUDGEMENT NO. 149 (26 MAY 1970):[17] LIOTTI V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Procedure laid down for the reclassification of posts—An internal appeals body is entitled to recommend the rescinding, on grounds of prejudice, of a decision to withhold a regular salary increase

The complainant having claimed that she was performing functions proper to a higher grade than her own, the Finance Division—in which she was working—asked the Establishment Section to review her post description. In April 1968, after looking into the matter, the Establishment Section recommended that the post should be reclassified G-4. The Assistant Director of the Finance Division, however, was of the opinion that submission of the recommendation to the Establishment Committee must be deferred, since he felt the complainant's upgrading was not warranted because she lacked the calm temperament required. In addition, soon afterwards the complainant's chief informed her of his decision to defer for three months her annual salary increment which fell due on 1 November 1968 because of misgivings about her approach to her work and her relations with her colleagues. At the end of the three months the increment was in fact granted on the grounds that her work had sufficiently improved.

The complainant lodged an appeal with the Appeals Committee, which recommended: (1) that complainant should receive her salary increment with effect from 1 November 1968, since there had been no valid reason for withholding it; (2) that steps should be taken to upgrade her post. The Director-General accepted the second recommendation but not the first, since, in his view, questions of efficiency fell outside the Committee's competence. The complainant was informed of the decision on 5 March 1969. Soon afterwards the Establishment Committee decided to recommend the upgrading of the complainant's post and she was promoted to a higher grade.

The complainant lodged a complaint with the Tribunal against the decision of 5 March 1969 maintaining that she should be upgraded retroactively and that the withholding of her annual increment for three months was unfair; in addition, she asked to be reimbursed the expenses paid to a lawyer whom she had consulted regarding her case.

The Tribunal, referring to article VIII, paragraphs 1 and 2, of the Constitution of FAO stating that the staff of the Organization shall, subject to the rules made by the Conference, be appointed by the Director-General and be responsible to him, and to rule XXXVI, paragraph 4, of the General Rules of the Organization stating that ". . . the Director-General shall act in his unfettered judgement in appointing, assigning and promoting staff personnel . . .", pointed out that staff members could request reconsideration of decisions taken with respect to allocation of their post (FAO Staff Rule 302.232) but that any request for reclassification of a post had to originate from the department head or division director (Staff Rule 302.231, FAO Manual section 280.411). In the present case the Tribunal felt that the procedure laid down in the relevant texts had been duly followed and that the delay between the complainant's written request for reclassification and the actual reclassification could be explained by the misgivings that her superiors had had at one time about her suitability for the upgraded post. It found that no staff regulation or rule had been violated in form or substance.

With regard to the withholding of her regular within-grade salary increase for a period of three months the Tribunal recalled that the Appeals Committee which had heard the persons closely concerned with her appeal had found that the increase had been withheld

[17] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

because of personal prejudice. Although the Committee was not competent to consider complainant's efficiency—and in fact it had not done so—it was competent to find the existence of prejudice. The Director-General therefore had committed an error of law in stating in his letter of 5 March 1969 that he could not endorse the recommendation of the Appeals Committee on that point simply on the ground that the Committee was not competent to make such a recommendation. The Tribunal therefore rescinded the decision to withhold the salary increase.

However, the Tribunal dismissed the claim for payment of the costs of engaging a lawyer recalling that under the terms of Staff Rule 303.136 a staff member appealing to the Appeals Committee could only designate another staff member to represent him before the Committee. It followed that any advice sought from some outside source must be paid for by the staff member himself.

7. Judgement No. 150 (26 May 1970): [18] Akinola Deko v. Food and Agriculture Organization of the United Nations

The resignation of an official entails the termination of his appointment unless it is established that the resignation was not given voluntarily—The rules relating to disciplinary procedure only apply in so far as such a procedure has in fact been initiated

The complainant, who was alleged to have committed errors which amounted to unsatisfactory performance, was urged to resign, in return for which the whole matter would be regarded as closed. At his request he received a memorandum setting out his alleged errors, and after an exchange of letters he sent the Director-General a letter of explanation which he said should be regarded as his resignation. The Director-General informed the complainant that he accepted his resignation and that the matter was now regarded as closed. The complainant appealed to the Appeals Committee which held that, since the complainant's employment had been terminated by his own resignation he was therefore not entitled to plead section 301.111 concerning appeals to the Appeals Committee. He then lodged a complaint with the Tribunal against the Director-General's decision taken on the basis of the Appeals Committee's report, maintaining that sections 330.321 to 330.325 of the Manual, governing the disciplinary procedure, had not been observed and rejecting all the charges against him.

The Tribunal recalled that the resignation of an official of an organization entailed the termination of his appointment unless it was established that the resignation had not been given voluntarily. It noted that, in order to prove that the resignation which he had submitted to the Director-General had not been voluntary, the complainant maintained, first, that the procedure followed by the Director-General in the days preceding the letter of resignation had been irregular in that it was not in conformity with the FAO Manual section 330 and, secondly, that pressure had been exerted upon him and his freedom of action had thereby been restricted.

The Tribunal pointed out that, in order to safeguard, if possible, the reputation both of the Organization and the official, the Director-General was always free to ask the official for explanations before initiating the disciplinary procedure. In the present case the procedure which had been started could not have caused any injury to the complainant, particularly since that procedure had been terminated by a unilateral act of the complainant. Under the circumstances the plea based on an alleged infringement of FAO Manual section 330 was unacceptable. With regard to the question of the validity of the complainant's

[18] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

resignation it was evident from the facts of the case that no threat or pressure had been imposed by the Organization and that his resignation had been freely given and his appointment terminated as a result. The Tribunal therefore dismissed the complaint.

8. JUDGEMENT NO. 151 (26 MAY 1970):[19] SILOW V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Complaint by an official temporarily transferred against the circumstances of his reinstatement in his original Organization

The complainant, an official of FAO at grade P-5, was appointed Deputy-Director of a Joint FAO-IAEA Division within the Agency and was later promoted to grade D-1. He was, however, informed that, since the retirement age in IAEA was 60 as against 62 in FAO, he would be retransferred to FAO at his former grade, namely P-5, between the ages of 60 and 62, should IAEA decide not to retain his services. The IAEA having decided not to retain the complainant's services after he reached the age of 60, he returned to FAO where, although he kept the personal grade of D-1, he was appointed to a P-5 post with the title of "Technical Officer". Subsequently, he was appointed as "Scientific Officer" at grade D-1. The complainant then appealed to the FAO Appeals Committee maintaining (1) that at the time of his transfer to IAEA the Administration of FAO had acted unjustly in deciding that on his return to FAO he should automatically be demoted and that that question should have been held over for review at the time of retransfer; and (2) that his professional standing and reputation had suffered through his appointment to a P-5 post on his return to FAO. Having failed to obtain satisfaction the complainant appealed to the Tribunal.

The Tribunal recalled that, at the time of his transfer to IAEA, the complainant, who was born in 1908, had been informed that the retirement age in IAEA being 60 and in FAO 62, he might be retransferred to FAO for two years if he left IAEA in 1968, but with the grade of P-5. The decision had not been contested within the prescribed time-limit and had therefore become final. Accordingly, the sole obligation resting on FAO was to reinstate the complainant at grade P-5 from 1968 to 1970. In reinstating him at grade D-1 the Organization had taken a decision in his favour which went beyond its strict obligation towards him. Furthermore, it appeared from the evidence in the file that the complainant had been assigned to duties appropriate to an official of his grade. There was accordingly no foundation for the complainant's claim that the decision to retransfer him was irregular and that the circumstances of his reinstatement had been in any way damaging

9. JUDGEMENT NO. 152 (26 MAY 1970):[20] KERSAUDY V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Granting of a "permanent appointment (first-year probationary)"—A decision to terminate the appointment of an official on probation on the grounds of unsatisfactory performance may be regarded as a measure taken in the interest of the Organization—Limits of the Tribunal's authority to review such a decision

The complainant, after working for many years on a permanent contract as a translator in the United Nations and subsequently in IAEA, signed a contract of appointment with FAO, which stated under the heading "Type of Appointment" that he was granted a "perma-

[19] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

[20] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Lord Devlin, Judge.

nent appointment (first-year probationary)". His work having been deemed unsatisfactory, his probationary period was extended by six months. At the end of the six months he was informed that his appointment was terminated in accordance with section 301.0913, which empowered the Director-General at any time to terminate the appointment of a staff member serving a probationary period if, in his opinion, such action would be in the interests of the Organization. The complainant then appealed to the Appeals Committee which found the existence of prejudice against him and recommended that he be reinstated. When the Director-General did not accept the recommendation the complainant lodged a complaint with the Tribunal, maintaining (1) that the obligation placed upon him to undergo a probationary period after 15 years' service as a translator with the United Nations and IAEA constituted an infringement of his rights; (2) that he had not had an opportunity to defend himself, since the criticisms of his work were brought to his attention only after seven months of the probationary period had elapsed; and (3) that there had been misuse of authority in that the Director-General claimed to be acting under section 301.0913 (dismissal of an official on probation in the interests of the Organization), whereas in fact he was dismissed for allegedly unsatisfactory performance. The Tribunal noted that the requirement that a newly recruited official shall serve a probationary period was a normal condition generally imposed in such cases and that, although FAO Manual section 307.41 provided that staff members recruited by FAO after serving with the United Nations or another specialized agency might be exempted from serving a probationary period, it was clear from the terms of that provision that it did not confer any right on the persons concerned, but merely gave the Chief of the Personnel Department authority to waive the requirement if he was satisfied that it was appropriate to do so. The complainant's plea, which in any case was time-barred, was therefore without foundation on that point. The decision to extend the probationary period was also regular in view of Manual section 305.431 and the fact that the complainant had been given sufficient advance notice.

As to the reason for the decision to terminate the appointment, the Tribunal emphasized that, as the purpose of the probationary period was to ascertain whether a probationer had the necessary professional qualifications, the Director-General was entitled to discharge him as soon as he had satisfied himself that that was not the case. Consequently the termination of a probationer's appointment for unsatisfactory performance might be regarded as a measure taken in the interests of the Organization. The complainant claimed, first, that the decision to terminate his appointment had been taken in violation of his right to a hearing, and secondly, that it was not justified. The Tribunal acknowledged that termination of a probationer's appointment for unsatisfactory performance could not be taken until he had been informed of the Organization's intention and had had an opportunity of submitting his observations. In the present case, although the complainant had not been informed of the Organization's intentions to terminate his appointment nor invited to state his views, he had had an opportunity to discuss them before the Appeals Committee. Consequently his right to a hearing had not been violated.

With regard to the evaluation of the quality and quantity of the complainant's work, the Tribunal stated that, while there might be some doubt as to the importance or value of the criticisms of the work, it was not sufficient to justify the Tribunal in finding that in basing his decision on the unsatisfactory quality of the complainant's work the Director-General drew conclusions that were clearly contrary to the evidence. Moreover, it was a fact that the complainant did not produce the output that could reasonably be expected of him; it was clear that unsatisfactory output was an important factor in unsatisfactory performance. It followed that the complainant's claim that the decision impugned was tainted by any irregularity which the Tribunal was competent to review, including misuse of authority, was unfounded.

10. JUDGEMENT NO. 153 (26 MAY 1970): [21] DADIVAS AND CALLANTA V. WORLD HEALTH ORGANIZATION

Limits of the Tribunal's authority to review a decision rejecting a request for a post reclassification—Such a decision cannot be considered prejudiced if it has been confirmed by the internal appeals bodies after a thorough examination

The complainants, staff members of the WHO Regional Office in Manila, requested that their posts be reclassified because, following the reclassification of the post immediately above theirs, they had been assigned nearly all the duties related to it. The Director of the Regional Office rejected their request, whereupon they appealed, first to the Regional Board of Inquiry and Appeal and then to the Headquarter's Board of Inquiry and Appeal, but to no avail. They then lodged a complaint with the Tribunal alleging (1) that the additional responsibilities assigned to them properly belonged to the two higher posts and not to their own and (2) that the Organization was prejudiced against them.

In the opinion of the Tribunal an assessment of what amounted to an increase in duties and responsibilities sufficient to justify a promotion or increase in remuneration could not be made simply by comparing one list of tasks with another. Since the assessment had been made by the Director-General acting on the advice of a board of appeal, it was not enough for a complainant to allege simply that it was erroneous. In the absence of clear evidence of a mistaken assessment the Tribunal would not substitute its own assessment for that of the Director-General; it recalled, in that connexion, the well-established principle that it did not review a decision of that sort unless it was taken without authority, was irregular in form or tainted by procedural irregularities, was tainted by illegality or based on incorrect facts, or essential facts had not been taken into consideration, or unless conclusions which where clearly false had been drawn from the documents in the dossier.

As to the alleged prejudice against the complainants, the Tribunal pointed out that prejudice on the part of the Regional Director would be material in that case only if the Headquarters Board of Inquiry and Appeal had affirmed the Regional Director's decision without examining the case for itself. It was plain from the Board's report, and indeed the contrary was not alleged, that it had not acted in that way.

11. JUDGEMENT NO. 154 (26 MAY 1970): [22] FRANK V. INTERNATIONAL LABOUR ORGANISATION

Termination of the appointment of an official who refuses to comply with a decision concerning his transfer—Limits of the Tribunal's authority to review such a decision—It is not necessary for an official to perform the duties of the original post for a certain period, before being required to accept reassignment—The deliberate decision to discharge an official under article 12.8, paragraph 1 of the ILO Staff Regulations may not be appealed against under article 13.1—Consequences stemming from the point of view of time-limits for appeals

The complainant, who was recruited by the ILO for a post in Chile, was refused admission into Chilean territory on arrival because of his political activities during earlier visits. The competent authorities finally gave him permission to remain in the country but the Director-General of the ILO, considering that in view of what had occurred it was unlikely

[21] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Lord Devlin, Judge.

[22] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

that the complainant would be able to discharge his duties as successfully as might have been expected, instructed him to return to Geneva pending reassignment. The complainant then submitted an official complaint claiming that a transfer after an assignment lasting only one month was in violation of his terms of appointment and protesting against the unfair treatment to which he alleged he had been subjected. The decision was maintained. When the complainant had not left Chile by the appointed date, the Director-General informed him that he proposed to dismiss him and invited him to submit his observations. The complainant explained that the nerves of his family had been severely affected by the whole case and asked for an extension of time in which to reply. The Director-General nevertheless decided to dismiss him. The complainant then submitted two successive complaints to the Tribunal, one against the decision to transfer him and the other against the decision to discharge him.

The Tribunal, noting that the two complaints impugned two decisions, one of which was consequential to the other, ordered the joining of the two complaints.

I. With regard to the decision to transfer the complainant, the Tribunal recalled that article 1.9 (*a*) of the Staff Regulations provided that the Director-General assigned an official to his duties and his duty station subject to the terms of his appointment, account being taken of his qualifications, and that article 1.9 (*b*) provided the Director-General might second an official, with his consent, for temporary duty outside the service of the Office. It also pointed out that, while it referred to article 1.9, the offer of appointment submitted to the complainant specified that fixed-term officials were appointed initially to serve a particular programme and post and at a particular duty station, but that they might be transferred by the Director-General to other posts or duty stations. The Tribunal deemed that decisions to transfer an official lay within the discretion of the authority making them and were therefore subject to review by the Tribunal only within certain limits. In that connexion the Tribunal felt that the decision to transfer the complainant was not tainted by any of the irregularities that it was competent to review, namely:

(a) *Irregularities of procedure*

The Tribunal noted that the complainant found fault with the Director-General for not having informed him either of the reasons for his decision or of the particulars of the post to which he was to be reassigned. But it appeared from submissions in the Organization's reply, which had not been contested, that the reasons for the transfer had been given him orally and that, in any case, he could not fail to be aware of them. As for the assignment to a new post, the Organization could not decide that without consulting the complainant in Geneva.

(b) *Illegality*

The Tribunal felt that the complainant could not maintain, on the basis of article 1.9 (*b*), of the Staff Regulations that his own consent was necessary for his reassignment, for that article applied to ILO officials assigned to temporary duty outside the service of the ILO. Furthermore, the complainant was mistaken in his interpretation of the clause in his contract specifying that fixed-term officials were "appointed initially for service for a particular programme and post." The wording of the provision did not mean that in every case an official must perform the duties of the original post for a certain period of time before being required to accept reassignment.

(c) *Misuse of authority and false conclusions*

As the complainant's arrival in Chile had given rise to an incident reported in the Press and followed by demonstrations, there was reason to fear that the presence of such an official in South America would be prejudicial to the successful implementation of the project to

which he had been appointed. In ordering the complainant's transfer, the Director-General did not put a false interpretation on the facts brought to his attention. Moreover, it appeared that the impugned decision was motivated not by the complainant's political view as such but by a fear that the success of his mission might be compromised by those views.

II. With regard to the complainant's discharge, the Tribunal noted that the decision was taken on 6 November 1968 and confirmed on 13 December 1968. As the second complaint resisted both those decisions its receivability must be considered separately in respect of each of them. With regard to the decision of 6 November 1968 the time-limit provided for in article VII, paragraph 2 of the Statute of the Tribunal—namely 90 days—had started to run from 11 November 1968 at the latest, the date on which the complainant acknowledged the receipt of the decision, and had ended on 10 February 1969. As the complaint was dated 12 March 1969, it was therefore time-barred in so far as it sought the rescinding of that decision. As for the decision of 13 December 1968, the complainant maintained that he had submitted a complaint under article 13.1 of the Staff Regulations against the decision of 6 November 1968 and that in ruling on that complaint the Director-General had in fact taken a new decision against which the second complaint was filed within the required time-limit.

The Tribunal dismissed this argument. It recalled that the purpose of article 13.1 was to avoid a decision's being referred to the Tribunal before it had been reconsidered with the Organization itself. In so far as it allowed an official not attached to an established ILO Office, such as the complainant, to submit his observations on a proposal to discharge him, article 12.8, paragraph 1, ruled out the application of article 13.1 and that a decision based on the first of those articles could not be the subject of a complaint under the second. However, in order to prevent any possibility of avoiding the application of article 13.1, the Tribunal must satisfy itself that a decision to discharge an official under article 12.8, paragraph 1, was lawful.

The Tribunal noted in that connexion that, in the first place, the Director-General had observed the procedure laid down in article 12.8, paragraph 1, for officials not attached to an ILO office and, secondly, that the sanction of discharge could not be regarded as being out of proportion to the complainant's dereliction of duty. As the complainant had clearly shown that he did not intend to comply with the instructions concerning his transfer which it was his duty to obey, the Organization was not obliged to make use of his services in Chile, where his presence might be prejudicial to the Organization's work or in any other place since he refused to move from Chile.

In those circumstances, the decision of 6 November 1968 having been legitimately taken under article 12.8, paragraph 1, the decision of 13 December 1968 was merely a confirmatory decision which could not be the starting-point of a new time-limit for the filing of an appeal. The second complaint was not receivable in so far as it impugned the decision of 13 December 1968.

12. JUDGEMENT NO. 155 (6 OCTOBER 1970): [23] KAUSHIVA v. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

A decision placing an official on leave with pay up to the date of expiry of his contract cannot be regarded as dismissal or suspension prior to the initiation of disciplinary proceedings— It is not for the Tribunal to order any alteration of a report made on an official by the competent authorities of the Organization

The complainant was engaged for a post in Ghana on a fixed-term appointment which was to terminate on 31 August 1968. His supervisors having severely criticized his behaviour and the quality of his work, UNESCO informed him that it had decided to grant him early repatriation, that he would accordingly be placed on annual leave as from the Easter vacation and that when his annual leave entitlement was exhausted he would be placed on special leave with pay up to the date of expiry of his contract; this decision was confirmed on 25 July 1968. On 8 May 1968, the complainant, at his request, received a periodical report; this report being unfavourable, he challenged it. An *ad hoc* committee was then set up to consider the matter; on the recommendation of this committee, the Director-General informed the complainant on 11 September 1968 that he confirmed the performance evaluation made in the periodical report.

The complainant then submitted two appeals to the UNESCO Appeals Board. The first contested the decision to repatriate him dated 25 July 1968 and the second challenged the decision of 11 September 1968 confirming the terms of the periodical report. The Appeals Board found that the decision to repatriate the complainant, although justified by the thorough investigation made by headquarters, was in fact equivalent to suspension of the complainant from his functions and ought to have been taken only under Staff Rule 110.3. Considering, however, that the Organization had not terminated the complainant's appointment before its normal date of expiry and that consequently the complainant had not suffered any loss, the Appeals Board found that in so far as it sought to secure a re-evaluation of performance and a new appointment, the appeal was not receivable, and that in so far as it sought to secure the annulment of the repatriation measure, it had become purposeless. The Director-General informed the complainant that he accepted this recommendation.

In the case of the second appeal, the Appeals Board, considering that the periodical report had not been proved to be inaccurate and considering moreover that the author of the report had not been guided by motives other than the interests of the Organization, recommended that the appeal should be rejected. The Director-General accepted this recommendation.

The complainant then complained to the Administrative Tribunal attacking the decisions of 25 July 1968 and 11 September 1968 and the two confirmatory decisions taken on the recommendation of the Appeals Board. He submitted that the decision to place him on annual leave was equivalent to a measure of suspension and that the Organization had deprived him of any means of defending himself by failing to take that measure in accordance with the relevant provisions of the Staff Rules. He added that at the outset he had been given reason to hope that his appointment would be renewed and that its non-renewal had undoubtedly resulted from the formally incorrect decision to repatriate him, a fact which he considered entitled him to compensation. Lastly, he claimed that the whole of the procedure followed in his case had been tainted by serious irregularities and, in particular, that he had been kept in ignorance of all the correspondence concerning him; he attributed the charges made against him to the personal animosity of his supervisor.

[23] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

I. As to the decision of 25 July 1968, the Tribunal found that it had neither the purpose nor the effect of prematurely terminating the complainant's employment at UNESCO; it constituted neither dismissal not suspension prior to the initiation of disciplinary proceedings. It had three purposes:

(1) to remind the complainant of the date of expiry of his contract;
(2) to terminate his employment in Ghana;
(3) to settle his administrative position from the date of his repatriation until the date of expiry of his contract.

As to the first point, the Tribunal emphasized that a decision refusing to renew a contract was not a disciplinary measure and fell within the discretionary power of the Director-General. It was therefore subject to the Tribunal's control only within certain limits. The contested decision presented none of the irregularities open to criticism by the Tribunal.

As to the second point, the Tribunal considered that a decision to withdraw an official from specific functions was in no way disciplinary. The official concerned should, however, be informed of the decision beforehand, particularly when personal considerations were involved. In the case in question, the complainant had received several warnings and, moreover, the decision of 25 July 1968 had been taken after a thorough investigation, in the course of which the complainant had had an opportunity to state his case, had been carried out.

As to the third point, the Tribunal emphasized that the Director-General had fulfilled his obligation to regularize the complainant's position by granting him special leave with pay up to the date of expiry of his contract and that, in law, the decision, which was favourable to the complainant and in the interest of the Organization, was beyond reproach.

II. As to the decision of 11 September 1968, the Tribunal noted that the report of 9 May 1968 had been made at the complainant's own request and that, moreover, under Staff Rule 104.11, the Bureau of Personnel was entitled, at any time to request that such a report be made. The Tribunal added that it was not for it to order any alteration of a report made on an official by the competent authorities of the Organization or the withdrawal from the dossier of any part of such report.

III. As to the other claims, the Tribunal found that the Organization had entered into no commitment as regards possible renewal of the complainant's contract and that the latter's statement that the decision of 25 July 1968 terminated his legitimate expectations was quite false. Considering that the facts of the case did not reveal any malice towards the complainant on the part of the Organization—in fact the contrary was true—the Tribunal dismissed the complaint.

13. Judgement No. 156 (6 October 1970): [24] Schmidth v. Food and Agriculture Organization of the United Nations

Non-receivability of a complaint taken directly to the Tribunal in violation of the rule concerning exhaustion of internal appeal procedures

In his complaint to the Tribunal, the complainant impugned a decision whereby the Organization, having found that he and his family had not, during their home leave, spent in their home country the fourteen calendar days necessary for entitlement to travel expenses, refused liability for a part of such expenses.

[24] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

The Tribunal dismissed the complaint. It noted that a decision could not be impugned before it unless it was a final decision, that is, unless the complainant had exhausted such other means of resisting it as were open to him under the applicable Staff Regulations. In the case in question, the complainant had not impugned a final decision after exhausting the internal appeal procedure and he could not, moreover, validly plead that he was unaware of the pertinent provisions in order to justify his direct complaint to the Tribunal.

14. JUDGEMENT NO. 157 (6 OCTOBER 1970): [25] ANTONACI v. INTERNATIONAL LABOUR ORGANISATION

Complaint seeking compensation for illness attributable to the performance of official duties—The entitlement to sick leave of a person with a fixed-term contract ends upon the expiry of the contract

The complainant had been appointed on a short-term contract after undergoing a medical examination on appointment whose results were considered satisfactory by the Medical Adviser of the ILO. A few weeks before the expiry of his contract the ILO asked him to arrange to return to Geneva in good time. At the request of the complainant, his contract was extended for approximately ten days. During the return journey he was seized with acute pains in the left leg which the doctors attributed to discal hernia with compression of the sciatic nerve; when he arrived at Geneva, the ILO Medical Service had him admitted to the Cantonal Hospital of Geneva, where it was found that the discopathy had simply disappeared. The complainant then wrote to the ILO asking it to bear his medical expenses until his full recovery. He attributed his illness to the arduous conditions of his mission. Some time later, he was informed that his contract would terminate in a few days' time. He then repeated his request and also submitted a request for compensation in accordance with section 8.3 of the Staff Regulations. The ILO Compensation Committee examined this request and dismissed it on the ground that his illness was not attributable to the performance of official duties. In the meantime, the complainant had lodged a complaint under rule 9.1 of the Rules Governing Conditions of Service of Short-Term Officials in which he maintained that he had received unfair treatment when he had been informed that his contract would terminate and requested the payment of reasonable damages in addition to the payment of medical expenses. He subsequently contested the recommendation of the Compensation Committee. His requests having been rejected, he appealed to the Administrative Tribunal. The parties agreed, however, to submit the complainant's case to a medical board consisting of three doctors, one appointed by the complainant, one by the Organisation and the third by those two. The doctor appointed by the complainant found that the illness had been provoked by the conditions of employment on missions whereas the other two found an internal pathology unconnected with the conditions of employment and could not regard the complainant's work for the ILO as an aggravating factor. On the basis of the board's report, the ILO confirmed its decision and the complainant resumed proceedings before the Tribunal. He alleged, *inter alia* (1) that he had been subjected to unwarranted and unfair treatment as a result of the decision informing him of the date of expiry of his contract; (2) that his illness was attributable to the performance of official duties and entitled him to compensation; and (3) that the ILO Medical Adviser, by carrying out only a superficial medical examination on his appointment, was guilty of negligence which made the ILO responsible.

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[25] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

As to the first point, the Tribunal noted that the complainant having been ill on his return to Geneva, the Organisation had agreed to extend his contract for a period equivalent to the sick leave to which he was entitled. After that date, as a short-term official whose contract had expired and who was not entitled to its renewal, the complainant had no further legal connexion with the ILO; consequently, the Organisation could no longer legally grant him further sick leave or continue to bear his medical expenses.

As to the second point, the Tribunal found that it appeared from the documents in the dossier and in particular from the report of the medical board that the complainant's illness was attributable to an earlier process of degeneration extraneous to his employment with the ILO and that it could be regarded as having been aggravated by his service only by clearly defined factors: however, none of the factors mentioned by the complainant could be regarded as having aggravated a disease from which he had been suffering before his appointment.

Finally, as to the third point, the investigation had not established that a thorough medical examination would have shown the ILO that the complainant was not fit for the appointment in question.

The Tribunal therefore dismissed the complaint.

15. Judgement No. 158 (6 October 1970) [26] Devdutt v. World Health Organization

Request for reinstatement after resignation—Limits of the Tribunal's authority to review a refusal to reclassify a post which, in default of appeal, became operative

On 20 May 1968, the complainant, who had worked with the WHO Regional Office for South East Asia for nearly 20 years, addressed a memorandum to the Regional Director setting forth his grievances in respect of an application for special leave, the reclassification of his post and the conditions of work in his section. Having received no reply, he wrote to the Regional Director on 28 October 1968 informing him that he was going to appeal to the Board of Inquiry and Appeal and that his letter could be considered as his appeal to the Board as well as his resignation. The resignation was accepted.

The Regional Board of Inquiry and Appeal, to which the case was referred, found that the complainant's submissions in respect of special leave, the reclassification of his post and his conditions of work were not receivable because they had been submitted after the prescribed time-limit and all channels of appeal had not been exhausted. In regard to the complainant's request for reinstatement, the Regional Board found that there were no grounds for recommending reinstatement since his resignation had not been made conditionally and the complainant had at no time manifested any intention of withdrawing it.

The complainant then referred the case to the headquarters Board of Inquiry and Appeal, which reached different conclusions: while recognizing that the Administration had not committed any abuse of authority in accepting the resignation, it regretted that more energetic attempts had not been made to modify the course of events. Observing that the complainant had considerably increased his academic qualifications over the years, the Board recommended that the Director-General should make every effort to offer the complainant an opportunity to resume service with the Organization if a post should become vacant. The Director-General having rejected this recommendation by a decision of

[26] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

9 December 1969, the complainant appealed to the Tribunal requesting it, *inter alia*, to rescind the decision of 9 December 1969.

The Tribunal noted in the first place that the possible irregularities in the procedure before the Regional Board of Inquiry and Appeal were not such as to affect the validity of the decision impugned, which had been taken by the Director-General on the completion of a regular form of procedure after exercising powers of investigation as broad as those of the Regional Director on the advice of a body which, like the Regional Board, had a joint composition.

As to the claim concerning resignation, the Regional Director was fully justified in believing that the complainant genuinely intended to leave his post, particularly since he had already resigned once in 1967 and had changed his mind only after discussions with his supervisors. Furthermore, the complainant's resignation as submitted was not in any way conditional. Accordingly, the Regional Director had acted fully in accordance with the rules and the Tribunal could not censure the decision whereby the Director-General confirmed that of the Regional Director.

As to the reclassification of the complainant during the period prior to the termination of his services, the Tribunal noted that its authority to review was subject to a twofold limitation: in the first place, since a decision had been taken on the question and, in default of any appeal, had become operative, only facts subsequent to that decision could be taken into consideration; secondly, having regard to the Director-General's discretion in such matters, the decision impugned could be rescinded only if tainted by clearly determined irregularities. The point at issue, therefore, was whether, as a result of events between the decision impugned and the resignation, the refusal to regrade the complainant should be censured for any reason falling with the competence of the Tribunal. The Tribunal replied to this question in the negative.

16. Judgement No. 159 (6 October 1970): [27] Bhandari v. World Health Organization

Complaint seeking the rescinding of a decision of dismissal for serious misconduct

The Director of the WHO Regional Office for South East Asia having discovered that the Organization's diplomatic pouch was being used for illicit traffic in foreign currencies, the complainant was implicated. According to his statements, he was detained for a whole day in a senior official's office; was threatened with being denounced and even with physical brutality and was bullied into signing a document in which he confessed to having played an active role in the traffic in question. He alleged that on the following day he was again summoned and detained in a room adjoining the office of the senior official. He stated that on the same day he sent a letter—which remained unanswered—to the Regional Director withdrawing his confession of the day before. According to the Organization, the questioning took place quite normally. The complainant was suspended under Staff Rule 530 and one week later was dismissed for serious misconduct in accordance with Staff Rule 510.6.

The complainant appealed to the Regional Board of Inquiry and Appeal, which heard witnesses, examined several pieces of evidence, including some confidential documents withheld from the complainant, and recommended that the Regional Director reject the appeal. The recommendation was accepted. The headquarters Board of Inquiry and

[27] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

Appeal, to which the complainant then appealed, recommended confirmation of the Regional Director's decision. The Director-General accepted that recommendation.

In his complaint to the Tribunal, the complainant repeated his denials, claimed that, in default of proof, the decision to suspend him was unlawful and alleged that the decision to dismiss him was likewise tainted by serious irregularities since the charges had not been made in writing and the complainant had not been given the necessary time to prepare his defence. He further stated that the procedure before the Regional Board of Inquiry and Appeal had been irregular.

As to the charges against the complainant, the Tribunal found that the Organization's decision to dismiss him had been based on the statement signed by the complainant. The Tribunal found that the statement abounded in particulars which were too clearly detailed to have been invented by a third person and were moreover corroborated by similar statements made by five other persons charged, two of whom had not retracted their confessions; finally, the statement had been signed in the presence of witnesses. Moreover, the treatment the complainant complained of, even supposing it had in fact been meted out to him, was not of such a kind as to force him to confess to imaginary acts of misconduct, and the fact that, as he claimed, he retracted his statement the next day proved that he had not been deprived of freedom of expression.

As to the decision to suspend the claimant, the Tribunal found that the three conditions to which the suspension of a staff member is subject under Staff Rule 530 had been fulfilled: firstly, there had been serious misconduct, since any act by which a staff member uses his position as an official for his personal advantage falls within the definition in Staff Rule 510.6; secondly, the charges brought against the complainant could be presumed to be well-founded, in view of the confessions signed by him; and, lastly, the continuance in office of the complainant was liable to prejudice the service since he had lost the confidence of his supervisors.

Lastly, as to the decision to dismiss the complainant, the Tribunal noted that by virtue of Staff Rule 520, second paragraph, serious misconduct could result in summary dismissal and found that in the case in question the provision had been correctly applied. It found that since the case involved the breaking of the Organization's rules, the rules of the Organization alone were applicable, not any national legislation.

As to the procedural irregularities mentioned by the complainant, the Tribunal pointed out that the purpose of the procedures which allegedly had not been respected was to enable the person concerned to defend himself and were inapplicable once he had admitted the charges.

The Tribunal therefore dismissed the complaint.

17. Judgement No. 160 (6 October 1970): [28] Sood v. World Health Organization

This case is broadly similar to the case dealt with in Judgement No. 159.

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[28] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

18. JUDGEMENT NO. 161 (6 OCTOBER 1970):[29] SETHI v. WORLD HEALTH ORGANIZATION

This case is broadly similar to the case dealt with in Judgement No. 159.

19. JUDGEMENT NO. 162 (6 OCTOBER 1970):[30] RAJ KUMAR v. WORLD HEALTH ORGANIZATION

This case is broadly similar to the case dealt with in Judgement No. 159.

20. JUDGEMENT NO. 163 (6 OCTOBER 1970):[31] DHAWAN v. WORLD HEALTH ORGANIZATION

A complaint shall not be receivable unless it impugns a final decision

The complainant had applied for a vacant post. On learning that another candidate had been selected he lodged an appeal against the Selection Committee's decision with the Regional Board of Inquiry and Appeal but was informed by the Secretary to the Board that his appeal was not receivable.

The Tribunal, to which the case was submitted, noted that according to article VII of its Statute a complaint was not receivable unless a final decision was impugned, the person concerned having exhausted such other means of recourse as were open to him under the applicable Staff Rules. The complaint was not directed against any decision taken by the Director-General of WHO. It was therefore not receivable.

21. JUDGEMENT NO. 164 (17 NOVEMBER 1970):[32] VERMAAT v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Commencement of the period within which an appeal against an administrative decision must be submitted

In 1968, the complainant, a technical assistance expert of FAO, had requested the United Nations Administrative Tribunal to rescind a decision by the Standing Committee of the Joint Staff Pension Board refusing to validate his period of service prior to 1958. He also maintained that he had been entitled to participate in the Pension Fund from the time when he joined FAO and that by not enrolling him FAO had failed to fulfil its contractual obligations.

In its Judgement No. 118,[33] the United Nations Administrative Tribunal had rejected the plea against the Pension Board. With regard to the plea directed against FAO, it had observed that it appeared from the FAO Staff Regulations that it was the ILO Administra-

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[29] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

[30] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

[31] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Mr. A. T. Markose, Deputy Judge.

[32] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Lord Devlin, Judge.

[33] See *Juridical Yearbook*, 1968, p. 169.

tive Tribunal which was the competent jurisdiction. The complainant then wrote to the Director-General of FAO asking him to make the necessary arrangements to enable him to validate his service with the Organization prior to 1 January 1958 for pension purposes. Having received a negative reply, he appealed to the FAO Appeals Committee which found that the appeal was directed against administrative decisions taken in 1951 and subsequently reaffirmed each time the appointment was renewed, that in 1958 the complainant had been made aware of his previous Pension Fund status, that six years had elapsed before he had had recourse to the FAO Staff Pension Committee and that his appeal must therefore be regarded as time-barred.

In his complaint to the Tribunal, the complainant pointed out that the Organization could not argue that he ought to have protested against his non-enrolment in the Fund at the outset of his appointment: according to him, there was in fact no administrative decision; the Organization had merely omitted to enrol him in the Fund. He relied on Judgement No. 118 of the United Nations Administrative Tribunal, which had stated that in the file before it there was nothing to indicate that the legal problems which had been raised by the complainant had received administrative consideration or been the subject of any decision open to appeal.

The Tribunal drew attention to the provisions of FAO Staff Rule 303.131:

> "A staff member who wishes to lodge an appeal shall state his case in a letter to the Director-General through the department head or division director. In the case of an appeal against an administrative decision or a disciplinary action, the letter shall be despatched to the Director-General within two weeks after receipt of the notification of the decision impugned. If the staff member wishes to make an appeal against the answer received from the Director-General, or if no reply has been received from the Director-General within two weeks of the date the letter was sent to him, the staff member may, within the two following weeks, submit his appeal in writing to the Chairman of the Appeals Committee, through the Secretary to the Committee".

It followed from this provision that the period within which an appeal against any administrative decision affecting FAO officials must be submitted started to run from the date of notification to the persons concerned. In appointing the complainant in 1951 under a contract which made no provision for his membership in the Joint Staff Pension Fund, the Director-General had thereby taken the decision not to enrol him in the Fund. Although that decision had not been brought to the notice of the complainant at the time, it had been confirmed and brought to his notice by the letter in which the Director-General had informed him that he would become a member of the Joint Staff Pension Fund only from 1958. Accordingly, that was the date at which the period laid down by the provision quoted above began to run. The Organization was therefore justified in contending that the appeal had lapsed and that the decision impugned was not tainted with illegality.

22. JUDGEMENT NO. 165 (17 NOVEMBER 1970):[34] WEST V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

This case is broadly similar to the case dealt with in Judgement No. 164.

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[34] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Lord Devlin, Judge.

23. JUDGEMENT NO. 166 (17 NOVEMBER 1970):[35] BIDOLI V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Discretionary power of the Director-General in the matter of renewal of a fixed-term appointment and in the matter of appointments—Limits of the Tribunal's authority to review

The project for which he worked having been abolished and the complainant having accordingly been notified that his contract would not be renewed, he applied for vacant permanent posts. When other candidates were selected, he lodged an appeal with the Appeals Committee. He attributed the refusal to appoint him to the vacancies for which he had applied to the animosity of his supervisor. Two members of the Committee were of the opinion that the decision appeared to have been taken because of the complainant's personality but the majority recommended that the Director-General not reconsider his decision. That recommendation was accepted.

The complainant then lodged a complaint with the Tribunal, contending that an official who had given entire satisfaction could reasonably expect that his contract would be extended, that according to judgements of the Tribunal, such extension did not lie within the personal and sovereign discretion of the Director-General and that non-renewal of his appointment was attributable to factors other than his efficiency.

The Tribunal noted that the complainant had referred to it both the decision by which he had been informed that his contract would not be renewed and the decision appointing candidates other than himself to the posts for which he had applied. It emphasized that those decisions lay within the discretionary power of the Director-General, a fact which, firstly, excluded any right on the part of the complainant to the renewal of his appointment or to appointment to the posts for which he had applied, and, secondly, limited the Tribunal's authority to review. Within the limits of that authority to review, the complainant claimed that refusal to extend his contract was attributable solely to the animosity of his supervisor and that the selection of candidates other than himself had been based on an obvious error of judgement in regard to his merits and on unwarranted prejudice in favour of the persons so appointed.

As to the non-renewal of the contract, the Tribunal found that it was clear from the dossier and the oral proceedings that the measure was justified by the termination of the programme and that it had been of general character. It added that the alleged animosity the complainant ascribed to his superior had not been proved. As to the fact that the complainant was not appointed to the posts for which he had applied, the Tribunal considered that the proceedings had shown that the choice of other officials could not be regarded as contrary to the interests of the service or as tainted by favouritism. It added that while it might be a matter for regret that the complainant, whose efficiency was not in question, should have had to leave FAO, it could only find that the decisions impugned were legally valid. The complaint was therefore dismissed.

24. JUDGEMENT NO. 167 (17 NOVEMBER 1970):[36] TAYLOR UNGARO V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Loss of "non-local" status—Any official is subject to the provisions of the Staff Rules in force at the time he concludes his contract with the Organization

The complainant, who had been given a "non-local" appointment on 16 May 1966, was given an indefinite appointment, still with "non-local" status, on 16 May 1968. After

[35] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Lord Devlin, Judge.
[36] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Lord Devlin, Judge.

her marriage to an FAO staff member on 13 July 1968, she informed the Personnel Division that she did not intend to assume Italian nationality and that in accordance with section 23 of the Irish Nationality and Citizenship Act, 1956 (No. 26), she was retaining her Irish nationality and therefore—according to her—her entitlement to "non-local" status. In reply, the Personnel Division informed her that as a result of her marriage to a person with "local" status, she had lost her "non-local" status under the provisions of Staff Rule 302.4073. Her appeal to the Appeals Committee having failed, the complainant appealed to the Tribunal, contending that Staff Rule 302.4073, which was based on an administrative memorandum of 5 October 1965 which had been incorporated in the Staff Rules on 12 December 1966, and which provided for the acquisition of local status in situations such as that of the complainant, created a discrimination based on sex and prejudiced the rights she had acquired under Staff Rule 302.4073 which had been in force at the time of her original appointment (under that rule, the status of an official could not be changed during the period of his service unless he voluntarily acquired the nationality of the country of the duty station—automatic acquisition of citizenship by marriage not being construed to be voluntary). Furthermore, Staff Rule 302.4073 was contrary to the proposals of the Staff Council, which had objected to the incorporation of Memorandum AM 65/60 in the Rules.

The Tribunal emphasized that it was not disputed that if Staff Rule 302.3023 was applicable, the claim must fail. Likewise, it was not disputed that if the earlier rule 302.4073 was applicable, the claim must succeed. The Tribunal recalled that at the time of her marriage the complainant had been employed under a contract signed on 14 June 1968 which had been made subject to the Staff Rules. The edition of the Staff Rules then in force had been that of 12 December 1966, which incorporated rule 302.3023. Accordingly the claim must fail unless the complainant could show that the rule in question was either invalid or inapplicable, in which case the earlier rule would be applicable to her.

The claimant had contested the validity of the rule on four grounds, namely: discrimination based on sex, discrimination based on category, the fact that the Staff Council had not approved the rule and the fact that the Staff Council had not been consulted. As to the first three grounds, the Tribunal considered that even if the allegations were well founded, it would not affect the validity of Staff Rule 302.3023 inasmuch as the Director-General, in adopting that rule, had not exceeded the powers conferred on him under Rule XXXVI of the General Rules of the Organization. As to the fourth allegation, it failed on the facts.

The complainant had contended that Staff Rule 302.3023 was not applicable to her, claiming in the first place that she was not bound by it because it had not been brought to her knowledge at the time of her appointment. In the opinion of the Tribunal, that argument was not founded because the contract was expressly made subject to the Staff Rules and Regulations and it was not necessary that any particular provision of those texts should have been brought to the complainant's attention.

The complainant contended further that the rule was not applicable to her because under her earlier contracts she had acquired the right to "non-local" status in accordance with Staff Rule 302.4073 and the Director-General had no power to make a new rule depriving her of that status. The Tribunal had found it unnecessary to consider whether the complainant had acquired such a right by virtue of her earlier contracts because, even if she had, it had been extinguished when the contracts had expired.

25. JUDGEMENT NO. 168 (17 NOVEMBER 1970):[37] KIEWNING-KORNER CASTRONOVO V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

This case is broadly similar to the case dealt with in Judgement No. 167.

26. JUDGEMENT NO. 169 (17 NOVEMBER 1970):[38] LOOMBA V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Decision terminating the appointment of an official upon expiry of his probationary period—Limits of the Tribunal's authority to review such a decision

The complainant had received, on 3 October 1967, a one-year appointment which was subject to six months' probation. From January 1968, his supervisor expressed serious reservations about him and in March 1968 recommended that his appointment should terminate on the expiry of his probationary period. Having learnt of this recommendation, the complainant wrote to the Chief of Personnel requesting, *inter alia*, that an inquiry should be made into the fraudulent practices which, according to him, were rife in the office in which he worked. Headquarters decided not to implement immediately the recommendation that the claimant's appointment should be terminated and accordingly his probationary period was twice extended by cable, first until 30 April 1968 and then until 15 May 1968. After an inquiry, the Organization reached the conclusion that the complainant's accusations were unfounded and accordingly decided not to extend his appointment. The complainant then appealed to the FAO Appeals Committee, which found that although the procedure adopted for the termination of the appointment had been somewhat lax in that two cables extending the probationary period had been handed to an official who had already been suspended from duty, it was reasonable to suppose that the complainant had received them. The Committee added that the Organization was justified in terminating the appointment although there appeared to have been an element of prejudice, the extent of which the Committee had been unable to assess. It therefore recommended the Director-General to grant the complainant some compensation. That recommendation was accepted.

The case having been referred to it, the Tribunal recalled that according to Staff Regulation 301.0913 the Director-General may at any time terminate the appointment of a staff member serving a probationary period if in his opinion such action would be in the interests of the Organization. Such a decision fell within the discretion of the Director-General and could not be rescinded by the Tribunal unless it was tainted by clear irregularities.

The Tribunal noted that according to its terms, Staff Regulation 301.0913 applied during the period of probation. That must be understood to mean not only the trial period prescribed by the contract of appointment but also any period by which the probation had been expressly or tacitly extended. The Organization claimed to have extended the complainant's period of probation twice by cable. The question arose, however, whether the complainant had been aware of those cables and it was therefore doubtful whether there had been any express extension. On the other hand, it appeared at least from the circumstances that the complainant's period of probation had been extended to the date of his dismissal in such a way that he was able to learn of it. Having learnt that there had been a proposal for his dismissal, he was not unaware of the uncertainty of his position and could not reasonably interpret the absence of a decision before the normal termination of the probationary period to mean that Staff Regulation 301.0913 would not be applied. Accord-

[37] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Lord Devlin, Judge.

[38] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Lord Devlin, Judge.

ingly, there were grounds for holding that at the date of termination of his appointment this Regulation still applied and that the decision impugned could not, therefore, be time-barred.

The complainant pleaded, in vain, violation of Staff Regulation 301.103 which provides that the official concerned should receive a written statement of the reasons for dismissal and gives him the right to supply explanations, also in writing. This provision is included in the chapter on disciplinary measures and does not apply to the termination of an official on probation, since such a decision is not of a disciplinary nature.

Lastly, the Tribunal noted that the accusations levelled against his supervisor by the complainant were not supported by any evidence in the dossier and revealed a mentality incompatible with the performance of the duties of an international official. The Director-General, therefore, had neither misinterpreted the facts nor drawn clearly mistaken conclusions from the documents in the dossier. The Tribunal therefore dismissed the complaint.

27. JUDGEMENT NO. 170 (17 NOVEMBER 1970):[39] NAIR V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Complaint impugning a decision of dismissal for serious misconduc

The complainant had been given several successive fixed-term contracts under a pre-investment project. In February 1967, a check of the project accounts for which he was responsible revealed several irregularities and a deficit of 1,300 rupees, which sum the complainant had used for his personal needs and subsequently refunded. No disciplinary action was taken against him but he was warned of the consequences of any future irregularities. Some months later the project manager informed the Chief of Personnel in Rome of further irregularities in an account handled by the complainant and of the irregularities which had been detected in February 1967. A detailed audit was then ordered, as a result of which the Director-General decided to suspend the complainant from duty without pay pending the results of a further investigation. This investigation was carried out by an *ad hoc* committee composed of three senior officials who questioned several members of the project staff and reached the conclusion that there was no reasonable doubt of the complainant's guilt. The latter was accordingly informed that he had been dismissed under Manual provision 330.24 for serious misconduct according to the terms of provision 330.15 The FAO Appeals Committee, to which the case was referred, recommended that that decision be maintained.

In his complaint to the Tribunal, the complainant did not contest the fact that funds had been misappropriated but maintained that the project manager had incriminated him in order to protect himself. He maintained that his dismissal had been motivated by prejudice and that the *ad hoc* committee had also been prejudiced. The Tribunal found that, by setting up an *ad hoc* committee to carry out an investigation, the Organization had made every possible effort to dispel the misgivings aroused by the contradictory allegations of the project manager and the complainant. The members of the committee were not project staff and there was no reason to doubt their impartiality. Moreover, their findings were corroborated by those of the Appeals Committee.

The Tribunal emphasized that the project manager had indeed initialled documents which were intended to conceal the misappropriations but that did not mean that he was aware of the real nature of his acts or that he had profited by them. It was understandable that, being absorbed by the management of the project, he had failed for some time to notice

[39] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Lord Devlin, Judge.

the complainant's dishonesty. Moreover, it was unlikely that an official of his rank would have engaged in improper dealings, and so risked his losing his appointment, for a few thousand rupees, and it would have been even more astonishing if he had taken as an accomplice a subordinate whose lack of discretion he had reason to fear. Accordingly, by fully exonerating the project manager, the Appeals Committee and the Director-General had correctly evaluated the facts brought to their attention. Even assuming that the project manager had been found at fault, the guilt of the complainant, who had already received a warning, was not ruled out thereby. In short, all the circumstances of the case showed that the guilt of the complainant should be regarded as established with a probability approaching certainty. The dismissal was therefore justified and the complaint must be dismissed.

28. JUDGEMENT NO. 171 (17 NOVEMBER 1970): [40] SILOW V. INTERNATIONAL LABOUR ORGANISATION

In a complaint against the "International Labour Organisation and the ILO Administrative Tribunal, for the operation of which the ILO is responsible to the member Governments of those United Nations organisations which recognize the jurisdiction of the Tribunal", the complainant requested the Tribunal to reopen proceedings in respect of two complaints he had previously brought to the Tribunal, one against IAEA and the other against FAO, which had formed the subjects of Judgements Nos. 142 [41] and 151. [42]

The Tribunal emphasized that the complainant had never been an official of the International Labour Organisation and that his complaint was not therefore one the Administrative Tribunal was competent to hear under the provisions of article II of its Statute. It added that, under the terms of article VI of the Statute, "The Tribunal shall take decisions by a majority vote; judgements shall be final and without appeal"; accordingly, if the complainant was requesting the Tribunal to rescind its earlier Judgements Nos. 142 and 151, his claims were not receivable.

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[40] Mr. M. Letourneur, President; Mr. A. Grisel, Vice-President; Lord Devlin, Judge.

[41] See *Juridical Yearbook*, 1969, p. 203.

[42] See above p. 149.