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Part Two. Legal activities 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. 167 (23 MARCH 1973):[2] FERNANDEZ RODRIGUEZ v. SECRETARY-GENERAL OF THE UNITED NATIONS

Application alleging non-observance of terms of appointment—Principle of good faith in relations between the parties to an agreement—Compensation for injury caused by invalid periodic report

The applicant, after having worked for some time at the Latin American Institute for Economic and Social Planning, agreed that his appointment with the Institute should be terminated and that he should be assigned to ECLA. A few months before his contract with ECLA expired, he complained that the terms of the arrangement to which he had agreed had not been observed and requested that he be reinstated in his post with the Institute. After being advised that consultations had been started with Headquarters before taking a final decision on his request and that in the meantime he would have to continue to discharge his duties at ECLA, he filed an appeal with the Joint Appeals Board. Since he was not satisfied with the decision taken by the Secretary-General of the United Nations in the light of the recommendations of the Board, he filed an application with the Tribunal, alleging that the aforementioned arrangement had not been justified and that his assignment to ECLA in violation of the principle of good faith had caused him enormous material and moral injury.

The Tribunal noted that the applicant had been assigned to ECLA as a result of a mutual agreement between the Institute, ECLA and the applicant; since there was no evidence of what had been mutually agreed upon, it was not in a position to find that the assignment of duties to the applicant by ECLA was either a breach of any agreement arrived at during the compromise of his appeal or a violation of any specific staff regulation or rule applicable to him.

The applicant contended that the functions assigned to him in ECLA were a violation of his terms of appointment. The Tribunal noted that when the applicant was assigned to ECLA,

[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 1973, 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 and 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 Telecommunication Union, 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; Mme P. Bastid, Vice-President; Mr. F. A. Forteza, Member.

he had every reason to expect fair treatment in the new sphere of activity allotted to him, but he had been assigned duties which he was not qualified to perform, for example, the gleaning of information from publications written in a language with which he was not familiar. The Tribunal therefore endorsed the conclusion of the Joint Appeals Board that "the respondent, by assigning the appellant to work in ECLA which he was patently unqualified to perform, had disregarded the principle of good faith in relations between the parties to an agreement". However, it found that since the applicant had completed the full term of his appointment he had suffered no financial loss.

With regard to moral injury, the Tribunal observed that, as stated in its Judgement No. 92[3] "in awarding damages it [the Tribunal] has to be satisfied that the damages claimed follow naturally as a consequence of the action contested", and considered that the moral injury mentioned by the applicant was too vague and not capable of quantification in terms of money.

The applicant also affirmed that he had been the subject of an unfavourable periodic report which the Secretary-General had subsequently decided, in accordance with a recommendation of the Joint Appeals Board, to withdraw from his file, and which had jeopardized his employment prospects. The Tribunal considered that the evidence provided by the applicant did support that assertion to a certain extent and awarded the applicant a sum of $1,000 as compensation.

2. JUDGEMENT NO. 168 (26 MARCH 1973):[4] MARIAFFY V. SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting a decision terminating a probationary appointment—Latitude accorded the Administration concerning the duration of the probationary period—Assessment of suitability as an international civil servant is a matter within the competence of the Secretary-General

The applicant held a probationary appointment, which would normally have lasted for two years. Shortly before the end of this two-year period, the competent authorities in the applicant's duty station did not recommend that he should be given a permanent appointment or that his appointment should be terminated, but that it should be extended for an additional year. That view was not accepted by the Office of Personnel in New York, which recommended that the applicant's services should be terminated. That recommendation was accepted by the Appointment and Promotion Committee. The applicant's appointment was therefore terminated pursuant to Staff Regulation 9.1 (*c*).

The applicant contested the decision to terminate his appointment before the Tribunal; in his view, the decision had not been taken in full awareness of his abilities because for medical reasons he had worked only 16 out of the 21 months of service which the Appointment and Promotion Committee had taken into consideration and thus had not had the opportunity to serve a normal probationary period. The Tribunal observed that the probationary contract and the relevant provisions of the Staff Rules and Staff Regulations contained no strict rules relating to the length of service. It was merely stated in Staff Rule 104.12 (*a*) that "The period of probationary service under such an appointment shall normally be two years" and that "The probationary appointment shall have no specific expiration date". Only the possibility of extending the probationary period "in exceptional circumstances" was, under that rule, limited to one year at the most.

The Tribunal therefore considered that the respondent had a wide margin of discretion in determining the moment at which a decision was taken on the future of the holder of a probationary contract and there were no grounds for asserting that the respondent was legally obliged to extend the probationary period in order to compensate for the applicant's absenses for medical reasons.

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[3] See *Juridical Yearbook*, 1964, p. 206.

[4] Mme P. Bastid, Vice-President, presiding; Mr. F. A. Forteza, Member; Mr. Mutuale-Tshikantshe, Member.

The applicant also contended that it was not correct to state that he had not proved his suitability as an international civil servant. The Tribunal observed that the assessment of the applicant's abilities was a matter within the competence of the respondent, who must also take into consideration, on the recommendation of his appropriate advisers, medical factors as they existed at the time when the question of the granting of a permanent contract arose.

3. JUDGEMENT NO. 169 (26 MARCH 1973): [5] SENGHOR v. SECRETARY-GENERAL OF THE UNITED NATIONS

Termination of the appointment of a staff member holding a fixed-term appointment—The individual concerned must be informed of the reason for the decision to terminate his appointment at the time when it is taken—Payment of compensation in lieu of specific performance

The applicant held a fixed-term appointment with the Economic Commission for Africa (ECA). Just over a year after he took up his duties, he sent to his uncle, the President of Senegal, a letter of which he sent a copy to the Executive Secretary of ECA and in which he expressed his desire to "devote himself fully and fearlessly to an intelligent campaign which would open wide the doors of ECA to *'francophonie'*", and described how he was trying "skilfully to overcome obstacles and in spite of [the Executive Secretary] to bring about the basic changes which are needed". On the same day, the Executive Secretary sent the applicant a confidential memorandum in which he said that he considered the applicant unsuited to fulfil the duties of an international civil servant. Some months later, in a confidential memorandum addressed to the Director of Personnel, he recommended termination of the applicant's appointment. Two years after he entered the service, the applicant was given a periodic report in which he was rated as "on the whole, an unsatisfactory staff member", and which he rebutted as being ill-founded. Some months later, he requested a transfer to United Nations Headquarters in New York, but the Office of Personnel informed him that the prospects of finding a suitable post for him were bad and suggested that he should resign or agree to the termination of his appointment with full indemnities. The applicant rejected those proposals and a decision was then taken terminating his appointment. The Joint Appeals Board, with which he lodged an appeal, recommended the payment to the applicant of compensation equal to the total of his salary and allowances for the period between the date of the termination of his appointment and the date on which that appointment was due to expire. The Secretary-General decided to grant the applicant compensation amounting to six months of his salary and allowances.

The Tribunal had first to consider whether the decisions taken with respect to the applicant disregarded his rights under his contract and under the provisions of the Staff Regulations and Rules. It noted that although the letter informing the applicant of his termination referred to Staff Regulation 9.1 (*b*), which authorizes the termination of the appointment of a staff member with a fixed-term appointment for any of the reasons specified in Regulation 9.1 (*a*) (Unsatisfactory service, abolition of post or reasons of health), it gave no precise reason for the termination. The same applied to the letter confirming the termination decision. Not until a later stage had the Administration expressed its regrets to the applicant that the reason for the termination had not been conveyed to him before and explained to him that his appointment had been terminated for unsatisfactory service.

The Tribunal found that the Secretary-General had modified his decision concerning the amount of the indemnity to be paid to the applicant "in the light of" the report of the Joint Appeals Board, an attitude which necessarily implied acceptance in substance of the Board's position. The respondent admitted that the termination of the appointment was improper, but his assessment of the injury sustained by the applicant was different from and less favourable than that of the Board. The Tribunal consequently considered that the question still at issue was essentially that of the amount of compensation to which the applicant was entitled.

[5] Mme P. Bastid, Vice-President, presiding; Mr. F. A. Forteza, Member; Mr. Mutuale-Tshikantshe, Member.

In that connexion the Tribunal noted that at the time when the termination decision was taken, the applicant had not been officially informed of the reason for the termination and had not been requested to give an explanation. The contested decision must therefore be regarded as improper.

Noting that the applicant had not requested reinstatement and that in any event his contract had expired before the pronouncement of the judgement, the Tribunal concluded that rescission of the contested decision could not have the effect of restoring the parties to the *status quo ante*. Referring to previous judgements (No. 68,[6] 92[7] and 113[8]), it stated that compensation in lieu of specific performance might prove to be adequate and proper relief. In that connexion the Tribunal referred to its Judgement No. 113[9] in which it had granted the individual concerned, as compensation, the equivalent of his base salary for the period of the contract remaining as from the date of termination. It considered, however, that the applicant could not expect to remain in his post until the end of his contract and considered that in assessing the injury sustained at an amount equal to six months' salary and allowances, the respondent had assessed the injury equitably and reasonably.

4. JUDGEMENT NO. 170 (30 MARCH 1973):[10] SULE v. SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting a decision refusing to renew a fixed-term appointment or to convert it into a different type of appointment

The applicant, who had entered the service of the UNDP Office at Lagos on 9 September 1963, received a succession of fixed-term appointments, the last of which was due to expire on 31 January 1968. On 29 May 1967 he was suspended indefinitely from duty without pay on the grounds of misconduct and insubordination and on 11 September 1967 his appointment was terminated on the ground of unsatisfactory services under Staff Regulation 9.1 (*b*). The Joint Appeals Board, with which he filed an appeal, submitted a report in the light of which the Secretary-General decided to rescind the termination decision and to order that the applicant's fixed-term appointment be allowed to run its course. The applicant then asserted that his contract was due for renewal covering the period February 1968-February 1969 and that by September 1968 he had become eligible for indefinite appointment. Since he was denied such an appointment and the outcome of his appeal to the Joint Appeals Board was not favourable to him, he submitted an application to the Tribunal, requesting basically (1) rescission of the decision of the Secretary-General not to renew his fixed-term appointment and not to convert that appointment into an indefinite appointment and (2) payment of compensation for the injury sustained.

The Tribunal noted that the applicant's letter of appointment contained the following provision: "This Fixed-Term Appointment does not carry any expectancy of renewal or of conversion to any other type of appointment in the Secretariat of the UNDP", and that Staff Rule 104.12 (*b*) contained a similar provision. With regard to the Conditions of Service for locally recruited staff members of the UNDP Office in Nigeria, the Tribunal noted that paragraph 3 (*a*) reads as follows:

"3. *Appointment*

(*a*) On recruitment staff members may be granted one of the following types of appointment:

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[6] *Judgements of the United Nations Administrative Tribunal*, Numbers 1 to 70 (United Nations publication, Sales No.: 58.X.1), p. 398.

[7] See *Juridical Yearbook*, 1964, p. 206.

[8] See *Juridical Yearbook*, 1967, p. 299.

[9] *Ibid.*

[10] Mr. R. Venkataraman, President; Mr. F. T. P. Plimpton, Vice-President; Sir Roger Stevens, Member.

"*Initial fixed-term appointment.* If a staff member is recruited with an expectation of continuing service (as distinct from recruitment specifically for temporary or short-term duties) he normally is given initially a fixed-term appointment for a trial period of three months duration.

"*Fixed-term appointment.* If the staff member's services have proved satisfactory during the trial period he normally receives on completion of that period an appointment for a fixed term of one year.

"*Indefinite appointment.* If the staff member's services are to continue after completion of the first year's fixed-term appointment, he receives either a further fixed-term appointment or, alternatively, an indefinite appointment.

"*Appointments for temporary assistance.* Fixed-term appointments for temporary assistance may be authorized for brief periods."

The applicant, relying on the words of the provision entitled "Indefinite appointment", argued that he was entitled to receive either another fixed-term appointment or an indefinite appointment and that he could not be denied both. The Tribunal noted, however, that the clause was applicable only "if the staff member's services are to continue". The applicant had received successive fixed-term appointments when the Administration had decided that his services were to continue. But as the decision regarding the applicant's latest fixed-term appointment had been that his services were not to continue, the aforementioned provision did not apply to him. The Tribunal added, furthermore, that to construe the provision as guaranteeing the applicant, at the end of a fixed-term appointment, either a further fixed-term appointment or an indefinite appointment would be inconsistent with the terms of the applicant's letter of appointment and of the Staff Rules, and would negate the very concept of a fixed-term appointment through in effect making such an appointment interminable.

The Tribunal therefore rejected the application.

5. JUDGEMENT NO. 171 (3 APRIL 1973):[11] CHAMPETIER v. SECRETARY-GENERAL OF THE UNITED NATIONS

Application seeking compensation for injury caused to the individual concerned by a letter sent by the Administration to the authorities of the country in which he was performing his duties.

The applicant was engaged as a mining engineer for a Special Fund project in Guinea for a period of one year beginning on 12 February 1969. On 4 August 1969 he addressed to a Guinean official a report criticizing the management of the project, sending a copy to the UNDP Resident Representative. That step gave rise to an exchange of correspondence between Headquarters and the applicant. On 15 December 1969, the Guinean Secretary of State for Foreign Affairs informed the UNDP Resident Representative a.i. that the Government of Guinea wished the applicant to be appointed project manager. In reply it was stated that "United Nations Headquarters considers that the applicant's skills do not qualify him for the post of project manager". On 5 February 1970 the applicant, whose contract had in the meantime been extended for two months, wrote a letter of complaint to the Commissioner for Technical Co-operation, in which he alleged that the terms of the aforementioned letter were defamatory. He subsequently sought compensation for the moral and material injury which he considered he had sustained as a result of the letter complained of.

The Tribunal, to which an application was submitted, noted that in a letter of 20 January 1970 a member of the Office of Technical Co-operation had informed the Resident Representative a.i. that United Nations Headquarters could not accede to the Guinean authorities' request that the applicant should be appointed project manager. The Resident Representative a.i. had therefore informed the Guinean authorities that the applicant's skills did not qualify him for the post of project manager; he added that the applicant's appointment

[11] Mme P. Bastid, Vice-President, presiding; Mr. Mutuale-Tshikantshe, Member; Sir Roger Stevens, Member.

was being extended for two months until an adequate candidate could be submitted to the Guinean Government for approval and the name of a "competent candidate" presented. The letter had been sent to several units of the Guinean administration and was not marked "confidential". The applicant, too, received a copy.

The Tribunal considered that it did not have to determine whether the terms of the aforementioned letter were defamatory in the legal sense. It addressed itself rather to the question of whether the letter and the circumstances of its dispatch were of such a nature as to be prejudicial to the applicant professionally. It was of the view that the respondent had handled the matter in an unusual manner and with considerable ineptitude. It seemed surprising that the applicant had not been informed personally by the Resident Representative a.i. of the decisions relating to him contained in the letter addressed to the Guinean authorities. The Tribunal also considered that the text of the letter itself was open to a number of objections: the references to future candidates for the post of project manager could be construed as carrying critical implications concerning the applicant and might well cause him embarrassment during the remainder of his stay in Guinea. Moreover, the Guinean Government had been notified of the extension of the applicant's appointment before the applicant himself had been informed and could indicate whether he was willing to accept the offer of an extension.

The Tribunal then had to consider whether the respondent's conduct had in fact caused the applicant embarrassment and distress and whether the applicant's professional standing had been adversely affected. The Tribunal first noted that although the applicant had complained in a letter of 5 February 1970 that the terms of the letter complained of were defamatory, he had nevertheless accepted the offer of an extension of his appointment. The Tribunal next observed that the Administration, in a letter dated 3 March 1970, had assured the applicant that nobody was questioning his professional competence and subsequently offered to send him a certificate which would indicate the quality of his work and his official conduct. The applicant complained that he had been unable to find employment, but the Tribunal stated that if he considered that he was the victim of prejudice created by the letter complained of, he could have taken advantage of the possibilities offered to him by the Administration with a view to redressing the situation, which he did not seem to have done. That being so, the Tribunal stated that it remained unconvinced that serious or lasting prejudice to the applicant had been caused by the terms of, or the circumstances surrounding the dispatch of, the letter of 30 January 1970. The Tribunal recognized, however, that embarrassment during the remainder of his stay in Guinea might have resulted from the extraordinary ineptitude with which that letter had been drafted and delivered. The Tribunal considered that the only reparation to which the applicant would appear to be entitled was a moral one and that the substance of the judgement itself should give him suitable satisfaction.

6. JUDGEMENT NO. 172 (5 APRIL 1973):[12] QUEMERAIS v. SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting a decision terminating a regular appointment—The Secretary-General may terminate a staff member holding a regular appointment if, in his opinion, such action would be in the interest of the Organization—The ground of abolition of post may be reasonably invoked only if it proves impossible to retain the staff member in a suitable post—Conditions under which a work evaluation procedure which might lead to the termination of the appointment of a staff member must be conducted—Granting of an indemnity in lieu of reinstatement

The applicant had been employed at UNICEF for almost 10 years and had held a regular appointment. After UNICEF decided to discontinue the activities to which the applicant was assigned, it offered him a post in another service, explaining that a trial period of three months was prescribed, and that if the applicant proved unable during that period to adapt himself to

[12] Mme P. Bastid, Vice-President, presiding; Mr. R. Venkataraman, President; Mr. Mutuale-Tshikantshe, Member.

his new duties, there would be no other alternative than to terminate him owing to the abolition of his post. The staff member accepted that offer. At the end of the trial period—which meanwhile had been extended by six months—his supervisor submitted a report in which he concluded that he could not consider the applicant to be the collaborator he needed. Since no post could be found for him in the European Office or at Headquarters in New York, the applicant was notified on 17 November 1970 that his appointment would be terminated on 28 February 1971 but that in order to facilitate his readjustment he would be released from all duties forthwith.

The Tribunal felt that the basic issue in the case was the conditions under which a regular appointment may be terminated. It noted that despite the many similarities which existed in respect of Staff Rules 104.13, 104.14 and 109.1 between the regular appointment and the permanent appointment, there was an essential difference between regular and permanent appointments where termination conditions were concerned. The rules applicable to permanent appointments were specified in Staff Regulation 9.1 (*a*). Under Staff Rule 104.13 (*b*), regular appointments were in general subject to the Staff Regulations and Staff Rules applicable to temporary appointments which are not for a fixed term. Consequently, the matter was governed by Staff Regulation 9.1 (*c*) under which "the Secretary-General may at any time terminate [the appointment] if, in his opinion, such action would be in the interest of the United Nations".

Consequently, the Tribunal held that it could not be maintained that, for the purposes of a termination decision, the applicant should be assimilated with a staff member holding a permanent appointment.

The Tribunal noted that the applicant had been terminated as a result of a change in the activities for which the European Office of UNICEF was responsible. As a result of that change, the applicant's supervisor had been transferred to Abidjan and there ceased to be any justification for the existence of the post held by the applicant. The Tribunal noted that UNICEF had foreseen the problem since 1968 and that a Special Committee had been instructed to formulate proposals in order to mitigate the effects of the forthcoming termination of the applicant's assignment. The offer made to the applicant and referred to above constituted implementation of Staff Rule 109.1, according to the respondent. Since the offer was conditional on the results of a trial period, its acceptance by the applicant did not finally resolve his situation.

The Tribunal noted that there was no change in the number of posts budgeted for, but observed that a change in orientation had nevertheless been given to an operational activity and that a Technical Assistant post could very well be affected by that change. Consequently, the Tribunal considered that a change in a field of activity of the Organization resulting in the complete elimination of a previous activity could, because of the nature of the applicant's assignment, justify the respondent's terminating his appointment on the ground of abolition of post, but that the respondent was obliged to observe Staff Rule 109.1 (*c*), as he had in fact acknowledged by himself assimilating abolition of an assignment to abolition of post; the applicant could therefore be terminated on the basis of Staff Regulation 9.1 (*c*) only if the application of Rule 109.1 (*c*) did not enable him to be retained in a suitable post in which his services could be effectively utilized.

The Tribunal noted that in the notice of termination the respondent had merely indicated that there was no suitable vacancy. On 9 June 1972, however, the respondent had felt obliged to give a detailed explanation of the real reasons for termination in which he based himself essentially on the evaluation of the applicant's work. The Tribunal did not accept the contention of the applicant that the respondent had changed reasons during the termination procedure in contravention of the rule *allegans contraria non audiendus est.* It held that since it was not possible to retain the staff member concerned in accordance with Staff Rule 109.1 (*c*), the staff member in question might be terminated under Staff Regulation 9.1 (*a*) if he held a permanent appointment and under the very general provisions of Staff Regulation 9.1 (*c*) if he held a regular appointment.

It remained to determine whether the applicant's suitability for the purposes of Staff Rule 109.1 (*c*) had been assessed according to a proper procedure. In connexion with the trial period to which the staff member had been subjected, the Tribunal noted that under Staff Rule 109.1 (*c*), the preference given to staff members with regular appointments was made contingent upon the existence of reasonable conditions for adaptation to the post in question. It felt that it might in general be useful to verify such adaptation over a certain period and hence to defer a final decision.

In connexion with the procedure followed by the respondent in arriving at the decision to terminate the applicant's appointment on the basis of the reports drawn up after the trial period, the Tribunal noted that the minutes of the meeting of the Personnel Committee—which the respondent indicated was the equivalent in local UNICEF offices of the Appointment and Promotion Board—did not show that the Committee itself had carried out an evaluation of the applicant's work. It emerged that the Committee had regarded the opinion of the applicant's supervisor as decisive. In no way had the applicant been called upon to present his case in writing or in person to the Committee or to convey his opinion on the reports concerning him. The Tribunal stated that it could not regard as proper an evaluation of a staff member's work which might lead to the termination of his appointment when it was entrusted to a body comparable to the Appointment and Promotion Board and that body was not put in a position to be informed of the observations of the staff member concerned as well as the complaints about him. The Tribunal therefore concluded that the applicant had not been afforded the guarantees of due process before the Committee, and that consequently, the final termination decision, which the respondent based on the evaluation of the applicant's work by the Committee, was improper and must be rescinded.

The Tribunal recalled that as a locally recruited staff member, the applicant was entitled to remain in service only so long as the European Office of UNICEF had its headquarters in Paris. Since the European Office was transferred to Geneva on 1 October 1972, the rescinding of the termination decision did not afford a basis for ordering the applicant's reinstatement. That being so, and in accordance with its previous judgements, the Tribunal granted the applicant, in lieu of reinstatement, an indemnity which it fixed at the net base salary which the staff member would have been entitled to receive from the end of his appointment (28 February 1971) up to 30 September 1972; the applicant would retain possession of the amounts paid to him in connexion with the notice of termination and the termination indemnity.

7. Judgement No. 173 (5 April 1973):[13] Papaleontiou v. Secretary-General of the United Nations

Application contesting a decision refusing to renew a fixed-term appointment

The applicant, who since 2 February 1966 had held a fixed-term appointment which had been renewed on several occasions, was reassigned on 1 July 1968 to UNTSO with Damascus as his first duty station. Before taking up his new assignment, he took his home leave in Cyprus, his home country, where he had left his family. On 12 July 1968, he asked to be informed of his future assignment in order to be able to decide whether his family would join him. On 23 August 1968, he was advised that he would be reassigned to either Amman or Jerusalem on completion of his Damascus detail but that if he were assigned to Jerusalem he would be considered for the normal three-months rotation to Kantara as the needs of the service arose. In the meantime, however, the applicant had brought his family to Damascus. On 17 September 1968 the applicant was reassigned to Amman but was advised not to bring his family with him. On two occasions at the end of 1968 he complained to the Chief Administrative Officer about the inconvenience of being separated from his family. On 4 January 1969, he received a performance evaluation which contained the following conclusion:

[13] Mr. R. Venkataraman, President; Mr. F. T. D. Plimpton, Vice-President; Sir Roger Stevens, Member.

"In summary Mr. Papaleontiou was a conscientious and capable secretary. He could not, however, adjust to temporary separation from his family. This affected his work and his constant complaining about his situation did not enhance inter-personal relations within the Liaison Office."

On the same date, the applicant was reassigned to Jerusalem. Since his appointment was about to expire, the Chief Administrative Officer was called upon to make a recommendation concerning the staff member's future; he did so in a negative sense, stressing that the applicant did not seem prepared to accept the type of service which was a concomitant of his obligations as a Field Service staff member. When that recommendation had been approved by Headquarters and confirmed by the Secretary-General, the applicant referred the matter to the Tribunal, requesting it to order his reinstatement or the payment of compensation.

The Tribunal stressed that the fixed-term appointments received by the applicant each contained the usual stipulation that a fixed-term contract does not carry any expectancy of renewal or of conversion to any other type of appointment. He had, therefore, under the terms of his appointment, no contractual rights to renewal. Moreover, nothing in the files supported the applicant's allegation of an express or implied commitment on the part of UNTSO to renew his appointment.

The applicant contended that the evaluation report whose conclusion is quoted above and upon which the contested decision was based, was vindictive and a distortion of the truth. The Tribunal, however, noted that the report was favourable to the applicant so far as his competence was concerned. With regard to the assessment of the adverse effects of the staff member's family situation on his work, the applicant had produced no evidence to show that it was a distortion of truth. Neither had he proved that the author of the report had been prejudiced against him. Consequently, the Tribunal rejected the applicant's conclusion on that lead.

In conclusion, with regard to the applicant's charge of "discrimination, humiliation and having an ulterior motive" made against the respondent because of the refusal to allow him to bring his family to his successive duty stations, the Tribunal recognized that the movement of dependants with the staff member to duty stations must be subject to the exigencies of the Field Service. Accordingly, it also rejected the conclusions of the applicant in that respect.

8. JUDGEMENT NO. 174 (6 APRIL 1973):[14] DUPUY v. SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting a termination decision for abandonment of post—A staff member who, having been the subject of a decision of suspension without pay, is reinstated in his post must, in principle, be paid his full salary for the entire period of suspension, less appropriate deductions

The applicant was employed in the UNDP Office at Yaoundé and held an indefinite appointment. She had requested the Acting Resident Representative for leave without pay in order to be able to accompany her husband, who had been summoned to France as a matter of urgency. After having given his approval on 31 July 1968, the Acting Resident Representative reconsidered his decision on the following day and informed the applicant that if she refused to reconsider her request for leave, he would be compelled to terminate her contract with the Organization. On 4 August 1968, the applicant left for France. On 28 August 1968, the Chief of the Personnel Branch sent the staff member a letter informing her that she had been suspended from duty without pay and inviting her to submit a written explanation of the reasons for her action. When the applicant took cognizance of the letter upon her return to Yaoundé, she sent the Chief of the Personnel Branch the explanations he had requested. The latter proposed that the Resident Representative should permit the applicant to resume her work with pay immediately after the Deputy Resident Representative (who was Acting Resident Representa-

[14] Mme. P. Bastid, Vice-President, presiding; Mr. F. T. P. Plimpton, Vice-President; Sir Roger Stevens, Member.

tive at the time of the events) had been reassigned. On 17 January 1969, the Resident Representative had not yet been able to put the proposal to the applicant since he did not know the date of the Deputy Resident Representative's transfer. In the meantime, the applicant had accepted temporary employment with the Area Office of the ILO, which was prepared to offer her a permanent contract. On 14 March 1969, the Chief of the Personnel Division cabled the Resident Representative that Headquarters was agreeable to the applicant's transfer to the ILO and prepared to restore her to full pay status for the period 2 August 1968 to 2 January 1969, the date on which she had begun to work for the ILO. Having been informed of this offer, the applicant wrote to the Director of the ILO Area Office that the question of her transfer to the ILO had never been raised officially, that in order to facilitate the settlement of her problem she would not do any more work for the ILO and that she intended to claim payment in full of the sums owing to her to the date of official notification of UNDP's decision. On 8 April 1969, the Resident Representative wrote to the applicant that it had been decided to terminate her contract and that the applicant's emoluments for the period 16 September 1968 (date of her return from leave without pay) to 8 April 1969 would be paid, less the period during which she had worked for the ILO. The applicant having referred the matter to the Joint Appeals Board, the Chief of the Personnel Division sought the advice of the Rules and Procedures Section, whose Chief replied in the following terms:

> "Had our views been taken on this case at the outset we would have recommended separation for abandonment of post, or dismissal. Having taken no measure against her for almost a year, UNDP will have to decide between reinstatement or an agreed termination with full indemnities. Every month that passes by will increase your liability towards her. If she refuses a separation I suggest that your office demand of her to report back for duty right away, failing which she should be separated for abandonment of post. If she returns, you will have to put up with her for a while until she evokes a new reason for her separation which, judging from her behaviour, I have no doubt will happen quite soon."

After various administrative developments, the applicant stated that she rejected the arrangements proposed by UNDP with a view to an agreed termination agreement. The Resident Representative then informed the applicant—who was then working at the French Embassy—that Headquarters had decided to reinstate her immediately in her post and asked her to discuss the procedures of her reinstatement with the Deputy Resident Representative. On the same day, at the UNDP Office, the applicant had an interview with the Deputy Resident Representative in the course of which, asked whether she was planning to take leave in the near future, she refused to reply. In fact, the Deputy Resident Representative had heard that she would be going to Europe on leave in October for three or four months, but he did not question her further on that matter.

The applicant resumed her work on 26 September 1969 but in a letter to the Chief of the Personnel Division dated 26 September which was received in New York on 10 October she indicated that she would be unable to perform her duties at Yaoundé as from 2 October 1969 to 1 January 1970.

The applicant did not report for duty on 2 October or thereafter. On 13 October 1969, the Resident Representative had a memorandum handed to the applicant in which he asked her to indicate in writing the reasons for her absence from the office without authorization and without having notified or warned the Office; he also asked her to resume her post immediately and warned her that if she did not it would mean that she had abandoned her post. On 31 October 1969, the Chief of the Personnel Division instructed the Resident Representative to advise the applicant formally that she had been separated from UNDP for abandonment of post, but she had left Yaoundé for France and she was advised of the decision only on 29 November 1969.

The Tribunal, to which the matter was referred, had first to consider whether the applicant was justified in claiming that she had accepted her reinstatement only conditionally and that

the conditions she had made—namely that she could not work from 2 October 1969 to 1 January 1970 and that she should be paid full salary for the period of suspension—had not been met, so that there was no reinstatement. The Tribunal noted that those conditions had not been mentioned by her either at her interview with the Deputy Resident Representative or in the course of her last three working days at UNDP. On the other hand, in the official correspondence the applicant had acknowledged that she had accepted "an immediate reinstatement" and that she had resumed her duties on 26 September 1969. The Tribunal therefore reached the conclusion that the applicant was in fact reinstated on 26 September 1969.

The applicant also contended that the Administration's delay in replying to her letter of 26 September concerning her absence amounted to tacit approval of that absence. However, in the opinion of the Tribunal, the file showed that the Resident Representative's so-called "silence" lasted only one day and could not be interpreted as implicit acceptance of 1 January 1970 as the date of the applicant's reinstatement. In any case, silence even if prolonged could not be regarded as implying consent when it was, as in the case in question, contrary to the intent and declarations of the parties. The applicant also contended that her letter of 26 September 1969 to the Chief of the Personnel Division constituted a request for leave without pay, that the delay in replying to her was tantamount to approval and that the subsequent termination was therefore null and void. For the reasons set forth above, the Tribunal held that the so-called delays did not amount to approval of a request for leave.

Third, the applicant claimed that termination for "abandonment of post" was neither authorized nor provided for in the Staff Rules and that for a grievance of that nature disciplinary proceedings ought to have been initiated. However, the Tribunal noted that annex III, paragraph (*d*), to the Staff Regulations provided that no termination indemnity should be paid to a staff member who abandoned his post; that confirmed, in the opinion of the Tribunal, the long-standing Administration practice of regarding unauthorized absence, in certain circumstances, as abandonment of post and cause for separation since the prohibition against paying termination indemnity to a staff member who abandons his post would be meaningless if abandonment of post was not a distinct and independent reason for termination.

Neither did the Tribunal allow the applicant's claim that she had been the victim of prejudice. It felt that, however deplorable it might be, the fact that the Administration in New York hesitated for 14 months provided proof of its desire to reach a solution acceptable to the applicant.

However, the Tribunal considered that the reinstatement of the applicant, which put an end to her suspension without pay, meant in effect that she should not have been suspended and that in principle she should be paid her full salary for that period less appropriate deductions. In the circumstances, the Administration had wrongly credited her with no salary or leave accruals for the period during which the applicant had worked at the ILO and the French Embassy. The Tribunal therefore decided that the Respondent should (1) pay the applicant the difference between the salary she would have received at UNDP for the period during which she had worked at the ILO and the French Embassy and the salary she had received from the ILO and the French Embassy during that period and (2) calculate the applicant's leave entitlement for that period and pay the cash equivalent thereof to her. In addition, the Tribunal recalled that if she had not been suspended, the applicant would normally have received a salary increment on 1 July 1969. Noting that at the end of 1967, the applicant's supervisor had recommended that she should receive *two* annual increments on 1 May 1968 in view of her excellent record of service, the Tribunal ruled that the Respondent should recalculate the salary due to the applicant for the period 1 July 1969 to 2 October 1969 in such a way as to include in it a one-step increment.

Finally, in view of the long delays in the settlement of the case, the Tribunal ruled that the Respondent should pay the applicant interest at a rate of 6 per cent per annum, from 2 October 1969 until the day of payment, on the sums owing in application of the judgement.

9. JUDGEMENT NO. 175 (11 OCTOBER 1973):[15] GARNETT v. SECRETARY-GENERAL OF THE UNITED NATIONS

Motion for interpretation of a Tribunal judgement—Computation, on the basis of Staff Rule 103.9, of the increase in salary following promotion—For the purposes of that provision, "salary" includes post adjustment—The requirements of the provision in question are satisfied if the monthly salary earned by the staff member promoted exceeds, during the year following his promotion, the salary which he would have obtained in his former post by an amount equal to the prorated portion of one full step in the new post allocable to the period

By its Judgement No. 156,[16] the Tribunal had ordered the respondent to re-compute the applicant's salary for the year 1 September 1969 to 1 September 1970[17] in accordance with Staff Rule 103.9 (i) as construed by the Tribunal, taking into account all increases during the year in the salary scale of either her prior position or the position to which she was promoted. After she had been informed of the method which the respondent had used to re-compute her salary, the applicant filed a motion for interpretation of Judgement No. 156 with the Tribunal, requesting it to state that the computation should continue throughout the first year following her promotion.

The Tribunal recalled that Staff Rule 103.9 (i) reads as follows:

"(i) During the first year following promotion a staff member in continuous service shall receive in salary the amount of one full step in the level to which he has been promoted more than he would have received without promotion, except where promotion to the lowest step of the level yields a greater amount. The step rate and date of salary increment in the higher salary level shall be adjusted to achieve this end."

The Tribunal noted that the re-computation which the respondent had carried out pursuant to Judgement No. 156 had resulted in the applicant's receiving, in her promotion post during the period 1 September 1969 to 31 December 1969, an amount which exceeded the portion of one full step in the P-2 level which would have been allocable to that period.

As to the period 1 January 1970 to 30 June 1970, the re-computation had resulted in the applicant's receiving in her promotion post an amount which she claimed was less than what she would have received during that period in her old post after adding thereto the portion of one full step in the P-2 level which would have been allocable to that period.

The Tribunal first had to determine whether, in the calculations incidental to the application of Staff Rule 103.9 (i), post adjustment should be taken into account in the computation of the "salary" received by the staff member in the post to which he or she had been promoted. It was emphasized that the rule in question did not specifically define the term "salary", and that there was no basis for the applicant's contention that the term meant only base salary prior to post adjustment. Furthermore, the obvious purpose of Staff Rule 103.9 (i) was to ensure that a staff member should not suffer financially by reason of a promotion. Thus, in comparing remuneration in the new position with remuneration in the old, the rule must have intended in both cases to include all amounts actually received. General Service salary scales were related to local costs of living, since they were based on the best prevailing conditions of employment in the locality concerned, and Professional category remuneration was similarly related through post adjustment. The Tribunal felt that to omit post adjustment in calculations under Staff Rule 103.9 (i) would have been to compare unlikes and to misunderstand the purpose of the rule.

The applicant also claimed that on 1 January 1970 the salary scale in her old post had risen, as a result of a general salary increase and what would have been her next salary increment, from $8,770 to $9,701, whereas at that date her new salary scale (including post

[15] Mme. P. Bastid, Vice-President, presiding; Mr. F. T. P. Plimpton, Vice-President; Mr. Mutuale-Tshikantshe, Member.

[16] See *Juridical Yearbook*, 1972, p. 125.

[17] The applicant had been promoted from the General Service category to the P-2 level, as of 1 September 1969.

adjustment) at P-2 step I was only $9,593. The Tribunal considered that that contention lost sight of the fact that from 1 September 1969 to 31 December 1969, while her old salary was at the rate of $8,770, she had been receiving, at the P-2 step I level, a salary of $9,593, which was substantially more than what she was entitled to claim under Staff Rule 103.9 (i). Indeed, there would be no reason to change the applicant's status as of the beginning of a month unless, calculated cumulatively from the beginning of the year to date, her receipts in her new post during that period had not exceeded what she would have received in her old post during the period by an amount equal to the prorated portion of one full step in the new post allocable to the period.

Noting that the over-all effect of the measures taken by the respondent was in conformity with Rule 103.9 (i), since the applicant had received, by the end of the year following her promotion, slightly more than the amount required by that rule, the Tribunal rejected the application.

10. Judgement No. 176 (12 October 1973):[18] Fayad v. Secretary-General of the United Nations

Application for validation of a period of service completed by a participant in the United Nations Joint Staff Pension Fund prior to his admission to the Fund—Question whether the person concerned was a United Nations staff member during that period or not—Computation of the five-year period of service which an associate participant in the Fund must prove in order to become a full participant

From 3 March 1963 to 2 March 1965 the applicant served as a judge in the Republic of the Congo (now the Republic of Zaire) under a contract, hereinafter referred to as a "judiciary contract", concluded between himself and the United Nations. On 16 August 1965, he was appointed a United Nations technical assistance expert. He was admitted to the United Nations Joint Staff Pension Fund as an associate participant on 16 August 1965 and as a full participant on 16 August 1966. On 3 October 1966, he requested that the period of service he had completed before becoming a participant be included in his contributory service under article III.2 (*a*) of the Pension Fund Regulations concerning validation of non-pensionable service. His request was rejected. The parties then agreed to submit the case directly to the Tribunal under article 7, paragraph 1, of its Statute.

The Tribunal noted that the respondent, in agreeing that the application be submitted directly to the Tribunal, had taken into account, *inter alia,* the fact that the dispute related not only to the terms of the judiciary contract but also to the interpretation of the United Nations Joint Staff Pension Fund Regulations. In the circumstances, the Tribunal concluded that it was competent to pass judgement upon all aspects of the application in conformity with article 2 of its Statutes.

The Tribunal examined first the scope of the judiciary contract. While noting that, under the terms of the contract, the applicant was not a staff member of the United Nations Secretariat, the Tribunal admitted that the fact that the contract had been concluded by the United Nations could lead to misunderstanding. Indeed, one of the preambular paragraphs stated that "the United Nations desires to engage the services" of the applicant, a formula which could be taken to mean that the applicant would be employed by the United Nations, if not as a member of the Secretariat, then at least in some other capacity. Moreover, in a report drawn up on 5 April 1963 by the United Nations Office in Kinshasa, the applicant was described as a staff member. Accordingly, in so far as the respondent relied on the contract clause indicating that the applicant was not a member of the United Nations Secretariat to prove that the applicant was not employed by the United Nations, the contention was not entirely convincing.

[18] Mme. P. Bastid, Vice-President, presiding; Mr. Mutuale-Tshikantshe, Member; Sir Roger Stevens, Member.

The Tribunal considered, however, that it was clear from the contract that the applicant could, without having been consulted or advised, have ceased to have any administrative link with the United Nations if the Government of the Congo had been substituted for the Organization after the contract had been in force for one year. The Tribunal took the view that that clause showed in fact that the applicant was not in the service of the United Nations, since otherwise it would have been necessary to concede that the applicant could change employers without further formality.

The Tribunal also emphasized that the clause in the contract providing that the applicant must neither seek nor accept instructions from any other Government or any authority external to the Republic of the Congo showed that it was to the Government of the Congo that the applicant had contracted his fundamental obligations. Such a commitment was undoubtedly imcompatible with Staff Regulation 1.1, and nothing in the contract allowed the conclusion that the Staff Regulations and Rules were applicable to the applicant.

The Tribunal therefore decided that, by accepting the judiciary contract, the applicant had not acquired the rights or incurred the obligations of a United Nations staff member, and consequently accepted the respondent's conclusion that the applicant could not claim admission to the Fund for the period of service completed as a judge, either at the time, or by way of subsequent validation. Moreover, the record showed the applicant had not only been advised indirectly that he was excluded from participation in the Fund, but had also been informed that he would receive additional financial assistance to help him to continue contributing to another pension scheme. The Tribunal therefore considered unfounded the applicant's claim that he was entitled to assume that his service as a judge could subsequently be validated for pension purposes.

The Tribunal next considered the conditions in which the applicant, having been admitted to the Pension Fund, had requested validation of his service for the period covered by the judiciary contract. It noted that on 3 October 1966 the applicant had applied to become a full participant in the Fund, pointing out that he had been employed by the United Nations under a two-year contract from 1963 to 1965, then for one year from 16 August 1965, and that having just concluded a new two-year contract—which brought his period of service up to five years—he fulfilled the conditions laid down in article II of the Regulations of the Fund.

The Tribunal noted that in reply to that letter, the Office of Personnel had issued a Personnel Action form described as an "amendment to show entitlement to full participation in the United Nations Joint Staff Pension Fund (from 16 August 1966), in accordance with article II, paragraph 2, of the Regulations of the Pension Fund". The reference to article II.2 (which allows the five-year period required in article II.1 to be calculated under certain conditions) indicated clearly that the Office of Personnel considered at the time that the two years' service completed by the applicant under his judiciary contract constituted a period of service that allowed him to become a full participant in the Fund. However, when the Pension Fund had received the applicant's request for validation, it had indicated that it intended to validate only the period of one year during which the applicant had been an associate participant. The Tribunal considered that it was the Pension Fund which had interpreted article III of its Regulations correctly, since the applicant could not claim validation for the period of service completed under his judiciary contract either on the basis of article III.1 (*a*) (since the applicant was not an associate participant during that period), or on the basis of article III.1 (*b*) (since at that time he was not a full-time staff member of a member organization).

The Tribunal therefore rejected the application.

11. JUDGEMENT NO. 177 (12 OCTOBER 1973):[19] FASLA V. SECRETARY-GENERAL OF THE UNITED NATIONS

Confirmation of a Tribunal judgement which had been the subject of a request for an advisory opinion of the International Court of Justice—Inadmissibility of an application submitted in violation of the rule concerning time-limits for internal remedies

A. Since Judgement No. 158[20] had been the subject of a request by the Committee on Applications for Review of Administrative Tribunal Judgements for an advisory opinion of the International Court of Justice, and since the Court had expressed the opinion[21] that the Tribunal had not failed to exercise the jurisdiction vested in it and had not committed a fundamental error in procedure which had occasioned a failure of justice, the Tribunal confirmed the judgement in question, which accordingly became final as of 12 October 1973.

B. As differences of opinion had arisen between the applicant and the respondent regarding the enforcement of Judgement No. 158, the applicant requested the Tribunal to decide on the amount of compensation due to him under the judgement.

The Tribunal noted that the application dealt in substance with questions which had neither been discussed by the parties nor considered by the Tribunal when Judgement No. 158 had been rendered. What was in effect before the Tribunal was a new application which did not comply with the requirements of article 7, paragraph 1, of the Statute, which reads as follows:

> "An application shall not be receivable unless the person concerned has previously submitted the dispute to the joint appeals body provided for in the staff regulations and the latter has communicated its opinion to the Secretary-General, except where the Secretary-General and the applicant have agreed to submit the application directly to the Administrative Tribunal."

The Tribunal therefore declared that the application was not receivable.

C. The applicant had also submitted an application for revision of Judgement No. 158, under article 12 of the Statute of the Tribunal. The Tribunal had first to consider whether the application for revision had been made within one year of the date of the judgement. It found that, since the revision proceedings could be instituted only against a final judgement, the time-limit for applying for revision could begin to run only from the date on which the judgement had become final, i.e., in the present case, from the date of the judgement confirming the original judgement. The Tribunal concluded that the application was not barred by time.

The Tribunal next considered whether the conditions for an application for revision laid down in article 12 of the Statute were fulfilled. That provision made it possible to challenge a judgement which had been given on the basis of erroneous or incomplete facts, provided that the facts invoked by the party claiming revision had been unknown to that party and to the Tribunal when the judgement had been given and that those facts were of such a nature as to be decisive factors.

The applicant asserted that he had "discovered" that his counsel had not conducted the case in the applicant's best interests. The Tribunal emphasized, however, that any appeal involved various options on the pleas to be made and on the arguments to be presented, and that it could not be considered that a fact unknown to the Tribunal and to the applicant had been discovered when, after the event, the applicant arrived at the conclusion that another course should have been followed in the presentation of his case. With regard to the documents which the applicant claimed had not been produced to the Tribunal before it rendered Judgement No. 158, it appeared that they had not been unknown to the applicant at the time of the case. The Tribunal therefore considered that the conditions laid down in article 12 of the Statute were not fulfilled and that the application should therefore be rejected.

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[19] Mr. R. Venkataraman, President; Mme. P. Bastid, Vice-President; Mr. Mutuale-Tshikantshe, Member.

[20] See *Juridical Yearbook*, 1972, p. 127.

[21] See p. 193 of this *Yearbook*.

12. JUDGEMENT NO. 178 (16 OCTOBER 1973):[22] SURINA v. SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting a decision refusing renewal of a fixed-term appointment—Circumstances liable to create in the holder of such an appointment an expectation of renewal—Granting of an indemnity because of those circumstances

The applicant had been appointed to a post as associate expert in Trinidad and Tobago for a one-year term beginning on 2 March 1970. On 14 January 1971, the Office of Technical Co-operation asked the UNDP Regional Representative in the Caribbean to inform it whether the Government of Trinidad and Tobago was requesting an extension of the applicant's contract. On 9 March 1971, the Regional Representative replied in the negative but added that, since the Government concerned had given earlier indication for extending the applicant's contract, he suggested that an appropriate extension should be granted him in order to enable him to settle his personal affairs. The contract was, accordingly, extended by one month, and the applicant was separated from service on 1 April 1971.

Before the Tribunal, the applicant claimed that his appointment should have been extended. Noting that his letter of appointment did not carry any expectation of renewal or of conversion to any other type of appointment in the United Nations Secretariat, the Tribunal found that the applicant's claim had no legal foundation.

It noted, however, that the applicant, knowing that the host Government had at one point requested an extension of his contract, had had legitimate grounds for expecting such extension. The expectation thus created had extended for one week after the expiration of the applicant's initial period of appointment and that during that week the applicant had continued to work exactly as if the procedure for renewing his contract had been under way and, according to the file, without having been officially informed that that was not the case.

The Tribunal noted that if the applicant's appointment had in fact been extended for one year and if the applicant had been terminated at the end of one month, he would have been entitled, in accordance with annex III to the Staff Regulations, to an indemnity equivalent to five days' salary for each of the 11 months remaining before the expiration of his contract—a total of 55 days. The Tribunal considered that equivalent compensation should be granted to the applicant because of the behaviour of the respondent mentioned above. The Tribunal therefore decided that the respondent should pay to the applicant an indemnity equal to his net base salary for a total of 55 days.

13. JUDGEMENT NO. 179 (18 OCTOBER 1973):[23] ASHTON v. SECRETARY-GENERAL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

Application submitted by a claimant of validation of prior service where the claim was barred by time—Question of the existence of a causal link between the Administration's action and the applicant's inaction.

The applicant, referring to Judgement No. 152,[24] requested compensation for injury suffered as a result of having been deterred from filing in time a request for validation of his prior non-contributory service because of the issuance of a circular of 26 February 1958.

The Tribunal had to examine whether the applicant's failure to comply with the time-limit prescribed for requesting validation of prior service resulted directly from the circular dated 26 February 1958. While agreeing that the circular in question would normally have had a dissuasive effect on a staff member from making an application for validation of prior service, it concluded, from an examination of the file, that that circular could not be considered as a factor which by itself alone determined the applicant's decision not to request validation. It therefore held that the causal link between the respondent's circular and the applicant's failure

[22] Mme. P. Bastid, Vice-President, presiding; Mr. Z. Rossides, Member; Sir Roger Stevens, Member.

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

[24] See *Juridical Yearbook*, 1971, p. 166.

to request validation had not been established and consequently that the damage, if any, suffered by the applicant was not directly attributable to the respondent's action. For those reasons, the Tribunal rejected the application.

14. JUDGEMENT NO. 180 (19 OCTOBER 1973):[25] OSMAN V. SECRETARY-GENERAL OF THE UNITED NATIONS

Application by a former associate participant in the Joint Pension Fund claiming wrongful deprivation of benefits under a provision of the Regulations of the United Nations Joint Staff Pension Fund relating to conditions for admission as a full participant—Rejection of the claim on the grounds that associate participants are not eligible for benefits under the provision in question—Question of the propriety of an administrative decision extending the applicant's appointment to a date prior to the anticipated date of completion of the project to which he was assigned

The applicant had been recruited as a technical assistance expert on 5 February 1964 and had served thereafter under a succession of fixed-term appointments. Upon completing one year of uninterrupted employment on 16 June 1965, he became an associate participant in the United Nations Joint Staff Pension Fund. On 8 November 1967, he reached the age of 60 and, consequently, ceased to be an associate participant. On 15 May 1971, he requested that he be considered as continuing to be an associate participant in the Fund up till 16 June 1969, the date of completion of five years' continuous service, that from 16 June 1969 he become a participant, and that his whole period of service, including two months' service in the early part of 1964, be validated as contributory service towards pension. His request was rejected.

Before the Tribunal, the applicant contended that under the Pension Fund Regulations which came into force on 1 January 1967 he had become entitled on that date to full participation in the Pension Fund since prior to that date he had completed more than one year of continuous service and had received an appointment for one year, as required by paragraph 1 of article II of the said Regulations, and that the Administration by oversight or administrative error had failed to apply correctly the Regulations in his case.

The Tribunal pointed out, however, that, under article II of the Regulations, the right to become a participant in the Pension Fund under paragraph 1 was available to every full-time member of the staff who *was not an associate participant under paragraph 2.* The applicant's contention that, since he fulfilled the conditions prescribed under paragraph 1, he became entitled to participation in the Fund ignored the qualifying proviso that such participation was "subject to paragraph 2", dealing with the category of associate participants, to which the applicant belonged.

The Tribunal did not agree with the applicant's argument that such an interpretation of article II led to an absurdity.

It therefore concluded that there had been no administrative error or oversight on the part of the respondent in not enrolling the applicant as a participant in the Fund on 1 January 1967.

The applicant had alternately pleaded that he had been entitled on the expiry of his appointment ending on 9 September 1967 to an appointment from 10 September 1967 to 31 October 1969 or later and that, had he been given such an appointment, he would have become a participant under paragraph 2 of article II. The applicant had, in fact, been offered by a letter dated 31 July 1967 an extension of his contract which would carry through to the end of the project to which he was assigned, i.e., February 1969, and had thereafter been issued on 5 October 1967 a letter of appointment from 10 September 1967 to 9 March 1969.

The Tribunal noted that if the applicant's appointment had been extended to 16 June 1969, he would have had an appointment extending his total continuous period of employment to five years, thus fulfilling the requirements for becoming a participant. The appointment granted to him covered only the period up to 9 March 1969, a little over three months short of the period required for the applicant to become a participant in the Fund. The applicant

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

maintained that as a consequence of the date of expiration of his appointment having been fixed as 9 March 1969, he had suffered an injury in that he was deprived of his pension benefits. He argued that, by granting him such an appointment at a time when it had become likely that the project would be further extended and that his services would be required accordingly, the respondent had acted improperly and had caused loss for which he was under an obligation to compensate.

The Tribunal noted that when the applicant signed his letter of appointment, it had become obvious to the Administration that, subject to the agreement of the recipient Government, the date of completion of the project would have to be shifted to 31 October 1969. However, nothing in the file indicated that, when that letter was issued, the Administration had been notified of any agreement with the recipient Government to warrant a change in the plan of operation. Noting that, in accordance with UNDP practice, the formal consent of the recipient Government was essential for an extension of the duration of the project, the Tribunal did not agree with the applicant's contention that the Administration's decision to fix the date of expiration of the applicant's appointment as 9 March 1969 was improper.

It was, unquestionably, possible to argue that, in view of his length of service, the applicant should have been enabled to earn the benefits of participation in the Pension Fund. However, he had not raised any question regarding the duration of his appointment and its extension beyond 9 March 1969 either when the offer was made to him or when the letter of appointment was issued to him, even though he had been informed that the date of completion of the project would have to be shifted to 31 October 1969. Thus, if there had been any oversight on the part of the respondent, there had equally been a lapse on the part of the applicant in not bringing the matter at the relevant time to the attention of the Administration.

Accordingly, the Tribunal rejected the application.

B. Decisions of the Administrative Tribunal of the International Labour Organisation[26,27]

1. Judgement No. 198 (14 May 1973): Ozorio v. World Health Organization

The Tribunal recorded the withdrawal of suit by the complainant.

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[26]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 1973, the World Health Organization (including the Pan American Health Organization (PAHO)), 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 Nuclear Research, the Interim Commission for the International Trade Organization/General Agreement on Tariffs and Trade, the International Atomic Energy Agency, the World Intellectual Property Organization, the European Organization for the Safety of Air Navigation, the Universal Postal Union, the International Patent Institute, the European Southern Observatory and the Intergovernmental Council of Copper Exporting Countries. The Tribunal is also competent to hear disputes with regard to the execution of certain contracts concluded 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.

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

2. JUDGEMENT NO. 199 (14 MAY 1973): LEE v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Calculation of the salary increment upon promotion— Case of a staff member promoted to grade G-6 one month before the addition of new steps to grade G-5— Discretionary power of the Director-General

The complainant was promoted to grade G-6 on 1 December 1970 and was placed at step 6 in grade G-6 in accordance with staff rule 302.3051, which states:

> "... a staff member upon promotion shall be placed at the entrance rate of the higher grade level, provided that at this rate he would receive for continuous service during the first year following promotion a salary amounting to at least one full increment step (of the grade level to which he has been promoted) more than he would have received without the promotion. If he would not receive such an amount at the entrance rate, then his salary shall be placed at the step within the higher grade level which would provide such an increase. The date of the staff member's next salary increment in the higher grade level shall be adjusted to achieve this end."

On 5 January 1971 the staff was informed by administrative circular that three new steps (12, 13 and 14) had been added to grade G-5 with effect from 1 January 1971.

The complainant then asked for review of the decision to place her at step 6 in grade G-6 and for the grant of a higher step to take account of the fact that she would have been placed at the new step 12 from 1 January 1971 had she remained at grade G-5. The Administration dismissed her claim.

A complaint having been lodged, the Tribunal found that the Organization had acted strictly in accordance with the regulations as they were on 1 December 1970, the date when the complainant had been promoted to grade G-6. It agreed that it would have been for the personal benefit of the complainant if the promotion had been delayed until after 1 January 1971. The Tribunal noted that the Appeals Committee had recommended making the complainant's promotion effective from 2 January 1971 but that the Director-General had chosen not to endorse that recommendation, on the ground that the object of the change in the regulations was to benefit those who were unlikely to receive promotion. The Tribunal held that the decision was one which fell within the discretion of the Director-General and stated that it could see no grounds for interfering with it. It accordingly dismissed the complaint.

3. JUDGEMENT NO. 200 (14 MAY 1973): PANNIER v. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Complaint against a decision to defer the annual salary increment— Limits of the Tribunal's power to interfere with such a decision

On 17 December 1969 the complainant was transferred from one post to another in the Office in which he worked. On 7 December 1970 the Director of the Office recommended deferring his annual salary increment because his services had been unsatisfactory. The complainant then lodged two appeals with the Appeals Board, one against the decision to transfer him and the other against the decision to defer his annual salary increment. The Appeals Board held that the former was time-barred and therefore irreceivable and that the latter should be dismissed as unfounded. The Director-General having accepted that view, the complainant prayed the Tribunal *inter alia* to quash the two decisions mentioned above.

As to the decision to transfer the complainant, the Tribunal stated that it had not been impugned in time and had thus become final. The fact that the complainant had impugned in time the decision to defer the annual salary increment—which had no connexion with the decision to transfer him—could not have the effect of extending the period within which an appeal might be lodged against the latter decision.

As to the decision to defer the annual salary increment, the Tribunal noted that, according to staff rule 103.4, "the granting of an increment may be deferred or withheld if service is not satisfactory". The Tribunal found, on the basis of the dossier, that the decision had been taken

solely on the ground of the complainant's unsatisfactory service and that it was not tainted with any of the irregularities which enabled the Tribunal to interfere with such decisions. It accordingly dismissed the complaint.

4. JUDGEMENT NO. 201 (14 MAY 1973): SMITH v. WORLD HEALTH ORGANIZATION

Request for the revision of a judgement of the Tribunal—There being no provision in the Statute or Rules of Court of the Tribunal for revision, such a request can be considered only in quite exceptional circumstances

The complainant asked the Tribunal to review Judgement No. 189,[28] on the ground that the WHO official who had signed the observations of the Organization on the case had formerly been Assistant Registrar of the Tribunal.

The Tribunal pointed out that there was no provision in its Statute or Rules of Court for the revision of its judgements and that such a request could therefore be considered only in quite exceptional circumstances, in particular if the complainant adduced facts or evidence which he had been unable, through no fault of his own, to produce during the earlier proceedings; it would in any event not provide an opportunity for the parties to repair an omission or correct an error made by them during the original hearing of the case.

Since in the present case the sole ground adduced by the complainant in support of his request could have been put forward during the proceedings terminated by Judgement No. 189, and in addition the ground adduced was clearly without foundation, the Tribunal dismissed the complaint.

5. JUDGEMENT NO. 202 (14 MAY 1973): MALIĆ v. INTERNATIONAL PATENT INSTITUTE

Complaint against a decision rejecting the claim of a staff member to benefit from Staff Regulations which came into force subsequent to completion of his probation—A new provision relating to terms of recruitment cannot be validly invoked by a staff member already in service unless it has been given retroactive effect—Meaning of the principle of equal treatment for all staff members of an organization

On his appointment as a staff member, the complainant was granted two "seniority bonuses" under former staff rule 13, paragraph 2, which read as follows: "The Administrative Council may, however, on a substantiated proposal by the Director, grant seniority bonuses to take account of experience gained by a staff member in previous service in the public or private sector and of real and direct usefulness in carrying out his duties at the Institute." Under this system, up to two years' bonuses might be granted on recruitment, the payment being confirmed only at the end of the probation period, when an extra bonus might be granted or one granted on recruitment might be withdrawn. On completing his probation, the complainant had his two original bonuses confirmed.

Article 21 of the new Staff Regulations, which came into force on 1 January 1971, provided that up to four seniority bonuses might be granted to a staff member on recruitment. The complainant cited that provision in support of a claim for a third seniority bonus in addition to the two he had already received. In reply, he was informed that the new Staff Regulations did not provide for the review of decisions taken before their entry into force.

After an unsuccessful appeal to the Appeals Committee of the Institute, the complainant prayed the Tribunal to order the Institute to take account of the total period of his professional experience prior to his appointment (three years).

The Tribunal noted that, under both the old Staff Rules and the new Staff Regulations, the bonuses formed part of the terms of recruitment. Since the complainant had been appointed and confirmed before the entry into force of the new Regulations, he could have been granted an additional bonus on the basis of article 21 of the new Regulations only by retroactive application of that provision. Except for section VI, however, the new Regulations,

[28] See *Juridical Yearbook*, 1972, p. 142.

including article 21, had no retroactive effect and thus applied only to situations which had arisen after the date of their entry into force.

The Tribunal went on to say that the rejection of the complainant's application for an extra bonus did not violate the principle of equal treatment. That principle, which was laid down in article 5 of the new Staff Regulations and which would be applicable even in the absence of a specific provision, was intended to ensure that persons who were in similar circumstances in fact and in law were put on the same legal footing. However, since at the time of his recruitment the complainant had been subject to the former Staff Rules, he was actually in a different position from staff members recruited under the new Regulations. Consequently, he could not have suffered unequal treatment in relation to them.

The Tribunal found that there was no contradiction in the fact that all staff members, whatever the date of their appointment, enjoyed the benefits of the family allowances provided under article 41 of the new Regulations, even though the new article 21 was applied only to staff members appointed after the entry into force of the new Regulations. To grant family allowances on the basis of article 41 to the whole staff merely meant applying that provision normally to situations existing after it came into force. To grant the complainant an extra bonus under article 21, on the other hand, would mean giving retroactive effect to that provision in preference to the rules that had been applicable at the time.

The complainant also cited a transitional decision by the Administrative Council granting an additional bonus to staff members who had received three bonuses under the old Rules and who would have deserved one more if the new Regulations had been effective at the time. The Tribunal pointed out that, as the complainant had received only two bonuses up to the time when they did become effective, he was not covered by the Administrative Council's decision and could not, therefore, rely on it. Moreover, that decision did not violate the principle of equal treatment because, firstly, it was quite conceivable that a staff member who had received three bonuses under the former system might have been in a position to claim a fourth had the new Regulations been applicable, and, secondly, that possibility was not open to staff members who, like the complainant, had not reached the upper limit of three bonuses at the time of recruitment. Since the decision in question did not deal differently with similar situations, it did not violate the principle of equal treatment.

The Tribunal accordingly dismissed the complaint.

6. JUDGEMENT NO. 203 (14 MAY 1973): FERRECCHIA v. INTERNATIONAL CENTRE FOR ADVANCED TECHNICAL AND VOCATIONAL TRAINING (INTERNATIONAL LABOUR ORGANISATION)

Complaint against a decision to discharge a staff member for misconduct—Right of a staff member against whom disciplinary proceedings are taken to be heard—Principle of proportionality between the misconduct committed and the sanction

On 14 July 1971 the complainant received a reprimand after being found asleep at work. He contested the facts on the ground that he had been not asleep, but unwell. During the night of 7/8 March 1972 he was once again found sleeping on duty. On 23 January 1972 he was informed that the Director intended to impose the sanction of summary dismissal prescribed in article 11.8 of the Staff Regulations. After receiving the recommendations of the internal appeals body, with which an appeal had been lodged, the Director of the Centre decided to discharge the complainant under article 11.7 of the Staff Regulations (discharge with notice) and to grant him the maximum indemnity provided for under that article.

The complainant prayed the Tribunal to quash the decision to discharge him.

The Tribunal noted that in the proceedings before the internal appeals body the complainant, although he had been duly questioned, had not been allowed to be present during the hearing of witnesses or to participate in the examination of the evidence; although the statements made by the witnesses had been communicated to him he had not been in a position, during the hearing, to rebut the charges against him, to put questions, or to ask for

clarification. The right of a staff member against whom disciplinary proceedings were taken to be heard, which must be respected even where contrary provisions existed or in the absence of any explicit text, included *inter alia* the opportunity to participate in the examination of the evidence. Consequently, the complainant's claim that, because his right to be heard had not been respected, the decision impugned was tainted by a procedural irregularity was valid.

The complainant also contended that the decision to discharge him was out of proportion to his offence. In that connexion, the Tribunal pointed out that it would quash a decision if it was found *inter alia* upon an error of law. Cases in which a disciplinary sanction appeared out of all proportion to the objective and subjective circumstances in which the misconduct had been committed should be assimilated to cases of error of law. Since discharge and summary dismissal might cause serious harm to the staff member concerned, they should, in accordance with the principle of proportionality, be imposed only on one whose conduct appeared to be incompatible with the performance of his duties.

The Tribunal found that that condition was not fulfilled in the case before it. The seriousness of the complainant's misconduct could not be evaluated without taking into account the extenuating circumstances; in particular, in the course of six years' employment he had incurred only one mild penalty and had given proof of qualities which were appreciated by his supervisors. In those circumstances the complainant did not appear to be unfit for employment with the Centre, and therefore in discharging him the Director had not observed the principle of proportionality.

The Tribunal accordingly quashed the decision impugned. Inasmuch as the Centre considered that the complainant's reinstatement would be inadvisable, the Tribunal, on the basis of article VIII of its Statute, awarded him compensation in the amount of 1 million Italian lire.

7. Judgement No. 204 (14 May 1973): Silow v. International Atomic Energy Agency and Food and Agriculture Organization of the United Nations

Complaint against a decision that a staff member should retire—Discretionary power of the head of an organization

The complainant contested a decision by the Director-General of FAO informing him that on the FAO Appeals Committee's recommendation he was confirming his decision that the complainant should retire. The complainant also asked the Tribunal to find FAO and IAEA guilty of having wittingly submitted false information to it in the course of earlier proceedings[29] and to order them to pay damages.

The Tribunal noted that, under FAO staff regulation 301.095, the pensionable age for officials was 62. Since the complainant had reached that age by the time of his separation, the Administration had complied strictly with the aforementioned provision. The regulation did empower the Director-General to retain the services of an official beyond the specified age-limit, but such a derogation was confined to exceptional cases and lay within the discretion of the head of the Organization, who was responsible for its efficient operation. In refusing to make use of his discretionary power in the present case, the Director-General had made an appraisal of the facts which was not tainted with any of the irregularities that the Tribunal might correct.

Since the other arguments put forward by the complainant were not pertinent to the matters raised in the case and must therefore be disregarded, the Tribunal dismissed the complaint.

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[29] See *Juridical Yearbook*, 1969, p. 203 (Judgement No. 142) and *Juridical Yearbook*, 1970, p. 149 (Judgement No. 151).

8. JUDGEMENT NO. 205 (14 MAY 1973): SILOW V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

The complainant was protesting, firstly, against a decision forbidding him to attend a meeting of an FAO Committee and, secondly, against the manner in which his numerous appeals had been and were being dealt with in the FAO Appeals Committee.

The Tribunal recalled that, under article 8, paragraph 3, of its Rules of Court, "If it appears that a complaint is clearly irreceivable or devoid of all merit, the President may instruct the Registrar to take no further action thereon until the next session of the Tribunal. The Tribunal shall then consider the complaint and may either adjudge that it be summarily dismissed as clearly irreceivable or devoid of all merit, or order that it should be proceeded with in the ordinary way."

In this case, the Tribunal considered that the actions referred to it did not relate to the observance either of the terms of the complainant's contract of employment or of the Staff Regulations or Staff Rules. It therefore dismissed the complaint as being clearly outside its competence.

9. JUDGEMENT NO. 206 (14 MAY 1973): SILOW V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

The complainant stated that he had received from an anonymous source a copy of a roneoed notice inviting all delegates to the FAO Executive Council to take care if they were accosted by a mentally disturbed person. He believed that to be a move against him in his lengthy dispute with FAO. He therefore asked the Tribunal to hold the Director-General of FAO responsible for the incident and to order the Organization to pay him damages and to make him a public apology.

The Tribunal reached the same conclusion as in the case which was the subject of Judgement No. 205 and dismissed the complaint.

10. JUDGEMENT NO. 207 (14 MAY 1973): KHELIFATI V. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Complaint against summary dismissal—Principle of respect for the rights of defence—Discretionary power of the head of the organization with regard to the penalty to be imposed, subject to the principle of proportionality—Scope of the rule of equality as between officials in disciplinary matters

After receiving two successive censures, including one with a warning, the complainant had been suspended from his functions in accordance with staff rule 110.3, pending the report of the Joint Disciplinary Committee, and had then been dismissed on 30 June 1971 under staff regulation 10.2, for having come to work in a drunken condition. Although such dismissal did not entitle him to any period of notice or termination indemnity, the Director-General decided to pay the complainant his salary and allowances for the period of notice and the termination indemnity to which he would have been entitled had his appointment been terminated under staff regulation 9.1. That decision was brought before the Appeals Board, which held that the correct procedure had been followed and that the impugned decision respected the relevant Staff Regulations and Staff Rules.

The case was referred to the Tribunal, which first noted that it was clear from the minutes of the meeting of the Joint Disciplinary Committee, which had not been challenged, that the complainant had been invited before that meeting to acquaint himself with the contents of his file, that he had participated in the meeting of the Committee, that, assisted by his representative, he had been given the opportunity of submitting oral observations to the Appeals Board and that the principle of respect for the rights of defence had thus been respected.

The Tribunal then noted that the complainant was alleging that the charges against him were false but was not providing the slightest evidence in support of those allegations. On the

contrary, the Joint Disciplinary Committee had accepted the charges against the complainant only after hearing several witnesses. In addition, the charges were such as to warrant a disciplinary measure: it was within the sole discretion of the Director-General to decide upon the appropriate penalty, and the Tribunal could not substitute its judgement for that of the head of the Organization, unless it found that the penalty imposed was clearly out of proportion with the gravity of the offence, which was not so in the present case.

Lastly, the complainant contended that the decision impugned violated the principle of equal treatment for all public servants, inasmuch as several of his colleagues who had been found to be drunk had not been subjected to disciplinary measures. The Tribunal pointed out that the rule of equality as between officials within the same category did not apply to officials against whom disciplinary action had been or might be taken for different reasons and in different circumstances.

Consequently, the Tribunal dismissed the complaint.

11. JUDGEMENT NO. 208 (14 MAY 1973): JOSHI v. UNIVERSAL POSTAL UNION

Complaint against a decision refusing to grant a serving staff member the benefit of a liberalization of the criteria for recruitment—Limit of the Tribunal's power to interfere with a decision lying within the discretion of the head of the organization—Scope of the principle of equality as between the staff members of the same organization—This principle must be applied within the limits imposed by efficient administration

At the age of 33, the complainant had accepted an appointment as Third Secretary, after being informed that under the recently adopted rules on the recruitment, appointment and promotion of staff members of the International Bureau candidates for a post as Second Secretary should be at least 35 years of age and candidates for a post as First Secretary should be at least 40. Two years later he was promoted to Second Secretary.

In June 1971, having learned that an official aged 36 had just been appointed as Assistant Counsellor, the grade immediately above that of First Secretary, the complainant requested that his post be regraded to that of Assistant Counsellor. He was told that the minimum age of recruitment had been reduced because the retirement age would in future be 60 instead of 65, but that that change in the conditions of appointment conferred no rights on serving staff members.

The case was referred to the Tribunal, which recalled that under regulation 5, paragraph 3 (*a*), of the Regulations of the International Bureau of UPU the Director-General classified posts according to the functions mentioned in regulation 15 and determined grading standards, and that under regulation 13 the Internal Rules concerning post grading empowered the Director-General to grade staff members in accordance with their age, education, experience and ability. The Tribunal stressed that, in applying those provisions, the Director-General was required to exercise his discretion. It followed that his decisions could be set aside only if they were taken without authority, were irregular in form or tainted by procedural irregularities, or were based on incorrect facts, or on illegality, or if essential facts had not been taken into consideration, or if there had been a misuse of authority, or if conclusions which were clearly false had been drawn from the documents in the dossier.

With regard to the alleged lack of authority, the complainant maintained that the Director-General had in fact applied two parallel grading systems, the first adopted in 1968 and the second in 1971, and had thus acted *ultra vires*. The Tribunal noted, however, that the Regulations did not determine the substance of the measures to be taken and, in particular, did not forbid the successive adoption of different systems. Consequently, the Director-General had not exceeded his authority.

The complainant also charged the Director-General with having introduced in 1971 post grading standards which he had not previously published in a document communicated to the whole staff. The Tribunal considered that the complainant might not properly rely upon the failure to publish those standards, which applied to staff members recruited after his own appointment and which therefore did not directly concern him.

Thirdly, the complainant claimed that he had accepted appointment to the staff of the Union in the light of the Director-General's assurances concerning uniform application of the age criteria. Consequently, he alleged that the refusal to regrade him in the light of the new recruitment standards amounted to a breach of contract. The Tribunal noted, however, that the Director-General had not at any time excluded the possibility of amending the grading standards then in force or promised to adjust the complainant's position if that were done. The complainant himself had accepted appointment on the terms stated by the Director-General, without making any reservations to cover the possibility of the adoption of new grading standards. There could therefore be no question of any breach of contract.

Lastly, the complainant maintained that as a result of the adoption of new classification standards he had been put at a disadvantage in relation to officials appointed later. The Tribunal emphasized that, according to the principle of equality which was applicable in international organizations as a general rule of law, even if not embodied in any specific text, persons who found themselves in a similar factual and legal position should be put on the same legal footing. At the time of his appointment, the complainant had been subject to the old grading standards. His position was therefore different from that of staff members recruited in accordance with the new standards. The Tribunal therefore concluded that, since he had not been in the same position as those staff members, the complainant had not suffered any discrimination in relation to them.

The Tribunal added that the principle of equality must be applied within the limits imposed by efficient administration. If any amendment of grading standards were to entail a review of the position of staff members already appointed, complications would inevitably arise which might discourage the organizations from making necessary adjustments and thus compromise their efficient operation. It would therefore be unreasonable to require an organization to review the terms of appointment of all its staff members in the light of the principle of equality as a result of changes in standards of recruitment. The Tribunal therefore dismissed the complaint.

12. JUDGEMENT NO. 209 (14 MAY 1973): LINDSEY V. INTERNATIONAL TELECOMMUNICATION UNION

Complaint against a decision concerning the effect on salaries of a new exchange rate—Position under the regulations and rules of staff members of an international organization—The Tribunal is not competent to rule on the legality of resolutions adopted by the legislative organs of an international organization

By a resolution adopted in 1959 by the Plenipotentiary Conference of ITU, the conditions of service, salaries, allowances and pensions of the Union had been assimilated to those of the United Nations common system and the ITU Staff Regulations had been amended accordingly. The complainant had at that time submitted an appeal to the Tribunal—which led to Judgement No. 61 of 4 September 1962—protesting at the prejudice which ITU staff members might suffer because of the assimilation to the United Nations common system, stressing in particular that the Swiss franc had become slightly stronger than the dollar, that a change in the exchange rate had caused a slight loss and that in any case staff members faced a chronic risk. In response to the complainant's allegations, the Union pointed out that ". . . the dollar exchange rate is taken into account in establishing the index on which changes in the post adjustment allowance are based" and stated that "Fluctuations in that rate can therefore have only a negligible effect on ITU staff members . . .". By a Service Order of 17 May 1971, the Secretary-General of ITU decided to apply the exchange rate of 4.08 Swiss francs to the dollar. The complainant took the view that the increase granted in the post adjustment allowance did not fully offset the reduction in the value of the dollar, and he wrote to the Secretary-General pointing out the disadvantages of the new exchange rate and ascribing them to a breach of his conditions of service. Having unsuccessfully requested that he be granted fair compensation for the loss of salary allegedly suffered by him as a result of revaluation, the complainant appealed to the Tribunal and claimed that the rejection of his request (1) constituted a

violation of Judgement No. 61 and of the undertaking given by the organization during the proceedings which led to that judgement, (2) disregarded his terms of appointment and (3) had caused him serious prejudice for which he was entitled to compensation.

As to the first claim, the Tribunal considered that the present complaint was entirely different in origin and purpose from the complaints settled by Judgement No. 61. It followed that the complainant could not properly rely on the decision given in that judgement. Moreover, it appeared from the observations submitted by ITU during the proceedings which led to the aforesaid judgement that the Union did not, and in fact could not legally, undertake any commitment for the future.

As to the second claim, the Tribunal noted that the complainant's contract of appointment stated that his "duties and rights as an official of the International Telecommunication Union are laid down in the Staff Regulations and in the Rules of the Staff Provident Fund". Thus from the time of his appointment the complainant's position under the regulations and rules was liable in principle to be changed by the competent bodies of ITU; only if the Union had upset the whole structure of the complainant's contract could its action have given rise to the award of compensation. The Tribunal added that, even if it were granted that the whole structure of the contract had been upset in the present case, the complainant could not properly rely on that argument since he had agreed to the payment of his salary in dollars since 1960 without protest.

In any case, the complainant's position under the regulations and rules had been changed following the adoption of a resolution by the Plenipotentiary Conference in 1965 and the Tribunal was not competent to rule on the legality of such a resolution. The decisions taken by the executive authorities of the Union in pursuance of that resolution, and specifically those providing that staff salaries should be expressed and paid in United States dollars and not in Swiss francs as before, had themselves been explicitly approved by the Plenipotentiary Conference in 1965 and consequently were no longer open to discussion in contentious proceedings.

The Tribunal therefore reached the conclusion that the complaint could not substantiate his plea to the Tribunal to the effect that the Secretary-General of the Union, after the devaluation of the dollar, ought to have taken decisions contrary to those approved by the above-mentioned resolution of 1965; nor could he ask the Tribunal to substitute itself for the administrative authorities for the purpose of taking decisions which he claimed to be necessary.

As to the third claim, the Tribunal stated that the complainant's allegations of liability on the part of the Union were ill-founded, because he could not properly maintain either that the impugned decision constituted a breach of the terms of his contract or that it was taken in application of unlawful decisions.

13. Judgement No. 210 (14 May 1973): Mendis v. World Health Organization

Complaint against dismissal for misconduct—Concept of misconduct—Principle of proportionality between the impropriety and the penalty

Shortly before the expiry of his appointment, the complainant had been warned that it was the intention of the administration to dismiss him on the grounds of unsatisfactory service and misconduct. He appealed to the Regional Board of Appeal, which held that he had indeed committed misconduct and had shown himself to be unsuited for international service. The Board added, however, that considering his long record of service a warning would have been more appropriate. It accordingly recommended that the Regional Director should uphold his decision to dismiss the complainant but grant him an *ex gratia* payment equivalent to three months' salary in lieu of notice of non-renewal of appointment. The Regional Director accepted those recommendations, but the complainant appealed to the Headquarters Board of Inquiry and Appeal, which found that the complainant's misconduct was not of such gravity as to warrant dismissal as a disciplinary measure, and therefore recommended that the Director-General should take any step he deemed appropriate in the light of that finding. That recommendation was not endorsed by the Director-General, who on 11 August 1971 confirmed

the Regional Director's decision to dismiss the complainant for misconduct but said that he was prepared to adopt the Regional Board's recommendation for payment of three months' salary.

The case was referred to the Tribunal, which noted that the only ground mentioned in the decision of 11 August 1971 was in respect of "irregularities in dealing with a fellowship". In its reply, the Organization described the nature of the complainant's misconduct as follows:

> "Mr. Mendis ignored instructions from the Regional Office, provided false information, misrepresented facts in the letters he prepared to the Ceylonese Government and betrayed the trust that was placed in him by the WHO Representative in so far as signing documents was concerned".

In the view of the Tribunal, that summary of the grievances of the Organization raised four questions:

(1) Was there misrepresentation?

(2) Was the complainant responsible for it?

(3) Did it amount to misconduct within the meaning of Staff Rule 510.6?

(4) Was the penalty of summary dismissal out of all proportion to the degree of misconduct?

With regard to the first question, the Tribunal observed that the correspondence from the Office where the complainant worked contained four statements which had proved to be false. As to the second question, it found that one of the four misrepresentations appeared in a letter which had been signed by an official other than the complainant but that the three others bore the complainant's signature; it was clear that the four misrepresentations were part of a single scheme of deception; thus, if the complainant was innocent, he should have explained how he came to sign three of them. The explanations provided by the complainant on the subject were rejected by the Tribunal, which therefore concluded that the complainant was responsible for the four misrepresentations.

As to the third question, the Tribunal emphasized that "improper action" was a very wide term, which must to some extent be narrowed by its context in Staff Rule 510; that context showed that the impropriety must be sufficiently great to be treated as a species of "misconduct". Misconduct itself might vary very much in gravity. In the present case, the misrepresentations ascribed to the complainant were part of a deliberate plan and might have had a serious effect on the relations between WHO and the Government. In the opinion of the Tribunal, they amounted to misconduct.

With regard to the fourth question, the Tribunal considered whether the penalty imposed gave adequate weight not only to the nature of the misconduct taken by itself, but also to the extent to which in the circumstances of the case the complainant should be held to blame. In that connexion, the Tribunal considered that there were mitigating factors, which the Regional Director and the Director-General did not appear to have taken into account. The complainant might well have supposed that the regulations which he was required to follow did not count for much; in addition, because of defective organization in the Office where he worked, he had come to assume responsibilities greater than those appropriate to his grade. There was no evidence that he had been warned or closely supervised, or that he had been told that methods which had previously gone unrebuked were no longer acceptable. In the opinion of the Tribunal, when those mitigating factors were put into the scale together with the lack of any corrupt motive and the complainant's previous good record, they caused the sentence of summary dismissal to appear out of all proportion to the degree of misbehaviour in the case. Indeed, the Director-General himself had entertained some doubts, since he had accepted the recommendation of the Regional Board of Appeal concerning the payment of three months' salary in lieu of notice; that was consistent with automatic termination and inconsistent with dismissal for misconduct.

The Tribunal therefore quashed the decision of 11 August 1971 in so far as it confirmed the dismissal of the complainant for misconduct and confirmed that decision in so far as it granted to the complainant payment of three months' salary.

14. JUDGEMENT NO. 211 (14 MAY 1973): HOPKIRK v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Complaint seeking the rescission of a certificate of service—Discretionary power of the Director-General—A certificate of service, unless expressly covering a specific period, must take account of the entire period of service

The complainant left the Organization on 5 January 1969 upon the expiry of his contract. On 5 February 1969, he requested a certificate of service commenting on his work and conduct as an FAO staff member. Since the certificate given to him did not meet his expectations, he took the matter to the Appeals Committee and also requested reinstatement at the P-5 level and payment of damages.

Not meeting with satisfaction, he appealed to the Tribunal, calling for (1) reinstatement and (2) a new certificate of service.

On the first point, the Tribunal pointed out that the request could only have been granted if the Director-General's decision not to renew the complainant's contract had been set aside and that, since it had not been impugned within the prescribed time-limit, the decision had become final.

On the second point, the Tribunal noted that the principle that the Tribunal will not interfere, except upon particular and limited grounds, with decisions of the Director-General on matters that fall within his discretion, applied with special force to the form and contents of such documents as appraisal reports and certificates of service. In the Tribunal's opinion, it was the Director-General's responsibility to determine whether a certificate of service was in substance and language just and fair.

The Tribunal considered that there was no evidence of any prejudice in this case. However, it noted that according to the conclusions of the Appeals Committee, which were not disputed by the Organization, the services of the complainant had been satisfactory up to the last year and had only become unsatisfactory towards the end of his employment. The Organization maintained that "the assessment of a staff member's services, when set out in a certificate of service, should in particular reflect the standard of a former staff member's services at the time of his leaving the Organization". The Tribunal did not accept this view. It pointed out that a certificate of service relates to the whole period and that if an evaluation is correct only in relation to a part of the period, it must be limited to that part. It accordingly granted the relief sought by the complainant only on the grounds that the evaluation in the certificate was not based on the entire record and decided that the certificate would be rescinded in order that the Director-General might, if the complainant so requested, issue a new certificate on the correct basis.

15. JUDGEMENT NO. 212 (22 OCTOBER 1973): ZAMUDIO v. WORLD HEALTH ORGANIZATION

Complaint seeking the rescission of an appraisal report and of a decision to withhold an annual salary increment

The complainant was employed on a short-term contract; he had been given several warnings about the quality of his work and received a very bad appraisal report for 1971, which resulted in a decision to withhold his annual salary increment. The complainant appealed to the Board of Inquiry and Appeal but the decision impugned was confirmed by a decision of the Director-General dated 19 July 1972.

Since the complainant had been absent for several months on account of illness, the Director of the Joint Medical Service advised the Administration that, on medical grounds, WHO could not make further use of his services. On the date of expiry of his contract, which was 31 January 1973, the complainant ceased to be employed by WHO. Meanwhile, that is, when he was still working for the Organization, he had filed a complaint with the Tribunal, seeking:

(1) An end to the "policy of discrimination" against him;

(2) A transfer to a post suited to his abilities;

(3) The rescission of his appraisal report for 1971; and

(4) Payment of the salary increment which had been withheld from him.

As to the first point, the Tribunal stated that a thorough examination of the evidence revealed no trace of any "policy of discrimination" followed in respect of the complainant because of his nationality. It was, in fact, established that the decision of 19 July 1972 had been based on the way in which the complainant had performed his duties, and there was no evidence that it had been based on incorrect facts or represented abuse of authority.

As to the second point, the Tribunal noted that the assignment of a staff member to a specific post was a matter for the discretion of the Director-General. It did not appear from the evidence in the dossier that the Director-General's decision in the case was tainted by any of the irregularity which the Tribunal is competent to censure.

As to the third and fourth points, the Tribunal noted that the report to which exception was taken was based on facts which had not been proved to be incorrect and which were such as to provide legal justification for withholding the complainant's salary increment.

The Tribunal accordingly dismissed the complaint.

16. JUDGEMENT NO. 213 (22 OCTOBER 1973): MISRA v. INTERNATIONAL TELECOMMUNICATION UNION

Criteria for receivability of a complaint: time-limits, need for a decision giving grounds for a complaint, rule about exhausting internal remedies

The complainant had been appointed by ITU for one year, on 8 December 1968, and his contract expired on 8 December 1969. In the course of his mission he had been involved in a traffic accident. After his end-of-contract medical examination, the Director of the Joint Medical Services wrote to ITU on 20 January 1970 to report that the complainant was fully fit for work but should probably undergo physiotherapeutic treatment. On 26 August 1970, the complainant asked the Director of the Joint Medical Service whether he could claim under two insurance policies (a life insurance policy and a sickness and accident insurance policy) taken out in his name. On 5 July 1972, ITU wrote to the complainant confirming its earlier decisions, to the effect that the Organization would pay for 45 sessions of physiotherapeutic treatment. Meanwhile, in June 1972, the complainant had visited Geneva where he had held consultations with senior ITU officials. He claims to have then been promised a second mission. On 14 December 1972 he wrote to ITU referring to these alleged promises but was informed on 11 January 1973 that there were no vacancies suited to his qualifications and experience.

The complainant then took the matter to the Tribunal, asking it to order ITU to honour the assurances given to him by the Secretary-General.

The Tribunal dismissed the complaint. It pointed out that if the complainant intended to impugn the letter of 5 July 1972 in which the Secretary-General of ITU rejected his claim for compensation, his complaint was irreceivable because it was not filed within the time-limit required under article VII, paragraph 2, of the Statute of the Tribunal. If he intended to impugn the refusal to give him a new appointment, that complaint was also irreceivable because he was not impugning any decision embodying such a refusal and in any event he ought not to have addressed himself directly to the Tribunal before submitting an appeal to the administrative appeals body.

17. JUDGEMENT NO. 214 (22 OCTOBER 1973): DHAWAN v. WORLD HEALTH ORGANIZATION

Complaint against a decision to terminate staff member for abandonment of post—Failure to complete end-of-contract medical formalities does not constitute grounds for invalidating a termination

The complainant impugned a decision to terminate him for abandonment of post.

The Tribunal noted that the staff member's absence began on 22 June 1969 and continued until 11 October 1969, when the complainant was notified of his termination. It pointed out

that staff rule 980 provided that a staff member absent from duty without satisfactory explanation for more than 15 days was considered to have abandoned his post and should be terminated.

The Tribunal considered that the explanation given by the complainant—that during the whole of this period he was too sick to attend—could only be regarded as unsatisfactory in the light of the undisputed evidence. The Tribunal accordingly held the view that the complainant's appointment was validly terminated under Staff Rule 980.

The Tribunal noted that the complainant did not undergo the end-of-contract medical examination provided for in staff rule 330.7. It nevertheless considered that non-compliance with this rule did not in itself render a termination invalid.

The Tribunal accordingly dismissed the complaint.

18. JUDGEMENT NO. 215 (22 OCTOBER 1973): LIBERATI v. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Complaint against a decision refusing extension of a period of secondment—The Tribunal is only competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of staff members and of provisions of the Staff Regulations

The complainant, who had been a staff member of FAO since 1963, had been seconded to the Secretariat of GATT from June 1970 to June 1971. On applying for an extension of his secondment for a further year, he was refused on the grounds of "pressing requirements" in FAO. He then decided to return to FAO. Considering that the reasons given in support of the refusal to extend his secondment had not proved valid, he asked the Appeals Committee to recommend that the Director-General should pay him damages, or to recommend his termination owing to abolition of post. The negative findings of the Appeals Committee were accepted by the Director-General.

The Tribunal, in considering the case, noted that under article II of its Statute, it was competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of staff members and of provisions of the Staff Regulations. There was not, nor was there alleged to be, any term of the complainant's appointment or any provision in any Staff Regulations which required the Organization either to grant or to extend secondments to another international organization. The Tribunal accordingly decided that it was not competent to examine this complaint or to consider whether or not the reasons given by the Organization for its refusal were well founded.

19. JUDGEMENT NO. 216 (22 OCTOBER 1973): HAKIN v. INTERNATIONAL PATENT INSTITUTE

Complaint seeking the payment of child allowances—Definition of a dependent child—Case of a divorced staff member not having custody of his children

The complainant was divorced and custody of his two two children had been awarded to the mother. By a document signed before a notary he had undertaken to pay a monthly maintenance allowance for each of his two children. On 1 June 1970 he wrote to the Director-General of the Institute objecting to the Administration's decision to interpret the Staff Rules then in force to mean that the child allowance was not payable to a divorced father who did not have custody. His claim was dismissed by a letter of 19 June 1970. He then lodged an appeal with the Appeals Committee which was not receivable under the restrictive rules then in force. Later amendment of the rules enabled him to lodge a valid appeal, by a letter to the Director-General of 22 April 1972. On 5 May 1972 the Director-General dismissed his claim and he appealed to the Appeals Committee. The majority of the Committee recommended dismissing the appeal and the Director-General endorsed that recommendation in a letter to the complainant of 26 June 1972.

The Tribunal first had to consider the question of its competence. It pointed out that article 83 of the present Staff Regulations laid down the procedure for internal appeals which began with a request to the Director-General or to the Administrative Council, followed by

reference to an Appeals Committee if the request was rejected, and ended with a decision taken after consideration of the findings of the Appeals Committee. The internal procedure and the procedure before the Tribunal were connected; therefore, subject to any provisions to the contrary in its own Statute, the Tribunal was competent to hear any cases referrable to the internal appeals body. Under article 98, paragraph 4, of the present Staff Regulations, the Appeals Committees were competent to deal with disputes arising out of the application of the former Staff Rules. It followed that the same was true of the Tribunal itself, since its Statute contained no provisions to the contrary. Article 98, paragraph 4, could not, however, apply to disputes on which a final decision had been taken and which therefore could not be reopened failing a specific provision to that effect.

As to the substance of the question, the Tribunal pointed out that, as both parties agreed, the definition of a dependent child was the same in the old Rules as in the present Regulations (art. 43). Both texts specify that a child is the dependent of a staff member if he actually maintains him. It was the interpretation of the word "maintain" on which the parties disagreed. The complainant interpreted it to mean that a parent need only contribute to the costs of housing, feeding, clothing and educating the child in order to be deemed to maintain the child. The Institute held that only the person who provided for all the child's material and moral needs could claim to maintain it, and it followed that a child of divorced parents was considered to be maintained by the parent who had custody of the child.

The Tribunal acknowledged that both these interpretations were compatible with the letter of the applicable regulations. It noted, however, that under article 41 (*b*), the head of the family was defined as "a widowed, legally separated, divorced or unmarried staff member, of either sex, who has one or more dependent children within the terms of articles 43 and 44 below". The term "dependent child" therefore had the same meaning in article 41 and in article 43. It would clearly be unreasonable to describe a divorced staff member as the "head of the family" for the sole reason that he paid an allowance for his children. Besides, the complainant accepted this view himself inasmuch as he recognized that he was not entitled to an allowance as head of the family. It therefore followed that he could not claim the child allowance either, since the grant of both allowances depended on the fulfilment of the same condition.

In the opinion of the Tribunal, this interpretation could be regarded as conforming to the intentions of the authors of the former Rules and of the present Regulations. The maintenance allowance payable by a divorced person for children could very well be less than the amount of the allowance payable for a dependent child, and it would then be contrary to the spirit of the Regulations for the person paying the maintenance allowance to receive the whole amount of the child allowance. Hence, if the authors had intended that the applicable provisions should have the effect of making child allowances payable to a divorced staff member responsible for paying a mere maintenance allowance, they would presumably have included in the Regulation special provisions to deal with such cases; at the very least, provision would have been made for the payment of the child allowance to the parent having custody. The fact that both the former Rules and the present Regulations were silent on these points suggested that child allowances were in principle payable only to the staff member who had custody of the children. The only possible exception would be the case of a parent having custody being wholly unable to maintain the children, with the result that full responsibility for their maintenance was assumed by the other parent. In the present case the financial contribution made by the complainant to the maintenance of the children was probably smaller than that made by their mother, and he therefore did not actually maintain his children according to the strict interpretation adopted by the Tribunal. His claim for the payment of child allowances therefore failed.

The Tribunal also rejected the arguments of the complainant in support of his claim to an education allowance. The relevant provisions, as was clear from their wording, applied only to staff members with dependent children. It followed that the complainant was not entitled to an education grant or allowance since he had no dependent children within the meaning of the Regulations.

20. JUDGEMENT NO. 217 (23 OCTOBER 1973): HAKIN V. INTERNATIONAL PATENT INSTITUTE

This case is similar to the case dealt with in Judgement No. 202 [30]

21. JUDGEMENT NO. 218 (22 OCTOBER 1973): HAKIN V. INTERNATIONAL PATENT INSTITUTE

Complaint seeking to have the extension of a probation period some years earlier taken into account in the reclassification of staff members in a new system of grades and steps

The complainant was appointed to the Institute on a probationary basis in 1967, and in 1968 it was decided to extend his probation period by three months. His appointment was confirmed on 1 July 1968 and he was classed at grade 3 on scale 1. On 22 December 1971 the Administrative Council of the Institute adopted new Staff Regulations which replaced the Staff Rules under which the complainant had been recruited and prescribed a new system of grades and steps. On the basis of a scale of equivalence adopted by the Administrative Council, the complainant was reclassified at grade A.6, step 1, with effect from 1 January 1971, his seniority as of that date being fixed at 18 months. The complainant appealed against the regrading decision on the grounds that according to the scale of equivalence the seniority on which regrading was based should be the actual period spent in the service of the Institute, and that the delay in his advancement owing to the extension of his probation period should not be taken into account in regrading him. That appeal was dismissed, and he lodged an internal appeal, to which the response was a negative recommendation which was accepted by the Director-General.

The Institute, in its reply to the Tribunal contended that the complainant, although ostensibly contesting his regrading, was in reality impugning decisions taken in 1968 which had become final, and that it was therefore questionable whether his complaint was receivable and, if so, whether his arguments against the effects of the 1968 decisions could be taken into consideration. The Tribunal considered that there was nothing to prevent a staff member from lodging a complaint against one decision while at the same time disputing the validity of an earlier one, or claiming the cancellation of its effects, provided that it had not become final.

The Tribunal noted that in his memorandum the complainant stated that he did not dispute that "the purpose of the scale of equivalence used in regrading was to translate the staff member's position on the old scale at the time of regrading into the grades and steps prescribed by the new Staff Regulations". He thus recognized that in assessing his seniority with due regard to the situation created by the decision confirming his appointment in 1968, the Director-General had correctly applied the instructions contained in the new Staff Regulations. It followed that his claims appeared to be without merit.

It was true that the complainant contended that the decision on his regrading should have had regard to his real seniority, including the three months' extension of his probation, but that argument was not only in contradiction with his own statements but was also irrelevant. Article 98, paragraph 4, of the present Regulations did indeed give the appeals committees competence to consider disputes arising out of the application of the former Staff Rules, but it did not apply to disputes which had been the subject of a final decision; the complainant could not therefore rely on it to contest the validity of the 1968 decision, which had become effective immediately.

The Tribunal accordingly dismissed the complaint.

22. JUDGEMENT NO. 219 (22 OCTOBER 1973): HEROUAN V. INTERNATIONAL PATENT INSTITUTE

This case is similar to the case dealt with in Judgement No. 216.[31]

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[30] See p. 114 of this *Yearbook*.

[31] See p. 124 of this *Yearbook*.

23. JUDGEMENT NO. 220 (22 OCTOBER 1973): HEROUAN v. INTERNATIONAL PATENT INSTITUTE

Complaint seeking the revocation of a minute depriving staff members who were nationals of three specified countries of the option to have part of their remuneration transferred to accounts opened in their names with banks in their home countries—Applications to intervene—Any staff member affected by the disputed minute, whether or not he had availed himself of the above-mentioned option, had a direct personal interest in seeking the revocation of the minute in question—Revocation of the said minute on the ground of misuse of authority and violation of the principle of equal treatment

Prior to being amended article 63 of the Staff Regulation of the Institute contained the following provision:

> "In so far as exchange regulations and the rules governing Institute accounts opened abroad may allow, a staff member may ask for the regular remittance of part of his remuneration to an account opened in his name with a bank in his home country, provided that the Institute itself has a bank account in that country. Subject to these conditions, the remittance will be made at current official monetary exchange rates and any expenses incurred by the Institute shall be borne by the staff member."

By a minute of 28 July 1972 the Director-General had informed staff members who were nationals of Belgium, France and Luxembourg that because of exchange regulations and the rules governing the Institute's accounts in those countries it would not be possible until further notice to transfer part of their remuneration from those accounts. The minute was read out at a meeting of the Administrative Advisory Committee on 4 August. On 4 September 1972 the complainant asked the Director-General to revoke the disputed decision. The Director-General refused, and the case was submitted to the Appeals Committee, which held that the appeal was irreceivable on the ground that it impugned a decision taken after consultation with the Administrative Advisory Committee. This present complaint and applications to intervene from staff members of Belgian, French and Luxembourg nationality were then submitted to the Tribunal.

The Tribunal ruled first on the applications to intervene. It declared the applications from staff members of French nationality, whose interests were identical with those of the complainant and who accordingly had an interest in intervening in his complaint, to be receivable. It delcared the other applications not receivable on the ground that the applicants, being subject to different national laws and regulations, had not the same interests as the complainant.

The Institute maintained that the complainant had not at any time asked to be given the benefit of former article 63, so that the minute of 28 July 1962 could not be regarded as detrimental to him as an individual; only the Institute's refusal to grant an application based on former article 63 would have given rise to a valid complaint. It added that since former article 63 had been revoked and replaced the complaint was without foundation.

In response to that argument the Tribunal pointed out that the complainant, even though he had never availed himself of former article 63, had had the option to do so at any time; accordingly he had a direct personal interest in seeking the quashing of a decision which deprived him of that option. Moreover, the minute of 28 July had actually been applied until the entry into force of new article 63 of the Staff Regulations. The new provision, not being retroactive, affected future circumstances alone, and could not have the effect of nullifying a decision which had actually been applied from August 1972 to 15 March 1973.

The Tribunal ruled next on the legality of the minute of 28 July 1972. It pointed out that under former article 63 the Director-General of the Institute had had authority to decide whether the condition laid down in that article was fulfilled and, if not, to take such measures as the exchange regulations might require at any time. In that matter he necessarily had discretionary power, and it followed that the competence of the Tribunal to review his decision was a restricted competence.

The Tribunal noted that the minute of 28 July 1972 had been issued as the result of a circular from the French Minister of Finance. It held that the new regulations introduced by the French Government did not in themselves impede the exercise by staff members of their rights under former article 63; its effect was merely to oblige the Institute to obtain a supply of financial francs, which was neither impossible nor particularly difficult for it to do. It followed that the Director-General had misunderstood the effects of the article and had, moreover, violated the principle of equal treatment for staff members who were, in relation to the Institute, on an identical legal footing. The decision impugned was consequently quashed.

24. Judgement No. 221 (22 October 1973): Ozorio v. World Health Organization

Complaint against a decision, agreed to by the complainant subject to certain reservations, to extend an appointment—The Tribunal has no power to adjudicate upon claims and arguments that lead to a final decision unless they form part of that decision—Participation of the administration in the expenses incident to an appeal

The complainant was employed in Washington under a five-year appointment which was to expire on 31 December 1971. On 21 October 1971 he was notified of a decision to transfer him to New York and informed that his appointment was extended by one year; it was subsequently extended by two years. On 16 December 1971 the complainant informed the Director-General that he was submitting the decision to terminate his tenure of the post he had accepted in Washington to the Regional Board of Appeal. His appeal having been dismissed by the Regional Board of Appeal, the complainant appealed to the Headquarters Board of Inquiry and Appeal, which recommended that the appeal be dismissed on the ground that the impugned decision had not had the effect of separating him from service, since he had been given a new appointment in New York; the Board recommended, however, that he should be given a five-year appointment instead of a two-year appointment, and that the Organization should participate in meeting the costs incurred by the complainant in relation to the appeal; the Director-General accepted the first two recommendations of the Board of Inquiry and Appeal, but rejected the third; he notified the complainant of his decision on 6 November 1972. On 22 December 1972 the complainant agreed to the replacement of his two-year appointment by a five-year appointment, but reserved his right to appeal against the decision of 6 November 1972 in so far as it related to the termination of his appointment in Washington.

The Tribunal, on the subject of this aspect of the decision of 6 November 1972, pointed out that its competence extended, and extended only, to the review of final decisions that were impugned. In the course of proceedings leading to a final decision various claims and arguments might be put forward and resisted; except in so far as they formed part of the final decision, the Tribunal had no power to adjudicate upon them. It might be that at the end of the proceedings a complainant, while satisfied with the decision itself, would be dissatisfied with the reasoning or some of the reasoning by which it was sustained; unless the decision itself was impugned, the Tribunal had no power to review the reasoning or to comment thereon. Likewise, the Tribunal had no power to grant relief except that which flowed from the successful impugning of a final decision.

The Tribunal pointed out that the decision impugned in the current proceedings was contained in a letter of 6 November 1972 in which the Director-General had accepted the first and second recommendations of the Board of Inquiry and Appeal and had rejected the third. The decision impugned was therefore in two parts: the first part of the decision was, in effect, a single decision to reverse the termination and to grant an extension of appointment of five years, a decision reached not on the ground that the complainant was entitled to it but in the interests of the Organization.

The complainant had accepted the five-year appointment, "it being understood that such acceptance does not preclude me from appealing your decision of 6 November 1972 relating to the circumstances of the non-renewal of my appointment". The Tribunal considered that by that reservation the complainant was seeking to say one of two things:

(*a*) that while accepting the renewal of his contract, he was appealing against the non-renewal; or

(*b*) that while accepting the renewal, he still wished to complain about an earlier non-renewal and about the circumstances in which a decision, since superseded, had been reached.

The first assertion was self-contradictory; the second would involve an investigation into the history of a decision which was not being impugned and which, having been superseded, was not impugnable. The Tribunal could not therefore, give effect to the complainant's reservation.

With regard to the second part of the impugned decision, i.e., the refusal of the administration to participate in meeting the costs incurred by the complainant in relation to his appeal, the Tribunal noted that the complainant was not alleging that an obligation to pay the expenses incident to his appeal was one of the terms of his appointment or the subject of any provision in the Staff Regulations. It pointed out that there were provisions in the Staff Rules which required the Organization to pay costs in certain special situations which did not arise in the case in question. From which it was to be inferred that there was not in the Staff Rules any general or implied obligation to pay costs. The Tribunal consequently declared that it was not competent, under article II of its Statute, to order the relief requested.

25. JUDGEMENT NO. 222 (22 OCTOBER 1973): SMITH v. WORLD HEALTH ORGANIZATION

Complaint by a staff member who, after being granted a disability pension by the Organization, was awarded an annual disability benefit by the United Nations Joint Staff Pension Fund— Principle that there should be no double indemnity

As the result of an accident which had been held to be partly attributable to the performance of official duties, the complainant was granted an annual permanent disability benefit of 2,850 Swiss francs. The complainant had also submitted to the WHO Staff Pension Committee a claim for a full disability benefit. His claim having been rejected and his application for review dismissed, he appealed to the Standing Committee of the United Nations Joint Staff Pension Fund, which awarded him an annual disability benefit of $US 1,747.56, payable from 31 March 1970.

On 8 August 1972 the complainant was informed by WHO that under section II, paragraph 6, of the rules governing compensation, the award of the disability benefit by the Joint Staff Pension Fund would entail the deduction of that benefit from the amount payable in compensation.

Since the amount which remained due to the complainant from WHO after the deduction in question was made was so small, the Organization proposed commuting the benefit into a lump-sum payment of 4,290 Swiss francs. The complainant offered to make no further claim against the WHO if it raised the lump sum to 50,000 Swiss francs.

The Organization stated in a letter of 5 October 1972 that it stood by its decision.

In its considerations the Tribunal pointed out that by notifying the complainant of its decision to grant him an annual permanent disability pension of 2,850 Swiss francs, the Organization was not making a fresh promise and thereby creating a new contract. It was merely stating the manner in which it proposed to fulfil the obligations which it had already undertaken by its contract of employment with the complainant, governed as that contract was by the Staff Regulations. Staff rule 720 provided that a staff member was entitled to compensation in the event of illness, accident or death attributable to the performance of official duties on behalf of the Organization, payable in accordance with rules established by the Director-General. Section II, paragraph 6, of the rules so established provided that there should be deducted from the compensation prescribed "all benefits actually paid in respect of the same series of circumstances under the regulations of any international staff pension fund or international provident fund to which the staff member may belong".

The complainant did not dispute that benefits under such a fund which were actually payable at the time when the compensation was being established under staff rule 720 would

fall to be deducted from the amount to be fixed; but he contended that, once the compensation had been established and embodied in an award, benefits which thereafter became payable could not be deducted from it. That contention might be sustainable on a strict and literal construction of paragraph 6, but it was contrary to the principle that was clearly being expressed in the Rules, which was that an accident should not form an element in the assessment both of the compensation and of the pension benefits; that principle was, in fact, the familiar principle of insurance law that there should be no double indemnity. Accordingly the complainant's contention failed.

26. JUDGEMENT NO. 223 (22 OCTOBER 1973): GAUSI v. INTERNATIONAL CENTRE FOR ADVANCED TECHNICAL AND VOCATIONAL TRAINING (INTERNATIONAL LABOUR ORGANISATION)

Complaint seeking the quashing of a decision not to renew a fixed-term appointment— Discretionary power of the administration to retain in service a staff member who has reached retirement age— Quashing of a decision of non-renewal whose sole purpose is to remove a staff member in consequence of certain irregularities that have come to light in his service without any disciplinary proceedings having been undertaken

The complainant, who had reached the age of 60 on 22 October 1969 and would normally have retired on that date, had had several renewals of appointment, the last of which was due to expire on 31 July 1972. At the beginning of 1972 irregularities came to light in the evaluation reports on external training courses followed by holders of Centre fellowships, and the complainant's superior carried out inquiries. During one of his interviews with the complainant, the latter signed a statement promising not to ask for the renewal of his appointment. Immediately afterwards the complainant suffered a nervous breakdown and remained on sick leave until the end of July. On 26 July 1972 he was informed that his appointment at the Centre would end on 31 July 1972.

Since he was not a staff member and therefore, in his view, could no longer seek redress under the internal procedures, the complainant submitted directly to the Tribunal a complaint against the decision of 26 July 1972, in which he asked that he should be awarded damages for adverse effects on his health and on his prospects of finding new employment.

With regard to the receivability of the complaint, the Tribunal noted that the complainant had on 4 August 1972 submitted a complaint against the decision of 26 July 1972. He had thus complied with the rule that a staff member must make a complaint to the director of the organization before filing a complaint with the Tribunal. The Director, who had the option of referring the complaint first to the Staff Relations Committee, had replied by a decision of 23 August 1972 which gave the complainant only very partial satisfaction. The complainant was therefore entitled to submit a complaint to the Tribunal.

As to the legality of the decision impugned, it was clear from article 13.3 of the Staff Regulations that the Director had discretion in determining the special cases in which a staff member might be retained in service beyond the normal age limit, and the Tribunal's competence to review the legality of the decision was confined to determining, among other things, whether it was tainted by misuse of authority.

The Tribunal found that it appeared from the evidence as a whole that the Director's decision had not been based on the physical or mental inability of the complainant or on his unsatisfactory performance to date or on the necessities of the service. The sole purpose of the decision had been to remove the complainant from the Centre in consequence of irregularities that had come to light in his service, without any serious inquiry to determine who had been responsible and without any disciplinary proceedings providing proper safeguards having been undertaken. The decision was therefore tainted by misuse of authority and had to be quashed.

The Tribunal consequently ruled that the Centre should pay the complainant the sum of 35,000 Swiss francs as compensation.

27. JUDGEMENT NO. 224 (22 OCTOBER 1973): GAUSI v. INTERNATIONAL CENTRE FOR ADVANCED TECHNICAL AND VOCATIONAL TRAINING (INTERNATIONAL LABOUR ORGANISATION)

Following the submission of his first complaint to the Administrative Tribunal,[32] the complainant sent the Chief of Personnel of the Centre a letter enclosing a medical certificate and expressing the view that his poor health was due to the Centre's ill-treatment of him. Five months later, having received no reply, he submitted a further claim for compensation to the Tribunal.

The Tribunal ruled that in so far as the complainant's request was based on facts prior to 31 July 1972, his claims had been dealt with in Judgement No. 223, and that in so far as he was claiming compensation on account of circumstances or actions of the Centre subsequent to 31 July 1972, his claims were without merit, because he had at the latter date severed all his ties with the Centre and the dossier showed no trace of any action by the Centre subsequent to 31 July which might have arisen out of previous action or caused further injury to a former staff member who was no longer employed by the Centre.

The Tribunal consequently dismissed the complaint.

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[32] See Judgement No. 223 above.