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

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

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Chapter V

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

A. Decisions of the Administrative Tribunal of the United Nations[1] [2]

1. JUDGEMENT NO. 231 (9 OCTOBER 1978):[3] GAUDOIN *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Request for rescission of a decision denying application of a retroactive salary scale issued after the effective date of applicant's resignation—Question of the receivability of the application

The applicant, a former UNICEF staff member, had been denied the benefit of a revised local salary scale which had been issued after the effective date of his resignation (1 November 1973) but applied retroactively to 1 July 1973. Though the administrative decision embodying the denial had been rendered on 20 September 1974, the applicant had delayed filing his claim with the Joint Appeals Board until 30 January 1977.

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[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 1978, 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 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] At a special plenary meeting held on 29 September 1978, the United Nations Administrative Tribunal, further to a request for an advisory opinion from the Secretary-General of the United Nations, reached the following unanimous decision:

"Considering that the Statute of the United Nations Administrative Tribunal has made no express provision for receiving requests for an advisory opinion from any party nor laid down procedures for dealing with such requests and

"Considering that the history of the adoption of the Statute of the United Nations Administrative Tribunal shows that the General Assembly expressly negatived a proposal for investing the Administrative Tribunal with competence to render advisory opinions at the request of the Secretary-General or at the request of the Staff Committee with the consent of the Secretary-General;

"The Tribunal decides that it has no competence to entertain the request for an advisory opinion as stated in your letter dated 17 July 1978."

In this connexion it should be recalled that the initial draft Statute of the United Nations Administrative Tribunal, prepared in 1946 by the Advisory Committee appointed by the Secretary-General under the terms of General Assembly resolution 13 (I), contained no provisions authorizing the Tribunal to give advisory opinions (see *Official Records of the General Assembly, Fourth Session, Fifth Committee,* annex 10 the summary records of meetings, vol. I, document A/986, annex III). The revised draft Statute (first revision) submitted to the General Assembly by the Secretary-General on 21 September 1949 likewise contained no such provisions (*ibid.*, annex I). In its comments on the revised draft Statute, however, the Staff Committee proposed that the following article be inserted after article 2:

"The Tribunal shall be competent to give advisory opinions at the request of the Secretary-General or the Staff Committee." (*Ibid.*, annex IV, paras. 17-19.)

The respondent contended that, due to the long delay between the notification of the administrative decision and the submission of the applicant's claim, the requirements of staff rule 111.3(*a*)[4] were not complied with, and that, the Joint Appeals Board having determined that the appeal was not receivable on this ground, the Tribunal should reject the application as unreceivable under article 7 of its Statute.[5]

The Tribunal noted that, though warned throughout by the Secretary of the Joint Appeals Board that his appeal might not be receivable unless he was able to invoke exceptional circumstances justifying the long delay,[6] the applicant had failed to produce any satisfactory evidence to account for the delay of more than twenty-seven months before formulating his appeal.

Accordingly, the Tribunal concluded that the Joint Appeals Board's decision that the appeal was not receivable was well founded, and that, in the absence of a recommendation on merits from the Board, the application was not receivable under article 7 of the Tribunal's Statute.

2. JUDGEMENT NO. 232 (12 OCTOBER 1978):[7] DIAS *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Request for rescission of a decision denying validation of non-contributory services performed prior to eligibility for participation in the Pension Fund—Question of the receivability of the application

The applicant, a former technical assistance expert of the United Nations, had become eligible to participate in the United Nations Joint Staff Pension Fund on 1 January 1969. He had sought the advice of the Resident Representative of the United Nations Development Programme (UNDP) in Somalia, as to whether he could pay in instalments the sum that was payable to the Pension Fund for the purpose of validating his five years of service prior to January 1969. The Resident Representa-

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In the course of the discussion of the item in the Fifth Committee, the delegation of New Zealand similarly proposed to add after article 2 a new article reading:

"The Tribunal and the Appeals Board shall be competent to give advisory opinions at the request of the Secretary-General or at the request of the Staff Committee with the consent of the Secretary-General." (*Ibid.*, document A/C.5/L.4/Rev.1 and Corr.1.)

In a revised draft Statute (second revision) submitted to the Fifth Committee on 31 October 1949, the Secretary-General accordingly proposed the addition to article 2 of a paragraph 5 reading:

"The Tribunal shall be competent to give advisory opinions at the request of the Secretary-General or at the request of the Staff Committee with the consent of the Secretary-General." (*Ibid.*, document A/C.5/L.4/Rev.2.)

On 2 November 1949, at its 214th meeting, the Fifth Committee, on the proposal of the delegation of the Netherlands, decided to delete paragraph 5 of article 2 by a vote of 30 to 3, with 7 abstentions.

The subject-matter of the above-mentioned request for an advisory opinion was subsequently dealt with by the Tribunal in its judgements Nos. 337, 338 and 339. A summary of those judgements will appear in the *Juridical Yearbook*, 1979.

[3] Mme. Paul Bastid, Vice-President, presiding; Mr. T. Mutuale, Member; Sir Roger Stevens, Member; Mr. F. A. Forteza, Alternate Member.

[4] Reading as follows:

"(*a*) A staff member who, under the terms of regulation 11.1, wishes to appeal an administrative decision, shall, as a first step, address a letter to the Secretary-General, requesting that the administrative decision be reviewed. Such a letter must be sent within one month from the time the staff member received notification of the decision in writing."

[5] Reading 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."

[6] Under staff rule 111.3 (*d*) "An appeal shall not be receivable by the Joint Appeals Board unless the above time limits have been met, provided that the Board may waive the time limits in exceptional circumstances."

[7] Mr. R. Venkataraman, President; Sir Roger Stevens, Member; Mr. E. Ustor, Member.

tive had advised him that, since he had only a three month fixed-term contract with the prospect of an extension very much in doubt, he could only make payment in a lump sum. On the basis of this advice, the applicant had decided not to validate his prior years of service. However, contrary to the Resident Representative's expectations, the applicant received an extension of his contract, and thereafter continued in the employ of the United Nations until 1977. He however made no further attempt to pursue the possibility of validation and the issue remained dormant until 1976, when the applicant sought the guidance of his superior in making a tentative assessment of his retirement entitlements.

On 28 July 1977, the applicant asked that the Secretary of the United Nations Joint Staff Pension Board be informed that the Resident Representative had committed an administrative error in advising him that he could not pay by instalments, and that the United Nations should bear the financial consequences of this error and pay the actuarial cost of validation. His request having been denied by a decision of 12 December 1977 and the respondent having agreed by a decision of 14 February 1978 to direct submission of an application to the Tribunal, the applicant filed an application on 11 April 1978, contending that the alleged administrative error of the Resident Representative was imputable to the United Nations, which therefore had to bear the responsibility and the financial consequences of the material loss he suffered.

In answer to the respondent's claim that the subject-matter of the application was time-barred, the Tribunal observed that the application attacked an administrative decision dated 12 December 1977 and thus was lodged in due time. The Tribunal held that the time limits for appeals set by Staff Rules 111.3(*a*) and (*b*) were irrelevant in the present case and that the respondent's objection based on those limits was therefore invalid.

The Tribunal noted that the principal question in connexion with the applicant's claim was whether the omission of the applicant to validate his previous service was caused by following the allegedly misleading advice. From the evidence, it appeared that the applicant had been told not, as he contended, that he could only make payment in a lump sum but rather that since his contract was about to expire and stood little chance of being renewed, the question of validating past services by monthly payments was not highly relevant. This advice under the then prevailing circumstances was reasonable; when these circumstances changed with the renewal of the applicant's contract, it was for him to take this change into consideration, to look after his own interests and to take the necessary steps toward validation for which he had ample time. Hence, the Tribunal concluded, it was not negligence on the part of the Resident Representative but a lack of due diligence on behalf of the applicant that had cost him the loss of an opportunity. No administrative error having been committed by the Resident Representative, the question of the liability of the United Nations for the alleged error did not arise.

3. Judgement No. 233 (13 October 1978):[8] Teixeira *v.* Secretary-General of the United Nations

Legal status of an individual having worked during 10 years for the Organization under successive special service agreements—Allegations of misuse of procedure and violation of general principles of international law—Entitlement to a termination indemnity

The applicant had previously filed with the Tribunal an application on which the Tribunal, by its judgement No. 230[9], had declared itself competent to pass judgement, adding that, unless the parties settled the matter, the applicant could file with the Tribunal pleas on the merits of the case.

For nearly ten years, the applicant worked for the Economic Commission for Latin America (ECLA) under a number of special service agreements. He contended that the link established between him and ECLA gave him in fact the status of a regular employee as opposed to that of an independent or occasional worker, that the Administration had committed a misuse of procedure by continuing, for improper purposes, to use the special service agreement procedure rather than using the normal recruitment procedure, and that the special service agreements should be declared null

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

[9] See *Juridical Yearbook*, 1977, p. 155.

and void because their essential clauses conflicted with certain general principles of law and basic rights recognized by international law and national labour laws, because of their leonine character and because of the misuse of power.

The Tribunal noted that the applicant had never contested the exact terms of the special service agreements defining the reciprocal legal relations between himself and the Administration. It also noted that the applicant himself had contributed to the creation and renewal of the factual situation, which he claimed was in contradiction with his contractual status, by agreeing to conclude special service agreements under which he accepted the legal status of an independent contractor and expressly waived being considered "in any respect as being a staff member of the United Nations". The Tribunal further observed that the personal situation which had allegedly obliged the applicant to enter into successive special service agreements could only be taken into account if it was established that the Administration had taken advantage of that situation, which was not the case in this instance. The Tribunal therefore held that the applicant could not use his factual situation as an argument to claim a legal status different from his contractual status.

On the issue of procedural irregularity, the Tribunal observed that the special service agreement procedure, although improper by the Administration's own admission, had been favourable to the applicant since it had enabled him to continue rendering services and receiving remuneration. The Tribunal also found that the applicant had been warned that he could not count on a contract as a staff member. For these reasons the Tribunal held that the applicant was not entitled to request a ruling that the special service agreements were leonine and null.

The Tribunal rejected the applicant's contention that generally recognized principles of international law had been violated because of "serious inequality of treatment among staff members", observing that this claim was based on the argument, already dismissed, that the applicant had been in fact a staff member.

Considering however the length of the period during which the applicant had worked for ECLA and the Administration's ratings of the quality of his work, the Tribunal found that, although his agreements contained no provisions to that effect, the applicant could count on receiving a termination indemnity from the respondent. The Tribunal fixed the amount of the indemnity at 3,000 dollars.

4. Judgement No. 234 (18 October 1978):[10] Johnson *v.* Secretary-General of the United Nations

Request that the Tribunal specify the date to be taken for calculation of the amount in Swiss francs of compensation awarded as reparation under an earlier judgement—An interpretation favourable to the Applicant of the staff rule relating to the education grant cannot be contested after compensation has been awarded as reparation.

By its Judgement No. 213,[11] the Tribunal had reversed the decision terminating the Applicant's appointment and, on the grounds that she could have expected to remain in service until superannuation, awarded her a termination indemnity of one week's salary for each month of uncompleted service, or two years' net base salary, less the amount of the *ex gratia* payment already received following the recommendations of the Joint Appeals Board. The Applicant asked that the compensation be paid in Swiss francs at the exchange rate prevailing on the date of her termination contending that, in determing the exchange rate to be applied, the criterion should be the date on which the injury occurred. The Respondent maintained that the exchange rate applied in calculating the compensation was the exchange rate prevailing on the date of payment.

The Tribunal noted that the annual amount in dollars of the Applicant's net base salary was not the matter at issue, and that the dispute arose from the changes in the exchange rate of the dollar in Geneva. It also noted that, in an express provision brought to the attention of the Applicant at the time of her appointment, the Respondent had made an exchange operation necessary for each pay-

[10] Mr. R. Venkataraman, President; Mme P. Bastid, Vice-President; Mr. Endre Ustor, Member.
[11] See *Juridical Yearbook*, 1976, p. 135.

ment, with the result that the Applicant's salary, established in dollars, was actually paid to her in Swiss francs. The same procedure had been followed in making the *ex gratia* payment recommended by the Joint Appeals Board.

The Tribunal observed that, although the injury had occurred on the date of termination, the sum due to the Applicant had been determined by the judgement. It was thus on the date of the judgement that the debt owing to the Applicant had been determined with binding force and her rights in Swiss francs must therefore be established on the date of the judgement and according to the exchange rate prevailing on that date.

The Tribunal also noted that, in calculating the compensation due in application of Judgement No. 213, the Respondent had seen fit to deduct, in addition to the amount of the *ex gratia* payment, an amount of 950 dollars which, according to him, represented reimbursement by the Applicant of part of the education grant for which she was said to be liable in accordance with staff rule 103.20 (*g*).[12]

The Tribunal noted that the principle of proportionality set forth in that staff rule left the Respondent a large measure of discretion. It also observed that, in the course of the financial settlements which had followed the termination of the Applicant and at the time of the payment of the *ex gratia* indemnity, the Respondent, by not claiming the reimbursement of 950 dollars, had interpreted staff rule 103.20 (*g*) in a manner favourable to the Applicant and had considered that reimbursement would not be "normal". According to the Tribunal that interpretation could not be modified following Judgement No. 213, and the Respondent must therefore refund the sum in question to the Applicant.

5. JUDGEMENT NO. 235 (20 OCTOBER 1978):[13] MATHUR *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting a reprimand delivered under staff rule 110.3—Non-observance of the prescribed time-limit for lodging an internal appeal—Confirmation of the decision of the Joint Appeals Board that the appeal was not receivable, since there had been no exceptional circumstances beyond the Applicant's control

On 11 December 1974, the Applicant had received a reprimand under staff rule 110.3 (*c*), following an administrative investigation concerning certain aspects of his conduct. On 26 February 1976, he had lodged an appeal with the Joint Appeals Board. The Board found that the appeal was not receivable since the Applicant had not requested a review of the contested decision until more than nine months had elapsed from the time he had received notification of it, that is, long after the expiry of the prescribed time-limit of one month. Having examined the documents in the case, the Board had concluded that the Applicant could not invoke exceptional circumstances as grounds for waiving the statutory time-limit.

In the light of the facts, the Tribunal concluded that the failure of the Applicant to comply with the time-limits was due not so much to oversight or indolence as to genuine doubts about the applicability of the prescribed procedure to the subject-matter of his complaint. Other considerations, in particular the fact that his contractual status had been uncertain for some months, taken by themselves, could have constituted a basis for "exceptional circumstances" in which the Board might have authorized a waiver of the prescribed time-limits. In the Tribunal's view, however, those considerations could not be taken by themselves. It considered that the Applicant had been perfectly aware of the implications and the limitations of a formal appeal against an administrative decision, that for reasons of his own and with his eyes open he had been reluctant to initiate such an appeal, that his reluctance had persisted even after his contractual status was no longer in doubt and that the delay in submitting the appeal had been the result of the exercise of a choice on

[12] This provision reads as follows:

"Where the period of service of the staff member does not cover the full scholastic year, the amount of the grant for that year shall normally be that proportion of the grant otherwise payable which the period of service bears to the full scholastic years."

[13] Mr. R. Venkataraman, President; Mr. F. A. Forteza, Member; Sir Roger Stevens, Member.

his part and could not be attributed to exceptional circumstances beyond his control. The non-compliance with the prescribed time-limits was the responsibility of the Applicant and the decision of the Joint Appeals Board that the appeal was not receivable must therefore be upheld.

6. JUDGEMENT NO. 236 (20 OCTOBER 1978):[14] BELCHAMBER *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting the introduction of a new salary scale for General Service staff in Geneva to replace a scale established following negotiations between the administrations concerned and the representatives of the staff—Did the Secretary-General have a statutory or contractual, express or implied, obligation to negotiate with the staff representatives before introducing the new scale?—Effect of the establishment of the International Civil Service Commission on earlier practice in that field—Obligation of the Secretary-General to hold consultations with the staff representatives concerning the ICSC recommendations—Refusal of the staff representatives to co-operate either at the stage of the drafting of the ICSC recommendations or of the discussion of those recommendations.

At the beginning of 1975, at a plenary meeting of representatives of the Executive Heads and of the staff of the seven Geneva-based organizations, it was decided to conduct a survey of emoluments of General Service staff. This survey, the results of which all parties undertook in advance to accept as binding, was carried out at the end of 1975 by an independent institution, the Battelle Institute. At the beginning of 1976, the representatives of the Executive Heads expressed very serious misgivings about the validity of the conclusions reached by that Institute. The staff regarded this as a breach of the Executive Heads' commitment and a strike ensued at the United Nations Office at Geneva. In March 1976, the Executive Heads and the staff representatives agreed that the Institute's findings should be checked jointly with a view to the construction of the new salary scale and that the new scale would be implemented with effect from 1 August 1975. The Controller of the United Nations, who was designated as sole negotiator, then held a series of meetings with the representatives of the staff, which culminated on 23 April 1976 in an agreement.

On 22 December 1976, in resolution 31/193 B, the General Assembly requested the International Civil Service Commission to have a survey made of local employment conditions at Geneva, to make recommendations as to the salary scales deemed appropriate and to inform the General Assembly of the actions taken in that regard. The ICSC accordingly carried out a survey in Geneva, as a result of which it recommended reductions from the existing scale and communicated its findings and recommendations to the General Assembly in September 1977. During September and October 1977, the Secretary-General and his representatives engaged in consultations with the staff representatives. On 22 November 1977, the Secretary-General announced to the Fifth Committee his intention to implement the ICSC recommendations and on 21 December 1977, in its resolution 32/200, the General Assembly noted with appreciation the ICSC report and the intention expressed by the Secretary-General. The new salary scale was introduced effective 1 January 1978.

The Applicant, a General Service staff member of the United Nations Office at Geneva, filed an application with the Tribunal requesting that it direct the Secretary-General to rescind the salary scale of the General Service category at Geneva which he had, according to her, introduced unilaterally and without prior negotiations with the Staff Council.

The Tribunal noted that, according to the Applicant, the requirement that the Secretary-General negotiate with the Staff Council before fixing the salary scale of the staff in the General Service category formed part of the conditions of service of such staff. It added that the case involved consideration of the scope and effects of Staff Regulations 8.1 and 8.2 and Staff Rule 108.2 concerning staff relations. It therefore ruled that it was competent to hear and pass judgement on the application.

The Tribunal first considered whether there was a statutory or contractual, express or implied, obligation on the part of the Secretary-General to negotiate with the Staff Council prior to the introduction of the revised salary scale. It pointed out that the legal "right" and "duty" to engage in

[14] Mr. R. Venkataraman, President; Mme P. Bastid, Vice-President; Mr. F. T. P. Plimpton, Vice-President; Mr. E. Ustor, Alternate Member.

collective bargaining, if any, arises out of a statute or contract and that, apart from statutory or contractual obligations, it was not aware of an enforceable right to collective bargaining based on general principles of labour law. The question was therefore to determine whether such an obligation existed in the case under consideration. In that connexion, the Tribunal noted that there were no provisions in the Staff Regulations and Rules for "collective bargaining" or "negotiation in good faith"; nor were the latter provided for *in express terms* in the agreement of 23 April 1976 or in the earlier agreements of 1968–1969. It added that the agreement of 23 April 1976 had not prescribed any time-limit for its duration and, since it did not limit the powers of the Secretary-General to revise the salary scale of the staff in the General Service category from time to time, it could not have created any contractual obligation as to "collective bargaining" or "negotiation in good faith" with the staff representatives prior to the revision of the scale.

The Tribunal then considered whether such an obligation was implicit in the agreements of 1968-1969 and 1976. It found that, since 1957, there had invariably been discussions between representatives of the Executive Heads and of the staff of the various Geneva organizations in inter-agency committees, joint advisory committees, joint working parties, etc., prior to the fixing of the salary scale of General Service staff by the Secretary-General. It was not the Applicant's case that the Secretary-General could not make a salary revision without the consent of the representatives of the staff, nor was any derogation from his authority involved. In fact, in agreeing in advance to abide by the results of the survey carried out in 1975, the Secretary-General had exercised the wide discretion he had in the matter.

The Tribunal also noted that the holding of consulations between the representatives of the Executive Heads and of the staff of the Geneva-based organizations on the revision of salary scales was a long-established practice based, according to the Respondent, on Staff Regulations 8.1 and 8.2. It observed that no joint group had been constituted for the purpose of consultation before the introduction of the salary scale effective from 1 January 1978. Noting that the Respondent maintained that the constitution of such groups had become irrelevant after the establishment of the ICSC, the Tribunal considered whether the establishment of the ICSC had altered the situation. It concluded that the earlier practice of constituting joint committees to decide on the metholodogy of the survey or on the choice of an agency for conducting it had become inapplicable after the establishment of the ICSC, which had been charged with the same responsibilities under article 12 of its Statute. It also noted that the Statute and rules of procedure of the ICSC afforded fair and reasonable opportunity for the staff to make representations to the Commission and to discuss issues with it both before and after the formulation of its recommendations.

The Tribunal then considered whether, after the receipt of the recommendation of the ICSC and before the promulgation of the revised salary scale, there had been an obligation on the part of the Respondent to engage in consultations with the staff representatives through joint administrative machinery in application of Staff Regulations 8.1 and 8.2. From the positions adopted in that connexion by the ICSC and the Under-Secretary-General for Administration and Management and from the established practice described above, it concluded that there was an implied obligation on the part of the Respondent to hold consultations with the staff representatives prior to the revision of the salary scale.

The Tribunal thus had to determine whether there had been a breach of that obligation by the Respondent. It noted that the staff representatives had not availed themselves of the opportunity offered to them of co-operating with the ICSC and that, by their refusal to co-operate, they had rendered article 12, paragraph 3, and article 28 of the Statute of the ICSC infructuous. It also observed that the staff representatives had been afforded ample opportunity to discuss the ICSC recommendations with senior officials in New York but had refused to accept the report of the ICSC as a basis for discussion. The staff representatives appeared to have relied on the contention that the agreement of 23 April 1976 could not be altered except by another agreement. As stated earlier, however, that agreement did not involve any derogation from the authority of the Secretary-General in the matter and it must moreover be read consistent with and subject to the statutory changes introduced by the establishment of the ICSC.

The Tribunal concluded that, in view of the negative attitude adopted by the staff representatives, the Respondent could not reasonably have been expected to follow the procedures

utilized in the past. The Tribunal had therefore decided that there had been no breach of an obligation on the part of the Respondent and that the salary scale promulgated effective 1 January 1978 was not vitiated.

B. Decisions of the Administrative Tribunal of the International Labour Organisation[15] [16]

1. JUDGEMENT NO. 331 (8 MAY 1978): LEDRUT *v.* INTERNATIONAL PATENT INSTITUTE
The tribunal recorded the withdrawal of the complainant's suit.

2. JUDGEMENT NO. 332 (8 MAY 1978): SIKKA *v.* WORLD HEALTH ORGANIZATION
The Tribunal recorded the withdrawal of the complainant's suit.

3. JUDGEMENT NO. 333 (8 MAY 1978): CUVILLIER *v.* INTERNATIONAL LABOUR ORGANISATION

Complaint impugning a decision taken on the recommendation of an Appeals Committee which had not considered the full dossier of the case—Quashing of the impugned decision

The complainant, who occupied a P-4 post, had been told that, under the grading survey of P-1 to D-1 posts undertaken within the Organisation, her post would continue to be graded P-4. An appeals procedure having been established, the complainant appealed against the decision in question. The Appeals Committee made its recommendation to the Director-General in the autumn of 1975. Upon the resignation of the members of the Committee, the Director-General decided to hold over his decision on all the cases on which he had not received the Appeals Committee's reports until after its members had resigned. Once a new Appeals Committee had been formed, the Director-General referred to it the cases on which no final decision had been taken. The Committee recommended confirming the grade of the complainant's post at P-4 and she was notified of the Director-General's decision to that effect. She asked to see the text of the Committee's final recommendation, but her request was refused.

The Tribunal noted that, according to the Organisation, the Appeals Committee had not carried out a second full review of the complainant's case but had merely "resumed consideration of the grading". It stressed that once the Director-General decided not to act on the recommendations already made, and to set up a new Committee with a somewhat different membership, he was bound to start the proceedings all over again before that Committee, to put to it the entire cases of the staff members concerned, and to ask for its recommendations on the entirety of those cases. It added that

[15] 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 1978, 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, the Intergovernmental Council of Copper Exporting Countries, the European Free Trade Association, the Inter-Parliamentary Union, the European Molecular Biology Laboratory and the World Tourism Organization. The Tribunal is also competent to hear disputes with regard to the execution of certain contracts concluded by the International Labour Organisation and disputes relating to the application of the Regulations of the former Staff Pension 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.

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

the new Committee could not legally make such recommendations without giving the staff members a hearing in accordance with the general principles of law, something which, in the event, it had not done.

The Tribunal consequently quashed the impugned decision and referred the complainant's case back to the Director-General of ILO for a new decision to be taken after due consultation of the Appeals Committee.

4. JUDGEMENT NO. 334 (8 MAY 1978): CAGLAR *v.* INTERNATIONAL TELECOMMUNICATION UNION

Complaint impugning a decision to terminate an appointment when a post was abolished—Limits of the Tribunal's power of review with regard to such a decision

The complainant impugned a decision by which his appointment was to be terminated as a result of his post being abolished pursuant to a decision of the Administrative Council of ITU.

The Tribunal noted that the application of regulation 9.1 (*b*) of the organization's Staff Regulations and Staff Rules, on which the impugned decision was based, was contingent on the existence of a suitable post in which the staff member's services could be effectively utilized. Applying it required knowledge of the duties of vacant posts and of staff members' qualifications and raised matters of discretion. Hence the Tribunal could not quash decisions taken under that provision unless they were taken without authority, or violated a rule of form or procedure, or were based on a mistake of fact or of law, or if essential facts had been overlooked, or if the decision was tainted with abuse of authority or clearly mistaken conclusions were drawn from the facts.

The Tribunal concluded, after examining all the documents in the dossier, that the impugned decision was not tainted with any of those flaws. It noted in particular that under regulation 9.1 (*b*) of the Staff Regulations and Rules the priority granted to a staff member whose post was abolished was not absolute but subject to two conditions, namely the existence of a suitable vacant post and the staff member's capacity to give useful service, and that it might be necessary to test the ability of the staff member whose post had been abolished to occupy another post. Hence the Secretary-General had made no mistake of law in making the complainant serve a trial period before appointing him to a new post.

The Tribunal also considered that, contrary to the complainant's contention, the Secretary-General had a duty to take account not just of the reports for the trial period but of earlier ones as well: since the priority granted under regulation 9.1 (*b*) was not absolute, the question to be decided was whether priority was deserved, in other words, whether the complainant was qualified for the post offered to him and could give useful service in that post. Accordingly the Secretary-General had to take account of all the information he had on the complainant. Throughout most of the time he was employed by ITU, the complainant's performance had been criticized with varying degrees of severity. The Secretary-General had therefore not drawn clearly mistaken conclusions from the dossier in deciding that the complainant was not fit for the vacant post.

5. JUDGEMENT NO. 335 (8 MAY 1978): DAUKSCH *v.* INTERNATIONAL PATENT INSTITUTE

Request for the substitution of a new "place of origin" for that determined at the time of recruitment—Concept of "place of origin"—Discretionary power conferred on the Director-General by the relevant provision of the Staff Regulations

The complainant had requested that his "place of origin", which had been determined as the place of his recruitment, be changed, *inter alia*, because of a shift in the "centre of his interests" as a consequence of his marriage.

The Tribunal recalled the terms of article 18 of appendix III to the Staff Regulations, which reads:

> "A staff member's place of origin is determined when he takes up his appointment, with due regard to the place of recruitment or the centre of his interests.
>
> "The Director-General may, by a special decision, later alter that determination, while the staff member is serving under appointment and when he leaves.
>
> "While the staff member is still serving, however, such a decision may be made only in exceptional circumstances and after he has produced evidence in support of his request."

The Tribunal noted that the second and third paragraphs of that article left the matter to the discretion of the competent authority and that decisions taken by virtue of those provisions could not be quashed unless tainted with certain well-defined flaws.

In the opinion of the Tribunal, it was impossible, without straining the term beyond normal usage, to take the "place of origin" of a married man to be the place where his wife had relatives or property. Moreover, the exceptional circumstances required by the third paragraph did not exist because it often happened that a man formed connexions with the place where his wife's family lived and where she had property.

The complainant alleged in addition that other staff members had had their place of origin changed. The Tribunal established, however, upon examination of the dossier, that the circumstances were not the same, and it consequently dismissed the complaint.

6. JUDGEMENT NO. 336 (8 MAY 1978): HAYWARD *v.* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Irreceivability of a complaint not referring to a final administrative decision—Article VII of the Statute of the Tribunal

The Tribunal, having established that the complainant had submitted a claim to the Administration and then, having obtained an interview to discuss his problems, had decided not to pursue the matter but to refer it to the Tribunal, emphasized that the Administration's failure to act was not, in the circumstances of the case, equivalent to an adverse decision. The complainant was free to resume correspondence and, in that case, could not consider that his claim had been rejected when 60 days' silence had elapsed. The Tribunal, considering that the complainant had not obtained a final decision within the meaning of article VII of its Statute, declared the complaint irreceivable.

7. JUDGEMENT NO. 337 (8 MAY 1978): FRASER *v.* INTERNATIONAL LABOUR ORGANISATION

Complaint impugning a decision not to extend a fixed-term appointment—Limits of the Tribunal's power of review with regard to such a decision

The complainant held a fixed-term appointment which had been extended to 30 August 1977. He impugned a decision to terminate his appointment at that date.

The Tribunal emphasized that the extension of fixed-term appointments was a matter which fell within the Director-General's discretionary powers and that it could not interfere with decisions in that respect unless they were tainted with certain well-defined flaws, none of which was present in the case. In particular, the core of the complainant's argument was to contest the judgements of fact made by the Director-General, in which the Tribunal could not interfere.

8. JUDGEMENT NO. 338 (8 MAY 1978): STANKOV *v.* WORLD HEALTH ORGANIZATION

Dismissal of a complaint impugning a decision declaring an internal appeal irreceivable on the ground that it was time-barred

The complainant appealed to the Regional Board of Appeal on 6 January 1976 against a decision of 13 August 1975 refusing to convert his home leave into sick leave. The Regional Board of Appeal declared the appeal irreceivable on the ground, *inter alia*, that it was time-barred. The headquarters Board of Inquiry and Appeal, to which the matter was referred, had recommended that the appeal should be deemed receivable, but that recommendation had been dismissed by the Director-General.

The Tribunal dismissed the complaint on the ground that the impugned decision should have been appealed to the Regional Board of Appeal not later than 30 days after 13 August 1975. The appeal, not having been lodged until 6 January 1976, was time-barred and the Director-General had therefore been right to dismiss the appeal.

9. JUDGEMENT NO. 339 (8 MAY 1978): KENNEDY *v.* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Cancellation, after acceptance by the complainant, of a document defining the terms of his appointment—Question of the Tribunal's jurisdiction—Comparison between the resolution con-

cerning the defendant organization's acceptance of the Tribunal's jurisdiction and article II, paragraph 5, of the Tribunal's Statute—Question of the receivability of the complaint in view of the rule concerning exhaustion of internal means of redress—Conclusion of the Tribunal that the document in question constituted a binding contract for a conditional appointment

After offering the complainant a six-month consultancy, the organization sent him two copies of a document entitled "Terms of employment", which stipulated that his appointment would be confirmed after medical clearance, the United States loyalty clearance and other "internal clearances" had been received. As requested, the complainant returned one of the two copies of the document, duly signed, thereby informing the organization that he accepted the proposed terms. However, he was subsequently informed that the document in question had been cancelled, because the requisite "internal clearances" were lacking.

In considering the case, the Tribunal first had to settle the question of its jurisdiction: it pointed out that, under the terms of article II, paragraph 5, of its Statute, it heard "complaints alleging non-observance, in substance or in form, of the terms of appointment of officials". It noted that the appointment was effected after the "terms of appointment" had been framed, by mutual agreement, by the Organization and the person to be appointed. One of the "terms of appointment" was that the person in question would be appointed as an official in due course. If the organization did not observe that term, the non-observance fell within paragraph 5 of article II. Of course, in order for jurisdiction to be conferred on the Tribunal, the complainant must establish that he had agreed to the terms of employment; but if, as in the case under consideration, there was a dispute about that point, it was a dispute which, under article II, paragraph 5, the Tribunal was competent to determine.

The Tribunal did note that the resolution in which the FAO Conference had accepted the jurisdiction of the Tribunal referred to "complaints of alleged non-observance of the terms and conditions of appointment of FAO staff members". However, it deemed it unnecessary to discuss whether there was any substantial difference between that wording and the wording of article II, paragraph 5, of its Statute, or whether an organization which was acceding to the Tribunal could, by appropriate words, exclude a part of the jurisdiction conferred upon the Tribunal by its Statute. Accordingly, it deemed that the Statute was the document which was known to define the jurisdiction of the Tribunal, and the resolution was merely an instruction to the Director-General to arrange for the organization to accept that jurisdiction. Moreover, it would be unrealistic to think that, when the Conference had passed the resolution in question, it had wished to exclude from the Tribunal's jurisdiction the highly unusual category of disputes about whether or not a contract had been made.

The Tribunal then considered the question of the receivability of the complaint in the light of the Organization's contention that the complainant had not, as required by article VII of the Statute, exhausted such means of resisting the decision impugned as were open to him under the Staff Regulations. The Tribunal observed that it was open to the Organization, if it wished, to dispense with the requirement in article VII. It noted that, when the complainant had notified the Director-General of his intention to file an appeal, he had been informed by the Director of Personnel that the Organization would consider any such appeal as irreceivable but that the Tribunal would determine for itself the receivability of any claim addressed to it. The complainant had then declared his intention to file a complaint with the Tribunal. Since the organization had not replied, the complainant had rightly concluded that it would be pointless for him to file an appeal under the Staff Regulations.

On the merits, the Tribunal noted that, while the language of the document entitled "Terms of employment", which the complainant had signed, could be interpreted to mean that the organization was not bound to confirm the appointment, it did not provide any basis at all for the argument that, if the appointment was confirmed, the complainant was not bound to accept it. Accordingly, the organization had no ground for contending that no contract had been made.

The Tribunal considered that the language of the document and the circumstances of the case supported the view that the Organization had intended to make a commitment, albeit one that was subject to certain conditions. Accordingly, the said document constituted a binding contract for a conditional appointment. Only the "other internal clearances" had been lacking in order for the contract to be completed. It had been for the organization to define the meaning of those words; it had also been its duty to initiate the requisite procedures and, if necessary, to explain why they had

failed. Since the organization had remained silent on both those points, the Tribunal could not assume that that condition had not been fulfilled.

The Tribunal therefore quashed the impugned decision and granted the complainant an indemnity equal to the salary he would have received for a six-month consultancy.

10. JUDGEMENT NO. 340 (8 MAY 1978): BIGGIO, VAN MOER, RAMBOER, HOORNAERT, BOGAERT, DESCAMPS AND DEKEIREL *v.* INTERNATIONAL PATENT INSTITUTE

Complaint impugning a decision establishing a promotion list—Limits of the Tribunal's power of review with regard to such a decision

The complainants impugned a decision of the Director-General endorsing a promotion list in which their names had not been included. The Tribunal stressed that such a decision fell within the scope of discretionary authority and, thus, that it could interfere with it only if it was tainted by very specific flaws.

It noted that the Careers Committee, which on 27 January 1976 had drawn up a promotion list for 1975, had subsequently been asked to draw up a second list of staff members eligible for promotion by order of merit, it being understood that only those staff members included in the first list should be taken into consideration. The Tribunal pointed out that, in its Judgement No. 300,[17] it had decided that the Director-General had not abused his discretionary authority by promoting only those staff members included in the said list; the Tribunal thus concluded that, since the complainants were not included in that list, they could not properly contend that the decision to refuse them promotion had been tainted with any flaw which entitled the Tribunal to interfere.

11. JUDGEMENT NO. 341 (8 MAY 1978): LEE *v.* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Request for the reimbursement of travel expenses on the ground that the Organization had neglected its obligation to inform staff members of a change in the provisions governing home leave

In its Judgement No. 271,[18] the Tribunal had ordered "that the claims of the interveners be remitted to the Director-General for him to determine what sums, if any, are in the light of this judgement due . . . in respect of home leave entitlement, and with liberty to the interveners, if they do not accept such determination, to apply to the Tribunal . . .".

The complainant, an intervener in the case settled by Judgement No. 271, contended that, over and above the expenses she had incurred in taking leave in 1972, she should be repaid the leave expenses she had incurred in June 1970.

The Tribunal noted that the benefit of home leave travel paid for by the organization had not been extended to the category of officers to which the complainant belonged until 1 June 1969 and that copies of the amendment to the Regulations concerning that benefit had been circulated to the staff in the usual way, namely one copy per desk.

Under the new system, the complainant could have claimed the benefit of paid home leave travel as of December 1970. She said that, had she known, she would have postponed the leave she had taken in June 1970. On the ground that the Personnel Department had failed to inform her of her rights, she asked that she should be reimbursed for the travel expenses incurred in 1970. Having studied the dossier, however, the Tribunal stated that it could not find that there had been any fault by the Organization constituting a breach of the regulations or of the complainant's contract of employment.

12. JUDGEMENT NO. 342 (8 MAY 1978): PRICE *v.* PAN-AMERICAN HEALTH ORGANIZATION (PAHO) (WORLD HEALTH ORGANIZATION)

Complaint concerning reclassification of a post—Limits of the Tribunal's power of review with regard to such a decision—Quashing of the decision because it lacked a proper basis of fact was

[17] See *Juridical Yearbook*, 1977, p. 165.
[18] See *Juridical Yearbook*, 1976, p. 146.

based on irrelevant matters or was tainted by irregularity—Decision of the Tribunal ordering the reclassification in question

The complainant impugned a decision by which the Administration had refused to reclassify his post at the P-4 level.

The Tribunal observed that that decision was one taken within the discretionary authority of the administration, over which the Tribunal had only a limited power of review.

The Tribunal noted, however, that in the case in point there was complete disagreement between the Board of Inquiry and Appeal and the Chief of Personnel, and that in the circumstances the fact that the Director of PAHO had allowed the Chief of Personnel to become involved in the decision taken as a result of the recommendation of the Board of Inquiry and Appeal was *prima facie* an irregularity.

The Tribunal further stressed that the Director of PAHO had referred the question to the WHO Chief of Personnel for "an evaluation" or "an advisory opinion", thus addressing himself to a member of an outside organization who was nevertheless considered an independent expert on the matter.

The Tribunal considered that although the Director could legitimately ask the WHO Chief of Personnel for help in making up his own mind, he had no right to delegate his responsibility. Indeed, the WHO Chief of Personnel appeared to have treated the application made to him simply as a reference of the matter to him for decision.

The WHO Chief of Personnel had, moreover, been contacted not by the Director but by the PAHO Chief of Personnel. Since his evaluation was to be extremely influential in what was in effect a new process of appeal, the fact that only one of the parties had access to him was gravely irregular.

Lastly, the Tribunal reached the conclusion, after reviewing the facts, that the evaluation made by the WHO Chief of Personnel was irrelevant since it had been made on the wrong basis. However, the decision impugned seemed to be based on that evaluation. The Tribunal therefore concluded that that decision was defective in that it lacked a proper basis of fact, was based on irrelevant matters or was tainted by irregularity, and that it should therefore be quashed.

The Tribunal added that, on the basis of the dossier, the complainant's post should have been classified as P-4 if the PAHO/WHO Classification Plan was applied. PAHO had in fact adopted the WHO Classification Plan and the Director had no power to depart from it by a discretionary decision in a particular case. Observing that, if the matter were remitted to the Director for a new decision he could only act in accordance with the law and within the limits of his authority by following the recommendation by the Board of Inquiry and Appeal for reclassification to the P-4 level, the Tribunal ordered such reclassification.

13. JUDGEMENT NO. 343 (8 MAY 1978): OSUNA SANZ *v.* INTERNATIONAL LABOUR ORGANISATION

Complaint impugning a decision not to renew a fixed-term contract—Limits of the Tribunal's power of review with regard to such a decision

The complainant impugned a decision by which the International Labour Organisation had refused to renew his fixed-term contract.

The Tribunal recalled that such a decision, taken at the termination of the contract, could be quashed only if it was tainted with various specific flaws. It held that none of the complainant's grounds were valid and therefore dismissed the complaint.

14. JUDGEMENT NO. 344 (8 MAY 1978): CALLEWAERT *v.* INTERNATIONAL PATENT INSTITUTE

Complaint concerning the conditions of membership in the sickness insurance scheme provided for in the Staff Regulations for spouses of staff members—Existence of difference of treatment on grounds of sex—Refusal by the Tribunal to allow application of provisions establishing discrimina-

tion which offended against the general principles of the law and particularly of the international civil service

The complainant had requested that her husband be admitted to membership of the sickness insurance scheme provided for in the Staff Regulations and had undertaken to pay the full cost of his membership. Subsequently, however, she had asked for reimbursement of the amounts which had been deducted as a result from her salary, contending in particular that the provisions in accordance with which the Institute had made those deductions introduced discrimination among staff members on grounds of sex.

The Tribunal observed that according to article 28 of appendix IV to the Staff Regulations, adopted by the Administrative Council in its capacity as an executive body, membership of the Institute sickness insurance scheme was open to "the staff member, his wife and dependent children under the age of 21 who are not engaged in any gainful activity, are not married and are actually maintained by the staff member".

It noted that the Director-General considered that the text explicitly applied only to wives of male staff members and not to husbands of female staff members, thus interpreting it so as to discriminate among Institute staff members. The Tribunal considered that it could not allow application of a text establishing discrimination which offended against the general principles of law and particularly of the international civil service. It therefore decided that the complainant was entitled to repayment of the amounts which had been improperly deducted from her salary for her husband's membership in the sickness insurance scheme.

15. JUDGEMENT NO. 345 (8 MAY 1978): DIABASANA *v.* WORLD HEALTH ORGANIZATION

Complaint impugning a decision of dismissal for disciplinary reasons—Refusal of the Tribunal to assess the appropriateness of such a measure except in cases of disproportion between the misconduct and the sanction imposed

The complainant impugned a decision by which his fixed-term contract had been terminated because he had been guilty of misconduct by becoming improperly involved, by virtue of his status as a WHO staff member, in a private transaction. The Tribunal recognized after reviewing the dossier that the complainant was guilty of misconduct legally warranting a disciplinary sanction. The Tribunal considered that it was not for it to consider the gravity of the sanction imposed on the complainant unless it appeared from the dossier that the sanction was disproportionate to the misconduct, which was not the case.

The Tribunal therefore dismissed the complaint.

16. JUDGEMENT NO. 346 (8 MAY 1978): SAVIOLI *v.* WORLD METEOROLOGICAL ORGANIZATION

Complaint impugning a decision terminating a permanent appointment on the ground of abolition of post—Limits of the Tribunal's power of review with regard to such a decision—Abolition of a post is in order only when it is based on objective reasons relating to the functioning of the Organization—Scope of obligations incumbent on the Administration towards staff with permanent appointments whose posts are abolished.

The complainant impugned a decision by which the Organization had terminated her permanent appointment on the ground that her post had been abolished.

The Tribunal noted that, according to staff regulation 9.2, the Secretary-General could terminate the appointment of a staff member if the necessities of the service required reduction of the staff. It recalled that, as a measure of administrative organization, the decision to abolish a post and dismiss the incumbent fell within the scope of discretionary authority and could not, therefore, be rescinded unless it was tainted with specific flaws.

The Tribunal emphasized that, to be in keeping with staff regulation 9.2, the abolition of a post should be required by the necessities of the service, i.e. it should be based on objective reasons relating to the functioning of the Organization, for example, for purposes of savings or rationalization, but not on the wish to get rid of an undesirable staff member, it nevertheless being understood

that when the abolition of a post was required by the interests of the Organization, it was not tainted because it led to the dismissal of an unqualified staff member.

On examining the dossier, the Tribunal considered that the abolition of the complainant's post had been based on an objective reason, namely the financial situation of UNDI , and therefore appeared to be in keeping with staff regulation 9.2.

The Tribunal then recalled the wording of the first sentence of staff rule 192. l (*b*), which reads:

> "If the necessities of the service require that the appointment of staff members be terminated as a result of abolition of posts or reduction of staff, staff members vith permanent appointments shall as a general rule be retained in preference to those hol ing other appointments, subject to the availability of suitable posts in which their services can be effectively utilized."

In the opinion of the Tribunal, that provision imposed on the Secretary-Ge ieral the obligation to ask all department directors about any posts which were vacant or would l ecome so within a certain period, and to conduct consultations for several months before dismiss ng a staff member who had given the Organization long and satisfactory service. That provisic n also obliged the Secretary-General to inquire into all posts corresponding to the qualifications of the holder of the abolished post and held by staff members belonging either to his grade or, subje ct to the agreement of the person concerned, to a lower grade.

On examining the dossier, the Tribunal considered that the Organization iad not pursued its inquiry for as long as it should have done given the circumstances. It noted that the Secretary-General had based his decision on the list of posts which were vacant when the post was abolished and had failed to take account of the fact that temporary situations could have changed sooner or later, for such unforeseen reasons as resignation, illness or death. According to the Tribunal, the organization should have pursued its inquiries at least until the date of expiry o the complainant's period of notice.

Secondly, the attention of the department directors should have been dra wn not only to the complainant's last two posts but also to the possibility of appointing her to posts more or less different from those she had recently held, even if they were normally held by staff me mbers belonging to a lower grade.

Consequently, the Tribunal quashed the impugned decision and awarded th complainant compensation equal to three years' salary.

17. JUDGEMENT NO. 347 (8 MAY 1978): TYBERGHIEN *v.* INTERNATIONAL P/ TENT INSTITUTE

Complaint impugning a decision concerning the date from which a promoti on should take retroactive effect—Limits of the Tribunal's power of review with regard to such a decision—Principle of equality of treatment of staff members

The complainant impugned a decision by which the Director-General had refused to make a promotion which took effect on 1 October 1975 take effect retroactively from 1 January 1975. He maintained that the decision was unfavourable to him in relation to other colle igues who, having either less seniority or lower performance marks than he, had been promoted on the same date.

The Tribunal emphasized that the impugned decision was a discretionary one and therefore could be quashed by the Tribunal only if it was tainted with specific flaws.

It recalled that the principle of equality could be infringed in two ways: eit ier by treating differently cases which were plainly alike; or by treating in the same way cases vhich were plainly unlike. It considered that the complainant was mistakenly alleging the latter ki id of breach of the principle of equality, since he was not of plainly greater merit than those staff r embers he considered to have been treated unduly favourably. Consequently, the Tribunal dismis sed the complaint.

18. JUDGEMENT NO. 348 (8 MAY 1978): DAUKSCH *v.* INTERNATIONAL PATE NT INSTITUTE

Complaint impugning a decision refusing a promotion—Limits of the Trib unal's power of review with regard to such a decision—Principle of equality of treatment of staf members

The complainant impugned a decision by which the Director-General had refused him a promotion despite the fact that he had the same seniority as, and better performance marks than, his colleagues who had been promoted.

The Tribunal emphasized that the impugned decision was a discretionary one and therefore could be quashed by the Tribunal only if it was tainted with specific flaws. In particular, it noted that the complainant's situation and that of the staff members with whom he was comparing himself were different in terms of the number of years actually spent at the Institute, which made a difference in treatment justifiable. Consequently, it dismissed the complaint.

19. JUDGEMENT NO. 349 (8 MAY 1978): DIAZ ACEVEDO *v.* EUROPEAN SOUTHERN OBSERVATORY (ESO)

Complaint impugning a decision to dismiss the person concerned on the ground of his attitude, which the organization deemed unacceptable—Alleged failure to comply with the rule of the exhaustion of internal means of redress—Difference between standards of behaviour required of staff according to whether they are collaborating on a hierarchical basis or negotiating conditions of employment—The Administration's discretionary power with regard to the choice of disciplinary penalties to be imposed in the case of a breach of discipline is subordinate to the principle of proportionality between the offence and the penalty

The complainant had been the subject of a decision to dismiss him on the ground of the attitude he had adopted towards his superiors and which the organization deemed unacceptable. He asked the Tribunal to order his reinstatement and the payment of an indemnity for night work and to award compensation for overtime.

The Tribunal first pronounced upon the receivability of the complaint, in the light of the organization's argument that the complainant had not exhausted the internal means of redress. It considered, on examining the dossier, that this argument was not relevant.

With regard to the merits of the case, the Tribunal emphasized that, in accordance with the provisions of the Staff Regulations and Rules, local staff who, like the complainant, regularly performed night work should sign a special contract, stating the conditions and special indemnities paid for that kind of work. It considered that the organization had not complied with that provision, probably not paying an indemnity and certainly by not specifying what it was in the contracts of the staff concerned.

It noted that the rather strained relations which existed between the complainant and his superior officer were linked to the existence of those anomalies and fell within the framework of efforts towards normalization in which the complainant's superior had taken part not on a hierarchical basis but as a negotiator. In that respect, the Tribunal emphasized that

> "Things can be said in free negotiations about conditions or work in a manner which cannot be used in answer to an order which has to be obeyed. A negotiator does not need to be armed with disciplinary sanctions; he is as free as any other individual to break off discussions with anyone whose manners he finds intolerable. It is because a superior officer cannot break off relations with his subordinates that sanctions against disrespect have to be provided."

The Tribunal also emphasized that at no stage had the superior officer warned the complainant about his disrespect even though, if he considered that his subordinate had gone too far, it was for him to make it quite clear that he would not longer tolerate such behaviour. It finally stressed that, at the meeting following which the dismissal was ordered, nothing had been said or done by the complainant that, taking into account the nature of the meeting and the fact that his previous attitude had never given rise to any rebuke, might properly be interpreted as showing a degree of disrespect sufficient to constitute an offence against the Regulations or a breach of contract. In any case, the Tribunal added, any offence given did not deserve more than a reprimand and, while it was true that the selection of the appropriate penalty fell within the discretion of the Director-General, that discretion should be exercised subject to the principle of proportionality; accordingly, in the case in hand, the summary dismissal constituted a penalty which was out of proportion to any offence committed.

The Tribunal consequently quashed the decision to dismiss the complainant and awarded him, by way of compensation, the amount of $US 12,000. In addition, it recognized that the complainant

was entitled to payment of an indemnity for night work and, in that respect, awarded him an amount equal to 10 per cent of the basic salary for a period of six months, in accordance with the provision of the Local Staff Regulations which prescribes that claims relating to the payment of indemnities may not be raised later than six months from the date on which the local staff member became entitled to raise such a claim.

20. JUDGEMENT NO. 350 (13 NOVEMBER 1978): VERDRAGER *v.* WORLD HEALTH ORGANIZATION

Application for review of a judgement of the Tribunal—Irreceivability of such an application other than in exceptional circumstances, such as the emergence of new facts of decisive importance

The complainant was applying for the review of Judgement No. 325.[19]

The Tribunal emphasized that an application for review of a judgement of the Tribunal was not provided for in either the Statute or the Rules of Court and therefore could be declared receivable only in quite exceptional circumstances, such as when new facts of decisive importance had come to light since the date of the judgement. The complainant did not adduce any new fact of that nature. Moreover, even supposing that the Tribunal had committed a material error, as contended by the complainant, which was not the case, that error would have had no effect on the judgement, so that the application, even if regarded as an application for correction of a material error, was still irreceivable.

21. JUDGEMENT NO. 351 (13 NOVEMBER 1978): PIBOULEAU *v.* WORLD HEALTH ORGANIZATION

Complaint impugning a decision not to renew a contract taken, according to the organization, for reasons of economy—Rejection of the allegation that the impugned decision was taken in breach of the Staff Rules and of the Conventions and Recommendations of the International Labour Organisation

The complainant impugned a decision not to renew her contract which had been taken, she claimed, in breach of the WHO Staff Rules and of the Conventions and Recommendations of the International Labour Organisation on maternity protection.

The Tribunal noted that the Organization had extended the complainant's contract by the period necessary to ensure that she benefited from the pre-natal and post-natal maternity leave prescribed in the Staff Rules. It concluded that the complainant had suffered no prejudice by reason of the behaviour of the Organization, which, far from committing any offence, had correctly implemented the Staff Rules.

The Conventions and Recommendations of the ILO invoked by the complainant had not been made applicable to WHO and, in any case, had not been infringed.

The organization stated that the impugned decision was attributable solely to the desire to make savings. It was not for the Tribunal to pass judgement on a policy which fell within the exclusive competence of the executive organs of WHO, or to review measures taken in pursuance of that policy.

22. JUDGEMENT NO. 352 (13 NOVEMBER 1978): PEETERS *v.* INTERNATIONAL PATENT INSTITUTE

Complaint impugning a decision relating to the content of a periodic report—Limits of the Tribunal's power of review with regard to such a decision—The advisory bodies called upon to give their opinion on the matter to the Director-General enjoy the same freedom of assessment as the Director-General

The complainant impugned a decision by which the Director-General had refused to amend a comment contained in the former's report. The Tribunal emphasized that such a decision was of a discretionary nature and could not be quashed by the Tribunal unless it had been tainted with specific flaws.

The Tribunal noted that the complainant had alleged procedural flaws, maintaining in particular that the internal bodies which had examined the matter had gone beyond the scope of the task entrusted to them and had infringed the rule of *non ultra petita*.

[19] See *Juridical Yearbook*, 1977, p. 184.

However, the Tribunal emphasized that the bodies in question were advisory in nature. Given that, in the exercise of his authority, the Director-General was quite free to determine the assessment he deemed appropriate, the advisory bodies called upon to give him their opinion enjoyed as much freedom as he in the assessment of the official's performance.

The Tribunal, considering the allegation of procedural flaws to be irrelevant and, in addition, noting that the Director-General had not drawn plainly inaccurate conclusions from the dossier, dismissed the complaint.

23. JUDGEMENT NO. 353 (13 NOVEMBER 1978): BASTANI *v.* INTERNATIONAL CENTRE FOR ADVANCED TECHNICAL AND VOCATIONAL TRAINING (INTERNATIONAL LABOUR ORGANISATION)

Request for reinstatement submitted by a staff member who resigned after having been suspended—Power of any supervisor to suspend a staff member from duty forthwith and without formality in view of the temporary nature of such a measure, in the interests of the Organization

The complainant had resigned after being suspended from duty because of the way he had behaved in an official meeting and his resignation had been accepted. Before the Tribunal he impugned the decision to suspend him and asked to be reinstated.

The Tribunal noted that the complainant had resigned of his own free [illegible] had not been coerced. Even supposing that, as he claimed, he had resigned because he had been suspended, the fact remained that according to the general principles of the international civil service, a supervisor may suspend from duty, forthwith and without formality, a staff member who is guilty of misconduct serious enough to make it clear that it is incompatible with the organization's interests to keep him on the staff. Moreover, the suspension was a provisional measure and reserved the staff member's rights and would have been followed by an inquiry affording him full safeguards.

In this case, in view of the serious incidents created by the complainant, it was incumbent on the Chief of Personnel to suspend him forthwith, as the case was to be referred later to the Director of the Centre for disciplinary proceedings.

The Tribunal therefore dismissed the complaint.

24. JUDGEMENT NO. 354 (13 NOVEMBER 1978): SHALEV *v.* UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Complaint impugning a decision not to renew a fixed-term contract—Limits of the Tribunal's power of review with regard to such a decision—Prior demotion on disciplinary grounds is one of the elements which can legitimately be taken into consideration in determining whether or not it is in the interest of the Organization to extend a staff member's appointment

The complainant impugned the decision not to renew his fixed-term contract.

The Tribunal observed that according to Staff Rule 104.6 (*b*) it was within the Director-General's discretionary authority to make such a decision and that therefore the complainant had no right to extension of his appointment, and where it was not extended the Tribunal's power of review was limited.

The nub of the complainant's case was that the impugned decision was the consequence of an earlier disciplinary decision taken by the Director-General to demote him from D-1 to P-5. Although that decision had become final the Tribunal might nevertheless consider whether the decision not to extend his appointment was not really a further disciplinary sanction based on the same facts, in which case it would be a mistake of law.

The Tribunal noted that in determining whether or not to extend a staff member's appointment the Director-General had to consider whether the extension was in the organization's interests in the broad sense, for example by taking account of all the facts in the dossier. If a staff member had suffered a disciplinary sanction the Director-General was bound to keep a balance between that adverse fact and other facts in the staff member's favour and should take such facts into account in reaching his decision, in the organization's interest alone. A clear distinction had to be drawn between imposing a covert disciplinary sanction on a staff member—which was unlawful—and taking into account, in reaching a decision of different purport, the fact that in his career the staff member

had suffered a disciplinary sanction—which, save in exceptional circumstances, was perfectly lawful.

In the present case the Director-General stated that he had made a full review of the complainant's dossier and that, inasmuch as it had been based on appreciations of fact, his decision was not subject to review by the Tribunal. Moreover, that decision did not seem to be tainted by any of the flaws which entitled the Tribunal to interfere. The Tribunal therefore dismissed the complaint.

25. JUDGEMENT NO. 355 (13 NOVEMBER 1978): LEVEUGLE AND BERNEY *v.* INTERNATIONAL LABOUR ORGANISATION

Request for a reclassification of posts in view of the duties relating thereto—Referral of the decisions in question to the Director-General

The complainants impugned a decision confirming the grading of their posts at the P-3 level. Both had been recruited at the P-3 level as translators and were paid a special allowance for their interpretation work. As a result of a reorganization of the Office they had been transferred to a new unit and placed under the authority of the chief interpreter and they therefore claimed that they should be regraded P-4 on the grounds that since their transfer they had been mainly taken up with interpretation and that the grading of their posts no longer corresponded to their actual duties and should be reviewed.

The Tribunal considered that that contention could not be submitted directly to it and referred the complainants back to the Director-General for possible review of the grading of their posts.

26. JUDGEMENT NO. 356 (13 NOVEMBER 1978): CHEN *v.* WORLD HEALTH ORGANIZATION

Complaint impugning a decision not to renew a contract—Failure to observe the rule relating to the exhaustion of internal remedies—Irreceivability of the complaint

The complainant impugned the decision not to renew his contract. After appealing to the Regional Director, who rejected the appeal, he brought the matter before the Tribunal.

Under the Staff Regulations the complainant had the right to appeal against the Regional Director's decision to a Board of Inquiry and Appeal but had not exercised that right. Under article VII of the Tribunal's Statute "a complaint shall not be receivable unless . . . the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations". The Tribunal therefore declared the complaint irreceivable.

27. JUDGEMENT NO. 357 (13 NOVEMBER 1978): ASP *v.* INTERNATIONAL LABOUR ORGANISATION

Complaint concerning the calculation of compensation owed for accumulated leave in the light of the coming into effect, six months prior to the cessation of service of the person concerned, of a new régime pertaining to this—Notion of acquired rights—Principle of non-retroactivity whereby facts and events which were completed at the time of the entry into force of a new statutory régime shall be governed by the rules pertaining to the previous régime

The complainant, who had ceased being a staff member on 31 August 1977, claimed that the compensation to which he was entitled for accumulated leave should have been calculated on the basis of the relevant provision of the Staff Regulations as at 31 December 1976, not the Staff Regulations as amended effective 1 January 1977. He claimed to have an acquired right to application of the earlier version of the provision in question.

The Tribunal recalled that a staff member could derive an acquired right either from a clause of his contract of appointment or from a provision of the Staff Regulations or the Staff Rules which was important enough to affect the mind of the ordinary applicant when he was considering joining the staff of the organization. In the present case the claimant could not claim an acquired right on either of those grounds.

The Tribunal, however, wondered whether application of the former text of the relevant provision was warranted by the rule precluding retroactivity, which removed from the ambit of new law facts and events which had been completed by the time that law came into force. The Tribunal did not deem it necessary to settle that point. It noted, on the one hand, that the organization had cor-

rectly applied the former version of the relevant provision in the complainant's case and that the latter therefore was mistaken in claiming that the provision had been violated and that, on the other hand, there was no question that, based on the new version of the article in question, the person concerned had received everything which was due to him.

The Tribunal therefore dismissed the complaint.

28. JUDGEMENT NO. 358 (13 NOVEMBER 1978): LANDI *v.* INTERNATIONAL CENTRE FOR ADVANCED TECHNICAL AND VOCATIONAL TRAINING (INTERNATIONAL LABOUR ORGANISATION)

Complaint regarding a refusal to extend an appointment beyond the age limit set by the Staff Regulations—Limits of the Tribunal's power of review with regard to such a decision

The complainant impugned a decision whereby the Director of the Centre had refused to extend his appointment beyond the age limit set in the Staff Regulations.

The Tribunal observed that such a decision was discretionary and could be interfered with only if it was tainted with very specific flaws. It concluded that all the grievances invoked by the claimant were groundless and therefore dismissed the complaint.

29. JUDGEMENT NO. 359 (13 NOVEMBER 1978): DJOEHANA *v.* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS)

Complaint impugning a decision not to renew a contract—Limits of the Tribunal's power of review with regard to such a decision—Deficiency of the dossier concerning the professional behaviour of the staff member during his last two years of service and the nature of the duties performed by him during that period—Quashing of the impugned decision on the ground of abuse of authority

The complainant impugned a decision whereby the organization had refused to extend his appointment. The Tribunal observed that such a decision was discretionary and that it could interfere only if the decision was tainted with very specific flaws.

The Tribunal noted that, at the end of 1974, the organization had postponed its final decision concerning the complainant to October 1976 and that regarding the decisive matter of determining whether, during that period, the complainant had proved unable to perform the services expected of him, the dossier was incomplete. It also said nothing about the nature of the tasks entrusted to the complainant during this period and it was therefore difficult to determine whether the organization had made vigorous enough efforts to find him a post in which his often acknowledged talents could have been put to good use.

In the view of the Tribunal, if the organization intended not to renew the complainant's appointment it needed to rely on decisive facts. Such facts did not appear in the evidence produced by the parties. Thus the circumstances in which the decision not to renew the contract had been taken pointed to an abuse of authority. In particular, since there was no description of the posts the complainant had held in 1975 and 1976 and no detailed comment on his performance during that period, there was reason to believe that the Director-General had either failed to take account of essential facts or had drawn clearly mistaken conclusions from the facts. In either event the impugned decision had to be quashed. The Tribunal ordered that the complainant be paid compensation amounting to the remuneration which he would have received during one year.

30. JUDGEMENT NO. 360 (13 NOVEMBER 1978): BREUCKMANN *v.* EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION (EUROCONTROL AGENCY)

Complaint seeking the application, by analogy, of the régime in effect within the European Communities regarding pension rights to the case of the person concerned—Scope of the principle whereby the claims submitted to the Tribunal and the claims in the internal appeal must be the same—Application by analogy, within an organization, of the régime applicable in another organization is justified only if the applicable text contains a gap due to an oversight

The complainant left the Commission of the European Communities to join the Eurocontrol Agency and did not avail himself of the right, provided for in article 12 of annex IV to the Staff Regulations of the Agency, to transfer the actuarial value of his pension rights from one organization

to another. When he later asked to do so his request was denied and he therefore filed a complaint with the Tribunal requesting it to "find against the opposing party in the sense that such party should be obliged to recognize the actuarial value of the pension rights being introduced into the Eurocontrol scheme as an analogous decision to Regulations No. 174.65/EEC and 14 65 EURATOM".

The Tribunal noted the Agency's contention that the claims submitted in the complaint were irreceivable because they did not correspond to the claims submitted in the internal appeal. It dismissed this argument, observing that, although the claim referred to article 1[illegible] of annex IV to the Staff Regulations and proposed applying by analogy the "actuarial" solution adopted by the Commission of the European Communities, whereas the purpose of the complaint was merely to have the complainant's rights determined by analogy in accordance with the rules of the Communities, the purpose was the same, namely, to secure recognition of the complainant's right to benefit under the Eurocontrol pension scheme. The Tribunal stated that the principle whereby the claims submitted to it and the claims in the internal appeal must be the same applied only to the substance, and had been respected in the present case.

As to the merits, the Tribunal felt that there were no grounds for applying to the particular case of the complainant, even by analogy, the rules in force for staff of the European Communities. Such application would be warranted only if the Eurocontrol rules failed to provide for that matter due to an oversight. That was not the case, since the Committee of Management of the Agency before which the case had been brought had expressly refused to meet the complainant's claims by amending the rules.

The Tribunal therefore dismissed the complaint.

31. JUDGEMENT NO. 361 (13 NOVEMBER 1978): SCHOFIELD *v.* WORLD HEALTH ORGANIZATION

Complaint impugning decisions considered prejudicial by the complainant—obligation of the Organization to respect the dignity and reputation of staff members and not cause them unnecessary personal distress—This obligation may be breached even if there has been no irregular decision—The Tribunal orders compensation for moral prejudice only in exceptional circumstances when the injury is of a kind likely to impair a staff member's career

The complainant alleged that a series of decisions concerning him constituted punitive measures taken against him without justification. In particular, he had been summarily relieved of his functions as acting director of a division and displaced from his post as chief of a programme for which he had been responsible for several years.

The Tribunal recognized that, if one tested the substance of the claim by asking oneself to what extent the complainant had suffered materially by the action taken, as distinct from the way in which it had been taken, the answer had to be that he had not suffered much.

Nevertheless, the complaint was about the way in which the complainant had been treated and its aim was to secure some kind of rehabilitation. In the opinion of the Tribunal that claim, if it could be made out on the facts, was good in law irrespective of whether or not the decisions complained of were valid. On that point, the Tribunal stated the following:

> "Just as it is implicit in every contract of service that the staff member shall be loyal, shall treat his superiors with due respect and shall guard the reputation of the Organization, so it is implicit that the Administration in its treatment of staff members shall have a care for their dignity and reputation and shall not cause them unnecessarily personal distress. Often distress and disappointment cannot be avoided but, where it can be, it should be. As in all organizations, the staff member must take the rough with the smooth and there are bound in management to be pieces of clumsiness or tactlessness which can be sufficiently smoothed over by apology or explanation. The Tribunal is not likely to concern itself with cases other than those of grave injury which has been left unredressed. But where such injury has occurred it is not the decision to take the action that is relevant—in substance it may be correct or incorrect—but the decision as to the form in which it should be taken and as to how it shall be executed."

While rejecting the argument that the decisions in question had been motivated by personal prejudice or had been otherwise illegal, the Tribunal considered that they had been taken in such a way that the interests, the feelings and the reputations of those who had been affected by them had

been treated as of no account. The question which remained to be determined was whether the ruthlessness with which the decisions had been applied had been so excessive and unnecessary as to amount to a breach of the obligation referred to in the passage of the judgement quoted above.

Having been called upon for the first time to consider a claim for compensation for moral prejudice arising from decisions which it had not deemed irregular, the Tribunal noted that to find moral prejudice in such a case and to award compensation for it was to take a very exceptional course and one which could be taken only in circumstances in which grave injury of a kind likely to impair a staff member's career had been left unredressed. In that respect, the Tribunal reached the conclusion that, in the light of the facts, the injury done to the complainant's feelings and reputation was so grave as to amount to a breach of obligation which called for compensation. The Tribunal fixed the amount of compensation at 30,000 Swiss francs.

32. JUDGEMENT NO. 362 (13 NOVEMBER 1978): ALONSO *v.* PAN AMERICAN HEALTH ORGANIZATION (PAHO) (WORLD HEALTH ORGANIZATION)

Complaint seeking payment by the Organization of fees of legal counsel retained on behalf of two staff members and at their request by a staff member holding the post of chairperson of a subcommittee of the Staff Association—Complaint is outside the Tribunal's jurisdiction—Article II of the Statute

The complainant, a staff member of the Organization, was the "chairperson" of the Legal Subcommittee of the PAHO/WHO Staff Association in which the duly elected representatives of the staff are recognized as "representing the views of that portion of the staff from which elected".

Two staff members in dispute with the Organization had authorized the complainant to represent them in negotiations with the Organization and to obtain legal counsel on their behalf. The complainant had retained counsel and made herself personally liable for his fees. The two disputes had later been settled on terms which made no provision for the settlement of costs. Legal counsel had submitted his bill to the Organization, which had refused to pay it.

The Tribunal noted that, under article II of its Statute, the Tribunal was open to any official who alleged non-observance of his terms of appointment or of the Staff Regulations or who was in dispute with the Organization concerning the compensation provided for in cases of invalidity, injury or disease incurred by him in the course of his employment. It observed that the complainant alleged that she was entitled to be compensated by the Organization for the injury sustained in that she had been left to pay counsel's fees herself. In the opinion of the Tribunal, the word "injury" in the English text of article II of the Statute had to be given the restricted meaning of physical injury, particularly in view of the use of the word "*accident*" in the French text. Moreover, even if there had been a physical injury, it would not have been incurred by the complainant in the course of her employment because there was nothing to suggest that an elected representative of the staff was employed as such by the Organization: any such interpretation would be incompatible with the nature and purposes of the Staff Association.

The Tribunal therefore dismissed the complaint as outside its jurisdiction.

33. JUDGEMENT NO. 363 (13 NOVEMBER 1978): GHAFFAR *v.* WORLD HEALTH ORGANIZATION

Complaint concerning the payment of an installation allowance—Provision, following a recommendation of the internal board of appeal, of an additional sum considered by the Organization to end the dispute—Obligation of the Director-General to conform to the Staff Rules in calculating the allowances due to staff members—A provision that the Organization may authorize an allowance if certain conditions are fulfilled gives the Administration the power to determine whether or not the conditions are fulfilled but not to withhold the payment when the conditions are fulfilled

The complainant was transferred to Abu Dhabi on 3 August 1975 and remained there until 15 May 1976. For the first period of 30 days, in accordance with the relevant provision of the WHO Manual, he received an installation allowance amounting to $US 4,770. After requesting that an installation allowance be paid to him for the entire duration of his stay at Abu Dhabi, he had received an additional amount of $2,000, following a recommendation from the Board of Inquiry and Appeal.

The complainant impugned the decision by which the Director-General had implemented the recommendation of the Board of Inquiry and Appeal on the ground that the relevant Staff Rules had not been correctly applied. The Organization contended that the complainant, having elected to take the payment of $2,000, was estopped from contending that he was entitled to anything more.

The Tribunal maintained that it was true that a debtor was entitled to offer a creditor less than the amount of the claim and that if the offer was made on condition that it was to be accepted in full and final settlement, the creditor could not accept the payment and reject the condition.

Nevertheless, in the case in question, the two parties had not been in a debtor and creditor situation and had not been free to negotiate a settlement: the Director-General had had to decide upon what was just and, unless he erred in the exercise of his discretion, his decision settled the matter. When, therefore, the Director-General had awarded to the complainant the sum of $2,000, he had done so because he considered that the sum was due, and the payment could not be subject to any condition that was not warranted by the Regulations.

Since the complainant had apparently requested payment for the entire duration of his stay at Abu Dhabi of the installation allowance provided for in the WHO Manual for the second period of 60 days following the first 30-day period, the Tribunal considered the question of how to interpret the provision of the Manual envisaging the possibility of the Organization extending payment of the allowance beyond the 60 days.

The Tribunal did not accept the view of the Organization that the use of the word "may" in the provision in question imported a large measure of discretion in allowing or disallowing requests for an extended allowance. It noted that when a regulation or rule made the payment of a sum subject to conditions and the question of whether or not a condition was fulfilled was a matter to be determined by the competent authority, the word "may" was a more appropriate word to use than the imperative in that it gave the competent authority the responsibility to apply its own judgement to the question. If in good faith and on reasonable grounds the authority withheld approval, that concluded the matter. But the use of the word "may" was quite inadequate to confer upon the authority an unbounded discretion so that, even where the conditions were manifestly fulfilled, it could for any reason or for no given reason withhold the allowance.

In the light of these facts, the Tribunal considered that the complainant was entitled to payment of the allowance for the second period of 60 days.

As to the third period, the Tribunal recognized that the relevant provision allowed the Organization wide discretion of interpretation but also noted that there was nothing in the dossier to show that the Organization had ever exercised any discretion. Nevertheless the Director-General must have been satisfied that the necessary conditions were fulfilled when he accepted the recommendation of the Board of Inquiry and Appeal concerning the payment of an additional amount of $2,000, since otherwise there would have been no basis for the award of that sum.

In the opinion of the Tribunal, the complainant had found himself in exceptional circumstances because of the uncertainty in which the Organization had left him as to his contractual status and because of real financial hardship. The Tribunal concluded that the installation allowance was payable in respect of the third period.

Consequently, the Tribunal decided that the complainant was entitled to the installation allowance for the period from 2 September 1975 until 16 May 1976.

34. JUDGEMENT NO. 364 (13 NOVEMBER 1978): FOURNIER D'ALBE v. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Complaint regarding the validation of a period of service for pension purposes—Question of the receivability of the complaint ratione materiae*—Consideration of the conclusion of the internal appeals body concerning the irreceivability of the complaint because of the failure to submit it in time*

The complainant asked the Tribunal to take the necessary action to ensure that the period of service he had performed before 31 December 1957 was taken into account for the purpose of calculating his pension or, failing that, to award him an allowance by way of compensation.

The Tribunal noted that at the time of his first appointment in 1951, the complainant had signed as "accepted" a notice of personnel action containing the note "not applicable" opposite the heading "Provident Fund Pension Scheme". It also noted that in January 1953, the Regulations of the Fund had been amended (article II thenceforth provided for the admission to the Fund of members of affiliated organizations under contract for a year or more and article III provided that under certain conditions previous service might be taken into account) and that the complainant had not been informed of that development. The Tribunal also observed that in 1958, the complainant had been informed of his admission to the Fund and advised that he could not avail himself of the provisions of article III because his previous service as an expert of the technical assistance programme was specifically excluded from participation in the Fund. Lastly, the Tribunal noted that on 27 October 1976 the complainant, referring to the unfavourable position taken by the Director-General at the General Conference in 1976 regarding the validation of previous service performed by experts which was not covered by article III, had written to the defendant organization contending, *inter alia*, that the Administration was at fault in not allowing him to avail himself of the provisions of article III.

The Appeals Board, to which the matter had been referred, had decided that it was competent to adjudicate upon the complaint, but that the complaint was irreceivable. By a decision of 26 July 1977, the Director-General had accepted the opinion of irreceivability while reserving his position on competence.

The Tribunal first took a decision on its jurisdiction. It noted that the Organization maintained that, since the complainant alleged a failure to observe the Statutes of the Fund, the matter was within the jurisdiction of the United Nations Administrative Tribunal. Nevertheless, it observed that it was the object of the complaint to obtain compensation from the Organization for its alleged breach of duties and that it therefore fell within the jurisdiction of the Administrative Tribunal of the International Labour Organisation.

The Tribunal then considered whether the Appeals Board had been right in considering the complaint as irreceivable on the ground that it was time-barred. It took the view that the answer to that question would be in the affirmative if the statement "not applicable" and the 1958 decision referred to above were considered to be administrative decisions. The question was therefore whether those statements were decisions. In the opinion of the Tribunal, that could not have been the case unless the Organization had the power to give a decision binding on the complainant as to whether or not the provisions of article III were available to him, and it did not have that power. The statements in question consequently had to be construed as no more than advice about the way in which the matter would be decided upon by the competent body. The complainant was therefore justified in contending that such advice was erroneous and misleading and that by giving such advice, the Organization had failed to observe some regulation or to fulfil a duty arising out of the contract of service. While the question as to whether or not the advice in question had indeed been erroneous and misleading was open to discussion, there was no doubt that the matter had not been settled and that, therefore, it called for a decision.

The Tribunal thus decided that the complaint was receivable in so far as it was based on the allegation that the Organization had failed to fulfil its obligation to give staff members correct information concerning their participation in the Fund, and it quashed the decision of 26 July 1977.

35. JUDGEMENT NO. 365 (13 NOVEMBER 1978): LAMADIE AND KRAANEN *v.* INTERNATIONAL PATENT INSTITUTE

Complaints concerning the applicability to the staff members concerned of the new conditions of employment resulting from the conclusion of an inter-State agreement—Competence of the Tribunal to consider the complaints—Concept of acquired rights in respect of remuneration, promotion and retirement

The complainants alleged that, as a result of the integration of the International Patent Institute into the European Patent Office (EPO) on the basis of an agreement between the States concerned, they had been forced to accept conditions of employment very different from those which had led them to join the Institute, and they consequently demanded the quashing of the EPO decision subjecting them to new conditions of employment.

The Tribunal first noted that, according to EPO, the Tribunal was not competent to consider applications for the quashing of legislative acts or *a fortiori* decisions to approve international agreements, since that would impair the authority of the States parties. Nevertheless, the Tribunal observed that the complainants were not contesting the validity of the integration agreement but were contending only that the provisions of that instrument should not apply to them and were not asking the Tribunal to disregard State sovereignty. It added:

> "It is immaterial that the provisions which they say should not apply are embodied in an international agreement and not in the Staff Regulations of an organization which still exists. Whatever the nature of the text which contains the provisions, they have the same purport, namely the legal position of the staff of an organization. Where a provision of the Staff Regulations is amended the Tribunal may order the defendant organization to apply the old text and not the new. So, too, when provisions of Staff Regulations are amended so as to comply with clauses in an international agreement the Tribunal may order the application of the former rather than the latter. In the present case, therefore, the plea that the Tribunal is not competent fails."

With regard to the argument that the Institute had radically altered the terms of appointment of its officials without their real co-operation, the Tribunal noted that representatives of the Institute staff had taken part in the discussions which had preceded the conclusion of the integration agreement.

As to the merits of the case, the Tribunal noted that the complainants contended that the integration agreement infringed their acquired rights. It observed that a right was acquired when he who had it might require that it be respected notwithstanding any amendment to the rules, and that an acquired right should be understood to be either a right which arose under an official's contract of appointment and which both parties intended should be inviolate, or a right laid down in a provision of the Staff Regulations or Staff Rules which was of decisive importance to a candidate for appointment.

It noted that although under the provisions of the Institute's Staff Regulations staff members had as a rule been paid salaries identical to those of European Communities, staff stationed in the Netherlands at the time when the Regulations had come into force, no provision of the Staff Regulations guaranteed that that parity would continue. Moreover, the integration agreement had not brought about any cut in the salary which the complainants received from the Institute and, although it was true that former Institute officials would have fared less well than European Communities staff if the salaries of the latter had risen faster than the salaries of EPO staff, the officials transferred from the Institute to EPO had no acquired right to be paid the same salary from 1 January 1972 as European Communities staff and could not allege unfair discrimination.

The complainants also maintained that their acquired rights had been breached by the change in the rules on promotion. On that point, the Tribunal stated the following:

> "It is true that when he takes up employment with an organization an official may reasonably hope some day to advance in grade and that the rules on promotion create an acquired right in so far as they offer the prospect of advancement. But the substance of the acquired right to promotion is merely the possibility of advancement because it is only on the strength of such a possibility that a staff member may have accepted appointment. The provisions which lay down the conditions governing promotion do not confer any acquired rights on a staff member because, when he takes up his appointment, he cannot foresee how he will fare in his career. On the contrary, those provisions are subject to amendment and the staff member must expect such amendment."

On the question of the pension scheme, the Tribunal recognized that an official who offered his services to an organization might be expected to give decisive importance to the provisions on his pension rights and that any curtailment of those rights should therefore be regarded as affecting an acquired right. Nevertheless, it reached the conclusion that the complainants' acquired rights would have been infringed only if the Administrative Council had guaranteed the application of the pension scheme of the European Communities to former Institute officials, and it had not.

With regard to expatriation, education and leave expense allowances, the Tribunal recognized that it could legitimately be asked whether their outright abolition would not violate an acquired right. Nevertheless, it considered that the amount and conditions of payment of such allowances did not constitute acquired rights and, indeed, that the staff member should expect them to vary.

As to the question of the internal appeals system available to the staff, the Tribunal concluded that even according to the integration agreement, the complainants would continue to enjoy such protection as precluded any curtailment of their acquired rights.

The Tribunal therefore dismissed the complaint.

36. JUDGEMENT NO. 366 (13 NOVEMBER 1978): BIGGIO, VANMOER AND FOURNIER *v.* INTERNATIONAL PATENT INSTITUTE

This case is similar to the case which is the subject of Judgement No. 365.

37. JUDGEMENT NO. 367 (13 NOVEMBER 1978): SITA RAM *v.* WORLD HEALTH ORGANIZATION

Complaint impugning a transfer decision—Quashing of the decision on the grounds of prejudice and incomplete consideration of the facts—Compensation for the moral prejudice suffered by the complainant

The complainant requested the quashing of a transfer decision concerning him which, according to him, had been taken in violation of the established rules and procedures. He also asked to be reinstated in the post he had occupied before the appointment of his replacement and to be given retroactively the grade given to the latter.

The Tribunal first considered the receivability of the complaint. It noted that the appointment of a third person to the post previously occupied by the complainant and the transfer of the complainant to another post were discretionary decisions to be taken by the Administration in the interests of the Organization. The complainant, however, contended that discretion had been abused and also alleged irregularities, including breaches of Staff Rules, affecting each of the decisions separately.

The Organization did not dispute the receivability of the complaint in general terms; in particular it did not dispute the complainant's right to challenge his assignment. Nevertheless, it contended that to the extent that the complaint was directed against the appointment of the complainant's successor, it was time-barred. The Tribunal noted that the complainant was not asking that the decision in question be quashed, but was asking for remedies that would appear to be consequential on the quashing. It was not within the competence of the Tribunal to grant relief in those forms, and it was therefore unnecessary to consider to what extent the claims were time-barred. Nevertheless, the Tribunal stressed that the two decisions were inseparably linked and that the complainant must contest the validity of the decision to appoint a successor if he wanted to be able to allege abuse of power in relation to the transfer decision.

The complainant alleged that there had been both personal prejudice against him and an incomplete consideration of the facts. On the question of the facts, the Tribunal reached the following conclusion:

> "When outstanding considerations are overlooked, it suggests that the matter is not being examined objectively; and this in turn suggests in the case of competent examiners that it is prejudice rather than lack of perception that is at work. [In the case in question], it was not on the evidence a prejudice *against* the complainant but a prejudice *for* [his successor]. The Board of Inquiry and Appeal appreciated 'the desire of a newly appointed high official to choose a collaborator with whom he is well acquainted and in whose ability and co-operation he can place his complete confidence'. But a selection process, as the Board in effect goes on to say, cannot be fair if the head of the department is openly pressing his own candidate, putting him at an advantage by clothing him temporarily with the office, and failing to see that there are other candidates. The Board noted that the complainant was not considered for the vacancy, 'presumably because the Administration was eager to recruit [his successor]'. The complainant fell a victim to [his superior's] prejudice for another."

The Tribunal therefore concluded that the transfer decision had been affected by prejudice and incomplete consideration of the facts and should be quashed. It added that it was the moral prejudice

which the claimant had suffered which must be compensated. In that respect, it reaffirmed the position it had taken in Judgement No. 365.[20]

Since the Administration in its treatment of the complainant and irrespective of whether its decision to assign had been right or wrong had failed to observe the general obligation of showing concern for the dignity and reputation of staff members, the Tribunal fixed at $ 2,000 the sum to be awarded to the complainant as compensation.

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[20] See page 158 of this *Yearbook*.