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

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

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Chapter V

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

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

1. JUDGEMENT NO. 237 (13 FEBRUARY 1979):[2] POWELL *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application seeking rescission of a bulletin suspending the practice followed by the United Nations up to that time pursuant to a previous bulletin by which the Organization reimbursed national taxes levied on one-third lump sum pension payments — Origin of staff regulation 3.3 (f) on the reimbursement of national taxation in respect of salaries and emoluments paid to the staff of the Organization — Authority of the Secretary-General to issue, for the purpose of applying the Staff Rules and Regulations, circulars which the Tribunal has held to have the same force and effect as the Staff Rules unless inconsistent with the Staff Regulations — Concept of acquired rights — under its Statute the Tribunal is competent to rescind individual decisions but not to rescind erga omnes *a decision which is in the nature of a regulation — Examination at the request of the respondent of the question of the legality of the practice followed by the Organization prior to issuing the bulletin mentioned in the application — Arguments adduced from the fact that staff regulation 3.3 refers only to "salaries and emoluments" and covers only staff members in service — Arguments adduced from the fact that the one-third lump sum pension payment is not subject to staff assessment — Rejection of these arguments*

The applicant requested the rescission of a bulletin bearing the symbol ST/SGB/167 which had suspended, as from 16 July 1978, pending an advisory opinion from the Administrative Tribunal on the question, all reimbursements out of the Tax Equalization Fund with respect to national taxes paid by retired or retiring staff members on one-third lump sum payments received out of the Joint Staff Pension Fund. A subsequent bulletin (ST/SGB/169) had confirmed the aforementioned suspension following the decision of the Administrative Tribunal that it had no competence to entertain a request for an advisory opinion.[3]

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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 1979, 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 contracts or terms of appointment.

[2] Mr. R. Venkataraman, President; Mme Paul Bastid, Vice-President; Mr. Francisco A. Forteza, Member; Mr. Francis T. P. Plimpton, Vice-President, Alternate Member.

[3] On this point, see *Juridical Yearbook*, 1978, pp. 135 and 136.

The Tribunal first noted that the provisional decision on suspension had been motivated by the fact that questions had been raised concerning the legality of a practice followed by the Organization pursuant to a circular issued on 16 December 1974. Noting that, in addition to the present application, two other applications had been filed by staff members who were still in service, the Tribunal considered that it must examine each application in accordance with its Statute and leave it to the Secretary-General to take the necessary action with a view to the adoption by the appropriate authorities of the measures which might be required in the light of the Tribunal's judgement.

After retracing the history of the system governing the reimbursement of taxes levied on staff of the United Nations, which had culminated in the introduction into the Staff Regulations of regulation 3.3 (*f*),[4] the Tribunal recalled that under Article 97 of the Charter the Secretary-General was the Chief Administrative Officer of the Organization and that, under the Staff Regulations "he shall provide and enforce such staff rules consistent with these principles as he considers necessary". It deduced from that that the Secretary-General had discretion in framing the Staff Rules and in applying the Staff Regulations, and noted that in the exercise of his functions the Secretary-General issued administrative orders and information circulars which the Tribunal had held to have the same force and effect as the Staff Rules unless inconsistent with the Staff Regulations, adding that, in the present case, such a circular had been issued, namely the circular of 16 December 1974.

With respect to the legal effect of that circular, the Tribunal referred to its Judgements No. 89[5] and 195[6] and decided on the basis of those precedents that the circular had created a right which the applicant could claim when he opted for a one-third lump sum payment.

The Tribunal also referred to its Judgement No. 202[7] in which it had explained the meaning of respect for acquired rights in cases other than those in which a contractual stipulation exists:

> "Respect for acquired rights also means that the benefits and advantages accruing to a staff member for services rendered before the entry into force of an amendment cannot be prejudiced. An amendment cannot have an adverse retroactive effect in relation to a staff member, but nothing prevents an amendment to the Staff Rules where the effects of such

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[4] Regulation 3.3:

. . .

(*f*) Where a staff member is subject both to staff assessment under this plan and to national income taxation in respect of the salaries and emoluments paid to him by the United Nations, the Secretary-General is authorized to refund to him the amount of staff assessment collected from him provided that:

(i) The amount of such refund shall in no case exceed the amount of his income taxes paid and payable in respect of his United Nations income;

(ii) If the amount of such income taxes exceeds the amount of staff assessment, the Secretary-General may also pay to the staff member the amount of such excess;

(iii) Payments made in accordance with the provisions of the present regulation shall be charged to the Tax Equalization Fund;

(iv) A payment under the conditions prescribed in the three preceding subparagraphs is authorized in respect of dependency benefits and post adjustments which are not subject to staff assessment but may be subject to national income taxation.

[5] *Judgements of the United Nations Administrative Tribunal*, Numbers 87 to 113 (United Nations publication, Sales No. E.68.X.1, p. 22).

The relevant passage of the Judgement reads as follows:

"Each of the staff members in question was entitled to expect that his individual legal status would be determined on the basis of the interpretation given in that circular, which had been issued by the competent authority and was binding on the latter until properly amended."

"The Tribunal considers that the Respondent is not justified in barring in an individual case the application of the interpretation of the relevant provisions he has given in a circular of general scope".

[6] AT/DEC/195. For a summary of the Judgement, see *Juridical Yearbook*, 1975, p. 118. In this Judgement, the Tribunal was of the view that the document in question enunciated "a new policy . . . and [its purpose was] to bring about a fundamental change in the future conditions of employment of precisely that category of staff into which the applicant fell". The Tribunal considered that that document " . . . created rights for staff members in that category even though they might have been unaware of its existence or of the rights thus created."

[7] AT/DEC/202. For a summary of this Judgement, see *Juridical Yearbook*, 1975, p. 128.

amendment apply only to benefits and advantages accruing through service after the adoption of such amendment (Judgement No. 82, *Puvrez*)".[8]

The Tribunal concluded that this principle prohibited the application of bulletins ST/SGB/167 and 169 and that the right to reimbursement established in the applicant's favour must be respected by the respondent.

The Tribunal observed, however, that it had no competence to rescind *erga omnes* a decision in the nature of a regulation, such as the suspension ordered by the Secretary-General, noting however that the respondent had sought a ruling on the legality and validity of the position taken in 1974 with regard to tax reimbursement on partial commuted lump sum payments. The Tribunal examined that question by reference to the relevant provisions.

It first analysed the contention that regulation 3.3 covered only "salaries and emoluments" and was not applicable to the one-third lump sum payment. In that regard, it had to determine whether, given the relevant provisions of the Pension Fund Regulations and the practices of the Organization, the sum in question partook of the character of the other lump sum payments mentioned in articles 29 (*e*), 30 (*c*), 31 (*c*) (ii) and 32 of the Pension Fund Regulations or of periodic payments of retirement benefits. It noted that the *100 per cent* commuted lump sum payable under articles 29 (*d*) (ii), 29 (*e*), 30 (*c*) and 31 (*c*) (ii), mentioned above, had always been treated as eligible for tax reimbursement and had always systematically been reimbursed for over 30 years. The same practice had been followed in the case of the withdrawal settlement payable under article 32. The Tribunal, while recognizing that partial lump sum withdrawal and full lump sum withdrawal did not have the same implications, stressed that both benefits were payable by the Pension Fund and that there was no legal basis for the difference between a partial lump sum payment and a full lump sum payment. It concluded that the law and practice applicable to full lump sum payments applied with equal force to partial lump sum payments.

In ascertaining whether the partial lump sum payments came within the category of "salaries and emoluments", which alone qualify for tax reimbursement under staff regulation 3.3 (*f*), the Tribunal observed, on the basis of existing documents, that the United Nations Administration had always considered full lump sum withdrawals from the Pension Fund as emoluments of the staff. In addition, it noted that the General Assembly had authorized the partial lump sum withdrawal to enable staff members to meet difficult situations such as reintegration into the national life of their own countries and that, from that point of view, the one-third lump sum payment could also be regarded as a terminal payment which under staff regulation 3.3 (*f*) was eligible for reimbursement.

With respect to the contention that reimbursement was provided only for the benefit of *serving staff members*, the Tribunal held that to be invalid: it noted that tax levied on salaries, terminal payments, lump sum withdrawals and withdrawal settlements from the Pension Fund were refunded to *former staff members* after separation and that in a 1951 document the Administration had clearly recognized that for the purpose of reimbursement of taxes, the term "staff members" also included former staff members.

Turning finally to the contention that entitlement to tax reimbursement arose only where payments made by the Organization were subject both to staff assessment and to national income tax — a condition not met by the one-third lump sum pension payment, on which no staff assessment was levied — the Tribunal sought to determine whether staff regulation 3.3 (*f*) was exhaustive and whether only those items of remuneration mentioned therein were eligible for tax reimbursement. It noted that in practice taxes levied on allowances other than those explicitly mentioned in the subparagraph in question had always been reimbursed even though they were not subject to staff assessment and that the same applied to withdrawal settlements under article 32 of the Pension Fund Regulations, and to the full lump sum payments under articles 29, 30 and 31. It consequently reached the conclusion that the absence of staff assessment did not by itself bar tax reimbursement under staff regulation 3.3 (*f*) and that since national income taxation on full lump sum withdrawals from the Pension Fund had always been reimbursed on the authority of regula-

[8] *Judgements of the United Nations Administrative Tribunal*, Numbers 71 to 96 (United Nations publication, Sales No. E.63.X.1, p. 78).

tion 3.3 (*f*), even though those withdrawals had not been subject to staff assessment, the reimbursement of such taxation on partial lump sum withdrawals from the Pension Fund was likewise legal and justified under that same regulation.

In the light of the above, the Tribunal concluded that the authorization under the information circular of 16 December 1974 to reimburse national taxes levied on partial lump sum pension payments was valid and decided that the applicant was entitled to reimbursement of national income taxation on the one-third lump sum payment of his pension.

2. JUDGEMENT NO. 238 (8 FEBRUARY 1979):[9] CARLSON *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application by a serving staff member requesting the Tribunal, first, to order the rescission of the bulletin referred to in the application which gave rise to Judgement No. 237 and, second, to order the reimbursement of taxes owed in respect of a one-third lump sum pension benefit — Rejection of the first plea for the reasons stated in Judgement No. 237 — Rejection of the second plea as unfounded since the staff member had not yet retired

The applicant, who had been scheduled to retire on 30 September 1977, upon reaching the age of 60, had agreed to an extension of her service for a total of 18 months and was therefore due to retire on 31 March 1979, i.e., after the date of this Judgement. She requested the Tribunal, first, to order the rescission of bulletins ST/SGB/167 and 169, referred to in Judgement No. 237 summarized in subsection 1 above, and secondly, to order the payment of tax reimbursement on partial lump sum commutation of benefits from the United Nations Joint Staff Pension Fund. The Tribunal rejected the applicant's first plea for the reasons stated in Judgement No. 237. With regard to the applicant's second plea, it recalled that same Judgement, in which it had confirmed the validity of the bulletin of 16 December 1974. The Tribunal added that, since the applicant continued at the time of the judgement to be in pay status with the United Nations, she could not, having regard to the relevant provisions of the Administrative Rules of the Pension Fund, claim any vested right to her retirement benefit. In other words, as she had not yet retired, she was not entitled to exercise her option for the one-third lump sum commutation benefit and thus had no grounds for requesting tax reimbursement. With regard to the request for tax reimbursement, the Tribunal held that, since the cause of action had not yet arisen, no decision was called for.

3. JUDGEMENT NO. 239 (13 FEBRUARY 1979):[10] MASIELLO *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

The case is similar to that dealt with in Judgement No. 238.

4. JUDGEMENT NO. 240 (15 MAY 1979):[11] NEWTON *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application by a former staff member of UNRWA seeking the validation for pension purposes of periods of previous service performed at a time when UNRWA staff members were not eligible to be participants in the Pension Fund — Decision of the General Assembly limiting the power to validate such periods of service to the case of staff members still in pay status as at a specific date — Allegations of injustice and discriminatory treatment — The Tribunal has no competence to rule on a decision of the General Assembly, or on the Secretary-General's proposal which served as the basis for such a decision

[9] Mr. R. Venkataraman, President; Mme Paul Bastid, Vice-President; Mr. Francisco A. Forteza, Member; Mr. Francis T. P. Plimpton, Vice-President, Alternate Member.

[10] Mr. R. Venkataraman, President; Mme Paul Bastid, Vice-President; Mr. Francisco A. Forteza, Member; Mr. Francis T. P. Plimpton, Vice-President, Alternate Member.

[11] Mr. R. Venkataraman, President; Mme Paul Bastid, Vice-President; Mr. Endre Ustor, Member; Mr. T. Mutuale, Alternate Member.

The Applicant had served with UNRWA for a period between 1952 and 1957, which he had asked to have validated when, upon being transferred to UNICEF, he became a participant in the Pension Fund. All his efforts to obtain validation of that period of service had, however, been to no avail. In 1975, the Assembly decided, on the proposal of the Secretary-General, that periods of service performed between 1950 and 1960 by certain UNRWA staff members would be validated by the Pension Fund, with the proviso that only staff members "still on the rolls as of 31 December 1975 would be eligible for such coverage".

In considering the case, the Tribunal noted that the applicant claimed to be the victim of inequity and discrimination as a result of the proposal of the Secretary-General referred to above, and requested the Tribunal to correct that "inequity situation" by recommending to the Secretary-General that he take appropriate measures to validate for pension purposes the applicant's service with UNRWA. The Tribunal noted that in the proceedings the applicant had not asserted that he had a right to Pension Fund coverage under the terms of his appointment with UNRWA and that his complaint, although formally attacking an action by the Secretary-General, was actually against the aforementioned decision of the General Assembly.

The Tribunal recalled that in another case with which it had dealt previously (Judgement No. 229),[12] the Administration of UNRWA had considered that the person concerned, notwithstanding his retirement prior to 31 December 1975, was eligible to elect Pension Fund coverage of his pre-1961 service under the said decision of the General Assembly on the ground that on 31 December 1975 he had been serving on the staff of an organ of the United Nations. In the present case, however, the applicant did not contest that on 31 December 1975 he had not been in service with any organ of the United Nations and the precedent referred to above was therefore not applicable.

The Tribunal found that, in the circumstances of the case, it was unable to grant the relief requested by the applicant. Although the General Assembly had acted upon the proposal of the Secretary-General, it remained entirely responsible for its decision in the matter. Moreover, the Secretary-General's proposal was not an administrative decision and hence was not within the Tribunal's competence.

The Tribunal further considered that making proposals to the General Assembly lay within the discretionary power of the Secretary-General and that, while the Tribunal was not precluded from making observations if it considered that legislative acts of the Organization appeared contrary to the general principle of non-discrimination, and while such observations could be considered by the competent authorities as recommendations, the present case did not seem to call for such action, as a decision limiting eligibility for certain advantages to active staff members could not normally be deemed to constitute unlawful discrimination. A retired staff member could not make claim before the Tribunal to benefits which the legislative organ of the Organization saw fit to grant subsequent to his separation from service to staff members still in service. Even if such action was felt by the retired staff member as regrettable or inequitable, he had no legal right to such benefits and in the absence of such right the Tribunal could not espouse his claim.

5. JUDGEMENT NO. 241 (17 MAY 1979):[13] FURST *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting, first, the appointment of a staff member at a given level to fill a post graded at the next higher level and, second, a decision to transfer the applicant, which he contended was a misuse of power that resulted in detriment to him

The applicant contested, first, a decision which he had previously contested unsuccessfully before the Tribunal[14] to appoint him as a staff member at the P-3 level to a post graded P-4/P-5. The

[12] AT/DEC/229. For a summary of the Judgement, see *Juridical Yearbook*, 1977, pp. 154 and 155.

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

[14] See Judgement No. 134 (AT/DEC/134), reproduced in *Judgements of the United Nations Administrative Tribunal*, Numbers 114 to 166 (United Nations publication, Sales No. E.73.X.2), p. 188, summarized in *Juridical Yearbook*, 1969, p. 191.

applicant adduced as new and conclusive evidence in support of his application the introduction by UNDP in 1973 of a comprehensive and consistent system of classification of Headquarters and field posts and of vacancy notices. The Tribunal stated that it was unable to share the applicant's views as to the relevance of the system of classification to the decision which he contested. It emphasized that the system had been introduced with the intention of defining the qualifications and experience called for in each post; designed as a guide for applicants, the system was not intended to require that posts classified at a certain level could not in any circumstances be occupied by staff members below that level, and it placed no obligation whatever on the Administration to promote automatically any staff member graded lower than the level of the post to which he was appointed. The Tribunal concluded that the appointment of the applicant at the P-3 level in no way contravened the United Nations Staff Regulations or the established practice and involved a valid exercise of authority by the Administration.

The applicant also contested the decision to transfer him to a post of Area Officer in New York in 1975. The applicant contended that, while the Administration had the power to transfer staff members, it abused that power if, as alleged in the present case, it required a staff member to accept a transfer which was demonstrably to his detriment. The Tribunal noted, however, that a UNDP circular of 1968 interpreted staff regulation 1.2 as imposing an obligation on staff members to accept assignments to a specified duty station at a given time, specifying that in all such cases the Administration would take into account all relevant considerations as far as possible. The obligation, in short, was on the staff member but the Administration was ready, at its discretion and allowing for the exigencies of the service, to take his personal situation and wishes into account. The Tribunal did not accept the premise on which the applicant based his argument, namely, that the transfer had been to his detriment because it deprived him of the opportunity for promotion.

The Tribunal, therefore, concluded that both decisions contested by the applicant represented a valid exercise of authority on the part of the respondent and that, with respect to all other matters to which the application related, the respondent had acted throughout in good faith and within his rights.

6. JUDGEMENT NO. 242 (22 MAY 1979):[15] KLEE *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application seeking compensation for the injury suffered by the applicant as the result of a decision depriving him of a legitimate expectancy of extension of his appointment — Determination of the duration of the appointment on which the applicant could reasonably count — Extent to which periods of service completed by the applicant under short-term appointments may be deducted from the anticipated total duration of the appointment for the purposes of assessing compensation

The applicant had been informed on 24 October 1974 that the Executive Director of UNIDO had decided to recommend a two-year extension of his fixed-term appointment which was scheduled to expire on 31 March 1975. That recommendation had been approved by Headquarters. Subsequently, however, UNIDO had reversed its position and the applicant had obtained only two successive six-month extensions. The case had been referred to the Joint Appeals Board, which had recommended payment of a year's salary. However, the Secretary-General decided to grant the applicant an *ex gratia* payment amounting to three months' salary, an amount which, as stated in the text of the decision:

> "was determined according to the formula established by the Administrative Tribunal whereby in cases of legitimate expectancy of extension of fixed-term appointments, the compensation granted is equal to the amount of termination indemnity that would have been payable had the appointment been extended and then terminated forthwith."

The Tribunal, considering the case, noted that by the foregoing reference, the respondent had acknowledged that the applicant had a legitimate expectancy of extension of his appointment. The

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

Tribunal considered, however, that since the respondent claimed to have realized that expectancy by successive extensions of the appointment it must determine the duration of the appointment on which the applicant could reasonably count and whether that expectancy had been realized.

While acknowledging that the memorandum of 24 October 1974 did not have the character of an administrative decision obliging the respondent to maintain the applicant in service until 31 March 1977, the Tribunal noted that the respondent had undertaken to recommend a two-year extension to Headquarters and that that undertaking could only have meant that the respondent was convinced that the agreement of Headquarters would be obtained. It was that conviction and the fact that the applicant had been informed of it that had given the latter grounds for his expectancy that he would be maintained in service for a certain period. It followed that the duration of the appointment on which the applicant could count was that specified by the respondent in the memorandum of 24 October 1974, namely two years. As to the appointments granted to the applicant after 31 March 1975, which represented a total of one year of service, they could not be taken into account to cover 50 per cent of the duration of the expected appointment, since they had been granted in the short-term and in circumstances quite different from those envisaged in the memorandum of 24 October 1974.

With regard to the injury sustained as a result of the premature termination of the contractual bond, the Tribunal noted that the respondent, considering that the applicant had a legitimate expectancy that his appointment would be extended, had deduced from that that the applicant was in the position of a staff member who, according to the earlier judgements of the Tribunal,[16] could "anticipate" the granting of a contract according to "normal practice". In this case, however, the expectancy of extension had been clearly defined and the situation thus differed from those in which the Tribunal had evaluated the compensation according to the "formula" referred to above.

Considering that the reasons invoked by the respondent for not realizing the expectancy created by him were not justified and that the change of position on the respondent's part was not attributable to an external intervention but to the very authorities which had taken the steps that had created the applicant's expectancy, and further considering the exceptional material difficulties which the respondent's conduct had caused the applicant, the Tribunal considered that in addition to the compensation equivalent to one year's salary provided for in the recommendation of the Joint Appeals Board, the applicant should be granted the equivalent of three months' salary.

With regard to the request for compensation for the applicant's inability to claim any pension from the Joint Staff Pension Fund, the Tribunal considered that the applicant's right to a retirement pension could have been affected by a change in personal circumstances and, on the basis of the principle that damages should not be remote or indirect, it rejected the request.

7. JUDGEMENT NO. 243 (23 MAY 1979):[17] JIMENEZ CARILLO *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application requesting compensation for the illness and death of a staff member, attributable, according to the applicant, to the performance of official duties on behalf of the United Nations — Limits of the Tribunal's power of review in such cases — Administrative negligence entailing the responsibility of the respondent in the case

The applicant requested the Tribunal to declare that the illness and subsequent death of her husband, a former technical assistance expert of the United Nations, were directly attributable to the performance of official duties on behalf of the United Nations. The Tribunal, invited to determine whether the illness of the deceased staff member could be attributed to the performance of his official duties and whether as a result the respondent was under an obligation to compensate the

[16] See Judgement No. 132 (AT/DEC/132), reproduced in *Judgements of the United Nations Administrative Tribunal*, Numbers 114 to 166, p. 172, and summarized in *Juridical Yearbook*, 1969, p. 189, and Judgement No. 227 (AT/DEC/227), summarized in *Juridical Yearbook*, 1977, p. 151.

[17] Mme Paul Bastid, Vice-President, presiding; Mr. Francisco A. Forteza, Member; Sir Roger Stevens, Member.

applicant, recalled that it was not competent to pass judgement on the opinions expressed by medical practitioners in such cases and confined itself to consider whether the respondent's decisions had been taken in accordance with due process.

The Tribunal noted that when the claimant was separated from service, the formality of a medical examination on separation from service as provided for in the Staff Rules had been ignored and that such an examination might have made it possible to avoid a dispute which had continued for 10 years.

With reference to the Secretary-General's decision to deny, in accordance with the recommendation of the Advisory Board on Compensation Claims, the claim for compensation for service-incurred illness resulting in total disability, the Tribunal concluded from the fact that the terminology used in the recommendation in question was similar to that previously used by the Medical Director about the staff member in question that the said recommendation had been based solely on the opinion of the Medical Director.

Moreover, the Tribunal observed that despite the submission by the applicant, in support of a request that the case be reopened under article 9 of appendix D to the Staff Rules, of a medical certificate from the attending physician which provided an explanation different to that previously offered by the Medical Director, the respondent had maintained that, since the said request did not contain any new information, there was no ground for reopening the case, and had not taken any step that might lead to a considered opinion on the validity of the new explanation proposed.

With reference to the conclusions of the medical board convened under article 17 (*b*) of appendix D to the Staff Rules after the death of the applicant, the Tribunal recalled that it did not regard itself as competent to examine and compare the value of the conclusions reached by the members of the Board. It confined itself to noting that the respondent had applied the procedures laid down in appendix D to the Staff Rules, that his decision had been based on the opinion of the majority of the medical board and that the validity of that decision could not be contested.

Considering, however, that the formality of a medical examination on separation from service had not been complied with, that the respondent had failed to take into consideration a medical certificate that might have provided new elements in the case, that there had been considerable delay in convening the medical board referred to earlier and that the 17-month delay between the date of the medical board's report and the date on which the applicant had been informed of the Secretary-General's final decision was excessive, the Tribunal found that those instances of administrative negligence entailed the responsibility of the respondent and awarded the applicant $5,000 as compensation.

8. JUDGEMENT NO. 244 (25 MAY 1979):[18] BERNARD *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting the validity of a termination by mutual consent pursuant to staff regulation 9.1 (a) *and of a deduction from payments due upon separation from service pursuant to staff rule 103.18* (b) *(iii) for the purpose of paying a private debt of the staff member concerned — Proof of consent by a staff member to a termination by mutual agreement — Policy of the Organization with regard to the application of staff rule 103.18* (b) *(iii) — Limits of the Tribunal's power of review with regard to decisions taken pursuant to a provision conferring discretionary authority on the Secretary-General — Question of determining whether the termination indemnity falls under the category of "emoluments" mentioned in staff rule 103.18* (b) *(iii)*

The application raised two questions, namely: (1) was there a valid termination of the applicant's appointment in accordance with staff regulation 9.1 (*a*) ? and (2) was the deduction for third-party indebtedness made by the respondent from the terminal entitlements of the applicant authorized under staff rule 103.18 (*b*) (iii) ?

[18] Mr. R. Venkataraman, President; Mr. Francisco A. Forteza, Member; Mr. Endre Ustor, Member.

The Tribunal first recalled the provisions of the last paragraph of staff regulation 9.1 (*a*), which reads as follows:

> "Finally, the Secretary-General may terminate the appointment of a staff member who holds a permanent appointment, if such action would be in the interest of the good administration of the Organization and in accordance with the standards of the Charter, provided that the action is not contested by the staff member concerned".

It observed that the applicant contended that the decision not to contest a proposed termination must be in writing — a condition which, according to the applicant, was not fulfilled in this case — and that he asserted he had never given his consent, verbally or otherwise. The Tribunal noted that the Staff Regulations and Rules did not stipulate that a written agreement was necessary in the case envisaged; it found that the existence of such an agreement was a question of fact to be determined on the evidence, which could be documentary, oral or circumstantial, and found no authority for the applicant's contention on that point.

After examining the circumstances which had culminated in the separation, the Tribunal found that it was more likely for the applicant to have agreed to a termination with the monetary benefits provided for in such cases than to risk a termination with financial loss. Moreover, the file showed that the applicant had not disputed the termination by mutual agreement when he received the notice of termination and that it was when he discovered that certain deductions had been made from his terminal payments that he changed his mind and sought to go back on his consent. Lastly, certain documents in the file corroborated the respondent's contention that the applicant had expressed his agreement to the termination in writing. The Tribunal therefore held that the applicant had consented to the proposed termination.

Having reached that conclusion, the Tribunal rejected the contention that the applicant remained a staff member, observing that it found no provision for withdrawing consent to a termination by mutual agreement, that once a termination became effective it remained in force unless set aside by a process of law and that furthermore the applicant, having received his terminal entitlements, less the aforementioned deductions, could not logically claim that he remained a staff member.

As to the applicant's contention that his consent to termination had been conditional on his receiving the full termination indemnity without deductions and that, as that condition had not been fulfilled, there could be no termination, the Tribunal considered that in the light of the documents in the file it was baseless.

The applicant also contested the deductions made by the respondent for third-party indebtedness, contending in particular that on the date of separation there had been no valid final judgement for the debt and that consequently staff rule 103.18 could not be invoked. After reviewing the facts of the case, the Tribunal reached the conclusion that on the date when the deductions were made, there was in existence a binding and valid debt certified as such by the legal counsel for the respondent.

After recalling that by virtue of the Convention on the Privileges and Immunities of the United Nations,[19] the United Nations, its property and assets enjoyed immunity from every form of legal process and that it was open to the Organization to expressly waive its immunity, on the understanding, however, that no such waiver of immunity could extend to any measure of execution, and after observing that by virtue of staff regulation 1.8 the immunities and privileges attached to the Organization furnished no excuse to the staff members who enjoyed them for non-performance of their private obligations or failure to observe laws and police regulation and that hence, staff members could not use the United Nations as a shield against payment of their debts to third parties, the Tribunal recalled that according to staff rule 103.18 (*b*) (iii) deductions from salaries, wages and other emoluments could be made "for indebtedness to third parties when any deduction for this purpose is authorized by the Secretary-General".

[19] United Nations, *Treaty Series*, vol. 1, p. 15.

After recalling the policy of the United Nations concerning the application of that rule, which was set forth in a legal opinion dated 6 February 1968,[20] the Tribunal noted that the applicant had not had the court orders against him stayed or overturned through appropriate legal proceedings, and considered that the respondent had been right in regarding the subsisting court orders as binding on the applicant, as the respondent could not get involved in the validity of judgements concerning staff members in their personal capacity. The Tribunal added that staff rule 103.18 (*b*) (iii) conferred discretionary authority upon the Secretary-General and that its competence was limited to the question whether the exercise of discretion was arbitrary or capricious. In the light of the facts, it considered that the Secretary-General had been within his rights in ordering a deduction for the applicant's indebtedness.

Lastly, the applicant contended that the relevant staff rule authorized deductions only from "salaries, wages and other emoluments" and that since the termination indemnity did not fall under any of those categories the rule was inapplicable. The Tribunal noted that the term "emoluments" had not been defined in the Staff Regulations and Rules, but it considered that according to the definitions given in authoritative dictionaries the term "emoluments" included termination indemnities. It added that since under staff regulation 3.3 (*a*) termination indemnities were regarded as emoluments for the purposes of staff assessment, it was also logical to regard them as emoluments for the purposes of deductions for indebtedness to the United Nations or to third parties under staff rule 103.18 (*b*).

In the light of the foregoing, the Tribunal rejected the application.

9. JUDGEMENT NO. 245 (25 MAY 1979):[21] SHAMSEE *v.* UNITED NATIONS JOINT STAFF PENSION BOARD

Application seeking execution of a sequestration order issued by a domestic court with regard to the pension of a former staff member — The Pension Fund enjoys the same immunity from every form of legal process as the United Nations and the waiver of such immunity cannot extend to measures of execution — Risk that in the absence of an appropriate provision in the Pension Fund Regulations, persons receiving pensions from the Pension Fund may use the immunities of the Fund as a shield against performance of their private obligations

The applicant requested the Tribunal to direct the Pension Fund to honour the order of sequestration issued by a United States court and to pay her as receiver the pension due to her former husband, a retired employee of the United Nations.

The Tribunal first observed that although the Convention on the Privileges and Immunities of the United Nations had been concluded before the establishment of the Pension Fund, there seemed to be no doubt that the Fund enjoyed the same immunity from the jurisdiction of domestic courts as the Organization itself. It was true that the assets of the Fund were separate from those of the Organization and that the United Nations was only one of several organizations participating in the Fund and that the Secretary-General of the United Nations was not the chief executive officer of the Fund, but the Fund was nevertheless a subsidiary organ of the General Assembly and according to article 18 of its Regulations its assets were "acquired, deposited and held in the name of the United Nations". Thus a strict interpretation of the relevant instruments led to the conclusion that the Pension Fund was covered by the immunity of the United Nations.

The Tribunal then recalled the terms of article II, section 2, of the Convention on the Privileges and Immunities of the United Nations[22] and stated that since the United States was a party to that

[20] Reproduced in *Juridical Yearbook*, 1968, p. 215.

[21] Mr. R. Venkataraman, President; Mme Paul Bastid, Vice-President; Mr. Endre Ustor, Member.

[22] This provision reads as follows:

"The United Nations, its property and assets, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except in so far as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution."

Convention, the immunity provided for in that provision applied in respect of the jurisdiction of the United States courts. In the light of the conclusion formulated in the preceding paragraph, the provision in question also applied to the Pension Fund, so that on the one hand, the immunity from legal process against the Fund could be waived, and on the other, such waiver could not extend to any measure of execution.

The application, therefore, obviously ran counter to the basic rule embodied in article II, section 2, of the Convention, which forbade the waiver of immunity from legal process for the purpose of execution of decisions of local courts. The Tribunal concluded that the Pension Fund was not bound to honour the sequestration order of a United States court.

The Tribunal then examined the extent of the privileges and immunities of United Nations staff members, whether in service or retired, in respect of their obligations to third parties. It recalled the provisions of article V, section 20, of the Convention and of staff regulation 1.8, which made it clear that staff members could not use their privileges and immunities as a shield against performance of their private obligations or payment of their debts to third parties. It also recalled staff rule 103.18 (*b*) (iii), which permitted deductions from salaries, wages and other emoluments for the purpose of indebtedness to third parties.

The Tribunal observed that although it was obvious that the privileges and immunities of the United Nations could not serve the purpose of dispensing staff members, even those who had retired, from the fulfilment of their private obligations, such staff members could indirectly benefit unduly from the immunities of the Pension Fund and from the lack of a provision similar to staff rule 103.18 (*b*) (iii) in the Pension Fund regulations. It added that it was for the General Assembly to consider whether, in the light of the present case, it might be desirable to amend the Pension Fund regulations on the lines of the aforementioned staff rule.

Lastly, the Tribunal considered that the objections concerning its competence raised by the respondent were well founded. In particular, it noted that the applicant could not show that she was "entitled to rights under the [Pension Fund] regulations by virtue of the participation in the Fund of a staff member ..." as required under article 49 of the Pension Fund regulations. The applicant contended that she had been appointed receiver and that consequently the Pension Fund was not being asked to make payment to any third party but to the duly appointed receiver of the assets of the very person to whom the Fund owed an obligation. The Tribunal considered that argument unconvincing, since recognition by the Pension Fund of the appointment of a receiver of assets for the purpose of collecting the pension of a staff member would amount to the recognition of a court decision as binding on the Fund and that in view of its immunity from every form of legal process the Fund could not be expected to grant such recognition, the more so since the court order appointing the receiver constituted a "measure of execution."

The Tribunal accordingly rejected the application.

10. JUDGEMENT NO. 246 (2 OCTOBER 1979):[23] FAYEMIWO *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting a decision terminating a regular appointment by virtue of staff regulation 9.1 (c) — Limits of the Tribunal's power of review with regard to such a decision — Allegations of prejudice and procedural defects

The applicant contested a decision terminating his regular appointment by virtue of staff regulation 9.1 (*c*), under which the Secretary-General may at any time terminate an appointment "if, in his opinion, such action would be in the interests of the United Nations".

The Tribunal first observed that it was not open to it to rescind a decision which was within the Secretary-General's discretion, unless it could be shown that the decision to terminate was due to prejudice or other factors extraneous to the staff member's performance or that the applicant had suffered injury as a result of procedural defects. The Tribunal first had to determine whether the

[23] Mr. R. Venkataraman, President; Sir Roger Stevens, Member; Mr. Endre Ustor, Member.

applicant had suffered prejudice based on external factors. In the light of the material contained in the file, it came to the conclusion that given his mixed record, the applicant's contention that the decision to terminate was "based on extraneous factors rather than on an objective and dispassionate analysis of [his] weaknesses and strengths" could not be sustained.

With regard to the alleged procedural defects, the Tribunal first sought to determine whether a special report on the applicant should have been prepared before the termination. In view of the involved and conflicting nature of the instructions concerning the preparation of reports on staff members, the Tribunal felt that the applicant's superiors could not be held to have committed any procedural error in following the instructions of one of the applicable texts and omitting to prepare an interim report on separation. The Tribunal also noted that the applicant had signed his last periodic report only three months before the decision to terminate was taken and that there was no basis for the contention that procedural irregularities had occurred.

The Tribunal considered, however, that the respondent should have made an appraisal of the rebuttal filed by the applicant to his final periodic report and should have afforded him an opportunity to defend himself before taking the termination decision, especially in view of the active role he had played in the Staff Association and the possible allegation of prejudice arising therefrom. While recognizing that the applicant had reduced the possibility of such action by the tactics of evasion adopted by him after he learned of his impending separation, the Tribunal emphasized that it was part of good administration to observe the dictum that justice should not only be done but also be seen to be done.

11. JUDGEMENT NO. 247 (4 OCTOBER 1979):[24] DHAWAN *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application seeking compensation for injury sustained, according to the staff member concerned, as a result of an error committed by the Administration regarding his possible participation in the Joint Staff Pension Fund — Conclusion of the Tribunal that by virtue of the relevant texts, the staff member was entitled to participate in the Fund as an associate participant — Rejection of the contention that the staff member had signed a contract excluding his participation in the Fund because the Organization had agreed to appoint him at a higher step than originally envisaged — Computation of the compensation due — Statement of the reasons for the decision concerning the amount of the compensation, in accordance with article 9, paragraph 1, of the Statute of the Tribunal

The applicant, the widow of a former staff member of UNDP, an Indian national appointed in 1965, claimed that her husband had been wrongly deprived of the right to become an associate participant in the United Nations Joint Staff Pension Fund and claimed compensation for the loss she had thus suffered. She contended that the decedent had been led to accept terms of appointment excluding him from participation in the Pension Fund by misrepresentations made through responsible officers authorized by the Organization to negotiate and reach agreement with him on his terms of appointment.

The Tribunal emphasized that the texts applicable at the time showed that when in 1965 the decedent was given an appointment for one year, associate participation in the Pension Fund was the normal condition of service. It further observed that on that date there had no longer been any bar under Indian law to a seconded Indian civil servant joining the United Nations Pension Fund and that participation in a national retirement scheme had ceased to be a ground for exclusion from participation in the United Nations Pension Fund. The Tribunal concluded that at the time of his appointment the decedent had been entitled to become an associate participant in the Pension Fund.

The respondent contended that the decedent had signed a contract excluding him from participation in the Fund and that he had voluntarily agreed to that exclusion because the

[24] Mr. R. Venkataraman, President; Mme Paul Bastid, Vice-President; Mr. Francisco A. Forteza, Member.

Organization had agreed to appoint him at a higher step to compensate him for payments he had to make to his national pension scheme. The Tribunal observed that this argument which, it noted in passing, implied recognition of the right of the decedent to become an associate participant in the Pension Fund, was not borne out by the correspondence in the file, which showed that the officers of the respondent had considered that the decedent's participation in the Fund was barred not because he had waived his right to participation but because, according to them, he did not fulfil the requisite conditions because he was contributing to a national pension scheme. The Tribunal also noted that it was clear from the file that the decedent had been appointed at a higher step than originally envisaged in order to provide him with a net salary equivalent to the salary he was drawing from his Government and not as compensation or consideration for waiving his United Nations pension rights.

The Tribunal therefore concluded that since the decedent had accepted terms of appointment excluding him from participation in the Fund on the basis of misrepresentation by the respondent's officers, such terms of appointment did not conclude his rights. In order to compute the amount of compensation due to the applicant because the decedent had been wrongfully deprived of his pension rights, the Tribunal requested computation of the capital value of the benefits which the applicant and her children would have received had the decedent been an associate participant of the Pension Fund on the date of his death. Considering that the action was not for enforcement of obligations under the Pension Fund Regulations but for compensation for administrative failures on the part of the respondent, the Tribunal applied the exchange rate in force on the date of the judgement, and since the amount of compensation had been fixed on that date, denied the applicant's request for interest from the date of the death of the decedent.

Since the amount of compensation fixed exceeded two years' net base salary of the decedent, the Tribunal, in accordance with article 9, paragraph 1, of its Statute, which required that its decision in such cases be accompanied by a statement of reasons, explained that the rule that compensation should not exceed two years' net base salary would not ensure adequate compensation for the loss suffered by the applicant.

12. JUDGEMENT NO. 248 (5 OCTOBER 1979):[25] SEGERSTRÖM *v.* UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST

Application contesting a decision not to renew a fixed-term appointment — Contention that because of the conditions in which the applicant was required to work, the respondent was not able to assess his performance — Contention derived from the clause in the contract of appointment providing for the automatic extension of a one-year appointment to two years after the completion of a six-month probationary period, provided that the applicant's services were satisfactory — Rejection of those contentions

The applicant contested a decision not to renew his fixed-term contract, contending that, in view of the conditions in which he had been required to work, the respondent had not been in a position to assess his performance.

The Tribunal noted, however, that the applicant had been aware, at the time when he was appointed, of the conditions in which he would have to work and had, moreover, never complained about them during his service. Furthermore, six periodic reports containing substantial appraisals of his performance were prepared and the applicant could thus not claim that the respondent had not been able to assess his performance.

The applicant also contended that the respondent had violated the clause of his contract providing that after the completion of six months of satisfactory service his one-year appointment would automatically be extended to two years. The Tribunal thus had to determine whether the applicant had shown six months of satisfactory service. It noted that eight months after the applicant

[25] Mr. R. Venkataraman, President; Mr. T. Mutuale, Alternate Member; Mr. Endre Ustor, Alternate Member; Sir Roger Stevens, Alternate Member.

had taken up his duties, the respondent had informed him that he had decided to extend his probationary period for a further four months. The Tribunal considered that that decision proved that the respondent had not considered the performance of the applicant during his first six months of service to be satisfactory. The applicant contended that in taking that action the respondent had violated the terms of his contract, under which he was entitled to know after six months — in order to plan his life accordingly — whether his service would be extended for a second year or whether he should commence preparations to quit in another six months.

The Tribunal found, however, that there was no provision in the contract according to which it was mandatory for the respondent to give the applicant notice either of termination or of renewal of the appointment after the first six months. It therefore found that the rights of the applicant had not been violated by the mere fact that the probationary period was extended.

With regard to the quality of the applicant's performance, the Tribunal emphasized that it was for the respondent to decide whether the service of the applicant had been satisfactory or not. The fact that almost all the applicant's periodic reports were mediocre, although they had been prepared by different supervisors, disposed of charges of prejudice and the Tribunal could therefore not interfere with the evaluation made by the respondent.

Lastly, the Tribunal, after studying the file, rejected the applicant's allegation that he had never been advised that the result of his further probationary service was unsatisfactory.

In the light of the foregoing, the Tribunal rejected the application.

13. JUDGEMENT NO. 249 (8 OCTOBER 1979):[26] SMITH *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application requesting reimbursement of salary withheld following work stoppages — Unauthorized absence and failure to perform duties remove the basis for payment of salary — Jurisprudence of the Tribunal according to which the resolutions of the General Assembly constitute, as far as the staff members to whom they are applied are concerned, conditions of employment to be taken into account by the Tribunal — Rejection by the Tribunal of arguments based on the doctrine of estoppel — Concept of "unauthorized absence"

The applicant requested the Tribunal to order reimbursement of the amounts withheld from her salary as a result of the work stoppages which took place at Headquarters from 23 January to 12 February 1979. She contended that General Assembly resolution 31/193 B II — which provided that no salary would be paid to staff members in respect of periods of unauthorized absence from their work — did not provide the necessary legal basis for the respondent's decision, that the respondent was estopped by his conduct from legally invoking that resolution, and that in any event the conditions laid down by the resolution had not been met.

The Tribunal noted that the Staff Regulations and Rules contained no provision regarding collective work stoppages in support of claims against the Administration. It noted that the staff had resorted to that means of pressure on various occasions and that such conduct *per se* had not been considered by the respondent as grounds for terminating the employment of the persons concerned or for the imposition of disciplinary measures.

The Tribunal noted, however, that staff regulation 1.2 provided that "the whole time of staff members shall be at the disposal of the Secretary-General" and that according to staff rule 101.2 (*c*) "a staff member shall be required to work beyond the normal tour of duty whenever requested to do so". It was therefore apparent that "work" was the fundamental obligation of staff members, receipt of salary being the essential counterpart to work performed and that unauthorized absence or failure to perform duties removed the basis for payment of salary. However, presence at the place of work and the objective of the work stoppage distinguished those two situations from abandonment of post

[26] Mr. R. Venkataraman, President; Mme Paul Bastid, Vice-President; Mr. Francis T. P. Plimpton, Vice-President; Mr. Francisco A. Forteza, Alternate Member; Mr. Endre Ustor, Alternate Member.

which, according to the Tribunal's jurisprudence,[27] amounted to an admission of separation from service.

In support of her contention that General Assembly resolution 31/193 B II did not provide the necessary legal basis for the contested decision, the applicant first maintained that the resolution in question had been adopted by the General Assembly with a particular situation in mind concerning the General Service staff at Geneva and hence did not have the general applicability attributed to it by the respondent. The Tribunal emphasized, however, that while section I of the resolution indeed concerned a particular situation, section II was a general provision applicable to the entire United Nations staff and that the *travaux préparatoires* confirmed that interpretation because they showed that section II was intended to apply to all duty stations and all levels and hence to the entire United Nations staff. The Tribunal added that as a resolution of the General Assembly, the resolution in question did not have to be submitted in advance to the Staff Committee, for staff regulation 8.2 and staff rule 108.1 envisaged prior consultation with the staff on matters to be regulated by the Secretary-General and on those falling within the competence of the General Assembly.

The applicant also maintained that the resolution in question could not provide a legal basis for the Secretary-General's decision until it had been incorporated into the Staff Regulations; she contended that the respondent had incorporated the text on 31 January 1979 and backdated the decision to 1 January 1979. The Tribunal observed, however, that resolution 31/193 B II, adopted in 1976, had been brought to the attention of the staff through a circular of 17 January 1977; that on 20 December 1978 the General Assembly had adopted a new provision on the question, to be incorporated into the Staff Regulations, and that the latter decision had been brought to the attention of the staff on 22 January 1979. The Tribunal therefore found that whatever the date on which the amended Staff Regulation had been issued, the new provision had been officially brought to the staff's attention, first in 1977 and then in 1979. That being so, and in view of its consistent jurisprudence, according to which resolutions of the General Assembly constituted, as far as the staff members to whom they applied were concerned, conditions of employment to be taken into account by the Tribunal, the latter decided that the resolution in question could be relied upon as a basis for the non-payment of salary in circumstances such as those prevailing in the case, even before being incorporated into the Staff Regulations.

The applicant further contended that the respondent was estopped by his own conduct and by the conduct of his representatives from relying on resolution 31/193 B II and in particular that by failing to take any steps for two years to incorporate that resolution into the Staff Regulations, the respondent had demonstrated his intention not to act on it. The Tribunal observed, however, that if one decided, as it had done, that a resolution of the General Assembly was binding on the applicant, the incorporation of the text in question into the Staff Regulations could not affect the respondent's right to apply the resolution to the applicant. The Tribunal further noted that in the light of the material in the file it was not possible to maintain that the respondent had allowed uncertainty to continue about the possible application of the resolution and it concluded that the arguments which the applicant had sought to draw from the doctrine of estoppel were without foundation.

The Tribunal lastly had to determine what constituted "unauthorized absence". It upheld the interpretation of the respondent, based on provisions concerning staff members' right of association, according to which attendance at "extraordinary general meetings" of the staff could not be described as unauthorized absences. On the other hand, it considered that the objective of the electoral unit meetings was in fact organized work stoppage and that accordingly participation in those meetings could not be considered as authorized absence inasmuch as no relevant provision allowed for their having such an objective.

On the basis of those considerations, the Tribunal rejected the application.

[27] See Judgement No. 220 (AT/DEC/220), summarized in *Juridical Yearbook*, 1977, p. 146.

14. JUDGEMENT NO. 250 (9 OCTOBER 1979):[28] SFORZA-CHRZANOWSKI *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application seeking recognition of the abnormal character of a termination of services following a transfer measure which was allegedly invalid — Limit of the Tribunal's power of review with regard to decisions falling within the discretionary authority of the Administration

The applicant requested the Tribunal to recognize that his fixed-term appointment had been terminated in conditions which were not normal because of pressure brought to bear on him to leave his duty station before the date of expiry of that appointment.

The Tribunal noted that at the same time as it had requested the applicant to leave his duty station, the Administration had decided on measures to enable him to complete his term of appointment. The measure in question was therefore quite clearly an administrative measure which terminated not the contract of service but an assignment to a specific place. Such a measure fell within the discretionary power vested in the Secretary-General by staff regulation 1.2. Consequently, the Administration did not have to justify the merits of the reasons for which it had taken that measure. It was for the applicant to substantiate his allegation that the reasons adduced to justify the measure taken in his case were not valid.

Having regard to the circumstances, the Tribunal found that, in deciding to terminate the applicant's assignment, the Administration had not abused its discretionary power and that consequently the allegation that the attempts to remove the applicant from his post amounted to a form of pressure was not founded. The Tribunal therefore considered that applicant's separation from service, which in any event had occurred on the expiry of his fixed-term appointment, was in no way abnormal, and it rejected the application.

15. JUDGEMENT NO. 251 (11 OCTOBER 1979):[29] NOBLE *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application contesting decisions withholding periodic salary increments — Obligation of the respondent to comply with the provisions of the applicable texts designed to ensure that the staff member's case is given careful consideration

The applicant contested a series of decisions to withhold her periodic salary increments in 1971, 1972, 1973 and 1975.

With regard to the first two decisions, the Tribunal noted that the applicant's periodic report was unfavourable and that the provisions concerning the rebuttal of periodic reports had been meticulously observed by the respondent. On the other hand, he had ignored the requirements of paragraph 8 of administrative instruction ST/AI/115 and of personnel directive PD/5/69 regarding special reports in connexion with the withholding of salary increments; he had also ignored the provision of the aforementioned directive stating that "if a decision is taken to withhold the staff member's salary increment, the staff member must be notified and shown the report evaluating his service". The Tribunal therefore emphasized that the applicant had been deprived of the opportunity of rebutting a special report dealing specifically with those aspects of her unsatisfactory performance which in the respondent's view justified the withholding of her salary increment. While recognizing that the applicant had been given every opportunity to rebut criticisms of her performance in the context of her periodic report, the Tribunal considered that the provisions of paragraph 8 of administrative instruction ST/AI/115 and personnel directive PD/5/69, whose purpose was to ensure that decisions affecting salary increments were given careful and discrete consideration by the Administration and by the staff member concerned and were not, as it were,

[28] Mme Paul Bastid, Vice-President, presiding; Mr. Francisco A. Forteza, Member; Mr. T. Mutuale, Member; Mr. Endre Ustor, Alternate Member.

[29] Mr. Francis T. P. Plimpton, Vice-President, presiding; Mr. Endre Ustor, Vice-President; Sir Roger Stevens, Member.

lumped together with and lost sight of in the mechanics of dealing with periodic reports. In particular, the Tribunal rejected the respondent's contention that since personnel directive PD/5/69 had not been widely circulated it fell into a different category from other instructions relating to staff and could be more loosely interpreted. In that connexion, the Tribunal referred to its Judgement No. 237,[30] where it was stated that "the Secretary-General issues administrative orders and information circulars which the Tribunal has held to have the same force and effects as the Staff Rules, unless inconsistent with the Staff Regulations".

The Tribunal consequently concluded that the decisions to withhold the applicant's salary increments in 1971 and 1972 were vitiated by procedural defects and should therefore be rescinded. With regard to the 1973 decision, the Tribunal noted that the applicant had been informed in due time that action was being taken to terminate her appointment for unsatisfactory services and that she had been given the opportunity to challenge that recommendation. It considered that the notice of termination was the equivalent of the procedure contemplated in administrative instruction ST/AI/115 and personnel directive PD/5/69 and accordingly rejected the applicant's pleas relating to 1973. Lastly, with regard to the measures taken by the respondent in 1975 in respect of withholding the periodic salary increment, the Tribunal considered that they were procedurally correct and that the decision was valid.

16. JUDGEMENT NO. 252 (11 OCTOBER 1979);[31] ZANARTU *v.* UNITED NATIONS JOINT STAFF PENSION BOARD

Application contesting a decision depriving a staff member of an early retirment benefit on the basis of a decision by the Pension Fund granting him a disability benefit — Article 28 (a) of the Pension Fund Regulations — Determination of incapacity for the purpose of disability benefits may be made only at the request of the organization involved

In view of the applicant's frail health, UNICEF submitted his case to the United Nations Staff Pension Committee with a view to his being granted a disability benefit, and a favourable decision was taken by the Committee. Some months later, however, the staff member resigned and elected to receive an early retirement benefit commuted in part into a lump sum. UNICEF informed the Secretary of the United Nations Joint Staff Pension Board of those developments, stating that in view of the facts the earlier request that the applicant should be granted a disability benefit was to be considered as void. The Secretary then informed the applicant that, in view of the provisions of article 28 (*a*) of the Pension Fund Regulations and the aforementioned determination by the Pension Committee, he was precluded from giving effect to instructions for the payment of any benefit other than a disability benefit. His request for a review of the Secretary's decision having failed, the applicant brought the case before the Tribunal.

The Tribunal first noted that the applicant had died before the case came to judgement and that his widow and children had decided to pursue the application. It noted that the dispute concerned the sums to be paid to the applicant by the Pension Fund from the date of his resignation to the date of his death, and that since it was not debatable that the widow and sons of the applicant had succeeded to his rights on his death the Tribunal was open to them under article 2 (*a*) of its Statute. It therefore declared itself competent to pass judgement on the application.

After recalling the terms of article 28 (*a*) of the Pension Fund Regulations,[32] the Tribunal proceeded to compare the disability benefit for which the applicant had been eligible with the

[30] See p. 129 above.

[31] Mme Paul Bastid, President; Mr. Francis T. P. Plimpton, Vice-President; Mr. Francisco A. Forteza, Member.

[32] Reads as follows:

"*Entitlement to benefits*

"(*a*) A participant who is not eligible for a retirement benefit under article 29 *or a disability benefit under article 34* may elect on separation to receive an early retirement benefit or a deferred retirement benefit or a withdrawal settlement if he satisfies the conditions of article 30, 31 or 32 respectively." [Emphasis added.]

amount he would have received with the early retirment benefit commuted into a lump sum to the extent of one third of its actuarial equivalent, which he had requested at the time of his resignation. The Tribunal noted that, in view of his frail health, it was clearly in the applicant's interest to receive the early retirment benefit, commuted, rather than the disability benefit.

The Tribunal noted that under rule 4.3 of the Administrative Rules of the Pension Fund, the determination of incapacity for the purpose of disability benefits could be made only at the request of the organization involved, in this case UNICEF. It noted that UNICEF had stated that, in view of the applicant's resignation, the memorandum sent earlier requesting that he be granted a disability benefit was to be considered as void. That memorandum formed the only basis for the Pension Committee's grant of a disability benefit to the applicant, and the voiding of the request contained therein destroyed the basis for the grant of a disability benefit and therefore rendered it void and ineffective *ab initio*. Since on the date of the memorandum in question no periodic payment of the disability benefit had yet been made, the provision in that memorandum which purported to void *ab initio* the original UNICEF request was effective and enforceable.

The Tribunal concluded that the applicant had been entitled to elect to receive an early retirement benefit and to request that it be commuted into a lump sum to the extent of one third of its actuarial equivalent, and it ordered the respondent to give effect to the applicant's election of that formula.

B. Decisions of the Administrative Tribunal of the International Labour Organisation[33] [34]

1. JUDGEMENT NO. 368 (18 JUNE 1979): ELSEN AND ELSEN-DROUOT *v.* EUROPEAN PATENT ORGANISATION

Effect of the merger of two international organizations on their staff regulations and rules. Receivability of a complaint on that matter. Non-existence of an acquired right to the rate, amount or conditions of payment of expatriation allowance. Scope of the principle of equal treatment

As a result of the integration of the International Patent Institute into the European Patent Organisation (EPO), achieved through an agreement between the Chairman of the Administrative Council and the Director-General of the Institute on the one hand, and the President of the European

[33] 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 1979, 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.

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

Patent Organisation, on the other, the complainants, who were husband and wife and had heretofore been on the staff of the Institute and as such subject to the Staff Rules and Regulations of the Institute, had become, by virtue of article 4 of the integration agreement, EPO staff members and as such subject to the EPO Staff Regulations. As this development resulted in their case in a reduction of their expatriation allowance, they had filed internal appeals against the Council's decision to accept the integration agreement. Their appeals having been dismissed by the Administrative Council by a decision of 9 December 1977, they asked the Tribunal to quash that decision in so far as it made applicable to the complainants the provisions of the EPO Staff Regulations relating to the determination of the expatriation allowance and to quash that decision in so far as it constituted refusal to continue to apply to the complainants the provisions of the Institute Staff Regulations relating to the determination of the expatriation allowance.

EPO pointed out that the complainants did not allege non-observance of the terms of their appointment or of the provisions of the Staff Regulations but asked for the quashing, albeit partial, of the decision of the supreme body of an international organization to authorize the signing of an international agreement on the merger of both organizations. According to EPO, the provisions of the agreement in question were not in law tantamount to any amendment which might be made in the staff regulations of an international organization during its existence; hence, if the Tribunal allowed the claim and quashed the decision to approve the agreement or declare its main provisions null and void, it would be interfering in matters falling within the competence of Member States and of the international organizations set up by them and go outside the limits of its own competence. EPO deemed it unthinkable that the Tribunal should require it to apply staff regulations or grant terms of appointment which its executive bodies had never approved and therefore asked the Tribunal to declare that it was not competent to hear the claims.

EPO further maintained that the decision of 9 December 1977 was merely to dismiss internal appeals against the decision in question and could not be assimilated to a collective or individual decision taken under the Staff Regulations. The complaint was therefore, according to EPO, irreceivable.

The Tribunal found those objections groundless. It pointed out that whether the provisions governing the staff of an organization were embodied in internal rules or in an international agreement, they had been adopted by the representatives of the States members of the organization and their purpose was to govern conditions in the international civil service. Hence, by analogy, just as the Tribunal could decide not to apply a provision of the staff regulations in a particular case, so it could decide not to apply a clause of an international agreement. Moreover, there was no question of asking the Organisation to bring the provisions which used to govern the Institute staff back into force. If a complaint was justified in principle, what the Tribunal would do was to treat those provisions as part of the contract of appointment and apply them as such. What the complainants were really seeking was not the revocation of an international agreement but payment of financial benefits by EPO.

On the merits of the case, the Tribunal noted that the developments described above had resulted in a reduction of the expatriation allowances payable to the complainants and that they were therefore both alleging infringement of their acquired rights.

In this connexion the Tribunal stated the following:

> "A right is acquired when he who has it may require that it be respected notwithstanding any amendment to the rules. It may be either a right which is laid down in a provision of the Staff Regulations or Staff Rules and which is of decisive importance to a candidate for appointment or a right which arises under an express or implied provision in an official's contract of appointment and which the parties intend should be inviolate."

In the view of the Tribunal, the conditions for the acquisition of a right were not met in the present case. It was quite clear that expatriation, education and leave expense allowances were matters of importance to someone who joined the staff of an international organization. The question therefore arose whether the outright abolition of such allowances would in principle violate an acquired right. There was, however, no acquired right to the amount and the conditions of payment

of such allowances. Indeed, the staff member should expect amendments to be prompted by changes in circumstances if, for example, the cost of living rose or fell, or the organization reformed its structure, or even found itself in financial difficulty. Hence the reduction in the expatriation allowance paid to the complainants did not infringe any right which was of decisive importance to them in accepting appointment and which might be regarded as acquired. Moreover, there was no clause in their contract which even tacitly guaranteed them any such right. Finally, the Tribunal noted that according to article 11.2 of the integration agreement, the application of the new provisions "may not under any circumstances result in the payment of a total net salary lower than that which, containing the same elements, was received by the official in respect of the last full month prior to the entry into force of this agreement". In other words, in any event the complainants suffered no actual cut in remuneration. The Tribunal therefore rejected the plea that acquired rights had been infringed.

The complainants finally claimed that the acceptance of the integration agreement introduced an element of discrimination among staff members inasmuch as the amount of the repatriation allowance varied depending on whether the spouse of a staff member was or not on the staff of EPO. The Tribunal recalled that the principle of equality meant that where the facts were the same the treatment was the same: spouses who were both on the EPO staff were not in the same position as spouses of whom only one was on the EPO staff, and a difference in treatment was therefore warranted.

In the light of the above, the Tribunal dismissed the complaint.

2. JUDGEMENT NO. 369 (18 JUNE 1979): NUSS *v.* EUROPEAN PATENT ORGANISATION

Effect of the merger of two international organizations on their staff regulations and rules. Receivability of a complaint on that matter. Non-existence of an acquired right to privileges, immunities and facilities granted to the organization and its officials in the interest of the organization

The complainant, formerly an official of the International Patent Institute in The Hague, became an official of the European Patent Office on 1 January 1978 in accordance with the integration agreement concluded on 19 October 1977 between the Institute and EPO. On 2 December 1977 he lodged an internal appeal against the decision of the Administrative Council of the Institute to approve the integration agreement, on the grounds that some of its provisions costituted a grave breach of the essential terms of his appointment. The Council dismissed his appeal by a decision of 9 December. That decision was notified to the complainant on 14 December and it is the one he impugned before the Tribunal. The complainant maintained that by concluding the integration agreement the Institute consented to the replacement of its own Staff Regulations by basically different ones. In particular, it had done away with article 11 of the Institute Staff Regulations, which conferred on Institute staff the status of international officials who enjoyed the benefits of immunities and privileges granted by the host State to the organization. It was clear, he stated, that the defendant organization was at fault because it failed to do its utmost, particularly in negotiations with the Dutch authorities, to safeguard the interests of its expatriate staff. The Institute, he said, made a practice of referring to the benefits in its publicity material and offers of employment. It therefore knew full well that by consenting to the withdrawal of those benefits it was authorizing a change in one of the basic terms of appointment. He asked the Tribunal to quash the decision of 9 December 1977 in so far as it failed to preserve article 11 of the Institute Staff Regulations; subsidiarily, to quash the decision in so far as it constituted a refusal to award the complainant at least financial compensation for the wrong he was suffering owing to the loss of the special benefits enjoyed by international officials; to appoint an expert to assess the actual damage suffered by the complainant by reason of the loss of the benefits of article 11 of the Institute Staff Regulations; to order the Institute or its successor to pay the complainant a monthly allowance to be determined by the expert; to order the Institute or its successor to pay damages amounting to not less than 2,000 guilders for the moral prejudice suffered by the complainant; and to award costs against the defendant, the amount to be determined by the Tribunal.

The Tribunal observed that, as a consequence of the merger agreement signed on 19 October 1977, the European Patent Office, not the International Patent Institute, was the defendant organization. As to procedural aspects, the Tribunal declared the complaint receivable, rejecting for reasons similar to those stated in Judgement No. 368[35] several arguments of the defendant organization to that effect. Furthermore, contrary to what the organization maintained, the Tribunal observed that the question of the privileges and immunities enjoyed by the Institute and EPO staff under the headquarters agreements was not one of competence but a matter of substance, to wit, whether or not the complainant was entitled to continue to enjoy certain privileges.

With reference to the privileges and immunities granted to the staff of the International Patent Institute and the European Patent Office and the alleged violation in their respect by the complainant, the Tribunal observed that the complaint of the staff member constituted an alleged violation of acquired rights. A right was acquired, the Tribunal observed, when he who had it may require that it be respected notwithstanding any amendment to the rules. The Tribunal further elaborated on that concept in terms similar to those contained in Judgement No. 368.[35] The Tribunal observed that the conditions for the acquisition of a right were not met in this case. The privileges which the complainant said that he had lost derived, first, from the headquarters agreement between the Netherlands Government and the Institute and, secondly, from the Institute Staff Regulations. Article XI of the agreement provided, however, that the privileges, immunities and facilities were granted to the Institute and its officials solely in the interests of the Institute and not for their personal advantage. Similarly, the first paragraph of article 15 of the Institute Staff Regulations confirmed that the privileges and immunities and facilities were granted to the Institute and its officials solely in the interests of the Institute and not for their personal advantage. Similarly, the first paragraph of article 15 of the Institute Staff Regulations confirmed that the privileges and immunities of the staff were granted in the interests of the Institute. Hence, according to the terms of the agreement and the Staff Regulations, the privileges granted thereunder and now claimed by the complainant were not a personal right, and so could not have been of decisive importance to him when he accepted appointment. Furthermore, the Tribunal found, there was no clause in his contract expressly guaranteeing the complainant the benefits he was claiming. And although the Institute did mention the privileges in more or less explicit terms in its publicity material and in notices to future staff members, it explained that the benefits were granted by the Netherlands Government and made no firm promise on which the complainant might rely. New staff members should therefore have realized that the benefits depended on the continuation of an agreement with a State which could at any time ask to have it amended, or even just amend it. Besides, the Tribunal found that the complainant continued to enjoy the main tax advantage, namely, exemption from income tax. The Tribunal further observed that the allegation of negligence against the Institute had not been proved.

The Tribunal dismissed the complaint.

3. JUDGEMENT NO. 370 (18 JUNE 1979): MERTENS *v.* EUROPEAN PATENT ORGANISATION

Complaint impugning a decision not including a staff member in the promotion list. Exhaustion of internal means of redress in cases of non-appealability of decisions. Discretionary character of decision not to promote. Limited circumstances under which a discretionary decision may be interfered with: lack of authority, formal or procedural flaw, mistake of fact or of law, omission of essential facts, abuse of authority, mistaken conclusions drawn from facts. Non-existence of those circumstances in the decision involved in the present case. Dismissal of the complaint

The complainant, an administrative assistant at grade B-3 in the International Patent Institute, was one of the those eligible for promotion to B-2 in accordance with the career pattern for an administrative assistant. Careers committees were appointed to draw up the promotion rosters. The decision promoting officials in 1977 was posted in the Institute on 9 December 1977.

[35] See subsection 1 above.

The complainant was not on the list of promotions to B-2. By a letter of 15 December he submitted an internal appeal to the Director-General. On 1 January 1978 the European Patent Organisation succeeded the International Patent Institute, and on that date the complainant became an official of the European Patent Office in accordance with the integration agreement concluded between the two organizations. By a letter dated 1 February 1978 in reply to his letter of 15 December 1977, the complainant was informed that in accordance with the Staff Regulations of the former Institute the decision of 9 December 1977 was, as far as EPO was concerned, final. That was the decision impugned by the complainant before the Tribunal.

He contended that his merits were comparable with those of the first two eligible candidates, who did get a promotion. The Careers Committee, he observed, did not seem to have performed its task with the conscientiousness expected of it nor did the Director-General's decision seem to have been founded on any more consistent grounds, he argued. The decision not to promote him constituted wrongful and unfair treatment, especially in view of its effects on his subsequent career. He was appointed administrative assistant in 1973 and as such had access to the higher grade, B-2, with a maximum yearly salary of 68,908 guilders. The decision had the effect not only of postponing for some time the normal financial benefit of promotion but also of preventing him from reaching that maximum salary level. Moreover, as a result of the absorption of the Institute staff by EPO on 1 January 1978 he was automatically graded B-5 in the grading system of the new organization, whereas other staff members promoted to Institute grade B-2 in 1977 were given grade B-6 in the European Patent Office. Grades B-5 and B-6 in that Office were not combined, and the almost automatic career system which applied in the Institute did not exist in the Office. He had now no hope of obtaining the remuneration he would have received at Institute grade B-2. If he happened to be promoted to Office grade B-6 his remuneration would still be that of Institute grade B-3, which was higher than that of Office grade B-6. On the other hand, officials who were promoted to Institute grade B-2, and who now had Office grade B-6, would get the remuneration which applied to Institute grade B-2. The complainant therefore considered that he had suffered a covert penalty, although he had always been regarded as a good official.

He asked the Tribunal to decide that the decision of 9 December 1977 was wrongful; that he should have been promoted to Institute grade B-2; should the Tribunal unaccountably refuse to order his promotion to Institute grade B-2, that his remuneration from EPO, although, since 1 January 1978, he had held only EPO grade B-5, was that which he would have received had he been promoted to Institute grade B-2; that he should be paid damages corresponding to 4 per cent interest on the difference between B-3 and B-2 remuneration from the date of his promotion, in the usual way (from the anniversary of the date of taking up appointment); that he should be paid 1,000 guilders to cover costs; and that the Organisation should produce comparative data (on seniority, performance marks, and the like) for all B-3 staff members whether or not they reached grades B-2 and A-7 in the Institute so that the complainant could, if need be, submit further plans and the Tribunal could pass judgement in full knowledge of the facts.

As to procedural aspects, the Tribunal observed that the Director-General had been correct in dismissing the internal appeal submitted by the complainant on the ground that, in accordance with Institute staff regulation 82, the decision notified on 9 December 1977 was not subject to internal appeal and an appeal against it would lie only to the Tribunal. The Tribunal rejected the complainant's contention that the question of the receivability of the internal appeal ought to have been decided by the Appeals Committee itself, not by any intermediary such as the Director-General. Although it was true that as a rule a decision not to hear a case should be taken by the appeals body and not by the body which communicated the appeal to it, in the present instance, however, it was so obvious that no internal appeal would lie that the intermediary could hardly be blamed for not letting the appeals body itself declare the appeal irreceivable. In any case it would be unduly formalistic to quash the impugned decision because of a flaw which had no effect whatever on the proceedings or on the outcome of the case. The Tribunal therefore considered that the internal means of redress had been exhausted and, since the complaint had been filed within 90 days from the notification of the impugned decision, it was receivable.

Regarding the last part of the complainant's claim for relief, namely, the request of communication of information, the Tribunal observed that all that the Tribunal had to determine was why the two staff members promoted to B-2 for 1977 were thought to be more deserving than the complainant. The reasons why other staff members were kept at B-3 or promoted to A-7 — a grade which the complainant was not interested in — were immaterial and needed not therefore be considered here. Therefore the comparative table submitted by the Organisation on the two promoted officials and the complainant himself was sufficient.

As to the decision not to promote the complainant, the Tribunal found it was a discretionary one. Hence the Tribunal could quash it only if it was taken without authority, or was tainted by a formal or procedural flaw, or was based on a mistake of fact or of law, or if essential facts were left out of account, or if the decision was tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts. The complainant had failed to establish any of the flaws which would entitle the Tribunal to interfere.

In particular, the Tribunal added, there was nothing to suggest that in taking the impugned decision essential facts had been left out of account. The Careers Committee had compared the merits of the officials concerned, with due regard to their seniority and age. The impugned decision was no doubt based on the same criteria which, as a rule, were the ones applied.

Lastly, the Tribunal observed that it did not appear from the dossier that clearly mistaken conclusions had been drawn from the facts. One of the two officials promoted to B-2 in 1977 had joined the Institute staff 20 years earlier than the complainant, had reached B-3 a year earlier, was at a much higher step and had been given the same performance marks as he from 1974 to 1976. He therefore had qualifications which the complainant did not. The other staff member promoted to B-2 in 1977 had joined the Institute staff and reached B-3 earlier than the complainant, was at a higher step and had been given a higher mark in 1976. Hence, the Director-General did not abuse his discretionary authority and the effects of the decision not to promote the complainant derived from the relevant rules.

The Tribunal therefore dismissed the complaint.

4. JUDGEMENT NO. 371 (18 JUNE 1979): MERTENS *v.* EUROPEAN PATENT ORGANISATION (NO. 2)

Effect of the merger of two international organizations on their staff regulations and rules. Receivability of a complaint on that matter. Non-existence of an acquired right to a specific grade if the duties and remuneration of the post remain the same. Non-existence of an acquired right to the method of salary adjustment, to conditions governing promotion, to conditions of payment of expatriation allowance or to privileges and immunities granted to the organization and its officials in the interest of the organization. Compensation factors in the application of the principle of equal treatment

The complainant, a former staff member of the International Patent Institute and now an official of the European Patent Office, contended that the decision of the Administrative Council of the Institute of 23 September 1977 whereby it approved the integration agreement with the European Patent Office[36] had been taken in breach of article 90 of the Staff Regulations, which related to joint consultations; that he fared less well in the new organization in that he held a lower grade; that the salary scale was less favourable; that there was now a discriminatory system of remuneration in that there were two different categories; that pension benefits were calculated at the rate of 2 per cent of the salary for each year of service for EPO officials but at the rate of 1.75 per cent for former Institute officials; that career opportunities were not as good; that an additional increment was no longer granted in the event of promotion; and that because of the merger of the two organizations the complainant had forfeited almost all his diplomatic privileges, to which the Institute referred in publicity material at the time of his recruitment and which had been of decisive importance to him in accepting appointment. He asked the Tribunal to declare that the decisions of 23 September 1977

[36] See subsections 1 and 2 above, Judgements Nos. 368 and 369.

and 9 December 1977 (which rejected his internal appeal) were improper and, failing the quashing of those decisions, that they did not affect him; and to award him fair compensation for present and future material prejudice and for the moral prejudice he had suffered, and costs. As to procedural aspects, the Tribunal declared the complaint receivable, rejecting, for reasons similar to those stated in Judgement No. 368,[37] several arguments of the defendant organization to that effect.

The Tribunal also found that, contrary to what the complainant contended, the Administrative Advisory Committee of the Institute had in fact been consulted and although it expressed no opinion, which was optional in accordance with the Staff Regulations, it had discussed the matter of the merger at four meetings. It therefore rejected that plea.

As to the merits, the Tribunal observed that the substance of the official's complaint constituted an alleged breach of his acquired rights. It defined and elaborated on that concept in terms similar to those contained in Judgements 368, 369 and 370.[38] The Tribunal further pointed out that the condition for the acquisition of a right had not been met in the present case. With reference to the complainant's contention that he had been given in EPO a grade which was normally less well paid and which, in his view, did not match his responsibilities, the Tribunal pointed out that neither the Institute Staff Regulations nor the complainant's terms of appointment gave him an acquired right to any particular grade. What mattered to a staff member was not so much his actual grade as the consequences of obtaining it. The Tribunal observed that there was no need to consider whether a staff member had an acquired right to continue to receive the agreed remuneration since in any event the complainant had not been deprived of that right, which was guaranteed by means of payment of a compensatory allowance. Moreover, even if the complainant now held a grade inferior to his qualifications, he was performing in the EPO the same duties that he performed in the Institute. He had therefore not been deprived of any acquired right by the transfer from his former employment.

As to the method of salary adjustment, the complainant had no acquired right to the application of the methods practised in the Institute. There was therefore no need to consider whether the EPO Staff Regulations prescribed the same incremental curves as did the Institute rules.

With reference to the alleged discriminatory treatment based on the different rate for calculation of retirement pension, the Tribunal observed that that argument was based on only one factor of comparison between the position of former Institute officials and that of other EPO officials, namely, the relationship between contributions and pension benefits. It left other factors out of account, such as the payment of a compensatory allowance to the former Institute officials to make good the reduction in salary which they would have suffered had the scale applying to other EPO officials been applied to them. Hence, while former Institute officials fared less well in one respect than other EPO officials, they fared better in another, which appeared just as important. Hence, in so far as existed, the discriminatory treatment which the complainant alleged should be regarded as compensated.

Regarding the conditions governing promotion, the Tribunal observed that it was not a fact of decisive importance that as a result of the integration agreement the complainant would not derive from any promotion the benefits he would have enjoyed as an Institute official. The provisions which laid down the conditions governing promotion did not confer any acquired rights on a staff member because, when he took up his appointment, he could not foresee how he would fare in his career. On the contrary, those provisions were subject to amendment and the staff member could expect such amendment.

With reference to the arguments concerning the reduction in the expatriation allowance and the forfeiture of diplomatic privileges and immunities, the Tribunal rejected them for reasons similar to those given, respectively, in its Judgement No. 368 and in its Judgements Nos. 369 and 372.[39] The Tribunal therefore dismissed the complaint.

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[37] See subsection 1 above.
[38] See subsections 1, 2 and 3 above.
[39] See subsections 1 and 2 above and 5 below.

5. JUDGEMENT NO. 372 (18 JUNE 1979): GUYON *v.* EUROPEAN PATENT ORGANISATION

This case is broadly similar to the case dealt with in Judgement No. 369.

6. JUDGEMENT NO. 373 (18 JUNE 1979): ABBOT *v.* WORLD HEALTH ORGANIZATION

Complaint seeking compensation for loss of professional standing following a decision to abolish a post and to transfer a staff member. Discretionary character of the impugned decision. Circumstances under which such decisions may be interfered with by the Tribunal. Impugned decision found by the Tribunal as implying either error of fact or law, lack of consideration of essential facts or clearly mistaken conclusion drawn from facts. Obligation for the organization to compensate the staff member for loss of professional standing and for personal distress caused by improper transfer

The complainant, who had been in the service of the World Health Organization as a nurse from 1959, held in 1972 the post of regional nursing adviser in Manila at grade P-4. In 1974 the Organization decided to divide her responsibilities, leaving her with Nursing Education and creating a new post of regional adviser on nursing administration and services. A Miss L. was appointed to the latter post. In 1976 the Regional Director, for a reason that is not challenged, namely, because of the decreasing work load, decided that the two posts should be reunited. Further, he decided, which decision is challenged, to achieve this by abolishing on 1 October 1976 the complainant's post. The complainant's contract of service had not been terminated and she had since been employed on assignments at the P-4 grade in Copenhagen.

Miss L. was due to retire from her post in February 1977 when she reached the age limit. A new description of the post was prepared, it was raised to the P-5 level and advertised early in 1977. The complainant applied for it unsuccessfully. A Miss F., a staff member of WHO serving as a nurse in a team financed by the United Nations Fund for Population Activities, was appointed.

Appeals to the Regional Board of Inquiry and to the Headquarters Board of Inquiry and Appeal, although partially decided in favour of the complainant, did not entirely satisfy the latter's claims.

The complainant contested both the decision to abolish her post rather than Miss L.'s post and the decision to appoint Miss F. rather than herself to the P-5 post after Miss L.'s retirement. The complainant believed that she had suffered from the malice of the Regional Director and that there was no sound reason for refusing to appoint her to the post left vacant on the retirement of Miss L. Her professional reputation had been damaged by what she regarded as unlawful action, and her present duties did not carry the same responsibility and prestige as those she performed before. She claimed payment of her full salary up to 31 August 1980, her full pension at the age of 60, and full termination benefits (repatriation expenses, etc.); repayment of the cost of shipping home her personal effects from Manila; compensation for the damage to her professional reputation, which she considered should be not less than $30,000; and costs. Since, in principle, the infringed decisions were within the sphere of discretionary authority, the Tribunal thought it could interface with them only if they were taken without authority, or violated a rule of form or procedure, or were based on an error of fact or of law, or if essential facts had not been taken into consideration, or if the decisions were tainted with abuse of authority, or if a clearly mistaken conclusion had been drawn from the facts.

The Tribunal, recalling some findings of fact of the Headquarters Board of Inquiry and Appeal, found certain features of the affair surprising. The complainant had in 1976 about four years to run before she reached the retirement age, while Miss L. had only five months: the complainant's annual appraisals had always been good: why had her post been selected for abolition and not Miss L.'s? Furthermore, the description of the new P-5 post was almost identical with that of the complainant's post before it was divided. In the choice between the candidates what weight, if any, had been given to the complainant's experience of the same work? Why had the grade of the new post been raised to P-5? Had it remained at P-4, it would have been difficult not to have offered it to the complainant as "a reasonable offer of re-assignment" within the spirit of MS 9.340; this regulation, however,

provided that there was no obligation to offer to a displaced official a post of a higher grade. Miss F. did not enjoy the priority which attached to a person whose post has been abolished.

Although the Tribunal found no positive evidence of personal prejudice towards the complainant, the matters set out in the preceding paragraph called for an explanation. Since there was none to be found in the dossier the Tribunal felt bound to infer that in the taking of the decision there had been some error of fact or of law or that essential facts had not been taken into consideration or that a clearly mistaken conclusion had been drawn from the facts. Accordingly, the decision had to be set aside.

The Tribunal laid special weight in the head of claim seeking financial compensation for loss of professional standing and personal distress. What the complainant might have had to accept as the inevitable consequences of a valid transfer, she was not obliged to accept without compensation when the transfer was made improperly. Positions which were graded at the same level might nevertheless differ considerably in status and prestige. The Tribunal found that the complainant had lost the professional standing that the post of regional adviser gave. Moreover, the transfer was handled in such a way as to give the impression that she was being edged out of her position for reasons unstated; this must have caused her personal distress.

Accordingly, the Tribunal allowed the complaint in so far as it related to compensation for loss of professional standing and personal distress, ordering that the decision of the Organization, in so far as it refused to pay such compensation, be quashed; that the Organization pay to the complainant $8,000 as such compensation and reimburse her costs in the proceedings to the extent of $2,000; and that, save to the extent that they were accepted in the impugned decision, the other claims be dismissed.

7. JUDGEMENT NO. 374 (18 JUNE 1979): ALMINI *v.* INTERNATIONAL CENTRE FOR ADVANCED TECHNICAL AND VOCATIONAL TRAINING (INTERNATIONAL LABOUR ORGANISATION)

Complaint seeking interpretation of the words "one year's salary compensation" to be paid in lieu of reinstatement ordered by the Tribunal in another judgement. Interpretation of those words by the Tribunal as meaning net salary at the end of the appointment plus incidental allowances including post adjustment

By Judgement No. 306 [40] the Tribunal had ordered the defendant organization to reinstate the complainant in his former post and, failing that, to pay him a sum equivalent to one year's salary. In executing that judgement the defendant organization decided not to reinstate the complainant but to pay him the prescribed compensation.

The complainant asked the Tribunal to say whether the words "one year's salary" should be construed to exclude post adjustment and family allowances or to mean "one year's full salary", including, over and above net salary, post adjustment and family allowances, and whether the step taken to determine the "salary" should be the last one held by the complainant or the next one above.

The Tribunal observed that it was clear from the wording of the judgement that the "one year's salary" to be paid in lieu of reinstatement was equivalent in that particular instance to the salary which the complainant was receiving at the date when his appointment ended, i.e. the net salary which he was paid after deduction of tax at the source but including incidental allowances, and in particular post adjustment. There was no reason, however, to take account of any increment which he might have received had he remained on the staff.

8. JUDGEMENT NO. 375 (18 JUNE 1979): DURAN *v.* PAN AMERICAN HEALTH ORGANIZATION

Complaint inpugning a decision terminating sick leave and ordering reassignment of a staff member. Receivability of the complaint. Test of receivability of a complaint applies to the decisions

[40] See *Juridical Yearbook*, 1977, chap. V, sect. B 21.

as a whole, not to separate issues raised by them. Medical and financial aspects involved in granting of sick leave. Power of the Director to assess evidence of incapacitation if contradictory or indeterminate. Discretionary power of the Director to order reassignment of a staff member. Circumstances which a transfer must not involve. Dismissal of the complaint by the Tribunal

The complainant, a P-4 professional staff member with a permanent appointment in Washington, was informed by the Organization in March 1975 that she was to be transferred to a P-4 post in Barbados. She protested against the transfer, and it was eventually cancelled because of the objections of the Director of the Joint Medical Service who, on medical grounds, advised giving the complainant sedentary work in Washington. On 14 July 1976 the PAHO medical referee said that the complainant was fit for service in Brasilia provided that she would not be required to travel, and on 2 August 1976 the Chief of Administration officially informed her of her transfer to Brasilia.

The complainant then went on annual leave and later on sick leave. On 4 November 1976 the Chief of Personnel was informed by the medical referee that the complainant should be put on sick leave or temporary disability for a period of 6 to 12 months and that she would require medical clearance before returning to work. The complainant then left for Florida, where she took a university course. Between October 1976 and May 1977 there was a series of medical reports on her — in particular by consultant psychiatrists — and the Director of the Joint Medical Service then decided that she was fit to resume work, in the post in Brasilia if it was still available. On 8 June 1977 the Chief of Administration asked the complainant to take up her post in Brasilia and first to report to Washington for briefing. She was to arrive in Brasilia by 1 August at the latest. On 27 June the complainant's attorney informed the Chief of Administration that she refused to go to Washington on the grounds that she had not been given adequate medical clearance for her prescribed duties. On 2 August the Chief of Administration told her that if she did not report to Brasilia by 22 August her appointment would be terminated on that date in accordance with staff rule 980 for abandonment of post. Having failed to comply on 23 August she was informed that her appointment had been terminated with effect from the day before.

On 21 November 1977, the Director of the Bureau, against the recommendation of the Board of Inquiry and Appeal to which the complainant had appealed, upheld the decision to transfer her to Brasilia. This decision was impugned by the complainant before the Tribunal.

The complainant alleged that the decision to send her to Brasilia constituted a breach of several provisions of the Staff Regulations and Staff Rules and that the appointment in Brasilia was a less responsible one and would therefore have proved damaging to her career. She took the view that PAHO did not have adequate medical grounds for terminating her sick leave and transferring her to Brazil. She therefore asked the Tribunal to reinstate her in sick leave with pay from 20 June 1977 until termination of the sick leave was justified by facts set forth by medical experts who would have evaluated her; to cancel her reassignment to Brasilia or, failing that, to postpone such reassignment until she was medically cleared for the post; and to order the repayment of reasonable fees for her attorney and expenses incurred in the internal proceedings and in the Tribunal proceedings.

The Organization contested the receivability of the complaint in so far as it challenged the transfer to Brasilia, and then, only as it related to certain issues raised by this challenge which the Organization regarded as being out of time. As to the merits, the Organization asked that the complaint be dismissed.

As to the receivability of the complaint, the Tribunal observed that the test of receivability was applied to decisions, not to issues. If an appeal against a decision was receivable, the appellant must be allowed to raise any issue that was relevant to the decision unless that issue had actually been decided and so became *res judicata*.

As to the merits, the Tribunal defined its task as one of deciding whether, on the whole of the material known to the Director on 21 November, it had been unreasonable for him first to terminate the complainant's sick leave and secondly to assign her to Brasilia. An entitlement to sick leave with its accompaniment of sick pay, the Tribunal observed was not a matter to be settled simply by a medical evaluation. It was not uncommon for a specialist to advise that the patient should give up his job until his symptoms disappeared, then allow a year free from syptoms to elapse and then begin

to consider going to work again. The Director had to take a practical decision. The advice tendered may well be the best way of effecting a complete cure in the long run. The question for the Director, however, was not whether it should be accepted or rejected — that was for the patient — but whether the cure proposed should be financed by the Organization or an insurance company. The Director was bound by the regulations. He could not decide that the insurance company should pay unless he had concluded under staff rule 670.1 that the staff member was incapacitated from the performance of his duties. The only course open to the Director had been to examine and assess the evidence of incapacitation. The conclusion of the Board had been in effect a finding that, on the evidence as it stood and without a further evaluation, the complainant was incapacitated. The Tribunal further proceeded to establish whether the Director could reasonably have differed from this conclusion. The Tribunal found that the evidence of incapacitation contained in the complainant's dossier could be subjected to two main criticisms. First, the psychiatrist consulted on whose opinion largely rested the evidence of incapacity, said before the Board virtually the opposite of what he had said five months before. Secondly, the evidence of incapacity was of an indeterminate character. It was virtually conceded that the complainant could work anywhere except at her old job or "overseas". The former disability was readily understandable, but no attempt had been made by any of the witnesses or in the arguments advanced for the complainant to explain why she could not work overseas. It was understandable that a line should be drawn between those countries which have and those which do not have temperate climates and good medical facilities, but not readily understandable why that line should coincide with the line drawn between the United States and other countries. It was nowhere explained why the complainant was capable of doing the work which she wanted to do in Miami but incapable of doing the work that she did not want to do in Brasilia. A decision to send her to Brasilia did not mean a decision to keep her there if her health suffered; it need mean no more than a decision to give it a trial. There was nowhere in the medical evidence a firm, clear and reasoned statement that merely to begin work in Brasilia would be likely to cause disablement by anxiety and depression. In its absence, the Tribunal concluded that it had not been unreasonable for the Director to conclude that incapacitation had not been established.

As to the assignment itself, the Tribunal observed that the Director's choice had been strictly limited. The complainant could not, in her own interest, apart from those of the Organization, be returned to headquarters. It was not suggested that there was any other place of duty in the United States to which she could be assigned. The choice lay between an assignment to Brasilia, about the results of which the evidence was at best obscure, and a termination of her appointment, the result of which, according to her psychiatrist might be a violent response, either in a reactivation of the neurosis or some other assertion of her anger and feeling of injustice. A decision to give the former a trial before resorting to the latter could not, considering only the complainant's interest, be faulted. The Tribunal also found that in accordance with staff rule 4.65 a staff member could be reassigned whenever it was in the interest of the Bureau to do so. The Tribunal conceded that it was well established that in the ordinary case the transfer must not involve a change of grade or a reduction in salary or a lowering of dignity. The Tribunal found, however, that in this case the responsibilities of the two posts were broadly the same since they carried the same grade of P-4. Furthermore, even if the new post could be considered a less important and desirable position, that was a sacrifice which, in the interests of the Organization (which in this case, since no one disputed the need for a transfer, coincided with her own), the complainant must be prepared to make.

Finally the Tribunal rejected other arguments of the complainant based on procedural irregularities. It declared the complaint receivable but dismissed it.

9. JUDGEMENT NO. 376 (18 JUNE 1979): HUNEKE-LOGAN *v.* WORLD HEALTH ORGANIZATION

Complaint impugning a decision to terminate an appointment on grounds of physical limitations. Decision of the Tribunal concluding that the impugned decision was a lawful application of the relevant staff rule

On 1 September 1965 WHO appointed the complainant as a statistician under a two-year contract to a post which was later graded P-2. On 1 September 1967 she had her appointment

extended by five years. She took 35 days of sick leave in 1968, 286 days in 1969, 18 ½ days in 1970 and 21 ½ days in 1971. In March 1972 she asked for a five-year appointment. On the advice of the Medical Service she was given only a two-year appointment, expiring on 31 August 1974. In 1972 she took 7 days of sick leave, in 1973 18 days and in 1974 20 days.

WHO contended that the complainant's working relations with her colleagues were unsatisfactory. The complainant blamed her immediate supervisor. She also complained of pains in her arms which she said were due to overwork and prevented her from doing her work properly. In November 1975 the chief of her branch and the Director of the Medical Service proposed transferring her. WHO stated that there was no vacancy. The complainant took 17 days of sick leave between 1 January and 30 August 1975 and was absent 17 times for reasons of health between 30 August and 26 November. She applied for leave without pay for six months from 20 January 1976 and for another six months from 21 June 1976.

On 27 July 1976 the complainant was informed by the Organization that her appointment was terminated in accordance with staff rule 930.5. The complainant made three claims in turn. First, she asked that her ailments — epicondylitis and epitrochleitis — should be regarded as service-incurred. The Director-General dismissed that claim on the recommendation of the Compensation Claims Committee. Secondly, she appealed against the administrative decision, taken on medical grounds in accordance with staff rule 930.5, to terminate her appointment. Thirdly, she claimed compensation for total disability. That claim was dismissed on 6 January 1978 by the insurance administrator. WHO also decided to set up a medical board of review in accordance with the text of staff rule 1020.1, then in force. After review of the complainant's medical file, medical examinations and two interviews between the chairman of the board and the complainant, the medical report confirmed the medical limitations which were the grounds for terminating her appointment. On 18 January 1978 the Director-General upheld his decision to terminate that appointment with effect from 6 September 1976.

The complainant filed her complaint asking the Tribunal principally: to declare that there were no medical grounds which warranted termination by WHO of appointment on the basis of staff rule 1020.2; to declare accordingly that the termination of her appointment was unwarranted and therefore null and void; to order WHO to reinstate her; to order WHO to pay her as compensation for loss of salary the amount which she would have been paid in salary from 6 September 1976, the date of termination, and subsidiarily, should the Tribunal nevertheless uphold the Director-General's decision of 18 January 1978, to quash the insurance administrator's decision of 6 January 1978; to award her compensation for her disability; and accordingly to order the medical board to establish the decree of her disability.

The Tribunal recalled WHO staff rule 930.5 which states:

> "When, on the advice of the Staff Physician, a staff member is unable to continue his present functions because of physical limitations, although he would be suitable for another assignment in the Organization, but for whom no such assignment can be found, the staff member or a physician designated by him will be informed of the medical conclusions as outlined in Staff Rule 1020.1 and his appointment shall be terminated. He shall be entitled to a notice period equivalent to that specified in Staff Rule 950.3 and to an indemnity equivalent to that specified in Staff Rule 950.4."

It appeared clearly to the Tribunal from the report of the WHO medical board that, first, the pains suffered by the complainant were not attributable to her work in WHO and that, secondly, they did not prevent her from doing that work, provided certain arrangements were made. On the first point, the Tribunal accepted the unanimous opinion of the medical board, which consisted of three especially well-qualified physicians, including one designated by the complainant herself.

On the second point, the Tribunal observed that from the documents in the dossier it appeared that WHO was unable to find any post which the physicians felt would have suited the complainant. Her performance was not beyond criticism and was partly to blame for the reluctance of chiefs of branch to take her on their staff. But the main reason why WHO could not find a post for her, the Tribunal went on to say, was that her duties were highly technical and so there were few posts suitable for her.

The Tribunal found the Organization's application of staff rule 930.5 correct and the complainant's claim for compensation unfounded. It therefore dismissed the complaint.

10. JUDGEMENT NO. 377 (18 JUNE 1979): RUDIN *v.* INTERNATIONAL LABOUR ORGANISATION

Complaint impugning a decision on the grading of a post. Procedure to be followed. Discretionary authority of the Director-General on matters of post-grading

The complainant impugned a decision on the grading of her post. She had previously appealed against that grading to the Professional Grading Appeals Committee and, after the original decision had been confirmed by the Director-General on the Appeals Committee's recommendation, she had submitted a "complaint" under article 13.2 of the Staff Regulations. The Director-General had referred the complaint to the Professional Grading Appeals Committee which had confirmed the grading and whose recommendation the Director-General had endorsed in the decision now before the Tribunal.

The complainant alleged procedural irregularities and asked the Tribunal, principally, to quash the decision under consideration and declare that her post should be graded at a higher level or alternatively, to request the Director-General to review the impugned decision on the basis of a report by a joint committee with full powers of inquiry.

The Tribunal observed that from the wording of article 13.2 of the Staff Regulations it appeared that although the Director-General could, if he wished, consult the joint committee on a "complaint" submitted to him by a staff member, he was under no duty to do so. The complainant appealed to the Director-General against a decision on her grading which he had taken on the recommendation of the *ad hoc* appeals committee, and it was open to him either to decide on that appeal without prior advice or else to seek further advice. In the latter case, there was no objection to his consulting again before taking the impugned decision the committee which he had already consulted, particularly since the matter was of an essentially technical nature.

As regards the complainant's allegations of irregularities in the procedure followed by the Appeals Committee, the Tribunal found them unsubstantiated.

As to the merits, the Tribunal observed that in grading the complainant's post the executive head exercised his discretionary authority. Hence the Tribunal would consider neither whether the grading criteria applied were sound, nor whether they were correctly chosen and applied nor, in particular, whether the degree of responsibility attaching to the complainant's post was properly taken into account.

The case would be different only if the Tribunal had discovered some clear mistake of assessment in the decision which the Director-General had come to. No such conclusion could be drawn from the documents in the dossier. The Tribunal therefore dismissed the complaint.

11. JUDGEMENT NO. 378 (18 JUNE 1979): SAUER *v.* EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION

Complaint by a technical staff member of the Karlsruhe Control Centre impugning a decision declaring him as having "non-active status". Circumstances under which such a declaration is lawful. Dismissal of the complaint by the Tribunal

The complainant, a citizen of the Federal Republic of Germany, was a second-category controller at the Karlsruhe Centre. In accordance with annex V to the Staff Regulations governing officials of the Eurocontrol Agency, the administrative regulations governing the permanent staff of Eurocontrol apply to members of the technical staff of the control centres at Maastricht and Karlsruhe.

The Federal Republic of Germany decided that the Federal Office of Air Navigation Safety (Bundesanstalt für Flugsicherung) should be in charge of air navigation, and the procedure for declaring staff to have "non-active status" therefore had to be followed. By a circular of 14 June 1977 the Director-General informed the staff that the measures approved by the Permanent

Commission on 9 June 1977 would be put into effect. On the Joint Committee's recommendation decisions were taken on 13 July and 10 August on the types of posts abolished and on the list of eight staff members declared to have "non-active status". On becoming "non-active" four of them were redeployed to the French and West German administration and another was re-engaged by Eurocontrol. On 15 September the complainant appealed against the Director-General's decision of 10 August to include him in the list of "non-active" staff. His appeal was dismissed on 13 January 1978.

The complainant took the view that, in so far as the decision to declare him to have "non-active status" was based on article 41 of the Staff Regulations, it should be quashed for want of a proper foundation in law.

Article 41 of the Staff Regulations reads as follows:

"1. An official with non-active status is one who has become supernumerary by reason of reduction in the number of posts in the Agency.

"2. Reductions in the number of posts in a particular grade shall be decided by the appropriate budgetary authority under the budgetary procedure. The appointing authority shall, after consulting the Joint Committee, decide what types of posts are to be affected by such measures. The appointing authority shall draw up a list of the officials to be affected by such measures, after consulting the Joint Committee, taking into account the officials' ability, efficiency, conduct in the service, family circumstances and seniority."

The complainant asked the Tribunal principally: to quash on the ground of error of law, inasmuch as it was based on article 41 of the Staff Regulations, the decision to declare him non-active, so that he would continue to be employed until the completion of a termination procedure which suited his interests and the situation in which he was put because of the decision of the Federal Republic of Germany with regard to the staff of the Karlsruhe Centre; subsidiarily: should it prove difficult to keep the complainant on the Eurocontrol staff, to award him compensation for the wrongful and unlawful termination of his appointment, assessed in accordance with the rules on redundancy in the European Communities . . .; and to award costs, including the complainant's proven legal expenses, against the defendant organization".

The Tribunal did not find it necessary to consider the plea of irreceivability made by the Organization. The Tribunal observed that, in accordance with article 41 of the Staff Regulations, a declaration that a staff member had non-active status, following a reduction in the number of posts in the Agency, was a measure not in itself disciplinary and one which the Director-General was entitled to take, provided posts did have to be abolished, and provided he heeded a number of criteria set out in that article. The fact that the Director-General had to abolish posts was not in dispute in the present case. Nor did it appear from the document in the dossier that in taking the impugned decision he disregarded any of the criteria mentioned above. The Tribunal found that the Agency was under no duty to take exceptional and temporary measures before carrying out the dismissals forced on it by the need for a reduction in staff. Nor could the complainant rely on any provisions which he alleged apply in other organisations.

The Tribunal dismissed the complaint.

12. JUDGEMENT NO. 379 (18 JUNE 1979): PAULUS *v.* EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION (EUROCONTROL)

Complaint alleging mishandling of personnel file of a staff member by the Organization. Need to prove material or moral prejudice to claim compensation

The complainant claimed that two documents had been abstracted from his personnel file and that their abstraction had proved detrimental to the normal continuation of his career in the Agency. He stated that he would be properly compensated for the "material or moral prejudice, or both, which he had suffered" if the Agency were ordered to pay 1 Belgian franc as damages and to pay costs.

The Tribunal found that from the documents in the dossier it appeared that the Eurocontrol Agency had not caused the complainant any material or moral prejudice entitling him to compensation and therefore dismissed the complaint.

13. JUDGEMENT NO. 380 (18 JUNE 1979): BERNARD AND COFFINO *v.* INTERIM COMMISSION FOR THE INTERNATIONAL TRADE ORGANIZATION/ GENERAL AGREEMENT ON TARIFFS AND TRADE

Complaint contesting the introduction of a new salary scale for General Service staff to replace a scale established following negotiations between the administration concerned and the staff representatives. Effect of the establishment of the International Civil Service Commission on earlier practice in this field. Relationship in this field between the United Nations and its specialized agencies. Question whether the Director-General has a statutory or contractual, express or implied, obligation to negotiate with the staff representatives before introducing the new scale. Distinction between consultation and negotiation. Dismissal of the complaint by the Tribunal

The complainants, members of the General Service category of staff, objected to a new salary scale that the Director-General of the Organization applied to their category by a decision of 20 January 1978.

The salary scale so far in force was the uniform salary scale for that staff category, common to the United Nations Office and the United Nations specialized agencies in Geneva. The said scale was established by reference to the best prevailing salary rates in the city for whose determination surveys were carried out from time to time, although not at any set intervals, by methods decided on after consulting the staff association of the Organization. A dispute as to the results of the 1975 survey led to a strike by United Nations staff which was settled by an agreement on 23 April 1976 between a sole negotiator designated by the Secretary-General and by the executive heads of the Geneva-based agencies on the one hand, and by the staff representatives of the Organization concerned, on the other. It fixed the scale of salary increments which were supplemented by an agreement of 1 September 1976 providing for interim cost of living adjustments.

By resolution 31/193 B of 22 December 1976 the United Nations General Assembly instructed the International Civil Service Commission (ICSC) to carry out a new survey. A working party set up by the Commission consulted the representatives of the Geneva-based organizations and of their staffs and, despite strong objections expressed orally and in writing by the staff representatives, chose a method for collecting data which differed from the methods applied in earlier surveys. The staff representatives later took the view that the application of that method, to which they had objected, had been defective and therefore incorrect. They therefore rejected the Commission's recommendations and refused to join the administrations in working out the arrangements for applying them, on the grounds that they did not afford an acceptable basis for discussion. On 22 November 1977 the Secretary-General of the United Nations announced that the recommendations would be put into effect. On 20 January 1978 the Director-General of the defendant Organization adopted the same arrangements. The staff took the view that the new scale was to their disadvantage.

A request of reconsideration of the decision of 20 January 1978 having been rejected by the Director-General, the complainants appealed to the Tribunal asking it: (*a*) to find that the agreement of 23 April 1976 either created a clear understanding on prior negotiations or recognized that a clear understanding was already in existence, and (*b*) additionally, to find that the Director-General of ICITO-GATT had breached the agreement by unilaterally revising, without prior negotiations with the staff representatives, the salary scale of the General Service category he had fixed pursuant to the agreement. Accordingly, they also asked the Tribunal to quash the decision of the Director-General of ICITO-GATT dated 20 January 1978, introducing as from 1 January 1978 a new salary scale for General Service category staff in ICITO-GATT, and to restore, retroactively from 1 January 1978, the *status quo ante* on the basis of the 1976 agreements on salary scales and interim adjustments.

The complainants maintained that salary was regulated by the contract of appointment, that it could not be altered unilaterally and that the 1976 agreements fixing the salary scale did not provide for denunciation and remained in force from one survey to the next.

The defendant Organization contended that having been adopted by the United Nations, the new salary scale had *ipso facto* to be adopted by the defendant's administration. The Tribunal was competent only to review individual decisions, not general decisions like the one of 20 January 1978. Furthermore, a complaint on the individual decision applying the new scale to the complainants would now be time-barred. Basing itself on the Belchamber case decided by the United Nations Administrative Tribunal,[41] the defendant stressed that the 1976 agreement had been adopted without prejudice to the ICSC review of General Service category salaries with the full participation of the staff representatives, and that the latter's negative attitude had deprived of effect a number of articles of the statute of ICSC by stubbornly refusing consultation with the Organization on the ICSC recommendations.

In answer to the foregoing the complainants contended that the Organization had its own legal personality distinct from the United Nations, that the Tribunal's statute provided for the impugnation of decisions affecting "a class of officials", that it was pointless given the defendant's avowed automatic alignment on the United Nations' scale and that, in the Belchamber case, the United Nations Administrative Tribunal had been mistaken in holding that the staff representatives' "negative" attitude on the work and recommendations of ICSC had discharged the Secretary-General from his obligation to consult them. It was the Secretary-General who had wanted to change the results of the 1976 agreement.

With reference to its jurisdiction, the Tribunal rejected the first two paragraphs of the relief sought by the complainants concerning the 1976 agreement, observing that they might constitute considerations leading to the order but not part of the order itself. The Tribunal accepted its competence with reference to the remaining claim for relief, since they constituted an alleged breach of the contract or staff regulations.

As to the merits, the Tribunal, recalling the Belchamber case decided by the Administrative Tribunal of the United Nations, observed that although the facts and contentions of the present case were not exactly the same, the fundamental question was the same. It stressed that the defendant Organization had not drawn up staff regulations of its own but had provided for the application of the United Nations Staff Rules and Regulations and that the Tribunal would therefore hesitate to depart from any interpretation given to any regulation by the United Nations Tribunal. The Tribunal observed that article VIII of the Staff Regulations of the defendant Organization provided that a Staff Council elected by the staff should be established for the purpose of exercising continuous contact between the staff and the Director-General and that rule 108.1 provided that the Staff Committee should be consulted on questions of policy on, *inter alia*, salaries. Article VIII also provided for a joint Advisory Committee which, under rule 108.2, was to be composed of a Chairman selected by the Director-General from a list proposed by the Staff Council, of four members representing the Staff Council and of a like number representing the Director-General (these provisions are referred to, hereinafter, as article VIII). The Tribunal stressed the fact that since there were seven Geneva organizations, it was manifestly desirable that there should not be seven different and competing salary scales. However, since the seven had staff associations and some sort of provision for consulting them, but the provisions were by no means in the same terms, it would be highly improbable that seven different bodies engaged in separate discussions about figures, would all come up with precisely the same figure. Consequently the organizations had entered into a network of agreements between themselves to promote co-ordination. The name given to this network was "the common system".

The complainants, the Tribunal added, contended that the April agreement had qualified, on a contractual basis, the independent authority for the executive heads to set the General Service scales under the rules of the common system; and that, therefore, the complainants' contractual rights under the Staff Rules extended, aside from the actual scales of remuneration, to the agreed methodology for surveys, to the agreed procedure for processing data arising out of surveys and to their right to negotiate their salary with their employer on the basis of the results of such surveys.

[41] *Juridical Yearbook*, 1978, Chap. V, Sect. A, 6.

The Tribunal agreed that the April agreement had created or recognized a clear understanding that the executive heads would not exercise their power of settling salary scales without prior negotiation with the staff associations. It did not agree, however, that the April agreement bound the executive heads to use the same methodology in all subsequent surveys until they denounced the agreement.

As to the promise to negotiate before settling the salary scales, the Tribunal, unlike the complainants, concluded that it was an obligation neither specifically expressed in the complainants' contract of employment nor implied in it. That was a promise, the Tribunal maintained, that was not in need of incorporation into a contract of employment so as to make it effective. The sanction for the breach of it was the occurrence of the labour trouble which the agreement was designed to avoid.

As to the explanation advanced by the Organization that during the process which led to the April agreement it was engaged in consultation under article VIII — article which, the Tribunal added, formed part of the complainants' contracts — the Tribunal observed that in this way of looking at the case the question would become one of whether or not the Organization committed a breach of article VIII. Both sides asserted that consultation and negotiation were only two words for the same thing. Yet the Organization alleged that the Director-General offered to consult/negotiate before making the decision impugned while the complainants asserted that the Director-General was unwilling to consult/negotiate at all.

Unlike the parties, the Tribunal thought there was a clear distinction between consultation and negotiation. If the end product of the discussions was a unilateral decision, consultation was the appropriate word. If it was a bilateral decision, i.e. an agreement, negotiation was appropriate. The Tribunal was satisfied from the history of the discussions between the executive heads and the staff associations up to 1976 that the discussions were negotiations in the fullest sense.

The Tribunal found that, if the obligation to consult under article VIII was literally interpreted, it was not broken but that, if it was interpreted in the sense contended for by the complainants, it was broken. The literal interpretation was to listen and to exchange views. The Organization gave ample opportunity for consultation both before and after ICSC made its recommendations and was in full possession of the staff association's views.

If the obligation under article VIII extended to negotiation, the relevant subject matter of negotiation under staff rule 108.1 (*a*) was any question relating to policy on salaries. It would not be open to the Director-General to close part of this field and label it non-negotiable. There was no evidence that the complainants' staff association was unwilling to join any negotiations or discussions which covered the whole of the field; its refusal was to negotiate within the framework of the ICSC recommendations.

So the question, if it had to be decided within this framework, would be whether the duty of consultation in article VIII had by 1977 been qualified by the practice of the preceding 10 years or more and expanded to embrace negotiation. If negotiation was different from consultation, it was difficult to see how the change could be made otherwise then by an amendment made in accordance with the Staff Regulations. If what was relied on was the practice of the Organization, it would be necessary to examine minutely how the machinery of article VIII was used so as to see what implications could properly be drawn.

However, the Tribunal concluded that there was not a shred of evidence in the dossier that the machinery of article VIII had ever been used at all. The Tribunal found no evidence that the joint interagency bodies which successfully negotiated the April agreement and its predecessors were acting or purporting to act as the organs of any particular organization or under any particular set of regulations. In this situation, the Tribunal could not found its judgement on the hypothesis that in the discussions between the executive heads and the staff associations up to 1976 nothing was involved except the application of article VIII. Accordingly, the Tribunal gave its judgement not in the terms of reasoning of whether or not a breach of article VIII had occurred, but instead, in the terms of reasoning it set out above, namely, whether the obligation to negotiate said to have arisen from the April agreement had modified the Staff Regulations or had been incorporated into the individual contracts of the complainants. The Tribunal concluded that the breach of such an obligation, if any

such obligation existed, would not be a non-observance of the complainants' terms of appointment or of any staff regulation.

It therefore dismissed the complaint.

14. JUDGEMENT NO. 381 (18 JUNE 1979): DOMON AND LHOEST *v.* WORLD HEALTH ORGANIZATION

This case is broadly similar to the case dealt with in Judgement No. 380.

15. JUDGEMENT NO. 382 (18 JUNE 1979): HATT AND LEUBA *v.* WORLD METEOROLOGICAL ORGANIZATION

This case is broadly similar to the case dealt with in Judgement No. 380.

16. JUDGEMENT NO. 383 (18 JUNE 1979): RIEDINGER *v.* EUROPEAN PATENT ORGANISATION

The Tribunal recorded the withdrawal of suit by the complainant.

17. JUDGEMENT NO. 384 (18 JUNE 1979): PEETERS *v.* INTERNATIONAL PATENT INSTITUTE

The Tribunal recorded the withdrawal of suit by the complainant.

18. JUDGEMENT NO. 385 (18 JUNE 1979): PEETERS *v.* INTERNATIONAL PATENT INSTITUTE

The Tribunal recorded the withdrawal of suit by the complainant.

19. JUDGEMENT NO. 386 (18 JUNE 1979): HOUYEZ *v.* EUROPEAN PATENT ORGANISATION

The Tribunal recorded the withdrawal of suit by the complainant.

20. JUDGEMENT NO. 387 (18 JUNE 1979): NIVEAU DE VILLEDARY *v.* EUROPEAN PATENT ORGANISATION

The Tribunal recorded the withdrawal of suit by the complainant.