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UNITED NATIONS JURIDICAL YEARBOOK

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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. 253 (22 APRIL 1980):[2] KLEE *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Compensation expressed in a currency other than the United States dollar — Rate of exchange — Relevance to same of the method followed in determining the measure of damages

In this judgement, the Tribunal interprets its previous Judgement No. 242 delivered on 22 May 1979[3] in which it had decided that the Secretary-General "pay the applicant the amount of 15 months' salary at the P-3, step VII level, including all allowances except home-leave entitlement, which the applicant would have earned had he been maintained in UNIDO's service for 15 months from 1 April 1976".

Pursuant to the said judgement, the Administration made an advance pending final payment, the said advance representing 80 per cent of the salary plus emoluments due to the applicant. The Administration's final calculations showed what it considered to be an over-payment and, rather than pay the applicant a balance, it claimed reimbursement of the sum of Austrian schillings 1,726 said to result from the application of the rate for conversion prevailing on the date of payment.

The applicant requested the Tribunal to interpret its previous judgement and to rule that the compensation awarded him should be paid in Austrian currency at the rates of exchange in effect between 1 April 1976 and 30 June 1977. Applicant's major argument was that the rate of exchange should relate to the period of 15 months during which the Tribunal, for the purpose of determining the amount of compensation, ruled that he should be considered as having been in the service of UNIDO. Applicant added that otherwise the sum paid to him would not in fact correspond to the salary which he would actually have been paid during that period and which constitutes the basis for the compensation awarded by the Tribunal.

Respondent's major argument was that in accordance with the established policy of the United Nations, the rate of exchange is that in effect as of the date of payment. Respondent added that payment was not unreasonably delayed by him.

In interpreting its previous judgement, the Tribunal attached much importance to the method it followed in determining the measure of damages. The Tribunal emphasized that it had fixed the compensation by reference to the applicant's notionally continued service for 15 months from 1 April 1976. This method clearly shows that the Tribunal intended actually to reconstruct the applicant's career financially for the said period.

The Tribunal distinguished the instant case from the Johnson case (Judgement No. 234)[4] cited by Respondent. In that case, the method of determining the measure of damages was different in that it was fixed by reference to a definitively established amount, "equal to the amount of 2 years' net based salary". There was no notional continuation of service in the Johnson case.

For the above reasons, the Tribunal ruled that the compensation awarded the applicant must be calculated by reference to the sums he would have earned in Austrian schillings had he been maintained in service over the period from 1 April 1976 to 30 June 1977 and that the conversion of the dollar amounts should be on the basis of the various successive exchange rates during that period.

With regard to the sum of $1,000 awarded for costs, the Tribunal decided, following precedent of Judgement No. 234 (Johnson), that conversion should be at the rate prevailing on the date of Judgement ordering payment, namely 22 May 1979.

2. JUDGEMENT NO. 254 (23 APRIL 1980):[5] FERNANDEZ-LOPEZ *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Compensability of death arising out of an accident while travelling to the normal place of work in a supervisor's private automobile — Interpretation of article 2 (b) *(iii)* in fine *of appendix D — Non-applicability of rules adopted in inter-organizational consultations and creating provisions beyond the existing regulations and rules unless such rules are incorporated in the individual rules of the organization concerned*

On 23 March 1975, the applicant's husband, a staff member of UNCTAD, suffered death while travelling with his supervisor in the latter's private automobile from the staff member's home in the suburbs of Geneva to the Palais des Nations. The accident occurred on a Sunday and the route followed by the staff member's supervisor, who was also fatally injured in the accident, was not a direct route from the staff member's home to the office. It is not contested that the purpose of this trip on the date of the accident was to attend to some urgent business of the United Nations. The applicant was denied compensation under appendix D on the ground that the accident resulting in her husband's death was not attributable to United Nations service. More particularly, emphasis was put on the provision contained in subsection (*b*) (iii) of article 2 of appendix D which excludes from compensability injury or death arising out of private motor vehicle transportation sanctioned or authorized by the United Nations on the request and for the convenience of the staff member.

In her application, the applicant argued mainly that the above-mentioned provision of article 2 (*b*) (iii) concerns the case of a staff member travelling in his own vehicle to or from work on an ordinary working day. She submitted that the situation would be substantially different had the staff member been requested by his supervisor to travel to the place of work in a vehicle supplied by the supervisor.

The respondent's position was based mainly on his contention that injury or death arising out of accidents taking place during travel to work are considered service incurred only where the travel is along a direct route between the staff member's home and his place of work. This, the respondent explained, was a new general rule adopted in consultations among the United Nations and the specialized agencies. The respondent pointed out that the direction of travel, as well as the location of the accident, did not indicate that the staff members were on a direct route to their offices at the time of the accident. Furthermore, the respondent observed that the vehicle was not furnished by or at the direction of the United Nations and that the supervisor did not have authority to approve the use of a private automobile, including his own, for official travel.

The Tribunal ruled out the application of the "general rule" agreed to among organizations of the United Nations system. In so doing, it pointed out that if such a rule goes beyond a simple interpretation of existing regulations and rules, it cannot be considered as governing the relations between the Administration and the staff of an organization unless it is incorporated in the individual terms of appointment or in rules duly established by the international organization concerned.

With regard to article 2 (*b*) (iii) *in fine*, the Tribunal ruled that its provision was not intended to regulate the problems arising out of accidents occurring as a result of travelling to and from the normal place of work. It related obviously to any other kind of official travel, for instance, when a staff member instead of travelling by train wishes to use his own car. This may be authorized for his own convenience and at his own risk. The travelling by car to and from the normal place of work needs no authorization and falls outside the ambit of article 2 (*b*) (iii). The Tribunal considered the Administration's more extensive interpretation of this provision inadmissible.

The Tribunal found that the death of the applicant's husband was attributable to the performance of his official duties under article 2(*a*) of appendix D since he was travelling as instructed by his superior. With regard to the question of taking a direct or indirect route to work, the Tribunal observed that this point was not mentioned in appendix D and that, furthermore, it did not arise in the instant case because the choice of route was not that of the applicant's husband.

For the above reasons, the Tribunal rescinded the decision denying the applicant compensation and ruled that she and her dependent children were entitled to compensation as provided in staff rule 106.4 and in appendix D to the Staff Rules.

3. JUDGEMENT NO. 255 (24 APRIL 1980):[6] TEIXEIRA *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Revision of Tribunal judgements — Limits of the power of revision under the statute of the Tribunal

By its Judgement No. 233, delivered on 13 October 1978,[7] the Tribunal had ruled on the merits of the applicant's claim that he was in fact a staff member although he was serving as an independent contractor under a series of successive special service agreements. The Tribunal had denied the claim but, in view of the length of the period involved and of the circumstances of the case, it awarded the applicant $3,000 in damages.

In a subsequent application, the applicant requested the Tribunal to revise its aforementioned judgement under articles 11 and 12 of its statute and to grant in substance his original pleas.

The Tribunal first observed that article 11 of its statute is irrelevant since it refers to a procedure which is not conducted before the Tribunal. With regard to article 12, the Tribunal observed that it can revise a judgement under its provisions only if three specific circumstances mentioned therein are established. The Tribunal recalled its previous ruling in its Judgement No. 73 (*Bulsara*)[8] to the effect that its powers of revision are strictly limited by its statute and that the said powers cannot be enlarged or abridged in the exercise of its jurisdiction by the Tribunal.

In applying those principles to the instant application for revision, the Tribunal noted that no newly discovered fact was mentioned by the applicant and that he was merely presenting the same case in different terms with further argumentation. In elaborating on this statement, the Tribunal pointed out that the applicant's requests in the instant application had been already considered and ruled upon in its previous judgement.

For the foregoing reasons, the Tribunal rejected the application.

4. JUDGEMENT NO. 256 (25 APRIL 1980):[9] WILLEMS *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Transportation of private automobiles to duty stations at United Nations expense — Conditions for exercising this entitlement — The one-year time limit for retroactive financial claims

The applicant was transferred to UNTSO in Jerusalem for an undetermined period which, in actual fact, did not exceed 16 months. He transported his private automobile from Antwerp, Belgium, to Ashdod, Israel, and later claimed reimbursement of the transportation expenses. His claim was submitted more than one year after the arrival of the automobile in Ashdod. The Administration turned down his claim for that reason, invoking staff rule 103.15, and also because the age of the automobile (13 years) and its mileage (104,000 miles) did not meet the requirement of reasonableness within the meaning of administrative instruction ST/AI/176 which regulates the matter.

The Tribunal noted that the Staff Rules and the administrative instruction cited above did not confer any firm rights to a staff member to transport his personal car at United Nations expense and that, at the most, they confer an entitlement which can be exercised only on conditions and in circumstances prescribed by the Secretary-General.

The Tribunal noted that one such condition was that the assignment to the duty station be expected to be for a period of two years or more. Another condition was that the transportation be reasonable in the circumstances. Factors such as the age of the automobile, the potential loss on resale if not transported, and the relative price of automobiles in the locality and at the duty station were to be taken into account in determining the reasonableness of transportation.

The Tribunal ruled that in the circumstances of the case, transportation of the applicant's automobile was not reasonable and that, furthermore, he did not meet the requirement of the two-year expected duration of the initial assignment.

With regard to staff rule 103.15, the Tribunal ruled that it covers all payments due to the staff member and that the one-year time-limit contained in that article was properly applied to the applicant's case.

For the above reasons, the Tribunal decided that the Secretary-General had used his discretion properly in dismissing the applicant's claim and rejected his application.

5. JUDGEMENT NO. 257 (30 APRIL 1980):[10] ROSBASCH *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Termination of a permanent appointment for unsatisfactory services — Secretary-General's discretionary authority limited only by the requirements of due process and of a thorough investigation and review

The applicant's permanent appointment was terminated for unsatisfactory services upon the recommendation of the competent joint review body. Before the Tribunal, she contended, in particular, that the decision of the joint review body had not been properly reached and that the Administration had failed to carry the burden of proof of the charges of misconduct and poor performance. She requested rescission of the decision to terminate her appointment and subsequent reinstatement.

The Tribunal examined in detail the proceedings of the joint review body and concluded that the said organ had followed the established procedure and conducted a complete and thorough review of the case. The Tribunal also quoted approvingly from the report of the Joint Appeals Board which had reached the same conclusions.

The Tribunal noted in particular that the Administration had scrupulously respected the applicant's right to reply to adverse statements and that the joint review body's report was based on its eight meetings and the hearing of 17 witnesses.

The Tribunal therefore concluded that the termination procedure was proper and that the applicant's contentions with regard to it were without merit. The Tribunal recalled its often repeated ruling that it cannot substitute its judgement for that of the Secretary-General concerning the evaluation of the performance of the staff member and that this matter lies within the Secretary-General's discretionary authority. Having concluded that the applicant's complaints about procedural irregularities were unfounded, the Tribunal rejected the application.

6. JUDGEMENT NO. 258 (6 NOVEMBER 1980):[11] EL-TAWIL *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Non-validation of a period of service alleged by the applicant to be the result of an administrative error — Application for compensation for the damages suffered in that connexion — The application is rejected in view of the applicant's negligence

In an application filed on 27 February 1980, the applicant sought to have the Organization bear the financial consequence of the non-validation of a period of service completed by him 18 years earlier, which non-validation he alleged to be the result of an administrative error.

The respondent contended that, since the application had not been filed within the time-limits prescribed in article 23 of the Pension Fund Regulations or in staff rules 103.15 and 111.3 (*a*), it was untimely. The Tribunal noted, however, that none of those provisions related to the filing of an application with the Tribunal. Article 23 of the Pension Fund Regulations was concerned with the period within which election could be made for validation of non-contributory service, staff rule 103.15 with retroactivity of payments and staff rule 113.3 (*a*) with the procedure of the Joint Appeals Board. Moreover, the respondent had agreed to the submission of the case directly to the Tribunal without making any reservation as to the application being time-barred. For those reasons, the Tribunal found that the application was not time-barred.

On the merits, the Tribunal noted that the applicant was required under the Pension Fund Regulations and Administrative Rules to give notice in writing to the Secretary of the Staff Pension Committee of his application for validation within one year of the commencement of his participation and that he had failed to do so despite the reminder appearing on the form which he had duly

signed at the time of his admission to the Pension Fund. The Tribunal concluded that, even if there had been some negligence on the part of the Administration, the negligence of the applicant in not following the required procedure was the determining factor in depriving him of the validation of his non-contributory service, and that the application should therefore be rejected.

7. JUDGEMENT NO. 259 (6 NOVEMBER 1980):[12] HOPPENBROUWER *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application for seeking compensation for the loss of personal effects — The notion of a direct connexion with the performance of official duties — Does such a connexion exist if the loss is incurred during a necessary stopover while travelling between two cities visited by the claimant in the performance of official duties?

The applicant sought compensation for the loss incurred as a result of the theft of various personal effects from his hotel room in Honolulu.

The Tribunal emphasized that, to fall within staff rule 206.6, the loss of personal effects must be "directly attributable to the performance of official duties on behalf of the United Nations" and that, according to the provisions of paragraph 3 (*a*) of administrative instruction ST/AI/249, the loss should be deemed to be directly attributable to the performance of official duties when it

> "occurred as a *direct result* of travelling by means of transportation furnished by or at the expense or direction of the United Nations in connexion with the *performance of official duties*". (Emphasis added by the Tribunal.)

The Tribunal noted that, since the applicant had had to make a stopover at Honolulu to return to his post in Apia, he must be considered as having been "travelling" at the time of the burglary even though he had not been aboard a means of transport at that time but rather was awaiting the first available connecting flight onwards, that his stay at the hotel had exposed his personal effects to a risk of burglary which he otherwise would not have incurred and that the loss of his personal effects had therefore been a direct result of travelling.

The Tribunal then considered whether the travelling had been connected with the performance of official duties. It noted that, while the applicant had not taken the direct route (Netherlands–New York–Honolulu–Apia) and had made a detour to Washington, he had done so after obtaining official approval for official consultations in New York and Washington. The Tribunal was satisfied that the consultations constituted the performance of official duties. Moreover, it rejected the argument that, once the applicant had left Washington, he had left official duties behind, and considered that once the applicant had, in the course of his journey, carried out official duties in New York and Washington, his travel between those cities and his duty station was in connexion with the performance of "official duties". The Tribunal concluded that the loss was a *direct result* of travelling in connexion with the performance of *official duties*. Furthermore, it rejected the argument of the respondent that the liability of the Organization was restricted to cases where a common carrier or innkeeper was liable, an argument for which no basis could be found in the relevant provisions, and further observed in that connexion that:

> "The Organization's lack of a right of recovery against a third party, whether a common carrier, an innkeeper or anyone else, is not relevant to the liability of the Organization, nor is the alleged long-standing policy of the Claims Board, on which the respondent also relies (Judgement No. 254: Fernández-López).[13] The Tribunal considers the Corrado case (Judgement No. 209)[14] to be irrelevant as it was concerned with a burglary at a private dwelling where the claimant resided at the place, where he was normally stationed."

Having regard to paragraph 3 (*b*) of the applicable administrative instruction, which provided that:

> "No compensation shall be paid for any loss or damage which was occasioned by the negligence or misconduct of the claimant",

the Tribunal was satisfied that, as the applicant intended to make only a short stay at the hotel, there was neither negligence nor misconduct on his part in leaving his property locked in a suitcase in his locked bedroom instead of depositing it in the custody of the hotel.

In the light of the foregoing, the Tribunal ordered the rescission of the contested decision and the payment to the applicant of such amount as the Claims Board might assess.

8. JUDGEMENT NO. 260 (6 NOVEMBER 1980):[15] DENIS *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application made to the Tribunal on the basis of an opinion of the Secretary of the Joint Appeals Board concerning the receivability of the appeal to the Board — Referral of the case to the Board

The applicant objected to a decision of 19 March 1979. On 28 January 1980, he had addressed an appeal to the Secretary of the Joint Appeals Board of UNIDO, who had replied that, in view of the provisions of staff rule 111.3 (*a*), the case could not be considered by the Joint Appeals Board.

The Tribunal noted that the letter from the Secretary of the Joint Appeals Board did not inform the applicant of a decision of the Joint Appeals Board but only of the opinion of the Secretary concerning the receivability of the appeal and that the Board did not consider the question of a possible waiver of the time-limits provided for in staff rule 111.3 (*d*). The Tribunal therefore considered that it would be inappropriate to consider the merits of the case at that stage and referred the case to the Joint Appeals Board for consideration in the light of the relevant staff rule.

9. JUDGEMENT NO. 261 (11 NOVEMBER 1980):[16] BOELEN *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application directed against a decision not to renew a fixed-term contract — Discretionary power of the respondent in the matter — Confirmation of the contested decision notwithstanding certain irregularities justifying the payment of compensation

The applicant's main request to the Tribunal was that it rescind a decision not to renew a fixed-term contract. The Tribunal considered the following issues: (1) the nature of the applicant's appointment and her expectations concerning renewal of that appointment and (2) the circumstances of her separation from service.

As to the first of those issues the Tribunal found that, on the basis of the available evidence, the Administration had made no commitment about the renewal of the applicant's appointment and consequently her expectations could not have amounted to more than a hope that her employer would use his discretionary power to assess her performance and that depending on his findings he would offer her a renewal of appointment.

As to the second issue the Tribunal concluded, in the light of the documents in the case, that the author of the periodic report which formed the basis of the decision regarding renewal of the contract had not been motivated by prejudice in writing the periodic report in question. It pointed out, however, that the Administration had not arranged for the report to reach the applicant early enough to enable her to dispute the contents of the report before the decision not to renew it was taken, and that there had been no appraisal of the applicant's formal complaints relating to the contents of the report. In the Tribunal's view, however, these irregularities did not carry such weight as would be necessary to find that the contested decision was unjust or illegal, and any losses that the applicant might have suffered on that account had been adequately compensated by the payment of two months' salary, as recommended by the Joint Appeals Board.

The Tribunal accordingly rejected the application.

10. JUDGEMENT NO. 262 (11 NOVEMBER 1980):[17] THORGEVSKY *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application for measures to offset the negative effects on pension rights of a promotion from the General Service category to the Professional category — Rejection of the application in the absence of regulations enabling such negative effects to be remedied

The applicant, after serving from 1958 to 1971 in the General Service category, had been promoted to the P-1 level in February 1971 and then retired in 1978. Since 1975, she had been disturbed to note that if she had remained in the General Service category she would have received a higher pension than she would be entitled to if she left the Organization at the P-1 level. Her application was therefore made to ensure that her retirement pension was equal to the pension she would have received if she had taken retirement at the time of her promotion to the P-1 level.

The Tribunal noted, first of all, that the "final average remuneration" which served as the basis for calculating the pension would indeed, in the case of the applicant, have been higher if she had not been promoted. It concluded, however, that this case did not involve the application of staff rule 103.9 concerning the effects of promotions on salary, which according to the practice of the Tribunal (Judgement No. 156[18]), applies in the case of promotion from the General Service category to the Professional category, nor the application of staff rule 103.16 (*c*), adopted pursuant to administrative instruction ST/AI/209.

The Tribunal noted that the problem raised by the applicant arose because the pensionable remuneration of staff in the General Service category had substantially increased after her promotion and consequently the person concerned would, from the point of view of pension rights, have done better to remain at her earlier level. The applicant invoked the judicial precedent set on the subject by the ILO Administrative Tribunal in its Judgement No. 257 (Grafström),[19] and her reasoning was based in fact on the idea that there was a "common system" of salaries for the staff of the United Nations and the specialized agencies. The Tribunal noted, however, that the existence of divergencies among the various organizations regarding solutions was still a reality. It then considered whether the solution provided by the ILO Administrative Tribunal in the Grafström case was in conformity with the provisions which the United Nations Administrative Tribunal must apply. It noted that in both cases the dispute dealt with the salary to be taken as a basis for the pension and that the ILO Administrative Tribunal in the Grafström case had allowed the applicant's appeal on the basis of provision 302.3103 of the FAO Staff Manual, which read as follows:

> "When, on his promotion from the General Service to the Professional category, a staff member's pensionable remuneration would otherwise be reduced, special arrangements may be made for maintaining the said remuneration at its previous level.",

considering that that text should be given a "wide interpretation" and should be interpreted as dealing with the future as well as the present and as making it possible to maintain the pensionable remuneration "at the level at which it would have otherwise been".

The Tribunal noted that since the decision of the ILO Administrative Tribunal was expressly based on a text which was not included in the provisions which the United Nations Administrative Tribunal must apply, the latter Tribunal could not apply for the benefit of the applicant the solution provided in Judgement No. 257. It therefore rejected the application, although considering it regrettable that a promotion could in certain cases entail a reduction in pension.

11. JUDGEMENT NO. 263 (12 NOVEMBER 1980):[20] ELMOZNINO *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application for assistance under a study programme and for compensation for the loss caused by administrative delay

The applicant had asked for assistance under the External Studies Programme to attend a nine-week course in Russian. After his request had been rejected, he had lodged an appeal with the Joint Appeals Board, which found the decision to reject the application arbitrary and recommended that the request should be reconsidered. In the light of the Board's report, the Administration had

then decided to submit the applicant's request for financial assistance to the Advisory Panel on External Studies, which had recommended that study leave with full pay should be granted. The applicant, however, had decided not to take such leave on the grounds that it had been granted too late.

In his application he requested the Tribunal to order the Secretary-General not only to grant him special leave with full pay but also to pay tuition for the course in question and in addition to pay him compensation for the loss caused by the delay in his studies in Russian.

In the view of the Tribunal, the language of the relevant administrative instruction indicated that its purpose was to invite applications for assistance which the Assistant Secretary-General might authorize if he thought it in the interest of the Organization to do so. The instruction did not confer a right to be granted assistance and it also did not confer a right to be granted assistance at a particular time. Moreover, the loss for which the applicant claimed compensation was purely speculative and the consequences of the delay in his studies in Russian was so hypothetical that compensation ought not to be awarded.

The Tribunal therefore rejected the application while remarking that the delays in considering the application for assistance did not meet the requirements of good administration.

12. JUDGEMENT NO. 264 (18 NOVEMBER 1980):[21] PIRACES *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Decision terminating an appointment in the interest of the Organization, despite the existence of a prior agreement between the applicant and the respondent terminating the appointment by mutual consent — Such a decision taken in such circumstances constitutes a violation of a contractual obligation — Award to the applicant of compensation by way of reparation for prejudice suffered as the result of administrative delays

The applicant had, following a number of incidents, consented to an agreed termination of his appointment under staff regulation 9.1 (*a*), a solution that had been suggested by the administration of ECLA, approved by the Medical Director and recommended by the Director of the Division of Personnel Administration at Headquarters. He had also requested the Secretary-General, in exercise of his discretionary power, to grant him the maximum termination indemnity under staff regulation 9.3 (*b*). However, on receiving the notice of termination the applicant had noted that his appointment was being terminated "in the interest of the United Nations" under staff regulation 9.1 (*c*).[22] His request for the maximum termination indemnity had, moreover, subsequently been rejected on the grounds that regulation 9.3 (*b*) applied only to staff members holding a permanent appointment, whereas the applicant had held a regular appointment.

The case had been submitted to the Joint Appeals Board, which had found that the decision to terminate the applicant's regular appointment had been improper and should be rescinded and had recommended the reinstatement of the applicant or, failing that, the award of compensation in an amount equivalent to 307 weeks' base net salary. Those recommendations had been rejected, but the applicant had been granted an *ex gratia* payment in an amount equivalent to the 50 per cent additional termination indemnity requested by him.

The applicant subsequently appealed to the Tribunal, which held that in purporting to terminate the applicant's appointment in the interest of the United Nations, the respondent had failed to appreciate that the contract had already been terminated by agreement and had thereby violated a termination agreement already arrived at which was binding on both parties. In that connexion the Tribunal declared:

> "An arrangement on the termination of an employment, approved by the parties, is comparable to an accepted resignation and must equally bind the Respondent. Consequently, the decision of termination under staff regulation 9.1 (*c*) is ill-founded."

On the other hand, the Tribunal found the recommendation of the Joint Appeals Board to reinstate the applicant highly questionable and pointed out in that connexion that a violation of a contractual obligation concerning termination of services could not be sanctioned by the reinstate-

ment of the applicant who had given his approval to the termination: such violation could be sanctioned only by the reparation of the loss suffered which, in the case in question, was the direct result of the considerable delay in the payment of the additional indemnification of 50 per cent. The Tribunal held that, while the respondent had finally decided to make the grant of the additional indemnification, thus accepting the consequences of the termination agreement, the payment without any interest of a sum computed on the basis of a salary paid in 1972 was obviously inadequate. Considering, moreover, that the respondent had produced that very long delay, the Tribunal ordered him to pay the applicant $3,000 in reparation for prejudice suffered.

13. JUDGEMENT NO. 265 (19 NOVEMBER 1980):[23] KENNEDY *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Application directed against a decision of separation from service for abandonment of post — Determination of the date of repudiation of the contract of employment

The applicant contested a decision separating her from the service for abandonment of post on 3 October 1972. That decision was the culmination of a series of events which had begun with the rejection of a request for extension of leave, for health reasons, beyond 17 July 1972.

The Tribunal first considered the state of the applicant's health and concluded, on the basis of the documents, that either because of the nature of the applicant's ailment and treatment or because of the difficulties of long-distance correspondence and consultation, no proper assessment of the applicant's state of health and fitness to travel had been made.

The Tribunal then considered the degree of co-operation which had existed between the applicant and the various doctors and administrative units of the United Nations. In the light of the documentation, the Tribunal found that as from mid-December 1972 the applicant had begun to behave in a manner inconsistent with the discipline and loyalty required by the organization.

Finally, the Tribunal considered whether the decision to treat the applicant as having abandoned her post had been consonant with all the circumstances of the case and whether sufficient justification had existed to uphold that such abandonment had to be deemed to have taken place on 2 October 1972. It observed that the pattern set for the separation of staff members holding permanent appointments included some basic principles; the Tribunal was of the opinion that those principles also applied to abandonment of post. It therefore held that the applicant had been entitled to the fixing of a specific date for separation for abandonment of post. The Tribunal noted that on several occasions after 2 October 1972 the Administration had asked the applicant to return to duty or provide justification for her absence, and that it was not until 2 February 1973 that any communication which might be considered as notice had been sent to her, but it still did not preclude the possibility of her returning to New York and resuming her post. The decision to treat the applicant's conduct as a repudiation of her contract of employment had not been taken until 6 March 1973, and the contract should normally have ended on that date and not retroactively.

The Tribunal decided that the determination of the Secretary-General that the applicant had abandoned her post had been properly made but that her separation had taken effect on 6 March 1973 and not retroactively from 3 October 1972. It consequently decided that a sum of $2,000 should be paid to the applicant as compensation for that error and that for pension purposes the date of separation from service should be deemed to be 6 March 1973.

14. JUDGEMENT NO. 266 (20 NOVEMBER 1980):[24] CAPIO *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Introduction in implementation of a resolution of the United Nations General Assembly, of a new promotion system — Application seeking recognition of an acquired right to the retention of the former system — Respect for acquired rights means that the complex of benefits and advantages to which a staff member is entitled for services rendered before the entry into force of a new rule cannot be impaired — Since the necessary administrative measures relating to her

suitability to be considered for promotion had been taken prior to the introduction of the new system, the applicant is justified in requesting that the former system be applied to her

The applicant, a staff member at the G-5 level, sought recognition of her right to be considered for promotion to the P-2 level, notwithstanding the provisions of General Assembly resolution 33/143 (limiting the number of promotions of staff members from the General Service category to the P-1 and P-2 levels to a fixed percentage) and those of the administrative instructions issued by the Secretary-General in implementation of that resolution. She contended that she had an acquired right to the retention for her benefit of the former system.

The applicant argued that the system established by the Secretary-General pursuant to resolution 33/143 disregarded the system established by the Charter and the Staff Regulations. The Tribunal, referring to its Judgement No. 162,[25] stressed that the rules of the Charter were "legally binding on United Nations organs", that responsibility for their implementation fell upon those who were competent to make rules applicable to the staff and that the arrangements made by the Secretary-General to that end must be "consistent with these principles".

The Tribunal recognized that the General Assembly was entitled to demand the introduction of a new system to govern promotions of staff members from the General Service to the Professional category and that the Secretary-General had exercised his discretion in setting up a system of selection by competitive examination. However, the Tribunal added that the relevant administrative instruction (ST/AI/268) had made provision for transitional measures applying to the examinations held in 1979 and, as the applicant's promotion should have been considered in 1979, the question arose whether she had been entitled to benefit from the transitional measures introduced by the respondent.

The applicant argued that she had an acquired right to the retention for her benefit of the promotion system that had been in force prior to the issue of the relevant administrative instruction. She contended that, since the procedure for her promotion in accordance with the rules of the former system had been initiated by her chief of service prior to the adoption of resolution 33/143 and since her Department had formulated its recommendations prior to the issue of the administrative instruction establishing the new system, she was entitled to have the proposal for promotion evaluated according to the rules in force at the time when that proposal had been made. The respondent contended that the new procedure which he had been entrusted with establishing was applicable immediately to staff members whose promotion was to take place between 1 April 1979 and 31 March 1980. The Tribunal acknowledged that there had in fact been a change in procedure and that, from that standpoint, the applicant could not claim acquired rights and the retention for her benefit of the competence of the bodies which, under the former system, would have examined her case.

The Tribunal noted, however, that in the promotion system established in 1957, certain benefits and advantages had been granted to staff members for services performed: evaluation with a view to promotion was based on the conditions in which the person concerned performed professional functions; furthermore, a staff member could be included in the promotion register irrespective of the classification of the post he occupied. The Tribunal considered that it was legitimate to speak of acquired rights with regard to those prerogatives attached to services performed at the time when the procedure was initiated, and apply to them the judicial precedents established by the Tribunal (Judgements No. 82[26] and No. 202[27]) and added that respect for acquired rights meant that the complex of benefits and advantages to which a staff member was entitled for services rendered before the entry into force of a new rule could not be impaired. As to the case in point, since the necessary administrative measures relating to the applicant's suitability to be considered for promotion in 1979 had been taken prior to the adoption of resolution 33/143 and prior to the issue of administrative instruction ST/AI/268, the applicant had acquired the right to have her suitability for a P-2 post evaluated according to the method established in 1957, and not by the competitive examination method.

The Tribunal noted that provision had been made for a transitional system taking into account the acquired rights of those staff members who fulfilled certain conditions but that the applicant had not enjoyed the benefit of that system because she failed to meet one of the necessary conditions.

namely, to be charged against a Professional post in the staffing table of the Department. The Tribunal concluded that the acquired rights of the applicant had not been taken duly into consideration and that a way should be found to ensure that she enjoyed the benefit of those rights and that she was given an opportunity to have her right to promotion considered in the light of the criteria used in the system which had existed prior to the introduction of the competitive examination system.

The Tribunal also noted that, since 1 April 1980, the applicant had been eligible for the special post allowance to which any staff member called upon to assume the duties and responsibilities of a post at a higher level than his or her own is entitled on the basis of staff rule 103.11 (*b*). The Tribunal acknowledged that the respondent was entitled to use his discretion in that connexion but it considered that the applicant was entitled to be informed of the change in her status and that, by his silence, the respondent had deprived her of an opportunity existing for her benefit, thus causing her to sustain an injury for which she was entitled to compensation. The Tribunal evaluated the injury sustained as the amount the applicant would have received by virtue of the special post allowance for the period from 1 April 1980 to the date of the judgement.

15. JUDGEMENT NO. 267 (21 NOVEMBER 1980):[28] ADLER *v.* SECRETARY-GENERAL OF THE UNITED NATIONS

Does an immediately preceding permanent appointment with another organization of the United Nations system confer certain rights on the holder of a probationary appointment with the Secretariat? (resolved in the negative) — Effect of a satisfactory rating in performance reports on the Secretary-General's discretion in terminating an appointment

After having held a permanent appointment with FAO the applicant accepted a probationary appointment with UNIDO. Before the expiry of the said appointment a decision was taken to extend it rather than convert it into a permanent appointment. This decision was taken in view of the poor rating obtained by the applicant under the heading of "quality of work accomplished" although he obtained the middle over-all rating of "a staff member who maintains a good standard of efficiency". No improvement having been observed in the quality of the applicant's work, his appointment was terminated following the prescribed procedure before the Appointment and Promotion Committee. The decision was taken under the provision of staff rule 104.12 (*a*) on the basis that the applicant did not possess the necessary requirements of efficiency, competence and integrity which an international civil servant must have under the relevant provisions of the Charter and of Staff Regulation 4.2.

The applicant appealed the said decision and the Joint Appeals Board recommended that the decision be maintained but awarded the applicant compensation in an amount equal to six months' salary for certain procedural irregularities which did not affect the validity of the decision. The Secretary-General accepted the said recommendation.

Before the Tribunal the applicant requested rescission of the decision to terminate his appointment and claimed considerably higher indemnities on various alleged grounds. His major arguments were: (1) that having acquired the status of an international civil servant holding a permanent appointment with one organization in the system, another organization may not deny him a permanent appointment on the grounds that he lacked the qualities required of an international civil servant because this would amount to divesting him of an acquired status for no valid reason, and (2) that having been rated in three consecutive periodic reports as "a staff member who maintains a good standard of efficiency", the decision to terminate his probationary appointment was unjustified.

On the first point the Tribunal observed that the applicant's move from the FAO to UNIDO was not in fact a transfer although described as such in certain administrative documents. The crucial fact, the Tribunal ruled, was the applicant's acceptance of a new probationary appointment with UNIDO, which meant that he did not carry over his previous status of a permanent appointee to the new organization. The Tribunal rejected the applicant's contention that he was divested of an acquired status for no valid reason. It ruled that having accepted a probationary appointment the applicant was subject to the provisions of the Staff Rules which give the Administration the option of either terminating such an appointment or converting it into a permanent appointment.

On the second point the Tribunal recalled its previous rulings to the effect that it cannot substitute its own judgement for the Secretary-General's regarding the evaluation of the performance of the staff, provided that the said evaluation was based on a full knowledge of the facts and that there was no evidence of prejudice or other extraneous factors in the motivation of the decision. It further ruled that a rating of "a staff member who maintains a good standard of efficiency" (the middle over-all rating) has no incidence on the discretionary nature of the decision to grant or to deny the applicant a permanent appointment.

B. Decisions of the Administrative Tribunal of the International Labour Organisation[29,30]

1. Judgement No. 388 (24 April 1981): Barbar *v.* Food and Agriculture Organization of the United Nations

Termination of a programme appointment for abolition of post — Sincere effort at re-assignment incumbent on the Organization — Preferential right of former staff members to be considered for vacant posts — Failure to do so — Compensation

The complainant held an appointment without limit of time which may be terminated if no re-assignment is available in the FAO programme. He was informed of the decision to terminate his appointment as from 30 September 1975 under Manual section 370.1 831 (1). That provision states that a programme appointment may be terminated for abolition of post when no appropriate re-assignment is available.

The complainant challenged the decision as having been taken without any serious attempts to find him a new assignment. The Tribunal ruled that under the relevant section of the Manual, the Organization, before terminating an expert's appointment, must make sure that it cannot find him a re-assignment. The Tribunal found that the Organization was dilatory in this effort and that, furthermore, one of the substantive divisions refused to help in finding the complainant a suitable assignment.

The complainant also argued that the Organization refused to take account of his application for various vacancies at headquarters. While observing that under the relevant section of the Manual, the complainant may be re-assigned only as an expert and not to headquarters posts, the Tribunal ruled that as former staff members, experts whose appointments had been terminated have a certain right to preference in being considered, but not necessarily in being appointed to any vacant post. It ruled that the Organization in refusing to give this preferential consideration to the complainant failed to take due account of all the relevant factors of his case.

For the above reasons, the Tribunal awarded damages equivalent to one year's salary.

2. Judgement No. 389 (24 April 1980): Al-Zand *v.* Food and Agriculture Organization of the United Nations

Termination of probationary appointment — Discretionary decision — Limited grounds for quashing same

On 20 June 1975, the complainant entered the service of FAO under a fixed-term appointment for a period of 33 months, including 12 months on probation. Before the end of the probationary period, he was notified of the decision to terminate his appointment with effect from 10 April 1976 under staff regulation 301.0913 which states that a probationary appointment may be terminated if the Director-General considers such action to be in the Organization's interest.

The complainant challenged this decision, contending that his services were satisfactory and that the reasons invoked for terminating his appointment were subjective and extraneous.

The Tribunal recalled the principles established in its case law in similar disputes, namely that a discretionary decision may be quashed only if it was taken without authority or violated a rule of form or of procedure, or was based on a mistake of fact or of law, or if essential facts were left out of account, or if the decision is tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts.

Examining the facts of the case, the Tribunal concluded that criticisms were made by the complainant's immediate supervisors who were in a position to form an opinion about his work. The said criticisms centred mainly around the complainant's inability to do practical work and his insufficient knowledge of French which prevented meaningful communication with his colleagues and the national counterparts. In these circumstances, the Tribunal ruled that it was open to the Director-General to conclude that it would be in the Food and Agriculture Organization's interest to terminate the complainant's appointment without exceeding or abusing his discretionary authority.

The complaint was therefore dismissed.

3. JUDGEMENT NO. 390 (24 APRIL 1980): FLORES-ARAUZ *v.* WORLD HEALTH ORGANIZATION

Time limit for filing a complaint — Process by which written notification of an administrative decision is effected

The Tribunal cited paragraph 2 of article VII of its statute which provides that to be receivable, a complaint must have been filed within 90 days after the complainant was notified of the decision impugned. In the present case, the decision impugned is dated 5 December 1977, but was not delivered to the complainant in person until 8 April 1978. Earlier, however, a memo to which a copy of the decision was annexed was delivered by hand at the complainant's residence on 13 January 1978, and received there by a person believed to be the complainant's servant. Moreover, on 14 February 1978, the Director wrote to the complainant saying that he had not heard from him regarding the memorandum "that was delivered to your house". The complainant admitted having received this second letter, but did not reply to it denying receipt of the memorandum. He further did not deny that the first memo was accepted at his residence, nor did he offer any explanation as to what could thereafter have happened to it. In these circumstances, the Tribunal found that the complainant was notified of the decision on 13 January 1978, more than 90 days prior to the filing of his complaint.

The complaint was dismissed as irreceivable.

4. JUDGEMENT NO. 391 (24 APRIL 1980): DE LOS COBOS AND WENGER *v.* INTERNATIONAL LABOUR ORGANISATION

Compulsory leave without pay — Right of Administration to impose same in certain cases

On 21 July 1978, the staff of the International Labour Organisation were informed of a temporary modification in the terms of their contracts of employment, by which four working days during the period from 1 August 1978 to 31 January 1979 were to be days of leave and unpaid. This decision was taken to meet the financial constraints of the ILO. It was based on article 4.8 of the Staff Regulations which gives the Director-General the right to modify unilaterally the terms of any contract of employment without prejudice to the acquired rights of officials.

The complainants challenged this decision as constituting a reduction of salary which violates their acquired rights. The Tribunal defined an acquired right as being one which is enforceable notwithstanding any amendments to the rules; for example, a right should be considered to be acquired when it is laid down in a provision of the Staff Regulations or Staff Rules, and is of such decisive importance that to impair it without the official's consent is to impair terms of appointment which he expects to be maintained. Also, a right will be acquired if it arises under an express provision of an official's contract of appointment and both parties intend that it should be inviolate. Not all rights arising under a contract of appointment are acquired rights even if they relate to remuneration. It is of the essence that the contract should make express or implied provision that the right will not be impaired. Applying these criteria, the Tribunal observed that the right to

payment of the salary is not derived from any provision of the Staff Regulations or Staff Rules, but is contractual and so is immune to amendment only if the parties intend that it should be inviolate. The Tribunal observed that the reduction of salary was both slight and short-lived and that the decision stemmed from a desire to keep on officials who would have otherwise been dismissed. For the above reasons, the Tribunal ruled that the complainants had failed to prove any breach of acquired rights.

On the other hand, the Tribunal did not find any violation of the rule requiring consideration for services rendered since both salary and working time were reduced.

The decision did not apply to several categories of officials such as experts, General Service officials in external offices and those who had taken voluntary part-time employment. The complainants argued therefore that the decision violated the principle of equal treatment of the staff. The Tribunal recalled that equality means that those in like case should be treated alike, and that those who were not in like case should not be treated alike. The principle is therefore not violated if officials in different circumstances are treated differently. Experts are paid out of funds obtained from outside the ILO, General Service staff in field offices were exempted on social grounds because their remuneration is lower and other officials cited by the complainants voluntarily helped in easing the ILO financial burden.

The Tribunal concluded therefore that there has been no violation of the principle of equality. On the above grounds, the complaint was dismissed.

5. Judgement No. 392 (24 April 1980): Duran v. Pan American Health Organization (PAHO) (World Health Organization)

Abandonment of post — Constitutive elements of same — Internal appeal against decision to report to duty station constitutes satisfactory explanation for not complying with it

By a decision of 8 June 1977, the complainant's sick leave was terminated and she was instructed to report to her duty station. She informed the Administration that she could not comply with the instructions on medical grounds. Thereupon she was informed that if she did not report for duty by 22 August, her appointment would be terminated for abandonment of post under staff rule 980 which states "A staff member absent from duty without satisfactory explanation in excess of 15 working days shall be considered to have abandoned his post and his appointment shall be terminated without indemnity". On 23 August, having failed to comply, the complainant was informed that her appointment had been terminated with effect from 22 August. The complainant had appealed in the meantime to the Board of Inquiry and Appeal.

The Tribunal ruled that staff rule 980 must be interpreted in the light of the ordinary principles of contract law. The circumstances must indicate that the party who fails or refuses to perform does not ever again intend to do so. This entitles the other party to treat the contract as having come to an end and is not obliged to wait indefinitely in case the first party might change his mind. Thus, abandonment of post involves a physical element and a mental element. To the physical failure to perform a contractual duty there must be added an intention to abandon future performance. Rule 980 allows the intention to be assumed from the fact of absence without reasonable explanation for 15 days.

Applying the above to the facts of the present case, the Tribunal ruled a *bona fide* challenge to the validity of an order is a satisfactory explanation for not complying with it. By challenging it in the manner prescribed by the regulations, the complainant was affirming the contract, not abandoning it. The Tribunal concluded that the nature of the present case does not bring it within either the letter or the spirit of rule 980.

With regard to the complainant's claim for back pay and reinstatement, the Tribunal referred to its previous judgement No. 375 which had disposed of these issues.

The decision to terminate the complainant's appointment for abandonment of post was quashed.

6. JUDGEMENT NO. 393 (24 APRIL 1980): MOORE *v.* PAN AMERICAN HEALTH ORGANIZATION (PAHO) (WORLD HEALTH ORGANIZATION)

Selection for appointment to higher post — Irregular procedure — Compensation for staff member improperly rejected

The complainant was not selected for one of four P-1 vacancies put up for competition. She appealed to the Board of Inquiry and Appeal alleging that neither her file nor even a summary of her qualifications was submitted to the Selection Committee. Another Selection Committee was set up but the complainant was again not selected for any of the vacancies. The complainant appealed to the Headquarters Board of Inquiry and Appeal which found that the two Selection Committees had infringed the pertinent rules of the Personnel Manual and that the membership of one of the committees had been unsuited to its function. The Director-General thereupon decided that a review and reclassification of the complainant's post be undertaken and be given effect from 1 March 1977 unless in the meantime there was an opportunity to give her priority for promotion. A dispute arose over the procedure followed in reclassifying her post, and the complainant refused to fill in a questionnaire on the ground that according to her the rules did not require it. She then filed a complaint with the Tribunal against the Director-General's decision taken upon the recommendation of the Board of Inquiry and Appeal.

Noting that the Organization had acknowledged that the procedures were irregular, the Tribunal ruled that the complainant's plea to have them cancelled no longer had any foundation. She now had to co-operate fully with the new procedure for review and qualification of her post.

On the complainant's claim for payment and compensation, the Tribunal observed that by being improperly rejected in the selection proceedings in 1977, the complainant had suffered moral prejudice, serious and specific enough to entitle her to damages. In determining the amount of damages, the Tribunal observed that the Director-General collected the mistakes made in the regional office and decided that a new review of classification of the complainant's post should be undertaken with effect from 1 March 1977. The Tribunal considered that this decision went some way towards compensating the complainant for the material and moral prejudice she suffered.

The complainant was awarded damages in the amount of $2,000.

7. JUDGEMENT NO. 394 (24 APRIL 1980): NEUVILLE *v.* WORLD HEALTH ORGANIZATION

Complaint brought by the brother of a staff member — No locus standi *before the Tribunal*

The complainant claimed compensation for the accidental death of his brother who was a staff member of WHO in India. He alleged that his brother had committed suicide because of a mental illness caused by the WHO treatment of him.

The Tribunal noted that the complainant was not a staff member of WHO, neither was he a person to whom the staff member's rights evolved on his death, nor a person who derived rights from the contract of employment of the deceased or from the provisions of the Staff Regulations.

The Tribunal ruled that under the relevant provisions of its statute, the complainant had no *locus standi* and dismissed the complaint.

8. JUDGEMENT NO. 395 (24 APRIL 1980): TARRAB *v.* INTERNATIONAL LABOUR ORGANISATION

Grant of a special post allowance to P-5 — Claim that promotion was the proper action to take — Time limit for challenging decision to grant SPA — Discretionary nature of promotion

The complainant was assigned to the ILO office in Aden in October 1974 and again in October 1977. On both occasions, he was granted a special post allowance to P-5. Before the Tribunal, he alleged that since his assignments were "without limit of time", he should have been promoted to the level of the post rather than granted a Special Post Allowance.

Regarding the complainant's challenge to the decisions granting him SPA, the Tribunal noted that the said decisions were not impugned before it within the time limit and had become final when the complainant challenged them in April 1978. So long as the said decisions were neither

amended by the Administration nor invalidated by special circumstances of time or place, they remained in force.

In respect of the complainant's claim to promotion, the Tribunal observed that the Director-General of the International Labour Organisation enjoyed, under the relevant provisions of the Staff Regulations, a discretionary authority in matters of promotion and was free, but not obligated, to make an appointment by direct selection as the complainant claimed that he should have done. The Tribunal ruled that the Director-General's decision not to promote the complainant was not tainted with any of the flaws which entitle the Tribunal to interfere. The complaint was dismissed.

9. JUDGEMENT NO. 396 (24 APRIL 1980): GUISSET *v.* FOOD AND AGRICULTURE ORGANIZATION

Termination of probationary appointment — Discretionary character of same — Compensation for injury to staff member's dignity and reputation (Denied)

The complainant was appointed as special assistant to the Director-General of FAO at the D-2 level under a five-year appointment of which the first year was a probationary period due to expire on 17 January 1977. The relationship between him and the Director-General reached such a low point that the decision to terminate the appointment was taken before the expiry date of the first year of probation. The complainant challenged this decision, requesting that it be rescinded and claiming damages for injury to his dignity and reputation.

The Tribunal noted the discretionary nature of the decision to terminate a probationary appointment. It also noted the incompatibility of temperament between the Director-General and the complainant, and the strained feelings between them for which it did not hold the Director-General alone responsible. In these circumstances, the Tribunal concluded that in terminating the complainant's appointment, the Director-General had acted in the interests of the Organization and committed no breach of the provision on which he had based his decision.

On the complainant's claim for damages, the Tribunal noted that under any contract of appointment, the Organization was bound to respect a staff member's dignity and reputation. If the Organization fails in that duty, it may be ordered to pay compensation but only for serious wrong likely to prove damaging to a staff member's career. The Tribunal ruled that the circumstances in which the complainant's appointment was terminated did not warrant payment of the damages he claimed. Feeling no need to consider whether the decision was damaging to the complainant's dignity or reputation, the Tribunal merely observed that it did not damage his professional position. The complaint was dismissed.

10. JUDGEMENT NO. 397 (24 APRIL 1980): ARNOLD *v.* INTERNATIONAL TELECOMMUNICATION UNION

Reassignment to a post with less responsible duties — Allegation that the decision was based on disregard of an essential fact fails if the decision is based on other sufficient factual grounds

As part of a reorganization of the secretariat of ITU, the complainant was reassigned from her previous post to a new one which, in her opinion, carried less responsible duties. She challenged the decision to reassign her, invoking mainly the fact that her previous post had been reclassified to P-3 and that the reassignment resulted in depriving her of a promotion. She alleged that the decision was taken with disregard to an essential fact, namely her performance reports.

The Tribunal observed that the Secretary-General of ITU had given the reasons which, in his view, justified the assignment of the complainant to new duties. It further noted that it took place within the framework of a larger re-organization. On the complainant's argument that an essential fact was disregarded in taking the decision, the Tribunal ruled that an essential fact can be said to have been overlooked only if the impugned decision was really taken by oversight. In the case at hand, the Secretary-General was well aware of the complainant's qualifications even though he may not have taken full account of the performance reports.

Noting that the complainant had failed to show that the decision was tainted with any flaw which entitled it to quash it, the Tribunal dismissed the complaint.

11. JUDGEMENT NO. 398 (24 APRIL 1980): MAGER *v.* EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION (EUROCONTROL)

Internal means of redress — "Complaint" as distinct from "request" — Statutory time limits

In 1974, the complainant accepted a five-year appointment with the Organization. On 7 November 1977, she submitted a "request" for converting her temporary appointment into a permanent one. The Organization argued that the complaint was time-barred because it was a challenge to the decision granting the complainant a five-year appointment and should have been submitted within the statutory time-limit for challenging that decision.

The Tribunal noted that under the Staff Regulations of the Organization, there was provision for a "request" for the taking of a certain decision by the Administration and there was also provision for a "complaint" against an act adversely affecting a staff member. While there was no time limit for submitting a request, a complaint had to be submitted within three months of the date of the decision. The Tribunal characterized the complainant's action as a "complaint" and not a "request." Therefore, the complaint should have been filed within three months from the date the temporary appointment was notified to the complainant.

Ruling that the internal appeal was not filed in time, the Tribunal dismissed the complaint.

12. JUDGEMENT NO. 399 (24 APRIL 1980): SCHOFIELD *v.* WORLD HEALTH ORGANIZATION

Failure by the Administration to produce a performance appraisal report — Right of the staff member to same

The complainant had not been supplied with an appraisal report for the year December 1976 to November 1977. He filed this complaint in order to obtain such a report and also claimed damages for moral and professional prejudice caused by the lack of an appraisal report.

The Organization argued that the position taken by the complainant rendered its obligation to produce an appraisal report no longer possible of achievement. It further argued that the complainant was within a few years of retirement, that an appraisal report was unlikely to affect his prospects within the Organization and that therefore the issuance of such a report was of doubtful value.

The Tribunal ruled that *prima facie* the complainant was entitled to have the report for what he thinks it will be worth. It ruled further that the usefulness of a report was not to be judged exclusively by the staff member's situation in the Organization. A staff member was entitled to have such a report for his own satisfaction as well as for use in seeking other employment even after retirement. In this respect, a staff member was not confined to the certificate of service provided under a different staff rule.

As to the claim for damages, the Tribunal ruled that there was no evidence of any moral or professional prejudice justifying compensation.

For the above reasons, the Tribunal ordered that a performance appraisal report for the period in question should be provided the complainant and dismissed his other claims.

13. JUDGEMENT NO. 400 (24 APRIL 1980): VERDRAGER *v.* WORLD HEALTH ORGANIZATION

Review of a Tribunal judgement — No provision in the statute or the rules of the Tribunal — Exceptional cases where such a review could be conducted

By its judgement No. 325,[31] the Tribunal had ruled on the merits of the complaint by the present complainant. He filed a first application for review which the Tribunal dismissed in judgement No. 350.[32] He filed the present, second request for review contending that since those two judgements were delivered, the decisive importance of a document had come to his attention.

The Tribunal observed that neither its Statute nor its Rules permitted an application for review of a previous judgement. The Tribunal may therefore declare such an application receivable only in quite exceptional circumstances, for example when new facts of decisive importance have come to light since the date of the judgement.

Applying the above principle to the present application, the Tribunal noted that the document invoked by the complainant was filed in the first complaint by the Organization and that the complainant himself appended it to his first application for review. He could not now, in a third complaint, properly invoke a state of ignorance for which he was himself responsible. The application for review was dismissed.

14. Judgement No. 401 (24 April 1980): Connolly-Battisti v. Food and Agriculture Organization of the United Nations

Compliance with a previous judgement

In judgement No. 323,[33] the Tribunal ordered that the complainant's salary be "recalculated on the basis that there should have been a 10 per cent interim adjustment instead of a 2 per cent". Unsatisfied with the way in which FAO carried out the said judgement, the complainant filed a second complaint in order to secure compliance with the previous judgement.

Having looked into the calculations carried out by the Organization and the arguments of the complainant, the Tribunal concluded that its previous judgement had been complied with and dismissed the complaint.

15. Judgement No. 402 (24 April 1980): Grasshoff v. World Health Organization

Compensation for injury in circumstances of abnormal risk — Unlimited liability of the Organization — Non-applicability of statutory provisions on compensation

The complainant was sent by WHO on mission to Dacca, then in East Pakistan, at a time when the hostilities of the civil war had not yet ceased. On 11 August 1971, a bomb explosion caused injury to his head and spine and left him with a deteriorating partial disability. He was granted compensation under the statutory provisions governing compensation to staff members in the event of death, injury or illness attributable to the performance of official duties on behalf of WHO. Unsatisfied with the compensation thus obtained, he filed this complaint invoking the Organization's unlimited liability for the injury suffered by him.

The Tribunal observed that even in the absence of any explicit provisions, it was the fundamental principle of every contract of employment that the employer will not require the employee to work in a place in which he knows or ought to know to be unsafe. This principle is to be applied with due regard to the nature of the employment. In some employments there are unavoidable risks. The question in each case is whether the risk is abnormal having regard to the nature of the employment. An employee was not obliged to run abnormal risks for the benefit of his employer.

Applying the above principles to the current case, the Tribunal considered that the complainant's mission to Dacca involved abnormal risks in respect of which he was entitled to be indemnified. The nature of the complainant's employment precluded his having accepted the risk of hostilities in an area of civil war.

The Tribunal rejected the Organization's argument that its relevant statutory provisions limited the Organization's liability even when it was at fault. Those provisions should not be interpreted as a clause limiting the Organization's liability in the event of breach of contract. In such cases, the proper compensation corresponds to the loss actually incurred and cannot be settled according to a general tariff.

With regard to the interpretation of the term "particular hazards" appearing in the compensation rules of the Organization, the Tribunal ruled that the said term referred to hazards within the contract which are inherent in the nature of the employment. It cannot be interpreted as empowering the Organization to require the staff member to accept risks outside the contract.

For the above reasons, the Tribunal granted the complainant further compensation over and above what he had been awarded under the internal compensation rules of the Organization.

16. JUDGEMENT NO. 403 (24 APRIL 1980): CONNOLLY-BATTISTI *v.* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Non-recognized staff association — Critical memorandum addressed to the Chairperson — Withdrawal of same if unwarranted

The complainant was the Chairperson of a staff association which was not recognized by the FAO as a representative body for the purpose of negotiation with respect to the terms of appointment of the staff and generai staff welfare.

Although deferring to the right of staff to organize freely, the relevant provision of the Staff Regulations of FAO, as amended in November 1974, authorized the Director-General to maintain contact and to negotiate with one or more representative staff bodies recognized by him. The association chaired by the complainant was not so recognized.

On 30 December 1975, the complainant received a memorandum which instructed her to devote her entire working time to her duties and to cease using FAO stationery in connexion with the activities of the staff association of which she was Chairperson. Withdrawal of the said memorandum was the purpose of her present complaint.

The complainant's main argument was that the distinction between recognized and unrecognized staff associations implied discrimination contrary to the basic rule of nondiscrimination between staff members whether as individuals or as groups. The Tribunal did not find it necessary to rule on this argument. It examined instead the circumstances under which the memorandum in question was addressed to the complainant and concluded that it had not been preceded by a thorough examination of the facts and that the assertions contained in it were not substantiated. Accordingly it ordered withdrawal of the memorandum in question.

17. JUDGEMENT NO. 404 (24 APRIL 1980): DE VILLEGAS *v.* INTERNATIONAL LABOUR ORGANISATION

Change of staff member's contractual status from indeterminate to fixed term by agreement with the Organization — Validity of same

Her post having been abolished in the context of a wider reorganization, the complainant was informed of the termination of her appointment of indeterminate duration. She appealed the decision to the internal appeals body where an agreement was reached on the following points:

(*a*) That the complainant would be promoted to grade P-4 retroactively from 1 January 1975;

(*b*) That the complainant's appointment of indeterminate duration would end on 20 August 1977;

(*c*) That she would be granted a fixed-term contract for the period from 21 August 1977 to 20 August 1978.

The agreement further stated the complainant's entitlements in case the said fixed-term contract was not renewed. The complainant recognized the above agreement as constituting full and final settlement of all matters pending between her and the ILO.

Upon the expiry of the fixed-term contract, the complainant's appointment was not renewed and she filed the present complaint contesting the validity of the agreement and asking to be reinstated to her original post without interruption of service and claiming damages for material and moral injury incurred.

The Tribunal rejected the complainant's challenge to the validity of the agreement or to its binding character. It ruled that the complainant was competent to enter a valid binding agreement on the date on which she signed the contested instrument.

The Tribunal also rejected the complainant's other argument to the effect that there is no text which provides for converting an appointment of indeterminate duration into a fixed-term one. The Tribunal noted that although this was true, there was neither any general principle of law or provision of the Staff Regulations nor any term of the claimant's contract of appointment which precluded such a change of status.

For the above reasons, among others, the Tribunal dismissed the claim.

18. JUDGEMENT NO. 405 (24 APRIL 1980): RUDIN *v.* INTERNATIONAL LABOUR ORGANISATION

Supervisor's right to assign provisionally duties of a lower level in the interest of the service — Alleged unfair treatment, in particular delaying the preparation of the performance report

The claimant claims that the chief of her department steadily curtailed her normal duties without notification to her and without having any change made in the official description of her post. She requested that the said decision be quashed and that she be reinstated in her duties as described in her job description. The Tribunal observed that it was inherent in the supervisor's authority to employ his subordinates in the best interest of the department or branch with due regard to their abilities, provided that he does not alter the grade, reduce the salary or show lack of consideration. The Director-General was free to assign provisionally to staff members the duties of officials holding a lower grade if that was in the Organization's interest.

The complainant had also cited ill treatment by her supervisor, mainly by delaying preparation of her annual report. While agreeing that the delay in preparing the report was unfortunate, the Tribunal ruled that the delay did not taint the report with any impropriety, specially since it caused the complainant no wrong.

For the above reasons, the Tribunal dismissed the complaint.

19. JUDGEMENT NO. 406 (24 APRIL 1980): HOEFER *v.* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Non-renewal of fixed-term appointment — Lack of recourse except in case of prejudice or illegality

On 25 March 1974 the claimant was granted a one-year fixed-term appointment with FAO. Upon the expiry of this appointment, it was not renewed and the claimant was separated on 24 March 1975.

In examining the claimant's challenge to the above decision, the Tribunal cited the provision of the Staff Rules regarding the expiry of fixed-term appointments without prior notice on the specific expiration date. It pointed out that an expectancy of renewal or extension is justified only when the circumstances show a continued need for the staff member's services and when the said services were satisfactory. The Tribunal examined the staff member's performance during his one-year mission in Chad and concluded that his assignment had not run smoothly. The Tribunal ruled that in these circumstances it was natural that the appointment should not be renewed. It added that a claimant could attack a decision of this kind only if he adduces concrete evidence of prejudice or illegality. Having found no such evidence in the present case the Tribunal dismissed the complaint.

20. JUDGEMENT NO. 407 (24 APRIL 1980): LEBEE *v.* EUROPEAN ORGANIZATION FOR NUCLEAR RESEARCH (CERN)

The Tribunal recorded the complainant's withdrawal of suit.

21. JUDGEMENT NO. 408 (24 APRIL 1980): GÁRCIA AND MÁRQUEZ *v.* PAN AMERICAN HEALTH ORGANIZATION (PAHO) (WORLD HEALTH ORGANIZATION)

Internal means of redress — Exhaustion of same a condition for receivability of complaint before the Tribunal

The claimant had filed a complaint alleging interference by the administration in the staff's exercise of the right of free association and the violation of a previous agreement on the subject between the parties. The Tribunal noted that in October 1978 one of the claimants had lodged an appeal with the Board of Inquiry and Appeal and that the Board had not yet given its decision. Thus the internal means of redress had not been exhausted as article VII, paragraph 1 of the statute of the Tribunal requires.

The Tribunal observed that the claimants would have benefited from a derogation from the rule only if the Board either by its statements or by its conduct had evinced an intention not to give a decision within a reasonable period. The Tribunal found that in the present case the Board had not stated any such intention, on the contrary at the moment when the claimants were lodging their complaint with the Tribunal, the Board was on the point of giving a decision.

For the above reasons, the Tribunal dismissed the complaint.

22. JUDGEMENT NO. 409 (24 APRIL 1980): DE GREGORI *v.* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Salary upon promotion — Subsequent changes in the salary scale have no effect on calculation of same

Upon the reclassification of his post the claimant was promoted from G-4, step 5, to G-5, step 3. Two months later changes were made in the salary scale narrowing the range of remuneration. The result was that whereas at the time of his promotion the claimant's salary had been 6.4 per cent higher than that of his former grade, under the new scale it was only 2.9 per cent higher. In his complaint before the Tribunal he claimed a recalculation of his salary upon promotion.

The Tribunal declared itself satisfied that at the time of the claimant's promotion his new salary was correctly determined according to the applicable rule. The Tribunal pointed out the anomaly represented by the fact that had the claimant been promoted two months later he would have obtained one more step in the new grade. The question which the Tribunal considered was whether the principle of equal treatment of the staff had been fully observed. It ruled that since the change in the salary scale had created new circumstances the principle of equal treatment was not involved because all that it required was that all staff members in similar circumstances be similarly treated.

For the above reasons the Tribunal dismissed the claim.

23. JUDGEMENT NO. 410 (24 APRIL 1980): SCHOFIELD *v.* WORLD HEALTH ORGANIZATION

Written reprimand, incomplete record of the incident — Rescission of the decision of reprimand

In May 1978 an incident took place between the claimant and his supervisor in the course of which, the claimant contended, he was hit by the supervisor. The supervisor having brought the incident to the attention of the administration, the Director-General addressed to the claimant a letter of reprimand dated 1 June in which the claimant was blamed for having forced his presence upon a senior officer and having insisted upon a discussion without consent or a prior appointment to do so. The Director-General cited staff rule 1110.1.2 on disciplinary measures.

Since the claimant had not been afforded a hearing, the Tribunal raised the question of whether disciplinary action could be decided on the written record alone. The Tribunal felt that it did not need to resolve this question since it considered the written record in itself incomplete. In fact, as the Tribunal noted, it was essential for the Director-General to ascertain what explanation or excuse the claimant had to give. Moreover, the Tribunal did not consider it feasible to split the incident into two parts and to ignore the alleged misconduct of the supervisor. In the Tribunal's view a decision to reprimand one party while leaving the case against the other party unconsidered was open to question.

For the above reasons the Tribunal quashed the decision to reprimand the claimant.

24. JUDGEMENT NO. 411 (24 APRIL 1980): SCHOFIELD *v.* WORLD HEALTH ORGANIZATION

Change of duties allegedly intended as penalty — Rescission of same

The claimant alleged that the new duties assigned to him by the Director-General on 3 March 1978 were a concealed form of penalty. In its examination of the case the Tribunal noted that though the claimant kept his personal grade P-6, the new assignment was nominally at the P-5

level. The use of the word nominally was intended to indicate the Tribunal's belief that there was little or no work for the claimant to do. The Tribunal further noted that the claimant remained in this inappropriate assignment for over a year during which time there was no satisfactory evidence that the Administration made any effort to improve his position.

Regarding the claimant's claim for damages, the Tribunal noted that a compensation, if granted, would not be for the lack of a worthwhile job since the Organization did not guarantee that. It would be for slackness and delay on the part of the administration in looking for such a job for him.

For the above reasons the Tribunal quashed the decision of 3 March 1978 and awarded the claimant compensation in the amount of Swiss francs 3,000.

25. JUDGEMENT NO. 412 (24 APRIL 1980): RENSINK-LECLERCQ *v.* EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION (EUROCONTROL)

Request for working half-time — Discretionary decision by the Administration

The claimant requested rescission of a decision denying her request for working half-time for personal reasons. She based her complaint on a provision of the General Conditions of Employment which reads: "Exceptionally the Director-General may upon applications setting out the reasons therefore authorize a servant to work half-time if he considers that this would be fully in the interests of the agency." She also invoked annex II which sets out the arrangements for half-time work.

The Tribunal observed that the above provision does not bestow on staff members any right to work half-time. The Director-General enjoyed wide discretion in granting or denying such requests. The Tribunal further noted that the claimant's duties were such that it was difficult for them to be performed by someone working half the time.

The Tribunal recalled its own case law according to which it will quash a decision of a discretionary nature only if it was taken without authority or violated a rule of form or of procedure or was based on an error of fact or of law or if essential facts were not taken into account or if the decision is tainted with abuse of authority or if a clearly misleading conclusion was drawn from the facts.

For the above reasons the Tribunal dismissed the complaint.

26. JUDGEMENT NO. 413 (24 APRIL 1980): OVER *v.* EUROPEAN MOLECULAR BIOLOGY LABORATORY (EMBL)

Non-observance of the time-limit for filing complaint — Non-receivability of same

The complaint before the Tribunal contained three pleas:

(*a*) Rescission of the decision not to renew a fixed-term appointment;

(*b*) Promotion to the next grade; and

(*c*) Payment of study expenses.

With regard to the first plea, the Tribunal observed that the decision not to renew the contract had been notified to the complainant by letter dated 29 November 1978. Since the complaint was dated 20 May 1979, the complainant had not respected the 90-day time-limit set in the statute of the Tribunal and his complaint was irreceivable.

Regarding the claim for promotion the Tribunal noted that the decision not to promote the complainant was notified to him on the same date as the decision not to renew his appointment. This plea was therefore equally irreceivable.

On the claim for payment of study expenses the Tribunal observed that the said expenses dated back to 1977. For the same reasons the complaint was irreceivable under the relevant provisions of the statute of the Tribunal.

For the above reasons the Tribunal dismissed the complaint.

27. JUDGEMENT NO. 414 (24 APRIL 1980): JOHNSON v. INTERNATIONAL LABOUR ORGANISATION

Fixed-term appointment in replacement of permanent appointment terminated for abolition of post — Validity of the said action — Claim of duress rejected

The complainant was notified of the termination of his permanent appointment for abolition of post. While his appeal against the said decision was being considered by the Joint Committee he reached an agreement with the Organisation whereby his permanent appointment should terminate and a new and renewable contract should come into force the following day for a period of 15 months.

The complainant alleged that the agreement was invalid because it was contrary to the provisions of the Staff Regulations and also because it was concluded under duress and was tainted with an essential error.

On the validity of the agreement the Tribunal ruled that although a change from permanent to fixed-term appointment is not expressly provided for in any text, it is by no means precluded. There was nothing to prevent the official who had left the Organisation from being reappointed and it was therefore equally admissible to replace one kind of appointment with another.

On the allegation of duress the Tribunal noted that in the circumstances of the present case the complainant was able to make his choice freely and was not subject to any pressure from the Organisation. The Tribunal also rejected the complainant's allegation that the agreement was tainted with an essential error regarding the renewal of the fixed-term appointment.

For the above reasons the Tribunal dismissed the complaint.

28. JUDGEMENT NO. 415 (24 APRIL 1980): HALLIWELL v. WORLD HEALTH ORGANIZATION

Expiry of fixed-term appointment — Staff member's right to be considered for available vacancies

The complainant served under successive fixed-term appointments until the last one expired on 31 December 1977. She appealed against the decision not to extend her appointment. She invoked what she considered to be an incomplete consideration of the facts as well as a violation of the relevant provision of the WHO Manual which requires the Organization to "make every effort to employ . . . surplus project staff on other suitable projects . . . ".

The Tribunal noted the discretionary nature of the decision not to renew a fixed-term appointment. Such a decision did not interfere with a contractual right but merely disappointed an expectation. In case of abolition of post the Director-General must still consider whether there is any other work which the official can usefully do and which it is in the interest of the Organization that he should do. In this connexion the Tribunal cited staff regulation 4.4 which gives preference to persons already in the service over persons from outside.

Applying the above principle to the present case the Tribunal noted that there was a first vacancy advertised in July 1977 for which the claimant was not considered despite her being well qualified for it. There was a second post for which the complainant was not considered for which she was certainly well qualified. This second post had been created to cover all or much of the work pertaining to the complainant's post which had been abolished. The Tribunal drew the inference that the complainant was not offered the said post which was the continuation of her own previous post because a decision had already been taken not to keep her in the service on the grounds of her nationality.

The Tribunal ruled that where a preference was expressed in the Staff Regulations for persons already in the service, it was not open to the Administration to ignore that preference for whatever reason. The complainant was entitled to compensation for failure by the Administration to consider her for other posts for which she should have been given preference.

For the above reasons the Tribunal awarded the complainant 8,000 Swiss francs in compensation plus 2,000 Swiss francs in reimbursement of costs.

29. JUDGEMENT No. 416 (24 APRIL 1980): DIEWALD *v.* EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION (EUROCONTROL)

Status of staff member on leave for personal reasons — Right to reinstatement

The complainant, a translator with EUROCONTROL, invoked a provision of the Staff Regulations which requires that on the expiry of his leave on personal grounds the staff member must be reinstated in the first post corresponding to his grade which falls vacant in his category or service, provided that he satisfies the requirements for that post.

The Tribunal noted that the right to reinstatement was subject to two cumulative conditions:

(*a*) There must be a vacant post; and

(*b*) The staff member must be qualified for it.

The Tribunal noted that the translator's post which was vacant when the complainant applied for reinstatement was of a higher level than his own post. Moreover, one of the qualifications required for the vacant post was that the incumbent's mother tongue be English, whereas the complainant's mother tongue was French. The Tribunal noted further that in the new budget a translator's post of the level encumbered by the complainant was abolished together with 13 others for financial reasons.

In the preceding circumstances the Tribunal ruled that the decision not to reinstate the complainant was properly taken under the authority which the Director-General enjoyed and was not tainted with any mistake of law or any other flaw.

For the above reasons the Tribunal dismissed the complaint.

30. JUDGEMENT No. 417 (24 APRIL 1980): FOURNIER D'ALBE *v.* UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Validation of prior service for pension purposes — Interpretation of exclusion clause — Personnel action forms as part of the contract

The complainant was claiming validation of his period of service from 23 April 1951 to 31 December 1957. Having lost his appeal to the Appeals Board he lodged his complaint with the Tribunal.

In the "notices of personnel action" corresponding to the period under dispute the words "not applicable" figured in a space headed "provident fund pension scheme". The Tribunal rejected the complainant's first argument to the effect that the said heading did not refer to the Pension Fund. The complainant argued further that the words "not applicable" did not constitute an exclusion clause. The Tribunal considered that the words were ambiguous and must be interpreted according to the circumstances. Having looked into the circumstances of the case the Tribunal ruled that since the claimant did qualify in every other respect the only justification for the statement "not applicable" could be the fact that he was excluded by his contract. The Tribunal added that the phrase "not applicable" must, to be given any effect at all, be interpreted in that sense.

On the question of whether a personnel action form was or was not part of the staff member's contract, the Tribunal considered it unnecessary to resolve it in principle and to say whether in all circumstances and for all purposes such forms were part of the contract of employment. In the present case, the contract was silent on pension rights where it should have said something had the intention been to include the claimant in the pension scheme. In the opinion of the Tribunal the words "not applicable" in the personnel action form only made explicit what was implied in the contract. The Tribunal concluded therefore that the complainant was "excluded by his contract of employment" from participation in the Fund.

The Tribunal found it impossible to suppose that the complainant was not at the time aware of the question of pension rights and that he was not getting any, and pointed out that the absence of any deduction from his salary should have alerted him to the fact. Furthermore the complainant should have realized that the policy of UNESCO at the time was not to grant pension rights to technical assistants. The Tribunal concluded that the contract should now be interpreted in the light of those circumstances which prevailed at the time.

For the above reasons the Tribunal dismissed the complaint.

31. JUDGEMENT NO. 418 (11 DECEMBER 1980): CONNOLLY-BATTISTI *v.* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

The Tribunal recorded the complainant's withdrawal of suit.

32. JUDGEMENT NO. 419 (11 DECEMBER 1980): VAN BOGEDOM *v.* EUROPEAN PATENT ORGANIZATION (EPO)

The Tribunal recorded the complainant's withdrawal of suit.

33. JUDGEMENT NO. 420 (11 DECEMBER 1980): CONNOLLY-BATTISTI *v.* FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS

Reprimand — Effect of signature of same by an official said to be an interested party to the incident — Difference between reprimand and written censure

By a previous judgement No. 274,[34] the Tribunal had directed that certain documents be removed from the complainant's record and remitted to the Director-General for reconsideration so that he might, if he thought fit, reprimand the complainant for having caused an interruption of the proceedings of the FAO Council in committee on 15 June 1973. Having reconsidered the case, the Director-General reprimanded the complainant for the abovementioned incident.

The complainant objected to the reprimand on three counts:

(*a*) It was signed by the Deputy Director-General who was an interested party to the initial complaint;

(*b*) The Director-General had failed to review the case as intended by the Tribunal; and

(*c*) The letter with its references to the Staff Regulations constituted a written censure and not a mere reprimand.

With regard to the first point, the Tribunal did not consider that the particular form of signature invalidated the reprimand although it expressed the view that it was preferable, in view of the lack of urgency, that the document bear the Director-General's own signature. In rejecting this objection the Tribunal noted that the Director-General himself had reviewed the matter and had left instructions before leaving headquarters with the Deputy Director-General to sign and dispatch the document on his behalf.

On the complainant's second objection, the Tribunal stated that in judgement No. 274 it had not intended the Director-General to re-examine the incident. The said judgement left it to the Director-General to exercise his discretion on the question of whether the complainant's conduct, as recorded in the judgement, was deserving of a reprimand.

As to the third objection, the Tribunal ruled that the terms of the reprimand did not exceed what was proper and that it did not amount to a censure as distinct from a reprimand.

For the above reasons, the Tribunal dismissed the complaint.

34. JUDGEMENT NO. 421 (11 DECEMBER 1980): HAGHGOU *v.* INTERNATIONAL CENTRE FOR ADVANCED TECHNICAL AND VOCATIONAL TRAINING (INTERNATIONAL LABOUR ORGANISATION)

Non-renewal of fixed-term appointment for abolition of post — Discretionary nature of same — Alleged procedural defects

In view of the projected abolition of his post, together with 51 others, the complainant was notified that his appointment would not be extended beyond its pre-determined expiry date of 31 May 1979.

The Director of the Centre had previously announced in an information note that he was setting up a Working Group to advise him on the staffing consequences of the decisions to abolish posts. The subsequent resignation of the Staff Union members rendered the said Working Group inoperative. The complainant maintained that the non-renewal of his appointment having been decided without the benefit of the advice of the Working Group, the decision was invalid.

The Tribunal noted the basic discretionary nature of the decision not to extend or renew a fixed-term appointment. Under the regulations, such a decision was procedurally unfettered. The Tribunal addressed the question of whether by the information note mentioned above the Director had bound himself to a certain procedure. It ruled that the information note could be so construed only if it was intended to have a contractual effect as between the Organization and the complainant. The Tribunal was of the opinion that the information note did not become part of the contractual relationship between the Organization and the complainant. Therefore, the Tribunal declared itself not empowered to examine an allegation that the information note had not been complied with.

The Tribunal further noted that the complainant did not challenge the decision on the merits. He made no allegations of bias or of having been deprived of presenting his case.

For the above reasons, the Tribunal dismissed the complaint.

35. JUDGEMENT NO. 422 (11 DECEMBER 1980): WATTERS *v.* WORLD HEALTH ORGANIZATION

Allowance for stepchildren — Conditions for entitlement to same — Full dependence on a staff member

The complainant had married a Danish staff member having legal custody of a daughter from a previous marriage, and receiving both an alimony from the child's own father and a child allowance from the Organization. After his marriage, the applicant was informed by the Administration that the child would not be considered his dependent and that he would not receive child allowance unless he adopted her.

Complainant then argued that for the purpose of WHO staff rule 310.5.2, which reads "the children, if determined dependent, shall be recognized as the dependents of that parent holding the higher level post", it was sufficient that his stepdaughter was recognized by the Organization to be *de facto* fully dependent on him for her support, and that adoption was not required. Therefore, he maintained that as the parent holding the higher level post he was entitled to child allowance. The Regional Director and subsequently the Director-General having rejected his complaints, the applicant filed an appeal with the Administrative Tribunal.

The Tribunal, taking cognizance of the case, considered whether the stepchild was a "child of both parents", within the meaning of staff rule 310.5.2. It pointed out that staff rule 335 enumerates three categories of children, the third one being a category constituted by a discretionary power given to the Organization to recognize as dependent any child who is "*de facto*" fully dependent upon a staff member for its support. Staff rule 310.5.2 expressly provides that for its purpose "child" shall include a child in this category.

The Tribunal considered whether the child was *de facto* fully dependent on the complainant. It noted that the Director-General has discretionary power to recognize a child as a dependent. Therefore unless the Director-General when withholding recognition erred in law, reached a mistaken conclusion on the facts or otherwise abused his power, the Tribunal could not interfere. In the case under consideration, the Director-General's decision, conveyed in his letter of 16 August 1979 — which is the impugned decision — was carefully expressed and fully reasoned. The Director emphasized that the question was whether the child was fully dependent on the complainant or, in other words, whether he was her only source of support. He held that as long as the mother, as a staff member, received a child allowance, this was not the case.

The applicant claimed that the Director-General's decision was erroneous and that he had applied the rule in a narrow and restrictive fashion. The Tribunal observed that, apart from the fact that expenditure in itself is not sufficient proof of an established dependency, the question was whether or not there was full dependency between the complainant and his stepdaughter. This was clearly not the case, as the mother received an allowance for the child.

With respect to the meaning of the word "full", the Tribunal noted that this could only be determined by looking at the text. The language used indicated that all cases in which dependency is not as complete as it normally is between child and parent should be excluded from the operation of the rule.

The Tribunal, holding that the Director-General was bound to this interpretation of the text and that to choose another alternative would be to take the law into his own hands, dismissed the complaint.

36. JUDGEMENT NO. 423 (11 DECEMBER 1980): ROELOFSEN *v.* EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION (EUROCONTROL)

Failure to exhaust internal means of redress — Non-receivability of the complaint

The complainant was challenging the Administration's recalculation of her salary following a change in her family circumstances. In a letter dated 22 February 1979, addressed to the Director of Personnel and Administration, she outlined her reasons for challenging the decision and requested further information on the decision from the Director of Personnel and Administration. The word "complaint" did not occur in the said letter.

Having recalled the provision of its statute which makes receivability of a complaint contingent upon exhaustion of internal means of redress, the Tribunal noted that by sending a letter seeking further information and explanation on a decision, a staff member was not necessarily initiating an internal appeal process. The complainant ought to have worded her letter differently and used terms more closely approaching those of an appeal. The mere expression of disagreement with the decision was not enough.

For the above reasons, the Tribunal dismissed the complaint.

37. JUDGEMENT NO. 424 (11 DECEMBER 1980): GATMAYTAN *v.* PAN AMERICAN HEALTH ORGANIZATION (PAHO) (WORLD HEALTH ORGANIZATION)

Date of entitlement to salary increase upon promotion — Staff member not to suffer from administrative delays

On 1 December 1975, the complainant was appointed to a post of administrative officer trainee at grade P-1. From 1976, he performed the duties of a P-2 management officer although he continued to hold the P-1 post. He was promoted to grade P-2 with effect from 1 December 1977. The complainant asked that the date of the promotion be 1 October 1976 and that he be paid the difference in salary accordingly.

The Tribunal noted the relevant provision of the Staff Rules which determines the effective date of any change in salary. In cases other than that of a within-grade increase, the date of entitlement was the first of the month nearest the date of final approval. The Tribunal was of the opinion, however, that if the procedure was unreasonably prolonged for causes attributable to the Organization, the staff member should not suffer from the delay.

Having examined the circumstances of the complainant's change of status, including a recommendation by the Chief of Personnel to the Director that the grading at P-2 take effect from 1 June 1977, the Tribunal noted an internal disagreement regarding the procedure to be followed in reclassification matters, which resulted in delaying the decision concerning the complainant's promotion. The Tribunal observed that instead of being promoted at the prescribed date of 1 June 1977, the complainant thus had to wait six months for his promotion. This delay was entirely due to the way in which administrative organs work and therefore the Organization should make good the wrong done to the complainant.

For the above reasons, the Tribunal quashed the impugned decision and directed that the effective date of the complainant's promotion to P-2 be 1 June 1977 and that he be paid the difference in salary resulting therefrom. Furthermore, the amount of $1,000 was awarded the complainant in costs.

38. JUDGEMENT NO. 425 (11 DECEMBER 1980): DE BRUIN, DERBAL AND KELLET v. EUROPEAN PATENT ORGANIZATION (EPO)

Regrading to higher level — Right to post corresponding to actual duties

In 1978, when the International Patent Institute merged with the European Patent Office, complainants who had been grade C-4 library clerks in IPI were informed that they would be assigned to grade B-2 posts. They appealed this decision, claiming that their previous duties corresponded to B-3 posts and consequently asked for regrading.

The complainants contended that they were to perform in EPO the same duties as they had in IPI, and that under article 11.1 of the EPO Staff Regulations, EPO had to grant them the grade corresponding to their duties. Therefore they asked the Tribunal to quash previous decisions dismissing their appeal and refusing regrading.

According to article 3.1 of the EPO Staff Regulations, the President of EPO shall draw up a specific description of the duties of all posts and make recommendations as to the grade warranted by the post description. Article 11.1 entitles each official to the grade corresponding to the description of the duties he performs.

The Tribunal found that, although EPO had pleaded that the present post descriptions were only provisional and would be revised by August 1980, EPO was bound by the rules it had itself made. Therefore, the complainants were entitled to grade B-3, since that grade corresponded to post description 3323, reflecting their actual duties. Their claim for a small sum in costs was allowed.

39. JUDGEMENT NO. 426 (11 DECEMBER 1980): SETTINO v. PAN AMERICAN HEALTH ORGANIZATION (PAHO) (WORLD HEALTH ORGANIZATION)

Reimbursement of national income tax on sum received in partial commutation of pension rights — "Earnings" defined — Acquired rights, only fundamental benefits and not every contractual benefit so considered

In April 1975 the complainant retired from the service of the Organization and received from the Pension Fund a lump sum in settlement of one third of his pension rights. Being a United States citizen, he paid income tax on that sum and applied to the Organization for reimbursement of the tax. Having been turned down, he filed the present complaint.

The Tribunal noted that the complainant's contract provided for reimbursement of income tax on "PAHO — WHO earnings only". The question was therefore to define the meaning of the word earnings. In the opinion of the Tribunal that term did not, in the absence of an express provision to the contrary, include a lump sum paid not by the employer but by the Pension Fund. The Tribunal noted that in March 1953 when the complainant was first employed, there was a provision in the Manual to the effect that "earnings" included the Organization's contribution to the Fund and lump sum payment from the Fund in excess of the staff member's contribution. This provision, described by the Tribunal as curious, was omitted from the revision of the Manual published in June 1954 and was never repeated. The claimant contended that he had an acquired right to the inclusion of his lump sum in the earnings with regard to which national taxes were reimbursable.

The Tribunal, in defining "acquired rights", ruled that not every benefit conferred by the staff member's contract could be considered an acquired right but only those benefits which were fundamental. Observing that reimbursement of the tax on a lump sum in excess of the staff member's contribution (and not on the whole of the lump sum) was, even while it lasted, of dubious practical value, the Tribunal concluded that the said reimbursement was not a fundamental benefit and did not therefore constitute an acquired right. The Tribunal added that there was nothing to show that the claimant himself considered it to be of any importance at all since he did not protest the removal of the supposed benefit only one year after he had joined the service.

The Tribunal considered the principle of equality of treatment which the claimant invoked, citing cases where two staff members who had opted for a reimbursement of their own contributions

were reimbursed taxes paid in respect of those contributions made before 1965. The Tribunal was of the opinion that there was a categorical distinction between withdrawal of one's own contribution and receipt of a lump sum payment in partial commutation of a pension. The principle of equality did not require that the two categories be treated in the same way.

Finally, the Tribunal rejected the claimant's argument based on the practice of the United Nations Organization and pointed out what the United Nations Administrative Tribunal itself stated in its Judgment No. 237,[35] namely, that its ruling in that case was confined to the tax reimbursement régime of the United Nations and was not intended to have a systemwide implication.

For the above reasons the Tribunal dismissed the complaint.

40. JUDGEMENT NO. 427 (11 DECEMBER 1980): DICANCRO *v.* PAN AMERICAN HEALTH ORGANIZATION (PAHO) (WORLD HEALTH ORGANIZATION)

Charge of misconduct — Special leave with pay imposed on staff member — Non-validity of same — Non-renewal of fixed-term appointment motivated by prejudice — Compensation

The claimant, an official of PAHO, ran in the 1978 election against the incumbent Director. The Director was reelected by 18 votes to 14. On 16 October 1978, he wrote to the complainant accusing him of misconduct. Having considered the complainant's explanations the Director informed him on 8 December 1978 that the position he had taken precluded all possibility of a fruitful working relationship and that it would not be in the interest of the Organization to continue to employ him. He therefore put the complainant on special leave with full pay from 15 December 1978 to 30 June 1979 and informed him that his appointment would not thereafter be renewed. The claimant challenged the said decision.

The Tribunal noted the discretionary character of a decision not to renew a fixed-term appointment and its own limited power of review with regard to such decisions.

The Tribunal recalled that the relevant provision of the Staff Rules required a staff member who became a candidate for a public office of a political character to resign from the secretariat. It was of the opinion that the office of Director was not a public office of a political character within the meaning of that provision. The Tribunal further looked into the complainant's conduct during the campaign to ascertain whether any of his acts could be characterized as misconduct. It ruled that in the absence of an express regulation a staff member was bound only by those standards of propriety to be observed by all candidates generally; otherwise the electoral process would be unfair. With regard to the provision of the rules which characterized as misconduct any conduct by a staff member unconnected with his official duties tending to bring the Organization into public disrepute the Tribunal was of the opinion that the said provision did not cover criticism of the Organization's policies in the course of an electoral campaign. The said provision was aimed against acts by a staff member in his private capacity which were so disgraceful as to bring into public discredit the Organization to which he belonged.

The letter in which the Director charged the complainant of misconduct was described by the Tribunal as "highly improper and the Director ought not to have sent it". The Director had, without having heard what the complainant had to say, made up his mind not only that there had been misconduct but also that there was nothing to mitigate the extreme penalty of dismissal. He had thus disqualified himself from giving a valid decision on the issue of misconduct. The Tribunal concluded that the Director strongly resented the fact that the complainant had stood against him in an election in which the Director had only barely escaped defeat. His decisions regarding the complainant were therefore defective as vitiated by prejudice.

With regard to the issue of special leave with full pay the Tribunal ruled that it could be granted if requested but could not be imposed upon a staff member who did not request it. For this reason, regardless of the fact that it was motivated by prejudice, the decision was invalid. In this respect the Tribunal made the distinction between suspension pending investigation of alleged misconduct and imposition of a special leave with full pay. Because he had dropped the charge of misconduct the Director could not resort to suspension and was therefore seeking to do illegally,

through the imposition of special leave with full pay, what he could no longer do properly after having dropped the charge of misconduct.

On the larger issue of non-renewal the Tribunal looked into the likelihood of co-operation between the complainant and the Director after December 1978. It noted that in a letter to the Director the complainant had written that the election was over and that he believed that he could have a fruitful relationship with the Administration. This letter remained unanswered. The Tribunal considered that *prima facie* it was in the interest of the Organization to renew the claimant's contract because of his long experience in its service rather than pay him six months' salary for doing nothing and then refusing to renew his contract. In the Tribunal's view there was evidence that the high probability was that the claimant would have given useful and loyal service to the Organization for the rest of his career. However, the Tribunal concluded that a reinstatement at the point where matters were would not be in the interest of the Organization. With regard to the compensation claimed by the claimant for interruption of his career the Tribunal awarded it in principle and directed the parties to proceed with some calculations on the basis determined by the Tribunal and to submit any disagreement to the Tribunal for assessment. With regard to compensation for moral prejudice, the Tribunal noted that this was not a simple case of nonrenewal and that the complainant was the victim of a misconceived charge of misconduct of which the Director pronounced him guilty. The Tribunal noted that the letter dropping the charge contained no withdrawal or apology and that the illegal use of the rule of special leave made it appear as if the complainant had been summarily dismissed. The Tribunal awarded the complainant $20,000 in damages for moral prejudice.

41. JUDGEMENT NO. 428 (11 DECEMBER 1980): ROBINSON *v.* INTERNATIONAL TELECOMMUNICATION UNION

Classification of posts — Discretionary decision — Allegation of discrimination for assigning several levels to the same occupational group rejected

In the context of a reorganization of the International Frequency Registration Board, a review committee was set up to hear disputes over classification. The claimant was notified that he would continue to be graded P-3. He challenged the said decision alleging mainly that

(*a*) The right procedure for grading his post was not followed id the Review Committee failed to exercise its competence and did not give him a hearing; and

(*b*) That the decision was discriminatory since grade 4 was granted to several other engineers who were performing exactly the same duties as the complainant.

The Tribunal noted the discretionary character of the decision assigning the complainant to a grade P-3 post and its limited power of review of such decisions.

The Tribunal rejected the allegation of procedural defects because the complainant adduced no evidence of the Committee's terms of reference and because it was another official's application that the Committee declared itself without competence to hear. The Tribunal noted that although the complainant was not invited to address the Committee, his application for review of his classification was put to it. There was no breach of his right to a hearing since the right does not mean that he must be heard in person.

On the allegation of discrimination, the Tribunal noted that there were two kinds of engineering posts, only one of them being held by P-4 officials. The claimant was mistaken in contending that he ought to hold that grade simply because he was an engineer.

For the above reasons the Tribunal dismissed the complaint.

42. JUDGEMENT NO. 429 (11 DECEMBER 1980): GUBIN AND NEMO *v.* EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION (EUROCONTROL)

Amendment of staff rule increasing staff members' contribution to the Pension Fund with no corresponding increase in the Organization's contribution — Challenge to same — The Tribunal

may entertain the challenge to a rule and not only to its application — Proper and valid amendment to Staff Rules — Acquired rights under the rules defined

In June 1977 the relevant provision of the Staff Regulations was amended to increase the staff members' contribution to the Pension Fund from 6.75 per cent to 8 per cent with no corresponding increase in the Organization's contribution. The complainants, later joined by a considerable number of colleagues, challenged the said decision and asked that their salaries be restored to the figures for June 1977.

The Tribunal noted that the real subject of the dispute was the validity of the amendment to article 83(2) of the Staff Regulations. As such the complainant's plea was receivable because the right to impugn a decision subsumes the right to challenge the rule on which the decision was founded. In such cases, however, the Tribunal may not exercise as wide a power of review over the rule as over a decision taken under it.

The Tribunal observed that the only limitation, under the Staff Regulations, to the competent body's power to amend was that the decision be taken unanimously. In the present case article 83(2) was amended by unanimous decision. The amendment was therefore proper and valid.

The complainants raised three objections to the decision of the competent organ. The first two concerned discrepancies between the amended provision and other existing provisions of the Staff Regulations which provided for a 1 to 2 ratio between the contribution of the staff and that of the Organization and required further an actuarial assessment before changing the rate of contribution. In rejecting these two objections, the Tribunal noted that what the competent organ did was to amend the rules and not simply to apply them as they existed. So long as the competent organ was acting under its power of amendment, it was free to amend the Staff Regulations as it pleased and was therefore not bound by them.

The complainants' third objection related to the alleged misrepresentation of the facts underlying the decision of the competent organ. The Tribunal ruled that only the body empowered to amend staff regulations may determine whether the amendments it adopts are desirable. That was a matter for the governing bodies of the Organization and not for the Tribunal to decide.

The Tribunal then addressed the question of whether the complainants had an acquired right to the 1 to 2 ratio of contributions contained in the Staff Regulations before the amendment. It ruled that there can be an acquired right only where a particular provision of the rules had induced the staff member to join the service and where the amendment of the rule would substantially alter conditions of service. The original provision of the Staff Regulations with regard to contributions to the Pension Fund conferred no acquired right on the complainants because its effect on their decision to accept appointment was not direct enough for any acquired right to arise.

The Tribunal further noted that the amended provision of the Staff Regulations guaranteed payment of pensions by Member States and that furthermore the Organization decided to include pensions in its budget. This guarantee by Member States and the payment of pensions under the budget independently of the position of the Pension Fund deprived the question of the Organization's contribution of all practical importance where the staff were concerned, since payment of the pensions no longer depended on the solvency of the Pension Fund.

For the above reasons the Tribunal dismissed the complaint.

43. JUDGEMENT NO. 430 (11 DECEMBER 1980): CHAMAYOU *v.* EUROPEAN MOLECULAR BIOLOGY LABORATORY (EMBL)

Time-limit for filing a complaint with Tribunal — Non-receivability for failure to observe same

On 15 September 1978, the complainant joined the staff of EMBL on a fixed-term appointment for three years, including six months' probation. On 15 February 1979, he was informed in writing that his appointment would not be confirmed. This decision was re-confirmed in a letter of 30 April 1979. Complainant, maintaining that the decision was tainted with abuse of authority, appealed to the Administrative Tribunal in September 1979. Under the Staff Rules, there is no internal appeal against termination of a probationary appointment.

The Tribunal found that the letter of 15 February was indeed the final decision. According to article VII (2) of the statute of the Tribunal, applicant should have filed his appeal within 90 days from that date, or taking into consideration the letter of 30 April, no later than 29 July. The complaint was therefore time-barred and irreceivable.

44. JUDGEMENT NO. 431 (11 DECEMBER 1980): ROSESCU *v.* INTERNATIONAL ATOMIC ENERGY AGENCY (IAEA)

Termination of fixed-term appointment — Interests of a Member State given more weight than the Agency's — Decision tainted by misuse of authority — Compensation

Complainant's second two-year fixed-term appointment expired in January 1979. In June 1978, the Agency had asked the authorities of his country of nationality whether they would agree to an extension of five years. The answer was negative. The Agency then decided to extend complainant's contract for eight months only.

Complainant argued that commitments made to him were not honoured and that the Director-General's decision was in breach of article VII of the statute of the Agency which states that in the performance of his duties, the Director-General shall not seek or receive instructions from any source external to the Agency. In his appeal, the complainant asked the Tribunal to quash the Director-General's decision or to award him compensation.

The Tribunal found that a decision on the extension of an appointment falls within its scope of review if it is tainted with some such flaw as misuse of authority. There would be such misuse when, though a decision is formally *intra vires,* authority is exercised for some improper purpose.

The executive head of an organization should at all times safeguard its interests and where necessary give them priority over others and he should not forgo taking a decision in the organization's interests for the sole purpose of satisfying a member State.

In the case before it, the Tribunal observed that the request made to the Romanian authorities by the Agency to extend complainant's contract for another five years was clear evidence that this extension was in the Agency's interests and that the only reason not to carry out the original intention was to defer to the will of same authorities. Furthermore, the Tribunal noted that there was no evidence that the Romanian authorities consented to the complainant's appointment for only a limited period of time. Actually they had themselves proposed in 1976 a five-year extension, up to January 1982.

The Tribunal further noted that the Romanian authorities had not explained the withholding of their consent to the proposed extension. Had they said that they were unable to agree because they needed the complainant back, this might have been a sound reason. Even this, however, would have required the complainant's consent, which he did not give since he showed his firm determination not to return to his country.

The Tribunal concluded, therefore, that the Director-General in taking the decision let the interests of the Romanian authorities prevail over the Agency's for no valid reason and thereby committed a misuse of authority which tainted his decision.

The Tribunal awarded complainant *ex aequo et bono* 50,000 United States dollars in compensation and 15,000 French francs in costs.

45. JUDGEMENT NO. 432 (11 DECEMBER 1980): DROST *v.* EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION (EUROCONTROL)

Reimbursement of medical expenses — Excluded types of treatment

The complainant requested the reimbursement of dental expenses for his wife and himself. His request was turned down because it related to orthodontic treatment. His complaint in respect of himself was declared non-receivable by the Tribunal because it was time-barred. The Tribunal considered the substance of his claim in respect of his wife.

The evidence submitted by the Organization regarding the nature of the treatment, particularly the Medical Advisor's report, was considered conclusive by the Tribunal. The Tribunal added that the explanations given by the complainant's dentist himself indicated that the complainant and his wife did not undergo ordinary dental treatment. Since orthodontic treatment is excluded from the medical scheme unless the person is under 16 years of age, the Tribunal dismissed the complaint.

46. JUDGEMENT NO. 433 (11 DECEMBER 1980): VALENCIA GÓMEZ *v.* LATIN AMERICAN INSTITUTE FOR EDUCATIONAL COMMUNICATION

Action against an Organization which is not among those who recognize the jurisdiction of the Tribunal — Non-receivability of same — Allegation of being part of UNESCO rejected

Having been dismissed from the service of the Mexico City-based Latin American Institute for Educational Communication, the complainant filed his complaint with the Tribunal against the said Institute and against UNESCO.

In so far as the action was directed against the Institute, the Tribunal noted that the said organization was founded by the Mexican Government and had not recognized the jurisdiction of the Tribunal.

In so far as the complaint was addressed against UNESCO, the Tribunal noted that the Institute could not be treated as part of UNESCO which had done no more than lend its financial support and co-operation to the work of the Institute.

For the above reasons, the Tribunal dismissed the complaint.

47. JUDGEMENT NO. 434 (11 DECEMBER 1980): A'ADAL *v.* INTERNATIONAL CENTRE FOR ADVANCED TECHNICAL AND VOCATIONAL TRAINING (INTERNATIONAL LABOUR ORGANISATION)

Time-limit for appeal starts from notification of decision — Exchange of correspondence after the decision does not open a new time-limit

Having been notified on 16 March 1979 of the decision not to extend his fixed-term appointment, the complainant filed his complaint on 23 January 1980.

The Tribunal took note of the fact that the complaint was submitted after the expiration of the prescribed time-limit. It did not accept the complainant's argument based on a subsequent exchange of correspondence. It ruled that the letter of 16 March 1979 was clear and explicit enough to constitute the decision to be impugned within the meaning of article VII, paragraph 2, of the statute of the Tribunal.

For the above reasons, the Tribunal dismissed the complaint.

48. JUDGEMENT NO. 435 (11 DECEMBER 1980): ZIHLER *v.* EUROPEAN ORGANIZATION FOR NUCLEAR RESEARCH (CERN)

Scope of the rule on the exhaustion of internal remedies — Service-incurred partial disability — Exceptional cases where the Organization's liability may exceed the limits set in the internal rules

The complainant received compensation under the internal rules of the Organization for a partial hearing disability estimated at 8 per cent resulting from a work-related accident. Not satisfied with the compensation paid him, he filed his complaint with the Tribunal. adducing further arguments and explanations.

On the question of receivability, the Tribunal noted that the rule which requires exhaustion of internal remedies means:

(1) That the complaint to the Tribunal must rely on the same essential facts and issues as those relied on in the internal appeal proceedings; and

(2) That the claims must not exceed in scope the claims submitted in those proceedings.

Beyond that, there was nothing to prevent a complainant from making submissions which he did not make in the internal proceedings. Since the Tribunal will apply the rules on its own, there is no reason to forbid the complainant from drawing to its attention considerations which it may take into account of its own accord. The complaint was therefore receivable.

The Tribunal noted that the parties were in agreement that the impugned decision was in accordance with CERN rules. The complainant argued, however, that there was a general principle of law precluding application of those internal rules because the Organization was guilty of negligence. In such cases, the complainant contended, the general liability for negligence should supplement the Staff Rules and Regulations. The Tribunal rejected this argument noting that the Organization would have incurred liability beyond the provisions of its own rules only if it had exposed the complainant to a degree of danger incompatible with the normal performance of his duties and beyond the requirements of his contract of employment.

The above not being the case, the Tribunal dismissed the complaint.

49. JUDGEMENT NO. 436 (11 DECEMBER 1980): SACIKA *v.* INTERNATIONAL LABOUR ORGANISATION

Agreed termination — Subsequent facts allegedly nullifying same — Receipt of indemnity after knowledge of said facts bars staff member from invoking them

The complainant was appointed Assistant Director-General of the International Labour Organisation for a period of five years from 15 May 1977. The appointment was not a success. Within a short time it became apparent that there were divergencies between the complainant's conception of his role and that of the Director-General. Lengthy negotiations resulted in an agreement in May 1979 under which the complainant's appointment was to be terminated on 1 December 1979 and payment of the termination indemnity be made. The sum agreed upon was actually paid to the complainant on 10 September 1979.

As part of the agreement leading to the termination of the complainant's appointment, the Director-General was to write an explanatory letter to the President of the complainant's country of nationality, which he did on 1 June 1979. A copy of this letter was sent forthwith to the complainant.

On 30 October 1979, the complainant informed the Director-General in writing that the latter's letter to the President was a very serious breach of faith in that it reflected adversely on the complainant's capabilities. The passage which the complainant had in mind stated the Director-General's belief that the complainant could perform many important functions for which his aptitudes and personal qualities would be more suited than they were for working in an international organization.

Maintaining that this development nullified the agreed termination, the complainant requested the Tribunal, among other pleas, to award him adequate compensation for the unlawful termination of his appointment with ILO.

While expressing its belief that it would have been better if the letter to the President had not contained the disputed passage, the Tribunal noted that the said passage referred to personality rather than to professional competence. The Tribunal did not conclude that the passage in question was written with a view to preclude the complainant's future appointment to an international civil service post. On the whole, the object of the offending passage was to reinforce the fact that there was no question about the complainant's personality and integrity.

The Tribunal concluded that the charge of bad faith was unfounded. At the worst, the passage objected to was an error of judgement falling far short of bad faith, which must be deliberate. Had the letter been written with the aim of harming the complainant, a copy would not have been immediately sent to him. The Tribunal noted that it did not seem that the letter struck the complainant at the time as an act of bad faith since he failed to protest immediately.

Finally, the Tribunal observed that by 1 June the complainant knew all the facts which he was invoking in support of his allegation that he was the victim of bad faith. However, on 10 September he received the amount due under the agreement, thus confirming rather than challenging it.

For the above reasons, the Tribunal dismissed the complaint.

50. JUDGEMENT NO. 437 (11 DECEMBER 1980): HAKIN *v.* EUROPEAN PATENT ORGANIZATION (EPO)

Deduction from salary for non-performance of duties — Interest on amounts refunded after being so deducted — Condition for entitlement to same

Complainant took part in a sit-in strike in September 1977, protesting the effects on the staff of the merging of the International Patent Institute and EPO. Complainant participated only during periods of free time. However, in December he was informed that a sum would be withheld from his salary for "non-performance of duties".

He asked the Tribunal to order EPO to pay him the withheld amount plus interest at 10 per cent per year as from 1 January 1978 and a token sum of 1 Dutch guilder in moral damages.

The Tribunal found with respect to the first claim that EPO had repaid the amount claimed after the complaint had been lodged and that the claim for repayment was therefore without substance.

As far as payment of interest was concerned, the Tribunal noted that this claim would only succeed if the deduction from salary had been unjustified. As this could not be established for a fact, the claim was disallowed.

Finally, if the claim for payment of token damages for moral prejudice was to succeed, the accusation of the Organization ought to have caused the applicant emotional disturbance beyond material damage. As this was clearly not the case the Tribunal could not allow this claim either.

Therefore, the complaint was dismissed.

51. JUDGEMENT NO. 438 (11 DECEMBER 1980): LUYTEN *v.* EUROPEAN PATENT ORGANIZATION (EPO)

Performance evaluation report — Discretionary nature of same — Tribunal may not substitute its own judgement for that of the staff member's supervisors

The complainant challenged the performance evaluation report of 1975 in which he received the rating "good". The internal proceedings resulted in the confirmation of that rating. The complainant requested the Tribunal to order that he be given a "very good" rating for 1975.

The Tribunal pointed out the discretionary nature of the assessment of an official's performance by his supervisors. It noted that the impugned decision contained two points:

(*a*) The general assessment "good" and

(*b*) A statement to the effect that the Reports Committee, to which the complainant had requested referral of the matter, was defunct.

With regard to the second point, the Tribunal ruled that the Reports Committee was in fact defunct and that an assessment for 1975 could not be referred to it. On the first point, the Tribunal stated that it may not substitute its own assessment for the decision taken by the President of the European Patent Organization in the exercise of his discretion and grant a "very good" general assessment.

Accordingly, the Tribunal dismissed the claim.

52. JUDGEMENT NO. 439 (11 DECEMBER 1980): VERDRAGER *v.* WORLD HEALTH ORGANIZATION

Application for review of a Tribunal judgement — "New fact" defined

The present complaint was the complainant's third application for the review of a previous judgement No. 325[36] by which the Tribunal had dismissed his original complaint. As a basis for his third application, the complainant argued that he became aware of a certain annotation on a document contained in the file and that this new fact warranted review of the judgement.

The Tribunal defined a new fact such as will warrant an application for review as being a material fact affecting the decision and one of which the complainant had no knowledge and was unable to obtain knowledge in the course of the original proceedings.

Applying this definition to the case at hand, the Tribunal noted that the document bearing the annotation in question was part of the record in the original proceedings. Although the annotation was scarcely legible, nothing at the time prevented the complainant from asking the World Health Organization to make its meaning clear. He therefore had only himself to blame for not obtaining information on the matter in due time. His becoming aware of the annotation much later was not a new fact as defined above.

For the preceding reasons, the Tribunal dismissed the complaint.

53. JUDGEMENT NO. 440 (11 DECEMBER 1980): MOLINA *v.* WORLD HEALTH ORGANIZATION

Termination of a probationary appointment — Discretionary decision — Appraisal report based on prejudice — Annulment of same

The complainant was given a two-year appointment, the first year of which was to be a probationary period. Before the end of the said period, he was informed that his appointment would be terminated on 24 July 1979. The complainant challenged this decision and objected to an appraisal report dated 18 May 1979 which he considered to be tainted by prejudice.

On the question of termination, the Tribunal noted the discretionary nature of the decision, adding that in the present case and in similar cases, the Tribunal would exercise additional caution in reviewing a decision to terminate a probationary appointment. Otherwise, probation would not serve its purpose as a trial period. Examining the circumstances which led to the decision, the Tribunal concluded that no essential facts were overlooked in reaching it. The Director-General had personally, and after the exercise of great care, concluded that there was sufficient evidence to show that the complainant had "not satisfactorily adjusted to WHO service". In such circumstances, it was virtually impossible for the Tribunal to intervene.

On the question of the appraisal report, the Tribunal concluded that the first reporting officer's prejudice could be inferred from the dossier as a whole and that the purpose of the report appeared to be to reduce the chances of the complainant's obtaining employment with some international organization other than the World Health Organization.

For the above reasons, the Tribunal ordered the annulment of the appraisal report and dismissed the complainant's other claims.

54. JUDGEMENT NO. 441 (11 DECEMBER 1980): PHERAI *v.* EUROPEAN PATENT ORGANIZATION (EPO)

Entitlement to expatriation allowance — Entitlement to travel on home leave — Transfer from one international organization to another is not a new appointment — Acquired right

Complainant, who was a Dutch citizen at the time, joined the staff of the International Patent Institute in 1970. When Suriname, where he was born, acceded to independence in 1975, he took Surinamese nationality. In 1978, IPI was integrated in EPO and consequently he became a member of the EPO staff.

In IPI, complainant had been entitled to repayment of cost of travel on home leave to Suriname but not to expatriation allowance. EPO denied complainant both expatriation allowance and home leave travel.

The complainant contended that the date of his appointment to IPI was not the same as the date of his appointment to EPO. Therefore, article 72 of the EPO Service Regulations, which applied to staff members who at the time of their appointment were not citizens of the country in which they are serving and had not been resident there for at least three years, no account being taken of previous service with other international organizations, entitled him to expatriation allowance as from his date of appointment to EPO. Furthermore, article 60 of same Regulations granted staff members who are entitled to expatriation allowance repayment of travel expenses on home leave.

He asked the Tribunal to quash the decision denying him expatriation allowance and costs of travel on home leave, or, subsidiarily, to declare him entitled to repayment of cost of travel for himself and his family.

The Tribunal first examined article 10 of the Agreement of Integration which stipulated that only staff members who were entitled to expatriation allowance before the integration would continue to receive the allowance. As complainant was not entitled to it in the Institute, he could not claim it from EPO.

As regards article 72, the Tribunal found that staff members who were transferred to an organization were not deemed newly appointed by it. Complainant's date of appointment to EPO therefore was the date of his initial appointment to IPI.

The claim for expatriation allowance, whether it relied on article 10 or article 72, failed.

Finally, the Tribunal considered the claim regarding repayment of the cost of travel on home leave. It concluded that there was a breach of an acquired right when an allowance which may have prompted a staff member to join the organization was done away with. In the present case, the discontinuance of the repayment of travel expenses, which represented a considerable advantage for the complainant, was a breach of such a right. This claim therefore succeeded.

Complainant was further awarded 300 Dutch guilders towards his costs.

Notes

[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 1980, 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, the International Fund for Agricultural Development 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] Mme Suzanne Bastid, President; Mr. Francisco A. Forteza and Mr. T. Mutuale, Members.

[3] For a summary of the judgement, see *Juridical Yearbook,* 1979, p. 134.

[4] For a summary of the judgement, see *Juridical Yearbook,* 1978, p. 138.

[5] Mme Suzanne Bastid, President; Mr. Endre Ustor, Vice-President; Mr. Samar Sen, Member.

[6] Mme Suzanne Bastid, President; Mr. Francisco A. Forteza and Mr. T. Mutuale, Members; Mr. Francis T. P. Plimpton, Vice-President, Alternate Member.

[7] For a summary of this judgement, see *Juridical Yearbook,* 1978, p. 137.

[8] See *Judgements of the United Nations Administrative Tribunal,* Numbers 71 to 86 (United Nations publication, Sales No. 63.X.1).

[9] Mr. Francis T. P. Plimpton, Vice-President, presiding; Mr. Endre Ustor, Vice-President; Mr. Samar Sen, Member; Mr. Francisco A. Forteza, Alternate Member.

[10] Mr. Francis T. P. Plimpton, Vice-President, presiding; Mr. Endre Ustor, Vice-President; Mr. Samar Sen, Member.

[11] Mr. Endre Ustor, Vice-President, presiding; Mr. Samar Sen, Mr. Arnold Kean, Members.

[12] Mr. Francis T. P. Plimpton, Vice-President, presiding; Mr. Endre Ustor, Vice-President; Mr. Arnold Kean, Member.

[13] For a summary of the judgement, see p. 145, above.

[14] For a summary of the judgement, see *Juridical Yearbook,* 1976, p. 130.

[15] Mr. Francis T. P. Plimpton, Vice-President, presiding; Mr. Samar Sen, Mr. Arnold Kean, Members; Mme Suzanne Bastid, President, Alternate Member.

[16] Mr. Endre Ustor, Vice-President, presiding; Mr. Francisco Forteza, Mr. Samar Sen, Members.

[17] Mme Suzanne Bastid, President; Mr. Endre Ustor, Vice-President; Mr. Francisco A. Forteza, Member.

[18] For a summary of the judgement, see *Juridical Yearbook,* 1972, p. 125.

[19] For a summary of the judgement, see *Juridical Yearbook,* 1975, p. 145.

[20] Mr. Francis T. P. Plimpton, Vice-President, presiding; Mr. Samar Sen, Mr. Arnold Kean, Members.

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

[22] Under staff regulation 9.1 (*a*) agreed terminations apply only to permanent appointments.

[23] Mme Suzanne Bastid, President; Mr. Samar Sen and Mr. Arnold Kean, Members.

[24] Mme Suzanne Bastid, President; Mr. Francis T. P. Plimpton, Vice-President; Mr. Francisco Forteza, Member.

[25] For a summary of the judgement, see *Juridical Yearbook*, 1972, p. 133.

[26] *Judgements of the United Nations Administrative Tribunal*, Numbers 71 to 86 (United Nations publication, Sales No. 63.X.11).

[27] For a summary of the judgement, see *Juridical Yearbook*, 1975, p. 128.

[28] Mme Suzanne Bastid, President; Mr. Endre Ustor, Vice-President; Mr. Francisco A. Forteza, Member.

[29] 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 1980, 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.

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

[31] For a summary of the judgement, see *Juridical Yearbook*, 1977, p. 184.

[32] For a summary of the judgement, see *Juridical Yearbook*, 1978, p. 150.

[33] For a summary of the judgement, see *Juridical Yearbook*, 1977, p. 180.

[34] For a summary of the judgement, see *Juridical Yearbook*, 1976, p. 150.

[35] For a summary of the judgement, see *Juridical Yearbook*, 1979, p. 129.

[36] For a summary of the judgement, see *Juridical Yearbook*, 1977, p. 184.