Extract from:

UNITED NATIONS
JURIDICAL YEARBOOK

1983

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

Chapter V[1]

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

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

1. JUDGEMENT NO. 305 (2 JUNE 1983): JABBOUR *v.* THE SECRETARY-GENERAL OF THE UNITED NATIONS[3]

Non-renewal of fixed-term appointment—A staff member on a fixed-term appointment has no legal expectancy of renewal of his contract—Respondent's negligence in failing to extend to the applicant fair and just treatment

The applicant, who had been with the United Nations on a series of fixed-term appointments from 1961 to 1976, appealed the non-renewal of his fixed-term appointment.

The Tribunal stated that, although a staff member on a fixed-term appointment had no legal expectancy of renewal of his contract, nevertheless "after a staff member has been retained in service by a series of short-term contracts for many years and has rendered satisfactory services to the United Nations he can reasonably expect a measure of accommodation either in the form of extension or renewal of short-term contracts or by the respondent trying in good faith and earnestly to find him some alternative employment". The Tribunal observed that the respondent had been, in a variety of ways, negligent as an employer in failing to extend to the applicant fair and just treatment, and as a consequence the applicant had suffered. Accordingly, the Tribunal considered that the applicant was entitled to some compensation for the wrong administrative treatment he received and for the delay in the disposal of his appeal by the Joint Appeals Board due to procrastination by the respondent.

For the above reasons, the Tribunal awarded the applicant $2,500 in damages.

2. JUDGEMENT NO. 306 (2 JUNE 1983): GAKUU *v.* THE SECRETARY-GENERAL OF THE UNITED NATIONS[4]

Non-renewal of fixed-term appointment—Discovery of false statement made by the applicant frustrates any reasonable expectation of renewal of his contract—Discretionary power of the respondent not to renew the contract

The applicant appealed against the non-renewal of his fixed-term appointment.

The applicant had been in the employment of the United Nations for less than two years when it was found that he had made false statement in his Personal History form.

The Tribunal observed that its jurisprudence had always maintained that if after long and loyal service and after a series of fixed-term and similar contracts a staff member was separated there must be a determination whether such a staff member could reasonably expect an extension. The Tribunal concluded that, whatever might have been the hope of the applicant for continued employment after the discovery by the respondent of the false statement, he could have no reasonable expectation of any extension.

As to the question whether the respondent had been influenced by improper motives or had failed to observe the basic procedural requirements, the Tribunal was hesitant to come to a definite conclusion on a matter of this nature, particularly as the respondent had been within his rights, both in terms of the contract and because of the false statements made by the applicant, to refuse further extension. Even if there had not taken place the incident in which the applicant's supervisor allegedly

assaulted him, and which the applicant believed had influenced the respondent's decision, the rights of the respondent not to renew the contract remained unimpaired.

For the above reasons, the Tribunal rejected the application.

3. JUDGEMENT NO. 310 (10 JUNE 1983): ESTABIAL *v.* THE SECRETARY-GENERAL OF THE UNITED NATIONS[5]

Geographical distribution as basis for excluding promotion opportunity—The action constitutes a violation of Article 101.3 of the Charter of the United Nations and staff regulations 4.2 and 4.4—Excessively long delay on the part of the Administration in connection with the hearing of the applicant's appeal—The injury caused to the applicant by the Administration's refusal to take his candidature into consideration cannot be equated with the loss of salary since he did not have a right to promotion.

The applicant and the respondent disagreed as to whether the applicant's candidature for the post of Director of the Division of Recruitment had been ruled out without having been taken into consideration or examined.

The Tribunal found, on the basis of written communications from the Office of Personnel Services in the dossier, that the applicant had been excluded from consideration for appointment to the post in question because the position had been reserved for candidates from French-speaking African countries. The Tribunal held that the respondent's decision to rule out the applicant's candidature was tainted with errors of law and prevented the applicant from exercising his right to have his candidature for a vacant post examined on the basis of all the conditions established by Article 101.3 of the Charter of the United Nations and staff regulations 4.2 and 4.4. The Tribunal observed that it was not for the Secretary-General to alter these conditions laid down by the Charter and the Staff Regulations by establishing as a "paramount" consideration the search, however legitimate, for "as wide a geographical basis as possible", thereby eliminating the paramount consideration set by the Charter in the interests of the service—"the necessity for securing the highest standards of efficiency, competency and integrity". The applicant lost any chance of success that his candidature might have had if the correct procedure had been followed. The Tribunal held that the Administration's responsibility was therefore entailed and the injury thereby caused to the applicant must be remedied.

The applicant further requested the Tribunal to order the respondent to pay him compensation for the excessive delay in replying to the Joint Appeals Board's proceedings, which the Tribunal had already recognized in its Judgement No. 291.[6] The Tribunal additionally noted that the Secretary-General's reply to the applicant's request for review had been sent to him only after the Secretary-General had decided to fill the vacancy. The applicant had thus been informed indirectly and his request had been rejected without being told the reasons. The Administration then had waited nearly 18 months before communicating the reply to the Joint Appeals Board. The circumstances in which the applicant had been informed of the rejection of his request for a review and the excessive delay on the part of the Administration in connection with the hearing of his appeal, in particular, in sending its reply to the Joint Appeals Board, constituted a fault which entailed the responsibility of the Administration.

The Tribunal found that the injury caused to the applicant by the Administration's refusal to take his candidature into consideration in making the appointment to the vacant post while binding and restricting itself by legally erroneous conditions which automatically had eliminated the applicant, could not be equated with the loss of salary and allowances which the applicant had suffered as a result of not being promoted, since the applicant had not had a right to promotion. While the Secretary-General had been under the strict obligation to respect the rules of form and substance applicable in the case, he had also been free to choose among the various candidates.

In view of the overall circumstances of the case, the Tribunal decided that the applicant should be fairly compensated for the injury he had sustained as a result both of the refusal to take his candidature into consideration and of the delays caused in the hearing of his appeal, by the award of overall compensation equivalent to two months of his net base salary.

4. JUDGEMENT NO. 317 (21 OCTOBER 1983): CUNIO *v.* THE SECRETARY-GENERAL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION[7]

Extent of the power or control of the Tribunal in relation to a unanimous conclusion of the Advisory Joint Appeals Board that an appeal is frivolous within the meaning of article 7, paragraph 3, of the Tribunal's statute—Exclusion of the applicant from hearings of the Advisory Joint Appeals Board—The Board is not competent to examine substantive questions of professional efficiency

The applicant impugned a decision whereby the Secretary-General had accepted a recommendation of the Advisory Joint Appeals Board that the applicant's appeal be rejected as frivolous.

The Tribunal recalled the terms of article 7, paragraph 3, of its statute which reads as follows:

> "In the event that the recommendations made by the joint body and accepted by the Secretary-General are unfavourable to the applicant, and in so far as this is the case, the application shall be receivable, unless the joint body unanimously considers that it is frivolous."

The Tribunal furthermore recalled that in its Judgements No. 288 (*Marret*)[8] and No. 269 (*Bartel*),[9] it had ruled that it was not precluded from considering whether a joint body's conclusion based on the frivolous character of the appeal was vitiated by some irregularities.

In this connection, the Tribunal expressed dissatisfaction with the Advisory Joint Appeals Board's action in excluding the applicant from hearings at which her superiors had been invited to be present and to make statements on the substance of her appeal. It felt constrained to observe that it could not sanction any practice by which a joint body would act from the beginning of its proceedings to exclude an appellant from meetings convened to hear individuals who might take positions in opposition to those advanced by the appellant.

The Tribunal added that it would accept the exclusion of an appellant should he or she by misconduct demonstrate that his or her presence was disruptive of the joint body's proceedings; in that case the appellant could be warned and if, following a warning, the misconduct continued, doubtless the joint body could properly exclude the appellant and admit only his or her counsel. But it was wrong in principle to exclude the staff member from the outset of proceedings.

The Tribunal did not, however, consider that the Board's proceedings had been vitiated by any irregularity that might have arisen from limiting participation at the two meetings to the applicant's counsel. Had the applicant participated in those meetings, she would have been able at best to provide information and opinions concerning her competence in her work. But evaluation of professional competence and efficiency was beyond the competence of the Board pursuant to ICAO General Secretariat Instruction GSI-1.4.7, paragraph 16, which provides that:

> "In the case of a termination or other actions on the grounds of inefficiency or relative efficiency, the Board shall not consider the substantive question of efficiency, but only evidence that the decision had been motivated by prejudice or by some other extraneous factor."

With respect to the applicant's claim that the Advisory Joint Appeals Board had failed to consider relevant evidence, the Tribunal reiterated that the Board was not competent to determine inefficiency or relative efficiency and that its failure to consider evidence related to that issue was not of such a character as to vitiate its proceedings.

For the above reasons, the Tribunal rejected the application.

5. JUDGEMENT NO. 320 (28 OCTOBER 1983): MILLS *v.* THE SECRETARY-GENERAL OF THE UNITED NATIONS[10]

Request for tax reimbursement on a partial lump-sum withdrawal benefit from the United Nations Joint Staff Pension Fund—Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the organizations applying the United Nations Common System of Salaries and Allowances—Question whether the Agreement is a source of rights and obligations for staff members—Characterization of the reimbursement of the taxes imposed upon the lump-sum payment as "terminal expenses"—Situations resulting from transfer to and from the United Nations should not be resolved

in such a way as to create anomalies—Principle of equality of treatment among the staff members of the United Nations

The applicant would have been due for retirement on 31 October 1979 but was, prior to that date, transferred to FAO with an initial assignment until 31 October 1981, which he accepted on the express understanding that his acceptance would not jeopardize his acquired rights under his permanent appointment with the United Nations.

On 31 October 1981, having completed his fixed-term appointment and attained the FAO retirement age of 62, the applicant exercised the option under article 29 (*d*) (i) of the Pension Fund Regulations to commute into a lump sum one third of the actuarial equivalent of his retirement benefit and subsequently received a lump-sum payment of $201,534.50 upon which he was assessed and paid United States income taxes. He then requested reimbursement of that part of the tax attributable to his lump-sum withdrawal benefit which related to his service with the United Nations. His request having been rejected by the Assistant Secretary-General for Personnel Services, he brought the case before the Tribunal.

The crucial question in the Tribunal's view was whether the applicant had lost his entitlement to tax reimbursement owing to the fact that shortly before the date on which he would have attained the mandatory United Nations retirement age he had transferred to FAO, where he had worked under a fixed-term appointment until his retirement.

The respondent based his position on the "principle that a staff member moving from organization to organization within the United Nations common system can only retire once, at which time his terminal and pension entitlements are established under the regulations and rules of the organization from which he separates." The respondent made reference to the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances (CO-ORDINATION/R.931/Add.1), sub-paragraphs 8 (*a*) and (*b*) of which read as follows:

> "(*a*) A staff member who is transferred will cease as from the date of transfer to have any contractual relationship with the releasing organization, which will therefore be under no obligation to re-employ him should he leave the receiving organization.
>
> "(*b*) As from the date of transfer, the entitlements of the staff member will be governed by his contractual relationship with the receiving organization."

The Tribunal, however, observed that the Agreement in question also contained the following provision:

> "1 (*b*) The Agreement . . . does not of itself give the staff member rights which are enforceable against an organization. It merely sets out what the organizations will normally do. The Agreement can only be enforced to the extent that either the organizations have included appropriate provisions in their administrative rules or the parties have accepted to apply it in the individual case."

In the view of the Tribunal, it was evident from this provision that the Agreement was generally not *per se* a source of rights and obligations for staff members, and the respondent's argument that the Agreement did bind the applicant because it was reflected in the terms and conditions of the FAO appointment was unacceptable because the FAO appointment merely mentioned that the case was an "inter-agency transfer" and said nothing about the Agreement. The Tribunal recalled that in its Judgement No. 237 (*Powell*)[11] it had stated that the one-third lump-sum payment might be regarded as a terminal payment, from which it flowed that the reimbursement of the taxes imposed on the lump-sum payment was also a terminal expense. On the question whether the situations resulting from transfers from and to the United Nations must necessarily be resolved in a way creating anomalies, the Tribunal observed that under its paragraph 1 (*b*) the Agreement "merely sets out what the organization will [in case of transfer] normally do". Normally, in the view of the Tribunal, the organizations would not adversely affect legitimate expectations of staff members, particularly of those with long years of service; they would seek to avoid inequities and would not act in a way which would prejudice certain categories of staff and give undeserved advantages to others. Inequities

could be avoided by pro-rating for the purpose of tax reimbursement the lump sums received both by those leaving and by those joining the United Nations.

The Tribunal was not convinced by the argument of the respondent suggesting a measure of illegitimacy in the applicant's effort to have the benefit of extended service in FAO and at the same time maintain his claim for reimbursement of taxes on the lump-sum payment he had expected from the Pension Fund on the basis of his years of service with the United Nations. The Tribunal observed that, as tax reimbursement was regarded as a terminal payment due to the applicant by the United Nations for work done for the Organization during the period of his service, the fact that the applicant has continued working for a different employer could not be considered as either reprehensible or legally depriving him of the fruits of his former work. The Tribunal added that to deny the applicant reimbursement of the national income taxes levied on that portion of the lump sum pension payment which was the fruit of his service to the United Nations would also run counter to the overriding principle of equality of treatment among the staff members of the United Nations.

In the light of the above, the Tribunal rescinded the impugned decision and ordered the Secretary-General to reimburse to the applicant a sum equivalent to the taxes he would have paid on the lump-sum pension benefit to which he would have been entitled had he retired from the United Nations in 1979, and to pay him interest on that sum.[12]

B. Decisions of the Administrative Tribunal of the International Labour Organisation[13]

1. JUDGEMENT NO. 550 (30 MARCH 1983): GLORIOSO *v.* PAN AMERICAN HEALTH ORGANIZATION (WORLD HEALTH ORGANIZATION)[14]

Irreceivability of a claim on account of non-exhaustion of internal means of redress—Decision of the Director of PAHO refusing to consider a complaint as having allegedly been already disposed of by a previous judgement—Quashing of that decision as tainted with a mistake of law—Only exceptional circumstances warrant compensation for distress and moral injury

Further to an appeal by the complainant, the Board of Inquiry and Appeal had recommended repayment to her of such medical costs resulting from her situation in PAHO as could be substantiated by her personal physician and verified by the organization's medical referee. The recommendation had been endorsed by the Director of PAHO in a decision dated 18 June 1980.

The complainant subsequently claimed repayment of medical costs she had allegedly incurred as a result of the way PAHO had treated her. On the recommendation of the PAHO Board of Inquiry and Appeal, the Administration decided to repay some of the above-mentioned costs. The complainant went again to the Board to claim repayment of further costs alleging that its earlier recommendations had not been respected. The Board found that its earlier recommendations were "under implementation" and declared the appeal irreceivable. The conclusions of the Board were endorsed by the Director.

The Tribunal recalled that under article VII of its statute there were two conditions of receivability of a complaint, namely, exhaustion of internal remedies and respect of time-limits. With respect to the first condition, the Tribunal noted that the relevant staff rule precluded an appeal to the Board of Inquiry and Appeal until an authorized official had taken a final decision. It observed that a final decision had been taken by the Administration on a first series of claims but that on subsequent claims the complainant had not sought a final decision. The Tribunal concluded that although she had submitted to the Board of Inquiry and Appeal and to the Director the general question of her medical expenses, the complainant had exhausted the internal means of redress only in respect of the above-mentioned first series of claims, and that her complaint was not receivable in relation to the subsequent claims.

On the merits, the Tribunal noted that, in endorsing the conclusion of the Board that the complainant's claim was *res judicata*, the Director appeared to have relied on Judgement No. 450.[15] The Tribunal, however, observed that that judgement did not dispose of the question of the repayment of medical expenses which PAHO had agreed to bear and therefore did not have the authority of *res judicata* in the matter. In fact, both the Director and the Board were required to take the matter up. The Director's refusal to consider the claim for repayment of medical expenses therefore suffered from a mistake of law. The Tribunal accordingly quashed the impugned decision and ordered the Director to ascertain whether due effect had been given to his decision of 18 June 1980.

Under a second head of claim, the complainant sought the "expungement of all correspondence" about her of which she had not been given a copy. The Tribunal found this claim irreceivable as the internal means of redress had not been exhausted.

The third claim related to damages for distress and moral injury. The Tribunal observed that friction, in greater or lesser degree, was the inevitable adjunct of everyday life and that to award restitution for every sort of emotional distress would be to invite ceaseless litigation. It found that there were in the present case no exceptional circumstances which alone warranted compensation for such distress.

2. JUDGEMENT NO. 551 (30 MARCH 1983): SPANGENBERG *v.* EUROPEAN PATENT ORGANIZATION[16]

Complaint against a decision denying promotion on the basis of rules applicable to staff members of a specific nationality—Principle of equal treatment among officials of an international organization—Admissibility in certain circumstances of departures from this principle aimed at securing a balanced staff

The complainant had been recruited from the German Patent Office to a post in Grade A-3 in October 1979. His application for a post at Grade A-4 was rejected on the ground that he did not meet the seniority requirement applicable to nationals of the Federal Republic of Germany.

The Tribunal noted that the organization, because of the circumstances in which it had been created, had found it necessary, in order to avoid starting off with a staff that was not nationally well balanced, to offer to potential employees who were not nationals of the Federal Republic, for a transitional and limited period a reduction in the minimum number of years of experience required for recruitment and in the seniority requirement for promotion. The Tribunal furthermore noted that the complainant, while agreeing that an organization could offer special benefits to staff recruited abroad, argued that such differential treatment should not apply to promotion.

The Tribunal expressed the following views on the matter:

> "A system which discriminates in the matter of promotion between officials according to their nationality seriously offends against the principle of equal treatment and should as a general rule be forbidden. Although international organizations may determine quotas for recruitment for the purpose of preserving or developing the international character of the staff, officials are normally entitled to objective treatment after they have taken up duty. This is a general rule. If in any particular case it can be shown that a scheme for determining quotas on recruitment would not work satisfactorily unless it was extended in a limited way to subsequent promotion, an exception may be justified.
>
> "In the unusual circumstances of this case, in which it proved necessary to recruit many officials of the same nationality to establish a new secretariat, the Tribunal holds that the Administrative Council was free to lay down for a strictly limited period conditions for promotion which differed according to nationality. When as here the object is to secure a balanced staff and there is no evidence to suggest any abuse of authority by the Administration designed to show favour or cause detriment to particular staff members, the Tribunal holds that its action was not unlawful."

As regards the complainant's argument that the policy of accelerated promotion for staff who were not nationals of the Federal Republic was not introduced until after the date of his contract of employment and should therefore not be able to prejudice him, the Tribunal observed that promotion

was a matter within the discretion of the President and Administrative Council and that the staff member had no right or expectation that the rules or policy applicable at the date of his contract would remain unchanged.

3. JUDGEMENT NO. 566 (20 DECEMBER 1983): BERTE AND BESLIER *v.* EUROPEAN PATENT ORGANIZATION[14]

Salary deductions of staff members on strike—A special rule for calculating deductions cannot be introduced by the organization in breach of staff regulations

The complainant, staff members of EPO, took part in a series of strikes concerning working hours from 12 May to 18 June 1981. By a circular of 20 May 1981, the Chief of Personnel introduced a method of calculating salary deductions for services not rendered which was less favourable to the staff members than the one established under the existing EPO Service Regulations. The rule was applied retroactively to the complainants for salary deductions for the periods during which they were on strike.

The complainants submitted the case to an Appeals Committee, and in January 1982 EPO refunded the difference between the sums withheld and the lesser sums the complainants said it was entitled to withhold. However, it did so *ex gratia* and without payment of interest. Further strikes occurred in September, October and December 1982. The complainants took part and deductions were again made from their salaries in accordance with the circular of 20 May 1981. The Appeals Committee recommended allowing their claims to interest for the period for which each sum had been withheld, but on 15 December 1982, the President of the Office rejected the claims. That and the circular of 20 May 1981 were the decisions they impugned.

The complainants contended that the Chief of Personnel had no authority to issue the circular or to apply it retroactively. Article 65 (1) *b* of the Service Regulations prescribing a method of calculating remuneration payable to staff members for services rendered was, in their view, the only rule applicable to the case. Accordingly, they moved that the Tribunal quash the decision of 15 December 1982, declare unlawful the circular of 20 May 1981 and order payment of the sums and interest wrongly withheld and costs.

The Tribunal held that the strikes were lawful and that a contractual relationship continued to exist between the organization and the staff members on strike; the Service Regulations should therefore apply and article 65 was the rule by which to calculate salary deductions. In the absence of any exceptions provided in article 65, the Tribunal considered that the organization had no legal authority to establish a special rule by a circular.

The Tribunal observed, however, that even where a strike was not an abuse of right an organization would of course be entitled to make special rules on salary deduction different from the rules on absence from duty for other reasons. But such rules must be incorporated into the staff regulations in accordance with the prescribed procedure for the making and approval of rules. The executive head was not competent to adopt such rules, let alone such rules which were retroactive. To accept EPO's submissions would be to allow the imposition of a covert disciplinary sanction. The EPO staff had exercised an acknowledged right and had not committed any misconduct.

For the above reasons, the Tribunal ruled that the impugned decisions were unlawful and must be set aside. The Tribunal ordered that the complainants be paid the sums wrongfully deducted from salary and interest at 10 per cent per year on the sums wrongfully withheld with effect from the date of payment of each corresponding monthly salary up to the date of repayment; and awarded 1,000 guilders to each of the complainants as costs.

4. JUDGEMENT NO. 570 (20 DECEMBER 1983): ANDRÉS, BLANCO AND GARCIA *v.* EUROPEAN SOUTHERN OBSERVATORY (NO. 2)[14]

Application for review of earlier judgements of the Tribunal—The finality of the Tribunal judgements does not preclude the exercise by the Tribunal of a limited power of review provided certain conditions are met

The Organization requested the review of Judgements Nos. 507[16] and 508.[17]

The Tribunal first considered the general question of the nature of its power of review. It held that article VI of its statute providing that the judgements of the Tribunal shall be final and without appeal did not purport that errors arising through accident or inadvertence or the like could ever be corrected, and thus the provision did not preclude the exercise of a limited power of review. The Tribunal noted that cases in which the power of review might be exercised include an omission to take account of particular facts; a material error involving no exercise of judgement and therefore distinguishable from misappraisal of fact which did not warrant review; an omission to pass judgement on a claim; and the discovery of a new fact.

The Tribunal found that the organization failed to show with convincing evidence that its pleas fell into any of the above categories of cases or that the case was exceptional in which insistence upon the principle of finality would be unjust.

The Tribunal further considered an application made by the respondent in their surrejoinder that the compensation ordered by Judgements Nos. 507 and 508 should be paid in United States currency. It upheld the organization's objection to this application on the ground that the application had no place either in response to an application for review or in a surrejoinder.

For the above reasons, the Tribunal decided to dismiss the application for review of Judgements Nos. 507 and 508 and the application that the sums ordered to be paid by the said judgements should be paid in United States currency and to order payment of $500 to each respondent as costs.

5. JUDGEMENT NO. 580 (20 DECEMBER 1983): TEVOEDJRE *v.* INTERNATIONAL LABOUR ORGANISATION AND MR. FRANCIS BLANCHARD[14]

Terms of competence of the Tribunal—Retirement age and the special position of the Director-General of the organization—Scope of the principles of equality

The complainant, a citizen of Benin born in 1929, was a Deputy Director-General in ILO and was presented by his Government as a candidate for the post of Director-General of ILO in the election to be held by the Governing Body of ILO on 1 March 1983. Mr. Blanchard, the incumbent, a French citizen born in 1916, made it known that he would accept a further term as Director-General. The complainant wrote to the offices of the Governing Body to ask that the Tribunal be invited to state whether article 11.3 of the Staff Regulations, which set an official's 65th birthday as the latest date for his retirement, applied to the Director-General. The request was refused. After several representations made by the complainant and the Government of his country to the Governing Body advocating the disqualification of any candidate over the age of 65, and in view of the refusal of the Governing Body to do so, the complainant's Government withdrew his candidacy on 1 March 1983. On the same day, Mr. Blanchard, as sole candidate, was elected for the further five-year term.

The complainant submitted that the decision by the Governing Body not to apply to Mr. Blanchard (the second defendant in the present case) the retirement age of 65 ran counter to the principles of legality and equal treatment. The former required that an authority comply with the rules in force even though it had adopted them itself. The Governing Body was not free to ignore the rule on the retirement age in article 11.3 of the Staff Regulations, which applied *mutatis mutandis* to the Director-General as to any other staff member. That the Director-General was a staff member was clear from articles 0.2 and 2.1 and 2.2 of the Regulations. The application of the rule on retirement age to the Director-General was also required by the principle of equality. The complainant contended that the decision by the Governing Body had caused him injury in that the Government of Benin withdrew his candidacy; by 1989 he would be too old to stand for election, and there was injury to his career. He invited the Tribunal to declare unlawful the admission of the second defendant's candidacy and therefore to quash the Governing Body's decision of 1 March 1983; subsidiarily, to award him token damages of one Swiss franc for moral injury, the Swiss-franc equivalent of $US 200,000 ($US 40,000 a year for five years) for material injury and SwF 30,000 in costs.

ILO challenged the competence of the Tribunal on three grounds: (1) the impugned decision had been taken by the Governing Body; (2) it had been an appointment by a collective body to an elective post, and therefore a policy decision; and (3) its purport had been to appoint the Director-General, who was not a member of the ILO staff.

The Tribunal observed that in accordance with its statute it was competent to hear complaints alleging non-observance of the terms of appointment of officials and of provisions of the Staff Regulations, without reference to who had taken the alleged wrongful decision. Furthermore, the claim that the age limit had not been observed did not involve a matter of policy but rather a matter within the purview of the Tribunal's powers. Besides, if the Director-General was not subject to the rule which the complainant alleged had been broken, the complaint would be dismissed not for lack of the Tribunal's competence but for lack of merit.

On the merits of the case, the Tribunal examined the allegations of the complainant summarized above. As to the question of legality, the Tribunal observed that article 11.3 set the normal age of retirement at 60 and vested in the Director-General the power to extend an appointment up to the age of 65 in particular instances. The rule did not apply to an official appointed for a fixed term to a post other than one approved by the General Conference or the Governing Body. Furthermore, in empowering the Director-General to keep some officials up to the age of 65, the rule implied that his subordinates might not stay on after reaching that age, but it did not make the Director-General himself subject to the rule. It did not vest in the Governing Body in regard to the Director-General the power which the Director-General had in regard to his subordinates. As to the Director-General, the question of age limit had been left open.

Concerning the question of the principle of equal treatment, the Tribunal observed that that principle did not mean that the same rules might be uniformly applied to everyone. What it meant was that like facts required like treatment in law but different facts allowed of different treatment. The impugned decision was compatible with the principle as so stated. The Director-General's place in the organization was beyond comparison. Because of his unique status and position of pre-eminence, the Governing Body was at liberty to set no age limit and in so deciding was not in breach of the principle of equality.

For the above reasons, the Tribunal dismissed the complaint.

6. JUDGEMENT NO. 595 (20 DECEMBER 1983): BENYOUSSEF *v.* WORLD HEALTH ORGANIZATION[18]

Complaint directed at a decision terminating a fixed-term appointment for reasons of health—A complainant cannot alter the substance of his original claim after filing his complaint—In case of termination, the period of notice should begin on the date of notification of the termination decision—The finding of fact serving as a basis for the decision may however be made at a date prior to that of the decision

The complainant impugned a decision terminating his fixed-term appointment under staff rule 1030 for reasons of health.

The Tribunal considered the main question in the case to be whether the conditions set in staff rule 1030.2 for termination for reasons of health had been fulfilled. It recalled that staff rule 1030.2.1 set forth the first of those conditions as follows: "The medical condition must be assessed as of long duration or likely to recur frequently." The Tribunal noted that the complainant had expressly declined to allow disclosure to the Tribunal of the medical files in the hands of the WHO staff physician, a position which, the Tribunal observed, he was entitled to take, inasmuch as only the patient could release his doctor from professional secrecy. The Tribunal also noted that at a subsequent stage the complainant's counsel had indicated that his client agreed to waive professional secrecy. In this connection, the Tribunal recalled that the purpose of the procedural rules it applied was to enable the parties not only to submit the full pleadings but also to hold an exchange of briefs in which they enjoyed complete freedom of speech. It pointed out that, while the existence of rules of this liberal kind was necessary if justice was to function properly, the parties must not be allowed to delay the judgement by resorting to dilatory action, this being one reason why a complainant could not alter the substance of his original claim after filing his complaint. The Tribunal recalled that as a rule it allowed each side to file no more than two briefs and that only in exceptional cases did it admit further material. It pointed out that the complainant had consistently declined throughout the written proceedings to allow discovery of his medical file and could therefore not at a late stage be allowed to alter the basis of his case.

Proceeding on the basis of the complainant's refusal to allow discovery of his medical file, which precluded study of the report of the WHO physician and of the reasons for his diagnosis, the Tribunal noted that in support of his claim that his illness was only temporary the complainant indicated that he had carried out research and missions since leaving WHO. The Tribunal held that that did not necessarily mean that one condition set forth in staff rule 1030.2 had not been fulfilled. As for the medical certificates produced by the complainant, the Tribunal observed that they had no value as evidence since the complainant had refused to let the WHO physician state his opinion, thereby destroying the parity which should exist between the parties, and which the Tribunal could only restore by discounting the medical certificates.

On the complainant's request for an expert inquiry, the Tribunal stressed that it was never bound to order such an inquiry and would do so only when necessary to ascertain the truth. The Tribunal stated that such a step did not appear to be necessary in the present instance, adding that its stand in the matter was no more than the consequence in law of the fact of the complainant's refusal to allow disclosure of the medical file. The Tribunal concluded from the foregoing that the complainant should be deemed incapable for reasons of health of performing his former duties in WHO.

With respect to the second condition for termination for reasons of health which was set forth in staff rule 1030.2.2 in the following terms: "reassignment possibilities shall be explored and an offer made if this is feasible," the Tribunal observed that the evidence did not reveal whether WHO had complied with this requirement, and that if WHO had failed to comply with the above rule, then the complainant would be right to contend that the impugned decision was in breach of staff rule 1030.2.2. The Tribunal, however, noted that the reason why the point remained obscure was that the complainant would not allow the Tribunal access to the whole file. It also remarked that this plea was not included in the complainant's internal appeal and that, in any case, there was no formal defect. The Tribunal therefore rejected the claim on its merits.

The complainant further contended that the impugned decision was unlawful because it was retroactive in effect. The Tribunal noted that staff rule 1030.3.1 provided that a staff member whose appointment was terminated for reasons of health "shall be given three months' notice", and staff rule 1030.4 stipulated that he should receive a termination payment. The Tribunal held that, while the complainant had not, in his internal appeal seeking the quashing of the termination, pleaded breach of staff rule 1030.3, he was not precluded from doing so for the first time before the Tribunal, inasmuch as his plea fell within scope of the claim he had submitted to WHO and was therefore not in breach of staff rule 1240.2.

On the substance of the plea, the Tribunal found that the complainant had received the letter of termination of 9 June 1981 and that the period of notice should have begun on that date, with the termination grant and other benefits being calculated and paid accordingly. It held that any other conclusion would offend against the rule that a decision must not be retroactive in effect, adding that no organization might retroactively alter at will the position of staff and that, furthermore, the effect of WHO's arrangement might be to do away with one of the benefits prescribed in staff rule 1030.3. The Tribunal thus concluded that the impugned decision should be set aside on that point and that WHO should review the complainant's administrative position.

The Tribunal held, however, that the complainant could not plead the rule against retroactivity in support of his contention that WHO was wrong to take 2 April 1981 as the material date for determining his medical condition. It observed that the rule did not preclude making the finding of fact at a date prior to that of the decision and that once it was correctly decided that the complainant's medical condition came within staff rule 1030.2.1 it was irrelevant that the Board took 2 April as the material date. To hold any other view, the Tribunal remarked, would obviously make it impossible to terminate an appointment for reasons of health.

In the light of the foregoing, the Tribunal quashed the impugned decision in so far as it was in breach of staff rules 1030.3.1 and 1030.3.4, and the complainant was referred back to WHO for the correction of his administrative position prior to termination. The Tribunal also decided that the sums payable to the complainant should bear interest at 10 per cent a year from the date on which they were due and awarded him 2,000 Swiss francs as costs. The remaining claims were dismissed.

---

[1] In view of the large number of judgements which were rendered in 1983 by Administrative Tribunals of the United Nations and related intergovernmental organizations, only those judgements which are of general interest have been summarized in the present edition of the *Yearbook*. For the integral text of the complete series of judgements rendered by the three Tribunals, namely Judgements Nos. 301 to 320 of the United Nations Administrative Tribunal, Judgements Nos. 543 to 595 of the Administrative Tribunal of the International Labour Organisation and Judgements Nos. 13 and 14 of the World Bank Administrative Tribunal, see, respectively: documents AT/DEC/301 to 320; *Judgements of the Administrative Tribunal of the International Labour Organisation:* 50th Ordinary Session and *ibid.*, 51st Ordinary Session; and *World Bank Administrative Tribunal Reports*, 1983, part II.

[2] 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 1983, 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: ICAO and IMO. In addition, agreements limited to applications alleging non-observance of the Regulations of the United Nations Joint Staff Pension Fund had been concluded with ILO, FAO, UNESCO, WHO, ITU, ICAO, WMO and IAEA.

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.

[3] Mr. Samar Sen, Vice-President, presiding; Mr. Herbert Reis and Mr. Roger Pinto, Members.

[4] Mr. Endre Ustor, President; Mr. Samar Sen, Vice-President; Mr. Roger Pinto, Member; and Mr. T. Mutuale, Alternate Member.

[5] Mr. Arnold Kean, Vice-President, presiding; Mr. Luis de Posadas Montero and Mr. Roger Pinto, Members.

[6] For the text of the judgement, see *Judgements of the United Nations Administrative Tribunal*, Numbers 231 to 300, 1978-1982 (United Nations Publications, Sales No. E.83.X.1).

[7] Mr. Samar Sen, Vice-President, presiding; Mr. Herbert Reis and Mr. Roger Pinto, Members.

[8] For a text of the judgement, see *Judgements of the United Nations Administrative Tribunal*, Numbers 231 to 300, 1978-1982 (United Nations Publication, Sales No. E.83.X.1).

[9] For a summary of the judgement, see *Juridical Yearbook, 1981*, p. 112.

[10] Mr. Endre Ustor, President; Mr. Luis de Posadas Montero and Mr. Roger Pinto, Members.

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

[12] In a dissenting opinion, one Member of the Tribunal expressed the view that the applicant, having retired as a staff member of FAO, was only entitled at the time of his retirement to the rights and benefits due to the staff members of that organization and could not claim a benefit which was only due to those who retired as staff members of the United Nations. He stressed that the applicant was eligible for the benefit he claimed neither at the time when he left the service of the United Nations nor at the time of retirement. He furthermore observed that the Tribunal could have based its judgement on the fact of the existence of an undeniable responsibility on the part of the United Nations for not having duly and timely informed the applicant as to what his entitlements in his new post would be, thus failing to comply with paragraph 1 (*c*) of the Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations applying the United Nations Common System of Salaries and Allowances.

[13] 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 1983, 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 European Patent Organization, 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, the World Tourism Organization, the African Training and Research Centre in Administration

for Development, the Central Office for International Railway Transport and the International Center for the Registration of Serials. 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 for 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.

[14] Mr. André Grisel, President; Mr. Jacques Ducoux, Vice-President; and Lord Devlin, Judge.

[15] For a summary of the judgement, see *Juridical Yearbook, 1981*, p. 127.

[16] For a summary of the judgement, see *Juridical Yearbook, 1982*, p. 149.

[17] For a text of the judgement, see *Judgements of the Administrative Tribunal of the International Labour Organisation:* 48th Ordinary Session.

[18] Mr. André Grisel, President; Mr. Jacques Ducoux, Vice-President; and Sir William Douglas, Deputy Judge.