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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

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. 343 (3 JUNE 1985): TALWAR V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[3]

Extension of appointment beyond retirement age—Staff regulation 9.5 and General Assembly resolution 33/143—Precedents cannot be established through the exercise of discretionary and exceptional powers

The Applicant, a former UNICEF staff member, had claimed the right to be retained in the service of UNICEF beyond the age of 60, relying on a memorandum in which his supervisor recommended such extension and on the fact that other such extensions had been granted to UNICEF staff members. He also asserted that he needed the extension for certain humanitarian reasons.

The Tribunal did not contest the merits shown in the Applicant's record or the humanitarian factors that might exist in his case but stated that it was bound to point out that those reasons were irrelevant as far as extensions beyond the 60-year age limit were concerned. It observed that extensions beyond the age of 60 were governed by staff regulation 9.5 which provided that: "Staff members shall not be retained in active service beyond the age of sixty years. The Secretary-General may, in the interest of the Organization, extend this age limit in exceptional cases."

In the opinion of the Tribunal, such "exceptional cases" had been defined by the General Assembly in section II, paragraph 3, of its resolution 33/143 of 20 December 1978 as those in which a suitable replacement for the retiring staff member had not been found, a process which should not normally go beyond six months.

The Tribunal stated that in the Applicant's case suitable replacements had easily been available and, as a consequence, there appeared to be no need for an extension, in spite of the Applicant's excellent record and of the humanitarian reasons that might have been argued in his favour.

The Tribunal could not concur with the Applicant's view that the granting of extensions beyond the 60-year age limit to some other staff members had created an expectancy in connection with his own situation, so that any decision in his respect that would differ from those taken in the cases in which extensions were granted would imply discriminatory treatment against him. The Tribunal was of the opinion that extensions beyond retirement age were subject to decisions of an exceptional nature to be taken by the Secretary-General or his representatives, according to their discretion, and as a general rule no exceptional and discretionary decision could create an expectancy. Furthermore, no proof had been provided by the Applicant to substantiate his claim that the decision to put an end to his service at the regular age of 60 had been due to discriminatory reasons.

The Tribunal held that since under staff regulation 9.5 extensions were only to be granted exceptionally according to the Secretary-General's discretion and within the limits of the decision of the General Assembly, no staff member could normally claim the existence of precedents that could create an expectancy as to his or her continuation in service beyond the normal age limit.

For the above reasons, all the Applicant's pleas were rejected.

2. JUDGEMENT NO. 348 (14 JUNE 1985): LUQMAN V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[4]

Correction of personnel data regarding status—Staff rule 104.4 (a)—Lack of any definite rules

or guidelines concerning correction of such data—The Applicant waited too long before requesting the correction

The Applicant, a former member of UNIDO, had requested recognition of a new date of birth, with concomitant correction of his administrative records.

The Tribunal observed that there did not seem to be any definite rules or guidelines concerning the correction of basic data such as date of birth which staff members provided for recruitment and personnel purposes. The Tribunal noted, however, that under staff rule 104.4 (*a*) it was the duty of staff members to supply such information on appointment and that duty imposed on staff members the obligation and the responsibility to make every effort to ensure that the information was correct.

The Tribunal observed that the Applicant had provided information about his date of birth in 1967 and it was on 21 October 1980 that he had sent to the Administration the memorandum transmitting a copy of the "excerpt of transcript of judgement in lieu of birth certificate" dated 7 February 1980 and requesting a correction of his date of birth. The Tribunal considered that the Applicant had waited too many years before requesting the correction and failed also to give, in his defence, any reason or justification for such a long delay.

For the above reasons, the Tribunal considered as being without merit the Applicant's request for correction of the date used in his administrative records.

3. JUDGEMENT NO. 360 (8 NOVEMBER 1985): TAYLOR V. UNITED NATIONS JOINT STAFF PENSION BOARD[5]

Restoration of prior contributory service—General Assembly resolutions 37/131 and 38/233—Article 21 (b*) of the Regulations of the United Nations Joint Staff Pension Fund*

The Applicant, a staff member of FAO whose fixed-term appointment had expired in 1982 and had been renewed after an interval of 16 months in 1983, appealed against the refusal of the Joint Staff Pension Board to allow him to restore his former period of contributory service. During the interval in which he was not a Pension Fund participant, the Regulations of the United Nations Joint Staff Pension Fund had been amended by General Assembly resolution 37/131 of 17 December 1982 in such manner as to prevent restoration of the Applicant's prior contributory service, in view of the length of such service.

The Tribunal, in its majority judgement, considered that the Applicant's period of contributory service, prior to the amendment of the Pension Fund Regulations, had earned him a legal right to restoration of that period, which had not been eliminated by that and a subsequent amendment made by resolution 38/233 of 20 December 1983, since they specifically provided that the amendments were to be without retroactive effect.

The Tribunal concluded that the Applicant's conditional right to restoration of his prior contributions, as it existed on 31 March 1982, had been preserved by the terms of the relevant amending resolutions of the General Assembly.

For the above reasons, the Tribunal ordered the Respondent to rescind the decision denying the Applicant's request for restoration of his prior contributory service and, at the appropriate time, to calculate his benefits accordingly.[6]

B. Decisions of the Administrative Tribunal of the International Labour Organisation[7]

1. JUDGEMENT NO. 666 (19 JUNE 1985): CHOMENTOWSKI V. EUROPEAN PATENT ORGANIZATION[8]

Educational allowances paid under article 10 (3) of the Agreement on the integration of the International Patent Institute and the European Patent Organization—Concept of acquired rights to educational allowances—No one is entitled to payment of an allowance which was wrongly paid to others

The three complainants, former employees of the International Patent Institute at The Hague, were transferred to the European Patent Organization (EPO) on 1 January 1978 in keeping with the agreement on the integration of the two organizations ("the Transfer Agreement"). Under article 10 (3) of the Transfer Agreement they were paid education allowances for their children as prescribed in article 47 of the Institute Staff Regulations and the implementing rules. They moved to Munich and enrolled their children at the European School there. Two of them continued to receive the Institute education allowances. On 19 July the Principal Director of Personnel wrote to them that there had been a mistake since the third paragraph of article 10 (3) meant that the Institute allowances were due only to the extent that the organization did not offset the actual costs borne, and not covered by EPO education allowance, by means of subsidies to the schools attended. Since EPO wholly financed the European School, the allowances would cease in July 1982 but the sums wrongly paid would not be refundable, and supplements to the expatriation allowance would be due under article 72 (6) of the EPO Service Regulations.

The complainants lodged an appeal against the decision of 19 July. They contended that the second paragraph of article 10 (3) of the Transfer Agreement preserved their acquired right to payment of the lump-sum education allowance they had been paid at the Institute. In their view some expenses which were not covered by the EPO allowance could never be "offset" by EPO financing of the European School. So long as such expenses were not repaid by EPO the acquired right subsisted, and the expenses must continue to be repaid by means of the Institute allowance in accordance with article 10 (3). The supplement to the EPO expatriation allowance was smaller than the Institute education allowance, the right to which had in any event a sounder legal basis. In addition, one of the complainants who had not received the education allowance requested retroactive payment, alleging that he had been discriminated against.

The Tribunal held that the complainants would be entitled to payment of the education allowance under the first and second paragraphs of article 10 (3) only if EPO's subsidizing of the School failed to offset the actual costs borne and not covered by the education allowance provided for in the EPO Service Regulations by means of subsidies to the schools attended by the children of transferred officials.

The Tribunal stated that EPO's application of article 10 and the Service Regulations did not constitute breach of any acquired right of the complainants. An allowance might form an essential part of the official's contract in that he considered it to be of decisive importance when he accepted employment and its abolition would therefore constitute breach of his acquired right, but he had no acquired right to the actual amount of the allowance or to continuance of any particular method of reckoning it. Thus the Tribunal concluded that there had been no breach of acquired rights.

Moreover, the Tribunal indicated that no one might plead breach of the principle of equality on the ground that he had not received a benefit unlawfully conferred on others.

For the above reasons, the Tribunal dismissed the complaints.

2. JUDGEMENT NO. 675 (19 JUNE 1985): PEREZ DEL CASTILLO V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS[9]

Non-renewal of a staff member's contract—Question whether the staff member is entitled to know the reason for the non-renewal of his contract—The rule that the non-renewal of a staff member's contract must be the subject of a reasoned decision is an implication of principle of law

The Complainant had joined FAO in 1969 under a fixed-term appointment, which had been successively extended. In July 1980 he was seconded for two years to UNDP. In May 1982, without giving the Complainant any explanation, FAO notified him that it had decided to extend neither his appointment nor his secondment.

The Complainant claimed compensation for his loss of expectation of employment and alleged that the failure to provide a reason for the non-renewal constituted an abuse of authority.

The Tribunal stated that the rule that the non-renewal of a staff member's contract was not automatic but must be the subject of a reasoned decision did not depend upon the Staff Regulations but was rather an implication of principle of law.

The Tribunal also noted that the staff member was entitled to know the reason for the non-renewal of his contract since it was only with that knowledge that, when he was seeking other employment, he could answer the inquiries of prospective employers.

The Tribunal concluded that the impugned decision was wrongly motivated and an abuse of power and held in the circumstances that the Complainant had sustained especially grave moral injury and that he was entitled to damages.

For the above reasons, the Tribunal awarded him the sum of US$ 15,000 as compensation.

3. JUDGEMENT NO. 701 (14 NOVEMBER 1985): BUSTOS V. PAN AMERICAN HEALTH ORGANIZATION (WORLD HEALTH ORGANIZATION)[10]

Termination of a short-term contract—Question whether Complainant's duties corresponded to the nature of his contract—Intention of the parties is to be ascertained in order to determine their true legal relationship

The Complainant had been employed since 1970 under short-term contracts in the Latin American Centre for Perinatology, affiliated to PAHO. His original contract had been regularly succeeded by further contracts. On 23 December 1982 he was informed that his contract would terminate on 31 December, and he left the organization on the latter date.

The Complainant maintained that because his duties were of a continuing nature since he worked under long-term programmes, at the time of dismissal he had been under a contract of indeterminate duration with PAHO for nearly 12 years. Accordingly he contended that the rules on staff reduction, notice and compensation for abolition of post—rules 940, 950 and 1050 respectively—ought to have been applied.

The Tribunal noted that the main issue in the case was whether the relationship between the parties had truly been expressed by a series of separate contracts for fixed periods or whether it could be properly expressed only by a single contract for an indefinite period.

From all the evidence in the dossier the Tribunal concluded that the work done for PAHO by the Complainant over more than 11 years had constituted a continuous whole and that its division into contractual periods on a short-term consultant basis had been fictitious. The mutual intention had been that the Complainant should be employed for as long as his services were required and he had been willing to give them. To an agreement of such a character the law added the term that reasonable notice of termination must be given. PAHO had broken that term and, since in the circumstances of the case reinstatement was inadvisable, the Tribunal assessed the appropriate compensation.

The Tribunal noted that the case was of a very exceptional, if not unique, character since it looked behind the documents to ascertain the intention of the parties. The Tribunal indicated at the same time that its decision did not affect short-term appointments in general.

For the above reasons, the Tribunal ordered the organization to pay to the Complainant the sum of US$ 17,500 as compensation.

C. Decisions of the World Bank Administrative Tribunal[11]

1. DECISION NO. 23 (22 MARCH 1985): EINTHOVEN V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT[12]

Applicant's claim that his assignment was not in accordance with the Bank policy regarding the reassignment of the Operations Evaluation Department staff—Personnel Manual statement 4.04—Competence of the Tribunal under article II (1) of its statute is limited to non-observance of the contract of employment or terms of appointment

The Applicant, a senior evaluation officer in the Operations Evaluation Department (OED), after being assigned to the Western Africa region challenged in his complaint both the Respondent's general policy regarding reassignment of OED staff as articulated in Personnel Manual statement (PMS)

4.04 and the relevant Personnel Manual circulars and the application of that policy to his particular case.

The Tribunal observed that as to both the policy and its application it had in accordance with article II (1) of the statute the authority to examine only whether there had been "non-observance of the contract of employment or terms of appointment" of the Applicant. So long as the Bank's resolution and policy formulation was not arbitrary, discriminatory, improperly motivated or reached without fair procedure, there was no violation of the contract of employment or of the terms of appointment of the staff member. The Tribunal concluded that the Respondent's decision to utilize normal reassignment channels for staff members being transferred into and out of OED had been not such a violation.

As to the Applicant's plea that his assignment to a position and to a geographic region that could provide him with no job satisfaction had been a form of "censure", imposed upon him as a result of his adverse comments in earlier OED audits, the Tribunal noted there was no evidence at all to support his claim. The failure to reassign a staff member to a fully satisfying post could not by virtue of that fact alone be interpreted as a covert form of censure or reprisal. PMS 4.04 and the relevant Personnel Manual circulars, as well as direct statements to the Applicant by Bank superiors, made it clear that staff members would have their preferences considered but could not always expect to have them honoured. When Bank interests dictated reassignment elsewhere, those interests would prevail. The Tribunal concluded that such a policy, which fell within the discretion of the Respondent, had been fairly applied in the case.

The Tribunal concluded that the Respondent's actions were not only in conformity with those policies and procedures but also that they were not arbitrary, improperly motivated or carried out in violation of a fair and reasonable procedure.

For the above reasons, the Tribunal rejected the application.

2. DECISION NO. 26 (4 SEPTEMBER 1985): MENDARO V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT[13]

Inadmissibility of the Applicant's complaint under articles II and XVII of the statute of the Tribunal—Non-parties' communications seeking to influence the outcome of a case pending before the Tribunal considered by the Tribunal as an improper and unacceptable attempt to interfere with the mission of the Tribunal

The Applicant claimed that her application was admissible under article II of the statute of the Tribunal because she reasonably believed that the United States courts had been the appropriate forum for her complaint until 27 September 1983, when the United States Court of Appeals for the District of Columbia Circuit had rendered its decision. She pointed out that under article XVII of the statute there were exceptional circumstances which permitted the filing of the application after the time-limit mentioned in that article and that, in fact, the application had been filed within 90 days of receiving notice from the United States Court of Appeals that the Tribunal was the appropriate forum.

The Tribunal stated that it could not pass judgement upon the merit of the Applicant's claim because her application had not been filed in time and was therefore not admissible under the Tribunal's statute. The Tribunal indicated that its statute had two provisions governing the time within which an application must be filed, namely articles II and XVII. The Tribunal observed that the application in question did not fall within article II because the events which the Applicant alleged to have given rise to her claim had occurred after the entry into force of the statute, on 1 July 1980. The Applicant, however, attempted to bring her case within that article by invoking the decision of the United States Court of Appeals of 27 September 1983, and the fact that she had filed her application with the Tribunal within 90 days thereafter. The Tribunal noted that the decision of the Court of Appeals could not be regarded as "the occurrence of the event giving rise to the application" mentioned in paragraph 2 (ii) (*a*) of article II, since that language clearly referred to action adverse to a staff member that was taken by the Respondent. Nor could that court's decision be regarded as representing an exhaustion of the remedies available within the Bank Group mentioned in paragraph 2 (ii) (*b*) of the same article. The Tribunal held that because all of the pertinent events giving rise to the application had taken place prior to 1 July 1980 the application, in order to be timely, must fall within the conditions set forth in

article XVII, which required that the cause of complaint must have arisen subsequent to 1 January 1979, and that the application must have been "filed within 90 days after the entry into force of the present statute", that is, by 29 September 1980. As an exception to the general principle laid down in article II, which "reflected a desire to bring cases to the Tribunal without delay", article XVII could not be construed so as "to render the time-limits to the statute almost ineffective (*Novak* case).[14]

The Tribunal noted that in the case in question the Respondent had expressly notified the Applicant that the Tribunal had been created and that it was, beginning in July 1980, an available forum—and indeed the exclusive forum—to hear her claims of violation of the legal rights of a staff member. That the Applicant had none the less decided not to file her application by the 29 September 1980 deadline fixed in the statute was the result of a conscious choice on her part and could in no way be attributed to exceptional circumstances. In any event, doubts regarding the outcome of proceedings before a judicial body—whether jurisdictional or relating to the merits—could not reasonably be regarded as warrant to ignore the pertinent statutory time-limits; rather, those doubts were properly to be submitted in a timely manner for decision by that body. Otherwise, all statutory time-limits would be rendered meaningless.

With reference to letters to the Tribunal and/or the President of the World Bank supporting the Applicant's efforts for a fair and open hearing on the merits of her case which the Applicant had incorporated as annexes to her pleadings, the Tribunal observed that for non-parties to address to the Tribunal or to the President of the World Bank communications seeking to influence the outcome of a case pending before the Tribunal was an improper and unacceptable attempt to interfere with the mission of the Tribunal.

For the above reasons, the Tribunal decided that the application was inadmissible.

NOTES

[1]In view of the large number of judgements which were rendered in 1985 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. 342 to 360 of the United Nations Administrative Tribunal, Judgements Nos. 647 to 720 of the Administrative Tribunal of the International Labour Organisation and Decisions Nos. 18 to 27 of the World Bank Administrative Tribunal, see, respectively: documents AT/DEC/342 to 360; *Judgements of the Administrative Tribunal of the International Labour Organisation:* 55th, 56th and 57th Ordinary Sessions; and *World Bank Administrative Tribunal Reports*, 1985.

[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 1985, 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 provisions, 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 Fuind 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. T. Mutuale, President; Mr. Herbert Reis and Mr. Luis M. de Posadas Montero, Members.

[4]Mr. T. Mutuale, President; Mr. Samar Sen, Vice-President; and Mr. Luis M. de Posadas Montero, Member.

[5]Mr. Arnold Kean, Vice-President, presiding; and Mr. Endre Ustor and Mr. Roger Pinto, Members.

[6]In his separate opinion one Member of the Tribunal held that the Applicant had satisfied the requirements of article 21 (*b*) of the Pension Fund Regulations as his return to participation in the Fund had occurred within 12 months (taking into consideration intervening periods of employment with FAO under consultancy contracts) and he had not received a benefit within the meaning of that article.

[7]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 December 1985, 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 Organisation 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.

[8]Mr. André Grisel, President; Mr. Jacques Ducoux, Vice-President; and Mr. Héctor Gros Espiell, Deputy Judge.

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

[10]Mr. André Grisel, President; Lord Devlin, Judge; and Sir William Douglas, Deputy Judge.

[11]The World Bank Administrative Tribunal is competent to hear and pass judgement upon any applications alleging non-observance of the contract of employment or terms of appointment, including all pertinent regulations and rules in force at the time of the alleged non-observance, of members of the staff of the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation (referred to collectively in the statute of the Tribunal as the "Bank Group").

The Tribunal is open to any current or former member of the staff of the Bank Group, any person who is entitled to claim upon a right of a member of the staff as a personal representative or by reason of the staff member's death and any person designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan.

[12]Mr. E. Jiménez de Aréchaga, President; Mr. A. K. Abul-Magd and Mr. P. Weil, Vice-Presidents; and Mr. R. A. Gorman, Mr. N. Kumarayya and Mr. C. D. Onyeama, Judges.

[13]Mr. E. Jiménez de Aréchaga, President; Mr. A. K. Abul-Magd and Mr. P. Weil, Vice-Presidents; and Mr. R. A. Gorman, Mr. N. Kumarayya, Mr. E. Lauterpacht and Mr. C. D. Onyeama, Judges.

[14]*World Bank Administrative Tribunal Reports*, 1982, decision No. 8, para. 17.