Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

1988

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 United Nations Administrative Tribunal[2]

1. JUDGEMENT NO. 409 (11 MAY 1988): TRENNER V. THE SECRETARY-GENERAL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION[3]

Personal upgrading is within discretion of the Secretary-General — Any faults in the procedure leading to the decision not to reclassify post are irrelevant to the refusal to grant a personal upgrading — Tribunal cannot substitute its judgement for that of the Secretary-General in the reclassification of posts

The Applicant, who had worked with the International Civil Aviation Organization (ICAO) in the past, was offered a job at the ICAO Regional Office in Paris as a Language Officer, at the P-3, Step V, level, but did not accept it. Upon further consideration, bearing in mind the Applicant's experience, the Secretary-General amended the initial offer changing the entry level to P-3, Step X, which the Applicant accepted, and she re-entered the service of ICAO on 26 August 1985.

In December 1985, the P-3 post encumbered by a Russian Language officer, who worked in the European Regional Office, with responsibilities similar to the Applicant's, was upgraded to P-4. Subsequently, on 18 December 1985, the Applicant was recommended for promotion to P-4, and on 24 January 1986, the Applicant submitted a request for reclassification of her post to the P-4 level. On 28 April 1986, the Establishment Officer confirmed to the Secretary-General that her position had been graded correctly at the P-3 level in accordance with the standards set forth by the International Civil Service Commission for the common system. The Applicant was informed verbally on 13 May 1986 of this decision.

On 12 June 1986, the Applicant requested a personal upgrading to P-4, which was also rejected. She appealed this decision.

The Tribunal noted that a personal upgrading was a matter wholly within the discretion of the Secretary-General, the exercise of which could not be interfered with by the Tribunal in the absence of mistake of law or fact on his part, omission to consider essential facts, or consideration of extraneous matters.

The Tribunal observed that the Applicant had attempted to link her present claim with alleged faults in the procedure leading to the decision not to reclassify her post, but any such faults would not be relevant to the Secretary-General's decision to refuse personal upgrading. The Tribunal, however, stated that even if the present appeal had been against refusal to reclassify the Applicant's post, it was not the function of the Tribunal to substitute its judgement for that of the

Secretary-General in job classification matters, even if the Tribunal had acquired expertise in that area. Instead, the function of the Tribunal would have been to determine whether the Respondent had acted within his "reasonable discretion". (See Judgement No. 396, *Waldegrave* (1987), paragraph XV.) The Tribunal further noted that the Applicant's post had been re-evaluated by two independent experts from the ICSC who confirmed the P-3 level classification. Presumably, the Applicant would bring her concerns to the attention of the appropriate review body.

For the foregoing reasons, all pleas of the Applicant were rejected.

2. JUDGEMENT NO. 410 (17 MAY 1988): NOLL-WAGENFELD V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[4]

Recovery of overpayment in respect of dependency benefits — Staff rule 104.10(d) — Rule-making authority invested in the Secretary-General — No retroactive effect of staff rules — Question of interpretation of staff rule — Incumbent on staff member to request an authoritative determination of eligibility for benefits since her interpretation of staff rule differed from the Administration's — Higher standard of conduct for staff members who are attorneys — Effect of negligence on part of the Administration

The Applicant appealed the decision to recover overpayments of dependency benefits she had received in respect of her twins. The Respondent had contended that the Applicant was not eligible for dependency benefits because her husband, who worked for the International Telecommunication Union (ITU), a United Nations specialized agency, was receiving dependency benefits in respect of their first child, and only one spouse could receive such benefits under the Staff Regulations and Rules.

The Tribunal pointed out that the central substantive question turned on the applicability and meaning of the United Nations staff rule 104.10(d) which provided that:

> "The marriage of one staff member to another shall not affect the contractual status of either spouse but their entitlements and other benefits shall be modified as provided in the relevant Staff Regulations and Rules. The same modifications shall apply in the case of a staff member whose spouse is a staff member of another organization participating in the United Nations common system …"

The Applicant had raised the question as to whether the rule could have validly imposed anything on any other organization such as the ITU, or the latter's staff members. However, the Tribunal considered that the ITU and the United Nations participate in the United Nations common system. Furthermore, staff rule 104.10(d) had been authorized by General Assembly legislative action as a valid exercise of the Secretary-General's authority, and was consistent with the broad principles of personnel policy, one of which disfavoured duplication of benefits and inequality as between staff members regarding dependency benefits. Moreover, it was not for the Tribunal to impose artificial restrictions on the rule-making authority invested in the Secretary-General by the General As-

sembly in this regard. The Tribunal, therefore, rejected the Applicant's notion that before the Secretary-General could properly adopt staff rule 104.10(d), it was necessary for the General Assembly to have included in the Staff Regulations a specific principle relating to the effect of marriage between United Nations staff members and staff members of other organizations in the common system.

The Tribunal also rejected the Applicant's contention that staff rule 104.10(d) would not apply to her because her marriage occurred prior to 1 January 1980, the effective date of the provision in question. However, the Tribunal disagreed, finding no evidence of any intention by the Secretary-General to create a privileged group of staff members entitled to continuation of duplicate dependency benefits because of the happenstance that their marriage occurred before 1 January 1980. Moreover, in the Applicant's situation, the duplicate benefits payments which she sought to perpetuate were directly occasioned, not by her marriage, but by the birth of her twins in late 1981. There was no improper retroactive application of the staff rule.

The Applicant also raised questions of the interpretation of staff rule 104.10(d). However, the Tribunal disagreed with the Applicant's interpretation of the words "some modifications," preferring the plain meaning and intention of the staff rule. Moreover, the Tribunal stated that if there were even the slightest question as to how the Administration interpreted staff rule 104.10(d), it was dispelled by administrative instruction ST/AI/273, which clearly and unequivocally placed the Applicant on notice that her view regarding entitlement to dependency benefits was not shared by the Administration.

In the Tribunal's view, in all circumstances of this case, the Applicant could not have been unaware that she was not entitled to dependency benefits and that it was inappropriate for her to claim them before having requested from the Administration an authoritative written determination, upon which she could have appealed if unfavourable. There was no valid reason for the Applicant to have had the free use of United Nations funds prior to such a determination. Equally inappropriate was the Applicant's apparent theory that if there were some impropriety in her seeking and obtaining benefits, it was up to the Administration to discover this and notify her. (Cf. Judgement No. 346, *Chojnacka* (1985).) The Organization was entitled to a higher standard of conduct from the staff, particularly attorneys.

The Applicant also advanced a number of procedural arguments. The Tribunal noted preliminarily that when, as here, a staff member had received funds from the Organization to which the staff member was not entitled because of a staff rule such as 104.10(d), and had done so on the basis of her own interpretation of the rule, which was in conflict with an official interpretation of the Administration, the right of the Organization to recover overpayments under staff rule 103.18 would not be defeated by purely technical procedural arguments in the absence of a compelling showing of substantial prejudice resulting from the alleged procedural deficiency. The Tribunal did take note of the negligence on the part of the Administration, describing it as reaching "an astonishing level," but stated that this negligence did not absolve the Applicant of responsibility. The Administration could recover the overpayments paid to the Applicant.

3. JUDGEMENT NO 415 (24 MAY 1988): MIZUNO V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[5]

Non-renewal of fixed-term appointment because of refusal to accept a field posting — Competency of Joint Appeals Board — Question of discrimination — Due process rights of staff member must be fully protected even when he is annoying and suspected of dissimulation and lack of candour — Question of reasonable expectation of continuous employment — Requirement of a formal warning

In 1983, the United Nations High Commissioner for Refugees (UNHCR) announced to the staff new guidelines for the reassignment of staff in the Professional category to be applied with immediate effect. Under the new policy, staff members could express preferences among duty stations, but in the absence of such preferences, the Administration could assign any staff member to any field station it considered appropriate.

On 21 September 1983, the Applicant, a Legal Officer at the P-3 level, was requested to exercise his choice among seven posts, but the Applicant declined to do so, and after several requests for the reasons for his refusal he stated that he wished to complete the work that had been currently assigned to him. Later he claimed illness as the basis for his refusal, as well as misunderstandings regarding his unwillingness to take up one of the field postings. In a memorandum dated 30 January 1984, the Applicant was informed that because of his repeated refusals to accept field posts and in view of the unacceptable arguments he had advanced, the High Commissioner had decided not to extend his appointment beyond the expiration date on 26 July 1984. On 26 October 1984, the Applicant was separated from the service of UNHCR, and the Applicant appealed.

As to the Applicant's complaint that he had not been given a full opportunity for an "open hearing" and of unduly protracted proceedings, the Tribunal did not find that there had been material irregularities in the proceeding of the first Appeals Board. In the Tribunal's view, the Board was competent to decide what was the best procedure to follow, and the delay in the disposal of the case was not of an unusual nature given the plethora of details which had to be carefully considered.

Additionally, the Tribunal found no evidence of discrimination. The rules about rotation had to be applied at the discretion of the Respondent and in the interest of the Organization and after suitable consultation. The question was not how the other staff members were dealt with, but whether the Applicant was deprived of due process or was treated unjustly or became a victim of prejudice, and here there was no such evidence.

The Tribunal noted that the Respondent was not free of traces of annoyance and of suspicion of dissimulation and lack of candour on the part of the Applicant at some of the actions he had taken, but such an impression would not exempt the Respondent from fully respecting and protecting those rights of the Applicant to which he was entitled. The offer of the seven posts was the Administration's only offer and was made by telephone, and the Applicant was requested to give an immediate reply for reasons which had not been made clear. The Tribunal concluded that the haste with which the Applicant was asked to make up his mind was not in full conformity with the requirements of due process, even after making allowances for the part played by the Applicant himself. The Tribunal further noted that the Respondent refused without any justifi-

cation to extend the Applicant's contract, even by a short time, when the conciliatory procedure was undertaken and when the Director of the Division of Personnel and Administration in New York had requested such an extension.

On the other hand, the Tribunal was of the view that the Applicant could have no reasonable or legal expectation for the renewal of his contract. An essential element in the General Assembly's resolution 37/126, part IV, providing "for every reasonable consideration" after five years of continuing good service by staff members holding fixed-term contracts, was missing. The Applicant's service was under five years.

Furthermore, only two Performance Evaluation Reports (PERs) on the Applicant existed. The Report for the period 1 August 1981 to 26 July 1984 was not signed by the Applicant, and no explanation was forthcoming why the PERs were not prepared regularly and on time. The Tribunal concluded that, in the absence of valid PERs, the Tribunal had little option but to reject the plea that the Applicant had claim to or reasonable expectation for continuous employment either under General Assembly Resolution 37/126 or by application of the Tribunal's past decisions. At the same time, the Tribunal pointed out that, while the relevant resolution provided for "every reasonable consideration" after five years of satisfactory continuous service on fixed-term contract, it did not prescribe that such consideration would automatically mean renewal of the contract or that fixed-term contracts could not be terminated on due dates.

The Tribunal took the view that although the Applicant had ample opportunity to realize what the consequences of his actions could be, he did not receive any formal warning that his current contract would not be extended because of his refusal to accept any of the seven posts. The regulations and the repeated advice of the senior officers should have been enough of a warning, but considering that UNHCR circulars regarding field postings were issued in 1983 and that the Applicant had only a few years' service with UNHCR, it would have been more appropriate to have given him some formal warning. Moreover, the Tribunal did not consider the lack of a formal warning before terminating the Applicant as a veiled disciplinary measure as the Applicant had contended.

The Tribunal awarded monetary compensation in the amount of US$3,000 to the Applicant for the Respondent's lack of full application of all the requirements of due process and other aspects of the Respondent's handling of the case. All other pleas were rejected.

4. JUDGEMENT NO. 418 (25 MAY 1988): WARNER V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[6]

Non-promotion to the Professional category — Treatment of an outstanding staff member — Question of the existence of an agreement — Question of commitments made to a staff member — Remedy for not honouring commitments

The Applicant, who had entered the service of the United Nations on 12 April 1961, and who was functioning as "Supervisor of the Secretarial Unit" at the G-5 level since 1 April 1972, was recommended by the Director of the Departmental Administrative and Finance Office of the Department of Economic and Social Affairs to head a new Unit in the Office of Personnel Services for the purpose of providing secretarial training to the Organization as a whole, at the

P-2 level. A year later, the Applicant was transferred with her G-5 post on a non-reimbursable loan basis for six months, to the Office of Personnel Services. Although the administrative measure was effective for six months, neither Department issued further personnel action forms to extend the Applicant's assignment or transfer her officially to the Office of Personnel Services.

In December 1978, the General Assembly established a competitive examination for the selection of General Service staff members for posts in the Professional category. Subsequently, the Office of Personnel Services did not recommend the Applicant for promotion to the P-2 level during the 1979 promotion review, nor did they initiate any procedure to reclassify her post. The Applicant in 1981 appealed the decision not to reclassify her post and not to promote her to the P-2 level.

The Tribunal noted that the Applicant was considered to be an outstanding staff member by her supervisor and was a credit to the United Nations. Unfortunately, the Administration had not treated the Applicant in a reciprocal manner. The Tribunal noted in this regard that it was not until March 1982 that an official date to transfer the Applicant to the Office of Personnel Services, effective 1 January 1982, was taken, even though the Applicant had performed her duties in Personnel since 16 October 1978, i.e., for 41 months. This confused situation, resulting from the Administration's own actions, was all the more unfortunate, in the view of the Tribunal, because it permitted the Applicant and the Respondent to draw opposing inferences from it.

The Tribunal disagreed with the Respondent's contention that the Applicant had not established the existence of an agreement whereby the Respondent undertook to upgrade her post or grant her a promotion to the P-2 level. The Tribunal noted the insistence with which the Director of the Departmental Administration and Finance Office imposed her promotion to the P-2 level as a condition for transferring the Applicant to the Office of Personnel Services, and when the Director of Personnel accepted this transfer after careful consideration, he implicitly accepted this condition which was never revoked. Furthermore, in the opinion of the Tribunal, the confusion attending the transfer procedure could not be invoked by the Respondent to support his own interpretation.

The Tribunal in its jurisprudence had on a number of occasions — most recently in its Judgement No. 342, *Gomez* (1980), paragraph V — defined the conditions for the existence of the Administration's commitments to staff members and their scope. As early as 1965, in the *Sikand* case (Judgement No. 95, paragraph III), the Tribunal noted:

> "The Tribunal in its jurisprudence has established that the terms and conditions of employment of a staff member with the United Nations may be expressed or implied and may be gathered from correspondence and surrounding facts and circumstances."

In 1969, in the *Fürst* case (Judgement No. 134, paragraph III), the Tribunal stated the following:

> "Appointments and promotions are within the discretion of the Secretary-General and, unless there is a legal obligation binding on the Secretary-General, the Tribunal cannot enter into the merits of the same."

Such commitments became null and void if the staff member to whom they were made did not meet the legitimate expectations of the Administration. In this case, however, the Applicant did not fall short of these expectations. She set up the new unit as planned, and supervised it in a way deemed excellent by all those called upon to evaluate it. The decision to appoint or promote a staff member to whom commitments have been made is the sole prerogative of the Administration. If this decision was not taken, however, the attendant circumstances may well entail the responsibility of the Administration.

In the present case, the Tribunal observed that the Administration failed to grant the Applicant the benefit of the transitional measures envisaged at the time of the establishment of a competitive examination as the only means of moving from the General Service category to the Professional category. Despite its commitments, the Administration did not recommend the Applicant for a promotion to the P-2 level at the time of the 1979 promotion review. Notwithstanding the outstanding services rendered by the Applicant, the Administration took no concrete steps to initiate any procedure whatsoever, in accordance with established rules, to make it possible to promote the Applicant. It did not make all the efforts which the Department of Economic and Social Affairs and the Applicant were entitled to expect following the Applicant's transfer to the Office of Personnel Services.

In those circumstances, the Tribunal was of the belief that the responsibility of the Administration was entailed and that it should compensate for injury sustained by the Applicant. In determining that the Applicant should be paid US$25,000, the Tribunal also took into account the long and inadmissible delays on the part of the Administration in the appeals process.

On the other hand, the Tribunal could not order the Respondent to ensure that the Applicant's assignments were at the P-2 level, nor decide that her post should be classified to the P-2 level or that she should be promoted to the P-2 level without having to participate in a competitive examination.

5. JUDGEMENT NO. 421 (27 MAY 1988): CHATWANI AND PETTINICCHI V. THE COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST; DUGUERNY AND VETERE V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[7]

Complaint against deferment at Geneva and Vienna of the introduction of the remuneration correction factor (RCF) in the calculation of Professional salaries — Nature of International Civil Service Commission rules — Competency of Executive Heads to modify or rescind ICSC decisions — Question of justification based on financial crisis

In July 1986, the International Civil Service Commission (ICSC) noted that, since exchange rate fluctuations directly affected take-home pay, it was necessary to find a solution that would minimize any future gains or losses to staff, and, therefore, decided that a new procedure for implementing the remuneration correction factor (RCF) be applied on an interim basis with effect from

1 September 1986 to the post adjustment portion of Professional salaries. However, the Commissioner-General of UNRWA and the United Nations Secretary-General applied the RCF arrangements, at Geneva and Vienna, only from 1 January 1987 because of the financial crisis and in consistency with other economy measures taken.

The Applicants appealed those decisions, requesting that they be paid the amount in salary they lost as a result of the ICSC's decision being deferred to 1 January 1987.

The Tribunal was of the view that the observance of the rules duly adopted by ICSC was of the utmost importance. The Tribunal noted that the Respondent did not contest the fact that the measure in question was of a mandatory nature and must be adopted by all organizations that form part of the United Nations common system of salaries, allowances and other benefits payable to international staff members. The Tribunal further noted that it was not for the United Nations Secretary-General or for the Secretaries-General or Directors-General of the other organizations in the common system to revise, modify or rescind a decision adopted by ICSC in accordance with its statute.

In view of the above, the Tribunal considered that the decisions by the Secretary-General and the Commissioner-General of UNRWA to defer the implementation of the RCF procedures with effect from 1 September 1986 were tainted with illegality, and, therefore, must be rescinded.

The Respondent's invoking the financial crisis to justify the suspension of the ICSC decision could not be considered because, in the opinion of the Tribunal, the Secretary-General did not have the authority to do so, whatever the reasons for his actions. It was not for the Tribunal to substitute for the erroneous decision by the Secretary-General another decision he could have adopted in the exercise of the power conferred on him by virtue of which authorized him to take the initiative in adopting measures to guarantee the Organization's survival in the event of a serious financial crisis: for example, by calling on staff members to make financial sacrifices or by obtaining appropriate guidance from the General Assembly. It was, therefore, not necessary for the Tribunal to pronounce on the existence and scope of that power.

For these reasons, the Tribunal rescinded the measures adopted by the Commissioner-General of UNRWA and the United Nations Secretary-General, which deferred the application of the RCF to the calculation of their post adjustment from 1 September 1986 to 1 January 1987. The Tribunal further ordered payments to the Applicants, with effect from 1 September 1986 to 31 December 1986, of an amount representing the difference between the two amounts of post adjustment.

6. JUDGEMENT NO. 424 (27 OCTOBER 1988): YING V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[8]

Summary dismissal for serious misconduct — Question of delegated authority in personnel matters — Conditions attached to appearance of a witness — Judgement No. 104 (Gillead) — Question of referring serious misconduct to Joint Disciplinary Committee — Broad discretionary power of the Secretary-General in disciplinary matters — Personal responsibility regarding certifications of accuracy of income tax reimbursements

The Applicant had served since 1969 with the United Nations Children's Fund (UNICEF), and was a permanent resident of the United States and, therefore, subject to the payment of United States taxes on his United Nations earnings. The Applicant's wife, who had worked in the United Nations Tax Unit, and who had been under investigation by the United Nations Internal Audit Division (IAD), had resigned in June 1985.

During 1985, the United Nations Accounts Division conducted a review of cancelled cheques issued by the United Nations to United States citizens and United States permanent residents for the purpose of tax reimbursement. These cheques are made payable jointly to the staff member and to the pertinent tax authority. In practice, when the staff member endorses the cheque, he or she should promptly forward it to the tax authorities. During the course of its review, the Accounts Division verified that cheques issued to the Applicant had been deposited in his wife's bank account, or in their joint account, and had not been forwarded to the taxing authorities, as required by the procedures established by the Organization. The Accounts Division referred the matter to the IAD and it proceeded to audit the Applicant's tax records. It developed that over a four-year period, tax returns that the Applicant had filed with the U.S. Internal Revenue Service and the New York State Tax Department were different from the copies of the returns that he had submitted to the United Nations in order to obtain reimbursement and in respect of which he had made all the certifications required by the Organization. The Applicant's explanations in the matter were found unsatisfactory, and effective 21 October 1985, he was summarily dismissed for alleged tax fraud. The Applicant appealed that decision.

The Tribunal rejected the Applicant's contention that the Executive Director was a "junior officer" and that because the dismissal decision was made at that level, the Applicant was denied due process. Likewise, the Tribunal rejected the apparent claim that the Secretary-General was not authorized to act in personnel matters through subordinates to whom he had duly delegated authority.

The Tribunal considered that the alleged fraud consisted of joint income tax returns having been filed by the Applicant and his wife with the taxing authorities which indicated that their tax liability was significantly less than the tax liability shown on purported (but not actual) copies of the tax returns which were submitted to the United Nations for the purpose of reimbursement of taxes paid by the Applicant and his wife. In addition, for several years, tax reimbursement cheques given by the United Nations to the Applicant and his wife which were supposed to have been endorsed over to the taxing authority were instead deposited in either the wife's bank account or in their joint account.

The Tribunal further noted that the course of conduct attributed to the Applicant was squarely in violation of certifications signed by the Applicant that (1) the copy of the tax returns submitted to the United Nations was a true copy of that submitted to the tax authorities; (2) tax liabilities had been minimized by filing joint returns and claiming all allowable exemptions and deductions; (3) proper use had been made of the United Nations tax reimbursement cheques received; and (4) the amounts received for the purpose of meeting income tax liabilities had been paid to the appropriate tax authorities.

The Applicant, on the other hand, had maintained that since 1974, his wife had handled all aspects of their joint return and he professed a lack of knowl-

edge of the whole affair. In this regard, the Tribunal noted that, in the proceeding before the Joint Appeals Board (JAB), it was represented that the Applicant's wife would be willing to testify to explain the details of the fraud she had perpetrated and the innocence of her husband. However, her willingness to testify was conditioned on her testimony being heard without the presence of her husband which the JAB did not accept. The Tribunal agreed that a potential witness was not entitled to attach such conditions to appearance as a witness, and this was particularly true of someone in the position of the Applicant's wife whose credibility would be highly suspect in any event.

The JAB declined to reach the merits in the case, and recommended that the summary dismissal be rescinded and the case referred to a Joint Disciplinary Committee (JDC). Citing Judgement No. 104, *Gillead* (1967), the JAB believed that because the UNICEF Director of Personnel, in suspending the Applicant, had invited the Applicant to make any further written statement or explanation he might wish to make on the matter prior to a final decision, that as a matter of law, this signified that the Applicant's culpability was not patent and, therefore, summary dismissal was improper. The Secretary-General, however, maintained the decision to summarily dismiss the Applicant, based on his conclusion that the Applicant's misconduct was serious and warranted summary dismissal.

The Tribunal found that the JAB had read into the *Gillead* case more than the judgement itself stood for. In *Gillead*, the Tribunal pointed out that "… the conception of serious misconduct … was introduced … to deal with acts obviously incompatible with continued membership of the staff", and "the disciplinary procedure should be dispensed with only in those cases where the misconduct is patent, and where the interest of the service requires immediate and final dismissal". That principle remained unchanged here and tax fraud, as well as wrongful certifications associated with tax reimbursement, was plainly covered by it. Nothing in *Gillead* held that the obvious or reprehensible degree of misconduct necessarily disappeared or was diminished because a staff member was given another opportunity to provide a further explanation, or further information. Here, nothing further was presented by the Applicant that differed materially from what he had presented previously.

The Tribunal rejected, as it had in the past, the contention that in a case involving summary dismissal for serious misconduct, the Secretary-General must refer the matter to the JDC. Neither staff regulation 10.2 nor staff rule 110.3(a) required such a referral. (See also Judgement No. 104, *Gillead* (1967).) Indeed, even if a matter was referred to the JDC, the Secretary-General may have reasonable grounds for declining to follow its recommendation. (See Judgement No. 210, *Reid* (1976).) Nor was there any validity in the Applicant's claim that under staff rule 111.2(a) the Secretary-General was obliged to review the summary dismissal decision before the case may be taken by the Applicant to the JAB. Here again it was clear that this was a matter which the staff rule reserved to the discretion of the Secretary-General.

As regards the question whether the Secretary-General acted within bounds of his reasonable discretion in determining that the Applicant's conduct was tantamount to serious misconduct warranting summary dismissal, the Tribunal has consistently emphasized the broad discretion of the Secretary-General in disciplinary matters. This included judgements as to what constitutes serious

misconduct, as well as the nature of the discipline to be imposed for it. In this case, the Tribunal concluded that there was not the slightest question as to the propriety of viewing the Applicant's actions as misconduct of the most serious nature and deserving of the most serious punishment including summary dismissal.

Furthermore, there was no evidence of material mistake of fact, prejudice or other extraneous considerations that would vitiate the decision in the present case.

The Tribunal also pointed out that even if the UNICEF Executive Director and the Secretary-General had believed the Applicant's story that he was ignorant of his wife's fraudulent behaviour, it still could have been reasonably concluded that the Applicant was guilty of serious misconduct warranting summary dismissal. Every United Nations staff member had an absolute personal and non-transferable responsibility to see to it that each and every certification furnished to the United Nations in connection with United Nations reimbursement of income taxes was accurate, and it was no answer, in the view of the Tribunal, that the staff member acted in good faith by trusting another, no matter what the apparent justification for the trust.

For the foregoing reasons, the application was rejected in its entirety.

B. Decisions of the Administrative Tribunal of the International Labour Organization[9]

1. JUDGEMENT NO. 883 (30 JUNE 1988): IN RE LARGHI V. PAN AMERICAN HEALTH ORGANIZATION (WORLD HEALTH ORGANIZATION)[10]

Complaint against transfer — Organization's interests are paramount in reassigning staff — Limited power of review of discretionary decision — Question of personal prejudice

The complainant, who was in charge of the Viral Zoonoses Section at the Panamerican Zoonoses Center (CEPANZO) of the Pan American Health Organization (PAHO), and who had the grade P-4 as a virologist, was ordered by the Acting Director of CEPANZO and the PAHO's Coordinator of Veterinary Public Health to transfer to the National Health Institute of Peru, in Lima, in order to help in producing vaccine against rabies, a subject he was expert in. The complainant objected to this transfer, contending that the transfer would have broken up his family at the time when he was only six years short of retirement, and that the transfer was unlawful because of breach of rules on transfer and personal prejudice against him.

The Tribunal held that there was no breach of rules on transfer. According to the relevant staff regulations and rules, while a staff member's particular abilities and interests are to be taken into consideration, the interests of the Organization are paramount. This also was reflected in Judgement No. 447 (*in re Quinones*) where, in paragraph 4, it was stated "… It is true that if the Organization's interests carry greater weight, the Division will act accordingly." Furthermore, the Tribunal pointed out that in accordance with the Staff Rules,

provided the correct procedure was followed the Director had wide discretion in determining transfers of Professional category staff. In the case of such a discretionary decision, the Tribunal had a limited power of review, and could set it aside only if the decision were taken without authorization or in breach of a rule of form or procedure, or was based on an error of fact or of law or if some essential fact was overlooked, or if there were misuse of authority, or if a mistaken conclusion were drawn from the facts.

As regards the complainant's contention that personal prejudice motivated the transfer, the Tribunal did not find any evidence. The Tribunal noted that while he had been working with people of high calibre and had had access to certain facilities in Argentina, the purpose of his transfer to Peru was to enable him to pass on his knowledge and experience in a country which needed them badly. Indeed, the Tribunal further noted the Organization had granted him at the same time of the transfer a five-year extension of his appointment.

The complaint was, therefore, dismissed.

2. JUDGEMENT NO. 885 (30 JUNE 1988): IN RE WEST (NO. 10) V. EUROPEAN PATENT ORGANIZATION[11]

Reprimand for abuse of right of appeal — Purpose of right of appeal — Annoyance of appeal cannot negate right — Jurisdiction of Tribunal and the Organization in such matters

The complainant, who had been employed by the European Patent Organization (EPO) since 1982, lodged his first appeal in 1984 against the determination of his starting grade. Thereafter, he lodged a number of appeals which were rejected, when in August 1986, the President of the EPO wrote to the complainant observing that, though repeatedly told since April 1985 that the matter was *res judicata*, he had persisted in his claims. He had thereby abused his right of appeal and acted in breach of his duty to respect the EPO's interests, and the President imposed a disciplinary sanction under article 93(1) of the Service Regulations. Thereafter, the complainant lodged an appeal against the reprimand.

The Tribunal noted that an EPO staff member who alleged non-observance of the terms of his appointment or of the applicable staff rules and regulations had the right to submit an internal appeal and, if still dissatisfied, to appeal ultimately to the Tribunal. As the Tribunal pointed out, the existence of this right was in the interests of both sides since it served to maintain harmony, general efficiency and good morale in the Organization.

The Tribunal acknowledged that most staff members exercised the right of appeal sensibly. However, even though a few abused it and caused annoyance to the Administration, as in the present case, the Tribunal was of the view that the interests of both justice and sound administration demanded the Organization endure litigation.

The Tribunal further stated that it was for the Tribunal itself to determine whether the complainant had abused his right of appeal. The Organization would simply decide whether the appeal was receivable and, if so, whether there was merit to it.

For the foregoing reasons, the Tribunal held that it was wrong to have imposed the reprimand on the complainant, and it was quashed.

3. JUDGEMENT NO. 891 (30 JUNE 1988): IN RE MORRIS V. THE WORLD HEALTH ORGANIZATION[12]

Abolition of post — Question of post of indefinite or limited duration — Delay in following reduction-in-force procedure not a good reason for refusing to implement it — Question of expectation of continuity of employment

The complainant, a dentist, was appointed to the World Health Organization (WHO) in 1975 and assigned to the staff of the Pan American Health Organization (PAHO), the WHO's Regional Office for the Americas, where he held a series of appointments. In May 1982, he was assigned as a Dental Officer to a P-4 post under a project in Guyana, his appointment to expire on 31 December 1984. In August, he was informed that there would be no funds for the project after 31 December 1984 and that his appointment would therefore expire under WHO staff rule 1040, on the completion of temporary appointments.

The complainant appealed this decision seeking the application of rule 1050, on abolition of post and reduction in force. Rule 1050.2 states that when a post "of indefinite duration" was abolished there shall be a "reduction in force" and the incumbent shall be given "priority for retention" on the staff. Under rule 1050.4 he shall be awarded an indemnity if his appointment is nevertheless terminated. The Administration agreed that the complainant be paid the indemnity under rule 1050.4, but refused to apply the reduction-in-force procedure to the complaint contending that it was too late.

The Tribunal noted that the rules governing departure from service differed according to the reason for separation, and here the Organization had treated the complainant's case under the provisions on expiry of contract in rule 1040, which was less favourable than those on abolition of post in rule 1050. When he complained, the Organization conceded that he should have come under rule 1050 and offered him compensation. The complainant, however, claimed the application of the reduction-in-force procedure provided for in rule 1050.2, under which he could have been entitled to compete for retention in the Organization with others holding similar posts. Only if he were not successful would an indemnity be payable under rule 1050.4.

The Tribunal considered that the matter at issue was whether the abolished post was one of indefinite or limited duration. If it were of limited duration, the reduction-in-force procedure would not have applied under the rules. On review of the facts, the Tribunal concluded that, in the absence of a definition of either indefinite or limited duration, the post though a post of limited duration of 24 months at the start became one of indefinite duration because of the possibility of additional funding for the project. Therefore, the complainant was entitled to the application of the reduction-in-force procedure.

The Tribunal also concluded that the delay, which was the fault of the Organization, in following the procedure was not a good reason for refusing to implement it.

Regarding the Organization's contention that the complainant could not have expected continuity, the Tribunal considered that the legitimate expectations could exist only in the context of the Staff Regulations and Rules, and it was not the type of appointment but the type of post held by a staff member that determined his entitlement to the application of the reduction-in-force procedure. The complainant, too, had legitimate expectations that his right under the rules would be respected.

The Tribunal ordered the Organization to apply the reduction-in-force procedure in accordance with staff rule 1050.2.

4. JUDGEMENT NO. 911 (30 JUNE 1988): IN RE DE PADIRAC (NO. 2) V. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION[13]

Complaint against violation of freedom of association — Question of receivability — Standards that govern freedom of association — Status of President of the Conference — Question of administrative action free from judicial review — Nature of facilities granted to a staff association — Executive Head's consultation with staff association — Question of damages

The complainant was a staff member of the United Nations Educational, Scientific and Cultural Organization (UNESCO), since 1976, and was President of the Staff Union Association (STA) from March 1984 until March 1987, and filed the present appeal both as a staff member and staff representative. Firstly, he contested the decision by the Assistant Director-General for General Administration refusing permission to reproduce and distribute the text of a supplement to the STA bulletin. The supplement was to say that at a meeting on 24 October 1985, regarding staff retrenchment, recruitment and renewal of appointments, the President of the General Conference of UNESCO had promised the presidents of the STA and the other staff association he would recommend letting them make their joint statement but that in a letter to them of 30 October 1985 he had said he had made no such promise; that on 4 November 1985 he had told them that after speaking to the Director-General he had recommended that the officers of the Conference should refuse permission; and that the statement had been thwarted by the President's dilatory tactics and his fear of offending the Director-General.

Secondly, the complainant lodged a second appeal against the decision of 28 March 1986 that reduced the STA's allotted print run for 1986 from the 1985 figure of 2_ million to 2 million pages and that the STA would be charged for any printing over and above the lower figure.

The Organization raised the issue of receivability as regards the appeal being filed on behalf of the Staff Association. The Tribunal agreed, citing Article II(6) of the Statute of the Tribunal, which precluded bodies having legal personality to bring an appeal. The Organization further submitted that the complainant as a member of the staff bringing the complaint was irreceivable because he had suffered no injury as a staff member and because the decision he was challenging was not directed at him as an individual. The Tribunal noted that the claims advanced by the complainant as a member of the staff rested solely on the Organization's alleged failure to abide by staff regulations 8.1 and

8.2 and staff rules 108.1 and 108.2, which acknowledged the staff's right of association. The Tribunal further noted that regulation 8.1 read: "Machinery shall be provided by the Director-General to ensure continuous contact between the staff and himself through duly elected officials of the association or associations representative of the staff." Regulation 8.2 stated that the Director-General shall set up an administrative body with staff participation. The Organization thus accepted as a term of every contract of appointment its duty to respect freedom of association, and anyone who had such a contract may challenge any decision that impaired that freedom. His complaint was, therefore, receivable insofar as he was suing in his own name.

As regards the complainant's first appeal, the Tribunal pointed out that earlier judgements of the Tribunal have set forth the principles that govern freedom of association. According to precedent, a staff association enjoyed special rights that included broad freedom of speech and the right to take to task the administration of the organization whose employees it represented. Like any other freedom, however, freedom of speech had its bounds. A staff association may not resort in public to action that impaired the dignity of the international civil service, save that the degree of discretion required to it was not as great as was expected of an individual staff member: both law and practice allowed it wider freedom of speech and only gross abuse would be inadmissible.

The Organization had two objections to the bulletin supplement, the first being that the text contained mistakes of fact. In the view of the Tribunal, such a plea was in itself inadmissible. Judgement 496 (*in re Garcia and Marquez*) of 3 June 1982 read: "This has from time immemorial been the standard excuse for censorship; the alleged object is never to suppress the truth but just to make sure that only the truth is told. Freedom of association is destroyed if communication between the members is allowed only under supervision." Besides, more than one construction might be given to the talks with the President, and without casting doubt on anyone's integrity or good faith. Without saying which interpretation was right and which was wrong, the Tribunal held that the Organization committed an unlawful act of censorship.

The Organization's other objection was that the term "dilatory tactics" was insulting or even libelous. The Tribunal observed that the President of the Conference, who did not belong to the Administration, exerted no direct authority over the staff, and that was why they had a duty to show great discretion in any criticism of him. Yet while the Conference was in session he had authority that went beyond the mere direction of business and his position was not neutral. When he turned down a request from a staff association he was not acting as the political representative of a sovereign Member State but was on par with a senior official and as such was not immune to criticism. The language may have been ill-chosen but taking it out of context lent it undue weight. The text of the supplement did not go beyond the proper bounds of a dispute over matters the Staff Association believed to have threatened the essential interests it safeguarded. It had not acted from malice or bad faith.

As to the first part of the complainant's case, the Tribunal concluded that in denying the Association its customary privilege of having a text printed and issued the Organization infringed its rights as representative and defender of the staff's interests. The impugned decision could not stand.

In connection with the complainant's second appeal, the Tribunal considered that the STA was customarily granted facilities that helped it to function, and one of them was an allotment of paper and a print run. The Organization had contended that the complaint was irreceivable because in allotting the resources at his disposal, the Director-General took a merely administrative measure which afforded no cause of action and was not subject to review by the Tribunal.

In Judgement No. 496 and others, the Tribunal recalled that it had held that the executive head of an organization did enjoy some degree of discretion and in exercising it was immune to judicial review. Thus, while the Tribunal would not entertain any claim from the Staff Association arising out of the alleged breach of an agreement with the Organization for the supply of facilities, the Tribunal would consider whether the Organization was guilty of an actionable breach of freedom of association. The Tribunal observed that the impugned decision seriously curtailed the facilities at the STA's disposal and made a real difference. What was more, the facilities were not of the lesser kind that might have been withdrawn without detriment to the running of the Association. In the view of the Tribunal, it was therefore competent to rule on the lawfulness of the duration.

In this regard, the Tribunal noted that the grant of facilities to a staff association was not a privilege the Organization at any time may withdraw as it pleased. The Tribunal further noted that Chapter VIII of the Staff Regulations and Rules provided among other things for a top-level administrative body with staff participation to advise the Director-General on staff matters in general, and in this connection, one of an executive head's duties was to consult the staff association on such matters. The Tribunal concluded that since the Organization acted unlawfully in taking a decision which seriously disrupted the Staff Association's work and in failing to let the Association state its views, the impugned decision must be set aside.

Finally, as to the claims to damages, the Tribunal observed that the two decisions that were quashed and which caused the Staff Association moral injury were afforded full redress by the publication of this judgement. No damages were awarded for material injury. The complainant himself had stated that the STA had kept within its allotted print run. The other claims were dismissed.

5. JUDGEMENT NO. 937 (8 DECEMBER 1988): IN RE FELLHAUER V. THE FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS[14]

Termination as a disciplinary measure — Conduct that constitutes misconduct — Principle of proportionality — Question of abuse of authority

The complainant, who had been a staff member of the Food and Agriculture Organization of the United Nations (FAO) since March 1968, was at the P-4 level when he was terminated from service after disciplinary proceedings. He was paid compensation in lieu of notice and the sums he owed the Organization would be deducted from his final emoluments.

The Tribunal noted that the complainant was dismissed under staff regulation 301.102, which stated that the Director-General "may impose disciplinary measures on staff members whose conduct is unsatisfactory". Furthermore, in the Staff Rules and the Manual, "dismissal for misconduct" was defined as termination for conduct that jeopardized the reputation of the Organization.

FAO had charged fraud in connection with duty travel and sick leave. The Tribunal observed that on four separate occasions, the complainant was absent from duty without permission and that the submissions offered by the complainant were implausible. The Tribunal further noted that as regards home leave travel, he was twice in breach of the letter and spirit of the rules, as well as the misuse of an airline ticket issued in 1983 for the repatriation of his son.

The complainant contended that his conduct did not warrant dismissal, the improprieties he was charged with not being tantamount in themselves to misconduct. The Tribunal agreed that none of the charges against the complainant amounted in itself to misconduct, but what was serious was that there were several. The complainant had failed to prove his own good faith and his answers to each of them were unsound. The Tribunal was satisfied on the evidence that he was in gross breach of duty.

The complainant also alleged breach of proportionality, claiming that when disciplinary action was out of proportion to the offence, there was a mistake of law that warranted setting the impugned decision aside. The Tribunal considered that there must be the closest scrutiny of the evidence when the measure taken was dismissal, and on scrutiny of the evidence before it in this case the Tribunal could not regard the complainant's behaviour over the years as just carelessness that was partly excusable and did not call for dismissal. Here, the complainant was guilty of cheating, and the Director-General had not drawn the wrong conclusions from the evidence or exceeded his discretionary authority in imposing a severe sanction.

The complainant also alleged abuse of authority. He claimed that what had prompted FAO to terminate his services were the Director-General's suspicions that he had given confidential information to a journalist friend who had written articles taking FAO and its Director-General to task. The Tribunal noted that to prove abuse of authority, the complainant must show that the reason for his dismissal had nothing whatever to do with serving the Organization's interests. The Tribunal considered that the complainant had adduced no substantive evidence in support of his allegations. Moreover, the charges against him were proven, whatever the motives may have been.

The complaint was dismissed.

6. JUDGEMENT NO. 939 (8 DECEMBER 1988): IN RE NOOR V. THE INTERNATIONAL LABOUR ORGANIZATION[15]

Complaint against transfer — Circular 180 — Question of procedural irregularity — Election to staff committee did not immune staff member from transfer

The complainant, a citizen of Somalia, had joined the International Labour Organization (ILO) in 1966 and served at Geneva headquarters until 1973 when

he was assigned to various field posts. Thereafter, he made many attempts to return to headquarters in Geneva, and was eventually assigned there temporarily for intensive retraining with a view to his transfer to administrative work in Africa. He had reached the level P-4. On 24 March 1986, he was informed of his appointment to the post of Deputy Director of ILO's office at Lagos, effective 1 July 1986. He objected and requested an appointment to a post at headquarters. He then obtained on grounds of health the suspension of his transfer for 12 months. In October 1986, he stood for election to the Committee of the ILO Staff Union and was co-opted as a member of the Committee on the departure of one of the elected members. The same month, the Director of the Joint Medical Service in Geneva gave his opinion that there was no medical reason why he should not be posted to a developing country. He again protested, complaining that the humid climate in Lagos posed a health risk to him. Subsequently, he was notified of his transfer to the post of Deputy Director of the ILO office at Dar es Salaam, effective 1 January 1988.

The first ground on which the complainant challenged the decision was breach of circular 180. The circular, as the Tribunal pointed out, did not promise that service in the field would be limited to a specific number of years for any official, nor did it make an unqualified promise to bring back to headquarters an official who had spent a substantial period in the field: all it promised was intensive effort to do so. In this regard, the Tribunal observed that the Organization had made considerable efforts to find a suitable post for him at headquarters as he had done himself, but these efforts were unsuccessful. Furthermore, the decision to send him to Africa was made because only there were there vacant posts corresponding to his qualifications. In the circumstances, the Tribunal concluded there was no breach of circular 180.

As to the complainant's plea that the Organization breached article 4.2(f), which read: "The method of filling any other vacancy below the grade of D-1 shall be decided by the Director-General after consulting the Selection Board …". The ILO had contended that since the complainant had not advanced this plea in the internal proceedings, he could not put it to the Tribunal. The Tribunal disagreed with this assertion stating that a complainant could submit new pleas in support of the same claim. What he may not do is address to the Tribunal new claims. Here, it was not in dispute that the Selection Board was not consulted before the transfer was decided on, and the Organization did not plead urgency. The Tribunal therefore held that the impugned decision was flawed, but a minor procedural flaw, for which the Tribunal awarded the complainant 4,000 Swiss francs.

The complainant also had submitted that since he was a member of the Staff Union Committee his transfer to the field was in breach of article 10.1 of the Staff Regulations, which related to staff relations, and of the general principle of freedom of association. However, the Tribunal stated that there was no rule which forbade the transfer of a member of the Staff Union Committee outside Geneva, and election to the Committee conferred no immunity from transfer.

His other claims were dismissed.

7. JUDGEMENT NO. 946 (8 DECEMBER 1988): IN RE FERNANDEZ-CABALLERO V. THE UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION[16]

Non-renewal of fixed-term appointment — Judicial review of discretionary decision — Duty to inform of reason for non-renewal — Misstatements of facts surrounding the recommendation — Tainted decision — Financial straits give no excuse for breach of principles that protect staff — Question of damages

The complainant joined the staff of the United Nations Educational, Scientific and Cultural Organization (UNESCO) on 1 July 1982 under a fixed-term appointment for two years. He was assigned as a grade P-4 expert in educational information and documentation to the Regional Office for Education in Latin America and the Caribbean (OREALC) in Santiago, Chile. He had his appointment extended by two years from 1 July 1984.

At the end of 1985, the Organization wanted to make savings. As a result, the complainant's post was downgraded to P-3, to which the complainant had agreed. On 25 June 1986, his records were passed on to the Committee on Redeployment which identified two posts for the complainant. However, on 8 July, the Chief of the Staff Administration Division sent a telex to the Acting Director of the Regional Office requesting that he inform the complainant that his contract was extended by two months to 31 August 1986 at which time the complainant would leave the Organization. This telex was confirmed by a letter to the complainant which he claimed he never received. The complainant appealed the decision not to renew his appointment by a further period of two years from July 1986.

The Tribunal pointed out that, according to rule 104.6(b), a fixed-term appointment does not imply any right to extension or conversion to an indeterminate appointment and shall, unless extended or converted, expire according to its terms, without notice or compensation. Although renewal of a fixed-term appointment was at the Director-General's discretion and the Tribunal would not replace his judgement with its own, his decision was not immune to review. The Tribunal would consider whether it was taken without authority, whether it was tainted with any procedural or formal flaw or with a mistake of law or of fact, whether any essential fact was ignored, whether any mistaken conclusion was drawn from the evidence, and whether there was abuse of authority.

In this case, the decision not to renew the complainant's appointment was tainted with several fatal flaws. First, the decision was not taken by the competent authority, in accordance with the UNESCO Manual.

Even more serious, in the view of the Tribunal, was the failure to inform the complainant of the reasons for the decision. Although the Director-General was free to make his own assessment of the material facts, the staff member was entitled to know the reasons for the Director-General's conclusion, in order to appeal if he so chose. In the instant case, the complainant was not given the reasons for the non-renewal — not in the telex to his supervisor, nor was it proven that an explanatory letter addressed to him was ever delivered or that he was given the information in any other way.

Thirdly, as the Tribunal noted, the Organization, not having informed the complainant, was in breach of the duty of consideration it owed its staff, of the principle of good faith and of the rule that the staff member had a right to be kept informed of any action that may have affected his rights or legitimate interests.

There were also the misstatements of fact, particularly the statement by a representative of the Administration that the Committee on Redeployment had not taken up the complainant's case, whereas in fact the Committee had not only seen his file but identified two posts and recommended putting him on one of them. The Tribunal held that the mistakes of fact influenced the Board's recommendations. Since the Director-General relied solely, in taking his final decision, on a recommendation that was tainted with mistakes of that kind, his decision too was flawed with the same mistakes.

It was true that at the time UNESCO was in sore financial straits, largely because Singapore, the United Kingdom and the United States had withdrawn from membership and, in pursuance of decisions by its General Conference and Executive Board, it had to make drastic cuts in staff costs. But the need for savings afforded no proper excuse for breach of the principles that protected the staff against arbitrary decision-making.

Because of the four flaws identified above the impugned decision could not stand. In the circumstances of the case there were no grounds for reinstatement, but in accordance with Article VIII of its Statute, the Tribunal would award damages for material injury. Since the complainant had served UNESCO for only four years and the renewal he might have expected would not have been for more than two years, the Tribunal set the amount at the equivalent of six months' full pay at grade P-4 at the rate applicable at the date of his separation.

In the opinion of the Tribunal, there was no award of moral damages. Since the Organization was applying a policy of staff retrenchment required by financial constraints the non-renewal could not have been deemed to have harmed the complainant's professional reputation. Nor indeed did he offer any evidence of moral injury.

C. Decisions of the World Bank Administrative Tribunal[17]

DECISION NO. 56 (26 MAY 1988): LYRA PINTO V. THE INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT[18]

Complaint against regrading — Review of discretionary exercise — Freezing of staff member's salary violated fundamental element of employment

In 1982, the Job Grading Program was instituted at the World Bank, and on 26 September 1985 the Applicant, employed in the Bank since 1973, was notified that her position was regraded. Her post of Staff Assistant was graded at level 15; level 15 was approximately the equivalent of grade "E" under the former grade structure. Prior to the grading exercise, the Applicant's position was at grade "G", which was considered to be of equal value to grade 16 in the new grade structure. Because the salary range for grade 15 was lower than the salary range for her former grade "G", the Applicant was entitled to salary pro-

tection for two years starting 1 October 1985. The Applicant's salary was already about $1,000 above the maximum in grade 15. Hence, the Applicant could not have shared in merit or structural adjustment increases after 30 September 1987.

The Applicant appealed contending that the regrading was a transparent attempt to deny access to promotions, to negate the value of experience, skills and career development and to renege on previous standards. She further contended that the decision to abolish certain grade levels and collapse all staff assistants' grades into one E level grade was entirely arbitrary. The Respondent, on the other hand, pointed out that these grievances were addressed to the design of the new grading and salary structure itself, rather than specifically to the correctness of the grading decision with respect to the Applicant's position. On those grounds, the Job Grading Appeals Board concluded that it was not competent to judge the adequacy or otherwise of the new grading system and methodology, but only their application to specific cases.

The Tribunal agreed that the Job Grading Programme constituted an exercise of discretionary authority by the Respondent and, as such, was not subject to review by the Tribunal, unless it was shown that there had been an abuse of discretion by reason of the action taken in a concrete case "being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure". (See *Saberi*, Decision No. 5 (1982), paragraph 24.) No such abuse of discretion had been shown.

The Applicant's principal contention was that her salary review increases after the effective date of her job regrading should not have been limited by the two-year grandfathering provision. In support of her claim, the Applicant cited the Principle of Staff Employment, paragraph 5(1)f, which stated that the Respondent shall:

> "establish procedures and conditions under which staff members may be assigned to positions graded at various levels, while providing reasonable measures to alleviate adverse effects on staff members assigned to positions graded or regraded at a lower level."

The Tribunal agreed with the Applicant. Citing *de Merode* (Decision No. 1 (1981), paragraphs 111 and 112), the Tribunal concluded that the freezing of the Applicant's salary, from 30 September 1987, would deprive her, without justifiable cause, of the right to benefit from periodic adjustments reflecting changes in the cost of living and other factors, which the Tribunal had found to be a fundamental element in the Applicant's conditions of employment which the Bank did not have the right to change unilaterally.

For the above reasons, the Tribunal decided that the decision was rescinded so far as it did not provide for the payment to the Applicant, as from 30 September 1987, of the periodic salary review increases approved by the Respondent for staff members in grade 16.

NOTES

[1]In view of the large number of judgements which were rendered in 1988 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. 409 to 438 of the United Nations Administrative Tribunal, Judgements Nos. 879 to 951 of the Administrative Tribunal of the International Labour Organization and Decision No. 56 of the World Bank Administrative Tribunal, see, respectively: documents AT/DEC/371-438; *Judgements of the Administrative Tribunal of the International Labour Organization*: 64th and 65th Ordinary Sessions; and *World Bank Administrative Tribunal Reports*, May 1988.

[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.

The Tribunal shall be open: (*a*) to any staff member of the Secretariat of the United Nations even after his employment has ceased, and to any person who has succeeded to the staff member's rights on his death; and (*b*) to any other person who can show that he is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied.

Article 14 of the statute states that the competence of the Tribunal may be extended to any specialized agency brought into relationship with the United Nations in accordance with the provisions of Articles 57 and 63 of the Charter of the United Nations upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. Such agreements have been concluded, pursuant to the above provisions, with two specialized agencies: International Civil Aviation Organization and International Maritime Organization. In addition, the Tribunal is competent to hear applications alleging non-observance of the Regulations of the United Nations Joint Staff Pension Fund.

[3]Mr. Arnold Kean, Vice-President; Messrs Jerome Ackerman and Francisco A. Forteza, Members.

[4]Mr. Roger Pinto, Vice-President; Messrs Jerome Ackerman and Ahmed Osman, Members.

[5]Mr. Samar Sen, President; Messrs Francisco A. Forteza and Ioan Voicu, Members.

[6]Mr. Roger Pinto, Vice-President; Messrs Jerome Ackerman and Ahmed Osman, Members.

[7]Mr. Samar Sen, President; Mr. Roger Pinto, First Vice-President; Mr. Arnold Kean, Second Vice-President; and Mr. Jerome Ackerman, Alternate Member designated pursuant to article 6, paragraph 1, of the Rules of the Administrative Tribunal.

[8]Mr. Roger Pinto, Vice-President, Presiding; Messrs Jerome Ackerman and Francisco A. Forteza, Members.

[9]The Administrative Tribunal of the International Labour Organization is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of the staff regulations of the International Labour Organization and of the other international organizations that have recognized the competence of the Tribunal, namely, as at 31 December 1988, the World Health Organization (including the Pan American Health Organization), 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 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, the International Center for the Registration of Serials, the International Office of Epizootics and the United Nations Industrial Development Organization. The Tribunal is also competent to hear disputes with regard to the execution of certain contracts concluded by the International Labour Organization and disputes relating to the application of the regulations of the former Staff Pension Fund of the International Labour Organization.

The Tribunal is open to any official of the above-mentioned organizations, even if his employment has ceased, 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 upon which the official could rely.

[10]Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; Mr. Edilbert Razafindralambo, Deputy Judge.

[11]Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; Mr. Edilbert Razafindralambo, Deputy Judge.

[12]Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; and Miss Mella Carroll, Judge.

[13]Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; and Miss Mella Carroll, Judge.

[14]Mr. Jacques Ducoux, President; Miss Mella Carroll, Judge; and Mr. Pierre Pescatore, Deputy Judge.

[15]Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; and Miss Mella Carroll, Judge.

[16]Mr. Jacques Ducoux, President; Tun Mohamed Suffian, Vice-President; and Mr. Hector Gros Espiell, Deputy Judge.

[17]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 a 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.

[18]Mr. Eduardo Jimenez de Aréchaga, President; Messrs Prosper Weil and A. Kamal Abul-Magd, Vice-Presidents; and Messrs Robert A. Gorman, Elihu Lauterpacht, Charles D. Onyeama and Tun Mohamed Suffian, Judges.