Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

1997

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

CONTENTS (*continued*)

CONTENTS (*continued*)

CONTENTS (*continued*)

CONTENTS (*continued*)

Chapter V

DECISIONS OF ADMINISTRATIVE TRIBUNALS OF THE UNITED NATIONS AND RELATED INTERGOVERNMENTAL ORGANIZATIONS[1]

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

1. JUDGEMENT NO. 814 (25 JULY 1997): MONTELEONE-GILFILLIAN V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[3]

Non-promotion to P-3—Absence of an updated performance evaluation report was a violation of due process—Duty of Respondent to act with reasonable promptness to the Panel on Discrimination reports—Question of discrimination —Importance of fair treatment of staff members

On 1 September 1984, the Applicant was assigned to the Kingston Office of the Special Representative of the Secretary-General for the Law of the Sea, as an Administrative Officer on a special post allowance (SPA) to the P-2 level. On 1 June 1988, she was promoted from the General Service category to the Professional category at the P-2 level, with retroactive effect to 1 April 1979. The Applicant's performance during the periods 1 January to 31 December 1986 and 1 January to 31 December 1987 was rated as "excellent". Subsequent to her promotion she took the necessary steps for the reclassification of her post to the P-3 level, in the belief that her department, the Office for Ocean Affairs and the Law of the Sea, had supported this reclassification. However, her department did not act upon the request for reclassification.

The Applicant appealed an administrative decision by the Secretary-General, upon the recommendation of the Appointment and Promotion Committee, not to include her name in the 1992 P-3 Promotion Register. The Applicant claimed that the promotion review process had been tainted by procedural irregularities and lack of due process. She asserted that the denial of her request for promotion was the culmination of a long pattern of discrimination based on her status as a female staff member, who was not a lawyer, in a small, local legal office, and the animosity against her resulting from an earlier dispute with the Respondent with regard to her initial promotion to the P-2 level.

In support of her claim, the Applicant cited the Respondent's failure to conduct performance evaluations in accordance with established procedures. She had not received a performance evaluation report (PER) between 1988 and 1995, and prior to 1988, she had consistently received PER ratings of "excellent" and "very good". At the time of her request for promotion review in 1993 there was a four-year gap in her performance record due to the Respondent's failure to follow his own performance review procedures.

The Joint Appeals Board (JAB) found, and the Tribunal concurred, that the absence of a current PER "was of critical importance" in the context of a promotion review and that the "long delay in providing the staff member with her PER

was a violation of the rules". The Tribunal also agreed with the JAB conclusion that the absence of an updated PER was a violation of due process. The Tribunal had previously concluded that when a denial of promotion was based on incomplete and inaccurate information, "the Applicant's right to full and fair consideration for promotion [was] not adequately respected". (Cf. Judgements No. 592, *Sue-Ting-Len* (1993), and No. 586, *Atefat* (1992).)

The Tribunal further noted that the Panel on Discrimination and Other Grievances (the Panel on Discrimination) had recommended to the Respondent, in August 1993, that he update her performance records. The Respondent had failed to provide an updated performance report until August 1995, almost two years after the Panel's recommendation and more than six years after her last PER. The Tribunal found that this delay constituted a serious violation of due process. The Tribunal had previously held that:

> "[i]f the Panel on Discrimination is to continue to serve the valuable purposes for which it was established and to carry out its mission effectively, it is essential . . . that the Respondent react with reasonable promptness to the Panel on Discrimination reports regardless of whether it agrees or disagrees with them." (See Judgement No. 507, *Fayache* (1991), para. XVII.)

In this instance, the Tribunal noted that the Respondent's delay of one year in responding to the Panel's report and his further 12-month delay in meeting the Panel's recommendation had the effect of undermining the Panel's work and purpose. It also unnecessarily jeopardized the Applicant's chances of receiving a promotion.

The Tribunal next examined the Applicant's claim that she had been the victim of a long-standing pattern of discriminatory and prejudicial treatment. While the decision of the Compensation and Classification Service denying the Applicant reclassification to the P-3 level was not itself before the Tribunal, the process leading up to that decision was probative of the Applicant's discrimination claim. The Tribunal noted that the Applicant's attempt, since 1988, to receive adequate redress for her request for reclassification to the P-3 level had been rebuffed by refusal and inaction. Her initial submission in 1988 of a new job description at the request of her supervisors had never been acted upon, thereby denying her an opportunity for review of the reclassification of her post. In 1992, the Applicant again attempted to obtain such a review once the Office for Ocean Affairs and the Law of the Sea had been transferred to the Office of Legal Affairs. The Office of Legal Affairs refused to complete the form, again denying the Applicant a formal review of her request. Under pressure from the Applicant, the Office sought, instead, an informal review of the request. Ultimately, the Compensation and Classification Service denied the Applicant's request for reclassification. When the Applicant appealed this denial to the Classification Appeals and Review Committee, she received no response. Her appeal was never heard.

The Tribunal found that the delay and inaction were inappropriate and had contributed to the Applicant's belief that she was being discriminated against because of her status as a female who was not a lawyer. It also contributed to the impression that the Respondent was retaliating against her for her earlier dispute over her promotion to the P-2 level. In the view of the Tribunal, all staff members were entitled to be dealt with in good faith and in a manner that was fair. Moreover, the Tribunal noted that failure to abide by established procedures gave rise to dissatisfaction and low morale and threatened the in-

tegrity of the entire Organization. It also led to unnecessary and costly litigation. The Tribunal concluded that the Applicant's request for reclassification had not been dealt with efficiently, promptly or in good faith.

However, despite the Tribunal's finding that the Respondent's conduct in the present case was egregious, it agreed with the JAB that there was no evidence of a pattern of discrimination. In August 1993, the Panel on Discrimination had described the Respondent's treatment of the Applicant as "benign neglect". Two years later, the JAB concluded that there was no convincing evidence of discrimination. In the Tribunal's view, nothing had changed to modify that conclusion. The Tribunal had noted in a previous case that:

> "... There is a vast difference between cases of [discrimination] and cases in which supervisors simply do not share a staff member's evaluation of his own qualifications, performance or merit, or in which there is disharmony between supervisors and a staff member for a variety of reasons having nothing at all to do with unlawful discriminatory attitudes". (Cf. Judgement No. 507, *Fayache* (1991), para. XVIII.)

The Tribunal considered that, in the present case, the Respondent should have dealt with the Applicant's request for reclassification more effectively. However, it did not find that the underlying motivation for the Respondent's conduct was discrimination on the basis of gender or retaliation.

Based on the foregoing, the Tribunal concluded that the Applicant was entitled to compensation for the violations of due process, but not for discriminatory treatment. The Respondent's failure to update the Applicant's performance record until 1995 and the unreasonable delay in responding to the Panel on Discrimination's report had jeopardized the Applicant's career advancement and violated her right to full and fair consideration for promotion.

For the above reasons, the Tribunal ordered the Respondent to pay to the Applicant nine months of her net base salary at the rate in effect on the date of the communication of this judgement. The Tribunal also affirmed the JAB's recommendation that the Applicant should receive full and fair consideration for all vacancies for which she applied and for which she was qualified.

2. JUDGEMENT NO. 841 (1 AUGUST 1997): GUEST AND SLATFORD V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[4]

Termination due to abolition of posts—Question of a promise creating a legal obligation—Did the Organization use its best efforts to reassign staff members?—Question of the staff members' acting in reliance upon a promise—Issue of the Organization discharging its obligation

Both Applicants had served at the G-6 level in the World Food Council secretariat in Rome when their posts were abolished as a result of restructuring. Applicant Guest was offered another post with the United Nations Compensation Commission in Geneva but she rejected the offer, indicating that "she would accept nothing less than a permanent appointment at her current grade/step and non-local status". Such an offer was not forthcoming, and she was ultimately terminated. Applicant Slatford was offered another post in the Department for Policy Coordination and Sustainable Development in New York. She rejected the offer and was terminated. The Applicants appealed, claiming that the Secretary-General, on 11 September 1992, had promised that those staff members in the lower-echelon positions, such as the Applicants, were "in no danger of losing their em-

ployment with the United Nations as a result of the restructuring exercise". This same promise had been reiterated, to the United Nations Staff Union by the Controller on behalf of the Secretary-General on 16 March 1993 and by the Secretary-General himself on 17 June 1993, in a newsletter to the Staff Union in Vienna.

The Tribunal first considered whether the promise created a legal obligation for the Respondent. The Tribunal noted that the promise was specific in nature, made in public and reiterated in different media. Moreover, the promise was made by an official who had the authority to fulfil it. The Tribunal recalled its holding that "the Administration must behave responsibly in its administrative arrangements and refrain from expressing hopes or intentions that it has no expectation of fulfilling". (Cf. Judgements No. 444, *Tortel* (1989), and No. 342, *Gomez* (1985).) In the light of the foregoing, the Tribunal decided that the promise had created a legal obligation for the Secretary-General towards those staff members who were not in upper-echelon positions and who were threatened by the abolition of their posts.

Having established the existence of a legally binding promise, the Tribunal next considered the scope and content of the obligation created by the promise. The Tribunal concluded that the promise compelled the Secretary-General to make, in good faith, his best efforts to place the staff members whose posts had been abolished in reasonably equivalent positions, subject to the availability of such posts and to the willingness of the staff member to be transferred to other duty stations.

The Tribunal next considered whether, given the fact that a specific, legally binding promise existed, the Applicants had relied upon that promise in such a way as to justify compensation. The Tribunal recalled its jurisprudence on the issue, that "[a] staff member is normally entitled to expect the Organization to honour commitments on which the staff member has relied in good faith". (Cf. Judgement No. 444, *Tortel* (1989).) The Tribunal noted that the Applicants had acted in reliance upon the promise: in good faith, both Applicants had let eight months elapse without seeking other employment, trusting that the Secretary-General's promise would be fulfilled and that they would be offered posts equivalent to the ones they held in the World Food Council. The Tribunal was of the view that, if a staff member had acted, in good faith, in reliance on a legally binding promise, that staff member was entitled to compensation, if such reliance was ultimately detrimental to his or her interests.

Having established the content of the obligation created by the Secretary-General's promise, and the Applicants' reliance thereon, the Tribunal went on to examine whether, by that conduct, the Respondent had discharged that obligation. Specifically, the Respondent was obliged to use his best efforts to find suitable positions for both Applicants in the Organization. The facts indicated that, of a total of 13 World Food Council General Service staff members, only two had been re-employed in Rome. Four of the 13 had resigned, and five did not wish to be relocated outside Rome. The Applicants had declined offers of alternative employment. Thus, the Respondent had succeeded in placing only two staff members in new posts. The resignation of four staff members, and the refusal of a further five to be relocated outside Rome, had left the Respondent with only two staff members—the Applicants—whom he had to place. This was not a very heavy burden.

A review of the facts revealed some efforts by the World Food Council to place the Applicants and a manifest lack of will on the part of other organizations within the United Nations system to absorb General Service staff members from

the Council. The experience of Applicant Guest in Geneva, where she was interviewed on 28 and 29 October 1993, for posts with UNCTAD, revealed a rather disorganized effort by the authorities of the World Food Council with respect to her placement. The Joint Appeals Board (JAB) report stated that "in her concluding summary, the Appellant indicated that only certain interviews had been 'job interviews as such' but even then there [had] not [been] a very clear picture of particular requirements, duties or job availability". The Tribunal noted that the record did not show any attempt made by the World Food Council authorities to bring the difficulties they experienced in placing the Applicants, and thus the possible breach of the promise made by the Secretary-General, to his attention or to the attention of those in his cabinet.

As the record indicated, the Applicants eventually were offered posts. However, in the opinion of the Tribunal, the conditions upon which those offers were made were so disadvantageous compared to the Applicants' previous employment that both Applicants declined the offers.

In order to avail herself of the post in Geneva, Applicant Guest would have been obliged to resign her status as a permanent staff member (thereby forfeiting her right to compensation for involuntary separation), lose seniority to the G-5 level, relinquish her international recruitment status and pay her own travel and removal expenses. Moreover, she was given less than a day in which to accept the offer. Applicant Slatford's situation was similar. The offer made to her would have necessitated the resignation of her permanent appointment in favour of a one-year probationary appointment and the payment of her own travel and moving expenses to New York. The Tribunal considered that the terms of those offers, and the conditions upon which they had been made, demonstrated a callous disregard on the part of the Respondent for his responsibilities towards the Applicants. Such conduct did not meet the minimum requirements of good faith that were essential to good administration.

Having taken account of all the facts, the Tribunal considered that the Respondent had not made his best efforts to place the Applicants in posts that were reasonably equivalent to those they had occupied in the World Food Council, which his promise obliged him to do. The Tribunal concluded that the Respondent must pay the Applicants compensation for the breach of promise to them.

The Tribunal assessed this compensation at one year of each of the Applicants' net base salary at the rate in effect on the date of their separation from service. Furthermore, the Tribunal agreed with the recommendation by the JAB that each Applicant should be awarded the sum of $4,000 "for the unreasonable and untimely manner" in which the employment offers had been made and the sum of $1,000 for the Respondent's "failure to properly inform [them] of the developments in connection with the restructuring exercise".

3. JUDGEMENT NO. 848 (25 NOVEMBER 1997): KHAN V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[5]

Non-promotion to P-5—Issue of receivability—Question of a binding promise to promote the staff member—Staff members entitled to due consideration for promotion

The Applicant, on 1 May 1991, wrote to the Director-General for Development and International Economic Cooperation requesting that she be promoted to the P-5 level, claiming that she had been occupying a P-5 post since 1981 and performing functions at the P-5 level. The Director-General recommended that she

should be promoted, but she was not. She appealed, arguing, inter alia, that the Administration had made a binding commitment to promote her to the P-5 level.

At the outset, the Tribunal dealt with the issue of a time-bar of the Applicant's claim that her non-placement in a P-5 post violated her rights. The Tribunal noted that the Applicant had been placed in the P-5 post in 1987, the year she had been promoted to the P-4 level. In July 1990, the Applicant was removed from this post and placed in a P-4 level post. It appeared that the Applicant had become aware of this change in placement only in 1991. At that time, the Applicant could have availed herself of the recourse procedures established by staff rule 111.2, which allowed an appeal from an administrative decision "within two months from the date the staff member received notification of the decision in writing". The decision to remove the Applicant from a P-5 post and to place her in a P-4 post was taken at least one and a half years before the date of her appeal. The Tribunal therefore found that, with respect to this claim, the Applicant's appeal was time-barred.

Regarding the Applicant's claim that there was a binding promise to promote her to the P-5 level, the Tribunal noted that the Applicant contended that in May 1991, she had received an oral promise from the Director-General for Development and International Economic Cooperation to promote her to the P-5 level. In support of that contention, the Applicant referred to a note for the file dated 27 February 1992, which recommended the Applicant for promotion and asked that consideration be given to the issue. However, the note did not contain a binding promise to promote the Applicant. Accordingly, the Tribunal was unable to conclude that a binding commitment existed to promote the Applicant.

The Tribunal also considered whether the Applicant's rights had been violated by the manner in which the P-5 post, to which the Applicant claimed she should have been assigned, was filled. The Tribunal noted that the P-5 post the Applicant was seeking had been filled by an external candidate through what was alleged to have been a "private arrangement", without having been advertised. This appeared to be a violation of staff regulation 4.4, which reads:

> "Subject to the provisions of Article 101, paragraph 3, of the Charter and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations."

The Tribunal had held on numerous occasions that staff members already employed by the United Nations had a right to the fullest consideration for appropriate vacancies. The breach of staff regulation 4.4 constituted a violation of the Applicant's rights. (Cf. Judgements No. 310, *Estabial* (1983), and No. 362, *Williamson* (1986).) The manner in which the post had been filled deprived the Applicant of her right to due consideration for promotion to the P-5 level.

In addition, the Tribunal considered whether the fact that there was no up-to-date PER violated the Applicant's rights to full and fair consideration for promotion to the P-5 level. The Tribunal had repeatedly held that the Organization must comply with its own procedures, which included the timely evaluations of a staff member's performance. "It is the responsibility of the Administration to ensure that personnel records required by promotion review bodies are complete, up to date and submitted in a timely fashion. The Tribunal finds that the Applicant's right to be duly considered for inclusion in the . . . Promotion Register was not fully respected and, as a consequence, the responsibility of the Organization is engaged". (Cf. Judgement No. 586, *Atefat* (1992).)

For the foregoing reasons, the Tribunal ordered the Respondent to consider the Applicant fully and fairly for promotion to the P-5 level as soon as possible, and to pay the Applicant an amount equal to four months of her net base salary, at the rate in effect on the date of the judgement, as compensation for the procedural irregularities set forth above.

4. JUDGEMENT NO. 850 (26 NOVEMBER 1997): PATEL V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[6]

Separation from service due to misconduct—Scrupulous respect for requirements of due process in cases of charges of fraud against a staff member—Question of whether procedural errors affected the substance of the case—Standard of proof in misconduct cases—Discretionary authority of the Secretary-General in misconduct cases

The Applicant, who had entered the service of the United Nations in July 1977 at the P-3 level, was working in the Economic and Social Commission for Asia and the Pacific (ESCAP) in Bangkok at the D-1 level when she was separated from service for misconduct. She had altered a statement of annual earnings of her husband from the Asian Institute of Technology to indicate a lower salary, thus qualifying her for payment of the United Nations dependency allowance in respect of her husband.

The Applicant appealed the decision of the Secretary-General not to accept the recommendations of the Ad Hoc Joint Disciplinary Committee (JDC), but instead to separate her from service due to misconduct. Additionally, she requested the Tribunal to order, as a preliminary measure, the Respondent to communicate to the Applicant the "broad guidelines on sanctions applicable in cases of misconduct" as well as other information.

Regarding the Applicant's plea for this preliminary measure, the Tribunal recognized the Respondent's admission that the Applicant had not been provided with the "broad guidelines on sanctions applicable in cases of misconduct" which the Administration had furnished to the JDC. The Respondent also admitted that when the Chief, Personnel Services Section, had provided additional clarification on the case, neither the Applicant nor her counsel had been present and two witnesses had given testimony in the presence of each other. The Tribunal noted that the charge of misconduct due to fraud against the Applicant was severe, and therefore the Administration must be scrupulous in its respect for the requirements of due process. Having reviewed the case, the Tribunal took note of the Respondent's admission that certain procedural errors had been committed. In that regard, paragraph 17 of administrative instruction ST/AI/371, dated 2 August 1991, states:

> "If the Committee [the JDC] decides to hear oral testimony, both parties and counsel should be invited to be present, and no witnesses should be present during the testimony of other witnesses."

The JDC did not respect this provision. The Tribunal found that although the JDC had committed procedural errors, those errors were technical in nature and had not affected the substance of the Applicant's case so as to result in a miscarriage of justice (Judgement No. 583, *Djimbaye* (1992)). Nonetheless, the Tribunal emphasized that, especially in a difficult case such as the present one, the Administration must take care to ensure that all procedural requirements were scrupulously respected.

On the substance of her claim, the Applicant submitted that the Administration's charges against her had not been proved beyond a doubt and that they should therefore be dismissed. The Tribunal rejected this argument. Under the Staff Regulations and Rules, disciplinary proceedings were administrative proceedings regulated by the internal law of the Organization. Once a prima facie case of misconduct was established, the staff member must provide satisfactory evidence to justify the conduct in question (Judgements No. 484, *Omosola* (1990), and No. 592, *Dey* (1991)).

The Tribunal noted that it was incumbent upon the staff member who obtained allowances or benefits from the Administration, on the basis of his or her certification, to ensure that proper information was supplied. The Applicant had submitted a certificate for dependency benefits on which she indicated that "I certify that the information provided in this form, as well as the supporting evidence submitted with it, is true and complete to the best of my knowledge and belief". Since the certification was incorrect, the Applicant had the onus of proof to convince the Secretary-General that, in submitting the certificate, she had not acted contrary to the highest standards of integrity, as mandated by the Charter of the United Nations. In order for the Applicant to prevail, it was not sufficient for her to claim good faith based on trusting another's representation (cf. Judgement No. 424, *Ying* (1988)). The Applicant had produced evidence showing that her conduct was, or may have been, attributed to the dire personal circumstances in which she found herself at the time of her misconduct. The JDC's consideration of those facts had led it to find that they constituted mitigating circumstances. Consequently, the JDC had recommended that the Applicant should be suspended without pay for three months, that she should lose all steps within her grade above step I, and that a letter of censure should be placed in her personnel file.

However, as the Tribunal noted, it was within the Secretary-General's discretion to determine whether a staff member had met the standards of conduct required by the Charter and the Staff Regulations and Rules. (Cf. Judgements No. 414, *Ying* (1988); No. 425, *Bruzual* (1988); and No. 479, *Caine* (1990).) It was clear that the Secretary-General, in his determination, must act without prejudice or other extraneous considerations and with respect for the requirements of due process (cf. Judgements No. 436, *Wiedl* (1988), and No. 641, *Farid* (1994)). Taking into account the technical procedural errors previously discussed, the Tribunal considered that, however harsh the result might be for the Applicant, the Secretary-General was within his discretionary authority in determining that the Applicant's alteration of the certificate from the Asian Institute of Technology constituted misconduct, which had resulted in the sanction applied.

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

5. JUDGEMENT NO. 851 (25 NOVEMBER 1997): GURUN V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[7]

Denial of right of a General Service staff member to apply for a Professional post—General Service to Professional examination goal of ending gender discrimination in the promotion process—Means of serving the Organization as a Professional staff member through internal and external examinations should be even-handedly applied

The Applicant, who had entered the service of the Organization in February 1980, at the G-2 level, was working in the Special Unit of Palestinian Rights of

the Department of Political Affairs as a Meetings Services Assistant at the G-5 level when she applied for the post of the Non-Governmental Organization Liaison Officer, at the P-3 level, also in the Department of Political Affairs. She was informed that her application could not be taken into consideration and that the only means through which a Secretariat staff member could be promoted from General Service to the Professional category was through the General Service to Professional (G to P) examination. She appealed, contending that the decision to bar her from applying for a Professional post violated her rights under the United Nations Staff Regulations and Rules.

The Respondent relied in large part on General Assembly resolution 33/143, of 20 December 1978, to contend that his decision not to accept the JAB's recommendation to apply for the P-3 post in question if it had not been filled was in conformity with applicable United Nations regulations and rules. In examining resolution 33/143, which provided for the movement of General Service to the Professional level, the Tribunal noted that in its preamble, the Assembly called upon the Secretary-General and all the United Nations organizations "to put an end to any form of discrimination based on sex, as laid down in Article 8 of the Charter of the United Nations, in conditions of employment, recruitment, promotion and training and to ensure that the opportunities for employment and promotion of women in the United Nations system are equal to those of men".

Article 8 of the Charter provides that:

> "The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs."

The Tribunal noted that one of the goals of the above resolution was to put an end to discrimination based on sex in the conditions of employment and promotion. It had recently considered the issue and had held that "since the competitive examination places no improper restriction on the eligibility of any staff member for the competitive examination, it raises no questions under Article 8 of the Charter". (Cf. Judgement No. 722, *Knight et al.*, para. X (1995).)

General Assembly resolution 33/143 states that "competitive methods" must be used to select a candidate from the General Service category for Professional-level posts. The Applicant held an advanced university degree and had received excellent performance evaluation reports. Nevertheless, the Tribunal found that promoting a General Service candidate to the Professional category by other avenues than those expressly provided by the General Assembly resolution would run counter to the wording and spirit of the resolution. As explained by the Tribunal in Judgement No. 722, *Knight et al.* (1995):

> ". . . since the General Assembly introduced the system regulating promotion from the General Service category to the Professional category through the competitive examination and since the Tribunal had upheld the legality of the system in Judgement No. 266, *Capio* (1980), there is no valid basis for challenging its legality . . .
>
> "V. The Tribunal has had a number of occasions to consider the competitive examination system, most recently in Judgement No. 694, *Chen* (1995), but has had no reason to question its legality or to reconsider the *Capio* decision. The Applicants in this case briefly refer to *Capio*; they do not ask that it be reconsidered, and the Tribunal will not do so."

A further argument that the Applicant advanced was that the requirements of the G to P examinations could be disregarded by non-staff members who could sit for the national competitive examinations to enter the Professional category. This suggested a situation whereby the Applicant's chances for promotion to the P-3 level would be greater if she were an external candidate. However, the Tribunal noted that when the Applicant wanted to apply for the P-3 post, she was unable to do so due to her own refusal to sit for the G to P examination. As a consequence, she might have been at a disadvantage with respect to external candidates who had passed the examination. But it considered that it could bear no responsibility for circumstances which were of the Applicant's own making. In addition, the national competitive examinations were, in any event, identical, both in form and in substance, to the G to P examinations. This demonstrated that the means for serving the Organization as a Professional staff member had been even-handedly applied. Everyone, whether internal or external, must take the same examination to become a Professional staff member at the P-1 and P-2 levels.

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

6. JUDGEMENT NO. 852 (25 NOVEMBER 1997): BALOGUN V. THE SECRETARY-GENERAL OF THE UNITED NATIONS[8]

Non-consideration for post—Interpretation of staff regulation 4.4—Question of "internal" candidates being restricted to those employed under the 100 Series of the United Nations Staff Rules

The Applicant had been serving with the Economic Commission for Africa (ECA) at the L-5 level, on a series of fixed-term intermediate-term appointments under the 200 Series of the United Nations Staff Rules, when he applied for the P-5 post of Chief, Public Administration and Management Section, in ECA. He was informed that he was not eligible for consideration for the vacancy, as it had been advertised internally only and as such was open only to staff members who had been recruited either through a competitive examination or through a review by the United Nations appointment and promotion bodies. The Applicant appealed, contending that the practice of making a distinction between staff members based on their type of contract was invalid.

In consideration of the case, the Tribunal took note of staff regulation 4.4, which provides that:

> "Subject to the provisions of Article 101, paragraph 3, of the Charter, and without prejudice to the recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, *to the requisite qualifications and experience* of persons *already in the service of the United Nations* . . ." (emphasis added)

The Tribunal noted that the words "internal service" or "internal candidates", which had been cited by the Respondent, were not even mentioned in the text of staff regulation 4.4; accordingly, the correct interpretation of this legal rule could not turn on such concepts. The Tribunal found that the important concept here was that the fullest regard should be given to the "requisite qualifications and experience" of those people "*already in the service of the United Nations*" (emphasis added). The Tribunal was of the view that the words "already in the service of the United Nations", when given their natural and ordinary meaning, included those persons recruited under the 200 Series, who were employed in the exclusive service of the Organization, who had taken an oath to the Organization and whose

Letters of Appointment obliged them to abide by the terms and conditions of the United Nations Staff Regulations and Rules. All those staff members, except those serving the Organization on consultancy agreements, since they did not fulfil the conditions specified above, shared the same legal obligations towards the Organization and should therefore benefit from the same rights.

The Tribunal noted that Article 101, paragraph 3 of the Charter, which provides that:

> "[t]he paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the *highest standards* of efficiency, competence and integrity . . ." (emphasis added)

is limited to a certain extent by the preference given in staff regulation 4.4 to those already serving the Organization as staff members. In interpreting staff regulation 4.4, the Tribunal believed that, in order to secure the "highest standards" in personnel, it was necessary that the appointment and promotion bodies be given the widest possibility of choice among staff members.

Another rule that bore on the interpretation of staff regulation 4.4 was Article 8 of the Charter of the United Nations, which provides that:

> "The United Nations shall place *no restrictions on the eligibility* of men and women to participate in any capacity and under *conditions of equality* in its principal and subsidiary organs." (emphasis added)

The Tribunal considered that the more restrictive the interpretation given by the appointment and promotions bodies to what they termed "internal service", the more likely there was to be an infringement of staff regulation 4.4, in the light of Articles 8 and 101 of the Charter.

The Respondent advanced several arguments to support his contention that "internal" candidates should be restricted to those employed under the 100 Series of the Staff Rules. Among them was his claim that the conditions for employment under the 200 Series were less stringent than for 100 Series employment. The Tribunal was of the view that the paramount consideration in the process of selecting candidates for posts was their capacity to perform the tasks at issue. The appointment and promotion bodies should be perfectly capable, by reviewing an applicant's performance history and evaluations as well as administering any tests they considered appropriate, of determining which candidate possessed the best qualifications for the post in question, notwithstanding the series of the Staff Rules under which the candidate was appointed. The text of staff regulation 4.4 supported that interpretation, as it spoke of the regard that must be given to the "requisite qualifications and experience" of those serving the Organization. For the Administration to give the "fullest regard" to candidates "in the service of the United Nations", the appointment and promotion bodies must admit all the candidates in the service of the United Nations to the competition and must recognize that the determining factor was the "qualifications and experience" of the staff member, not the series of the Staff Rules under which he or she had been appointed. It was clear that admitting 200 Series staff to competition for "internal" vacancies did not assure their selection for the post, but barring them from competition was inconsistent with Articles 8 and 101 of the Charter.

The Respondent also contended that the posts of 200 Series staff were funded from different sources than those of 100 Series staff. Furthermore, he submitted that the "core functions" of the Secretariat were exercised by 100 Series

staff, who should therefore be selected for "internal" posts in order to promote their careers within the Organization. The Tribunal considered it irrelevant that funding for 200 Series posts was obtained from different sources than for 100 Series posts. The source of a post's funding had no bearing on the "qualifications and experience" of a candidate applying for a different post. With respect to the argument that 100 Series staff performed "core functions" and should therefore be privileged in the development of their careers within the Organization, the Tribunal found that, as the concept of "core function" was not defined, it was not an appropriate benchmark by which to determine who should enjoy a career in the United Nations. Further, the Tribunal noted that 100 Series appointments were, for posts above the P-3 level, open to external candidates who had not passed any kind of competitive examination. If those 100 Series staff had not passed a competitive examination, they were, by the Respondent's own logic, no different from 200 Series staff applying for the same posts.

The Tribunal was of the view that limiting recruitment for "internal" vacancies to staff holding 100 Series appointments, thereby excluding from consideration staff serving under the 200 Series, might not be in the best interests of the United Nations, as this would limit the Organization's ability to fill vacancies with the most qualified personnel. The fact that 200 Series staff members did not, when they entered the service of the United Nations, have an expectation of a career within their own branch of service did not necessarily deprive them of the legitimate expectation, under Articles 8 and 101 of the Charter, of a career serving the United Nations on the strength of their "qualifications and experience", as mandated by staff regulation 4.4.

For the foregoing reasons, the Tribunal ordered the Respondent to allow the Applicant, who had been recruited under the 200 Series, to submit his candidacy for any internal vacancy for which he was qualified and for which he applied. The Tribunal rejected all other pleas.

7. JUDGEMENT NO. 865 (26 NOVEMBER 1997): EAGLETON V. THE COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST[9]

Repayment by staff member to United Nations of tax refund due to a casualty loss deduction from the United States Internal Revenue Service—Tax Equalization Fund—Purpose of reimbursement of taxes by the United Nations—Purpose of refund by the United States Internal Revenue Service due to casualty loss of property

The Applicant, a citizen of the United States, entered the service of the Agency on 1 October 1988 as Deputy Commissioner-General in the Office of the Commissioner-General, at the Assistant Secretary-General level, in Vienna. In March 1994, the Applicant was preparing to retire and move back to the United States, but, having been appointed Special Coordinator for Sarajevo on 29 March 1994, he decided to remain in Europe. His personal effects had been packed in preparation for the move by the Vienna warehouse of Herber Hausner. Instead of proceeding with the move to the United States, the Applicant chose to store his personal effects with Herber Hausner while he was on assignment in Sarajevo. On 20 October 1994, a large portion of the Applicant's property was destroyed when a fire broke out in a Vienna warehouse where the property was being stored during the Applicant's service on special assignment in Sarajevo. The property was uninsured, and neither the warehouse management nor UNRWA was willing

to compensate the Applicant for his loss. The Applicant therefore took advantage of the casualty loss deduction provided by the United Nations Internal Revenue Code and, as a result, received a full refund of his 1991, 1992 and 1994 paid tax and a partial refund of his 1993 paid tax. The total refund amounted to $213,993.00.

Pursuant to United Nations practice, UNRWA had reimbursed the Applicant for the portion of his 1991, 1992, 1993 and 1994 United States income tax which was attributable to his United Nations salary, a total of $134,671. UNRWA claimed that the Applicant was required to transfer the corresponding amount of his tax refund to UNRWA. The Applicant claimed that he was entitled to the full refund amount. As a result of this dispute, the Administration required the Applicant to provide UNRWA with a letter of credit for the sum of $134,671.

In the view of the Tribunal, the proper resolution of this matter required an understanding of the source of the funds which were used to reimburse the Applicant for the taxes imposed by the United States on the Applicant's United Nations salary. All United Nations employees were subject under the rules of the United Nations staff assessment plan to a direct assessment by the United Nations on their United Nations salaries and emoluments. (Cf. Judgements No. 237, *Powell* (1979); No. 425, *Bruzual* (1988).) The majority of United Nations employees were exempt from national taxation under section 18 of the Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly on 13 February 1946. The staff assessment plan was intended to approximate national income taxation. The United States, however, was not bound by section 18 of the Convention, and therefore taxed American United Nations employees on their United Nations salaries as well as their other personal income. In order to provide relief from double taxation to those employees who were subject to both the United Nations staff assessment and national income taxation, the United Nations had developed a tax reimbursement system. Under staff regulation 3.3, where a United Nations staff member was subject to both staff assessment and national income taxation with respect to his or her United Nations salary, the Organization refunded to the employee the full amount of the national income taxes paid on his or her United Nations salary. The source of these tax reimbursements was the Tax Equalization Fund, which consisted of the revenues collected from staff assessments.

The Tribunal considered that while the reimbursement by the Organization of the Applicant's United States taxes was designed to protect him from the effect of double taxation, the tax refund from the United States authorities was intended to compensate him for the casualty loss of his property. The confiscation by the Agency of that payment would vitiate the purpose of the refund by the United States authorities.

For the foregoing reasons, the Tribunal held that the Applicant was entitled to $133,348 of the $134,671 tax refund issued to him by the United States Government. Accordingly, the Tribunal ordered the Respondent: (*a*) to release to the Applicant the letter of credit in the amount of $134,671, which UNRWA currently held; and (*b*) to pay to the Applicant $1,370.42, which represented the fee paid by the Applicant to the South Side Bank ($2,693.42) in order to obtain the above-referenced letter of credit, minus the $1,323 owed to UNRWA in relation to the federal income tax for the year 1994.

B. Decisions of the Administrative Tribunal of the International Labour Organization[10]

1. JUDGEMENT NO. 1581 (30 JANUARY 1997): ROMBACH-LE GULUDEC V. EUROPEAN PATENT OFFICE[11]

Non-waiver of immunity by European Patent Office in connection with an allegation of assault by the president of the Office against another staff member—Competency of the Tribunal

The complainant was a staff member of the European Patent Office (EPO) at The Hague when, on 4 December 1995, she took part in a demonstration at the EPO headquarters in Munich to protest against meetings of the heads of delegation of its Administrative Council. She alleged that during the demonstration she had been assaulted by the then president of EPO and sustained injury and consequential pain and distress. Subsequently, on 11 March 1996, the complainant learned from a communiqué from the new president to the staff that in response to a letter from the German authorities the Administrative Council had decided not to waive the immunity of the former president in regard to that incident.

By a letter dated 7 June 1996 to the chairman of the Administrative Council, the complainant lodged an internal appeal against the decision not to waive the former president's immunity. In response, by a letter dated 29 July 1996, the chairman informed her that she was not free to appeal against decisions of the Council. He added, however, that the Service Regulations provided other means of redress. She filed an appeal with the Tribunal.

The Tribunal dismissed the complaint, relying on Judgement No. 1543 (*in re Popineau No. 12*), in which it had declared that the decision whether or not to waive the president's immunity fell within the Council's discretion and that such exercise of discretion was a matter outside the Tribunal's competence, affecting as it did relations between the defendant organization and a member State. The Tribunal held that the reasoning in Judgement No. 1543 held good for the instant case. Since the complaint was therefore clearly irreceivable it must be summarily dismissed in accordance with article 7(2) of the Tribunal's Rules.

2. JUDGEMENT NO. 1584 (30 JANUARY 1997): SOUILAH V. WORLD METEOROLOGICAL ORGANIZATION[12]

Dismissal for unsatisfactory conduct—Suspension of dismissal until judgement—Application for hearings of witnesses—Regulations 1.5 and 4.2—Standard of conduct for an international civil servant—Question of proportionality of disciplinary measure to offence

The complainant, an Algerian, was dismissed from WMO, effective 20 January 1996, pursuant to rule 192.1(*a*) for repeated breaches of the standards of conduct of the international civil service. He had been employed at the G-4 level.

In March 1975, the complainant had been married in Geneva and, subsequently, had had a son, in May 1975, and a daughter, in September 1978, both born in Geneva. His marriage had been dissolved by a Swiss cantonal court in March 1989 and custody of the children had been awarded to the mother, and he was ordered to pay support of 1,000 francs to his former wife. He neither defended the divorce suit nor objected to the terms of the decree. However, he neither kept up the payments of alimony nor met other debts, such as bank loans, rent and bills from doctors.

When the complainant failed to make his support payments, the Geneva Cantonal Service for Advances and Recovery of Alimony (SCARPA) lent sums to his former wife and sought recovery from him. He failed to pay the sums and, in February 1990, he was prosecuted for default of maintenance under section 217 of the Swiss Penal Code. When he again failed to pay the sums, SCARPA referred the matter to the Permanent Mission of Switzerland to the United Nations Office at Geneva. Thereafter, there ensued reminders to the complainant of his duties towards both WMO and the host country, as well as much written and oral discussion about the case between the Swiss authorities, including the Mission, and WMO. Eventually, in 1992, the criminal chamber of the Geneva cantonal court, a police court, sentenced him to three months' imprisonment, subject to five years' stay of execution, for default of maintenance under section 217 of the Penal Code and for misappropriation of property under distraint in breach of section 169. On 8 December 1993, the police court gave him, pursuant to section 169, a suspended sentence to one month's imprisonment for failure to pay into the Receiver's Office sums he owed to another creditor. On 1 December 1994, the police court again sentenced him for default of maintenance, under section 217, to two months' imprisonment and to three years' expulsion from Switzerland, both penalties to be subject to three years' stay of execution. It revoked the stay granted on 9 November 1992. The criminal chamber of the cantonal court upheld the sentence on 4 May 1995. The court stated that, according to SCARPA, the arrears amounted to 67,010 Swiss francs, whereas in a letter of 8 May 1995 the Mission said they totalled 159,450. The true figure remained unclear.

On 15 June 1995, the police court again gave him a suspended sentence, under section 180 of the Penal Code, to one month's imprisonment for threat of assault to another official, who had filed suit against him. The criminal chamber of the cantonal court upheld the judgement in substance on 23 October 1995. The complainant made two applications for pardon, but a legislative body of the Canton of Geneva (le Grand Conseil) dismissed them.

His landlord and his dentist approached WMO about unpaid bills. It then came to light that the United Nations Staff Mutual Insurance Society had made him a loan to pay the dentist, but he had used the money to clear other debts.

Disciplinary proceedings were finally initiated, and in its report dated 12 January 1996, the unanimous conclusion was breach of duty warranting dismissal. The Secretary-General endorsed the report, and the complainant was dismissed from WMO service as from 20 January 1996.

The complainant appealed, claiming that his conduct was confined to his private life, his services being found satisfactory; that the punishment was too harsh; and that it affected others: he could not now meet his debts to his family and other creditors.

The complainant also had requested the Tribunal to suspend dismissal so that he might remain in employment at least pending the judgement. However, the Tribunal pointed out that, pursuant to article VII (4) of its statute, it was not empowered to make a ruling of that kind. Furthermore, the complainant had applied for the hearing of four witnesses: three members of the WMO staff and his former wife. However, since any material issue of fact or of law might be decided on the written evidence, the Tribunal decided such hearing would serve no purpose.

In consideration of the merits of the case the Tribunal recalled regulation 1.5, which read:

"Members of the secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on that status . . . they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status."

Regulation 4.2 further declared the paramount consideration in the appointment of staff to be the need to secure the highest standards of efficiency, competence and integrity. And WMO took the quite proper view that it must follow the same criteria in deciding whether to keep someone on its staff.

The Tribunal noted that besides carrying out his allotted tasks an international civil servant had a duty to show such dignity of behaviour as not to harm the good name that the organization must enjoy if it was to do its job properly. He must in particular abide by the law and respect the public order of the host State of any other country to which the organization might assign him. He must govern his private life accordingly, especially as it might touch on society at large: see, for example, Judgement 1501 (*in re Cesari*). Thus, in previous cases, the Tribunal had upheld the dismissal of an official who had complained about his organization to the host country and accused another staff member of many offences (Judgement 63, *in re Andreski*); of one who had embezzled funds and run up debts (Judgement 79, *in re Giannini*); of one who kept reporting drunk for work (Judgement 207, *in re Khelifati*); and of one who had without consent set up a business of his own in the area of the organization's work (Judgement 1363, *in re Popineau Nos. 6, 7 and 8*).

As the Tribunal noted, in the present case the complainant, though well paid (for the month of May 1995 his pay had amounted to 6,988.40 Swiss francs plus 1,051.35 in allowances; after deductions totalling 1,152.80 francs, for pension contributions, insurance premiums and the rental of a garage, he was left with 6,886.95 francs in take-home pay), had failed time and again, and quite improperly, to meet his financial obligations, in particular the payment of alimony to his family, and disobeyed orders by the Swiss courts and administrative authorities. The Republic and Canton of Geneva, where the organization had its headquarters, had had to lend large sums, of which he had paid back only a small fraction. He had caused loss to the canton, and that was the more objectionable in that he was paying no income tax. He had received four prison sentences for offences against Swiss law—default of maintenance, misappropriate of property under distraint and threat of assault—which seriously disrupted public order. The Swiss Permanent Mission and his creditors had approached the organization many times, thereby putting it under the awkward obligation of acknowledging the misconduct of a member of the staff. Moreover, more than once he had received money from the United Nations Staff Mutual Insurance Society to pay bills, yet had used it for other purposes because he was in financial straits.

As to the claim by the complainant that the punishment was disproportionally heavy, the Tribunal stated that according to the rule of proportionality there must be some reasonable connection between offence and punishment, particularly when the official was dismissed on disciplinary grounds: see, for example, Judgements 937 (*in re Fellhauer*); 1070 (*in re Couton*); 1210 (*in re Zaidi*); 1250 (*in re Pena-Montenegro*); and 1363 (*in re Popineau Nos. 6, 7 and 8*). There had been no breach of the rule in the present case. WMO was free to conclude that its own interests required dismissing someone as neglectful of duty as

the complainant. He had been given a long time in which to improve, though to no avail; accordingly his interests had been given ample consideration.

The complainant further argued that, his conduct having been beyond reproach since October 1994, it was disproportionately severe to dismiss him for his earlier conduct, particularly as his family and other creditors were now at risk of receiving nothing at all. In the view of the Tribunal, the plea was irrelevant. The Tribunal held that, for one thing, there was no evidence to suggest that the complainant had offered the organization and all his creditors any sound arrangements for clearing off what he owed to them; had he done so, his creditors and the Permanent Mission would no doubt have dropped the matter. For another thing, according to reports the organization had received after October 1994, his conduct had grown much worse. The conclusion was that WMO had good reason to believe that keeping him on was unacceptable and its Secretary-General had not exceeded the bounds of his discretion in deciding on dismissal. The complaint was dismissed.

3. JUDGEMENT NO. 1586 (30 JANUARY 1997): DA COSTA CAMPOS V. EUROPEAN SOUTHERN OBSERVATORY[13]

Dismissal based on less than serious conduct—Duty to warn staff member of shortcomings—Right of defence—Proper notice of termination—Question of damages regarding wrongful termination

The European Southern Observatory (ESO) recruited the complainant, a Belgian who was born in 1943, in 1974 on a three-year appointment as a Personnel Officer at step 5 in grade 8. After two extensions it granted him an indefinite appointment on 15 June 1981. On 19 January 1982, it gave him an award for outstanding service. On 23 November 1988, it promoted him to step 10 in grade 9, as Head of Personnel Administration and General Services as from 1 March 1988. He received a second award for outstanding service on 20 December 1989. The Director General promoted him to step 4 in grade 10 on 17 December 1992.

The post of head of Personnel was vacant from the end of July 1980 to August 1993, except from January 1985 to April 1986. In March 1993 the complainant applied for it, but ESO said that he was not qualified.

By a letter of 1 December 1994, the Director General told him that he was dismissed under article R II 6.01 (i) of the Staff Regulations, which allowed dismissal "for other specified reasons, related to the exercise of functions". The letter stated that though his appointment was to expire on 1 July 1995, he was to stop work on 2 December 1994, the date of the notice of dismissal. He would be on special paid leave during the period of notice and was to remove all his belongings from his office by 5 p.m. on that day. The reasons given were that for over a year he had been failing to carry out his main tasks properly, had got on badly with his first-level supervisor, the head of Personnel, and by his behaviour had marred the organization's standing and good name.

In consideration of the case, the Tribunal noted that the report of the Joint Advisory Appeals Board had unanimously concluded that ESO had failed to show just cause for the termination. Furthermore, ESO had admitted to having had no legal grounds for dismissal, but contended that the complainant's personality barred taking him back, and that he should be compensated for wrongful dismissal.

In the view of the Tribunal, citing Judgement 1546 (*in re Randriamanantenasoa*), if ESO wished to dismiss him on the grounds of his shortcomings, though not serious, it had a duty to warn him in what ways he fell short and give him the opportunity of doing better. ESO had failed to do this. Moreover, the Tribunal stated that had his shortcomings warranted disciplinary action, he should have had the safeguards of disciplinary proceedings. It was wrong to have deprived someone of those safeguards by resorting to some other procedure for termination that allowed no right of defence (Judgement 1496, *in re Gusten*).

The Tribunal was also of the opinion that the summary dismissal and the way in which the complainant had received notice of it were quite irrelevant to ESO's interests and were damaging to his dignity and good name.

Regarding the damages to be awarded, the Tribunal recalled article VIII of its statute:

> ". . . if satisfied that the complaint was well founded, shall order the rescinding of the decision impugned or the performance of the obligation relied upon"; but if such rescinding or performance is "not possible or advisable" the Tribunal will award the complainant compensation for the injury sustained.

Furthermore, in the opinion of the Tribunal, the circumstances of each case determined whether redress was to take the form of reinstatement or an award of damages. In the present case, though the complainant must be made whole, that might be done by an award. The Tribunal doubted whether it would be reasonable to order ESO to take back someone who got on badly with other senior officers, especially when there might be little scope for finding him proper employment in an organization of that size. Besides, in the talks the complainant had not ruled out a financial settlement, even though there had been no agreement on the amount.

The parties had agreed that if ESO had abolished the complainant's post it might under the material rules have awarded him the equivalent of 57 1/2 months' basic pay in all: 46 1/2 months' basic pay plus repatriation grants and pay for the period of 6 months' notice. ESO had offered to round the amount up to 58 months' pay. But instead of abolishing his post it had wrongfully dismissed him. Taking account of his age and career prospects, the Tribunal held that he would get fair redress in the award of a total of 61 months' basic pay including all entitlements of employment. Any sums already paid by the Observatory were to be subtracted from the total.

The Tribunal further held that ESO might choose between reinstatement and the award of such damages. Whichever option it might prefer, the complainant was further entitled, by way of compensation for the injury attributable to the sudden breach of contract, to an award of 50,000 French francs in moral damages. Since the complaint was allowed, the Observatory should pay him costs of 20,000 francs.

4. JUDGEMENT NO. 1595 (30 JANUARY 1997): DE RIEMAEKER (NO. 3) V. EUROPEAN ORGANISATION FOR THE SAFETY OF AIR NAVIGATION[14]

Non-appointment to post—Limits of discretion in matching an applicant with qualifications indicated in a vacancy notice—Question of remedy

The complainant joined the staff of the European Organisation for the Safety of Air Navigation (Eurocontrol) on 2 January 1969, in the Translation and Inter-

pretation Division. She was Chief Interpreter, and Acting Head, when she impugned the Director General's decision to appoint another individual as Head of the Division and reject her own application for the post. She also challenged a decision to relieve her of her duties of Acting Head, and sought reinstatement in those duties and permanent appointment as Head of the Division.

As regards the complainant's plea that Eurocontrol had failed to observe the terms of the vacancy notice for the post, the Tribunal noted that the vacancy notice, inter alia, had required "long experience (at least 10 years) of translation, revision and interpretation". The complainant had claimed that she met the requirements of the post, and that the individual selected had never been an interpreter and had no experience of interpretation. The agency had responded that the individual, though not an interpreter, knew enough about interpretation to run a language service and had skills in management that the complainant lacked. In the agency's view, an applicant did not have to meet all the requirements set out in the notice; thus it was a proper exercise of discretion to lend more weight to some of them than to others, especially since no one candidate, and certainly not the complainant, had all of them.

The Tribunal rejected the agency's argument. In its opinion, though the qualifications stated in a vacancy notice were not absolutely binding and the Director General might still exercise some discretion, he might not so utterly discard them as to flout the rules that ensured proper openness and objectivity of the competition. In the present case, the qualifications that Eurocontrol had set out were fully warranted by its desire to appoint someone with experience of both translation and interpretation to head the service. Having itself laid down those essential qualifications, the agency had a duty to abide by them. Yet it had plainly failed to do so since, as it admitted that the individual selected had never worked as an interpreter, though he had spent "22 years in the English language section of Division GS.3", and so had no experience at all of interpretation, let alone the "long" experience the notice had called for. Moreover, his having had one interpreter as a subordinate obviously did not amount to experience in heading a team of translators and interpreters.

The Tribunal held that although the complaint was irreceivable insofar as the complainant was claiming reinstatement in her former duties and permanent appointment to the post, the procedure for appointment to the post should be cancelled and the case should be sent back to Eurocontrol so that it might make an appointment to the post by due process. The Tribunal also ordered that Eurocontrol should pay the complainant 100,000 Belgian francs in costs.

5. JUDGEMENT NO. 1601 (30 JANUARY 1997): AELVOET (NO. 5) AND OTHERS V. EUROPEAN ORGANISATION FOR THE SAFETY OF AIR NAVIGATION[15]

Claims for costs of appeal—Standard for filing of a complaint against a decision affecting a class of officials—Question of a cause of action—Basis for claim for costs upon reversal of disputed decisions

The complainants were staff members of Eurocontrol in category C, and were paid a "typist's allowance", pursuant to rule 7 of the Rules of Application of the Staff Regulations. On 11 January 1995, the Director General issued office notice 2/95 to amend the conditions governing payment and, on 1 March 1995, issued notice 7/95 to give effect to notice 2/95. Notice 7/95 provided for a "functional" allowance that was "linked to the performance of the specific tasks of a

'Head of Secretariat' post". It listed the posts that conferred entitlement to the allowance and the names of the staff in those posts.

In a letter dated 16 March 1995, the Staff Association requested the Director General to hold the consultations provided for under the agreement of 9 January 1992 between the agency and the staff unions. When the Director General refused, the Association requested the chairman of the Permanent Commission of Eurocontrol to order that the procedure for consultation should be followed. On 29 May 1995, the complainants lodged internal "complaints" under article 92(2) of the Staff Regulations requesting withdrawal of the two notices and for a declaration that the Director General had acted unlawfully in failing to suspend the effect of them pending a decision by the Permanent Commission.

On 2 June 1995, the Director General issued office notice 10/95 suspending notices 2/95 and 7/95 until further notice.

In the meantime, the "complaints" were referred to the Joint Committee for Disputes, which held that they showed no cause of action. The Director General endorsed the Committee's conclusion. Though they filed separately on 4 December 1995, the complaints raised the same issues of fact and law, and accordingly the Tribunal joined them.

Eurocontrol had contended that the appeal was irreceivable. It claimed that notices 2/95 and 7/95 were general administrative decisions affecting a class of officials, whereas the Tribunal ruled only on individual disputes. However, the Tribunal, citing Judgement 1081 (*in re Albertini and others*) recalled that it had already ruled that the mere fact that a decision affected a category of staff, and was therefore a general one, did not preclude a challenge. Citing Judgement 1134 (*in re Ngoma*), the Tribunal added that the complainant must comply with the requirement in article VII (1) of its statute that internal remedies must be first exhausted.

Eurocontrol further argued that since notice 10/95 had suspended notices 2/95 and 7/95, the challenges had no cause of action. However, the Tribunal was of the view that notice 10/95 was not about the substance but rather concerned the future date of the entry into force of the earlier notices. In other words, there was nothing to preclude their being put into effect soon, and the complainants still had reason to seek the outright withdrawal of provisions that might have caused them injury, even if Eurocontrol alleged that no actual injury was then ascertainable. Indeed, Eurocontrol subsequently cancelled notices 2/95 and 7/95 by notice 19/95, dated 22 December 1995, and it was at that point that the complainants lost their cause of action.

Regarding the complainants' claim for costs of the present appeal, the Tribunal concluded that since the reversal of the disputed decisions had come only after the filing of the complaints and the complainants had therefore been put to needless expense, their claim for costs had succeeded. Eurocontrol's counterclaim to an award for costs against the complaints was dismissed. The complainants were awarded 100,000 Belgian francs.

6. JUDGEMENT NO. 1603 (30 JANUARY 1997): BENSOUSSAN, BONGIOVANNI AND FREEMAN (NO. 3) V. FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS[16]

Request for payment of difference between previous flawed post adjustment and new corrected amount—Right of staff member to challenge lawfulness of a

decision taken outside the organization—Question of pension contributions in calculation of post adjustment—Question of length of time in changing flawed system—Issue of budgeting for payment of damages

The complainants were employees of FAO. They challenged decisions by the Director General of the organization not to pay them the difference between the amounts they said should have been paid in post adjustment in the 24 months preceding the date of making their claims and the amounts they were actually paid. They also claimed interest thereon.

In consideration of the case, the Tribunal noted that the International Civil Service Commission had defined "post adjustment" as an amount paid in addition to net base salary, which was designed to ensure that the take-home pay of Professional and higher categories of staff of the common system of the United Nations, to which FAO belonged, had the same purchasing power equivalent throughout the system. In determining the post adjustment account was taken not only of the cost of goods and services at duty stations, but also of the sums deducted from staff pay for contributions to the United Nations Joint Staff Pension Fund.

The Tribunal further noted that it was the Commission which worked out the method of determining post adjustment: see for example Judgements 1265 (*in re Berlioz and others*) and 1266 (*in re Cussac and others*). For the purpose of reckoning the effect of pension contributions, the Commission had made changes to correct the flaws of the method it had introduced in July 1990. It had become clear in 1993 that that method was perverse in that, as FAO had pointed out, it was serving to lower the figure of the post adjustment allowance "by one third of the amount of any increase in pension contributions, while the deductions made from staff pay were increased by the same amount". It was not until 1995 that the Commission had done something: it endorsed a recommendation from the Advisory Committee on Post Adjustment Questions for counting "actual" pension contributions at each updating of the post adjustment index. The Commission had set the effective date of the change at 1 November 1995.

Mr. Bensoussan and Mr. Bongiovanni had lodged claims on 27 October 1994 and Mr. Freeman on 29 December 1994. Having put the Commission's decisions into effect, FAO had told the complainants that the method of reckoning the index would apply to them as from 1 November 1995. They impugned the final decisions that the Director General had taken on 22 June 1995 in refusing to apply the new method retroactively to their post adjustment allowance. They contended that by condoning a flawed method the organization had acted in bad faith; that its belief that it was bound by the Commission's decision and its refusal to pay interest on arrears amounted to mistakes of law; and that it was so doubtful of being in the right that it had made provision in its budget for 1996-1997 against the retroactive payments they were claiming.

The Tribunal made the point that even though the Commission might make recommendations for aligning conditions of service in the common system and might decide on the methods of determining them, the staff might still challenge any action by that body, independent though it be of the organization that employed them. As was said in Judgement 1000 (*in re Clements, Patak and Rodl*), to cite but one:

> ". . . when impugning an individual decision that touches him directly, the employee of an international organization may challenge the lawfulness of any general or prior decision, even by someone outside the organization, that affords the basis for the individual one."

Accordingly, the Tribunal considered that the complainants might challenge the lawfulness of the Commission's method up to November 1995 even though the FAO had done no more than fall in line. On that score the organization was wrong in pleading that the complainants were out of time: the staff might always challenge in law the rules that were applied to them. In any event the Staff Rules of the FAO allowed a claim to payment of amounts due in the immediately preceding 24 months.

Regarding the lawfulness of the method followed from 1990 to 1995 for reckoning post adjustment, the Tribunal was aware that there was no one method: whether it counted pension contributions in full, or only in part, or discounted them altogether in the tally of expenditure by staff. Such contributions amounted to expenditure in that they reduced take-home pay and yet they were an investment as well, and there was no faultless method. The draughtsman's purpose must be to establish a system as fairly as he could, checking any damage caused.

In that regard, the Tribunal considered that the method introduced in 1995 served the purpose better than the one it had superseded, but the method in use from 1990 to 1995 was not unlawful. Nor had the Commission taken too long, as the complainants had contended, to change the method once its unwanted effects had shown up. As FAO and the Commission had both pointed out, the system of post adjustment was complex. It was plain on the evidence that sure and abiding results were scarcely attainable.

It was the conclusion of the Tribunal that since the method that had been dropped in 1995 was not in itself unlawful, the complainants were not entitled to the retroactive correction of pay that each of them claimed. FAO's sensible precaution of putting in its budget the wherewithal to execute a ruling in their favour was obviously no argument in support of their case. In sum, there was neither mistake of law nor bad faith in applying decisions by the Commission that were lawful. The complaints were dismissed.

7. JUDGEMENT NO. 1634 (10 JULY 1997): GAWLITTA V. EUROPEAN MOLECULAR BIOLOGY LABORATORY

Termination of appointment—Intention of the parties determines interpretation and the application of the contract—Terms of contract are not superior in rank over Staff Rules and Regulations

The European Molecular Biology Laboratory (EMBL) employed the complainant as from 1 January 1991 under a contract dated 5 December 1990. That contract described his "Category of Personnel" as "Supernumerary Employee (A)-S1" and his function as that of a "Bookkeeping Assistant" at grade 2-0; it set a probationary period of six months; and it provided for termination after that period without any statement of reasons by the giving of six weeks' notice. It did not state the duration of the contract. It said that the contract was subject to the Staff Rules and Regulations as well as to the internal guidelines and rules issued by the Director-General.

The complainant received regular advancements in step on the completion of probation and on every anniversary of his appointment up to 1 January 1994, but in 1995 his step increase was withheld for a short period of time until he had fulfilled specified requirements, which he had done in April 1995. And on 1 May 1995, he was granted a promotion to "4-04", which had until then been withheld.

In a memorandum dated 18 April 1995, the head of Personnel informed him of his transfer from the Finance department to Personnel. In that memorandum, the "Category of Personnel" was described as "Administrative Officer of Paying Office" and not as "Supernumerary". EMBL did not, however, carry out the transfer but decided instead to keep him in Finance, "where he could draw on his experience of the work and consolidate on a recent performance that had been considered satisfactory enough to grant him a step increase to 4-04".

By a memorandum dated 8 December 1995, the head of Personnel gave him a six weeks' notice of termination without any statement of reasons, and on 27 December, he filed an appeal challenging the validity of the notice on the grounds that it had been signed by the head of Personnel, and not, as staff regulation R.2.1.02 required, by the Director-General; that it did not, as staff regulation R.2.6.06 required, state the reasons for termination; and that the termination, for which there was in fact no cause, was in breach of good faith.

The Tribunal noted that in its report of 20 May 1995 to the Director-General the Joint Advisory Appeals Board had concluded that, though the accuracy and quality of the complainant's work were undisputed, relations between him and his first-level supervisor had irretrievably broken down, partly because he "could be seen to be overqualified for his post". The Board observed that contracts for supernumeraries were beginning to be widely used to relieve difficulties caused by limits imposed on EMBL in the recruitment of staff; that while they "were originally intended to apply to short-term positions", they were more and more being applied to "long-term employment . . . in administrative, secretarial and other posts" and that they were "inappropriate for long-term employment" by EMBL and "should be eliminated as quickly as possible". The Board considered the contract between the complainant and EMBL to be "inappropriate for the period of his employment" and that its termination conditions were suitable only for a contract not exceeding one year and expressed dismay "that a person could be employed for five years on a contract with such poor personal protection". It concluded, however, that the parties were bound by the contract which they had signed and that EMBL had acted strictly in accordance with its terms.

At the Tribunal level, EMBL pleaded that under staff rule 1.1.01 its legal relationship with each employee was governed by the Staff Rules, the Staff Regulations and the contract. The contract concluded with the complainant provided for termination with due notice, but without any statement of reasons, and declared him to be a supernumerary employee. Not only had he accepted those terms at the time, but he had not challenged them even later by internal appeal. Nor can he have assumed that his contractual relationship with the Laboratory had undergone any fundamental legal change by the passage of time.

The Tribunal recalled its Judgement 701 (*in re Bustos*), in which it had held:

> "The function of a court of law is to interpret and apply a contract in accordance with the intention of the parties. When a contract is expressed in writing, the intention is normally to be ascertained from the documents produced. In some cases, however, the parties—or at any rate the party which is in a position to formulate the document—do not desire that the true relationship should be revealed. The reason for this is that, if the true relationship was made manifest, the law would impose consequences which the parties—or at any rate the stronger of them—do not wish to face."

And in Judgement 1385 (*in re Burt*), in which the Tribunal had looked behind the wording of a written contract on the grounds that it was merely a device

to deny the employee the protection of the rules, it had given effect to the real intention of the parties.

The Tribunal noted that supernumeraries were casual workers employed to carry out a certain task for a limited period of time, and that the duration must be shown in the contract and be not more than 12 months, though an exception was allowable in special circumstances. Furthermore, the Staff Regulations prescribed for each type of contract periods of notice applicable to resignation, termination and dismissal, but with the proviso that they might be reduced by mutual agreement. Under regulation R.2.6.06, every "member of the personnel" was entitled to be "notified of his dismissal in a letter indicating the reason or reasons, the date of termination of his contract and the date of the last day to be worked". There was no provision for any exclusion or exception. Moreover, it was the Director-General's duty under regulation R.2.1.11 to ensure that every supernumerary received a written contract which specified, among other matters, the category of personnel to which he belonged, the classification of his work or the function to be performed, and a period of probation not to exceed three months.

In the present case, the Tribunal considered that the basic terms and conditions of the complainant's contract—particularly as regards the nature of the work, the length of probation, and the failure to state a duration not exceeding the 12 months—made it fundamentally inconsistent with supernumerary employment of the kind contemplated by the Staff Rules and Regulations. Whatever doubt there might have been at the outset, it was quite clear by April 1995 that the complainant was not regarded as a supernumerary; his work was in no sense casual or temporary, he had received regular advancement and his transfer to another department had been proposed.

Relying on staff rule 1.1.01, the Laboratory had contended that the terms of the contract prevailed over the Staff Rules and Regulations on the grounds that the latter were not "given a superior rank over the provisions in the individual contract". The Tribunal rejected the contention. Not only was the Director-General bound to abide by the Staff Rules and Regulations, but the contract itself recognized that it was subject to the Staff Rules and Regulations.

The Tribunal also noted that the report of the Joint Advisory Appeals Board showed that EMBL was resorting to the grant of supernumerary contracts even for long-term regular employment as a device to circumvent limits imposed on the recruitment of staff and was so formulating the contracts as to conceal its true relationship with the employees. It had not specifically denied this. Indeed in its reply it accepted that "the present situation of supernumeraries is unsatisfactory" and stated that changes were under consideration. The provision for termination without any statement of reasons and on six weeks' notice was an integral part of the device that it adopted.

Therefore, in the view of the Tribunal, the term "supernumerary employee" must be disregarded because it was inconsistent with the parties' intent as expressed in the terms and conditions of the contract as well as with the Staff Rules and Regulations. Accordingly, the Tribunal held that in December 1995, the complainant was not a supernumerary and so his appointment could not be terminated without any statement of reasons on six weeks' notice. But neither might he be regarded as a staff member on a fixed-term, open-ended or indefinite contract. He had no right to the renewal of his appointment, and it did not appear from the evidence that the Laboratory would have renewed it had the proper procedure been followed.

The Tribunal concluded that the intention that both parties had formed, if not at the beginning, then at the latest by 1995, was, to quote Judgement 701, that "the complainant should be employed for as long as his services were required and he was willing to give them", and that to an agreement of that character "the law adds the term that reasonable notice of termination must be given". The complainant was entitled to an award of damages for the lack of such notice, and the amount is set *ex aequo et bono* at 35,000 German marks. He also was awarded costs of 8,000 marks.

8. JUDGEMENT NO. 1647 (10 JULY 1997): BOMBO N'DJIMBI V. WORLD HEALTH ORGANIZATION

Request for upgrading of post—Basic principles of post classification—Upgrading of post is a discretionary decision subject to limited review by Tribunal—Question of prejudice—Question of term of special duty allowance

WHO appointed the complainant on 1 March 1982 to post 3.2764 in its regional office in Brazzaville as a clerk-typist at grade BZ.5. It upgraded his post and so promoted him to BZ.6 on 1 June 1982. On 1 July 1986, it had him take on for 12 months the duties of a post for an administrative assistant, No. 3.0069, that was a graded BZ.9. In November 1987, it put a revised description of his own post, 3.2764, to the Standing Committee on Reclassification of Posts with a recommendation from his supervisor for its upgrading to BZ.9. It thereupon rose to the level of BZ.7 as from 1 December 1987. After further applications for upgrading to BZ.9 the Standing Committee recommended on 30 August 1990 that the grade level should be maintained at BZ.7. The Regional Director agreed. In August 1991, the complainant once again applied for a reclassification to BZ.9, but the Committee recommended an upgrading only to grade BZ.8. By a decision of 19 March 1992 the complainant was promoted to grade BZ.8 as from 1 March 1992.

He appealed, claiming the upgrading of his post to BZ.9 from 1987 to 1990 and to BZ.10 from 1990 to 1995.

In support of his claim to upgrading, the complainant, inter alia, cited his supervisor's recommendations and his competent and devoted performance of the duties of the post to which he was temporarily assigned, post 3.0069.

The Tribunal was of the opinion that those arguments were irrelevant. It considered that the basic rules on grading were reflected in Manual paragraph II.1.30, which read:

> "The following basic principles of post classification must be adhered to:
>
> 30.1 There should be equal pay for work of equal value;
>
> 30.2 Posts of approximately equal difficulty and responsibility should be placed in the same grade;
>
> 30.3 A change in the grade of a post should result only when a significant change in the level of its duties and responsibilities has occurred;
>
> 30.4 The grading of a post depends upon the assigned duties and responsibilities required and not on the qualifications, job performance, seniority or other characteristics of an incumbent."

In other words, the Tribunal noted that grading hinged neither on quality of performance nor on seniority. The sole criteria were the duties and responsibilities of the post, and the grade could not change unless there was a "significant change in level".

Moreover, citing Judgements 1067 (*in re Glenn*) and 1152 (*in re Korolevich*), the Tribunal made the point that upgrading required close familiarity with the conditions in which the staff member worked. The assessment of the type of work performed and the level of responsibility was a value judgement, and only those whose training and experience equipped them for the task might make such an assessment. The decision was therefore a discretionary one, and subject to review only on limited grounds, and would not ordinarily be set aside unless it was taken without authority or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse of authority, or if a clearly mistaken conclusion was drawn from the facts. Consistent precedent had it that the Tribunal would not substitute its own assessment or direct that a new one should be made unless it was satisfied on the evidence that there was a fatal flaw of that kind. So the complainant's performance of his temporary duties, even though his supervisor thought highly of it, was irrelevant to the question of upgrading his post 3.2764 to BZ.9.

The complainant further argued that the descriptions of two other posts, 3.0624 and 3.3267, which were for administrative assistants and did bear grade BZ.9, included the same duties as his own. He objected to the upgrading of a BZ.8 post for an assistant to BZ.9 only six months after the holder of that post had joined the unit. He inferred that the boards were prejudiced against him.

The Tribunal considered that whether posts were much the same was an issue of fact. The regional Board said that it had made a thorough review of the descriptions of various posts that had formerly been graded BZ.7, BZ.8 and BZ.9 and had compared post 3.2764 with posts 3.0069 and 3.0624. It had come to the conclusion that the duties of the latter two were more important and that the Standing Committee on Reclassification of Posts had been right to upgrade 3.2764 in 1987 to BZ.7 and in 1992 to BZ.8. Even supposing that someone else at grade BZ.8 did rise swiftly to BZ.9, his case differed in that he was already on a BZ.8 post whereas the complainant was claiming promotion from BZ.6 to BZ.9. There being no evidence to cast any doubt on the regional Board's findings and conclusions, the Tribunal held that the comparison the Board had made did not bear out the charge of prejudice. It concluded that there was no fatal flaw in the decision not to upgrade the complainant's post.

The complainant had also claimed payment of the special duty allowance up to 31 July 1995, when he had taken early retirement, on the grounds that he had continued performing the duties of post 3.0069 until that date, the defendant having failed to tell him that he was not to do so.

The Tribunal noted that a post at a higher grade than that of the staff member might not in any event exceed 12 months and that it was only from the fourth month that the staff member had been paid the special allowance. The defendant argued that a personnel action form dated 10 June 1987 had informed the complainant that he would not receive the allowance after 1 July 1987, i.e., at the end of the maximum period of 12 months allowed in staff rule 320.4. Such forms, in accordance with Manual paragraph II.4.150, were sent to staff members to inform them of any change in their contractual situation or entitlements. And it was that form that, according to rule 580.1, constituted "an amendment to the terms of ap-

pointment under rule 440.3". That was how the headquarters Board of Appeal had construed the rules: it had held that the personnel action form sufficed to tell the complainant that the temporary attribution of the other duties was to end. The Tribunal held that, there being no reason to depart from that view, the complainant's plea could not be sustained.

The complaint was dismissed.

9. JUDGEMENT NO. 1653 (10 JULY 1997): EFFÉIAN V. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Termination of special post allowance—Question of explanation of internal appeals—Question of time limits for submission of appeal—Dissenting opinion regarding exhaustion of international appeals and merits of the case

The complainant joined the staff of UNESCO on 1 July 1979 at step 1 in grade G.3. The organization regularly renewed her fixed-term appointment until 31 January 1995, when she took retirement. Her post, BXR-068, was upgraded to G.4 as from 1 July 1988 and to G.5 as from 1 July 1993. As from 1 February 1991, she was required to perform some of the duties of another post, BRX-067, which was graded P.1/P.2 and was vacant. She was accordingly granted the special post allowance provided for in the Staff Rules at grade P.1/P.2 as from 1 May 1991. A personnel action form dated 2 September 1994 terminated payment of the allowance effective 1 July 1993. On 9 September 1994, she requested from the Director of the Bureau of Personnel that the allowance should be continued from 1 July 1993 until 31 January 1995. The Assistant Director-General for External Relations interceded in her favour with the Director of the Bureau of Personnel. The Director answered him in a memorandum of 22 November 1994 that, according to a technical assessment by the classification section of the Bureau of Personnel, the duties of post 67 which the complainant had been performing warranted only grade G.5; there was thus no question of allowing her to receive the allowance at any higher grade.

The Assistant Director-General sent another memorandum on 10 February 1995 and the Director of Personnel answered on 3 March that she would not change her decision. On 19 May, the complainant wrote a letter to the Director-General asking him to intercede. On 7 September, the Acting Director-General answered that the complainant was not to receive the allowance after 1 July 1993. On 27 October 1995, the complainant filed a notice of appeal with the Appeals Board, and on 5 February 1996, her detailed statement of appeal. In its report of 5 July 1996, the Board recommended rejection. By a decision of 4 October 1996, the Director-General endorsed that recommendation, and the complainant appealed to the Tribunal.

The organization submitted that the complaint was irreceivable on the grounds that the complainant had failed to comply with the rules on internal appeal and in particular with the time limits for appeal to the Director-General and in the internal appeal proceeding.

The Tribunal pointed out that, according to article VII, paragraph 1, of its statute, a complaint "shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of resisting it as are open to him under the applicable Staff Regulations". Thus, where the staff regulations laid down a procedure for internal appeal it must be duly followed: there must be compliance not only with the set time limits but also with any rules of procedure in the regulations or implementing rules.

The Staff Regulations and Staff Rules of UNESCO laid down an internal appeal procedure, and paragraphs 7(*a*) and (*c*) and 10 of the statutes of the Appeals Board contain the particulars. Thus paragraph 7(*a*) reads:

> "A staff member who wishes to contest any administrative decision or disciplinary action shall first protest against it in writing. The protest shall be addressed to the Director-General through the Director of the Bureau of Personnel, within a period of one month of the date of receipt of the decision or of the action contested by the staff member if he is stationed at headquarters . . ."

In support of its objection to receivability, the organization pointed out, first, that the complainant had failed to address a "protest" to the Director-General through the Director of the Bureau of Personnel, but had merely sent him her letter of 19 May 1995, which was no "protest" within the meaning of 7(*a*); and, secondly, that it was out of time anyway.

The Tribunal held that the first argument failed. It considered that the complainant had duly addressed her letter of 19 May 1995 to the Director-General in the form of a protest within the meaning of paragraph 7(*a*). Although she had sent it to him directly and not through the Director of the Bureau of Personnel, staff rule 101.1 conferred upon a staff member the right of "access to the Director-General, normally through established supervisory channels, but exceptionally and for sufficient reason, directly". This was just such an exceptional case. On 9 September 1994, the complainant had addressed an appeal to the Director of the Bureau of Personnel who, instead of forwarding it to the Director-General, had passed it on to the Assistant Director-General for External Relations. The Assistant Director-General had interceded twice on her behalf, but to no avail. So she was free to conclude that in the circumstances she had no choice but to go directly to the Director-General. Indeed the Director-General had not demurred. As for her letter 19 May 1995, it was hardly arguable that its purpose was to protest against the decision notified in September 1994 to stop paying her the allowance.

The defendant's second argument was that the complainant missed the time limit of one month in paragraph 7(*a*) for addressing her protest to the Director-General. On this contention, the Tribunal noted that since the decision to stop the allowance had been notified on 2 September 1994, the deadline was long past by 19 May 1995, when she made her protest. The Tribunal considered that the argument was unanswerable. It noted that it was true that she had begun with an appeal of 9 September 1994 to the Director of the Bureau of Personnel, who was supposed to forward it to the Director-General: see Judgement 1259 (*in re Camara*). And the fact that the Director had forwarded it instead to the Assistant Director-General for External Relations might conceivably have had the effect of suspending the time limit. But the Assistant Director-General had written his memorandum of 10 February 1995 and the Director of Personnel had taken her decision on 3 March 1995; so the time limit had started again to run at the latter date. Even on that assumption the complainant's appeal of 19 May 1995 to the Director-General was, however, too late.

The defendant further argued that the complainant had failed to supply her detailed appeal within the time limit in paragraph 10 of the Appeals Board's statutes, i.e., "within one month of the notice of appeal": she did not supply it until 5 February 1996. The complainant explained that the secretary of the Appeals Board had asked her not to enter her detailed appeal before receiving acknowledgement of receipt of the notice, and she did not receive such acknowledgement until 31 January 1996. That was borne out by the secretary's letter of 9 January

1996, which said: ". . . your detailed appeal must reach me by. . . 9 February 1996". The Board itself did not take the view that the complainant had been late in filing her detailed appeal. The organization's plea that the complainant had failed to abide by paragraph 10 was therefore not upheld.

The Tribunal, however, concluded that the protest against the decision of 2 September 1994 was outside the time limit in paragraph 7(*a*). The complaint was therefore irreceivable, the internal remedies not having been exhausted.

In a dissenting opinion, one of the judges in the case endorsed the decision, but on different grounds. He considered that while the complainant missed the time limits, her case might be distinguished from earlier ones in which the Tribunal had held that the internal remedies had not been exhausted: see Judgement 995 (*in re Agbo*); 1132 (*in re Bakker No. 2*); 1140 (*in re Rosen*); and 1181 (*in re el Ghabbach No. 3*). In the present case the decision-making authorities of UNESCO had not declared the internal appeals time-barred and therefore irreceivable, but had rejected them on the merits. In its report of 5 July 1996, the Appeals Board had not ruled on the administration's plea that the appeal was out of time but had recommended rejection on the merits. And in his decision of 4 October 1996, the Director-General had endorsed that recommendation. He had done so after seeing a further report made in August 1996 by the head of the classification section of the Bureau of Personnel, and so had all the material evidence at his disposal for deciding on the matter. It is indeed scarcely arguable that as the executive head of the Organization the Director-General was competent to determine whether the staff member had been unfairly treated. Where the system of appeal required that remedies available in law before some other body should be first exhausted, the purpose was to relieve the higher authority of going into the merits of a dispute which could have been put to the lower authority first but had not been and to respect the competence of the lower authority. The requirement was met when the lower authority had gone into the merits even if according to its own rules it was wrong to do so. Any other approach would prove needlessly troublesome to the would-be appellant. In the present case the organization was pleading failure to exhaust the internal remedies on the grounds that its acting Director-General and then the Director-General ought to have declared the appeals irreceivable. But since its shift in attitude was prejudicial to the other party, it was estopped from so pleading: *venire non licet contra factum proprium*.

In any event, the dissenting judge was of the opinion that the complaint was devoid of merit. What the complainant was objecting to was the grading of the duties of post 67 that she was performing. According to the case law, such grading might be made only by those whose training and experience qualified them for the exercise. The Tribunal would not substitute its own assessment and might exercise only a limited power of review in the matter: see Judgement 591 (*in re Garcia*). The classification section of the Bureau of Personnel had graded the duties that the complainant was performing in line with the relevant grading standards. A fuller assessment which the head of the section had made for the Director-General in August 1996 had come to the same conclusion. And the complainant had offered no plea to warrant setting the assessment aside.

There was no strict rule as to whether a particular duty belonged to the Professional or to the General Service category. That too was a matter within the discretion of the grading officers, and so was their assessment; see Judgement 606 (*in re Polacchi*). The evidence that the complainant was relying upon did not suggest that there was any fatal flaw in the impugned decision.

10. JUDGEMENT NO. 1668 (10 JULY 1997): BARDI CEVALLOS V. UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION

Application for review of judgement—Judgements are res judicata—Standards for review of previous judgements

The complainant sought review of Judgement 1525 of 11 July 1996, whereby the Tribunal had set aside a decision by the Director-General of UNESCO and referred the complainant back to the organization "for reconsideration of his right to renewal of appointment". The decision not to renew his appointment had showed a procedural flaw in that it had been taken before the Senior Personnel Advisory Board (SPAB) had expressed an opinion on his case. What was required, according to the Tribunal, was a new decision after SPAB had expressed its views.

In consideration of the application for review, the Tribunal noted that its judgements carried the authority of res judicata and only in quite exceptional circumstances would it review them. Several pleas for review were inadmissible, such as a mistake of law or a misreading of the evidence. Other pleas might be admissible provided that they were material to the Tribunal's ruling. They included the overlooking of some material fact, or a material error, i.e., a mistaken finding of fact which called for no appraisal and which was to be distinguished on that score from a misreading of the evidence: see for example Judgements 442 (*in re Villega No. 4*), 1309 (*in re Ahmad No. 3*) and 1353 (*in re Louis No. 4*).

The organization had first argued that the Tribunal had committed a mistake of fact in Judgement 1525. It held that the procedure to be followed before SPAB was governed by the Rules of Procedure of Personnel Advisory Boards in their version dated 20 November 1967, the one in force at the material time. The organization pointed out that that version had been repeated by circular 1751 of 16 January 1991. Only an excerpt of that circular had been submitted to the Tribunal. A new version of the Rules had come into force on 19 July 1995, i.e., at a date subsequent to the material facts.

The Tribunal pointed out that it did not keep a full stock of the rules on the functioning of the organization. At its session in May 1996, it had wanted to consult the text of the Board's Rules of Procedure for the purpose of entertaining the defendant's objections as to the competence of that body. It had applied to the secretariat of the organization for the text and was sent by fax the text of 19 July 1995. It then asked for the text of the Rules of 20 November 1967 in their English and French versions. The organization did not, however, tell it of the date of repeal of the 1967 Rules or explain that for some time the procedure of the Board had not been governed by any written rules at all. The Tribunal therefore considered that any mistake on that score in Judgement 1525 was attributable to the organization's failure to provide full information. In any event it was immaterial to the outcome. Even though the complainant cited the Rules of Procedure in support of his contention that the Board was entitled thereunder to ask for and obtain certain information before giving its views, the Tribunal noted that even in the absence of written Rules of Procedure the Board had continued to function in accordance with unwritten rules that were akin both to those that had been in force earlier and to those that had come into force later. That was borne out by what the organization had said in its rejoinder about the reasons for the repeal of the old Rules and their eventual replacement by the new ones. Any mistake of fact there might have been was therefore irrelevant to the ratio of the judgement.

The organization further objected to the statement in the judgement that it was common ground that the Rules of 20 November 1967 were the material provisions. It pointed out that neither of the parties had taken up the issue. The Tribunal, however, continued to rely on the information supplied by UNESCO in holding that those Rules did apply. In the absence of comment from the parties, it inferred that there were no objections to the relevance of those rules.

The organization's second plea was that there was a mistaken conclusion that the Board was some sort of decision-making body that had to sort out staff problems, whereas in fact there was no such thing as co-management.

The Tribunal noted that since what the organization was pleading was a mistake of law, its plea was inadmissible. It was wrong anyway, since the Tribunal did not hold that the Board was a decision-making body, but merely that it gave its opinion in the context of a procedure aimed at finding fair expedients.

Thirdly, the organization argued that the Tribunal had misconstrued Judgement 969 (*in re Navarro*). It had interpreted the passage in that judgement under paragraph 21 starting "As for the failure of the headquarters Board of Appeal to make any recommendation" to mean that the Director-General was free to take a decision without any recommendation from the Senior Personnel Advisory Board.

The Tribunal held that here again the organization was pleading a mistake of law, and that was not admissible. The plea was also devoid of merit. The passage in question must be read in full and in context. Moreover, Judgement 1525 showed that the material issue was not the same in the present case as in *Navarro* since in the present case the lack of the prior opinion was due solely to the Administration's failure to let the Board have the information it had requested.

UNESCO's fourth plea was that the Tribunal had misread and misapplied Judgement 1289 (*in re Enamoneta*). It argued that in the present case, as in that one, the Personnel Advisory Board had expressed an opinion—namely that not enough had been done to look for another post—and so the Director-General was free to dispense with any formal recommendation, the Board having expressed its opinion.

According to the Tribunal, this argument again went to an issue of law and was an inadmissible plea. It was also devoid of merit. Contrary to what UNESCO contended, SPAB was entitled to seek information on the possibilities of redeploying Mr. Bardi Cevallos and the Administration had failed to answer, though the request was quite reasonable, as the Board needed the information to enable it to make a decision. The Board could not properly be accused of meddling in the area of the Director-General's own competence.

The organization's fifth and last plea was that the Tribunal should not have sent the complainant's case back "for reconsideration of his right to renewal of appointment". It maintained that a fixed-term appointment conferred no "right" to renewal of an appointment. The Tribunal held that the plea again went to the law and was not one that the Tribunal would entertain. Besides, the organization was mistaken. The Tribunal had not said that the complainant had any right to renewal; it had merely ordered the organization to take a new decision on the issue in accordance with due process.

For the above reasons, the organization was required to follow the procedure ordered in Judgement 1525 and take a new decision, and the organization was ordered to pay the complainant 5,000 French francs in costs.

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

1. Decision No. 158 (11 April 1997): Thomas Daniel Smith v. International Bank for Reconstruction and Development[18]

Termination because of misconduct due to failure to pay taxes and certify that taxes were up to date—Question of serious misconduct—Proportionality of penalty—Issue of remedy, including consequences of reinstatement

The Applicant joined the Bank on 10 October 1978 as a Mover in the Administrative Services Department, on a regular appointment. In the following years, he was reassigned and promoted, and from 1991 until the termination of his appointment the Applicant held the position of Web Pressman in the General Services Department.

The Applicant, a United States national entitled to tax reimbursement, on three occasions falsely completed Tax Allowance Certificate forms applying for such reimbursement and consequently received from the Bank sums which he should have used to pay his taxes, but did not. The Applicant also fell into arrears with the payment of both his federal and his state income taxes, a situation which led the Internal Revenue Service (IRS) in 1994 to request the Bank to attach part of the Applicant's salary to meet his obligations. Having regard to its immunity, the Bank declined to comply with this request. The Applicant had committed a similar violation of the Bank's Rules in 1985 and had at that time been warned in writing that a further occurrence of the same kind could lead to the termination of his employment. On the second occasion, the Bank terminated the Applicant's employment, and the Applicant appealed.

The Tribunal noted that staff rule 6.04 on "Tax Allowance" provided that "all staff members who are citizens of the United States . . . may apply for a tax allowance". The same rule provided in paragraph 2.01 that "[a] staff member is required by the Bank Group to pay timely all income and social security taxes due from time to time . . . The payment of such taxes was a condition of the staff member's receiving a payment of tax allowance or social security tax reimbursement". It was evident that the Applicant had acted in breach of this condition by diverting to his own use sums paid to him by the Bank for the sole purpose of meeting his tax obligations.

The Applicant argued that his conduct did not constitute serious misconduct under staff rule 8.01, as alleged by the Respondent, and that the severity of the penalty imposed by the Bank was disproportionate to the offence committed.

Regarding the Applicant's first contention, the Tribunal agreed with the Respondent that staff members entitled to tax reimbursement should honestly fulfil their duties to the tax authorities in the United States. This was a matter in which the Bank had a legitimate interest and was not a matter exclusively between the staff member and the tax authorities. The tax reimbursement was not, as the Applicant had alleged, simply part of the staff member's income, but rather a payment directly related to the staff member's United States tax obligations and its payment was clearly conditional upon the amount being used by the staff member for the payment of tax and for no other purpose. It was therefore, in the view of the Tribunal, appropriate for the Bank to regard as serious misconduct the Applicant's misuse of the payments made to him for the purpose of tax reimbursement, as well as the making by the Applicant of false statements to the effect that the payments had been or would be used for the purpose of paying tax.

As to the argument that the disciplinary measure imposed by the Bank was disproportionate to the wrong done, the Tribunal first recalled staff rule 8.01, paragraph 4.01, of the Staff Rules, which provided that:

> "Disciplinary measures imposed by the Bank Group on a staff member shall be determined on a case-by-case basis, taking into account the seriousness of the matter, extenuating circumstances, the situation of the staff member, the interests of the Bank Group and the frequency of conduct for which disciplinary measures may be imposed . . ."

The provision was reflected in the concept of "proportionality", which was well established in the case law of the present as well as other administrative tribunals.

In consideration of the issue, the Tribunal noted that the Bank had given consideration to some factors relevant to the assessment of the proportionality of the punishment of the offence. The recommendation made by the Ethics Officer to the Director of the Personnel Management Department, on 26 January 1995, stated that account had been taken in particular of the fact that it was a second offence, that fraud was involved, that the total amount owing was substantive and that the combined income of the Applicant and his wife (also employed in the Bank Group) was substantive. But, as the Tribunal noted, at that stage no indication was given that other relevant personal circumstances of the Applicant had been considered, which, subsequently, in requesting administrative review of the Bank's decision the Applicant had set out in great detail. When eventually the decision to terminate was confirmed, the Bank had stated that it had taken into account the personal circumstances of the Applicant in the light of Bank policy and past practice.

This determination by the Bank was, however, not conclusive, and the Tribunal was entitled to review that determination and assess whether the conclusion that the Applicant's employment should be terminated was reasonably related to the nature and severity of the offence. In that respect, the Tribunal, taking into account its own past practice as shown in cases such as *Carew* (Decision No. 142, 1995) and *Planthara* (Decision No. 143, 1995), found that it had reached a conclusion different from that of the Bank. Although the Tribunal agreed with the Bank that the Applicant's behaviour amounted to serious misconduct, it felt that dismissal was too severe under the circumstances. The Tribunal noted in particular three factors to which the Bank did not appear to have given sufficient weight: (*a*) the Applicant had served the Bank for 16 years; (*b*) the Applicant, without prompting from the Bank and before his misconduct was brought to the attention of the Bank, had entered into agreements with the United States Internal Revenue Service and the State of Virginia tax authorities for a schedule of deferred payments of tax, which indicated that the Applicant was making a genuine effort to cope with his tax payments; and (*c*) the initial decision on the part of the Bank to dismiss the Applicant had been taken at the same time as the Bank was seeking to reduce the number of staff employed in its printing services and, if the Bank had adopted any other sanction than dismissal, the Applicant would in November 1994 have been able to obtain a separation package involving some element of redundancy payment additional to the separation allowance paid to him, which could, presumably, have helped the Applicant to meet his outstanding tax obligations, which as the Tribunal noted had not been discharged despite the disciplinary measure imposed on him by the Bank.

As the Tribunal had concluded that the Bank's selection of the most extreme measure available to it was excessively harsh, article XII (1) of the Tribunal's

statute required it to order rescission of the decision contested or the specific performance of the obligation invoked, or to fix the amount of compensation to be paid to the Applicant for the injury sustained should the Bank decide that the Applicant should be compensated without further action being taken in the case.

The rescission of the Respondent's decision to terminate the Applicant's employment entailed certain logical consequences, including his reinstatement in his former position and the restoration of his employment benefits to the level they would have been had his employment not been terminated. But if this were done it carried with it the obligation of the Applicant to repay to the Bank the sums received by him from the Bank in connection with his separation, as well as the revival of the Bank's right to impose upon the Applicant a disciplinary measure proportionate to the Applicant's established misconduct.

Should the President of the Bank decide that the Applicant should be compensated without further action being taken in the case, the Tribunal fixed the amount of compensation at $25,000 additional to the payments already made to the Applicant at the time of his separation, and ordered payment of $3,000 in costs.

2. DECISION NO. 164 (10 JUNE 1997): RALPH ROMAN (NO. 2) V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT[19]

Complaint against performance review report for 1993—Limited review of discretionary nature of staff member's performance evaluation—All relevant and significant facts should be taken into account when assessing staff member's performance

The Applicant, who began his service with the Bank on 2 July 1973, returned from an external service assignment with UNESCO in January 1989. He re-entered service with the Bank as a Principal Education Specialist, level 25, in the Population and Human Resources Department (PHR). In the Applicant's 1989/90 performance review report (PRR) the Division Chief, Education and Employment Division (PHREE), expressed his dissatisfaction with the Applicant's work for that period and gave him a performance rating of "unsatisfactory". The Applicant requested an administrative review of his performance rating and, as a result, his rating was upgraded to "satisfactory" and his salary review increase was revised upward.

During the period from 1 July 1990 to 31 March 1991, the Applicant worked on a temporary assignment in Division 1 of the Operations Evaluation Department (OEDD1) as a Principal Evaluation Officer, level 25. The Division Chief, OEDD1, assessed the Applicant's performance in the 1990/91 PRR as fully satisfactory. The Applicant's assignment in OEDD1 was thereafter extended for one additional year. In his PRR for the period from 1 April 1991 to 31 March 1992, the Applicant's Division Chief stated that the output of the Applicant's two years' work in OED was problematic and that he had failed to show the leadership expected of a senior officer. The Applicant requested an administrative review of the report and subsequently filed an appeal with the Appeals Committee. The Appeals Committee recommended that the Applicant's request to have the comment concerning leadership deleted from his PRR should be granted and that his Division Chief should be advised of the need to provide some frequent and structured feedback on performance, particularly where some aspects of performance were judged below expectations. The Vice-President, Personnel and Administration,

accepted the recommendation. The Applicant returned to PHREE on 1 July 1992, but was officially on loan to OEDD1 up to 31 August 1992.

The present application before the Tribunal concerned the Applicant's 1 April 1992 to 31 March 1993 performance review report, which spanned five months in the Operations Evaluation Department, Division 1 (OEDD1), and seven months in the Population and Human Resources Department, Education and Employment Division (PHREE)—"the 1993 PRR". In the staff member's Summary Assessment section of the 1993 PRR (section I), the Applicant had outlined his work in both OED and PHREE. In OED, his tasks had involved, inter alia, audits and work on an Africa human resources study; and, in connection with his work in PHREE, the Applicant had prepared an "approach paper" relating to his work on the "education management" contribution to the intended sector policy paper for fiscal year 1995 and had convened a meeting of PHREE staff to discuss it.

The supervisor responsible for the 1993 PRR was the Policy Adviser, Education and Social Policy Department, who had been the Division Chief, PHREE, who had already evaluated the Applicant negatively in the 1989/90 PRR ("the Division Chief, PHREE"). He assessed the Applicant's performance for the 1993 PRR as falling short of that expected of staff of his level and experience in terms of sectoral leadership, policy work or operational support. He stated, inter alia, that the general view of the meeting which had reviewed the approach paper was that it lacked an adequate conceptual framework and needed substantial revisions. It was noted that the Applicant had produced a revised version, but that the second draft had been held in abeyance pending the preparation of the first business plan under the new organizational structure. The Applicant's supervisor further noted that he had expected the Applicant to be involved in several operational support tasks, but that the Applicant's operational support had been limited to eight staff weeks in one country (Uzbekistan). The Applicant had in his performance plan proposed 19 weeks of operational support, including the Caribbean and Zambia.

In an attached supplemental review of the Applicant's performance, the Division Chief, OEDD1, who as a result of an Appeals Committee recommendation had deleted his comments concerning the lack of leadership of the Applicant in the 1991/92 PRR, was of the view that the 1992 draft of the Africa human resources study prepared by the Applicant was inadequate by the Bank's standards. He noted that this was acknowledged by the Applicant when he said that its release had been premature. He further noted that the Applicant had been working on a revised draft of his chapter for the study.

The Applicant objected to his supervisors' review of his performance and set forth in writing his comments on their assessments.

In their review of the 1993 PRR comments of the Applicant and his supervisors, the Management Review Group agreed with the assessment of the Division Chief, PHREE, that the Applicant's performance had not met the expectations for staff of his level and experience. For that reason, the Group had determined that the Applicant's recent salary merit award should reflect an unsatisfactory performance rating. It was also decided that the Applicant's performance would be monitored and evaluated in accordance with staff rule 5.03, paragraph 2.02.

The Applicant sought administrative review of the decision. The decision was confirmed. Thereafter, the Applicant appealed to the Appeals Committee which, by a majority decision, rejected the appeal, and he appealed to the Tribu-

nal, requesting the rescission of the 1993 PRR and the merit award based on it. The Applicant's main contention was that the evaluations of his performance, both by the Division Chief of OEDD1 and by the Division Chief of PHREE, were incomplete, biased and tainted by both inaccuracies and misleading statements.

The Tribunal recalled that it had on many occasions recognized the discretionary nature of the evaluation of staff performance by the management of the Respondent. The Tribunal would only review such an evaluation to determine whether there had been an abuse of discretion in that the decision was arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure.

In respect of the OEDD1 evaluation covering the first five months of the period under review, the Applicant maintained that it was incomplete because the Division Chief, OEDD1, who had reviewed the Applicant's September 1992 draft chapter which formed part of the Africa human resources study draft report, had not seen the March 1993 revisions to that chapter which the Applicant had sent to the Task Manager under whose direction he worked, rather than to the Division Chief, OEDD1.

The Tribunal noted that the record did not indicate that the Applicant and the Division Chief, OEDD1, had ever discussed the Applicant's progress with regard to the Africa human resources study after or indeed before the Applicant had returned to full-time work with PHREE. Nor did the record indicate whether, and to what extent, the Task Manager had provided the Division Chief with his comments on the Applicant's contribution to the Africa human resources study during the Applicant's assignment in OED or after his return to PHREE.

According to the Applicant's comments on his supervisors' assessment as stated in the 1993 PRR, the Applicant understood from the Task Manager that the Division Chief, OEDD1, had not been given the revised draft submitted by the Applicant to the Task Manager in March 1993 during the period of review. The Division Chief, OEDD1, had not yet read the revised draft when preparing his 22 April 1993 supplementary evaluation and his assessment of the Applicant was thus based only on the earlier draft handed to OEDD1 in September 1992. Furthermore, he had mistakenly concluded from the Applicant's statement in section I of the PRR that the OED draft report of the Africa human resources study had been prematurely released as an acknowledgement by the Applicant that his draft chapter was inadequate. It was beyond doubt, however, that the Applicant was referring to the draft report of the Africa human resources study as a whole, which included his draft chapter which had been altered by the Task Manager. The Task Manager had agreed with the Applicant that the draft chapter should be further edited by the Applicant but unfortunately the draft report had been released in the fall of 1992 by the Division Chief, OEDD1, during the absence of the Task Manager.

The Bank raised the argument that the Division Chief, OEDD1, was not obligated in the review of the Applicant to cover the period after the Applicant's full-time assignment to OEDD1, namely, after 31 August 1992. The Tribunal was of the view that it was the obligation of the Respondent, when assessing the performance of staff members for a given period of review, to take into account all relevant and significant facts that existed for that period of review. The revised draft chapter delivered by the Applicant to OED, whether to his Task Manager or to the Division Chief, OEDD1, in March 1993 was a relevant fact, particularly in view of the weight given by the Division Chief, OEDD1, to the September 1992

draft. The Respondent should have taken the March 1993 draft into account for a full and proper assessment of the Applicant's performance for the period under review.

In view of this conclusion, the Tribunal found it unnecessary to deal with the other contentions of the Applicant.

For the above reasons, the Tribunal decided that both the 1993 PRR and the salary merit award based thereon must be quashed. This conclusion would normally lead to the requirement that the Respondent prepare a new performance review for 1992/93. However, it was impossible for the Tribunal to predict what would be the content of such a review, particularly having regard to the fact that the Applicant had now retired from the Bank's service. The Tribunal therefore ordered that the Respondent compensate the Applicant in the amount of $5,000 without there being need for any further action by the Respondent. The Tribunal also awarded the Applicant $3,000 for costs.

3. DECISION NO. 165 (10 JUNE 1997): WILLIAM BRANNIGAN V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT[20]

Abolition of post—Staff rule 7.01 (abolition in the interest of efficient administration)—Question of substantive differences between old position with any relevant new position—Issue of remedy in the light of loss of full pension and related benefits

The Applicant complained that his position as Senior Public Information Officer in the External Affairs Department was declared redundant in violation of staff rule 7.01, paragraphs 8.02 and 8.03. He contended that the newly created position of External Affairs Counsellor in the same department (to which he was not appointed) was in essence identical to the one the Applicant had previously occupied and that his position had been abolished by the Respondent not in the interests of efficient administration but in order to allow the recruitment of a younger staff member.

The Tribunal noted that the duties of the Applicant in the Media Division of the External Affairs Department at the time his position was declared redundant included liaising with correspondents and producers of major television and radio news programmes, planning and implementing press promotion for major Bank publications, preparing and operating the press rooms for the spring and annual meetings of the Bank and the International Monetary Fund, summarizing news articles for *Daily Development News*, liaising with the Office of the Vice-President, Development Economics and Chief Economist, and handling day-to-day media enquiries.

In September 1994, a new Director of the External Affairs Department was appointed. At that time, the various functions and staffing levels in the department were reviewed in conjunction with the fiscal year 1996/97 budget guidelines for reductions in the Bank's administrative budget. On 10 January 1995, the Applicant was informed that his position had been declared redundant as of 6 February 1995. The redundancy was based on a redefinition of the role of the department, as a consequence of which there would be a need for "someone with 1995 state-of-the-art television skills". Among other things, interviews for Bank staff on television and radio programmes would be arranged by a junior consultant recently recruited from a broadcasting organization. In addition, *Daily Development News* would be mostly produced in Paris by a trilingual editor and liaison with the Vice-President, Development Economics and Chief Economist,

would be transferred to another team. Day-to-day media enquiries would be handled by several people. In the light of those developments, it was concluded that the Applicant's skills were no longer relevant to the work programme in the Media Division.

On 27 March 1995, the Applicant requested an administrative review of the decision to declare his position redundant, stating, among other things, that his skills and experience matched the qualifications sought by the External Affairs Department and that age discrimination was involved in the decision to make him redundant. However, he was informed that the decision to make him redundant had been taken in accordance with staff rule 7.01, paragraph 8.02(*b*), as there was an abolition of position, the required process had been followed and the relevant Vice-President had agreed with the decision under review.

The Applicant applied for other Bank positions within the External Affairs Department but was not selected for any of them. He remained in regular pay status through 5 October 1995 and was then placed on special leave through 12 March 1997, thus ending his employment with the Bank some 10 1/2 months before the date on which he would have become entitled to full pension and other retirement benefits under staff rules governing termination. The Applicant appealed.

In consideration of the case, the Tribunal noted that even if the Applicant's post was abolished in the interests of efficient administration, under staff rule 7.01, the question remained whether it had been truly abolished so as to warrant the application of the staff rule. In the view of the Tribunal, this was a matter of comparing the "old" position with any relevant "new" position. To demonstrate the abolition of a position it was not enough that there might have been some differences between the old and new positions; the differences must be ones of substance. The Tribunal had in previous cases emphasized the need for the Bank to show a clear material difference between the new position and the position that had been made redundant (*Fabara-Nuñez*, Decision No. 101 (1991); *Arellano*, Decision No. 161 (1997)).

In that regard, the Tribunal noted that the External Affairs Department was indeed subject to a process of reorganization in order to provide a new approach to media relations and to adjust to the introduction of new technologies. That reorganization entailed a number of changes, including the mutually agreed separation of some existing staff members and the recruitment of some new ones. However, in the judgement of the Tribunal, the changes that had been effected in the Applicant's position were not material.

The Tribunal considered that if the substantive work of the Senior Public Information Officer position originally held by the Applicant before redundancy was compared with the new position of External Affairs Counsellor, or even with some of the other positions that became available, a striking similarity could be noted. Many of the responsibilities were substantially the same, particularly as to the requirements of contact and liaison with the media. Although the Bank emphasized the need in the new position for familiarity with new broadcasting technologies, particularly in the television field, it did not explain how that familiarity necessarily extended beyond the requirements of the Applicant's position that he should deal with television and radio broadcasters and journalists.

Nor was the Tribunal persuaded that the transfer of certain functions to other staff positions had materially altered the position previously held by the Applicant. Much of the Respondent's justification of the "abolition" of the Applicant's

position related to the transfer to Paris of the production of *Daily Development News*. However, that particular change did not appear to be significant for several reasons: the assignment had only recently been added to the Applicant's usual duties as an ad hoc task; part of the production of the service remained in Washington; and the Applicant had devoted only a limited proportion of his time to that task. The addition of a foreign language ability to the new position in connection with the production of *Daily Development News* did not appear to be an element which significantly changed the content of the position held by the Applicant. Similarly, the elimination of the responsibility to liaise with the Vice-President and the reassignment to others of specific minor tasks had not changed the essence of the work of the Senior Public Information Officer.

The Tribunal therefore concluded that the decision of the Respondent to declare the Applicant redundant on the basis of the abolition of his position was invalid and must be quashed. Consequently, there was no need for the Tribunal to address the Applicant's further contention that his post had been abolished for an improper motive.

Furthermore, in the opinion of the Tribunal, remedies must also be provided to redress the situation of the Applicant having been made redundant 10 1/2 months before he would have become entitled to a full pension and other related benefits. Therefore, should the President of the Bank decide not to reinstate the Applicant, he should be compensated by bridging him from the end of his remunerated employment to such point in time as would enable him to receive a full pension and corresponding benefits. Such calculations must include the salary lost by the Applicant during such period, less any income net after tax received from other employment. The Tribunal also awarded the Applicant $5,000 for legal costs.

4. DECISION NO. 173 (18 NOVEMBER 1997): CHRISTOPHER NAAB V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

Complaint against limitation of the consultancy re-employment of staff members who have left the World Bank with a severance package—The Bank's right to change conditions of employment—No right of contractual employment after staff member's termination of appointment—Question of exemption from amended rule 4.01—Complying with due process

The Applicant was employed by the Bank in a regular position as Technical Assistance Officer in the Western Africa Projects Department from August 1974 to March 1987. In 1987, the Applicant's position was declared redundant under staff rule 7.01, and he left the service of the Bank on 5 March 1987, receiving a severance package under that rule. In July 1989, the Applicant was offered a consultancy appointment for six months in the Asia Technical Department. The Applicant's appointment was extended several times for periods of six months each through July 1993. On 23 June 1993, the Applicant's appointment was extended until 31 July 1994.

The Tribunal noted that when the Applicant's employment had terminated in 1987, staff rule 4.01 contained no time restriction on consultancy appointments of retirees and former staff members whose employment had been terminated because of redundancy or mutual agreement. In April 1994, the Bank amended staff rule 4.01, paragraph 8.03, which limited the consultancy re-employment to 120 work days in any 12 months.

By memorandum to the Director, Personnel Management Department, dated 10 July 1994, the Division Chief, Private/Public Sector and Technology Development Division, Asia Technical Department, sought and obtained for 12 months an exception to the new policy with respect to the Applicant's employment. In support of his request, the Division Chief had stated that, among other things, the Applicant provided specialized services that all departments needed, but that none could afford individually on a full-time basis. He emphasized the Applicant's excellent performance and added that neither the Applicant nor the affected managers had received advance warning of the introduction of the new policy. He requested that an exception be made for the Applicant under a grandfather provision.

The Applicant's appointment was extended until 31 July 1995, and, by a letter dated 1 August 1994, the Applicant was informed by the Deputy Director, Personnel Management Department, of the revision of staff rule 4.01, paragraph 8.03, and how it affected him. The Deputy Director further informed the Applicant that at the time of his next contract renewal after April 1994, the 120-day limit would apply to him.

The Applicant filed an application on 6 February 1996 requesting the Tribunal to direct the Respondent to rescind the amendment of staff rule 4.01, paragraph 8.03. He contended that such limitation and its application to his consultancy re-employment violated an essential element of his conditions of employment. He further requested the Tribunal to direct the Bank to grandfather him from application of the amended rule and also requested compensation in the amount of three years' salary.

In consideration of the case, the Tribunal first considered whether the amended rule 4.01 infringed upon an essential condition of the Applicant's terms of employment. The Applicant had argued that neither when his initial employment was terminated for redundancy in 1987 nor when he was rehired in 1989 was there any rule limiting his continued long-term employment as a consultant. And his right not to be subjected to any restriction on the terms of employment was a fundamental and essential element of his employment which could not be changed without his agreement.

The Tribunal rejected this argument. It noted that in *de Merode* (Decision No. 1 (1981), para. 38) it had held that "the conditions of employment cannot be frozen at the date the staff member joins the Bank" and that "the conditions of employment for which the Tribunal must assure respect are not those which existed at the date of appointment of the claimant but those which exist at the date of the alleged non-observance; it implies, by its very words, possible changes in the conditions of employment". The Tribunal found in that case that "the power to make rules implies in principle the right to amend them" (para. 31).

Furthermore, the Tribunal considered that the fact that at the time the Applicant was hired by the Bank, at the time he was separated with a financial package and at the time he was rehired as a consultant there existed no limitation on the duration of a future consultancy re-employment, did not, per se, constitute an essential element of a staff member's conditions of employment. A staff member had no right to remain indefinitely immune from the application of any limitation the Bank might subsequently impose on future re-employment of such a staff member, provided that such limitation was not imposed in an arbitrary or discriminatory manner. The Tribunal had decided in *Singh* (Decision No. 105 (1991), para. 55) that "as a Consultant, the Applicant has no right of contractual employment by the

Bank after the term of his appointment expired. He may be engaged only if the Bank so determines". In addition, the Tribunal had decided in *Brebion* (Decision No. 159 (1997), para. 33) that the terms and conditions pertaining to the hiring of consultants "cannot generally be considered as 'essential' for the simple reason that normally there shall be no prior commitment as to consultancy arrangements and any contract to this effect will be governed by the Staff Rules in force at the time it is made". In the *Brebion* case, the Tribunal had decided that the Applicant should be exempted from the application of the amended rule 4.01 for the sole reason of the existence of an explicit commitment made by the Bank to that effect. The Tribunal had found the evidence of such a commitment to be overwhelming, so much so that "in the specific circumstances of this case, the 120-day limitation to consultancy employment affects an essential term of the settlement agreement" (para. 38). There was no such commitment in the present case.

Moreover, the Tribunal noted that the Respondent, in its letter of 25 January 1990 informing the Applicant of his consultancy appointment, had stated clearly that the Bank "reserves the right to adjust the terms of the assignment as necessary". On his part, the Applicant in his letter of acceptance dated 1 February 1990 had stated that he accepted the consultancy appointment "under the terms and conditions of employment set forth in my letter of appointment and the policies and procedures of the Bank as at present in effect and as they may be amended from time to time".

The Applicant contended also that the application of amended rule 4.01 to him did not comply with fundamental due process standards. He quoted the statement in *de Merode* that changes, even of non-essential elements of the conditions of employment,

> "must be reasonably related to the objective which they are intended to achieve. They must be made in good faith and must not be prompted by improper motives, they must not discriminate in an unjustifiable manner between individuals or groups within the staff. Amendments must be made in a reasonable manner seeking to avoid excessive and unnecessary harm to the staff" (*de Merode*, Decision No. 1, para. 47).

The Tribunal noted that the record did not reveal any motive behind the Respondent's amendment of rule 4.01 other than the managerial consideration of avoiding the occurrence of "revolving door" situations. In the Respondent's words, the change of the rules was motivated by a desire to avoid the inconsistency of an "employment policy to pay staff to leave under one type of appointment, only to rehire them on another type of appointment for extended periods of time". It might be true that the particular case of the Applicant did not involve this kind of abuse against which the amendment of rule 4.01 was directed. However, the validity of a rule or the amendment thereof did not require that its targeted objective should be realized in every particular case to which it applied.

Moreover, contrary to the Applicant's contention, the record showed that he had been properly notified and informed of the amended staff rule 4.01, paragraph 8.03. The new rule had been distributed to all staff members through a manual transmittal memorandum of 9 April 1994. Furthermore, the Applicant had been personally informed of the prospective application of the amended rule to his future employment by a letter dated 1 August 1994.

The Tribunal also noted that the amended rule had not been applied retroactively to the Applicant. When he was informed of the amendment on 9 April 1994, his 1990 consultancy appointment was still in force as extended and the

amended rule was not applied to the then operating extension. Rather, it was stated in the letter of 1 August 1994 that "at the time of your next contractual renewal after April 1994, the 120-day limit will apply". Retroactivity of a kind that was prohibited consisted in the application of a new rule to legal rights and situations operative, begun and consummated prior to the coming into force of the new rule. This was not the case of the Applicant's subjection to the amended rule 4.01.

The Applicant had also contended that he had a right to be grandfathered from the application of the amended rule introducing the 120-day limitation because the Bank had an "established practice" of grandfathering staff members when it introduced restrictions on their employment. He contended that when staff rule 5.09 was issued in 1988 imposing a limitation on the right to re-employment of those separated with a package, similar to the limitation imposed by amended rule 4.01, he had been grandfathered from the limitation because his employment had been terminated before the 1987 reorganization. The Applicant, however, did not substantiate his contention, which was totally denied by the Respondent.

Also in support of this contention, the Applicant referred to the fact that he had been grandfathered from the application of the four years' limitation imposed by staff rule 4.01, paragraph 6.01. The Tribunal did not find this episode to be conclusive evidence of an "established practice" complementing the Applicant's conditions of employment. The two situations were not comparable. The effect of the four years' limitation was much more severe than the one imposed by the 120-day limitation. Whereas the former limitation barred the Applicant totally from being re-employed, the latter only imposed a restriction on the duration of his employment.

The Tribunal concluded that by amending staff rule 4.01, paragraph 8.03, and applying the time limit introduced by the amendment to the Applicant's future employment, the Respondent had not failed to observe the conditions of employment of the Applicant.

5. DECISION NO. 174 (18 NOVEMBER 1997): DEBORAH GUYA V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

Admissibility of application—Question of exceptional circumstances permitting admissibility—Issue of ignorance of the laws—No duty to advise staff member on the appeal process—Importance of observing time limits under Tribunal's statute

The Applicant requested the rescission of the decision of the Appeals Committee of 10 October 1995, denying the relief she had requested following the termination of her 24 years' employment at the Bank's East Africa Regional Office in Nairobi. The Respondent had raised the question of the admissibility of the application on the ground of its untimeliness, and the Tribunal had granted the request to separate the jurisdictional issues from the merits. Accordingly, the present judgement dealt only with the question of jurisdiction.

The Tribunal noted that pursuant to article II, paragraph 2(ii), of its statute, no application before the Tribunal would be admissible "except under exceptional circumstances as decided by the Tribunal" unless it was filed within 90 days from "receipt of notice, after the applicant has exhausted all other remedies within the Bank Group, that the relief asked for or recommended will not be granted".

The Tribunal also noted that the Applicant's attorney had expressly recognized that the application he was filing on behalf of Ms. Guya was untimely but nevertheless requested that the Tribunal receive it because of exceptional circumstances which, in his view, excused the untimeliness.

In support of her claim, the Applicant stated that she lived "in a relatively remote country with difficult communications"; that she had no permanent residence in Nairobi and had to use a postal box for communication; that she had no access to the facilities of the Bank's office; that she found it difficult to be in touch with her attorney in Washington; that she "had no access to the statute of the Tribunal and had no way of even knowing that she must submit her Application within 90 days". Moreover, in his letter to the Tribunal, the Applicant's attorney stated that while he had actually been contacted on behalf of Ms. Guya in December 1995 he was "absent from Washington over the holidays for three weeks" and that "[c]ommunication with Ms. Guya was re-established in late January [1996]" only. Consequently, he noted, it was not until 12 February 1996 that he had sent her an application form, which had reached her in Nairobi in late March only. Ms. Guya, he indicated in the pleadings, had returned the completed form to him on 22 April by speedpost. He had received it on 29 April, and submitted the application on 10 May.

The Tribunal, however, held that it was unable to identify anything exceptional in the circumstances. The allegation that Ms. Guya had no access to the statute of the Tribunal and had no way of even knowing of the 90-day rule had no basis either in law or in fact. As the Tribunal had repeatedly ruled, unawareness of the rules could not be characterized as an exceptional circumstance (*Novak*, Decision No. 8 (1982), para.17; *Mendaro*, Decision No. 26 (1985), para. 33), and "ignorance of the law is no excuse" (*Bredero*, Decision No. 129 (1993), para. 23). In the present case, the Applicant certainly knew of the Tribunal, its statute and its time limit requirements or, at least, was in a position to know of them. She had worked with the Bank's Nairobi office for 24 years. She had requested administrative review and appealed to the Appeals Committee within the prescribed time limits. As early as mid-December 1995, that is to say, in her own words, "within days of actually receiving the decision of the Vice-President for Personnel", she had contacted a retired staff member in Washington, who had previously been deputy head of the Nairobi mission, and "requested her assistance in making her Application to the Tribunal". And even assuming that Ms. Guya herself was not aware of the existence of the Tribunal and had no access to its statute, the attorney contacted on her behalf in December 1995, familiar as he should be with the Tribunal's procedures and jurisprudence, ought to have alerted her to the statutory time requirements and to the importance the Tribunal attached to them.

The Applicant also maintained that when the Respondent had decided on 5 October 1995 to accept the Appeals Committee's recommendation it did not give her the statute and rules of the Tribunal and did not advise her of her right to take her case to the Tribunal and of the 90-day statutory requirement.

The Tribunal noted that there was no rule of law requiring the Bank to advise the staff members at each and every stage of the judicial review and to recite to them the conditions and limits of such review as laid down in the relevant texts, the applicable general principles of law and the jurisprudence of the Tribunal. The fact that the Respondent had not advised the Applicant of her right to bring her case to the Tribunal and had not informed her of the time limit or other statu-

tory requirements could in no way be regarded as an exceptional circumstance under article II, paragraph 2(ii), of the statute of the Tribunal.

Neither did the Tribunal find anything exceptional in what the Applicant characterized as difficulties of communication. Fax and courier facilities were available in Nairobi. In addition, the Bank's Nairobi office had been instructed by headquarters as early as 19 July 1994 that "Ms. Guya is authorized to use the official pouch (without cost to her) to receive and send official documents to headquarters" relating to her termination, and that confidentiality should be guaranteed to her in that respect. The Applicant alleged in general words that she "was throughout barred from the Bank's offices in Nairobi", but she did not refer to any specific instance of her having tried to make use of that channel and having been denied access. The Bank's channel, moreover, was only an option, because, as the instructions from headquarters read, "Ms. Guya remains free to gain access to public mail, telephone and fax facilities outside the resident mission". The fact that on most occasions the Applicant and her attorney chose to use ordinary, rather slow, mail in preference to other, more speedy ways of communication available to them could not be regarded as an exceptional circumstance under article II of the statute.

Nor could the Tribunal characterize as exceptional circumstances under this provision the fact that the Applicant's attorney who, according to his letter to the Tribunal, had been contacted on behalf of the Applicant at an unspecified date in December 1995, had re-established contact with her in late January 1996 only because of his absence from Washington over the holidays and waited until 12 February to send her an application form, which presumably he must have done by ordinary mail since his letter reached her only in late March. The Tribunal was also unable to identify as an exceptional circumstance the fact that the Applicant, although having received the application form in late March, had returned the completed form on 22 April only.

The Tribunal deemed it necessary to emphasize once again the importance of the provisions of the statute governing time limits for the smooth functioning of both the Bank and the Tribunal. As it had ruled in a previous case, the Tribunal could not regard a delay due to the Applicant's "own casual treatment of the relevant legal requirements" (*Agerschou*, Decision No. 114 (1992), para. 45) as excused by exceptional circumstances under article II of the statute. The facts invoked suggested negligence and lax handling of the case. The Tribunal unanimously decided that the application was inadmissible.

6. DECISION NO. 181 (18 NOVEMBER 1997): CHANDRA HOEZOO V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

Termination based on redundancy—Staff rule 7.01 regulating redundancy —Allegation of sexual harassment—Question of undue influence on redundancy decision

The Applicant joined the Bank in 1977 at a level C position in the Northern Agricultural Division, Eastern Africa Projects Department. In the course of her career with the Bank, she was transferred to other divisions and was successively promoted to level D in 1979 and level E in 1983. This last position was equivalent to level 15, but as a result of the 1987 reorganization of the Bank she accepted a lesser-graded position at level 14. On 9 February 1990, the Applicant transferred to the Agriculture and Environment Division of Country Department VI (AF6AE). In 1993 and 1994, she undertook developmental assignments in other

departments of the Bank. While on her second developmental assignment, the Applicant's position in AF6AE became redundant on 31 March 1995. The Applicant was then placed on administrative leave and a contemporaneous job search was taken which proved unsuccessful. Notice of termination was given on 27 September 1995. The Applicant's special leave terminated on 8 September 1997. The administrative review requested by the Applicant confirmed the earlier decision taken by the Respondent and in her appeal before the Appeals Committee she did not succeed in obtaining reinstatement. The Applicant appealed to the Tribunal, contending that the decision to make her position redundant had been carried out in a capricious and arbitrary manner and was not in accordance with staff rule 7.01, paragraphs 8.02(*d*) and 8.03, which were the specific provisions invoked by the Bank.

The Tribunal noted that the competent departmental management team, composed of nine individuals, most of whom were in senior positions, had decided in 1995 on a number of budget reductions, in terms of both programmes and positions, in accordance with the policy established by the Bank at the time. Teamwork and technology skills were among the competencies identified as determining which staff members to retain in the Applicant's job classification and both performance and skills were among other factors taken into account in that connection. Three positions were ultimately abolished in the department, with one staff member having volunteered to leave and two others having been made redundant. The redundancies were decided on the basis of a business plan designed in the interests of efficient administration. Since the reductions affected several positions at levels 14 to 17, the Tribunal concluded that paragraph 8.02(*d*) of staff rule 7.01 was the appropriate provision to apply in the present case.

The Tribunal further noted that the proper application of that provision required that the performance and skills of staff members should be taken into consideration by the Respondent when determining how to reduce their number. While unsatisfactory performance "cannot alone furnish a basis for terminating service with the Bank on the ground of redundancy" (*Jassal*, Decision No. 100 (1991), para. 31; *Fabara-Nuñez*, Decision No. 101 (1991), para. 32), this did not mean that the performance or skills of a given staff member might not be taken into account when deciding, in the context of a redundancy procedure under staff rule 7.01, paragraphs 8.02(*d*) and 8.03, who should be retained. The Tribunal had held in that regard that "the extent of the Applicant's skills was indeed considered by the Respondent, not to justify the redundancy on these grounds but, on the contrary, to consider whether she could be kept in the new structure of the division" (*Denning*, Decision No. 168 (1997), para. 27). Indeed, if several positions were reduced in number under staff rule 7.01, paragraph 8.02(*d*), as was the case here, the Bank was required under paragraph 8.03 to take into account, among other elements, the performance of the staff members. In that respect, the guidelines governing redundancy in the Bank had been adequately followed.

The Tribunal noted that the Applicant's contention that the decision to make her position redundant had been carried out in a capricious and arbitrary manner was related to the argument that the decision had been based on an incomplete assessment of her performance. It considered that the Bank's assessment of a staff member's performance and qualifications was an important exercise of its managerial discretion, and the Tribunal would review such an assessment only for abuse of discretion (*Jassal*, Decision No. 100 (1991), para. 37). The record in the present case showed that criticism of the Applicant's performance had begun in the performance review for the period 1987/88, that is, before she had transferred

to AF6AE, and continued uninterrupted during the following evaluation periods. In most cases such criticisms had referred to tardy arrival, timeliness of work, performing below par, absence from workstation and other matters. In the review period of 1992/93, the Applicant's performance had been judged unsatisfactory, and a request had been made that she should be transferred from the division. Developmental assignments followed thereafter and, in spite of the Applicant's assertion to the contrary, it appeared that criticism was also made of her performance in other departments where these assignments were carried out. All such evaluations had been taken into consideration, and properly so, at the time of deciding on redundancies on a competitive basis. The Tribunal noted, however, that the Applicant was right in arguing that, except for the review period of 1992/93, she had never been given an unsatisfactory rating, a situation which might mislead the staff member into thinking that he or she would be insulated against future adverse personnel decisions.

The Applicant had also contended that the unsatisfactory performance review she received for the review period of 1992/93, her placement on developmental assignments for the two following years and her ultimate redundancy and termination all had originated in an incident and complaint of sexual harassment involving her supervisor at the time, "Mr. X". Upon review of documents provided by the parties, the Tribunal concluded that while a degree of informality seemed to characterize the working relationship between the Applicant and Mr. X, there was nothing in the record that supported the Applicant's allegation of sexual harassment.

The Tribunal recalled that the incident involving Mr. X was alleged to have taken place in 1990 and the Applicant had apparently informed the Project Adviser in the Department about the matter. It also appeared that, after receiving a critical performance evaluation from Mr. X for the 1990/91 review period, she had mentioned the matter in passing to her Division Chief at the time. But none of those complaints had been put in writing or otherwise documented. Although there was some dispute as to whether the Applicant's Division Chief had expressly accorded the Applicant the opportunity to pursue the matter formally, it was in any event the case that she had taken no action at the time. It was only after the redundancy notice that the Applicant had brought the alleged incident to the attention of the pertinent Personnel Officer. A formal complaint had been made to the Ethics Officer only at the time that the administrative review was requested, on 30 October 1995, or five years after the incident was alleged to have taken place. The investigation by the Ethics Officer, based on materials submitted and interviews with several staff members, concluded that there was insufficient evidence to proceed further. The Applicant referred to complaints of sexual harassment by other staff members against Mr. X and asserted that Mr. X had eventually been relieved from his managerial duties on those grounds. Neither of those events had been documented. No matter involving either the Applicant or Mr. X had been brought to the attention of the Department's Gender Committee.

Moreover, some other key events also contradicted the allegation that there might have been improper motive in the decision to make the Applicant's position redundant. The problems relating to the Applicant's performance had become apparent much earlier than the date of the alleged incident with Mr. X. Even for the review period of 1991/92, which followed the date of the alleged incident, the Division Chief had made positive comments about the Applicant in the annual performance review. A link between the criticism of her performance and the alleged incident could not therefore be established. Neither was there any evidence

that the developmental assignments were linked to such an incident or that the Applicant had been forced to accept such assignments. Rather, they had been arranged in consultation with the Applicant so as to provide new opportunities to enable her to overcome the performance problems affecting her in AF6AE.

The Tribunal was therefore satisfied that there had been no improper motive in the decision to make the Applicant's position redundant, nor was there any evidence that such a motive might have guided the performance review, developmental assignments or other relevant events.

The Applicant also argued that the decision to make her position redundant was retaliatory on the part of the former Division Chief, AF6AE, and Mr. X. Implicit in that argument was the question whether the redundancy decision had been unduly influenced by the former Division Chief. The Tribunal had dealt on a number of occasions with the question of influence by an unsympathetic manager on a redundancy process and had taken a critical view when improper influence had been found (*Klaus Berg (No. 2)*, Decision No. 99 (1990), para. 38). In the present case, however, as in a recent precedent, "[t]he Tribunal finds that there is no evidence that the Respondent abused its discretion in applying the selection criteria prescribed by rule 7.01, paragraph 8.03, or that it was improperly influenced by supervisor X or the Director" (Teferra, Decision No. 169 (1997), para. 17). In fact, decisions about this and other redundancies were taken by the departmental management team, which as noted above was composed of nine individuals, and which did not include at the time either the former Division Chief, AF6AE, or Mr. X. The new Division Chief, AF6AE, was the one who had participated in the departmental management team, and there was no evidence of any improper influence on or by him.

The Tribunal dismissed the appeal.

7. DECISION NO. 182 (18 NOVEMBER 1997): "A" V. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT

Denial of disability pension benefits—Review of decision by the Tribunal —Timeliness of application—Eligibility standards for disability pension: totally incapacitated and likely to be permanent

The Applicant appealed to the Tribunal the decision of the Pension Benefits Administration Committee denying the disability pension applied for by the Applicant under section 3.4(*a*) of the Staff Retirement Plan of the Bank, which provides:

> "A participant . . . shall be retired on a disability pension if one or more physicians designated by the Administration Committee certify, and the Administration Committee finds, that the participant was then totally incapacitated, mentally or physically, for the performance of any duty with the Employer which he might reasonably be called upon to perform and that such incapacity is likely to be permanent."

On 31 May 1996, the Pension Benefits Administration Committee decided that the Applicant was not entitled to the disability pension and so notified the Applicant on 3 June 1996. The Applicant appealed to the Tribunal on 15 November 1996 pursuant to section 10.2(*f*) of the Staff Retirement Plan, which provides that the decision of the Pension Benefits Administration Committee:

> "shall be conclusive and binding on all persons concerned, subject to the appeal of the decision to the World Bank Administrative Tribunal."

The power of the Tribunal under section 10.2(*f*) is very broad and allows for the examination of all elements of fact and law as well as of procedural fairness and transparency. As stated by the Tribunal in *Courtney* (No. 2), Decision No. 153 (1996), paragraph 30:

> "The Tribunal may examine (i) the existence of the facts, (ii) whether the conditions required by the Staff Retirement Plan for granting the benefits requested were met or not, (iii) whether the Pension Benefits Administration Committee in taking the decision appealed has correctly interpreted the applicable law, and (iv) whether the requirements of due process have been observed."

The Respondent raised first a jurisdictional objection that the appeal was untimely because it had been filed five months after the notification of the decision of the Pension Benefits Administration Committee and not within the 90-day period prescribed by article II of the statute of the Tribunal. In the Respondent's view, the application should have been filed at the latest by 3 September 1996, but it was filed on 15 November 1996 and hence was time-barred.

The Applicant contended that her failure to file her appeal with the Tribunal within the statutory time limit was caused by exceptional circumstances related to her illness and the long history of severe depression and psychological disorders dating back to age 11. The Respondent argued that the Applicant's illness did not constitute an exceptional circumstance for waiver of the 90-day rule. In particular, the Respondent contended that during the summer and fall of 1996, the Applicant was sufficiently well to participate in the presentation of her case to the Appeals Committee challenging her term on the ground of redundancy.

In order to determine the issue, the Tribunal reviewed the Applicant's medical records placed before the Pension Benefits Administration Committee. The Tribunal held that while it was true that the Applicant had participated in the proceeding before the Appeals Committee, her replies were mostly limited to "yes" or "no". Therefore, it concluded that the Applicant's medical condition was such as to constitute an exceptional circumstance and was not time-barred.

Turning to the merits of the case, the Tribunal stated that the question of the Applicant's eligibility for a disability pension turned on the interpretation of section 3.4 (*a*) of the Staff Retirement Plan, which rested on whether her incapacity was (*a*) "total" "for the performance of any duty with the Employer which she might reasonably be called upon to perform"; and (*b*) "likely to be permanent". In the present case, the Tribunal noted that the Pension Benefits Administration Committee had relied, among other things, on the view of the Medical Adviser who had concluded that while the Applicant was currently incapacitated from performing certain tasks, that incapacity was unlikely to be permanent.

Citing its decision in *Courtney* (No. 2), Decision No. 153 (1996), paragraph 30, the Tribunal concluded that the medical record evidenced that the Applicant could not perform any duty comparable to those of her former position with the Employer. Regarding the issue of whether the Applicant's incapacity was likely to be permanent, the Tribunal noted the reports of four medical specialists in psychiatry and other disciplines related to her illness (collectively "the medical reports"). The Tribunal also noted that the Pension Benefits Administration Committee had been advised by the Medical Adviser who had reviewed the reports. In that regard, the Tribunal, citing *Shenouda* (Decision No. 177 (1997), paras. 36-37), which had dealt with the need for a guarantee of procedural fairness and transparency in the proceedings and decision-making arrangements of the Pen-

sion Benefits Administration Committee, considered that the Medical Adviser had never examined the Applicant.

In the view of the Tribunal, the conclusions of the Pension Benefits Administration Committee could not be sustained in the light of the medical reports, particularly in the following respects:

(*a*) They failed to take sufficient account of the fact that the Applicant had suffered from severe depression since childhood. In 1992, Dr. X had concluded that the Applicant had a "severe psychiatric condition". The underlying cause of the Applicant's illness was a long-standing one and the medical reports did not show that the problem had been eradicated or improved by treatment;

(*b*) The conclusion that the Applicant was expected to be permanently incapacitated for any job that the Bank might reasonably ask of her seemed to be based on the Medical Adviser's statement that "her psychological state is improving. She is said to be coping better with her job-related resentment". However, that statement of improvement was made in relation to a person who was in "acute crisis". Indeed, according to the medical reports "at best she has not regained her baseline level of functioning prior to the 1988 incidents and at her worst remains depressed . . . volatile and withdrawn". It might be inferred from the above that her mental condition was so abysmal that the improvement was such as only to enable her to cope with daily living and was a far cry from any ability to do any work and more particularly work compatible with her training and experience.

In the light of such a long history of severe depression and psychological disorders, which seemed to have deteriorated with the years, the Tribunal considered that the Applicant might be regarded as totally incapacitated for the performance of any duty with the Bank which she might reasonably be called upon to perform and that such incapacity was "likely to be permanent". It must be noted that section 3.4(*a*) did not say that such incapacity must be permanent but only "likely" to be permanent. The test was confirmed by section 3.4(*d*) of the Staff Retirement Plan which empowered the Bank to terminate the disability pension on medical examination or other satisfactory evidence that the incapacity of a retired participant had wholly ceased or that he or she had regained the earning capacity which he or she had before the disability.

The Tribunal concluded that the Applicant was entitled to the disability benefit under the Staff Retirement Plan. The Applicant was also awarded $5,000 in legal costs.

D. Decisions of the Administrative Tribunal of the International Monetary Fund[21]

1. JUDGEMENT NO. 1997-1 (22 AUGUST 1997): MS. "C" V. INTERNATIONAL MONETARY FUND[22]

Non-conversion of fixed-term appointment into a regular appointment on the ground of unsatisfactory performance—Burden of proof—Question of reprisal for accusations of sexual harassment—Issue of transfer—Question of adequate warning of interpersonal difficulties—Opportunity to rebut complaints of criticism

The Applicant was employed with the Fund on a two-year fixed-term appointment commencing 5 August 1992, as a Staff Assistant, grade A4, in the African Department, under a division chief who in early 1993 was succeeded by a new department chief, "Mr. A". The Applicant alleged that on two occasions he addressed remarks to her, once in spring 1993 and the second time on 6 December 1993, which she regarded as sexually harassing. The Applicant reported the 6 December 1993 incident three days later to the Deputy Director of the Division, who the Applicant asserted not only would secure for her an apology from Mr. A, but would also recommend a promotion for her if she would drop the issue of harassment. The Applicant further stated that the Administrative Officer of the Department took her to lunch in the Fund's Executive Dining Room and advised her not to pursue the matter further.

In the spring of 1993, as a result of reorganization in the African Department, a new division chief, "Mr. D", became the Applicant's immediate supervisor. The Applicant's first annual performance report (APR) covered the period from the initial date of her appointment until August 1993, which was signed by Mr. D. While there was no performance rating on the APR, it indicated that she was technically very competent, but that in pressure situations her normally good relationships with other members of the division were adversely affected. The Applicant's second APR covered the five-month period from August 1993 to the end of December 1993, in which she was awarded a performance rating of "2", a 2 per cent merit award and a promotion to grade A5. On 24 February 1994, at a meeting with the Director, the Deputy Director and the Administrative Officer regarding her performance, the Applicant was told she had deficiencies in the area of her interpersonal skills. At the close of the meeting she raised the matter of the unresolved complaint of harassment and was informed that the matter was closed.

In May 1994, upon learning that a conversion of her fixed-term appointment to a regular staff appointment was not being proposed, the Applicant, in the light of the favourable performance review, promotion and merit increase, complained that the non-conversion was in retaliation for her having raised the issue of sexual harassment. Under the circumstances it was decided that, in order to remove any basis for a perception that the decision not to convert her appointment had been influenced by her complaint about her former Director, she should be transferred to another department, the Staff Benefits Division of the Administration Department, where she accepted an appointment for an additional year, effective 29 August 1994.

The Applicant's third APR, which covered the period from 1 January 1994 to 31 December 1994, was prepared by her supervisor in the Administration Department, "Mr. B", and, as required, it included input from her former supervisor in the African Department regarding her performance in that department during the first eight months of the review year. The combined assessment was very favourable and made no mention of any difficulties with interpersonal skills.

In early March 1995, while the Applicant was on vacation, three immediate co-workers separately approached Mr. B with complaints about the Applicant's interpersonal behaviour within the division. The Applicant was confronted with the complaints upon her return to the office on 29 March 1995. When she requested to confront her accusers and respond to specific elements of their accusations, Mr. B declined on the ground that her colleagues had spoken in confidence. Furthermore, a personnel officer present at that meeting confronted the Applicant alone, relaying complaints about her interpersonal skills that had surfaced prior to

her transfer to the Administration Department, initially during a Fund training course, then in occasional confrontations or misunderstandings with several economists.

The record indicated that the Applicant was visibly surprised and upset by the accusations. She called in sick the next day, was subsequently placed on sick leave and never returned to work. On 10 May 1995, the Applicant was officially informed that, based on the information about her performance, her employment with IMF would expire in August, at the termination of the one-year extension of the original two-year appointment.

On 17 January 1997, the Applicant filed an appeal with the Tribunal, claiming, inter alia, that the Fund's decision not to convert her fixed-term appointment to a regular staff appointment on the ground of unsatisfactory performance was unlawful because it was in retaliation for complaints of sexual harassment that she had made against her supervisor in the African Department.

In consideration of the Applicant's complaints, the Tribunal took note that the Applicant, having held a fixed-term appointment, carried the burden of proof (*Safavi v. the Secretary-General of the United Nations*, UNAT Judgement No. 465, para. V (1989)). The Tribunal further considered that it was not necessary for it to decide for the purposes of the present case whether the alleged incidents qualified as sexual harassment or merely constituted inappropriate behaviour, but what was important to the case was that the Applicant could have reasonably believed that she was an object of sexual harassment and consequently could have made an accusation in good faith. The sustainability of an accusation of harassment made in good faith was not a precondition for a finding of reprisal in response to that accusation (*Belas-Gianou v. the Secretary-General of the United Nations*, UNAT Judgement No. 707 (1995), p. 45).

In examination of whether or not the Fund had acted in good faith in responding to the Applicant's complaint, the Tribunal had concluded that it had. In that regard, the Tribunal noted that the Applicant had pursued her complaint through appropriate channels up to the Director of Administration. The Director himself had investigated the complaint and concluded that it had not merited disciplinary action against Mr. A. The facts that the Administrative Officer of the African Department had taken the Applicant to lunch and advised her not to pursue the matter, and that the Applicant had subsequently been promoted and still later transferred to the Administration Department, did not, in the view of the Tribunal, demonstrate design by the Fund to "cover up" inaction on the Applicant's complaint of sexual harassment.

The Applicant alleged that her transfer to the Administration Department was not meant to give the Fund opportunity for objective appraisal but rather designed to put distance between a decision to terminate her and the eventual implementation of that decision. She had further alleged that there was an agreement that the decision on conversion would be made by the Administration Department on the basis of her performance in that department, "untainted" by prior problems that had arisen in the African Department.

The Tribunal noted that it was accepted that the administration of an international organization had the power to transfer staff members when and how it chose to even when the statutory law did not explicitly confer that power on it. Accordingly, in the opinion of the Tribunal, it would have been surprising if the Applicant's transfer were to have been subject to the condition that the decision on conversion exclusively turned on the Applicant's performance in the Adminis-

tration Department. Moreover, the Tribunal considered that it would not have been appropriate administrative procedure not to have mentioned the Applicant's prior performance difficulties to her new supervisors. Nor would it have been possible to transfer a person to another department without any explanation of the reasons for the transfer.

Regarding the issue of procedural or substantive irregularities surrounding the assessment of the Applicant's performance, the Tribunal noted that the promotion and salary increase at the end of the Applicant's second year of a fixed-term appointment were unusual under the Fund's policies (*Mr. D'Aoust v. International Monetary Fund*, IMFAT Judgement No. 1996-1). However, in the view of the Tribunal, this of itself should not have led the Applicant to expect conversion at the end of the third year, nor establish the Applicant's claim that the Deputy Director of the African Department had offered her a raise and a promotion in return for dropping the harassment matter.

The question was whether the situation represented a failure to warn the Applicant of perceived shortcomings in her performance that were relied on by the Fund in deciding not to convert her appointment. In that regard, the Tribunal noted that in the Fund's Guidelines for Conversion of a Fixed-term Appointment it was provided that supervisors shall take into account the candidate's ability "to work effectively with supervisors, peers and subordinates". It was clear that deficiency in interpersonal skills equally might lawfully be taken into consideration in preparation of the annual performance report (*Nualnapa Buranavichkit v. International Bank for Reconstruction and Development* (WBAT Judgement No. 7 (1982)); *Soad Hanna Matta v. International Bank for Reconstruction and Development* (WBAT Judgement No. 12 (1982))). Furthermore, the importance of performance evaluation systems in avoidance of arbitrariness and discrimination was emphasized in *Carl Gene Lindsey v. Asian Development Bank* (ADBAT Decision No. 1 (1992)). At the same time, the Tribunal also noted that adequate warning and notice were requirements of due process because they were necessary prerequisites to defence and rebuttal (*Safavi v. the Secretary-General of the United Nations* (UNAT Judgement No. 465, paras. VI-VIII (1989))).

While the Tribunal had concluded that the Applicant's allegation that her denial of conversion to a permanent post was in reprisal for her complaint of sexual harassment was unfounded, and that the Applicant had not met the burden of showing an abuse of discretion by the Fund in not giving her a permanent contract, it had found irregularities in the process of the Fund's decision. Two irregularities stood out: First, when the Applicant was accorded an extension of a year and transferred to the Administration Department, she should have been informed (*a*) precisely why she was not converted to permanent status at the end of two years; and (*b*) what steps should be taken by her to correct her perceived problems in interpersonal relations. Secondly, at the dispositive session of 29 March 1995 where Mr. B's earlier highly positive appraisal was peremptorily overturned, the Applicant was confronted neither by her critics nor by specific and rebuttable incidents of their criticism. That in particular was a lapse in due process.

The Tribunal considered that that session was not meant to be determinative and in fact had become so only because of the extremity of the Applicant's reaction to it and her failure to return to work. Nevertheless, the Tribunal found that the Fund should have taken steps to ensure that when transferred to the Administration Department, and in the course of her work there, she was made fully aware of her need to improve her interpersonal skills and the possibilities of so doing.

Moreover, and most fundamentally, when the Applicant's supervisor was given evidence by her co-workers of her interpersonal deficiencies, the Applicant should have been afforded a meaningful opportunity to rebut that evidence (*Carl Gene Lindsey v. Asian Development Bank* (ADBAT Decision No. 1, para. 9 (1992))).

In the view of the Tribunal, those failures by the Fund's Administration gave rise to a compensable claim of the Applicant, even though the decision not to offer the Applicant permanent employment stood. The Applicant was awarded compensation in the sum equivalent to six months' salary and reasonable costs of her legal representation.

2. JUDGEMENT NO. 1997-2 (23 DECEMBER 1997): MS. "B" V. INTERNATIONAL MONETARY FUND[23]

Complaint against non-promotion immediately upon assuming higher-level post but rather "underfilling" the post for a year before being promoted—Internal law of the Fund—Question of having the authority to change personnel policy—Issue of retroactivity—Question of limited circulation of notice of policy change—A vacancy announcement may refine the Job Standards

The Applicant was employed with the Fund, effective 7 February 1983, and promoted in August 1994 to a position at grade A6. In August 1995, she applied for a position within her section at the grade A7/A8. A selection panel rated the Applicant, whose performance had earned an "outstanding" rating in her 1994 annual performance report, as "the best overall candidate among those interviewed in terms of relevant experience and skills necessary for the position" and unanimously selected her to fill the vacancy.

A difference of opinion soon arose as to the grade at which the Applicant's new appointment would be made, the Staff Development Division concluding that she had not satisfied the minimum time in grade or the education requirements for the position as described in the vacancy announcement. Ms. Z, a senior official of the Division, communicated the following views to the Applicant's department: since the Applicant's undergraduate and graduate degrees were in foreign languages, she did not fulfil the educational requirement of the posted vacancy, and since she had completed only one year of the three-year requirement for progressively responsible experience at grade A6, the Applicant should "underfill" the position for one year, in accordance with the "Kennedy-Swain Memorandum", permitting "underfilling" when either the selecting department or the Staff Development Division concluded that the candidate did not currently fully meet the stated requirements. Accordingly, the Applicant served at the A6 grade from 20 September 1995 to 1 November 1996, at which date she was promoted to grade A7. In her annual performance report for 1995, she was given an "outstanding" rating and granted a 5.9 per cent merit increase.

On 25 September 1996, the Applicant contested the "underfilling" of her position at grade A6. Specifically, she complained that the Kennedy-Swain Memorandum which formed the basis for the decision was without legal validity and that, therefore, the only governing rule was the basic policy laid down in staff bulletin 89/28, which prescribed rules concerning promotion within the same job ladder as well as into alternative ladders. The Applicant's promotion fell into the former category, and promotions in that category were subject to minimum time-in-grade requirements. For a promotion from grade A6 to grade A7, the time-in-grade requirement was three years in grade A6. A change in policy was

undertaken when it was discovered that the rule set out in staff bulletin 89/28 had led to inequities in promotions within the same ladder as compared with promotions across job ladders. This had led to Messrs Kennedy and Swain, the chiefs of the two divisions of the Administration Department with responsibility for policies concerning promotions, to issue their memorandum, liberalizing the time-in-grade restriction of staff bulletin 89/28 as well as providing for a "uniform approach" to the application of time-in-grade rules.

In consideration of the legality of the memorandum, the Tribunal noted article III of its statute, which provided that the Tribunal shall apply the internal law of the Fund, including generally recognized principles of international administrative law concerning judicial review of administrative acts, and, furthermore, as explained by the Commentary, that there were two unwritten sources of law within the internal law of the Fund: (*a*) the administrative practice of the organization; and (*b*) certain general principles of international administrative law, such as the right to be heard.

Moreover, in its judgement in re *D'Aoust* (*Mr. Michel D'Aoust v. International Monetary Fund*, Judgement No. 1996-1), the Tribunal had set forth the following essential conditions for a regulatory decision: it must be taken by an authorized organ of the Fund and laid down in a published official document of the Fund, with a determinable effective date, of which the staff had been given reasonable notice.

The Applicant had contended that the Kennedy-Swain Memorandum, on which the challenged decision had been based, was an invalid document because the Division Chiefs were without authority to make policy for the Fund on personnel matters. The Job Standards of the Chiefs of those Divisions did not provide them with that authority to change policy, and the approval by the former Director of Administration, Mr. Rea, could not have survived his departure from the Fund. However, the Tribunal found that the official functions of the Divisions and of their Chiefs conferred upon them sufficient authority to codify a pre-existing practice and issue the contested policy memorandum. A consideration, though not a determinative consideration, in so concluding was that the Kennedy-Swain Memorandum liberalized existing restraints on promotions, i.e., it removed an unintended and inequitable result of bulletin No. 89/28, namely, that staff promotions within the same job ladder were subject to time-in-grade requirements that did not apply in the same way when staff were promoted into a different job ladder. The Tribunal, citing Organization of American States Administrative Tribunal Judgement No. 117 (*Jose Luis Pando v. Director General of the Inter-American Institute for Cooperation on Agriculture* (1992)), which enunciated a principle regarding the form in which administrative actions might be clothed, concluded that the memorandum was a lawful form of the issuance of a personnel policy. It was a written statement of an adjustment in personnel policy, based on a pattern of practice, clearly related to its antecedents, which set forth the policy change to be made, and which had been circulated to senior personnel officers of every Fund department, to their administrative officers and to the Staff Association.

The Applicant also asserted that the memorandum had been retroactively applied to her and adversely affected her interests. She had applied for the personnel assistant position in question on 9 August 1995, while the Kennedy-Swain Memorandum was dated 7 September 1995. In the view of the Tribunal, in the absence of a specific provision setting the effective date of the memorandum, the date of the memorandum itself denoted the date on which it became effective.

That date, 7 September 1995, antedated the Fund's decision regarding the Applicant's promotion (20 September 1995). There was no legal justification for regarding the date on which she had applied for promotion as controlling.

Furthermore, the Applicant had impugned the memorandum for its limited circulation. In that regard, the Tribunal recalled *D'Aoust*, in which it had held that a particular practice fell short of meeting the essential criteria for a regulatory decision because it did not afford reasonable notice to the staff. In the present case, however, the Kennedy-Swain Memorandum did not constitute an unpublished practice known to and employed by a small number of officials of the Administrative Department of the Fund. It had been published, and circulated to all senior personnel managers, to all administrative officers and to the Staff Associations. Also citing *D'Aoust* and *Ricardo Schwarzenberg Fonck v. IDB (Case No. 2)* (1984), the Tribunal noted that where actions and omissions had not affected the complainant, irregularities were irrelevant. A fortiori, where the legal position of the complainant was affected, but in a positive way, lack of notice furnished no ground for complaint. In the present case, Ms. B had received her promotion before having completed the three years at grade A6 required under staff bulletin 89/28. On the basis of the applicable principles and precedents, and in view of the facts of this case, the Tribunal concluded that the limited measure of the circulation of the Kennedy-Swain Memorandum had not adversely affected the Applicant.

The Applicant had also argued that the vacancy announcement had violated the Fund's law. She had argued that the posted requirements were unlawful, and relied on the Job Standards for grade A7 to argue that she met the "desirable qualifications" of the Job Standards, and that the vacancy announcement had been illegally altered to require "the completion of a university degree programme". The Tribunal concluded that vacancy announcements might properly refine and particularize qualifications set out in the Job Standards and had legally done so in the present case. It was also noted that the underfilling policy, as articulated in the Kennedy-Swain Memorandum, had permitted the promotion of the Applicant to grade A7 without her even attaining a university degree in human resources management, just as it had permitted her promotion without her having met the three-year minimum time in grade at grade A6.

The Tribunal decided that requiring the Applicant to underfill, for approximately one year, a position to which she was promoted on 20 September 1995 had not contravened the internal law of the Fund and reflected a proper application of lawful rules concerning promotions and time-in-grade requirements.

NOTES

[1]In view of the large number of judgements which were rendered in 1997 by administrative tribunals of the United Nations and related intergovernmental organizations, only those judgements which are of general interest and/or set out a significant point of United Nations administrative law have been summarized in the present volume of the *Yearbook*. For the integral text of the complete series of judgements rendered by the four Tribunals, namely, Judgements Nos. 808 to 867 of the United Nations Administrative Tribunal, Judgements Nos. 1561 to 1672 of the Administrative Tribunal of the International Labour Organization, decisions Nos. 156 to 184 of the World Bank Administrative Tribunal and Judgements Nos. 1997-1 and 1997-2 of the Administrative Tribunal of the International

Monetary Fund, see, respectively: documents AT/DEC/AT/DEC/808 to AT/DEC/867; *Judgements of the Administrative Tribunal of the International Labour Organization: 82nd and 83rd Ordinary Sessions*; *World Bank Administrative Tribunal Reports, 1997*; and *Administrative Tribunal of the International Monetary Fund, Judgements Nos. 1997-1 and 1997-2.*

[2]Under article 2 of its statute, the United Nations Administrative Tribunal 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]Samar Sen, Vice-President, presiding; and Mayer Gabay and Deborah Taylor Ashford, Members.

[4]Hubert Thierry, President; Mikuin Leliel Balando, Vice-President; and Julio Barboza, Member.

[5]Samar Sen, Vice-President; and Mayer Gabay and Deborah Taylor Ashford, Members.

[6]Hubert Thierry, President; and Mayer Gabay and Deborah Taylor Ashford, Members.

[7]Samar Sen, Vice-President, presiding; and Mayer Gabay and Deborah Taylor Ashford, Members.

[8]Hubert Thierry, President; and Mayer Gabay and Julio Barboza, Members.

[9]Hubert Thierry, President; and Mayer Gabay and Deborah Taylor Ashford, Members.

[10]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 1997, 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 World Trade Organization, 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 Organisation, 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 Intergovernmental Organisation for International Carriage by Rail, the International Center for the Registration of Serials, the International Office of Epizootics, the United Nations Industrial Development Organization, the International Criminal Police Organization (Interpol), the International Fund for Agricultural Development, the International Union for the Protection of New Varieties of Plants, the Customs Cooperation Council, the Court of Justice of the European Free Trade Association, the Surveillance Authority of the European Free Trade Association and the International Service for National Agricultural Research. The Tribunal also

is 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.

[11]Sir William Douglas, President; Michel Gentot, Vice-President; and Edilbert Razafindralambo, Judge.

[12]Sir William Douglas, President; and Edilbert Razafindralambo and Jean-François Egli, Judges.

[13]Sir William Douglas, President; Michel Gentot, Vice-President; and Jean-François Egli, Judge.

[14]Sir William Douglas, President; Michel Gentot, Vice-President; and Edilbert Razafindralambo, Judge.

[15]Michel Gentot, Vice-President; and Edilbert Razafindralambo and Jean-François Egli, Judges.

[16]Sir William Douglas, President; Michel Gentot, Vice-President; and Mella Carroll, 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]Elihu Lauterpacht, President; Robert A. Gorman and Francisco Orrego Vicuña, Vice-Presidents; and Prosper Weil, A. Kamal Abul-Magd, Thio Su Mien and Bola A. Ajibola, Judges.

[19]Robert A. Gorman, a Vice President of the Tribunal as President; and Prosper Weil and Thio Su Mien, Judges.

[20]Elihu Lauterpacht, President; Robert A. Gorman and Francisco Arrego Vicuña, Vice-Presidents; and Prosper Weil, A. Kamal Abul-Magd, Thio Su Mien and Bola A. Ajibola, Judges.

[21]The Administrative Tribunal of the International Monetary Fund became operational on 1 January 1994. The Tribunal is empowered to review any employment-related decision taken by the Fund on or after 15 October 1992.

[22]Stephen M. Schwebel, President, and Nisuke Ando and Michel Gentot, Associate Judges.

[23]Stephen M. Schwebel, President; and Georges Abi-Saab and Nisuke Ando, Associate Judges.