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UNITED NATIONS JURIDICAL YEARBOOK

1998

Part Two. Legal activities of the United Nations and related intergovernmental organizations

Chapter V. Decisions of administrative tribunals of the United Nations and related intergovernmental organizations

Chapter V[1]

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

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

1. JUDGEMENT NO. 870 (31 JULY 1998): CHOUDHURY AND RAMCHANDANI v. THE SECRETARY-GENERAL OF THE UNITED NATIONS[3]

Non-promotion—Question of bias or discrimination—Committee taking administrative decisions should be properly constituted—Mere expectancy of promotion does not create a right to promotion

Both Applicants were employed by the United Nations Military Observer Group in India and Pakistan (UNMOGIP) in the New Delhi office. Applicant Choudhury had been promoted, on 1 April 1985, to Senior Typist/Clerk at the G-5 level, and the overall rating on all his performance evaluation reports since 1977 had been "a very good performance". Applicant Ramchandani was at level ND-5, effective 1 July 1994, as a result of the salary scale being converted to a seven-level structure. His overall rating on his performance evaluation report for the period from 12 July 1988 to 28 February 1993 was "an excellent performance".

By memoranda in 1992, the Chief, Field Personnel Section, Field Operations Division, transmitted to the Office of Human Resources Management, the Division's recommendations for promotion, based on the review and recommendation of the 1992 UNMOGIP Subsidiary Promotion Review Panel for locally recruited General Service staff. The Applicants were not among the eight staff members recommended for promotion, and they appealed.

However, the Joint Appeals Board, in its report of 23 January 1996, stated that the Panel had concluded that the two had failed to show convincingly that the decision not to include them in the 1992 promotion listed violated their rights.

In its consideration of the case, the Tribunal acknowledged that it would not substitute its own judgement for that of the Administration (Judgement No. 275, *Vassiliou* (1981)), but that it would ascertain whether there had been an abuse of discretion. In that regard, the Tribunal noted that the Applicants had alleged discrimination, claiming that (*a*) the Subsidiary Promotion Review Panel sat in Rawalpindi, Pakistan, (*b*) the Panel had representation only from the Rawalpindi office, and (*c*) the number of staff promoted at the New Delhi office was low in comparison with the number promoted from the Rawalpindi office. The Tribunal, on the other hand, was of the view that none of these factors, assuming them to be true, supported by themselves the conclusion that there was bias or discrimination against the Applicants in the decision not be promote them.

The Tribunal next addressed the issue of the composition of the UNMOGIP Subsidiary Promotion Review Panel that had carried out the review and made recommendations regarding the 1992 promotions. In its consideration, the Tribunal

noted that it was a general principle of international administrative law that a committee involved in the taking of administrative decisions should be properly constituted (cf. Judgement No. 28, *Wallach* (1953)), and, furthermore, that the principle required that, in the constitution of a committee, in keeping with the maxim that justice must not only be done, but must seem to be done, if there was representation on a committee, there must be properly distributed representation. And, as the Tribunal pointed out, the constitution of the Subsidiary Promotion Review Panel was defective in that regard, as there was no representation, direct or indirect, of the Local Staff Association in New Delhi or of the staff in Srinagar. The Tribunal had found the Respondent's explanation for the lack of representation that the travel restrictions between Pakistan and India prevented representation from staff in the New Delhi and Srinagar offices inadequate. In the opinion of the Tribunal, the disproportionate representation was a procedural irregularity which violated the rights of the Applicants, and it was not necessary for the Applicants to show that had there been proper representation they would have been promoted, nor was it significant that the Subsidiary Promotion Review Panel was an advisory body and not the authority taking the final decision on promotions. Here, there was sufficient injury to the Applicants for which compensation was due.

The Tribunal also considered the Applicants' subsidiary claim that they had an expectancy of being promoted. The fact that Applicant Ramchandani relied on the conduct of his supervisor in virtually assuring him that he would be promoted did not, in the opinion of the Tribunal, amount to the giving of a promise that the Applicant would be promoted, nor was there evidence of an agreement to promote the Applicant.

For the foregoing reasons, the Tribunal ordered the Respondent to pay each of the Applicants three months of the Applicants' net base salary, as well as ordered the Respondent to undertake a meaningful review of the constitution of the UNOGIP appointment and promotion bodies with a view to securing fair representation of all staff in the India and Pakistan offices.

2. Judgement No. 872 (31 July 1998): Hjelmqvist v. the Secretary-General of the United Nations[4]

Question of a grossly negligent medical evacuation—Compensation for service-incurred injury—Question of reimbursement for travel expenses—Appendix D to the United Nations Staff Rules—Compensation of an unreasonable delay—Entitlement to daily subsistence allowance while recuperating from an injury—Access to United Nations medical files—Award of compensation under special circumstances

The Applicant entered United Nations service on 8 September 1987, on a short-term appointment, and on 27 May 1991 he commenced service with the United Nations Guard Contingent in Iraq (UNGCI) and was assigned to Suleimaniyah in the Northern Territory, effective 15 June 1991.

On 17 August 1992, the Applicant and two colleagues were in a United Nations vehicle on patrol outside Suleimaniyah when they were fired upon. The Applicant was hit by a bullet, which grazed his right forearm and penetrated his lower abdomen. His left leg also was injured during the episode. According to the investigation report, some 30 minutes after the shooting incident, the Applicant was taken to a dispensary at Kolar, and then transferred by car to Suleimaniyah Hospital, a journey of about two hours. On the same day, the United Nations representative

in Suleimaniyah faxed a report on the "shooting incident" to the United Nations Designated Official for Security, describing the Applicant as "in stable condition and alert" and "in high spirits", but, because surgical intervention was necessary for his leg wound and facilities at Suleimaniyah were inadequate, the Senior Medical Officer, United Nations Special Commission (UNSCOM), Baghdad, recommended a medical evacuation. Still on the same day, the Senior Medical Officer, UNSCOM, asked the Deputy Medical Director of the United Nations Medical Service at Headquarters, by telephone, to authorize the medical evacuation of the Applicant. Authorization was given by the Deputy Medical Director for a medical evacuation to New York via Zurich. On 18 August 1992, a fax was prepared in New York to provide written confirmation of such authorization to the Senior Medical Officer, UNSCOM, in Baghdad. However, that fax, while marked "RUSH", was not transmitted until 19 August 1992.

According to the statement of facts agreed to by the parties, before the written authorization arrived in Baghdad, UNGCI arranged, in consultation with the Senior Medical Officer, UNSCOM, an immediate medical evacuation to Sweden, the Applicant's home country. Also according to that agreed statement of facts, as well as according to the 19 August 1992 report of the Senior Medical Officer, UNGCI, Baghdad, on 18 August 1992, the Applicant was driven from Suleimaniyah to Kirkuk by ambulance, flown from Kirkuk to Baghdad by helicopter, transported to Habaniya airport, some 80 kilometers away, by UNSCOM ambulance, flown to Kuwait on an UNSCOM flight, and thence to Sweden on a Swissair Ambulance. The Applicant underwent several operations at Lund University Hospital to remove such bullet fragments as were accessible and to transplant a vein from his right leg into his left to replace the ruptured femoral vein. Soon after his surgery, he developed a thrombosis in his left leg, and was put on anticoagulants. On 30 September 1992, the Applicant was discharged from Lund Hospital, and then moved to Värnamo, where his parents lived, and his medical treatment was continued at Värnamo Hospital.

On 17 January 1993, the Applicant submitted a claim for compensation under Appendix D to the United Nations Staff Rules to the Advisory Board on Compensation Claims for reimbursement of his medical expenses. Upon a request from the United Nations Deputy Medical Director in January 1993, the Lund surgeon reported in April 1993 that the Applicant would probably not be able to return to work as a Security Officer before September 1993. Furthermore, on 8 April 1993, the Applicant requested travel authorization to return to New York, and on the basis of the surgeon's Medical Statement, the Deputy Medical Director certified him as fit for travel. He further authorized the Applicant to travel in business class, based on the recommendation of the Applicant's surgeon. The Applicant returned to New York on 30 April 1993, and the Medical Service referred him to a vascular surgeon for an evaluation, who subsequently wrote on 25 May 1993 that the Applicant would require contrast venography to delineate the anatomy of his venous system, but felt that "the additional time of continued physiotherapy to build collateral is preferable at this time and intervention either diagnostically or therapeutically is premature". He noted that "it is my feeling that his present plan of returning to Sweden in the late summer, at which point anticoagulants will be decreased, is satisfactory."

The Applicant returned to Sweden, and in August 1993 he exhausted his entitlement to sick leave with full pay and sick leave with half pay combined with annual leave. On 1 September 1993, the Applicant was placed on special leave without pay under staff rule 105.2(*a*)(i) pending resolution of his status. On 20 October 1993, the Applicant was examined by his surgeon in Lund, who reported that another year

of anticoagulants was recommended, and that the Applicant had been referred to a plastic surgeon "for evaluation and probably correction". The surgeon concluded, "It is doubtful whether the patient ever will be completely recovered."

On 18 November 1993, the Advisory Board on Compensation Claims recommended that the injury be recognized as attributable to the performance of official duties and approved reimbursement of "all medical expenses, together with the round-trip travel expenses to Sweden, certified by the Medical Director as reasonable and directly related to the injury". The Secretary-General accepted this recommendation on 10 November 1993. On 12 December 1995, the Advisory Board recommended compensation under Appendix D in the amount of US$ 40,612.00, equivalent to a 55 per cent loss of function of the whole person under article 11.3 of Appendix D, as well as reimbursement of the round-trip travel between New York and Lund, and special sick leave credit under article 18(*a*) of Appendix D from 17 August 1992, until the first day of entitlement to a disability pension to be determined by the United Nations Joint Staff Pension Fund (UNJSPF). The recommendation was adopted by the Secretary-General on 16 December 1995. A cheque for $42,497.80, representing $40,612.00 in compensation, $389.80 in medical expenses certified as of that date, and $1,496.00 for a round-trip economy air ticket New York/Lund/New York, was issued on 30 January 1996.

On 23 February 1996, the Applicant was informed by the Secretary, UNJSPF, that the Pension Committee had determined him to be incapacitated for further service and consequently entitled to a disability benefit under article 33 of the Regulations of the Fund. On 29 March 1996, the Chief, Cluster IV, Office of Human Resources Management, recommended to the Assistant Secretary-General for Human Resources Management that the Applicant's fixed-term appointment be terminated for reasons of health under staff regulation 9.1(*a*), and on 2 April 1996 the Assistant Secretary-General informed the Applicant that the Secretary-General had decided to terminate his appointment with effect from the date of the notice.

At the Tribunal level, the Applicant had argued that his medical evacuation from Iraq to Lund, Sweden, was not in accordance with procedures articulated in personnel directive PD/1/1992 concerning medical evacuations, and the Tribunal agreed.

As the Tribunal noted, under paragraph 8 of PD/1/1992, the Head of Office has the authority to determine the place to which a staff member should be medically evacuated and then advise the Medical Director of the decision. In the present case, the Tribunal considered that a gunshot wound was an "extreme medical emergency" for which medical evacuation "shall be authorized, as a general rule, to the place nearest the duty station where adequate medical facilities are available" (PD/1/1992, para. 15). In the view of the Tribunal, one of the three regional medical facilities in the Middle East that were listed in PD/1/1992—Amman, Jerusalem and Cairo—should have been chosen by the Head of Office, bearing in mind that the injury was a gunshot wound to the lower abdomen with a bullet, or fragments thereof, "lodged near the lesser trochanter of the left femur". Furthermore, as the Tribunal noted, there was a specific medical evacuation plan for Iraq, which also would have allowed for evacuation to Kuwait.

The failure to choose one of the above-cited countries, in the view of the Tribunal, where there was likely to be found the expertise to treat gunshot wounds, and evacuating him to Sweden instead not only was in error but also resulted in the Applicant, inter alia, losing his livelihood and his capacity to enjoy physical activity.

The Tribunal also made the point that the error made was not mitigated by the fact that it could never be known if prompt treatment would have prevented what had occurred, but there was certainly a greater likelihood that the consequences would not have occurred.

In addition to the Applicant's basic claim of his grossly negligent evacuation, he raised several other claims.

In response to the Applicant's claim that the $40,612 awarded him was insufficient compensation for his service-incurred injury, which failed to take into account adequately his emotional, psychological and physical pain and suffering, the Tribunal drew attention to article 11.3(*a*) of Appendix D, which stated:

> "In the case of injury or illness resulting in permanent disfigurement or permanent loss of a member or function, there shall be paid to the staff member a lump sum, the amount of which shall be determined by the Secretary-General on the basis of the schedule set out in paragraph (*c*) below … and applying, where necessary, proportionate and corresponding amounts in those cases of permanent disfigurement or loss of member or function not specifically referred to in the schedule."

The schedule provided in subsection (*c*) of article 11.3 only listed objective physical loss and not emotional or psychological damages. Indeed, the maximum compensation allowed could not exceed twice the annual amount of the pensionable remuneration at the P-4, step V level, for the loss of both arms, hands, legs, feet or sight in both eyes.

To the Applicant's argument that the Tribunal had the discretion to assess additional damages for non-physical pain and suffering, the Tribunal noted that the United Nations had specifically addressed the issue of damages for injuries incurred during service with the Organization. Compensation was based on an objective assessment of loss of function derived from medical reports submitted by the claimant and in accordance with the *AMA Guidelines to the Evaluation of Permanent Impairment*. Accordingly, the limitations outlined in article 11.3 were binding and not susceptible to subjective valuations of pain and suffering. The recommendation of the Advisory Board on Compensation Claims, approved by the Secretary-General, of compensation for 55 per cent of loss of function of the whole person, was not unreasonable for the injuries suffered by the Applicant. The Respondent adhered to the procedures and compensation schedule established by Appendix D of the Staff Rules, and the Tribunal therefore would not disturb that decision. The Tribunal further noted that the Applicant had not availed himself of the procedure for reconsideration of the determination by the Secretary-General of the type and degree of disability pursuant to article 17 of Appendix D.

The Applicant also argued that he should have been fully reimbursed for round-trip tickets from Lund to New York at the business-class rate, instead of for economy class. However, as the Tribunal noted, the request of 10 August 1993 for reimbursement of round-trip tickets did not mention the need of a business-class seat, nor was any approval for business-class travel given at that time. Nor did the recommendation by the Advisory Board refer to reimbursement for business-class travel. Therefore, the Respondent was justified in only reimbursing the Applicant for the amount needed for economy-class air fare. Staff rule 107.10(*a*) reads: "For all official travel by air, staff members and their eligible family members shall be provided with economy class transportation …" The Applicant also had contended that he should have been reimbursed for the business-class round-trip airfare he

subsequently had to purchase from Sabena Airlines in Lund since his return route to New York on Delta Airlines had been discontinued. However, the Applicant had not been authorized to fly business class. In addition, staff rule 107.12(*a*) states that "unless the staff member concerned is specifically authorized to make other arrangements", the tickets for official travel "shall be purchased by the United Nations". There was no indication that the Applicant had been given the authority to make such alternative arrangements.

Furthermore, the Tribunal considered the issue of the delay in payment of the Applicant's salary. His salary was cut off in September 1993, and as early as November 1993 the Applicant's injury was recognized by the Secretary-General as attributable to service, yet he did not receive his salary until April 1996. As the Tribunal noted, article 11.1(*b*) of Appendix D to the United Nations Staff Rules stated:

> "the salary and allowances which the staff member was receiving at the date on which he last attended at duty … shall continue to be paid to the staff member until … (ii). If, by reason of his disability, he does not return to duty, then until the date of the termination of his appointment or the expiry of one calendar year from the first day of absence resulting from the injury or illness, whichever is the *later*." (emphasis added)

It therefore remained unclear to the Tribunal why the Applicant's salary had been cut off in September 1993. As the Tribunal further noted, in a memorandum to the Executive Officer, Department of Administration and Management, the Secretary of the Advisory Board on Compensation Claims had written:

> "Under article 18(*a*) of Appendix D, any authorized absences are charged to the sick leave of the staff member. Following the exhaustion of sick leave, the staff member shall be placed on special leave with full pay covering the period of article 11.1(*b*)—one calendar year from the date of accident—and on special leave without pay for any period of subsequent special leave."

But if the Applicant was receiving sick leave with pay after the accident under article 18(*a*), then, according to the Tribunal, under a proper reading of article 11.1(*b*), payment should have continued until the Applicant's termination, since that occurred later than the "expiring of one calendar year from the first day of absence". The Respondent was unable to provide a satisfactory explanation to the Tribunal on how Appendix D had been applied to the Applicant, and the Tribunal therefore considered that the Applicant's not receiving his salary until April 1996 represented an unreasonable delay that should be compensated.

The Applicant also had asserted that he should have been paid daily subsistence allowance (DSA) while he was recuperating in Sweden. The Tribunal noted that a staff member's entitlement to DSA was directly dependent on his or her entitlement to home leave. The Applicant, while in New York, had been recruited by the United Nations to work at Headquarters, and therefore, under staff rule 104.6, the Applicant was considered a locally recruited staff member, ineligible for home or family leave. However, as both the Applicant and the Respondent noted, locally recruited staff members were entitled to home and family leave when detailed on an international mission lasting longer than six months. The Applicant had contended that locally recruited staff members on international detail should be entitled to take home leave in the country where they were recruited. The Applicant argued that, at the time of his injury, not only was he a resident of New York, but his wife was as

well. But, as the Tribunal noted, staff rule 105.3(*d*), concerning home leave, states: "The country of home leave shall be the country of the staff member's nationality." According to staff rule 105.3(*d*)(iii), only the Secretary-General may authorize a "country other than the country of nationality as the home country, for the purposes of this rule". To be granted such an exception, the staff member must show "that [he or she] maintained normal residence in such other country, for a prolonged period preceding his or her appointment, that the staff member continued to have close family and personal ties in that country and that the staff member's taking home leave there would not be inconsistent with the purposes and intent of staff regulation 5.3". Although the Applicant's circumstances presented grounds for a possible exception to this rule, in the opinion of the Tribunal, the Applicant never sought such an exception from the Secretary-General. Therefore the Tribunal was in no position to grant such a dispensation. The country of the Applicant's nationality was his home country.

Furthermore, the Applicant had been medically evacuated to his home country. Under PD/1/1992, the availability of DSA was very limited for medical evacuations to the home country. "Actual expenses for a hotel room or other accommodations (meals included) incurred by the patient … may be reimbursed, on the basis of receipts" for staff members evacuated to their home country. Only expenses incurred during the first 45 days following evacuation may be reimbursed. Reimbursements are capped at 50 per cent of the subsistence allowance payable to staff members medically evacuated to countries other than the place of home leave. The Applicant made no effort to obtain reimbursements by submitting the necessary receipts.

Finally, the Applicant alleged that the Respondent had denied him access to his medical files. The Respondent had argued that the medical files were maintained by the Organization for its benefit and not for that of the staff member, but could be made available to the staff member's personal physician when necessary. The Tribunal had requested the Respondent to provide the Applicant's medical file to the Tribunal for a review in camera. In this case, the medical files did contain information crucial to the claims made by the Applicant. The Tribunal did not order transmittal of the medical files to the Applicant because all relevant medical information that was pertinent had already been provided to the Tribunal by the Respondent and then to the Applicant by the Tribunal. The Tribunal failed to understand the rationale for preventing staff from having access to their own medical files. It recommended that the policy be reconsidered and reversed.

The Tribunal concluded that the Applicant had been adequately compensated for his injury attributable to official duties and that DSA payments had been properly denied. However, the Respondent had unreasonably withheld the reimbursement of the Applicant's salary payments and he should be compensated for the delay, and, what was most important, he should be compensated for the injuries he had suffered as a result of his improper evacuation from Iraq to Sweden. The Tribunal therefore ordered the Respondent to pay the Applicant three years of his net base salary as compensation. In granting this compensation, which exceeded the two-year limit mandated by article 9 of its statute, the Tribunal had particularly taken into account the special circumstances of the case, namely, the Respondent's gross negligence in the handling of an extreme medical emergency arising in a situation known to be very dangerous to the Applicant, which had resulted in severe physical and psychological impairment for the Applicant.

3. JUDGEMENT NO. 874 (31 JULY 1998): ABBAS V. THE COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST[5]

Non-withdrawal of staff member's resignation—Area staff rule 109.6—Question of when resignation becomes effective—Question of prejudice or improper motivation in not granting re-employment—Separation on health grounds—Question of coerced resignation—Joint Appeals Board should avoid even the appearance of bias or partiality

The Applicant entered the service of United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) on 7 January 1985, on a temporary assistance contract, as a Trade Instructor (Electrician). On 18 September 1985, the Applicant was granted a temporary indefinite appointment, as an area staff member, in the post of Trade Instructor "B" (Electrician), at the grade 9, step 1, level, at the Damascus Training Centre, Syrian Arab Republic. On 1 October 1989, the Applicant was promoted to grade 10, step 5, level.

From the time he entered service through 1994, the ratings on the Applicant's periodic reports ranged from satisfactory to outstanding. In 1992, the Applicant received two letters from the Director, UNRWA Affairs, commending him on his work.

From October 1993 to January 1995, the Applicant was reprimanded several times for absenting himself from his place of duty and for smoking in the workshop in the presence of trainees. On 7 January 1995, the Principal, Damascus Training Centre, sent a letter to the Applicant that listed the Applicant's unauthorized absences and instances of lateness. It warned the Applicant that if there were any further complaints about his conduct, the Agency would be obliged to take appropriate action. On 9 January, 19 February and 13 March 1995, the Principal, Damascus Training Centre, again noted that the Applicant had been absent from duty without permission. On 20 March 1995, he was again reprimanded, and on 29 March 1995 he received a written censure for further repeated absences. On 6 and 13 April 1995, the Applicant again absented himself from duty, without permission or valid reason.

On 12 April 1995, the Applicant submitted his resignation, with effect from 20 April 1995, citing as reasons (*a*) severe pain in his spinal cord and (*b*) a bad psychological and nervous condition. By letter dated 13 April 1995, the Field Personnel Officer, Syrian Arab Republic, informed the Applicant that despite the Applicant's insufficient notice, the Agency accepted his resignation, with effect from the close of business on 19 April 1995. On 18 April 1995, the Applicant wrote to the Director, UNRWA Affairs, requesting the withdrawal of his resignation. In a reply dated 19 April 1995, the Field Administration Officer informed the Applicant that his request had not been approved, and the Applicant appealed.

The principal issue raised by the Applicant was whether, under the applicable rules, a resignation became effective only after it had been accepted by the Respondent. In considering the issue, the Tribunal drew attention to area staff rule 109.6:

"2. A staff member who resigns shall give to the Agency:

"(*a*) Such period of notice as is provided for … in his/her Letter of Appointment; or

"(*c*) Such other period of notice as the Commissioner-General may at his discretion accept.

"3. Every notice of resignation shall contain a written statement of the staff member's decision to resign, shall be signed by the staff member and shall

specify the date on which he/she proposes that his/her resignation should take effect."

In the view of the Tribunal, the Applicant's letter of 12 April 1995 complied with the essential requirements of the staff rule since it contained written notice of the decision to resign, was signed by the Applicant and specified the date on which he proposed that the resignation should take place.

Furthermore, the Tribunal considered that the language of area staff rule 109.6 suggested, on its face, that a staff member's compliance with the conditions of the rule constituted resignation: "A staff member resigns who gives to the Agency a written notice of resignation." In the view of the Tribunal, there was no indication that the validity of the resignation was conditioned on acceptance. In addition, if the rule were to require consent in order to make resignation effective, then a staff member who wished to leave would be at the mercy of the Agency which, for either arbitrary or malicious reasons, might wish to impede a staff member's departure. The Tribunal could not conceive that the rule was intended to confer on the Agency such authority over a staff member's decision to leave. However, as the Tribunal pointed out, paragraph 2(*c*) of staff rule 109.6 did allow the Commissioner-General the discretion to accept the period of notice for resignation designated by the staff member. In the present case, the Applicant had requested that his resignation be effective eight days after the date of his letter giving notice, and the Applicant's letter of appointment required him to give "not less than 30 days' written notice". The Tribunal, rejecting the Applicant's argument that his irregular designated period of notice rendered his resignation invalid unless accepted by the Commissioner-General, interpreted staff rule 109.6, paragraph 2(*c*), to give the Commissioner-General discretion regarding the date that staff member's resignation became effective, rather than regarding the validity of the resignation.

The Applicant also contended that the Respondent's decision not to accept his request to withdraw his resignation had been based on prejudice and constituted an abuse of discretion. Because the Tribunal had concluded that the Applicant's resignation was effective under area staff rule 109.6, the issue of the Applicant's request to withdraw his resignation was subject to rules regarding re-employment. Personnel directive A/4/Part VI/Rev.5, paragraph 3.2, provided that reappointment should be "carefully considered, and should not normally be approved unless there was a *clear element of Agency interest* in obtaining the former staff member's services again" (emphasis added). The burden was on the Applicant to present convincing evidence when alleging that the decision not to grant re-employment had been tainted by prejudice or improper motivation (cf. Judgement No. 553, *Abrah* (1992)). In that regard, the Tribunal noted that the Applicant had received numerous reprimands and a letter of censure for various absences from work over a period of 19 months prior to his resignation, and according to the record the Applicant had not appealed those actions. In addition, the Applicant had asserted both a medical and a psychological condition as reasons for his resignation. Personnel directive A/4/Part VI/Rev.5, paragraph 3.5, established a presumption that employees "separated on health grounds" were "incapacitated from further service" and "should not be re-employed in any capacity". It would have been reasonable for the Respondent to accept the Applicant's asserted reasons accompanying his resignation and to be reluctant to re-employ him without a substantial Agency interest in his re-employment.

In the Tribunal's view, the Applicant had fallen short of meeting his burden of producing convincing evidence of prejudice with respect to the Respondent's

decision, and the Respondent's decision not to accept the Applicant's request to withdraw his resignation was reasonable and did not constitute an abuse of his discretion.

The Applicant also asserted that the resignation itself was the product of "pressure and oppression". The crux of this claim seemed to be that the Respondent had attempted to coerce the Applicant's resignation through reprimands and censures. The Tribunal agreed with the Respondent that, in a claim that a resignation had been coerced, the burden of proving improper motive or coercion was on the Applicant (cf. Judgement No. 93, *Cooperman* (1965)). The Applicant argued that the fact that he had resigned was in itself evidence of coercion because his UNRWA employment was his only potential source of income in the area. He also argued that his periodic reports had been positive. In addition, the Applicant noted that his first reprimand had cited absences allegedly having taken place as much as two years earlier. Finally, the Applicant asserted that his alleged tardiness in reporting related to office-hour requirements to which he, as a member of the teaching staff, should not have been subject. The Tribunal found that the record before it did not sustain the Applicant's claim that his resignation had been coerced.

The Applicant asserted that the recommendation of the Joint Appeals Board (JAB) should be invalidated due to the appearance of a conflict of interest. The Joint Appeals Board that heard the Applicant's initial appeal included the Principal, Damascus Training Centre, who was the Applicant's supervisor and who had issued the reprimands dated 7 January and 20 March 1995 which constituted part of the Applicant's coercion claim. As the Tribunal noted, it was a clearly established principle that the Joint Appeals Board should make every effort to avoid even the appearance of bias or partiality. Paragraph 10 of area staff rule 111.2 gave the parties the right to request the removal of any Board member. The Applicant had failed to challenge the participation of the Principal of the Damascus Training Centre at the time of the hearing; however, the Chairman had the authority to "excuse any member from the consideration of a specific appeal" regardless of the parties' requests. The Tribunal found that while the Applicant had erred in not challenging the participation of the Principal, Damascus Training Centre, at the time of the hearing, the Chairman had also erred in permitting one whose interest was so inextricably bound in the issue before the Board so as to raise a question whether he could play an impartial role (cf. Judgement No. 624, *Muhtadi* (1993)). The Tribunal concluded that although the participation of the Principal, Damascus Training Centre, should have been questioned, the recommendation of the JAB likely would not have been different, nor would the decision of the Tribunal.

For the foregoing reasons, the Tribunal rejected the Applicant's pleas in their entirety.

4. Judgement No. 879 (31 July 1998): Karmel v. the Secretary-General of the United Nations[6]

Abolishment of post—Obligations of good-faith efforts by the Administration and creation of another post with the same defining functions—Compensation for anguish, humiliation and stress

The Applicant entered the service of the United Nations Children's Fund (UNICEF) on 12 December 1973, on a three-month fixed-term appointment as a Clerk/Typist at the G-2 level. After serving on a further three-month fixed-term appointment as a Bilingual Clerk/Typist at the G-3 level, the Applicant was granted

a probationary appointment, with effect from 1 April 1974. The appointment was converted to a permanent appointment on 1 December 1975. On 1 January 1977, the Applicant was promoted to the G-4 level. On 20 April 1980, she was transferred to the post of Secretary, Programme Division, Asia Section. On 16 March 1992, the Applicant was promoted to the G-5 level and her title changed to Principal Secretary.

On 26 January 1996, the Director, UNICEF Programme Division, informed the Applicant that the post she encumbered, as Principal Secretary, had been slated for abolition. If the recommendation to abolish the post was accepted, her appointment would be terminated on 31 July 1996, unless the Administration could place her in another position.

The Applicant appealed, alleging (*a*) that her post had not in fact been abolished, since nearly all of its defining functions had been passed on to a newly created post, to which someone else had been appointed without any advertisement or open competition; and (*b*) that the Administration had not made a good-faith effort to find the Applicant a new position equivalent to her abolished post.

In the Tribunal's view, since the Applicant's first claim was correct, it would not need to consider her second claim. The Tribunal concluded that it need not address the issue of whether or not the Administration had made a reasonable effort to secure for the Applicant a post equivalent to the one she had formerly encumbered, from among the numerous vacancies for which the Applicant applied. It was sufficient that the Tribunal had determined "that the post she originally encumbered was not in fact abolished, that she was deviously and unjustly removed from it". Moreover, as the Tribunal noted, although the Applicant had finally been placed against a post which seemed to be equivalent to the one she had originally encumbered, the post was of fixed duration, and that was not an adequate solution because she should have been placed in a permanent position. In the opinion of the Tribunal, the Applicant had obviously been the victim of a serious wrong committed by the Administration when her post had been abolished without any justification. In the present case, the Applicant's post had been abolished, and a practically equivalent post had been created, with a different name and a slightly different job description at one grade lower in the hierarchy. The Applicant could not apply for the newly created post because she was at the G-5 level. Without advertisement or open competition, another staff member who had been placed against the post had been appointed to that "new" post. A year later, the post had been upgraded to G-5. The Tribunal concluded that the Applicant's post had not been abolished, and that the above process constituted a subterfuge for removing the Applicant and replacing her with another staff member.

In that regard, the Tribunal pointed out that, unfortunately, the manipulations to which the Applicant had been subject were becoming a habit in the United Nations Administration. The Tribunal noted that by this simple device, some staff members were dismissed and others were placed in their stead. It seemed to be of no importance if, at the end of the process, the Organization had to pay compensation to the person unjustly removed. The Tribunal was not aware whether any action was taken against those responsible for such elementary exercise in deviousness. The Tribunal, more than once, had come across the situation like the one described above (cf. Judgements No. 679, *Fagan* (1994), and No. 890, *Ossolo* (1998)).

The Tribunal also drew attention to the fact that the Respondent had claimed that, in accordance with UNICEF procedures, staff on abolished posts were auto-

matically placed against posts at their own level for which the Organization considered them to have the requisite qualifications. However, as the Tribunal pointed out, it was only after the Joint Appeals Board had recommended that a suitable post be found for her and that three months' net base salary be paid as an indemnity to her that a new job had actually been found for the Applicant.

The Tribunal considered that the Applicant had been subjected to a rather long and frustrating process of applying for 34 different posts, without support from the Administration, and the Applicant should be compensated for the anguish of not knowing whether she was going to be separated from the Organization; the humiliation of not receiving any permanent post for which she had applied; and the stress to which she had been subjected by the conduct of the Administration.

Accordingly, the Tribunal ordered that the Applicant be placed in a permanent post equivalent to the one she had encumbered before the artificial abolition of her own post, within 12 months of the date of communication of the judgement, or if the Respondent should decide that, in the interest of the United Nations, the Applicant alternatively should be compensated, without further action being taken in her case, pursuant to article 9, paragraph 1, of the Tribunal's statute, the amount of compensation to be paid to the Applicant should be fixed at 15 months of her net base salary, and, additionally, that compensation be awarded to her in the amount of nine months of her net base salary.

5. Judgement No. 885 (4 August 1998): Handelsman v. the Secretary-General of the United Nations[7]

Non-renewal of appointment under 200 Series—United Nations staff rule 204.3—Question of countervailing circumstances in non-renewal of 200 Series staff—Question of an express promise regarding continuation of employment—General Assembly resolution 37/126—Compensation for disingenuous efforts of Administration in assisting Applicant in finding an alternative post

The Applicant entered the service of the United Nations on 5 December 1983, on a special service agreement (SSA) for a period of two weeks and four days, as a consultant with the Department of Technical Cooperation for Development. He served on three additional SSAs, and on 1 November 1984, he was granted a one-year intermediate-term appointment at the L-5 level under the 200 Series of the United Nations Staff Rules, as an Interregional Adviser in electronic data processing in mineral exploration and development in what was then the Department of International Economic and Social Affairs (later incorporated into the Department for Development Support and Management Services). Over the next nine and a half years, the Applicant remained in the service of the United Nations on a series of intermediate-term and long-term appointments. He separated from service on 30 April 1994.

During 1993, internal restructuring and decentralization efforts led to a discussion of the future prospects of staff under the 200 Series of the United Nations Staff Regulations and Rules. By a letter dated 28 December 1993 from the Under-Secretary-General, Department for Development Support and Management Services, the Applicant was informed that his appointment had been extended until 31 March 1994, with the explanation that the Department had been confronted with financial difficulties and changing programmatic requirements and that it was therefore not in a position to renew his contract beyond its current expiration date of 31 March 1994. In the meantime, on 5 January 1994, the Under-Secretary-General for Human

Resources Management distributed a written statement in which it was noted that "every effort will be made to place supernumerary staff". And on 26 January 1994, the chief of the Applicant's Department wrote to the Director of Personnel, Office of Human Resources Management, with a copy to the Applicant, stating: "It is my understanding that the central Administration is doing its utmost to ensure that the incumbents of the Interregional Adviser posts earmarked for decentralization are redeployed along with the posts. In this regard, I would like to recommend that [the Applicant] be redeployed to the Economic and Social Commission for Asia and the Pacific (ESCAP) . . ."

On 9 March 1994, the Director of the Division of Economic Policy and Social Development and the Director of the Division of Public Administration and Development Management proposed to the Under-Secretary-General for Development Support and Management Services that he extend the appointments of a number of advisers, including an extension of one month for the Applicant. The proposal was approved and the Applicant's appointment was extended through 30 April 1994, when the Applicant separated from service.

The Applicant appealed, requesting a suspension of action of the administrative decision not to renew his fixed-term appointments.

As the Tribunal noted, the Applicant held an appointment under the 200 Series of the United Nations Staff Rules and Regulations, the rules applicable to technical assistance project personnel. Under staff rule 204.3:

"Project personnel shall be granted temporary appointments as follows:

"(*a*) Temporary appointments shall be for a fixed term and shall expire without notice on the date specified in the respective letters of appointment. They may be for service in one or more mission areas, and may be for short, intermediate or long term, as defined in rule 200.2(*f*). . . .

"(*d*) A temporary appointment does not carry any expectancy of renewal."

The rules thus permit the Respondent to separate a staff member appointed under the 200 Series from a post, even without prior notice and without regard to either the quality of the services that the staff member rendered or the staff member's personal attributes. The Tribunal has consistently upheld the application of these rules (cf. Judgements No. 610, *Ortega* (1993) and No. 614, *Hunde* (1993)).

That being the case, the Tribunal further noted that, unless there existed countervailing circumstances, project personnel staff members might see their relationship with the Organization terminated when the last of their 200 Series appointments expired. Countervailing circumstances might include (*a*) an abuse of discretion in not extending the appointment, or (*b*) an express promise by the Administration giving a staff member an expectancy that his or her appointment would be extended. The Respondent's exercise of his discretionary power in not extending a 200 Series contract must not be tainted by forms of abuse of power such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness or other extraneous factors that might flaw his decision. The Tribunal found no evidence of any improper motive on the part of the Administration. Nor did the Tribunal find that the Administration became obliged to find the staff member a new and equivalent post to the one he had occupied because it had made an express promise to that effect.

The Applicant claimed that an express promise had been made during discussions of the Joint Advisory Committee on the future prospects of staff serving

under the 200 Series, in the light of the imminent restructuring of the economic and social sectors of the Secretariat. What the Applicant cited as the Administration's position at that meeting appeared to consist of nothing more than opinions expressed by some representatives of the Administration about what the policy of the Organization should be in relation to the staff serving under the 200 Series. Those statements could not be understood as express promises concerning the Applicant's employment. The Applicant also referred to correspondence between the Under-Secretary-General for Development Support and Management Services and the Under-Secretary-General for Administration and Management regarding redeployment of staff appointed under the 200 Series to regional offices. However, as the Tribunal observed, the Applicant failed to point out in those communications any express promise made to him concerning his continued employment. Nor could the memorandum dated 6 December 1993 from the Director of Personnel to all staff members of the Department for Development Support and Management Services, including the Applicant, seeking to identify all those who were interested in reassignment, be construed as an express promise to reassign the Applicant. Nor could the Applicant rely on General Assembly resolution 37/126 of 17 December 1982, section IV, paragraph 5, which required that "staff members on fixed-term appointments upon completion of five years of continuing good service … be given every reasonable consideration for a career appointment", since the resolution did not apply to staff members appointed under the 200 Series.

The Tribunal noted that the Administration had made slight efforts towards finding another post for the Applicant, but that while no express promise had been made to the Applicant concerning his future employment, it found that the Administration's conduct towards the Applicant might have caused the Applicant to believe that the Administration would soon find him a new post. The Respondent's plans concerning the reorganization of staff serving under 200 Series appointments, resulting in the non-extension of a large number of staff members' contracts and the retention of other staff, coupled with the statements made by the Administration described above, could, in the Tribunal's view, have allowed room for ambiguous interpretation so as to have misled the Applicant. Further, in a letter dated 15 July 1994, transmitting to the Applicant the Joint Appeals Board report concerning the Applicant's request for suspension of action and informing the Applicant of the Respondent's decision to take no further action in the case, the Under-Secretary-General for Administration and Management stated, in relevant part:

> "The Secretary-General has also taken note of the comments of the Board regarding your service and expertise and would like to assure you that you will receive full consideration for the post in question [i.e., the ESCAP vacancy] and for any other post for which you apply and are found to be qualified."

The letter also could have had the effect of misleading the Applicant, in the opinion of the Tribunal.

As in the *Noyen* case, the statements made by the Administration to the Applicant, "coupled with the Applicant's erroneous assumptions concerning his status, must be considered as having adversely affected his alternate plans for employment resulting in possible loss" (cf. Judgement 839, *Noyen* (1997)). Likewise, the Tribunal concluded that the Applicant in the present case was entitled to compensation.

Furthermore, as the Tribunal noted, the Applicant had pointed to an exchange of correspondence that might have had the effect of thwarting his placement, for which the Respondent had no explanation.

The Tribunal concluded that the Administration's efforts in assisting the Applicant were disingenuous, and ordered the Respondent to pay to the Applicant three months of his net base salary as compensation for the damage he had suffered due to the conduct of the Administration, and rejected all other pleas.

6. Judgement No. 897 (20 November 1998): Jhuthi v. the Secretary-General of the United Nations[8]

Dismissal for misconduct—Disciplinary measures involve an exercise of a quasi-judicial power—A finding of misconduct—Burden of proof in disciplinary cases—Application of obsolete procedure for suspension from duty—Right of counsel

The Applicant entered the service of the United Nations on a six-month fixed-term contract as a Security Officer, at the G-4 level, in the United Nations Common Services Safety Unit, United Nations Centre for Human Settlements (Habitat), in Nairobi. He served thereafter on a series of fixed-term contracts of varying duration. On 1 April 1990, his functional title was changed to Senior Security Officer. On 1 October 1990, he was promoted to the G-5 level. On 25 October 1993, the Applicant was separated from service, pursuant to staff regulation 10.2, paragraph 1, and staff rule 110.3(*a*)(vii), after an ad hoc Joint Disciplinary Committee had concluded, and the Secretary-General had agreed, that the Applicant had stolen a Panasonic Notebook computer from the UNICEF/WFP office in the United Nations Complex in Gigiri, Kenya. The Applicant appealed his dismissal.

As the Tribunal had held in Judgement No. 890, *Augustine* (1998), the taking of disciplinary measures involved the exercise of a discretion by the Administration, but it was also the exercise of a quasi-judicial power. In disciplinary cases, the Tribunal examined (*a*) whether the facts on which the disciplinary measures were based had been established; (*b*) whether they legally amounted to serious misconduct or misconduct; (*c*) whether there had been any substantive irregularity; (*d*) whether there had been any procedural irregularity; (*e*) whether there was an improper motive or abuse of discretion; (*f*) whether the sanction was legal; and (*g*) whether the sanction imposed was disproportionate to the offence.

As the Tribunal noted, with regard to the finding of misconduct, there were two matters that needed to be considered: first, whether the findings of fact and misconduct were justified on the evidence and, second, whether, as the Applicant alleged, the Joint Disciplinary Committee had considered, and had been influenced by, irrelevant facts when it had concluded that the Applicant was guilty of misconduct.

As the Tribunal further noted, the critical facts were that the Applicant had been on duty in the area when a computer was stolen from the UNICEF/WFP office. Later, the same computer was found to have been in his possession. In general, the burden of proof, where discretionary powers were exercised by the Administration, required both parties to provide the Tribunal with all the relevant evidence that they had to enable the Tribunal to establish the facts. In disciplinary cases, when the Administration produced evidence that raised a reasonable inference that the Applicant was guilty of the alleged misconduct, generally termed a prima facie case of misconduct, that conclusion would stand, the exception being that if the Tribunal chose not to accept the evidence, or the Applicant provided a credible explanation or other evidence, that made such a conclusion improbable, (see Judgement No. 484, *Omosola* (1990)). In the present case, in the opinion of the Tribunal, the evidence adduced by the Administration raised a strong prima facie case that the Applicant had

stolen the computer. In the face of this prima facie case, the Applicant had provided the explanation that, while he had indeed come into possession of the computer, which he had later given his brother to sell, in order to raise money for a trip to India, he had purchased it for Kenya shillings 20,000 from a man named Chris whom he had met through a Tanzanian trader. He further claimed that Chris was unavailable to testify because he had since died. The Applicant failed to produce any acceptable evidence insofar as the Joint Disciplinary Committee was concerned that Chris had ever existed, let alone that he had died. He also failed to produce a satisfactory affidavit from the Tanzanian trader, as had been requested by the Committee, producing instead an undated, unofficially translated statement that the Committee considered to be wholly unsatisfactory.

Further, the Applicant initially stated that he had purchased the computer "thinking it was contraband" and "acknowledge[d] that the purchase of contraband items is a practice in poor judgement". He later sought to correct that statement to read that he had purchased the computer "*not* thinking it was contraband" (emphasis in original). In the Tribunal's view, the Applicant's attempted correction of the statement was not compatible with the rest of that statement and, thus, far from rebutting the prima facie case against him, raised serious doubts as to his veracity.

The Applicant also alleged that his suspension, after the initial investigation, was improper because there were irregularities in its imposition. The Tribunal noted that the Respondent had applied an obsolete procedure for suspension that had been superseded six months earlier by the revised Chapter X of the United Nations Staff Rules, and the Executive Director who had imposed the suspension did not have a proper delegation of authority to do so. The Tribunal, therefore, found that there was an error in the application of the law which, while not being sufficiently substantial to nullify the decision to impose disciplinary measures, nevertheless violated the Applicant's rights. For this irregularity, the Tribunal ordered the Respondent to pay to the Applicant two months' net base salary.

The Applicant had also complained that he had been denied access to his counsel in New York, who was a member of the Panel of Counsel and who allegedly had not been informed of the Joint Disciplinary Committee proceedings until two months after that body had made its recommendations to the Secretary-General. The claim that this amounted to a denial of the right to representation was not correct. Staff rule 110.7(*d*) provided that a "Joint Disciplinary Committee shall permit a staff member to arrange to have his or her case presented before it by another staff member or retired staff member at the same duty station where the Committee is established". The Applicant's right to have local counsel, as provided in staff rule 110.7(*d*), was fully respected, and, in fact, a staff member represented him at the proceedings before the ad hoc Joint Disciplinary Committee. Although the Applicant now claimed that he was entitled to have his New York counsel represent him, he presented no evidence that he had sought to obtain her presence during the proceedings in Nairobi. The Tribunal concluded that the Applicant's right to the assistance of counsel pursuant to the Staff Regulations and Staff Rules had been fully honoured. The Tribunal concluded that there were no material procedural irregularities of which the Applicant could complain with respect to his right to counsel.

For the foregoing reasons, the Tribunal rejected the Applicant's pleas, except for the suspension irregularity.

7. JUDGEMENT NO. 903 (20 NOVEMBER 1998): KHALIL V. THE COMMISSIONER-GENERAL OF THE UNITED NATIONS RELIEF AND WORKS AGENCY FOR PALESTINE REFUGEES IN THE NEAR EAST[9]

Refusal to change Applicant's date of birth in relation to date of retirement—Question whether appeal to the Joint Appeals Board was lodged within the prescribed time limits—Personnel directive A/9—Policy against date of birth change

The Applicant entered the service of the Agency on 8 February 1956, as a Teacher, at the grade 4 level, at El Buss School, Tyre, Lebanon. He was successively promoted, eventually reaching the grade 17 level, in the post of Senior Education Officer. The Applicant separated from service upon retirement on 30 November 1996.

In the Agency's records are two employment application forms, one signed in April 1956 and another unsigned, both indicating the Applicant's date of birth as 11 November 1936. There also are an UNRWA Agreement-Beneficiary form, signed in April 1956 by the Applicant and an UNRWA representative and two witnesses, and two separate area staff dependency reports, signed in April 1963 and July 1967, respectively, by the Applicant, all indicating his date of birth again as 11 November 1936. However, on 8 September 1967, the Applicant was provided with a United Nations laissez-passer, on which the date of his birth was noted as "11 November 1937". On 15 March 1971, the Applicant signed a Designation, Change or Revocation of Beneficiary form giving "11 November 1937" as his date of birth.

On 27 August 1989, the Applicant informed the area Personnel Officer that he had received a document from the Agency that incorrectly noted his date of birth as 11 November 1936, instead of 11 November 1937, and asked the area Personnel Officer to take the necessary action to correct it. On 31 August 1989, the area Personnel Officer wrote to the Applicant, noting that 11 November 1936 had been given as his date of birth in his application for employment form and in other Agency documents. On 13 September 1989, the Applicant advised the area Personnel Officer that the date "1936" must have been a typographical error and that the handwriting on the application for employment form was not his own. He provided the area Personnel Officer with several documents showing his birth date as "1937", but on 8 November 1989, the Chief, Personnel Services Division, informed the Applicant that his date of birth could not be changed in the Agency's records.

On 16 October 1995, the area Personnel Officer informed the Applicant that, on 11 November 1996, the Applicant would reach the age of retirement and that the Agency would not defer his retirement beyond that date. On 20 July 1996, the Applicant wrote to the Commissioner-General requesting that his date of retirement be deferred to the end of November 1997, in the light of the mistake made in the Agency's records regarding his date of birth. In a reply dated 16 September 1996, the Director of Administration and Human Resources "confirm[ed] all previous correspondence on the subject" of the Applicant's date of birth, in accordance with the policy set forth in personnel directive A/9. He also rejected the Applicant's request for an extension of his service beyond retirement age, on the ground that such request had not been submitted to the Director of Administration and Human Resources one year before the retirement date, as required.

On 25 September 1996, the Applicant requested the Director of Administration and Human Resources to reconsider his decision, claiming that a grace period had

been given to staff to amend their date of birth in the Agency's records and that, because he was on secondment to UNESCO during that time, he had been unaware of such a grace period. On 2 October 1996, the Director of Administration and Human Resources confirmed his earlier advice.

On 5 November 1996, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB adopted its report on 18 May 1997, which supported the Applicant's claim. However, the Commissioner-General had rejected the JAB recommendation because (*a*) the appeal to the JAB had not been lodged with the Board within the time limits prescribed under the area staff rules, and (*b*) the Applicant was not entitled to have his birth date changed, as such change was contrary to the area staff rules.

The Tribunal, noting that the JAB had received the application and addressed the merits of the appeal, decided also to receive the appeal before it and pass judgement, in accordance with article 2 of its statute. The Tribunal observed that the Applicant had tried on prior occasions to have his date of birth changed and continued to provide documents to the Agency that he believed supported his claim. Thus, the discussions between the Applicant and the Agency appeared to be ongoing and the appeal was properly considered to be timely.

In addition, the Tribunal considered it convenient to reassert the policy contained in the relevant personnel directive A/9, paragraph 6.1:

> "A staff member's age for retirement purposes shall be determined on the basis of evidence on UNRWA personnel records. Staff members will not be allowed to change a previous birth declaration."

This provision was amplified to include the following:

> "Once a certified date of birth has been accepted by the Agency, it becomes a part of the Agency's internal and official records. As such, it governs the application of all the relevant staff regulations and staff rules to the staff member's service with the Agency, including the date of retirement and, as an internal record of the Agency, it is beyond the jurisdiction of external parties. For a number of years, the staff member's date of birth has been on the pay slip. The Agency therefore is entitled to assume that staff members who have not already petitioned to change their dates of birth accept the Agency's records as being correct."

The Applicant objected to the application of this directive to his case because the directive only applied once a certified date of birth had been accepted by the Agency. In his case, he argued, there was no such certified date of birth.

In the Tribunal's view, the only critical document was the original birth certificate of the Applicant, which did not appear to be obtainable. This would be the sole document on which the Applicant's birth date was not based on his word. The birth dates recorded on all the other documents were either based on the Applicant's word or on a former document issued on the Applicant's word. In such circumstances, the authorities issuing such documents had to believe the Applicant or condemn him not to travel, not to marry, not to register his children, etc. The Tribunal, then, was not persuaded by the large number of documents brought in as evidence. Relying on the clear terms of personnel directive A/9, the Tribunal was bound to accept that the birth date on the Applicant's second application for employment form, which he had signed, could not have been certified other than by the Applicant's word.

The Applicant's signature was preceded by the words: "I certify that the statements made by me in answer to the foregoing questions are true, complete and correct in all respects." Under the heading "Personal history", the Applicant stated: "I was born in 1936, at Kabri Village." Furthermore, the date of birth of the Applicant given on three subsequent documents signed by him coincided with the date on the second signed employment application form, and the Tribunal had no reason to doubt the veracity and authenticity of these documents: they expressed the Applicant's good-faith statement of his date of birth on documents having a different purpose than just ascertaining his age. On 15 January 1990, the Applicant presented an identification document issued by the Higher Arab Committee for Palestine in Beirut on 23 April 1953. The Applicant maintained that the document "stands for my birth certificate", that it "was issued three years before I joined UNRWA", and that it "clearly states that my date of birth is 1937". However, since the Applicant himself had maintained that he did not possess his original birth certificate, the document must have been issued on his word, just as the others.

Moreover, in the view of the Tribunal, even if the Applicant had been mistaken or absent-minded when he had initially stated his date of birth as 1936, that circumstance was irrelevant. The Agency had adopted a policy, codified as personnel directive A/9, which gave total priority to the first date of birth declared by a staff member in the Agency's internal documents over all other declarations. As the Tribunal recalled, in matters of retirement age, the Agency required certainty since not only the rights of the retiring staff members were at stake, but also the interests of other staff members in pursuing their careers by filling the vacant posts of those who retired.

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

8. Judgement No. 906 (20 November 1998): Ziadeh v. the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East [10]

Termination on medical grounds—Audi alteram partem—*Importance of Medical Board report being transparent and stating reasons for conclusions—Question of bias or prejudice—Reinstatement of Applicant not appropriate remedy*

The Applicant entered the service of the Agency on 1 October 1983, as Medical Officer "B" (Part Time) at grade 14, in Jarash Camp Health Centre. On 1 January 1986, the Applicant was granted a temporary indefinite appointment as an area staff member in the capacity of Medical Officer "B" (Relieving) at grade 14, in the Jordan Field. On 1 October 1986, he was transferred to the post of Medical Officer "B" in the Baqa'a Camp Clinic, Balqa Area. He was subsequently transferred to a number of other offices in the region. The Applicant separated from service on health grounds with effect from 5 March 1996.

On 22 July 1992, the Applicant underwent a kidney transplant operation. On 27 August 1992, a Medical Board convened to examine the Applicant and determine his fitness for continued service with the Agency. On 11 November 1992, the Board concluded that the Applicant was "fit for continued service with the Agency" and recommended "re-evaluation after three months". During the period between 4 February 1993 and 16 January 1995, five other Medical Boards re-evaluated the Applicant. Each Board concluded that the Applicant remained fit for continued service with the Agency; each recommended re-evaluation of the Applicant's condition after six months.

On 19 July 1995, the Applicant was examined by another Medical Board which concluded, on 19 September 1995, that the Applicant was fit to resume his duties with the Agency. The Board recommended re-evaluation after one year. It further noted in an attached confidential letter to the Chief, Field Health Programme, Jordan, that although the Applicant was found fit by the Board he was found to suffer from a vascular necrosis of the head of the femur, both sides, which rendered him more vulnerable to fracture, and therefore, to avoid the probability of in-service accidents that might result from mobility and travel, the Board recommended that the Applicant be stationed in a health centre and not travel within the area throughout the scholastic year. On 28 September 1995, the same Medical Board was reconvened and "reviewed the reports and investigations concerning [the Applicant]". On 1 October 1995, the Board submitted to the Chief, Field Health Programme, Jordan, its conclusions that "[the Applicant was] *unfit* to resume his duties with the Agency" and that "the provisions of paragraph 7 of staff rule 109.7 do not apply in his case". On 2 October 1995, the Field Health Officer concurred with those conclusions.

On 23 October 1995, the Applicant requested the Director of UNRWA Affairs and the Director of Health to review the decisions to declare him unfit for continued service and to terminate his appointment. The Applicant enclosed medical reports from specialists in support of his claim that he was fit for service.

In consideration of the case, the Tribunal noted:

1. That between 27 August 1992 and 19 September 1995, the Applicant's health had been examined and reviewed by no less than six Medical Boards, all of which had concluded that he was fit to work in the medical service of UNRWA.

2. That on all such occasions, his fitness for service had been determined by reference to his capacity to discharge his functions in an acceptable manner and that both the Applicant and the Respondent had considered that to be the primary consideration whereby his condition should be assessed.

3. That no new medical evidence had become available to the Medical Board between the report of the Medical Board dated 19 September 1995, when it reported the Applicant as being "fit to resume his duties", and the report dated 28 September 1995, when the same Board had reconvened to review the Applicant's case and found him "unfit to resume his duties". The same information it had previously considered had served as the basis for the new conclusion. The Applicant had experienced no substantial or relevant deterioration in his condition between those dates which would have entitled the Board to change its original conclusion from "fit to resume his duties" to "unfit to resume his duties".

4. That the reconvening of the same Medical Board and the reconsideration by it of the Applicant's fitness for service had been inspired by the Respondent. The Respondent had rejected the Board's first conclusion not on the grounds that there was new evidence that the Applicant was unfit to resume his duties; rather, the Respondent believed that the Applicant would be unable to discharge his duties because his medical condition made him susceptible to easily fracturing his femur, which was weakened by a vascular necrosis, and because the immunosuppressive medication that he needed to take made him vulnerable to developing an infection. Thus, the Respondent feared that the Applicant might suffer a service-incurred injury or other service-related illness, which would expose the Respondent to adverse financial burdens and would constitute "an unnecessary and undesirable outcome".

5. That none of the specialists whom the Applicant consulted, including two to whom the Applicant had been referred by the Agency, had concluded that he was unfit.

6. That between 19 September and 28 September 1995, the Applicant had never been apprised of the reasons why his case was being reconsidered, i.e., the Applicant's potential exposure to a service-incurred injury or illness or the potential financial consequences to the Respondent. The Respondent appeared to have changed the interpretation of "unfit for duty" without giving notice of such change in definition to the Applicant, so as to deny him an opportunity to challenge the application of such definition to his case and to deny him the opportunity of adducing evidence or making presentations that he was not "unfit" within the widened definition.

Based on the above findings, the Tribunal concluded that the Applicant had been denied the right to participate in any meaningful way in the Medical Board's reconsideration of his fitness for service. He had been denied his right to furnish evidence thereon or to challenge any evidence which might have been adverse to him. The Applicant had thus been denied the rights protected by the principle of *audi alteram partem*, being analogous to the right to confront one's accusers. In short, the Applicant had been denied due process.

The Tribunal was further concerned as to the inadequate content of the report of the Medical Board dated 28 September 1995, in that it repeated verbatim the earlier report of 19 September 1995, when it declared him "fit to resume his duties". The only difference in the 28 September report was that the word "unfit" had been substituted for the word "fit". It stated no ascertainable reasons for the change in its conclusion, and, since all the medical evidence from the specialists was to the effect that he was fit, the Tribunal could only assume that it had found him "unfit" because of the new and expanded definition. Likewise, the Respondent's reasons for accepting the later conclusion, rather than the original conclusion that he was fit for duty, made by the very same Board, were difficult, if not impossible, to ascertain. The Tribunal was satisfied that due process required that such a report be transparent and should state reasons so as to allow a dissatisfied staff member to challenge its contents.

The Tribunal was also concerned that the very persons who had orchestrated or inspired the reconvening of the Medical Board were those who had ultimately inspired the decision to separate the Applicant from service on the ground that he was unfit for service. That situation might bring about the perception that bias or prejudice had tainted the termination of the Applicant's appointment.

The Tribunal was satisfied that for the reasons stated, the Respondent had deprived the Applicant of both fairness and due process in the procedures that had eventually led to the Respondent's decision to separate the Applicant from service on the grounds of health. The Tribunal had considered the Applicant's request for reinstatement but considered that not to be an appropriate remedy. First, the Tribunal was not satisfied that had the procedures been correct and fairly conducted, the decision of the Medical Board and the Respondent's acceptance thereof would have been different. Second, the circumstances had obviously changed since the Applicant was separated. The Applicant had been in private medical practice since his separation, and substantial separation benefits had already been paid to the Applicant. The Tribunal therefore considered that the payment of compensation would be more appropriate remedy than reinstatement, and ordered the Respondent to pay to the Applicant compensation in the amount of two years' net base salary.

B. Decisions of the Administrative Tribunal of the International Labour Organization[11]

1. JUDGEMENT NO. 1689 (29 JANUARY 1998): MONTENEZ (NO. 2) V. EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION (EUROCONTROL AGENCY)[12]

Non-promotion—Limited review of promotion decisions—Roles of selection and promotion boards—Role of private firm in selection process—Article 2 (1) (a) *of rule No. 2—Article 2 (2) of rule No. 2—Article 6, paragraph 5, of rule No. 2—Importance of an organization following its procedure*

The complainant joined the staff of Eurocontrol at its headquarters in Brussels on 1 October 1985, as a translator at grade LA6. On 1 January 1992, he was promoted to grade LA5. From 16 March 1994 to 15 February 1995, he was acting head of the French Language Translation Unit of the Linguistic Division.

On 26 April 1995, Eurocontrol published a notice of competition, No. HQ-95-LA/097, for the post of head of Unit at grade LA4. It said that applicants had to be of French mother tongue or have received their education in French, and have "sound knowledge of English, German and at least one other of the languages used in the Agency". There was to be a preliminary selection, based on an assessment of the applicants' academic and other qualifications, and then a final selection from the shortlist to be made on the strength of further assessment and of interviews.

The complainant applied on 20 June 1995, as did another staff member, an interpreter at grade LA5. This staff member had been with the Agency since 5 October 1970 and in 1988 had been appointed deputy to the head of the Unit. She had been the acting head since 1 April 1995.

On 22 August 1995, the Selection Board decided that the complainant and the Acting Head were the only candidates to qualify and it ranked them on a par. An officer of the Human Resources Directorate requested the complainant and the acting head to report for what he called a "personal development exercise", which was to consist of an interview with a firm of recruitment consultants. On 17 November, an ad hoc promotion board, chaired by the Director General and made up of three members of the Administration and two staff representatives, recommended the acting head for the post. By a letter of 28 November, an official of the Human Resources Directorate told the complainant on the Director General's behalf that his application had been unsuccessful.

On 29 February 1996, the complainant submitted a "complaint" to the Director General under article 92(2) of the Staff Regulations against the rejection of his application and the appointment of the other staff member. The case was put before the Joint Committee for Disputes. In its report of 31 July 1996, the Committee said that the "complaint" was warranted because the appointed candidate had neither "a degree in German" nor "knowledge of the level usually required for the duties [of the post], particularly revising translations". In a letter of 23 September 1996 to the complainant, the Director General rejected the Committee's recommendation.

In consideration of the case, the Tribunal recalled that, according to a long line of precedent, the executive head of an organization had broad discretion in making appointments and his decision was subject only to limited review. The Tribunal

would interfere only if the decision was taken ultra vires or showed a formal or procedural flaw or mistake of fact or law, or if some material fact was overlooked, or if there was misuse of authority or an obviously wrong inference from the evidence. See, for example, Judgements 1436 (in re Sala No. 2) 1995, 1497 (in re Flores) 1995,1654 (in re van der Laan Nos. 1 and 2) 1996.

The complainant first argued that considering the two candidates at two stages—assessment of technical qualifications by a selection board, and then recommendations by a promotion board to the Director General—was against article 30 of the International Labour Organization Regulations, and in that regard the Tribunal noted that article 30(2) read:

> "For each competition, a selection board shall be appointed by the Director General. This Board shall draw up a list of suitable candidates, in order of merit and without distinction of nationality.
>
> "The appointing authority shall decide which of these candidates to appoint to the vacant posts.
>
> "In the event of a selection being made which is not in conformity with the list drawn up by the selection board, reasons for the appointment shall be given in consequence."

The Tribunal, concluding that the complainant had misread the precedents he had cited that dealt with article 30, was of the view that the job of a selection board was to draw up a list of qualified internal and external candidates so as to keep the procedure impartial and help the Director General. It need not make any recommendation. But appointment to a post at a higher grade was a promotion, and so article 45 applied. The promotion board too was supposed to help the appointing authority by making proposals for promotion on the strength of a comprehensive assessment. In Judgement 1477 (in re Nacer-Cherif) 1995, a case in which another organization was the defendant, the Tribunal had found that there were two stages of selection: first, a panel drew up a list of candidates according to their merits on paper; then the list went to a selection board. The Tribunal held that the selection board was bound by its terms of reference and not free to delegate any of its responsibility to a selection panel, even though there was no general rule against such division of authority.

The Tribunal agreed with Eurocontrol that the qualifications the Selection Board must assess according to article 30(2) were the candidates' merits on paper and, if need be, as revealed in tests of their technical skills, and then it was up to the promotion board and then to the Director General to assess temperamental fitness for management. So the promotion board had not in the present case encroached on the Selection Board's competence.

The complainant also argued that there had been a further breach of article 30 in the fact that the Selection Board had delegated the task of interviewing the candidates to a private firm of consultants. The Tribunal, recalling that Judgement 1477, for one, had affirmed that, unless so empowered by a written text, a body might not delegate authority or competence, and stated that in the present case the material rules did not actually require the Selection Board itself to interview candidates. So it was free to obtain expert help in framing questions of a sort that only candidates with particular qualifications could answer, even though it still had to assess their answers itself and make recommendations accordingly. Furthermore, the Tribunal, rejecting the complainant's argument that the Director General was not free to go

beyond the Selection Board's shortlist and to take into account further information obtained in tests or interviews, concluded that, since there was nothing wrong with splitting up the process of assessment, there was no objection either to following up the rating of candidates' technical skills with whatever psychological tests the organization's interests demanded.

The complainant further argued that the membership of the promotion board, which included the Director General, had offended against article 30 and the requirement of independence of the Administration. As the Tribunal stated, there had been no breach of article 30 in bringing the promotion board into the process of selection. It was not the same body as the Selection Board, and the same rules did not apply to both of them. Nor were the promotion board and the Director General one and the same: they might have different views even if the Director General himself was on the board. The board was supposed to contribute to the impartiality and openness of the promotion procedure, and it had done so, in the view of the Tribunal.

The complainant pleaded a procedural flaw, namely, breach of article 2(l)(*a*) of rule No. 2, in that the notice had failed to say what sort of competition was intended: was it one that assessed paper qualifications only or one that involved tests as well? That Tribunal noted that the provision did require that a notice should state what the competition was to be based on and set out the process of selection. That was necessary because the process must be explicit enough to be binding on the appointing authority, and because staff members needed the information to help in deciding whether to apply and to know what to anticipate. In that regard, the Tribunal noted that notice 25/94, of 8 December 1994, had stated that the process of selection would start with comparison of the candidates' paper qualifications and of experience, but that the "final selection" would depend on "assessments and interviews", which, among other things, set out two stages: first the Selection Board would look at the candidates' records and draw up a shortlist; then everyone on the list would:

> "be assessed by means of interviews, which may include tests, and/or other assessment procedures. A recommendation of the most suitable candidate(s) will be made by the service concerned to the appointing authority."

And as the Tribunal observed, Eurocontrol was obviously basing the competition on qualifications, and if the complainant was really unsure on that score he had only to ask the Administration. Since he had not done so, presumably he had not needed to, and for him to raise the issue at the current stage scarcely showed good faith.

The complainant also charged the Agency with breach of its duty under article 2(2) of rule No. 2 to inform him that he was to be assessed on the strength of "qualifications and tests". The Tribunal recalled that article 2(2) stated that "where the competition is on the basis of qualifications and tests, the candidates admitted to the competition shall be informed of the nature of the tests". But, in the opinion of the Tribunal, it did not apply in the present case: for the reasons given above, the competition was to be on the strength, not of "qualifications and tests", but just of "qualifications". Besides, the Agency had given the complainant due notice of the psychological tests he was to take and had offered him any information he needed.

The complainant cited the report of the Joint Committee for Disputes in support of his further plea that the Director General ought not to have taken the Selection Board's shortlist, because this was not the "reasoned report" which article 6, para-

graph 5, of rule No. 2 required the Board to submit along with its list. The Agency had replied that that provision must be "construed in, and adapted to, the context of each case": where candidates were found suitable and put on a par, no explanation was called for, though "a reasoned report would have made sense had the Board put the two candidates in order of preference". The Tribunal noted that the "reasoned report" required in article 6 of rule No. 2 served the two purposes of helping the Director General take a decision and of allowing review of it. And as to review, it also answered the requirement of article 30(2) of the Staff Regulations:

> "In the event of a selection being made which is not in conformity with the list drawn up by the selection board, reasons for the appointment shall be given in consequence."

So if the Director General endorsed the Board's recommendations, the reasoned report required of it became decisive; whereas if he did not, he must give reasons of his own. In any event the final ranking, whether by the Board or by the Director General, must be accounted for. If the Director General followed the Board's rating of the candidates' technical qualifications he need not say why; so the Board at least must say what its reasons were for the rating.

As the Tribunal further noted, what sort of reasons should be given would turn on the nature of the procedure and the stage it had reached. According to precedent, the form in which they were conveyed must not be such as to harm the prospects of unsuccessful candidates, especially internal ones: see Judgements 1223 (in re Kirstetter No. 2) and 1390 (in re More) 1994. Likewise, only where a prima facie case has been made for quashing an appointment should there be access to a candidate's personal records: see Judgement 1436 (in re Sala No. 2) 1999. Again, all that might be expected of the Selection Board was enough explanation for its choice to make sense, though a fuller one might have been in order when it put shortlisted candidates on a par or in an order of preference. Ranking two or more *ex aequo* posited a finding that they were on a par; but they might be either equal in all respects or else, despite different qualities in different areas, rated broadly equal: the Director General and the complainant needed to know which.

The Tribunal, however, concluded that in the present case the Selection Board had not complied with the requirement. Nor had Eurocontrol later removed the flaw. Although the reasons stated for the impugned decision were sufficient and though the complainant's other objections to it failed, it did show a fatal flaw. An organization that set up an advisory body and had a duty to consult it must abide by its own rules and keep to the prescribed procedure: see Judgements 1488 (in re Schorsack) 1995 and 1525 (in re Bardi Cevallos) 1996.

The Tribunal therefore decided that the Director General should reconsider the case in the light of the reasoned report which the Selection Board must submit to him. The Agency was to resume the process of selection at the point at which the flaw had occurred. The Selection Board should make the reasoned report required under article 6 of rule No. 2 and the process then should go ahead as prescribed. But according to the Tribunal, since the psychological tests were quite irrelevant to the Board's assessment of technical qualifications, they were not to be repeated.

The Tribunal also stated that, having succeeded in part, the complainant was entitled to costs, of 50,000 Belgian francs.

2. JUDGEMENT NO. 1696 (29 JANUARY 1998): FELKAI V. CUSTOMS COOPERATION COUNCIL[13]

Termination of appointment because of poor performance—Regulation 9—Review of probationer is very limited—Delegation of authority must have basis in the Rules—Compensation, not reinstatement, for lost earnings—Question of moral injury—Article VII (1) of Tribunal's statute—Question of abuse of discretion

The complainant joined the Council on 11 April 1994, as a publications officer at grade B4. Her contract was for three years, including six months' probation. A probation report that her then supervisor, the head of Financial Services, wrote on 29 August 1994, stated that though she had "undoubted abilities" her temperament was awkward. He recommended extending the period of probation which was done and confirmed in writing on 27 September, and she accepted. A new supervisor, who was head of Administrative Services, wrote a second probation report on 22 February 1995, which said much the same thing as the first and recommended that unless the complainant improved she should be terminated. On 23 February 1995, the Administration spoke to the Chairman of the Staff Committee, the vice-chairman too being present. The Chairman saw no need to consult the Committee as a whole and endorsed the recommendation for termination of the complainant's appointment.

The Chairman was to be absent for three weeks and the vice-chairman replaced him. By a memorandum he wrote later on 23 February, the vice-chairman asked the Head of Administrative Services to write a note on the case to be put to the full Committee; failing that, he explained, the Committee could not give the "preliminary opinion" required of it as an advisory body. In her reply of 24 February, the head of Administrative Services stated that the chairman had already been consulted and was in favour of termination. The same day, the vice-chairman wrote back maintaining that according to regulation 9 there still had to be a plenary meeting of the Committee. In a letter of 24 February, the Secretary-General gave the complainant notice of termination at 10 April, releasing her from duty to report for work after 10 March. His letter set out the reasons: though very good at preparing publications, she was tactless and clumsy in her dealings with others and poor at administrative work.

By a detailed memorandum dated 8 March 1995, the vice-chairman told the head of Administrative Services that at a meeting on 6 March the Staff Committee had taken the view that the Administration had a duty to consult it under regulation 9. He accordingly asked for further information and commented on the termination.

On 13 March, the Secretary-General rejected a request from the complainant for review of the decision not to confirm her appointment. She appealed to the Appeals Board. In a report dated 9 August 1996, it concluded that the Secretary-General's decision of 24 February 1995 to terminate her appointment showed neither formal nor substantive flaws and should stand. On 2 September 1996, the Secretary-General gave her notice of his final decision to end her appointment, and she appealed.

In consideration of the case, the Tribunal observed that regulation 9 read:

"(*a*) Officials shall be appointed for a fixed term or an indefinite term.

"(*b*) The first six months of service by an official shall be a probationary period. At the end of this period, the Secretary-General shall decide:

(i) To confirm the appointment; or

(ii) Exceptionally, with the consent of this official and after consultation with the appropriate advisory body, to prolong this probationary period for a further period of not more than six months; or

(iii) After consultation with an advisory body, to terminate the appointment upon giving one month's notice or upon payment of one month's emoluments."

And staff circular No. 136, which implemented regulation 9, provided:

"Any actions taken under the terms of this Regulation shall be notified to the official concerned in writing. The appropriate advisory body to be consulted under (*b*) (ii) and (iii) shall be the Administration Committee in the case of an official in category A and the Staff Committee in the case of all other categories."

The Tribunal further noted that according to precedent a decision to end an appointment was a discretionary one and could be set aside only if it were taken ultra vires or showed a formal or procedural flaw or mistake of fact or law, or if some material fact was overlooked, or if there were an obviously wrong inference from the evidence or misuse of authority. The Tribunal would apply those criteria with even greater caution in reviewing the case of a probationer; otherwise, probation failed to serve as a period of trial. An organization must be allowed the widest discretion in the matter and its decision would stand unless the defect was especially serious or glaring. Moreover, where the reason for non-confirmation was poor performance, the Tribunal would not replace the employer's assessment of the complainant with its own. See Judgments 1161 (in re Bouritsas) 1992; 1175 (in re Scotti) 1992; 1183 (in re Hernández Quintanilla) 1992; 1246 (in re Pavlova Nos. 1 and 2) 1993; 1352 (in re Offerman) 1994; 1386 (in re Bréban) 1995; and particularly 1418 (in re Morier) 1995.

As the Tribunal observed, both parties acknowledged that the wording of regulation 9(*b*)(3) was plain: the decision to terminate an appointment at the end of probation might be taken only "after consultation with an advisory body", the Staff Committee. The Council argued that it need only speak to the Chairman, such being its practice to date. The complainant demurred: the Committee should, she maintained, have met in plenary to take up the matter and make a recommendation. Although the Chairman supported the Council's contention, a meeting of the members chaired by the Vice-Chairman preferred that of the complainant.

The Council's argument postulated prior delegation of authority to the Committee's Chairman or officers. But to be valid, in the opinion of the Tribunal, such delegation must have some basis in the rules (so said Judgement 1477 (in re Nacer-Cherif) 1996). Failing that, any action would be ultra vires. The Council cited no rule that allowed the Committee to delegate authority and the practice on which it did rely could have no effect in law, as the conditions that made a practice an enforceable custom had not been met. The alleged rule was not widely recognized as binding; indeed opinion varied on what it actually was.

The Tribunal therefore concluded that there had been wrongful failure to consult the Staff Committee; the Secretary-General had been wrong to decide on the case before he had consulted it; and, in line with *patere legem*, the impugned decision and the others he had taken in breach of his duty to consult it must be set aside. As the Tribunal recalled, authority for that was to be found in Judgements 1488 (in re Schorsack) 1996 and 1525 (in re Bardi Cevallos) 1996.

In the present case, the complainant claimed not reinstatement, but compensation for any earnings she had lost in the now expired period of three years following 11 April 1994, the date of her appointment. Since she had one year's probation on full pay, the loss she alleged was in the last two years of that period. The Council was not free to end her appointment until it had consulted the Staff Committee and it had not consulted the Committee within the three-year period. The parties had not argued the amount of her losses or of her actual or potential earnings in the last two years of the period. The Tribunal therefore made her an award *ex aequo et bono*.

She also claimed moral damages on the grounds that "her workload was unduly heavy for almost a year, conditions were very distressing, she suffered nervous collapse and the termination harmed her professional and personal standing". On that point, the Tribunal recalled article VII(1) of its statute that stated that for a complaint to be receivable the internal remedies must be exhausted, and it would not entertain any claim to damages that had no direct connection with the impugned decision. That decision being about termination, the only material issue was whether termination had caused her actionable moral injury.

For want of consultation of the Staff Committee the decision was unlawful. But in the view of the Tribunal, it was unlikely that the Committee would have found in her favour, and if so, such a finding would probably not have swayed the Secretary-General. And her other pleas did not warrant moral damages: she had seen her file; the Council had respected her right to a hearing or had subsequently made good any omission to do so; she had received the probation report before probation had expired; and the mere extension of probation had been stark enough warning. Besides, she must have realized that while she was still on probation her position was precarious.

As the Tribunal had stated, the Secretary-General had wide discretion in the matters of confirmation of the complainant's appointment. Had he decided against it even after going through the proper procedure, he could hardly have been accused of abuse of discretion. His first duty was to safeguard the Council's interests. Having found that the complainant had got on badly with other staff, he was free to conclude that it was in the Council's interest to let her go even if she was not the only one at fault nor even mainly to blame.

Having said that, the Tribunal ordered the Council to pay her damages for both material and moral injury in the amount of one year's pay at the rate applicable to her last month on actual duty, plus interest to be reckoned at the rate of 8 per cent a year as from 28 November 1995, the date on which she had filed with the Appeals Board the brief in support of her internal appeal. She also was entitled to 100,000 Belgian francs in costs.

3. Judgement No. 1706 (29 January 1998): Broere-Moore (No. 5) v. United Nations Industrial Development Organization[14]

Gender discrimination—Question of being a staff member at time of selection process—Staff rule 103.12(a)*(ii)—Policy of giving preference to women—Question of agreed termination—Tribunal's jurisdiction regarding discrimination issues vis-à-vis a panel on discrimination*

On joining UNIDO on 19 May 1992, the complainant became chief of its Public Relations and Information Section. Her grade was P.5 and she held a fixed-term appointment for two years. The Organization prematurely terminated

it in the course of an exercise in staff reduction and by an "agreed termination", dated 30 November 1993, under staff regulation 10.3(*c*). She made that the subject of her first complaint, which the Tribunal dismissed in Judgement 1483 (in re Broere and Moore) 1996. One of the terms of termination was that she was to be put on special leave without pay from 1 January 1994 to 31 March 1995.

The reduction of staff affected women more than men in senior posts in the Professional category. Thus, none of the 74 men at grade P.5 were terminated, but five out of the eight women were, their departure increasing what the complainant called the "gender imbalance" at that grade.

When the complainant went on special leave, the Director-General appointed as officer-in-charge from 1 January 1994 a man who had been an unsuccessful applicant for the post of Chief of the Public Relations and Information Section, which had been encumbered instead by the complainant. On 22 February 1994, UNIDO advertised the vacant post of chief of the Public Information Section. It was not disputed that the post was identical to the one the complainant had held, the required qualifications and the functions being the same. The notice of vacancy stated that "interested female candidates" were "particularly encouraged to apply". The complainant applied before the closing date, which was 10 March 1994.

On 1 September 1994, UNIDO appointed a man who had been an external candidate, and by her letter of 23 September 1994 the complainant asked for review. By a letter dated 17 October 1994, UNIDO replied that her first complaint referred to "most of the issues contained in the above-mentioned letter" and that "it would not be appropriate to make any additional comments". In a letter of 17 August 1995, the complainant said that the organization's pleadings on that complaint had not dealt with the issue and she repeated her request of 23 September 1994. She received a similar reply dated 8 September 1995 from the Director of Personnel Services.

On appeal the Joint Appeals Board held that it lacked competence because her appeal did not relate to an administrative decision within the meaning of staff rule 112.01(*a*) and her objections to the appointment of a man were not based on non-observance of the terms of her appointment: she was alleging discrimination, and for that UNIDO had, like other United Nations agencies, established a specialized body known as the Panel on Discrimination and Other Grievances, which alone was competent.

In the present complaint, her fifth, the complainant requested that UNIDO be ordered to grant "redress and pay compensation for the inequity and gender discrimination in appointing an outside male candidate to [her] post".

She contended, first, that she had been an internal candidate and so had been entitled to the benefit of staff rule 103.12(*a*)(ii), which provided:

> "… the appointment and promotion bodies shall, in filling vacancies, normally give preference, where qualifications are equal, to staff members already in the service of the Organization …"

Her second contention was that the chief of Personnel Administration had acknowledged that:

> "In principle, the Organization supports the various resolutions adopted by the [United Nations] on the status of women. The Organization has also to implement its governing bodies' policies for increasing the participation of women at all levels."

Such policies were, she observed, also reflected in the vacancy notice, which encouraged women to apply; but UNIDO had failed to comply and instead had resorted to "gender discrimination".

Finally, she alleged that the successful candidate had been an employee of the Organization of Petroleum Exporting Countries (OPEC); that "under pressure of OPEC's Secretary-General, his compatriot, UNIDO's recruitment chief, felt obliged to put the name of this OPEC candidate on the UNIDO roster when UNIDO was downsizing"; and that that was why the notice had invited applicants from the roster. She contended that the successful candidate had not satisfactorily completed probation, which UNIDO had extended by a year, and it had reassigned him to its office in Geneva. In support of her plea of discrimination she added that on the expiry of his contract it had given him a six-month extension for the sole purpose of sending him on a peace-keeping mission. Yet in a similar situation in 1994, when the Office of Human Resources Management of the United Nations had selected her for a peace-keeping mission while she was on special leave without pay, the Director-General had refused to release her despite his earlier assurances that UNIDO would continue to help her to find employment elsewhere. The post of Chief of Public Information had then been filled, on 1 September 1995, by promoting another staff member, junior to the complainant, who had been promoted to P.5 only in early 1994.

UNIDO had not denied any of those allegations. It maintained that the recruitment had taken place at a time when the complainant had ceased to be a staff member. Although originally she had been put on special leave until 31 March 1995, it had changed the date because she wanted to withdraw her contributions from the United Nations Joint Staff Pension Fund: by a letter dated 13 September 1994, the Director of Personnel Services informed her that the Director-General had agreed to her request that the date of expiry of her special leave be changed to 31 July 1994. UNIDO argued that in consequence it could not have violated any of her rights by a decision taken on 1 September 1994. By then she was no longer a staff member and, even if she had still been on special leave at that date, yet "in the light of a lawful agreed termination, there [were] no rights of the Complainant … that could have been violated by appointing an outside male to her former post". In the organization's submission, the impugned appointment did not amount to any failure to observe the terms of her employment; she would have been estopped from making such a claim; and her complaint was therefore irreceivable.

On the merits, UNIDO pointed out that there had been 18 candidates, including four internal ones, and that the successful candidate had been "selected by a lawful discretionary decision as the candidate best suited for the post": there had been no "gender discrimination".

Addressing the issues, the Tribunal observed that the selection process had been completed by 1 September 1994, and as far as the selection committee was concerned the date of expiry of her special leave was, even on 1 September 1994, still 31 March 1995 and had not yet been advanced; so to all intents and purposes she had remained a staff member throughout the selection process. At the date on which the committee made the recommendation that formed the basis of the impugned decision, it had no right or power to deny the complainant preference under rule 103.12(*a*)(ii). To do so was thus in breach of her rights as a staff member, and the breach was not removed by the subsequent change, on 13 September 1994, in the date of expiry of her leave. Although the change was retroactive it could not affect the process of selection, which had by then been concluded, in the opinion of the Tribunal.

As the Tribunal noted, particularly in view of the drastic impact that the staff reduction exercise of 1993 had had on women holding senior posts in the Professional category, the organization's professed policy of increasing the number of women staff at all levels required at least that, other things being equal, it should give preference to applications from women; indeed encouraging women to apply was consistent only with their right to such preference. And the Tribunal assumed that the complainant's qualifications were at least equal to those of the selected candidate and held that she had not been given preference over him.

The Tribunal further held that the "agreed termination" had not in any way restricted her rights under the Staff Rules, while she remained a staff member, to preference over an outside male candidate in any future competition, where qualifications were equal.

As for the special panel set up to deal with allegations of discrimination, neither the Joint Appeals Board nor UNIDO had cited any provision of the Staff Rules which compelled recourse to that panel. The complainant's failure to put her grievance before it did not make her complaint irreceivable. Where a matter was otherwise within its jurisdiction, the Tribunal could and would entertain related allegations of discrimination.

The Tribunal therefore concluded that the denial of preference to the complainant was a violation of rule 103.12(*a*)(ii) and of her rights as a woman candidate and contrary to the declared policy of UNIDO and to the terms of the vacancy notice. Not only was the complaint receivable, but it succeeded on the merits. Since the post in question was then held by someone else, the Tribunal made her awards of damages which it set *ex aequo et bono* at US$ 45,000 material injury and $25,000 for moral injury. She also was awarded $1,000 in costs.

4. Judgement No. 1728 (29 January 1998): Swaroop v. World Health Organization[15]

Termination because of abolishment of post—Role of a Reduction-in-Force Committee—Manual paragraphs II.9.280 and 530—Question of half-time posts—Reasonable offer of reassignment

The complainant joined WHO as a clerk in 1966. On 1 June 1968, the organization appointed him as a trainee classifier at grade G.3. Having completed his training period and received several promotions, he was awarded on 1 July 1985 a "career service appointment" at grade G.6. At the time in question he was working in the Registry Unit of the Division of Conference and General Services as a classifier. His duties included sorting correspondence, identifying important correspondence for coding, filing, and retrieving information for programmes.

Because of financial constraints, WHO decided in 1995 to abolish a total of 167 posts at headquarters with effect from 1 January 1996. Ninety of them were in the Division of Conference and General Services and included 9 out of the 12 posts for classifiers: the three to be retained were of indefinite duration, one at grade G.7, one at G.6 and one at G.5. The decision to abolish the 167 posts was conveyed to the staff by the Director of the Division on 17 July 1995. The Administration issued two circulars in that month explaining the procedure to be followed for the reduction in force. By a memorandum of 29 September 1995, the Director of the Personnel Division informed the complainant that his post would be abolished.

Before implementing the reduction-in-force procedure, WHO made efforts in accordance with paragraph II.9.265 of the Manual to reduce the number of terminations of appointment. First, it encouraged voluntary separation. Secondly, it gave staff the opportunity of applying for vacant fixed-term posts on the basis that those whose posts were being abolished would have priority. The complainant applied, albeit unsuccessfully, for four such posts. Thirdly, the organization converted 24 vacant full-time posts in the Division of Conference and General Services into 48 half-time ones as from 1 January 1996 and offered a half-time post to staff members of the Division whose posts were being abolished, including the complainant. Twenty-six accepted, and the complainant declined. None of the 24 vacant posts would have been open for competition in a reduction-in-force exercise because they were either vacant posts funded from extrabudgetary sources or posts, other than those being abolished, which had become vacant as a result of voluntary separation. Only occupied posts would have been open for competition in a reduction-in-force procedure.

As a result of those efforts, there were by 15 November 1995 only 29 staff members in the General Service category who were to take part in the reduction-in-force competition. In that competition, Manual paragraph II.9.340.3 stated:

> "… suitability for retention is assessed essentially by reference to the staff members' respective performance, including suitability for the international civil service, as evidenced by their various appraisal reports and other records; only if this comparison is not decisive should the precise periods of service be taken into account."

The Reduction-in-Force Committee reviewed the candidacy of the complainant, who, along with four other colleagues in the Registry Unit, competed for two full-time posts within the same occupational group. But it did not find him more "suitable for retention" than the others, and he was therefore not offered a post.

Manual paragraph II.9.360.1 provided:

> "… if the candidate has received no offer of another post, he or she may request the committee to allow him or her to compete for posts in a different occupational group. Such a request is only accepted if, having regard to qualifications and experience, the candidate is obviously well-suited for work corresponding to that group. He or she will be presumed to be well-suited if he or she has held a post in the different occupational group at the same grade as that of the abolished post or at not more than one grade lower for at least one year during the preceding fifteen years."

That did not, however, preclude the Reduction-in-Force Committee from considering, case by case, whether candidates were suited for different occupational groups.

The complainant applied unsuccessfully for posts in four occupational groups: the library, accounting, health records and archives. The Reduction-in-Force Committee found that he was obviously not suited for work in any of them. Since he had been unsuccessful in the competition for retention, the complainant was informed by a letter dated 13 December 1995 and signed by the Director of Personnel that the Director-General had decided to terminate his appointment as at 31 March 1996. The organization later postponed the termination to 31 May 1996.

Of the full-time posts in the Division that had been converted into half-time ones and offered to staff of the Division, a few remained unfilled. The organization

issued notices of vacancy in December 1995 for six half-time posts, stating that staff whose posts were being abolished would have priority. Of the six posts, four were for assistants in Registry at grade G.6, and although the duties were identical, two notices were issued because two, covered by notice LR/95/30, were of limited duration while the other two, covered by notice LR/95/31, were not. The duties were also similar to those of classifiers. The complainant applied in response to both notices and on 2 February 1996 he was selected for one of the posts covered by LR/95/31, which he declined, but not for either of the posts covered by LR/95/30.

On appeal, the headquarters Board of Appeal recommended rejecting his request for reversal of the notice of termination, but it expressed dissatisfaction with the efforts made to find a suitable reassignment for him. The Board recommended that the Administration should continue its efforts to find alternative employment for the complainant and reimburse his "certifiable legal expenses" up to 2,000 Swiss francs. In a letter of 20 November 1996 to the complainant, the Director-General said that he accepted the first recommendation. In regard to the second, he told the complainant that, because of the particular situation of the Division, staff members would be allowed to hold two part-time posts. As for the third recommendation, he granted SwF 300 in costs.

At the Tribunal level, the complainant contended that the records of the Reduction-in-Force Committee had not been disclosed to him; that no valid reason or explanation had been given for the decision not to retain him within or outside his occupational group; and that he had been denied an opportunity of stating his case before termination. He claimed that a staff member threatened with termination through no fault of his own because of a reduction in force had fewer procedural safeguards than one who faced disciplinary proceedings on account of, for example, wilful misconduct.

However, as the Tribunal noted, the functions of a Reduction-in-Force Committee were similar to those of selection committees, which dealt with appointments, promotions and the like. While it was true that the records of selection committees must be made available to appellate bodies, yet insofar as they related to staff other than the appellants themselves, they were confidential, and there was no general requirement of disclosure to such appellants. The same rule must apply to a Reduction-in-Force Committee, and the circumstances of the present case warranted no exception. Likewise, the Staff Rules and the Manual imposed no duty on a Reduction-in-Force Committee or a selection committee to give the staff member a detailed explanation for its conclusions. As for the right to be heard before termination, it must of course be respected where there was a proposal to terminate an appointment for disciplinary reasons or for unsatisfactory performance. A Reduction-in-Force Committee did not, however, make findings of that kind, but performed very different functions. That was clear from Manual paragraph II.9.340.3, which required assessment "essentially" on the basis of appraisal reports and other written records of performance and service. The Tribunal held that there had been no denial of the complainant's rights to equal treatment and to a fair procedure.

The complainant also argued, citing Manual paragraph II.9.280, that the organization had failed to identify him as a candidate for retention, thereby prejudicing his chances for retention in the competition. Citing Manual paragraphs II.9.530 to 550, he further submitted that the notice conveying the Director-General's decision to terminate his appointment, signed by the Director of Personnel, was void because it was not initialled by the Director-General. However, the Tribunal held that

Manual paragraph II.9.280 did not require that the incumbent of a post that was to be abolished be specifically described or designated as a "candidate for retention", but only that he be told of his "rights and obligations". And Manual paragraph II.9.530 required that notification of termination be signed by someone "authorized to sign personnel actions [and] initialled by the supervisor who initiated the action". Since the notice of termination, duly signed by the Director of Personnel, conveyed the decision of the Director-General, it was unnecessary, in the view of the Tribunal, for the latter to authenticate it further with his own initials.

The complainant next submitted that the decision to convert 24 existing full-time posts in the Division of Conference and General Services, after abolition, into half-time ones was irregular and ultra vires and deprived him of his acquired right to secure one of the full-time posts through a reduction-in-force competition. In that regard, the Tribunal observed that Manual paragraph III.3.160 provided that a post in a unit might be abolished and the funds used to establish a new one in the same unit. Paragraph 11.18.30 stated that a part-time post might be created in the same way as a full-time one. The Tribunal therefore held that the decision to create half-time posts in order to reduce the hardship to staff members faced with termination was neither irregular nor ultra vires. Moreover, as stated above, none of the 24 full-time posts would have been available for a reduction-in-force competition.

The complainant contended that WHO had failed to take suitable steps to find him alternative employment and to make him a reasonable offer of reassignment before termination although such reassignment would have been "immediately possible". It had violated staff rule 1050.2.5, which read:

> "A staff member's appointment shall not be terminated before he has been made a reasonable offer of reassignment if such offer is immediately possible."

In response, WHO had referred to the efforts to reassign the complainant which it had made before, during and even after the reduction-in-force procedure. It pointed out that the complainant himself acknowledged that it had even interviewed him for a post for which he had not applied. However, as the Tribunal observed, WHO had neither denied nor explained the observations which the Board of Appeal had made about the availability of full- and half-time posts. It was quite clear that four half-time posts of Registry assistants remained unfilled in December 1995, and it was reasonable to infer that they were posts which had been created by converting two full-time ones for which the complainant must have been eligible. Further, he had been found suitable for the half-time posts covered by notice LR/95/31, and the organization had offered no explanation as to why he was not considered suitable for the identical, but time-limited, half-time posts covered by notice LR/95/30. It might well be, as WHO contended, that a staff member might not usually hold two half-time posts, but the impugned decision showed that the Director-General did have discretion to appoint a staff member to two such posts.

In the opinion of the Tribunal, the conclusion was that WHO had been in a position to offer the complainant either a full-time post or two half-time posts but had failed to do so, and that he was therefore entitled to an award of material damages for its failure to make him a reasonable offer of reassignment. In determining the amount of the award, the Tribunal noted that the complainant could without prejudice to his claim have mitigated his loss by accepting a half-time post. It set the amount at SwF 25,000. He also was awarded SwF 5,000 in costs.

5. Judgement No. 1733 (29 January 1998): Umar v. International Atomic Energy Agency[16]

Non-promotion—Question of governmental sponsorship—ILO Judgement No. 431 (in re Rosescu)—Paragraph 68 of the Administrative Manual and paragraph A.2 of staff notice SEC/NOT/1309

The complainant joined the Agency on 16 April 1974, as a safeguards technician at grade G.4. He was promoted to G.5 on 1 November 1974, to G.6 on 1 January 1978 and to G.7 on 1 January 1984. He held a post at step 12 in G.6, which was equivalent to step 12 in G.7 under the old system of numbering.

On 4 May 1995, he applied for a post at grade P.3 as a safeguards inspector. The notice of vacancy stated that appointment was "subject to government endorsement". On 18 January 1996, the complainant's first-level and second-level supervisors signed a report appraising his performance. The former stated that "Mr. Umar should not only be promoted to the Professional level but also be kept in our Section where he is a very valuable asset". The second-level supervisor stated his "full agreement with the comments made by the supervisor". However, by a memorandum dated 15 July to the Director General, the Director of Personnel reported that the Permanent Mission of Pakistan to the United Nations Office at Vienna had said that the Atomic Energy Commission of that country was "not in a position to sponsor" the complainant's application. Subsequently, the Director General stated in memoranda that his approval for the complainant's promotion was subject to the express condition of government sponsorship, and since there was no such sponsorship the complainant could not be appointed to the post. The complainant was informed on 31 July that on the basis of the completed evaluation, his application had not been successful. No reason was given. The complainant replied on 11 September that it appeared from the endorsement on the memorandum of 15 July that the sole reason for rejecting his application was the failure to secure government sponsorship. He submitted that sponsorship was contrary to the principles of the international civil service and to articles VII.D and F of the Agency's statute. In accordance with staff rule 12.01.1(D)(1), he asked for review of the decision in the letter of 31 July and, if the Director General was not willing to reverse it, for waiver under rule 12.02.1(B) of the Joint Appeals Board's jurisdiction and for leave to appeal directly to the Tribunal.

The Director General confirmed on 9 October 1996 that he had approved the complainant's inclusion in the reserve list of P.3 safeguards inspectors on the express condition of government sponsorship; that such sponsorship had not been given; and that he saw no reason to reverse his decision but agreed to waiver of the Joint Appeals Board's jurisdiction.

In consideration of the case, the Tribunal noted that article VII.D of the Agency's statute provided:

> "The paramount consideration in the recruitment and employment of the staff and in the determination of the conditions of service shall be to secure employees of the highest standards of efficiency, technical competence and integrity. Subject to this consideration, due regard shall be paid to the contributions of members to the Agency and to the importance of recruiting the staff on as wide a geographical basis as possible."
>
> Article VII.F read in part:
>
> "In the performance of their duties, the Director General and the staff shall not seek or receive instructions from any source external to the Agency …"

The Agency's position was that the requirement of government sponsorship had existed for nearly 40 years and had since the beginning applied to all posts that were subject to geographical distribution. In 1990, the Agency had had a particular need for qualified technical staff and its Board of Governors had called on member States to suggest competent candidates who would ensure the highest standards prescribed by article VII.D. The Agency explained that the requirement had developed throughout the years into a useful instrument for verifying a candidate's credentials. It was of paramount importance in view of the Agency's terms of reference. It also was, stated the Agency, of practical use in that many staff had come and still came from a national civil service or an institution in the "semi-public sector", such as a research or other institute, and they returned to their home country with the useful knowledge they had gained in their scientific fields while working for the Agency. Lastly, the Agency pointed out that according to article VII.D "due regard shall be paid to the contributions of members … and to the importance of recruiting the staff on as wide a geographical basis as possible". Since member States were entitled only to a limited number of staff, their interest in the employment of their nationals could not be ignored. "Some sort of consultation with member States on the appointment of Agency staff must therefore be held." In practice, once the process of selection was over, the Agency requested the resident representative of a member State whether it would sponsor the chosen candidate.

The Agency further stated that from time to time a member State would refuse sponsorship, but that in exceptional circumstances the Director General had waived the requirement when he deemed that necessary in the Agency's interests. That showed, the Agency argued, that the Director General did not seek instructions from a member State and that the process was rather one of consultation.

In that regard, the Tribunal recalled that in Judgement No. 431 (in re Rosescu) 1980, the Tribunal had held:

> "The executive head of an organization is bound at all times to safeguard its interests and, where necessary, give them priority over others. One area in which the rule applies is staff recruitment. If a Director-General intends to appoint to the staff someone who is a government official in a member State, he will normally consult the member State, which may wish to keep the official in its service. Similarly, if such a government official's appointment is to be extended, it is reasonable that the organization should again consult the member State, which may have good reason to re-employ him. This does not mean that a Director-General must bow unquestioningly to the wishes of the Government he consults. He will be right to accede where sound reasons for opposition are expressed or implied. But he may not forego taking a decision in the organization's interests for the sole purpose of satisfying a member State. The organization has an interest in being on good terms with all member States, but that is no valid ground for a Director-General to fall in with the wishes of every one of them."

However, in the present case, the complainant was not being recruited for the first time, but had been in the Agency's service for 22 years. Pakistan had been consulted not about an extension of his contract but about a promotion for which he was fully qualified and it had given no explanation at all for its refusal to "sponsor" him. It had not even stated it wished to re-employ him. If Pakistan had given a reason, the Director General would have had to consider whether it was sound or not and whether refusing him the appointment was in the Agency's best interests. Since

it offered none, he had no basis on which to exercise his discretion. The complainant was fully qualified for promotion; his abilities were well known to the Agency and appreciated. The paramount consideration mentioned in article VII.D had been heeded, namely, seeking staff of the highest standards of efficiency, technical competence and integrity. The reason stated by the Agency for refusing him the appointment which he would otherwise have been granted was therefore untenable and acting from that reason amounted to a mistake in law.

The complainant had asked the Tribunal to declare that paragraph 68 of section 3, part II, of the Manual and paragraph A.2 of staff notice SEC/NOT/1309 were void because they were contrary to articles VII.D and VII.F of the Agency's statute and to the general principles of the international civil service. Paragraph 68 was about appointments in the Professional and higher categories of staff, and it read:

> "68. Appointments to posts subject to geographical distribution require sponsorship by the competent authorities in the applicant's member State. This will be obtained by the [Director of the Division of Personnel] before an offer of appointment is made to the selected candidate. Such sponsorship is deemed to have been given if the member State concerned does not inform [that Director] to the contrary within a reasonable period of time after having been approached in writing by the Agency."

Paragraph A.2 of SEC/NOT/1309 stated:

> "In the case of posts subject to geographical distribution, due regard shall be paid to the importance of recruiting staff on as wide a geographical basis as possible. Accordingly, government sponsorship will be required."

In the opinion of the Tribunal, the requirement of government sponsorship in those two provisions were ultra vires. The provisions must comply with the requirements of articles VII.D and F of the statute. In the performance of their duties, the Director General and the staff might not seek or receive instructions from any source external to the Agency. For the Director General to allow a member State a veto on the appointment of a staff member was to "receive instructions" from an external source and an interference with the paramount consideration of securing staff of the right calibre. The Tribunal therefore declared that paragraph 68 of the Administrative Manual and the sentence "Accordingly government sponsorship will be required" in paragraph A.2 of SEC/NOT/1309 were null and void as being contrary to articles VII.D and F of the statute.

The Tribunal concluded that since the complainant would have been promoted if the Director General had not allowed the unreasoned veto by the member State, he was entitled to appointment to a grade P.3 post for a nuclear safeguards inspector under a fixed-term contract for three years as from 22 July 1996, the date of approval of the other appointments from the reserve list of P.3 safeguards inspectors. The complainant also was entitled to the sum of 35,000 Austrian schillings in costs.

6. Judgement No. 1742 (9 July 1998): Everts (No. 2) v. Food and Agriculture Organization of the United Nations[17]

Suspension from duty due to misconduct—Importance of disciplinary process safeguards

Other facts relevant to this case are set out in Judgement No. 1741 (9 July 1998): Everts (No. 1), on Mr. Everts's first complaint. On 15 June 1995, the

Executive Director of the Programme decided to relieve the complainant of his duties as Deputy Executive Director for Operations. On 16 October 1995, he lodged an internal appeal against the Director's refusal to reverse her decision. In its report of 21 June 1996, the Appeals Committee of FAO held that the challenged decision was an "affront to his dignity", but it found no evidence of material injury. It recommended granting him redress for "grave moral injury". By a letter of 15 November 1996, which the complainant impugned, the Director-General sent him a copy of the report and rejected his appeal.

The complainant submitted that in suspending him from duty for misconduct FAO had acted in breach of due process and thereby had made a mistake of law. The decision and its hasty execution were in breach of the organization's duty of respect for his dignity and good name and caused him unnecessary and undue injury. Besides material injury, he had sustained, as the Appeals Committee had held, grave moral injury: the offer of transfer to a less senior post in the United Nations was so "deeply humiliating" as to damage his career and good name. What was more, the decision was out of all proportion to anything he had done. He further charged that the decisions not to renew his contract and to suspend him from duty were linked to and were tantamount to a "dismissal", and that the persistent allusions to his conduct showed that he had suffered a hidden disciplinary sanction. He claimed the quashing of the impugned decision and an award of costs.

As the Tribunal recalled, the World Food Programme had recruited the complainant on 31 August 1993 under a fixed-term appointment for two years. In his first complaint (Judgement No. 1741), he had impugned a final decision of 15 November 1996 by the Director-General of FAO not to renew his contract. After taking the original decision, on 21 April 1995, the Executive Director of WFP sent the complainant a memorandum dated 15 June 1995, in which she cited statements he had made, in a memorandum of 25 May 1995 to her, indicating that he either could not or would not "stop the activity outside the Programme" aimed at making her change her mind about his contract. She charged him with breach of the standards of conduct for members of the international civil service and stated that since he must not go on rejecting her authority she would have him transferred to the United Nations Department of Humanitarian Affairs, with the consent of the Director of that Department, or, if he preferred, put him on special leave. The complainant had rejected her charges and said he saw no reason to choose between the options she had presented, objecting as he did to the very decision which had led her to offer him the choice. Subsequently, the Director-General rejected the Appeals Committee's recommendation of "prompt redress of some kind to make him whole". In the present complaint, his second, he submitted that that decision erred in law by denying him due disciplinary process.

In the opinion of the Tribunal, because of the complainant's high rank in the Programme the decision was tantamount to a disciplinary sanction imposed on him on the grounds of his behaviour. Since those grounds rested on his own supervisor's allegations and accusations, there ought to have been due disciplinary process affording him the opportunity of arguing his case and, if need be, questioning anyone who was levelling charges against him. By depriving him of the safeguards of due disciplinary process before taking what amounted to disciplinary action, the Director-General had erred in law. His decision therefore could not stand. The decision was an affront to the complainant's dignity. There being no material injury, he was entitled to an award of US$ 4,000 in moral damages and to the sum of 10,000 French francs in costs.

7. Judgement No. 1745 (9 July 1998): de Roos v. European Southern Observatory[18]

Abolishment of post—Question of outsourcing—Question of breach of promise by the Administration—Importance of giving true reason for outsourcing—Organization must do its best in reassigning displaced staff

The European Southern Observatory (ESO) had recruited the complainant in September 1986 as an "operation technician (computers)". In 1995, it decided to hire an outside contractor to take over some of its work in information technology—"outsourcing" was its term—and it therefore set about reforming its Data Management Division. It thus came to abolish three posts, including the complainant's, in the Computer Management and Operation Group of the Division. By a letter of 6 December 1995, the head of Personnel informed him that: his post was to be abolished; his last working day would be 31 December 1995; he would be given 10 months' notice, up to 5 October 1996, and in the intervening period would be on special paid leave; and that the Observatory had failed to find him a suitable post, but he might apply for a new job as "archive system design and engineer" which was shortly to be announced. The complainant appealed against the decision of 6 December 1995, and the case was put before the Joint Advisory Appeals Board.

In its report the Board was highly critical of the Observatory. It held that the abolition of posts that outsourcing had brought about was "a general question concerning the personnel" and warranted prior consultation of the Standing Advisory Committee in accordance with article R VII 1.02 of the Staff Regulations. It did not accept the argument that outsourcing saved money. Nor, in its view, had the Observatory done enough before letting him go to give him the training he had requested or to find him another post. The Board therefore recommended that he be reinstated. By a decision of 19 September 1996, however, the Director General upheld the earlier decision, though he "reiterated" the ESO offer to help the complainant to find a suitable new job.

The complainant brought six pleas to the Tribunal: the loss of posts which was the pernicious by-product of outsourcing required prior consultation of the Standing Advisory Committee; the dismissal was in breach of promises made to the staff; ESO had failed to reveal the true reason for the abolition of the post; it had been remiss in attempting to find another post for him; it had committed an abuse of authority; and it had caused him unnecessary, undue and, therefore, actionable moral injury.

In the view of the Tribunal, the complainant was mistaken in pleading a procedural flaw in the decisions to subcontract work and discard posts. Article R VII 1.02 of the Staff Regulations, which he cited, stated:

> "The Director General shall consult the [Standing Advisory] Committee and receive its recommendations on general questions concerning the personnel including the contents and application of the Combined Staff Rules and the present Regulations."

But he had misread that article. In the opinion of the Tribunal, the mere fact that a decision on organization or management might affect the staff was insufficient to make consultation compulsory. A policy of staff retrenchment did amount to a "general question concerning the personnel". What ESO had done was to subcontract work to a firm of specialists in information technology so as to keep pace with

change in that field. Such a decision did not in itself come within the ambit of article R VII 1.02, even if it did affect the redeployment of posts or even the chances of survival of some of them. And the abolition of the complainant's post and two others was not a "general question" calling for referral to the Committee.

The Tribunal also was of the view that the complainant's plea of breach of promise had failed as well. In support of his contention that ESO had broken its word, he stated that the acting head of the Data Management Division had promised staff on 29 March 1995 that outsourcing would not entail forfeiting any posts. The evidence included a verbatim record of one of the meetings of the Joint Advisory Appeals Board, showing that a statement to that effect had indeed been made at a time when the view still held that the firm that was awarded the contract would take over staff from the Data Management Division. However the firm that was awarded the contract would not agree to those terms. The statement of the Acting Head of the Division, which was indeed rash, had understandably aroused hopes, but it hardly amounted to a specific individual promise on which the complainant could rely.

Under his third plea that the reason ESO had given for abolishing his post was neither true nor sufficient, the complainant alleged that its real reason for bringing in the firm was to cut costs and limit the number of international staff. The Appeals Board examined those arguments at length and reached the conclusion that the subcontracting had probably resulted in no additional savings, that the calculations had been hurried and were unreliable, and that the desire for savings was not the true reason for abolishing the complainant's post. In the opinion of the Tribunal, however, what mattered was not whether the ESO figures were correct but whether it had given the complainant the true reason for the abolition of the post. The answer was starkly clear: In the exercise of management prerogatives the Observatory had chosen to farm out work so as to obtain the help of a firm of experts. The upshot was the sacrifice of several posts in the Computer Management and Operation Group; there would, but for that, have been overlap. The complainant knew that full well, and the true reason showed no mistake of fact.

Regarding his plea that ESO had failed to do its utmost to reassign him, the Tribunal noted article R II 6.11, which read:

> "A member of the personnel shall not be dismissed owing to the suppression of a post or a general reduction of complement, unless the Director General has ascertained that the member of the personnel cannot be transferred to another post within the Organization."

Quite apart from that written rule, the Tribunal had often declared—see Judgements 269 (in re Gracia de Muñiz) 1976, and 1231 (in re Richard) 1993, to give both early and recent examples—that:

> "an organization may not terminate the appointment of a staff member whose post has been abolished, at least if he holds an appointment of indeterminate duration, without first taking suitable steps to find him alternative employment."

Judgement 1553 (in re Moreno de Gómez) 1996 was apposite as well. The rule was not that an organization must actually find a job, but that it must at least do its best, and in good time, to place someone whose post is to disappear.

In that regard, the Tribunal noted that ESO had offered no evidence of having done so, barring the sentence in the letter dated 6 December 1995 from the head of Personnel stating that "after verification of other job opportunities within

the Organization which would correspond to your qualifications, we, unfortunately, cannot offer you another position" and the bald remark that a post for an "archive system design and engineer" would soon be created and that he might apply for it. That invitation had come after the decision had been taken to dismiss him. As the Tribunal noted, the Appeals Board had concluded—and the defendant did not challenge its findings on that score—that several heads of department had been asked orally whether they had any post for him. But the quest had not even begun until 27 June 1996, which was after the hearings before the Board, which had probably pointed out the Administration's breach of R II 6.11, and long after 6 December 1995, the date of the letter notifying the complainant of the abolition of his post.

ESO stated, quite rightly, that the verbatim record of the Board's hearings did not have the same authority in law as formal minutes. However, statements made by some witnesses, undoubtedly in good faith, were worth citing. Moreover, the hearings had borne out two contentions: one, that ESO had probably not done its utmost to convince the firm to hire the complainant; and the other, that the head of his unit, the Data Management Division, was unaware of the Observatory's duty under article R II 6.11. The conclusion from the foregoing was that ESO was in breach of its duty to give priority to placing the holder of an abolished post and that the impugned decision could not stand.

In considering how to redress the situation, the Tribunal noted that ESO was not certain it could find him a suitable post, and in the appeal proceedings he had stated that payment of damages would be acceptable to him in lieu of reinstatement. The Tribunal therefore exercised its discretion under article VIII of its statute and, as in Judgement 1586 (in re da Costa Campos) 1997, allowed the defendant to choose between two options: ESO should either reinstate the complainant as from the date of dismissal or pay him damages equivalent to 36 months' base salary, less the amounts it had paid him in terminal and repatriation benefits. The Tribunal also awarded the complainant 20,000 French francs.

8. Judgement No. 1747 (9 July 1998): Gilli and Noethe v. European Southern Observatory[19]

Failure of organization to reveal complete Advisory Appeals Board report on another staff member's appeal—Question of receivability—Articles R VI 1.10 and VI 1.11 of the Staff Regulations

The complainants, employees of the European Southern Observatory, requested the Tribunal to quash decisions of 13 January 1997, taken on the Director General's behalf, to allow the staff to see the full text of a report of the Joint Advisory Appeals Board concerning the appeal by a staff member whose post had been abolished by ESO. The Director General had agreed to allow the staff to see the Board's "findings" and "conclusions and recommendations", but not the first three sections of its report, which contained no recommendations as such. In the complainants' submission, that was in breach both of the second paragraph of article R VI 1.11 of the Staff Regulations and of the good faith that should govern relations between an organization and its employees.

The Observatory replied that the complaints were irreceivable on the ground that the complainants had shown no cause of action. It stated that the Board's "recommendations" and "findings" had been shown to the staff. The refusal to disclose the rest of the report had caused the complainants themselves no injury; they were

obviously acting for the Staff Association, and that was the sort of case the Tribunal might not entertain.

In the view of the Tribunal, the Observatory's plea failed. Though ESO had disclosed part of the report, the complainants' point was that it had failed to publish the full text. Though that had not caused them any particular injury, they did have a right to know in full the Board's findings and conclusions on a case of abolition of post due to outsourcing. Even though the impugned decisions affected the staff as a whole and the complainants appeared to be acting for many others, they were not representing a staff association in a class action against a general decision. They were making distinctly individual challenges to the rejection of their request for full disclosure. That did not entail any abuse of process.

The Tribunal concluded that, in addition to being receivable, the complaints succeeded on the merits. In that regard, the Tribunal noted article R VI 1.10 of the Staff Regulations, which read in part:

> "The Board shall submit its recommendations to the Director General in writing within 30 calendar days after the date of the last hearing to which the appellant and/or his representative have been summoned."

and article R VI 1.11:

> "The Director General shall notify the appellant of his decision in writing, within 60 calendar days after receipt of the Board's recommendations.
>
> "Unless the appellant objects, this decision and the recommendations of the Board shall be brought to the notice of the personnel."

ESO had argued that article R VI 1.11 required it to disclose no more than the Board's "recommendations" *strictu sensu*, viz. the findings and conclusions that afforded the Director General guidance in taking a decision. The complainants retorted that it was the full text as submitted to the Director General that must be made available, not just the Board's conclusions on what the outcome should be.

As the Tribunal observed, although the wording of the Regulations was unclear, the word "recommendations" might not bear a different meaning on each of the three occasions that it appeared in the above texts. By the Board's "recommendations", in the opinion of the Tribunal, was meant the entire outcome of its work as put to the Director General, even if it was divided into sections. For appeal proceedings to be properly adversarial, ESO must let the staff member have the full text of the Board's report. As a matter of fact, it had done so in the present case. As the Tribunal further observed, in sending the appellants the Board's "recommendations", the Director General had drawn no distinction between the various sections of the report but had duly turned over the full text submitted by the Board. And when he came to apply the second sentence of R VI 1.11, the Director General had no reason to put any narrower construction on the term. Actually ESO had conceded that what it had to disclose might be not just the section headed "Conclusions and recommendations", since it also let the staff see the section on "findings" on which the Board had based its recommendations. It drew a distinction, though the report was an indivisible whole, between what might and what might not be revealed. The distinction was spurious, in the view of the Tribunal, if articles R VI 1.10 and R VI 1.11 were read together. The Tribunal concluded that, there being no need to rule on the complainants' second plea, the impugned decisions must be set aside.

The Tribunal further concluded that, since they had succeeded, the complainants were entitled to costs, and the Tribunal awarded each of them 7,500 French francs.

9. Judgement No. 1750 (9 July 1998): Peroni v. International Training Centre of the International Labour Organization[20]

Non-renewal of appointment—For appeal to be received, staff member must exhaust all internal means of redress—Claims of staff member must be cast in language such that an organization would gather that a decision was expected of it—Limited review of non-renewal decisions of short-term or fixed-term appointments—Question of discriminatory treatment—Duty of organization to ease hardship of non-renewal decisions

The complainant joined the staff of the ILO International Training Centre on 2 April 1990. He was initially employed on a short-term appointment from that date to 4 May 1990 as a clerk at grade G.2 in accounts. He was granted an extension of appointment until 28 March 1991. After a break of 10 months, the Centre re-employed him as a G.2 clerk in the Budget and Control Section from 21 January to 20 March 1992. On 17 May 1993, he returned to serve once again for three months at grade G.1 in the Documentation Section. He then served almost without break from 23 August 1993 to 31 October 1996, usually as a clerk in the Budget and Control Section, later called the Budget Section, on a series of short-term contracts.

The Centre's finance and budget services underwent an internal and external audit. For the sake of efficiency the Budget and Control Section was merged with the Finance Service, while budget, accounting and finance remained distinct. It was also agreed that the workload had fallen in the new Budget Section. By a letter of 30 August 1996, the Centre told the complainant that it would not be extending his appointment beyond 31 October 1996, as the need for short-term staff had become moot. Because his work had been "satisfactory" and because his contract was subject to rule 3.5 of the "short-term rules", he would receive six weeks' pay in termination indemnity. He was placed in a half-time post in the Administration Service until the end of October 1996 and at his own request received another two-month posting, again at half-time, up to 31 December 1996, in the Training Department. The complainant had been on sick leave since 18 December.

The Centre offered to help him to look for another job. While he was working at the Centre he could have applied for 23 posts it had posted for external and internal competition and for three open to internal candidates, including short-term staff covered by rule 3.5. Shortly before and after termination it had told him of 13 other vacancies, but he had showed no interest: he had merely said that they were not suitable, without explaining why. In 1997, the Centre offered him a short-term appointment for five months but he turned it down, partly on the grounds that by then his case was pending.

On 30 January 1997, he had indeed filed a "complaint" with the Director of the Centre against the decision not to renew his appointment. He objected to the Centre's failure to respond to his request of 16 December 1996 for an explanation for the non-renewal of his contract, but acknowledged that it had "given the reasons orally". In his submission he claimed that rule 3.5 entitled him to an extension and that the Centre could have retained someone with his skills, that the impugned decision was discriminatory and that it was "distressing" not to have been granted an extension at least until the end of the few weeks of sick leave that remained to him.

On 6 May 1997, the Deputy Director informed him that the Director had rejected his "complaint". Despite rule 3.5, he said, short-term appointments did not become fixed-term ones. Even staff who held fixed-term appointments were not ipso facto entitled to renewal. The whole point of giving a short-term contract was to preclude a career. That was why short-term staff were not allowed to enter internal competitions. The complainant had learned the reasons for non-renewal from the letter of 30 August 1996. He had had opportunities of entering competitions but had let them go by. Though the Director knew that he had been on sick leave from 18 December 1996, the complainant had not requested an extension to cover the period of sick leave, so that for want of a decision his claim on that score could not but fail.

In consideration of the case, the Tribunal first noted that under article VII(1) of the Tribunal's statute a complaint would be receivable only if the complainant had exhausted the internal remedies. Any claim to an extension of his appointment to cover the period of his sick leave would fall outside the ambit of his claim to an ordinary extension; see Judgements Nos. 1425 (in re Schickel-Zuber, Nos. 2 and 3) 1995, and 1494 (in re Mossu) 1996. For the complaint to be receivable he would have had to include it in an internal appeal and exhaust all his internal means of redress.

The Tribunal considered that a claim must be cast in such language that the organization would gather that a decision was expected of it. Sometimes it might be inferred from circumstances, for example, where the claimant had little knowledge of law. But, as the Tribunal observed, as one who professed a degree in international law the complainant might, if he were putting a claim to the Centre, have been expected to make it tolerably clear. The Tribunal therefore concluded that the Centre was correct not to have treated his mere sending of a medical certificate in mid-December 1996 as a claim to an extension to cover the period of sick leave and, then, to maintain that no such claim had formed the subject of internal appeal or decision. Moreover, the claim was irreceivable because he had failed to exhaust his internal remedies.

Regarding the merits of the case, the Tribunal recalled that precedent left renewal of a short-term or fixed-term appointment to the discretion of the organization. The decision must stand unless it was taken ultra vires, showed a formal or procedural defect, erred in fact or in law, ignored some material fact, amounted to an abuse of authority or made a blatantly wrong deduction from the evidence.

In the present case, the Tribunal noted that the complainant, offering not always the same arguments, had accused the Centre of failing to explain, as it should have, the reasons for refusing him renewal, and a steady line of precedent did indeed have it that non-renewal and valid reasons therefore must be duly notified so that the staff member might act accordingly and in particular exercise the right of appeal; see, for example, Judgements Nos. 1544 (in re Gery-Pochon) 1996 and 1583 (in re Ricart Nouel) 1997. In his internal "complaint" the complainant had not denied that he had received an explanation for the non-renewal of his contract. What he had said was that he had been given no particular explanation in the text of the decision telling him that the two months' extension up to 31 December 1996 for half-time work would be the last one. However, in the view of the Tribunal, the case law did not require that the reasons be stated in the text that gave notice of non-renewal. Though the Centre had granted the complainant the last extension in his own interests, so as to soften the blow,

his departure had been held over only for a short while and he had been given only part-time employment. Therefore the reasons underlying the non-renewal remained sound. He had received an adequate explanation from the text of the decision granting him the last extension, taken together with the communications and discussions that had both preceded and followed it.

The complainant also pleaded discriminatory treatment. The Tribunal was of the view that the Centre's answer was plausible. It explained how it had disposed of the four holders of short-term appointments in the Finance and Budget Service. The complainant and another were both in the Budget Section and were treated alike: they both had to leave. The other two, who were in the Finance Section, were also to leave, but the Centre had kept them on for a time because they were needed either in the Finance Section or elsewhere. Thus those in the Budget Section had been put on a par, whereas the Finance Section had had a rather different need, having urgent work still in hand. Besides, when just a few of its staff must leave, an organization had to choose them at discretion and such a decision was subject, as stated above, only to limited review. The Centre's account again showed no evidence of abuse of that authority.

The complainant further contended that under rule 3.5 he was entitled to the same safeguards against non-renewal as the holder of a fixed-term appointment. The Centre challenged the contention, and it was right. Although according to precedent an organization had discretion in the matter of renewal, it must do its utmost to ease hardship; see for example Judgement No. 1450 (in re Kock and others) 1995. In the present case the Centre had done this. It had given the complainant due notice, a two-month extension on half-time employment in another job and payment, by way of indemnity for abolition of post, in an amount to which he was not objecting. It had offered to help him in finding a new job either by entering its own competitions or by addressing himself to some other organization. There was no reason to doubt the genuineness of its offer, though the complainant seemed to have shown no interest. In 1997, it had offered him an appointment of five months' duration, and he declined on the grounds that his case was pending. That was an unconvincing reason since it had never been stated that the offer hinged on his withdrawing suit.

The conclusion was that the Centre had fulfilled its obligations, and the Tribunal dismissed the complaint.

10. Judgement No. 1752 (9 july 1998): Qin (Nos. 1 and 2) v. International Labour Organization[21]

Claims made by widower and son of staff member who had committed suicide—Widower can only plead rights arising from wife's contract of employment—Question of suicide being attributable to official duties—Role of Compensation Committee—Limited review of Medical Board's conclusions—Article 8.3 of Staff Regulations—Article II (6) of Tribunal's statute

Mr. Qin lodged the two complaints in his own name and on his son's behalf, and the Tribunal joined them. They both concerned the consequences of the death of his wife, whom ILO had employed as an audio-typist in its Chinese pool. On 14 December 1993, she took her own life. In his first complaint, lodged on 10 September 1994, her widower sought the quashing of a decision he discerned in a letter of 13 June 1994 from the Director-General. The letter set out the findings of an inquiry into her "tragic" death and concluded that:

> "there was a hostile working environment [in the Chinese pool] and that a number of administrative errors had been made in the Office. However, there is no evidence that these factors were the cause of the suicide or that other factors outside the Office or of a medical nature did not play a role."

The Director-General took action regarding the administrative errors that were brought to light, but would not be dismissing any of those the complainant had seen as culprits. Besides the quashing of the "decision" of 13 June 1994, the complainant also claimed damages for the material and moral injury sustained by his wife and family and for harm to his good name, the "rejection" of a petition he regarded as a libel against her and a "fair and just" decision on the strength of the findings of the inquiry.

The complainant's second complaint, lodged on 8 August 1997, impugned a decision of 22 May 1997 to reject his claim to an award of compensation under annex II to the Staff Regulations. After completion of the procedure set out in the annex and referral to the Compensation Committee and to a medical board, the Director-General came to the view that his wife's suicide had not been attributable to the performance of duty and—since, for one thing, ILO had already offered 63,000 Swiss francs towards her son's material welfare—the complainant was not entitled to moral damages. He claimed the quashing of that decision; an avowal by ILO that his wife's death had been service-incurred; the payment of an annuity for himself and of a lump sum for his son; sums in damages for moral injury to his wife, his son and himself; and interest on all those amounts.

In the opinion of the Tribunal, the complainant's first plea was irreceivable. The Director-General's letter of 13 June 1994, which summed up the findings of the inquiry, had had no effect on his rights and so was not a challengeable decision. As the Tribunal noted, the ILO Legal Adviser had stated that the letter of 13 June 1994 was not an administrative decision that had had any effect on the complainant's rights and obligations (see Judgement No. 1203 (in re Horsman, Koper, McNeill and Petitfils) 1992 . The only passage that might have been read as final rejection of his claims was the one in which the Director-General said he would not be dismissing any of his wife's colleagues or supervisors. He might not, however, plead any rights but those arising from his wife's contract of employment with the organization.

Concerning the complainant's second plea that his son was entitled to payments under article 8.3 and annex II to the Staff Regulations, the Tribunal observed that:

> "In the event of illness or injury attributable to the performance of official duties, an official shall be entitled to compensation as prescribed in annex II. In the event of the official's death in consequence of such illness or injury, his dependants shall be entitled to compensation as prescribed in annex II."

In that regard, the Tribunal noted that from January until July 1995 the competent body, the Compensation Committee, had met six times to consider his claims. It declared that:

> "so far as it could tell from the evidence it could neither find that Mrs. Li's official duties had been the decisive or even likely cause of what she did and was therefore unable to recommend treating her death as attributable to the performance of duty."

The Director-General endorsed the Committee's findings. The complainant then applied for the setting up of a medical board under paragraph 25 of annex II:

"(*a*) In the event of a conflict of opinion on the medical aspects of the relationship between an illness or injury and the performance of official duties, the Director-General may refer the case for advice to a medical board composed of three duly qualified medical practitioners, one of whom shall be chosen by the Director-General, one by the official, and the third by the two practitioners so chosen …

"(*b*) A medical board composed as provided in subparagraph (*a*) shall also be consulted if the official concerned, or his surviving dependants, so request …"

The Director-General agreed, and the board met on 23 April 1997. It found: "Mrs. Li's suicide was the result of a serious emotional state akin to mental illness"; "factors connected with her official duties and factors external to her work … may have brought it about, on account of her exceedingly sensitive and vulnerable temperament"; but that "the extent of it attributable to work did not prove decisive". It was on the strength of the Compensation Committee's recommendations and the medical board's findings that the Director-General had taken the decision of 22 May 1997 impugned in the second complaint.

The complainant pleaded breach of due process by the Compensation Committee in that it had not allowed him to question the witnesses or procure the additional evidence necessary in order for the truth to be revealed. As the Tribunal pointed out, the Compensation Committee was just an advisory body, not a court of law; and it was in any event obvious on the evidence that it had done its work thoroughly. It had heard many witnesses, including the complainant, and complied with all its rules of procedure. As the Tribunal noted, there was no denying that conditions at work did cast his late wife into a state of distress that had grown worse as time went by; however, it saw no reason to quarrel with the medical board's findings. As it had held in Judgement No. 1284 (in re Fahmy No. 2) 1993 and many other cases, it might not replace qualified medical opinion with its own, though it might review the procedure and determine whether the doctors' findings showed any factual mistake or inconsistency, or overlooked an essential fact, or drew a plainly wrong conclusion from the evidence. In the present case, there was nothing to counter the findings that his late wife's state of deep despondency was traceable to several factors and that conditions at work were not the decisive factor. The complainant could not succeed in his contention that her wilfully taking her own life was the consequence of an illness "attributable to the performance of official duties" within the meaning of article 8.3 of the Staff Regulations. The conclusion by the Tribunal was that his claims to an annuity for himself and to a lump sum for his son must fail, and so must his claims to material and moral damages.

The organization submitted that he had access to the Tribunal under article II (6) of its statute only as the successor to any rights his wife might have had, since she alone was an official of ILO. He might claim damages only for moral injury he claimed she had suffered in its employ because of its failure to treat her with due care or for whatever other reason. Moreover, the Tribunal stated that her sad death had of course alerted ILO to things that had gone awry in the Chinese unit. But there was not a whit of evidence to suggest that, by act or omission, it had denied her the sort of considerate protection any organization owed its staff. Quite the contrary indeed: it had extended her appointment in the teeth of attempts to get rid of her and the pains it had taken to get to the bottom of the whole wretched business demonstrated the special attention it had devoted to her case.

For the above reasons, the Tribunal dismissed the complaints.

11. Judgement No. 1763 (9 July 1998): Gonzalez-Montes v. International Atomic Energy Agency[22]

Dismissal because of misconduct—Questions of general corruption among airline ticket suppliers, even if proven, did not relieve staff member of fraud—Chairman of Disciplinary Board must refrain from personal involvement in the investigation—Members of the Board appealed from may not give legal advice to the body which hears the appeal

The complainant joined the staff of IAEA in 1969. At the time in question he was employed as a Safeguards Inspector and head of unit in the Department of Safeguards at grade P.5.

The complainant impugned a decision of 16 December 1996 by the Director General of the Agency to accept the recommendation of the Joint Appeals Board to dismiss him. His case had originally been referred to the Joint Disciplinary Board after an investigation by the Agency, and he appealed to the Appeals Board against the Director General's decision of 5 August 1996 to accept the Disciplinary Board's recommendation of dismissal. From an investigation into his claims to reimbursement for duty travel, the Agency discovered that on four separate occasions the complainant had switched the business-class airline ticket provided to him by the Agency for an economy-class ticket and had kept the difference in value for personal use. On each of three occasions—duty travel to the United Kingdom from 28 June to 8 July 1993; to Brazil from 16 June to 4 July 1994; and to Brazil and Argentina from 3 to 20 July 1995—he had exchanged his original ticket for an economy-class ticket, but after travelling, had submitted the original, unused ticket stub as part of his claim to the reimbursement of duty travel expenses. The fourth occasion—duty travel to Brazil and Argentina from 16 to 28 May 1994—had prompted the most serious allegation against the complainant. The complainant had submitted in support of his travel claim a copy of the travel agent's flight coupon for his original, unused ticket. During the Agency's investigation in June 1995, he stated that he had not submitted the original ticket because he had misplaced it and, using his credit card, had purchased a replacement at the Vienna airport on the day of his outbound flight. He submitted his replacement ticket stubs, dated 13 May 1994, and, when requested for proof of payment, submitted a receipt from the airline, dated 28 August 1995, which referred to yet another, unexplained ticket number. Both the original ticket and the replacement ticket had cost 66,960 Austrian schillings, which was the amount that the receipt for the third ticket referred to.

In the complainant's submission to the Tribunal he alleged that "kickbacks", bribery and general corruption existed among the "suppliers of tickets". He stated that his actions had exposed the corruption and pressured the Administration to "find a scapegoat". In support of those allegations he relied heavily on an unexplained document that appeared to relate to the commission payable to the travel agency for tickets sold. Even if the allegations had some substance, which they did not on the evidence presented, they did not relieve him of fault for fraud committed against the Agency.

Regarding the issue of the Director of the Division of Personnel serving as both the chairman of the Disciplinary Board and the head of the department conducting the initial investigation, the Tribunal observed that the Director of the Division of Personnel should be chairman of the Board as required by paragraph 13 (*a*) of section 13, part II, of the Agency's Administrative Manual and that did not constitute a procedural flaw, but it did give rise to a situation in which there was a grave danger

of an actual breach of procedural fairness. That was what in fact had occurred. As the chairman of the Disciplinary Board, the Director had to refrain from personal involvement in the investigation. He must not be both judge and policeman, in the view of the Tribunal.

The Tribunal further noted that it was common ground that the Director of the Division of Personnel not only had been involved in the initial investigation, but actually had taken part in the questioning of certain witnesses, including the interview with the Iberian Airline representative, which, in the opinion of the Tribunal, was a key element in the Agency's case against the complainant since it was essential to the very serious allegation that he had attempted to tamper with the evidence. As chairman of the Joint Disciplinary Board, the Director of the Division of Personnel had a duty to be, and to appear to be, impartial, and he should have scrupulously refrained from collecting evidence from witnesses outside the complainant's presence; moreover, it did not matter if the evidence worked to the complainant's prejudice or not. The Tribunal, citing Judgement No. 999 (in re Sharma) 1990, concluded that that constituted a serious breach of due process.

The complainant also asserted a second serious procedural flaw: the Appeals Board had requested and received a legal opinion from the Director of the Legal Division during the appeal. That too was a violation of due process because that Director had been a member of the Disciplinary Board, whose recommendation was under appeal. The Agency admitted that the Director had signed a legal opinion that had been prepared at the request of the Appeals Board. That opinion should not have been given by the Director and should have been rejected by the Appeals Board; the Director simply should not have been involved, in substance or in form, with the Appeals Board's recommendation. A member of the body appealed from might not give legal advice to the body which heard the appeal.

The complainant also raised objections to the sum deducted from his final pay, which amounted to US$ 43,766.54. However, the Tribunal was of the view that that was not receivable because he had not attempted to resolve the matter internally. However, the Tribunal confirmed that the Agency must take into account insofar as possible, in determining the total sum due to it, the actual expenses incurred by the complainant to be reimbursed under the relevant travel rules.

The Tribunal concluded that the decision to dismiss the complainant should be set aside and the case sent back to IAEA for reconsideration. The complainant was awarded his costs in the amount of $5,000.

12. Judgement No. 1768 (9 July 1998): Bodar v. European Organization for the Safety of Air Navigation (Eurocontrol Agency)[23]

Non-appointment to post—Issues of receivability—Question of failure of Administration's referral to advisory body—Decision must be set aside regardless of consequences for appointed staff member—Tribunal could not entertain claims of appointed staff member in present case

The complainant was a staff member of Eurocontrol. Since 1 October 1990 he had been a second-class assistant at grade B3, and since July 1994 secretary to the Staff Committee, at the Eurocontrol headquarters in Brussels. In September 1995, a Mr. Boivin was placed in a post for an accountant at the Agency's Institute of Air Navigation Services in Luxembourg. He had been selected from a reserve list, on which he had been placed on the basis of an evaluation of his application for

another post. On 30 November, the complainant lodged an internal "complaint" against that appointment, and the appointment was subsequently cancelled as from 31 August 1996. Subsequently, on 1 March 1996, Eurocontrol put up for competition the post of head of the Accountancy and Personnel Office at grades A5/A6/A7 at the Institute. It was open to both inside and outside applicants.

The complainant applied, as did Mr. Boivin. Being unsure of his status, Mr. Boivin applied twice, once as an outside candidate and once as an internal one on the strength of his appointment of September 1995. Eurocontrol treated him as an outside applicant. On 15 May 1996, the Selection Board examined the 23 applications and drew up a shortlist of 5 candidates. The complainant was not on the list, and Mr. Boivin was eventually selected for the post. In a letter dated 31 May 1996, the Director of Human Resources notified the complainant on the Director General's behalf that he had been unsuccessful, other candidates having been found more suitable. The letter was sent to him by messenger service. On the photocopy that the complainant produced appear the initialled words "Received on 8/6/96". He was said to have received the letter on 3 June but to have changed the "3" to an "8".

The complainant lodged an internal "complaint" by a memorandum of 4 September 1996 "against the process of selection for post LX-96-AA/022 and the appointment of Mr. Boivin to it".

The Tribunal addressed the complaint lodged by Eurocontrol and Mr. Boivin that the complainant's appeal was irreceivable. They had claimed that instead of seeking the quashing of a process he ought to have sought the quashing of Mr. Boivin's appointment. Instead he had sought the quashing of the decision of 31 May 1996, a new claim that he had not put in his internal appeal and that was therefore irreceivable. However, the Tribunal was of the opinion that the organization must interpret a staff member's claims in good faith and read them as it might reasonably have been expected to do. Furthermore, there was no doubting the complainant's intent in his internal appeal and in this complaint. He wanted the Administration to take, and the Tribunal to order, action for the process of selection and appointment to the post to start all over again, in hopes of obtaining the post himself. The drift of both internal appeal and complaint was the same: see Judgements Nos. 1575 (in re Doyle) 1997 and 1595 (in re De Riemaeker (No. 3)) 1997. In his appeal he objected to his "rejection for the post" and challenged the appointment of Mr. Boivin, in which his own rejection was implicit: see Judgement No. 1223 (in re Kirstetter (No. 2)) 1993. And though his complaint did not expressly seek the quashing of the appointment of Mr. Boivin, consistent precedent held that allowing the unsuccessful candidate's case entailed quashing the appointment made: see Judgements Nos. 1049 (in re Dang and others) 1990; 1223 (in re Kirstetter (No. 2)) 1993; and 1359 (in re Cassaignau (No. 4)) 1994. Thus in the present case the claim was implied. Nor was the complainant's claim to the quashing of the decision to reject him a new one, since it had been at least implicit in his internal appeal.

According to the Tribunal, the material issue was whether, to meet the time limit in article 93(3) of the Staff Regulations, the complainant needed to challenge only the appointment of Mr. Boivin. Contrary to what he contended, the decision of 31 May 1996 was not ultra vires. But here the decision of rejection was notified to a candidate before the appointment was announced, and in considering whether the time limit for internal appeal ran from the date of notification of his own rejection or of the actual appointment, the Tribunal recalled that in Judgement No. 1223 (in re Kirstetter (No. 2)) 1993 it had stated:

"So the staff member has undeniably the right to file an internal appeal or a complaint with the Tribunal if he believes that the appointment to a vacancy he has applied for is improper. He may for that purpose challenge any relevant decision, whether it be the express rejection of his own application or the rejection implied in the appointment of someone else."

The Tribunal therefore reasoned that since the unsuccessful candidate might challenge the process of selection of the successful one, it was only reasonable that the time limit for internal appeal should run from the date at which he learned of the appointment. It was immaterial to the present case whether an exception might be allowed to that rule if the sole issue that the appeal raised related to the unsuccessful candidate: for example, whether he had applied too late, or had failed to qualify for the post. The Tribunal concluded that the internal appeal was not out of time, and it did not matter when the complainant had received the letter of 31 May 1996.

In his first brief, the complainant had merely challenged the offending decisions, and in his rejoinder he had added a claim to moral damages. Since according to article 6(1)(*a*) of the Tribunal's rules and the schedule thereto the "relief claimed" must be stated in the complaint, the new claim was irreceivable.

In both his original brief and his rejoinder the complainant had contended that the Director General had acted in breach of the annex to office notice 6/95 of 1 March 1995 by failing to refer to the Joint Committee for Disputes—which that notice had set up—his "complaint" against the decision to appoint Mr. Boivin. The Agency did not take the point in its reply, but in its surrejoinder explained that the reason why it had not put his case to the Joint Committee for Disputes was that the Committee had stopped working and was not taking cases at the time.

In that regard, the Tribunal noted that article 4 of the annex setting out the rules of the Joint Committee for Disputes stated:

"The appointing authority must seek the opinion of the Joint Committee for Disputes before taking a decision to reject even part of an appeal lodged under article 1. The Joint Committee shall give an opinion, stating the grounds on which it is based, no later than two months subsequent to receipt of the request for an opinion. This opinion shall be signed by the Chairman and forwarded by him to the appointing authority.

"If no opinion is received within this period, the appointing authority may proceed with its decision."

Like article VII(3) of the Tribunal's statute, article 93(3) of the Staff Regulations stated that failure to reply to a "complaint" within 60 days implied rejection. The duty of consulting the Joint Committee before rejecting a "complaint" must apply both to express and to implied rejection; otherwise it would be meaningless and the Administration might simply bypass it. The Committee must be consulted even in the event of partial rejection: that showed the intent that rejection of any kind should go to it. Since the present case had never been referred to the Committee, there had been a breach of the rule.

Furthermore, the Tribunal recalled that according to a long line of precedent, to take a decision without the required referral to an advisory body or without awaiting its report was a fatal breach of due process: see Judgements Nos. 1488 (in re Schorsack) 1996; 1525 (in re Bardi Cevallos) 1996; 1616 (in re Echeverría Echeverría and others) 1997; and 1696 (in re Felkai) 1998.

Moreover, in the view of the Tribunal, the Agency's response was immaterial to observance of the rule of law. It neither repealed nor formally suspended the

requirement of referral to the Committee, and as long as the requirement existed, it must comply.

The Tribunal concluded that the implied decision must be set aside, with whatever consequences that might have for the rejection of the complainant's candidature and the appointment of Mr. Boivin. The Agency must start the procedure again at the point at which the breach of due process had occurred and the Director General should make a new decision after referral to the Joint Committee for Disputes. The complainant was also entitled to costs, and the amount was set at 50,000 Belgian francs.

In the brief the Tribunal had invited from Mr. Boivin, he had requested the Tribunal to declare the Agency liable and to order it to "reinstate" him. Since he was not a party to the dispute, the Tribunal would not entertain the requests. Nor would it entertain his claims to damages from the complainant for and to the imposition of disciplinary penalties on Eurocontrol employees.

13. Judgement No. 1769 (9 July 1998): Chvojka v. International Atomic Energy Agency[24]

Responsibility for loss of vested pension rights under Austrian Pension Insurance Scheme—Tribunal's jurisdiction limited to granting relief for breach of the terms of employment of international civil servants—Question of an acquired right—Staff rule 8.01.3(A)(2)—Question of compensating staff member to make him whole—Dissent argued that Agency had not altered rights of staff member but rather the Austrian Government had done so

The complainant joined the staff of the Agency in October 1980. At that time he was a member of the Austrian Pension Insurance Scheme (APIS), also known by its German abbreviation ASVG. Under the rules of APIS then in effect, a person's entitlement to a pension on retirement depended on the length of coverage or participation in the scheme, with a minimum qualifying period of 180 months (15 years). Coverage included both "contributory" coverage, i.e., periods during which contributions to the scheme were made by both employer and employee, and "substitute" coverage, corresponding to periods of secondary or university education during which no contributions were made. By the time the complainant joined the staff of the Agency, he had accumulated a total of 123 months of coverage under APIS, made up of 71 months of "substitute" coverage and 52 months of "contributory" coverage.

At the time the complainant joined the Agency, staff rule 8.01.3(A)(2) provided that persons in his position could participate in APIS if they had "accumulated less than 15 insurance years (contributory plus substitutional periods) in that Scheme; they shall participate in the United Nations Joint Staff Pension Fund after having accumulated 15 years in the Austrian Pension Insurance Scheme". Rule 8.01.3(A)(2), which was repealed in 1983, was consistent with the general provisions of the Headquarters Agreement entered into between the Agency and the Government of Austria and a more specific agreement concerning social security which had come into effect on 1 July 1974. Article 2(1) of the latter agreement provided that "officials who, on taking up their appointment with IAEA, do not participate in the Pension Fund shall participate in the … pension insurance provided for in ASVG". Article 1(7) of the same agreement defined the abbreviation ASVG by reference to the applicable Austrian legislation "as amended from time to time".

The combined effect of the agreement and rule 8.01.3(A)(2) was to allow the complainant to choose to remain in APIS until he had accumulated the minimum requirements for the vesting of pension rights under that scheme, at which time he would be obliged to join the Pension Fund and to cease contributing to APIS. The repeal of staff rule 8.01.3(A)(2) in 1983 was accompanied by the adoption of transitional provisions allowing the complainant to continue his contributions to APIS as before until he met the minimum qualifications. He did so in July 1985, at which time he was obliged to switch from APIS to the Pension Fund. As of the latter date he had a clear vested right to receive a pension from APIS upon his eventual retirement but would not, at least for so long as he remained a member of the Agency's staff, be in a position to make any further contributions to APIS. All future pension contributions in respect of the complainant, both the employer's and the employee's, were to go to the Pension Fund and upon retirement from the Agency he would of course be entitled to a pension from that source as well.

Eleven years later, in July 1996, the provisions of APIS were substantially changed. The scheme appeared to have been so severely underfunded as to require retroactive amendment by what was referred to as a "savings" package. By the amending legislation APIS was changed so that education (i.e., "substitute" coverage) would no longer be taken into account in calculating the minimum qualification periods, even where those periods had already been long since acquired. Although the 1996 amendment adversely affected all Austrians who had been relying in part on their education periods to qualify for an APIS pension, the vast majority of them would still receive a pension, albeit a reduced one, on retirement because they had continued or would continue to work in Austria and to contribute to the scheme. The removal of "substitute" coverage would not have a drastic impact on anyone who already had the necessary 15 years of contributory coverage or who, being still a contributor, would in due course acquire them. Transitional provisions in the legislation stated that those who, as a result of the amendments, would no longer qualify for a full pension could either "buy back" their education years or continue to work until they did qualify. A special clause provided for those who had retired or who could no longer work and contribute to the scheme; there was, however, no provision for those who were working and who for reasons other than retirement were unable to continue to contribute to APIS.

The Austrian savings package therefore left the complainant (and some other Agency staff members) with a very limited and unattractive set of choices. Because he no longer met the minimum requirements for APIS, he no longer qualified for any APIS pension. Because he was a staff member of the Agency, he was obliged to contribute to the Pension Fund and could not resume contributions to APIS. His contributions to APIS and those of his employer were effectively lost. The "buy-back" option offered by the 1996 Austrian legislation was most unattractive since it would have required the complainant to make a payment into APIS equal to approximately six months' salary.

The complainant protested to the Agency seeking its intervention with the Austrian Government. He requested the Agency, if it was unwilling or unable to obtain relief from the Government, to provide relief to him in the form of return of his contributions to APIS. By a letter of 27 January 1997, the Director General refused all the relief sought and also indicated that he had no objection to waiving the jurisdiction of the Joint Appeals Board so that the complainant could have recourse directly to the Tribunal, which he did.

In any consideration of his complaint, the Tribunal pointed out that the limits of its jurisdiction must be kept clearly in mind. The Tribunal had no jurisdiction over the Austrian Government. The 1996 legislation, which of course was valid in Austrian law, would not be the subject of any comment by the Tribunal as to its validity in international law. In that regard, the Tribunal might neither order an international organization to negotiate with a member State nor set the objectives of any such negotiation: see Judgement 1456 (in re Belser and others) 1995. The Tribunal's jurisdiction was limited to granting relief for breach of the terms of employment of international civil servants as such terms might be determined from the contract of employment, the applicable staff regulations and rules and other relevant documents.

On the other hand, as the Tribunal observed, there was no doubt that the complainant had lost a vested right to receive a pension from APIS. That loss amounted to breach of an acquired right within the meaning that had been assigned to that term by the case law: see in particular Judgements Nos. 832 (in re Ayoub and others) 1987 and 986 (in re Ayoub (No. 2) and others) 1989. The test established by those and other judgements required an appreciation of the balance between the nature and importance of the terms of employment which had been altered, the reasons for the change and the consequences of allowing a claim to an acquired right. On any reading, the entire loss of the complainant's right to obtain a pension from APIS upon retirement in respect of his first five years with the Agency constituted a very important breach. As matters stood, he had lost not only the benefit of participation in a pension plan during the first five years of his employment (a fundamental term of employment of any international civil servant), but also the entire contribution made on his behalf to APIS.

However, as the Tribunal recalled, former staff rule 8.01.3(A)(2), as in force at the time the complainant became a member of the Agency staff, constituted one of the terms of his employment. There could be no question that, when the staff rule was read in context, the purpose and intent of that term of employment was to provide him with a pension from APIS, and that purpose and intent had been frustrated: the term had been altered. The staff rule, however, obliged the complainant to cease contributing to APIS and to become a member of the Pension Fund when he had completed 15 years of membership in that scheme. He did so in July 1985. From that time forward the Agency's obligation to give the complainant access to a pension plan has been fulfilled through the Pension Fund.

In the opinion of the Tribunal, while the Austrian legislation of 1996 might have provided the occasion for the complainant to lose his vested right to a pension from APIS, the actual cause of that loss, and thus of the alteration of the term of the complainant's employment, was the way in which the former staff rule itself had been applied through the agreement between the Agency and the Austrian Government. The staff rule obliged the complainant to withdraw in 1985 after attaining what was then the necessary minimum qualification. The agreement did nothing, however, to ensure that such minimum would not be changed and that vested rights would be protected. If the complainant had remained in APIS, he could have continued to contribute to APIS and would in fact by 1996 have achieved substantially more than the minimum 15 years of contributions he required to qualify for a pension. As it was, however, he was bound to cease contributing, but the Agency did not protect the contributions made on his behalf.

By former staff rule 8.01.3(A)(2), in the view of the Tribunal, the Agency had recognized its obligation to provide a pension for the complainant. As one of

the possible sources of such pension, it had made APIS available but had limited the complainant's participation therein to the 15-year minimum qualifying period then in effect. However, through its agreement with the Austrian Government, the Agency had acknowledged that the scope of APIS would be "as amended from time to time" without its even being consulted. It thus chose an inherently defective vehicle to fulfil its pension obligation to the complainant, since the pension itself was subject to factors (other than ordinary economic constraints such as inflation, currency variations and the like) that were entirely outside the Agency's control. In fact, as events turned out, the 1996 amendments to APIS had resulted in the application of the former staff rule in a way that effectively deprived the complainant of any right at all to an APIS pension. To put the matter another way, the reason for the alteration of the term of his employment was the Agency's reliance upon factors in which it had no say for the fulfilment of its obligation to make a pension available to him.

The Tribunal therefore concluded that the application of former staff rule 8.01.3(A)(2) to the complainant had resulted in the loss to him of an acquired right. While the rule had subsequently been repealed, and the Tribunal could not in any event set it aside, it declared the rule to be inapplicable to his case.

Furthermore, since the source of the complainant's loss was the defective application of the staff rule, the Tribunal held that he was entitled to succeed and to recover damages. The measure of those damages should be what was required to place him in the position in which he would have been if the Agency had not both allowed him to participate temporarily in APIS and then obliged him to withdraw therefrom. On the information made available by the parties, the only means of approximating that result (a means which the Tribunal recognized as imperfect) was to oblige the Agency to pay to APIS on the complainant's behalf a sum sufficient to "buy back" his substitute coverage in that scheme. The Tribunal noted, however, that, notwithstanding the rejection of the complainant's request to that effect by the impugned decision, the Agency in its reply indicated that it was engaged in continuing exchanges with the appropriate Austrian authorities. If those exchanges "resulted" or "were to result" in an agreement that would allow the complainant to qualify for an APIS pension in respect of his period of contributory coverage in APIS, such an agreement would more accurately compensate for the true measure of his loss. Accordingly the Tribunal, while ordering the Agency to pay the amount necessary to buy back his period of substitute coverage in APIS, would allow the Agency a further period of six months from the date of the present judgement to reach a satisfactory alternative arrangement with the Austrian Government if it so chose. The complainant also was entitled to costs in the amount of 45,000 schillings.

The Vice-President of the Tribunal, Mella Carroll, produced a dissent to the above decision:

She noted that an acquired right was a right which a staff member might expect to survive any amendment of the rules: Judgement No. 832 (in re Ayoub and others) 1987. Put another way, where there had been an amendment, there would be a breach of an acquired right that warranted setting the decision aside if the altered term of appointment was "fundamental and essential": Judgement No. 986 (in re Ayoub (No. 2) and others) 1989.

By virtue of staff rule 8.01.3(A)(2), the complainant had the options at the time of his appointment of completing the minimum 15 years' membership required under APIS or becoming an immediate contributor to the Pension Fund. By that

time he had accumulated 5 years and 11 months' non-contributory membership and 4 years and 4 months' contributory membership; he therefore lacked 4 years and 9 months' further contributory membership. He was asked to choose once and for all, which he did on 25 August 1981 by opting to complete his APIS membership. When the rule was repealed in 1983, every new staff member was required as from 1 January 1983 to become a member of the Fund immediately. The right of the complainant to complete his 15 years' APIS membership was left untouched by virtue of transitional arrangements. In the Vice-President's view, this was an example of the Agency's respecting his "acquired right" to complete the minimum period. On 1 August 1985, having completed this period, he became a member of the Fund.

The change to the APIS rules in 1996 was made by the Austrian Government. There was no change made by the Agency to its rules or to the terms of the complainant's appointment. The choice offered to him in 1981 was made in good faith so that he would not lose the benefit of his contributory and non-contributory years of membership of APIS. In the Vice-President's opinion, good faith works in two directions. Since the option was offered in good faith, there was a corresponding requirement of good faith on the part of the complainant, which meant not trying to place the blame on the Agency. In his own pleadings the complainant stated that he was aware that the pension coverage under APIS was subject to Austrian law and could be amended and that he could rely on the political process in the normal course to prevent any serious impairment of his right. He was disappointed in his expectations. But that did not entitle him to expect the Agency to recompense him. He made his choice and, in the opinion of the Vice-President, must bear the consequences. The Agency played no part in altering his rights under APIS and should not be obliged to pay damages.

That was not to say that the Agency was free to abandon him entirely, and it had not done so. It was currently taking steps to compile information to be put to the competent Austrian authorities with an appropriate request for relief for the staff concerned. The degree to which the Agency was obliged to extend itself in its assistance did not need to be determined in the present case.

To construe staff rule 8.01.3(A)(2) as conferring on the complainant the right to a *pension* from APIS as distinct from conferring a right to *contribute* to a pension until the 15 years' minimum was accumulated was, in her opinion, unjustified. The Agency had fulfilled its obligations as an employer by making membership of the Fund immediately available. The APIS concession was exactly that: a concession. The Agency had not chosen to fulfil its pension obligations through an "inherently defective vehicle". It was the complainant who had chosen to contribute for a limited period towards the state pension in preference to one from the Fund. The Vice-President could not agree that the application of staff rule 8.01.3(A)(2) to the complainant had resulted in the loss of an acquired right. Instead it had actually given him an acquired right to complete his 15 years' membership, a right that could not be taken from him when the rule was repealed. To declare the rule inapplicable to the complainant's case, as stated in the judgement, was to say that he should have started contributing immediately to the Fund, in which case his loss was limited to the difference between the United Nations pension he would receive and the pension he could have had if he had joined the Fund in 1981.

In Judgement No. 986 the Tribunal had held that it could not set the amounts of the complainants' entitlements but that their rights to redress should be determined when each of them left the service of the organization. It appeared to the Vice-

President that similar considerations applied in the present case. There was no way in which the complainant could at the current stage quantify the loss of four years and nine months of contributions to the Fund. There was also the possibility that he might not remain with the Agency until retirement age, so that he might yet be able to complete 15 years' contributory membership of APIS. A further possibility was that the Austrian authorities might grant relief to the staff affected by the changes to APIS after the present judgement had been executed. If staff rule 8.01.3(A)(2) was not to applied to the complainant, there was no justification for requiring the Agency to buy back the years for which no contribution had been made (which was not even claimed as relief) so that the complainant might enjoy the benefits of a state pension based on 15 years' contributions. That would discriminate against all those staff members who had joined the Agency when the rule was in force and started to contribute immediately to the Fund. If the complainant was entitled to succeed on the merits—which was contrary to her view—the most he was entitled to was a declaration that when his pension from the Fund was calculated on retirement he would be entitled to compensation for the difference between that pension (plus any APIS pension which might ultimately turn out to be payable) and a pension calculated to include the "lost" four years and nine months at the commencement of his service.

14. Judgement No. 1770 (9 July 1998): Ballester Rodés v. European Patent Organization[25]

Backdating effective date of promotion—Article 49(7) and (10) of the EPO Service Regulations—To exclude any possible injustice in non-promotion decision, case sent back to Promotion Board

The complainant joined the staff of the European Patent Office, the secretariat of the European Patent Organization (EPO), on 1 October 1991 as a lawyer. On the strength of his reckonable experience of six years and eight months, EPO placed him at grade A2. It confirmed his appointment as a permanent employee at the end of one year's probation. On 22 February 1996, he requested the President of the Office to promote him to grade A3 as from 1 October 1993, and the decision to refuse that claim was what he was impugning in his complaint. However he did receive a promotion to grade A3 as from 1 February 1996, so that his only claims remaining were for the backdating of the promotion to 1 October 1993 and for an award of moral damages.

In consideration of the case, the Tribunal noted that article 49(7) of the EPO Service Regulations read:

> "Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them".

Article 49(10) read:

> "The President of the Office shall forward to the Promotion Board the names of all permanent employees who possess the necessary qualifications referred to in paragraphs 7 and 9".
>
> "The Board shall examine the personal file of all permanent employees satisfying the relevant requirements and may, if it so decides, interview any permanent employee under consideration.
>
> "The Board shall draw up and forward to the President of the Office for his decision a list, presented in order of merit, of permanent employees who

are eligible for promotion, based on a comparison of their merits, together with a reasoned report."

In a note to the chairman of the Promotion Board, the President set out the guidelines for listing candidates for promotion in 1993. The note appeared in the EPO *Gazette* of 26 July 1993. Identical guidelines had since been set for promotion in 1994, 1995 and 1996. According to the guidelines, staff members at grade A2 who had a "good record of performance" qualified for promotion to grade A3 provided they had at least eight years' reckonable experience, and such "record" normally meant "performance during a period of time much longer than the period covered by the last report".

As the Tribunal noted, the complainant could not have been considered for promotion by the Promotion Board in 1993 and 1994 because his staff report for the period from 1 October 1992 to 30 September 1993 had declared his performance to be "less than good". However, he had contested that assessment and, after conciliation, his supervisors had given him on 21 July 1995 two new staff reports, one covering that period and the other for the period from 1 October 1993 to 31 March 1994. Both had assessed his performance as "good".

On 11 July 1995, he had filed a complaint with the Tribunal with regard to promotion. He explained that on 21 July, during the conciliation procedure, the Vice-President in charge of Directorate-General 5 had made a promise on the President's behalf that the President "would promote the complainant to grade A3, retroactively with effect from 1 October 1993, if his name appeared in the recommendation list of the Report of the Promotion Board", which was to meet in December 1995, provided he withdrew his complaint. He promptly did so. The Promotion Board met in December 1995. The majority did not recommend the complainant for promotion. The staff representatives, who were in the minority, were in favour of promoting him in 1995 and observed that the majority were in error both in refusing to draw up a full list of employees eligible for promotion in order of merit and in making "any kind of 'recommendation' whatsoever". Since there was no positive recommendation from the Promotion Board, the President decided not to promote the complainant. He appealed.

In its report of 5 February 1997, the Appeals Committee observed that the complainant's only claim was to promotion retroactive to 1 October 1993 and it held that his "claim cannot succeed since his probationary period expired only on 30 September 1992 and one year's service following the probationary period was an insufficient basis to establish the record of performance for promotion purposes". Having recommended the rejection of the appeal insofar as it related to promotion in 1993, the Committee went on to consider whether a claim to promotion in 1994 or 1995 might succeed. It concluded that the Promotion Board had no power to exclude from its list candidates who were eligible for promotion and that, since the Board had had no report on the complainant's performance in the period from 1 April 1994 to 30 June 1995, its failure to call for one amounted to "omission of an essential fact". The Committee doubted whether the Board should have referred to the change in the assessment of the complainant's performance after conciliation. It doubted, too, whether the criterion of "fair contribution", which was applicable to patent examiners, ought to have been applied to him, particularly since he had not been told what a "fair contribution" meant in the work he was doing and the criterion was not mentioned in the President's note to the Board. The Committee therefore recommended allowing the appeal in part and sending the case back to the

Promotion Board for reconsideration in the light of its opinion. By a letter dated 10 March 1997, the President informed the complainant that he had decided to follow the opinion of the Committee and reject his request for promotion in 1993 but, "in order to exclude any possible injustice", was sending his case back to the Promotion Board for "review as to whether [he] should have been promoted in 1995".

As the Tribunal pointed out, the complainant was adamant that his claim was not to promotion under article 49, i.e., at the President's discretion, but only to the enforcement of the promise made to him on 21 July 1995. He argued that the condition to which that promise was subject had been fulfilled because the Promotion Board had no power to exclude from the list candidates who, like him, qualified for promotion. EPO pleaded that it need not comment on the existence of such a promise because, even if one had been made, it was subject to the condition that the complainant's name "appeared in the recommendation list of the report of the Promotion Board", and that condition had not been satisfied. As observed by the Tribunal, the complainant's position that a promise had been made to him on 21 July 1995 was supported, in the proceedings before the Committee, by the statement of another staff member who was present during the conciliation proceedings. EPO had not submitted any evidence to the contrary. The Tribunal held that such a promise had been made.

In considering whether the condition to which that promise was subject had been fulfilled, the Tribunal observed that article 49(10) of the Service Regulations required the President to forward to the Promotion Board the names of "all permanent employees who possess the necessary qualifications". The complainant contended that the list which the Promotion Board was required to draw up and send to the President had to contain all the names, though put in order of merit. He argued that the Board was free neither to exclude from the list any employee who met the minimum requirements nor to make "negative recommendations" of any kind about those who were on the list; and since EPO did not deny that he met the minimum requirements he had an "acquired right" to appear in the recommendation list and thus the condition was fulfilled. In the view of the Tribunal, even if the complainant were right in his contention that the Promotion Board was not free to exclude his name from the list which it had prepared in accordance with article 49(10), that would mean only that his name should have appeared on *that* list. But the promise referred to a different list, "the *recommendation* list of the report of the Promotion Board". Article 49 makes no mention of a "recommendation list". To determine what was meant by that expression it was necessary to turn to the President's note to the Board. Under "General remarks" the President invited the Board to:

> "present [its] recommendations in lists, established in order of merit within each grade, of those the Board considers to have the merit for promotion. The lists must be accompanied with a reasoned report."

As the Tribunal pointed out, that cast a duty on the Board to identify and list only those employees whom it considered fit for promotion. The Board was not bound, as a matter of course, to include the complainant's name in that list of recommendations. The Tribunal therefore concluded that the relevant condition was not satisfied, and his claim failed.

In the opinion of the Tribunal, that did not conclude the matter, however. The President decided to send the case back to the Promotion Board for review because the Appeals Committee had found that its proceedings were flawed. The doubts which the Committee had expressed over the issue of promotion in 1994

and 1995 were equally applicable to the Board's refusal to recommend promoting the complainant in 1993. Further, the ground on which the Committee had relied for recommending rejection of his claim to promotion in 1993—that one year's service after probation was not sufficient to constitute a "record" of performance—was not one which the Board had taken into consideration in the light of the particular circumstances.

The Tribunal further concluded that, in accordance with the President's clear wish to "exclude any possible injustice", the case must be sent back to EPO so that the Promotion Board might reconsider the question of promoting him in 1993, 1994 or 1995. But his claim to an award of damages for the moral injury he said he had sustained must fail.

The Tribunal therefore quashed the President's decision of 10 March 1997 refusing the complainant promotion in 1993 and sent the case back to the organization so that the Promotion Board might reconsider the question of promoting him in 1993, 1994 or 1995.

15. Judgement No. 1772 (9 July 1998): Tueni v. United Nations Industrial Development Organization[26]

Abolishment of post—UNIDO staff regulation 10.3(a) *and staff rule 10.02* (a)—*Importance of Advisory Group observing its own procedural rules*

On 1 January 1973, the complainant joined the staff of UNIDO, which was then a subsidiary organ of the General Assembly of the United Nations, as a secretary. On 1 January 1974, the organization granted her a permanent appointment. On 1 August 1987, it assigned her to the Fellowship Training Unit as a clerk, and in January 1989 changed her title to senior fellowship clerk. Her appointment was terminated on 28 June 1996.

The organization had had to make a drastic reduction in its budget for the biennium 1996-1997 as a result of a substantial drop in financial support from the United States of America, the main contributor. It accordingly carried out a staff reduction exercise in two stages: first, a scheme of "voluntary separation", for which staff might apply by 8 January 1996, and then non-voluntary measures. The complainant did not apply by the deadline for voluntary termination. By a letter of 22 February 1996 the Managing Director of the Division of Administration informed her that her post was to be abolished and that an Advisory Group on Human Resource Planning which had been set up in August 1995 would, after review, recommend to the Director-General either keeping her on or ending her appointment.

In consideration of the case, the Tribunal noted that UNIDO staff regulation 10.3(*a*) read:

> "The Director-General may terminate the appointment of a staff member who holds a permanent appointment if the necessities of the service require abolition of the post or reduction of the staff, if the services of the individual concerned prove unsatisfactory, or if the staff member is, for reasons of health, incapacitated for further service."

Staff rule 110.02(*a*) provided:

> "If the necessities of the service require abolition of a post or reduction of staff, and subject to the availability of suitable posts in which their services

can be effectively utilized, staff members with permanent appointments shall be retained in preference to those on fixed-term appointments, provided that due regard shall be paid in all cases to relative competence, to integrity and to length of service".

And according to a bulletin, DGB(M).5, issued by the Director-General on 16 January 1996, the Advisory Group was to apply the following principles:

"In accordance with staff regulation 10.3 and staff rule 110.02, staff members whose posts are abolished will be measured against available suitable posts to ascertain whether their services can be effectively utilized in those posts. In all such cases due regard shall be paid to the following criteria:

— Relative competence;

— Integrity;

— Efficiency and effectiveness;

— Qualifications and skills related to key priority themes, programmes and essential functions;

— Length of service;

— Geographical and gender balance.

"… The term 'available suitable posts' in which the staff member's services can be effectively utilized means posts occupied by other staff members or available vacant posts in areas with similar qualification requirements."

In submissions it put to the Joint Appeals Board on 23 December 1996, the organization explained as follows what the Advisory Group had done:

(*a*) Starting in March 1996 it had "obtained information on, and reviewed the qualification requirements of", vacant posts "available for possible staff redeployment". It had analysed "the background, expertise, experience and service record" of staff whose posts had been abolished and "established which staff members would match the requirements of one or several vacant posts". It had then invited a further evaluation of each candidate from the "manager"—i.e., the head of the unit—who was supposed to give "an objective assessment of the candidate's suitability".

(*b*) Next, the Group had "reconsidered the situation of all staff members with permanent appointments who had not been found suitable for a vacant post" to see whether they would be suitable for any post held by an official on a fixed-term appointment. It identified posts "with similar qualification requirements", and again it asked the manager to assess each candidate who met them.

(*c*) If no suitable post had by then revealed itself, the Group had made an "initial conclusion" recommending termination. At that point it had allowed an "informal recourse procedure" whereby a staff member might point out to it any "new elements" warranting reconsideration.

(*d*) If the Group still found no suitable post even after further review, it recommended termination.

In sum, the Group had, in the defendant's words, "measured" each holder of a permanent appointment "against several posts in order to identify the most promising and serious placement possibilities". "All of them", said UNIDO, "were the subject of discussions within the Advisory Group and with managers and supervisors".

As the Tribunal observed, in the first three weeks of April 1996, the complainant had been called for interviews for three posts, but nothing had resulted from them.

At its 10th meeting, the Advisory Group deemed it undesirable to place General Service staff on jobs at any grade lower than their current ones. Nevertheless, the complainant's first interview was for G.4 posts, though she had been at grade G.5 or its equivalent since 1974. The complainant then discovered that on 22 April 1996 her own supervisor had interviewed two staff members for a G.5 post for a senior fellowship clerk in her unit; it was identical to her own and had not been abolished, and it was held at the time by a junior colleague, S, who was currently only on a fixed-term appointment. By a memorandum dated 23 April the complainant requested, presumably in accordance with staff rule 110.02, to be considered for that post. Her supervisor had sent a memorandum on 22 April to the officer-in-charge of the Project Personnel Service stating that her work was fully satisfactory; that she was "the only clerk in possession of the very specialized qualifications needed to perform the duties of a fellowship clerk"; that the supervisor had been supervising S "for many years"; and that if anyone should be given preference over S on the grounds of contractual status it was she. The Advisory Group nevertheless decided that, since her memorandum of 23 April had "pre-empted the informal recourse procedure", she would not be evaluated for S's post; that the review of her candidature against that of S would be made in the context of that procedure; and that "when she was informed of the initial proposal … that she be separated from service", she would be told of the decision on her memorandum of 23 April. She received no reply to the memorandum.

The Advisory Group sent her its "initial proposal" dated 20 May 1996 for terminating her appointment. It told her, not that her claim to the post, but that her memorandum of 23 April 1996 would be "considered … during the course of the informal recourse procedure". The Acting Director of Operational Support Services in the Division of Administration and the officer-in-charge of the Project Personnel Service interviewed her on 17 June 1996. Among the reasons they gave for preferring to keep S on the disputed post were the following:

(*a*) The "fact sheets" showed that S's performance had been rated more highly in the most recent period: although she had "fully achieved" the results expected for eight of her tasks she had "exceeded" them for the others, whereas the complainant had "fully achieved" expectations—the lower rating—for all of them;

(*b*) The complainant worked only in English;

(*c*) According to the new structure the post would, if that was required, include the additional functions of appointment clerk and of secretary. The complainant had acknowledged that "her past experience had not made her thoroughly familiar with appointment and administration of staff and experts", though she had professed willingness to be trained provided she could keep her current duties;

(*d*) S had much better computer skills;

(*e*) The complainant had "limited flexibility and interest in undertaking different functions" while S was more versatile;

(*f*) The complainant had said that she would not consider working part-time or at a lower grade.

At its 32nd meeting, the Advisory Group agreed with the views and recommendation of the Acting Director of Operational Support Services. It observed, however, that since the complainant was able to work in French it was wrong of the Acting Director to say that she worked only in English. Indeed according to her performance reports she had worked in both languages and her knowledge of German too

was "highly useful". On 19 June 1996, the Director of Personnel Services presented the complainant with a notice of termination of her permanent appointment as at 28 June 1996. The complainant asked the Director-General to review the decision, he refused and she appealed to the Joint Appeals Board on the grounds that:

(*a*) The termination was unlawful because her post had not been abolished;

(*b*) Her rights under rule 110.02 (*a*) had been disregarded;

(*c*) She had been improperly denied the opportunity of voluntary termination because her supervisor had encouraged her not to apply for it.

In its report of 11 April 1997, the Board recommended rejecting her appeal and in a letter to her of 13 May 1997 the Director-General stated that he accepted that recommendation. She thereupon duly filed the present complaint.

In considering the complainant's plea of breach of her rights under rule 110.02 (*a*), the Tribunal observed that in its report, the Board stated that it had:

> "noted the thoroughness with which the [Advisory Group] had dealt with the [complainant's] case. It had reviewed her background and experience, had reviewed her against the [relevant] criteria … A further review took place with a view to her suitability for vacant posts as well as for posts occupied by fixed-term staff members … The Board studied the interview reports prepared by the staff members who had interviewed [her] … and heard three of them. The Board noted that [she] apparently showed a strong preference to continue to perform the same functions she had performed in the past. However, she showed willingness to accept different functions and to undergo training to fulfil them …
>
> "From the interview reports the Board also found that [she] would not have met the requirements of posts she was interviewed for, which actually required different duties and responsibilities than the ones [she] had held in her previous position …
>
> "The Board was of the opinion that [she] was fairly treated, that every effort had been made … to find possibilities for her redeployment and that she had been given a fair chance by the interviewers. However, … flexibility and effective teamwork were what was most needed and these were qualities [she] did not seem to exhibit."

The Tribunal noted that UNIDO had produced S's fact sheet and her last three performance reports, which covered 1991 to 1995. Although her performance in 1995 had been rated slightly higher than the complainant's in 1994-1995, only for four out of 15 assignments did her last three appraisals state that she had "exceeded expected results". The complainant's last three performance appraisals, which covered 1990 to 1995, said she had "exceeded expected results" in performing seven out of a total of 20 tasks. Further, her appraisal for 1992-1993 recorded that because of her excellent performance for many years she had been chosen to act as training assistant on her supervisor's retirement in March 1993 and had since, despite "difficult conditions", "exceeded the expectations" in fulfilling her new duties. It also said that since 1 April 1993 she had been supervising two others; and since S's fact sheet showed that previously Mrs. Schurz had—jointly with Mr. Hanselmann—been supervising S's work, it was probable that from April 1993 the complainant had supervised S's work, as Mr. Hanselmann himself had stated in his memorandum of 22 April 1996.

Those appraisals also showed that S had joined UNIDO in 1982, nine years after the complainant; although S had become a fellowship clerk in 1982 and the complainant in 1987, the complainant had been appointed senior fellowship clerk in 1989, one year before S; and when Mrs. Schurz had retired in 1993 it was the complainant who had been picked, in preference to S, to perform her duties. Her performance report showed that she did perform those duties, even though she was not actually appointed to the post. The appraisals thus afforded material evidence in support of several of the complainant's assertions: that the length and quality of her service were by no means inferior to S's; that her career had progressed more rapidly; that she had supervised S's work; and that she was no less versatile than S and no less keen or able to take on different duties. In coming to conclusions unfavourable to the complainant without considering those appraisals the Advisory Group and the Joint Appeals Board had disregarded material facts.

Moreover, the Tribunal noted that, at its 15th meeting, the Advisory Group had affirmed its commitment to obtaining a broad consensus on each case that took into account the views of managing directors and supervisors. In the present case it had taken into account the views of the Acting Director of Operational Support Services and the officer-in-charge of the Project Personnel Service, who had encumbered their posts only since January 1996. As S had been working as the Acting Director's secretary as from January 1996, neither he nor the officer-in-charge had direct knowledge of S's work as a fellowship clerk. The complainant stated, and UNIDO did not deny, that neither of them had had any contact with her regarding her work. Their ability to make a comparative assessment was thus severely limited, in the view of the Tribunal. Although Mr. Hanselmann had been the direct supervisor of both S and the complainant for over six years, the two interviewers and the Advisory Group had made no effort to obtain his views, nor had they considered what he had said in his memorandum of 22 April 1996. The Advisory Group had thus failed to observe its own procedural rules. Further, the Joint Appeals Board, in the complainant's absence, had heard the two interviewers and Mr. Hanselmann on another aspect of the case, but even then had not sought Mr. Hanselmann's views on the relative merit of the two staff members.

Under rule 110.02 (*a*), staff members with permanent appointments were entitled to preference for "suitable posts in which their services can be effectively utilized". It was obvious from the outset that the complainant's services could have been used in the identical post then held by S; the Advisory Group was therefore bound to consider whether she would be more suitable than S. Yet it had refused to do so, even when she had claimed her rights, on the wholly untenable grounds that that "pre-empted the informal recourse procedure". It was unfortunate that one of the officers who had later interviewed her on 17 June 1996 had already omitted her name from the chart of the new structure of the Project Personnel Service. Instead of considering her for the post most suitable for her, the Advisory Group had sent her for interviews for four posts, three of which either were at a lower grade or required qualifications not similar to hers. The Joint Appeals Board had been wholly mistaken in concluding that the Advisory Group had dealt with the case with thoroughness and fairness: on the contrary, it had failed to observe its own procedural rules and infringed her rights under rule 110.02(*a*).

The decision to terminate the complainant's appointment was therefore flawed and must be quashed, there being no need to entertain any of her other pleas. Since further staff reduction had taken place in January 1998, the Tribunal would order her reinstatement as from 29 June 1996 up to February 1998, the month in which

she qualified for early retirement, and payment of full arrears of salary, allowances and other benefits less any amounts she was paid on termination. If she had any occupational earnings during the period from the date of termination up to February 1998, she should also give credit for the net figure. UNIDO should pay its share of contributions for her to Van Breda, the health insurance brokers, and to the United Nations Joint Staff Pension Fund, up to the same date. She should be deemed for all purposes to have left on early retirement in February 1998 and be entitled to all benefits due upon such retirement. On account of the moral injury she had suffered, the Tribunal awarded her the sum of US$ 30,000 in moral damages, and she also was entitled to $2,000 in costs.

16. Judgement No. 1779 (9 July 1998): Feistauer v. International Labour Organization[27]

Abolishment of post and transfer to Bangkok—Limited review of restructuring and redeployment of staff—Question of abuse of authority—Question of an improper procedure regarding abolition of post and transfer

The complainant joined the staff of ILO in 1987 under a fixed-term appointment as a senior subcontracting officer at grade P.3 in the Technical Cooperation Equipment and Subcontracting Branch (EQUIPRO) of the Department of Technical Cooperation. ILO upgraded his post to P.4 as at 1 October 1993 and at the same time promoted him to that grade. His post was abolished as of 31 March 1996, at which time he was transferred to the post of senior specialist in employment development, at grade P.5, on the East Asia Multidisciplinary Advisory Team in Bangkok.

Following lengthy correspondence with the Organization, by a letter dated 11 March 1996, the complainant formally appealed the decision of his transfer to Bangkok to the Director-General under article 13.2 of the staff regulations. The Director of the Personnel Department dismissed the appeal on the Director-General's behalf by a letter to the complainant dated 23 August 1996. The complainant appealed against that decision to the Tribunal.

The complainant submitted that the EQUIPRO management structure was "top-heavy" and that, if the organization was sincerely interested in cutting costs, there were several more reasonable alternatives to the abolition of his post, including the abolition of one supervisory position, or the merger of EQUIPRO and the Equipment and Office Supplies Section, or both. The complainant invited the Tribunal to consider the cost-effectiveness and justification of the organization's decision to keep two supervisory posts in EQUIPRO for one Professional staff member and five General Service staff and, in so doing, to determine whether the abolition of his post, and not some other cost-saving measure, was in the organization's best interests. However, on such questions of policy the Tribunal considered that it would not substitute its opinion for that of the Administration. As it had often said, an international organization must have the ability to adapt to changing circumstances. The Tribunal would interfere with such a decision on matters as restructuring and redeployment of staff only if it had been taken without authority or in breach of a formal or procedural rule, or had been based on a mistake of fact or of law, or neglected some essential fact, or constituted an abuse of authority, or had drawn mistaken conclusions from the factual evidence: see, for example, Judgement No. 1131 (in re Louis) 1991.

According to the complainant, there had been abuse of authority because the person who decided to abolish his post was directly threatened by the cuts to

EQUIPRO and therefore had decided to abolish the complainant's post rather than his own. That submission, however, was not supported by the facts, in the view of the Tribunal.

As the Tribunal observed, the Director had stated, in her minute of 15 March 1996 to the Treasurer and Financial Comptroller of ILO, that it was the chief of EQUIPRO who had decided in 1995 that two posts had to be abolished. She had then stated that it was the chief of the Internal Administration Bureau (INTER) who had discovered, through the Personnel Planning and Career Development Branch (P/PLAN), that the vacant post in Bangkok might be suitable for the complainant. She concluded that the proposal to abolish the complainant's post and transfer him to Bangkok was the result of a "joint process among EQUIPRO, INTER and P/PLAN." Under the reorganization, the head of Operations in EQUIPRO had assumed the complainant's responsibilities over and above his own. It was therefore apparent that the head of Operations had made little or no input into the decision to abolish the complainant's post, or indeed into the decision to transfer him to Bangkok. However, even if he had participated in the decision to abolish the complainant's post, that would not in itself have constituted abuse of authority. There was not a jot of evidence to support the complainant's allegation that the choice was between abolishing the post of head of Operations or that of the complainant.

The complainant requested the Tribunal to comment on whether the restructuring of EQUIPRO was in line with established ILO procedures and with norms applicable to international organizations. According to the complainant, a normal procedure for restructuring would be (*a*) a neutral description of new posts; (*b*) a call for candidacies; (*c*) unbiased selection; and (*d*) assignment. However, the Tribunal would review the process insofar as it might involve personal prejudice, abuse of authority or similar defects. But it was not for the Tribunal to decide what a "normal procedure" for restructuring might be.

In the present case, the organization had determined that two posts needed to be abolished within EQUIPRO. It had then found a potential position for the complainant in Bangkok, and determined that responsibilities within EQUIPRO could be shifted to merge two posts into one. The complainant had at all times been kept informed of the process, particularly of decisions affecting him directly, and he had been given the opportunity to object, which he did. As for the abolition of his post, there was nothing to suggest that an improper or unfair procedure had been followed.

With respect to the complainant's transfer to Bangkok, in the opinion of the Tribunal, the organization had every right to transfer him and to decide to abolish his current post as a result. However, because it was established practice to consult an employee on a proposed redeployment, the organization had a duty to consider the complainant's objections to redeployment before deciding to abolish his post on that basis.

As the Tribunal noted, the evidence established that the organization had first approached the complainant on 7 December 1995 about the proposed transfer. His contract had been renewed for a further three months at the end of December 1995 and, on 16 February 1996, the Selection Board had made the final recommendation to transfer him. In the meantime, although it became increasingly clear that the Organization was going to abolish his post and transfer him, he had been given ample opportunity to express his objections. There could be no doubt that, by the time the final decision was made, everyone involved was fully aware of his per-

sonal and professional objections. The conclusion must be that the organization had considered his objections but had made its decision in spite of them, which it was entitled to do.

For the above reasons, the complaint was dismissed.

C. Decisions of the World Bank Administrative Tribunal[28]

1. Decision No. 185 (15 May 1998): Ezatklah v. International Bank for Reconstruction and Development[29]

Redundant post—Limited review of redundancy decisions—Staff rule 7.01—Question of retaliation—Material difference between new post and abolished post—Obligation on organization to make an effort to find alternative post

The Applicant joined the World Bank's London Office Division of the European Office Department in October 1981, as a secretary, level B. In 1984, she was promoted to level C and, in 1986, her position was re-graded to level 16. The title of her position was changed to Staff Assistant in 1988, and to Specialized Staff Assistant in 1992. At the time she was declared redundant in May 1995, she held the title of Senior Specialized Staff Assistant. The London Office was restructured and the Applicant's post was abolished effective 1 June 1995. She appealed that decision.

In considering the matter, the Tribunal noted that redundancy decisions were within the discretion of the Bank, and that the Tribunal would review them only to determine whether they constituted an abuse of discretion, as being arbitrary, discriminatory, improperly motivated or carried out in violation of a fair and reasonable procedure (Saberi, Decision No. 5 (1982)).

In that regard, the Tribunal could find nothing to substantiate the Applicant's allegation that there had not been a true redundancy. The reorganization of the London Office had been motivated by a desire to enhance the efficiency of the new role of the Office. In that context, it was not unreasonable for the Applicant's supervisor to have recommended that the Applicant's colleague, and not her, occupy the newly created position of Program Assistant since she was already familiar with the new functions.

The Applicant contended secondly that the reorganization of the London Office had not been carried out in the interests of efficient administration, as required by staff rule 7.01, paragraph 8.02, because there had been budgetary increases in staff instead of decreases. As the Tribunal noted, it appeared indeed that there had been budgetary increases with regard to staff. The Respondent itself admitted that the budget of the London Office had increased after the Applicant had been declared redundant. The Tribunal noted, however, that the factors determining whether a reorganization was efficient included not only the staff budget, but also the redefined work strategies and the priorities resulting from the new structure. Even if a staff budget was increased, staff reductions could be made based on a different business rationale. In the present case, the increase in the budget had occurred in the areas of communications and public relations, both of

which were new or additional work priorities in the restructured London Office. The Tribunal found that it was within the Respondent's discretion, according to its new business plan, to abolish a position part of whose tasks had been phased out and to use the funds from the abolition, and any additional necessary funds, to support the new structure of the Office.

The Applicant also claimed that the redundancy of her position was the product of retaliation against her because of her complaints against her former supervisor. The Applicant claimed that because of these strained relations and her mistreatment by her former supervisor she had been put at a disadvantage at the time of the reorganization. The Applicant had in that respect alleged that if her earlier Performance Review Records, containing her former supervisor's evaluations of her performance, had been corrected, they would have presented a different picture of her to her new supervisor and she would have been in a much stronger position both when the decision on the redundancies was being made and during the time she was searching for alternative employment.

On that point, the Tribunal first noted that, even during the many years that the Applicant was under the supervision of her former supervisor, she had received merit increases and promotions based on some good performance reviews. The Tribunal further noted that the Applicant had failed to challenge, by requesting timely administrative remedies, the Performance Review Records about which she was currently complaining. The record showed that the Applicant had complained formally only to the Ethics Officer and that that complaint, made in December 1993, was about discrimination by her former supervisor. Following an investigation, the Ethics Officer had informed the Applicant in May 1994 that there were no grounds for her complaints. The Applicant did not take any other formal action after the completion of the investigation. That complaint could not now be properly reviewed by the Tribunal.

The question thus arose as to whether the new Program Assistant position that had been created was materially different from or essentially the same as the Senior Specialized Staff Assistant position previously encumbered by the Applicant. The Tribunal found that the two positions differed materially. In Brannigan (Decision No. 165 (1997)), the Tribunal had held:

> "To demonstrate the abolition of a position it is not enough that there may be some differences between the old and new positions; the differences must be ones of substance. The Tribunal has emphasized in this respect the need for the Bank to show a clear material difference between the new position and the position that was made redundant."

As noted by the Tribunal, the record showed that the new position required its occupant to perform a number of tasks commensurate with the new role of the London Office as an external affairs unit, while the earlier position occupied by the Applicant required her to perform mainly administrative tasks. The Tribunal further noted that, in spite of some tasks common to both the Applicant's former position and the new position (i.e., performance of some administrative tasks), there were material differences between them. In addition, the tasks assigned to the former positions held by the Applicant and her colleague were different.

Nonetheless, a careful examination by the Tribunal of the record did indicate that the Respondent had abused its discretion with respect to its obligations under staff rule 7.01, paragraph 8.05, and staff rule 5.06. Staff rule 7.01, paragraph 8.05, as it then provided, stated:

"The Director, Personnel Management Department, or a designated official, *shall seek to place the staff member in another position among existing or known prospective vacancies in his type of appointment within the Bank Group, the duties of which are commensurate with his qualifications*, or for which he can be retrained in a reasonable period of time, as provided in paragraph 8.06. *Placement may also be offered in a vacant lower-level job for which the staff member is qualified and which he is willing to accept under rule 5.06*, 'Assignments to lower-level positions.' " (emphasis added)

The Applicant had argued that she was qualified for, and that she should have been offered, pursuant to staff rule 7.01, paragraph 8.05, and staff rule 5.06, any of the three new positions in the London Office or, at least, the lower-graded position of Junior Staff Assistant. The Tribunal had already addressed the Applicant's claim that she should have been selected for the Program Assistant position. With respect to the other two positions, of Communications Consultant and Junior Staff Assistant, the Tribunal found that the decision not to reassign the Applicant to either of them was within the discretion of her new supervisor. It found, however, that his discretion had not been exercised reasonably in not offering the Applicant the Junior Staff Assistant position.

Although neither staff rule 5.06 nor staff rule 7.01, paragraph 8.05, imposed an obligation on the Respondent to place a staff member in another position and, particularly, in a vacant lower-level position, they did impose an obligation on the Respondent to make an effort to place the staff member in existing or known prospective vacant positions for which he or she was qualified. This implied an obligation at the least to notify the staff member of the existence of such a vacancy and to permit her to apply for it. Although the Respondent had assisted the Applicant generally in her attempts to secure alternative positions, it had failed to offer her the immediate vacant position of Junior Staff Assistant in her unit. That, in the view of the Tribunal, was the only way in which the Respondent could have demonstrated that it had genuinely tried to find the Applicant an alternative position for which she was qualified, and to ensure that it had fulfilled its duty to make an effort to place her in such a position or at least to give her an opportunity of being considered for one. Whether the Applicant was finally selected or would have accepted an offer to occupy an alternative position was not material.

In the present case, as the Tribunal pointed out, the Applicant had neither been notified of the existence of, nor offered, any of the other positions created in the London Office and, in particular, that of Junior Staff Assistant. The Communications Consultant position required professional experience in media and public relations, skills which the Applicant apparently did not have. Thus, the Respondent had been justified in not offering it to her. The Junior Staff Assistant position, however, was an entry-level position and its duties consisted of "reception and telephone (*general plus PIC*); word-processing and graphics workstation support, especially for communications consultant; routine office clerical and accounting functions; assistance with arrangements for meetings and events; assist visiting Bank staff (emphasis added). In the opinion of the Tribunal, those were some of the duties which the Applicant had performed in the past fully satisfactorily and which she was more than qualified to perform at the time of the redundancy of her employment.

For the above reasons, the Tribunal decided that the Respondent should pay the Applicant compensation in the amount of US$ 40,000 net of taxes and $3,000 in costs and expenses.

2. Decision No. 188 (15 May 1998): Singh v. International Bank for Reconstruction and Development[30]

Termination based on unsatisfactory performance—Evaluation of staff performance is a discretionary decision—Protections under staff rule 7.01—Interpersonal relations cannot be ignored in performance evaluation—Abuse of discretion regarding performance evaluation—Difference between unsatisfactory performance based on professional incompetence and unsatisfactory performance based on questions of personal relations—Question of remedies

The Applicant joined the Bank in 1973 as a Research Assistant and made a successful career while working mostly in the Africa Region. She was promoted to levels 21 and 22 and during the 1990-1991 evaluation she was cleared for promotion to level 23. In 1993, she was invited to join the Africa-Western Africa Department, Country Operations Division (AF4CO), also within the Africa Region, where she was assigned the responsibility of task-managing various Sierra Leone missions in 1993-1994, in particular, a Judicial and Legal Reform Project ("Sierra Leone Project") and an Agriculture Sector Support Project. Until she joined AF4CO, she had received fully satisfactory merit awards, although remarks were made in her 1992-1993 Performance Review Record (PRR) and earlier exchanges about difficulties she had had with team membership and with her need to enhance her interpersonal skills.

In AF4CO, the Applicant continued to have problems with interpersonal relationships and the PRR for 1993-1994 was critical of the Applicant's interpersonal skills, an aspect that was identified as affecting her performance, and as a result of that evaluation she was placed, on 14 June 1994, in a performance effectiveness plan. Subsequently, both the Senior Country Officer for Ghana and the new Division Chief both requested her removal from the Department, invoking problematic interpersonal skills and unsatisfactory performance related thereto. The notice of termination was issued on 17 August 1995, and the Applicant appealed, claiming she had been terminated on grounds of redundancy, with the Respondent arguing that her termination had been based on poor performance.

In that regard, the Tribunal noted that the notice of termination had been issued on the ground that "there were no good prospects for satisfactory performance within the African Region", or elsewhere in the Bank Group.

The Tribunal had recognized in many cases that the evaluation of staff performance was a discretionary decision within the powers of the Respondent's management (Lopez, Decision No. 147 (1996); Romain (No. 2), Decision No. 164 (1997)), as it also had recognized that such evaluation "may refer not only to the technical competence of the employee but also to his or her character, personality and conduct generally, insofar as they bore on ability to work harmoniously and to good effect with supervisors and other staff members" (Matta, Decision No. 12 (1983)).

In the view of the Tribunal, there were many valid reasons for the Respondent to have evaluated the Applicant as a poor performer given her interpersonal difficulties and the manner in which that affected the work of the Division. The Tribunal also was satisfied that there had been no improper motives underlying such negative assessments. The allegation of the Applicant that they were in retaliation for her views and complaints on the projects undertaken did not find support in the facts of the case, particularly as her problems had surfaced much earlier than the projects mentioned.

However, the Tribunal also noted that the Respondent had mismanaged the handling of this matter in several important respects.

The first serious flaw related to the application of staff rule 7.01, paragraph 11.02, which provided that the Bank terminate the appointment of a staff member for unsatisfactory performance. The Applicant had argued, and the Respondent had admitted, that she had never been placed under the rule. In fact, as the Tribunal observed, the performance effectiveness plan issued for her on 24 June 1994 had not invoked any rule in particular. Moreover, the Management Review Record of 8 July 1994 had expressly provided that if the Applicant did not improve her performance under the effectiveness plan, only then "would [she] be placed on a formal monitored performance plan in accordance with staff rule 7.01, section 11, Unsatisfactory Performance". Such a formal monitored performance plan had never been prepared and therefore some of the guarantees established under the rule had not been observed. While it was true, as the Respondent argued, that adequate warning about the Applicant's performance had been amply and timely given and that the necessary feedback had been provided to her, pointing out repeatedly the problem of interpersonal skills and how to improve them, the fact remained that she had never been formally placed on a monitored performance plan and that no warning of termination had been issued to her in that connection.

The Respondent had argued that, despite the absence of a final warning, "the procedures followed were nonetheless adequate and reasonable, and satisfied the requirement of due process". However, as the Tribunal noted, if a staff member was not formally placed under staff rule 7.01, paragraph 11.02, there could be no basis on which the staff member could know clearly where the process was leading. In the present case, the possibility of termination had not been mentioned either in writing or in any other way. The Respondent argued that the application of staff rule 7.01, paragraph 11.02, would in any event have been useless because the Applicant's performance continued to be problematic under the performance effectiveness plan. That argument was not tenable and, even if factually correct, could not be substituted for the application of a staff rule. Although staff rule 7.01, section 11, had been invoked subsequently, at the time when the process of removing the Applicant from the Division began to unfold, that could not ensure the adequate handling of the process as a whole.

With respect to the 1994 PRR, while the Applicant had emphasized that that evaluation had been biased and that the information favourable to her performance had been suppressed by the Division Chief and other officials, the fact remained that, although there were on occasion positive references to her performance, the issue of interpersonal difficulties was again present at all times. In the view of the Tribunal, just because the Applicant's performance on the technical level might have been considered adequate in some evaluations did not necessarily mean that bad interpersonal relations should be ignored. It was for that reason that when the Ghana Parliamentary Project had been discontinued, the Division Chief had come to the conclusion that there was no work programme matching the Applicant's skills, a situation which, contrary to what the Applicant argued, was not related to redundancy. It also was on that basis that the Applicant had first been informed that she would not be given a satisfactory performance evaluation and why, in the 1994 PRR, she had been considered "ineffective in all aspects of working with others".

In the opinion of the Tribunal, even though the Respondent's evaluation of the Applicant's interpersonal skills was correct, there nonetheless had been mismanage-

ment with respect to some of the procedures that were followed. No supplementary evaluation from the former Division Chief who had worked with the Applicant during most of the six-month period of the performance effectiveness plan had been requested by the Respondent. Such a supplementary evaluation could have provided broader input for the process leading up to the 1994 PRR. A complaint made by the Applicant regarding misconduct of her former Division Chief in connection with the 1993-1994 PRR had apparently been dismissed by the Ethics Officer on the basis that there were insufficient grounds to pursue an investigation, but that dismissal had not been documented and the Applicant was not so informed until after she had been terminated. The Tribunal also noted that the Management Review Record of 8 July 1994 had specifically decided that it was for the Management Review Committee to judge the Applicant's performance in January 1995, a decision that was not complied with, thus leaving the normal PRR as the sole basis for evaluation. As the Tribunal pointed out, because the matter was serious and affected a competent staff member who had worked for the Bank for many years, it was evidently recognized that it was desirable that decisions be kept at a high managerial level, an objective that had not been achieved.

The Tribunal further noted that the timetable followed in the preparation of the 1994 PRR was open to question. As the Applicant had argued, that PRR had not been finalized until after her removal had been decided and the notice of termination issued. While some delays might be explained by requests made by the Applicant herself, it was not right to reach the decision of termination without the complete PRR. The Management Review had followed the completion of the PRR. Moreover, in the present case, the fact that both the Department Director and the Division Chief had been part of the Management Review Group could be seen as adversely affecting the necessary transparency and impartiality of the process, since both officials had requested the Applicant's removal before the PRR had come to be considered by the Management Review Group.

The Tribunal had held in a previous case:

> "Two basic guarantees are essential to the observance of due process in this connection. First, the staff member must be given adequate warning about criticism of his performance or any deficiencies in his work that might result in an adverse decision being ultimately reached. Second, the staff member must be given adequate opportunities to defend himself." (Samuel-Thambiah, Decision No. 133 (1993)).

As the Tribunal observed, the paradox of the present case was that the Applicant had had more than adequate warning on most issues, except termination, and many opportunities to defend herself—the voluminous correspondence and documentation of the record speaking for themselves—but the mismanagement of the procedures followed had resulted in a disregard for due process. Staff rules were not written for the sake of formality but precisely to secure an orderly process that would be fair and ensure that the staff member affected could feel that his or her case had been properly considered. Even if the Respondent was in substance right about the decision that it had taken with respect to the Applicant, its departure from the relevant rules amounted to an abuse of its discretion.

In the Tribunal's view, a third problem area concerned the payments and benefits associated with the Applicant's separation from the Bank. In spite of the fact that the Applicant had completed 22 years of service with the Bank and that she had reached the age of 49, the Respondent decided at first that her termination would

be made without any severance payments. As the Tribunal recalled, while it was true that staff rule 7.01, paragraph 11.04, provided that a staff member separated for reasons of unsatisfactory performance was not entitled to severance payments, it also was true that the same rule allowed for exceptions taking into account the circumstances of the case. On that point, it was appropriate to make a distinction between unsatisfactory performance based on professional incompetence and unsatisfactory performance based on questions of personal relations. The two situations were different in nature. Given the circumstances of the case, it would not have been unreasonable for the Bank to have had recourse to the exception at the outset. Such recourse would in any event have been limited to 50 per cent of the amount that would have been payable to the Applicant had her employment been terminated on grounds of redundancy. But the fact that the Respondent had not applied the exception did not appear to have been related to improper motive, retaliation or vindictiveness, as the Applicant believed, but simply to a rather mechanical application of the rule. As the Tribunal observed, the situation had been partly corrected in the administrative review concluded on 4 December 1995.

The Applicant had pursued her claims before the Appeals Committee. That body had concluded on 11 December 1996 that the Applicant should have been declared redundant and had recommended, among other things, separation on those grounds with all associated benefits, including special leave and career search assistance. The Vice-President for Human Resources, by a letter to the Applicant of 3 February 1997, accepted the recommendations of the Appeals Committee "to the extent that it provided you the severance payments that you would have received had you actually separated on grounds of redundancy". As the Tribunal observed, that did not mean that the ground for separation had been changed, but only that the Applicant's severance payments would be made equivalent to those under redundancy as the standard of measurement. The Applicant was thereby entitled to receive the 22.5 months' net salary as a severance payment, from which the 11.25 months' payment already received would be deducted. An additional lump sum was authorized on that basis. The total of both severance payments was US$ 119,268.74.

The Tribunal turned to the question of remedies. The Respondent had argued in that connection that in granting the additional severance payment recommended by the Appeals Committee there had been adequate compensation to the Applicant for some of the procedural flaws discussed above, notably the fact that she had not been dealt with under staff rule 7.01, section 11. However, in the view of the Tribunal, the disregard for due process and abuse of discretion resulting from the mismanagement of the case went wider than the fact that the Applicant had not been dealt with under staff rule 7.01, section 11. Since it was most unlikely that the final outcome would have been different if the appropriate procedures had been followed, the quashing of the decision to terminate the Applicant's employment, as requested by the Applicant, was not a realistic option. Moreover, the possibility that the Respondent could reinstate the Applicant must be ruled out in the light of the circumstances of the case. The Tribunal concluded that the appropriate remedy in the present case was an award of compensation to the Applicant for the intangible damage which she had suffered as a result of such mismanagement, to be paid in addition to the severance payments already received.

For the above reasons, the Tribunal decided that the Respondent should pay the Applicant compensation in an amount equivalent to three months' net salary in addition to the severance payments made, and $6,418 in costs and expenses.

3. Decision No. 197 (19 October 1998): Rendall-Speranza v. International Finance Corporation[31]

Complaint of sexual harassment—Request for anonymity—Definition of sexual harassment—Staff rule 8.01—Nature of investigation phase was administrative and not adjudicatory—Question of irregularities during investigation phase—Credibility of victim—Question of actions amounting to sexual harassment—Other improper behaviour giving rise to compensation for the victim—Staff rule 4.02 on probation and staff rule 7.01 on ending employment—Question of a hostile working environment

On 26 September 1992, the Applicant accepted an appointment as a level 23 Investment Officer with Division I of the International Finance Corporation, and pursuant to the World Bank Staff Rules, her appointment was subject to a probationary period.

Upon joining the Corporate Finance Services Department, the Applicant was assigned to work on an advisory mandate in Slovenia, which included work on the Tomos project. The Applicant began to complain in late 1992 that she was not being given interesting assignments, that her competence was not being recognized and that the work she was being asked to perform was beneath her level. The Applicant thereafter discussed reassignment opportunities with the Director, Personnel and Administration for IFC, at which time, according to the Director and others, the Applicant expressed a preference for her transfer to the Europe Department in IFC.

In an initial interim evaluation of the Applicant's performance dated 26 May 1993, the Applicant's supervisor in Corporate Finance Services (the Manager of Division I) indicated that the Applicant's assignment on the Tomos project "did not go smoothly". The Applicant's supervisor was critical of the Applicant's interpersonal, analytical and computer skills. The Applicant challenged the initial interim evaluation of her performance, asserting that it was "totally biased and unfair". Following a meeting with the Applicant, the Manager of Division I submitted, on 11 June 1993, a revised interim evaluation of the Applicant's performance. While that evaluation was less critical of specific aspects of the Applicant's performance, the Manager stated in the revised evaluation that "management felt that she needed more clarification on her responsibilities than I had considered necessary for someone of her age and experience".

The Applicant was subsequently transferred to Division I of the Europe Department, effective 28 July 1993, and her probationary period extended to 30 June 1994. During January 1994, the Division Manager's interim evaluation of the Applicant was critical of the Applicant's performance and of her interpersonal relations, and in a note dated 13 May 1994, to the Director of the Europe Department, the Division Manager complained about the Applicant's delay in completing an assignment and suggested that she be told by the end of May that she would not be confirmed.

In a letter dated 9 June 1994, to the Executive Vice-President of IFC, the Applicant requested an appointment "at the suggestion of the Ombudsman" to "describe a sequence of unprofessional behaviours" which, she claimed, had jeopardized her "professional and personal objectives in IFC".

By a memorandum dated 20 June 1994, to the Director of the Europe Department, the Division Manager of Europe Division I provided a detailed and highly critical final appraisal of the Applicant's performance. His evaluation con-

sisted of a critique of the Applicant's assignments in the Department and a negative assessment of the Applicant's professional and interpersonal skills. It was again his recommendation that the Applicant not be confirmed.

On 24 June 1994, pursuant to the Applicant's request of 9 June 1994, the Executive Vice-President of IFC met with the Applicant to discuss her allegations of unprofessional behaviour. At the time, the Applicant described purported instances of sexual harassment on the part of the Director of the Europe Department.

On 27 July 1994, the Applicant submitted to the Ethics Officer a formal complaint of sexual harassment, "including physical assault and battery", against the Director of the Europe Department. In her complaint, the Applicant presented a detailed chronology of events from early 1992 to May 1994, in which she included allegations of inappropriate behaviour and comments and instances of alleged sexual harassment all on the part of the Director of the Europe Department, beginning with the recruitment process. An underlying theme of her complaint was that the decision not to confirm her was a product of the Director's adverse reaction to her denial of his advances. Among other things, the Applicant asserted that the Director of the Europe Department had arranged for her to be transferred to his Department. She further described many lunch, dinner and other social outings with the Director, during which time he had allegedly prompted personal discussions, pursued her and made unwanted and forcible sexual advances. In explaining why she had continued to accede to requests of the Director to accompany him on such outings, the Applicant stated that he had generally presented a business excuse and that, because he was her Department Director, the refusal of such "overtures" might have affected her career. Throughout her complaint, she listed dates, places and times to corroborate her allegations and indicated that there were a number of different witnesses to the social outings, the phone calls and to the Director's pursuit of her. In that respect, she provided a suggested list of 12 witnesses and a list of questions to put to the witnesses.

In September 1994, an independent investigation was initiated by a Senior Vice-President, and she had concluded that sexual harassment had not taken place.

On 26 January 1995, a management review meeting took place to discuss the Applicant's confirmation. The management review group consisted of the Vice-President for Operations of IFC, the Europe I Division Manager and the Director of Personnel and Administration. A staff member of Corporate Finance Services also attended to comment on certain aspects of the Applicant's response. The substance of the review was included in a memorandum to the Applicant, dated 13 March 1995. According to the memorandum, the review members had undertaken a detailed discussion of the Applicant's performance and experience and had concluded, without dissent, that the Applicant's confirmation should be denied.

The Applicant filed an appeal with the Appeals Committee, which concluded in its report dated 28 June 1996 that while there had been no abuse of discretion with respect to the decision not to confirm the Applicant, the conduct of the Director of the Europe Department could "only be characterized as one unbecoming a manager" and was at odds with Bank Group policy embodied in the document *Preventing and Stopping Sexual Harassment in the Workplace*. In the light of its conclusions, the Committee recommended that the sexual harassment investigation be reopened in order to hear testimony relevant to the Applicant's credibility and that all other requests made by the Applicant be denied.

On 25 July 1996, the Vice-President for Human Resources accepted the Committee's recommendations and requested the independent investigator to re-

open the investigation into the Applicant's complaint of sexual harassment against the Director of the Europe Department. The Vice-President for Human Resources requested the independent investigator to interview the 16 witnesses identified by the Applicant's attorney. She further provided the independent investigator with the earlier terms of reference and with the pertinent positions of the Applicant's attorney's letter of 6 January 1995.

Notwithstanding objections raised by the Applicant regarding the proposed procedure, the independent investigator conducted a subsequent investigation in which she interviewed 14 witnesses. In a supplemental report submitted on 23 December 1996, she concluded: (*a*) "certain credibility issues were not affected by the additional witnesses"; (*b*) "no new witness rehabilitated" the Applicant's credibility on events and the evidence cited in the first report demonstrated "an intent to fabricate on her part"; (*c*) the initial report had "accurately recounted witness testimony"; and (*d*) the additional witnesses "undercut" rather than corroborated the Applicant's testimony. The Applicant was provided with a copy of the report, and informed by the Vice-President for Human Resources that the evidence presented did not warrant a finding of misconduct on the part of the Director of the Europe Department.

The Applicant submitted her application to the Tribunal on 2 September 1997, requesting anonymity; however, the Tribunal denied that request on the ground that it was not satisfied that the publication of her name was highly likely to result in grave personal hardship to her.

The Tribunal considered that the central issue in the case was the Applicant's complaint that she had been subjected to sexual harassment by her Director, and that the Respondent had failed to discharge its obligation to protect her from such harassment. That alleged failure was principally, according to the Applicant, through the Bank's acceptance of the findings and recommendations of an outside investigator, who had interviewed witnesses and produced two reports that concluded that sexual harassment had not taken place, and through the Bank's resulting decision not to impose disciplinary measures against the Director.

As the Tribunal observed, the Bank had made the prevention and eradication of sexual harassment of its staff members an important part of its personnel policy. In a Bank document issued in September 1994, entitled *Preventing and Stopping Sexual Harassment in the Workplace*, sexual harassment was defined as: "any unwelcome sexual advance, request for sexual favour or other verbal, non-verbal or physical conduct of a sexual nature which unreasonably interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment." Although that definition had been promulgated after the incidents under consideration in the present case, the definition was consistent with similar definitions adopted in both international jurisprudence (see, e.g., *Belas-Gianou v. Secretary-General of the United Nations*, Judgement No. 707 (28 July 1995), referring to "Procedures for dealing with sexual harassment", United Nations document ST/AI/379 dated 29 October 1992; and *In re Abreu de Oliveira Souza*, ILOAT Judgement No. 1609 (30 January 1997), referring to "Sexual harassment policy and procedures", ILO Circular No. 543, dated 2 November 1995) and domestic jurisprudence and all parties had presented their case on the assumption that the definition was appropriate. The Tribunal found that the definition provided a reasonable criterion for the purpose of deciding the present case.

Since the Bank clearly acknowledged that it had an obligation to protect its staff members from harassment, that protection became a part of the staff members'

conditions of employment and terms of appointment, which was thus enforceable by the Tribunal. The Bank had, within its discretion, concluded that the appropriate way in which to implement its obligations was to afford certain procedures to its staff members who complained about the harassing behaviour of other staff members. The mechanism provided by the Bank was the mechanism that was provided more generally in the staff rules relating to disciplinary measures. Those rules provided for the filing of a formal complaint on the basis of which an investigation was to be undertaken into the alleged misconduct.

The Applicant had complained that the Bank had failed to respond in a timely fashion to her sexual harassment claim. The Tribunal, however, observed that the record did not support her claim, and that, noting that because staff rule 8.01, paragraph 5.02, required the provision of "supporting evidence of the alleged behaviour" before initiating a formal investigation, the Ethics Officer had requested the Applicant to provide him with the details relating to her complaint of sexual harassment. But once the Bank had obtained the required evidence, an independent investigator had been selected and had begun her investigation—less than two months after the Applicant had filed a formal and particularized complaint with the Ethics Officer.

The Applicant also complained of procedural irregularities during the investigatory phase. In that regard, the Tribunal noted that in order to assess whether the investigation had been carried out fairly, it was necessary to appreciate the nature of the investigation and its role within the context of disciplinary proceedings. After a complaint of misconduct was filed, an investigation was to be undertaken in order to develop a factual record on which the Bank might choose to implement disciplinary measures. As the Tribunal pointed out, the investigation was of an administrative, and not an adjudicatory nature. It was part of the grievance system internal to the Bank. The purpose was to gather information, and to establish and find facts, so that the Bank could decide whether to impose disciplinary measures or to take any other action pursuant to the Staff Rules. The concerns for due process in such a context related to the development of a fair and full record of facts, and to the conduct of the investigation in a fair and impartial manner. They did not necessarily require conformity to all the technicalities of judicial proceedings.

The Tribunal noted that the Bank had set down the investigator's terms of reference in detail; on her part, the investigator had sent a letter to the parties so informing them, and informing them as well of the general procedures by which the investigation was to be conducted. The record showed that the investigator had given both sides, the Applicant and her Director, ample opportunity to be heard, and an equally ample opportunity to try to corroborate their respective versions of the events by proposing large numbers of witnesses who they believed would support and lend credibility to their conflicting interpretations of the facts.

The Applicant and her Director had had access to each other's transcript, but the Applicant complained of lack of comparable access to the transcripts of the other interviewed witnesses. Staff rule 8.01 ("Disciplinary measures"), however, as pointed out by the Tribunal, did not obligate the Bank to provide staff members with such transcripts. It was partly on that basis, and in order to maintain the confidentiality of the testimonies provided by the Bank, that the Tribunal, on 15 May 1998, denied the Applicant's request for the transcripts of the witnesses.

The Applicant criticized the Bank's hasty decision of 10 January 1995 to accept the investigator's first report, only four days—including a weekend—after re-

ceiving a 42-page rebuttal of the report by the Applicant's then attorney. It may be recalled that the Appeals Committee had concluded that the Respondent's action "was unreasonable, arbitrary and constituted an abuse of discretion" and that, rather than accept the report at face value, further inquiry should have been undertaken by the Bank. The Vice-President for Human Resources had indeed agreed to "give effect to the Committee's recommendation as expeditiously as possible", and the investigator thereupon had undertaken an extended set of additional interviews and prepared a second report. The Tribunal shared the view of the Appeals Committee that the Bank's initial endorsement of the first report was indeed hasty. The Bank purported to place very high priority upon the elimination of sexual harassment and protection of its staff members from such harassment. Because the criticisms directed by the Applicant's attorney against the first report were extensive and detailed, it was incumbent upon the Respondent to give such criticisms its most serious consideration. The Tribunal concluded, however, that that shortcoming had been remedied by the Bank's acceptance of the Appeals Committee recommendation that the investigation should be reopened "in order to hear testimony relevant to establishing Appellant's credibility".

The fact that the investigation had been reopened and supplemented only upon the recommendation of the Appeals Committee did not, in the opinion of the Tribunal, however, alter the inconsistency noted between the policy forbidding sexual harassment and the actual implementation of that policy in the present case, which, among other things, had caused unnecessary delay to the Applicant in the resolution of the matter.

As the Tribunal noted, it was undisputed that the Applicant's Director had engaged in a number of social behaviours of a questionable character towards the Applicant, including dinner invitations, discussions of his personal and marital problems, visits to her home and to the countryside, and personal touching (which the Director characterized as minor and innocent); those attentions towards her had begun as early as the time of her recruitment and continued over a period of several months. The principal conflict, in the view of the Tribunal, in the Applicant's and the Director's versions of the events related to such matters as the frequency of the meetings, the intensity of the personal discussions, the frequency and nature of the physical contacts, her resistance to his advances and the like. It was the conclusion of the Tribunal that there was clearly sufficient evidence to substantiate the findings of the investigator, so that it was not an abuse of discretion for the Bank to endorse those findings.

The conclusions of the investigator had been set forth in two reports in a manner that was detailed and thorough. As the Tribunal observed, to some extent they had been based upon a general sense on the part of the investigator that the Applicant was not a credible person and that she was given to exaggeration and even to fabrication. But her resolution of those conflicts of credibility had been based on much more particularized circumstances and inferences. They included: internal inconsistencies within the Applicant's own testimony, the failure of third-party witnesses (typically named by the Applicant as presumably favourable to her) to corroborate her version of important events, contrary and factually precise testimony by the Director, the testimony of fellow staff members that they had encouraged the Applicant to distance herself from the Director and his advances but that she had belittled their advice and stated her disinclination to do so, and on the fact that the Applicant had insisted on continuing to work in the Director's Department even when she was given an opportunity to transfer elsewhere.

As observed by the Tribunal, the investigator, in doubting the Applicant's claim of sexual harassment, placed weight on the fact that the Applicant had failed to protest to the Bank about any such harassment for nearly two years after it had allegedly begun and then only after the Applicant had first learned of the imminent negative performance evaluations and of the recommendation that her appointment not be confirmed. That obviously suggested to the investigator that the harassment charges were pretextual. Supporting that inference, in the view of the investigator, was the Applicant's initial proposal for discussions of a financial settlement. The Tribunal appreciated that delay in reporting instances of harassment might be explainable for reasons other than that the victim had welcomed the sexual advances. As the Tribunal pointed out, there might be strong pressures not to make even a well-based complaint, such as fear that one would be branded as a troublemaker, a fear that one's image for ethical probity might become tarnished, uncertainty about the definitions in the employer's policy or the commitment to its implementation, a wishful belief that the victim could handle the matter herself without creating undue inconvenience or embarrassment to others, and ultimately perhaps by a fear of retaliation by the harassing party. The fact that the investigator treated the Applicant's delay in calling the matter to her superior's attention as a relevant matter did not, however, vitiate her overall conclusion. It was not unreasonable for her to treat it as a part of a large picture pointing towards doubt about the Applicant's credibility.

In the view of the Tribunal, even apart from any conflict in the testimonies, which had been resolved by the investigator adversely to the Applicant, if the testimony of the Applicant were accepted as fully credible it still failed to show that she had unequivocally rejected the advances of her Director. Even according to the Applicant's own version of the facts, she had not given an unmistakable signal that those advances were unwelcome. The record in fact showed that:

(*a*) The Applicant had continued to call upon her Director and to receive his calls on several occasions followed by accepting his invitations to go outside the Bank for drinks, lunches, dinners and other meetings of a social nature, totally unrelated to her work with IFC;

(*b*) Her expressions of rejection and unwelcomeness had been limited to those advances that were of a clear physical and sexual nature. That behaviour could create an impression that the Applicant was receptive to advances of lesser degree. Typical of that ambivalent expression of non-acceptance was her reaction to an incident that had taken place, according to her, on 28 June 1993, when her Director allegedly kissed her forcibly while outside her house waiting for a taxi to take him to his home. When he called her the next day to thank her for the dinner, he invited her to lunch—and she accepted. Again in July 1993, that is, less than a month after the 28 June incident, she claimed that he had kissed her forcibly while they were in her car, and that her only response was to say that she was "really not in a frame of mind for this";

(*c*) The Tribunal concluded that such ambivalent reactions, coupled with continued acceptance of an intimate social relationship unrelated to their work, did not support the claim that the Director's advances had been completely unwelcome and that a clear message of rejection had been conveyed to the alleged harasser. Moreover, according to the record, the Applicant had either asked to be transferred, or had not raised an objection to being transferred, to the Europe Department where her new Director was none other than her alleged harasser. In the view of the Tribunal, that cast doubt on the seriousness of the Applicant's efforts to put an end to the intimate social relationship between her and her Director.

The Tribunal, recalling the Bank's definition of "sexual harassment"—"any unwelcome sexual advance, request for sexual favour or other verbal, non-verbal or physical conduct of a sexual nature which unreasonably interferes with work, is made a condition of employment, or creates an intimidating, hostile or offensive environment"—noted that the independent investigator had concluded that whatever the nature of the advances on the part of her Director, the Applicant had not made it clear that they were unwelcome and that the Director had not committed sexual harassment. Furthermore, the Bank endorsed those conclusions and the Tribunal concluded that the evidence justified the Bank's decision.

The Tribunal also concluded, however, that the determination by the Bank that no sexual harassment had been committed should not have been regarded by the Bank as putting an end to the matter. There were forms of improper behaviour, even though falling short of sexual harassment, that should engage the attention of the Bank and require action on the part of its management. The Tribunal was troubled by the inappropriate conduct acknowledged by the Director and the failure of the Bank to react to such behaviour described by the Appeals Committee as "unbecoming a manager". In the publication entitled *Preventing and Stopping Sexual Harassment in the Workplace*, the Bank emphasized that managers had a primary responsibility in "establishing the tone for a healthy working environment". Among the steps outlined by the Bank to achieve that goal was included: "setting a good example—avoiding even the appearance of improper conduct".

As the Tribunal pointed out, the record indicated that the Director not only had failed to avoid "the appearance of improper conduct" but indeed had actively engaged in conduct falling short of what was expected and required from a manager responsible for the implementation of the Bank's policies. Examples of such behaviour included frequently meeting with the Applicant outside the office, engaging in—many times at his own initiative—an intimate social relationship and raising sensitive personal issues with the Applicant. Also of concern to the Tribunal was the extent to which such improper relationship was known to other staff members.

It was not by any means the intention of the Tribunal to inhibit healthy personal and professional relationships among staff members and the promotion of a congenial atmosphere in the workplace. The Tribunal was of the view, however, that the conduct of the Applicant's Director had crossed the line separating friendly congenial relationships from improper behaviour, thereby subjecting the Applicant to stress, confusion and other intangible injury. The Tribunal found that the Bank's failure to recognize the impropriety of such behaviour and the need to protect the Applicant entitled her to compensation. The assessment of such compensation must, however, take into account the fact that the Applicant herself had contributed to the continuation of the Director's conduct of which she was complaining.

As to the Applicant's contention that the Bank's decision not to confirm her in her position was an abuse of discretion, the Tribunal, in assessing the Bank's decision, referred to staff rule 4.02, dealing with "Probation". Paragraph 3.01 of that rule, as it was then in effect, stipulated that "if a staff member is considered not suitable for continued employment with the Bank Group, the manager responsible for the position shall recommend to the management review group that the staff member's appointment not be confirmed and that his employment be ended. The management review group shall, after reviewing the manager's recommendations, submit its recommendation to the staff member's department director or vice-president".

The same rule was confirmed by staff rule 7.01 on "Ending employment", which provided in paragraph 6.02 that "the Bank Group may terminate the appointment of a staff member which has not been confirmed, during or at the end of probation as provided in rule 4.02, 'Probation'". The Tribunal adhered to its previous ruling to the effect that the determination of whether a staff member's performance was satisfactory was a matter for the Respondent to decide, and that the Tribunal would not substitute its own judgement in that respect for that of the Respondent, but would examine only whether there had been arbitrary, unreasonable or discriminatory actions. (Saberi, Decision, No. 5 (1981); Suntharalingam, Decision, No. 6 (1981)).

It was evident to the Tribunal from the above series of evaluations of the Applicant's performance that several weaknesses had been consistently identified and brought to her attention, both before and after she had filed her complaint of sexual harassment in June 1994. It might be true, as the Applicant contended, that the kind of work assigned to her in Corporate Finance Services had not been a good choice for her, taking into consideration the nature of her previous experience in the private sector and the fact that there had not been enough work for her to do in Corporate Finance Services. The fact remained, however, as pointed out by the Tribunal, that she had been given more than one opportunity to improve her performance and to prove her ability to produce satisfactory work in two other departments. Against such a record of unsatisfactory performance, it could hardly be alleged that the decision of the Respondent to deny the Applicant's confirmation in her employment constituted an abuse of discretion. The Tribunal concluded that the allegation was unsubstantiated by the record, and the Respondent's decision not to confirm the Applicant in her position should therefore stand.

Regarding the claim of a hostile work environment (note the Bank's definition of sexual harassment mentioned above), the Tribunal found, in the light of the consistently unsatisfactory performance of the Applicant, that there was no support for the contention that had it not been for the unhealthy working atmosphere resulting from the improper behaviour of her Director, she could have produced satisfactory work. Her performance shortcomings as shown by the evaluations derived essentially from her lacking certain basic skills and experience. The Tribunal therefore rejected the Applicant's contention.

For the above reasons, the Tribunal decided that (*a*) the request to rescind the decision of the Vice-President for Human Resources concerning misconduct under staff rule 8.01 in respect of sexual harassment should be denied; (*b*) the Respondent should pay to the Applicant US$ 50,000 net of taxes; and (*c*) the Respondent should pay to the Applicant legal costs in the amount of $10,000.

D. Decisions of the Administrative Tribunal of the International Monetary Fund[32]

JUDGEMENT NO. 1998-1 (18 DECEMBER 1998): MS. "Y" V. INTERNATIONAL MONETARY FUND[33]

Receivability of claim—Statutory requirement of exhaustion of administrative remedies—Importance of producing a detailed factual record for consideration by Administrative Tribunal

The Applicant had been employed with the Fund since 1971 and was promoted to a professional position in 1983. In 1987, after she appealed her job grade, she was promoted to grade All, which grade she still held in 1995, when the position was abolished. Following the merger of two departments, the position of which she was incumbent was abolished effective 1 May 1995. The Applicant was advised of the options available to her under the Fund's policy governing abolition of posts. In accordance with that policy, efforts were made over a six-month period to find her an alternative position. In addition, on an exceptional basis, arrangements were made for her to be assigned to a Temporary Assignment Position in Department No. II for an initial period of 10 months, from 2 January 1996 to 31 October 1996. This was later extended for an additional four-month period through the end of February 1997. The position was later extended for an additional four-month period through the end of June 1997. The Applicant's selection for the Temporary Assignment Position effectively suspended the 120-day notice period and separation leave provided under the separation policy, and served as a bridge to the time when the Applicant would be eligible for an early retirement pension and provided her with continuous access to the Fund's health insurance.

On 28 August 1996, the Director of Administration had issued a memorandum to the staff announcing guidelines for the review of individual cases under an ad hoc discrimination review procedure, inviting persons who felt that their careers might have been affected by discrimination to request a review of their individual case. In response to that memorandum, on 30 September 1996, the Applicant requested a review, on the grounds that her Fund career had been adversely affected by discrimination based on profession, gender and age, which she contended had affected the grading of her position and culminated in the abolition of her post.

On 23 December 1996, the Fund informed the Applicant that she was not eligible to participate in the review process, as she would shortly be separating from the Fund on early retirement and any remedial action would be of a forward-looking nature. On 23 June 1997, the Applicant filed a formal grievance with the Grievance Committee in which she contested the decision that she was ineligible to participate in the ad hoc discrimination review process. Shortly thereafter, on 27 June 1997, the Director of Administration advised the Applicant that upon review of the matter she had concluded that the Fund should carry out a review of the Applicant's discrimination claim. Thus, the decision which the Applicant was challenging before the Grievance Committee was reversed, rendering her grievance moot.

The review was conducted by an ad hoc review team appointed by the Fund, consisting of an outside consultant and a senior official of the Administration Department. The team met with the Applicant on several occasions and concluded that there was no evidence to support the allegation that the grading of the Applicant's position or the abolition of her post had been influenced by factors of discrimination. The Applicant was informed of that conclusion and, by letter of 27 January 1998, requested the Director of Administration to conduct an administrative review of the decision.

The Director of Administration replied on 10 February 1998, explaining the basis for the conclusion that no relief was warranted and offering the Applicant an opportunity to meet once again with the review team so that it might further explain the process, and so that the Applicant might raise any new facts or arguments that she might wish to make. She did not take up the offer, but wrote again to the Director of Administration, challenging the nature of the process and repeating her request

for administrative review. On 8 May 1998, the Director wrote to the Applicant's counsel, advising that she had carefully reviewed the investigation carried out by the review team and that she fully concurred with its recommendation. On 7 August 1998, the Applicant filed a complaint with the Tribunal.

In response to the Application, the Fund filed a Motion for Summary Dismissal under rule XII of the Tribunal's Rules of Procedure, on the ground that the applicant had failed to comply with the statutory requirement that an Application might be filed with the Tribunal only after the Applicant had exhausted all available channels of administrative review. The Fund claimed that the application was irreceivable because the Applicant had failed to pursue her challenge to an administrative decision before the Grievance Committee in accordance with the established procedures.

The Applicant contended that the 8 May 1998 letter from the Director of Administration had come at the end of a series of meetings and exchanges of correspondence between the Applicant and the Fund and should at that point be considered as a final decision appealable to the Tribunal. She maintained that the correspondence culminating in the letter "should be considered a final individual decision, and the effective end of the administrative process that Applicant has been pursuing for a period far in excess of one year and which has neither provided Applicant with any of the relief she has requested nor provided verifiable evidence that the procedure was carried out".

In consideration of the case, the Tribunal, citing articles V and VI on admissibility of claims of its statute, observed that the issue before it was whether the ad hoc discrimination review committee constituted an alternative channel of review and hence one not involving the Grievance Committee. In that regard, the Tribunal recalled that Administrative Tribunals of international organizations had emphasized the importance of exhaustion of administrative remedies before recourse to them (see World Bank Administrative Tribunal Decision No. 132 (Rae (No. 2), 1993).

In the view of the Tribunal, the memoranda establishing the ad hoc discrimination review procedure and explaining that it was not meant to be in lieu of, and not meant to obviate recourse to, the Grievance Committee, could have been more explicit. The lack of clarity on the point, in the opinion of the Tribunal—and this was the distinguishing factor in the case—understandably might have led the Applicant to conclude that exhaustion of Grievance Committee channels was not required in her case. However, it was the view of the Tribunal that exhaustion of the remedies provided by the Grievance Committee, where they existed, was statutorily required and that the memoranda in question did not exclude that requirement. Moreover, recourse to the Grievance Committee would have the advantage of producing a detailed factual and legal record which was of great assistance to consideration of a case by the Administrative Tribunal.

The Tribunal accordingly held that the Applicant had not exhausted the channels of administrative review as required by article V of the statute and therefore that the Fund's Motion of Summary Dismissal was granted. Given the singular circumstances of the case, the Tribunal further held, in the event that the Grievance Committee, if seized, should decide that it did not have jurisdiction over the Applicant's claim, that the Administrative Tribunal would reconsider the admissibility of that claim on the basis of the application currently before it.

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[1] In view of the large number of judgements which were rendered in 1998 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 edition of the *Yearbook*. For the integral text of the complete series of judgements rendered by the four Tribunals, namely, Judgements Nos. 868 to 912 of the United Nations Administrative Tribunal, Judgements Nos. 1673 to 1783 of the Administrative Tribunal of the International Labour Organization, decisions Nos. 185 to 204 of the World Bank Administrative Tribunal and Judgement No. 1998-1 of the Administrative Tribunal of the International Monetary Fund, see, respectively: documents AT/DEC/868 to AT/DEC/912; *Judgements of the Administrative Tribunal of the International Labour Organization, 84th and 85th Ordinary Sessions*; *World Bank Administrative Tribunal Reports, 1998*; and *International Monetary Fund Administrative Tribunal Reports, vol. I, 1994-1999*.

[2] Under article 2 of its statute, the Administrative Tribunal of the United Nations is competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members.

The Tribunal shall be open to any staff member of the Secretariat of the United Nations even after his employment has ceased, and to any person who could 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, including such applications from staff members of the International Tribunal for the Law of the Sea.

[3] Deborah Taylor Ashford, Vice-President, presiding; and Chittaranjan Felix Amerasinghe and Victor Yenyi Olungu, Members.

[4] Mayer Gabay, First Vice-President, presiding; Deborah Taylor Ashford, Second Vice-President; and Chittaranjan Felix Amerasinghe, Member.

[5] Hubert Thierry, President; Deborah Taylor Ashford, Vice-President; and Kevin Haugh, Member.

[6] Deborah Taylor Ashford, Vice-President, presiding; and Julio Barboza and Chittaranjan Felix Amerasinghe, Members.

[7] Mayer Gabay, Vice-President, presiding; and Julio Barboza and Kevin Haugh, Members.

[8] Mayer Gabay, Vice-President, presiding; and Chittaranjan Felix Amerasinghe and Kevin Haugh, Members.

[9] Hubert Thierry, President; and Julio Barboza and Victor Yenyi, Members.

[10] Hubert Thierry, President; Julio Barboza and Kevin Haugh, Members.

[11] 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 1998, 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 Organization for the Safety of Air Navigation, the Universal Postal Union, the European Patent Organization, the European Southern Observatory, the Intergovernmental Council of Copper-Exporting Countries, the European Free

Trade Association, the Inter-Parliamentary Union, the European Molecular Biology Laboratory, the World Tourism Organization, the African Training and Research Centre in Administration for Development, the Intergovernmental Organization for International Carriage by Rail, the International Centre 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, the International Service for National Agricultural Research, the Energy Charter Secretariat and the International Hydrographic Bureau. 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.

[12] Michel Gentot, President; Julio Barberi and Jean-Francois Egli, Judges.

[13] Ibid.

[14] Mella Carrol, Mark Fernando and James Hugessen, Judges.

[15] Ibid.

[16] Ibid.

[17] Ibid.

[18] Michel Gentot, President; and Julio Barberis and Jean-Francois Egli, Judges.

[19] Michel Gentot, President; Mella Carroll, Vice-President; and James K. Hugessen, Judge.

[20] Michel Gentot, President; and Julio Barberis and Jean-Francois Egli, Judges.

[21] Michel Gentot, President; and Julio Barberis and James K. Hugessen, Judges.

[22] Michel Gentot, President; and Seydou Ba and James K. Hugessen, Judges.

[23] Michel Gentot, President; and Julio Barberis and Jean-Francois Egli, Judges.

[24] Michel Gentot, President; Mella Carroll, Vice-President; and James K. Hugessen, Judge.

[25] Mella Carroll, Vice-President; and Mark Fernando and James K. Hugessen, Judges.

[26] Ibid.

[27] Ibid.

[28] 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.

[29] Elihu Lauterpacht, President; Francisco Orrego Vicuna and Bola A. Ajibola, Judges.

[30] Ibid.

[31] Robert A. Gorman, President; Francisco Orregu Vicuna and Thio Sumien, Vice-Presidents; and Prosper Weil, A. Kamal Abul-Magd, Bola A. Ajibola and Elizabeth Evatt, Judges.

[32] 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.

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