Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

2004

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

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

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

1. *Judgement No. 1169 (23 July 2004): Abebe* v. *the Secretary-General of the United Nations*[3]

Receivability *ratione temporis*—Waiver of time limits pursuant to rule 111.3 (d) of the staff rules—Appointments under the 200 Series Staff Regulations and Rules in contravention of ST/AI/297[4]—Legal expectancy of renewal—Eligibility to apply and entitlement to a position—Gender parity rules—General Assembly resolution 49/167 of 23 December 1994 and ST/AI/412—Promotion of General Service staff to Professional posts outside the framework of competitive examinations—General Assembly resolution 33/143 of 20 December 1978

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[1] In view of the large number of judgements which were rendered in 2004 by the administrative tribunals of the United Nations and related intergovernmental organizations, only those judgements which address significant issues of United Nations administrative law or are otherwise of general interest have been summarized in the present edition of the Yearbook. For the full text of the complete series of judgements rendered by the tribunals, namely, Judgements Nos. 1164 to 1222 of the United Nations Administrative Tribunal, Judgements Nos. 2271 to 2374 of the Administrative Tribunal of the International Labour Organization, Decisions Nos. 309 to 329 of the World Bank Administrative Tribunal, and Judgement No. 2004–1 of the International Monetary Fund Administrative Tribunal, see, respectively, documents AT/DEC/1164 to AT/DEC/1222; Judgements of the Administrative Tribunal of the International Labour Organization: 96th and 97th Sessions; World Bank Administrative Tribunal Reports, 2004; and International Monetary Fund Administrative Tribunal Reports, Judgement No. 2004–1.

[2] The Administrative Tribunal of the United Nations is competent to hear and pass judgment upon applications alleging non-observance of contracts of employment of staff members of the United Nations Secretariat or of their terms of appointment. In addition, the Tribunal's competence extends to the United Nations Joint Staff Pension Fund (including cases from all specialized agencies that participate in the Fund and which have accepted the jurisdiction of the Tribunal in Pension Fund cases), the United Nations Programmes and Funds, such specialized agencies and related organizations that have accepted the competence of the Tribunal (the International Maritime Organization and the International Civil Aviation Organization), the staff of the Registries of the International Court of Justice, the International Tribunal for the Law of the Sea, and the staff of the International Seabed Authority. For more information about the United Nations Administrative Tribunal and the full texts of its judgements, see http://untreaty.un.org/UNAT/main_page.htm.

[3] Julio Barboza, President; and Omer Yousif Bireedo and Jacqueline R. Scott, Members.

[4] Administrative instructions describe instructions and procedures for the implementation of the Financial Regulations and Rules, Staff Regulations and Rules or Secretary-General's bulletins and are

The Applicant entered the service of the United Nations Economic Commission for Africa (ECA) at the G-5 level, as an English Secretary, on 25 October 1977. Her contract was subsequently extended and, on 1 August 1982, she received a permanent appointment.

On 8 March 1990, the Applicant, who was serving at the G-6 level, applied for the L-1 level post of Project Administrative Officer. On 30 August that year, she was offered a one-year intermediate-term appointment as Acting Project Administrative Officer, at the level L-1, step 1, under the 200 Series of the Staff Regulations and Rules. She was advised that her appointment would be subject to her resignation from her permanent post; accordingly, on 3 September, she resigned from her permanent post and accepted the offer. Thereafter, the Applicant's 200 Series contract was extended several times until she was informed, on 16 January 1996, that her appointment would not be extended beyond 31 January 1996, due to lack of funds.

On 2 April 1996, ECA advised the Office of Human Resources Management (OHRM) that a number of General Service staff members had been given 200 Series appointments for extended periods of time and had been given, or had assumed, career expectations under this Series. On 19 April, OHRM responded that the staff members in question had received 200 Series appointments in contravention of administrative instruction ST/AI/297 and of the delegation of authority to ECA. OHRM suggested that the staff members might be re-employed at the General Service level, if posts were available to accommodate them. On 10 May, the Legal Adviser, ECA, informed the Executive Secretary that the staff members had not been "properly advised as to the consequences of the 200 Series appointment." He continued, "[t]he only remedy I see to this is that on expiry of their present contract[s,] ECA seek exceptional approval to reinstate them in the 100 Series at the [General Service] level they had at the time of the 200 Series appointment."

On 31 July 1996, the Applicant was reinstated at her previous G-6 level with retroactive effect as of 1 February. On 2 August, the Applicant sent an "appeal" against the decision to reinstate her at the General Service level to the Executive Secretary and after extensive correspondence on the matter, she reiterated this request on 7 March 1997. Thereafter, she requested administrative review.

On 11 August 1997, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in New York. In its report of 7 December 1999, the JAB found the case receivable, *ratione temporis*, as exceptional circumstances existed in the case which warranted a waiver of the time limits, pursuant to staff rule 111.3 (d). It found that ECA should have considered the Applicant for promotion to the Professional level in view of her education, performance, and the Organization's goal of increasing the number of women serving at that level, as mandated by General Assembly resolution 49/167 of 23 December 1994 and ST/AI/412. The JAB concluded that the Applicant deserved full and fair consideration for appointment at the Professional level and recommended that the Secretary-General order ECA to make bona fide efforts to find her "a suitable post at the Professional level," in conformity with ST/AI/412. On 10 April 2000, the Applicant was informed that the Secretary-General did not agree with the JAB's conclusions as, pursuant to General Assembly resolution 33/143 of 20 December 1978, the promotion of staff from the General Service category to the Professional category is made exclusively through competitive examination. Accordingly,

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promulgated and signed by the Under-Secretary-General for Administration and Management or by other officials to whom the Secretary-General has delegated specific authority (see ST/SGB/1997/1).

he had decided to take no further action in her case. On 30 April 2002, the Applicant filed her Application with the Tribunal.

In its consideration of the case, the Tribunal agreed with the JAB that the case was receivable, *ratione temporis*. The Tribunal found that the Applicant and the Organization were involved in ongoing communication in an effort to resolve her situation and, whether her request for administrative review was submitted on 21 March 1997, as claimed by the Applicant, or on 13 May 1997, per the Respondent, it fell within the required two-month time limit. Accordingly, the Tribunal proceeded to consider the substantive question of whether the Applicant was entitled to be placed against another Professional post when her 200 Series appointment ended.

The Tribunal recalled that, in ordinary circumstances, given the temporary nature of 200 Series posts; the fact that the Applicant was notified on several occasions that her post was in danger of non-renewal; and, in the absence of an express promise that her contract would be renewed, she would not have a legal expectancy of renewal of her appointment. Despite the fact that the Respondent had admitted his culpability in putting the Applicant in the untenable situation in which she found herself, having resigned her permanent position, the Tribunal found that the Applicant had not provided any evidence that she was given an expectation of a career under the 200 Series. The Tribunal thus concluded that she did not have a legal expectancy to a career under the 200 Series and that the decision not to extend her 200 Series contract was within the Respondent's discretion and was not improperly motivated by prejudice, bias, or other extraneous factors.

Insofar as the Applicant's contention that she was entitled to be placed against a suitable Professional post under the 100 Series by virtue of ST/AI/412 is concerned, the Tribunal found that she had confused eligibility to apply for a position with entitlement. It noted that the Applicant had not applied for a single Professional post following the cessation of her 200 Series employment. Nonetheless, the Tribunal concluded that the Respondent had an obligation to identify appropriate posts for which she might apply and be qualified and to encourage her to apply thereto. Moreover, it found that under the terms of ST/AI/412, the Respondent should not have filled any Professional vacancies—other than those filled by competitive examination—with male candidates, until he had searched for six months for a suitable female candidate. As there was no evidence that the Respondent had made any effort to fulfil his obligations in this respect, the Tribunal held that he had acted in "complete disregard" of ST/AI/412. In view of her performance and experience, the Tribunal noted that the Applicant was exactly the kind of candidate for which gender parity rules were designed, and expressed its disappointment with the Respondent's lack of effort. It found that as she was entitled to have had the Respondent identify, and encourage her to apply for posts for which she might be qualified, she was entitled to compensation for the Respondent's failure to do so but that such entitlement did not give rise to a right to be placed against a Professional post.

Finally, the Tribunal addressed the issue of whether the Applicant was required to take the competitive "G to P" examination. The Tribunal found that under ordinary circumstances she would be required to take the examination in order to encumber a Professional post but that, as the Respondent had created the exceptional circumstances of her case and had permitted her to encumber a Professional post for several years, the requirement should be waived.

Accordingly, the Tribunal awarded the Applicant compensation of six months' net base salary at the P-2 level, at the rate in effect at the date of Judgement, for the failure of the Respondent to identify, and encourage her to apply for suitable Professional posts for which she might be qualified; ordered the Respondent to make "a substantial and timely effort to identify suitable Professional posts for which the Applicant might be qualified and to encourage the Applicant to apply for these posts"; and, rejected all other pleas.

2. *Judgement No. 1175 (23 July 2004): Ikegame* v. *the Secretary-General of the United Nations*[5]

Forum non conveniens—Authority to take disciplinary actions for alleged misconducts occurring during secondment—Inter-Organization Agreement concerning Transfers, Secondment or Loan of Staff[6]—Double jeopardy—Serious misconduct—Proportionality of disciplinary sanctions—Length of suspension pending disciplinary proceedings—Staff rule 110.1 and 2—Right to due process—Failure to notify staff of composition of Joint Disciplinary Committee—Conflict of interest—ST/AI/371[7]

The Applicant entered the service of the United Nations on 1 August 1995, as an Economic Affairs Officer at the P-5 level with a permanent contract. On 1 June 1999, she was seconded to a D-1 level post with the Food and Agriculture Organization (FAO) in Rome for two years.

On 4 March 2001, the Applicant was promoted to a D-1 post at the Department of Economic and Social Affairs, United Nations, with effect from 1 June 2001. On 24 May, FAO advised the United Nations that the Applicant would return to New York upon the completion of her secondment to take up her new duties. Attached to this memorandum were "Administrative Details" outlining FAO's appraisal of the Applicant's performance and conduct during her secondment. According thereto, FAO had initiated disciplinary proceedings against her following an internal investigation into her rental subsidy claims and instances of misconduct on her part had been established, but in light of her return to the United Nations, FAO had decided that disciplinary action "was no longer at issue." On 31 May, the Applicant provided an explanation of her actions to the Office of Human Resources Management.

On 1 June 2001, the Applicant took up her D-1 level position but, on 4 June, she was suspended from duty with full pay, with immediate effect, pending completion of disciplinary proceedings. The Applicant was invited to comment on the FAO allegations that she had committed rental subsidy fraud and had falsified the photocopy of a cheque in an effort to conceal her actions and mislead investigating officers. The Applicant responded on 18 June, professing "great surprise" at her suspension, which she considered to violate ST/AI/371. She noted that FAO had decided not to impose disciplinary action and argued

[5] Kevin Haugh, Vice-President; and Jacqueline R. Scott and Dayendra Sena Wijewardane, Members.

[6] The full title of the Agreement is Inter-Organization Agreement concerning Transfer, Secondment or Loan of Staff among the Organizations Applying the United Nations Common System of Salaries, Allowances and Benefits (see doc. CEB/2003/HLCM/CM/7).

[7] For information on Administrative instructions, see note 4 above.

that disciplinary proceedings at the United Nations would amount to double jeopardy, and would be prejudicial to her appeal at FAO.

On 19 September 2001, the case was referred to the Joint Disciplinary Committee (JDC) in New York. In its report of 22 April 2002, the JDC concluded that the Administration had failed to substantiate its charge of rental subsidy fraud. On the second charge of falsification of the copy of a cancelled cheque, the JDC found that the Applicant's "free and uncoerced admission of taking an intentional and affirmative action of altering both sides of the cancelled [cheque] and submitting it as an official document in the context of rental subsidy claim" constituted adequate evidence in support of the Administration's allegation of misconduct. Having concluded that the Applicant had failed to comply with her obligations under the United Nations Charter and to observe the standards of conduct expected of an international civil servant, the JDC recommended that she be demoted two levels and that a written censure be issued to her and placed as a permanent record in her Official Status file. On 25 June, the Applicant was informed that the Secretary-General had decided to accept the findings and conclusions of the JDC, and agreed that her conduct fell short of the standard of conduct expected of an international civil servant and amounted to serious misconduct within the meaning of staff rule 110.1, warranting disciplinary action. On 15 August, the Applicant filed her Application with the Tribunal.

In its consideration of the case, the Tribunal first addressed the issues of *forum non conveniens* and the authority of the United Nations to investigate and take disciplinary action with respect to the Applicant's alleged misconduct whilst on secondment to FAO. On the issue of *forum non conveniens,* the Tribunal determined that although New York may not have been the most convenient forum because of lack of nexus and because of inconvenience and difficulty in obtaining relevant background information, witness testimony and evidence, it was the reasonable and logical choice as the Applicant had returned to Headquarters. Insofar as the United Nations' authority in the matter was concerned, the Tribunal noted that article 7 (a) of the Inter-Organization Agreement concerning Transfers, Secondment or Loan of Staff provides that

> "[w]hen a seconded staff member returns to the releasing organization the receiving organization will provide the releasing organization with a statement showing: . . . (iv) an appraisal of the performance and conduct of the staff member during his secondment".

Moreover, pursuant to paragraph 9 (b) of the Agreement, if the receiving organization summarily dismisses the staff member, the releasing organization may investigate the matter itself and reach its own conclusion as to whether the circumstances warrant similar termination from the releasing organization. The Tribunal found that the rationale of paragraph 9 (b) could be applied to the Applicant's case and, thus, the Organization's actions were in keeping with the spirit of the Agreement. The Tribunal also considered the issue of double jeopardy, but determined that as FAO had not imposed disciplinary measures upon the Applicant but had expressly left her conduct to be dealt with by the United Nations, the concept of double jeopardy did not apply.

Insofar as the Applicant's lengthy suspension with full pay was concerned, the Tribunal found that it had not violated her rights to due process. At the time of her suspension, she had admitted her alteration of the cheque in question and the Tribunal considered this

> "reason enough for the Respondent to be concerned about allowing the Applicant to encumber the D-1 post to which she had recently been promoted . . . [as] . . . her admitted

> forgery was sufficient reason to have shaken the Respondent's confidence in her ability to comport herself with the honesty and integrity expected of all United Nations staff members and particularly of such a high ranking staff member".

The Tribunal noted that the provisions of staff rule 110.2 state that suspension pending disciplinary proceedings should normally not exceed three months but held that, while the Applicant's 13 months suspension was significantly longer than that period, she had suffered no financial harm as a result and, in view of her admittedly improper conduct, could not be heard to complain about the foreseeable consequences, which included suspension.

The Applicant had raised serious questions with respect to the constitution of the JDC. The Tribunal found also that the Administration's failure to notify her of the members of the JDC panel until she arrived at the hearing amounted to a denial of her rights to due process justifying compensation, as she was denied the right to submit a formal, substantive objection to any of the members. Further, the Tribunal agreed with the Applicant that the presence of one of the members of the JDC panel created a conflict of interest for two reasons: his "behaviour and comportment evidenced a lack of impartiality to the Applicant's counsel [said to result from prior interaction at the JDC], which might have, in turn, resulted in a lack of impartiality toward the Applicant"; and, more significantly, he had an "economic/employment interest . . . in the Applicant's demotion." The Tribunal noted that, whilst the JDC member "may have been pure of heart and may have harboured no self interest in the outcome of the Applicant's case, his presence, at a minimum, created the appearance of impropriety," and reiterated its position that joint bodies must "maintain an impeccable level of impartiality and fairness." The Tribunal held that the inclusion of a panel member "who at best appears to lack impartiality and be self-interested diminishes the entire JDC process and undermines any recommendation made by such JDC."

The Tribunal found that, under such circumstances, it would be justified in dismissing the entire case against a staff member but that, as the Applicant had admitted altering a copy of a cancelled cheque that was submitted by her for official purposes, the conclusion reached by the majority of the JDC was reasonable, if not inevitable. The Tribunal held that the Applicant's admitted wrongdoing constituted misconduct of such nature as to reasonably warrant her demotion by two levels and noted that, under the circumstances, it would also have found dismissal to be proportional to the misconduct. Accordingly, the Tribunal awarded the Applicant compensation of US$ 4,500 for the denial of her rights to due process by the JDC, but rejected all other pleas.

3. *Judgement No. 1181 (23 July 2004): Abu Kashef* v. *the Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA or the Agency)*[8]

Termination of the Applicant's services in the interest of the Agency—UNRWA Area staff regulation 9.1—Unsatisfactory professional conduct and performance of staff—Misuse of *laissez-passer*—Proper exercise of managerial discretion—Burden of proof

The Applicant entered the service of UNRWA at grade 11, on a temporary indefinite appointment as an Area staff member with the Gaza Training Centre, on 1 September 1984. Effective 1 January 1996, he was promoted to the post of Principal, at grade 16, subject to a twelve-month probationary period.

The Applicant's performance evaluation report (PER) for 1996 reflected "A Performance that Does Not Fully Meet Standards". As a result, the Applicant was informed that his probation had been extended for an additional six months and that failure to obtain a satisfactory PER at the end of his probation could result in the termination of his services. The Applicant's next PER rated his performance as "Satisfactory", however, his PER for August 1998 to June 1999 again reflected "A Performance that Does Not Fully Meet Standards". In consequence, his annual increment was deferred for six months and he was issued a "final warning". His PER for the period July to December 1999 also rated his performance as "Does Not Fully Meet Standards".

On 4 July 1999, the Applicant was served with a written censure for bypassing his supervisor and discussing a policy matter directly with the Director of Education, Headquarters, Amman. The Applicant did not appeal the written censure. Thereafter, he was investigated on allegations that he had misused his United Nations *laissez-passer* for private travel to Syria and Lebanon; had misrepresented the purposes of his trip as official travel in order to obtain a Syrian visa through UNRWA; and, had claimed 8 December 1999 as a "duty day" when, in fact, he was in Syria. The Applicant provided UNRWA with an explanation of his actions, insisting that he had travelled to Lebanon and Syria in the interest of UNRWA, at his own expense.

On 28 March 2000, the Applicant was informed that he had failed to provide a convincing explanation for misusing his *laissez-passer* and that, as the incident was part of a pattern of unsatisfactory professional conduct and performance, his services were being terminated effective 29 March in the interest of the Agency, under Area staff regulation 9.1. On 9 April, the Applicant requested administrative review of this decision but, on 13 April, he was informed that the decision stood. On 10 May, the Applicant lodged an appeal with the Joint Appeals Board (JAB) in Amman. In its report of 25 September 2001, the JAB concluded that the termination of the Applicant's appointment was harsh; based on incidents which did not necessitate such a severe measure; and, provoked by bias and prejudice against him. Accordingly, the JAB unanimously recommended that the impugned decision be reviewed. On 23 January 2002, the Applicant was informed that the Commissioner-General had determined that the JAB's conclusions were not supported by the evidence

[8] Kevin Haugh, First Vice-President; Brigitte Stern, Second Vice-President; and Jacqueline R. Scott, Member.

and that, therefore, he could not accept its recommendation. On 18 September, the Applicant filed his Application with the Tribunal.

In its consideration of the case, the Tribunal noted that, pursuant to Area staff regulation 9.1, "[t]he Commissioner-General may at any time terminate the appointment of any staff member if, in his opinion, such action would be in the interest of the Agency." The Tribunal recalled its jurisprudence that the Commissioner-General has the discretion to make managerial decisions with regard to staff members but that this discretion is not unfettered. Such decisions must not be improperly motivated, violate due process, be arbitrary, taken in bad faith or be discriminatory. Where a staff member seeks to vitiate the Respondent's decision on the basis of prejudice, improper motive or other extraneous factors, the burden of proving such prejudice or improper motive is on the staff member, who must adduce convincing evidence.

With respect to the Applicant's performance evaluations, the Tribunal found that his allegations of discrimination or improper motive were not supported by the evidence and that "having failed to rebut [his] PERs, the Applicant [was] deemed to have accepted them." Thus, it held that the decision to terminate the Applicant's services "in the interest of the Agency," insofar as it relied on his poor performance, was within the bounds of the Respondent's managerial discretion.

The Tribunal next considered whether the Respondent's decision was justified based on the Applicant's misconduct. The Tribunal noted that the misuse of the *laissez-passer* was but one instance of misconduct cited by the Respondent and had been "simply the 'straw that broke the camel's back'; the death knell to the Applicant's service with the United Nations". The Applicant had alleged that other staff members used their *laissez-passer* in a similar fashion, without suffering adverse consequences. The Tribunal recognized "the sometimes casual way in which the *laissez-passer* may actually be used," but held that it could not dispute the Respondent's right to take alleged violations of the rules governing the use of the *laissez-passer* "with the utmost seriousness and to impose the ultimate sanction on violators, provided he does not act in a discriminatory fashion and is not improperly motivated". Having found that the Applicant had failed to produce any evidence that the decision to terminate his services was arbitrary, capricious, improperly motivated or that others in similar circumstances had been treated differently, the Tribunal found that, insofar as the impugned decision relied on the Applicant's unsatisfactory conduct, it was also within the Respondent's managerial discretion.

Accordingly, the Application was rejected in its entirety.

4. *Judgement No. 1183 (23 July 2004): Adrian* v. *the Secretary-General of the United Nations*[9]

RECOGNITION OF DOMESTIC PARTNERSHIP—ST/SGB/2004/4[10]—PRINCIPLE OF APPLYING THE LAW OF NATIONALITY OF STAFF MEMBER FOR PURPOSES OF MARITAL STATUS—EVOLVING CONCEPT OF "COUPLE" AND OF "MARRIAGE"—FORCE AND EFFECT OF ADMINISTRATIVE INSTRUCTIONS AND INFORMATION CIRCULARS—INTERPRETATION OR AMENDMENT OF A STAFF RULE—GENERAL ASSEMBLY RESOLUTION 58/285 OF 8 APRIL 2004

The Applicant, a French national, entered the service of the United Nations Centre for Human Settlements in Nairobi at the L-2 level, as an Associate Expert, on 19 August 1990. His contract was extended a number of times and, effective 1 April 2002, he was appointed to the P-4 level position of Human Settlements Officer.

On 22 June 2000, the Applicant and his same-gender partner registered their domestic partnership under the French "*Pacte Civil de Solidarité*" (PACS). On 26 June, the Applicant requested spousal benefits for his partner. On 10 July, the United Nations Office at Nairobi (UNON) informed the Applicant that as French law does not characterize domestic partnerships as a marriage, the parties to such partnerships are not spouses and, therefore, his partner could not be recognized as a spouse or dependent spouse for the purpose of United Nations entitlements. On 7 September, the Applicant requested administrative review of this decision and, on 5 December, he lodged an appeal with the Joint Appeals Board (JAB) in Nairobi. In its report of 28 May 2002, the JAB concluded that, under French law, the PACS "was not the same legal instrument as a marriage" and that the Secretary-General's interpretation of the terms "spouse" and "dependant spouse" was not arbitrary. Accordingly, the JAB recommended that the appeal be rejected. On 24 October, the Applicant was informed that the Secretary-General had accepted the JAB's conclusions and recommendation, and had decided to take no further action on his appeal. On 8 November, the Applicant filed his Application with the Tribunal.

On 20 January 2004, ST/SGB/2004/4 entitled "Family status for purposes of United Nations entitlements", was issued, providing, in relevant part, as follows:

> "4. A legally recognized domestic partnership contracted by a staff member under the law of the country of his or her nationality will also qualify that staff member to receive the entitlements provided for eligible family members. . . .
>
> 5. The present bulletin shall enter into force on 1 February 2004."

In resolution 58/285, adopted on 8 April 2004, however, the General Assembly "[invited] the Secretary-General to reissue . . . ST/SGB/2004/4 after reviewing its contents, taking into account the views and concerns expressed by Member States thereon." The General Assembly

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[9] Julio Barboza, President; Brigitte Stern, Vice-President; and Jacqueline R. Scott, Member.

[10] Secretary-General's bulletins are approved and signed by the Secretary-General. Bulletins are issued with respect to the following matters: promulgation of rules for the implementation of regulations, resolutions and decisions adopted by the General Assembly; promulgation of regulations and rules, as required, for the implementation of resolutions and decisions adopted by the Security Council; organization of the Secretariat; the establishment of specially funded programmes; or any other important decision of policy as decided by the Secretary-General (see ST/SGB/1997/1).

> "[noted] the absence of the terms referred to in paragraph 4 of the bulletin in the context of the existing Staff Regulations and Rules, and [decided] that the inclusion of those terms shall require the consideration of and necessary action by the General Assembly".

In its consideration of the case, the Tribunal recalled that it had been presented with a similar case in Judgement No. 1063, *Berghuys* (2002), in which, "pursuant to the law of nationality of the staff member in question, [it] rejected the pension request submitted by the partner of a deceased staff member". The Tribunal also recalled that, in *Berghuys,* it had noted the importance of the principle adopted by the Organization of referring to the law of the staff member's State of nationality in questions of marital status, and had also noted the evolving nature of "[t]he concept of couple and that of marriage".

The Tribunal recognized the emergence of new forms of commitment, such as the PACS, which comprise domestic partnerships that do not entail all the rights of marriage, and are open to both heterosexual and homosexual couples. It found that, "[i]t was precisely to take into account such changes, which are occurring throughout the world, that the Secretary-General issued bulletin ST/SGB/2004/4." The Tribunal referred to its jurisprudence that administrative instructions and information circulars have the same force and effect as staff rules providing they are not inconsistent with the staff regulations and, accordingly, evaluated ST/SGB/2004/4 in order to ensure that it was in conformity with the Staff Regulations and Rules. The Tribunal found that the bulletin did not constitute an amendment to the Staff Regulations and Rules, but merely provided an interpretation of certain terms contained therein. The Tribunal was satisfied that the interpretation did not conflict with the letter and spirit of the Staff Regulations and Rules as "the only decision the Secretary-General took was to confirm a long-standing practice of the Organization according to which personal status is determined by the national law of the person concerned," and the Secretary-General had "simply [taken] note of the fact that some bodies of legislation are now treating same-sex partnerships as marriage for the purpose of granting certain social benefits". According to the Tribunal:

> "[t]his is no different . . . from the Organization's previously followed practice whereby, pursuant to the national law of certain States, it recognized polygamous unions, which are also distinct from marriage, i.e. the union of *one* man and *one* woman, in that they represent a union between *one* man and *several* women".

The Tribunal took account of General Assembly resolution 58/285 of 8 April 2004, but did not see it as an order requiring a change in the Staff Regulations and Rules, as it "simply note[d] that if the contents of the bulletin were to be incorporated in the staff regulations or rules, the Assembly should be consulted." Whilst the Assembly had invited the Secretary-General to review the situation, the bulletin remained in effect. In consequence, the Tribunal found that it should apply ST/SGB/2004/4 as of its entry into force on 1 February 2004.

In conclusion, the Tribunal held that when the Applicant first made his request for spousal benefits for his partner, he did not have such a right and the Administration was correct to refuse his request. However, the Tribunal considered that he did have the right to such benefits as of 1 February 2004 and, thus, it ordered that the Applicant be paid all spousal benefits and entitlements as of that date.

5. *Judgement No. 1189 (23 July 2004): Bogusz* v. *the Secretary-General of the United Nations*[11]

Compliance with promotion procedures—ST/AI/413[12]—Right to due process—Disclosure of objection to composition of Joint Appeals Board (JAB)—Denial of procedural rights—Declination to implement JAB recommendations on jurisdictional grounds—Consideration of equity and fairness as well as law—Necessity to identify an administrative decision adversely affecting the rights of the staff member—Consideration of health in making promotion decisions

The Applicant entered the service of the United Nations at the P-2 level, as Associate Social Affairs Officer, on 1 August 1974. Her contract was subsequently extended and she was granted a permanent appointment. At the time of the events which gave rise to her Application, she held the P-4 position of Programme Officer, Central Monitoring and Inspection Unit (CMIU), Office for Internal Oversight Services (OIOS).

On 3 March 1997, the Applicant applied for the P-5 level post of Senior Programme Management Officer, CMIU. On 13 March, she wrote to the Under-Secretary-General for OIOS regarding her candidacy and, in July, she met with him and the Director of CMIU, at which time, she alleged, the Under-Secretary-General indicated his support for her candidacy, despite the reservations of the Director, conditioned upon her finalization of a specific report.

On 2 March 1998, the Applicant went on three days of certified sick leave, which her personal doctor subsequently extended. In response to calls made to the Applicant's home, on 6 and 10 March her husband faxed OIOS to inform them that his wife was "resting under medical care". On 10 March, OIOS inquired as to her expected date of return and warned the Applicant that unless her sick leave was certified, her absence would be recorded as annual leave, until such leave was exhausted, and then as leave without pay. She remained on certified sick leave until 5 August 1999 when she was separated from service on grounds of ill health.

On 30 July 1998, the Applicant was invited to attend an interview for the P-5 post. She responded that she was on sick leave and unable to attend, but was still very interested in the post and would like to be interviewed at a later date. On 23 December, she was again invited for interview, however, she replied that she was unable to undergo an interview due to her illness, but had provided two memoranda to support her application and had been extensively interviewed previously for the post by the Under-Secretary-General for OIOS and the Director, CMIU. On 20 January 1999, the Applicant was informed that another candidate had been selected. On 18 March, she requested administrative review of the decision not to select her for the P-5 post.

On 28 July 1999, the Applicant lodged an appeal with the JAB in New York regarding the decision not to promote her and complained also of harassment and prejudicial treatment, both before and after she went on medical leave. On 18 and 19 July 2001, she wrote to the Secretary of the JAB, objecting to the composition of the Panel, who decided

[11] Kevin Haugh, Vice-President; and Omer Yousif Bireedo and Dayendra Sena Wijewardane, Members.

[12] For information on Administrative instructions, see note 4 above.

not to replace the contested member since lack of objectivity on his part could not be established. Subsequently, she asked the Secretary of the JAB to note her reservations for the record but not to make them known to the Panel. In its report of 31 January 2002, the JAB concluded that OIOS had complied with the promotion procedure under ST/AI/413, thus procedurally guaranteeing that the Applicant had received full and fair consideration during the promotion exercise. Insofar as the Applicant's claim that she had been subject to harassment by the Director, CMIU, both prior to and during her medical leave, the JAB concluded that, while there was no adequate evidence indicating that OIOS had been made aware of her complaints about harassment and prejudicial treatment and thus had had no duty to address them, OIOS "had statutory responsibilities to reach out to [her] when she was undergoing a major depression with understanding, support and encouragement, and . . . had failed to fulfil its expected responsibilities as a good employer". For this failure, the JAB recommended "symbolic compensation" of six months' net base salary "for the unnecessary aggravation and deterioration of [the Applicant's] mental conditions as a result of the indifferent and distrustful attitude of the OIOS Administration". On 11 October, the Applicant was informed that the Secretary-General agreed with the JAB's conclusion regarding the promotion exercise but that he had determined that her appeal with respect to harassment and prejudicial treatment was irreceivable, as it was not made within the prescribed time-limits against a specific administrative decision. Accordingly, he had not accepted the recommendation that she be paid compensation. On 12 February 2003, the Applicant filed her Application with the Tribunal.

In its consideration of the case, the Tribunal rejected the Applicant's contention that her candidacy for the P-5 post had been subjected to unfair conditions, such as the precondition placed on her by the Under-Secretary-General and the requirement to attend an interview while she was on sick leave, finding that

> "it was proper and reasonable for the Under-Secretary-General for Internal Oversight Services to have set for the Applicant a test wherein she could effectively demonstrate her capacity or potential to perform tasks of the higher level so that her performance might be better evaluated".

Moreover, the Tribunal found that the Applicant had been given a number of opportunities to interview for the position, each of which she declined due to illness, and that she had no right to have had the promotion exercise postponed indefinitely or until such unspecified date as her condition improved. The Tribunal also held that, in view of the nature of her illness and the uncertainty of her prognosis, the Administration was entitled to take her health into consideration in making the promotion decision. Thus, the Tribunal rejected the Applicant's claim that she was treated unfairly or denied reasonable consideration for promotion to the P-5 post.

Insofar as the Applicant's claims of harassment and ill-treatment, both during her employment and after she went on sick leave, were concerned, the Tribunal took note of the fact that the Respondent did not raise any issues of receivability or admissibility during the JAB proceedings and held that it "is unfair to staff members to tacitly allow such issues to be considered without protest by a JAB and then to decline to implement its recommendation on such jurisdictional grounds." The Applicant argued before the Tribunal that they were receivable "as the ill treatment afforded to [her] preceded and was cited in the request for administrative review." The Tribunal disagreed with the JAB's decision that although she had not identified an administrative decision linked to her alleged harassment, it was

a forum of equity as well as of law and could resort to considerations of equity and fairness in order to render the administration of justice more complete. Instead, it found that an administrative decision said to have adversely affected the rights of the staff member must always be identified, and that

> "in cases where the administrative decision is said to be the culmination of a course of conduct on the part of the Administration, the course of conduct must be considered as a relevant surrounding circumstance or as an aggravating or mitigating circumstance as the case may be. In cases of harassment, when complaints are adequately brought either to the attention of management or to the Grievance Panel, and investigation or other action would appear warranted, then a decision on the complaint, be it to ignore it or to fail to properly investigate it or to improperly reject it or to fail to take appropriate action where harassment is established, can each amount to an administrative decision of the type giving rise to a right to appeal to a JAB".

In the Applicant's case, the impugned administrative decision was the decision to appoint another person to the P-5 post. Whilst "[o]ther complaints adequately connected" to this decision would be receivable, the Tribunal held that the complaints of alleged ill treatment were so far removed from the impugned decision that the JAB had no jurisdiction to enter into them.

With respect to the Applicant's contentions concerning irregularities in the JAB proceedings, the Tribunal noted that, whilst the Presiding member of the JAB had acted within his authority in rejecting her objections to the composition of the JAB panel, "the Tribunal was surprised to learn that the Applicant's objections were disclosed to the JAB panel members and published in the JAB report" and considered "such disclosure to have been unnecessary and inappropriate, since the Applicant had specifically requested that her objections remain confidential". The Tribunal found that the appropriate course of action would have been to advise her that her objections would not be kept confidential and to have permitted her the opportunity of withdrawing them. The Tribunal did not find that the fairness of the JAB deliberations had been influenced, however, and decided to award "only nominal compensation" of US$ 750 for the violation of her rights.

6. *Judgement No. 1205 (24 November 2004): Alaj* et al. v. *the Secretary-General of the United Nations*[13]

Salary survey and scale—Discretion to undertake salary survey—Distinction between participation and consultation of staff—Retroactive application—Intervention—United Nations Common System Manual for Salary Surveys in Non-Headquarters Duty Stations (Manual)

On 10 June 1999, the Security Council adopted resolution 1244 (1999) in which it authorized the Secretary-General to establish in Kosovo an interim civilian administration led by the United Nations and an international civil presence in Kosovo. As a result, the United Nations Interim Administration Mission in Kosovo (UNMIK) was established.

In June 1999, a high-level mission was sent to Kosovo by the Office of Human Resources Management (OHRM) to undertake a review of the available salary information

[13] Julio Barboza, President; and Omer Yousif Bireedo and Jacqueline R. Scott, Members.

from the region. On 16 June, OHRM advised the United Nations Office of the High Commissioner for Refugees (UNHCR) Headquarters of the approval of a provisional General Service salary scale for locally recruited staff, subject to adjustment upon completion of a comprehensive salary survey. On 22 June, the new salary scale, which was made effective as of 1 June, was sent to the UNHCR Kosovo Office, which registered its objection thereto on 10 July.

On 20 July 1999, OHRM advised:

> "All locally-recruited staff of the common system in the General Service category recruited on or after 1 June 1999 shall be paid based on the new Provisional Salary Scale for Kosovo.
>
> Those staff members in the General Service category recruited prior to 1 June 1999 and paid under the Belgrade salary scale shall receive, in addition to the salary based on the Kosovo scale, a personal transitional allowance (PTA) representing the difference between the Belgrade salary scale . . . and the Kosovo scale. The PTA should be phased out at the expiration of the staff member's current short term contract."

Subsequently, 29 staff members recruited after the opening of the UNHCR Kosovo Office in June had their contracts changed to take into account the new provisional salary scale.

On 27 July 1999, an OHRM "Survey Specialist" was dispatched to Kosovo to review "the level of mission subsistence allowance in the mission area of UNMIK and [to conduct] a survey of best prevailing conditions of employment for the locally-recruited staff in Kosovo".

On 13 August 1999, the Applicants wrote to the Secretary-General requesting administrative review of the June decision to change the salary scales for locally-recruited staff members and, on 18 February 2000, they lodged an appeal with the Joint Appeals Board (JAB) in Geneva. In its report of 14 March 2002, the JAB determined that there were three categories of staff members, each of which had different entitlements:

> Category A—29 locally-recruited staff members who had their contracts changed at the end of July 1999, despite the fact that the new salary scale had been approved already on 16 June. The JAB found that whilst an administrative error had been made in implementing the wrong salary scale in their original contracts, the Administration had an obligation to correct this error and such correction did not undermine the acquired rights of the affected staff members.
>
> Category B—20 staff members who were employed prior to the opening of the Office in June 1999. As these staff members were awarded a PTA for the remainder of their existing contracts, the JAB found that they had suffered no loss of pay and, thus, their appeal was groundless.
>
> Category C—49 staff members who arrived after the opening of the Office or started new contracts after having been assigned to other duty stations. The JAB found that there were no grounds for applying any other salary scale than the one promulgated on 16 June 1999 in these cases.

Accordingly, the JAB concluded that the circumstances surrounding the establishment of the provisional salary scale and its application to the locally-recruited staff members in Kosovo did not reveal any violation of the rights of the 98 Applicants. On 22 August, the

Applicants were informed that the Secretary-General agreed with the JAB's findings and conclusions and had decided to accept its unanimous recommendation and to take no further action on the appeal.

In 2002 and 2003, comprehensive salary surveys were carried out in Kosovo.

On 23 December 2002, the Applicants filed an Application with the Tribunal, claiming, inter alia, that the decision to reduce the salary scales was taken without proper staff consultation and in violation with established procedures and that the reduction was based on incorrect and arbitrary assessment of Kosovo salaries. On 19 September 2003, an additional 56 staff members filed an Application for intervention in the case.

In its consideration of the case, the Tribunal admitted the Application for intervention on the basis that it advanced similar contentions to that of the Applicants' Application.

On the substance of the case, the Tribunal was satisfied that it was reasonable for the Respondent to have sought to verify the prevailing conditions in 1999 "in a zone that had suffered a veritable man-made cataclysm", finding that he was under no legal obligation to consult the staff about a decision to conduct a salary survey in order to ratify or modify an existing salary scale. The Tribunal noted the distinction between "consultation" and staff "participation", the latter which is required for salary surveys under the Manual and the criteria set out by the International Civil Service Commission. Insofar as staff participation was required, the Tribunal was satisfied that, given the circumstances of the June 1999 survey, "a flexible approach was justified for two reasons, namely the essentially provisional nature of the first salary scale and the decidedly exceptional circumstances of the establishment of a new mission in Kosovo." Moreover, the Tribunal found that "the shortcomings of the first provisional survey were mostly corrected by the second" (July 1999) survey.

The Applicants had impugned the validity of the Kosovo scale, maintaining that the (higher) Belgrade scale ought to have applied, on the basis that, as the June 1999 survey was defective and the July 1999 survey was improperly conducted, both surveys were null and void. The Tribunal was not persuaded by this reasoning, finding that the 2002 and 2003 surveys confirmed the results of the earlier surveys and, more importantly, the staff had not requested that a new survey be conducted in 1999, with the participation of staff; this is what the Administration did in 2002.

The Applicants also challenged the retroactive application of the provisional June scale. The Tribunal agreed that the new scale should have been applied from the moment it was promulgated, i.e., 17 June 1999, but found that "the issue of retroactivity was moot, as no contracts were signed by any of the Applicants prior to 17 June".

Accordingly, the Application was rejected in its entirety.

7. Judgement No. 1210 (24 November 2004): Tekolla v. *the Secretary-General of the United Nations*[14]

ENTITLEMENT TO SPECIAL POST ALLOWANCE (SPA)—QUASI-JUDICIAL DISCRETION OF THE SECRETARY-GENERAL—RETROACTIVITY POLICY FOR SPA REQUESTS—PAYMENT OF SPA AT NOT MORE THAN ONE LEVEL HIGHER THAN STAFF MEMBER'S LEVEL—STAFF RULE 103.11 (B) AND PERSONNEL DIRECTIVE PD/1/84/REV.1

The Applicant entered the service of the United Nations Economic Commission for Africa (ECA) at the G-6 level, as Documents Clerk, on 3 December 1962. His contract was subsequently extended and, effective 1 March 1974, he received a permanent appointment. At the time of the events which gave rise to his Application, he held the P-3 position of Economic Affairs Officer.

From October 1993 until 1 November 1995, the Applicant assumed the duties and responsibilities of an Economic Affairs Officer at the P-4 level. From August 1994, efforts were made by the Officer-in-Charge (OiC) of the Section and the Director of the Division to have the Applicant placed against the P-4 post and be paid SPA and, on 17 March 1995, he was advised that action was being taken to place him against the post.

From 15 September 1995 until 30 June 1996, the Applicant also assumed the duties and responsibilities of the P-5 post of OiC of the Section.

On 14 May 1998, the Office of Human Resources Management informed the Human Resources Management Service (HRMS), United Nations Office at Nairobi, that it could not support the request for an SPA

> "[g]iven the existing policy to restrict the retroactivity of SPAs to one year from the date when the recommendation was first made, as well as a lack of clarity on the exact dates when [the Applicant] was formally assigned to perform the [higher level] functions".

On 18 August, HRMS confirmed the dates of the Applicant's service at the P-4 and P-5 levels, noting that although his request for SPA was justified, "of course there is the issue of one year retroactivity which we have to take into account". On 29 June 1999, the Applicant was granted an SPA at the P-4 level for the period from 1 December 1995 until 30 June 1996.

On 30 September 1999, the Applicant took early retirement pursuant to a Memorandum of Understanding (MOU) which set out the terms of his agreed termination which included, *inter alia*, that the Organization had no further obligations to him. On 10 January 2000, the Applicant wrote to HRMS, claiming that the retroactivity policy should not apply to his SPA as the delay was due to the failure of ECA to take appropriate action on time. On 27 March, HRMS rejected this claim, citing the terms of the MOU. On 25 April, the Applicant requested administrative review of the decision not to grant him an SPA for the two posts he had encumbered and, on 25 July, he lodged an appeal with the Joint Appeals Board (JAB) in New York. In its report of 5 November 2002, the JAB concluded that "the MOU could not have included the SPA issue, because the [Applicant] had

[14] Kevin Haugh, Vice-President; and Spyridon Flogaitis and Dayendra Sena Wijewardane, Members.

assumed in good faith that the reason for not receiving the SPA was a technical problem and therefore was still pending". The JAB concluded that the Applicant was entitled to an SPA at the P-4 level from March to December 1995 for the performance of the P-4 level duties. In accordance with the provisions of Personnel Directive PD/1/84/Rev.1, which states that SPA is not normally payable at more than one level higher than that of the staff member, the JAB also concluded that the Applicant was entitled to an SPA at the P-4 level for his service as OiC from 15 September 1995 until 30 June 1996. Accordingly, the JAB recommended that the Applicant should be paid an additional five months of SPA to reflect the period 1 July to 1 December 1995.

On 10 January 2003, the Applicant filed his Application with the Tribunal. On 10 July, he was informed that the Secretary-General had accepted the JAB's conclusion and its recommendation to pay him SPA at the P-4 level for five months.

In its consideration of the case, the Tribunal held that ECA's response to the requests for an SPA for the Applicant could "best be described as vacillating, procrastinating and evasive". It found that the decision to grant him an SPA only as from 1 December 1995, due to "the alleged bar against retroactive payments", was "unconscionable" as it was the Administration itself which had caused the delay. Likewise, the Tribunal found the Administration's attempt to rely upon the terms of the MOU as extinguishing the Applicant's claims with regard to an SPA as "unconscionable" as, in the absence of specific provisions otherwise, it was quite reasonable for the Applicant to assume that the MOU related only to retirement entitlements.

The Tribunal noted that the JAB had counted the Applicant's period of service at the P-4 level as from 17 March 1995, thus recommending payment from 1 July (three months after the commencement of higher level functions). In view of the uncontested fact that the Applicant had assumed the functions as of 1 October 1993, the Tribunal held that it "ha[d] difficulty understanding the logic or rationale" of this recommendation.

The Tribunal reiterated its jurisprudence that payment of an SPA is not a staff member's right as, under staff rule 103.11 (b) and PD/1/84/Rev.1, the Respondent possesses discretionary authority over such awards. It found, however, that it is "a quasi judicial discretion which cannot be exercised capriciously or arbitrarily" and, "[s]ince no rational or cogent reason ha[d] been advanced as to why the Applicant should not have received payment" prior to 1 July 1995, it held that the Respondent's discretion had not been exercised lawfully or reasonably.

The Tribunal calculated the appropriate amount of SPA for the Applicant, taking the following factors into consideration:

(*a*) it was indisputable that the Applicant had fulfilled higher level functions for a total of 33 months in two periods (one P-4 and one P-5) between 1 October 1993 and 30 June 1996;

(*b*) pursuant to PD/1/84/Rev.1, SPA is not normally payable for the first three months of service at the higher level, and thus three months should be deducted from each period;

(*c*) "on a proper construction" of PD/1/84/Rev.1, the Applicant would not be entitled to payment of more than one SPA at a time, even if his performance of the P-4 and P-5 duties overlapped; and

(*d*) he had already received a total of 12 months' SPA.

Accordingly, the Tribunal awarded the Applicant compensation equivalent to SPA at the P-4 level, at the rate in effect at the time of Judgement, for an additional period of 15 months.

8. *Judgement No. 1215 (24 November 2004): Nwingte* v. *the Secretary-General of the International Maritime Organization (IMO)*[15]

Interpretation of Appendix D of the IMO Staff Rules—Role of the Advisory Board on Compensation Claims (ABCC) in cases alleging service-incurred injury—Authority and competence by Administration to unilaterally deny service-incurred injury status to staff member

The Applicant entered the service of IMO at the G-6 level, as Principal Clerk-Secretary, on 1 September 1995. She was promoted to the G-7 level position of Senior Administrative Assistant on 1 March 1997.

In 1998, the Applicant began to experience pain in her shoulder and right wrist which was diagnosed as repetitive strain injury (RSI) or work-related upper limb disorder. She subsequently informed the Medical Adviser's Office that her general practitioner had recommended a change in her workstation.

On 7 July 2000, the Staff Nurse wrote to the Head, Information Technology and Information Systems, regarding a replacement printer which had been requested for the Applicant as a broken lever on the printer she had been using to print was causing her difficulty. On 27 July, the Medical Adviser advised the Head, Personnel Section, that he had seen the Applicant, who continued to have wrist problems; that he had advised her to see her own general practitioner; that she should refrain from work for a minimum of two weeks; and, that she should not resume work without medical clearance. On 14 August, the Medical Adviser reported that the Applicant's condition had improved and she could return to work in a limited capacity, but recommended that she not use the defective printer. On 15 August, the Applicant requested that the sick leave approved by the Medical Adviser not be counted against her normal sick leave entitlement and that expenses from medical treatment be covered by the Respondent because her sick leave arose from RSI originating from the performance of her work duties.

On 28 September 2000, the Applicant was advised by the Head, Personnel Section, that IMO did "not accept an injury of an upper limb disorder as being service-incurred" and, in view of the small percentage of her time spent printing, disagreed that the broken printer had caused her injury. However, IMO did offer, as an exceptional measure, to refund the portion of her medical expenses not covered by medical insurance. On 3 November, the Applicant wrote to the Secretary-General requesting administrative review of the decision not to recognize her condition as work-related and, on 27 February 2001, she lodged an appeal with the IMO Joint Appeals Board (JAB). In its report of 28 February 2003, the JAB questioned the authority of the Head, Personnel Section, to comment on a medical disorder in the terms employed and recommended that "[m]embers of staff should not make medical comments or refute diagnosis when they obviously have no expertise". Insofar as

[15] Brigitte Stern, Vice-President; and Omer Yousif Bireedo and Jacqueline Scott, Members.

the Applicant's condition was concerned, the JAB found that the medical evidence available on the case was "sparse" and recommended a full medical report be obtained from an independent rheumatology or occupational health expert. The JAB also found that, even after the involvement of the Staff Nurse, IMO had unnecessarily delayed replacing the defective printer and had unduly delayed in responding to the Applicant's concerns, and recommended that IMO act "much more quickly and also more sympathetically in any future similar cases." On 11 March, the Secretary-General informed the Applicant that he had accepted the recommendations of the JAB.

On 4 April 2003, the Applicant was advised that an appointment had been set up for her to see the Medical Adviser. On 9 April, however, she indicated that the appointment would not satisfy the recommendation of the JAB that a report be obtained from an independent expert. Thereafter, the Applicant met with a specialist who produced a report dated 6 June. However, she refused to authorize the release of the contents of the report to the JAB. On 23 June 2003, the Applicant filed her Application with the Tribunal.

In its consideration of the case, the Tribunal first considered whether the IMO had the authority to deny the Applicant service-incurred injury status without submitting her case to the Advisory Board on Compensation Claims (ABCC). The Tribunal found that the IMO's interpretation of Appendix D of the IMO Staff Rules and the function of the ABCC in cases of alleged service-incurred injuries was "misguided" and noted that its interpretation

> "contravenes the manner in which the United Nations currently implements and historically has implemented Appendix D. . . Although Appendix D, on its face, is unclear as to who makes the initial determination as to service-incurred status, the long-standing practice of the United Nations has been that the Secretary-General is the one who makes the determination, *based on the recommendations* of the ABCC."

Accordingly, the Tribunal held that the Administration had erred in "unilaterally denying service-incurred status to the Applicant" and that, having been taken without proper authority or competence, the impugned decision was null and void.

Moreover, the Tribunal found that IMO had failed to apply even its stated, limited interpretation of Appendix D to the Applicant's case. In its Answer to the proceedings before the Tribunal, IMO asserted that it would submit a question of service-incurred injury to the ABCC when the Administration had denied the claim but the staff member disputed that determination. In the Applicant's case, however, no such submission occurred: when she disputed the finding of the Head, Personnel Section, that her injury was not service-incurred, the matter was not sent to the ABCC but, rather, the Applicant was referred to the JAB which lacked the authority to determine whether her injury was service-incurred. The Tribunal rejected IMO's defence that it was unaware the Applicant was making a claim for compensation under Appendix D, finding that it was obvious she was requesting compensation—albeit in the form of reclassification of sick leave and payment of medical expenses—for a service-incurred injury. The Tribunal held that IMO's "assertions in this regard indicate either disingenuousness or a lack of competence". The Tribunal also rejected IMO's contention that the Applicant had failed to file the appropriate form in order to claim an Appendix D benefit, finding that she had followed the relevant procedures "in all respects".

The Tribunal registered its concern regarding the "sweeping statement made by the Head, Personnel Section, denying the Applicant's claim for service-incurred status", stating that it was "at a loss to understand how an individual, not a member of the ABCC and with no apparent medical expertise, could so broadly ordain that upper limb disorders could never be service-incurred". It held that IMO, "through its Head, Personnel Section, [had] wildly overstepped its bounds and mischaracterized IMO's position on service-incurred injuries".

The Tribunal concluded that the failure of the Administration to follow the appropriate procedure under Appendix D had violated the Applicant's rights to be heard by the ABCC, and ordered the IMO

> "to establish an ABCC under article 16 (a) of Appendix D to the IMO Staff Rules for prompt review of the Applicant's request to treat her RSI as service-incurred and to make recommendations to the Secretary-General as to whether her injury was service-incurred".

It also awarded the Applicant compensation of US$ 10,000 for the above-referenced violation of her right and for the delays in her case.

9. Judgement No. 1219 (24 November 2004): Grossman v. *the Secretary-General of the United Nations*[16]

Calculation of Mission Subsistence Allowance (MSA)—Definition of "non-working days"—Staff rule 107.15 (e)—1974 Field Administration Handbook—Right to recover overpayment—Staff rule 103.18—Unjust enrichment—Estoppel—Compelling reasons of equity

On 1 May 1992, the Applicant was temporarily assigned to the United Nations Protection Force (UNPROFOR). Upon arrival, the Office of Personnel informed her of the mission's leave policy; specifically, she was advised that MSA would not be paid for periods of annual leave taken outside the mission area but would be paid for annual leave taken within the mission area. Following an audit of UNPROFOR, on 31 January 1994 the Internal Audit Division issued a report indicating that the mission had not been in compliance with staff rule 107.15 (e) with respect to MSA paid for periods of annual leave taken within the mission area. On 17 June, the Department of Peace-keeping Operations advised UNPROFOR that "[t]he upper limit on payment of MSA during periods of annual leave is one and a half days for each month of completed mission assignment regardless of where the leave is spent", and instructed that all leave records were to be reviewed and the necessary recovery action taken. On 15 July, UNPROFOR staff members were advised of this directive via information circular UNPROFOR/IC/328.

On 16 December 1994, the Applicant was informed that overpayments made to her would be recovered commencing January 1995. On 15 February 1995, she requested administrative review of this decision and, on 22 May, she lodged an appeal with the Joint Appeals Board (JAB) in New York. In its report of 25 July 1997, the JAB found that the relevant rules were ambiguous with respect to "non-working days" and unclear regarding MSA entitlements. It held that the case was "not as much a case involving overpayments of

[16] Brigitte Stern, Vice-President; and Spyridon Flogaitis and Dayendra Sena Wijewardane, Members.

MSA . . . as . . . a case of incorrect instructions on the part of the UNPROFOR administration" and recommended that the recovered amounts be reimbursed. On 13 November, the Applicant was informed that the Secretary-General had decided not to accept the JAB's recommendation "[s]ince the erroneous interpretation of the rules led to incorrect instructions and resulted in overpayments of MSA, the Organization had the obligation, under staff rule 103.18, to recover such overpayments". On 30 June 2003, the Applicant filed her Application with the Tribunal.

In its consideration of the case, the Tribunal determined that the central issue before it was whether the MSA paid to the Applicant when she was on annual leave whilst remaining in the mission area "was legally and correctly recovered by the Respondent". Thus, the Tribunal had to evaluate whether the policy implemented by UNPROFOR prior to the audit was in accordance with the staff rules and other applicable instructions.

The Tribunal found that the provisions of staff rule 107.15 (e) made it clear that staff members are not entitled to MSA when they are on annual or special leave. Moreover, it held that the reference to the payment of MSA for "non-working days, as long as the staff member is in the mission area" on page C-42 of the Field Administration Handbook was intended to cover weekends, holidays and emergency days, not annual leave initiated by a staff member. Thus, the Applicant had not been entitled to payment for MSA whilst on annual leave in the mission area.

Insofar as the Applicant had claimed that recovery of the money was unjust, unfair and discriminatory, the Tribunal decided to consider whether the manner in which the UNPROFOR administration implemented the MSA system gave rise to a claim of estoppel. It recalled its jurisprudence in Judgement No. 1079, *MacNaughton-Jones* (2002), in which it held "that the fact that an overpayment arises from confusion on the part of the Administration does not give rise to any consideration of equity requiring the Administration to forego its right of recovery provided it applies its own two year [time limit] rule." The Tribunal noted that, in this case, the Administration had acted well within that time limit. The Tribunal further recalled its jurisprudence in Judgement No. 986, *Steiner et al.* (2000) that, under staff rule 103.18 (b)(ii), overpayments can legally be recovered "because there was an 'indebtedness to the United Nations' occasioned by the Applicant's unjust enrichment". It held that only "compelling reasons of equity" would prevent the recovery of an overpayment and rejected as insufficient to meet this test the Applicant's assertion that she was the innocent recipient of the overpayment and had acted in good faith throughout. Accordingly, the Application was rejected in its entirety.

10. Judgement No. 1222 (24 November 2004): Othigo v. *the Secretary-General of the United Nations*[17]

Medical fraud—Recognition of only one dependent spouse—Discretion of the Secretary-General in disciplinary matters—Proportionality of sanctions—Separation from service with compensation in lieu of notice—Good faith defence—Plea of *ad misericordiam*

The Applicant entered the service of the United Nations Office at Nairobi (UNON) at the G-4 level, as Security Officer, on 8 August 1989. His contract was subsequently extended a series of times.

On 26 March 2002, the Chief of Security, UNON, was advised that the Applicant had submitted fraudulent medical claims in respect of maternity care and hospitalization for a woman whom he had misrepresented as his wife. The matter was reported to the Office of Internal Oversight Services (OIOS) for investigation, in the course of which the Applicant admitted that he had misrepresented Ms. X as Mrs. Othigo, his recognized spouse, in order to have the former admitted for hospital treatment. The Applicant provided an affidavit to the effect that he had married Ms. X in a traditional ritual. He subsequently produced an affidavit from a Commissioner of Oaths, in which he swore to being married to two wives, Mrs. Othigo and Ms. X, and admitted to having arranged for his second wife's admission into hospital for treatment using the particulars of his first wife. During the course of the investigation, Ms. X was readmitted into hospital, where she died. Albeit aware of the woman's identity, the Joint Medical Service subsequently certified the hospitalization expenses for her as Mrs. Othigo on compassionate grounds in order to facilitate the release of her body from the hospital mortuary.

On 9 October 2002, the OIOS report was sent to the Applicant and he was asked to respond to the allegations against him. He submitted his defence on 18 November but, on 3 December, he was advised that his case would be submitted to the Joint Disciplinary Committee (JDC) in Nairobi. In its report of 12 May 2003, the JDC concluded that it was "clear that the staff member ha[d] submitted medical claims for a person for whom such entitlements [did] not exist" under the United Nations Medical Insurance Plan (MIP). The JDC noted that, even had the Applicant and Ms. X been legally married, Ms. X could not have been covered by the MIP unless the Applicant's first wife had been removed from the plan, as staff members may not claim two dependent spouses. The JDC considered the Applicant's misconduct "so serious that [it] was unable to recommend a disciplinary measure that would allow [him] to continue his employment within the United Nations." In view of his length of service; his close relationship with Ms. X and the child; and, the fact that the Applicant had paid the hospital bills, the JDC did not recommend summarily dismissal but, rather, recommended that the Applicant be separated from service with three months' compensation in lieu of notice. On 10 June, the Applicant was informed that the Secretary-General had decided to accept the JDC's recommendation. On 8 October, the Applicant filed his Application with the Tribunal claiming that the sanction imposed was disproportionate.

[17] Kevin Haugh, Vice-President; and Omer Yousif Bireedo and Spyridon Flogaitis, Members.

In its consideration of the case, the Tribunal agreed with the JDC that the Applicant's "good faith" defence was not plausible, finding that, had he believed that Ms. X was entitled to MIP coverage as his second wife, there would have been no need to have misrepresented her as Mrs. Othigo.

The Tribunal also noted that the Applicant, before the Tribunal, argued that "his actions should be construed as 'misguided' or 'erroneous,' albeit wrongful, rather than fraudulent . . . and [that] he [made] an *ad misericordiam* plea that he should, in all the circumstances, have been afforded a greater degree of leniency." It also noted that the Applicant meant "erroneous in the sense of conduct which cannot be justified, rather than conduct which was the result of a factual mistake."

The Tribunal recalled its jurisprudence regarding the broad powers of discretion enjoyed by the Secretary-General in disciplinary matters. It affirmed that the Tribunal "does not substitute its judgement for that of the Secretary-General, but restricts itself to reviewing whether the decision-making process, and the decision reached, respected the rights of the staff member in question". It considered that it was "appropriate and proper" for the Respondent to have characterized the conduct in question as fraudulent and, under the circumstances, did not find the sanction imposed upon the Applicant as excessive or disproportionate. Accordingly, the Application was rejected in its entirety.

B. Decisions of the Administrative Tribunal of the International Labour Organization[18]

1. *Judgment No. 2278 (4 February 2004): Mr. A. H.* v. *the European Patent Organisation*[19]

Residence requirement under article 23 of the service regulations—Right to freedom of residence—Principle of equal treatment—Duty to substantiate decision—Expectation and contractual obligation

The Complainant challenged the decision of the President of the European Patent Organisation (EPO) that he was not allowed to take up residence in Belgium.

The Complainant, a British national, joined the European Patent Office (Office), which is based in The Hague, in 1997. For the first three years of his employment, the Complainant lived in the Netherlands. In November 2000, he purchased a house in Essen, Belgium, situated close to the Dutch border at a distance of 89 kilometres (km) from his place of work. In December 2000, the Complainant applied for an EPO home loan for his house, whereupon the Director of Personnel informed him that he was not allowed to take

[18] 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: International Labour Organization, including the International Training Centre; World Health Organization, including the Pan American Health Organization; United Nations Educational, Scientific and Cultural Organization; International Telecommunication Union; World Meteorological Organization, Food and Agriculture Organization of the United Nations, including the World Food Programme; European Organization for Nuclear Research; World Trade Organization; International Atomic Energy Agency; World Intellectual Property Organization; European Organization for the Safety of Air Navigation (Eurocontrol); Universal Postal Union; European Southern Observatory; Intergovernmental Council of Copper Exporting Countries; European Free Trade Association; Inter-Parliamentary Union; European Molecular Biology Laboratory; World Tourism Organization; European Patent Organisation; African Training and Research Centre in Administration for Development; Intergovernmental Organisation for International Carriage by Rail; International Center for the Registration of Serials; International Office of Epizootics; United Nations Industrial Development Organization; International Criminal Police Organization (Interpol); International Fund for Agricultural Development; International Union for the Protection of New Varieties of Plants; Customs Cooperation Council; Court of Justice of the European Free Trade Association; Surveillance Authority of the European Free Trade Association; International Service for National Agricultural Research; International Organization for Migration; International Centre for Genetic Engineering and Biotechnology; Organisation for the Prohibition of Chemical Weapons; International Hydrographic Organization; Energy Charter Conference; International Federation of Red Cross and Red Crescent Societies; Preparatory Commission for the Comprehensive Nuclear-Test-Ban Treaty Organization; European and Mediterranean Plant Protection Organization; International Plant Genetic Resources Institute; International Institute for Democracy and Electoral Assistance; International Criminal Court; International Olive Oil Council; Advisory Centre on WTO Law; and African, Caribbean and Pacific Group of States. The Tribunal is also competent to hear disputes with regard to the execution of certain contracts concluded by the International Labour Organization and disputes relating to the application of the regulations of the former Staff Pension Fund of the International Labour Organization. For more information about the Administrative Tribunal of the International Labour Organization and the full texts of its judgments, see www.ilo.org/public/english/tribunal/.

[19] Michel Gentot, President; James K. Hugessen, Vice-President; and Mary G. Gaudron, Judge.

up residence in Belgium, since he had accepted the terms in his letter of appointment, and particularly the "condition" that he resides in the Netherlands.

The Complainant lodged an internal appeal against this decision. While the Appeals Committee unanimously recommended that his appeal be allowed, the President of the Office rejected its recommendation. The decision of the President was the subject of the Complaint to the Tribunal.

The Complainant contended, inter alia, that EPO's attempt to prevent him from residing outside the Netherlands was contrary to the Universal Declaration of Human Rights and article 23 of the EPO service regulations.[20] He also alleged unequal treatment by identifying other staff members who had been allowed to reside in Belgium, one of whom had obtained a home loan from EPO for a Belgian property.

The Tribunal first stressed the "necessity for administrative decisions to be properly supported by reasons. This [was] particularly the case where, after an elaborate internal appeal procedure . . . the executive head of an international organization, acting in a quasi judicial capacity and as the penultimate arbiter of disputes between the administration and the staff, decides not to accept the recommendation of the internal appellate body." The Tribunal referred to its previous Judgment No. 2092 *In re Spaans* (2002), in which it stated that "when the executive head of an organization accepts and adopts the recommendations of an internal appeal body he is under no obligation to give any further reasons than those given by the appeal body itself. Where, however, . . . he rejects those recommendations his duty to give reasons is not fulfilled by simply saying that he does not agree with the appeal body."

The Tribunal also held that not only had the President of the Office a duty to be fair and objective in the performance of his functions as the final decision-maker in internal appeals, also his conduct must make it manifest that he has been so. It was not enough to state that he thought EPO had put forward the better case; this was a conclusion not a reason. The Tribunal concluded that the decision must be quashed for failure to give reasons.

The Tribunal further concluded that the decision was flawed in substance and cited and adopted passages from the report of the Appeals Committee.

In its report, the Appeals Committee noted that the Office applied a general rule that the requirements of article 23 of the service regulations would not be met if an employee's residence was more than one hour's travel time by public transportation away from his or her place of work. While the Committee considered that the Office was, in principle, entitled to establish such a general rule, it also noted that the rule had been established in order to limit claims to expatriation allowances by Belgian nationals living in Belgium and working in The Hague. The residence obligation was restrictively interpreted in such a

[20] Article 23 of the Service Regulations for Permanent Employees of the EPO headed "Residence," provides as follows: "A permanent employee shall reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties." Article 1 of the EPO Regulations for the Grant of Home Loans reads as follows: "(1) Any permanent employee of the European Patent Office having active status shall be entitled to apply for a loan for the building, purchase or conversion of residential property that is his main residence or is intended to become same after his retirement . . . (2) The property must be a residence within the meaning of Article 23 of the Service Regulations . . ."

way as to exclude residence outside of the Netherlands. Within the Netherlands, the Office accepted any residence within a 100 km radius of the place of employment.

The Appeals Committee concluded that the one hour rule was "based on extraneous considerations which led to a limitation, beyond the requirement of article 23, of the employee's right of freedom to residence."

Concerning the Complainant's claim of unequal treatment by EPO, the Appeals Committee found that the Organization had applied the one hour rule differently in the case of another staff member, living in the Netherlands, and that there was no basis for doing so. It reiterated its conclusion that the mere fact that the Complainant's residence was outside the Netherlands did not "constitute sufficient reason for refusing to acknowledge fulfilment of the residence requirement."

Finally, the Appeals Committee also held that EPO could not assert that the Complainant had agreed to take up residence in the Netherlands by accepting the offer of employment in which it was stated that "[t]he Office expects you to reside in the Netherlands." The Appeals Committee agreed that the "expectation" that the Complainant would take up residence in the Netherlands was not a contractual obligation.

The Tribunal ordered that the impugned decision be set aside. The Complainant's claim for damages was considered irreceiveable as he had not asserted that claim before the Appeals Committee. The Complainant was awarded costs, which, however, was limited in view of the repetitive nature of the Complainant's pleadings together with the personal attacks on a member of EPO's legal department and the unfounded and insulting comments about EPO contained therein.

2. Judgment No. 2280 (4 February 2004): Mr. K. M. v. *the European Patent Organisation*[21]

Duty of assistance to employees under article 28 of the service regulations—Injury by reason of the employee's office or duties—Obligation to provide compensation—Exemption from Dutch tax on private cars and motorcycles

The Complainant challenged the decision of the President of the European Patent Office (Office) to dismiss his internal appeal of a decision denying a request for reimbursement of legal costs under article 28 of the Service Regulations for Permanent Employees of the European Patent Office.[22]

The Complainant, a permanent employee of European Patent Organisation (EPO) posted in The Hague, bought a car in Belgium and imported it to the Netherlands, upon

[21] Michel Gentot, President; and Jean-François Egli and Seydou Ba, Judges.

[22] Article 28 of the Service Regulations for Permanent Employees of the Office, is entitled "Assistance by the Organisation." It reads as follows, "(1) If, by reason of his office or duties, any permanent employee . . . or any member of his family living in his household is subject to any insult, threat, defamation or attack to his person or property, the Organisation shall assist the employee, in particular in proceedings against the author of any such act. (2) If a permanent employee . . . suffers injury by reason of his office or duties, the Organisation shall compensate him in so far as he has not wilfully or through serious negligence himself provoked the injury, and has been unable to obtain full redress."

which the Dutch customs authorities asked him to pay a BPM tax.[23] The Complainant requested legal and financial assistance from the Office under article 28 of the service regulations in disputing the tax. This request was rejected since it was considered to be a matter of a private nature. The Complainant then brought his dispute with the customs authorities before the Dutch courts, in which it was decided that the Complainant was not ordinarily resident in the Netherlands and, accordingly, he was exempt from the BPM tax. Subsequently, the Complainant asked the President of the Office for reimbursement of the costs he had incurred in the court proceedings. This request was rejected and the Complainant lodged an internal appeal. The Appeals Committee unanimously recommended that the appeal be dismissed on the grounds that the Complainant was liable to pay the BPM tax and that the conditions for entitlement for compensation under article 28 of the service regulations were not met, i.e., injury suffered by reason of his office or duty. Accepting the recommendation of the Appeals Committee, the President rejected the appeal and this decision was the subject of the complaint to the Tribunal.

In its consideration of the case, the Tribunal agreed with EPO that "the fact that the [C]omplainant reside[d] in the Netherlands to work there for the Organisation [was] not connected with his personal decision to import a car from Belgium for his private use rather than purchase one in the Netherlands. It was because of that importation that he incurred costs in obtaining the recognition by the Dutch courts of a tax exemption which the EPO considered in good faith that he was not entitled to, based on his status and the provisions of both the Agreement with the Netherlands and the Protocol on privileges and immunities of the EPO." The Tribunal concluded that it could not be established that the Complainant had suffered injury by reason of his office or duty, as required by article 28 of the service regulations.

Concerning the Complainant's claim that his residence was in Croatia and that he spent more than 180 days outside the Netherlands, the Tribunal pointed out that the Organisation could not have recognized the Complainant's residence as being outside the Netherlands in view of article 23 of the service regulations which provides, in part, that a "permanent employee shall reside . . . in the place where he is employed", which, in the case of the Complainant, was in The Hague. The Organisation could not be blamed for not assisting the Complainant in his dispute with the Dutch authorities or for refusing to pay the compensation requested by the Complainant.

In view of its findings, the Tribunal concluded that the Complainant's allegation of breach of duty of care by the Organisation was unfounded. The Tribunal also held that the allegation of abuse of authority by, *inter alia*, collusion between the Organisation and the Dutch authorities, was unfounded. The Tribunal dismissed the Complaint.

[23] *Belasting van personenauto's en motorrijwielen*. The BPM tax is payable by residents of the Netherlands only.

3. Judgment No. 2292 (4 February 2004): Mr. J. M. W. v. *the European Patent Organisation*[24]

TERRITORIAL APPLICATION OF THE PENSION SCHEME REGULATIONS—APPLICATION OF THE CONVENTION ON THE GRANT OF EUROPEAN PATENTS, 1973,[25] TO TERRITORIES OF CONTRACTING STATES UNDER ARTICLE 168 OF THE CONVENTION—APPLICATION OF PRINCIPLES OF THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, 1950,[26] TO STAFF RELATIONS—PROTECTION OF PROPERTY RIGHTS—PRINCIPLE OF NON-DISCRIMINATION—CONSEQUENCES OF EXERCISING OPTION UNDER ARTICLE 33 OF THE PENSION SCHEME REGULATIONS

The Complainant, a British national, is a former staff member of the European Patent Organisation (EPO), from which he retired with an invalidity pension on 1 June 2001. He opted to retire in the United Kingdom (UK) and, under articles 33 and 42 of the Pension Scheme Regulations (the Regulations),[27] this choice determined the scale used to calculate the Complainant's pension and the adjustment to which he was entitled as a result of the fact that he was liable to pay UK income tax.

The Complainant wished to move to Gibraltar but was informed that, if he moved, his pension would be paid in German marks according to the German scale without any adjustment for income tax.[28] The Principal Director of Personnel advised that the territorial application of the Regulations was limited to the territories of the Contracting States of the Convention on the Grant of European Patents (the European Patent Convention), 1973. The United Kingdom, a Contracting State, had not designated Gibraltar as a territory to which the Convention was extended under its article 168.

The Complainant lodged internal appeals which were rejected by the President of the European Patent Office in a decision of 31 January 2003, upon the recommendation of the Appeals Committee. The decision of the President is the subject of the Complaint. Prior to the date of the President's decision in 2003, the Complainant had moved to the Isle of Man, a dependency of the British Crown.

The Tribunal first considered the claim by the Organisation that the Complaint was irreceivable as the Complainant had taken up residence in the Isle of Man where the issues raised regarding his pension did not apply. EPO cited the Tribunal's Judgment No. 764, *In re Berte* (No. 2) (1986), in which it held that:

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[24] Michel Gentot, President; James K. Hugessen, Vice-President; and Mary G. Gaudron, Judge.

[25] United Nations, *Treaty Series,* vol. 1065, p. 254.

[26] United Nations, *Treaty Series,* vol. 213, p. 221.

[27] Article 33, paragraph 1, specifies that pensions shall be calculated by reference to the permanent employee's salary and scales applicable to the country of his last posting. Paragraph 2 provides that "if the employee settles subsequently . . . in the country of which he is a national," he may "opt for the scale applicable to that country," and that option is deemed to be "irrevocable." Paragraph 4 reads "[w]here a country opted for under the provisions of [paragraph 2] is not or has not been a Member State of the one of the [Coordinated Organizations], the reference scale shall be that applicable in the host country of the headquarters of the Organisation responsible for payment of benefits." Article 42 provides that "[t]he recipient of a pension under these Regulations shall be entitled to the adjustment applying to the Member State of the Organisation in which the pension and adjustment relating thereto are chargeable to income tax under the tax legislation in force in that State."

[28] The EPO Headquarter is situated in Germany.

> "A decision by an international organization is challengeable before the Tribunal only if it causes the complainant injury. One that has no effect on his position is not, for example, an act which is not operative but a mere declaration of intent."

The Tribunal, taking into account the evidence provided by the Complainant that he had bought a property in Gibraltar, concluded that the likelihood that the Complainant may move there was sufficient to rule on the objection raised. However, the Tribunal further held that "the Complainant's request for an order to the Organisation regarding his right to exercise a new option, should the EPO revoke his option for the [United Kingdom] scale, amount[ed] to a request for legal advice, which [lay] beyond the jurisdiction of the Tribunal and must therefore be dismissed as irreceivable."

The Tribunal went on to consider the arguments as to the merits raised in the Complaint. The Tribunal noted that the United Kingdom had not declared, under article 168 of the Convention, Gibraltar as a territory to which the Convention is directly applicable and, contrary to the Complainant's opinion, concluded that "[i]t would be absurd to consider that the scope of the provisions of the EPO's pension scheme should be any different from that of the founding instrument of the Organisation, that is to say, the European Patent Convention".

Insofar as the Complainant's claim that the different pension rules applicable according to the place of residence of staff was a breach of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, the Tribunal held that while EPO was not bound by the Convention in the same way as signatory States, the general principles enshrined therein applied to relations with staff. However, the Tribunal further stated that "the fact that in connection with pension rights different rules apply according to the place of residence of retired staff members constitutes neither a breach of property rights nor a violation of the principle of equality, provided that the staff are not deprived of any of the rights they enjoy under the statutory and regulatory provisions . . . and that they have freely exercised their right of option." In this case, the issue was whether the option exercised by the Complainant, who took up residence first in London and then in the Isle of Man, would allow him the same benefits if he decided to take up residence in Gibraltar.

The Tribunal also held that the Complainant's argument that, having exercised an option under article 33 of the Regulations to take up residence in the United Kingdom, he was free to change his residence to any territory whilst retaining the same benefits, was absurd and the exercise of the option obviously did not have this effect. The Tribunal concluded that "for the purposes of calculating the [C]omplainant's pension, the EPO rightly refused to maintain the scale applicable to the United Kingdom and the related adjustment in the event that he takes up residence in Gibraltar."

The Tribunal dismissed the Complaint.

4. *Judgment No. 2302 (4 February 2004): Mr. J. A. T.* v. *the International Organization for Migration*[29]

WAIVER OF DIPLOMATIC IMMUNITY—DISCRETION TO WAIVE IMMUNITY—TRIBUNAL'S LACK OF JURISDICTION TO QUASH DECISION TO WAIVE IMMUNITY—PROCEDURE FOR WAIVER OF IMMUNITY—DISCRETION NOT TO RENEW CONTRACT IN THE INTERESTS OF THE ORGANIZATION—DECISION TO SUSPEND OFFICIAL—AGREEMENT BETWEEN THE INTERNATIONAL ORGANIZATION FOR MIGRATION AND THE GOVERNMENT OF SOUTH AFRICA

The Complainant challenged the decision of the Director General of the International Organization for Migration (IOM) to reject his appeal concerning the waiver of his diplomatic immunity, suspension from duty, non-renewal of his contract, and a claim for damages.

The Complainant was appointed Regional Representative of IOM's Mission with Regional Functions in Pretoria in 2000, under a one year fixed-term contract. In September 2001, IOM's Legal Advisor was informed that two of the Organization's employees had accused the Complainant of sexual harassment. The Director General sent a letter to the Complainant asking for his written comments in response to the affidavits from the two employees.

On 21 September 2001, the Director General received a fax, apparently unsigned, in which the Director of Public Prosecutions, Transvaal, asked that "the Director General . . . be formally and expressly requested, via the Department of Foreign Affairs," to waive any immunity that the Complainant might enjoy, in accordance with section 27 of the Agreement between IOM and the Government of South Africa. The Director General replied by fax and stated that the charge against the Complainant was not covered by the immunity from jurisdiction which he enjoyed. Under the terms of the Agreement between IOM and the Government of South Africa, the Complainant enjoyed immunity from detention and arrest. The Director General concluded that a refusal to waive the Complainant's immunity would impede the proper administration of justice and that a waiver would not prejudice the interests of IOM. He therefore decided to waive the immunity enjoyed by the Complainant.

On 26 September 2001, the Complainant was arrested and charged with indecent assault, but released on bail on the following day. On the same day, the Director General suspended him from duty with full pay. The Complainant's contract, which was due to expire on 29 October 2001, was extended for a period of three months. However, in a letter of 7 November 2001, the Director General informed the Complainant that, in the interests of the Organization, his contract would not be renewed beyond 31 January 2002.

On 5 January 2002, the Complainant lodged an appeal to the Joint Administrative Review Board relating to the decisions to waive his diplomatic immunity, to suspend him from duty, the non-renewal of his contract and the damages he allegedly suffered. The Board recommended rejecting the appeal and the Director General decided to endorse that recommendation. The decision of the Director General is the subject of the Complaint to the Tribunal.

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[29] Michel Gentot, President; James K. Hugessen, Vice-President; and Mary G. Gaudron, Judge.

The Tribunal first considered the Complainant's request to quash the decision to waive the Complainant's immunity. Referring to its Judgments No. 933, *In re Van Der Peet* (No. 12) (1988), No. 1543, *In* re *Popineau* (No. 12) (1996), and No. 2190, *F. Z.* (2003), the Tribunal noted that there was precedent to the effect that an organization "has a discretion to assess, in the context of its relations with a Member State, which are beyond the jurisdiction of the Tribunal, whether it is appropriate to lift the immunity from legal process of its employees". Thus, the Tribunal held that [w]hile [it] cannot quash a decision to waive diplomatic immunity, it may nevertheless examine the circumstances in which the immunity was waived and draw the appropriate consequences if there has been a violation of the contractual rights of the officials concerned or applicable general principles".

Turning to the question of whether a genuine application for waiver had been made, the Tribunal noted that the fax from the Director of Public Prosecutions was not signed by a competent authority, that there was no clear indication that it was addressed to the Organization and, further, that it did not contain a direct request for the Complainant's immunity to be waived. Furthermore, the fax from the Director of Public Prosecutions could not be considered as a properly submitted request as it stated that the request should pass via the Department of Foreign Affairs.

The Tribunal concluded that the Complainant had grounds to claim compensation for damage resulting from the decision to waive his immunity and assessed damages in the sum of 5,000 Swiss francs.

The Tribunal also concluded that the Complainant's request to quash the decision suspending him from his duties should fail as the Director General had given him the opportunity to defend himself against the serious accusations brought against him. It considered that the suspension was inevitable as one of the persons who made the allegations was the Complainant's own assistant.

Moreover, the Tribunal held that the claim regarding the decision to refuse to renew the Complainant's contract must fail since the Director General had acted within his discretion in rejecting the request for renewal and his decision showed neither an error of law nor an error of fact.

The Complainant's allegations of bad faith and abuse of authority were not accepted. As the Complainant was partially successful, the Tribunal awarded the Complainant costs of 2,000 Swiss francs.

5. *Judgment No. 2365 (7 May 2004): In* re *T. B.* v. *the Universal Postal Union*[30]

Suspension from duty pending investigation of serious misconduct—Staff rule 110.3—Discretion to suspend a staff member—Scope of review by the Tribunal of a decision to suspend—Right to be heard—Abuse of authority

The Complainant, a staff member of the Universal Postal Union (UPU), challenged a decision to temporarily suspend him after a number of irregularities had been discovered by an internal audit of his mission expenses. The auditor's report recommended his suspension in view of the systematic nature of the irregularities and, also, having regard to the number of appeals previously filed by the Complainant against UPU. On 16 May

[30] Michel Gentot, President; and Jean-François Egli and Seydou Ba, Judges.

2002, the Director General informed the Complainant of the initiation of a disciplinary procedure against him and of his suspension with immediate effect under staff rule 110.3, without loss of salary, until the procedure was complete. The Complainant was not heard prior to that decision.

On 14 June, the Complainant asked the Director General to reconsider his decision and, after having received no answer within the statutory time limit, the Complainant referred the matter to the Joint Appeals Committee (JAC). On 21 October, upon the recommendation of the JAC, the Director General confirmed the suspension of the Complainant. This was the impugned decision challenged by the Complainant before the Tribunal.

The Complainant was dismissed for serious misconduct with effect from 28 February 2003.

In its consideration of the case, the Tribunal first noted that "the suspension of the [C]omplainant was an interim precautionary measure, which was to last as long as the disciplinary procedure." It further noted that it was initially ordered without hearing the Complainant's views, "but that the latter's right to be heard [had been] safeguarded since he later [had] had an opportunity to exercise it before the impugned decision was taken", on 21 October 2002.

The Tribunal also held that as a suspension "imposes a constraint on a staff member, [the] suspension must be legally founded, justified by the requirements of the organization and in accordance with the principle of proportionality." The decision to suspend lies at the discretion of the Director General and it is therefore subject to limited review by the Tribunal, "that is to say, if it was taken without authority or in breach of a rule of form or of procedure, or was based on an error of fact or of law, or overlooked some essential fact, or was tainted with abuse in authority, or if a clearly mistaken conclusion was drawn from the evidence".

The Tribunal further considered the language of staff rule 110.3 and held that the expression therein "if he considers that the charge is well founded" should be understood to mean "if he considers that the specific accusations made allow him to presume that the charge is well-founded".

With regard to the Complainant's argument that insufficient reasons were given by the Director General for his decision, the Tribunal stated that, "without exceeding his extensive authority, the Director General could legitimately consider that it was in the UPU's interest to suspend the [C]omplainant", in view of the seriousness of the charges against him. Since the suspension was only temporary, not widely publicized and did not affect the Complainant's right to defend himself, it concluded that his rights were not violated. It further held that although the reasons given in the impugned decision might not have been sufficient, it was substantiated by the reasons given in the investigative report and in the recommendation by the JAC.

The Tribunal also concluded, contrary to the Complainant's arguments, that the suspension was based on objective reasons and did not constitute abuse of authority. Neither

was it a measure of reprisal, as there was no evidence that the Director General intended to penalize the Complainant for his prior appeals by deciding to suspend him.

Finally, concerning the Complainant's claim that the Director General prejudged his case as he made the decision one or two days after receiving the lengthy audit report, the Tribunal considered that the Complainant had misunderstood the internal nature of the report and held that the report could not on its own be conclusive proof against a staff member. Even if he was unable to study the report in full, there was no abuse in authority by the Director General in concluding that the report contained indications which merited further scrutiny through disciplinary proceedings.

The Tribunal dismissed the Complaint.

6. *Judgment No. 2359 (14 May 2004): Mr. E. G. A.* v. *the European Patent Organisation*[31]

Dependency allowance—Definition of "dependent children"—Interpretation of rules—Article 69(3) (c) of the service regulations and rule 2 of Communiqué No. 6

The Complainant challenged the decision of the President of the European Patent Organisation (EPO) to dismiss his appeal for payment of dependency allowance with respect to the period from 24 July 2000 to 31 August 2001.

In June 2000, the Complainant's partner took up residence with him. She had two children and until then she had been supporting them with a small income from a part-time employment supplemented by social benefits. Her working hours had been considerably limited by the fact that her handicapped son required additional care. Once she was cohabiting with the Complainant, the Netherlands authorities assessed her entitlement to social security benefits on the basis of the couple's combined income. As a result, in June 2000, she ceased to receive one of the two social security benefits to which she had previously been entitled. On 24 July 2000, the Complainant applied for a dependency allowance in respect of his partner's children.

By a note of 31 October 2000, the Director of Personnel rejected the Complainant's application on the grounds that the conditions for dependency allowance were not fulfilled, because the children were not under the Complainant's parental authority,[32] whereupon he lodged an internal appeal. On 12 September 2001, when the appeal was still pending, the Complainant obtained joint custody of his partner's children and he was granted dependency allowance with effect from 1 September 2001. The Complainant maintained his appeal, claiming payment of the allowance, with interest, as from 24 July 2000, the date of his application, plus moral damages and costs.

In its opinion of 9 December 2002, the Appeals Committee recommended that the appeal be dismissed. The Appeals Committee considered that the mother had partially forfeited her entitlement to social security benefits of her own free will by deciding to cohabit with the Complainant and noting that she had also chosen not to enforce mainte-

[31] Michel Gentot, President; James K. Hugessen, Vice-President; and Mary G. Gaudron, Judge.

[32] The Complainant was not married to his partner at that time. The children themselves were not married, and they were not the Complainant's legitimate, natural or adopted children. Nor was the Complainant in the process of adopting them.

nance claims against the children's biological father. The Committee also considered that the conditions for recognition as a dependent child were not met. On 6 February 2003, the Complainant was informed that the President of EPO had decided to reject his appeal in accordance with the recommendation of the Appeals Committee.

In reviewing the case, the Tribunal found some distinct problems with the reasoning of the Appeals Committee. The Tribunal stated that, "to say that the [C]omplainant's partner was not able to support her children because she voluntarily joined his household is to adopt an unduly simplistic view of causation, rather than to look for the real and effective cause of her inability." The Tribunal further stated that the rule relevant to the case was intended to be evidentiary, in the sense that it "relieve[s] an employee of the burden of producing detailed evidence that he or she 'mainly and continuously' supports the children in question if the various matters specified in the rules are established. An employee who cannot establish those matters may, nevertheless, establish by other evidence that the children in question are 'mainly and continuously' supported by him or her, or by his or her spouse."

The Tribunal concluded that the view taken by the Appeals Committee that the relevant rule is definitional rather then evidentiary, was an error of law. Furthermore, the Tribunal concluded that to reject the Complainant's appeal involved not only an error of law, but also an unduly legalistic approach to the relevant provisions.

The evidence was that, no other person than the Complainant and his partner contributed to the support of the children and that the Complainant was the breadwinner. Thus, the children were mainly and continuously supported by him at the relevant time. Accordingly, the Tribunal entitled the Complainant to be paid an allowance for the two dependent children for the period from 24 July 2000 until 31 August 2001. The Tribunal found no case for moral damages.

C. Decisions of the World Bank Administrative Tribunal[33]

1. Decision No. 309 (18 June 2004): Bernstein, Applicant v. *International Bank for Reconstruction and Development, Respondent*[34]

Pension eligibility requirements—Non-regular staff—Break in service—*Détournement de pouvoir*—Gender discrimination—Respect of prior expectations

[33] 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 of 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 reasons of the staff member's death and any person designed or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan. For more information on the World Bank Administrative Tribunal and the full texts of its decisions, see http://wbln0018.worldbank.org/crn/wbt/wbtwebsite.nsf.

[34] Francisco Orrego Vicuña, President; Bola A. Ajibola and Elizabeth Evatt, Vice Presidents; and Robert A. Gorman, Jan Paulsson, Sarah Christie and Florentino P. Feliciano, Judges.

The Applicant challenged the decision of the International Bank for Reconstruction and Development (the Bank) to deny her pension credit for her service as a non-regular staff member due to a disqualifying break in service. Such pension credit had been conferred on qualifying staff members in 2002 as an extension of the Bank's 1998 Human Resources Policy Reform (the Reform). The Applicant alleged that the Bank had engaged in gender discrimination because the disqualifying break in eligible service was the consequence of decisions made at a time when she was due to deliver her first child.

The Applicant joined the Bank in 1982 as a short-term staff member. In 1983, she obtained a long-term consultancy, which lasted until she left the Bank for the private sector in 1986. She rejoined the Bank as a short-term Consultant in 1989, and that same year her appointment was converted to a long-term consultancy. This consultancy expired on 30 April 1990, and shortly thereafter the Applicant gave birth to her first child. In August 1990, she obtained a short-term consultancy and, on 15 November 1990, another long-term consultancy. This latter consultancy lasted until November 1994, when her appointment ended due to a four-year limit from which the Applicant was not exempt since she had not been in continuous long-term service as of 30 September 1990. The Applicant was thereafter converted to a short-term consultancy until 2 January 1997, when she again became a long-term Consultant upon the partial abolition of the four-year rule. She was converted to a term appointment in 1998, and to an open-ended appointment in 1999.

Meanwhile, the Applicant began to accrue prospective pension credit on 15 April 1998, when the Reform came into effect. In 2002, the Bank's Executive Directors approved Schedule F to the Staff Retirement Plan (SRP), which conferred past pension credit on non-regular staff in continuous service with a pensionable appointment lasting until 1 January 2002, except for any service occurring before a break in eligible service of more than 120 consecutive calendar days prior to that date. Qualifying appointments included a long-term consultancy but not a short-term consultancy. The Applicant sought past pension credit for the period from her post-birth return to the Bank in August 1990 until the time she began participation in the SRP in 1998. The Bank informed the Applicant that she was ineligible for past pension credit because: (i) the pre-December 1994 period was excluded by the break begun when her long-term consultancy ended that month under the four-year rule; and (ii) the period from 2 January 1997 through 14 April 1998 was excluded since it amounted to less than 730 days.

In its consideration of the case, the Tribunal noted that the Applicant was questioning the rules rather than their application, and upheld its prior rulings in *Lavalle,* Decision No. 301 (2003) and in *Elder,* Decision No. 306 (2003) that the Bank's Schedule F neither constituted a *détournement de pouvoir* nor was unreasonable. The Tribunal confirmed the validity of general rules and noted the administrative nightmare and risk of arbitrary differentiation between like staff members that a review of each staff member's career history would entail. The Tribunal nevertheless agreed with the Applicant that her case was extraordinary, in that her change in status in 1990 from long-term to short-term was due exclusively to her child's imminent birth. As no paid maternity leave was granted

for consultants, the Applicant had had no option but to let her long-term consultancy contract expire, which would otherwise have been extended and her employment status unaffected by the four-year limitation introduced in her absence. The Tribunal further found that the Applicant's work as a short-term Consultant from 1994 to 1996 was materially identical to her work as a long-term Consultant immediately before and immediately after, and that the Bank had understood it to be such at the time.

The Tribunal thus concluded that the Applicant's short-term status at that time was an artifice undertaken to comply with the four-year rule. The Tribunal rejected the Bank's contention that it should not be held liable for compliance with a rule instituted as part of a staff regularization scheme mandated earlier by the Tribunal.[35] The Tribunal stated that the question was not one of regularization but rather one of determining for past pension credit purposes whether the Applicant's short-term employment was equivalent to a long-term consultancy because of its unchanging nature.

The Tribunal noted that "under recognized international standards, absence from work due to pregnancy and childbirth should not result in loss of continuity of employment, seniority or status." The Tribunal found that it was only because of the Applicant's pregnancy that she had lost her long-term status and was consequently affected by the four-year rule. The Tribunal concluded that the Applicant had had an expectation to rejoin the Bank in 1990 as a long-term Consultant, and that this perception and belief had been shared by the Bank. Moreover, the Tribunal found that at that time, neither the Applicant nor her managers were aware of the four-year rule. The Tribunal stated in this regard that while general policies might be changed by the Bank, a prior expectation must be respected when created by the acts of management itself.

The Tribunal for such reasons granted the Applicant past pension credit for the 1990 to 1998 period, minus 730 days as required by the terms of the SRP. The Tribunal further awarded the Applicant costs.

2. *Decision No. 317 (18 June 2004): Yoon (No. 4), Applicant* v. *International Bank for Reconstruction and Development, Respondent*[36]

Compliance with reinstatement order—"Comparable position"—Conduct of parties in Tribunal litigation—Censure of counsel

The Applicant claimed that she had not been reinstated to a "comparable position" by virtue of a prior Tribunal judgment[37] and that her new assignment had been made on the basis of a biased, fabricated and false appraisal of her aptitude and achievements. She further claimed that the International Bank for Reconstruction and Development ("the Bank") had retaliated against her and threatened to revoke her reinstatement. She entered a number of additional complaints against the Bank, and requested a wide range of relief, including the disciplining of three staff members.

[35] See, *Prescott,* Decision No. 253 [2001].

[36] Francisco Orrego Vicuña, President; Elizabeth Evatt, Vice President; and Jan Paulsson and Sarah Christie, Judges.

[37] *Yoon (No.2),* Decision No. 248 (2001).

The Tribunal stated that a person who is to be reinstated can neither expect that his or her previous position will have remained vacant, nor have greater rights than any other staff member. The Tribunal established that no one should be transferred, demoted or dismissed to accommodate a reinstatement, and that no position should be created simply for the purpose of reinstatement, as such would be a waste of Bank resources.

The Tribunal endorsed the test applied by the Appeals Committee in evaluating the Bank's compliance with the Applicant's reinstatement order, and stated that it should serve as a template in future cases. This test involved: (i) a substantive assessment of the proposals and conditions that were the subject of post-judgment communications between the Bank and the Applicant; (ii) an examination of the consultation and accommodation that occurred between the parties in placing the Applicant in a "comparable" position; (iii) a comparison of the Applicant's position at the time of reinstatement to the one she occupied upon her termination; and (iv) a review of the length of time it took for the Bank to reinstate the Applicant. After analyzing the facts of the case, the Tribunal declared that despite the Applicant's stridency and repetitive allegations and contentions, her accusations were hollow and wholly unjustified by the record. For such reasons, the Tribunal dismissed the Application.

Moreover, despite considering the Applicant a "highly articulate professional," the Tribunal determined that her case had been harmed by her frequent and obvious mischaracterizations of the record, and that the central thrust of her narrative strained logic. The Tribunal found that the Applicant had unjustifiably and recklessly accused other staff members, that she had mischaracterized past Tribunal judgments so as to cross the line of reasonable advocacy. The Tribunal found the Applicant's theories startling, fanciful, incredible and self-defeating. The Tribunal further deemed the conduct of the Applicant's counsel to have been "professionally reprehensible", as it found his "gratuitous confrontationalism, fallacious arguments, and unreliable pleadings to have served no purpose other than to fan the litigation." The Tribunal therefore censured him in the hope he would reflect on his duties as an officer of the court.

3. Decision No. 325 (12 November 2004): E, Applicant v. *International Bank for Reconstruction and Development, Respondent*[38]

Divorce and support obligations—Garnishment of wages—Relationship of Bank and Tribunal to national courts and authorities—Principle of abstention—Due process—Investigations

The Applicant challenged the decision of the International Bank for Reconstruction and Development (the Bank) to deduct a certain amount from his net annual salary and to forward it to his former spouse as semi-monthly court-ordered spousal and child support payments. The Applicant and the Bank disagreed in this regard as to the proper interpretation of the divorce decree that established the support obligation, in particular with regard to the crediting of "mortgage".

[38] Bola A. Ajibola, President; Elizabeth Evatt and Jan Paulsson, Vice Presidents; and Robert A. Gorman, Francisco Orrego Vicuña, Sarah Christie and Florentino P. Feliciano, Judges.

In 1998, the Bank had adopted a policy, known as the Bank Policy on Spousal and Child Support (the Policy), to deduct court-ordered spousal and child support payments from a staff member's wages when he or she could not provide evidence of having satisfied such obligations. The Policy was designed to ensure that staff did not seek to hide behind the Bank's immunity from garnishment orders, and gave to the Bank the authority to hear from a staff member accused of delinquency and, upon finding a "clear legal obligation" to make payments "of a readily ascertainable amount," to commence deductions.

In 2003, the Applicant's former spouse wrote to the Bank's Vice President of Human Resources to complain that the Applicant was not making full and timely spousal and child support payments as required by the divorce decree. This letter was forwarded to the Bank's Department of Institutional Integrity (INT), which requested evidence of compliance from the Applicant. The Applicant responded by asserting that he had complied fully with the decree. After a review of all the submitted materials, the Director of INT, on 31 July 2003, sent to the Manager of the Bank's Human Resources Service Center (HRSSC) a memorandum on INT's review and conclusions. The memorandum was not likewise forwarded to the Applicant. Pursuant to the INT memorandum, the HRSSC Manager informed the Applicant on 5 August 2003 that automatic payroll deductions would commence on 15 August 2003. The Applicant requested a copy of the INT memorandum and received it on 12 August 2003. The Applicant thereafter requested an administrative review of the decision to commence such deductions. He also complained of highly prejudicial errors in the administrative process of the INT and the Human Resources, including the denial of a fair opportunity to respond to their actions. In response, the Vice President of Human Resources informed the Applicant that she regarded his position to be contrary to the decree's clear language.

In considering the case, the Tribunal noted that neither party had challenged the Policy itself, and that both had agreed on the general principle that the Bank must avoid interpreting or construing ambiguous or unclear provisions of a national court decree. The Tribunal confirmed that this principle of abstention was equally applicable to itself. It further stated that "the Bank and its internal agencies such as INT should, when called upon to examine the judgments of national courts, refrain from resolving plausible, conflicting interpretive claims."

The Tribunal concluded that the conflicting interpretations of the divorce decree by the Applicant and by his former spouse concerning the crediting of "mortgage" raised a genuine and reasonable doubt as to the meaning of that within the decree's context, and that the decree otherwise contained important ambiguities that were beyond the power of the Bank to resolve. The Tribunal stated that while the Bank's practices and the common understanding of the term "mortgage" were relevant to such an inquiry, they were not dispositive. The Tribunal further declared that it was not for the Bank to instruct national courts "as to the correct meaning of terms in the decrees of those courts", and that it was altogether beyond the power of the Bank to declare that the national court would be "quite simply" wrong in the interpretation of its own language. The Tribunal found that the burden lay upon the Applicant's former spouse to turn to the national courts if she wished to vindicate her position.

In considering the Applicant's challenge regarding the procedure utilized by the Bank in ascertaining his liability for support payments and the lack of due process, the

Tribunal stated that since it is within the discretion of the Bank to assign the enforcement of its policies to a suitable internal entity, that entity has discretion to utilize suitable procedures when making findings, conclusions and recommendations. The Tribunal held that there was no abuse of discretion in giving to INT, outside of the relevant framework for investigations and with less elaborate procedures, the power to investigate and make recommendations concerning the alleged failures of a staff member in making family support payments pursuant to a divorce decree. The Tribunal nevertheless required that the procedures formulated under the Policy must accord with the fundamentals of due process of law, and that their distinction from other investigation procedures must be clear.

The Tribunal concluded that the requirements of due process had not been fully satisfied in the Applicant's case, as the Applicant had not been informed as to the applicable procedures and protections, nor had he been provided with reports, drafts or reasoning prior to the time the decision was made to garnish his salary.

The Tribunal for such reasons ordered that the deductions cease pending the decision of the national courts, that reimbursement be made, and that the Applicant be awarded compensation and costs.

D. Decisions of the Administrative Tribunal of the International Monetary Fund[39]

Judgment No. 2004–1 (10 December 2004): Mr. "R" (No. 2), Applicant v. *International Monetary Fund, Respondent*[40]

Reimbursement of security expenses indirectly incurred by a staff member—*Res judicata*—Article XIII of the Statute of the Administrative Tribunal of the International Monetary Fund (the Fund)—Unfairness of a regulatory decision in an individual case—Regulatory and individual decisions

The Applicant, the former Director of the Joint Africa Institute (JAI), then located in Abidjan, Côte d'Ivoire, challenged a decision of the Department of Human Resources to deny his request for reimbursement of security expenses said to have been incurred by him indirectly when he elected to live in a hotel rather than a private residence at his overseas post. The Applicant contended that the Fund's housing allowance for overseas Office staff, while designed to compensate for the difference between housing costs in Washington, D.C. and the duty station, unreasonably fails to take into account differences in security costs at the two locations, except in the circumstance in which the Fund has occasion to pay directly for security enhancements of and protection to the overseas residence. Therefore, the Applicant contended that the Fund unfairly penalizes a staff member who

[39] The Administrative Tribunal of the International Monetary Fund became operational on 1 January 1994. The Tribunal is competent to pass judgment upon any application: a) by a member of the staff challenging the legality of an administrative act adversely affecting him; or b) by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant. For more information on the Administrative Tribunal of the International Monetary Fund and the full texts of its judgments, see www.imf.org/external/imfat/index.htm.

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

decides to rent accommodation in a facility already outfitted with security equipment and guard services, the costs of which are included in the rent. The Applicant sought as relief the amount he estimated he would have incurred directly for guard services had he elected to live in a private residence.

This was the second case brought to the Tribunal by the Applicant challenging the benefits he received during his assignment as Director of the JAI. In his earlier Application, he contested the denial of his request for a) an overseas assignment allowance, and b) a housing allowance commensurate with the housing benefit received by the Fund's Resident Representative in Abidjan. In that Application, he challenged as discriminatory the difference in benefits granted to overseas Office Directors *vis-à-vis* Resident Representatives where such officials are posted in the same foreign city. In *Mr. "R,"* Judgment No. 2002–1 (2002), the Tribunal rejected the Applicant's contentions, holding that the allocation of different benefits to different categories of overseas staff was "rational, related to objective factors, and untainted by any animus against the Applicant, and that it was within the Fund's managerial discretion to decline to make an exception to the policy in the Applicant's case."

The Fund urged the Administrative Tribunal to deny the present Application on the ground that article XIII of the Tribunal's statute (finality of judgments) prevents the Applicant from re-litigating the same claims which were decided in the previous case. In the alternative, the Fund argued that its decision was consistent with the application of the appropriate housing policy.

In considering the Fund's first argument, the Tribunal referred to article XIII, section 2, of its statute which provides that "[j]udgments shall be final, subject to article XVI and article XVII, and without appeal.," which codifies a cardinal principle of judicial review, *res judicata,* and prevents the re-litigation of claims already adjudicated and promotes certainty among the parties and judicial economy. This case was the first before the Tribunal in which the principle has been raised as a defense to an Application.

The Tribunal referred to various decisions of the International Labour Organization Administrative Tribunal articulating the requirements for the doctrine of *res judicata* to operate as a bar to a subsequent proceeding. In applying these principles, the Tribunal noted that it was required to consider "what claims were raised by the Applicant in his earlier suit, what was the purpose of that litigation, what the legal arguments were put forward by the parties and considered by the Tribunal, and what was decided by the Tribunal and on what basis."

First, the Tribunal considered whether the outcome sought by the Applicant was the same as that sought in the earlier case. In this regard, the Tribunal noted that in the first case, the Applicant challenged the Fund's decision not to accord him the same perquisites as those granted to the Resident Representative. In the present case, however, the Applicant contested the application of a policy that distinguished between costs directly and indirectly incurred, the Fund meeting the former but not the latter. The Tribunal thus concluded that the purpose of the two claims were not the same.

The Tribunal then considered whether the Applicant's cause of action had the same foundation in law as that in the earlier case. The earlier case was decided by the Tribunal by determining if granting different benefits to different categories of staff constituted discrimination, "elucidating the principle of non-discrimination as a substantive

limit on the exercise of discretionary authority." In the present case, the Applicant challenged a policy that distinguished between security costs directly and indirectly incurred, thus identifying a different inequity than the one previously complained of. The Tribunal concluded that the doctrine of *res judicata* did not apply.

In considering the merits of the Application, the Tribunal first asked whether the Fund properly interpreted and applied its housing policy. The decision to refuse to reimburse indirect security costs was based on the policy that the Fund would pay for costs directly incurred by a staff member but not those which were avoided due to his choice of accommodation. The Tribunal concurred with the Applicant's argument "that these costs, far from being avoided, were indeed 'incurred,' albeit indirectly."

The Tribunal also addressed the Fund's argument that the Applicant was only seeking to challenge a regulatory decision.[41] The Tribunal, citing earlier decisions in which it discussed essential conditions for a valid regulatory decision, questioned whether the Fund's "policy" regarding reimbursement of security expenses for staff posted abroad met those requirements as there was no evidence before the Tribunal that the policy had been communicated to the staff of the Fund at large. Nevertheless, the Tribunal held that "even if it lack[ed] jurisdiction to pass upon the security policy as a 'regulatory decision', it [was] competent to consider the fairness of its application to the Applicant as an 'individual decision'."

The Tribunal ultimately concluded that there was "no cogent consideration, in the light of the Fund's policy of meeting security costs, why [the Fund] should be absolved of those costs in the case of [the Applicant] simply because they were indirectly rather than directly incurred. On the contrary, equal treatment of staff in their fundamental right to enjoy physical security should govern."

Accordingly, the Tribunal rescinded the decision of the Fund to deny payment of security costs indirectly incurred by the Applicant

[41] Under article II of its statute, the Tribunal has jurisdiction over challenges to both regulatory and individual decisions by the Fund.