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UNITED NATIONS JURIDICAL YEARBOOK

2009

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

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Chapter V

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

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

By resolution 61/261 of 4 April 2007, entitled "Administration of Justice at the United Nations", the General Assembly decided to establish a new, independent, transparent, professionalized, adequately resourced and decentralized system of administration of justice consistent with the relevant rules of international law and the principles of the rule of law and due process to ensure respect for the rights and obligations of staff members and the accountability of managers and staff members alike.

By resolution 62/228 of 22 December 2007, entitled "Administration of Justice at the United Nations", the General Assembly further decided to establish a two-tier formal system of administration of justice, comprising a first instance United Nations Dispute Tribunal and an appellate instance United Nations Appeals Tribunal. By resolution 63/253 of 24 December 2008, also entitled "Administration of Justice at the United Nations", the General Assembly decided that these new Tribunals shall be operational as of 1 July 2009. The Assembly further decided that the United Nations Administrative Tribunal shall cease

[1] In view of the large number of judgements which were rendered in 2009 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. 1434 to 1499 of the United Nations Administrative Tribunal, Judgments Nos. 2766 to 2861 of the Administrative Tribunal of the International Labour Organization, Decisions Nos. 389 to 426 of the World Bank Administrative Tribunal, and Judgment No. 2009–1 of the International Monetary Fund Administrative Tribunal, see, respectively, documents AT/DEC/1434 to AT/DEC/1499; *Judgements of the Administrative Tribunal of the International Labour Organization: 106th and 107th Sessions; World Bank Administrative Tribunal Reports, 2009; and International Monetary Fund Administrative Tribunal Reports, Judgement No. 2009–1.*

[2] The Administrative Tribunal of the United Nations was 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 extended to the United Nations Joint Staff Pension Fund (including cases from all specialized agencies that participate in the Fund and which had accepted the jurisdiction of the Tribunal in Pension Fund cases), the United Nations Programmes and Funds, such specialized agencies and related organizations that had 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.

to accept new cases as of 1 July 2009, and that it would be abolished as of 31 December 2009. The United Nations Administrative Tribunal therefore ceased to operate at the end of the year 2009.

1. *Judgment No. 1476 (25 November 2009): Acevedo* et al. v. *The Secretary-General of the United Nations*[3]

Suspension of granting of permanent appointments—Conversion of contractual status for staff on fixed-term appointments to permanent appointments—Staff shall be appointed by the Secretary-General under regulations established by the General Assembly—Considerable latitude of discretion enjoyed by the Secretary-General in matters of appointment, promotion and conversions

The Applicants were staff members of the United Nations serving on fixed-term appointments, with an entry on duty date prior to 1995. Secretary-General's bulletin[4] ST/SGB/280, issued on 9 November 1995, informed all staff members of the Secretary-General's decision to suspend the granting of permanent and probationary appointments, effective 13 November 1995. On 9 September 2004, the Secretary-General submitted his definitive proposals on new contractual arrangements, including a number of transitional measures which would ensure the protection of acquired rights of staff in service when the amended rules and regulations would come into force. In its resolution 59/226 of 23 December 2004, the General Assembly took note of the Secretary-General's proposals, and decided to revert to the issue at its sixtieth session, in 2005.

Between 10 November 2003 and 9 March 2004, the Applicants submitted requests to the Secretary-General for review of the decision to "keep in force the freeze on the granting of permanent appointments". The Organization replied to all such requests that the issue was under review, and that the Secretary-General had approved a one-time review of all staff who may have met the requirements to be considered for conversion to a permanent appointment. Should the Applicants meet the criteria for such conversion, they would be considered appropriately by the Staff Management Coordination Committee (SMCC).

Following this reply, the Applicants filed separate appeals with the Joint Appeals Board (JAB). The Organization and the Applicants agreed on 16 June 2006 that the appeal be submitted directly to the Tribunal pursuant to article 7 (1) of its Statute. On 17 October 2006, the Applicants filed an application with the Tribunal.

In setting out the legal framework, the Tribunal noted that Article 101 (1) of the Charter of the United Nations provides that staff shall be appointed by the Secretary-General under regulations established by the General Assembly. Accordingly, staff regulation 4.5 (b) provides that the Secretary-General shall prescribe which staff members are eligible for permanent appointments. In 1982, the General Assembly decided in resolution 37/126 that staff members of fixed-term appointment upon completion of five years of continuing

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[3] Goh Joon Seng, Second Vice-President; Jacqueline R. Scott and Brigitte Stern, Members.

[4] 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 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).

good service shall be given reasonable consideration for a career appointment; this decision was implemented as of 1 January 1993 in staff rule 104.12.

The Tribunal observed that it had long recognized the considerable latitude of discretion enjoyed by the Secretary-General in matters of appointment, promotion and conversions (see Judgments No. 362 *Williamson* (1986) and No. 958 *Draz* (2000)). The Tribunal noted that the General Assembly, by resolution 57/305 of 1 May 2003, had requested the Secretary-General to continue current contractual arrangements, which required maintaining the suspension on granting permanent appointments and maintaining *status quo* conferred by existing mandates. The Tribunal stated that the Secretary-General was thus entitled to refuse consideration of the Applicants for conversion of their contractual status, based on ST/SGB/280/Amend.1, and in light of all circumstances, including the subsequent General Assembly resolutions on the matter.

The Tribunal rejected the application in its entirety.

2. *Judgement No. 1490 (25 November 2009): Toh* v. *The Secretary-General of the United Nations*[5]

Failure by staff member to disclose financial information and to cooperate with investigation—Imposition of disciplinary measures constitutes a special exercise of quasi-judicial power by Secretary-General—Analysis by Tribunal of proper use of discretion by Secretary-General—Failure to disclose financial information and to cooperate with investigation constituting misconduct—Proportionality of Sanctions imposed—Allegations of discrimination and harassment to be addressed in an independent cause for redress

The Applicant served as Assistant Secretary-General of Central Support Services from July 2003 until the Secretary-General decided to place him on special leave with full pay on 16 January 2006 pursuant to staff rule 105.2, in connection with an ongoing audit and investigation of the procurement operations of the Organization. His status was converted to suspension with full pay on 22 December 2006, pursuant to staff rule 110.2.

The allegations against the Applicant concerned a failure in the management of the procurement process relating to the lease of at least two helicopters to the United Nations Transitional Authority in East Timor (UNTAET), his failure to disclose certain financial information in the 2004 and 2005 disclosure forms, and his failure to cooperate fully with the Procurement Task Force during the investigation.

The Applicant appealed to the Joint Disciplinary Committee (JDC), which issued its report on 4 October 2007. The JDC found that the Applicant could not be attributed the Organization's harm in relation to the procurement process of the helicopters. It concluded however that he had neglected to exercise due care in the filing of the 2004 and 2005 financial disclosure forms, and that his failure to cooperate with an officially authorized investigation constituted misconduct. The JDC recommended that the Applicant receive a supervisory reprimand for the former finding, and a written censure for the latter. By a letter of 15 October 2007 the Secretary-General informed the Applicant that he was to be demoted to the D-2 level without possibility of promotion, and be imposed a fine of two months' salary. On 2 January 2008, the Applicant filed an application with the Tribunal.

[5] Dayendra Sena Wijewarane, President; Jacqueline Scott and Brigitte Stern, Members.

The Tribunal noted that there was no dispute over the fact that the Applicant had failed to disclose certain assets in his financial disclosure forms, including a bank account in the United Kingdom, and real property in Singapore and in the United States. The Tribunal further noted that, in signing his financial disclosure forms, the Applicant had attested that the disclosures were true, complete and correct to the best of his knowledge, and had acknowledged that the failure to provide true, complete and correct information to the best of his knowledge and belief may have serious consequences, including the institution of disciplinary proceedings.

The Tribunal recognized that the imposition of disciplinary actions involves the exercise of discretion of the Secretary-General. Unlike other discretionary powers, such as with respect to promotion, or transferring or terminating employment, the imposition of disciplinary measures constitutes a "special exercise of quasi-judicial power". Thus, in such circumstances, the process of review by the Tribunal is of a particular nature; the Secretary-General's interest in maintaining high standards of conduct must be reconciled with the interest of staff in being assured that they are not penalized unfairly or arbitrarily (see Judgment No 941 *Kiwanuka* (1999)).

In matters of discipline, the Tribunal generally applies an eight factor analysis to determine whether the Secretary-General has properly exercised his discretion. The Tribunal examines: 1) whether the facts on which the disciplinary measures were based have been established; 2) whether the established facts legally amount to misconduct or serious misconduct; 3) whether there has been any substantive irregularity (e.g. omission of facts or consideration of irrelevant facts); 4) whether there has been any procedural irregularity; 5) whether there was an improper motive or abuse of purpose; 6) whether the sanction is legal; 7) whether the sanction imposed was disproportionate to the offence; and 8) whether there has been arbitrariness. This list is however not intended to be exhaustive (*ibid.*; see also Judgment No 898 *Uggla* (1998).

As to whether the Applicant's failure to accurately fill out his financial disclosure forms constituted misconduct or merely negligence, the Tribunal noted that the Applicant had been involved in the review of the system of financial disclose and therefore could not plead ignorance of the relevant rules. On the other hand, the Tribunal found that the forms were not well crafted and the way questions were posed changed from year to year, which, the Tribunal accepted, may have caused some confusion. The Tribunal accepted that the failure to disclose the bank accounts in 2004 may have been due to a misunderstanding, but found that for the year 2005, the Applicant knew or should have known that his bank accounts constituted assets that needed to be disclosed. The failure to disclose this information constituted misconduct. With regard to the Applicant's failure to disclose his personal residences, the Tribunal noted that in 2004 such disclosure was in fact not required. By 2005, however, the Applicant was required to disclose *all* real estate, which was made clear in the definition of assets in the disclosure form. The Tribunal was not convinced by the Applicant's argument that the omission of this information was an oversight, and concluded that it, also, constituted misconduct.

Turning to the alleged failure of the Applicant to cooperate with the investigation of the procurement process, the Tribunal noted that the Applicant conceded that the Secretary-General had the authority to request financial records from him, but contended that the Secretary-General had abused his authority and that the scope of the request was overly

broad. It was agreed that, while he had, after some time, produced some documentation, the Applicant had failed to provide the financial records relating to two substantial pieces of real estate. The Tribunal concluded that the Applicant had a duty pursuant to staff regulations 1.2 (n), (m), and (r), and staff rule 104.4 (e) to comply with the request of the Secretary-General, and his failure to do so constituted misconduct.

The Tribunal added that, in light of the systemic investigations into the misuse of funds, waste and abuse in the procurement process in the United Nations, a process in which the Applicant participated, including as a high-level manager, it was within the Secretary-General's purview to request and investigate the Applicant's financial records. There was no evidence that the requests for information were improperly made or that he was singled out with such requests. In the view of the Tribunal, based on the Applicant's senior role, and in light of the circumstances and the time period, the requests were not unreasonable.

Finally, the Tribunal did not agree with the contention made by the Applicant that he was not obliged to produce financial records for the years 1998, when he was not employed by the Secretariat, and 2006, when he was placed on special leave without pay. The Tribunal observed that the Applicant had indeed been a staff member of the United Nations in both 1998 and 2006, and as such subject to the Staff Regulations and Rules.

Turning to the question whether the sanctions imposed were disproportionate, the Tribunal recognized that the recommendations by the JDC, which had been more lenient than those imposed by the Secretary-General, were indeed just recommendations. Given that the Applicant had wilfully refused to disclose accurately his assets and to provide all the information requested, the Tribunal could not say that the measure imposed had been disproportionate or unwarranted.

Finally, the Tribunal stated that it was mindful of the Applicant's strong allegations of discrimination and harassment against him by his supervisor in the context of the investigation. However, it found that such allegations should be addressed in an independent cause for redress; and could not be used to dislodge the independent obligation to disclose financial information.

In view of the foregoing, the Tribunal rejected the application in its entirety.

3. *Judgement No. 1495 (25 November 2009): Annan* v. *United Nations Joint Staff Pension Board*[6]

Payment of pension benefits to former staff member elected as Secretary-General—Suspension of pension benefits during term of office as Secretary-General—Ambiguous meaning of the word "suspension" in this context—Principle that, in complex matters relating to pensions, the Administration must be especially careful and transparent—When possible or reasonable, it is assumed that the Pension Fund makes assumptions and decisions that are favourable to staff members—In view of ambiguity, interpretation must be made as having a lesser rather than a greater adverse affect on Applicant

[6] Bob Hepple, First Vice-President; Goh Joon Seng, Second Vice-President; and Brigitte Stern, Member.

The Applicant was a staff member of the United Nations for 30 years, until he retired on 31 December 1996, and took office as Secretary-General on 1 January 1997. The Applicant had during his service contributed to the United Nations Joint Staff Pension Fund (UNJSPF) from June 1966 to December 1996, with a break in service from 20 November 1974 to 19 November 1975. On 14 January 1997, the Secretary of the United Nations Joint Staff Pension Board (UNJSPB) addressed an unsigned "draft" letter to the Special Assistant to the Secretary-General emphasizing that due to concerns of "perceived inconsistency" and with "double-dipping", the best option would be for the Applicant to voluntarily suspend payment of his Pension Fund benefits during his term as Secretary-General. The Applicant maintains that this document was not sent to him or seen by him or his Special Assistant.

On 28 January 1997, the Applicant completed the UNJSPF payment of benefits form, in which he selected the option of a "one-third lump sum, or [USD] if less than one-third, OR your contributions with interest AND the balance as an early retirement benefit". In the payment instructions, he requested that payment of his periodic benefit be suspended during the period of his service as United Nations Secretary-General. The Secretary of the UNJSPB confirmed this choice on 3 February 1997. On 27 November 2001, the new CEO of the UNJSPF notified the Applicant that the suspension of the payment of benefits was made along the lines of article 40 (a) of the UNJSPF Regulations, and that as such, any benefits attributable to the time period he served as Secretary-General would not be payable.

On 27 June 2006, the Applicant wrote to the CEO of UNJSPF and informed him of the banking instructions where the Fund may transfer the accrued payments, as his tenure as Secretary-General would expire on 31 December that year. On 30 June, the CEO of the Fund informed the Applicant that only the cost-of-living increase applicable to his retirement benefits as of April 2006 would be payable. On 7 July, the Applicant informed the CEO that he disagreed with the interpretation of their 1997 arrangement, and requested that the Standing Committee review the matter. On 31 August 2007, the CEO of UNJSPF informed the Applicant that the Standing Committee had met on 11 July, and that it had concluded that the arrangement concluded had been appropriate and legally valid, and that the Applicant voluntarily had placed himself in the same situation as retired staff members who returned to service pursuant to article 40 of the Regulations of the Fund. On 25 April 2008, the Applicant filed an application with the Tribunal.

As to the receivability of the claim, the Tribunal took the view that the Applicant could not have requested a review until a formal decision on a request for payment of benefits had been made. The application was consequently not time-barred.

The Tribunal noted that the Applicant interpreted the term "suspend" in the sense of a determent of payment for the period he held office as Secretary-General; whereas the Respondent, on the other hand, argued that a suspension implied a waiver or forfeiture of periodical benefits. On the face of it, the Tribunal found that the words "that payment of my periodic benefit be suspended" were ambiguous, and were capable of being interpreted either way. It was accordingly necessary for the Tribunal to investigate the sense and meaning of the words used, on the basis of the evidence of all the relevant surrounding facts available to the Parties at the time the payment instruction was given by the Applicant, and accepted by UNJSPF. The Tribunal stated that it had to put itself in the factual matrix in which the Parties were at that time, and to determine what the words used in the payment

instruction would convey to a reasonable person against the background of the Applicant's election as Secretary-General. The Tribunal took the view that any subsequent action taken was not relevant, as this would imply that the payment instruction meant one thing when it was signed, and another thing at a later stage.

The Tribunal firstly noted that the fact that the Applicant, in his capacity as Secretary-General, was not considered a staff member of the United Nations supported the Applicant's interpretation. As Secretary-General, he did not contribute to the UNJSPF, and all his terms and conditions of service were set by the General Assembly. Secondly, the General Assembly and the Office of Human Resources Management did not seek to apply any measure aimed at "double dipping" such as a cap on his earning, as had previously been done for retirees employed as consultants by the Organization. Thirdly, article 40 (a) of the UNJSPF Regulations, concerning the effect of re-entry into participation by former staff members, clearly did not apply to the Applicant's case.

Against these considerations, the Tribunal noted, the Respondent made reference to a statement of 2 October 2008 by the former CEO of UNJSPF, by which he stated that he met with the Applicant's Special Assistant in January 1997, and expressed the view that "the concept of 'double-dipping' could not be circumvented by the simple device of choosing to delay the payment of UNJSPF pension". The Respondent further referred to an *aide mémoire* dated 9 January 1997, and a draft memorandum dated 14 January 1997, by which the Secretary-General was advised to avoid "double-dipping", by accepting a voluntary suspension of his payments, which would be parallel to article 40 (a) of the Fund's Regulations. The Applicant however denied ever having received the *aide memoire*, and contended that his Special Assistant was never authorized to discuss his personal pension entitlements. He further claimed that, while he was advised to consider avoiding the appearance of receiving an income from two sources while Secretary-General, he was never advised that he would be required to forfeit his pension benefits.

The Tribunal noted that the evidence in support of both versions was circumstantial, and that there had been no opportunity to cross examine witnesses in order to establish the truth. In any event, the alleged documents presented by the Respondent did not show that the Applicant had been informed that he would be expected to forego his benefits for his period in office as Secretary-General. They did not rule out the entirely credible possibility that the Applicant could avoid any appearance of conflict of interest by deferring payments until he left office.

In resolving this conflict of evidence, the Tribunal was guided by the well-established principle that, in complex matters relating to pensions, "the Administration must be especially careful" (Judgement No. 1185, *Van Leeuwen* (2004)) and transparent (Judgement No. 1091, *Droesse* (2003)). Moreover, the Tribunal assumed that whenever possible or reasonable, in its negotiations the Fund makes assumptions and decisions that are favourable to staff members (*ibid.*). In the present case, the Fund failed to act carefully and transparently in order to ensure that the consequences of the wording used by the Applicant in his payment instruction were made clear to him. In view of the ambiguity, the instruction must be construed as having lesser rather than a greater adverse effect on the Applicant's pension entitlements. Thus, not without hesitation, the Tribunal found that the Respondent had failed to establish on the balance of probabilities that the word "suspend" was used in the sense of a forfeiture of periodic benefits.

B. United Nations Dispute Tribunal

By resolution 61/261 of 4 April 2007, entitled "Administration of Justice at the United Nations", the General Assembly agreed that the new formal system of administration of justice should comprise two tiers, consisting of a first instance, the United Nations Dispute Tribunal, and an appellate instance, the United Nations Appeals Tribunal, rendering binding decisions and ordering appropriate remedies. It further decided that a decentralized United Nations Dispute Tribunal shall replace existing advisory bodies within the current system of administration of justice, including the joint appeals boards, joint disciplinary committees and other bodies as appropriate.

By resolution 62/228 of 22 December 2007, entitled "Administration of Justice at the United Nations", the General Assembly decided to establish a two-tier formal system of administration of justice, comprising a first instance United Nations Dispute Tribunal and an appellate instance United Nations Appeals Tribunal. It further decided that the United Nations Dispute Tribunal initially should be composed of three full-time judges, to be located in New York, Geneva and Nairobi, and two half-time judges.

By resolution 63/253 of 24 December 2008, entitled "Administration of Justice at the United Nations", the General Assembly adopted the statutes of the United Nations Dispute Tribunal and United Nations Appeals Tribunal. It also decided that the United Nations Dispute Tribunal and the United Nations Appeals Tribunal shall be operational as of 1 July 2009, and it abolished, as of the same date, the joint appeals boards, the joint disciplinary committees and the disciplinary committees of the separately administered funds and programmes.

The judgments summarized hereinafter therefore cover the period 1 July-31 December 2009.

1. *Judgment No. 003 (22 July 2009): Hepworth* v. *Secretary-General of the United Nations*[7]

Lawfulness of a decision not to extend a fixed-term appointment—Request for suspension of a contested administrative decision subject to management evaluation—Interpretation of the expression "prima facie" in article 2.2 of the UNDT Statute—Staff members serving under fixed term appointment do not have right to renewal unless there are countervailing circumstances—Countervailing circumstances include abuse of discretion in not extending an appointment or an express promise to extend appointment—Organization's exercise of its discretionary power must not be tainted by abuse of power—Decision of non-renewal not considered *in specie* a veiled disciplinary sanction

The Applicant joined the United Nations Environment Programme (UNEP) in 2000 as Deputy Director of the Division of Environmental Conventions (DEC) and also worked in parallel on wild life related issues for the Division of Environmental Policies Implementation (DEPI), at the D-1 level. In 2004, while stationed in Nairobi, the Applicant accepted a transfer to Bonn to be appointed as acting Executive Secretary with the Secretariat of the Convention on Migratory Species (CMS), which acceptance was the result of discussions with the then Executive Director of UNEP. During these discussions the Applicant and

[7] Judge Thomas Laker (Geneva).

the then Executive Director of UNEP held a meeting on 15 April 2004 of which confidential minutes were taken. These minutes expressed the wish of the then Executive Director (ED) to make the Applicant Officer-in-Charge (OIC) of CMS. They also said that "the ED will give 3 or 4 months as OIC (extendable until ED makes final selection for the post). During the time [the Applicant] can demonstrate his ability to handle the position (. . .) [The Applicant] said that he would give it a try and that he is happy that he will culminate his career in CMS". In 2005—as acting Executive Secretary—the Applicant applied for the post of Executive Secretary of CMS and was ultimately selected and recruited for the post. In 2007, UNEP renewed the Applicant's appointment as Executive Secretary of CMS for two years until 26 July 2009.

On 24 February 2009, the Executive Director of UNEP verbally offered the Applicant the position of Special Advisor on biodiversity within DEPI in Nairobi. On 26 February 2009, the Applicant responded to the Executive Director of UNEP declining the offer providing both professional and personal reasons. After having received verbal communication on 26 March 2009, the Applicant requested the Executive Director to reconsider the decision to reassign him to the position of Special Advisor on Biodiversity in Nairobi. In a memorandum dated 1 April 2009, the Applicant was informed by the Executive Director of UNEP of his decision to reassign him to the Special Advisor post in Nairobi. In an email dated 15 May 2009, the Applicant indicated that he was not prepared to accept the reassignment offer in Nairobi nor would he sign a new contract with UNEP in that capacity. On 5 June 2009, the Applicant submitted to the Secretary-General a request for review in relation to the decision to transfer him to Nairobi.

By letter dated 15 June 2009, the Executive Director of UNEP informed the Applicant that, in view of his decision not to transfer to Nairobi as instructed, UNEP was not in a position to extend his current contract beyond its expiration on 26 July 2009. On 15 July 2009 the Applicant submitted a request for management evaluation of the decision not to extend his fixed-term appointment beyond its 26 July 2009 expiration date.

On 15 July 2009, the Applicant requested the Tribunal to suspend the decision dated 15 June 2009 not to renew his appointment beyond the date of expiration, during the pendency of the management evaluation.

According to article 2.2 of the Tribunal's Statute, adopted by General Assembly resolution 63/253 of 24 December 2008, the "Tribunal shall be competent to hear and pass judgment on an application filed by an individual requesting the Dispute Tribunal to suspend, during the pendency of the Management Evaluation, the implementation of a contested administrative decision that is the subject of an ongoing management evaluation where the decision appears prima facie to be unlawful, in cases of particular urgency, and where its implementation would cause irreparable damage." In this regard, the Tribunal explained that the expression "*prima facie*" as such can have at least two meanings, which may lead to different results: it seems arguable that 'at first sight' means that the unlawfulness of the decision is that clear and far beyond every doubt that it can be discovered already at first sight. On the other hand—with accentuation of the word first—it implies that one can have second thoughts about it upon closer inspection which can lead to a different result from the first sight. The Tribunal noted that, since the suspension of action is only an interim measure and not the final decision of a case, it may be more appropriate to assume that *prima facie* in this respect does not require more than serious and reasonable

doubts about the lawfulness of the contested decision. This understanding could also rely on the fact that article 2.2 of the UNDT Statute only requires that the contested decision "appears" *prima facie* to be unlawful. The Tribunal reasoned that following this interpretation, which clearly is in favor of any request for suspension of action, the Organization's decision not to renew the Applicant's appointment did not appear *prima facie* to be unlawful. It did therefore not need to consider the other prerequisites for suspension of action, namely that the case be of particular urgency, and whether its implementation would cause irreparable damage.

The Tribunal then turned to staff regulation 4.5 (c) according to which "a temporary appointment for a fixed term shall expire automatically and without prior notice on the expiration date specified in the letter of appointment". Staff members who, like the Applicant, are serving under a fixed term appointment do not have a right to renewal, unless there are countervailing circumstances. According to the United Nations Administrative Tribunal's jurisprudence, countervailing circumstances may include abuse of discretion in not extending an appointment, or an express promise by the Organization that gives the staff member an expectancy that his or her appointment will be extended. Further, the Organization's exercise of its discretionary power in not extending a fixed term contract must not be tainted by forms of abuse of power, such as violation of the principle of good faith in dealing with staff, prejudice or arbitrariness, or other extraneous factors that may flaw its decision (see Judgment No. 885, *Handelsman* (1998)).

In applying these criteria, the Tribunal rejected the Applicant's claim that he had a reasonable expectancy of renewal. In this regard, the Applicant had only had relied on the minutes of the meeting held on 15 April 2004, according to which no express promise of the Organization could be deduced.

Finally, the Tribunal rebuked the argument of the Applicant that the decision of non-renewal was an improper exercise of discretion, finding that there was no evidence that this decision constituted a veiled disciplinary sanction for the Applicant's non-compliance with respect to his transfer to Nairobi. The Tribunal further found no evidence supporting the Applicant's claim that the decision of non-renewal was in fact an abuse of authority and a retaliatory measure against him for raising politically sensitive issues with the German Government. The Tribunal held that the Organization was not bound to give any justification for not extending the fixed-term appointment, and that no right to renewal had been created, even if the transfer to Nairobi, as claimed by the Applicant, had been unlawful.

For these reasons, the Tribunal rejected the request by the Applicant.

2. *Judgment No. 2009/022 (23 September 2009): Kasyanov* v. *Secretary-General of the United Nations*[8]

Consideration by internal candidates eligible for lateral move 15 days after vacancy announcement—Administrative instruction ST/AI/2006/3 provides for two classes of candidates (15-day candidates and 30-day candidates)—Selection process in two stages, the second of which will only arise upon the non-identification of a suitable candidate during the first—Maxim *generalia specialibus non derogant*—

[8] Judge Michael Adams (New York).

PRESENT CASE DISTINGUISHED FROM JUDGEMENT NO. 310 (1983) OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

On 4 January 2008 the Applicant submitted his application for a vacant post as an interpreter at the P-4 level, advertised on 31 December 2007. His application met the criteria for eligibility for a lateral move under section 5.4 of administrative instruction[9] ST/AI/2006/3, and was qualified for consideration after 15 days after the date on which the post had been advertised.

The suitability of the Applicant for the vacant post was not assessed until the applications of candidates eligible for consideration after 30 days had also been received. The pool of applicants considered for appointment contained another 15-day candidate, who had however applied only after 30 days, and a number of 30-day candidates. Five candidates (including the Applicant and the other candidate eligible for consideration after 15 days), were considered for the position, and finally one of the 30-day candidates was selected.

The Applicant claimed that, because he was a 15-day mark candidate who was assessed as suitable for appointment, the other candidates should not have been considered, and he should have been selected for appointment.

The Tribunal first considered the context of the relevant provisions applicable in the case. In administrative instruction ST/AI/2006/3, paragraph 2.2 provides, *inter alia*, that the system of staff selection "requires that vacancies be made available in the first instance for lateral moves of eligible staff before other candidates may be considered for selection". The nature of the priority given to eligible staff is stated in section 7.1 of the same administrative instruction: an eligible and suitable staff member is to be moved into a vacancy before other candidates may even be considered. Together with the eligibility requirements provided for in section 5, these provisions underline the key importance of the notion of lateral movement: it is not a merely desirable aspect of staff management but is a critical element of a complex and carefully elaborated system of selection and deployment of the human resources available to the Organization.

Sections 5.4 and 5.5 in the same administrative instruction deal respectively with eligibility for lateral moves at what is called the 15-day mark and the 30-day mark by specifying particular attributes that vary according to the level of the position being sought, the office in which the Applicant is serving and in which office the position is placed and, importantly, the Applicant's field mission history. Internal candidates and Field Service Officers who have been on mission detail for specified periods are made eligible to be considered at the 15-day mark in order to recognize and encourage mission service. The Tribunal in this respect observed that it was obvious that any significant watering down of the advantage of being a 15-day candidate would have an adverse, potentially considerable, impact on this important policy objective and that recognition and encouragement would vary unpredictably. The Tribunal rejected the assertion made by the Organization that the word "shall" in section 4.5 of the administrative instruction was to be interpreted as "may". Although the Tribunal observed that such interpretation has on rare occasions been made,

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

the phrase "shall normally" in the immediately preceding sentence, spoke against such an interpretation in the present case.

As to the submission by the Organization that management resources did not, or usually did not, or sometimes did not, permit compliance with the time limit, the Tribunal was, in contrast, of the understanding that the inclusion of the 30-day candidates in the pool of internal candidates had rather been a deliberate decision by the management, arising from the management's interpretation of the administrative instruction and the application of the Guidelines rather than being the result of an inability to consider the 15-day candidates separately.

Moving to section 7.1 of the administrative instruction which requires first priority to be given "to lateral moves of candidates eligible to be considered at the 15-day mark", the Tribunal clarified that section 7.1 is concerned with 15-day candidates as part of a particular *class* of lateral moves, rather than what is to happen at a specific *date*. This section clearly and unambiguously requires a selection process in two stages, the second stage of which would only arise at the non-identification of a suitable candidate at the first stage.

In this regard, the Tribunal rejected the Organization's argument that the provision should be interpreted in the light of the general language of the Charter of the United Nations or the Staff Regulations, since such an interpretation, in the absence of transparent rules capable of yielding predictable, rational and understandable results, would have outcomes that could justifiably be seen as arbitrary, capricious, inconsistent and unpredictable. The Tribunal also rejected the argument that section 7.1 was inconsistent with the Charter and the Staff Regulations. It pointed out that the maxim *generalia specialibus non derogant* (the general does not qualify the particular) applied, and where an administrative instruction is clear, unambiguous and unqualified, it would only be in the clearest case that it would be held to have a different meaning because of words of general policy drawn from another, albeit superior instrument.

The Tribunal rebuked the Organization's argument relying on Judgement No. 310 (*Estabial*, 10 June 1983) of the United Nations Administrative Tribunal. In the said judgment, the Secretary-General had decided that only candidates from francophone African countries would be considered for a vacancy, and this condition was part of the advertised requirements for selection. The Administrative Tribunal, in that case, held that the Secretary-General was prohibited by Article 101, paragraph 3, of the Charter and staff regulation 4.2 from establishing a limitation to francophone African nationals. The Dispute Tribunal distinguished from Judgement No. 310 and explained that, whereas the former case related to an *ad hoc* decision by the Secretary-General which was deemed inconsistent with the Charter and the Staff Regulations, the latter case concerned the proper interpretation of the relevant administrative instruction. Moreover, the Dispute Tribunal stated that, in view of the Organization's policy of promoting diversity in appointments, Judgment No. 310 had been wrongly decided.

The Tribunal finally rejected the Organization's argument that the evaluation and selection guidelines contained in annex IV of administrative instruction ST/AI/2006/3 could be used to interpret the administrative instruction in case the former are inconsistent with the latter. However, mere fact that the guidelines appear to assume a different procedure than that laid down in the administrative instruction would not be sufficient to provide for an interpretation that directly contradicts the language of the provisions of

the administrative instruction, particularly given that the guidelines are subordinate to the administrative instruction.

In conclusion, the Tribunal held that the clear and binding meaning of section 7.1 of ST/AI/2006/3 is that, if it has not been possible to evaluate the 15-day candidates by the 30-day mark, they should be placed in a separate pool and evaluated before the 30-day candidates. If a suitable 15-day candidate is identified at that stage, then it is unnecessary to consider the applications of the 30-day candidates. Therefore, in the present case, the Applicant was not considered in accordance with ST/AI/2006/3, as was his legal right. The parties were directed to provide written submissions as to the appropriate relief that should be ordered.

3. *Judgment No. 2009/027 (30 September 2009): Sina* v. *Secretary-General of the United Nations,* Judgment on application for a summary judgment[10]

Application for summary judgement under article 9 of the Rules of Procedure—Evidence capable of establishing likelihood of connection between allegations against investigation conclusions critical of the Applicant and decision to not renew contract

The Applicant was employed by the Kabul office of the United Nations Development Programme (UNDP) on a 300 series appointment of limited duration, which was due to expire on 28 February 2007. He was a munitions expert whose job involved him in the programme for disbanding and disarming what was then called the "northern militias", and worked at a munitions storage facility in Kabul.

The Applicant lived in a single room in a guesthouse in Kabul. On 12 October 2006, an explosion occurred in his room. He was seriously injured and required hospitalisation and extensive medical care. An investigation immediately proceeded, involving members of the Afghan police and also, it appears, a number of persons employed by the UNDP, whose precise role is unclear.

In due course, it was established, beyond question, that the source of the explosion was a mortar round which, in all likelihood, had only partially exploded. A first report was made by the Special Investigation Unit of the Department of Safety and Security on 26 October 2006, and was handed over to the UNDP Office of Audit and Performance Review (OAPR) for further action. In substance, the report implicated an employee, who was the Applicant's co-worker, of the UNDP in the explosion. The second investigation was primarily designed to ascertain the actual circumstances of the incident of 12 October 2006. The investigators were critical of the initial investigation at the scene and detailed a number of respects in which the forensic examination departed from elementary appropriate practice. However, given the chaotic circumstances, nothing in the report suggested that the United Nations officers had acted carelessly or unprofessionally.

The investigation suggested that the suspicion against the Applicant's co-worker was wrongly directed, and that the Applicant himself may in fact have been implicated, though the precise manner in which it occurred could not be ascertained, partly because of shortcomings in the initial forensic examination of the scene. Nevertheless, the investigation

[10] Judge Michael Adams (New York).

found, the forensic evidence available justified, at the least, the reasonable suspicion that it was the Applicant who was responsible one way or another for the explosion.

On 21 December 2006, the then Programme Director for UNDP Kabul informed the applicant that, in accordance with the usual practice on notification, his contract was due to expire on 28 February 2007, and that it would not be renewed. As it happened, various extensions were later given to the Applicant, arising from his medical condition and his sick leave entitlements.

The Applicant contended that the decision not to renew his contract was affected by the adverse opinions of the investigators, whose opinions were embodied in the report dated January 2007. The Respondent applied under article 9 of the Rules of Procedure of the Tribunal for a summary judgement.

The Tribunal found that it seemed reasonably possible, at least, that the Programme Director had, by the time of the decision not to renew his contract, been made aware of the investigators' conclusions that were critical of the Applicant. The evidence was therefore, contrary to the submission of the Respondent, capable of establishing a likelihood of a connection between the investigation's conclusions on the one hand and the Applicant's failure to obtain a renewal of his contract on the other. Whether the evidence ultimately would justify such a conclusion would be a matter for trial, but the Tribunal was not convinced that this was a case where the application for summary dismissal would be justified. It was explained that there were various other aspects of the Applicant's case which until then had not been adequately articulated and that these, as pointed out by the Respondent, included substantial legal obstacles which the Applicant would need to overcome before he could succeed. These circumstances did not change the conclusion in the case at hand, and the Tribunal therefore dismissed the motion for summary judgment.

4. Judgment No. 2009/030 (7 October 2009): Hastings v. *Secretary-General of the United Nations*[11]

Ineligibility of applicants for positions more than one level higher than personal grade—To establish the meaning and intention of a United Nations provision, the relevant context is the hierarchy of United Nations internal legislation—Staff rule 112.2 allows for exceptions to Staff Rules—Exceptions may similarly be made to administrative instructions, which are subordinate legislation—Applicant's request for an exception to be made not properly considered

The Applicant was a staff member of the United Nations since 1978 and was working in the Advisory Committee on Administrative and Budgetary Questions (ACABQ) Secretariat since 1999. In 2000 she was promoted to the P-5 level as Senior Administrative Management Officer. In July 2006 the Applicant applied for the vacant position of Executive Secretary, a post at the D-2 level. At that time administrative instruction[12] ST/AI/2002/4 was in force, which did not impose eligibility restrictions on staff members applying for a position two levels above their own. The Applicant participated in a competency-based interview but was not selected for the position.

[11] Judge Coral Shaw (New York).

[12] For information on administrative instructions, see note under section 2 above.

On 1 January 2007, Administrative Instruction ST/AI/2006/3 came into force replacing ST/AI/2002/4. Section 5.2 of ST/AI/2006/3 provides that staff members shall not be eligible to be considered for a position more than one level higher than their personal grade.

On 1 September 2008, the then Executive Secretary separated from employment pursuant to an agreed termination, and the Applicant was named acting Executive Secretary and was granted a special post allowance (SPA) to the D-1 level, while remaining employed at the P-5 level.

On 13 January 2009, the vacant D-2 post of Executive Secretary was announced. A month later, the Applicant wrote to the Secretary-General requesting that an exception be made to section 5.2 of ST/AI/2006/3 to enable her to apply for the D-2 post. In this letter she set out the reasons why she should be considered for the position, including her long experience and increasing responsibility in the ACABQ Secretariat, that she had been receiving an SPA at the D-1 level since September 2008, as well as her performance and achievements as acting Executive Secretary. She also recalled Article 101, paragraph 3, of the Charter which provides that the paramount consideration in the employment of the staff shall be the necessity of securing the highest standards of efficiency, competence and integrity as well as gender balance.

On 16 March 2009 the Staffing Service, at the Strategic Planning and Staffing Division of the Office of Human Resource Management replied, denying her request. This reply was subsequently confirmed by the Assistant Secretary-General for Human Resource Management (ASG), upon an enquiry by the Applicant. The Applicant sought administrative review, by which the original decision was upheld. She then appealed to the Joint Appeals Board (JAB). On 1 July 2009 the case was transferred from the JAB to the Dispute Tribunal.

The Tribunal observed that the first issue in the case was whether section 5.2 of ST/AI/2006/3 allows for exceptions to the rule that persons applying more than one level higher than their personal grade not are eligible for consideration. The Tribunal explained that the meaning of any legislative provision is ascertained by the meaning of its words in the light of the intention of the rules as a whole, and that this intention is generally ascertained by reference to the context of the provision in the rules. Where the wording of an instruction suggests that no exception is permitted, the question of whether a provision is mandatory or directory has historically been another aid to interpretation. To establish the meaning and intention of a United Nations provision, the relevant context is the hierarchy of United Nations internal legislation. This is headed by the Charter of the United Nations, followed by resolutions of the General Assembly, Staff Regulation and Rules, Secretary-General bulletins, and finally administrative instructions. In this regard, the Tribunal noted a number of relevant provisions, including Article 101, paragraph 3, of the Charter, providing that "the paramount consideration in the employment of the staff and the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity.", and staff rule 112.2, which provides:

> Exceptions to the staff rules may be made by the Secretary-General, provided that such exception is not inconsistent with any staff regulation or other decision of the General Assembly and provided further that it is agreed to by the staff member directly affected and is, in the opinion the Secretary-General, not prejudicial to the interests of any other staff member or group of staff members.

Given the hierarchy of United Nations legislation, the Tribunal concluded that it cannot be the case that exceptions may be made to staff rules but not to administrative instructions which are essentially subordinate legislation. Administrative instructions must therefore be subject to staff rule 112.2 (b) in the same way that staff rules are. The Tribunal found it is conceivable that in certain circumstances an exception would have to be made to meet Article 101, paragraph 3, of the Charter, for example, where an otherwise ideal candidate with the highest standards of efficiency, competency and integrity does not meet the prerequisites for the position, rule 112.2 (b) could be invoked for the paramount considerations to prevail in order to enable an exception to be made to the otherwise strict rule.

The second issue of the case was whether the decision of the ASG not to allow an exception was lawful. In the view of the Tribunal, in order for the decision to be lawful, the ASG must have turned her mind to the possibility of an exception being made, the criteria for such an exception, and considered whether the Applicant's situation amounted to such an exception. In view of the wording in the correspondence between the Applicant and the Respondent, leading up to the ASG's formal reply, the Tribunal found that the approach of the Respondent had been that section 5.2 of the relevant administrative instruction did not allow for any exceptions.

Apart from the valid submission by the Respondent that any exceptions should be very limited, the Tribunal observed that there was nothing to indicate what guidelines (if any) the ASG used to evaluate the Applicant's eligibility to be considered for an exception. There was certainly a basis for such a consideration to be made, given that she had had the necessary qualifications to be selected for an interview in 2006, prior to the change to the administrative instructions. For these reasons, the Tribunal found that it was more likely than not that the Applicant's case for an exception had not been properly considered and, accordingly, the decision to reject her application had not been lawful.

5. Judgment No. 2009/034 (13 October 2009): Shashaa v. *Secretary-General of the United Nations*[13]

Preconditions in article IX of Staff Regulations and chapter XI in Staff Rules must be present to terminate permanent contract with the Organization—Good faith efforts must be made by the Organization to find alternative posts for permanent staff members whose posts are abolished—Staff member's right to three months' notice upon termination of contract—Obligation of the Organization to identify alternative posts within the Organization—Reasonable cooperation can be expected from staff member but onus is on Organization to protect permanent staff member—Universal obligation of both employee and employer to act in good faith towards each other includes acting rationally, fairly, honestly and in accordance with the obligations of due process

The Applicant entered the service of the United Nations Development Programme (UNDP) in Jordan in 1978 as a locally recruited general service staff member. In 1985, he was granted a 100 series permanent appointment. In 1999, at the request of UNDP office in Iraq, he was assigned to a temporary two-year 200 series post as an L-4 level finance officer with the UNDP Electricity Network Rehabilitation Programme (ENRP) in northern Iraq.

[13] Judge Coral Shaw (New York).

His local post in Jordan was protected by a lien for two years. However, two years later, when asked by UNDP, the Applicant agreed to stay in northern Iraq, and consequently forfeited the lien on his post in Jordan. He remained in northern Iraq for the next eight years.

In 2004, the Applicant's contract with ENRP came to an end. In a letter dated 9 March 2004 from the Office of Human Resources (OHR) he was advised of some matters concerning the ending of his contract which were relevant to his later separation from service and his present claim. Following that letter, the Applicant was assigned to another 200 series appointment in Iraq with UNDP with an expiry date of 30 April 2007.

On 7 April 2007 the Applicant was advised he would be separated from service on 30 April 2007. In taking this step, UNDP did not recognise the permanent nature of his initial appointment in Jordan, but treated him as though his only appointment with UNDP had been the temporary 200 series appointment which had expired on 30 April 2007. He consequently only received termination payments in accord with separation from his temporary appointment.

The Applicant requested administrative review of the decision to separate him from service. Following this review, UNDP acknowledged that an error had been made and decided to compensate the Applicant for termination entitlements due to him also from the 100 series appointment. The Applicant appealed the decision to separate him from service.

The Tribunal observed that the Staff Rules and Regulations significantly limit the circumstances under which a permanent contract with the Organization may be terminated before the mandatory retirement age, as such employment is subject to particular safeguards. The protections enjoyed by permanent staff have been discussed in a number of judgments of the United Nations Administrative Tribunal, including in *Fagan* (1994) and *Carson* (1962), which established that good faith efforts must be made by the Organization to find alternative posts for permanent staff members whose posts are abolished, in order to avoid to the greatest extent possible a situation in which permanent staff members with a significant record of service with the Organization are dismissed and forced to undergo belated and uncertain professional relocation. In such cases, the Organization must show that the staff member was considered for available posts and was not found suitable for any of them before termination.

In the case at hand, the March 2004 letter to the Applicant was cited by the Respondent as evidence of UNDP's policy concerning the responsibility of staff members in the Applicant's situation to identify suitable alternative placements. The Tribunal however found that the policy was not in accord with the Staff Rules. For example, it overlooked the positive requirement of clause (i) of staff rule 109.1(c) which requires the employer to retain staff members with permanent appointments in preference to all other types of appointments; and the requirement in clause (ii) which requires that local staff be given consideration for suitable posts available at their duty stations. Although the employer can expect reasonable cooperation from a staff member, the onus is on the employer to protect the permanent staff member, and the responsibility for searching out and finding a position should not rest with the staff member as suggested by UNDP in the March 2004 letter.

The Tribunal observed that there was no evidence or even suggestion that UNDP had any reason to terminate the Applicant's service for reasons of performance or because he was not deemed suitable for service in any part of the United Nations system. Rather, he was initially deemed to be separated from service solely because of the abolition of the

200 series post. He was given three months' notice of the end of the temporary appointment but no proper notice of an intention to separate him entirely from service with the Organization by terminating his 100 series appointment. The Tribunal further noted that before deciding to separate him entirely from service, UNDP had to consider whether any of the preconditions of article IX of the Staff Regulations and chapter IX of the Staff Rules for termination of a permanent appointment had been met. This was a breach of the required process.

Further, if any of the preconditions of staff regulation 9.1 had been met, staff rule 109.3 obliged UNDP to give the Applicant three months' notice of the intended separation. The Tribunal emphasized that such notice is not a mere formality. Although payment in lieu may be given, such payment is a secondary option. Three months' notice would have given both parties the opportunity to take reasonable steps to ascertain if there were any suitable positions available for the Applicant to be employed as a permanent staff member elsewhere in the Organization.

Finally, had UNDP had no alternative other than to terminate the Applicant's permanent appointment, he had a possibility to take special leave without pay pursuant to staff rule 109.4 (d), which, in the absence of evidence to the contrary, in the Tribunal's view had been available in 2007. This would at least have enabled the Applicant to continue making contributions to the Pension Fund, and take advantage of other staff benefits, albeit at his own expense.

As to the question whether UNDP had acted in breach of its obligations of good faith and fair dealing, the Tribunal referred to its findings in *James* (2009), in which it held that the universal obligation of both employee and employer to act in good faith towards each other includes acting rationally, fairly, honestly and in accordance with the obligations of due process. The Tribunal noted that, although UNDP had not acted in accordance with its obligations towards the Applicant, this was due to its misunderstanding of his employment status rather than because of a dishonest and unfair process. As soon as the error was brought to its attention, UNDP acted in good faith to rectify the situation in a manner which it may have believed was adequate, but which the Tribunal found inadequate.

Turning to the question of remedies, the Tribunal considered that, although the consequence of the present judgment was that the Applicant would be entitled to remedies, these could not be properly assessed without more evidence and submissions. It explained that one matter which needed clarification was whether the opportunity for special leave without pay was an option available to the Applicant at the time he was separated. Another matter was whether and to what extent UNDP had already compensated the Applicant for any loss arising from its failure to recognize his permanent status.

In conclusion, the parties were to advise the Tribunal within 30 days of the date of the judgment whether (a) the parties had reached an agreement on the remedies to be provided to the Applicant, (b) the parties wished to pursue mediation on the issue of remedies, or (c) a further hearing and decision by the Tribunal to determine appropriate remedies would be required.

6. *Judgment No. 2009/036 (16 October 2009): Morsy v. Secretary-General of the United Nations*[14]

Request for extension of time limit for filing complaint with Tribunal (article 8.3 of the UNDT Statute)—Difference in the texts of the relevant provisions of the Statutes of the United Nations Administrative Tribunal and of the UNDT—A legislative body is presumed to be aware of the state of the law when enacting a statute—When two acts are *in pari materia* it can be inferred that a provision should bear the judicial interpretation previously placed on it—The expression "exceptional cases" in the UNDT Statute has a wider definition than the expression "exeptional circumstances" in the Statute of the Administrative Tribunal—"Exceptional" to be interpreted as out of the ordinary, unusual, special or uncommon, and shall be determined in each case on its own merits—Individual may by his own action or inaction forfeit his right to be heard by failing to comply with time limits—Applicant was diligent, but was caught in the unusual circumstance of a transition between two systems—Finding that there was an exceptional case in the present instance

The Applicant received an administrative decision dated 27 March 2009 from the Secretary-General between 30 March and 9 April 2009. On 3 June 2009, the Applicant sent a letter to the United Nations Administrative Tribunal (UNAT) requesting a 90-day extension to submit his appeal of the said decision, and the Tribunal granted an extension until 30 June 2000. It also stated that after 30 June, cases could be filed with the United Nations Dispute Tribunal (UNDT), and that information on the location of the Registry of the UNDT would be made available in due course. On 10 June 2009, the Applicant emailed the Administrative Tribunal requesting "that the case be transferred to the new Tribunal, or please provide me with the details to effect such transfer". On or around 24 July 2009, the Applicant received a letter from the UNAT dated 14 July 2009 advising him to submit his application to the UNDT and providing the new Tribunal's contact information. By email dated 4 August 2009, the Applicant requested advice on the new procedure to appeal the decision with the Dispute Tribunal. By email dated 7 August 2009, the Applicant submitted the same request, and submitted also the same application form he had submitted to UNAT on 3 June 2009, requesting an extra 90 days to file his case for reasons of "changing [his] counsel and relocating overseas". On 16 August 2009, the Applicant, then unrepresented, made application for an extension of time until 8 October 2009 to lodge his application with the United Nations Dispute Tribunal.

After a comparison between the old and new rules, regulations and Statutes concerning the extension of time limitations, the Tribunal observed that article 7.4 of the Statute of UNAT clearly articulated that an application shall not be receivable unless filed within the time limits. The Statute of the UNDT does not contain the same mandatory prohibitive words "shall not be receivable" as the Statute of UNAT. There is consequently no express prescriptive bar or prohibition relating to the 90, 30, or 45 day period; it is confined only to a three-year limitation period. Whilst UNAT applied the test of "exceptional circumstances" in the old process for request for extension of time limits, UNDT may suspend or waive the deadlines "only in exceptional cases". The Tribunal observed that the current provisions are not inflexible. Although article 8.4 of the Statute of UNDT is prohibitive or

[14] Judge Memooda Ebrahim-Carstens (New York).

prescriptive in nature, articles 8.1 and 8.3 grant the Tribunal discretion to waive or suspend deadlines in exceptional cases.

Under the new Rules of Procedure UNDT is granted a general power to shorten or extend the time for compliance with time limits fixed by the Rules of Procedure, or to "waive any rule when the interests of justice so require". This general power to shorten or extend the time for compliance covers the deadlines set out in article 7.1 of the Rules of Procedure. The time limits in that article are identical to those in article 8.1 of the Statute.

As to the meaning of the relevant provisions of the new Statute, as compared to the earlier one, the Tribunal noted that a legislating body is presumed to be aware of the state of the law at the time of the enactment of a statute. Thus, when a particular provision has received a judicial interpretation and the legislature has re-enacted it or included it in a statute in *pari materia*, the courts can validly infer that the legislature intends the provision to bear the judicial interpretation previously placed on it. However, the two acts must be in *pari materia*; they must be identical and deal with the same subject matter, and not merely give effect to the same policy.

The Tribunal pointed out that the old and new Statutes were not in *pari materia*. The General Assembly, presumed to have been aware of the state of the law at the time of the enactment of the Statute, in not re-enacting or adopting the old provisions, evinced, in the opinion of the Tribunal, a clear and manifest intention that the old test based on UNAT's definition of "exceptional circumstances" would not be applicable.

Further the Tribunal stated that an "exceptional case" has a much wider definition and cannot be equated with the old definition of "exceptional circumstances". An exceptional case may include a case which raises a matter of important legal precedent which requires to be decided on the general applicability of a particular provision or policy, irrespective of personal or extraneous circumstances preventing the applicant from filing timeously. A case may also be exceptional because it falls in the transitional period between the old and the new dispensation, and is delayed by a genuine confusion over the applicable procedures. According to the Tribunal, the clear and manifest intention was that the old test was not to be applicable. Therefore, the Tribunal found that it should not be bound by the previous wording and the strict definition of "exceptional circumstances" in interpreting "exceptional reasons" and "exceptional cases". It was furthermore explained that "exceptional" simply means something out of the ordinary, quite unusual, special, or uncommon. To be exceptional, a circumstance or reason need not be unique or unprecedented or very rare, but it cannot be one which is regular or routinely or normally encountered. What constitutes exceptional must be decided in each case on its own merits.

The Tribunal further noted that a subjective construction by which the test is reliant on the Applicant's own perception of "exceptional reasons" would, of course, lead to an absurdity, as each applicant would deem his reasons to be exceptional. It follows that the Tribunal must have the discretion, to be exercised judiciously, upon a consideration of all the relevant facts in each particular case, to establish whether the Applicant's case is out of the ordinary, special, uncommon, or unusual. Whether an Applicant sets out exceptional "reasons" or "circumstances" is a matter of mere semantics, so long as the Tribunal finds his case to be exceptional as something out of the ordinary.

Moreover, the Tribunal observed that time limits exist for reasons of certainty and expeditious disposal of disputes in the workplace. An individual may by his own action or

inaction forfeit his right to be heard by failing to comply with time limits, for the maxim *vigilantibus et non dormientibus legis subveniunt* (the law aids those who are vigilant and not those who are asleep) would surely apply.

In this case, the Applicant had already received an extension of the time limit until 30 June 2009, granted by UNAT. The delay in filing this matter with UNDT on 16 August, having received information at the end of July, was not inordinate. The reasons provided by the Applicant, that he changed counsel and was relocating, were not, in the opinion of the Tribunal, entirely persuasive as exceptional when viewed alone. However, the Applicant was diligent and did not simply sit back nor abandon his rights at any time. His default was not willful or due to gross negligence on his part, and there was no evidence of bad faith.

The Tribunal noted that time limits are not supposed to trap an applicant who acts in good faith. In the case at hand, it appeared clear that through no fault of his own, the Applicant was caught in the unusual circumstance of a transition into the new internal justice system, when procedures were unclear or still in progress and timeous guidance was unavailable to him. This does not mean that any case from the transition period would be considered as sufficiently exceptional. However, in consideration of the totality of the Applicant's particular situation, the Tribunal was satisfied that this was an exceptional case with exceptional reasons justifying an extension of time.

For these reasons, the Tribunal decided that the Applicant was granted an extension of time to file his application with the Registry of the Dispute Tribunal on or before 16 November 2009.

7. Judgment No. 2009/054 (26 October 2009): Nwuke v. *Secretary-General of the United Nations, Judgment on receivability*[15]

Application of suspension of action of a disputed administrative decision—Interim relief cannot be ordered in cases of appointment, promotion or termination—Disputed decision not deemed *prima facie* unlawful

The Applicant claimed that he was invited for an interview for the post of Director of the Trade, Finance and Economic Development Division (TFED) of the United Nations Economic Commission for Africa (UNECA) on 12 June 2009. On 13 June 2009, the Applicant wrote to the Human Resources Services Section of UNECA and informed them that since in the past UNECA had appointed candidates from the roster, he should be treated in the same manner as those other rostered candidates. On the same date, according to the Applicant, he wrote to the Office of Human Resources Management (OHRM) to request for an authoritative interpretation of the provisions of Administrative Instruction[16] ST/AI/2006/3 entitled Staff Selection System, but he never received a response.

On 24 June 2009, the Applicant wrote to the Secretary-General of the United Nations to complain of discriminatory treatment and abuse of due process in promotions at UNECA. The Applicant alleged that he had been the subject of discrimination at UNECA for a considerable period of time because he had refused an offer of the Executive Secretary of UNECA of an L-6 post in the latter's Office where he "would be writing for him." The

[15] Judge Vinod Boolell (Nairobi).

[16] For information on administrative instructions, see note under section 2 above.

Applicant alleged that this discrimination was again demonstrated in the process of filling the vacant post of Director, TFED.

In a letter dated 3 August 2009, the Management Evaluation Unit (MEU) directed that the Applicant should submit to a competency-based interview for the post of Director, TFED, UNECA. The MEU also advised that, on the basis of the management evaluation, the Secretary-General had concluded that the decision to request the Applicant to undergo a competency-based interview was appropriate in his case. He further concluded that in order to avoid even the appearance of a conflict of interest, UNECA should reconfigure the composition of the Advisory Selection Panel (ASP) constituted to interview him.

On 8 September 2009, the Applicant filed an application with the Nairobi United Nations Dispute Tribunal (UNDT), in which he requested, *inter alia*, the UNDT to compel the Organization to investigate his complaints against UNECA senior management, notably, the Executive Secretary, of abuse of due process and discrimination in appointments, and to restrain the Executive Secretary and/or any of his agents from cancelling the vacancy announcement for the post of Director, TFED, until this matter was either fully resolved or fully adjudicated by the UNDT.

On 5 October 2009, the Executive Secretary, UNECA, announced his decision to fill the post of Director, TFED.

The Tribunal observed that article 13.1 of the Rules of Procedure read together with article 2.2 of the Statute of the Tribunal clearly state that an application may be filed for suspension of action of a disputed administrative decision that is the subject of an ongoing management evaluation. Staff rule 111.2 requires a staff member to first request a review of the contested decision. The Tribunal stated that these provisions must be interpreted in such a way as to give effect to the underlying philosophy embodied in them, which according to the Tribunal is to allow management the opportunity to rectify an erroneous, arbitrary or unfair decision, as well as to provide a staff member the opportunity to request a suspension of the impugned decision pending an evaluation by management. The Tribunal found that the provisions cannot be interpreted to mean that the management evaluation is optional. At the same time, article 14.1 of the Rules, read together with article 10.2 of the Statute of the Tribunal, puts a limit on the power of the Tribunal to order an interim relief to suspend the implementation of an administrative action even if all the other requirements are met. Such interim relief cannot be ordered in cases of appointment, promotion or termination.

The Tribunal pointed out that the underlying philosophy behind the express exception in rule 14.1 is to avoid any paralysis of the work of the Organization and any hampering of its activities. Given the principles and purposes of the Organization as set out in Article 1 of the Charter, it would indeed be inadvisable to issue suspension orders in relation to appointments or promotions when these measures have been implemented for the good running of the Organization. That exception however does not debar an applicant from seeking relief through alternative procedures.

Turning to the case at hand, the Tribunal did not find any unlawfulness in the decision of the Organization not to appoint the Applicant to the position of Director, TFED, UNECA. It was explained that the Applicant had himself to blame as he declined to submit to an interview as requested. He could not, therefore, invoke his own omissions to pray for an equitable remedy.

The position to which the Applicant was laying claim was related to an appointment, as was the administrative decision dated 5 October 2009, of the Executive Secretary, UNECA, to fill the vacancy. This could not be the subject of an interim relief in view of the exception contained in article 14 of the Rules.

The Tribunal for these reasons concluded that the decision was not *prima facie* unlawful. The application was therefore not receivable under articles 13 and 14 of the Rules.

8. *Judgment No. 2009/075 (13 November 2009): Castelli* v. *Secretary-General of the United Nations*[17]

Claim for relocation expenses—Break-in-service designed to evade compensation due to staff members with continuous service exceeding 12 months—Relocation grant due upon appointment or assignment for one year or longer does not necessarily apply upon continuous service for one year—Employment continued in substance despite formal break-in-service—Advice of central review bodies not required for appointment which would have the effect of conferring continuous service of one year or more by virtue of accumulation—When accepting an offer of employment a staff member must be able to assume that offer is duly authorized—Acknowledgement accepting appointment subject to conditions laid down in Staff Rules and Regulations cannot be regarded as making the acceptance conditional in any material way—Employment can only be terminated in specific circumstances under relevant staff rules

The Applicant was employed in New York with the United Nations Mission in Nepal (UNMIN) for a period commencing on 4 April and ending on 31 December 2007. The contract was limited to service with UNMIN, and its extension was subject to the extension of the mandate of UNMIN and the availability of funding. On 4 January 2008 he entered into a further contract of employment effective from 1 January 2008 until 30 June 2008. This contract specified that the appointment was limited to service with the United Nations Observer Mission in Georgia (UNOMIG). The parties appeared to agree however that this was a mistake, and the Applicant remained at his UNMIN post in New York, performing the same functions as before. On 25 February 2008, the Applicant was informed that he was required to take a break in service from 4 March 2008, with a "reappointment" from 7 March to 30 June 2008. The Applicant declined to undertake this break in service, aimed at excluding him from the additional entitlements due to staff members after twelve months of service, and continued to work as before. The Organization claimed, nevertheless, that he was not employed in the same position under his second contract and that he was not employed by the Organization during the days specified as the break-in-service. When the Applicant later sought to obtain his entitlements, the Organization refused to pay. Claiming that the second contract was invalidly entered into, since appointments for one year or more were required to be reviewed by the central review bodies (CRBs), the Organization attempted to terminate his employment.

On 28 March 2008 the Applicant accepted an offer for another job and accordingly resigned from his position on 7 April 2008.

[17] Judge Michael Adams (New York).

The Applicant contested the Organization's decision not to pay him certain emoluments related to travel, assignment and relocation expenses. The Applicant's entitlement to the payments depended largely upon whether he had served a continuous period of employment for one year or more, but also upon whether his non-compliance with certain formal requirements could be waived as provided in the Department of Peacekeeping Operations' Human Resources Handbook.

The Tribunal observed that the claim made by the Applicant for relocation expenses depended on the interpretation of section 11 of administrative instruction[18] ST/AI/2006/5 of 24 November 2006, which provides for the payment of a relocation grant on "appointment or assignment for one year or longer". It pointed out that it was not altogether certain that the term "appointment" was the same as "employment". However, since this was the practice at the time the contract was entered into, it was an implicitly agreed that the Applicant would be accorded the entitlement of a staff member who had been employed continuously for a year. Indeed, it was conceded from the very beginning by the Organization that, if the Applicant's service were continuous, he would be entitled to the relocation grant; this was the reason explicitly given for requiring the Applicant to take the break in service.

The Tribunal observed that the break-in-service appeared to be merely a device designed to evade the compensation required to be paid to a staff member who serves for an uninterrupted period of a year or more: it served no managerial or organizational purpose. Since, in these circumstances, it was part of the agreement that the staff member would be reemployed after the break-in-service, although there was in form a termination of one contract and the commencement of another, in substance the employment continued. This situation was, in the view of the Tribunal, indistinguishable from leave without pay. It was explained that the mere fact that there were two contracts did not change the fact that the employment continued for a year or more. The Tribunal further observed that the fact that United Nations could procure the agreement of staff members to an artificial arrangement by which they forgo significant entitlements was a reflection of the overwhelming bargaining power of the United Nations as an employer.

In arguing that the second contract was invalid, the Organization had relied on the terms of rule 104.14 of Secretary-General's bulletin[19] ST/SGB/2003/1. This rule required that the CRBs advise the Secretary-General on all appointments of one year or longer. The Tribunal found that the term "appointment", as used throughout the Rules, is not cumulative but singular; moreover, the distinction between appointment on the one hand, and continuous service on the other, was embodied in the Rules. It was therefore not, the Tribunal concluded, intended to oblige a CRB to advise on an appointment which would have the effect of conferring continuous service of one year or more by virtue of accumulation.

The Tribunal additionally noted that, even if the second contract would have been one on which the CRBs should normally have advised, an exception to rule 104.14 (h) applied for staff members "recruited specifically for service with a mission". Albeit that the Applicant was stationed in New York, it was accepted that he was recruited to UNMIN. The Tribunal did not accept the argument put forth by the Organization that his employment with UNMIN had ended with the first contract. Although it may well be that the funding

[18] For information on administrative instructions, see note under section 2 above.

[19] For information on Secretary-General's bulletins, see note under section 1 of chapter V A, above.

arrangements had changed, the Tribunal did not accept the Organization could unilaterally vary the character of the contract of employment.

Further in this regard, the Tribunal did not agree that the failure of the CRBs to advise on the Applicant's second contract would have rendered the contract invalid. In the view of the Tribunal, the Applicant, when offered an employment, should be able to assume that the person who made the offer was authorized do so. As both the offer and the acceptance were unconditional, in accordance with the principles of contract law, a valid and fully enforceable contract was thus concluded.

As to the argument put forth by the Organization that the Applicant, as a finance officer, should have known about the unpredictable financing arrangements of the Organization, the Tribunal observed that this demonstrated an approach to employment contracts destructive of transparency, inconsistent with the requirements of good faith, and productive of uncertainty.

The Tribunal turned to the legal significance of an acknowledgement which the Applicant had been required to sign upon his appointment, which read:

> I hereby accept the appointment described in this letter, subject to the conditions therein specified and to those laid down in the Staff Regulations and in the Staff Rules governing temporary appointments for a fixed term. I have been acquainted with these Regulations and Rules, a copy of which has been transmitted to me with this letter of appointment.

The Tribunal found that this condition, which was too vague to be given legal significance, could not it be regarded as making the acceptance of the contract conditional in any material way.

Finally, as to the termination of the Applicant's contract, the Tribunal observed that the relevant staff rules (ST/SGB/2002/1) provided for termination in specific circumstances (see article IX), none of which applied in the present situation. As to the contention by the Organization that, as the second contract was invalid, it had a legal right to terminate the Applicant's employment on 4 March 2008, the Tribunal observed that, even if it had this right (which, for the reasons already stated, was not the case), it had not in fact exercised it. The Applicant declined to comply with the Organization's "requirement" to take a break in service, and the Organization did nothing stop the Applicant from working during that period, and was consequently estopped from contending the contrary.

The Tribunal thus concluded that, in respect of the relocation grant, the application was upheld.

9. Judgment No. 2009/091 (17 December 2009): Coulibaly v. *Secretary-General of the United Nations*[20]

Dismissal for serious misconduct—United Nations staff members must uphold highest standards of integrity—Applicant provided false information in application form, certified its truthfulness, and submitted forged transcript to support statements, in violation of the United Nations Charter and Staff Regulations—*Nemo auditur propriam turpitudinem allegans*—Disciplinary measure of dismissal not ill-founded, disproportionate or partial

[20] Judge Vinod Boolell (Nairobi).

The Applicant joined the United Nations High Commissioner for Refugees (UNHCR) Representation Office in Abidjan on 5 February 2001 as a Finance Clerk, at a G-4 level. Between January 2003 and the end of 2006, his contract was extended several times on the basis of fixed-term appointments, following which the Applicant was promoted to the post of Administrative Assistant at a G-6 level. On 1 January 2007, his fixed-term contract was extended for an additional year.

At the time of his initial appointment, the Applicant indicated in his application form P.11 under "Education", *inter alia*, a higher technician's certificate, Brevet Technicien Supérieur (BTS), from the Pigier school in Abidjan, Côte d'Ivoire. The same information was indicated in his *curriculum vitae* submitted as part of his application for the post of Administrative Assistant in June 2002.

On 4 September 2006, the Applicant passed the United Nations Finance Examination, and subsequently submitted to the Division of Human Resources Management the same information regarding his educational background. On 11 September 2006, the Division of Human Resources Management sent the Applicant a standard e-mail informing him that his name would automatically be included in the international professional roster, and that he would be considered for professional posts corresponding to his profile and experience. In order to identify a post commensurate with the applicant's qualifications and experience, the Division asked the Applicant to provide copies of his qualifications and diplomas, as well as a new P.11 form. The following day, the Applicant submitted a number of documents, including a transcript from the Pigier school in Abidjan, indicating that he had attended classes there from 2 October 1995 to 15 May 1998.

In accordance with United Nations practice, the Division of Human Resources Management at UNHCR wrote to the Pigier school in Abidjan on 8 November 2006 to obtain confirmation of the authenticity of the documents submitted by the Applicant. On 4 December 2006, the Director of Studies of the Pigier school informed the Division that the school had no record of a student by the Applicant's name for the period in question, and that the transcript provided by the Applicant was a forgery. The Division of Human Resources Management informed the Applicant of this response, and invited him to comment. The Applicant replied on 18 December 2006 that he was "shocked", and that he would visit the school himself. In a letter of 22 December 2006, the Applicant wrote to explain that the transcript he had provided had originally been drawn up to enable him to register as an outside candidate for the BTS examination in accounting. He stated that he had not been aware that the school had not kept a copy of the transcript. He also mentioned that he had received computer science training (internship in computer studies) at the same institution in 1991 and attached a receipt and a certificate. He added that he had had no doubts as to the authenticity of the documents provided at the time of his appointment and had had no intention of cheating.

Having received this information, the Division asked the Representation Office in Abidjan to conduct an investigation, and to that end, the Deputy Representative of UNHCR in Abidjan met the Director of Studies of the Pigier school on 23 January 2007. He obtained a confirmation that the subject codes used in the transcript provided by the applicant did not match the codes normally used by the Pigier school.

On 13 July 2007, the Office of the Inspector General contacted the Applicant by phone. In response to the inspectors' questions, the Applicant explained that he needed

proof of enrolment in order to take the Ivorian BTS training in accounting in June 1999. According to the Applicant, he obtained the disputed transcript at that time in exchange for CFAF 200,000 (approximately USD 460.09) from an unnamed individual at the Pigier school. During the hearing, the Applicant stated that this is an established practice. Later, the Applicant realized that he had studied the French, not the Ivorian, tax system. Consequently, the Applicant returned to the Pigier school in 2006 and learned that the transcript had been forged and that the person who had given it to him had been dismissed. The Applicant asserted that he had not taken the examination because the Ivorian tax system curriculum is different from that which he had studied at the National Institute of Higher Technical Education (INSET) in France, not because of the transcript issue. During the hearing, the Applicant also stated that he had never obtained a BTS and that he had never attended classes at the Pigier school. He had acquired the transcript in order to obtain an equivalent rating of his qualifications in his country of origin, on the basis of a course in accounting taken in France and of his transcript from the INSET.

By memorandum of 13 November 2007, the Head of the Legal Affairs Section informed the Director of the Division of Human Resources Management that the Applicant had committed an act of serious misconduct and recommended summary dismissal. The recommendation was approved by the Division management and the Applicant was informed of his summary dismissal on 8 December 2007.

In an appeal to the New York Joint Appeals Board, submitted on 29 January 2008, registered on 13 February 2008, and transferred to the United Nations Dispute Tribunal on 1 July 2009, the Applicant contested his dismissal for serious misconduct without notice or compensation.

At a hearing on 15 December 2009, Mr. Nicaise Zocli, Director of Studies at the Pigier school since 1984 provided testimony by which he contested, *inter alia*, the letterhead of the transcript, which he claimed was a forgery; the signature, which he said was not his own; the night classes, which he claimed did not exist during the years of study covered by the transcript; and the Applicant's enrolment in the school between 1995 and 1998.

The Tribunal considered that the decisive issue in the dispute was whether the circumstances of the submission of the forged transcript justified the Applicant's summary dismissal. In this regard, the question was whether the Applicant, upon his appointment, intentionally provided false information in the P.11 form and later submitted a forged transcript to support that information. The Applicant had clearly indicated that he had attained a BTS level of studies through a three year programme at the Pigier school. The Tribunal observed that the contents of the transcript could be interpreted to mean that he had regularly attended classes at that institution and had received grades sufficient to validate his level of study. However, the Applicant stated that he never studied at the Pigier school.

The Tribunal was not convinced by the submission by the Applicant that he had not realized that his transcript had been forged until 2006. It observed that staff members must uphold the highest standards of integrity, which is one of the core values of the United Nations. Despite being aware of the fraud, the Applicant provided false information in his P.11 form, certified the truthfulness of his statements by signing the form, and submitted a forged transcript to support his statements. The Tribunal stated that, only by acting, by contacting the Human Resources Management to modify his form, could the Applicant have demonstrated integrity. The Tribunal thus found that the Applicant could not make a

plea founded on an illegal act (*nemo auditur propriam turpitudinem allegans*), and stated that making false statements clearly is in violation of the provisions of the Charter of the United Nations and the Staff Regulations.

The Tribunal concluded, in light of the foregoing, and without the need to establish whether the forged transcript was decisive in the appointment of the Applicant, or whether he himself had committed the forgery, that UNHCR took a disciplinary measure that was not ill-founded, disproportionate or partial. It noted that the P.11 form clearly indicates that any misrepresentation or false documentation renders a staff member liable to termination or dismissal. The appeal by the Applicant was thus rejected.

10. Judgment No. 2009/097 (31 December 2009): Lewis v. *Secretary-General of the United Nations, Order on suspension of action*[21]

Application for suspension of action pending management evaluation—Decision to not review contract *prima facie* unlawful—Prerequisite of urgency satisfied—Mere economic loss can never be considered irreparable harm—Loss of employment for performance reasons is more than an economic act with more than economic consequences, and can constitute irreparable harm

The Applicant was employed as a local officer on a twelve-month fixed-term contract at the United Nations Children Fund (UNICEF) in Jamaica. Her contract was due to expire on 31 December 2009. On 30 November 2009, the Applicant was informed in writing by the Representative of UNICEF Jamaica (the Representative) that her contract would not be renewed after its expiration on 31 December 2009.

On 29 December 2009, the Applicant filed a request for management evaluation and an application for a suspension of action on what she alleged to be the decision not to renew her contract. The management evaluation was not completed at the time of the present proceedings; it was expected that it would take about one month.

The Applicant contended that the decision to not renew her contract was based on alleged performance inadequacies. This information about the Applicant's performance allegedly came from the Deputy Representative of UNICEF Jamaica (the Deputy Representative), who was the Applicant's immediate supervisor and who the Applicant claimed had developed against her feelings of ill will which led to the Representative being misled about the Applicant's performance. The matter said to give rise to the perceived ill will was a complaint made by the Applicant that the Deputy Representative had not given her sufficient financial allowance for the purpose of attending a conference in Panama, an issue which the Applicant raised with the staff association on her return from the training. The Applicant said that, following this report, the Deputy Representative ceased talking to her, which was a marked change from her previous "open office" approach.

The Applicant also relied on a performance evaluation report (PER) which was completed on 17 December 2009 after she was informed about the non-renewal of her contract. Unlike her two previous evaluations, this was critical and, although overall she was assessed as having "met most expectations with room for improvement", the comments of the Deputy Representative could only be read as being very critical of the Applicant's performance in a number of important respects.

[21] Judge Coral Shaw (New York).

The Tribunal observed that it was not in a position to assess whether the Deputy Representative's assessment of the Applicant's performance was fair. Certainly, the language in which it had been expressed, if the Applicant's evidence was to be accepted, did not reflect objectivity.

Turning to the prerequisites for suspension of action, the Tribunal reasoned that on balance the Applicant had a reasonably arguable case, and that the prerequisite of *prima facie* unlawfulness therefore was satisfied.

As to the prerequisite of urgency, the Tribunal stated that this prerequisite was plainly satisfied as the contract expired the very same day as the present judgment. Counsel for the Respondent did not seek to argue otherwise.

As to the requirement of irreparable harm caused if the application was not granted, the Tribunal noted that this prerequisite was of greater difficulty. It noted that it seemed clear that mere economic loss never can be irreparable as, if the Applicant succeeded in the substantive action, compensation would be payable. On the face of it, there was nothing in the case which provided a basis for concluding that the Applicant's loss was other than economic. At the same time, the Tribunal noted that the loss of employment for performance reasons was more than a purely economic act with more than purely economic consequences, and could constitute irreparable harm for the purpose of articles 13 and 14 of the Tribunal's Rules of Procedure, as had been mentioned in several other suspension of action cases. While the Tribunal expressed some scepticism towards this reasoning, it decided to adopt the same approach. The Tribunal pointed out that a suspension of action under article 13, if granted, is only for the period of a management evaluation and it is therefore in the hands of the Respondent, to a significant degree, to limit the cost of such an order.

In conclusion, the Tribunal decided, on balance, that the suspension of action should be granted until the management evaluation was completed and notified to the Applicant.

C. Decisions of the United Nations Appeals Tribunal

By resolution 61/261 of 4 April 2007, entitled "Administration of Justice at the United Nations", the General Assembly agreed that the new formal system of administration of justice should comprise two tiers, consisting of a first instance, the United Nations Dispute Tribunal, and an appellate instance, the United Nations Appeals Tribunal, rendering binding decisions and ordering appropriate remedies.

By resolution 62/228 of 22 December 2007, entitled "Administration of Justice at the United Nations", the General Assembly decided to establish a two-tier formal system of administration of justice, comprising a first instance United Nations Dispute Tribunal and an appellate instance United Nations Appeals Tribunal. It further decided that the United Nations Appeals Tribunal shall be composed of seven members who will sit in panels of at least three.

By resolution 63/253 of 24 December 2008, entitled "Administration of Justice at the United Nations", the General Assembly adopted the statutes of the United Nations Dispute Tribunal and United Nations Appeals Tribunal. It also decided that the United Nations Dispute Tribunal and the United Nations Appeals Tribunal shall be operational as of 1 July 2009.

No decisions were delivered by the United Nations Appeals Tribunal in 2009.

D. Decisions of the Administrative Tribunal of the International Labour Organization[22]

1. *Judgment No. 2778 (4 February 2009): G.J. B., G. D., M. G. and S. M.A.* v. *European Organization for Nuclear Research (CERN)*[23]

Five-year review of the financial and social conditions applicable to members of personnel—Freedom of international organizations to choose methodology, system or standard for determining salary adjustments for its staff—Chosen methodology must ensure that the results are stable, foreseeable, and clearly understood—Proper reasons must be given for departure from external standard of reference—Necessity to save money not in itself a valid reason for departing

[22] 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; African, Caribbean and Pacific Group of States; the Agency for International Trade Information and Cooperation; European Telecommunications Satellite Organization; International Organization of Legal Metrology; International Organisation of Vine and Wine; Centre for the Development of Enterprise; Permanent Court of Arbitration; South Centre; International Organization for the Development of Fisheries in Central and Eastern Europe; Technical Centre for Agricultural and Rural Cooperation ACP-EU; International Bureau of Weights and Measures; ITER International Fusion Energy Organization; Global Fund to Fight AIDS, Tuberculosis and Malaria; and the International Centre for the Study of the Preservation and Restoration of Cultural Property. 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 http://www.ilo.org/public/english/tribunal/index.htm.

[23] Seydou Ba, President; Claude Rouiller and Patrick Frydman, Judges.

FROM ESTABLISHED STANDARD OF REFERENCE—MAINTENANCE OF DEGREE OF EQUIVALENCE WITH OTHER EMPLOYERS REFERS TO ALL FINANCIAL AND SOCIAL CONDITIONS—ENTITLEMENT OF THE ORGANIZATION TO OFFER OTHER ADVANTAGEOUS EMPLOYMENT CONDITIONS IN PREFERENCE TO HIGHER SALARIES—DECISIONS WITHIN DISCRETION OF THE ORGANIZATION ONLY REVIEWED BY TRIBUNAL IN CASE OF PLAIN MISUSE OF POWER

Every five years the European Organization for Nuclear Research (CERN) carries out a general review of the financial and social conditions applicable to the members of its personnel with a view to ensuring that these conditions remain competitive. Prior to the start of the review, the Council decides which financial and social conditions are to be covered by the review, and draws up a list of employers from which relevant data is to be collected for the purpose of comparing their conditions of employment with those offered by CERN. By a decision of 19 October 2006, the Council approved a package of measures proposed by the management to give effect to the findings of a five-yearly review conducted in 2005.

The four Complainants in the current case each lodged an internal appeal on 23 March 2007, in which they challenged the validity of the decision of 19 October 2006, and claimed that, had the Organization drawn valid conclusions from the five-yearly review, their salaries would have been significantly higher.

The Tribunal recalled its Judgments Nos. 1821 and 1912, in which it had determined that an international organization is free to choose a methodology, system or standard of reference for determining salary adjustments for its staff, provided that it meets all other principles of international civil service law, and that the chosen methodology must ensure that the results are stable, foreseeable, and clearly understood. Where the methodology refers to an external standard but grants discretion to the governing body to depart from that standard, the organization has a duty to state proper reasons for such departure. Furthermore, while the necessity of saving money may be one valid factor in adjusting salaries, the mere desire to save money at the staff's expense is not by itself a valid reason for departing from an established standard of reference.

Interpreting annex A1 of the Staff Rules, which lay down the principles and procedures governing the review, the Tribunal observed that the purpose of the five-yearly review was, ultimately, to enable CERN to have high-quality staff. The maintenance of a degree of equivalence with the conditions offered by other employers was therefore to be seen as a means to achieve that goal rather than as a goal in itself. The Tribunal emphasized that, in any case, the equivalence referred to was not specifically that of remuneration, but more generally that of all the "financial and social conditions" applicable to the members of the Organization's personnel.

The Tribunal observed that it may be deduced from the relevant provisions that the Organization must include remuneration among the conditions covered in the survey, and was obliged to examine whether an adjustment of salaries might be necessary. The financial rules did not however oblige the Organization to raise the salary scale based solely on a finding that the salaries had undergone a comparative deterioration, excluding the data concerning other relevant conditions. In addition, the "possible adjustments of remuneration" referred to in the Staff Rules did not necessarily have to take the form of a general increase in the salary scale. Despite their obviously more modest impact, the measures concerning the salary scale of certain career paths and the advancement scheme

which the Council had decided upon were indeed aimed at bringing about some adjustment of salaries. The Tribunal further noted that given the ultimate goal of five-yearly review, namely to enable the Organization to have staff of the highest calibre, it seemed natural that it should be entitled to offer the members of its personnel other advantageous employment conditions in preference to higher salaries, if such a choice appeared better suited to that goal.

The Tribunal concluded that the Council could not be said to have departed from the reference standard to which it was obliged to refer in its decision-making, the guide being not only the results of the comparative survey but more generally encompassing all data and analyses used in the preparation of the five-yearly review. Even if had been was the case, the Tribunal recalled Council was entitled to depart from the reference standard, given that it provided reasons for doing so. As reasons had been clearly set out in the proposal adopted by the Council, all three criteria set out in Judgments Nos. 1821 and 1912 had been met. The Tribunal dismissed as unfounded the claim made by the Complainants that the Organization had been guided by the necessity to achieve savings at the personnel's expense.

As to the contentions made by the Complainants that the Council had drawn blatantly wrong conclusions from the data submitted to it, and that the Organization favourably portrayed new provisions which personnel in fact derived very small advantages from, the Tribunal noted that these aspects lay within the discretionary powers of the Council, and would not be censured by the Tribunal but in cases in which the management had plainly misused its authority.

The Tribunal thus found that the Organization was entitled to refuse the general increase demanded by the Complainants, and dismissed the claim.

2. *Judgment No. 2791 (4 February 2009): E.H.* v. *European Patent Organization*[24]

Alternative recruitment procedure for post as Principal Director—Standing of individual Staff Committee members to file suits as representatives of that body—Recruitment should generally take place by way of competition—Alternative procedures may be used in exceptional cases, for recruitment to posts requiring special qualifications—Administration should specifically identify special qualifications required—Staff shall be informed of each vacant post—Staff should have been informed of the decision to abandon the initial recruitment procedure and adopt a new recruitment procedure—Staff should also have been informed of material change in the advertised post—Award of moral damages

In August 2003, a vacancy notice was published by the European Patent Office for the post of Principal Director, Corporate Communications Manager, at grade A6. Having considered the approximately 100 candidates who applied for the position, the Principal Director of Personnel considered that none of them was suitable, and decided, after consulting the staff representatives and the Vice-President of the Directorate-General 4, to engage a recruitment consultant. A few months later, the consultant presented the Office

[24] Mr. Seydou Ba, President of the Tribunal; Ms. Mary G. Gaudron, Vice-President; and Ms. Dolores M. Hansen, Judge.

with a list of ten candidates, who were interviewed by the Principal Director of Personnel, and of whom three were pre-selected. Mr. S, who was one of the three pre-selected candidates, but who had not submitted an application pursuant to the original vacancy announcement, was subsequently selected for the post.

On 14 January 2005 the Complainant, in her capacity as Deputy Chairperson of the Munich Staff Committee, asked the President of the Office to cancel the appointment of Mr. S, or to, otherwise, treat her letter as an internal appeal. She was informed by a letter of 28 February 2005 that the President had not acceded to her request, and that the matter had been referred to Internal Appeals Committee.

In its opinion of 10 October 2006, a majority of the members of the Appeals Committee considered that the Office had in the recruitment of a Principal Director conducted an arbitrary procedure which had infringed the "consultation rights" of the staff representatives. By a letter of 8 December 2006, which the Director of Personnel Management and Systems notified the Complainant that the President of the Office had decided to reject her appeal as receivable only insofar as it concerned the rights of the Staff Committee, and unfounded in its entirety. This is the impugned decision.

As to the *locus standi* of the Complainant, the Tribunal reiterated its constant ruling that individual members of the Staff Committee must have the power to file suits as representatives of that body, based on the rationale that if the Staff Committee was not able to file suits, the only way to preserve common rights and interests of staff was to allow individual officials to act as their representatives.

Article 7(1) of the Service Regulations provided that recruitment should generally be by way of competition, but it also allowed for an alternative procedure to be used in exceptional cases, for recruitment to posts which require special qualifications. The Tribunal pointed out, that in such exceptional case it was incumbent on the Administration to specifically identify those special qualifications required, as without that information, a potential complainant would have no basis upon which to assess whether there were grounds for a complaint under this provision. The Tribunal noted that the EPO justified its reliance on the exception with reference the seniority of the position and the close working relationship with the President. As the arguments put forth by the Office were simply descriptive of the position however, and did not identify the special qualifications required for the post, the Tribunal was not satisfied that the it had sufficiently justified its use of an alternative recruitment procedure.

As to the reliance by the Office on the absence of a recruitment procedure in the specimen contract, the Tribunal observed that it would be unnecessary and unexpected to find recruitment procedure information in an employment contract, which provides the terms and conditions of employment. In addition, as the Office had established specific terms and conditions for certain senior positions, the Conditions for Employment for Contract Staff, and in particular the recruitment provisions in article 3, did not apply to principal directors.

The Tribunal moved on to consider whether the Office had violated article 4(2) of the Service Regulations, which required that staff be informed of each vacant post when the appointing authority decided that the post was to be filled. In the view of the Tribunal, at the time that a recruitment consultant was engaged, a new recruitment procedure had been

adopted, and a decision had been taken to abandon the initial recruitment procedure. It stated that, at a minimum, the staff should have been informed that the recruitment had been assigned to a consultant and provided with information regarding the application process. The failure to do so constituted a violation of article 4 (2), which aimed to provided institutional transparency and which constituted a regulatory recognition and safeguard of a staff member's right to a fair opportunity to submit a candidature for a vacant post. Contrary to the assumption of the Office, article 4 (2) existed separately from the recruitment procedures, and was therefore applicable also in the case of an alternative recruitment procedure. Lastly, the Tribunal noted that the contract was ultimately entered into for a longer period than what was initially advertised. This was a material change of which staff members should also have been informed.

For these reasons, the Tribunal decided that the impugned decision be set aside. The Tribunal however concluded that it was beyond its power to order the Office to start a regulatory procedure by open competition for the post. The Complainant was awarded moral damages for the violations of the Service Regulations and the delayed processing of the internal appeal.

3. Judgment No. 2797 (4 February 2009):J. B. v. *International Labour Organization (ILO)*[25]

Use of external collaboration contracts for specific, well-defined tasks or advisory missions—Duties were not identical or ongoing, but diversified, and did not match the tasks of a "programme officer"—Question of inappropriate use of external contracts

The Complainant worked as an unpaid intern at the ILO Branch Office in Madrid between 17 July 2000 and 14 October 2001. On 15 October 2001, the Director of the office issued an external collaboration contract until 31 December 2001 under which the Complainant was to identify potential donors among the Spanish Autonomous Communities and draw up the relevant contracts. Nine external collaboration contracts were subsequently signed by the parties. There were breaks between some contracts and they had different purposes, apart from the last contract signed on 1 February 2005, the purpose of which was the continuation of the previous one. The last contract ended on 31 August 2005.

On 10 October 2005 the Complainant brought an action for wrongful dismissal before the Labour Court of Madrid, which on 16 January 2006 delivered a judgment against the ILO. In addition, on 24 October 2005, the Complainant filed a grievance with the Administration under article 13.2, chapter XIII, of the Staff Regulations of the ILO in which he requested a review of the "decision not to renew" his external collaboration contract which had ended on 31 August 2005. As his grievance was deemed inadmissible, he submitted the case to the Joint Advisory Appeals Board on 6 March 2006.

In its report of 26 March 2007, the Joint Advisory Appeals Board found the grievance to be admissible and recommended that the Director-General redefine the contractual relationship between the office and the Complainant; replace the external collaboration contracts with an equal number of fixed-term contracts for the period 15 October 2001 to 31 August 2005; and draw all the legal consequences of that redefinition. By a letter of 25

[25] Seydou Ba, President; Claude Rouiller and Patrick Frydman, Judges.

May 2007, the Executive Director of the Management and Administration Sector informed the Complainant that the Director-General rejected his grievance as inadmissible. This was the impugned decision.

The Tribunal rejected the Complainant's submission that he had in fact performed the duties of an official, and that the Organization thus had violated the provisions of circular No. 11, series 6, paragraph 1 (b), by making inappropriate use of external collaboration contracts. The Tribunal noted that the contracts signed by the Complainant related to specific well-defined tasks or to advisory missions for the benefit of the Madrid office, as expressly stipulated in these contracts. It accepted the Organization's submission that the diversity of tasks covered by the various contracts was sufficient to show that the title "Project Officer", which the Complainant claims to have held, did not in fact match the tasks he performed. Almost all of the contracts ended with the submission of reports written by the Complainant upon completion of his assignments. The Tribunal found that for five years the Complainant had carried out duties which were not identical or ongoing but diversified, and which had met the immediate needs of the Madrid office. The Tribunal further found that the facts of the case were thus not similar to those in Judgment No. 2708, and that no proof had been provided for the other claims in connection with circular No. 11.

The Tribunal also rejected the Complainant's claim that the Organization had violated circular No. 630, series 6, paragraph 12, as external collaboration contracts had not been used for a purpose other than that for which they were intended and complied with the rules applying to this type of contract.

The Complainant's claim to redefine his working relationship with the Office during the period from 17 July 2000 to 14 October 2001 was found by the Tribunal to be time-barred.

For the above reasons, the Tribunal dismissed the complaint in its entirety.

4. Judgment No. 2805 (4 February 2009): A.H. K. v. European Patent Organization (EPO)[26]

No requirement that grounds of appeal be specified when lodging an appeal—Interpretation of relevant Staff Regulations and Rules—If written regulations are silent on a matter, a term may be implied only if it is obviously comprehended within the text that its statement is unnecessary, or if it is necessary to give effect to some other term

The Complainant joined the European Patent Office in December 1986 as an administrative employee at grade B2. At the material time, he held a position at grade B3.

On 1 June 2005 the Complainant lodged a complaint of harassment involving four managers under circular No. 286 concerning the protection of the dignity of staff. Upon receipt of the complaint by the President of the Office, the formal procedure of resolution of harassment-related grievances was initiated in accordance with the aforementioned circular and the complaint was referred to the Ombudsman. In her report to the President of the Office on 9 March 2006, the Ombudsman concluded that there was no proven case of

[26] Mary G. Gaudron, Vice-President; Giuseppe Barbagallo and Dolores M. Hansen, Judges.

persistent or recurring harassment on the part of the managers. By letter of 19 May 2006 the President informed the Complainant that he had decided to reject the complaint.

In a letter to the President of 21 August 2006, the Complainant indicated that he was lodging an internal appeal against that decision under article 15 of circular No. 286 and that further details would be provided by his counsel at a later date. The Director of the Employment Law Directorate replied on 8 September 2006 that, due to the absence of a statement in support of his appeal, the President had not been able to examine the grounds for review of the contested decision, and had thus decided to reject the appeal. He added that the advice of the Internal Appeals Committee would be sought as soon as the Complainant provided sufficient reasons for contesting the President's decision.

The Complainant's counsel, contending that grounds of appeal were not necessary, requested in a letter on 6 March 2007 that the appeal lodged on 21 August 2006 be referred to the Internal Appeals Committee, alternatively that his letter be treated as a formal complaint of harassment lodged by the Complainant pursuant to article 9 of circular No. 286. The President replied on 29 March 2007 giving reasons for not meeting either of those requests, but not expressly refusing them. This was the decision impugned by the Complainant before the Tribunal on 11 June 2007.

In response to the Organization's plea of irreceivability for failure to exhaust the internal means of redress, the Tribunal observed that the issue at the centre of the complaint was whether it was necessary to provide grounds of appeal. If grounds of appeal were not required, the President's failure to meet the Complainant's request of 6 March 2007—conveyed by his letter of 29 March 2007—was properly to be viewed as a final decision rejecting the Complainant's appeal with respect to his harassment complaint, with no further avenue of internal appeal open to him.

The Tribunal noted that there was no express provision in the Service Regulations or in circular No. 286 requiring that grounds of appeal be specified when lodging an appeal. With regard to the Organization's contention that the requirement for the specification of the grounds of appeal was implied in the Service Regulations, the Tribunal held that where regulations and rules or other written documents were silent as to a matter, a term dealing with that matter may be implied only if it was so obviously comprehended within the text used in the regulations and rules or other document that its statement was unnecessary, or, if the term to be implied was necessary to give effect to some other term. The Tribunal held that the expressions "lodge an internal appeal" in article 107 and "[a]n internal appeal shall be lodged" in article 108 did not so obviously comprehend the formulation of grounds of appeal that the specification of that requirement was unnecessary. Neither was the specification of the grounds of appeal necessary to give effect to the terms of article 109 of the Service Regulations. The Tribunal explained that if no grounds were specified, the President may and, ordinarily, would reasonably conclude, that he cannot give a favourable reply. The first part of the President's obligation under that article would then be satisfied and he could, and should, proceed to convene the Internal Appeals Committee. If the President wished to ensure that, for the future, grounds for appeal were specified, he could take appropriate steps to bring that about. Thus, the complaint was held to be receivable.

For the above reasons, the Tribunal decided that the President's decision of 29 March 2007 should be set aside to the extent that it impliedly dismissed the Complainant's internal appeal of 21 August 2006 and refused to refer that appeal to the Internal Appeals Com-

mittee. The Tribunal directed the President of the Office to transmit the Complainant's internal appeal to the Internal Appeals Committee within ten days of the delivery of the Judgment. The Complainant's claim for moral damages was rejected. The Tribunal noted that since the Complainant's matter would have been referred to the Internal Appeals Committee in a timely manner had he provided the grounds of appeal as he indicated in the letter of 21 August 2006, both sides were equally to blame for the delay that had ensued.

5. *Judgment No. 2809 (4 February 2009): N.S.* v. *European Organization for Nuclear Research*[27]

Non-award of an indefinite contract to staff member—Different procedures for recruitment and awarding of indefinite contracts to staff members—In the latter case, it is sufficient to advise eligibile staff members that long-term positions are available in their field of activities—No breach of the requirement of reciprocal and mutual trust between Organization and staff member—Positive annual appraisal cannot be substituted for the conclusions of a selection board—Within discretion of an Organization to set out rules for conducting assessments for awarding of contracts

The Complainant was a Swiss national and joined European Organization for Nuclear Research (CERN) in 1993. In 2001 he became a staff member with a three-year limited-duration contract, which was renewed for an additional three years in 2004. He was subsequently granted an exceptional extension of this contract from 1 July to 31 December 2007.

In 2006, CERN changed its contract policy under which the limited contract could be converted into indefinite contracts on the condition established by administrative circular No. 2 (Rev. 3) (the "circular"). As three long-term jobs became available within the physics department's manpower plan, the Human Resources Department proposed on 21 April 2006 that the Complainant be assessed by the Departmental Contract Review Board (DCRB) for the award of an indefinite contract. At the end of this assessment, the DCRB considered that the Complainant met all the criteria of the circular, but was critical of his communication skills, resulting in a lower ranking. On 16 October 2006, the Director-General informed the Complainant that he had decided not to award him an indefinite contract.

On 12 December 2006, the Complainant appealed against the Director-General's decision. In its report of 4 July 2007, the Joint Advisory Appeals Board recommended that the appeal be dismissed. The Director of Finance and Human Resources, acting on behalf of the Director-General, subsequently informed the Complainant that he had decided not to award him an indefinite contract. That was the impugned decision.

The Tribunal noted that reference should be made to Judgment No. 2711, in which the Organization's new contract policy was fully described. Under this new policy, an indefinite contract could be awarded provided that there was at least one long-term job available for the activity concerned within the manpower plan of the department, and that the candidate fulfilled the activity-linked criteria. It also set down personal criteria, which

[27] Mr. Seydou Ba, President of the Tribunal; Mr. Claude Rouiller and Mr. Patrick Frydman, Judges.

included performance, conduct, initiative, commitment and flexibility, ability to integrate and ability to communicate.

In response to the contention made by the Complainant that the recruitment procedure had been flawed, the Tribunal noted upon reading of the circular that the procedures differed depending on whether the procedure concerned recruitment, or the awarding an indefinite contract to a staff member already working within the Organization. In recruitment situations, a vacancy announcement should indeed be publicized to attract qualified candidates. As to the awarding an indefinite contract however, this was one of the "possible developments regarding the contractual position" mentioned in the circular, in which case it was sufficient to advise eligible staff members that one or more long-term positions existed in their field of activities. The Complainant had in the present case been informed of this availability, and had not raised any objections to being assessed pursuant to the terms and procedure laid down in the Circular. It could therefore not be said that the Organization had conducted the procedure in breach of relevant texts or contrary to the Tribunal's case law. Similarly, the Tribunal found that the Complainant had had the right to be heard, as he had the possibility to appraise the Director-General of his comments before a final decision was made. Further, the comments of the Complainant had been taken into account in the final report of the DCRB, on the basis of which the Director-General had made his decision.

The Tribunal rejected the complaint that the Organization had acted in breach of the requirement of reciprocal or mutual trust. It stated that there was no need for the Organization to bring to the attention of the staff the manpower plan which contained the number of filled and vacant posts. According to the wording of the Circular, the Organization's sole duty when deciding whether to award an indefinite contract was to inform the staff candidates that there was at least one long-term job available for the activity concerned. In the present case, the Organization was deemed to have had fulfilled its duty in this regard. The Tribunal was also of the view that the question of the number of available jobs was irrelevant for the Complainant, as he could be assessed as long as there was at least one long-term job available in his field of activities.

Finally, in response to the contention made that the DCRB report contained manifestly erroneous conclusions in the light of the Complainant's excellent appraisal reports, the Tribunal held that a good performance record did not in itself justify selecting one candidate rather than another. The opinion of the author of an annual appraisal could not be substituted for the conclusions of a selection board which was responsible for selecting the best candidate for the award of an indefinite contract. The Tribunal found that the Complainant's annual appraisal reports had been taken into account, and that due regard had been given to his comments and to those of his supervisors before the DCRB report had been submitted to the Director-General for a final decision. The Tribunal concluded that it lay within the discretion of each Organization to set its own rules for conducting an assessment; and as the assessment in the present case complied with the rules established by the Circular, it would refrain from assessing the candidates on merit or rule on the Organization's choice.

6. *Judgment No. 2840 (8 July 2009): K. J. L.* v. *World Health Organization*[28]

Receivability of complaint by former staff member—No regulatory provision in WHO Staff Regulations and Rules on access to the internal appeal process by former staff members—Under such Regulations and Rules, a former staff member does not have recourse to the internal process where a decision was communicated to her after separation from the Organization

The Complainant was a former staff member of the World Health Organization (WHO), who had joined the WHO Regional Office for Europe (EURO) in Copenhagen as a Human Resource Officer at grade P-3 in the Division of Administration and Finance on 1 September 2003. On 1 July 2005, her appointment was extended until 31 August 2007. On 14 September 2005, the Complainant went on sick leave and was subsequently diagnosed as suffering from a service-incurred stress disorder. On 15 September, she informed the Regional Director for Europe of her decision to resign. The Regional Director accepted her resignation on 19 September.

By letter of 24 November 2005, the Acting Human Resource Manager informed the Complainant that the necessary formalities for her separation from service, which according to staff rule 1010.1 would take effect on 15 December 2005, had been initiated. He acknowledged that in view of her recent medical certificate she might not be able to return to duty before the effective date of resignation and explained that in that case the Director of Health and Medical Services would consider her medical condition in the light of WHO Manual, paragraph II.9.570.4, and revert back to her on this matter.

The Complainant's effective date of resignation was deferred twice owing to the extensions of her sick leave by letters of 13 December 2005 and 21 April 2006, the latter changing the terms of the Complainant's sick leave status to sick leave under insurance coverage. She was also informed that the period of sick leave under insurance coverage would continue until she was either declared fit to work or her entitlement thereunder was exhausted. In a medical report dated 14 November 2006, the Complainant's treating physician attested that the Complainant's condition was improving but that it could not be excluded that her depressive symptoms might reappear if she returned to work. He noted that it would be possible for her to resume work at a job outside EURO.

By letter of 21 December 2006, the Human Resource Manager notified the Complainant that on the basis of the latest medical reports her sick leave would end on 31 December 2006, that the administrative formalities had been completed, and that she would in due course receive a Personnel Action to reflect her separation from service with effect from 1 January 2007. The Personnel Action was sent to the Complainant on 12 January 2007. The Organization contests that an annex entitled "Administrative formalities in connection with separation from service" was enclosed with that letter indicating that the Director of the Health and Medical Services had confirmed that in her case "an exit medical examination [was] not necessary"; this is disputed by the Complainant.

An exchange of e-mails ensued between the Complainant, Dr. G. M. and the Director of Human Resources Services, in which the Complainant stated that she had been separated from the Organization without having undergone a medical examination, as required under staff rule 1085. In an e-mail of 6 March 2008 the Director of Administration and

[28] Seydou Ba, President; Mary G. Gaudron, Vice President; and Dolores M. Hansen, Judge.

Finance replied that, on the basis of the Complainant's medical reports, she had on 23 November 2006 been assessed as fit for work, and accordingly her separation had taken effect on 1 January 2007 in accordance with Manual paragraph II.7.570.4. He added that, in light of the detailed medical record of her state of health following the examination by WHO on 16 of August 2005, and the medical reports received from her treating physician throughout 2006, the relevant provisions of the Staff Rules and the WHO Manual were considered to be fulfilled. On 5 May 2008, the Complainant lodged a complaint with the Tribunal impugning the decision of 23 November 2006.

The Tribunal rejected the Defendant's submission that the complaint was time-barred, as the decision of 23 November 2006 that the Complainant would not undergo an exit medical examination was first communicated to the Complainant on 6 March 2006. Taking into account the mandatory nature of the examination and its potentially significant legal consequences for both parties, the Tribunal found that a deviation from this norm had not been specifically communicated to the Complainant neither in the letter of 21 December 2006 or in the annex to the letter of 12 January 2007.

The Tribunal next considered whether the Complainant was required to or, indeed could, access the internal appeal process after March 2008, given the fact that she no longer was a staff member of the WHO. The Tribunal noted that the WHO Staff Regulations and Staff Rules did not contain regulatory provisions similar to those of other international organizations that specifically contemplate access to the internal appeal process by former staff members. Noting that there was no precedent on this issue, the Tribunal held that under WHO Staff Regulations and Staff Rules a former staff member did not have recourse to the internal appeal process where a decision has been communicated to her first after separation from the Organization.

For the above reasons, and with reference to Judgment No. 2582, the Tribunal concluded that in these circumstances the former staff member had recourse to the Tribunal and her complaint was thus receivable. The Organization was given thirty days from the delivery of the Judgment to file its reply on the merits.

7. Judgment No. 2846 (8 July 2009): G. L. N. N. v. European Patent Organization[29]

Promotion pursuant to "age-50 rule"—Promotion Board should examine merits of the staff member individually and having regard to the overall quality of work performed in the service of Organization

The Complainant joined the European Patent Office at grade A3 in November 1991, and was granted a permanent appointment on 1 May 1993. As from 2001 his deteriorating state of health occasioned many absences on sick leave, and on 1 December 2004 he was granted an invalidity pension.

In its Judgment No. 2272, delivered on 4 February 2004, the Tribunal held that the President of the European Patent Office had committed an error of law and abused his authority by abandoning the "age-50 rule" as from 1999. This rule, which had been applied consistently from 1981 to 1998, stipulated that promotion to the A4 grade at age 50 would be offered to all who have served at least 5 years in the A3 grade, irrespective of their total previous experience, provided their record of work was good.

[29] Seydou Ba, President; Claude Rouiller and Patrick Frydman, Judges.

Following that Judgment, the President decided to refer to the Promotion Board all other cases from 1999 onwards of employees who might be eligible for promotion to A4 at the age of 50, in order for the Promotion Board to recommend promotions for all those in the A3 grade who met the criteria. However, the Complainant was not granted a promotion.

On 15 March 2005, relying on the age-50 rule, he requested retroactive promotion to grade A4 as from 24 March 2001. In its opinion of 7 August 2007 the Internal Appeals Committee unanimously recommended that the appeal be rejected. The Complainant was informed by letter of 28 September 2007 that the President of the Office had decided to follow the Committee's recommendation to reject his appeal. Moreover, he was informed that the staff report covering the period from 1 January 2000 to 6 September 2001 gave him an overall performance rating of "less than good", and would be finalized and placed in his personal file. That was the decision challenged before the Tribunal.

The Tribunal pointed out that the President of the Office, in his 2001 note to the Chairmen of the Promotion Boards, had stated that employees over the age of 44 with more than 19 years of recognized experience could be promoted to grade A4 provided that their record of performance had been "good" during a period of time covering at least three normal reporting periods. The Tribunal held that the criteria laid down in this note could not be applied automatically by the Promotion Board, which should have examined the Complainant's merits individually. It would be contrary to the purpose of the age-50 rule to assess an employee's merits without any regard for the overall quality of the work he or she has performed in the service of the Organization, as reflected in his or her file as a whole.

Taking into account the fact that the Complainant had consistently obtained the rating "good" for all aspects of his performance in his staff reports between 1992 and 1999, and that the "less than good" rating for the reporting period from 1 January 2000 to 6 September 2001 had not been finalized in an adversarial manner, probably owing to the Complainant's poor health, the Tribunal found that the Organization could not refuse to promote the Complainant.

The impugned decision was thus set aside and the Tribunal held that the Organization must promote the Complainant to grade A4 with retroactive effect from 1 April 2001.

8. *Judgment No. 2854 (8 July 2009): R. B. B.* v. *International Federation of Red Cross and Red Crescent Societies (IFRC)*[30]

Lawfulness of termination of appointment—No abuse of authority nor retaliation—Definition of "hidden sanction"—Termination constituted hidden disciplinary sanction and must be set aside—Where termination constitutes a hidden disciplinary sanction and reinstatement is not appropriate, compensation should be assessed on the basis of what would have occurred if proper procedures had been followed—Award of compensation and moral damages

The Complainant was the former Head of the Federation's Risk Management and Audit Department. He joined the Federation on 7 January 2002 under a fixed-term appointment and was granted an open-ended contract on 1 January 2005. By letter of 13 July 2007, the Secretary General of the Federation terminated the Complainant's appointment as

[30] Seydou Ba, President; Mary G. Gaudron, Vice-President; Dolores M. Hansen, Judge.

Head of the Federation's Risk Management and Audit Department "in the interest of the Federation", pursuant to article 11.4 of the Staff Regulations, with effect from 31 December 2007.

The Secretary General referred in his letter to a "fundamental disagreement" between himself and the Complainant as to the role of the internal audit function. According to the Secretary General there had been a number of incidents in which the Complainant had communicated with the Finance Commission, the President of the Federation, the Governing Board and representatives of National Societies on such issues as periodic appraisals and audits without first obtaining his approval.

On 15 September 2007, the Complainant initiated an internal appeal against the decision of 13 July 2007 before the Joint Appeals Commission. The Commission pointed out that there was a professional difference of opinion between the Complainant and the Secretary General over the audit function, over which it was not qualified to render judgement. However, it held that valid grounds for termination had existed as early as April 2006, and expressed its perplexity as to why the Secretary General had allowed so much time to pass before taking "definitive action" in July 2007. The Commission recommended that "a mutually agreed and realistic compensation arrangement" be concluded. However, an agreement was not reached and, by letter of 18 December 2007, the Secretary General informed the Complainant that he had decided to maintain the decision of 13 July 2007. This was the impugned decision.

The Tribunal rejected the Complainant's arguments that the impugned decision constituted an abuse of authority and/or retaliation for having informed members of the governing bodies of his concerns that the Secretary General and Finance Commission had violated the Federation's Code of Conduct. The Tribunal pointed out that the immediate cause of the decision was the Complainant's communication during March and April 2007 with the President and members of the Governing Board in respect to the formation of an audit and management committee, which was authorised neither by the Complainant's job description nor by the Internal Audit Charter.

With regard to the Complainant's plea, alleging that the impugned decision was tainted with procedural irregularities and amounted to a disguised disciplinary measure, the Tribunal referred to Judgment No. 2090, in which it stated that the provisions of the Federation's Staff Regulations dealing with termination did not authorise the arbitrary termination of contracts, and added that "there must be no breach of adversarial procedure [. . .] nor abuse of authority, nor obvious misappraisal of the facts". Thus, a decision purportedly taken under article 11.4 of the Staff Regulations in the interests of the Federation would be set aside if it constituted a disguised disciplinary measure, since a decision of that kind was not taken in the interest of the Federation but for the purpose of avoiding the procedural requirements that must be observed in the case of disciplinary measures. The Tribunal reiterated, with reference to Judgment No. 2659, the definition of a hidden sanction as "a measure which appears to be adopted in the interests of the Organization and in accordance with the applicable rules, but which in reality is a disciplinary measure imposed as a penalty for a transgression, whether real or imaginary". Since there could be no doubt that the Secretary General was of the view that the Complainant's unauthorised communications with the President and members of the Governing Board constituted

misconduct, the Tribunal concluded that the Complainant's termination constituted a hidden disciplinary sanction and that the impugned decision must be set aside.

The Tribunal did not find the Complainant's plea, alleging that the impugned decision was the result of bias or malice on part of the Secretary General or that it was discriminatory, substantiated. Both the Secretary General and the Complainant were wrong in their disagreement as to the role of the internal audit function. The Secretary General wrongly obstructed the Complainant's right of direct access to the Finance Commission in respect of audit material, while the Complainant did not have a right or duty to communicate with the President and members of the Governing Board.

The Tribunal held that in a case such as the present one where termination constituted a hidden disciplinary sanction and reinstatement was not appropriate, compensation should be assessed on the basis of what would have occurred if proper procedures had been followed. The Tribunal pointed out that article 11.2.1 of the Staff Regulations allowed for termination with notice, "after a formal written warning allowing three (3) months for improvement", if a staff member did not maintain satisfactory relations with the Secretary General. Thus, if proper procedures had been observed, the Complainant would have been retained in employment for the duration of the warning and notice periods, amounting, in all, to approximately nine months. Given that the Complainant has had the benefit of five months' notice, the Tribunal held that it was appropriate for compensation to be awarded for four months following the expiry of the notice period specified in the letter of termination of 13 July 2007. In addition, the Complainant was awarded moral damages in the amount of 20,000 Swiss francs.

9. Judgment No. 2856 (8 July 2009): J. L. v. *International Labour Organization*[31]

Reassignment to new post following suppression of position due to replacement of IBM mainframe system—Receivability of claim different issue from question of mootness—A claim is moot when there is no longer a live controversy between the parties—An international organization necessarily has power to restructure some or all of its departments or units, including by the abolition of posts, the creation of new posts and the redeployment of staff—Transfer of non-disciplinary nature should show regard, in form and substance, for the dignity of the individual—Duty to provide training—Organization had done its utmost to respect Complainant's dignity and good name and not to cause him harm

The Complainant joined the International Labour Office, the International Labour Organization (ILO) Secretariat, in 1983 as a Systems Programmer at grade P-2 in the Bureau of Information Systems, which subsequently became the Information Technology and Communications Bureau (ITCOM). His position was reclassified twice and he was promoted to grade P-3 with effect from 1 February 1988 and to grade P-4 with effect from 1 August 1995. He held a contract without limit of time since July 1989.

The Complainant's main responsibility was the maintenance of the Office's IBM mainframe system within ITCOM. In 2003, the Office was in the process of developing the Integrated Resource Information System (IRIS), an Oracle-based enterprise resource planning system, designed to replace the IBM mainframe system. As the IRIS became fully

[31] Seydou Ba, President; Mary G. Gaudron, Vice-President; and Dolores M. Hansen, Judge.

operational on 30 June 2005 and the IBM mainframe system ceased to operate, the Complainant's position was suppressed. Further to the suppression of his position, the Complainant was in December 2005 assigned to the position of Applications System Administrator in ITCOM, which was classified as a P.3 position.

On 31 May 2006 he filed a grievance with Human Resources Development Department (HRD), arguing that his transfer to a position at grade P.3 was inequitable. A process of informal dialogue ensued, during which it was agreed that the P.3 position would be designated as P.4 for as long as the Complainant remained in it. However, it was determined that he was not actually performing all the duties attributed to the said position and that therefore additional training should be envisaged. On this basis, an updated skills assessment was carried out and a training plan was established. On 15 December 2006 the Administration confirmed the Complainant's transfer to the position of Applications System Administrator at grade P.4 with retroactive effect from 1 July 2005.

On 19 December 2006, the Complainant filed a grievance with the Joint Advisory Appeals Board pursuant to article 13.3.2 of the Staff Regulations against the implied rejection of his initial grievance filed with HRD on 31 May 2006. In his additional submissions of 6 March 2007 he requested a personal promotion with immediate effect to grade P.5. On 22 December 2006 the Director of the HRD informed the Complainant that, in light of his transfer and the minute of 15 December, HRD considered that the matter had been administratively resolved. The Board issued its report on 25 June 2007, and by a letter dated 24 August 2007 the Complainant was informed that the Director-General had followed the Board's recommendations and dismissed the grievance as moot and devoid of merit. It was this decision that the Complainant impugned before the Tribunal.

As to the Organization's argument that the claim was irreceivable as moot, the Tribunal observed that a plea of mootness was not an issue of receivability. It pointed out that, as a matter of law, a claim was moot when there was no longer a live controversy. Whether or not there was a live controversy was, however, a matter to be determined by the Tribunal. Thus, even if a claim was moot it could still be receivable. The Tribunal proceeded to conclude that a live controversy did exist between the parties and that the complaint thus should be examined on its merits.

Recalling its Judgment 2510, the Tribunal pointed out that "an international organization necessarily has the power to restructure some or all of its departments or units, including by the abolition of posts, the creation of new posts and the redeployment of staff". Thus, as stated in Judgment 1131, the organization's decisions on these matters were to be considered discretionary and the Tribunal's power of judicial review in this respect was limited. With regard to the Complainant's contention that his transfer to a lower-grade position was unlawful and humiliating, the Tribunal found it useful to recall its findings in Judgment 2229, in which it stated that a transfer of a non-disciplinary nature should show regard, in both form and substance, for the dignity of the individual concerned, particularly by providing him with work of the same level as that which he performed in his previous post and matching his qualifications.

As to the Complainant's contention that he was not put in a genuine P.4 position since a revised job description reflecting the change from P.3 to P.4 had not been issued, the Tribunal noted that the reason for the restructuring was the implementation of the new Oracle-based system and that the shift to the new system required the acquisition of new

knowledge and skills. The Tribunal pointed out that the Complainants had not adduced any evidence that he had the specific knowledge and skills required to function in a "genuine P.4 position" within the Organization's new Oracle-based system. While he had 27 years of experience, the unfortunate reality was that his experience was limited to the IBM mainframe system. The question remained however, whether the Organization failed to provide the Complainant with the proper training and the appropriate amount of exposure to the new Oracle-based system in order for him to be transferred to an adequate position. The Tribunal concluded that in the circumstances, the Organization had done its utmost to respect the Complainant's dignity and good name and not to cause him any harm. Despite that fact that the Complainant did not possess the requisite skills, his personal grade had not been altered; and in view of his skills deficiencies, it had not been possible to give him work at P.4 level within the Oracle-based system.

For the above reasons, the Tribunal dismissed the complaint.

10. Judgment No. 2857 (8 July 2009): L. R. M v. *European Patent Organization*[32]

Decision to cancel contract with external insurance broker in favour of self-insurance by staff—Retroactive deduction from salaries to cover deficit in provisional contributions for insurance—*De facto* change in Office decision to endorse Board's recommendation in full when refusing to provide information required—Insufficient information provided for the General Advisory Committee to give a reasoned opinion—When asking for approval of contribution rates, necessary to show how one arrived at those rates

The Complainant joined the European Patent Office in 1990. He was at the material time a member of the General Advisory Committee (GAC), appointed by the Staff Committee. The GAC was a joint body responsible for giving reasoned opinions, *inter alia*, on any proposal to amend the Service Regulations or to make implementing rules thereto, or on any proposal which concerned the staff as a whole or in part.

In 2001, the President of the Office proposed to cancel the contract with the external insurance broker covering the risks of death and permanent invalidity. The proposal explained that due to the increase in staff, self-insurance had become actuarially acceptable, that it would be more economical, and would serve to cut out the insurance company's profit margin. By decision CA/D 7/01 of 28 June 2001, the Administrative Council of the European Patent Organization (EPO) approved the proposal, and adopted, *inter alia,* implementing rules for article 84 of the Service Regulations, setting out the provisional contribution rates for death and total permanent invalidity insurance for the period of 2002–2004, and stipulated that a review would be conducted at the end of 2004, in order to make any necessary adjustment for the previous period, and to fix the provisional contribution rates for the following period. On 8 November 2004, the Principal Director of Personnel submitted a review of the provisional contribution rates for death and permanent invalidity insurance for the period 2002–2004 to the GAC, and invited it to give an opinion on the text of a draft circular which set out the final contribution rates for that period and the provisional rates for 2005. According to the review, the provisional contribution rates for 2004–2005 were not high enough to cover the benefits paid.

[32] Augustín Gordillo; Guiseppe Barbagallo; Dolores M. Hansen, Judges.

While the GAC members appointed by the President expressed a positive opinion of the proposal, those appointed by the Staff Committee declared themselves unable, for lack of information, to give a reasoned opinion. By circular No. 283 of 13 December 2004, the staff were informed that the provisional contributions were not sufficient to cover the benefit payments and that an estimate of the rates necessary to finance the benefits had shown that an amount of approximately 7.5 per cent of one month's basic salary would have to be recovered; consequently, this amount would be deducted from the retroactive salary adjustments to be paid in December 2004.

The Complainant contested the aforementioned circular as he considered the deduction from his December salary and the subsequent increase in the contribution rates to be illegal. The matter was referred to the Internal Appeals Committee (IAC), which on 14 January 2005 unanimously recommended that circular No. 283 be deemed marred by serious procedural irregularities and be set aside with retroactive effect. It further found that the GAC had not been in a position to establish whether the Office had correctly applied the premium-calculated methodology set forth in decision CA/46/1 on the basis of the documents available to it during its deliberations. The IAC thus recommended that EPO resubmit the contributions for the period 2002–2004 first to the GAC, and then to the Administrative Council for final decision. On 25 May 2007, the Complainant was notified of the President's decision to accept the unanimous recommendation of the IAC setting aside Circular No. 283 retroactively. This was the impugned decision.

The Tribunal first considered the receivability of the complaint. The Complainant challenged the "*de facto* rejection" of the IAC's recommendation stemming from the fact that insufficient documentation was again submitted to the GAC following the decision of 25 May 2007, indicating bad faith on the side of the Office. The Tribunal observed that in agreeing to resubmit documentation to the GAC, it stood to reason that the Office should have included everything that was requested by the GAC when it was consulted the first time. Instead, by submitting incomplete documentation, the Office had changed its previous decision to endorse the recommendation by the IAC, to endorsing it only in part. When the GAC, including the Complainant, informed the President of the Office on 28 September 2007 that it had not received sufficient information to form a reasoned opinion, the Complainant was informed of the *de facto* change in the Office's position, and correctly filed a complaint with the Tribunal within ninety days.

Having reviewed the documents submitted to the GAC the first and the second time, the Tribunal was of the opinion that there was not enough difference between the documents to consider their submission as a new decision which would had have to be appealed before the IAC.

Therefore, the Tribunal found that the EPO must consult the GAC again, providing the requested information. When asking for approval of the established contribution rates, the Tribunal noted, it was necessary to show how one had arrived at those numbers. Specifically, it would be necessary to first show the basis for the estimated contribution rate calculations leading to the switch from an external insurance broker to self-insurance, and then to show the basis for the final calculations of the contribution rates for the period 2002–2004. Having specified the basis for the calculations, the EPO could then point out what elements caused the drastic increase in the contribution rates. The EPO must also submit information regarding the previous period which showed the payment of benefits

per annum according to the group of staff, the number of invalidity cases in each group and any other information that would be useful in clarifying the reasons for the drastic increase in the contribution rates. Based on such information, the GAC should be able to form a reasoned opinion.

The Tribunal concluded that the impugned decision should be set aside and circular No. 283 be annulled *ab initio*. Each staff member represented by the Complainant was awarded one euro in moral damages. However, the Tribunal decided not to award punitive damages as it had not been proved that the Organization had acted in bad faith.

The Tribunal was of the opinion that the case should be sent back to the EPO which must resubmit the necessary documentation and information first to the GAC and then for a final decision in accordance with established procedures. If it was later concluded that adjustments would have to be made in the Complainant's favour, the Organization would have to repay the wrongly deducted amounts levied by the Office. However, as it was not clear whether this was the case, it would cause unfair detriment to the Organization in terms of the heavy administrative and financial burden, while offering an unjustified enrichment to the Complainant, to order such a refund at this point.

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

1. Decision No. 391 (25 March 2009): Anu Oinas v. *International Bank for Reconstruction and Development*[34]

Conversion of appointment to regular position—Issue of discrimination with regard to mandatory retirement age and pension benefits—Not within Tribunal's power to order discontinuation of mandatory retirement policy or to order the Bank to modify its policy—Role of Tribunal to examine case of non-observance of contract of employment or terms of appointment—Setting of age limits within the Bank's employment policy not *per se* incompatible with principle of non-differentiation—Principle of parallelism with the International Monetary Fund implies that IMF policies should only be used as reference point

The Applicant was employed with the Bank as a non-regular staff member ("NRS") since 1 August 1986. The Applicant's NRS contract came to an end on 26 June 1998. In December 1998 she was appointed to an open-ended position with the Bank where she

[33] The World Bank Administrative Tribunal is competent to hear and pass judgment upon any applications alleging non-observance of the contract of employment or terms of appointment, including all pertinent regulations and rules in force at the time of the alleged non-observance, of members of the staff of the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation (referred to collectively in the Statute of the Tribunal as "the Bank Group"). The Tribunal is open to any current or former member of the staff of the Bank Group, any person who is entitled to a claim upon a right of a member of the staff as a personal representative or by reasons of the staff member's death and any person designed or otherwise entitled to receive 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://lnweb90.worldbank.org/crn/wbt/wbtwebsite.nsf.

[34] Jan Paulsson, President, and Judges Francisco Orrego Vicuña, Sarah Christie, and Florentino P. Feliciano.

worked until reaching the age of retirement of 62 on 30 September 2007. Accordingly, the Applicant's appointment was in effect converted to a regular appointment after she had worked for the Bank for 12 years (1986–1998). At the time the Applicant's appointment was converted, the Gross Pension Plan of the Staff Retirement Plan had been closed to new participants. The Applicant thus became a participant in the Net Pension Plan which was introduced for regular staff appointed on or after 15 April 1998.

In the view of the Applicant, the Net Plan provided for lesser benefits than the Gross Plan, but did not provide for upward adjustment of the mandatory retirement age for the participants in the Net Plan. This created, according to the Applicant, an imbalance in the available benefits. The Applicant requested that the Tribunal order the Bank to cease to apply its mandatory retirement age policy or, alternatively, to modify its policy with regard to former NRS members, such as herself, covered under the Net Pension Plan by raising the mandatory retirement age for herself and those employees to at least 65.

In considering the case before it, the Tribunal was mindful that it was not a policy-making or a policy-reviewing institution. Accordingly, the Tribunal concluded that the Applicant's petition to have the Tribunal order the discontinuation of the mandatory retirement policy or, in the alternative, to order the Bank to modify its policy with regard to former NRS members participating in the Net Plan, was beyond the powers of the Tribunal.

The Tribunal recalled that its role was to examine whether there had been non-observance of the contract of employment or terms of appointment of the Applicant. Having regard to the Bank's Principles of Staff Employment, the Tribunal opined that setting age limits within the Bank's employment policy was not *per se* incompatible with the principle of non-differentiation. In *Crevier*, Decision No. 205 [1999], the Tribunal held "because staff members in different situations will normally be governed by different rules or provisions . . . discrimination takes place where staff who are in basically similar situations are treated differently." In this case, the Tribunal held that since former NRS members appointed after 15 April 1998 were treated under the same rules governing the Net Pension Plan, there is of course a difference with those governed by the Gross Pension Plan, but those within the same group are not treated differently.

The Tribunal noted that, while the parties have disagreed on the objectives of the policy reform and whether it had any connection with the rationale for mandatory retirement, in adopting a broad and fundamental reform of this kind the governing institution must take into account the various elements that influence employment policy and not just any one element in isolation. Retirement age is a crucial factor in any pensions system and could not have been overlooked in this case.

While national and regional legal systems may have adopted their own policy with regard to mandatory retirement age, the Tribunal stressed that it is for the Bank to make its own policy determinations in the interest of the institution and the collective well-being of staff members. Change to Bank policies that track trends based on macroeconomic developments in given countries or regions could have adverse effects on staff members. In any event, the Tribunal held that the conditions referred to by the Applicant and set out in the European Court of Justice's decision in *Palacios de la Villa* had been satisfied.

Furthermore, in response to the reference made by the Applicant to the standards of the International Monetary Fund (IMF), the Tribunal clarified that the principle of paral-

lelism with the IMF does not mean that the Bank is tied to IMF policies but rather that they should be used as a reference point.

The Tribunal hence dismissed the application.

2. *Decision No. 397 (1 July 2009): AG* v. *International Bank for Reconstruction and Development*[35]

Referral to national authorities of confidential information concerning investigation against staff member—Leak of confidential information to the press—Decision to make a referral to national authorities to initiate criminal proceedings against a staff member must be based on a written opinion of the General Counsel—Procedures established should ensure that staff members are provided with information of such referrals in a timely manner —Decision to investigate a leak of information is a discretionary managerial decision—Since evidence strongly suggested that the leak could have originated from the investigating office of the Bank, the matter should have been referred for an independent investigation—Potential prejudice to staff member's due process rights

The Applicant worked with the Bank from 1998 to 19 June 2003 when his position was terminated following an investigation by which the Department of Institutional Integrity (INT) found that he had received a bribe of $12,000 from a contractor working on a Bank-financed project. The Applicant did not challenge the termination of his employment before the Tribunal.

On 24 July 2003, the Bank referred his case to the United States Department of Justice (DOJ) believing it had collected evidence that the Applicant may have violated the laws of the United States and Switzerland. The DOJ requested that the Bank delay notifying the Applicant of this referral for six months so as to preserve the integrity of the evidence and to avoid frustration of its efforts to identify other potential applicants in the alleged crimes. As the six-month period was to expire, on 4 February 2004, the Bank referred the Applicant's case to the United States Internal Revenue Service (IRS). The IRS similarly requested that the Bank delay notifying the Applicant of the referral for six more months. On 27 January 2005, the IRS made a further request to the Bank to delay notification for six months. The Bank also referred the same case to the Swiss authorities, and failed to inform the Swiss authorities of its requirement to notify the Applicant of the referral. The Bank did not notify the Applicant of this referral. In fact, on 23 November 2004, the Applicant asked the Bank whether it had referred his case to any national authorities but did not receive a reply thereto.

On 22 June 2005, the Swiss authorities informed the Bank that they did not plan to pursue any charges against the Applicant. On 12 July 2005, the IRS also informed the Bank that they did not intend to investigate the Applicant further. The DOJ reached a similar conclusion. Pursuant to the Treaty of 25 May 1973 between the United States and Switzerland on international mutual assistance in criminal matters, the DOJ informed the Applicant that Switzerland had decided not to pursue any charges against the Applicant.

[35] Jan Paulsson, President, and Judges Francisco Orrego Vicuña, Sarah Christie, Florentino P. Feliciano, Zia Mody, Stephen M. Schwebel and Francis M. Ssekandi.

The Bank notified the Applicant on 20 July 2005 of the referrals to the criminal authorities but did not send any of the documents. The Applicant asked for the documents on 11 and 22 August 2005, and on 2 September 2005 the Bank assured him that he would receive them "shortly". However, at that time the Bank contacted the U.S. Attorney's Office which had expressed an interest in the case. The Attorneys' Office asked the Bank to delay informing the Applicant of the contents of the referral for two months. On 23 September the Bank informed the Applicant that pursuant to DOJ's request he would not receive any "documents or information pertaining to his case." A series of further deferral requests were made by the U.S. Attorney's Office over the course of some two years. The latest deferral was for a period of two months and expired on 24 June 2009.

The Applicant was contacted by a reporter from a U.S. newspaper on 17 January 2006 who asked him a number of questions, which included references to very specific confidential information that seemed to originate from INT's Report of Investigation, in preparation for an article on fraud and corruption at the Bank. On 8 February 2006, the Applicant forwarded a copy of this e-mail message to INT and asked that it investigate the leak. Two days later, he was informed that INT would not conduct an investigation because "[a]bsent credible information of an unauthorized disclosure by a staff member or staff members, it would be inappropriate for the Bank to engage in a fishing expedition." A few weeks later, an article was published in U.S. News & World Report, naming the Applicant, and including detailed information about the Bank's investigation of him.

The Applicant contended that the Bank secretly and improperly referred confidential information about him to national authorities and delayed unreasonably to notify him about the referrals, in violation of the Staff Rules and the Tribunal's jurisprudence. In addition, the Applicant alleges that the Bank improperly released confidential information to the U.S. newspaper. In response, the Bank asserted that its decisions were matters of managerial discretion. The Bank complied with its own guidelines, the requirements of the Staff Rules, and the Tribunal's findings in *C*, Decision No. 272 [2002]. It argued that did not abuse its authority when it decided not to investigate the alleged leak of confidential information.

In considering the case before it, the Tribunal found that the Bank had incorrectly interpreted the Tribunal's guidelines established in *C* [2002], and the provisions of the relevant Staff Rules, and violated these provisions when it failed to notify the Applicant of the content of the referrals to national authorities. The Tribunal opined that a decision to make a referral to national authorities to initiate criminal proceedings against a staff member must be based on a written opinion of the General Counsel of the Bank. The Bank should outline instances when such referrals may be made and the procedures to be followed in doing so. The procedures established should ensure that staff members are provided with information regarding such referrals in a timely manner, as a matter of due process and in compliance with the Staff Rules. Before referrals are made the Bank should consider whether there is sufficient basis for a criminal prosecution in a state of competent jurisdiction.

With respect to the Applicant's contentions that the Bank should have investigated his allegations of a leak, the Tribunal opined that the decision to investigate a leak is a discretionary managerial decision made by INT. However, having regard to the facts of the case, the Tribunal considered that the evidence strongly suggested that the leak could have

originated from INT, in which case the matter should have been referred for an independent investigation to determine the validity of the Applicant's complaint. The Tribunal thus found that the failure to conduct an investigation of the leak of confidential information was a violation of the Bank's rules and could potentially prejudice a staff member's due process rights.

For these reasons, the Tribunal ordered that the Bank provide the Applicant with all documents referred to the criminal authorities to date, since 2003. The Tribunal considered that the monetary compensation awarded by the lower instances was more than adequate compensation given the circumstances of the case. All other claims were dismissed.

3. *Decision No. 399 (1 July 2009): Bonaventure Mbida-Essama* v. *International Bank for Reconstruction and Development*[36]

NOTIFICATION REGARDING RESTORATION OF PRIOR PENSION SERVICE—IN THE CIRCUMSTANCES OF THE CASE, E-MAIL CONSTITUTED A REASONABLE MEANS OF COMMUNICATION—DATE ON WHICH NOTICE IS DEEMED RECEIVED IS NOT THAT IN WHICH THE RECIPIENT OPENS THE E-MAIL NOTICE—DECISION SHOULD NOT BE READ AS A GENERAL STATEMENT THAT THE BANK'S DUTY TO NOTIFY CAN BE DISCHARGED IN ALL CASES BY SIMPLY SENDING AN E-MAIL NOTIFICATION

The Applicant challenged the decision of the Bank's Pension Benefits Administration Committee (PBAC) that his election to restore his prior pension service had to be made within a five-year period which ran from the day the Bank informed him of the restoration opportunity by an e-mail message which he apparently never read.

The Applicant was employed by the Bank on a regular appointment from 1979 until he resigned from the Bank in 1988. At the time, the Applicant was covered by the Staff Retirement Plan pension scheme based on a notional gross remuneration (Gross Plan). When the Applicant resigned from the Bank, he decided to exercise his right under the Plan to take a lump sum withdrawal benefit. The Applicant was rehired by the Bank under a term appointment on 17 July 2000, where he became a participant of the new benefit scheme based on net salary (Net Plan). At this point, the Applicant requested that the Bank restore his past pension service to the Net Plan, but was informed that it was not Bank policy to do so.

In late 2002, the Bank amended its Staff Retirement Plan to allow the option for restoration of past pension service in certain circumstances. In particular, the amended plan provided that if such a participant (like the Applicant) "within five years after the date on which the participant received notice of the restoration opportunity provided under this section and while still a participant" refunds the earlier withdrawal payment, with interest, the participant will be credited with the number of days of service credited to him in the prior period of participation. To this end, the Bank would notify staff members about the restoration opportunity, and the staff member has a five-year restoration period running from the date of notice.

On 6 February 2003 the Bank's Pension Administration sent a notice to the Applicant's Bank e-mail account explaining of his right to restore his past pension service within five years, or by 6 February 2008. The Pension Administration sent a further message on 14 February 2003 providing more details on the restoration option. The Applicant claimed

[36] Jan Paulsson, President, and Judges Sarah Christie and Stephen M. Schwebel.

he only became aware of and saw the 6 February 2003 notice in July 2008, more than five years later. The Bank argued that it sent its restoration notices with a "read receipt" requested, so that it would receive a read receipt by e-mail when a recipient opens a restoration notice, and the receipt would be added to the recipient's pension files. The Bank explains that the read receipt would serve as evidence that the recipient opened the notice, but the five-year restoration period would still commence from the date on which the e-mail notice was transmitted to the participant's e-mail account, regardless of whether or when the message was opened or read.

The Applicant asked the PBAC to extend the deadline for his restoration period. On 23 October 2008, the Committee denied the request for an extension. The Applicant filed his Application before the Tribunal arguing that the five-year time period should run from 31 July 2008.

In considering the case before it, the Tribunal considered whether sending the restoration notice by e-mail in the Applicant's case was reasonable. The Tribunal found that e-mail certainly is a reasonable method of communication in today's workplace, especially in the Bank. The e-mail notices in this case were sent in February 2003. It cannot be disputed that by 2003 e-mail had become a routine and familiar format for intra-office communication in the Bank. In fact, it is not in dispute that the Applicant himself used e-mail as a means of communication on a regular basis in the course of his job responsibilities. Thus, the Tribunal found that sending the restoration notice by e-mail was reasonable in this case.

With respect to the Applicant's contention that the e-mail restoration notice must not be considered received until the recipient opens the e-mail notice, the Tribunal disagreed. The Applicant could not stop the clock running by deciding not to open the e-mail notice or by ignoring it. If his argument were accepted, it would mean he could keep the restoration period open indefinitely by simply deciding not to open the e-mail notice.

It understood that e-mail recipients may ignore or delete messages without opening them when it appears that the messages were unsolicited or where the sender is unknown. But here the Bank sent him an e-mail notice, captioned so as to convey its import, and another personalized and captioned follow-up message a week later. It was obvious to the Applicant that the two e-mail messages were sent from Pension Administration's e-mail account. The Applicant admits that he failed to open the e-mail message or even ignored them because he had lost interest in the restoration matter. The Tribunal concluded that the Bank could not be blamed for this.

The Tribunal thus dismissed the Applicant's claims. It however cautioned that this should not be read as a general statement that the Bank's duty to notify can be discharged in all cases by simply sending an e-mail notification. The Tribunal's holding in this case was tied to its circumstances.

4. *Decision No. 403 (7 October 2009): Shohreh Homayoun* v. *International Bank for Reconstruction and Development*[37]

Effect of national court order within the organization—Venue for claiming spousal support—Failure by staff member to elect withdrawal of pension—

[37] Jan Paulsson, President, and Judges Zia Mody, Stephen M. Schwebel and Francis M. Ssekandi.

RETIREMENT PROVISIONS BECAME PAYABLE ONLY AFTER STAFF MEMBER ELECTED TO RECEIVE THE PENSION—ABSENT ANY RULES APPLICABLE IN THE CASE WHERE A STAFF MEMBER OMITS TO MAKE AN ELECTION, THE TRIBUNAL FOUND NO WARRANT TO IMPOSE AN ELECTION WHERE NONE HAD BEEN MADE—IF A STAFF MEMBER'S OBLIGATIONS TO PROVIDE RETIREMENT BENEFITS TO A FORMER SPOUSE ARE ESTABLISHED AND ORDERED BY A COURT OF COMPETENT JURISDICTION BUT ARE NOT RESPECTED BY HIM, IT IS OPEN TO THE FORMER SPOUSE TO SEEK REDRESS THROUGH THAT COURT

The Applicant challenged a decision of the Pensions Benefits Administration Committee (PBAC) to deny her request for distribution of her former spouse's pension pursuant to the spousal support order issued by a court of the United States. The ground for the denial was that her former spouse (Mr. X) had not commenced a pension under the terms of the Staff Retirement Plan (SRP). In 1995, the Staff Retirement Plan had been amended to permit payments directly from the Plan for the support of divorced or legally separated spouses of retired Plan participants, pursuant to settlement agreements between spouses, or pursuant to a final order of a court in domestic relations proceedings.

The Applicant and Mr. X were married in Iran in 1980. They had two daughters. Mr. X began his employment with the International Finance Corporation (IFC) in December 1985 and became a participant in the Staff Retirement Plan as of that date. His employment with the IFC ended on 3 April 2007. Mr. X was 56 years old at the time and was eligible to withdraw unreduced early retirement pension.

A divorce decree was entered by the Superior Court of the District of Columbia on 25 October 2009 after a separation that began in November 1997. The Applicant subsequently obtained a number of court orders under the laws of the District of Columbia providing for awards of various forms of support. An order of 7 March 2007 determined that the marriage actually ended on 2 February 2006, and awarded the Applicant "50% (fifty percent) of [Mr. X's] pension from the World Bank, if and when paid to him, whether in the form of a lump sum or in the form of periodic payment or both". The Applicant's attorney submitted the orders to the Pension Benefits Administration Division (Pension Administration). The Manager, Pension Administration, informed Mr. X that, according to the orders, Pension Administration would be making spousal support payments to the Applicant, effective upon Mr. X's retirement.

Although Mr. X's employment with IFC indeed terminated on 3 April 2007, Mr. X never took the necessary steps to commence his monthly pension. On 3 June 2008, after waiting for more than a year, the Applicant submitted a request for relief to PBAC. At its meeting of 23 October 2008, PBAC considered and denied the Applicant's request seeing no provision in the SRP under which relief could be granted. PBAC further explained that under the terms of the Plan, Mr. X would need to elect to commence his unreduced early retirement pension, and only then would his pension be "payable".

The Applicant requested the Tribunal to: (i) instruct PBAC to reverse its decision and to order the Plan to pay the Applicant one-half of Mr. X's retirement pension without waiting for him to make an election, or to reach the age at which payments would begin automatically; and (ii) compensate the Applicant in the amount of pension foregone. The Applicant's contented that ever since Mr. X's employment with IFC ended he has failed to take proper steps to protect his family, and expressed anxiety that he might be deported and would thus be beyond the reach of the courts of the District of Columbia. Therefore

she urged that her share of Mr. X's pension be paid now, even without his submitting an application for withdrawal of pension.

In considering the case before it, the Tribunal examined whether PBAC correctly interpreted the applicable law and properly concluded that the conditions for granting the Applicant the requested benefits were not met. The Tribunal noted that amounts accessible under the SRP's early retirement provisions became payable only after four conditions were satisfied. Mr. X had fulfilled all conditions but the fourth: he had not elected to receive the unreduced pension. His pension was thus not payable. The Tribunal noted that the Bank may not have considered the possibility that staff members might omit to make an election, and noted that the Bank could amend its rules to cover such an eventuality. In the meantime, given the wording of the applicable rules, the Tribunal found no warrant to impose an election where none had been made. Thus, the PBAC did not contravene the terms of the Staff Retirement Plan by declining to pay out a portion of Mr. X's pension to the Applicant.

The Tribunal noted however, that if an SRP participant's obligations to provide certain retirement benefits to a former spouse are established and ordered by a court of competent jurisdiction but are not respected by the participant (potentially resulting in economic loss), it is open to the former spouse to seek redress through that court. Thus it was for the Applicant to seek a further order from the Superior Court of the District of Columbia should she wish to vindicate her position.

For these reasons, the Tribunal dismissed the Applicant's claims.

5. *Decision No. 424 (9 December 2009): Farah Aleem* & *Irfan Aleem* v. *International Bank for Reconstruction and Development*[38]

Effect of national court orders on the organization—Conflicting divorce orders by judicial authorities of two countries—Dispute to be resolved applying rules and policies of the Staff Retirement Plan—Amendment made to Staff Retirement Plan to protect interest of former spouses of staff members and to prevent staff members from evading domestic court orders—No legal basis for Applicant to avoid order from court in the host country

Mr. Aleem joined the Bank in 1985 and retired in 2004. Mr. and Ms. Aleem are citizens of Pakistan and were married in that country in 1980 under the laws of Pakistan. On 3 March 2003, Ms. Aleem filed a "Complaint for Limited Divorce, Custody, Support, Use and Possession and Other Relief" with the Circuit Court for Montgomery County, Maryland. Mr. Aleem filed his "Answer to Complaint" on 1 May 2003 requesting *inter alia* that the Circuit Court "[g]rant [Ms. Farah Aleem] a limited divorce on the basis of voluntary separation without cohabitation and no reasonable expectation of reconciliation". While the Maryland proceedings were in progress, Mr. Aleem went to the Pakistani Embassy in Washington, DC, where he signed a document he prepared titled "Divorce Deed" which recalled that a sum of Rs. 150,000 (equivalent to about USD 2,500) was fixed as consideration of the marriage contract, which would be paid by the husband if the marriage were dissolved. Mr. Aleem sent the Divorce Deed and the check to Ms. Aleem on 23 July 2003.

[38] Jan Paulsson, President, and Judges Florentino P. Feliciano, Stephen M. Schwebel, Francis M. Ssekandi, and Ahmed El-Kosheri.

In September 2003, Mr. Aleem went to Pakistan and filed an application with the Arbitration Council in Karachi for official confirmation of the divorce. The Arbitration Council sent notices to both Mr. Aleem and Ms. Aleem inviting them to appear in person before the Council "for confirmation of Divorce along with original Documents". Ms. Aleem wrote to the Arbitration Council requesting that Mr. Aleem's application be denied since there was a previously filed action in the jurisdiction of Maryland in which both Mr. and Ms. Aleem reside, the jurisdiction in which they jointly owned real property, and the jurisdiction in which both of their children had been born and raised. The Arbitration Council reiterated that the purpose of the notices were to ascertain whether both parties wish to reconcile. In the absence of information from Ms. Aleem, and in view of Mr. Aleem's confirmation that he did not wish to reconcile, the Arbitration Council sent a letter entitled "Confirmation of Divorce" to both Mr. and Ms. Aleem noting that "no reconciliation took place . . . the divorce is confirmed . . . on the day 26 February, 2004."

In Maryland, the divorce proceedings continued and both Mr. Aleem and Mr. Aleem filed numerous motions. On 5 April 2004, Mr. Aleem filed with the Circuit Court a Motion to Dismiss the Maryland proceedings because "the Pakistani authorities have already decided the issues of property divorce and property distribution." After a hearing, the Circuit Court dismissed Mr. Aleem's motion in May 2004. On 27 June 2006, the Circuit Court granted an absolute divorce. It also issued an order for spousal support requiring Mr. Aleem to pay his former wife, until the death of either party, 50% of his monthly benefit from the Bank's Staff Retirement Plan.

Mr. Aleem appealed to the Court of Special Appeals of Maryland arguing that the Circuit Court erred in its decision not to "give comity to Pakistani law under which his divorce by *talaq* did not include any equitable division of marital property titled in his name". In September 2007, the Court of Special Appeals denied his appeal. Mr. Aleem appealed to the highest court of the state which, on 6 May 2007, also dismissed his appeal.

On 13 May 2008 Ms. Aleem's attorney notified Pension Administration of the ruling of the Maryland Court of Appeals and requested payment to Ms. Aleem pursuant to the Order of the Circuit Court. Mr. Aleem objected, stating that he would contest the matter through the Bank's grievance system. Pension Administration then decided to suspend the disputed portion of the pension effective May 2008. The dispute was then referred to the Pension Benefits Administration Committee (PBAC), which decided to continue the suspension of the disputed portion of the pension until the matter was resolved by mutual agreement or by the Tribunal.

In considering the merits, the Tribunal concluded that the dispute must be resolved under the Staff Retirement Plan (SRP) applying the rules and policies contained therein. The Tribunal found that there is no need for the Tribunal to pronounce upon the validity of the Maryland and Pakistani divorce decrees or to assess their relative merits.

The Tribunal recalled that the SRP was amended in 1995 to ensure that Bank Group retirees comply with their family legal obligations in retirement. Previously, former spouses had no legal ability to recover portions of a Bank Group retiree's pension if the retiree left the jurisdiction or otherwise refused to pay the former spouse directly, whether voluntarily or following a valid court order. Thus the policy rationale behind this amendment to the SRP was clearly to protect the interests and welfare of the retired staff members' former spouses. The amendment was enacted to prevent staff members from evading domestic

court orders using the legal loopholes that existed prior to the amendment. The Tribunal thus sought to address what would be the proper solution given the context and policy rationale of the relevant provision of the SRP.

The Tribunal found that there was no legal basis for Mr. Aleem to evade the Maryland Order. He voluntarily submitted to the jurisdiction of the Maryland Circuit Court. The Tribunal noted that, even after the unilateral divorce under the Pakistani laws, he applied to the Maryland Circuit Court for a dismissal of the ongoing proceedings on ground of his Pakistani divorce. The Maryland Circuit Court refused to grant comity to the Pakistani divorce and his challenge to the highest court of Maryland failed. Thus, the Maryland Circuit Court Order was final and he was bound by that Order. Pension Administration and the Tribunal are not the right fora to challenge the decision of the highest court in a jurisdiction where both parties lived for over 20 years and made their home.

The Tribunal was unconvinced by Mr. Aleem's arguments that he was living in Maryland under diplomatic visas on grounds of his employment with the Bank, and that accordingly Pakistani law should govern their marriage and terms of their divorce. Mr. Aleem was neither a diplomat under international law nor under the Bank's Articles of Agreement. He was not immune from U.S. court orders relating to his marital obligations.

The Tribunal thus decided that the Bank must give effect to the Maryland Order and release the undisputed portion of Mr. Aleem's monthly pension including the amount already suspended to his former spouse.

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

Judgement No. 2009–1 (17 March 2009) *Mr. S. Ding, Applicant* v. *International Monetary Fund* (IMF)*, Respondent*[40]

Inadmissibility of an application challenging a regulatory decision pre-dating the entry into force of the Tribunal's statute—Comparison of the text of the pre-existing rule and that of the rule currently administered by the Fund—Invitation to the Fund to reconsider the policy on education allowance for children with birthdays falling within and outside the academic year

The Applicant, a staff member of the Fund, challenged elements of the Fund's policy governing eligibility for education allowances and their application in his individual case. The Applicant contended that the policy impermissibly discriminated in the case of a child, such as his own, whose birthday falls outside of the academic year. In such circumstance, asserted Applicant, the policy provided, in total, one less year of eligibility for education

[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 enrolee 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 http://www.imf.org/external/imfat/index.htm.

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

allowances than in the case of a child whose birthday falls within the academic year. Applicant sought as relief the establishment of his child's eligibility for education allowances for the 2008–2009 academic year and suggested revision of the Fund's policy to provide an equal number of years of eligibility for education allowances, irrespective of whether the child's birthday falls within or outside of the academic year.

The contested provision of General Administrative Order (GAO) No. 21, Rev. 7 (June 12, 2000), provides as follows:

> 4.02.1 *Children With Birthdays Falling Within the Academic Year.* A child whose birthday falls within the academic year shall qualify for education allowances beginning with the academic year during which the child's fifth birthday occurs until the end of the academic year during which the child's twenty-fourth birthday occurs.
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> 4.02.2 *Children With Birthdays Falling Outside the Academic Year.* A child whose birthday falls outside the academic year shall qualify for education allowances beginning with the academic year that follows the child's fifth birthday until the end of the academic year that precedes the child's twenty-fourth birthday.

The Fund contended that the application was inadmissible on the ground that the contested regulation pre-dated the entry into force of the Tribunal's Statute, and relied in this regard on article XX, section 1, of the Statute which provides:

> The Tribunal shall not be competent to pass judgment upon any application challenging the legality or asserting the illegality of an administrative act taken before October 15, 1992, even if the channels of administrative review concerning that act have been exhausted only after that date.

The Tribunal noted that article VI, section 2, of the Statute provides that an applicant may challenge a "regulatory" decision of the Fund either directly within three months of its announcement or effective date, or at any time as part of a challenge to an admissible "individual" decision taken pursuant to such "regulatory" decision. It was not disputed that the Applicant had filed his application within three months of the exhaustion of administrative review of the "individual" decision denying his request for education benefits for the 2008–2009 academic year. The general proviso of article VI, section 2, is, however, subject to the *lex specialis* of article XX. Accordingly, the question for decision by the Tribunal was whether the "regulatory" decision challenged by the Applicant had been taken before October 15, 1992.

In the view of the Fund, the Applicant was challenging a rule initially adopted in 1979. The 2000 revision of general administrative order (GAO) No. 21, maintained the Fund, represented a clarification, but not a substantive change, in the regulation. Applicant, for his part, maintained that because the rule that had pre-dated the Tribunal's competence had not expressly addressed the matter of eligibility of children with birthdays falling outside the academic year, the 2000 revision had introduced a new element in the eligibility criteria.

In order to assess the admissibility of the Application, the Tribunal initially compared the text of the pre-existing rule, which pre-dated the entry into force of the Tribunal's Statute, with the text of the rule currently administered by the Fund, which had given rise to Applicant's complaint. The Tribunal noted that the texts of the two rules differed in form. While the current rule (Revision 7 of GAO No. 21, adopted in 2000) differentiated explicitly between children whose birthdays fall within the academic year and those

with birthdays outside of the academic year, the prior version (Revision 6 of GAO No. 21, adopted in 1985) had made no such differentiation on the face of the regulation.

The Tribunal examined the history of the Fund's regulations governing age eligibility for education allowances and concluded that "in substance and in effect" the two regulations were the same: "Both only permit payment of education allowance benefits to a child who reaches his or her 5th birthday during the academic year. Both cut off payment of the education allowance at the end of the academic year in which the 24th birthday is reached." (para. 48.). As the provisions were the same in substance, ". . . . Mr. Ding's Application is tantamount to a challenge to a rule of the Fund that pre-dates the entry into force of the Tribunal's Statute." (*Id.*) Hence, by reason of the terms of article XX, paragraph 1, of the Tribunal's Statute, the Tribunal concluded that it was without jurisdiction to pass upon the merits of the Application.

Accordingly, the Application of Mr. Ding was denied.

Nonetheless, the Tribunal concluded its Judgment with the following observation:

"49. . . . the Tribunal is constrained to observe that the effect of the wording of the provisions in question is not clear on their face insofar as they bear on the number of years that a child of a staff member is entitled to the Education Allowance. They do not expressly state that children born outside the academic year will be entitled to the benefit of 19 years of the education allowance while those born within will be entitled to 20. Rather, staff are left to draw this implausible conclusion by their own calculation. As the Fund's pleadings confirm, these provisions result, or can result, in a child of a long-serving staff member receiving either 19 or 20 years of education allowance benefits, depending on whether the child is born during or outside of the academic year. The resultant inequality—whether intended or not—invites the reconsideration of the Fund."