Extract from:

UNITED NATIONS JURIDICAL YEARBOOK

2011

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

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

Page

Chapter V

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

A. United Nations Dispute Tribunal

By resolution 66/237 of 24 December 2011, entitled "Administration of justice at the United Nations", the General Assembly took note of the report of the Advisory Committee on Administrative and Budgetary Questions, decided to extend the mandate for the three ad litem judges of the Dispute Tribunal for one year, subject to review and possible extension for a further year.

In 2011, the United Nations Dispute Tribunal in New York, Geneva and Nairobi issued a total of 219 judgments. Summaries of 13 selected judgments are reproduced below.

1. Judgment No. UNDT/2011/005 (10 January 2011): Comerford-Verzuu v. Secretary-General of the United Nations[2]

Admissibility *ratione materiae* and *ratione temporis*—Tribunal has a duty to raise on its own motion issues relating to jurisdiction and admissibility—Decision of the Office of Internal Oversight Services refusing to carry out an investigation is an administrative decision appealable to the Tribunal—Right of Staff member to access to justice—Confirmative decision—Renewed request does not constitute a new administrative decision for the purposes of calculating time limits

On 30 November 2007, the Applicant filed an appeal with the former United Nations Administrative Tribunal against the decision of the Office of Internal Oversight Services ("OIOS") not to open an investigation following her complaint against the Administra-

[1] In view of the large number of judgments which were rendered in 2011 by the administrative tribunals of the United Nations and related intergovernmental organizations, only those judgments 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 judgments rendered by the tribunals, namely, Judgments Nos. UNDT/2011/001 to UNDT/2011/219 of the United Nations Dispute Tribunal, Judgments Nos. 2011-UNAT-101 to 2011-UNAT-188 of the United Nations Appeals Tribunal, Judgments Nos. 2954 to 3050 of the Administrative Tribunal of the International Labour Organization, Decisions Nos. 447 to 460 of the World Bank Administrative Tribunal, and Judgment Nos. 2011–1 to 2011–2 of the International Monetary Fund Administrative Tribunal, see, respectively, documents UNDT/2011/001 to UNDT/2011/219; 2011-UNAT-101 to 2011-UNAT-188; *Judgments of the Administrative Tribunal of the International Labour Organization: 110th and 111th Sessions; World Bank Administrative Tribunal Reports, 2011; and International Monetary Fund Administrative Tribunal Reports, Judgment No. 2011–1 to 2011–2.*

[2] Judge Jean-François Cousin (Geneva).

tor of the United Nations Development Programme ("UNDP") and the Director, Office of Legal and Procurement Support, UNDP, in relation to the death of her husband in the Democratic Republic of the Congo, while on mission as a UNDP staff member. On 11 July 2007, the Joint Appeals Board ("JAB") had issued a report in which, while declaring the appeal admissible *ratione temporis* and *ratione materiae*, it made no recommendation in favour of the Applicant. As the case could not be decided by the Administrative Tribunal before its abolition on 31 December 2009, it was transferred to the Dispute Tribunal on 1 January 2010.

In its Judgment, the Dispute Tribunal clarified that it was not bound by the conclusions of the JAB with regard to the admissibility of the application, and that it was on the contrary bound in all cases, including those where the issue is not raised by the parties, to verify whether its Statute, or the Statute of the former Administrative Tribunal, grants it jurisdiction to rule on the lawfulness of an administrative decision.

On the question whether the decision contested was an appealable administrative decision, the Tribunal considered that, while the General Assembly intended to confer "operational independence" to OIOS, it must, in stating that the Office acts under the authority of the Secretary-General, have intended to acknowledge that the Secretary-General was administratively responsible for any breaches or illegalities OIOS might commit. The Tribunal therefore found itself confronted with two principles which were difficult to reconcile: on the one hand, the "operational independence" of OIOS and, on the other, the binding nature of the request to the Secretary-General for review of management evaluation of the decision taken by OIOS in the exercise of its investigative functions. The Tribunal declared that, when faced with apparently contradictory instruments of equal value, it must necessarily give precedence to the staff member's right of access to justice. It concluded therefore that the fact that the Secretary-General may not modify the OIOS decision cannot operate to prevent the staff member from contesting it before the Tribunal, and that the decision of OIOS refusing to carry out the investigation requested by the Applicant was an administrative decision appealable to the Tribunal.

With regard to the admissibility *ratione temporis* of the application, the Tribunal noted that where the Administration fails to raise the lateness of a staff member's request for review of the decision, the Tribunal must do so on its own motion, because neither it nor the Administration has any right to waive an instrument setting time limits for appeals, unless in exceptional circumstances or in cases where the staff member has, before the expiration of the time limit, expressly requested an extension. Referring to its own case law (*Ryan* UNDT/2010/174 and *Bernadel* UNDT/2010/210), as well as that of the Appeals Tribunal (*Sethia* 2010-UNAT-079), according to which confirmative decisions subsequent to the contested administrative decision cannot be appealed, the Tribunal observed that the Applicant did not raise any new circumstances of fact or law dating from after the original administrative decision that might have obliged OIOS to take a new decision. Therefore, the Tribunal found that, by submitting her request for review to the Secretary-General more than six months after receiving notification of the contested decision, the Applicant was out of time and, therefore, it rejected the application as having been filed too late.

2. *Judgment No. UNDT/2011/012 (13 January 2011): Tolstopiatov v. Secretary-General of the United Nations*[3]

Compensation—Determination of compensable period—Heads of compensation—Loss of income—Medical and dental insurance—Entitlements such as repatriation grants, travel costs—Pension benefits—Offset—Duty to mitigate loss

In its Judgment UNDT/2010/147, the Dispute Tribunal held that the United Nations Children's Fund (UNICEF) had breached its obligations to the Applicant under his terms of employment. Since the Applicant was a UNICEF staff member on an abolished post, it was found that during his noticed period (from the time he was notified of his separation until it was implemented) UNICEF did not follow its own mandatory procedures for granting preferential treatment when the Applicant applied for some positions, and UNICEF did not comply with its obligation to offer meaningful recruitment assistance to the Applicant.

The issue to be determined by the Tribunal in the present Judgment was the compensation owing to the Applicant for the breach by UNICEF of its obligations under his terms of employment. The Tribunal preliminarily recalled that the very purpose of compensation is to place the staff member in the same position he or she would have been in, had the Organization complied with its contractual obligations. The Tribunal first examined the likelihood that the Applicant would have been offered a hypothetical new contract with UNICEF, and thereafter, where relevant, the characteristics of this new contract and any applicable offsets in the award of damages.

In the Tribunal's view, it was reasonable to assume that the Applicant would have been offered a new contract, had UNICEF properly complied with its own rules. The Tribunal found that, if UNICEF had fulfilled its obligations, this new contract would have been a two-year fixed-term appointment with a possibility of renewal. The Tribunal, however, considered that it could not be assumed that this contract would automatically have been renewed indefinitely and therefore limited the compensable period of time for lost compensation to a two-year term.

The Tribunal found that the Applicant was entitled to compensation for income loss under the hypothetical new contract, which included health and dental insurance subsidies. It further found that the Applicant was entitled to compensation for repatriation grant, travel, shipment, accrued annual leave and termination indemnity, in accordance with his rights under the hypothetical new contract.

In assessing the loss of earning capacity, the Tribunal recalled the principle in the case of *Anaki* 2010-UNAT-095, in which the Appeals Tribunal found that "compensation may only be awarded if it has been established that the staff member actually suffered damages". The Tribunal found that there was no basis for awarding compensation on the grounds that the Applicant had failed to substantiate the allegations on which he supported his claim, for instance, how the early retirement influenced his employment marketability, what job opportunities he had lost as a result and how the so-called proportional calculation was warranted. The Tribunal also rejected the claims for compensation for loss of pension and for non-economic compensation.

[3] Judge Marilyn J. Kaman (New York).

The Tribunal then determined that it was necessary to deduct, as an offset from compensation owing to the Applicant, any amounts received by him following his actual separation from UNICEF. The Tribunal observed that the Applicant had received overpayments made to him during the period of Special Leave Without Pay, and that he had made no attempts to notify UNICEF to rectify the situation. The Tribunal held that whether phrased in terms of equitable estoppel, the doctrine of clean hands or the principles of good faith and equity, the Applicant remained liable to UNICEF for the overpayments made to him.

The Tribunal finally identified a basic principle of law, according to which a party is obliged to mitigate his or her losses. This means that the aggrieved party must act reasonably following a breach and may recover only for those damages that arose naturally from the breach or could have been contemplated by the parties. In the employment context of the United Nations, the natural demand is for the staff member to demonstrate that s/he had sought other employment to limit her/his income loss. For the Applicant, mitigation considerations would include, *inter alia*, the professional qualifications of the Applicant, his attempts to find other employment following abolishment of his post, reasons for not seeking work, his age, and other efforts identified by him as amounting to mitigation. The Tribunal found that the Applicant failed to mitigate his loss by not adequately seeking other employment, and as such, reduced the compensation owing for loss of income by 25 per cent.

Taking into consideration all the aforementioned factors, the Tribunal ordered the Respondent to pay the Applicant USD 97,324.04 as compensation.

3. *Judgment No. UNDT/2011/032 (10 February 2011): Obdeijn v. Secretary-General of the United Nations*[4]

Notification of non-renewal of a fixed-term contract is an administrative decision—Obligation to disclose reasons for the non-renewal—Adverse inference from the Administration's refusal to disclose the reasons of the contested decision—An administrative decision taken without reason is arbitrary, capricious and unlawful—Staff member has right to have administrative decision properly reviewed

The Applicant contested the decision not to extend his fixed-term contract with the United Nations Population Fund ("UNFPA") beyond its expiration date of 2 April 2009. He alleged, *inter alia*, that the decision was improper because it was motivated by extraneous factors. On numerous occasions during the period of October 2008 to February 2009, the Applicant sought clarification as to the reasons for the initial six-month renewal of his contract and non-renewal thereafter. The Respondent refused to disclose the reasons for the contested decision to the Applicant or to the Tribunal, asserting that, in accordance with the UNFPA Policies and Procedures Manual, it was not required to provide reasons for a decision not to renew an appointment.

The Tribunal first determined that the decision not to renew a staff member's contract was an administrative decision within article 2.1 of the Statute as it necessarily affects the staff member's terms of appointment, namely, the duration of his or her contract. As the

[4] Judge Ebrahim-Carstens (New York).

Statute did not distinguish a decision not to renew and any other administrative decision, such a decision would not differ, in any significant respect, in its legal character from any other administrative decision made under the contract of employment and would be subject to the usual standards of review. Accordingly, it may be challenged in the same way as any other administrative decision. Furthermore, the Tribunal found that, the scope of the contested decision would not be the decision to set a certain expiration date, made at the time of the entry into contract, but the later decision not to extend his appointment beyond its original expiration date.

Turning to the question of the propriety of the contested administrative decision, the Tribunal emphasised that the employment relationship of international civil servants is governed by the internal law prevailing within the organization. In the adjudication of employment disputes that come before them, however, international administrative tribunals may rely on, among other sources, general principles of law—including international human rights law, international administrative law and labour law—which may be derived from, *inter alia*, international treaties and international case law. The Tribunal stated that any administrative decision entails a reasoned determination arrived at after consideration of relevant facts since there is a duty and requirement on institutions to act fairly, transparently and justly in their dealings with staff members. Like any other administrative decision, a decision not to renew a staff member's contract must be reasoned, as a decision taken without reasons would be arbitrary, capricious, and therefore unlawful. The Tribunal found that the UNFPA Manual could not have the effect of absolving the Respondent from the obligation to disclose the reasons for the contested decision, thus rendering the decision not reviewable and ousting the jurisdiction of the Tribunal. Whilst the Tribunal recognized the Organization's discretionary authority not to renew a fixed-term contract, the exercise of that authority is not immune to review by the Tribunal. In view of the Respondent's refusal to disclose the actual reasons for the contested decision and rebut the staff member's allegations of impropriety, the Tribunal was left with no choice but to draw an adverse inference and conclude that the contested decision was arbitrary, capricious, and therefore unlawful.

Although the findings above were sufficient to render the contested decision unlawful, the Tribunal made some additional observations concerning the non-disclosure of the reasons for the decision to the Applicant. It noted that reasons must generally be disclosed at the time of the notification of the decision, and they also most certainly must be disclosed when requested by the staff member, as well as at the management evaluation stage. The Tribunal pointed out that the right to have an administrative decision properly reviewed is part of a staff member's contract of employment. To merely state in response to a staff member's inquiries—as the Administration did in this case—that the contract will not be renewed because there is no obligation to renew it subjects the administrative decision to circular reasoning and frustrates the staff member's right of an appeal against administrative decisions under article 2.1 of the Statute. This is a fundamental right of every staff member and it must be allowed to be exercised meaningfully. The Tribunal therefore found that the Administration breached its obligation to disclose the reasons for the contested decision to the Applicant, particularly in response to his requests.

The Tribunal therefore ordered compensation in the amount equivalent to six months' net base salary and entitlements, VI step, with retroactive interest, for actual economic loss suffered. Being satisfied that any reasonable person would suffer emotional distress as a

result of the sustained lack of response and uncertainty created in these particular circumstances, the Tribunal further awarded USD 8,000 as compensation for emotional distress.

4. *Judgment No. UNDT/2011/050 (10 March 2011): Ostensson v. Secretary-General of the United Nations*[5]

Receivability *ratione materiae*—Scope of ST/SGB/2208/5—Staff members have the right to submit a harassment complaint and have it properly reviewed—Standard for initiating an investigation under ST/SGB/2208/5—Duty to act expeditiously—Compensation for moral damage—Principle of proportionality

The Applicant had been working for the United Nations Conference on Trade and Development ("UNCTAD") in various capacities when he applied for the position of Head of Commodities Branch, but without success. On 7 July 2008, the Applicant filed a formal complaint pursuant to the Secretary-General's bulletin ST/SGB/2008/5 (Prohibition of discrimination, harassment, including sexual harassment, and abuse of authority), alleging a series of incidents which he claimed amounted to harassment on the part of his direct supervisor, the newly appointed Head of the Commodities Branch. The Administration decided not to investigate his allegations on the grounds that the matter did not amount to harassment but rather fell into the category of disagreements on work performance or on other work-related issues. The Applicant was so informed on 15 October 2008. On 16 January 2009, the Applicant filed a claim with the Joint Appeals Board, challenging the decision not to take action of the harassment complaint that he had submitted on 7 July 2008. The case was subsequently transferred to the United Nations Dispute Tribunal, upon the abolishment of the Joint Appeals Boards.

The Tribunal determined from the outset that it had jurisdiction to examine the Administration's actions and omissions following a request for investigation submitted pursuant to ST/SGB/2008/5.

The Tribunal then considered the scope of ST/SGB/2008/5 and found that a literal interpretation of section 1.2 left no room for excluding systematically "[d]isagreement on work performance or on other work-related issues". Furthermore, the Tribunal stated that the right to submit a harassment complaint and to have it promptly reviewed is a key element of the policy set out in ST/SGB/2008/5 and a fundamental procedural safeguard for staff members. The Tribunal noted that the impact of the policy would be defeated if the duty to conduct a formal fact-finding investigation were reduced to cases where prohibited conduct had already been proven; rather, a fact-finding investigation ought to be initiated if the overall circumstances of the particular case offer at least a reasonable chance that the alleged facts may amount to prohibited conduct within the meaning of ST/SGB/2008/5. Even if some of the reported incidents, considered individually, may not necessarily amount to harassment, the allegations taken together regarding events that happened within a short time-span may warrant an investigation. Accordingly, the Tribunal found that the Administration erred in finding that the Applicant's complaint did not provide sufficient grounds to warrant a formal fact-finding investigation.

On the issue of compensation, the Tribunal, referring to the case-law of the Appeals Tribunal, found that, while the Applicant did not suffer any material damage, he had

[5] Judge Thomas Laker (Geneva).

endured unnecessary psychological distress due to the Administration's failure to discharge its duty to act expeditiously. The Tribunal then recalled that the principle of proportionality is the first and foremost guiding principle for the calculation of compensation and requires that all the circumstances of the case be taken into account, including the nature of the irregularity (*Solanki* UNAT-2010–044), the number and intensity of breaches, the impact thereof on the applicant (*Wu* UNDT-2009–084), and the values and principles at stake (*Applicant* UNDT/2010/148). In this view, the Tribunal found that the Applicant must be compensated in the amount of USD 10,000 for the moral injury suffered as a result of the decision not to investigate his harassment complaint.

5. *Judgment No. UNDT/2011/098 (10 June 2011): Mezoui v. Secretary-General of the United Nations*[6]

Procedural irregularities in a selection process—Tribunal's standard of review limited to verifying the regularity of the procedure followed and determining factual mistake or manifest error of assessment—Determination of compensation guided by nature of irregularity and chance of success—Calculation of material damage—Moral damages—Non award of compensation where previous compensation exceeds amount set by the tribunal—Abuse of proceedings

In July 2009, the Applicant filed an application with the United Nations Dispute Tribunal contesting the decision not to promote her to the position of Director (D-2) in the Office for Economic and Social Council Support and Coordination ("OESC") of the Department of Economic and Social Affairs ("DESA").

The Applicant claimed that a number of substantial procedural irregularities had tainted the selection process, namely that the Senior Review Group had failed to preapprove the evaluation criteria as required by the provisions of Administrative Instruction ST/AI/2002/4; that a number of irregularities had been committed during her interview, held on 7 March 2006; that her evaluation card had been falsified; and that she had been the victim of discrimination.

On the recommendation of the Joint Appeals Board, the Secretary-General had previously awarded the Applicant the amount of USD 23,400 (three months' net base salary) in compensation for an error in the consideration of her academic qualifications during the selection process.

The Tribunal stated that, given the discretionary character of selection decisions, its control of legality over those decisions is limited to assessing the regularity of the procedure followed and verifying that no factual mistake or manifest error in the assessment were committed.

The Tribunal found that, in addition to the error concerning the Applicant's academic qualifications, the selection process for the post had been tainted by numerous irregularities, which the Tribunal found to be substantial since they concerned the establishment of the evaluation criteria and the Senior Review Group's control over the respect of those criteria. The Tribunal found, in particular, that the Senior Review Group had failed to preapprove the evaluation criteria and had met without having developed and published its own procedures, as required by Secretary-General bulletin ST/SGB/2005/4. In addition,

[6] Judge Jean François Cousin (Genève).

the Tribunal observed that the Under-Secretary-General for Economic and Social Affairs had not complied with the provisions of Administrative Instruction ST/AI/1999/9, which required that he explain the reasons for choosing a male candidate over a female candidate for the post. In the present case, the panel had recommended a male candidate after it had interviewed four internal candidates (of whom the Applicant was the only female) and four external candidates (two males and two females). The Tribunal also held that the participation of the Assistant Secretary-General for Policy Coordination and Inter-Agency Affairs in both the selection panel and the Senior Review Group constituted an irregularity, since it gave rise to a conflict of interest. On the other hand, the Tribunal did not find any irregularity in the conduct of the Applicant's interview by the panel. It further indicated that, taking into account the limited character of its control, it could not substitute itself to the panel's evaluation of the competencies of the Applicant at the interview.

The Tribunal therefore declared the unlawfulness of the selection process as a whole, and proceeded to determine the compensation to be awarded to the Applicant. In this regard, the Tribunal recalled the judgments of the United Nations Appeals Tribunal in the *Solanki* and *Ardisson* cases, in which the Appeals Tribunal has indicated that the determination the amount of compensation due to the Applicant should be guided by two considerations: the nature of the irregularity that led to the annulment of the contested administrative decision; and the realistic chance that the Applicant would have been promoted had the correct procedure been followed.

The Tribunal calculated the material damage suffered by the Applicant as corresponding to the difference between her net take-home pay at the D-1 level and that which she would have received at the D-2 level between the earliest date on which her promotion could have been implemented and the date when she retired. The Tribunal set this amount at USD 17,000, including interest, to which it added a lump sum of USD 5,000 for loss of pension benefits (for a total of USD 22,000). Given the characteristics of the case and the number of candidates that were interviewed, the Tribunal held that the Applicant's chances of being promoted were one out of four. Accordingly, it fixed the appropriate compensation at USD 5,500 (i.e. one fourth of USD 22,000). The Tribunal further awarded USD 2,000 in moral damages for the unrest created by the procedural irregularities.

The Tribunal ultimately decided not to order any award of compensation on the grounds that the compensation already awarded by the Secretary-General on the recommendation of the Joint Appeals Board exceeded the amount set by the Tribunal.

The Tribunal further considered that, in the course of the proceedings, the Applicant had engaged in various misleading manoeuvres and had disregarded several orders issued by the Tribunal. The Tribunal, accordingly, awarded costs against the Applicant (USD 2,000) for abusing the proceedings before it.

The Tribunal decided not to apply article 10, paragraph 8, of its Statute, considering that the number and seriousness of the irregularities resulted more from collective negligence in the implementation of the applicable rules than from individual misconduct.

6. *Judgment No. UNDT/2011/115 (27 June 2011): Ibrahim v. Secretary-General of the United Nations*[7]

Disciplinary proceedings—Scope of application of ST/AI/371—Standard to initiate a preliminary investigation—"Unsatisfactory conduct" and "Reason to believe" that a misconduct occurred—Due process and right to legal assistance in the course of preliminary investigation—Due process rights during disciplinary proceedings–Burden of proof in allegations of bias or improper motivation—Criteria for the suspension of a staff member during disciplinary proceedings—Responsibility of the Respondent for delays in disciplinary proceedings—Removal of a working dog from staff member

The Applicant worked as a Security Officer and dog handler with the Department of Security and Safety (DSS) Canine Unit. On or about 3 July 2007, some of the Applicant's colleagues made a report to the DSS Internal Affairs Unit (IAU) that the Applicant had conducted himself in an improper manner in connection with his service as a member and leader of the Canine Unit, including that he had physically abused the working dog, "Buddy", that had been assigned to him. The IAU initiated a preliminary investigation, after which Buddy was taken away from the Applicant. The Applicant was also transferred to another unit and was suspended with full pay, and disciplinary charges were brought against him. The Applicant was eventually cleared of all allegations, but Buddy was not returned to him and he was not transferred back to the DSS Canine Unit.

The Tribunal first determined that the administrative instruction ST/AI/371 (Revised disciplinary measures and procedures) was applicable to a disciplinary case such as the present one. Under the provisions of its Statute, it could not set aside the application of an administrative issuance in force, unless it found that its provisions were in breach of an instrument that had a higher authority in the legal hierarchy of the United Nations normative framework. The Tribunal recognised that the provisions of ST/AI/371 was ambiguous and that clearer legislative guidance would be helpful in this regard, but for the purposes of the present case, it did not detect any inconsistencies between ST/AI/371 and General Assembly resolution 48/218B. On the contrary, the Tribunal found that it could not consider the United Nations Development Programme guidelines since the Applicant had no work relationship with the Programme.

The Tribunal then noted that the standard to initiate a preliminary investigation under section 2 of ST/AI/371 involved a two-step process: (a) the alleged behaviour must amount to possible "unsatisfactory conduct", i.e., misconduct under former staff rule 110.1; and (b) there must be "reason to believe" that the staff member in question behaved in such a way. In light of the staff rules and regulations and the Canine Manual, the Tribunal found that the Applicant's alleged abuse of Buddy would have constituted possible misconduct. Moreover, the Tribunal found that, given the grave nature of the allegations of dog abuse against the Applicant, it was proper for the Organization to initiate a preliminary investigation under section 2 of ST/AI/371.

The Tribunal then turned to the question whether the preliminary investigation against the Applicant was properly conducted. It found that the Applicant was not denied the right to legal assistance and had been properly informed of his right to such assistance,

[7] Judge Marilyn J. Kaman (New York).

and concluded that the Administration did not commit any due process violations in this regard. The Tribunal further noted that the Organization has an obligation to make decisions that are proper and in good faith and the discretion of the Secretary-General is not unfettered. In this regard, it reasoned that it was proper, during the preliminary investigation, to remove Buddy from the Applicant, observing that since working dogs are in the custody of the United Nations, the Organization, as their custodian, has the full right to make decisions regarding them, and to transfer the Applicant to another unit.

Furthermore, the Tribunal found that the disciplinary proceedings against the Applicant were conducted according to appropriate due process standards set forth in ST/AI/371, and that the decision to suspend the Applicant from duty with full pay pending disciplinary proceedings under former staff rule 110.2 and ST/AI/371, section 4, was proper, given the grave nature of the misconduct charge for abuse of a working dog in the Canine Unit.

With regard to the issue whether the disciplinary proceedings were improperly delayed, the Tribunal reaffirmed its previous jurisprudence according to which the Respondent is responsible for any delays and/or flaws in these proceedings. It found, however, that the disciplinary proceedings were not unduly delayed in the present case, and that it was proper to maintain the suspension of the Applicant while the disciplinary case against him was pending.

Finally, the Tribunal held that it was proper not to return the Applicant to his former job with the Canine Unit after the disciplinary case against him had been dismissed, since the Applicant did not show that there existed any adversative attitude towards him. The Tribunal also considered that it was proper not to return Buddy to the Applicant after the disciplinary case against him had been dismissed, since, once a staff member transfers to a position outside from the Canine Unit, he/she does not have any entitlement to keep the dog.

Having rejected all the contentions made by the Applicant, the Tribunal decided that the latter was not entitled to any compensation as he was not able to demonstrate any sort of "pecuniary damage, procedural violations, stress and moral injury" in connection with his being charged and suspended for possible misconduct. Accordingly, the Tribunal dismissed the application in its entirety.

7. Judgment No. UNDT/2011/126 (12 July 2011): Villamoran v. Secretary-General of the United Nations[8] [9]

Suspension of action of administrative decisions—Article 2.2 of the Statute of the United Nations Dispute Tribunal—Urgency—*Prima facie* unlawfulness—Irreparable damage—Break in service—Administrative issuances regulate matters of general application and directly concern the rights and obligations of staff and the Organization—Hierarchy of the Organization's internal legislation—General Requirements for administrative issuances—All rules, policies or procedures intended for general application may only be established through the Secretary-General's bulletins and administrative instructions—Legislation by means other than properly promulgated administrative issuances—

[8] Judge Ebrahim-Carstens (New York).

[9] See too *Villamoran v. Secretary-General of the United* Nation, Judgment No. 2011-UNAT-160 (3 October 2011).

Right to request for an exception to the Staff Rules is a contractual right and it cannot be unilaterally taken away

The Applicant, who held a fixed term appointment with the Department of Field Support (DFS), filed, on 5 July 2011, an application with the Tribunal seeking suspension of action with regard to two administrative decisions: (i) the decision to place her on a temporary appointment after the expiration of her fixed-term contract, which was due to expire on 7 July 2011; and (ii) the decision to require her to take a break in service of 31 days prior to her placement on temporary appointment.

On 7 July 2011, in view of the fact that this was the last working day before the Applicant's separation, the Tribunal issued Order No. 171 (NY/2011) ordering the suspension of the implementation of the contested decision pending the final determination of the present application for suspension of action, until 12 July 2011.

In its Judgment, the Tribunal considered the three requirements for a suspension of action under article 2, paragraph 2, of its Statute, namely: (i) whether the contested administrative decisions appeared *prima facie* to be unlawful; (ii) whether the application was of particular urgency, and (iii) whether the implementation of the decisions would cause the Applicant irreparable damage.

With regard to the particular urgency, the Tribunal recalled its jurisprudence according to which this requirement is not satisfied if the urgency was caused by the applicant. The Tribunal found that, with respect to the part of the application concerning the decision to place the Applicant on temporary appointment, which had been made as early as 25 May 2011, the urgency was self-created and that Applicant therefore failed to satisfy the overall test for a suspension of action with respect to that decision. On the contrary, with respect to the decision to require the Applicant to take a break in service prior to her temporary appointment, which was notified to her only on 23 June 2011, the Tribunal found that the Applicant did satisfy the requirement of urgency.

With regard to the requirement of *prima facie* unlawfulness, the Tribunal recalled that it is enough for an applicant to present a fairly arguable case that the contested decision was influenced by some improper considerations, was procedurally or substantively defective, or was contrary to the Administration's obligations to ensure that its decisions are proper and made in good faith.

The Tribunal noted that at the top of the hierarchy of the Organization's internal legislation is the Charter of the United Nations, followed by resolutions of the General Assembly, staff regulations, staff rules, Secretary-General's bulletins, and administrative instructions. Information circulars, office guidelines, manuals, and memoranda are at the very bottom of this hierarchy and lack the legal authority vested in properly promulgated administrative issuances. The Tribunal held that the Respondent had failed to refer to any relevant provision in a General Assembly resolution, staff regulations, staff rules, or other properly promulgated administrative issuances indicating that, in law, there is a requirement for staff members on fixed-term contracts who are being placed on temporary appointments to take a break in service. Accordingly, this requirement could not be introduced, as it was, in a memorandum from the Assistant Secretary-General, Office of Human Resources Management, to all executive officers, particularly considering that it would have the effect of unilaterally varying the terms of employment of affected staff. In this regard, the Tribunal noted that the said memorandum had not been circulated

publicly and was not available to staff members at large. Further, the Tribunal found that there were significant doubts with respect to whether the Assistant Secretary-General, Office of Human Resources Management, has delegated authority to impose such a break in service. The Tribunal found that the memorandum of the Assistant Secretary-General purported, in effect, to amend the existing administrative issuances by adding some new additional requirements concerning breaks in service preceding temporary appointments. It therefore concluded that there is no requirement, in law, to take a break in service prior to the temporary appointment and found that the contested decision appeared *prima facie* to be unlawful.

Turning to the question of irreparable damage, the Tribunal reaffirmed its jurisprudence that mere financial loss is not enough to satisfy the requirement of irreparable damage, and that, if the only way for the Tribunal to ensure that certain rights are truly respected is to grant interim relief, then the requirement of irreparable damage will be satisfied. The Tribunal found that the decision would have significant negative implications on the Applicant, including with regard to medical insurance; visa situation; pension participation, relocation to her home country, obstacles for re-employment on a temporary basis, and personal status. The Tribunal also found that the contemporaneous emotional effect of the implementation of the *prima facie* unlawful decision on the Applicant would be of such a nature as to justify a finding of irreparable damage. The Tribunal therefore concluded that this third requirement for a suspension of action was present.

In its final observations, the Tribunal indicated that there appear to be some significant issues directly affecting staff members' contractual rights that were presently decided in a non-transparent and unilateral matter. The Tribunal considered that if the matters being dealt with in this matter affect material contractual provisions, this practice contradicts not only the provisions of ST/SGB/2009/4, but also the requirements of good faith and fair dealing, and is detrimental to the basic rights of staff members. Decisions of general application that affect contractual rights must therefore be issued through properly promulgated administrative issuances.

The Tribunal also commented on the assertion, made by the Assistant Secretary-General, Office of Human Resources Management, that no exceptions to the decisions introduced by her memoranda may be granted. The Tribunal noted that the right to request and to be properly considered for an exception is a contractual right of every staff member and it cannot be unilaterally taken away, despite the language in those memoranda. It follows that any request for an exception to the Staff Rules must be properly considered, and that failure to do so would result in a violation of the contractual rights of the staff member requesting the exception.

The Tribunal ordered suspension, during the pendency of management evaluation, of the implementation of the decision requiring the Applicant to take a mandatory break in service after the expiration of her fixed-term contract and prior to a temporary appointment.

8. *Judgment No. UNDT/2011/138 (2 August 2011): Bagula v. Secretary-General of the United Nations*[10]

Summary dismissal—Manifest abuse of proceedings by the Applicant—Article 10, paragraph 6, of the Statute of the Dispute Tribunal—Dangers inherent in conducting judicial proceedings via teleconference—Attempts to mislead the Tribunal—Aggravated contempt of court by the Applicant—Costs awarded against the Applicant—Private legal obligations of staff members—Criminal accountability of United Nations Officials and experts on mission.

The Applicant was employed with the United Nations Mission in the Democratic Republic of Congo (MONUC) (as it then was) with a 300-series appointment as a warehouse worker in Bukavu. In 2006, the Special Investigations Unit (SIU) conducted an investigation into allegations that several staff members in the Engineering Section, MONUC, Bukavu, including the Applicant, had forced several Casual Daily Workers to pay money to secure and then retain their jobs in MONUC. SIU also conducted another investigation focusing specifically on the allegations against the Applicant. A disciplinary process ensued, following which, in the light of the Joint Disciplinary Committee's findings, conclusions and recommendations, as well as the entire record and the totality of the circumstances, the Secretary-General decided that the Applicant would be separated from service without notice or compensation in lieu thereof.

On 13 May 2009, the Applicant challenged the Secretary-General's decision before the former United Nations Administrative Tribunal. His application was transferred to the United Nations Dispute Tribunal, on 1 January 2010.

Having observed the demeanour of the witnesses who appeared before the Tribunal, examined and analyzed their evidence in support of the charge against the Applicant, the Tribunal found the evidence credible, truthful and properly acted upon. The testimonies relied upon by the Respondent when imposing the disciplinary sanction against the Applicant were substantiated, corroborated and truthful. The evidence relied upon by the Respondent in this case sufficiently supported the charge against the Applicant of improperly soliciting and receiving monies from local citizens in exchange for their initial recruitment and service as United Nations staff and was not recanted as alleged by the Applicant.

The Tribunal also established that the Applicant had attempted to mislead the Tribunal. It ascertained that, when the Tribunal had received testimony via teleconference, the Applicant had provided contact details of false witnesses, who had informed the Tribunal that they had lied to investigators, and that he had later tried to bring impostors to appear before the Tribunal at a hearing in Kinshasa. The Tribunal found that the Applicant's actions were criminal in the extreme and amounted to a blatant abuse of the Tribunal's process and aggravated contempt of court *in facie curiae*. It further observed that the present case amply illustrated some of the dangers inherent in conducting judicial proceedings via teleconference.

Pursuant to article 10, paragraph 6, of its Statute, the Tribunal found that the Applicant had manifestly abused the proceedings before it, and it recommended that the Administration should withhold all final entitlements, if any, still due to the Applicant. The Tribunal further recommended that all monies due to the individual witnesses for

[10] Judge Nkemdilim Izuako (Nairobi).

any work they undertook for MONUC and for which they were not remunerated should be recoverable from any entitlements that are due to the Applicant; in the event that these entitlements are not sufficient to cover these sums, the witnesses should be advised to pursue their claims in accordance with the laws of the Democratic Republic of the Congo. Alternatively, the Tribunal encouraged the United Nations Organization Stabilization Mission in the Democratic Republic of Congo Administration to exercise its discretion to determine how best to bring closure to the suffering of the witnesses in accordance with the applicable Staff Regulations and Staff Rules. The Tribunal rejected the Application in its entirety and awarded costs against the Applicant in the terms described.

The Tribunal strongly urged United Nations Member States to take all appropriate measures to ensure that crimes by United Nations officials and experts on mission do not go unpunished and that the perpetrators of such crimes are brought to justice, without prejudice to the privileges and immunities of such persons and the United Nations under international law, and in accordance with international human rights standards, including due process.

9. *Judgment No. UNDT/2011/162 (16 September 2011): Mushema v. Secretary-General of the United Nations*[11]

Separation from service for misconduct—Role of the Tribunal in the review of disciplnary cases—Facts constituting misconduct—Gross negligence—Foreseeable risk—Proportionate sanction—Due process rights during preliminary investigation and disciplinary process—Time Limit to respond to allegations—Substantive or procedural irregularity in disciplinary proceedings—Opportunity for cross examination of witnesses—Reinstatement of the Applicant—Compensation for loss of earnings—Compensation for procedural irregularities during investigation and disciplinary process

The Applicant, was a Senior Logistics Assistant at the World Food Programme (WFP), and responsible for supervising two warehouses in Dodoma, Tanzania (the main WFP warehouse and the Strategic Grain Reserve (SGR) warehouse). In September 2007, 13.033 metric tons of WFP vegetable oil went missing from the SGR warehouse. After the conduct of two investigations, the Applicant was charged with misconduct for gross negligence in the performance of his duties and responsibilities. Subsequent to the findings and recommendation of an *ad hoc* Disciplinary Committee, the Applicant was separated from service.

On 29 December 2008, the Applicant appealed the above-mentioned decision to the former United Nations Administrative Tribunal. On 1 January 2010, the case was transferred to the United Nations Dispute Tribunal.

In its Judgment, the Tribunal noted that, in reviewing disciplinary cases, its role is to examine: (i) whether the facts on which the disciplinary measure was based have been established; (ii) whether the established facts legally amount to misconduct; (iii) the proportionality of the disciplinary measure applied to the offence; and (iv) whether there was a substantive or procedural irregularity. Further, the Tribunal noted that, in reviewing dis-

[11] Judge Vinod Boolell (Nairobi).

ciplinary cases, it must scrutinize the facts of the investigation, the nature of the charges, the response of the staff member, oral testimony if available and draw its own conclusions.

After examination, the Tribunal concluded that the majority of the facts upon which the disciplinary measure was based were not established. The Tribunal found, however, that the fact that was established, based on the Applicant's own admissions, related solely to the Applicant not identifying even one of the of the 704 semi-empty/empty oil cartons in the warehouse during their regular physical inventory. The Tribunal's consideration of the allegation that the Applicant was grossly negligent in the performance of his duties and responsibilities was thus limited to the latter fact. After examination of the relevant rules and regulations, the Tribunal concluded that the established facts did not legally amount to misconduct within the meaning of staff rule 110.3. Pursuant to the United Nations Development Programme (UNDP) policies/procedures, gross negligence involves an extreme and reckless failure to act as a reasonable person would with respect to a reasonably foreseeable risk, regardless of whether intent was involved or not in the commission of the act or that the staff member benefits from it. The Tribunal considered the duties and responsibilities required to be performed by the Applicant by his terms of reference and the relevant WPF manuals and found that a reasonable person in the Applicant's position would not have been able to identify the semi-empty/empty cartons in the performance of his routine daily duties. The Tribunal further found no merit in the contention that the Applicant was grossly negligent because he failed to appreciate that the risk of theft was reasonably foreseeable and to adequately assess it.

Based on the circumstances of this case, the Tribunal found that the penalty of separation from service was disproportionate and unwarranted.

With regard to the regularity of the procedure, the Tribunal noted that there are two distinct investigatory procedures set out in ST/AI/371, which are similarly provided for in the applicable UNDP administrative issuance. The first procedure relates to an investigation where no specific allegation of misconduct is reported or individual staff members are identified. The Tribunal observed that—despite that fact that it is never done at this stage—normal due process rights would require that the staff member be warned if there is any incriminating matter that has been raised against or by him/her. The second procedure relates to cases where a staff member is investigated for unsatisfactory conduct. The Tribunal held that before such a disciplinary investigation is embarked on, there must be "reason to believe" that a staff member has engaged in "unsatisfactory conduct". The Tribunal further noted that, in the case of unsatisfactory conduct, if the investigation is flawed in that: (i) the due process rights of the staff member have not been respected; or (ii) it has not been thoroughly conducted, then the whole disciplinary process is tainted.

In relation to the investigations in the present case, the Tribunal held that, in view of the fact that the Applicant had been identified as a possible wrongdoer in the preliminary investigation, his due process rights should have been afforded to him upon the commencement of the preliminary investigation in October 2007. The Tribunal found that the Applicant was not afforded the requisite due process rights until he was given the Allegations of Misconduct on 15 April 2008 and, consequently, it concluded that the Applicant's right to due process was violated.

In relation to the Allegations of Misconduct, the Tribunal rejected the Applicant's claim that the decision to separate him from service was a foregone conclusion given the

language in the Allegations of Misconduct. Although the Tribunal acknowledged that the language used to recommend that Applicant' separation from service was inappropriate, it did not amount to a violation of due process rights. The Applicant further alleged that his due process rights were violated given the time he was afforded to respond to the allegations. The Tribunal held that it is perfectly permissible for the Tribunal, without imposing a strict time limit, to decide on a case by case basis, what would amount to a reasonable time. Such an exercise should consider the nature of the charges, their complexity, volume of documents, if they are annexed to the charges and whether the staff member needs additional materials to enable him/her to prepare the response. However, in concluding that the Applicant was given a reasonable amount of time to respond, the Tribunal held that due process also means that when the Administration files charges against a staff member, it should inform the staff member that if he/she needs more time to file a response, he/she should make a reasoned request to that end. The Tribunal noted that this was not done in the present case.

Lastly, the Applicant alleged that the *ad hoc* Disciplinary Committee failed to follow proper procedure in that it did not clearly communicate to him the evidence it used to reach its conclusions and that he was not given the opportunity to cross examine the witnesses. In relation to the latter contention, the Tribunal rejected the Respondent's submission that the applicable procedures do not require a hearing or the in-person cross examination of witnesses, stating that to accept the submission would amount to a denial of the fundamental rights of employees. In particular, seeing that the evidence given by the Head of Logistics to the Disciplinary Committee went to the core of the alleged misconduct, the Applicant should have been given the opportunity to at least cross examine the witness.

The Tribunal held that the Respondent unfairly dismissed the Applicant and that the charge of gross negligence was not well-founded. Additionally, the Tribunal concluded that that there were procedural irregularities in the conduct of the investigation and the disciplinary proceedings that form a separate basis for awarding compensation to the Applicant. The Tribunal ordered rescission of the decision to separate the Applicant from service and ordered the Respondent to reinstate the Applicant and to make good all of his lost earnings from the date of his separation from service to the date of his reinstatement. In the alternative, the Respondent was to compensate the Applicant for loss of earnings from the date of his separation from service to the date of the Tribunal's judgment. Further, the Respondent was to compensate the Applicant in the amount of six months' net base salary for the procedural irregularities during the investigation and disciplinary process.

10. Judgment No. UNDT/2011/174 (7 October 2011): Baron v. Secretary-General of the United Nations[12]

Request for compensation owing to injury attributable to the performance of official duties—Alleged gross negligence of the Organization in ensuring the security and safety of staff members—Irreceivability of claim relating to gross negligence for lack of a prior request to the Secretary-General—Interpretation of article 17 of appendix D to the Staff Rules—Reconsideration by the Secretary-General of a decision taken on the recommendation of the Advisory Board on Compensation Claims (ABCC)—Request for reconsideration is a prerequisite for

[12] Judge Jean François Cousin (Geneva).

FILING AN APPLICATION WITH THE TRIBUNAL—RECEIVABILITY OF THE CLAIM, GIVEN THE AMBIGUITY OF THE WORDING OF ARTICLE 17 OF APPENDIX A—ORDER FOR MEDICAL EVALUATION

On 19 August 2003, the United Nations headquarters in Baghdad, Iraq, suffered a bomb attack, resulting in the death of 22 persons and injuring many others including the Applicant who was serving with the security staff. In August 2009, the Applicant was separated from service for health reasons, following the United Nations Staff Pension Committee's decision to grant him a disability benefit pursuant to article 33 of the United Nations Joint Staff Pension Fund Regulations for a 67 percent permanent loss of function related to spinal column impairment and post traumatic stress disorder. On 28 January 2011, the Applicant contested the Secretary-General's decision of 29 October 2010 to approve the recommendation of the Advisory Board on Compensation Claim (ABCC), rejecting his request for additional compensation for the permanent loss of ear-nose-throat (ENT) and pulmonary functions before the Tribunal. He further requested the Tribunal to award him two years' net base salary as compensation for the gross negligence of the Organization in failing to ensure the security and safety of its staff in Baghdad.

With regard to the Applicant's claim for compensation related to the gross negligence of the Organization, the Tribunal found that there was nothing in the case file to show that a request in this regard was submitted to the Secretary-General and denied. That denial—and only that denial—could have been challenged before the Tribunal, after being submitted to management evaluation. This claim was therefore rejected as not receivable.

In relation to the Applicant's claim contesting the decision by which the Secretary-General had denied additional compensation for the permanent loss of ENT and pulmonary functions, the Respondent contended that the application was not receivable because the Applicant had not exhausted all internal remedies available to him before filing it. The Tribunal found that, pursuant to article 8, paragraph 1 (c), of its Statute and staff rule 11.2 (b), the Applicant was not required to request a management evaluation. As regards the request to the Secretary-General for reconsideration provided for by article 17(a) of appendix D to the Staff Rules, the Tribunal observes that the intention of the Secretary-General, in enacting such rule, was to make this request a prerequisite for filing an application with the Tribunal, since this procedure enables him to take an informed decision when his decision is contested on medical grounds. However, taking into account the use of words in this provision ("may", as opposed to "must"), the Tribunal considered that, even though the text should be interpreted as requiring the staff member to make such a prior request for reconsideration before filing his application with the Tribunal, the ambiguity of the wording was such that the Tribunal could not in the present case declare the application not receivable. The Tribunal therefore must rule on the merits.

However, since there were no medical certificates that established independently the type and degree of the Applicant's claimed impairments, the Tribunal ordered, pursuant to articles 9, paragraph 1, of its Statute and 19, paragraph 1, of its Rules of Procedure, that a medical evaluation be performed by a medical board, under precise conditions, before the ruling on the merits. Judgment on all other claims of the parties remained to be decided at a later date.

11. Judgment No. UNDT/2011/202 (29 November 2011): Bangoura v. Secretary-General of the United Nations[13]

EXECUTION OF JUDGMENTS OF THE FORMER UNITED NATIONS ADMINISTRATIVE TRIBUNAL—*RES JUDICATA*—JURISDICTION *RATIONE MATERIAE* OF THE FORMER ADMINISTRATIVE TRIBUNAL AND THE DISPUTE TRIBUNAL TO DEAL WITH THE NON-EXECUTION OF A JUDGMENT—JURISDICTION *RATIONE TEMPORIS*—RIGHT TO A REMEDY—HOLDING OF A PRESS BRIEFING AS EXECUTION OF THE JUDGMENT—DAMAGES FOR NON-EXECUTION OF JUDGMENT

The Applicant had filed an application with the former United Nations Administrative Tribunal seeking the execution of part of Judgment No. 1029, by which the Tribunal had decided in his favour, and compensation for the moral injury caused as the result of the non-execution of that Judgment, as well as damages and interest for the delay in the settlement of his claim of defamation.

The Applicant had been employed by the United Nations International Drug Control Programme since 1992, when, on 5 January 1997, The Washington Post published an article referring to him by name and making a number of allegations against him which ultimately proved to be false and unfounded. As a result of the article, the Applicant was placed on administrative leave and his contract was not renewed. The Acting Spokesman for the Secretary-General subsequently made an announcement at a press conference in relation to this matter.

The Applicant successfully brought a claim before the former Joint Appeals Board and later the former United Nations Administrative Tribunal, in relation to decisions to suspend him, not renew his contract, withhold his final payments and defamatory remarks made about him at the press conference in 1997. In the present case, he alleged that the Judgment of the Administrative Tribunal had not been executed in its entirety because the requirement that the Respondent publish the pronouncements of the Judgment at a press briefing was not complied with. In fact, the Respondent had issued a Press Release and annexed the Judgment to it, several months later than the Judgment required the briefing to be held.

In the present Judgment, the Dispute Tribunal found that the issues raised by the Applicant regarding harm to his reputation stemmed from the same cause of action examined by the Administrative Tribunal and, as such, were *res judicata*. The Applicant did not have the right therefore to bring the same complaints again.

Regarding the execution of Judgment No. 1029, the Tribunal first found that, by issuing a press release, the Respondent had failed to comply with the Judgment and as a result the full execution of that Judgment was outstanding.

With respect to the receivability *ratione materiae* of the application, the Dispute Tribunal noted that, contrary to its own Statute, the Statute of the former Administrative Tribunal did not mention the power of the Tribunal to deal with matters related to the non-execution of its own judgments. It further observed that the Administrative Tribunal had concluded, in its case law, that it did not have such power. However, the Dispute Tribunal disagreed with this position, stating that if the Administration refuses to accept the binding nature of a judgment of the Tribunal, the Tribunal must uphold its integrity.

[13] Judge Vinod Boolell (Nairobi).

Consequently, the Tribunal expressed the view that the former Administrative Tribunal did have the inherent power to deal with execution of judgments and that, as this case was transferred to the Dispute Tribunal, the latter also had jurisdiction to deal with the present case.

As regards the receivability *ratione temporis* of the application, the Dispute Tribunal noted that, as the Statute of the former Administrative Tribunal was silent as to execution of judgments, no time limit was prescribed and there was no clear rule as to when an application for execution of a judgment might become time-barred. The Tribunal held that execution, or implementation, of the Judgment ought to have occurred within a reasonable time after it became executable. Notwithstanding the long time that had passed since Judgment No. 1029 became executable, the Tribunal expressed the view that a party benefiting from a judgment in his favour cannot be left without a remedy through absolutely no fault of his own, and particularly not if the law itself was not clear on the issue of jurisdiction. It considered therefore that it was still open to the Tribunal to make an appropriate order for the fair and expeditious disposal of the case pursuant to article 19 of the Rules of Procedure, and bearing in mind article 36.

The Tribunal ordered the Respondent to execute Judgment No. 1029 by holding a press briefing in which his Spokesman would give particulars of both Judgment No. 1029 and the present Judgment, within one month following the date on which the present Judgment became executable. Furthermore, the Tribunal found that the failure to fully execute the Judgment had deprived the Applicant of complete redress for the wrong done to him for a period of nearly ten years, and awarded damages in the sum of USD 10,000.

12. Judgment No. UNDT/2011/205 (30 November 2011): Marshall v. Secretary-General of the United Nations[14]

Investigation by the Organization of Private legal disputes involving staff members—Organization has no business using its administrative procedures to involve itself in a personal dispute when other appropriate legal channels are available to parties to determine their rights and responsibilites—Due process—Conduct of investigations in the United Nations—Rescission of a cautionary note—Compensation—Moral damages

The Applicant had been serving as supervisor in the United Nations Mission in Ethiopia and Eritrea (UNMEE) based in Asmara, for which he had been competitively selected and formally recommended for a Special Post Allowance. In 2001, the Applicant began a consensual co-habitative relationship with another staff member at UNMEE ("the Complainant"). On 9 March 2005, a son was born to the couple. The relationship ended by mutual consent in June 2005. The Complainant subsequently spoke to the Chief Administration Officer (CAO) and the Acting Chief Communications and Information Technology Section (ACCITS) in UNMEE about her issues with the Applicant. The matter was discussed with the Applicant, who explained that the situation was brought about since the Complainant had unilaterally changed their child's name and removed his name as the father in the birth registration records. The ACCITS and CAO convened an informal peers' group and the Complainant expanded her allegations to include on-going verbal and

[14] Judge Nkemdilim Izuako (Nairobi).

physical abuse by the Applicant in their home against her during their co-habitation and after. The Applicant denied the allegations and explained that the Complainant had other motives for making them. At the suggestion of the peers' group, to which the Applicant agreed, the Applicant was temporarily assigned for one month to Addis Ababa.

On 15 August 2005, the Complainant outlined allegations, in a memorandum entitled "Seeking Protection", that she had been the object of verbal and physical assaults by the Applicant. She alleged that such assaults occurred for the most part after the Applicant had consumed excessive amounts of alcohol. On 8 September 2005, the Special Representation of the Secretary General of UNMEE (SRSG/UNMEE) established an *ad hoc* panel to undertake a preliminary investigation into the possible misconduct by the Applicant based on the allegations made by the Complainant. On 25 October 2005, the ACCITS decided, in an internal memorandum, to extend the Applicant's temporary assignment to Addis Ababa as a result of the official complaint. On 14 February 2006, in a meeting with the Applicant, the Senior Administrative Office and the Chief Civilian Personnel Office, the Chief of Administrative Services (CAS) insisted that the Applicant had an alcohol problem and ought to undergo treatment. In response to a question by the Staff Representative, the CAS also stated that the Administration could place the issue of alcohol abuse on the Applicant's official status file. On 8 August 2006, the Applicant was charged with verbally harassing the Complainant, physically assaulting her and acting in a manner unbecoming of his status as a civil servant.

On 19 December 2006, the Applicant was informed that, following a careful review of the investigation file and his response, the case was being closed in accordance with paragraph 9 (a) of administrative instruction ST/AI/371. The Applicant was, however, "cautioned" that he should be mindful to avoid the appearance of a conflict of interest between his professional duties and personal interests. The Applicant requested that the Officer in Charge (OIC) of the Administration take action to rectify the negative effects of this case on his career and to have all disparaging and potentially damaging records removed from his file, including withdrawal of the caution. Following an unfavorable outcome of the process before the Joint Appeals Board, the Applicant filed an appeal against the decision with the former United Nations Administrative Tribunal on 30 March 2009, which was transferred to the Dispute Tribunal on 1 January 2010.

In its Judgment, the Tribunal held that neither the evidence elicited or findings arrived at by the *ad hoc* investigating panel pointed to or suggested that what was alleged to have happened amounted to or constituted workplace harassment. Outside of their domestic partnership, the only other thing that the Complainant and the Applicant had in common was the fact that that they were both staff members of UNMEE. The Tribunal found that this was the singular reason why a domestic dispute found its way into the official sphere where United Nation resources were unduly deployed to both investigations and what appears to have been an unnecessary disciplinary process.

The Tribunal observed that investigative findings should be based on substantiated facts and related analysis, not suppositions or assumptions. The Tribunal found that the evidence before it demonstrated that there was a clear lack of impartiality, fairness and objectivity in the manner in which the investigation was conducted. It was evidenced from the records that the Applicant's explanations were never inquired into and were totally ignored. The Tribunal held that the investigation merely ended up granting credence to

gossip and some senior management officers' pre-conceived conclusions about the Applicant. Furthermore, it was clear to the Tribunal that the investigating panel's findings were largely irrelevant in so far as it was not the business of the Organization to concern itself with the private domestic affairs of individual staff members, especially where such findings had no bearing on the work environment. The Tribunal concluded that the purported investigations by the *ad hoc* panel, and the findings said to have been made, actually amounted to, as a whole, an invasion of privacy against the Applicant constituting an abuse of power and authority by those members of senior management who authorized it and acted upon its report.

The Tribunal held that even if the Administration examines complaints officially made to it, it must first do so with a view to determining whether the said complaint is one that it can lawfully and properly entertain. Allegations of domestic violence and conflicts over child custody, maintenance or paternity are properly matters for a criminal court and family court to entertain. The officials of the Administration had neither the power nor the capacity to wade into such matters. This was clearly beyond their scope and the Administration had acted *ultra vires* by its undue involvement. It had also breached the Applicant's human right to a fair adjudication of a domestic dispute by a properly constituted court when it arrogated to itself powers it did not have in that regard.

The Tribunal found that a range of the senior officials involved in this matter failed to critically evaluate the dispute at the expense of the good name of the United Nations. The Tribunal noted that the work of the Gender Focal Point (GFP) had an overbearing influence in the events leading up to the institution of disciplinary proceedings. The Tribunal also observed the efforts on the part of some senior officials in UNMEE Administration, through veiled threats, to "arm-twist" the Applicant into admitting to an alcohol problem. Additionally, the Tribunal considered that the actions on the part of the senior officials in the unilateral extension of the Applicant's one month temporary assignment showed bias, amounted to abuse of authority and a breach of the Applicant's due process rights. Furthermore, the Tribunal held that there was no basis for managerial action, that is, the cautionary note, and that what it sought to achieve was disciplinary sanction by stealth.

The Tribunal held that the Respondent indirectly facilitated the Complainant's false pretences to the Eritrean local authorities to alter the birth records of the child borne by the Applicant and herself, thereby allowing the Complainant to gain exclusive and sole custody of the said child. The Tribunal expressed the view that, if the case had been appropriately directed to the relevant authorities, the Applicant would not have had to endure a substandard investigation and baseless disciplinary process. These processes, the Tribunal found, caused damage to the Applicant's professional reputation and subjected him to extreme stress, moral damage and lost contact with his baby son. The Applicant has also had to engage in an international legal custody battle for his son.

The Tribunal recommended that all officials of the Organization, especially those in senior management positions, make serious efforts to familiarize themselves with the proper scope of their decision-making powers. They must continually refer to the relevant staff rules, bulletins and other administrative issuances and seek proper legal advice before making decisions that affect the status, contracts and indeed domestic life of staff members who work under them.

The Tribunal found Judgment in favour of the Applicant. The cautionary note, which was termed managerial action, was rescinded and nullified and the Tribunal ordered that all references to it in the Applicant's personnel record be removed. The Applicant further received the difference between the salary he received while in Addis Ababa and the special post allowance earlier granted him. The Applicant was awarded compensation for the substantial and grave mishandling by the Administration of this matter to his detriment in the amount of 24 months' net base salary. He was also awarded nine months' net base salary for the totality of the stress and moral damages suffered.

B. Decisions of the United Nations Appeals Tribunal

The United Nations Appeals Tribunal held its first session in 2011 in New York from 28 February to 11 March. It held its second session in 2011 in Geneva, from 27 June to 8 July, and rendered a total of 130 decisions that year.

1. *Judgment No. 2011-UNAT-109 (11 March 2011): Hastings v. Secretary-General of the United Nations*[15]

Staff rule 112.2 allows exceptions to Section 5.2 of Administrative Instruction ST/AI/2006/3 establishing ineligibility of applicants for positions more than one level higher than personal grade—Compensation for loss of a "chance" for promotion may sometimes be made on a percentage basis—trial court in best position to assess those damages—Except in compelling cases, the duration of damages awarded should be limited—An award for moral damages must be supported by specific evidence

The Respondent (Applicant in the first instance), a P-5 staff member, was granted a Special Post Allowance to the D-1 level in 2008. In 2009, the Respondent requested that an exception to section 5.2 of Administrative Instruction ST/AI/2006/3 be made to enable her, a P-5, to apply for a D-2 post. The Respondent was informed that her request could not be complied with as exceptions were not permitted under section 5.2 of ST/AI/2006/3. After the Respondent requested an administrative review of the decision and was informed that the decision would be upheld, the Respondent appealed to the Joint Appeals Board (JAB). Upon abolition of the JAB, the case was transferred to the United Nations Dispute Tribunal (UNDT).

On 7 October 2009, the UNDT issued Judgment No. UNDT/2009/030 in the case of *Hastings* v. *Secretary-General of the United Nations* (Judgment on Merits) and determined that the wording of section 5.2 was susceptible to exceptions under staff rule 112.2(b) and accordingly, the decision to reject the application on the basis that no exceptions were possible was not lawful. On 28 April 2010, the UNDT issued Judgment No. UNDT/2010/071 in the case of *Hastings* v. *Secretary-General of the United Nations* (Judgment on Remedies) and found that the Respondent had a 10 percent chance of being successful in her application for the D-2 post. The UNDT ordered the Secretary-General to pay the Respondent 10 percent of the difference between the salary and benefits she actually carried and that which she would have received in the D-2 position until retirement. In addition, the UNDT

[15] Judge Mark P. Painter, Presiding, Judge Jean Courtial and Judge Luis María Simón.

awarded the Respondent the sum of USD 5,000 for moral damages. On 14 June 2010, the Secretary-General filed an appeal from both Judgments.

The Appeals Tribunal affirmed that staff rule 112.2(b) allowed an exception to the language of section 5.2 of ST/AI/2006/3. With regard to the damages, the Appeals Tribunal affirmed that compensation for loss of a "chance" for promotion may sometimes be made on a percentage basis and that the trial court was in the best position to assess those damages. The Tribunal found the damages awarded—10 percent of the difference of salary and benefits until retirement—to be excessive. Except in very compelling cases, the Appeals Tribunal found that the duration of damages awarded should be limited and therefore modified the duration of the damages awarded to the Respondent to two years. The Appeals Tribunal also reaffirmed the principle that an award for moral damages must be supported by specific evidence and found that there was no such evidence of damages or injuries in the case to support the award of USD 5,000. The Tribunal therefore vacated the Judgment for moral damages.

2. *Judgment No. 2011-UNAT-120 (11 March 2011): Gabaldon v. Secretary-General of the United Nations*[16]

Withdrawal of offer of Appointment in the absence of a Letter of appointment—Unconditional acceptance of offer of appointment can create legally binding obligations between the Organization and its staff—Interpretation of "Staff Member" within the meaning of Article 3 of the United Nations Dispute Tribunal Statute—Access to the system of administration of justice by non-staff members limited to persons legitimately entitled to similar rights to those of staff members

The Appellant received an offer of appointment, subject to medical clearance, from the Chief Civilian Personnel Office of the United Nations Mission in the Sudan (UNMIS). Following the issuance of medical clearance by the UNMIS Medical Unit, the Appellant fell ill and was hospitalized. Subsequently, the UNMIS Medical Unit reversed its earlier clearance and assessed the Applicant as being "not fit" for employment. The Applicant was informed that the offer of employment had been withdrawn on the grounds that he had not been declared physically fit. The Appellant sought to contest the decision to withdraw his offer of employment under the former United Nations system of administration of justice. Upon the abolition of that Tribunal, the case was referred to the UNDT. The UNDT rejected the application on the grounds that it lacked jurisdiction *ratione personae* to adjudicate the claim. The UNDT Tribunal noted that the Appellant had never received a letter of appointment signed by a duly authorized official of the Organization and therefore had not become a staff member of the United Nations within the meaning of article 3(1) of the UNDT Statute. The Appellant lodged an appeal on 26 July 2010.

The Appeals Tribunal recalled that an employment contract of a staff member, which subject to internal laws of the Organization, was not the same as a contract between private parties, and that the issuance of a letter of appointment by the Administration could not be regarded as a mere formality. Nonetheless, the Tribunal found that an offer of appointment, though it did not constitute a valid employment contract, could produce legal effects, if all the conditions set forth in the offer of employment were unconditionally accepted and

[16] Judge Jean Courtial, Presiding, Judge Mark P. Painter and Judge Inés Weinberg de Roca.

fulfilled by the offeree in good faith. In such a situation the offeree should be regarded as a staff member for the limited purpose of seeking recourse within the internal justice system.

The Appeals Tribunal held that access to the new system of administration of justice for persons who formally were not staff members should be limited to persons who were legitimately entitled to similar rights to those of staff members. It followed that the UNDT had committed an error of law in denying the Appellant access solely on the grounds that the Appellant never received a letter of appointment, without seeking to ascertain whether the Appellant had satisfied all the conditions of the offer of employment and was entitled to contract-based rights. The Appeals Tribunal overturned the UNDT's judgment and remanded the case to the UNDT for examination of the facts of the case in light of its holding.

3. *Judgment No. 2011-UNAT-121(11 March 2011): Bertucci v. Secretary-General of the United Nations*[17]

Right to order the production of documents for the purposes of fair and expeditious disposal of proceedings—Right to request the verification of the confidentiality of documents—Specific or justified reasons needed to oppose an order for the production of documents—Statute of the United Nations Dispute Tribunal does not permit exclusion of a party from proceedings where the party does not comply with an order of the Tribunal—Violation of the Right to a Defence and Right to an Effective Remedy under the Universal Declaration of Human Rights

The Appellant contested the decision not to select him for the post of Assistant Secretary-General (ASG) of the Department of Economic and Social Affairs (DESA). The Appellant's recourse to the Joint Appeals Board (JAB) was transferred to the UNDT when the new system of internal justice became effective on 1 July 2009. The UNDT handed down two judgments on merits (Judgment No. UNDT/2010/080 of 3 May 2010 and Judgment No. UNDT/2010/117 of 30 June 2010, in the case of *Bertucci* v. *Secretary-General of the United Nations*) that ruled in favour of the Appellant. Judgment No. UNDT/2010/080 was a default judgment handed down against the Secretary-General by way of sanctioning the Administration for the refusal to produce pertinent evidence requested of it. The Secretary-General appealed both judgments.

The Appeals Tribunal recalled that the UNDT had, under its Statute and Rules of Procedure, the right to order the production of any document necessary for the fair and expeditious disposal of its proceedings. In the case at hand, the Appeals Tribunal pointed out that the Appellant had raised sufficiently serious questions before the UNDT, regarding the propriety of the process leading to the decision not to select him, and held that the UNDT judge had had sufficient grounds to order the production of the documents withheld by the Administration concerning the selection process that led to the impugned administrative decision.

The Appeals Tribunal further noted that, if the Administration opposed an order by the UNDT to produce a certain document in its possession, it could, with sufficiently specific and justified reasons, request the UNDT to verify the confidentiality of the docu-

[17] Judge Jean Courtial, Presiding, Judge Sophia Adinyira, Judge Kamaljit Singh Garewal, Judge Mark P. Painter, Judge Inés Weinberg de Roca and Judge Luis María Simón.

ment in question. Before such verification was completed, the said document could not be transmitted to the other party. If the UNDT considered the confidentiality of the document justified, it had to remove the document, or part of it, from the case file. The UNDT could not subsequently use such a document against a party unless the said party had an opportunity to examine it. Exceptions to the principle of confidentiality had to be interpreted strictly. In the case at hand, the Appeals Tribunal held that the objections proffered by the Secretary-General in declining to comply with the UNDT's order to produce were neither specific nor justified.

Nonetheless, the Appeals Tribunal held that the UNDT could not exclude a party from its proceedings if that party refused to execute the UNDT's order to produce a document, because to do so would run afoul of the principle of respect for the right to a defence and the right to an effective remedy before a judge, recognized in article 8 of the Universal Declaration of Human Rights. When a party refused to execute the UNDT's order to produce a document, the UNDT was entitled to draw appropriate conclusions from the refusal in its final judgment. The UNDT could have regarded the Administration's refusal as acceptance of the allegations made by the other party concerning the facts.

The Appeals Tribunal held that the UNDT had not been entitled to sanction the Secretary-General by preventing his counsel from taking part in the proceedings, and to deliver a default judgment. In delivering such a judgment, the UNDT had violated the right of the Secretary-General to be heard and had exceeded its competence. The Appeals Chamber set aside the two Judgments and remanded the adjudication of the case to the President of the UNDT for assignment to a Judge.

4. Judgment No. 2011-UNAT-130 (8 July 2011): Koda v. Secretary-General of the United Nations[18]

Constructive termination requires a reasonable person to believe that the employer was "marching [him or her] to the door"—Decisions of the Office of internal oversight may fall within the jurisdiction of the United Nations Dispute Tribunal if used to affect an employee's terms or contract of employment—Trial Court record a necessity for a review of factual findings by the United Nations Appeals Tribunal

The Appellant was appointed Director at the United Nations Information Centre in Tokyo (UNIC Tokyo) and subsequently underwent an investigation for allegations made against her conduct as Director. A report, issued by a panel constituted by the Department of Public Information (DPI) under Chapter X of the Staff Rules and the Administrative Instruction on Revised Disciplinary Measures and Procedures (ST/AI/371), was critical of the Appellant but did not find any misconduct. A subsequent report, issued by the Office of Internal Oversight Services (OIOS) as part of an audit, took note of the DPI Panel's report and recommended that the Appellant be re-assigned. The recommendation was rejected, and the Appellant's appointment was extended in May 2008. The Appellant subsequently resigned from her position in June 2008.

In October 2008, the Appellant filed an appeal with the JAB. The JAB did not review the Appellant's case before its abolition on 30 June 2009, and the case was transferred to

[18] Judge Mark P. Painter, Presiding, Judge Sophia Adinyira and Judge Inés Weinberg de Roca.

the UNDT. The UNDT dismissed the Appellant's application, finding that she was not constructively dismissed and declining to quash the DPI Panel's Report. The UNDT also found that OIOS' decision as to the content of its audit report was not within the Tribunal's jurisdiction. On 8 August 2010, the Appellant submitted her appeal, claiming that she was constructively dismissed and requested that the DPI Panel Report be quashed.

The Appeals Tribunal held that, in a case of alleged constructive termination, the actions of the employer must be such that a reasonable person would believe that the employer was "marching [him or her] to the door". The Appeals Tribunal held that the UNDT had applied the proper standard and found no constructive termination. Instead, the Administration had continued to extend the Appellant's contract, even in the face of negative reports.

The Appeals Tribunal expressed doubts that the DPI Panel Report could be considered to be an "administrative decision" subject to the Tribunal's jurisdiction. However, even assuming that the Report was subject to judicial review, the Appeals Tribunal deferred to the findings of the UNDT.

In relation to the OIOS report, the Appeals Tribunal recalled that OIOS operated under the "authority" of the Secretary-General, but enjoyed "operational independence". The Tribunal found that, since the Secretary-General had no power to influence or interfere with OIOS with regard to the contents and procedures of an individual report, neither the UNDT or the Appeals Tribunal had the jurisdiction to do so either, as they could only review the Secretary-General's administrative decisions. Nonetheless, the Appeals Tribunal held that since OIOS was part of the Secretariat, it was subject to the Internal Justice System. To the extent that any OIOS decisions were used to affect an employee's terms or contract of employment, the OIOS report could be impugned. For example, an OIOS report could be found to be so flawed that the Administration's taking disciplinary action based thereon had to be set aside. In the case at hand, although the UNDT had found the OIOS report to be flawed, the Appeals Tribunal found no error in the UNDT's holding that the OIOS report could not be impugned for the reason that the Administration had not based any disciplinary action on it.

The Appeals Tribunal noted that, in the case at hand, neither party contested the trial court's factual findings. Nonetheless, it noted that the appellate review of facts required a record. The Tribunal cautioned that in a case that turned on disputed facts, it would have no choice, in the absence of a written transcript, but to remand the matter to the trial court for a new, and recorded, hearing. The cost in time, money, and duplicated effort associated with a remand outweighed the cost of providing a transcript. It stated, further, that if the budget did not exist it had to be created, or the Organization's system of internal justice would fail.

5. *Judgment No. 2011-UNAT-131(8 July 2011): Cohen v. Secretary-General of the United Nations*[19]

Summary Dismissal—Article 10(5) of the Statute of the United Nations Dispute Tribunal—Compensation exceeding two years' net base salary ordered in lieu of specific performance of obligation to reinstate should be reasoned—Evidence

[19] Judge Jean Courtial, Presiding, Judge Luis María Simón and Judge Inés Weinberg de Roca.

OF AGGRAVATING FACTORS MAY WARRANT INCREASED COMPENSATION—INTEREST TO BE AWARDED AT THE U.S. PRIME RATE APPLICABLE ON DUE DATE OF THE ENTITLEMENT

The Respondent (Applicant in the first instance), a procurement assistant for the United Nations Mission in the Democratic Republic of the Congo (MONUC), had been formally charged and summarily dismissed for serious misconduct following an investigation by the Office of Internal Oversight Services (OIOS). The Respondent contested the decision to summarily dismiss her before the New York Joint Disciplinary Committee. The Committee found the summary dismissal had not been warranted by the evidence of the investigation and recommended that the Secretary-General suspend the decision to dismiss the Respondent. The Secretary-General declined to follow the Committee's recommendation and the Respondent filed an application with the UNDT. The UNDT subsequently found that the investigation had been unfair and prejudiced against the Respondent and that there had been no evidence on the record to show that the Respondent had solicited or received bribes.

The Administration brought an appeal against the UNDT's order that the Respondent be reinstated or, if the Administration so chose, in lieu of her reinstatement, payment of: (1) compensation equivalent to two years' net base salary, at the rate in effect on the date of her dismissal, with interest payable at a rate of eight percent per year as from 90 days from the date of issuance of the judgment until payment was effected; (2) her salaries and entitlements from the date of her dismissal to the date of judgment, with interest at a rate of eight percent; and (3) two months' net base salary as compensation for the breach of her right to due process.

The Appeals Tribunal recalled that article 10(5) of the UNDT Statute limited the total compensation awarded to an amount which would normally not exceed two years' net base salary of the applicant, unless the Tribunal ordered the payment of higher compensation and gave reasons for that decision. The Appeals Tribunal held that the rescission of an illegal decision to dismiss a staff member implied, for the Administration, both the reinstatement of the staff member and the payment of compensation for loss of salaries and entitlements not related to actual service performance, after deducting any salaries and entitlements that the staff member received during the period considered. In its view, the option given to the Administration, on the basis of article 10(5)(a) of the Statute of the Dispute Tribunal, to pay compensation in lieu of performance of a specific obligation such as reinstatement, combined with the cap fixed in article 10(5)(b), could not render ineffective the right to fair and equitable damages, which was an element of the right to an effective remedy. If, in lieu of execution of the judgment, the Administration elected to pay compensation, in addition to the damages awarded by the UNDT, such election could, depending on the extent of the damage, render the circumstances of the case exceptional within the meaning of article 10(5)(b). In such a situation, the UNDT was not bound to give specific reasons to explain what made the circumstances of the case exceptional.

The Appeals Tribunal found that the UNDT's findings of fact not only warranted rescission of the decision to summarily dismiss the Respondent, but also constituted aggravating factors in a case of irregular, prejudicial dismissal without corroborating evidence. Nonetheless, the Appeals Tribunal also found the compensation awarded by the UNDT to the Respondent, representing more than four years and eight months' net base salary, to be excessive.

Accordingly, the Appeals Tribunal upheld the Judgment of the UNDT, subject to the following amendments: (i) the compensation awarded by the UNDT for loss of earnings corresponding to the dismissal period was reduced to an amount equivalent to two years' net base salary plus entitlements not related to actual service performance, based on the situation as at the date of dismissal; (ii) the interest rate fixed in the UNDT's judgment was replaced by the U.S prime rate applicable on the due date of the entitlement.

6. Judgment No. 2011-UNAT-139 (8 July 2011): Basenko v. Secretary-General of the United Nations[20]

Competence of the United Nations Dispute Tribunal—Articles 2.1 and 3.1 of the United Nations Dispute Tribunal Statute—Interns not considered staff members of the United Nations—Interns do not have access to the United Nations Dispute Tribunal

The Appellant was undertaking a six month unpaid internship with the United Nations Office on Drugs and Crime (UNODC), which was interrupted by mutual consent owing to a conflict between the intern and her supervisor. On 14 May 2009, the Division of Management of the United Nations Office at Vienna (UNOV) made an offer to the Appellant, which she immediately accepted, to complete her internship with the International Trade Law Division from 1 October to 27 November 2009. This offer was subsequently withdrawn on 9 September 2009 on the grounds that the Appellant had made unauthorized use of her grounds pass after the interruption of her internship.

The Appellant submitted a request for management evaluation and the decision to withdraw the internship offer was upheld. On 27 May 2010, the Appellant filed an appeal against the decision with the UNDT and the application was rejected. The UNDT noted that the Appellant was neither a current nor a former staff member of the United Nations and that the UNDT was not competent to hear her application. The Appellant filed an appeal against the Judgment.

In rejecting the appeal, the Appeals Tribunal confirmed the UNDT's judgment, and held that, pursuant to articles 2.1 and 3.1 of its Statute, the competence of the UNDT was limited to cases brought by staff members, former staff members or persons making claims in the name of incapacitated or deceased staff members of the United Nations. The Appeals Tribunal recalled that, while access to the new system of administration of justice could be extended to persons who were not formally staff members but who could legitimately be entitled to rights similar to those of a staff member, such exception had to be understood in a restrictive sense. It held that, in accordance with paragraph 7 of General Assembly resolution 63/253 on the administration of justice at the United Nations, interns had no access to the new system of administration of justice. The Appeals Chamber also found that there was no evidence that any fundamental rights of the Appellant had been breached.

[20] Judge Jean Courtial, Presiding, Judge Mark P. Painter and Judge Mary Faherty.

7. Judgment No. 2011-UNAT-145 (8 July 2011): Eid v. Secretary-General of the United Nations[21]

Application for revision of judgment under article 29 of the United Nations Dispute Tribunal Rules of Procedure—Definition of 'fact' for revision of judgments—Issuance of new jurisprudence is an issue of 'law', not 'fact'

The Respondent (Applicant in the first instance) was informed that his post would be abolished effective 31 December 2002, with the availability of a compensation package that was conditional upon him giving a written undertaking not to enter into any proceedings against the Organization in connection with his termination. However the Respondent was not separated from service until 14 February 2003, after he was placed on sick leave from 9 December 2002. The Respondent's request for additional sick leave days was not approved and he continued to contest this decision as well as request that the compensation package be paid to him without delay. The case went through the administrative review and the Joint Appeals Board and was declared time-barred. The Respondent continued his appeal to the former Administrative Tribunal, which did not have an opportunity to review the case before its abolition on 31 December 2009. The case was subsequently transferred to the UNDT.

The UNDT rejected the part of the application that contested UNIFIL's refusal to grant the Respondent an extension of his contract on the ground of ill-health but considered the application to review the delay or refusal to pay the compensation package receivable. The UNDT ordered the Secretary-General to pay the normal termination indemnity and other sums owed to the Respondent in connection with his separation from service, with eight percent interest from 14 February 2003, when they fell due, until the payment was made.

On 1 July 2010, the Appeals Tribunal issued a synopsis of Judgment No. UNAT/2010/059 in the case of *Warren* v. *Secretary-General of the United Nations,* which fixed the interest rate applicable to pre-judgment compensation at the US prime rate applicable at the time the entitlement fell due. On 11 August 2010, the Secretary-General submitted an application for revision to the UNDT under article 29 of the UNDT Rules of Procedure. The Secretary-General considered the decision to fix the interest rate at the US prime rate to be a "decisive fact" and maintained that the UNDT's award of eight percent interest rate on the pre-judgment compensation in this case was contrary to the findings of the Appeals Tribunal. By Order No. 70 (GVA/2010) in the case of *Eid* v. *Secretary-General of the United Nations* dated 18 August 2010, the UNDT rejected the application for revision. On 4 October 2010, the Secretary-General filed an appeal from both the Judgment and Order.

The Appeals Tribunal held that a change in law was not a "fact" contemplated by the provision for revision of judgments in the UNDT Statute. The issuance of new jurisprudence by the Appeals Tribunal was an issue of law, not of fact. Thus, there were no grounds for revision, and the UNDT Order was affirmed. Furthermore, the appeal from Judgment No. UNDT/2010/106 in this case was considered not receivable as it was time barred.

[21] Judge Mark P. Painter, Presiding, Judge Inés Weinberg de Roca and Judge Jean Courtial.

8. *Judgment No. 2011-UNAT-160 (3 October 2011): Villamoran v. Secretary-General of the United Nations*[22] [23]

ARTICLE 13 OF THE UNITED NATIONS DISPUTE TRIBUNAL RULES OF PROCEDURE—INTERLOCUTORY APPEAL MADE DURING THE COURSE OF UNITED NATIONS DISPUTE TRIBUNAL PROCEEDINGS RECEIVABLE ONLY IN CASES WHERE THE TRIBUNAL HAD CLEARLY EXCEEDED JURISDICTION OR COMPETENCE—ORDER RENDERED BY THE UNITED NATIONS DISPUTE TRIBUNAL REQUIRES EXECUTION IN CASES WHERE ORDER IS BEING APPEALED

The Respondent (Applicant in the first instance), was on a fixed term appointment with the Department of Field Support (DFS). On 21 June 2011, the Respondent was informed that her fixed-term appointment would expire on 7 July 2011, that no further extensions could be granted beyond that date and that she could be considered for a temporary appointment after a minimum 31 day break in service. The Respondent filed a request for management evaluation on 23 June 2011. On 5 July 2011, the Respondent filed an application with the UNDT requesting suspension of two administrative decisions: (i) the decision to place her on a temporary appointment after the expiration of her fixed-term contract on 7 July 2011; and (ii) the decision to require her to take a break in service of 31 days prior to her placement on a temporary appointment.

The UNDT issued Order No. 171 (NY/2011) in the case of *Villamoran* v. *Secretary-General of the United Nations* on 7 July 2011, in view of the fact that it was the last working day before the Respondent's separation. Pursuant to Article 13 of the UNDT Rules of Procedure, the Tribunal noted that it had five days from the service of the application to consider an application for interim measures and thus ordered the suspension of the implementation of the contested decisions until 12 July 2011. On 12 July 2011, the UNDT dismissed the request for suspension of the decision to place the Respondent on a temporary appointment upon the expiry of her fixed-term appointment on 7 July 2011. It also granted the request for a suspension of the decision requiring the Respondent to take a 31 day break in service prior to her placement on the temporary appointment, pending management evaluation. The Secretary-General appealed Order No. 171 (NY/2011).

The Appeals Tribunal indicated that the Statute of the Appeals Tribunal did not clarify whether the Appeals Tribunal could hear an appeal only from a final judgment of the UNDT on the merits, or whether an interlocutory decision made during the course of the UNDT proceedings could also be considered a judgment subject to appeal. Nonetheless, the Appeals Tribunal recalled that it has constantly emphasized that appeals against most interlocutory decisions would not be receivable, except in cases where the UNDT had clearly exceeded its jurisdiction or competence.

The Appeals Tribunal held that, where the implementation of an administrative decision was imminent, through no fault or delay on the part of the staff member, and took place before the five days provided for under article 13 of the Rules of Procedure of the UNDT had elapsed, and where the UNDT was not in a position to take a decision under article 2(2) of the UNDT Statute, i.e. because it required further information or time to

[22] Judge Inés Weinberg de Roca, Presiding, Judge Kamaljit Singh Garewal and Judge Luis María Simón.

[23] See too *Villamoran v. Secretary-General of the United Nations*, Judgment No. UNDT/2011/126 (12 July 2011).

reflect on the matter, it had to have the discretion to grant a suspension of action for the five days. To have found otherwise would have rendered article 2(2) of the UNDT Statute and Article 13 of the UNDT Rules of Procedure meaningless in cases where the implementation of the contested administrative decision was imminent.

The Appeals Chamber therefore found that the UNDT's decision to order a preliminary suspension of five days pending its consideration of the suspension request under Article 13 of the UNDT Rules of Procedure was properly based on articles 19 and 36 of the UNDT Rules of Procedure. It held that the UNDT did not exceed its jurisdiction in rendering the impugned Order and therefore, the interlocutory appeal was not receivable.

The Appeals Tribunal also confirmed that an order rendered by the UNDT required execution in cases where the order was being appealed. The Appeals Tribunal found that article 8(6) of its Rules of Procedure which provided that "[t]he filing of an appeal shall suspend the execution of the judgment contested" did not apply to appeals of interlocutory orders rendered by the UNDT. It was for the Appeals Tribunal to decide whether the UNDT exceeded its jurisdiction and the Administration could not refrain from executing an order by filing an appeal against it on the basis that the UNDT had exceeded its jurisdiction.

9. Judgment No. 2011-UNAT-164 (21 October 2011): Molari v. Secretary-General of the United Nations[24]

Standard of proof required for disciplinary measures—The standard of proof of beyond a reasonable doubt, as applied by the Administrative Tribunal of the International Labour Organization, not applied by the United Nations—Misconduct involving the possibility of termination must be established by clear and convincing evidence, requiring more than a preponderance of the evidence but less than proof beyond a reasonable doubt

The Appellant, a Senior Procurement Specialist at the United Nations Office for Project Support (UNOPS), was charged with professional misconduct and separated from service with one month's notice and payment of termination indemnity. On 15 October 2009, the Appellant filed an application with the UNDT challenging the decision to terminate her service. On 7 April 2010, the UNDT concluded that the Appellant's behaviour amounted to professional misconduct and that the penalty of termination was not disproportionate to the gravity of the offence. On 1 November 2010, the Appellant appealed the UNDT Judgment.

The Appeals Tribunal recalled that when a disciplinary sanction is imposed by the Administration, the role of the Tribunal is to examine whether the facts on which the sanction is based have been established, whether the established facts qualify as misconduct, and whether the sanction is proportionate to the offence. It further declined to follow the Administrative Tribunal of the International Labour Organization in holding that the standard of proof in disciplinary cases was beyond a reasonable doubt, and which had never been the standard at the United Nations. Instead, it recalled that it had not as yet set an exact standard for the quantum of proof required. The Tribunal noted further that while disciplinary cases were not criminal in nature, when termination was a possible

[24] Judge Mark P. Painter, Presiding, Judge Sophia Adinyira and Judge Luis María Simón.

outcome, misconduct had to be established by clear and convincing evidence. Clear and convincing proof meant more than a preponderance of the evidence but less than proof beyond a reasonable doubt—it meant that the truth of the facts asserted was highly probable. It further indicated that granting an opportunity to a party to present evidence did not amount to shifting the burden of proof.

The Appeals Tribunal held that the facts in the case were so clear as to be irrefutable and that no matter what the standard, the Administration had met the burden. The UNDT Judgment was affirmed.

10. Judgment No. 2011-UNAT-165 (21 October 2011): Cherif v. International Civil Aviation Organization[25]

Mandate of the United Nations Appeals Tribunal limited to situations where staff members contest the application of an administrative decision—Regulatory decisions not within the jurisdiction of the United Nations Appeals Tribunal—Article 58 of the International Civil Aviation Organization (ICAO) Convention permits restrictions on hiring authority of the Secretary-General

The Appellant, the Secretary General of the International Civil Aviation Organization (ICAO) from 1 August 2003 to 1 August 2009, filed an appeal with the former Administrative Tribunal against two decisions taken by the ICAO Council. The decisions established the requirement, subject to certain exceptions, of written approval of the President of the Council for any hiring, appointment, promotion, extension and termination of P-4 employees and above. The Appellant contended that the decisions severely circumscribed his ability, as Chief Executive Office of ICAO, to make appointments to the Secretariat and his ability to exercise judgment with regard to such appointments.

The Appeals Tribunal recalled that its mandate, and that of the former Administrative Tribunal, was limited to situations where a staff member was contesting the application of an administrative decision, usually taken on behalf of the Secretary-General. Accordingly, it noted that since the Appellant was the Secretary General of ICAO when he filed the case, he was, in essence, suing himself. The Tribunal held further that the Appellant was challenging two regulatory decisions which, as such, were not subject to review by the Tribunal.

The Appeals Tribunal also found that the Council's decisions to restrict the Secretary-General's hiring authority were within its powers, under article 58 of ICAO's Convention, since they pertained to the terms of the relationship between the governing body of ICAO and its Secretary-General.

The appeal was dismissed for want of subject-matter jurisdiction.

[25] Judge Mark P. Painter, Presiding, Judge Kamaljit Singh Garewal and Judge Jean Courtial.

11. Judgment No. 2011-UNAT-172 (21 October 2011): Vangelova v. Secretary-General of the United Nations[26]

STANDARD OF REVIEW FOR NON-PROMOTION DECISIONS—LINK BETWEEN IRREGULARITY OF PROMOTION PROCEDURE AND NON-PROMOTION—ENTITLEMENT TO RESCISSION OR COMPENSATION FOR PROCEDURAL IRREGULARITY REQUIRES A FORSEEABLE CHANCE FOR PROMOTION

The Respondent (Applicant in the first instance) was a staff member of the United Nations High Commissioner for Refugees (UNHCR) since 1992. The Respondent was not among the persons promoted during the 2008 UNHCR annual promotion session. On 25 September 2009, the Respondent filed a request for management evaluation of the decision not to promote her. By a memorandum dated 4 December 2009, the Deputy High Commissioner (DHC) informed the Respondent that the decision had been taken in conformity with the regulations and rules of the Organization. On 4 March 2010, the Respondent appealed the decision to the UNDT.

While the UNDT did not sustain several of the Respondent's contentions, it found merit in the claim that UNHCR had promoted a staff member who was not eligible and whose candidacy had not been examined by the Appointments, Postings and Promotions Board (APPB). In view of such procedural irregularity, the UNDT ordered the rescission of the contested decision not to promote the Respondent, or in lieu thereof, the payment of 8,000 Swiss Francs as compensation for loss of salary due to the denial of the promotion. The UNDT also found that, since the Respondent's chances for promotion at the 2008 session were "close to zero" as 192 candidates (for 42 slots) had scored higher than the Respondent, no grounds existed for granting compensation for moral damages. On 29 November 2010, the Secretary-General filed an appeal.

The Appeals Tribunal held that an irregularity in promotion procedures would only result in the rescission of the decision not to promote a staff member when he or she would have had a significant chance for promotion. Thus, where the irregularity had no impact on the status of a staff member, because he or she had no foreseeable chance for promotion, then the staff member was not entitled to rescission or compensation.

In the case at hand, the Appeals Tribunal accepted the UNDT's finding that the Respondent's chances of promotion were close to zero, and held that there was consequently no link between the procedural irregularity and the Respondent's non-promotion.

The appeal was granted and the UNDT's decision to rescind and award of compensation were reversed.

[26] Judge Inés Weinberg de Roca, Presiding, Judge Mark P. Painter and Judge Jean Courtial.

C. Decisions of the Administrative Tribunal of the International Labour Organization[27]

1. *Judgment No. 3003 (6 July 2011): A. T. S. G. v. International Fund for Agricultural Development (IFAD)*[28]

ARTICLE XII OF THE STATUTE OF THE TRIBUNAL—RIGHT TO REQUEST ADVISORY OPINION FROM THE INTERNATIONAL COURT OF JUSTICE—TRIBUNAL MAY DEFER THE EXECUTION OF A JUDGMENT IF IT CONSIDERS SUCH A MEASURE JUSTIFIED—RIGHT OF THE STAFF MEMBER TO BENEFIT FROM IMMEDIATE APPLICATION OF A JUDGMENT—BALANCE BETWEEN THE RIGHTS OF THE ORGANIZATION AND THOSE OF THEIR STAFF MEMBERS—APPLICATION FOR A STAY OF EXECUTION OF A JUDGMENT IN LIGHT OF REQUEST FOR ADVISORY OPINION INADMISSIBLE

---

[27] 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 following 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 Organisation 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.

[28] Ms. Mary G. Gaudron, President, Mr. Seydou Ba, Vice-President, Mr. Giuseppe Barbagallo, Ms. Dolores M. Hansen and Mr. Patrick Frydman, Judges.

In response to Judgment No. 2867 in the case of *A.T.S.G.* v. *International Fund for Agricultural Development (IFAD)*, in which the Tribunal recognized its jurisdiction, set aside the challenged decision and ordered IFAD to pay material damages and interest, as well as moral damages and costs, IFAD decided to challenge the validity of that judgment before the International Court of Justice by way of a request for an advisory opinion under article XII of the Statute of the Tribunal.[29] IFAD submitted to the Tribunal a request for a "stay of execution" of Judgment No. 2867, pending the advisory opinion of the International Court of Justice.

According to article VI of the Statute of the Tribunal, the Tribunal's judgments were "final and without appeal". They therefore had an immediately operative character stemming from the Tribunal's earlier rulings,[30] as well as the authority of *res judicata* that they possessed. Neither the Statute nor the Rules of the Tribunal contained any provision by which the submission of a request for an advisory opinion under article XII would result, contrary to this principle, in a stay of execution of the contested judgment pending the Court's opinion.

Three sets of considerations led the Tribunal to exclude the possibility of such an application to stay the execution of a judgment.

First, the immediately operative character of the Tribunal's judgments was one of the cornerstones of its case law and for staff; it represented a fundamental guarantee of the effectiveness of the justice dispensed by the Tribunal. The application for suspension of execution was fundamentally distinct from the other kinds of application which it had found to be admissible, in the absence of express provisions. Furthermore, the Tribunal could at any time decide, as it had done in the past,[31] to defer the execution of a judgment if it considered such a measure justified. It was therefore for the organization concerned, if it sought to have the execution of a judgment deferred in the event that it proved unfavourable to itself, to submit a subsidiary claim for that purpose.

Second, recognition of the admissibility of a request for a stay of execution by the Tribunal would give rise to a legal anomaly. In a national legal system, it was normally the court handling the appeal against the judgment in question which was competent to decide on a request for a stay of execution of the judgment, not the court which had rendered the judgment. That was, moreover, also the case in the new system of administration of justice in the United Nations, introduced on 1 July 2009. The possibility of seeking a stay of execution of a judgment, which could readily be provided for in a two-tier court system, would

[29] According to IFAD, the Tribunal had ruled on matters which did not fall within its jurisdiction or which were vitiated by a fundamental fault in the procedure followed.

[30] See *In re Lindsey* Judgment No. 82 (10 April 1965).

[31] *Ibid*.

raise considerable difficulties if it were allowed by the Tribunal, which did not form part of such a system.[32]

Third, recognition of the possibility of such a request would strengthen a procedure which was already fundamentally imbalanced to the detriment of staff members (article XII of the Statute of the Tribunal, under which the option of recourse to the Court was confined to organizations), an inequality to which the Court had, moreover, drawn attention in its 1956 advisory opinion.[33] The Tribunal concluded that while it was not for it to criticize the provisions of its own Statute, it must not amplify the consequences of the objective inequality arising from article XII of its Statute. Recognition of the possibility of such a request for a stay of execution would upset the balance between the rights of the organizations and those of their staff members which it was the Tribunal's role to preserve.

Having regard to all these considerations, the Tribunal considered that it was not possible to recognize the admissibility of an application from an organization for a stay of execution of a judgment in respect of which the procedure set forth in article XII of its Statute had been initiated. It therefore dismissed the application by IFAD.

2. *Judgment No. 3046 (6 July 2011): M. V. (No. 8) v. World Meteorological Organization (WMO)*[34]

Absolute privilege of statements made in the course of legal proceedings—Inconsistent with fundamental legal principles and incompatible wth the role of the Tribunal to import a term which impinged on the right of an international organization to choose the manner in which it defended proceedings brought against it—Competence of the Tribunal under Article II of its Statute

The complainant requested the Tribunal to compel the World Meteorological Organization (WMO) to take various measures on the grounds that the written communications submitted by WMO to the Tribunal, in the context of an earlier complaint (Judgment No. 2861), were offensive, defamatory, illegal and/or false and had caused irreparable harm. The WMO contended that the complaint was irreceivable by virtue of the principle of *res judicata*.

The Tribunal held that the question was not one of *res judicata*, but rather that of "absolute privilege", which attached to statements made in, and in the course of, legal proceedings, including statements by the parties, their legal representatives and their wit-

[32] The Tribunal observed that recognition of such a possibility would face two key problems: (1) The question of the admissibility of a request for a stay of execution was generally subject to review in order to verify the seriousness of the arguments raised in support of the request. But whereas their seriousness was normally probed by the higher-tier court, the Tribunal could not rule on the correctness or soundness of its own judgments. It followed that the seriousness of a request for suspension could not be verified. Furthermore, if the possibility for organizations to seek such a stay of execution were recognized, they would be encouraged to have recourse to the Court, especially where a large amount of compensation had been awarded, and the risk of the procedure being abused could not be excluded. (2) The other key problem was that if the Tribunal recognized such a request as admissible, it could be confronted at the same time with an application for execution. While that would raise no problem in a two-tier court system, the Tribunal would be faced with a delicate balancing act.

[33] See *In re Lindsey* Judgment No. 82 (10 April 1965).

[34] Ms. Mary G. Gaudron, President, Mr. Giuseppe Barbagallo and Ms. Dolores M. Hansen, Judges.

nesses, so that, save in the case of perjury or interference with the course of justice, those statements could not be the subject of separate proceedings. Such privilege enabled the parties to present their cases fully so that a decision could be reached on the whole of the available evidence.

Absolute privilege also operated to ensure the independence and impartiality of the judicial process. A tribunal would not be independent and impartial, nor seen to be so, if it were to assume the role of dictating to the parties the evidence and arguments that they could advance in their cases. Because the parties must have that freedom or privilege, a tribunal could not apply sanctions in separate proceedings with respect to the evidence or arguments advanced, particularly not after the proceedings had been completed.

Article II, paragraph 5, of the Statute of the Tribunal provided that it was competent to hear complaints "alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the [applicable] Staff Regulations". The real question raised by the complaint was whether those words extended to decisions taken by an organization with respect to the conduct of proceedings before the Tribunal. The complainant pointed to nothing in the Staff Regulations limiting the right of WMO to choose the manner in which it could defend proceedings brought against it by an official. And although the Tribunal accepted that various international norms and other general legal principles formed part of an official's terms of appointment, it would be inconsistent with fundamental legal principles and incompatible with the role of the Tribunal to import a term which impinged on the right of an international organization to choose the manner in which it defended proceedings brought against it in the Tribunal, whether by way of evidence or argument or by way of communication with the Tribunal relating to the proceedings. It followed that the complaint was not one "alleging non-observance [. . .] of the [complainant's] terms of appointment [or] the [applicable] provisions of the Staff Regulations" and, thus, was not one that the Tribunal was competent to hear.

3. Judgment No. 3020 (6 July 2011): F.M. v. World Trade Organization (WTO)[35]

Headquarters Agreement—Exemption from taxation of income earned as international civil servant—Staff Rule 106.11 of World Trade Organization (WTO) designed to guarantee equal pay for work of equal value—Increase in tax burden of a (non-staff member) spouse, owing to the inclusion of tax-exempt income in the calculation of payable tax, results in unjustifiable inequality, and is subject to a refund by the Organization

The complainant, a World Trade Organization (WTO) staff member at the grade 10 (P-5) level, was married and resided in the Canton of Geneva with her husband, who was not an international civil servant. On 2 June 1995 the Swiss Confederation had signed a Headquarters Agreement with WTO, under which officials at the P-5 grade were exempt from all federal, cantonal and communal taxes on salaries, emoluments and allowances paid to them by the Organization. The Genevan legislature had always respected the principle of exemption under public international law. But unlike the practice followed by the Federal Government, the Genevan Government's practice had consisted at the material

[35] Ms. Mary G. Gaudron, President, Mr. Seydou Ba, Vice-President, Mr. Claude Rouiller, Ms. Dolores M. Hansen and Mr. Patrick Frydman, Judges.

time of including an international civil servant's tax-free earned income in the assessment of a couple's tax rate, resulting in an increased combined tax burden.[36] The complainant, relying on WTO Staff Rule 106.11, had asked the Organization to reimburse the excess amount of income tax paid by her husband since 1990, owing to the fact that the income she had earned as an international civil servant, which was in principle exempt from all national taxation, had been taken into account when the rate of this tax was calculated, thus amounting to indirect taxation. In its response, the Organization maintained that Staff Rule 106.11 applied only to cases where the international civil servant was himself/herself subject to tax on income received from the WTO, and did not apply to the taxable income of a spouse who was not a staff member.

The Tribunal considered that it did not lie within its competence to examine whether the practice followed by the Genevan tax authorities in the case had been compatible with the provisions on the exemption enjoyed in principle by the complainant as a grade P-5 official employed by an international organization which had concluded a headquarters agreement with Switzerland. It was, however, incumbent upon it to examine whether the Organization had correctly applied staff rule 106.11, on which the complainant relied.

The main purpose of that provision was to give effect to the principle of equality, which signified that staff members of an international organization must receive equal pay for work of equal value. The rules applied by the Genevan tax authorities in the case had entailed a reduction in the complainant's economic capacity compared with that of an international civil servant at the same grade and in the same family situation but domiciled in a Swiss canton where the rate of income tax of a taxpayer living with his/her spouse who was an international civil servant would be calculated without reference to the latter's salary.

Thus, the Tribunal considered that the impugned decision not to reimburse the excess amount of income tax paid by her husband owing to the fact that the income she had earned as an international civil servant had been taken into account was unlawful. The Tribunal therefore set aside the impugned decision and ordered WTO to reimburse the excess amounts paid to the Genevan tax authorities and to pay costs, in accordance with staff rule 106.11.

The Tribunal, recalling staff rule 106.10, reduced the applicable period for the refund of excess taxation to that for the years 2007 and 2008 on the basis that the complainant had failed to submit a timely claim for the refund of excess taxation paid in earlier years.

---

[36] The Act of 22 September 2000 on the taxation of natural persons, which had been applicable in the Canton of Geneva at the material time, had been repealed on 1 January 2010 by an Act of 27 September 2009. In both texts natural persons' income had been taxed progressively on the basis of income bands, and the incomes of couples living together had been added together for the purpose of determining the taxable amount. The progressive system based on income bands meant that that practice had increased the couple's tax burden in proportion to the size of the tax-free income, and had resulted in the indirect partial taxation of earned income which was in principle exempt from taxation.

4. *Judgment No. 2959 (2 February 2011): I.K.M. v. Organisation for the Prohibition of Chemical Weapons (OPCW)*[37]

Recruitment procedure of Chief of Cabinet—Violation of the right to compete for a post—Interpretation of Staff Regulation 4.3, requiring competitive hiring process "so far as practicable"—No explicit and specific exemption from the requirement that selection be made on a competitive basis—The existence of an established practice in violation of a rule could not have the effect of modifying the rule itself—Quashing of a direct appointment under Article VIII of the Chemical Weapons Convention

The complainant contested a decision to appoint a Chief of Cabinet of the Organisation for the Prohibition of Chemical Weapons (OPCW) directly, without holding a competitive process. The complaint was considered by the Appeals Council which held that the impugned decision breached staff regulation 4.3,[38] but considered the breach to be mitigated by the existence of a well-established practice of filling the post of Chief of Cabinet without holding a competition. The complainant contended that the Appeals Council had made an error of law in holding that a violation of the Staff Regulations could be mitigated by a practice. The complainant asked the Tribunal, inter alia, to set aside the impugned decision. In reply, OPCW maintained that the appointment of the Chief of Cabinet had not been made in violation of the Staff Regulations and Interim Staff Rules since the Director-General enjoyed a margin of discretion concerning appointments, particularly with regard to the decision whether or not to conduct a competitive process for the appointment of Chief of Cabinet.[39] It also noted that staff regulation 4.3 provided for competition "so far as practicable" which, in its view, was not the case with the appointment of the Chief of Cabinet, due to the nature of the position.

The Tribunal held that the impugned decision had violated the complainant's right to compete for the post of Chief of Cabinet, since staff regulation 4.3 provided no explicit and specific exception from the requirement that selection for the position be made on a competitive basis. The Tribunal further reiterated its position (see Judgment 2620) that the "impracticability" of the competitive selection process could not refer to a particular post. The expression "so far as practicable" could not be interpreted to mean that for certain specific posts a competitive selection process could automatically be considered as not practicable (*ubi lex voluit dixit, ubi noluit tacuit*). The Tribunal noted that the "impracticability" must instead relate to particular situations in which the Director-General might reasonably conclude that it was impossible to organize a competition, for example, where

[37] Ms. Mary G. Gaudron, President, Mr Giuseppe Barbagallo and Ms. Dolores M. Hansen, Judges.

[38] "Selection of staff shall be made without distinction as to race, gender or religion. So far as practicable, selection shall be made on a competitive basis. Selection and appointment of candidates shall also be done in a manner that ensures transparency . . .".

[39] Article VIII, paragraph 44, of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction ("The Director-General shall be responsible to the Conference and the Executive Council for the appointment of the staff and the organization and functioning of the Technical Secretariat. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity . . .").

there was "a need to fill a vacancy quickly to relieve a backlog of work or to satisfy existing or future work commitments" (see Judgment 2620, under 9).

Furthermore, the existence of an established practice of directly appointing a Chief of Cabinet was not relevant, as a practice which was in violation of a rule could not have the effect of modifying the rule itself, and the fact that employees might be aware of such a practice did not prevent them from exercising their right to impugn a decision based on that practice whenever it affected them.

The Tribunal therefore set aside the impugned decision and the decision to appoint the Chief of Cabinet, without prejudice to the rights of the interested party, in accordance with the established jurisprudence of the Tribunal.

5. *Judgment No. 2972 (2 February 2011): R.B. and D.B. v. European Patent Organisation (EPO)*[40]

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, redeployment of staff and assignment of new or different shift work patterns—No acquired right to work night shifts—Duty of care to ensure that new work arrangements do not cause financial hardship to staff—Moral damages unwarranted owing to acceptance by the Organization that some provision had to be made to cushion financial impact of new work arrangements

The complainants had joined the European Patent Organisation (EPO) as security officers in 1990 and 1991, respectively. When they had joined, each had been informed that he would receive a flat-rate allowance, known as the "Van Benthem allowance", equal to 34.37 per cent of his basic monthly salary for working "outside normal working hours and on non-working days". It was subsequently decided that, as from 1 January 2006, the work performed by security officers on night shift would be outsourced, the Van Benthem allowance abolished, and new Guidelines would be introduced for shift work. As a result of these directives, the security officers were compensated for shift work, the total being significantly less than the Van Benthem allowances for work performed outside normal working hours, such that their total salary was reduced.

The complainants lodged internal appeals with respect to the decisions to apply the Guidelines to them. The President of the Office accepted the recommendation of the Internal Appeals Committee with respect to the adjustment of the transitional allowance.[41] The complainants impugned that decision before the Tribunal. The main argument advanced by the complainants was that they had an acquired right to work night shifts and, in consequence, to receive payment of the Van Benthem allowance calculated by reference to their basic salary as adjusted from time to time.

The Tribunal recalled its established jurisprudence that an acquired right was breached when "an amendment adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted

[40] Ms. Mary G. Gaudron, President, Mr. Giuseppe Barbagallo and Ms. Dolores M. Hansen, Judges.

[41] The Internal Appeals Committee had recommended that the transitional allowance should be adjusted so that "the sum of the transitional allowance, the monthly basic salary and the standard shift allowance was no less than [their] monthly [. . .] salary on 31 December 2005".

an appointment, or which subsequently induced him or her to stay on".[42] An acquired right might derive "from the terms of appointment, the staff rules or from a decision".[43] In the case of each complainant, a decision had been taken when or shortly after he had joined the EPO that he would be paid the Van Benthem allowance for working "outside normal hours and on non-working days". The fact that that had not been specified in the employment contracts was not determinative of the question of acquired rights.

However, the Tribunal considered that there was a difficulty with the notion that the complainants had an acquired right to work night shifts, because an organization necessarily had a right to assign new or different shift work patterns. That consideration did not apply to an allowance.[44] However, the Tribunal recalled that an official "has no acquired right to the actual amount of the allowance or to continuance of any particular method of reckoning it. Indeed, he must expect these to change as circumstances change".[45] The complainants therefore did not have an acquired right to an immutable allowance calculated at 34.37 per cent of basic monthly salary.

However, it was apparent to the Tribunal that the EPO had at all stages accepted that the complainants were entitled to some transitional allowance that would cushion the effect of an immediate reduction in earnings. Leaving aside any question of legitimate expectation, the EPO must have known that the complainants had entered into financial obligations on the basis of the practice which was long-standing. In a context where there was a continuing need for security work to be performed at night, it had a duty of care to ensure that the new arrangements did not cause financial hardship to them. The only reasonable way the EPO could discharge its duty of care to cushion against financial hardship was to pay by way of allowance the difference between the actual amount of the Van Benthem allowance as at 31 December 2005 and the shift allowance payable in accordance with article 58(2) of the Service Regulations until such time as the shift allowance should equal or exceed the actual amount of the Van Benthem allowance paid on 31 December 2005.

For the above reasons, the Tribunal set aside the impugned decision.

The Tribunal further held that moral damages were unwarranted since the EPO has at all stages accepted that some provision had to be made to cushion the effect of the new work practices.

6. *Judgment No. 2996 (2 February 2011): M. C.B. v. European Molecular Biology Laboratory (EMBL)*[46]

Claims for invalidity pension arising from work-related injuries—Failure to exhaust internal remedies not a procedural bar where organisation is required

---

[42] See *R.M.C.S., M.F.F., M.G.B. and J.L.T.M. v. International Olive Oil Council (IOOC),* Judgment No. 2682 (15 November 2007), paragraph 6 of the considerations.

[43] See *M.M.A., R.H., S.R.C. and B.S.G. v. Pan American Health Organization (PAHO),* Judgment No. 2696 (9 November 2007), paragraph 5 of the considerations.

[44] "An allowance may form an essential part of the official's contract [. . .] and its abolition would therefore constitute breach of [an] acquired right". See *In re Chomentowski (N0.2), Maugain (N0.3) and Niveau de Villedary (N0.3),* Judgment No. 666 (19 June 1985), paragraph 5 of the considerations.

[45] *Ibid.*

[46] Ms. Mary G. Gaudron, President, Mr. Seydou Ba, Vice-President and Mr. Patrick Frydman, Judge.

BY STAFF REGULATIONS TO INFORM OF THE RIGHT OF APPEAL, BUT FAILS TO DO SO—TRIBUNAL CANNOT REPLACE A MEDICAL FINDING OF A BODY WITH ITS OWN ASSESSMENT—TRIBUNAL COMPETENT TO ASCERTAIN WHETHER THE DECISION OF AN INVALIDITY BOARD HAD FOLLOWED DUE PROCESS—MEMBERS OF AN ADVISORY BODY MAY NOT EXAMINE A CASE ON WHICH THEY HAD PREVIOUSLY EXPRESSED A VIEW—NATIONAL LAW OF HOST STATE INAPPLICABLE TO TERMS OF EMPLOYMENT

The complainant had been recruited by the European Molecular Biology Laboratory (EMBL) in 1998. In 2007, she had applied for an invalidity pension on account of the after-effects of some work-related accidents of which she had been the victim. The Invalidity and Rehabilitation Board, having considered in its recommendation of 2008 that the complainant did not satisfy the conditions of entitlement to an invalidity pension, had dismissed her application in 2008. The complainant had then lodged an internal appeal against that decision. On 30 April 2008 the Director-General had decided, in view of the complainant's criticism, to cancel his initial decision and to reconvene the Board, constituted of the same members. The Board had confirmed its recommendation and the Director-General had therefore refused to grant the pension in 2009. The complainant had lodged a request against that decision.

The Tribunal recalled that while it could not replace the medical findings of a body such as an invalidity board with its own assessment, it did have full competence to say whether there had been due process and to examine whether the board's opinion showed any material mistake or inconsistency, overlooked some essential fact or plainly misread the evidence.[47]

The Tribunal did not uphold EMBL's argument that the complainant's application for an invalidity pension ought to be rejected for failure to exhaust internal means of redress as required by article VII, paragraph 1, of the Statute of the Tribunal. While it was recognized that the complainant had not lodged an appeal against the second decision of the Board prior to filing a complaint with the Tribunal, it was pointed out that the Staff Regulation in question specifically envisaged the Director-General informing a person concerned, inter alia, of his/her right of appeal. The Tribunal noted that "[w]hile procedural rules and time limits usually apply to officials of international organisations without it being necessary to recapitulate them when a decision is notified, this is not the case where a rule expressly establishes an obligation to provide this information when notifying a decision, as is the case here". Since such formality had not been respected, the principle of good faith required that an official's complaint would not be deemed irreceivable owing to his or her failure to lodge an internal appeal, if the organisation itself had not abided by the requisite formalities.

In the Tribunal's opinion, one of the complainant's pleas concerning the lawfulness of the proceedings was of decisive importance in the case, namely her plea that when the Invalidity and Rehabilitation Board issued its second recommendation it had been improperly constituted in that it had comprised the same members as those who had already expressed an opinion on the granting of the disputed invalidity pension in 2008. This fact alone had objectively prevented the Board from being able to issue its second

[47] See *In re Fahmy (N0.2),* Judgment No. 1284 (14 July 1993), paragraph 4 of the considerations; *A.T. v. European Patent Organisation (EPO),* Judgment No. 2361 (14 July 2004), paragraph 9 of the considerations.

recommendation with the requisite impartiality, even though its members had subjectively considered that they could again take an unprejudiced decision on the case.

As the Tribunal had found in Judgment Nos. 179[48] and 2671,[49] the rule that members of an advisory body must not examine a case on which they had previously expressed a view applied even in the absence of an express text, since its purpose was to protect officials against arbitrary action. For the aforementioned reasons, the complainant was awarded costs and the case was referred back to EMBL in order that the Director-General take a new decision on the application after consulting the Invalidity and Rehabilitation Board, whose members must be different from those of the previous Board.

The Tribunal also held that the complainant's reliance on the national law of the organization's host State (Germany) was misplaced, since her terms of employment with exclusively governed by the Staff Rules and Regulations of the EMBL.

7. Judgment No. 2966 (2 February 2011): Amaizo v. United Nations Industrial Development Organization (UNIDO)[50]

Receivability of an appeal—If an appeal is time-barred and the internal appeals body was wrong to hear it, the Tribunal will not entertain a complaint challenging the decision taken on a recommendation of that body—Means of notification of a reassignment of post—Notification by e-mail is valid

The complainant impugned the Director-General's decision of November 2008 insofar as it had dismissed his first appeal directed against the decision to reassign him to Bangkok. The complainant disputed the validity of the notification of his reassignment, having been notified by means of an e-mail dated 16 August 2007. The organization argued that the complaint was irreceivable under article VII, paragraph 1, of the Statute of the Tribunal, as well as for the reason that his internal appeal had been out of time.

The complainant contended that e-mails were of no legal value unless they were accompanied by an official document serving as an acknowledgement of receipt. In addition, he stated that he had had no access to the Internet between 16 and 27 August 2007, while on mission in Africa, and could not therefore have consulted his e-mail. He indicated that it was only on 28 August 2007, upon his return from mission, that he had become aware of the memorandum of 15 August 2007.

The Tribunal deemed notification by e-mail to be valid.[51] However, it could not accept the complainant's assertions because it was clear from the submissions that, during his mission, the complainant had stayed in hotels with Internet access and that, in those circumstances, it was improbable that an international civil servant of his level could

---

[48] See *In re Varnet,* Judgment No. 179 (8 November 1971). The Tribunal had held that members of a body advising the executive authority of an international organization could not participate in deliberations and were therefore bound to withdraw if they had "already expressed their views on the issue in such a way as to cast doubt on their impartiality". See *In re Varnet,* Judgment No. 179 (8 November 1971).

[49] See *C.R.F. v. European Patent Organisation (EPO),* Judgment No. 2671 (5 November 2007).

[50] Mr. Seydou Ba, Vice-President, Mr. Claude Rouiller and Mr. Patrick Frydman, Judges.

[51] See *C.C.R.J.D v. International Criminal Court (ICC),* Judgment No. 2677 (2 November 2007), paragraph 2 of the considerations; and *W.A. v. European Patent Organisation (EPO),* Judgment No. 2947 (28 April 2010), paragraph 12 of the considerations.

have spent days without consulting his e-mail. Furthermore, his allegations were contradicted by evidence in the file showing that he had accessed his official e-mail account on 20 August 2007.

The Tribunal concluded from the foregoing that the complainant had plainly learned of the decision of 15 August 2007 on 20 August 2007 at the latest. Notification of this decision was thus regarded as having taken place on 20 August 2007 and the 60-day period stipulated by the relevant provision of the Staff Rules was therefore computed from that date. The internal appeal had therefore been lodged out of time. The Tribunal's case law established that, if an appeal was time-barred and the internal appeals body was wrong to hear it, the Tribunal would not entertain a complaint challenging the decision taken on a recommendation of that body.[52] It followed that the complaint was declared irreceivable.

8. *Judgment No. 3012 (6 July 2011): Toa Ba v. World Health Organization (WHO)*[53]

Receivability of an appeal—Time limits in procedural rules—Requirement to exhaust all internal means of redress—Duty of care to indicate means of redress and time limits clearly in relation to a decision

Following a lengthy procedure dating from 2001 aimed at determining the complainant's claim for medical compensation, the complainant challenged before the Tribunal the decision of the Director-General of the World Health Organization (WHO) to reject his request that the Organization recognise a causal link between his illness and his official duties. The WHO maintained that the complaint was irreceivable for failure to exhaust all means of redress within the meaning of article VII, paragraph 1, of the Statute of the Tribunal.

The Tribunal recalled that, according to its case law, a complaint could not be receivable unless the decision impugned was a final decision and the person concerned had exhausted such other means of resisting it as were open to him. The only exceptions allowed to that requirement were cases where staff regulations absolved the complainant from initiating a prior internal appeal procedure, where there was an inordinate and inexcusable delay in the internal appeal procedure, where for specific reasons connected with the personal status of the complainant he or she did not have access to the internal appeal body or, lastly, where the parties had mutually agreed to forgo the requirement that internal means of redress must be exhausted.[54] In the present case, the complainant challenged the Director-General's decision directly before the Tribunal, without first having had recourse to the Headquarters Board of Appeal. Since the circumstances did not war-

[52] For example, see *P.A. v. European Patent Organisation (EPO),* Judgment No. 775 (12 December 1986, paragraph 1 of the considerations; and *C.F. v. United Nations Educational, Scientific and Cultural Organization (UNESCO),* Judgment No. 2297 (7 November 2003) paragraph 13 of the considerations.

[53] Mr. Seydou Ba, Vice-President, Mr. Claude Rouiller and Mr. Patrick Frydman, Judges.

[54] For example, see *R.a.m.A. and Y.R.G. v. European Organization for Nuclear Research (CERN),* Judgment No. 1491 (1 February 1996); *J.M.B. v. Organisation for the Prohibition of Chemical Weapons (OPCW),* Judgment No. 2232 of 15 May 2003; *T.K. v. European Patent Organisation (EPO),* Judgment No. 2243 (5 May 2005); *A.F.H. v. United Nations Industrial Development Organization (UNIDO),* Judgment No. 2511 (3 November 2005); and *B.E.C. v. International Federation of Red Cross and Red Crescent Societies,* Judgment No. 2912 (7 May 2010).

rant a derogation from the rule governing the exhaustion of internal means of redress, it followed that the complaint was not receivable.

However, the Tribunal observed that the decision of the Director-General had failed to mention the means of redress and the relevant time limits. It was true that, in the absence of any statutory provision requiring such a reference, that omission would not ordinarily, according to the established jurisprudence of the Tribunal, constitute a flaw warranting restoration of the time limit. However, in the very specific circumstances of the case, given the complexity of the applicable rules of procedure, the duration of the procedure and the complainant's serious disability, the Organization's duty of care required it to indicate those means of redress and time limits clearly in its decision. The Tribunal therefore accorded the complainant a new time limit to appeal to the Headquarters Board of Appeal, starting from the date on which he was notified of the present judgment.

9. Judgment No. 3009 (6 July 2011): Hoening (no. 3) v. Universal Postal Union (UPU)[55]

Request for home leave—The fact of marriage to foreign national or adoption of foreign nationals sufficient for entitlement to home leave in one of those countries only if staff member maintained normal residence there for a prolonged period preceding appointment—Right to be heard—Purely internal documents do not, in principle, have to be communicated to the staff member

The complainant challenged before the Tribunal a decision of the Director-General of the Universal Postal Union (UPU) to reject a request for home leave in the country of his choice. By Judgment No. 2389, the Tribunal had dismissed his complaint because he had not lived in Germany, the country to which he claimed as his home, since his early childhood. Having married a French national in 1992, the complainant subsequently acquired French nationality through a declaration made on 19 March 2008. He and his wife had adopted three children of Indian origin. On 30 May 2008, the complainant submitted a new request for home leave in France, or in India, or in Germany, based on a passage in Judgment No. 2389 indicating that the home country was not necessarily that of a staff member's nationality, but could be the country in which the staff member had the closest connection outside the country where he was employed, for example the country of origin of his spouse, or that of children whom he had adopted or taken in but who he believed should keep up their connections with their native environment. Upon the recommendation of the Joint Appeals Committee, the Director-General announced that he was maintaining his previous decision to reject the request for home leave.

The complainant accused the defendant of having concealed documents which he needed for his defence before the Tribunal, namely an initial version of the report of the

[55] Mr. Seydou Ba, Vice-President, Mr. Claude Rouiller and Mr. Patrick Frydman, Judges.

Joint Appeals Committee.[56] This grievance, as framed by the complainant, concerned a violation of the right to be heard, and therefore of the right of the parties to be made aware of and to consult relevant documents in the case file.[57] The Tribunal considered that there was no rule requiring the defendant to notify the complainant of the Committee's first report, which did not contain the reasons for the impugned decision. It maintained that documents which related to the manner in which members of the Committee had reached their conclusion were purely internal and did not, in principle, have to be communicated to the staff member concerned. The Tribunal therefore concluded that the complainant's exercise of his rights of defence had not been hampered in any way, contrary to his assertions, and that the grievance that relevant documents had been unduly withheld, so violating his right to be heard, was unfounded.

With regard to the substance the request for home leave, the Tribunal recalled its established jurisprudence on the matter and emphasized that the complainant was required to show that he had maintained his normal residence in the requested country for a prolonged period preceding his appointment, and that there had to be close and continuing ties between him and that country, sufficient to give him the right to take home leave there.[58] The Tribunal therefore concluded that the fact that he had married a French national and had adopted Indian children was not sufficient for him to be entitled to home leave in France or in India. The complainant would also have had to have had his normal residence, for a prolonged period preceding his appointment, in one or other of those countries, which was not the case. The Tribunal therefore dismissed the complaint.

[56] The Tribunal noted that the report on which the impugned decision had been based had been drawn up in a somewhat unusual manner. In effect, the Joint Appeals Committee had submitted an initial report to the Director-General concluding that he "could authorise the complainant to take home leave in a country other than his country of nationality" given that "his request for home leave in France or in India could be regarded as a new element". The Director-General had taken the view that there was a contradiction in the report between the reasoning and the conclusions and that he therefore could not take an informed decision, and he had invited the Committee to clarify it. The Committee had then discussed the matter anew and had reviewed its initial report. In its recommendation, it had taken the view that its initial opinion should be altered to the disadvantage of the complainant.

[57] See *M.T.V. v. United Nations Educational, Scientific and Cultural Organization (UNESCO),* Judgment No. 2927 (8 July 2010), paragraph 11 of the considerations.

[58] See *B.H. v. Universal Postal Union,* Judgment No. 2389 (18 November 2004), paragraph 7 of the considerations.

D. Decisions of the World Bank Administrative Tribunal[59]

1. *Decision No. 448 (25 May 2011): JYK (No. 1 and No. 2) v. International Bank for Reconstruction and Development*[60]

Termination of employment on grounds of misconduct—Jurisdictional objection—Staff rule 8.01—Due process in misconduct investigations—Jurisdiction of peer review service in accordance with staff rule 9.03, paragraph 6.04(d)—Scope and standard of review of investigative proceedings—Scope of review of disciplinary sanctions—Proportionality of sanctions—Rescission of disciplinary measures

The Applicant challenged the decision of the Bank to terminate his employment contract. On 29 October 2008, the Applicant was interviewed by the Department of Institutional Integrity (INT) in connection with the unauthorized disclosure of confidential and non-public documents of the Bank's Board of Directors to a journalist who published two articles dated 10 October 2008 and 31 January 2007, on FoxNews.com. The Applicant admitted that he disclosed information contained in the 31 January 2007 article but denied involvement with the 10 October 2008 article. On 10 July 2009, INT issued its final report to the Vice President of Human Resources (HRSVP). The investigation determined that there was reasonably sufficient evidence, including the Applicant's admission, that he provided the confidential and non-public documents hyperlinked in the article of 31 January 2007. While there was significant circumstantial evidence to support the allegations that the Applicant was also the source for the confidential and non-public documents hyperlinked in the article of 10 October 2008, the totality of the evidence was insufficient to substantiate or refute those allegations.

HRSVP concluded that there was sufficient evidence of misconduct in relation to the 31 January 2007 article, and informed the Applicant of the decision to terminate his employment with effect from 9 January 2010. The Applicant challenged HRSVP's decision before the Peer Review Service (PRS). By letter dated 2 March 2010, PRS informed the Applicant that pursuant to staff rule 9.03, paragraph 6.04(d), it lacked authority to review "actions, inactions, or decisions taken in connection with staff member misconduct investigations." On 1 June 2010, the Applicant challenged the Bank's decision to terminate his employment before the Administrative Tribunal, and filed a second application on 28 July 2010 challenging PRS' decision on its jurisdiction.

---

[59] 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, the Multilateral Investment Guarantee Agency and the International Centre for the Settlement of Investment Disputes (collectively "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 full texts of its decisions, see http://www.worldbank.org/tribunal.

[60] Stephen M. Schwebel, President, Florentino P. Feliciano, Vice-President, Mónica Pinto, Vice-President, and Judges Zia Mody, Francis M. Ssekandi, and Ahmed El-Kosheri.

The Tribunal recalled the standards set in its precedents regarding the review of disciplinary cases, particularly *Koudogbo*, Decision No. 246 [2001], and noted that its scope of review in disciplinary cases was not limited to determining an abuse of discretion, but involved an examination of: (i) the existence of the facts; (ii) whether they legally amounted to misconduct; (iii) whether the sanction imposed was provided for in the law of the Bank; (iv) whether the sanction was not significantly disproportionate to the offence; and (v) whether the requirements of due process were observed.

On the existence of the facts, the Tribunal noted that in leaking extracts of deliberations of the Bank's Board, which were characterized as confidential information under paragraph 83 of the 2002 Policy on Disclosure of Information, the Applicant's actions legally amounted to misconduct in violation staff rule 3.01, paragraph 5.01, and principle 3.1 of the Principles of Employment. As the Tribunal was unable to discern from the content of the documents anything that reasonably demonstrated misconduct, the Tribunal could not find any legitimate justification for the disclosure which would have afforded the Applicant protection as a whistleblower. The Applicant's claims that he was a whistleblower therefore failed.

In considering whether the sanctions imposed against the Applicant were disproportionate to the gravity of his actions, the Tribunal recalled its decision in *Gregario*, Decision No. 14 [1983], in which it noted that "there must be some reasonable relationship between the staff member's delinquency and the severity of the discipline imposed by the Bank." The Tribunal observed that though the Applicant may have been unaware of the confidential nature of the documents he leaked, the Staff Rule in question provided that misconduct did not require malice or guilty purpose. Additionally, the fact that other members of staff may have been involved in disseminating the documents around the Bank did not relieve the Applicant of his own obligation to keep such information confidential. Nevertheless, the Tribunal held that the Applicant's actions had to be assessed in the context of the extraordinary circumstances at the time, and noted the Bank's failure to adopt an even-handed approach in its investigation of the source of the leaks. As a result, despite finding that HRSVP's decision to impose sanctions upon the Applicant was not unjust, the decision to terminate the Applicant's employment was deemed disproportionate in light of the prevailing circumstances at the time.

The Tribunal then addressed the Applicant's claims of denial of due process, finding first that INT complied with the Staff Rules then in force regarding the timing and type of notice provided to the Applicant. The Tribunal considered that the Applicant received a fair opportunity to provide his responses to the allegations, and the record demonstrated that the Applicant's responses were considered by HRSVP before he rendered his decision. Additionally, the Tribunal found that INT secured the necessary authorization to conduct a search of the Applicant's computer files and electronic messages as it bore a reasonable suspicion that the Applicant engaged in misconduct. However, the Tribunal held that the Bank's search methods of the Applicant's Bank-owned computer were unduly expansive and failed to respect the careful balance between the Bank's interest in electronic files as an employer and property owner and the staff member's interest in a reasonable measure of privacy as was established in D, Decision No. 304 [2003]. Furthermore, while the Tribunal was satisfied that the Applicant had had the opportunity to question the basis of INT's authority to search his computer, it observed that the Bank should have provided the Applicant with proof of the authorization to search his computer when initially requested.

The Tribunal noted that there was no justifiable reason for requiring staff members to pursue their grievance as far as the Tribunal in furnishing the Applicant with a copy of the authorization. The Applicant also challenged the restrictions on his ability to reproduce or electronically copy the INT Final Report; however, the Tribunal was unconvinced that those restrictions denied the Applicant the opportunity to defend himself effectively. Lastly, the Tribunal rejected the Applicant's claim that he was deprived of an opportunity to respond to new allegations raised in HRSVP's letter of 23 December 2009 as the letter merely recited the applicable standards and related factors, of which the Applicant had been notified in the Notice of Alleged Misconduct.

Concluding its findings, the Tribunal observed that the Applicant committed a serious breach of the Staff Rules by leaking confidential information and had to be held accountable. Nevertheless, the Tribunal considered the circumstances in which the Applicant committed the misconduct and observed that though confidential information was being leaked at all levels of the Bank, investigations were not undertaken during that time into other such leaks. In particular, the Tribunal found that INT had contented itself with pursuing the Applicant and did not undertake investigations into the initial source of the leaked information. Under those circumstances, the Tribunal concluded that termination of employment, the most severe sanction available to HRSVP, was a disproportionate sanction. The Bank was ordered to reinstate the Applicant as a staff member with effect from the date of the judgment but was entitled to impose an alternative disciplinary measure from the list set out in staff rule 8.01, paragraph 3.03.

2. *Decision No. 455 (25 May 2011): BP v. International Bank for Reconstruction and Development*[61]

Termination of service—Mandatory disciplinary measure for conviction of felonious criminal offence according to staff rule 3.00, paragraph 10.09—Due process in Office of Ethics and Business Conduct (EBC) review of misconduct allegations—Failure to conduct a fact finding causing prejudice to the applicant—Right of tribunal to review discretionary decisions—Factors in the exercise of discretion—Proportionality of measures—Extenuating circumstances

The Applicant challenged the Bank's decision to terminate her employment after she pleaded guilty to two felony counts of making false statements to the Federal Bureau of Investigation (FBI), an enforcement arm of the U.S. Department of Justice. The Applicant had been investigated by the FBI in relation to allegations of human trafficking and abuse of her domestic employee (a G-5 visa holder). She was however, never indicted of any crime; rather the FBI offered her the possibility to plead guilty without indictment to two counts for having made false statements to the FBI in the course of its investigation. Following her guilty pleas, she was placed on administrative leave and subsequently received a Notice of Misconduct which referred to the pleas and to the review conducted by the Office of Ethics and Business Conduct (EBC) under staff rule 3.00 (sections 8, 9 and 10). Contrary to the procedure noted in the Notice, the Applicant was later informed she would not be interviewed. In addition she was provided with a post-dated draft "Summary Case Report" which recommended a finding of misconduct by reason of her guilty pleas, adding that the

[61] Florentino P. Feliciano, Vice-President as President, Monica Pinto, Vice-President, and Judges Jan Paulsson and Zia Mody.

false statements had been made "in connection with a U.S. Government investigation into allegations of human trafficking and abuse of [her] G-5 Visa holder domestic employee." Following her complaint that she had not been given the opportunity to present her case, the Applicant was interviewed by EBC. However, she was informed that it was a courtesy interview and stated that "[t]here wasn't anything to look at either way, either mitigating or aggravating . . . once there has been a felony conviction there is really honestly nothing to fact-find other than the documents from the court . . . any extenuating circumstances outside of that would be outside of our scope".

In considering the merits, the Tribunal expressed fundamental concern with the Bank's position on two separate features of the case. The first was procedural, related to the duty to pay due attention to an individual staff member's personal circumstances prior to exercising discretion. The second was substantive and concerned disciplinary matters which involve a broader standard than "abuse of discretion" and specifically justify the Tribunal's need to appraise the proportionality of sanctions. Recalling *S*, Decision No. 373 [2007], the Tribunal held that the review of sanction decisions "will take into account factors such as the seriousness of the matter, any extenuating circumstances, the situation of the staff member, the interests of the Bank Group, and the frequency of conduct for which disciplinary measures may be imposed." According to the Tribunal, those factors were to have guided the Vice President of Human Resources (HRSVP) in the exercise of his discretion.

The Tribunal addressed due process and considered that EBC did not exhaust its mandate under the Staff Rule. The Tribunal noted that Staff Rule 3.00 required EBC to review and assist in the resolution of allegations of misconduct under paragraph 6.01(d), and that no exceptions were made for conviction of felonious criminal acts. In that regard, the Tribunal considered that there was no warrant for a merely "limited" review in a case of misconduct consisting of a felony conviction. The EBC was under an obligation by virtue of paragraph 10.01 to conduct "a fact finding to determine further information regarding the substance and circumstances of the matter". The Applicant had been informed by the Notice of Misconduct that EBC had determined, after conducting an "initial review," that further review would be appropriate in her case, that "fact finding" would take place and that all steps constituting this further review under the Staff Rule would follow. The Applicant was therefore entitled to expect that fact finding would be carried out which could unearth "information regarding the substance and circumstances of the matter" underlying the technical legal nature of the "felony" and thus any mitigating factors.

The Tribunal found that the steps indicated in the Notice of Misconduct were either not followed at all or not followed in the order required by the Staff Rule. Additionally, no facts underlying the circumstance and substance of the matter were presented in the body of the EBC report. The Tribunal noted that simply attaching documents without presenting and justifying conclusions drawn from them, or recording the summary findings of a court judgment without any investigation of the facts surrounding its circumstances, while nevertheless alluding to them in the conclusion without any explanation, led to an incomplete presentation of findings likely to result, in turn, in an erroneous review of the factors to be properly taken into account.

On the question of the proportionality of the disciplinary measures adopted by HRSVP, the Tribunal emphasized that while it had no mandate to assume the exercise

of HRSVP's disciplinary discretion, it was nevertheless required to assess the exercise of that discretion. To that end, the Tribunal observed that the Applicant's alleged misconduct concerned two false statements made to FBI investigators, namely, misrepresenting the nature of a financial transaction with a domestic employee, and denying that she had threatened the same employee. The Tribunal took note of the concession by the Bank's Lead Human Resources Specialist (HRSCO) that there might be types of "felonies" which, while unquestionably within the reach of staff rule 3.00, paragraph 10.09 and thus constituting misconduct sanctionable by dismissal, would, as a matter of official discretion, not necessarily lead to the drastic consequence of termination of employment. In addition, the Tribunal observed the similarity of the present case to *O'Humay* Decision No. 140 [1994] and noted the disparity in the disciplinary sanctions adopted by the Bank.[62]

Following an assessment of the Applicant's account of the circumstances of the case, the Tribunal held that what mattered was not so much the ultimate accuracy of her detailed account, but the plausibility thereof and the light that it would shed on the circumstances of her misconduct. The Tribunal opined that the critical question was how HRSVP conducted his evaluation of factors pertaining to extenuating circumstances as to proportionality. In addition, the Tribunal enquired what HRSVP might have made of the Applicant's circumstances had he properly addressed them as a matter of sanctioning discretion, particularly as to extenuating circumstances and seriousness of the case of the felony. The Tribunal took note of the HRSCO's statement that the refusal of the HRSVP to exercise discretion in the Applicant's favour was based on the context of her guilty plea rather than on the simple fact of falsity of particular statements to the FBI. However, the Tribunal held that if the word "context" was to have substance, it had to refer to more than making a single connection to the fact that the occasion of the falsehood was an inquiry into a matter which was sensitive for the Bank. "Context" required an appraisal of the materiality of the falsehood in light of broader circumstances, and a sense of proportionality consonant with the Bank's own precedents.

Considering all the circumstances, the Tribunal ruled that HRSVP's decision to terminate the Applicant's employment was a disproportionately grievous sanction *vis-à-vis* the misrepresentations made by the Applicant. The Tribunal criticized the decision as the exercise of sheer authority rather than a reasoned act of discretion, and emphasized that discretion required a sincere evaluation of relevant elements, principally extenuating circumstances and proportionality in that case. According to the Tribunal, a mere declaration that such elements had been considered would not suffice. The Tribunal concluded that the desire to show severity with respect to abuse of G-5 employees in the Bank's own "reputational" interest was no excuse for failing to accord due process in the individual case. For those reasons, the Bank's decision to terminate the Applicant's employment was rescinded, and the Tribunal ordered her reinstatement to the same position or a position similar to the one occupied at the time her employment was terminated. In addition, the Bank was ordered to pay the Applicant compensation in the amount of one year's salary net of taxes and to contribute to her costs.

[62] See *Safari O'Humay v. International Bank for Reconstruction and Development*, Decision No. 140 (14 October 1994). The Bank had applied alternative disciplinary sanctions for similar acts of misconduct.

3. *Decision No. 460 (11 October 2011): DMK v. International Bank for Reconstruction and Development*[63]

Benefits on ending employment—Reasonable interpretation of staff rule 7.02—Claim of unfair and unequitable treatment during relocation—Non-duplication of resettlement benefits provided by subsequent employer—Non-retroactive application of new rules

The Applicant retired from the Bank as a Manager (level GH) and prior to his resignation accepted a two-year fixed term appointment as Director, Office of Internal Audit with the United Nations Children's Fund (UNICEF). Upon formally informing the Bank's Human Resources Unit (HR) of his retirement, the Applicant received a 13 page memorandum entitled "Information/Benefits Upon Ending Employment". Paragraph 31 of the memorandum stated that the Bank Group would pay a resettlement grant of $5,000 for a staff member resettling without dependent children, and $7,000 for a staff member resettling with dependent children. Paragraph 32 stated: "Consistent with industry practice, the Bank Group will not provide resettlement benefits to the extent that they duplicate benefits provided by your next employer . . ." The Applicant elected to receive the Shipment of Household Goods and Personal Effects benefit from the Bank, and the Lump Sum Option for Travel and the Assignment Grant benefits from UNICEF. Following his retirement, the Applicant was informed on 29 July 2010 that he was neither eligible for the Bank's Resettlement Grant, as this was duplicated by the daily subsistence allowance (DSA) that he would receive from UNICEF, nor the Bank's Excess Baggage Grant, as this was included in the Lump Sum Travel benefit paid to him by UNICEF.

The Applicant challenged the HR Officer's decision and ultimately requested the assistance of the Ombudsman in resolving the dispute regarding the Resettlement Grant and the Excess Baggage Grant. On 7 September 2010, the Applicant filed a Request for Review with the Peer Review Service (PRS) challenging the administrative decision not to pay him the Resettlement Grant and the Excess Baggage Grant. The latter claim was not reviewed by PRS as the Applicant verified on 30 September 2010 that the Bank had deposited the sum into his bank account. PRS found in the Applicant's favour and recommended that the Human Resources Service Center (HRSSC) perform another review of the Applicant's case based on the plain meaning of staff rule 7.02, paragraphs 3.04 and 10.05. It also recommended that the Applicant should be paid a portion of the Resettlement Grant in an amount that was equitable to him to cover the costs for "preparations during a move to" his place of resettlement. The Vice President of Human Resources (HRSVP) advised the Applicant by letter dated 24 January 2011 of his decision not to accept the recommendation of PRS. It was that decision which was impugned before the Tribunal.

The Tribunal conducted an examination of the written record as well as the benefits to which the Applicant was entitled under both grants to address the question of whether the Bank correctly interpreted and applied staff rule 7.02 and all other applicable rules in the Applicant's case when it denied him the Resettlement Grant. The Tribunal observed that pursuant to staff rule 7.02, paragraph 3.04, a Resettlement Grant was provided by the Bank to "help defray costs associated with preparations during a move to and settling-in

[63] Stephen M. Schwebel, President, Florentino P. Feliciano, Vice-President, Mónica Pinto, Vice-President, and Judges Francis M. Ssekandi and Ahmed El-Kosheri.

at the place of resettlement, including the cost of transporting pets." With respect to the United Nations Assignment Grant, following a review of the United Nations Administrative Instruction and the International Civil Service Commission (ICSC) February 2009 and August 2010 booklets, the Tribunal found that it essentially covered the same types of costs as the Bank's Resettlement Grant. In particular, the February 2009 booklet described the intention of the Assignment Grant as providing staff "with a reasonable cash amount at the beginning of the assignment for the costs incurred as a result of appointment or reassignment. Its purpose is to enable staff to meet removal/installation related costs . . . and is based on the assumption that the main expenses of installation are incurred at the outset of an assignment." The Tribunal concluded that a textual, as well as purposive, interpretation of the Bank's Staff Rule and the relevant United Nations documents left no doubt that the Assignment Grant and Resettlement Grant covered the same costs associated with "settling in" or "taking up residence" at the place of relocation. The Tribunal found that the Bank, in comparing the two sets of benefits, had reasonably interpreted the relevant documents and denied the award of the Bank's Resettlement Grant as it would duplicate the Assignment Grant from UNICEF.

Regarding the retroactive application of the rules contained in the August 2010 ICSC booklet, the Tribunal recalled its decision in *Naab*, Decision No. 173 [1997], in which it held that prohibited retroactivity involved the application of a new rule to legal rights and situations operative, begun and consummated prior to the coming into force of the new rule. The Tribunal found that the definition and purpose of the Assignment Grant had always been the same since 2000 and agreed with the Bank that the August 2010 booklet did not introduce any amendments, but rather explained the purpose of the Assignment Grant. The Tribunal therefore held that the Bank did not apply a new rule to the Applicant's case retroactively.

Finally, the Tribunal addressed the Applicant's complaint about the treatment of his case by HRSSC. The Tribunal observed that as the Applicant chose to receive from UNICEF two of the three benefits related to his relocation and one from the Bank, the possibility of misunderstanding regarding the particular costs that each benefit covered was understandable. However, the Tribunal found that any confusion was quickly dispelled and the Applicant was informed of the type of benefits he would receive from the Bank. Furthermore, the Tribunal found of no particular significance the fact that the Bank initially equated the Resettlement Grant with part of the Assignment Grant and a month later equated the Resettlement Grant with the entire Assignment Grant. What mattered was that the Applicant was notified at all times that he was not entitled to a Resettlement Grant from the Bank. The Tribunal opined that the Applicant failed to demonstrate that he suffered compensable injury in this regard. The Applicant had found himself in a highly favourable financial position during his relocation since he was in a position to select which of the benefits offered by both organizations were most beneficial to him. As a result, the Tribunal found that any claim of unfair and inequitable treatment of the Applicant by the Bank during his relocation was not sustainable. The Tribunal held that there was no violation of the Applicant's contract of employment or terms of appointment and dismissed the Applicant's claims.

F. Decisions of the Administrative Tribunal of the International Monetary Fund[64]

1. *Judgment No. 2011–1 (16 March 2011): Ms. C. O'Connor (No. 2), Applicant v. International Monetary Fund (IMF), Respondent*[65]

Jurisdiction of the Administrative Tribunal—Admissibility pursuant to article V of the Statute of the Tribunal—Jurisdiction of the IMF's Grievance Committee—The IMF's Managerial and policy discretion cannot limit the jurisdiction of the Tribunal—Standard of review of position reclassification decisions—Governing procedures for job audit—Administrative review of a position reclassifciation decision within IMF—Abuse of discretion in reclassification decisions—Right to challenge job reclassification decisions before the Tribunal—Discrimination in the workplace—"Continuing harm"—Good faith

The Applicant contested the decision of the International Monetary (IMF or "the Fund") to reclassify her position from Senior Administrative Assistant (Secretary, Division) at Grade A7 to Senior Administrative Assistant (Office Services) at Grade A8. The principal issue raised by the Applicant is whether the IMF abused its discretion in reclassifying her position. Following the Applicant's request for administrative review, the Fund's Grievance Committee dismissed the majority of the Applicant's claims for lack of jurisdiction and concluded that the Applicant had not established any corruption or lack of integrity in the job audit process. On 23 August 2010, the Applicant filed an application with the Administrative Tribunal.

The Tribunal addressed, as a threshold matter, the Fund's challenge to the admissibility of the application on the basis of a Fund rule that expressly precludes a challenge to a job reclassification decision by the incumbent staff member. The Tribunal rejected this argument, concluding that the Fund's managerial and policy discretion does not extend to setting limits on the jurisdiction of the Administrative Tribunal as granted by its Statute. To permit the IMF, through the issuance of a human resources directive to carve out exceptions to the Tribunal's jurisdiction would be contrary to the intent and to the text of the jurisdictional provisions of the Statute.

Citing the Commentary on the Statute of the Tribunal, article II, section 1.a, the Tribunal held that Applicant's challenge to the position reclassification decision was one that fell within the scope of the Tribunal's jurisdiction, which, by its terms, is designed to afford recourse to a "member of the staff challenging the legality of an administrative act adversely affecting him." Additionally, the Tribunal invited the Fund to reconsider its

[64] The Administrative Tribunal of the International Monetary Fund became operational on 1 January 1994. The Tribunal is competent to pass judgment upon any application: a) by a member of the staff challenging the legality of an administrative act adversely affecting him; or b) by an enrollee in, or beneficiary under, any retirement or other benefit plan maintained by the Fund as employer challenging the legality of an administrative act concerning or arising under any such plan which adversely affects the applicant. For more information on the Administrative Tribunal of the International Monetary Fund and the full texts of its judgments, see http://www.imf.org/external/imfat/index.htm (accessed on 31 December 2011).

[65] Catherine M. O'Regan, President, Nisuke Ando and Michel Gentot, Judges.

internal law in light of the Tribunal's conclusion that the Applicant has standing to contest the position reclassification decision.

Turning to the merits of the Application, the Tribunal first considered whether the job reclassification decision was taken consistently with the Fund's internal law and with fair and reasonable procedures. The Applicant contended that: (a) the job auditors in the Compensation and Benefits Policy Division (CBD) of the Human Resources Department did not meet the qualifications set by the Fund for undertaking such assignment; (b) CBD was unduly influenced by or improperly "took the direction of" Applicant's Department; (c) CBD improperly took account of a 2005 audit of the position in carrying out the job audit of 2007; and (d) the job auditors improperly failed to contact persons mentioned by the Applicant in the Position Description Questionnaire (PDQ) with whom she stated she had interacted in relation to her work responsibilities.

The Tribunal examined each of these allegations, concluding, based upon the evidence in the record, that the Applicant had failed to meet her burden of showing that the contested decision had been carried out inconsistently with Fund rules or fair procedures. In the view of the Tribunal, it was clear that the CBD staff members who performed the job audit met the qualifications for that assignment. As to Applicant's contention that her Department improperly influenced the outcome of the decision, the Tribunal observed that the governing rules provide that CBD first undertake an audit and then circulate a draft report to the requesting Department. "This process of responsive communication is precisely what the [Fund's] policy contemplates and, in the view of the Tribunal, cannot be interpreted as improper influence." The Tribunal also rejected Applicant's claim that the 2007 position reclassification decision had been improperly affected by a 2005 job audit, finding that those who performed the 2007 audit reached their decision on different facts and independently of the 2005 job audit." As to Applicant's complaint that the job auditors failed to consult with all of the persons mentioned in the PDQ, the Tribunal concluded: "Discretion lies with the human resources professionals to determine which persons are relevant to substantiating the responsibilities carried out in the position under review. These decisions are a matter of expertise."

The Tribunal next examined whether the reclassification decision was based on an error fact or law. The Applicant asserted that the outcome of the job audit did not represent a proper classification and grading decision based upon the content, functions, and responsibilities of the position but rather, a way to simply promote her. The Tribunal observed that the right of a staff member to be properly graded and classified encompasses not only an accurate description of the level of responsibilities discharged by the staff member but also of the essential nature of those responsibilities. Decisions of this nature are generally beyond the expertise of the Tribunal. However, in light of all the evidence, the Tribunal found that there is no basis on which to sustain the Applicant's claim: "The decision was a reasonable one, taken after the consideration of relevant evidence. In the circumstances, the Tribunal will not second-guess the judgment of CBD in performing the job reclassification exercise."

The Tribunal additionally considered whether, as alleged by the Applicant, the reclassification decision was affected by racial discrimination or bad faith by her departmental managers. In the view of the Tribunal, the record indicated, to the contrary; that the Applicant's immediate supervisor and the Senior Personnel Manager (SPM) of her department

were supportive of her attaining a higher job grade. Furthermore, the Tribunal observed that the allegation of discriminatory animus was based principally on the Applicant's Annual Performance Reviews (APRs) and Merit-to-Allocation Ratios (MARs), that had allegedly improperly influenced the outcome of the job audit, and the Applicant's theory that management at the time was intent on changing the racial profile of the department The record reflected that CBD had access only to the "job content" section of the APR (a section prepared by the staff member herself) and not to her performance or MAR ratings. In the view of the Tribunal, the Applicant failed to establish a nexus between her allegation of discrimination and the decision of CBD.

The Tribunal also concluded that several additional claims advanced by Applicant were inadmissible for failure to exhaust channels of administrative review. These included an allegation of retaliation for contesting the position reclassification decision through the Fund's dispute resolution system and challenges to her earlier performance ratings and 2005 job audit.

As to Applicant's claim of continuing discrimination, a hostile work environment and career mismanagement, the Tribunal stated that it was willing to assume its admissibility without formally deciding the question of admissibility. The Tribunal concluded that there was nothing on the record that established a pattern of discrimination or the creation of a hostile work environment. The Applicant therefore did not succeed on those claims. In addition, as it had concluded that Applicant's case in relation to the 2007 job reclassification decision must fail, the Tribunal held that "[t]he consequence of that conclusion is that the basis of the Applicant's claim of career mismanagement also falls away." The Tribunal concluded that the Applicant appears to have genuinely felt that she had experienced discrimination; however there was no suggestion that the Applicant had pursued any remedy for the alleged discrimination until she challenged the 2007 position reclassification decision. The Tribunal therefore emphasized that staff share responsibility with the Fund in ensuring a workplace that is free from discrimination.

In conclusion, The Applicant succeeded in asserting her right to challenge the job reclassification decision in this Tribunal, but she did not meet her burden of showing that the Fund abused its discretion in taking that decision. In the view of the Tribunal, the decision to reclassify was not affected by procedural error. Neither was it based on an error of fact or law, nor motivated by discriminatory animus or improper motive. The decision was a reasonable one, taken after the consideration of relevant evidence, by persons trained to apply the job grading criteria. Accordingly, the Applicant's claim was denied.

2. *Judgment No. 2011–2 (14 November 2011): Ms. D. Pyne, Applicant v. International Monetary Fund (IMF), Respondent*[66]

General Administrative Order (GAO) N0.16, section 12—Voluntary separation benefits "Rule of age 50" Pension—Affirmative obligation to assist staff member to find suitable position in cases of reduction in strength, abolition of position or redundancy—Staff members' own conduct in the reassignment process may deprive them of remedy for IMF's Failure to take proactive steps—Differing employment benefits to different categories of staff—"Rational nexus" Test—Duty to offer reassignment assistance to "Volunteers"—Managerial discretion—Management

[66] Catherine M. O'Regan, President, Michel Gentot and Andrés Rigo Sureda, Judges.

MAY REJECT OR DEVIATE FROM THE GRIEVANCE COMMITTEE'S RECOMMENDATION—AWARD OF COSTS

The Applicant, a former staff member, raised claims arising from her voluntary separation from the Fund under the provision of General Administrative Order (GAO) No. 16 relating to a reduction in force and abolition of positions in her department. The Applicant initiated administrative review, challenging the department's failure to find her a suitable position for reassignment. Following her application to the Grievance Committee, IMF's Management declined to accept the Committee's recommendation that it accept the claim in part and compensate accordingly. On 4 May 2011, the Applicant filed her application with the Administrative Tribunal.

The Applicant's first claim was that the IMF had failed to meet the requirements of GAO No. 16, section 12.02. to assist her in seeking reassignment following the abolition of her position. The Tribunal held that it is the Fund's responsibility in the first instance to ascertain if the staff member desires reassignment assistance. This is so, explained the Tribunal, because the text of section 12.02 makes plain that in cases of reduction in strength, abolition of position or the redesign of a position resulting in a redundancy, the Fund "will" assist the affected staff member in seeking another suitable position to which he may be reassigned. In accordance with the text of the GAO, this obligation does not vary because the staff member has volunteered. At the same time, the Tribunal held that once the Fund has discharged its responsibility to inquire, the staff member must in turn apprise the Fund of her interests and preferences. In the view of the Tribunal, the weight of the evidence suggested that while the Fund failed to inquire about the Applicant's intentions, she herself took little initiative to make known to Fund officials any interest she may have had in reassignment.

The Tribunal concluded that the Fund failed to take the requisite initial step of inquiring about the Applicant's interest in potential reassignment. However, in denying the Applicant relief on her reassignment assistance claim, the Tribunal summarized its conclusions as follows:

> "99. The Tribunal has concluded above that the Fund is obliged by GAO No. 16, Section 12.02, to offer reassignment assistance in cases of abolition of position, including those in which the staff member "volunteers" in a reduction in force, without the staff member's having expressly asked for such assistance. That being said, the Applicant in this case gave unmistakable indications that she was making specific preparations to continue her career elsewhere. It is understandable that, in the circumstances, the Fund did not think to reassign her. Moreover, there is no evidence that any suitable position existed to which Applicant might have been reassigned. On the record before it, the Tribunal is unable to conclude that Applicant made an interest in reassignment known at the relevant time to Fund officials. Although Applicant's neglect to do so may be attributable in part to the Fund's failure to inquire about her preferences, on balance, Applicant's own failure to be "diligent in [her] own interests" (*Jakub*, para. 76) precludes relief in this case."

The Tribunal next considered Applicant's second principal claim, that the Fund improperly failed to extend to her the same enhanced separation benefits option relating to access to a "Rule of Age 50" pension with a bridge to retiree medical benefits as was made available to staff members separating under the 2008 Fund-wide downsizing

exercise.[67] The Applicant had been advised that, consistent with the terms of the "Rule of Age 50," she could qualify for that pension option only if she relinquished her SBF leave. She was further informed that the Medical Benefits Plan (MBF) amendment, which would have bridged her to retiree medical coverage, thereby enabling her to choose the "Rule of Age 50" pension, was not available to her because it was a temporary rule applicable only to those staff separating within the terms of the 2008 Fund-wide downsizing framework.

The Applicant claimed, alternatively, that (a) the Fund had "misapplied" the temporary MBP amendment by failing to consider her separation as being taken "in the context of the current downsizing in FY2009-FY2011" or (b) the amendment itself discriminated against staff members separating outside of the context of the Fund-wide downsizing exercise. The Tribunal considered and rejected both arguments.

Although the Applicant's separation took place close in time to the Fund-wide downsizing, the Tribunal recalled that the Applicant's separation was a result of a reduction in force taken in her section, prior to the Fund-wide downsizing. The MBP amendment had emerged solely from concerns relating to the efficacy of the downsizing incentives. Accordingly, the Tribunal concluded that the Applicant's separation took place within the period FY2009-FY2011, that fact of itself did not bring her separation within the terms of the benefits made available to staff separating under the Fund-wide downsizing.

The Tribunal next examined the question of whether the temporary MBP amendment discriminated impermissibly against other staff members including the Applicant. The Tribunal noted that in a series of Judgments it has sustained the allocation of differing employment benefits to different categories of Fund staff where it has found a "rational nexus" between the purpose of the benefit and the category of staff on which the benefit is conferred. Applying the "rational nexus" test, the Tribunal examined the proffered reasons for the MBP amendment and distinction in benefits and assessed whether its allocation to the category of staff separating within the framework of the 2008 Fund-wide downsizing—but not to staff such as Applicant who separated as the result of an earlier departmental reduction in force—was rationally related to those purposes.

The Tribunal concluded that what was clear from the history of the MBP amendment was that it was aimed at identifying the most appropriate mechanism to provide access to medical coverage to those staff under age 50 who were to separate under the Fund-wide downsizing program. Accordingly, it did not consider the position of the Applicant and other staff members who might have volunteered in other initiatives such as a departmental reduction in force. The Tribunal concluded that the Fund's demonstrated need to persuade staff members to participate in the downsizing program meant that differentiation between those who would participate and those who chose to separate voluntarily under other circumstances was not unjustifiable. In the view of the Tribunal, given that the purpose pursued was legitimate, and that the mechanism selected to achieve that purpose was closely tailored to meet that purpose, the failure to consider the position of staff members not affected by the downsizing program did not constitute an error of law.

[67] To provide incentives to voluntary separation as part of the 2008 Fund-wide downsizing, the Fund implemented a series of revisions to its internal law. These included (i) the "Rule of Age 50" pension option, an amendment with continuing effect, and (ii) a temporary amendment to the Medical Benefits Plan (MBP), which was limited to staff separating under the downsizing.

The Tribunal recognized that the Fund's Executive Board could have chosen to make the MBP amendment available to any staff member whose separation date fell within a specified period rather than limiting its availability to staff separating in the context of the current downsizing in FY2009-FY2011 only. That it did not do so, concluded the Tribunal, was supported by evidence and a weighing of policy considerations. In the view of the Tribunal, the temporary MBP amendment was a reasonable exercise of the Executive Board's policy-making discretion which this Tribunal finds no basis to overturn.

Lastly, the Tribunal considered whether the Fund's Management abused its discretion in declining to accept the recommendation of the Grievance Committee to award the Applicant partial attorney's fees for her representation before that Committee, pursuant to GAO No. 31, rev.4, section 7.04. The Tribunal recognized that the Grievance Committee is advisory to the Fund Management, which takes the final decision. Given that Management gave reasons in this case, which cannot be said to be arbitrary or improperly motivated, the Tribunal was unable to sustain the Applicant's complaint that Management abused its discretion in denying to reimburse her as recommended by the Grievance Committee.

The Tribunal concluded that it was not appropriate to award any costs to the Applicant because she hds not had significant success on the legal submissions made to the Tribunal. Accordingly, the Applicant's claim was denied.