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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

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Chapter V[1]

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

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

1. JUDGEMENT NO. 289 (14 MAY 1982): TALAN *v.* THE SECRETARY-GENERAL OF THE UNITED NATIONS[3]

Request for compensation for damages caused by the delay in the payment of the life insurance benefits—The Applicant sought relief in accordance with article 2, paragraph 2(b) of the statute of the Tribunal—Application of staff rule 206.2—Assessment of the damages sustained by the Applicant as a result of the delay caused by the negligence of the Respondent's services—Argument of the Applicant based on the decline during the delay in the rate of exchange of the United States dollar vis-à-vis *the French franc—Obligation to compensate by the payment of interest for the damage resulting from undue delay in the payment of a sum of money—Claim for compensation for moral damage*

The Applicant, the widow of a former United Nations technical assistance expert, acting on her own behalf and on behalf of her minor children, had requested the Tribunal to order and take measures and decisions to make amends for the substantial financial loss, caused *inter alia* by the decline in the exchange rate of the dollar, and the moral injury suffered by her and her children through misconduct on the part of the administration of the United Nations which resulted in an undue delay in the payment of death benefits under the life insurance taken out by her late husband.

The Tribunal first observed that the Applicant had rightly sought relief before the Tribunal in accordance with article 2, paragraph 2 (*b*), of its statute, which states that the Tribunal shall be open "to any other person who can show that he is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied". The Tribunal observed further that the rights to which the Applicant and her children were entitled derived from the Applicant's husband's participation in the group life insurance plan subscribed to by the United Nations in accordance with staff rule 206.2. Participation in the plan was compulsory for experts in the category to which the Applicant's husband belonged. The application of the rule entailed no financial responsibility for the Respondent, except with regard to the insurance subsidies. However, the Respondent's services, i.e., the Insurance Unit, were directly involved in establishing contact with the insurance company, particularly when insurance benefits were to be paid to the beneficiaries.

With reference to the Applicant's claim for compensation from the Respondent for the injuries caused by the negligence of the Respondent's services, the Tribunal noted that that claim had to do with the contractual obligations which made participation in the group insurance plan compulsory for the Applicant's husband, under staff rule 206.2. It observed, however, that to give a ruling on the claim for compensation necessitated reference to the general principles which were applicable with respect to administrative responsibility.

Having considered the performance of the Respondent's services in the case, the Tribunal noted that negligence on the part of those services had had serious negative implications for the Applicant.

With regard to the Applicant's claim for compensation for the amounts she would have earned if her financial transactions had taken place nine months earlier, the Tribunal found that

the insurance contract had stipulated payment in dollars without any reference to a foreign currency or to the price of gold. The injury alleged by the Applicant had to do with the decisions she had taken with a view to preserving the value of those funds, and whatever favourable or unfavourable consequences might ensue, immediately or in the long run, could not be directly attributed to the conduct of the United Nations. The Tribunal also noted that, when it came to determining the compensation payable for the administration's injurious conduct, claims by the Applicant on the basis of changes in the cost-of-living index could only rest on considerations of equity and not on a legal principle of general application.

The Tribunal was of the view that, when payment of a sum of money was unduly delayed, interest was payable and the payment of interest constituted compensation for the damage resulting from the delay. In the present case, since the delay was attributable to the United Nations, the Organization was responsible for payment of the interest, which should be in United States dollars without regard to the exchange rate against other currencies prevailing on the date on which payment would be made. The Tribunal accordingly decided that the Applicant was entitled to receive for herself and her children interest for the nine months' delay on the full amount of the insurance benefits themselves. There should be deducted from the amount of that interest the sum already paid by the company as interes . The debt-claim thus created on the date on which the insurance benefits were received by the Applicant should bear interest, payable by the Respondent to the Applicant and her children, from that date until the date of execution of the judgement.

In determining the applicable interest rate, the Tribunal noted the *B'rubé* case (Judgement No. 280),[4] in which the Tribunal had set a compensatory interest rate of 12 per cent on the amount to be reimbursed as a result of injurious conduct attributable to the services of the Respondent, and considered that the same rate should apply in the presen case.

With respect to the Applicant's claim for compensation for moral damages, the Tribunal recognized that the administration's conduct had been the direct cause of genuine disruption in the life of the Applicant at a time when she had to cope with all kinds of hardships and to earn her living in distressing circumstances. The Tribunal decided therefore that, in addition to the interest for the late payment, the Applicant was entitled to receive a sum of $2,000 by reason of the difficulties she had had to contend with and the costs she had incurred as a direct result.

2. JUDGEMENT NO. 300 (15 OCTOBER 1982): SHEYE *v.* THE SECRETARY-GENERAL OF THE UNITED NATIONS[5]

Suspension without pay of a staff member and non-renewal of his fixed-term appointment—Mitigation by the Respondent, acting on the recommendations of the Joint Appeals Board, of the disciplinary measure imposed on the Applicant—The Secretary-General's authority in disciplinary matters—Request for rescission of the decision not to renew the Applicant's fixed-term appointment—The circumstances did not create a legal expectancy of renewal of the Applicant's appointment.

The Applicant, a Field Service Officer (radio technician) with a fixed-term appointment, was assigned to the United Nations Truce Supervision Organization (UNTSO) headquarters at Jerusalem. On 5 May 1980, when the Field Service began a strike action, the Applicant removed a radio set which linked UNTSO to the United Nations Interim Force in Lebanon (UNIFIL). Upon its removal, the set was taken by the Applicant to the workshop allegedly for repair; it was reinstalled three hours later.

As a result of this incident, which was considered an illegal interference with vital communications facilities jeopardizing the security of the United Nations personnel and peace-keeping forces in the area, the Applicant was suspended from duty without pay pending an investigation under rule 110.4 of the Staff Rules. After the investigation, he was dismissed for misconduct as a disciplinary measure under staff rule 110.3 (*b*).

Maintaining that he had removed the radio set in good faith for the purpose of repairing it, the Applicant requested the Tribunal to order the Respondent to rescind the decision to suspend him without pay for a period of three months and to grant him a renewal of his appointment or, alternatively, to pay him prompt, effective and adequate compensation.

The Applicant contended that the Respondent's finding that his conduct had been "seriously negligent and unsatisfactory" had been "legally defective" inasmuch as it had been reached without due process, that the decision had been based on a mistake of fact and failure to take into account essential facts and that, further, it had been tainted by prejudice and extraneous considerations. He claimed also that he had had a "'legal expectancy" of renewal of his appointment created by the letter of 26 March 1981 informing him that he would be reinstated.

The Joint Appeals Board, before which the Applicant filed an appeal, stated *inter alia* that it was more probable than not that the Applicant had removed the radio set in good faith and recommended that his dismissal for the misconduct should be rescinded, with the consequence of his reinstatement in the service of the United Nations.

The Respondent noted that JAB in its conclusions differed with the conclusion of the UNTSO investigation that the Applicant had not removed the radio set in order to repair it or for any other proper reason and reserved his position in this regard. The Respondent maintained that, regardless of what the Applicant's motive had been, his actions resulted in the interruption of a vital link in the UNTSO communications facilities which could have had serious repercussions and determined that such actions had constituted unsatisfactory conduct warranting disciplinary action. The Respondent, however, taking into account the terms of the Board's report and all circumstances of the case, particularly the Applicant's prior record, decided to reinstate him in the service of the Organization for the duration of his fixed-term appointment and to pay him full salary and allowances for three months when he had been suspended without pay.

The Tribunal held that the decision of the Respondent to impose upon the Applicant disciplinary measures did not constitute a denial of due process, was not based on a mistake of fact and was not motivated by prejudice or other extraneous considerations.

In connection with the Applicant's reference to the recommendation of JAB that his dismissal for misconduct should be rescinded, the Tribunal observed that the reports of JAB were advisory and that the Respondent was entitled to reach different conclusions from those of that body on a consideration of all the facts and circumstances of the case.

The Tribunal noted further that it had in its jurisprudence consistently recognized the Secretary-General's authority to take decisions in disciplinary matters and had established its own competence to review decisions in disciplinary matters only in certain exceptional circumstances, e.g., in case of failure to accord due process to the affected staff member before reaching a decision (Judgement No. 210, *Reid*).[6] As the Tribunal had found that such conditions were not present in the case, it could not entertain the Applicant's claim for rescission of the Respondent's decision on the ground of the severity of the penalty. In that connection the Tribunal observed that the fact that the Applicant's undisciplined behaviour had occurred while he was serving in a body of a military character justified the severity of the disciplinary measure.

The Tribunal further observed that neither the text of the letter dated 26 March 1981, in which the Respondent had clearly stated that the Applicant's reinstatement in the service of the Organization had been ordered for the duration of his fixed-term appointment, nor any other circumstances which had been referred to by the Applicant, had created a legal entitlement to the renewal of his fixed-term appointment.

The Tribunal held that the Respondent was not bound by any contractual or statutory provision to renew the Applicant's fixed-term contract, nor had the Tribunal found any evidence of prejudice on the part of the Respondent in that respect.

For the above reasons, the Tribunal rejected all of the Applicant's claims.

B. Decisions of the Administrative Tribunal of the International Labour Organisation[7]

1. JUDGEMENT NO. 477 (28 JANUARY 1982): SCHAFFTER *v.* CENTRAL OFFICE FOR INTERNATIONAL RAILWAY TRANSPORT[8]

Claim to payment of the non-resident's allowance prescribed in article 17 of the staff regulations—Purpose of the non-resident's allowance—Factual and legal status of the complainant's stay in Switzerland—Reasons do not necessarily have to be given for a decision

The complainant, a French citizen, contended that he was "not locally recruited" and was claiming the non-resident's allowance, which he had been refused by the impugned decision. He observed that under article 17 of the staff regulations officials who were not locally recruited were entitled to a non-resident's allowance. According to article 26 of the staff regulations, an official is regarded as internationally recruited if he is "not locally recruited within the meaning of article 27", according to which "an official . . . is considered to be locally recruited if on appointment he fulfils one of the following conditions: . . (*b*) whatever his nationality, he has been resident in Switzerland for one year". The complainant stated that because one year before his appointment he had been in the employ of the French Ministry for Foreign Affairs and had been working, and also living, at the residence of the Ambassador of France at Berne, and being then the holder of an identity card as a member of the administrative staff of a diplomatic mission in Switzerland, his legal status was not that of a "resident". Furthermore, in 1976 the Director-General had granted him an education allowance on behalf of his son the payment of which was subject to the same conditions as that of the non-resident's allowance.

The Tribunal pointed out that the purpose of the non-resident allowance as prescribed in article 17 was to compensate non-Swiss officials for the cost of settling in Switzerland. The complainant, having lived in Berne from 1952 to 1972 and worked there in the French Embassy, was therefore resident both factually and with intention to reside, within the meaning of the staff regulations, for several years before joining the staff of the organization. The complainant's objections to that conclusion were not to the point; *inter alia*, the decision on granting an education allowance for his son was based on another provision, not on the rule of non-resident allowance. Whether it had been right or wrong, it was irrelevant to the case.

The complainant claimed also that the decision of the Administrative Committee which dismissed his appeal suffered from a formal flaw. He alleged the existence of a general rule whereby for any decision which caused prejudice reasons should be given, at least provided that its author did not have discretion in the matter.

The Tribunal stated that that plea failed. It observed that there were many decisions taken in international organizations and challenged before the Tribunal for which no reasons were given, and these included discretionary decisions. But that did not prevent a staff member from defending his rights. The reasons for the decision he impugned, even when not stated, would be apparent, if not from correspondence exchanged between the parties before it was taken, then at least from the organization's memorandum in reply to the complaint, on which the complainant was invited to comment in his rejoinder. Accordingly, in the absence of an express exception, there was no reason to require an organization, contrary to its usual practice, to give reasons for all of its decisions. All that was required was that the lack of reasons for the decision should cause the complainant no prejudice. Since the complainant had possessed all papers which had enabled him to plead his case, he had therefore suffered no prejudice whatever from the absence of a statement of the reasons for the impugned decision and could not rely on such absence to support his claim.

For the above reasons, the Tribunal dismissed the complaint.

2. JUDGEMENT NO. 479 (28 JANUARY 1982): DE ALARCON *v.* WORLD HEALTH ORGANIZATION[8]

Objection to the method of computing compensation for significant loss of functions and of earning capacity arising in the course of short-term employment—Deduction of the retirement pension payable by the staff member's former employer unauthorized because the pension was not paid in respect of the same series of circumstances—Claims for an allowance in respect of inflation and for interest

The complainant, a reader in psychiatry at the University of Southampton, was appointed by WHO on 25 May 1979 to carry out a one-month mission to Nicaragua in July 1974. During the mission he contracted an illness which grew steadily worse and which in 1976 was diagnosed as "active chronic hepatitis". Because of poor health he had to retire prematurely, on September 1978, at the age of 53. By a letter of 5 March 1979 the Secretary of the Advisory Committee on Compensation Claims informed him that he was entitled to payment of $US 20,000 as compensation for the 66 per cent loss of function which he had suffered. By a letter of 10 August 1979, the Secretary informed him that the Director-General had decided to accord him the prescribed benefit payable for loss of earning capacity. The amount of the benefit was to be equivalent to two thirds of pensionable remuneration less the amount of the pension paid by the superannuation scheme of the University of Southampton.

The complainant objected to the method of computing the benefits payable by WHO, and in particular to the deduction from the pension he was entitled to under the University superannuation scheme, as this deduction was not compulsory and ought in his case to have been waived.

The Tribunal observed that the WHO scheme for compensation of staff for death, injury or illness arising in the course of employment contained in section II.7, annex E of the manual was designed to fit the circumstances of staff in regular employment. The principal benefits are a lump-sum payment for loss of enjoyment of life and, on invalidity, a pension for loss of earning capacity. For total disability the lump sum was fixed in 1974 at $30,000, with a percentage reduction for lesser disabilities. For total loss of earning capacity the invalidity pension was fixed at two thirds of the annual pensionable remuneration, which was much the same as gross salary. It was in respect of the pension that the chief difficulty in the case arose, for the complainant, of course, had no gross salary.

With regard to the invalidity pension, the Tribunal concluded that the deduction by the organization of the whole of the retirement pension payable by Southampton University, thus reducing the invalidity pension as calculated by somewhat more than half, was not authorized by rule 6 (*b*) because the retirement pension was not "paid in respect of the same series of circumstances". Furthermore, the Tribunal considered that the only conclusion on the facts of the case was that the complainant's earning capacity had been totally extinguished and accordingly the degree of incapability should be assessed at 100 per cent.

With regard to the complainant's claim for an allowance in respect of inflation and for interest, the Tribunal observed that it was the general policy of the Tribunal to ensure that, as far as practicable, money withheld by the organization in error should, when it was eventually paid, have the same value in the hands of the complainant as it would have had if paid on the due date and that the complainant's loss of use of the money in the interval should be compensated by interest at the market rate. There was no difficulty in the case about protection against inflation since the payments from which the unauthorized deductions had been made were themselves index-linked under rule 31 (*b*), the reimbursement of the deduction should likewise be index-linked. The question whether in addition interest should be paid on the basic sum—i.e., on the amount due on the day when it should have been paid—had to depend on whether or not in the country of residence index-linked loans were commonly free of interest or other inducements to the lender. Since in the United Kingdom an index-linked loan commonly carried some other inducement, the Tribunal considered that it would be appropriate to order payment of interest on the basic sum at the rate of 2 per cent per annum.

For the above reasons the Tribunal ordered the Director-General to give effect to the impugned decision of 10 August 1979 as if the words "less deduction of the pension paid by the University retiring fund" were omitted; to pay to the complainant all the deductions made by virtue of those words and each deduction being adjusted for payment in the manner described above to compensate his loss of use of the money; to make a new determination of the amount of the invalidity pension in the light of the conclusion that the complainant's degree of incapacity should be assessed at 100 per cent; and to pay to the complainant the sum of £3,000 in respect of his costs.

3. JUDGEMENT NO. 493 (3 JUNE 1982): VOLZ *v.* EUROPEAN ORGANIZATION FOR THE SAFETY OF AIR NAVIGATION[9]

Non-renewal of short-term appointment—Tribunal competent under article 92 of the general conditions of employment—Complaint receivable since filed within the time-limit set in article VII of the statute of the Tribunal—As a rule the Tribunal does not apply municipal law—The renewal of a short-term appointment is a matter for the Director-General's discretion.

The complainant, a citizen of the Federal Republic of Germany, joined the European Organization for the Safety of Air Navigation (EUROCONTROL Agency) in 1976 on a three-year appointment as an assistant technician stationed at the Karlsruhe centre for air navigation control. His appointment was extended by a decision of 26 June 1980, to 31 December 1980. On 22 October 1980, the termination of his appointment was confirmed. He appealed, but by a letter of 23 December the Director-General informed him that his appeal was inadmissible because the decision of 22 October had merely confirmed the expiry of the appointment at the end of the year. The complainant filed his complaint in which he contended that there was no valid reason for not extending his appointment. He alleged that the non-renewal was a disguised form of dismissal and as such was not authorized by the staff regulations. He maintained that according to the general conditions of employment a dispute should go to the Tribunal only if there was no competent national jurisdiction. The dispute related to employment in the Federal Republic of Germany, and its courts had jurisdiction. According to the labour law of the Federal Republic the complainant had been unfairly dismissed. If the Tribunal nevertheless held that it was competent, the complainant invited it to quash the decision of 22 October 1980; to hold that the proper law was that of the Federal Republic and that he suffered unfair dismissal according to that law; and to order the extension of his appointment by five years from 1 January 1981, subsidiarily, to order the defendant to pay him the severance grant due to him under the staff regulations, the compensation payable in accordance with the case law of the Federal Republic and costs.

As to the question of its competence, the Tribunal observed that on appointment the complainant had accepted the general conditions of employment of the EUROCONTROL Agency, article 92 of which states that the Tribunal may hear any dispute regarding their non-observance.

Regarding the receivability of the complaint, the Tribunal noted that since the Director-General's decision to reject the complainant's internal appeal and to confirm the decision of 22 October 1980 had not been taken until 23 December 1980, the complaint had been filed within the time-limit set in article VII of the statute of the Tribunal and was therefore receivable.

With regard to the question of the proper law, the Tribunal stated that as a rule it would not apply municipal law. In accordance with article II of its statute, the Tribunal hears complaints alleging the non-observance of terms of appointment or of the staff regulations. In reaching its decisions it construes such texts by the accepted methods of legal interpretation. It also draws upon general principles of law in so far as they may apply to the international civil service. It takes no account of municipal law, however, except in so far as such law embodies those principles. As to the matters raised in the case, the provisions of municipal law differed and did not apply outside the municipal context. The municipal law cited by the complainant was therefore immaterial. In particular, the complainant's citizenship of the Federal Republic of

Germany, his residence in that country and the fact that he was working for EUROCONTROL there afforded no reasons for applying the law of the Federal Republic.

On the question of the non-renewal of the appointment, the Tribunal noted that under the rules applying to the complainant and in accordance with the general conditions of employment his appointment was to terminate automatically on the expiry of the contract and any subsequent extension. It was a matter for the Director-General's discretion whether to renew a short-term appointment and it did not appear from the evidence that his exercise of that discretion had been tainted with any abuse of authority. There were therefore no grounds for setting aside the decision.

For the above reasons, the Tribunal dismissed the complaint.

4. JUDGEMENT NO. 495 (3 JUNE 1982): OLIVARES SILVA *v.* PAN-AMERICAN HEALTH ORGANIZATION (WORLD HEALTH ORGANIZATION)[8]

Non-renewal of contract because of unavailability of funds—Contention that the decision was in breach of staff rules 910 and 920—Discretionary power of the administration to extend temporary appointments—Burden of proof in case of claims of victimization—Tribunal not satisfied that funds were not or could not have been available for extension—In the circumstances either decision for renewal or for non-renewal can be justified—Probability that a bias against the complainant was a factor in not renewing his contract

The complainant was first employed by the organization in October 1973 on a two-year contract which subsequently had been renewed from year to year. He was then notified that until October 1979, because of the unavailability of funds, under staff rule 1040 his contract would not be renewed after its expiry on 31 December of that year.

The complainant alleged that the decision had been based on personal prejudice despite the need for his services and that there were in fact funds to finance his post. He contended that the decision had been in breach of staff rule 910, which guaranteed the staff's right of association, and staff rule 920, which laid down its right of representation. The complainant maintained that the treatment he had received was just part of a broad pattern of victimization of elected staff representatives, often ill-disguised in the form of non-renewal of contract.

In his claim for relief he asked that the decision be quashed; that he be given normal two-year renewal from 1 January 1980; that he be awarded remuneration from that date to the date of his complaint; and that he be awarded moral, punitive or exemplary damages for the breach of his fundamental rights. He also claimed costs and damages for injury to his professional reputation.

The Tribunal observed that it was well established that the decision to make or withhold an offer of extension was a discretionary decision to be taken by the Director in the organization, and therefore one over which the Tribunal had only a limited power of review. It was also established that, in accordance with the principle of freedom of association, officers and members of the Staff Association might act in furtherance of their common interests and should not be penalized by the administration for any such activity that was not otherwise improper. It was not disputed that any such penalization would be an abuse of the Director's discretion and within the power of the Tribunal to review.

The Tribunal noted that it did not accept the submission of the complainant that in every case in which a staff member was so involved the burden of proof passed to the organization to show that his activities had had nothing to do with the decision, since each case must be decided on the proper inferences to be drawn from its own facts.

As to the unavailability of funds, the Tribunal was on the whole not satisfied that funds were not or could not have been available for some extension of the complainant's contract.

With regard to the complainant's allegation that the administration followed a policy of penalizing staff members because of their activities in the Association, the Tribunal observed that the cases produced in evidence by the PAHO Association were in fact too few in number

and too diverse in character to give the Tribunal much help in resolving the question whether participation in the Staff Association had been of itself a source of prejudice.

The Tribunal observed that in the case good reasons could be found either for renewal or for non-renewal of the complainant's contract. Objectively, a decision either way could be justified. In such a case it was enough for the complainant to show that it had been more probable than not that a bias against him had been a factor in the Director's mind when he had been considering whether the contract should be terminated. The Tribunal concluded that it had been more probable than not, and therefore the Tribunal would quash the Director's decision. However, in view of the uncertainty of the complainant's prospects, the compensation to be awarded to him could not be large. But since it was larger than what would have been paid to him under staff regulation 1050, it was unnecessary to consider the subsidiary issue as to whether the complainant's appointment had been lawfully terminated.

For the above reasons, the Tribunal quashed the Director's decision and ordered the organization to pay to the complainant $US 15,000 as compensation for the non-renewal of his contract and $8,000 in respect of his costs.

5. JUDGEMENT NO. 507 (3 JUNE 1982): AZOLA BLANCO AND VELIZ GARCIA *v.* EUROPEAN SOUTHERN OBSERVATORY[8]

Termination of the complainants' employment because of "an extremely difficult economic situation"—Receivability of the complaints—Application of article LS II 5.04 of the local staff regulations—Relevance of application of the national case law—Decisions of the local Supreme Court can be used as an aid to interpretation—Concept of excess of power—Impugned decision was outside the Director-General's authority

On 6 March 1981, the complainants received letters terminating their employment with the European Southern Observatory (ESO) in Chile on the same day because of "an extremely difficult economic situation". Their posts were abolished under article LS II 5.04 (10) of the local staff regulations. The complainants appealed forthwith to the Director-General, who refused the appeal. His letter of 21 May 1981 containing that decision was the decision impugned in the complaints.

The complainants contended that the dismissals should be quashed on the ground that essential facts had been disregarded. Under the article in question a contract might be terminated to meet the "functional requirements" of the organization. The article had been taken verbatim from the Chilean Labour Code, which the Chilean courts interpreted as justifying termination only when there were permanent economic difficulties irrevocably affecting future operations. The terminations had not been justified by any such difficulties. The complainants accordingly invited the Tribunal to quash the decision impugned and to order their reinstatement in ESO and the payment of salary up to the date of reinstatement; subsidiarily to order the payment of compensation for unjustified dismissal; and further subsidiarily, to order payment of the benefits provided for in the local staff regulations.

In its reply, ESO submitted that the letters of 6 March 1981 obviously had embodied the Director-General's own final decisions and, since more than 90 days had elapsed between 6 March and the filing of the complaints, the complaints were time-barred. Subsidiarily, ESO submitted that the complaints were unfounded since Chilean case law was irrelevant even if the ESO rules were identical to those of the Chilean Labour Code.

The Tribunal observed that the complainants assumed rightly that the Director-General would not reach a final decision until after he had considered carefully what they had to say. His letter of 21 May was not, as the organization contended, "purely confirmatory" of the letter of 6 March and it contained the final decision. The objection to receivability was overruled.

The Tribunal held that ESO, in arguing for its interpretation of the article in question, objected to the reference to the rulings of the Supreme Court of Chile on the mistaken ground that that was to apply the law of Chile to which the organization was not subject. The Tribunal

observed that the decisions of the Supreme Court were not of course binding on the Tribunal, but that did not mean that they could not be used as an aid to interpretation. The Tribunal considered that it seemed unlikely that the object of the discussed provision was to allow for the usual fluctuations in prosperity to eliminate surplus expenditure one year and might be to put it back in a year or two later. That was what ESO was doing in the case. The trimming of staff would obviously be a prudent measure. But that was not enough to bring article LS II 5.04 (10) to bear. In supposing that it was, the Director-General must have misconstrued the regulation and thus been led to exceed his powers. The decision impugned was outside his authority and must be quashed on that ground.

For the above reasons, the Tribunal quashed the decision of the Director-General dated 21 May 1981 and ordered the organization, finding reinstatement to be impossible or inadvisable, to pay to each complainant as compensation for wrongful dismissal a sum equal to three times the total gross remuneration paid to him in respect of the period 1 March 1980 to 26 February 1981 and as improved by any retroactive adjustment granted by the organization.

6. JUDGEMENT NO. 536 (18 NOVEMBER 1982): VILLEGAS *v.* INTERNATIONAL LABOUR ORGANISATION[10]

Applications for review and interpretation of Judgements Nos. 404 and 442—No formal requirements for the framing of Tribunal's judgements—Formal correctness of Judgement No. 442—Principle of res judicata*—No grounds for review and interpretation of the judgements*

The complainant requested the review and interpretation of Judgements Nos. 404 and 442.[11]

She contended that Judgement No. 442, which had dismissed the first application for review of Judgement No. 404, suffered from a formal defect in that the reasons for it were not stated. She argued that to comply with article VI of the statute of the Tribunal, according to which "the reasons for a judgement shall be stated", the text of a judgement should be in three parts: a summary of the facts, the considerations and the operative part, or decision. Judgement No. 442 did not summarize the facts. In her view, therefore, it could not be regarded as stating the reasons for the decision because the summary, the essential basis of the reasoning set out in the considerations, was lacking.

The Tribunal observed that, although the practice had indeed been to recapitulate the parties' submissions before proceeding to the considerations, the recapitulation did not constitute a distinct part of the judgement. Since there was no formal requirement the Tribunal need comply with, it might, if it wished, set out the parties' submissions in the considerations, and the mere absence of a recapitulation afforded no grounds for setting a judgement aside.

In Judgement No. 442 there were particularly sound reasons for not recapitulating the facts since the procedure followed was the summary one laid down in article 8 (3) of the rules of court. This was an article the Tribunal might apply if it was detrimental neither to the complainant's interests nor to the defendant's to dispense with further memoranda. The Tribunal so decided at its own discretion, being alone competent to determine the procedure, and it was not a decision to which the complainant might object. The Tribunal therefore rejected her allegation of a formal defect in Judgement No. 442.

With regard to the applications for review of the judgements, the Tribunal noted that review was an exceptional procedure and a derogation from the principle of *res judicata*. Accordingly, the complainant might not put forward repeatedly the same pleas in favour of review. Since she had not put forward any new plea in favour of review that she had been unable to rely on in the first one, or such as the Tribunal might have omitted to hear in Judgement No. 442, her claims in that regard failed.

Having concluded that Judgements Nos. 404 and 442 were clear and unambiguous, the Tribunal rejected the complainant's application for their interpretation.

For the above reasons, the Tribunal dismissed the applications.

7. JUDGEMENT NO. 537 (18 NOVEMBER 1982): LHOEST *v.* WORLD HEALTH ORGANIZATION[10]

Claim for termination payment under staff rule 1030.3.4—English and French versions of the rule differ—Since both texts adopted by the Executive Board are authentic, the Director-General's "correction" of the French version is null and void—Director-General's authority limited to making proposals for amendment of the staff rules—French text reflects the Executive Board's intent

The matter in dispute related to a "termination payment" payable to the complainant by virtue of WHO staff rule 1030.3.4. The complainant asked WHO to award him such payment in accordance with the French version of the rule as in force in 1979, according to which a staff member whose appointment was terminated under rule 1030 should receive a termination payment at the rates set out in rule 1050.4 provided that "the total payments in 1030.3.3 and 1050.4" due in the 12 months following termination were not more than one year's pensionable remuneration less staff assessment.

WHO contended that there had been a material error in the rule and that it needed to be supplemented by reference to the English version, which prescribed payment of the termination payment at the rates set out in rule 1050.4 provided that "the total payments in 1030.3.2, 1030.3.3 and 1050.4" due in the 12 months following termination were not more than one year's pensionable remuneration less staff assessment. Thus the English text provided for the deduction of sums paid under rule 1030.3.2 whereas the French did not.

WHO's first plea was that the text the Executive Board had really adopted had been the English one, the French translation being erroneous. Its second plea was that the error had been put right in a new edition of the staff rules published in March 980. Since the complainant had retired in December 1980, he could not in any event base himself on a superseded text.

The Tribunal observed that the Executive Board had adopted the French version of rule 1030.3.4, and the Executive Board alone could amend it. Instead it had been the Director-General who had decided to alter the French text, and the fact that he had done so was immaterial since according to rule 020 the Director-General's authority was limited to making proposals for amendment.

What the Tribunal had to decide was which text the Board had at that time actually adopted. Both the French and the English were authentic. In such circumstances the Tribunal would interpret the texts according to the usual methods. The French version of the rule had been approved by the Executive Board on 21 January 1978. Since there had been no substantive change of the rule at that time, the corresponding text was to be found in the old set of rules. Having analysed them, the Tribunal took the view that only the French text reflected the Executive Board's intent.

For the above reasons, the Tribunal quashed the impugned decision and referred the complainant back to WHO for recalculation of the benefit prescribed in rule 1030.3.4 in accordance with the French text of the rule.

C. Decisions of the World Bank Administrative Tribunal[12]

1. DECISION NO. 10 (8 OCTOBER 1982): SALLE *v.* INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT[13]

Termination of a probationary appointment—In accordance with Personnel Manual Statements, No. 4.02, the probationer has a legal right to the observance of his condition of employment—Merits of the Bank's decision will not be reviewed by the Tribunal except for the purpose of satisfying itself that there has been no abuse of discretion and the appropriate standards of justice have been met.

The Applicant contested IBRD's decision to terminate his probationary appointment rather than confirm it or extend his probation.

The Tribunal observed that it was of the essence of probation that the organization be vested with the power both to define its own needs, requirements and interests and to decide whether, judging by the staff member's performance during the probationary period, he did or did not qualify for permanent Bank employment. Those determinations necessarily lay within the responsibility and discretion of the Respondent, as the Tribunal had found in its Decision No. 7 (*Buranavanichkit*). It was also of the essence of probation that the evaluation of the probationer's suitability for Bank employment might be subject to changes during his period of probation. The Tribunal noted that, although contingent upon confirmation, the relationship between the Bank and the probationer was nevertheless a legal one. The probationer was a staff member "entitled to all appropriate staff benefits" (Personnel Manual Statements, No. 4.02), and he had a legal right to the observance of his conditions of employment. The observance of the probationer's conditions of employment was all the more imperative since the period of probation was a difficult one for the staff member both in terms of adjustment to the Bank's needs and policies and because of the inherent insecurity of his situation. While it was the duty of the Tribunal to draw the appropriate conclusions from any non-observance of the conditions of employment of a staff member under probation, the Tribunal would not substitute its own judgement for that of the Respondent on the staff member's suitability for permanent employment. As the Tribunal had declared in the above-mentioned Decision No. 7, the merits of the Bank's decision would not be reviewed by the Tribunal except for the purpose of satisfying itself that there had been no abuse of discretion and that the appropriate standards of justice had been met.

Having reviewed the Applicant's contentions, the Tribunal concluded that the Respondent's decision to terminate the Applicant's appointment had not amounted to the non-observance of the Applicant's contract of employment or terms of appointment.

For the above reasons, the Tribunal rejected the application.

2. Decision No. 11 (8 October 1982): van Gent *v.* International Bank for Reconstruction and Development[13]

Applicant's contention that reassignment as a result of the abolition of his Department was not carried out properly—Provisions concerning the reassignment of Tourism Projects staff as set forth in the memorandum of February 1978 constitute part of the conditions of the Applicant's employment—Non-observance of the prescribed procedures gives the Applicant a legitimate ground of complaint

Because of the Bank's decision to phase out lending for tourism projects, provisions for the abolition of the Tourism Projects Department and treatment of its staff were presented in a memorandum of February 1978. Efforts were also commenced to find suitable reassignment positions for its staff, including the Applicant, Division Chief at the "N" level.

After unsuccessful efforts at locating an acceptable position for the Applicant and after he had been without an assignment for almost a year, on 2 July 1980, he was advised that he would continue to be placed on lists for "N" level positions but would not be forced into such a position and that in the meantime he could take up a regular assignment as Deputy Division Chief at "M" level with his "N" level salary and grade retained. As an alternative he was offered a package of termination benefits. While reserving his right to appeal, the Applicant accepted the position of Deputy Chief under protest and provisionally; he also rejected the termination arrangements, which he claimed were inadequate.

The Applicant's main contentions were that the Respondent had not followed or had improperly interpreted, or had unilaterally changed, the principles it had adopted for the fair treatment of Tourism Projects staff as stated in the memorandum of February 1978. In particular, paragraph 25 of the memorandum, which had been written specifically to ensure the protection of the legitimate rights and concerns of the Tourism Projects staff, and which stated the

principles which should be applied so as to accord them fair treatment, had not been properly implemented. The Applicant also alleged that the Respondent had used unfair, inconsiderate and discriminatory practices in the reassignment process.

The pleas on the merits submitted by the Applicant were for rescission of the decision to place him in an "M" level position with the sole alternative of resignation from the Bank under an inadequate termination arrangement; and rescission of the decision made in May 1980 no longer to "force" him into an "N" level position. Believing, however, that a rescission of the contested decision would not provide an adequate solution, the Applicant requested the Tribunal to establish a fair and adequate termination arrangement that would undo, and compensate him for, the consequences of the Respondent's failure to perform its obligations.

The Tribunal observed that, while under article II of its statute it must determine whether there had been non-observance of the contract of employment or terms of appointment of staff members, such a determination had to be made in the current case not just with respect to the particular decision, but also with respect to the entire process of reassignment of the Applicant as a consequence of the phasing out of tourism lending by the Bank. Such process had constituted, as the Applicant alleged, a continuous breach of the principles for the treatment of Tourism Projects staff as set forth in the memorandum of February 1978.

As to the legal status of that memorandum, the Tribunal did not share the Respondent's position that described it as a "non-binding guideline to be followed as far as possible" and concluded that paragraphs 23 to 25 of the memorandum constituted part of the conditions of employment of the Applicant within the meaning of article II of its statute.

The Tribunal found that the non-observance of the prescribed procedures gave the Applicant a legitimate ground of complaint, since it was possible that such non-observance had caused the whole reassignment exercise to fail. Accordingly, the Tribunal considered that the remedy for the non-observance of the conditions of employment lay in the award of an appropriate termination package. In the circumstances of the case and taking into account the fact that the reassignment of the Applicant had involved no reduction of salary, the Tribunal found no justification for the very extensive pecuniary claims sought by the Applicant.

For the above reasons, the Tribunal decided to reject the Applicant's plea to rescind the decisions contested; to fix the date of the judgement as the starting day for the period of 90 days within which the Applicant might exercise the option for the alternatives offered him; to extend the period of special leave to 24 months counted from the day the option was exercised; and to confirm the offer of out-placement assistance in the event the Applicant left the Bank.

3. Decision No. 12 (8 October 1982): Matta *v.* International Bank for Reconstruction and Development[13]

Termination of the Applicant's employment through recourse to the system of disability retirement—Primary reason for this lies mainly not in the Applicant's technical skills but in the personality condition confirmed by the medical report—Inclusion in the Applicant's record of reference to the negative aspects of her performance and to her personality problems was a proper fulfilment of the Respondent's obligation to evaluate periodically her performance

Although her unsatisfactory performance had been the real reason for her termination, the Applicant's employment was ultimately terminated through recourse to the system of disability retirement. The applicant did not accept the decision of the Pension Benefits Administration Committee. Her main contentions on the merits were that her unsatisfactory Anniversary Evaluation Reports (AERs) had been unjustified; that the process by which AERs were completed was a violation of the provisions of personnel manual statement No. 4.01; and that the reason for her problems was the Respondent's failure to provide her with a stable work environment. In general, the Applicant alleged that she had been discriminated against because of her age.

The Applicant sought reinstatement in her job with the Respondent or a lump sum award in the amount of five years' compensation. She also requested "a clean record", the removal of

the "stigma" placed on her as being disabled and punitive damages in the amount of $500,000 for the pain and suffering caused by the Respondent's treatment of her.

Examination of the evidence supporting the decision to terminate the Applicant's employment through recourse to the system of disability retirement led the Tribunal to the conclusion that the decision of the Pension Benefits Administration Committee had been based on sufficient evidence. The evidence showed that the Applicant's technical skills had not been the primary source of complaint by her supervisors and that it had been her personality condition, confirmed by a medical report, that had interfered with the Applicant's overall performance, seriously impairing her ability to establish healthy and positive work relationships with colleagues and supervisors. Under those circumstances reinstatement of the Applicant would be inappropriate.

The Tribunal found nothing in the record to substantiate the Applicant's allegation that the negative parts of her AERs had been the result of disparate treatment by her supervisors because of her age.

In the light of the above, the Tribunal concluded that the inclusion in the Applicant's record of reference to the negative aspects of her performance and of her personality problems had been a proper fulfilment of the Respondent's obligation to evaluate her performance periodically. Her request for "a clean record" was therefore not well-founded. The Tribunal also found that the non-reassignment of the Applicant had not amounted to a violation of the Respondent's obligations under the reassignment provisions.

For the above reasons, the Tribunal dismissed the pleas and requests of the Applicant.

NOTES

[1] In view of the exceptionally large number of judgements which were rendered in 1982 by Administrative Tribunals of the United Nations and related intergovernmental organizations, only those judgements which are of general interest have been summarized in the present edition of the *Yearbook*. For the integral text of the complete series of judgements rendered by the three Tribunals, namely Judgements Nos. 281 to 300 of the United Nations Administrative Tribunal, Judgements Nos. 465 to 542 of the Administrative Tribunal of the International Labour Organisation and Judgements Nos. 7 to 12 of the World Bank Administrative Tribunal, see, respectively: *Judgements of the United Nations Administrative Tribunal,* Numbers 231 to 300, 1978-1982 (United Nations Publication, Sales No. E.83.X.1); *Judgements of the Administrative Tribunal of the International Labour Organisation:* 48th Ordinary Session and *ibid.*, 49th Ordinary Session; and *World Bank Administrative Tribunal Reports*, 1982 and *ibid.*, 1983, part I.

[2] Under article 2 of its statute, the Administrative Tribunal of the United Nations is competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. Article 14 of the statute states that the competence of the Tribunal may be extended to any specialized agency upon the terms established by a special agreement to be made with each such agency by the Secretary-General of the United Nations. By the end of 1983, two agreements of general scope, dealing with the non-observance of contracts of employment and of terms of appointment, had been concluded, pursuant to the above provision, with two specialized agencies: ICAO and IMO. In addition, agreements limited to applications alleging non-observance of the Regulations of the United Nations Joint Staff Pension Fund had been concluded with ILO, FAO, UNESCO, WHO, ITU, ICAO, WMO and IAEA.

The Tribunal is open not only to any staff member, even after his employment has ceased, but also to any person who succeeded to the staff member's rights on his death or who can show that he is entitled to rights under any contracts or terms of appointment.

[3] Mme Paul Bastid, Vice-President, presiding; Mr. Samar Sen, Vice-President; Mr. T. Mutuale, Member; Mr. Herbert Reis, Alternate Member.

[4] For a summary of the judgement, see *Juridical Yearbook 1981,* p. 122.

[5] Mr. Endre Ustor, President; Mr. Samar Sen, Vice-President; Mr. Arnold Kean, Vice-President; Mr. Herbert Reis, Alternate Member.

[6] For a summary of the judgement, see *Juridical Yearbook 1976,* p. 131.

[7] The Administrative Tribunal of the International Labour Organisation is competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment, and of such provi-

sions of the staff regulations as are applicable to the case of officials of the International Labour Office and of officials of the international organizations that have recognized the competence of the Tribunal, namely, as at 31 December 1982, the World Health Organization (including the Pan American Health Organization), the United Nations Educational, Scientific and Cultural Organization, the International Telecommunication Union, the World Meteorological Organization, the Food and Agriculture Organization of the United Nations, the European Organization for Nuclear Research, the Interim Commission for the International Trade Organization/General Agreement on Tariffs and Trade, the International Atomic Energy Agency, the World Intellectual Property Organization, the European Organization for the Safety of Air Navigation, the Universal Postal Union, the European Patent Institute, the European Southern Observatory, the Intergovernmental Council of Copper Exporting Countries, the European Free Trade Association, the Inter-Parliamentary Union, the European Molecular Biology Laboratory, the World Tourism Organization, the African Training and Research Centre in Administration for Development and the Central Office for International Railway Transport. The Tribunal is also competent to hear disputes with regard to the execution of certain contracts concluded by the International Labour Organisation and disputes relating to the application of the regulations for the former Staff Pension Fund of the International Labour Organisation.

The Tribunal is open to any official of the International Labour Office and of the above-mentioned organizations, even if his employment has ceased, and to any person on whom the official's rights have devolved on his death and to any other person who can show that he is entitled to some right under the terms of appointment of a deceased official or under provisions of the staff regulations on which the official could rely.

[8] Mr. André Grisel, President; Mr. Jacques Ducoux, Vice-President; Lord Devlin, Judge.

[9] Mr. André Grisel, President; Lord Devlin, Judge; Mr. Héctor Gros Espiell, Deputy Judge.

[10] Mr. André Grisel, President; Mr. Jacques Ducoux, Vice-President; Sir William Douglas, Deputy Judge.

[11] For summaries of the judgements see *Juridical Yearbook, 1980*, p. 162, and *Juridical Yearbook, 1981*, p. 123, respectively.

[12] The Tribunal is competent to hear and pass judgement upon any applications alleging non-observance of the contract of employment or terms of appointment, including all pertinent regulations and rules in force at the time of the alleged non-observance, of members of the staff of the International Bank for Reconstruction and Development, the International Development Association and the International Finance Corporation (referred to collectively in the statute of the Tribunal as the "Bank Group").

The Tribunal is open to any current or former member of the staff of the Bank Group, any person who is entitled to claim upon a right of a member of the staff as a personal representative or by reason of the staff member's death and any person designated or otherwise entitled to receive a payment under any provision of the Staff Retirement Plan.

[13] Mr. E. Jiménez de Aréchaga, President; Mr. A. K. Abul-Magd and Mr. P. Weil, Vice-Presidents; Mr. R. Gorman, Mr. N. Kumarayya, Mr. E. Lauterpacht and Mr. C. D. Onyeama, Members.